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Accountability and Comparative Fault

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ACCOUNTABILITY AND COMPARATIVE FAULT*

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INTRODUCTION

There are constant developments in tort law, so many that it is difficult to choose any one of them for an hour's discussion. Products liability, for instance, continues to develop new ideas.[1] And likewise the law of libel, a common-law Frankenstein monster adopted by the Supreme Court of the United States in the 1960's,[2] and on which the Court continues to perform new operations, to the dismay of nearly everyone.[3] Other courts as well have found themselves developing new doctrines in defamation cases, for instance, by classifying many libels as "opinion" in order to expand the free speech protection accorded to such utterances.[4]

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1. See Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986) (some products unreasonably dangerous per se).

2. The common law of libel was subject to substantial constitutional constraints in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964) (public officials must prove knowing or reckless falsehood); Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975 (1967) (same rule for public figures); St. Amant v. Thompson, 390 U.S. 727, 88 S. Ct. 1323 (and defendant cannot be held liable without a high degree of awareness that statement is probably false); and Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, (1974) (*private* figure who need not prove knowing or reckless falsehood but must prove some degree of fault plus actual damages). There are a number of related cases.

3. In Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985), the Court created a new category of speech that involved defamation of a private figure (as in *Gertz*, 418 U.S. 323, 94 S. Ct. 2997) and lacked any public concern content. For this category, the case permits recovery of presumed damages without proof of actual loss, a recovery not permitted under *Gertz*. Whether the other *Gertz* requirement—fault—is also dispensed with is not clear. There are a number of other recent cases which cannot be mentioned here.

4. Notably Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 2662 (1986); Janklow v. Newsweek, 788 F.2d 1300 (8th Cir, 1986), cert denied, 107 S. Ct. 272 (1986). Other defensive doctrines include the proposed protection for "neutral reportage," Edwards v. National Audubon Soc'y, Inc., 556 F.2d 113 (2d Cir. 1977), cert. denied, 434 U.S. 1002, 98 S. Ct. 647 (1977), and the "libel-proof plaintiff doctrines," see Herbert v. Lando, 781 F.2d 298 (2d Cir. 1986), cert. denied, 106 S. Ct. 2916 (1986).

Other economic and dignitary torts have come in for their share of innovation, too. Reverend Falwell's claim of mental distress resulting from a nasty satire of him in a nasty magazine seems to have opened a whole new field of liability of publishers.[5] Even the old tort of malicious prosecution is being subjected to substantial modifications.[6] Two major decisions of recent years have also expanded liability in the case of interference with contracts or prospects by holding that intent is no longer required and that negligence is sufficient.[7] The tort of wrongful discharge of an at will employee continues its developing career as an economic claim as well.[8] And, as with the field of defamation, you could well devote an extended discussion to any of these matters.

On the personal injury front, you could dwell on the new cases in which spoliation of evidence is recognized as a tort,[9] or in which liability for mental distress is expanded,[10] or in which loss of consortium claims are allowed on behalf of children when a parent is injured,[11] or a parent when a child is injured.[12] Or again, you could

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5. Falwell v. Flynt, 797 F.2d 1270 (4th Cir. 1986). The decision allows recovery for a satirical cartoon on the ground that, though it could not be actionable as libel because it could not be taken to assert anything as a fact, it could nevertheless be actionable as an intended infliction of mental distress. This appears to remove the protection given for speech of a non-factual kind, that is, speech which asserts opinion, idea, comment or even "rhetorical hyperbole." The case appears to extend liability also in common law terms, since the usual infliction of mental distress case typically involves a vulnerable plaintiff or a defendant who is in a position of power or authority over the plaintiff.

6. Cf. Malley v. Briggs, 106 S. Ct. 1092 (1986) (civil rights action based on officer's prosecution without probable cause; officer liable in spite of fact the magistrate found probable cause and signed a warrant). Although courts have not yet recognized a tort of "malicious defense," the California Supreme Court has in effect recognized a limited version of such a tort. See Seaman's Direct Buying Serv. Inc. v. Standard Oil Co., 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984).

7. J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979); People Express Airlines, Inc. v. Consolidated Rail Corp., 100 N.J. 246, 495 A.2d 107 (1985). Other courts have so far adhered to a narrower rule. Cf. East River S.S. Corp. v. Transamerican Delaval, 106 S. Ct. 2295 (1986).

8. E.g., Wagenseller v. Scottsdale Mem. Hosp., 147 Ariz. 370, 710 P.2d 1025 (1985); Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733 (Tex. 1985).

9. See Hazen v. Municipality of Anchorage, 718 P.2d 456 (Alaska 1986); De Vera v. Long Beach Pub. Transp. Co., 180 Cal. App. 3d 782, 225 Cal. Rptr. 789 (1986); Smith v. Superior, 151 Cal. App. 3d 491, 198 Cal. Rptr. 829 (1984); Henry v. Deen, 310 N.C. 75, 310 S.E.2d 326 (1984).

10. By dropping the traditional requirement that physical manifestations result from the distress and by recognizing a tort in fact-patterns wholly unlike those used in the past. Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr., 831 (1980).

11. E.g., Ferriter v. Daniel O'Connell's Sons, Inc., 381 Mass. 507, 413 N.E.2d 690 (1980).

12. Norvell v. Cuyahoga County Hosp., 11 Ohio App. 3d 70, 463 N.E.2d 111 (1983).

consider the expanded liabilities imposed by courts which have said that the plaintiff might recover in some cases without proving cause in fact by traditional standards[13] or the intense problems raised by toxic torts—for example, the statute of limitations problem.[14] You could discuss the innovative solution of one court which in effect allows the plaintiff two causes of action for some toxic torts—one for injuries that have occurred or which are likely to occur in the future, and a separate cause of action to accrue later for any new injuries that actually do occur.[15] All this is enough without even mentioning the expanded liabilities of those who serve alcohol to others,[16] or fail to protect plaintiffs from attacks by third persons.[17]

On top of this enormous expansion of liability is the massive counterattack in the form of numberless statutes passed under the name of "tort reform" and aimed at reducing liabilities by one technique or another, sometimes by limiting liabilities for pain and suffering or punitive damages,[18] sometimes by limiting joint and several liability,[19] and sometimes by a variety of other means.[20]

Faced with such a list of possible topics, the prudent thing for any speaker to do is to avoid them all and to concentrate on basics

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13. Herskovits v. Group Health Coop., 99 Wn. 2d 609, 664 P.2d 474 (1983); Robertson v. Counselman, 235 Kan. 1006, 686 P.2d 149 (1984). There is also the related "market share" rule adopted in some courts for some types of causal problems. See, e.g., Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980); McCormack v. Abbott Laboraties, 617 F. Supp. 1521 (D. Mass. 1985).

14. See, e.g., Jackson v. Johns-Manville Sales Corp., 781 F.2d 394 (5th Cir. 1986), cert. denied, 106 S. Ct. 3339 (1986) (fear of future cancer from exposure to asbestos is actionable as present injury).

15. Hagerty v. L. & L. Marine Serv. Inc., 788 F.2d 315 (5th Cir. 1986).

16. See infra notes 86-87. I do not think Louisiana's new statute, 1986 La. Acts. No. 17, will wholly avoid alcohol litigation. By its terms it does not exclude liability of either the licensed seller or social host for providing alcohol to minors too young for lawful purchase. Perhaps more importantly, it does not deal with claims now being asserted in the cases elsewhere that police or others should have protected an injured person from an intoxicated person. E.g., Weldy v. Town of Kingston, 514 A.2d 1257 (N.H. 1986). Failure to protect a person already intoxicated may be another ground for liability not excluded by the statute. See, pretermitting discussing of that possibility, Eldridge v. Downtowner Hotel, 492 So. 2d 64 (La. 1986).

17. See infra notes 88-90.

18. 1986 Alaska Sess. Laws ch. 139 (creating new sections in Alaska Statute, Sec. 09.17.010 et seq) (limiting nonpecuniary damages to $500,000 with certain exceptions; requiring clear and convincing evidence for punitive damages); 1986 Mass. Adv. Legis. Serv. ch. 351 § 26 (Law Co-op.) ($500,000 limit in medical malpractice for certain nonpecuniary damages in the absence of substantial impairment of bodily function or disfigurement and other special circumstances).

19. 1986 Wash. Legis. Serv. ch. 305, § 401 (West) (several liability only with certain exceptions).

20. E.g., 1986 La. Acts 17, § 1 (no liability for licensed sellers of alcohol for sale to adult drinkers; similar rule as to social hosts).

instead. Following such a plan, I want to suggest that the adoption of comparative negligence in Louisiana as elsewhere gives renewed significance to old legal concepts. We now must ask what contributory negligence really means and when it should apply. We now must consider causal concepts in a new light. We now must specify what duties a defendant might owe a plaintiff under comparative negligence to protect the plaintiff from his own fault.

But basic as these questions are, they have something in common with many of the topics I mentioned earlier. These questions are deeply concerned with accountability of actors who cause injury to others and with self-responsibility of their victims.

I. ACCOUNTABILITY FOR FAULT

A. Accountability as the Lodestone

The older idea of tort law, and the one that names it, is that liability is imposed for wrongdoing. Let me call this the idea of accountability: in a general and imperfect way, the idea is that everyone should be accountable in law for his or her wrongs, but not otherwise.

In the last generation or a little more, many thinkers have shifted their emphasis from accountability to compensation. They have become less concerned with whether the defendant really *deserves* legal liability because he was really at fault. They have become correspondingly more concerned with finding a means of compensating the injured plaintiff.[21]

Jurists interested in torts have also become interested in economic analysis. Some of them would limit liabilities to achieve economic efficiencies.[22] Others would expand liabilities to induce defendants to create safer products or environments.[23] In these analyses, liability is imposed for reasons of policy, to achieve some supposed public good, rather than for reasons of justice, to assess just desserts.

Tort law is probably an extraordinarily expensive method of achieving public good unless it also administers just desserts to the

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21. E.g., 4 F. Harper, F. James, and O. Gray, The Law of Torts § 25.1 (2d ed. 1986); Id. § 20.3, at 128. But cf. W.P. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser On Torts § 4, at 20 (5th ed. 1984) [hereinafter Prosser & Keeton On Torts].

22. The ordinary negligence rules, at least as interpreted under the well-known formula in United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), could accomplish economic efficiencies according to some analysis. See R. Posner, A Theory of Negligence, 1 J. Leg. Stud. 29 (1972).

23. E.g., G. Calabresi, The Costs Of Accidents (1970).

parties.[24] Fortunately, the lodestone at the center of tort law is the common belief that people ought to be held accountable for their wrongs and correlatively responsible for themselves.

B. *Comparative Negligence and Accountability*

Comparative negligence reflects accountability principles. Comparative negligence is one expression of renewed concern for accountability. Adoption of a comparative negligence rule may increase the number of instances in which a plaintiff recovers. It is therefore sympathetic to the compensation ideal. But it is also *exactly* what you would get if you sought accountability and only accountability.

Contributory negligence did not serve accountability principles. Comparative negligence rules assert, as did the regime of contributory negligence, that one is accountable not only for others, but for one's self. Under the rule of contributory negligence you could make the injured plaintiff accountable for his own misbehavior by applying the contributory negligence bar. Or you could find a way to duck the bar of contributory negligence, as in the case of last clear chance or discovered peril, and if you did this, you could hold the defendant accountable. But you never held both parties accountable. The plaintiff recovered all damages, in spite of his fault, or the defendant escaped all liability in spite of *his* fault. Either way the old regime served to assure us that the ideal of personal accountability could *not* be followed for both the faulty plaintiff and the faulty defendant.

How comparative negligence serves the fault principle. In contrast, comparative negligence holds each party to a liability proportioned to his respective fault. If the plaintiff is the only injured party, for instance, and he is guilty of 40% of the negligence, he must bear 40% of the damages—his own, in that case. The defendant guilty of 60% of the negligence must bear 60% of the damages. Although the amount of damages may vary enormously from case to case, liability for those damages is nonetheless proportioned to fault under the comparative negligence scheme, at least in the case of the pure comparative negligence.[25]

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24. Exact costs figures for the judicial resolution of disputes are not available, but it does seem clear that there are many costs, both tangible and intangible. See Dobbs, Can We Care For People and Still Count the Costs?, 46 Md. L. Rev. 401 (1986). In personal injury cases, the high cost of shifting the loss from one party to another, including investigation costs, lawyers' fees, and public costs of the judicial system, compares unfavorably with the relatively low cost of covering injury by private insurance—unless the tort system provides intangible benefits by providing justice.

25. The "modified" comparative negligence schemes fail to reflect accountability proportioned to fault in those cases in which the plaintiff's fault is equal to or greater

II. Comparative Fault: Effects on Related Doctrines

Two groups of effects. But the effects of adopting comparative negligence are not always predictable. I would like to suggest that the change from contributory negligence system to a comparative negligence system will have several kinds of effects. These fall roughly in two groups. The first group has to do with doctrines related to contributory fault but once thought to be quite distinguishable from it. A glance at some of these will suffice here.

Assumed risk. Assumed risk, for example, comes under renewed analysis when comparative negligence is adopted. This was once regarded as a defense wholly distinct from the contributory negligence defense. The adoption of comparative negligence tends to force us to recognize that assumed risk really seems to mean several different things. In some cases to say the plaintiff had assumed the risk really meant that the defendant was under no duty to the plaintiff, or that if he was then he was not negligent at all. In other cases to say that the plaintiff assumed a risk was really merely an emphatic way of saying he was guilty of contributory negligence.[26] Adoption of com-

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than that of the defendant. Although these systems of comparative fault do not directly reflect theoretically perfect accountability as in the pure system, they might nevertheless be thought to represent a judgment about self-responsibility. They might also represent one short-cut method of reaching issues dealt with in the First Hypothetical. See text accompanying infra notes 39-44. Because the modified system of comparative negligence cuts off many potential plaintiffs, however, it retains, for those plaintiffs, the characteristics of the old regime in which contributory negligence is a complete bar. For this reason, you might carry over into a modified system of comparative negligence some of the meliorating rules, including a duty-risk analysis. The comments below as to what rules should be carried over into comparative negligence systems thus deal only with pure comparative negligence systems.

26. The best collection of materials on the idea that assumed risk is always capable of being expressed as contributory negligence, no-duty or no-negligence, is still the Symposium: Assumption of Risk, 22 La. L. Rev. 1 (1961). See generally, Prosser & Keeton On Torts § 68.

Example: Plaintiff in an isolated rural area has a heart attack, borrows medicine from his neighbor, defendant, who has a similar heart problem. Defendant warns him he fears the medicine is contaminated, but as the attack is severe and help is hours away, plaintiff decides to risk it. In fact the medicine is contaminated and the plaintiff suffers some bad effects from it. Older cases might have denied the plaintiff's recovery on assumed risk grounds. Probably most thinkers would now agree that recovery should be denied, but on the ground that the defendant has violated no duty to the plaintiff; he is not negligent at all.

In other cases there is a genuine, if unspoken understanding that the risks are shifted to the plaintiff, and where such an understanding, if written, would not be against public policy, an oral understanding of this kind would negate the defendants' duty. This seems particularly appropriate where the plaintiff is in as good a position as the defendant to secure safety. Sometimes courts under comparative negligence regimes have seemed to say

parative negligence makes it important to know which meaning we have in mind. The result is that the assumed risk doctrine is being redistributed, so that its core ideas will, under comparative negligence, be handled under the doctrines of contributory negligence or where appropriate, "no duty."[27] We are gradually finding that we can do without the term and give more precise expressions to its meanings by using quite different expressions.

Avoidable consequences. A second related doctrine is that of avoidable consequences—the rule that you must use reasonable care to minimize your damages. As with assumed risk, this doctrine is sometimes really indistinguishable from contributory negligence and I feel sure that the courts will in some cases treat the failure to minimize damages as a species of contributory fault that will merely reduce damages under comparative negligence.[28] In other cases of avoidable consequences—those in which the plaintiff's unreasonable conduct results in identifiable additional damages—I think the old rules may be retained with the result that the plaintiff would be responsible for

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that the plaintiff's conduct will be treated as contributory negligence and damages merely reduced unless the "assumption of risk" was express. E.g., Salinas v. Vierstra, 107 Idaho 984, 695 P.2d 369 (1985). Cf. Arbegast v. Board of Educ., 65 N.Y.2d 161, 480 N.E.2d 365 (1985) (donkey baseball; one may contractually limit liability even after merger of assumed risk with comparative negligence). But perhaps the *form* of assumed risk is less important here than its actual communication, which quite often is not by words but by conduct. Just as one might have a genuine contract in which the terms were understood as a result of acts and customs, a willingness to assume a risk and to relieve the defendant of liability could be shown by conduct in some cases. And if the defendant is led reasonably to believe that his conduct is acceptable to the plaintiff, the plaintiff's subjective and unreasonable belief to the contrary should not operate to impose liability upon the defendant. I judge some courts would not accept this last statement. See Kuehner v. Green, 436 So. 2d 78 (Fla. 1983).

In still other cases what passed as assumed risk seems to be ordinary negligence and would be subject now to rules of comparative negligence rather than to a rule of complete bar. Example: Plaintiff, under no compulsion to do so, accepts a ride with a driver whom he knows sometimes drives too fast. If the plaintiff's decision to accept the ride is not unreasonably risky he should not be barred or suffer a reduction of damages; his conduct is contributory fault or nothing. If his decision to ride with the dangerous driver is unreasonably risky, he is guilty of contributory fault and his damages should be reduced in a comparative negligence system. There is no occasion in such cases to use the term assumed risk.

27. "[T]he adoption of a system of comparative fault should, where it applies, entail the merger of the defenses of misuse and assumption of risk into the general scheme of assessment of liability in proportion to fault." Bell v. Jet Wheel Blast, 462 So. 2d 166 (La. 1985). All of the cases cited in supra note 26 also support use of comparative negligence analysis in some, though not all, of the old "assumed risk" cases.

28. See Uniform Comparative Fault Act § 1(b); Phillips, The Case for Judicial Adoption of Comparative Fault in South Carolina, 32 S.C.L. Rev. 295, 310 (1980).

any additional losses he suffers that can be separately measured.[29]

Causation. Application of traditional rules. A third related doctrine is that of causation. In most cases the causal principles worked out before the advent of comparative negligence will continue to apply; the defendant's fault that is not causal will not be counted against him, and likewise the plaintiff's contributory negligence that is not causal will not reduce the plaintiff's damages.[30] In these respects causation remains unaffected by the adoption of comparative negligence.

New causal approaches. But there are cases in which new causal concepts may be used. When you cannot really compare the fault of the plaintiff and defendant, you might have to make some kind of causal comparison instead. For example, if the defendant is strictly liable and the plaintiff is negligent,[31] fault is not a common denom-

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29. Ability to separate damages caused by the plaintiff's fault from those caused by defendant's fault is perhaps one of the key elements that might distinguish "true" avoidable consequences cases from the pseudo-avoidable cases that are really contributory negligence cases in disguise. Where no separation can be made, apportionment on the basis of relative fault under the comparative negligence system is the most reasonable allotment of the costs of injury. Where separation can be made, the plaintiff should often be required to absorb the losses she has inflicted upon herself. For example, if the defendant negligently breaks the plaintiff's leg and cuts her hand, the defendant should be liable for these damages with reduction for the plaintiff's comparative fault. If the plaintiff unreasonably refuses to apply antiseptic to the cut or to have her leg set, so that her hand becomes infected and she walks with a limp, the plaintiff should not recover for the infection and the limp at all. This result is quite similar to the result you would expect in concurrent tortfeasor cases where there is no concert and no other special basis for liability. It is the inability to separate the damages that warrants the joint and several liability in such cases, so that if *A* breaks the plaintiff's leg and *B* simultaneously breaks the plaintiff's arm, each is liable for the harm he has done. In the avoidable consequences cases, "proximate cause" reasoning might produce the same result suggested here.

30. See infra notes 46-47. See also Eaglin v. State Farm Ins. Co., 489 So. 2d 464 (La. App. 3d Cir. 1986) (full recovery by plaintiff on the ground her negligence if any was not a cause); Forest v. State, 493 So. 2d 563 (La. 1986) (decedent "not guilty of any form of 'fault' by which the plaintiffs' judgment should either be denied or reduced . . . . [his] statutory violation did not constitute a cause in fact of the accident").

In Watson v. State Farm Fire & Cas. Ins. Co., 469 So. 2d 967 (La. 1985), the Supreme Court of Louisiana appeared to support the idea of some degree of causal apportionment, directing the trier to consider "both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." I read this to be consistent with the idea that fault which is not causal at all cannot be the basis for a defendant's liability or a plaintiff's reduction in damages. I feel quite unsure about the extent to which it might be read to authorize a causal apportionment that is inconsistent with an apportionment of negligence or fault.

31. The possibility of some kind of comparative "fault" reduction is recognized in this situation by a number of courts. E.g., Daly v. General Motors Corp., 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978). The general use of comparative "fault" in cases where negligence and strict liability are combined does not, however, foreclose

inator that would permit you to assign percentages of responsibility. Instead of trying to compare non-existent fault in this situation, you might try comparing causation instead. That is, you might try comparing the causal significance of the defendant's non-negligent conduct with the causal significance of the plaintiff's negligent conduct. Since we do in fact rate causal significance quite routinely in tort law when we make proximate cause assessments, I do not think comparative causation is an impossible task. But I do think it is very likely to diminish any real requirement that plaintiffs exercise a degree of responsibility for themselves.

There are ways to avoid the appearance of causal comparisons. In a products liability case, for example, you can say that though the defendant was not negligent because it did not know of the defect or of the risks of a product design, it is nevertheless strictly liable. You can then by fiction assume that the defendant had knowledge of the risks and ask what its share of fault would be under that fictional assumption.[32] This would represent a convenient way to think about the problem, but a comparison of the plaintiff's real negligence with the defendant's imputed or fictional negligence is not likely to focus the mind on the plaintiff's responsibility for his own well-being. In fact, it may be nothing more than a species of comparative causation in which the relative causal strength of the parties' conduct is measured by assessing the relative strength of the risks they took, whether those risks were negligently taken or not.[33] A comparative negligence system,

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the possibility that the contributorily negligent plaintiff will recover full, undiminished damages in certain cases. This can occur, for example, where the defendant's product is defective for the very reason that it subjects the plaintiff to harm from his own carelessness. See Bell v. Jet Wheel Blast, 462 So. 2d 166 (La. 1985), and the discussion in text accompanying infra notes 52-85.

32. Dean Keeton uses a similar formula in determining defectiveness of product design. See Prosser & Keeton On Torts § 99. Cf. LaJaunie v. Metropolitan Property & Liab. Ins. Co., 481 So. 2d 1357 (La. App. 1st Cir. 1985) (presuming knowledge of the risk by the strict liability defendant in order to balance risks and determine unreasonableness).

33. See Rizzo and Arnold, Causal Apportionment in the Law of Torts: An Economic Theory, 80 Colum. L. Rev. 1399 (1980). Rizzo and Arnold propose a model for comparing causation which would work in a system in which all liability was strict; as far as I can see, it would work equally well where the liability of one party is based on negligence and the other on strict responsibility. The Rizzo and Arnold theory attempts to assess risks created by parties in terms of probability, not in terms of risk-utility balancing. Thus *A* may create a probability of .90 that the decedent will be killed. *B* may create a probability of .45 that decedent will be killed. The two causes operating together may result in fact in the decedent's death. *A*'s responsibility would be twice that of *B*'s if both were strictly liable. A similar process could be used to allocate responsibilities between the defendant and the plaintiff who is guilty of contributory fault. The probabilities supposed are only estimates; but perhaps they are no less reliable than estimates of negligence in an ordinary comparative negligence case. They do, however, focus on

when coupled with strict liability systems, is likely to introduce at least this much deviation from traditional causal concepts. The deviation is likely to be accompanied by loss of focus on the plaintiff's own responsibility.

III. Comparative Negligence: Effects on Plaintiff's Recovery

A. The Possibilities

Adoption of comparative negligence may have a second group of effects. These have to do mainly with the effects of the plaintiff's fault on his recovery or the amount of it. I want to concentrate on some, but not all[34] of these effects.

Recovery with diminished damages. First, in some situations the plaintiff under the old regime would have been barred entirely by contributory negligence; but under the new dispensation his contributory fault will merely diminish his damages. This will be the most common effect and one that requires no discussion here.[35]

Plaintiff is still barred. Second, in some cases the plaintiff would be barred by what in the past we called contributory negligence; under comparative negligence the plaintiff will still be barred because we

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probabilities rather than fault, which suits the purposes of Rizzo and Arnold, but leaves me with the feeling that the element of accountability for fault may be lost in this process.

34. For instance, the traditional rule applied in some states that claims based on intentional torts, and by extension, willful and wanton or reckless torts, would not be defeated by the plaintiff's contributory fault. E.g., Harlow v. Connelly, 548 S.W.2d 143 (Ky. Ct. App. 1977). If this carries over after comparative fault, the plaintiff would recover unreduced damages. The matter is discussed in V. Schwartz, Comparative Negligence §5.3 (2d ed. 1986). A related question is whether to retain the common law rule that contributory negligence is no bar to an intentional tort. In the light of the courts' willingness to compare the plaintiff's fault with the defendant's non-fault in strict liability cases, see supra notes 31-33, a comparison of the defendant's intentional fault and the plaintiff's negligent fault is surely possible. For example, the plaintiff who walks out of a store without paying for an item might be arrested or prosecuted by the storeowner. If the storeowner is held liable in a malicious prosecution or false imprisonment suit, as in, e.g., Wal-Mart Stores, Inc. v. Yarbrough, 284 Ark. 345, 681 S.W.2d 359 (1984), it may not be unreasonable to suggest that the plaintiff should bear some responsibility for having left without paying. Some courts have raised another related possibility by suggesting that a single act or course of conduct by the defendant could be *both* negligence *and* an intentional tort, perhaps giving the plaintiff an option to emphasize the intentional aspect and avoid any reduction. See Mazzilli v. Doud, 485 So. 2d 477 (Fla. 3d Dist. Ct. App. 1986) (no reduction). See also Ghassemieh v. Scafer, 52 Md. App. 31, 447 A.2d 84 (Md. Ct. Spec. App. 1982).

35. There are many cases working out the math. E.g., Brittain v. Booth, 601 P.2d 532 (Wyo. 1979) (plaintiff's damages found to be $10,000, plaintiff's negligence 49%, recovery $5100). See generally H. Woods, Comparative Fault (1978 and Supp. 1986).

will perceive that the real reason for denying recovery was that the defendant was not negligent at all.[36]

Plaintiff makes a full, undiminished recovery. Third, in some cases under the old system the plaintiff might have had a recovery in spite of his contributory negligence; under comparative negligence he might still recover undiminished damages.[37]

Directions of these comments. Which of these results—diminished damages, no recovery at all, or undiminished recovery—is to be reached in a given case will require analysis which is best begun with some case-situations. From these, perhaps, we can get some guidance in principle if not in precise rule. Because the most familiar and least controversial case is one in which the plaintiff's damages are simply diminished in proportion to the plaintiff's fault, I will not take up cases that illustrate that idea at all. Instead, let me concentrate on the two other kinds of cases.

But first I want to acknowledge that the two main ideas here—that in some cases after comparative negligence the plaintiff may still recover nothing and that in other cases the plaintiff might recover undiminished damages—were first developed by Professor Wex S. Malone, one of the great elder statesmen of tort law.[38]

My acknowledgement to Wex Malone can never be enough. Nevertheless, this is the time to turn to the details.

B. Plaintiff is Completely Barred

1. The First Hypothetical. Let's begin with a simple and very old situation. Suppose:

> Defendant, a homeowner, is doing some work on his house and for this purpose has a pallet of bricks delivered and placed in the street next to the side of his house. While the bricks are piled there, the plaintiff rides his motorcycle down the street and runs into the bricks, causing serious injury to himself.

Two grounds for denying liability. In the old regime of contributory negligence the plaintiff might lose his case for either of two reasons. The judge might say that he is guilty of contributory negligence and should be barred for that reason. Or the judge might say that the defendant was not negligent at all, since, after all, bricks

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36. See text accompanying infra notes 39-44.

37. See text accompanying infra notes 52-85.

38. See Malone, Comment on Maki v. Frelk, 21 Vand. L. Rev. 930 (1968) and Malone, Some Ruminations on Contributory Negligence, 1981 Utah L. Rev. 91, reprinted in W. Malone, Essays On Torts 197 (1986).

that can be observed and avoided really do not represent any unreasonable hazard. They are no greater hazard than a car, motorcycle or bike parked in the same spot.[39] In all such cases the defendant creates an obstruction, but one that is not much of a risk, since the defendant knows it is visible to others and easily avoidable. The defendant's reasonable expectation is that others using the road can and will take care of themselves.

Choice of grounds was insignificant under old regime. In the old regime, it made no difference whether you looked at this as a case of contributory negligence or as a case in which the defendant was not negligent at all. Both ways of looking at the case would yield the same result—dismissal of the case.

But significant under the new. Under the new dispensation, however, if you look at this as a case of contributory negligence, you allow the plaintiff to recover and merely reduce his damages. But if you look at it as a case in which the defendant is not negligent at all, you will dismiss the claim entirely.

Analysis without considering contributory fault. The very earliest of contributory negligence cases was in this fact pattern. The plaintiff's claim was dismissed in *Butterfield v. Forrester*[40] when he rode his horse into building materials left by the homeowner in the road. The case has long been regarded as establishing the rule of contributory negligence. Yet as the redoubtable Wex Malone has pointed out,[41] such a case might well have meant that the defendant breached no duty to the plaintiff at all. The point is not limited to the exact facts in the First Hypothetical, so it may be worthwhile to attempt to state the general principle.

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39. Thus it is usually the owner of the parked car, or its occupants, who recovers from the driver who strikes the car, as in, e.g., Handy v. Cheatum, 410 So. 2d 322 (La. App. 4th Cir. 1982); Petite v. Richardson, 347 So. 2d 23 (La. App. 3d Cir. 1977); Holleman v. Viola, 330 So. 2d 627 (La. App. 4th Cir. 1976). Cf. Laird v. Travelers Ins. Co., 263 La. 199, 267 So. 2d 714 (1972). Negligence on the part of the car owner may be found if he violates a statute, as in Pierre v. Allstate Ins. Co., 257 La. 471, 242 So. 2d 821 (1971), and likewise if there is insufficient room to pass safely, see Haas v. Southern Farm Bureau Cas. Ins. Co., 321 So. 2d 380 (La. App. 4th Cir. 1975), or the obstruction is not readily visible so that the traveler cannot avoid the risk. Degeneres v. Pan-American Petroleum Corp., 153 So. 481 (La. App. 1st Cir. 1934) (plaintiff was injured on a small intake pipe installed in the way by a service station and sticking up only 2 1/2 inches). The traditional view is that abutting landowners, if not others, are entitled to use the street in reasonable ways in connection with use of the land, as by loading and unloading and stacking building materials. Van O'Linda v. Lothrop, 38 Mass. (21 Pick) 292 (1838); John A. Tolman & Co. v. City of Chicago, 240 Ill. 268, 88 N.E. 488 (1909).

40. 11 East. 59, 103 Eng. Rep. 926 (1809).

41. Supra note 38.

2. *Formulating the Principle of the First Hypothetical*

Expressions of the principle. The general idea that the defendant is not legally accountable to the plaintiff at all in the First Hypothetical can be expressed in several different ways. You can say that the defendant was under no duty to the plaintiff, or that he breached no duty, or that he was under no duty with respect to the risk involved, or that the defendant's negligence was not a proximate cause of the harm,[42] or, most simply of all, that the defendant was not negligent.

No negligence; negligence toward other classes. I prefer the simple no-negligence statement on the facts of the First Hypothetical and *Butterfield v. Forrester* for the very reason that it *is* the simplest statement. But if you push me, I will have to admit that it must be qualified. I think the homeowner is not negligent toward the plaintiff, but I have to admit that he might be negligent toward *some*one in *some* respect or another. The homeowner might have created an unreasonable risk to a blind neighbor who walks the street, or to a cyclist biking up the road at night.

Scope of risk and proximate cause expressions. Nevertheless, a risk toward someone else or a risk of some kind of harm that did not in fact occur is, as far as the plaintiff is legitimately concerned, no risk at all. As a result, the defendant is still not liable to the plaintiff in this particular case. This is where some other expressions might be helpful. You can say that the defendant was indeed negligent, but that the harm was not within the scope of the risk; or that the duty of the defendant did not extend to the risk of a sighted driver running into an open and obvious obstruction;[43] or that the defendant

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42. This logically includes the statement that the plaintiff's own conduct or that of a third person was "the sole proximate cause" of the harm, since in such cases the defendant's conduct is *not* a proximate cause. When a court says that the plaintiff's conduct is the "sole proximate cause," however, there is a risk that the focus is on plaintiff fault and not on causation in some more neutral sense. If what is really in issue is the plaintiff's fault, the comparative negligence rules should apply. If what is really in issue is causation, the focus should be on the idea that the defendant's conduct is *not* causal rather than that the plaintiff's conduct is.

43. I hasten to add that not all cases of open and obvious danger are susceptible to this conclusion. Suppose plaintiff owns land next to the railroad, which negligently emits sparks all along its track, creating a risk of fire. Plaintiff knows this but insists on his right to use his own land. This he does by storing materials used in his business on his land. If the defendant has no right to impose the risk on the plaintiff, it cannot be said that the plaintiff is expected to take care of himself. If you add that the defendant took an unreasonable risk of fire, then you conclude that the defendant was negligent even though the risk was known to the plaintiff and was "open and obvious." Cf. Leroy Fibre Co. v. Chicago, Milwaukee & St.P. Ry., 232 U.S. 340, 345 S. Ct. 415 (1914). The same would be true in the case of simultaneous action on the highway if defendant, driving the forward car engages in a series of dangerous sudden halts, running the risk

was negligent, but to a very different class of persons, such as blind persons; or you could even say that the defendant's negligence was not the proximate cause of the plaintiff's harm.[44]

Effect of comparative fault; accountability. All of the expressions carry a common connotation—that the defendant's fault, if any, is not fault directed toward the injury that happened or the person injured. And whatever the expression, the comparative negligence statute should not change the result—the defendant, whose fault, if any,

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that the plaintiff, driving the following car will not be able to stop in time. The plaintiff may be guilty of contributory fault if he does not in fact stop in time, but it cannot be said that the defendant is not negligent in such a case. He has imposed upon the plaintiff a risk which he cannot expect the plaintiff will always avoid and a risk that, on the public highway, he has no right to impose. The case in the First Hypothetical differs from these examples in that landowners usually are permitted to make use of roadways adjacent to their land, as are those who park cars there. In other words the landowner in the First Hypothetical has the right to create a situation in which the traveler must protect himself. Put another way, the landowner there would meet his duty of reasonable care by giving a warning of the danger. Since the danger there gives its own warning on most city streets, his duty of care is fulfilled. But the defendant driving on the highway does not meet his duty of care by warning that he is about to be negligent, nor does the railroad meet its duty by announcing that it intends to spray sparks. Other defendants, such as the defendant in the Third Hypothetical, likewise must do more for safety than give a warning. See infra note 52. Where that is the case the conclusion that the landowner in the First Hypothetical in not negligent at all will not be reached.

44. Although the duty/risk terminology might be preferred because it leads to less confusion or to more penetrating analysis, the statement that there is "no proximate cause" very often means that the injury was not within the scope of the defendant's duty, or that he was not negligent. The terms are thus to a large extent potentially interchangeable if correctly defined. See Nelson v. Powers, 402 So. 2d 129 (La. App. 1st Cir. 1981) (instruction in terms of proximate cause was not error if instruction conveyed the correct legal ideas). Thus in the obvious danger cases one might easily shift from "no negligence" or "no duty" to "no proximate cause." Since darkness is an obvious danger in itself, Shafouk Nor El Din Hamza v. Bourgeois, 493 So. 2d 112 (La. App. 5th Cir. 1986), is a good example. There the street was not lit and the victim was struck by a car. The court observed that if "Shafouk was on the roadway when struck, the sole proximate case of the accident was the failure of Shafouk to exercise reasonable care for his own safety . . . . Although the Police Jury may have a duty to protect a pedestrian using the sidewalk from injury caused by defects therein, it has no duty to provide and/or maintain sidewalks to protect him from the risks involved in walking the roadway, particularly in a rural area as was involved here. Neither the absence of nor defects in the sidewalk or shoulder were legal causes for the victim's injuries." 493 So. 2d at 121. The shift back and forth between proximate cause and scope-of-risk expressions seems entirely understandable and predictable.

Compare also the obvious danger—sitting on a balcony railing in a hotel—in Eldridge v. Downtowner Hotel, 492 So. 2d 64 (La. App. 4th Cir. 1986), where recovery was denied on a duty/risk analysis with the comment that some risks are responsibilities for his own safety, but where the court also explained its views by saying that "plaintiff's fall was in fact caused by his own want of skill, that is, in exercising bad judgment by sitting on the railing *and* in losing his balance," 492 So. 2d at 65 (emphasis by the court)—a causal form of expression.

is wholly irrelevant to this case, is not liable at all. Both the rule of shared liability under comparative negligence and the rule of no liability belong in the jurisprudence of torts if we are really to respect accountability for fault as a principle.

Comparative fault; compelling re-analysis. More specifically, comparative negligence systems increase the pressure on concepts of duty, negligence and causation, any one of which might bar the plaintiff completely. Cases we once considered to be cases of contributory negligence must now be re-analyzed to determine whether, after all, they are really cases of no duty, no negligence or no causation. This re-analysis compels a complete vindication of the defendant in cases like the First Hypothetical. But in others, re-analysis may work the opposite result by allowing a full recovery by the plaintiff.

C. *Plaintiff Suffers No Reduction in Damages*

1. *The Second Hypothetical*

I want to turn now to cases in which the plaintiff not only may recover in spite of his own fault but in which he may even recover full, unreduced damages. Consider:

> Decedent, who has always lived in the north, is invited to stay in the defendant's home located in a warm southern state where patio swimming pools are quite common. But suppose that the decedent is unaware that pools are common or that the homeowner has one. Arriving at night, the decedent accepts his host's invitation to make himself at home: he steps out on the patio in the dark and falls into the pool. Unable to swim, he drowns before the host-defendant discovers the accident.

An action for wrongful death is brought against the host-homeowner. The claim is that he was negligent in failing to warn or to light the patio.[45] The defense is contributory fault of the decedent.

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45. Under traditional common law rules the questions of contributory negligence in the land-owner-guest setting were often obscured by the rules limiting the landowner's duties to licensees and trespassers. But even a mere licensee, such as a social guest, is entitled under the common law rules to a warning of dangers when the landowner knows the licensee's presence and also knows of the proximity of the danger. See Prosser & Keeton On Torts §§ 58, 60. Under the more liberal rule in which reasonable care is owed to licensees as well as invitees, and sometimes even to trespassers, it is even easier to see that the homeowner may be negligent in failing to warn. The grandparent case is Rowland v. Christian, 69 Cal. 2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968). Its reasoning was approved in Cates v. Beauregard Elec. Coop., Inc., 328 So. 2d 367 (La. 1976), cert.

No contributory negligence; comparing the First Hypothetical. If the particular facts justify the conclusion that the defendant homeowner is negligent in failing to warn the plaintiff of the pool, then the case is a very easy one. It is, in fact, the exact reverse of the First Hypothetical. The defendant was *not* negligent in the First Hypothetical because he had every reason to expect that the plaintiff could see the materials in the road and take care of himself. By the same token, the plaintiff *was* contributorily negligent in that case because he could have taken care of himself but did not. But in the Second Hypothetical, if the defendant is found negligent at all, it will be because his failure to provide a warning *prevented* the decedent from taking appropriate safety steps. In such a case, depending on the exact shadings of fact, the decedent may be found not to be negligent at all. And in that case the plaintiff suing for his death should have a full recovery.

Plaintiff negligent vis-a-vis some risks. In the First Hypothetical I said I thought it would be best to explain the defendant's lack of liability by saying simply that he was not negligent at all, but that there would be cases where more complex explanations would be required. Much the same kind of observation can be made here. It is easiest to explain the plaintiff's full recovery in the Second Hypothetical by saying that the decedent was not guilty of contributory negligence at all. But I must confess that if you push me, I will have to say that the decedent in the Second Hypothetical might well have been contributorily negligent toward *some* risks, just as the defendant in the First Hypothetical might have been negligent toward blind walkers when he left the building materials in the road.

—Examples; full recovery. In the Second Hypothetical, for example, we can imagine that the decedent, blundering in the dark patio of a strange house did create some definite risks to himself. He could easily have tripped on a tricycle, bumped into a tree or scraped himself on a thorny hedge. But a trier of fact might well find that drowning in an unexpected pool of water is not within the risks that made his conduct negligent in the first place. If such a finding is made and justified, then a full and undiminished recovery for death of the decedent would be justified. Perhaps some courts would express this

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denied, 429 U.S. 833 (1976). There are, of course, other grounds for landowner liabilities in Louisiana under rules like those explained in Loescher v. Parr, 324 So. 2d 441 (La. 1975). Even if strict liability were applied on the facts of the Second Hypothetical, however, I think it would not change the analysis; victim fault, if it is otherwise an appropriate consideration, would not be excluded under the strict liability rule. See La Jaunie v. Metropolitan Property & Liab. Ins. Co., 481 So. 2d 1357 (La. App. 1st Cir. 1985).

idea by saying that the decedent was guilty of contributory negligence, but that his negligence was not a proximate cause of his death.[46]

—*Schwartz' view.* Professor Schwartz is suspicious of this reasoning.[47] He suggests that courts should be leery of old contributory negligence cases allowing the plaintiff a full recovery on such grounds. He has some good reasons for suspicion because it is all too easy to manipulate descriptions of the risks so as to make it seem that one's fault does not encompass a particular risk.[48] To the extent that courts might have manipulated the proximate cause concept under the old regime of contributory negligence, I think Professor Schwartz is right. There is simply no need for such verbal shenanigans after the adoption of comparative negligence rules.

—*A Qualified Agreement.* But if you apply a risk analysis to a defendant's conduct, limiting liability of a defendant to harms resulting from risks that made his conduct negligent in the first place, then it is entirely appropriate to apply a risk analysis to the plaintiff's conduct as well. The right result, I think, is to apply the risk analysis honestly, both when analyzing defendant-created risks and when analyzing plaintiff-created risks. If risk description is spare and general, the description will encompass many variations,[49] as it should, and the actor will be held accountable for all the variations as well as the most obvious and central risks of his conduct.

—*Applied to the Second Hypothetical.* If I try to apply this idea to the Second Hypothetical, I lean toward Professor Schwartz' po-

46. See Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 A. 924 (1890) (injury to plaintiff was not within the scope of the risk that made his conduct contributorily negligent). The same "proximate cause" answer might be given even if the court does not use scope-of-risk analysis. See Kubik v. Ingleheart, 280 Ark. 310, 657 S.W. 2d 545 (1983) (plaintiff operating boat negligently shot by defendant, boat's operation not a "direct cause" of plaintiff's harm, hence no reduction under comparative negligence). The facts in *Kubik* are sketchy, but it would seem that the identical answer would be given under a scope-of-risk version of "proximate cause." See also supra note 30.

47. V. Schwartz, Comparative Negligence § 4.5 (2d ed. 1986). Cf. H. Woods, Comparative Fault § 5.1 (1978 and Supp. 1986).

48. Compare Hughes v. Lord Advocate, [1963] A.C. 837 (H.L.) (risk of fire includes risk of explosion) with Doughty v. Turner Mfg. Co., Ltd., [1964] 1 Q.B. 518 (C.A. 1963) (risk of splashing molten metal when object is dropped in it does not include risk of eruption due to chemical reaction with the object).

49. See R. Keeton, Legal Cause (1963). Compare Derdiarian v. Felix Contracting Corp., 51 N.Y. 2d 308, 434 N.Y.S. 2d 166, 414 N.E. 2d 666 (1980) (worker placed at forward end of excavation protected by inadequate barrier "ignited into a fire ball" when driver who forgot his medicine suffered a seizure and ran into kettle of liquid enamel in the excavation; contractor's negligence as to barricade a proximate cause of injury) with Charles v. Lavergne, 412 So. 2d 726 (La. App. 3d Cir. 1982) (worker splicing new cable on old one on a pole, defendant drove truck over the cable on the ground, entangling it in axle and pulling on the pole, which broke and threw worker to the ground; driver's negligence did not create this specific risk). See also supra note 48.

sition. Decedent created risks of injury to himself from *unknown* dangers in the dark. The most likely of these would be dangers of a minor sort—scratches, bumps, falls. The strongest distinction between the drowning that actually occurred and the risks that the decedent accepted is that of magnitude, not kind. This in turn is a strong argument for letting comparative negligence work its wonders.[50] Unless you have an enormous distrust of the trier of fact, the trier's determination as a fact will be simpler and perhaps fairer than an attempt to resolve the question by a legal risk analysis. The trier can readily recognize that the risks created by the decedent were small risks of small harm and reduce damages by the smallest fraction. This seems to me preferable to an elaborate risk analysis in a very close case.

—*A qualified disagreement.* Nevertheless, there are surely cases in which the risk analysis has its place and in which the plaintiff should not only recover but should recover in full.

2. Variation on the Second Hypothetical

Suppose the guest in the Second Hypothetical is warned:

> "Don't go on the patio, you might fall in the pool and my lights aren't working." The guest steps out on the patio anyway, but instead of falling into the pool is struck by his host's car, which the host has improperly parked and which rolls downhill and crashes through the patio wall, striking the decedent and killing him.[51]

In this case the guest is perhaps as much guilty of contributory negligence as in the Second Hypothetical, but the risks he is taking—risks such as falling and even falling into a pool—are surely of a very different order than the risk of being struck by a car. This is not merely because the risk of being struck by a car suggests a danger of greater magnitude, but because no one would have said that the decedent's conduct increased his risk of being struck by a car at all. In this case I believe the plaintiff should recover fully for decedent's death and I believe that in cases involving parallel conduct by defendants you would reach a similar conclusion.

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50. If the actor is otherwise responsible for his negligence, the fact that the harm that occurs is more extensive than that foreseen or foreseeable does not relieve him of responsibility under generally accepted rules. See Restatement (Second) of Torts § 435 (1965). He escapes liability on a risk analysis only if the harm is of a different kind than the harm that was foreseeable.

51. The structure of the situation is suggested by Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 A. 924 (1890), but the particular facts are adapted to present a variation on the Second Hypothetical.

Analysis, not rules. In other words, the question whether a given case calls for a comparative negligence treatment or whether it calls instead for allowing a full recovery because the plaintiff was not negligent as to the kinds of risks that caused him harm depends on the facts of each case, and analysis rather than mechanical application of the rules is required.

The comparative fault choice in close cases. Close cases, however, need not call for difficulties. Doubts can readily be resolved in favor of a comparative negligence solution in all but the clearest cases. I say this because, although we should construct rules to minimize the risk of harm through undetected judicial error, the harms from an erroneous decision to apply risk analysis and the harms from an erroneous decision to apply comparative negligence are approximately equal and both are likely to be small. If, contrary to my recommendation, you were to apply a risk analysis to the Second Hypothetical, you would allow the plaintiff to make a full and undiminished recovery in spite of the decedent's negligence; but the difference between a full recovery and a diminished recovery in such a close case is not likely to be a very great one because the trier would almost certainly not have made a very large reduction in damages had the case proceeded upon a comparative negligence basis. The trier would very probably have reasoned that the decedent's negligence in risking a slip, bump or scratch is very minor compared to negligence of the homeowner who risks the guest's drowning and consequently damages would have been little reduced. And similarly, the risk from an erroneous decision to apply comparative negligence in the Variation would probably also be small. If the trier attempts to reduce damages in the Variation, when in an ideal world there would be no reduction, nevertheless the reduction is again likely to be a small one, and on the same kind of reasoning: the plaintiff's risk of a bump in the dark is very different from the defendant's risk that someone will be killed by an improperly parked and braked car.

—Comparative fault efficiency over risk analysis. Because the risks of error are both small and approximately equal it is probably more efficient to leave the doubtful case to the trier of fact under a comparative negligence rule. This would avoid the relatively elaborate judicial machinery of argumentation, briefs, opinion-writing and analysis over the question of risk-analysis in favor of the relatively simple decision of a jury or trier of fact. Thus my conclusion would be that if the risk created by the plaintiff is clearly of a different order and not merely a different magnitude, a full recovery is in order and the trier should be so instructed; but that in any other case, including all doubtful cases, the trier should be instructed on comparative fault instead.

3. The Third Hypothetical

The third hypothetical case is very different. Suppose that:

> A manufacturing company hires a worker to engage in a simple but repetitive and boring task. He is to place a piece of metal under a drill press, then activate the press with a foot pedal so that it comes down on the metal and molds it or cuts it or drills a hole in it. There is no safety device to prevent the worker from getting his hands under the drill when it comes down, and after hours of this boring work he reaches in to straighten the metal piece just as he hits the pedal with his foot. The result is a hand crushed or drilled through or cut off.[52]

Compared to the First Hypothetical. This kind of case, as factually different as it is from the First Hypothetical, is similar on one point: the plaintiff knows the danger and the defendant knows he knows. The argument made in the First Hypothetical is that since the defendant knew the plaintiff would appreciate the danger, the defendant was not negligent in allowing that danger to exist; indeed, that it was not much of a danger at all because it could readily be avoided by the plaintiff.

Contrasted with the First Hypothetical. But the differences are more important than the similarities. In the Third Hypothetical, the defendant can easily be found guilty of negligence in failing to protect the plaintiff by providing a machine suitably designed and safe. It is cheap and easy to set the machine so that it will not operate at all unless two buttons are simultaneously pressed by hand—a strategy that can avoid all but the most determined efforts to get a hand under the drill. The defendant should surely take this precaution.

Protecting the plaintiff from his own fault. Given that a finding of negligence against the defendant would be justified, the focus of the case would necessarily turn to the contributory negligence of the worker. And here is a very big difference between the First Hypothetical and the Third. If the defendant is negligent at all in the Third Hypothetical, it is because it is foreseeable that the worker will negligently get his hand in the press. The very thing we think the defendant should protect against is the worker's own lapse or his own inability to protect himself. So you are presented with an anomaly if you relieve the defendant. You would be saying he must exercise due care

52. Both the facts and the legal principles are suggested by Bexiga v. Havir Mfg. Co., 60 N.J. 402, 290 A.2d 281 (1972). Very similar facts have appeared in a number of products cases. E.g., Reid v. Spadone Mach. Co., 119 N.H. 457, 404 A.2d 1094 (1979).

to prevent the plaintiff from injuring himself through his own lapse, but that, as soon as the plaintiff *does* injure himself that way, the plaintiff is barred from recovery. This would be erecting a duty the breach of which could never result in liability. It would be denying relief in the very case the duty was intended to cover.

A leading case. On facts like these a leading case from New Jersey, *Bexiga v. Havir Manufacturing Co.*,[53] reasoned in just this kind of way. It held that the defendant-employer was under a duty to protect the plaintiff from the plaintiff's own lapses or inabilities, and that consequently the employer could not escape liability under the old rules of contributory negligence when such a lapse occurred.

And other examples. That kind of decision is paralleled in others, sometimes on quite different facts. For example, it is said that a hospital owes a patient a duty to protect the patient from his own incapacities and that the hospital that fails to do so cannot escape liability by claiming that a drunken or suicidal patient failed adequately to care for himself when, after all, it was the hospital's duty to protect the plaintiff from his own problems.[54]

Louisiana: duty/risk analysis; does the principle survive? The idea is well known, of course, in Louisiana as a part of the duty/risk analysis, on which I will say more later.[55] The general idea seems to be that in some cases the defendant is responsible to the plaintiff to protect the plaintiff from his own faults or incapacities. Let me call this the *Bexiga* principle after the New Jersey case.[56] The question is whether that principle, engendered as it was in the old regime of contributory negligence, will carry over to a comparative negligence system.

Johnson-Robertson differences. On this point two distinguished scholars, Professors Robertson and Johnson, have disagreed. Professor Robertson thinks there is no need to carry over the principle of protecting the plaintiff from his own fault to a comparative negligence regime.[57] Professor Johnson thinks the principle should be carried

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53. 60 N.J. 402, 290 A.2d 281 (1972).

54. Warner v. Kiowa County Hosp. Auth., 551 P.2d 1179 (Okla. Ct. App. 1976).

55. *Bexiga* itself has been cited and relied upon by the Louisiana Supreme Court. Travelers Ins. Co. v. Southwestern Transp. Co., 488 So. 2d 978 (La. 1986); Bell v. Jet Wheel Blast, 462 So. 2d 166 (La. 1985).

56. I believe the principle is at least approximately the same as the duty-risk analysis that is well-established in Louisiana jurisprudence, but I prefer to use a different designation for the idea involved because the duty-risk terminology carries with it a whole history and connotes some particular applications that I do not think are necessarily implicated by adoption of the general principle.

57. Robertson, Ruminations on Comparative Fault, Duty-Risk Analysis, Affirmative Defenses, and Defensive Doctrines in Negligence and Strict Liability Litigation in Louisiana, 44 La. L. Rev. 1343 (1984).

over.[58] I lean, as only members of the legal profession can, in both directions. I believe the principle, correctly identified and limited, should carry over; but I believe that few cases will qualify for the special protection.

The passing of Baumgartner. Louisiana's *Baumgartner* decision[59] purported to apply a kind of duty/risk analysis to a rather ordinary car-pedestrian accident, with the result that, under the contributory negligence regime, the plaintiff's fault was not counted against him at all. With the adoption of comparative negligence, the Louisiana Supreme Court overruled *Baumgartner*.[60] However, *Baumgartner* seemed to me to be more an effort to provide a humanitarian melioration of the harsh rule of contributory negligence and less a straight application of the duty-risk or *Bexiga* principle. If I am right, then to overrule *Baumgartner* is not to overrule the duty/risk analysis under comparative negligence or its application in cases like *Bexiga*.[61]

Survival of the principle may depend on what the principle is. So the question remains whether the *Bexiga* application of a duty/risk analysis may be appropriately carried over to a comparative negligence system. This may depend in part on what you think the principle really is and the kinds of cases in which you think it will be applied. Let me start by trying to sketch an approximation of the principle I think involved.

IV. FORMULATING THE *Bexiga* PRINCIPLE

What the principle is NOT. The principle in allowing the plaintiff to recover in the second hypothetical in spite of his own fault really *is* a principle. It is not a matter of whimsy or bias or sympathy. Although the principle might be buttressed by considerations of social policy,[62] it is not itself a principle of policy as distinguished from

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58. Johnson, Comparative Negligence and the Duty/Risk Analysis, 40 La. L. Rev. 319 (1980).

59. Baumgartner v. State Farm Mut. Auto Ins. Co., 356 So. 2d 400 (La. 1978).

60. Turner v. N.O.P.S.I., 476 So. 2d 800 (La. 1985).

61. *Bexiga* itself has been cited with approval by the Louisiana Supreme Court with the indication that it survives the adoption of comparative fault at least in products liability cases. Bell v. Jet Wheel Blast, 462 So. 2d 166 (La. 1985). There are many cases on similar facts. E.g., Lanclos v. Rockwell Int'l Corp., 470 So. 2d 924 (La. App. 3d Cir. 1985) (manufacturer of unguarded wood shaper, no comparative fault defense). But although the principle might be especially appealing in products cases for policy reasons, the justice reasons for the principle seem to go beyond products, and the idea has been applied in many situations. E.g., Travelers Ins. Co. v. Southwestern Transp. Co., 488 So. 2d 978 (La. 1986) (pre-comparative fault case, worker, warned of a hole in the floor, forgot and stepped into it anyway, not barred by contributory negligence).

62. The *Bexiga* rule is consistent with a deterrence philosophy, since it imposes liability on the actor most likely to respond with appropriate safety measures. Some thinkers might regard it also as a desirable way of "distributing" the costs of injuries.

justice or morality. It is, in fact, a principle about accountability.

The first element: The disabled plaintiff. One of the elements of the principle is that the plaintiff is in a class of persons who cannot protect itself from the risk in question. The idea that persons under a special disability should be protected from their own limitations or even their own dangerous proclivities is not a new one. It reaches back in tort law at least as far as the familiar cases involving statutory duties. A defendant is commanded by statute not to pass a halted school bus;[63] or not to sell dangerous items to minors.[64] The defendant who violates the statute cannot claim contributory negligence as a defense. The principle invoked is the one in the Third Hypothetical: it was his duty to protect the plaintiff from himself. What *Bexiga* suggests is that the principle is not limited to chronic disabilities, such as those of small children or those suffering mental disabilities. It is enough under *Bexiga* that the machine would be used in a repetitive routine that would dull the senses and reflexes even of the most alert and that the risk of an operator's negligence was known to the defendant.[65]

A second element: non-reciprocal risks. There may be a second element in the principle. It may not be enough that the plaintiff cannot protect himself. It may also be important that the plaintiff inflicts no substantial risks upon others by his contributory fault. The Third Hypothetical is a very good illustration of a plaintiff who may

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63. Van Gaasbeck v. Webatuck Cent. School Dist., 21 N.Y. 2d 239, 234 N.E. 2d 243, 287 N.Y.S. 2d 77 (1967).

64. See generally Prosser & Keeton on Torts at 461. There is much current litigation over the duty of one who supplies alcohol to a drinker who may later drive. Although many of the cases involve injuries suffered by third persons when the intemperate drinker drives negligently, some cases have approved the idea that the drinker himself, or his estate, may recover. Klingerman v. Sol Corp., 505 A.2d 474 (Me. 1986); Brannigan v. Raybuck, 136 Ariz. 513, 667 P.2d 213 (1983); Young v. Caravan Corp., 99 Wash. 2d 655, 663 P.2d 834 (1983). But the effect, if any, of the drinker's own contributory negligence in becoming intoxicated, is far from certain. In Blake v. Moore, 162 Cal. App. 3d 700, 108 Cal. Rptr. 703 (1984), the drinker's recovery was reduced for his comparative fault. In Weldy v. Town of Kingston, 514 A.2d 1257 (N.H. 1986), police stopped but did not arrest drinking teenagers. The car they were in later crashed and the teenagers and survivors sued the town for failing to effect an arrest to protect the teenagers. The court approved a recovery subject to a comparative negligence reduction. A recovery was denied as to a claimant whose negligence was deemed greater than that of the police because of New Hampshire's modified comparative negligence rule. The parties seem not to have argued the *Bexiga* principle.

65. This statement may seem to imply that the plaintiff was not in fact guilty of contributory negligence at all in *Bexiga*. I believe the trier of fact could properly have found no contributory negligence on these facts and also on the facts of Travelers Ins. Co. v. Southwestern Transp. Co., 488 So. 2d 978 (La. 1986). But I don't know that such a finding would be *required*, so the issue is an important one in determining what the trier should be told to do if it finds contributory fault.

be at fault, but whose fault is dangerous only to himself. After all, the press can smash his hand, but his hand will not hurt the press. Certainly you can say his claim not to be barred by contributory fault is a stronger one because the risks in the case were one-sided against him. The risks were not, in Wex Malone's term, "mutual."[66] In the diction of George Fletcher, the risks were non-reciprocal.[67] If the plaintiff's faulty conduct not only threatens himself but also subjects others to substantial and unreasonable risks, I think his claim to be relieved of the consequences of his fault is considerably less persuasive.

A third element: defendant's knowledge or reason to know the plaintiff's disability. There is, of course, a final element. The defendant who neither knows nor has reasonable ground to foresee the plaintiff's inability to protect himself comes under no duty to protect the plaintiff from his own fault. Such a defendant may not be negligent at all—that's the First Hypothetical—but even if he is, there is no reason not to invoke the ordinary rules of contributory negligence. In other words, the defendant's duty of care to protect the plaintiff from the plaintiff's own fault, incapacity, or dangerous proclivities should be invoked only when the defendant knows or should know of the plaintiff's limited ability to care for himself. Defendant's knowledge of *danger* alone would not be enough if the defendant did not also know of the plaintiff's limited ability to achieve safety for himself.

V. Application of the *Bexiga* Principle

A. The Role of Accountability

How should the principle be applied? If the general description of the principle in the Third Hypothetical is a reasonably sound one, there still remains the question of how it might be applied and the further question whether it should carry over into comparative negligence regimes.

Application: respect for self-determination. The first thing I want to say about application of the idea is that it can only make sense as good law if it is applied with respect for the co-eval principle of accountability. No plaintiff should be permitted to say, "Protect me, I am irresponsible." The principle of accountability has roots in respect for autonomy as well as in a demand for responsibility. The law has no business being paternalistic or requiring others to be paternalistic on behalf of autonomous, self-determining citizens.

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66. See Malone, Some Ruminations on Contributory Negligence, 1981 Utah L. Rev. 91, reprinted in W. Malone, Essays on Torts 197 (1986) ("The symmetry of the predicament . . . the mutality of risk . . . .").

67. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972).

—in a comparative negligence system. This means that the principle should not be invoked to protect those who really can and should protect themselves. For those who really can protect themselves, the meliorating principle of *Bexiga*, even if properly invoked under the regime of contributory negligence, assuredly should not carry over to the comparative negligence regime.

B. Testing the Principle

1. *Application—Case 1: The Mentally Disabled Plaintiff.* I would like to suggest four pattern cases in which the principle of the Third Hypothetical might be tested.[68] Because these cases all test the Third Hypothetical, I will try to avoid confusion by calling them "cases" instead of "hypotheticals."

> *Case 1. A mentally disabled adult.* John Clay, a mentally disabled adult, worked for a farmer, Johnson. Johnson took Clay as a foster child, an arrangement made with the welfare department. Johnson put him to work with machinery on the farm, and explained his duties, but did not explain the dangers. Clay put his hand in a grinder and it was severely injured. A reasonable person would have perceived the risk and would not have put a hand in the grinder. Clay did not adequately perceive the risk because of his mental limitations. In Clay's suit against Johnson the defense was contributory negligence.[69]

Solutions based on adherence or exceptions to the ordinary standard of care. One solution is to bar recovery on the ground that the plaintiff is guilty of contributory negligence because mentally disabled people are under the same standard of care as other persons. This is in fact the traditional view in the common law systems[70] and one adopted by the Restatement.[71] This awful result could be avoided by rejecting the objective standard of care and holding mentally disabled persons to some lesser standard of care, but that is a result we might not like if the mentally disabled person injures another rather than himself.[72] The result could also be avoided by holding that the standard is that of the reasonable prudent person when the mentally disabled

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68. All four cases are taken from D. Dobbs, Torts and Compensation, Personal Accountability and Social Responsibility for Injury 241 (1985).

69. The facts are suggested by Lynch v. Rosenthal, 396 S.W. 2d 272 (Mo. Ct. App. 1965).

70. See Prosser & Keeton on Torts § 135.

71. Restatement (Second) of Torts § 283B (1965).

72. Louisiana's solution in this regard is unique as far as I know. See Turner v. Bucher, 308 So. 2d 270, 273-74 (La. 1975) (nondiscerning persons not liable but their curators are).

person is a defendant, but is more lenient when he is a plaintiff. This would have the disadvantage of treating similarly situated people very differently; it might not violate equal protection, but it certainly does not seem very even-handed in administration of the law.

Allowing recovery under the Bexiga principle. In my view the best solution in a contributory negligence regime is to allow recovery by the mentally disabled person in this case, but to allow it on the principle in the Third Hypothetical. The farmer knows of the disability and is under a duty to use care toward the plaintiff—including care to prevent harm due to the plaintiff's own disability. Given such an obligation, the reason for the bar of contributory negligence disappears altogether.

Does the Bexiga Rule in Case 1 Survive Adoption of Comparative Negligence? Do these conclusions carry over to a system of comparative fault? If so, the plaintiff would continue to make a full, rather than a reduced recovery. I believe a full recovery is required even after the adoption of comparative fault rules.

—Common values of accountability. This seems to follow from common values about accountability. Ideally, we want each individual to be responsible for himself and accountable to others for harms caused by fault. But in Case 1 we know that the plaintiff cannot be responsible for himself. The very source of the defendant's duty of care is his own recognition that the plaintiff cannot care for himself. Accountability in this case requires the defendant to protect the plaintiff from himself; and conversely, the plaintiff is not held responsible for himself. If there is ever a case in which the defendant is under a duty to protect the plaintiff from his own fault, surely it is one like Case 1 where liability comports with all our traditional feelings about responsibility for self and accountability to others. To import comparative negligence into this situation would be at odds with these notions of accountability.[73]

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73. These statements do not explicitly address the question whether the principle should carry over to a comparative fault regime when the plaintiff is guilty, not merely of contributory negligence but some form of more serious and self-destructive behavior. In Argus v. Scheppegrell, 459 So. 2d 238 (La. App. 5th Cir. 1984), a doctor was found to have been seriously negligent in prescribing addictive drugs to a teen-ager, with little record keeping or control. The risk seems to have been that she would abuse the drugs and either negligently or intentionally take an overdose. She did in fact die of an overdose from a rather large prescription. The court thought that while the doctor's duty extended to protecting her from her own carelessness, it did not extend to protecting her from her deliberate decision to take the pills. But I believe that if the doctor's negligence was a failure to protect her from the mental and emotional deterioration that arises from drug abuse, that duty would necessarily encompass protecting her from a drug-induced desire for self-destruction as well. The facts in the case are not fully developed with respect to the teen-ager's state of mind.

2. *Application—Case 2: Contributory Fault That Also Creates Risks to Others*

> *Case 2.* Kincheloe, a child of 12, is driving a car on a rural road. His neighbor, Davis, was driving in excess of the speed limit in the opposite direction, approaching Kincheloe. He recognized Kincheloe and knew Kincheloe was inclined to take his father's car off and pull dangerous stunts. Nevertheless, Davis did not slow down. Kincheloe pulled over in Davis' lane, and Davis was unable to avoid collision because of his speed. Both Davis and Kincheloe were injured. In Kincheloe's claim against Davis, contributory negligence of Kincheloe was pleaded as a defense.

Incapacity in Case 2. The plaintiff here is known by the defendant to be under a disability—he is a child-actor who is known to engage in dangerous stunts, presumably because of his limited experience. For this reason, we might impose upon the defendant the kind of duty recognized in the Third Hypothetical—to use care to protect the boy from his own dangerous propensities.

A difference: risks to others. But here the plaintiff has not only created risks to himself in the classic pattern of contributory fault; he has also created risks to others, possibly even to others besides the defendant. In this respect the case is quite different from the appealing facts of the mentally disabled farm worker who puts his hand in the grinder. The concerns here are doubled. We deal not only with the plaintiff's responsibility to care for himself, but also his accountability to others for injury he causes them.

The no-child negligence solution. One solution here is to throw up your hands and declare that children of this age cannot be negligent. This solution would allow the boy to recover fully for his injury and would not impose any liability upon him for the injury he caused the other driver. Possibly this is the worst imaginable solution. It depends on a unrealistic premise—that a child cannot be negligent—and it works the double result of allowing him to avoid both self-responsibility and accountability to others.

Differential between negligence and contributory negligence solution. Another solution I do not favor would say that a child of this age can be guilty of negligence but not contributory negligence. Since one and the same act are involved both in the *negligence* and *contributory* negligence claim—that is, driving on the wrong side of the road, presumably not keeping a lookout—the distinction between negligence and contributory negligence here if not everywhere does not seem very convincing. It would hold Kincheloe accountable to others for his act, but not responsible for his own well-being. In a society that seeks to encourage self-reliance, autonomy, and responsibility, this distinction seems unsound.

The Bexiga principle as a solution. What other solutions are possible if these are not such good ones? One is to apply the principle of the Third Hypothetical or the duty/risk analysis and hold that Kincheloe can recover fully because he was acting under an incapacity that was known to the defendant, so that the defendant was under a duty to protect Kincheloe from his own dangerous propensities. The effect of this solution would be, apparently, the same as saying children cannot be found negligent at all. Kincheloe would recover fully and he would not be held accountable to others injured by his misconduct. If you believe that children are not moral beings, capable of making decisions on their own, then this result is appropriate. Otherwise it rejects the possibility of accountability and the compensation that goes with it, and also the possibility of responsibility for one's self. If Kincheloe really is capable of safer behavior, to allow his full recovery of damages and at the same time to deny that he is responsible for injury caused others seems to reject social policy in favor of compensation and moral obligations of responsibility.

Conclusion: the Bexiga principle does not survive adoption of comparative negligence in Case 2. If this analysis is correct, a case like this one calls for a straight application of comparative negligence. Kincheloe would not be barred by his fault, but would recover damages subject to diminution if the trier finds him guilty of contributory fault; at the same time, he—or possibly his parents—would be liable for the damages to Davis, subject to diminution for *Davis's* fault.[74] The result would be different if you believe that in fact Kincheloe was incapable of ordinary safe driving and also that Davis knew it; *that* scenario would invoke the principle in the Third Hypothetical.

3. *Application—Case 3: Defendant Does Not Know the Need for Special Care.*

> *Case 3.* Paulin, a retarded adult, walked down a rural road in the pre-dawn hours. He walked on the right side and wore dark clothes. Dalrymple was driving in the same direction. As he neared Paulin, a car came from the opposite direction and Dalrymple dimmed his lights. He never saw Paulin until the last minute. He struck Paulin, who was seriously injured. Contributory negligence was the defense in Paulin's claim against Dalrymple.[75]

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74. Kincheloe might be held to an adult standard of care in some states either because he is carrying on an adult activity (driving) or because he is operating a dangerous instrumentality. See Robinson v. Lindsay, 92 Wash. 2d 410, 598 P.2d 392 (1979); Krieger v. Howell, 109 Idaho 704, 710 P.2d 614 (Idaho Ct. App. 1986). Even under the child standard of care, he may be held responsible when he fails to live up to *that* standard. See Robertson v. Penn, 472 So. 2d 927 (La. App. 1st Cir. 1985).

75. The facts are suggested by Dorais v. Paquin, 113 N.H. 187, 304 A.2d 369 (1972).

Comparisons and contrasts; the plaintiff's unknown disability. Case 3 is like Case 1 and different from Case 2 in that the mentally retarded person who walks on the wrong side of the road in the dark creates no significant physical risks to others. But it differs from Case 1 too. The defendant here, a driver who does not see the plaintiff until the last moment, does not seem to know or have reason to know that he is dealing with a disabled person. Contrast Case 1 where the farmer knew of his worker's disability.

An argument for comparative negligence reduction. To hold one accountable for another's well-being is a serious thing at best; to hold one accountable to protect an unforeseen other from herself, surely, in a free society, requires some very special reasons. I would consequently argue that while the plaintiff in Case 1 should recover an undiminished amount even after comparative negligence, the plaintiff in Case 3 should not. If the defendant in Case 3 was negligent at all—a point of which I am in doubt—the plaintiff's damages should be reduced for comparative negligence.

The Oliver case. In *Oliver v. Capitano*,[76] a case much like Case 3, the plaintiff, who had a history of mental illness, was in a fit of bizarre behavior, hallucinating, wandering, and playing on earth moving equipment. She was struck by a truck backing up. There was no claim that the driver of the truck knew that the plaintiff was of unsound mind at the time. Nevertheless, the court thought contributory negligence would not necessarily be a bar, because the driver's duty was to watch where he was backing to avoid injuring any person who might not escape. This could include persons of unsound mind or deaf persons who had not heard the backing truck.

Plaintiff's disability not known in Oliver. The truck driver in *Oliver* seems to have had no ground for suspecting that he might be in the vicinity of a person who needed special protection. Much less was there any relationship between them that might impose any beyond-the-ordinary duty of care. Indeed, the finding of negligence is itself quite sketchy. The driver used his rear-view mirrors and back-up bell to secure safety. His negligence, if that is what it was, seems to have been only that he did not have a helper stand down to see that the path was clear. To impose a duty to care for a known or foreseeable person under disability is one thing; to impose a duty to care for a disabled person when no such person is to be expected is quite another.

A suspicion. This leads me to suspect that *Oliver* is not really like Case 3 at all but that it is instead a humanitarian effort to meliorate the vicious consequences of the contributory negligence rule.

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76. 405 So. 2d 1102 (La. App. 4th Cir. 1981).

But while *Oliver* succeeds admirably at doing so, it does not succeed so well in respecting the full scope of the defendant's autonomy and freedom to act, because the defendant, who had no reason to think he had to act for the protection of a mentally disabled person, is nevertheless subjected to liability in *Oliver*.[77]

Oliver under comparative fault. If I am correct in thinking that *Oliver* really is *not* a *Bexiga* or duty/risk case but is instead a humanitarian melioration of the old contributory negligence rule, then it seems to follow that the decision should become a dead-letter with the adoption of a comparative fault scheme. Cases, like *Oliver*, in the pattern of Case 3, call for application of ordinary comparative negligence rules to reduce damages, if indeed the defendant is negligent at all.[78]

This means that not all duty/risk cases are equal. Some case patterns call for continued use of that analysis. Some do not.

4. *Application—Case 4: Reciprocal Risks, Incapacity Unknown*

> *Case 4.* Perez and Dittman were both speeding as they traveled south on a public highway. Perez, who was 13 years of age, attempted to pass Dittman on a curve. At the same time Dittman lost control and began to skid over to his left. The two cars collided at this point. Each driver was injured.

Comparisons. Cases 2 and 3 each involved separate elements that would argue against any special protection for the plaintiff. In Case 4 the two elements are combined. Perez is a minor and under at least a legal if not an actual disability. But Dittman does not know of Perez' minority so that in this respect he is in much the same position as the defendant in Case 3 who does not know he is encountering a mentally disabled person. In addition, Perez inflicts risks on others as well as on himself.

The Bexiga principle should not survive adoption of comparative fault in Case 4. Even if you think that the plaintiff should get the benefit of the principle in the Third Hypothetical in either Case 2 or Case 3, Case 4 is surely a case in which that principle should not carry over into a comparative negligence system. It is, in fact, a very

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77. The *Oliver* court's reliance on *Baumgartner*, which I believe is a doctrine of humanitarian melioration rather than a true duty/risk analysis, might support my conclusion because *Baumgartner* has been held to have no application in the new comparative fault regime. See text accompanying supra note 59.

78. Detailed facts might shift a case from the pattern represented by Case 3 and *Oliver* into the pattern represented by the First Hypothetical—in which the defendant is not negligent at all because he reasonably expects plaintiff to be able to protect himself. In Case 3, Dalrymple might be negligent if he goes off the paved portion of the road in the dark, but perhaps not negligent if he stays entirely on the road and merely fails to see the dark-dressed stranger walking on the pavement.

strong case for a straight application of the comparative negligence rules under which each party may recover from the other with both recoveries diminished to reflect the claimant's fault.

Charting the Four Cases

The cases can be diagrammed in this way:

	Risk to:	
	Self Only	Self and/or Defendant
Knew or should know actor's incapacity	Case 1	Case 2
did not know of incapacity	Case 3	Case 4

C. Defendant's Knowledge or Reason to Know; Statistical Inflictions

Reconsidering: defendant's knowledge of the plaintiff's disability. I have suggested that in some cases the defendant should not be held to the expanded duty to protect the plaintiff from himself because the defendant had neither actual knowledge of the plaintiff's disability nor reason to know of it. This was my view as to Case 3, where the defendant driver struck the mentally disabled pedestrian but had no reason to think that a pedestrian would not be able to protect himself. I now want to suggest a possible qualification. Let me give you the Fifth Case:

> *Case 5.* Defendant constructs a metal light pole on the public sidewalk. The pole is so designed that upon impact it will crack open and there is a serious risk that wires will be exposed. This in turn creates the risk of serious electrical shock to a driver, passenger or even a bystander. Plemmons, driving negligently, collides with the pole at a low rate of speed, but the pole splits open like a bean pod, the wires pop out and Plemmons suffers very serious electric burns.

Differences: Lapse versus disability. This case is different from many we have discussed. Plemmons has no special proclivity for risk, as in the case of the 12-year old driver who like dangerous stunts. And he has no permanent kind of disability that clouds his ability to perform everyday tasks as in the case of the mentally disabled farm worker. He is merely guilty of contributory negligence and on the surface it would seem that his recovery should be diminished under the comparative negligence rules. This conclusion is reinforced by the fact that even if Plemmons had had a disability that inclined him to crash into light poles, the defendant did not know about it.

Differences: condition creating constant risks. But there is something else different here. The defendant in this case, unlike the others, has created a risk not merely to this plaintiff but to a large category of plaintiffs—to anyone in fact who is in a car being driven near one of these poles and also to anyone who is near one of the poles when cars are being driven nearby. The other cases we have considered have involved defendants whose conduct was directed at very particular people; although some of the defendants drove on the highway, thus creating risks to anyone who might be around, they did not drive constantly on the highway or create conditions that were unsafe for all highway users over long periods. There is very good reason for saying that defendants whose negligence is directed only at a particular plaintiff should not be compelled to protect that plaintiff from his own faults unless the defendant knew of those faults or had reason to know of them. But a defendant who inflicts an unreasonable risk upon multitudes of people and does so by a condition that remains risky not for a few moments but over a long period of time, must anticipate that some of those upon whom the risk in inflicted may be in no position to protect themselves.

The danger: carrying a good principle too far. Nevertheless, unless you attach special weight to the fact that the plaintiff is injured by highly unexpected electrical burns in Case 5,[79] I see no reason not to use the

79. Special weight might be attached here because it might be thought that the risks of plaintiff's conduct included harms from impact with the pole but not harms of electrical burns. If you thought this, you would adopt the argument made at text accompanying supra note 46. To avoid a side trip on this path, you could revise Case 5 to involve a pole that is negligently placed or negligently guarded. A "special weight" might be attached to the electrical burns on the ground that the risks are not reciprocal: plaintiff can be burned but the defendant cannot. I think this argument depends on the same underlying assumptions as the first argument and does not, therefore, stand as an independent ground. That is, it is based on the belief that "burns" are different in kind from the other risks associated with striking a pole. If Case 5 is revised to avoid these side trips, the pole merely stands there and the plaintiff is harmed by impact with it. In that case the risk of the plaintiff's conduct is the very one that came about. Furthermore, the risks imposed by the plaintiff on the pole and those imposed by the company on the plaintiff, if not precisely reciprocal, at least are interdependent: one cannot occur without the other.

straight rules of contributory negligence. The principle of the Third Hypothetical, if applied expansively, will consume the principle of self-responsibility. What is characteristic of a good comparative negligence case is the very fact that both parties are at fault, that the risk and the injury is the joint product of their fault, and that the damages cannot be apportioned.

Comparing the Rue Case. Case 5 is structurally similar to Louisiana's well-known decision in the *Rue* case,[80] where the plaintiff drove off the road and onto the shoulder. Striking a rut that should not have been left there by the highway department, she lost control and her car flipped over. The courts below held that her contributory negligence barred recovery, but the Supreme Court reversed.

—the first ground in Rue. I read the Supreme Court's decision as giving two distinct reasons for the reversal. The first reason sounds very much as if the court were saying that whatever the risks that made it negligent to drive off on the shoulder, they did not include the risk of getting the wheels locked in a rut. I take it this is an idea some courts would express by saying that her contributory fault was not a "proximate cause" of her injury.

—the second ground in Rue. The second reason given in the *Rue* decision was that the highway department's "duty to maintain a safe shoulder encompasses the foreseeable risk that for any number of reasons, including simple inadvertence, a motorist might find himself traveling on, or partially on, the shoulder." The principle of the Third Hypothetical was thus invoked to allow recovery in spite of contributory negligence.

Why Rue might be a difficult example. In some ways *Rue* is a bad example. As with the Third Hypothetical, it would be possible to decide that the plaintiff is not guilty of contributory negligence at all. Some people who go off the road are undoubtedly guilty of negligence in doing so. Others may not be; there seems little risk in letting wheels run on the shoulder in many cases, while in others the risk is quite distinct. There are good reasons to steer hard right in some cases, not in others. In the absence of evidence that there was some special and foreseeable risk in driving off the road, it would be easy enough to solve the *Rue* problem by finding no contributory negligence at all. The same might be said of the Third Hypothetical. There the worker at a dull repetitive task was almost certain sooner or later to make a wrong move in manipulating the material under the press. The same could be said of the worker carrying a box who steps in a hole, the presence of which he has been warned about.[81] For those who share feelings of this kind, it may be

80. Rue v. State Dep't of Highways, 372 So. 2d 1197 (La. 1979).

81. Travelers Ins. Co. v. Southwestern Transp. Co., 488 So. 2d 978 (La. 1986). Michigan's Court, much divided, has found this difficult in the post-comparative fault

hard to evaluate the question whether the *Rue*-type plaintiff should have damages diminished under comparative negligence, because the underlying feeling may be that there is no contributory negligence at all, or that if there was the risks created by that negligence did not include getting locked into a rut maintained by the state.

—accepting contributory fault as given. But *if* we can accept that in a given case the driver *is* guilty of contributory negligence, and *if* that negligence creates risks of the same order as the harm that came about, *then* there seems no reason not to apply the ordinary rules of comparative negligence, reducing the plaintiff's recovery of damages to reflect his own share in responsibility. This result seems most appropriate on *Rue*-like facts if the plaintiff is in fact guilty of fault, because if you do not draw the line at the facts of *Rue* it is hard to see where you can draw it without swallowing the whole principle of contributory fault.

A last clear chance. Indeed, once comparative negligence is adopted, *Rue* is an excellent case for charging the plaintiff's fault against her recovery, for it is the very reverse of the last clear chance case. In the last clear chance case the plaintiff's fault creates a peril from which the plaintiff cannot escape and the defendant discovers the peril and fails to use reasonable care to avoid it.[82] The old law under the contributory negligence regime of course held that the plaintiff was not barred by his earlier contributory fault because the defendant had the last chance to avoid the injury. Explanations for this rule differ. Some have said that it is really a rule of proximate cause; some have said that it is really less a reasoned principle than a humanitarian exception to principles. I would suggest that the last clear chance doctrine is a very special and perhaps very expansive version of the principle in the Third Hypothetical.[83] Indeed, for this reason, I think the last clear chance or discovered peril doctrines could well be abolished with the adoption of comparative negligence, so long as the narrower principle of the Third Hypothetical is retained.

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era. Perhaps its current view is that the plaintiff's negligence on these facts must count against him. See Hardy v. Monsanto Enviro-Chem Sys., Inc., 414 Mich. 29, 323 N.W. 2d 270 (1982).

82. The classic case was Davies v. Mann, 10 M. & W. 547, 152 Eng. Rep. 588 (Ex. 1842), where plaintiff had negligently placed his fettered ass near or on the road and it was struck by the defendant's negligently driven wagon. See generally Restatement (Second) of Torts § 479 (1965).

83. I think cases like Dufrene v. Dixie Auto Ins. Co., 373 So. 2d 162 (La. 1979), are more understandable as applications of the *Bexiga* rule or the duty/risk analysis than as applications of the occult doctrines of last clear chance or discovered peril. There the defendant, driving a car, failed to slow as he approached a child on a three-wheeled cycle in the road. The cyclist turned in front of the defendant and there was a collision with injuries.

Case 5 and Rue as reversals of last clear chance. But be that as it may, Case 5 and *Rue* represent reversals of the last clear chance situation, for in *Rue* it is the *plaintiff*, not the defendant, who encounters a condition created by earlier fault; it is a condition that cannot be changed now, and only the *plaintiff* has the chance to avoid the injury.[84] When the shoe is on the other foot, the defendant is liable and the plaintiff's fault is no bar to the plaintiff. A parity of reasoning would suggest in *Rue*, *not* that the plaintiff should be given special consideration, but on the contrary, that the plaintiff should bear the whole burden herself.

Case 5 and Rue should not survive adoption of comparative fault. I am not suggesting that such reasoning be followed, only that when the plaintiff is the best and indeed only source of safety when the moment for action arrives, this is a very good sign that the plaintiff should be asked to accept some self-responsibility. This means that, however right *Rue* may have been under the old regime, the plaintiff in such a case today should have to accept a reduced recovery to reflect comparative fault.[85]

D. Reconsidering the Third Hypothetical

Comparisons: Case 5 and the Third Hypothetical. If I am right about Case 5, then was I wrong supporting the plaintiff in the Third Hypothetical? After all, there we have a worker who, like the driver in Case 5, has no special disability; or if he has one it is not known to the

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84. The plaintiff in a *Rue* situation may or may not create risks to others. But, generally speaking, loss of control of a car on the highway, whether because of going off the road or otherwise, *is* a risk to others as well as to oneself, and we are, I think, justified in using this generality as our guide.

85. The analysis does not change even if the driver in Case 5 crashes into the light pole as a result of his mental disability. The defendant who erected the pole not only does not know of the plaintiff's disability, he created no special risks to disabled persons any more than to others who drive into poles rather than around them.

A little more detail about my conclusion may be in order. *Baumgartner*, which is often regarded as having used the duty/risk analysis in a rather ordinary contributory negligence case, was overruled by the Supreme Court of Louisiana. Turner v. N.O.P.S.I., 476 So. 2d 800 (La. 1985). Some interpret this as a decision that necessarily discards *Rue* as well. I am less sure. *Baumgartner* seems to me to have been a case striving for some justice under an unjust rule rather than a case applying a neutral principle. There is no basis for carrying that humanitarian impulse into the comparative negligence scheme, since comparative negligence itself satisfies the humanitarian needs and at the same time provides a practical and rational means for applying the principle of accountability for fault.

Rue might be different. You really can take the principle of the Third Hypothetical and expand it to cover, not merely cases of serious disabilities as in the case of the farm worker, but any case in which the plaintiff's contributory fault is foreseeable as one of the acts necessary to the joint product of injury. Rationally speaking, I think you could overrule *Baumgartner* with the advent of comparative fault but retain *Rue*. It is just that I don't think you should.

defendant who manufactured the dangerous machine. My reasoning in Case 5 suggests that a defendant who creates a risk to large numbers of people might indeed bear a special responsibility, but that this would not be enough to relieve the plaintiff of all the consequences of his own fault. Must I, on this same reasoning, then take the view that the plaintiff in *Bexiga*—the Third Hypothetical—must be barred by his fault, or at least that his fault must be used to reduce his damages in a comparative negligence system?

A distinction: a narrow class in the Third Hypothetical. I believe you could consistently hold the driver liable in Case 5 and at the same time allow a full recovery for the worker in the Third Hypothetical. You could emphasize the narrow class of persons to whom the risk is created in *Bexiga* as a ground for a special duty to that class. You could even find a special relationship between the manufacturer of the machine and the worker who must use it—they may not know each other by name but they are not legally strangers.

A better distinction: the worker's limited means of providing safety for himself. But I think the important reason for allowing a full recovery in *Bexiga* is this: the worker might avoid being contributorily negligent in two different ways. He might manage to stay alert and suppress his reflexes all during the dull day. If, however, he knows this is an impossible task and that sooner or later he will reflexively run his hand under the exposed press as it comes down, his only means of achieving safety for himself is to quit his job. The trouble with quitting his job is that, practically speaking, he really is not likely to have much choice. So for most workers in this situation, there really is *not* a second means of avoiding the danger. He must live with his own limited reflexes and the demands of repetitive work and take the consequences, because he has no options. This puts him in a position in which he must be able to get safe appliances from others or, more or less inevitably, suffer the crushing blow.

—the driver in Case 5 has choices. The driver in Case 5 is different. In the first place, he is not ordinarily subjected to long, repetitive work that dulls his reflexes, but if he is, he can stop the car and take a break to avoid losing his capacity to drive properly. In the second place, he may have many options about driving at all if he knows himself to be a poor driver. He has choices about how to keep himself a safe driver and even, at times, about when and where to drive. His position is not like that of the worker, who has, in practical terms, no choice at all about confronting the danger and perhaps no means of maximizing his own ability to operate safely.

Bexiga should carry over to comparative negligence. Given these differences, I have no hesitation in saying that a court could properly carry over the principle in the Third Hypothetical to give a full recovery to a worker there, but that it should not do so in Case 5 with the driver who

runs into the light pole. That means the worker's recovery should not be reduced, but the driver's should be, in a comparative negligence system.

CONCLUSION

Varied patterns. I have tried to suggest, not merely some diverse cases, but some cases that fall into identifiable patterns. If you believe that we should all ordinarily be responsible for ourselves and at the same time be accountable for our wrongs to others, these patterns make some kind of sense. They suggest that the plaintiff in a comparative negligence system should sometimes recover nothing, sometimes recover everything, and most often should recover reduced damages to reflect the plaintiff's fault.

Protecting others; from drinkers, attackers. The Third Hypothetical and the cases I used to test it in some ways reflect better than others the legal temper of contemporary tort law. Tort law today is very much wrapped up with the question of when one person should protect another. A substantial number of cases in a substantial variety of situations have held defendants responsible for plaintiffs' well-being. Many courts have now held that a provider of alcohol to a drinker is liable in some circumstances when the drinker drives negligently and harms the plaintiff.[86] Some have extended this liability to social hosts.[87] Some cases have held that a building owner must protect invitees from criminal attack in or near the building,[88] or that lessors of property must protect their tenants.[89] Colleges have likewise been held responsible to protect their students from violence, even where the violence does not erupt from conditions on the campus at all.[90]

—professionals' obligations. Professionals such as doctors or social workers may be obliged to protect minors or even adults by reporting injuries that might have resulted from abuse by others, and failure to do so may lead to tort liability.[91] Professionals, including clergy, may

86. E.g., Sorensen v. Jarvis, 119 Wis. 2d 627, 350 N.W. 2d 108 (1984); Chartrand v. Coos Bay Tavern, 298 Or. 689, 696 P.2d 513 (1985).

87. Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984); Clark v. Mincks, 364 N.W. 2d 226 (Iowa 1985).

88. Isaacs v. Huntington Mem. Hosp., 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985); Nallan v. Helmsley-Spear, Inc., 50 N.Y. 2d 507, 407 N.E. 2d 451, 429 N.Y.S. 2d 606 (1980).

89. Kline v. 1500 Massachusetts Avenue Apartment Corp., 439 F.2d 477, (D.C. Cir. 1970).

90. Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E. 2d 331 (1983) (unidentified attacker raped student in a dormitory room); Peterson v. San Francisco Comm. College Dist., 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984) (unidentified attacker in parking lot).

91. See Thelen v. St. Cloud Hosp., 379 N.W. 2d 189 (Minn. Ct. App. 1985).

also be obliged to protect patients from their own suicidal tendencies[92] and to protect third persons from their patients.[93]

—public entities; spouses. Courts have held public entities liable for failing to protect drivers on the road by arresting dangerous persons[94] or for failing to protect citizens from attack.[95] One court has even held that a wife must warn the neighbors of her husband's dangerous sexual proclivities.[96]

Autonomy and dependence. I do not suggest these liabilities are wrong; indeed some of the cases that refuse to impose responsibilities trouble me much more.[97] But I do suggest that these cases reflect a growing willingness to impose upon one person a responsibility for another. They reaffirm the fact that even in a world where we strive for autonomy and the self-responsibility that goes with it, we are highly dependent on many others for our own personal safety. The Third Hypothetical and the cases under it test how far we ought to go in requiring one person to protect another from himself and where, instead, we must begin insistence of self-reliance.

Trying to get the best of both worlds. If you want self-responsibility you insist that the plaintiff take care of himself when he can do so. But if you want accountability for wrongs, you insist that the plaintiff who *cannot* protect himself is entitled to some human concern from the defendant who can. This includes, for me, the worker in *Bexiga* or the Third Hypothetical and the mentally disabled farm worker in Case 1. It does

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92. See Nally v. Grace Community Church, 204 Cal. Rptr. 303 (Cal. App. 1984). This is an especially troubling case. The claim was that the clergyman's counseling directly inflicted distress and created dangers of suicide and in that respect liability is appealing. But as this occurred in the course of "spiritual counseling" the interference with religious activity is substantial.

93. Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

94. Irwin v. Town of Ware, 392 Mass. 745, 467 N.E. 2d 1292 (1984). There are, to be sure, contrary decisions. Everton v. Willard, 468 So. 2d 936 (Fla. 1985); Hildenbrand v. Cox, 369 N.W. 2d 411 (Iowa 1985).

95. This applies only where there is a duty owed to the citizen, as where either she or her attacker are identified more or less specifically. E.g., Sorichetti v. City of New York, 65 N.Y. 2d 461, 482 N.E. 2d 70, 492 N.Y.S. 2d 591 (1985); Division of Corrections v. Neakok, 721 P.2d 1121 (Alaska 1986).

96. Pamela L. v. Farmer, 112 Cal. App. 3d 206, 169 Cal. Rptr. 282 (1980). Contra, Rozycki v. Peley, 199 N.J. Super. 571, 489 A.2d 1272 (N.J. Super. Ct. Law Div. 1984).

97. For example, Roberson v. Allied Foundry & Mach. Co., 447 So. 2d 720 (Ala. 1984), where an employer hired work release prisoners on a late-night shift and gave them freedom to leave during work hours. They did and raped a woman working nearby. The court thought the employer had no special duty to concern itself with the well-being of those around. Possibly the result is justified on the ground that the employer was not negligent at all, but it is horrifying to think that the employer has no duty even to use ordinary care.

not include any person, such as the driver in Case 5, who can protect himself, and most assuredly does not include any person who can not only protect himself but whose conduct is a risk to others, as in Case 2.

Cases by case adjudication can take factors into account. In the end, I have to say that I think the Courts of Louisiana have been wise to leave much for case by case adjudication.[98] That kind of adjudication allows the factors suggested here—disability of a plaintiff, specific knowledge or foreseeability by a defendant of that disability, and reciprocity of risk—to be considered in determining when to allow full compensation and when to invoke the comparative fault principles to diminish it.

Difficult ideas? I suspect any judge working with these ideas would come to find them second nature and easy enough to work with. As a morning's entertainment, however, all this may seem a little too Byzantine, enough to make the emperor doze and trouble his sleep at the same time.

Comparative fault reduces risk of error. If so, there is one great consolation. Comparative negligence reduces the impact of error. If we wrongly allow a plaintiff a full recovery when we should reduce his damage, or vice versa, the changes are very good that the error will not be overwhelming. Still, within the limits of practicality and common sense, we should try to follow the principles of accountability and self-responsibility. I hope the cases discussed here will be helpful in that effort.

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98. Dorry v. LaFleur, 399 So. 2d 559 (La. 1981) (as to strict liability cases); Motton v. Travelers Ins. Co., 484 So. 2d 816 (La. App. 1st Cir. 1986); see Turner v. N.O.P.S.I., 476 So. 2d 800 (La. 1985). In the latter case the court said: "Care should be taken, however, to note that we do not hold that the victim's fault shall always reduce his compensation. There are cases in our literature in which injured persons have been allowed recovery (cases in which the contributory negligence of the plaintiff did not prohibit recovery). Some of those cases (which we do not propose to specify) should produce the same result today." 476 So. 2d at 804.