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The American Negligence Rule

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Articles

THE AMERICAN NEGLIGENCE RULE

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Abstract

This Article reviews and proposes a revision of the orthodox academic view of the negligence breach of duty requirement. The orthodox view comes from Oliver Wendell Holmes's treatment in his book, The Common Law, *and stresses the defendant's conduct. According to Holmes, negligence is conduct "on the wrong side of the line." Hence, negligence is the failure to have a spark arrester on one's locomotive, the failure to check one's blind spot before changing lanes, and the failure to retrieve all sponges before closing a patient. Legal economists have built on this view. They have argued that negligent conduct is that which fails the Learned Hand formula, in other words, conduct that lacks cost-beneficial precautions. Legal economists have also posited that juries as well as judges use cost-benefit analysis to assess negligent conduct. Legal philosophers, although they often reject cost-benefit analysis, also adhere to Holmes's conduct theory of breach of duty. Nevertheless, a close analysis of modern negligence cases reveals that American juries are often allowed and even encouraged to forgive negligent conduct. They routinely forgive failures to check blind spots, failures to retrieve all sponges from patients, failures of pharmacists to dispense the correct drugs, and the like. In the present century, this practice of jury forgiveness, and courts' acceptance of it, seems to be becoming more common. This Article explores the true legal structure of breach of duty and how it diverges from Holmes's conduct theory and the orthodox academic view of negligence, which is still based on Holmes's conduct theory.*

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I. INTRODUCTION

During this century, it has become increasingly evident that modern negligence practice can no longer fit comfortably within traditional academic theories.[1] During the late nineteenth and early twentieth centuries, scholars vigorously debated whether civil negligence was essentially a state of mind or conduct. The greatest American legal scholar of that era, Oliver Wendell Holmes, became the champion of the conduct theory, and in academic circles his ideas won out. Holmes was an American pragmatist, and his conduct theory of negligence was a victory for the pragmatist idea that the social world must be judged by objective data, not by interior mental processes.[2] Nevertheless, Holmes certainly did not pull the conduct theory of negligence exclusively from his pragmatist ideals. As he demonstrated in his scholarly work, conduct

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[1] *See, e.g.*, Kenneth S. Abraham, *The Trouble with Negligence*, 53 VAND. L. REV. 1187, 1187–24 (2001).

[2] Holmes wrote:

> [I]t must be borne in mind that law only works within the sphere of the senses. If the external phenomena, the manifest acts and omissions, are such as it requires, it is wholly indifferent to the internal phenomena of conscience. A man may have as bad a heart as he chooses, if his conduct is within the rules. In other words, the standards of the law are external standards, and, however much it may take moral considerations into account, it does so only for the purpose of drawing a line between such bodily motions and rests as it permits, and such as it does not. What the law really forbids, and the only thing it forbids, is the act on the wrong side of the line, be that act blameworthy or otherwise.

OLIVER WENDELL HOLMES, JR., THE COMMON LAW 110 (1881) [hereinafter HOLMES, COMMON LAW].

conceptions of negligence and its precursors go back to the Year Books.[3] As we will see, however, the question is not whether the conduct theory of negligence possesses some validity; it certainly is a useful explanation for many case results. The problem is that the conduct theory does not account for all negligence case results; many are plainly inconsistent with it.

The focus of this Article will be on courts' increasing willingness to allow juries "to forgive" objectively defined negligence. This is mainly an American story for the simple reason that most common-law jurisdictions no longer try negligence cases to juries. Still, as we will see, in U.S. courts, encouragement of jury forgiveness has become more pronounced as the years have passed. Throughout much of the twentieth century, if a jury did forgive a defendant's objective negligence, the trial judge, acting within a broad discretion, would usually order a new trial for the plaintiff. This order would usually prompt a settlement for less than full damages. Increasingly, trial courts are less likely to order a new trial for plaintiffs whose defendants have been forgiven. They let the jury's forgiveness stick and even order the plaintiff to pay the defendant's litigation costs.[4] Some prior commentators have noticed this development and call these cases instances of "jury nullification," following terminology originally used in the criminal setting.[5] This terminology seems to suggest that courts or other authorities oppose jury forgiveness and think of it as anti-social. Instead, the courts fully accept jury forgiveness as a fundamental part of the orthodox negligence rule. Indeed, the practice dates from the birth of accident law in the Middle Ages.

II. HOLMES'S CONDUCT THEORY OF NEGLIGENCE

At the turn of the twentieth century the leading problem in tort law was whether civil negligence was conduct or a state of mind. In 1881, Oliver Wendell Holmes initiated this debate by forcefully claiming that negligence was exclusively conduct, namely, conduct that fell below due care. He wrote that a man could have "as bad a heart as he chooses" but would still avoid liability so long as he stays on the right side of the

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[3] HOLMES, COMMON LAW, *supra* note 2, at 107. Holmes is quoting Judge Rede: "In trespass the intent" (we may say more broadly, the defendant's state of mind) "cannot be construed." The parenthetical interpolation is Holmes's.

[4] *See, e.g.*, Minnegren v. Nozar, 4 Cal. App. 5th 500, 514 (Ct. App. 2016) (ordering plaintiff to pay defendant's court costs in case in which defendant failed to yield right-of-way and t-boned plaintiff); discussion *infra* text accompanying note 171.

[5] *See, e.g.*, Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1603 (2001).

conduct line.[6] This idea was soon embraced by powerful allies, notably James Barr Ames,[7] Henry T. Terry,[8] and Henry W. Edgerton.[9] This position became the orthodoxy of the twentieth century and the foundation of its leading scholarly theories.[10]

Holmes's conduct theory came early in the history of the modern negligence rule. The case of *Vaughan v. Menlove*,[11] from 1837, has a good claim to be considered the first case decided on a negligence theory.[12] The defendant had constructed his hayrick in a way that made spontaneous

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6 HOLMES, THE COMMON LAW, *supra* note 2, at 110. For the full quotation, see *supra* note 2.

7 *See* James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908) (stating in negligence law "[t]he ethical standard reasonable conduct has replaced the unmoral standard of acting at one's peril"). Ames opened his article with a quotation from an early English chief justice: "The thought of man shall not be tried, for the devil himself knoweth not the thought of man." *Id.* at 97.

8 *See* Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 40 (1915) ("Negligence is conduct, not a state of mind.").

9 *See* Henry W. Edgerton, *Negligence, Inadvertence, and Indifference: The Relation of Mental States to Negligence*, 39 HARV. L. REV. 849 (1925). He wrote:

> Negligence neither is nor involves ("presupposes") either indifference, or inadvertence, or any other mental characteristic, quality, state, or process. Negligence is unreasonably dangerous conduct—*i.e.*, conduct abnormally likely to cause harm. Freedom from negligence (commonly called "due care") does not require care, or any other mental phenomenon, but requires only that one's conduct be reasonably safe—as little likely to cause harm as the conduct of a normal person would be.

Id. at 852.

10 *See* Patrick J. Kelley, *A Critical Analysis of Holmes's Theory of Torts*, 61 WASH. U. L. Q. 681, 740 (1983) (assessing Holmes's influence on tort theory); Thomas C. Grey, *Accidental Torts*, 54 VAND. L. REV. 1225 (2001) (same). *See, e.g.*, Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 38 (1972) [hereinafter Posner, *Theory of Negligence*] (defining negligence as substandard conduct as revealed by the Learned Hand formula). According to Posner, juries also apply the Learned Hand formula and assess whether conduct was substandard. *Id*. at 51–52.

11 *See* Vaughan v. Menlove (1837) 132 Eng. Rep. 490, 492; 7 Car. & P. 525 (leaving it to the jury to determine if defendant acted as a prudent man).

12 Another contender for the "first negligence case" is *Christie v. Griggs* (1809) 170 Eng. Rep. 1088; 2 Camp. 79, which was brought by a passenger aboard the defendant's stagecoach that crashed because of a broken axle. *Id.* at 1088–89. In this case, however, the parties had entered a contract for common carriage, and the plaintiff brought his suit not as "negligence" but as "assumpsit," reflecting either the contract itself or the "undertaking" by the defendant to carry the plaintiff to his destination. *Id*. *Christie v. Griggs* is now regarded as a negligence case in which the defendant's duty of care arose from the special relationship of common carrier-passenger or from the defendant's "undertaking," but it was not brought on a negligence theory. On the other hand, the case report for *Vaughan v. Menlove* did stress that it had been brought on a "negligence" theory and also that it was a case "of the first impression." *Vaughan*, 132 Eng. Rep. at 492. The modern negligence cases are commonly understood to have evolved from older cases brought under the writs of trespass *vi et armis* and trespass on the case.

combustion a risk. His neighbor, the plaintiff, warned him several times that the hayrick was dangerous, but the defendant answered that "he would chance it" and, even more maddeningly, that his property "was insured."[13] When the predictable occurred and the resulting fire burned down the plaintiff's cottages, he sued for negligence. The jury was instructed that "the question for them to consider, was, whether the fire had been occasioned by gross negligence on the part of the [d]efendant; adding, that [the defendant] was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances."[14] After the jury had found for the plaintiff, the defendant attacked the verdict on the ground that "he ought not to be responsible for the misfortune of not possessing the highest order of intelligence" and that the jury should have been asked simply whether the defendant had acted "bona fide to the best of his judgment."[15] The appellate court held that the jury had indeed been properly instructed and that the defendant's proposed conception of the negligence rule (mere good faith in using precaution) would be too subjective.[16]

Thus, the *Vaughan v. Menlove* court accepted an objective conception of negligence, but it was an objective definition of a negligent *state of mind* that seemingly defined the tort under the *Vaughan* court's discussion.

This was not the end of the matter, however, because *Vaughan v. Menlove* was soon followed by *Blyth v. Birmingham Waterworks Co.*[17] That case involved a municipal fire hydrant system that failed during a period of exceptionally cold weather and flooded the plaintiff's house. The plaintiff's case at trial was that the defendant had noticed that ice had encrusted the hydrant plugs that needed to pop out to relieve the stress of expanding frozen water below.[18] The system was so new and the weather so extreme that the defendant had failed to realize before the accident that the plugs needed to be cleaned in cold weather. The appellate court set aside the jury's verdict for the plaintiff and entered judgment as a matter of law for the defendant.[19] During this judgment, Baron Alderson gave the following definition: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."[20] This

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13 *See Vaughan*, 132 Eng. Rep. at 491.
14 *Id.* at 492.
15 *Id.*
16 *Id.* at 494.
17 *See* Blyth v. Birmingham Waterworks Co. (1856) 156 Eng. Rep. 1047; 11 Exch. 78.
18 *Id.* at 1048.
19 *Id.*
20 *Id.* at 1049.

was also an objective test of negligence, but here the focus was on reasonable *conduct*, not on a reasonable state of mind as in *Vaughan v. Menlove*. Alderson and his colleagues found that the defendant had not been negligent because its conduct had been reasonable given the lack of experience with how this type of water system would perform under frigid conditions.[21] The accident was "unforeseeable." This seminal case was early in a cascade of similar cases limiting juries' powers to find for plaintiffs based on omitted precautions that could not be justified on cost-benefit grounds.[22]

In the early scholarly debates about the definition of negligence, these two early cases—*Vaughan* and *Blyth*—became contested beacons, each suggesting an objective standard of negligence but one focusing on the reasonableness of the defendant's state of mind and the other on the reasonableness of the defendant's conduct.[23]

In 1861, writing five years after *Blyth* and twenty years before Holmes, the English legal theorist John Austin claimed that negligence was essentially a faulty state of mind.[24] In developing his theory, Austin chose as his principal example a "nondurable precaution," that is, precaution that does not last long and typically must be used repetitively.[25] We will see that conduct theorists, such as Holmes and his modern academic followers like Richard Posner, tend to focus on "durable" precautions, such as worn-out metal "nosing" on the edges of wooden steps and missing "safety appliances" on trains.[26] Austin's featured untaken precaution was the failure of a shooter to advert to the possibility that his bullet might pass through his target on his garden fence to a public road beyond.[27] Austin's detailed theory entailed an examination of the various

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21 *See id.* (finding that defendant's lack of experience with the risk in question resulted in unforeseeability).

22 *See infra* text accompanying note 96.

23 *Compare* Vaughan v. Menlove (1837) 132 Eng. Rep. 490, 493; 7 Car. & P. 525 (focusing on state of mind), *with* Blyth v. Birmingham Waterworks Co. (1856) 156 Eng. Rep. 1047, 1049; 11 Exch. 780 (focusing on conduct).

24 *See* JOHN AUSTIN, *Lecture XX: Negligence, Heedlessness, and Rashness*, *in* LECTURES ON JURISPRUDENCE 425–34 (Robert Campbell ed., 5th ed. 1911) [hereinafter AUSTIN, LECTURES].

25 *Id.* at 427.

26 *See, e.g.*, HOLMES, COMMON LAW, *supra* note 2, at 110. *See also* Posner, *Theory of Negligence*, *supra* note 10, at 38.

27 Austin's main example of negligence was:

> When I fire at the mark chalked upon the fence, it occurs to my mind that a shot may pierce the fence, and may chance to hit a passenger. But without examining carefully the ground of my conclusion, I conclude that the fence is sufficiently thick to prevent a shot from passing to the road. Or, without giving myself the trouble to look into the road, I assume that a passenger is not there, because the road is seldom passed. In either case, my confidence is rash; and, through my rashness or

mental states that would qualify to demonstrate negligence. These included "heedlessness," "rashness," "temerity," "foolhardiness," and "inadvertence."[28]

When Holmes wrote twenty years later, he used Austin's theory as a foil,[29] arguing that Austin's theories were inapposite to tort because Austin was a criminalist and a moralist.[30] Holmes boldly asserted that negligence liability could depend either on conduct or on the actor's "blameworthiness."[31] In his view, no third alternative existed and neither did any middle ground.

In favor of his conduct theory, Holmes offered both doctrinal and policy arguments. As to legal doctrine, Holmes argued that the writ of trespass, from which negligence sprung, always depended on conduct.[32] He gave many examples from the doctrine of trespass to land or "trespass *quare clausum fregit*," as it was known in his day.[33] The important thing was whether the defendant's conduct was on the "right side" of the property line. He argued that the theory of being on the "right side" of the line extended to negligence, sometimes literally, as under rules of traffic and navigation, originally imported from England.[34]

From a policy point of view, there are three main reasons for preferring a conduct standard to a standard that depends on a defendant's state of mind. The first reason is that when the negligence standard is based on conduct, strangers can coordinate their precaution with each other. Holmes seems to suggest this as a reason for a conduct standard and then backs off.[35]

The second reason is that a conduct standard is easier for a tribunal to measure than the defendant's state of mind. Tort liability based on blameworthiness inevitably depends on assessing the actor's mental processes, whereas conduct does not. Therefore, conduct is more

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> temerity, I am the author of the mischief. My assumption is founded upon evidence which the event shews to be worthless, and of which I should discover the worthlessness if I scrutinised it as I ought.

AUSTIN, LECTURES, *supra* note 24, at 428.

28 *Id.* at 427–28.

29 *See* HOLMES, COMMON LAW, *supra* note 2, at 81–82.

30 *See id.* at 81–83.

31 *Id.* at 125–26.

32 *See id.* at 78, 80–81.

33 *See id.* at 83 (arguing that the writ of trespass was dependent on the actor's conduct, regardless of the actor's intent).

34 *Id.* at 113–14.

35 Holmes wrote: "When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them." *Id.* at 109. Holmes's stress of "distinct defects that all can recognize" logically leads to the idea that these challenges can be the basis of coordination between injurer and victim, but he does not stress this idea. *Id.*

knowable than blameworthiness. Holmes stresses this reason and argues that interior states of mind are inherently unknowable.[36]

The third reason, which Holmes fully embraces and articulates with several examples, is that a conduct standard lends itself to the development of precedent that will clarify rules of conduct.[37]

To see Holmes's thinking, we can use the same case example that he chose as an illustration. That was *Crafter v. Metropolitan Railway*,[38] which involved an ordinary slip and fall allegedly due to the defendant's fault. On July 28, 1864, soon after the construction of London's first underground railway, the plaintiff, while exiting his train at King's Cross Station, walked up the defendant's exit steps. He slipped and fell, injuring himself badly. The stairway in question was six feet wide and had a wall on each side. The plaintiff was familiar with the stairway; he had used it every work day for almost eighteen months, which would have been practically from its first construction. Nevertheless, the plaintiff alleged that this stairway was unreasonably unsafe, and his attorney proposed three untaken precautions supported by two witnesses, at least one of them an expert. First, the brass nosing on the edge of the stairs, although originally roughened by the contractor, was worn slick. This was unsurprising because the evidence also indicated that every month 43,000 passengers used this stairway. The second untaken precaution was the lack of handrails. The third untaken precaution was that the nosing should have been made of lead and not of brass because lead would have stayed rough, presumably because constant traffic would have scarred this softer metal.[39] The defendant submitted no evidence but instead rested mute, a dangerous trial strategy today but apparently common at the time.

The trial court instructed the jurors that the question for them was "whether or not the staircase afforded *reasonable* accommodation to the public."[40] In its verdict, the jury found for the plaintiff that the staircase was "unreasonable" and awarded him £105.[41]

The unanimous appellate court held that the evidence was insufficient to support the verdict and entered final judgment for the defendant, ordering that the plaintiff take nothing from his action.[42]

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36 *See id.* at 107–09.

37 *Id.* at 111–13, 120–29.

38 Crafter v. Metropolitan Ry. Co. (1866) 1 LRCP 300 (Eng.). Holmes mistakenly called the case "Crafton [sic] v. Metropolitan Railway Co." in his discussion. *See* HOLMES, COMMON LAW, *supra* note 2, at 120.

39 *See Crafter*, 1 LRCP at 300–01.

40 *Id.* at 301 (emphasis added).

41 *Id.*

42 *Id.* at 301–04.

Before we get into deeper issues, we can note the reasons the court gave for its decision. It first stressed that the plaintiff was familiar with these steps and the danger that caused him to trip.[43] Second, the court said that handrails would not have done much good because, when trains unloaded, this staircase was so crowded that pedestrians could not always reach a handrail.[44] Third, the court noted that brass nosing was customary on similar stairways.[45] Justice Willes, who wrote the most influential opinion, said: "We all know that brass is a material which is commonly used for the nosing of stairs in public offices, steam-boats on the river, and other places of much resort."[46]

The bigger question for Holmes was how to understand this decision and similar decisions as consistent with the rule of law. What was the precise relationship between the judge's realm and the jury's in this case and all such cases?

He started by noting that even back in his day lawyers said that negligence presented a "mixed question of law and fact."[47] If that is so, Holmes reasoned, the breach of duty question can be broken down into two separate questions: (1) what exactly did the defendant do or omit to do; and (2) did the defendant's conduct meet the legal standard?[48] The difficulty was that the facts were so clear that the question given to the *Crafter* jury seemed to concern only the second question; under clear and undisputed facts the jury had been asked only whether the defendant's conduct was "reasonable." This seems to be a legal and not a factual question. Still, Holmes thought it would be reasonable for the court to hear the jury's answer:

> When a case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of the law of tort has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment.

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43 *Id.* at 301, 303, 305.
44 Crafter v. Metropolitan Ry. Co. (1866) 1 LRCP 300, 302–05 (Eng.).
45 *Id.*
46 *Id.* at 303.
47 *See* HOLMES, COMMON LAW, *supra* note 2, at 122.
48 *Id.*

> Therefore it aids its conscience by taking the opinion of the jury.[49]

The worry was, however, that different juries might answer the question of negligence differently in future stairway cases and other cases that were basically the same. In short, can we tolerate a situation of "justice luck" where one owner is liable and another immune with basically the same stairway? Holmes recoiled against this possibility and invented a solution. He said that a trial judge with experience would see how juries were answering the negligence question in common types of cases, and once the general answer was clear, could order liability as a matter of law or no liability as a matter of law in different types of cases. These decisions would become legal precedents and could be refined as time passed and even altered as technology progressed. Indeed, if courts did not engage in this legal pruning, Holmes worried that they "would leave all our rights and duties throughout a great part of the law to the necessarily more or less accidental feelings of a jury."[50]

Holmes argued that these precedential rules of precaution would still be limited by the doctrine of excuses and justifications,[51] but these would also be objectively defined. Thus, a person with "pronounced" mental illness[52] might be excused for being on the wrong side of the line, as might someone seeking to avoid a dangerous obstacle on the right side of the line.

Thus, Holmes thought that negligence law could retain its law-like quality and prevent the "accidental feelings of a jury" from holding sway only if negligence litigation were governed by two principles. First, jury instructions should become increasingly refined and detailed as the law of precaution develops. Juries might be instructed that particular precautions were required under particular conditions and would be left to determine whether the triggering conditions were or were not present at the time the accident in question occurred and whether the required precaution was used. Second, judges would have the power in clear cases to prevent or reject a jury verdict and order judgment as a matter of law. Holmes thought these judgments would be symmetrically distributed with judgments of breach of duty as a matter of law as common as the opposite.[53] Neither of these recommendations has been followed by the courts, and we will consider them in order.

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49 *Id.* at 123.

50 *Id.* at 126.

51 *Id.* at 113.

52 *Id.* at 109.

53 Holmes presciently used the example of a railroad grade crossing to illustrate his reasoning:

A. The Continued Generality of Negligence Jury Instructions

Most legal analysts see a division of labor between the judge and the jury that does not exist in negligence cases. Supposedly, the judge is the law explainer, and the jury is the law applier. Again, Holmes expressed the usual view. He said that when the issue in a negligence case is whether a party's conduct came up to the legal standard of care—not so much what the defendant's conduct actually was—that the judge could explain this legal standard to the jury in detail:

> If there is such a dispute, it is entirely possible to give a series of hypothetical instructions adapted to every state of facts which it is open to the jury to find.[54]

Moreover, as a trial judge becomes experienced with accident situations like the case at bar, the judge can issue directed verdicts in more and more cases. Even in those cases in which the judge wants the views of laypeople from the community as an "aid [to the judge's] conscience," with more experience he or she can do even better at explaining what the detailed breach of duty standard is.[55]

> If the whole evidence in the case was that a party, in full command of his senses and intellect, stood on a railway track, looking at an approaching engine until it ran him down, no judge would leave it to the jury to say whether the conduct was prudent. If the whole evidence was that he attempted to cross a level track, which was visible for half a mile each way, and on which no engine was in sight, no court would allow a jury to find negligence. Between these extremes are cases which would go to the jury. But it is obvious that the limit of safety in such cases, supposing no further elements present, could be determined almost to a foot by mathematical calculation.

Id. at 128–29. The example was prescient because later, when he was a Supreme Court Justice, Holmes sought to implement his thinking by making someone struck by a train contributorily negligent as a matter of law. *See* Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66, 69 (1927) (holding plaintiff contributorily negligent for not getting out of his car to check whether railroad tracks were clear). The case was ceremoniously limited by a later court. *See* Pokora v. Wabash Ry., 292 U.S. 98, 103 (1934) (finding, under circumstances somewhat different from those in *Goodman*, plaintiff did not need to get out of the car to look down the tracks).

54 *Id.* at 122.

55 Holmes wrote:

> If, now, the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at last be the business of the court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one,

The actual law of negligence has developed in the opposite direction from Holmes's views. The most common negligence instruction is the reasonable person test, quite similar to Baron Alderson's definition of negligence in the 1856 case of *Blyth v. Birmingham Waterworks Co.*, discussed above.[56] Many similar versions exist; the following is the New York version, which retains the "featureless generality"[57] that Holmes deplored:

> Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances. Negligence may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, on the other hand, from failing to do an act that a reasonably prudent person would have done under the same circumstances.[58]

This "reasonably prudent person" test will be called the "objective standard" because it frames the negligence issue, as Holmes did, in terms of *conduct*, not thought processes (the contrary position of Austin). It is not widely realized, however, that this most common jury instruction poses a metaphysical question in the most usual type of case to which it applies, a common and obvious error in failing to use some reasonable precaution, such as on one occasion failing to check a supermarket floor

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> that he was bound to use this or that precaution under these or those circumstances. The standard which the defendant was bound to come up to was a standard of specific acts or omissions, with reference to the specific circumstances in which he found himself.

Id. at 124.

56 *See* Blyth v. Birmingham Waterworks Co. (1856) 156 Eng. Rep. 1047, 1049; 11 Exch. 780.

57 HOLMES, COMMON LAW, *supra* note 2, at 111.

58 Committee on Pattern Jury Instructions, Association of Supreme Court Justices, N.Y. Pattern Jury Instruction—Civil 2:10 (Dec. 2016 update). The corresponding California instruction reads as follows:

> Negligence is the failure to use reasonable care to prevent harm to oneself or to others.
>
> A person can be negligent by acting or by failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation.
>
> You must decide how a reasonably careful person would have acted in [*name of plaintiff/defendant*]'s situation.

Judicial Council of California, Civil Jury Instruction 401, Basic Standard of Care (Sept. 2003) (Westlaw). *See also* Illinois Supreme Court Committee on Pattern Jury Instructions in Civil Cases, Ill. Pattern Jury Instruction—Civil 10.01 (Westlaw).

for newly fallen slippery debris.[59] The instruction does not explain whether the jury can forgive such errors on the theory that even reasonably prudent people sometimes commit them. Each individual jury must decide whether any given error was or was not negligence. Thus, juries do have the power to forgive mistakes, but they are not usually told that they have this power. They must infer the power under all the circumstances of the case, not infer the power, or not exercise the power if they have inferred it. The parties' attorneys may make arguments to the jury on this subject, but the judge typically tells them nothing in the instructions about how to deal with it.[60]

California and other states have recently made significant changes in their pattern jury instructions on medical malpractice, positively suggesting to juries that they may forgive a doctor's error. Suppose a surgeon has failed to count the sponges placed in a patient and has left one there.[61] In California, the following instruction would now be proper:

> [A/An] [*insert type of medical practitioner*] is not necessarily negligent just because [his/her] efforts are unsuccessful or [he/she] makes an error that was reasonable under the circumstances. [A/An] [*insert type of medical practitioner*] is negligent only if [he/she] was not as skillful, knowledgeable, or careful as other reasonable [*insert type of medical practitioners*] would have been in similar circumstances.[62]

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59 *See* HOLMES, COMMON LAW, *supra* note 2, at 111.

60 *See, e.g.*, Smith v. Canevary, 553 So. 2d 1312 (Fla. Dist. Ct. App. 1989) (holding "unavoidable accident" instruction improper in Florida, and definition of negligence for jury should track *Blyth v. Birmingham Waterworks* language and should be kept simple); Shumaker v. Johnson, 571 So. 2d 991 (Ala. 1990) (ruling "honest mistake" or "good faith error" by a physician no longer good instruction in Alabama medical malpractice cases).

61 *See* Akridge v. Noble, 41 S.E. 78, 78 (Ga. 1902).

62 Judicial Council of California Civil Jury Instruction 505, Success Not Required (new Sept. 2003) (Westlaw). The Missouri Approved Jury Instruction (Civil) 21.01 (7th ed.) provides as follows:

> Your verdict must be for the plaintiff if you believe:
> First, defendant (here set out act or omission complained of; e.g., "failed to set plaintiff's broken leg bones in natural alignment," or "left a sponge in plaintiff's chest after performing an operation," or "failed to administer tetanus antitoxin"), and
> Second, defendant was thereby negligent, and
> Third, as a direct result of such negligence plaintiff sustained damage.
> * [unless you believe plaintiff is not entitled to recover by reason of Instruction Number _____(here insert number of affirmative defense instruction)].

This instruction actively encourages forgiveness of a "left sponge" error because it asks the jury to consider whether the surgeon in question was as careful as other surgeons who, as the jury may surmise, also occasionally make the same type of error. The instruction encourages evidence about the surgeon's subjective thought processes, as John Austin would have wished. Was this surgeon thinking about safety? Did his or her colleagues believe that this surgeon was safety-minded?[63] In this realm, Austin's subjective standard of negligence has seemingly replaced Holmes's objective standard.

This is not quite the revolution that it appears. In the medical malpractice area, after trials in which verdicts have been challenged, courts have long held in manifold ways that a party's "mistakes" or "errors" do not necessarily equate to negligence.[64]

B. The Asymmetry of Judgments as a Matter of Law

Holmes thought that courts' peremptory judgments for plaintiffs would be approximately equal in number to those for defendants.[65] Nevertheless, if we look closely at U.S. common-law breach of duty cases, we find an astounding asymmetry. Although nonsuits and directed verdicts *for defendants* are indeed common, directed verdicts and judgments as a matter of law *for plaintiffs* are astonishingly rare. With common-law negligence cases, which in the U.S. remain jury-eligible,

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Although this instruction seems to be quite harsh on surgeons who have left sponges in their patients, it cautions that the jury must also find that the surgeon was "negligent" in leaving a sponge and requires that the following definition be read: "The term 'negligent' or 'negligence' as used in this [these] instruction[s] means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by the members of defendant's profession." *Id.* A jury might reason that a surgeon who left a sponge would not be negligent in doing so if he or she possessed the usual skill and learning. *See id.*

63 For a good example of this type of evidence exculpating a defendant whose conduct was negligent, see A.C. *ex rel.* Cooper v. Bellingham Sch. Dist., 105 P.3d 400 (Wash. Ct. App. 2005) (noting many witnesses testified that defendant who unaccountably lost grip on a piñata bat, which injured plaintiff, was nevertheless highly safety-minded).

64 *See* Terajima v. Torrance Mem'l Med. Ctr., No. B195298, 2008 WL 192650, at *2–6 (Cal. Ct. App. Jan. 24, 2008) (holding that mistakes do not equate to negligence after evidence indicated and the defendant admitted many mistakes in treating plaintiff); Williamson v. Prida, 89 Cal. Rptr. 2d 868 (Ct. App. 1999) (ruling negligence standard does not require "proper care" or the absence of errors). An Oregon case stated the legal doctrine accurately by approving the following jury instruction in a case in which a physician removed the anesthesia tube from his aspiration-prone patient in a way that caused the patient to aspirate his stomach contents: "A physician is liable for an error of judgment if the physician fails to act with reasonable skill and care in exercising that judgment. A physician is not liable for an error of judgment if the physician acts with reasonable care and skill in exercising such judgment." Rogers v. Meridian Park Hosp., 763 P.2d 400, 401 (Or. Ct. App. 1988) (upholding jury verdict for physician).

65 *See* HOLMES, COMMON LAW, *supra* note 2, at 128.

judges are extremely reluctant to enter judgment as a matter of law for plaintiffs. Such cases do exist in various states, but they are rare.

It would be easier to see this asymmetry in breach of duty cases if casebooks were compiled differently. Torts casebook writers continue to be highly influenced by Holmes's theory of breach of duty even as they fully recognize that an important part of it did not play out. Therefore, when we read a Torts casebook, we often see Holmes's theory validated, as it were, by legerdemain. The main method is to include in the breach of duty chapter several admiralty cases and Federal Tort Claims Act (FTCA) cases interlaced with common-law cases. Admiralty and FTCA cases are ineligible for jury trial but are instead tried to judges. When the breach of duty issue is always tried to judges, they develop a legal standard of the type that would exist more generally if U.S. courts had followed Holmes's recommendation. A good example is the casebook standard, *The T.J. Hooper*,[66] one of many admiralty cases decided as a matter of law for the plaintiff. It is highly misleading to include judge-tried admiralty and FTCA cases as examples of a rule that is supposedly applicable equally to jury-eligible common-law cases. In fact, the rules for the common-law cases are quite different, as the following discussion will explore.

C. The Reality of Negligence Litigation

The real law of negligence is quite different from Holmes's theory and was different even before Holmes wrote. It is asymmetrical in that courts are quite willing to declare *no* breach of duty as a matter of law but highly unwilling to establish the opposite, that is, breach of duty as a matter of law. At precaution levels below the obviously adequate, juries possess almost total discretion to find liability or not, and in this large zone there is much inconsistency of decision that the courts wink at. This is perhaps not the most obvious type of asymmetry, and possibly for this reason it has been little remarked. It is, however, the most important feature of negligence law. Courts police the negligence claims brought to them and weed out the cases of unavoidable accident or non-negligently caused

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[66] The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (defendant committed breach of duty as a matter of law when it failed to equip its tugboats with radio receiving sets). Two other admiralty cases that are often included in casebooks are *United States v. Carroll Towing Co.*, 159 F.2d 169, 174 (2d Cir. 1947) (holding Conners Co. liable as a matter of law for failing to have a bargee on board on the day of the accident), and *Smith v. Lampe*, 64 F.2d 201, 203 (6th Cir. 1933) (granting judgment for defendant as matter of law because he was reasonably ignorant of the customs of the sea). *The T.J. Hooper* and *Carroll Towing* are much more misleading for an understanding of common-law negligence doctrine because judgments of nonliability as a matter of law, as in *Smith v. Lampe*, are equally usual in common-law cases. *See, e.g.*, discussion *infra* Parts III.A, III.B (discussing *Carroll Towing*).

harm. It is as if courts believe that their most important role is to avoid creating incentives to overprecaution.

Whenever a plaintiff brings a negligence case, he or she will allege an "accident signature," a description that suggests in varying degrees that the defendant may have been negligently responsible. It has long been true that some alleged accident signatures *by themselves* can create a prima facie case that will take the plaintiff's case to a jury unless some further undisputed assertion is made by the defendant. Examples of these "prima facie accident signatures," in historical order, are: (1) the defendant's stagecoach suddenly crashed because its axle broke, and the plaintiff, a passenger, was thrown from it and was hurt;[67] (2) the defendant's hayrick spontaneously combusted, and the fire spread to the plaintiff's nearby cottages and destroyed them;[68] (3) one of the defendant's pipes burst, flooding the plaintiff's premises;[69] (4) a barrel fell from the second-story loading bay of the defendant's warehouse and struck the plaintiff, a pedestrian on the sidewalk below;[70] and (5) the defendant surgeon inadvertently failed to remove a surgical sponge from the plaintiff's body, which resulted in injury to the plaintiff.[71]

Simply because the accident signature creates a prima facie case does not mean that the plaintiff will win. For three different reasons, the plaintiff may still lose. First, before evidence is taken the defendant may allege or prove undisputed new matter that destroys the prima facie case made out by the accident signature. For instance, in the falling barrel case, if the plaintiff introduced undisputed evidence that the barrel fell because of a large earthquake that occurred at the same time as the accident, that new matter would prevent the case from getting to trial.[72] Second, the defendant may prove to the satisfaction of a court, either the court trying the case or an appellate court, that the defendant's conduct was not objectively negligent. That was the situation in the bursting fire hydrant case in which the jury returned a verdict for the plaintiff, but the appellate court subsequently found that no reasonable precaution had been omitted because at the time it was not reasonably foreseeable to the defendant that

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67 Christie v. Griggs (1809) 170 Eng. Rep. 1088; 2 Camp. 79.

68 Vaughan v. Menlove (1837) 132 Eng. Rep. 490; 7 Car. & P. 525.

69 Blyth v. Birmingham Waterworks Co. (1856) 156 Eng. Rep. 1047; 11 Exch. 781.

70 Byrne v. Boadle (1863) 159 Eng. Rep. 299; 2 H. & C. 722.

71 Akridge v. Noble, 41 S.E. 78, 78 (Ga. 1902).

72 *Cf.* Hutchinson v. Boston Gaslight Co., 122 Mass. 219, 220, 1877 WL 10122 (1877) (holding that evidence showing that defendant's gas main leaked and exploded, injuring plaintiff, during Boston's Great Fire of 1872 failed to make out a prima facie case of negligence). *But see* Fullerton v. Glens Falls Gas & Elec. Light Co., 141 N.Y.S. 838 (App. Div. 1913) (holding that plaintiff's showing that defendant's gas main leaked during a normal time and killed plaintiff's trees made out a prima facie case of negligence).

its hydrant system could fail because of frost.[73] Third, a jury may find that the defendant was not negligent. This was the situation in the case in which the surgeon closed the plaintiff before retrieving all the sponges.[74] In approving this verdict and the judgment entered on it, the appellate court stressed that the jury was entitled to find the defendant not guilty.[75] No evidence had been introduced suggesting that the defendant might have some objective excuse or justification for his substandard conduct in this case. Another surgeon testified that it was very difficult to find sponges in a patient's body, but that would not prevent the surgeon from counting the sponges in and out. The defendant himself maintained that he had diligently checked for sponges before closing the patient and believed that he had retrieved all of them.[76]

These few cases explain a deep truth about the negligence rule. It is not one rule but simultaneously two. For purposes of deciding whether the plaintiff has established a prima facie case, the standard of care is objectively defined in terms of conduct. In Holmes's words, the question is whether the defendant's conduct was on one side of the objectively defined due care line or not. Nevertheless, if the defendant's conduct was objectively substandard, juries still possess the power in a wide range of cases to find for the defendant. What to say about these jury acquittals of defendants who have obviously engaged in substandard conduct? (1) We could say that these affirmed defense verdicts represent a subjective side of the negligence rule; or (2) we could think that juries that have acquitted a defendant's substandard conduct have "nullified" the true negligence rule. Rather than accept either of these propositions, it is more accurate, and certainly more parsimonious, to conclude that juries possess *the power to forgive negligence*, not always, but in a wide range of cases. There is no law of when forgiveness is warranted, only a widespread and judicially-approved practice that would have appalled Holmes.

Indeed, for centuries, juries have apparently possessed the power to forgive negligence.[77] As J. H. Baker and others have recorded, post-

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73 *See Blyth*, 156 Eng. Rep. at 1049.

74 *See Akridge*, 41 S.E. at 78.

75 *Id.*

76 *Id.* at 78–80.

77 The great English legal historian J. H. Baker has written that the old rule of accidental trespass was probably fault-based and that a defendant would be considered guilty only if "he was to blame for it, first in the sense that he had caused it, and secondly in the sense that with reasonable care he could have avoided it." J. H. BAKER, AN INTRODUCTION TO LEGAL HISTORY 459 (3d ed. 1990) [hereinafter BAKER, INTRODUCTION]. Baker also added that there was no reason to believe that the trespass and trespass on the case entailed different standards of culpability. He wrote, "There is no reason to suppose that the standard was any different for trespass and case, since in either case it was left to the jury to decide

verdict controls of the type exercised in *Blyth v. Birmingham Waterworks Co.* became common in England starting in the fifteenth century.[78] To the extent that earlier common-law courts possessed fewer and less-developed ways to control jury absolutions of substandard conduct, it is possible that the modern liability rule is stricter than the classical rule.

III. THE LEARNED HAND FORMULA

A. The False Academic Conception of the Learned Hand Formula's Role

Professor Henry T. Terry originally proposed that the cost-benefit analysis of conduct should be the rule of decision in negligence cases.[79] Sixty years later Richard Posner embraced Judge Learned Hand's gloss of the breach of duty rule[80] announced in the famous *Carroll Towing* case.[81] Posner asserted that both judges and juries actually used—or could be understood to use—the Learned Hand formula in all negligence cases.[82] This idea has been tremendously influential among legal economists and even legal philosophers, some of whom have also embraced the Learned Hand formula[83] and variants of it.[84] Under the sway of this scholarship, the *Restatement (Third) of Torts* has recently adopted the Learned Hand formula for all negligence cases, arguing that it is already the rule of

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according to current notions of culpability." *Id.* Baker also argued that there were a number of successful "accident" pleas in the fourteenth century, but he conceded:

> they all could be described as cases where the chain of causation was broken by a force outside the defendant's control: for instance, the forces of combustion and wind (in fire cases), the perversity of animals (in running-down cases), or the plaintiff's own action (by moving in front of a horse, a moving dagger, or an arrow).

Id. at 457.

78 *See id.* at 97–101; Morris S. Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind*, 18 AM. J. LEGAL HIST. 267, 267 (1974); Clinton W. Francis, *The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England*, 83 COLUM. L. REV. 35, 63 (1983).

79 *See* Henry T. Terry, *Negligence*, 29 HARV. L. REV. 40, 52 (1915).

80 *See* Posner, *Theory of Negligence*, *supra* note 10, at 38.

81 *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947), *rev'g* Conners Marine Co. v. Pa. R.R. Co., 66 F. Supp. 396 (E.D.N.Y. 1946).

82 In describing the formative Gilded Age negligence cases, Posner wrote: "The jury's function was not limited to finding the facts; it was also responsible for deciding whether the facts found constituted negligence. It was the jurors who applied, within certain broad limits set by the judge, the Hand formula." Posner, *Theory of Negligence*, *supra* note 10, at 51.

83 *See, e.g.*, Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 J. L. & PHIL. 37, 37 (1983) (arguing that the Learned Hand formula is consistent with Immanuel Kant's corrective-justice philosophy).

84 *See, e.g.*, Gregory C. Keating, *Pressing Precaution beyond the Point of Cost-Justification*, 56 VAND. L. REV. 653, 657 (2003) (arguing that courts and juries should refer to cost-benefit analysis and then require precaution a bit beyond what cost-benefit analysis requires).

decision or should be.[85] Because it would eliminate jury forgiveness of errors, this rule would be much harsher than the actual rule now in existence.[86]

If the Learned Hand formula is the rule in all negligence cases, one puzzle is why negligence jury instructions do not refer to cost-benefit analysis. As already noted, they continue to use the less precise "reasonable" or "prudent" person test first announced in *Blyth v. Birmingham Waterworks*.[87] The mystery is compounded when we see that many courts give a Learned Hand formula instruction in products liability cases involving allegedly defective product designs.[88] Courts know how to give cost-benefit jury instructions; they simply do not do so in ordinary negligence cases.

B. The Learned Hand Formula as a Decision Rule for Triers of Fact

In debates between legal philosophers and legal economists about the negligence rule, it has seldom been stressed that *United States v. Carroll*

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[85] The *Restatement (Third) of Torts* states:

> A person acts negligently if the person does not exercise reasonable care under all the circumstances. Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (AM. LAW INST. 2010). The comments to this section cite to numerous cases and statutes that supposedly embrace the Learned Hand formula as the accepted rule of decision in negligence cases.

[86] If juries were required to use the Learned Hand formula in all cases, presumably they would have to convict every surgeon who left a sponge in a patient because, on a one-time basis, the burden of removing it would be less than the reduction in risk from doing so. Such a rule would benefit members of the plaintiffs' bar, who would win more cases, and perhaps even members of the defense bar, who might be able to litigate more cases. It seems probable that some medical malpractice cases involving routine practitioner errors are not litigated under the current regime because of the high probability that a jury would forgive the error in question. Defense lawyers could gain litigation fees from a less forgiving rule of decision. For instance, in all cases of retained foreign objects, it would become a litigable issue what the plaintiff's damages were. *See, e.g.*, *infra* Part VII.

[87] Blyth v. Birmingham Waterworks Co. (1856) 156 Eng. Rep. 1047, 1049; 11 Exch. 781.

[88] For instance, California Civil Jury Instructions (BAJI)—Civ. 9.00.5 (2018) provides in part:

> In determining whether the benefits of the design outweigh its risks, you should consider, among other things, the gravity of the danger posed by the design, the likelihood that the danger would cause damage, the mechanical feasibility of a safer alternate design at the time of manufacture, the financial cost of an improved design, and the adverse consequences to the product and the consumer that would result from an alternate design.

Id. Nothing like this instruction is recommended for a negligence case.

Towing Co. was an admiralty case.[89] As mandated by admiralty law, no jury was involved. The famous Learned Hand opinion found that the Conners Marine Company, the owner and lessor of the barge *Anna C*, was negligent as a matter of law for the absence of its bargee. This liability was joint with that of two other admiralty defendants, the Grace Line and the Carroll Company. The district judge had no difficulty finding the latter two defendants liable as a matter of law (the only kind of liability that exists in admiralty law) because of their compliance error in failing to tie secure knots that would have prevented the *Anna C* from breaking loose.[90] If the case had been tried under common law, a jury might have forgiven these two harried workers' negligence.

The issue for Judge Hand was whether the Conners Company was jointly liable (with the Grace Line and the Carroll Company) for the loss of its own barge and for the government cargo loaded aboard it. In deciding that the Conners Company had also breached a duty, Judge Hand reconciled similar cases on the same specific subject, that is, when it was a breach of duty for a bargee to be absent from his barge. Hand's approach would have won Holmes's approval because Hand adopted a highly precedential view of this question. After analyzing the facts of twelve previously decided absent bargee cases,[91] he then glossed their

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[89] United States v. Carroll Towing Co., 159 F.2d 169, 170 (2d Cir. 1947), *rev'g* Conners Marine Co. v. Pa. R.R. Co., 66 F. Supp. 396 (E.D.N.Y. 1946).

[90] *See id.* at 174.

[91] Judge Hand's analysis of the precedent bearing on whether a bargee's absence constitutes a breach of duty deserves full quotation because nothing like it exists in common-law cases. This was the type of analysis that Holmes envisioned for the common law, which under his recommendation would limit jury decisions (which, again, do not exist in admiralty cases):

> As to the consequences of a bargee's absence from his barge there have been a number of decisions; and we cannot agree that it is never ground for liability even to other vessels who may be injured. As early as 1843, Judge Sprague in *Clapp v. Young*, held a schooner liable which broke adrift from her moorings in a gale in Provincetown Harbor, and ran down another ship. The ground was that the owners of the offending ship had left no one on board, even though it was the custom in that harbor not to do so. Judge Tenney in *Fenno v. The Mary E. Cuff*, treated it as one of several faults against another vessel which was run down, to leave the offending vessel unattended in a storm in Port Jefferson Harbor. Judge Thomas in *The On-the-Level*, held liable for damage to a stake-boat, a barge moored to the stake-boat "south of Liberty Light, off the Jersey shore," because she had been left without a bargee; indeed he declared that the bargee's absence was "gross negligence." In the *Kathryn B. Guinan*, Ward, J., did indeed say that, when a barge was made fast to a pier in the harbor, as distinct from being in open waters, the bargee's absence would not be the basis for the owner's negligence. However, the facts in that case made no such holding necessary; the offending barge in fact had a bargee aboard though he was asleep. In

> the *Beeko*, Judge Campbell exonerated a power boat which had no watchman on board, which boys had maliciously cast loose from her moorings at the Marine Basin in Brooklyn and which collided with another vessel. Obviously that decision has no bearing on the facts at bar. In *United States Trucking Corporation v. City of New York*, the same judge refused to reduce the recovery of a coal hoister, injured at a foul berth, because the engineer was not on board; he had gone home for the night as was apparently his custom. We reversed the decree, but for another reason. In *The Sadie*, we affirmed Judge Coleman's holding that it was actionable negligence to leave without a bargee on board a barge made fast outside another barge, in the face of storm warnings. The damage was done to the inside barge. In *The P. R. R. No. 216*, we charged with liability a lighter which broke loose from, or was cast off, by a tanker to which she was moored, on the ground that her bargee should not have left her over Sunday. He could not know when the tanker might have to cast her off. We carried this so far in *The East Indian*, as to hold a lighter whose bargee went ashore for breakfast, during which the stevedores cast off some of the lighter's lines. True, the bargee came back after she was free and was then ineffectual in taking control of her before she damaged another vessel; but we held his absence itself a fault, knowing as he must have, that the stevedores were apt to cast off the lighter. *The Conway No. 23* went on the theory that the absence of the bargee had no connection with the damage done to the vessel itself; it assumed liability, if the contrary had been proved. In *The Trenton*, we refused to hold a moored vessel because another outside of her had overcharged her fasts. The bargee had gone away for the night when a storm arose; and our exoneration of the offending vessel did depend upon the theory that it was not negligent for the bargee to be away for the night; but no danger was apparently then to be apprehended. In *Bouker Contracting Co. v. Williamsburgh Power Plant Corporation*, we charged a scow with half damages because her bargee left her without adequate precautions. In *O'Donnell Transportation Co. v. M. & J. Tracy*, we refused to charge a barge whose bargee had been absent from 9 A.M. to 1:30 P.M., having "left the vessel to go ashore for a time on his own business."

Id. at 172–73 (footnotes omitted). Judge Hand concluded this precedential analysis by declaring as follows:

> It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her moorings. However, in any cases where he would be so liable for injuries to others obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends

legal doctrine with his famous formula. His approach instantiates what we would see more generally if common-law courts had adopted, rather than rejected, Holmes's recommendation of a precedential standard of due care. Nevertheless, if the issue of the absent bargee had come before a common-law court and the jury had forgiven his absence, a common-law court would have affirmed that acquittal. If a jury can acquit a surgeon who has left a scalpel in a patient, it can equally acquit an attendant who has left a barge. *Carroll Towing* would have been decided differently under those circumstances.

Many textbook and casebook authors have assumed that the negligence rule is much the same whether a case arises under the common law of negligence, where in the U.S. a jury is involved, or under a statute or body of law in which judges decide cases without juries. The principal examples are admiralty cases that involve collisions between ships and FTCA cases, which involve accidents caused by the federal government's negligence. In these systems there can be no jury forgiveness of errors because juries are not involved. In these cases, the breach of duty standard

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> upon whether B is less than L multiplied by P: i.e., whether B < PL. Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in "The Kathryn B. Guinan," supra; and that, if so, the situation is one where custom should control. We leave that question open; but we hold that it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence that he had no excuse for his absence. At the locus in quo—especially during the short January days and in the full tide of war activity—barges were being constantly "drilled" in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold—and it is all that we do hold—that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.

Id. at 173–74 (footnotes omitted). Judge Hand offered his Learned Hand formula as a "general rule" for absent bargee cases, but he phrased it so generally that it is obvious he thought it applied beyond that context. *Id.* at 173.

is much more objective and much more symmetrical. When a federal government surgeon leaves a foreign object in his patient, and there is no issue of whether the damages were caused by the lapse, the case results in judgment as a matter of law for the patient.[92] Similarly, judges in FTCA cases based on misfilled prescriptions routinely order judgment as a matter of law for plaintiffs when the damages were caused by error.[93] These same cases often result in jury forgiveness when they are tried through the ordinary negligence common-law process.[94]

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[92] *See* Vines v. United States, No. 2:05-cv-02370-FCD-GGH, 2008 WL 4470795, at *4–5 (E.D. Cal. Oct. 2, 2008) (holding judgment as a matter of law for plaintiff on breach of duty issue against surgeon who inadvertently left "small wire" in patient's back); Gills v. United States, No. 7:08-cv-00245, 2010 WL 1444590, at *4 (W.D. Va. Apr. 9, 2010) (finding negligence as a matter of law for leaving sponge in patient, but plaintiff unable to prove sponge was cause in fact of death); Kellar v. U.S. Dep't Veteran's Affairs, No. 08-cv-00761-WYD-KLM, 2010 WL 3785569, at *7 (D. Colo. Sept. 17, 2010) (determining breach of duty as a matter of law for leaving metal clamp in patient's chest). *See also* McCubbin v. Hastings, 27 La. Ann. 713, 719 (1875) (ordering judgment as a matter of law for plaintiff who sued pharmacist for dispensing error when case had been tried to judge); Dietze v. King, 184 F. Supp. 944, 949–50 (E.D. Va. 1960) (ordering judgment as a matter of law for plaintiff in diversity case where surgeon had left small sponge in patient). *Cf.* Prindle v. United States, No. 4:10-CV-054-A, 2011 WL 1869795, at *2 n.1 (N.D. Tex. May 13, 2011) (opining judgment as a matter of law would be given for plaintiff in FTCA case in which plaintiff suffered damage from surgeon leaving a foreign object in his body). *But see* Callahan v. Cho, 437 F. Supp. 2d 557, 565 (E.D. Va. 2006) (requiring FTCA plaintiff to comply with West Virginia malpractice reform statute, which required expert statement to create triable issue of fact, in a case where the Veterans Administration surgeon left small needle tip in his body because it could not be easily removed).

[93] *See* Zuchowicz v. United States, 140 F.3d 381, 382 (2d Cir. 1998) (Calabresi, J.) (entitling plaintiff to judgment as a matter of law in FTCA case when Navy hospital pharmacy dispensed twice the recommended dose to her decedent); Boyle v. United States, 948 F. Supp. 2d 570, 570 (D.S.C. 2012) (ruling for plaintiff in FTCA case after Navy pharmacist accidently dispensed ten times prescribed dose to plaintiffs' deceased); Boyle v. United States, 948 F. Supp. 2d 577, 584 (D.S.C. 2012) (providing separate order for damages in previous case); Espinosa v. United States, No. 00 C 3435, 2001 WL 1518536, at *3 (N.D. Ill. Nov. 29, 2001) (determining, in FTCA case, that Veterans Administration pharmacist committed breach of duty as a matter of law, by filling prescription with incorrect dose of drug, but also holding incorrect dose was not cause in fact of injury), *aff'd*, 47 F. App'x 402, 405, 2002 WL 31027954 (7th Cir. Sept. 9, 2002).

[94] *See infra* notes 150–54 and accompanying text.

IV. COST-BENEFIT ANALYSIS AS THE MAIN CONSTRAINT ON JURIES' BREACH OF DUTY DETERMINATIONS

A. Cost-Benefit Analysis as a Ground for Judgment as a Matter of Law for the Defendant

Many commentators have noticed that cost-benefit analysis and the Learned Hand formula are absent in negligence jury instructions.[95] They have sometimes inferred that both are irrelevant to the common law of negligence. That is incorrect. It is true that in negligence cases judges do not ask juries to do cost-benefit analysis, but cost-benefit analysis is still the most important general principle defining common-law breach of duty. The true role of cost-benefit analysis in jury-eligible cases is not to be the jury's decision rule but to be applied by judges to limit the cases in which juries can find negligence liability. Juries are indeed allowed to forgive the nonuse of a cost-beneficial precaution, but they are not permitted to require the use of precautions beyond the balance of cost-benefit analysis. This is undoubtedly a very permissive standard, and we will explore at the end of this Article what has probably caused the courts to adopt it.

As just noted, however, the most important ways in which courts use cost-benefit analysis are to dismiss a case before trial and to reject a jury verdict that reflects the jury's view that the defendant should have used precaution beyond the demands of cost-benefit analysis. From a very early point in the history of the modern negligence rule, courts—and therefore litigants—have focused on specific untaken precautions.[96]

Many grounds for a defense summary judgment exist. These include the absence of a duty by the defendant, the absence of proximate cause,

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[95] *See* Stephen G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1016–18 (1994); Michael D. Green, *Negligence = Economic Efficiency: Doubts* >, 75 TEX. L. REV. 1605, 1630–31 (1997); Patrick J. Kelley, *The* Carroll Towing Company *Case and the Teaching of Tort Law*, 45 ST. LOUIS U. L.J. 731, 757 (2001); Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 815–16 (2001); Patrick J. Kelley & Laurel A. Wendt, *What Judges Tell Juries about Negligence: A Review of Pattern Jury Instructions*, 77 CHI.-KENT L. REV. 587, 618–19 (2002); Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 THEORETICAL INQUIRIES L. 145, 151–52, 161–62 (2003); Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2005–06 (2007); Kenneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L.A. L. REV. 1171, 1222 (2008).

[96] *See, e.g.*, Blyth v. Birmingham Waterworks Co. (1856) 156 Eng. Rep. 1047, 1047–49; 11 Exch. 780 (holding that cleaning frost off a fire plug was not required, despite jury verdict to contrary, because no experience demonstrated that the precaution was useful); Crafter v. Metropolitan Ry. Co. (1866) 1 LRCP 300, 301–05 (Eng.) (finding, despite a jury verdict to the contrary, that defendant was not required to install handrail on staircase, replace the worn-out brass nosing on the staircase, or install nosing made of more durable material than brass).

the presence of assumption of the risk, and so forth. Especially in the modern era, courts are not totally consistent in how they characterize factual issues and how they sort them among the elements of negligence, which are usually taken to be duty, breach of duty, cause in fact, proximate cause, and actual harm. Nevertheless, courts almost always give reasons for their conclusion of no liability as a matter of law, and the reason in which we are interested is whether the defendant used adequate precaution in the situation that led to the plaintiff's harm.

In cases in which courts concern themselves with the adequacy of the defendant's precautions to assess whether the defendant deserved judgment as a matter of law, the most common grounds for this conclusion are: (1) the burden of additional precautions was outweighed by the reduction in risk that would have been produced by them; (2) the risk that harmed the plaintiff was "unforeseeable," which in this context usually means very small from an ex ante point of view; (3) the plaintiff failed to identify an untaken precaution or other fault by the defendant in a case in which res ipsa was unavailable; (4) the risk that harmed the plaintiff was "obvious" to the plaintiff; (5) the undisputed facts showed that the defendant used due care; (6) expert evidence was required to show breach of duty, and it was absent on the record; and (7) the defendant's act that caused the harm was involuntary. The first of these grounds for summary judgment invokes cost-benefit analysis and the Learned Hand formula, but especially given the usual context of analysis under each of these seven heads, all can be understood as suggesting the court's conclusion that no precaution untaken by the defendant would have paid out its costs in terms of reduced ex ante risk.

1. The Burden of Additional Precautions was Outweighed by the Reduction in Risk that Would Have Been Produced by Them

For a court to conclude that the burden of additional precautions was greater than the reduction in ex ante risk entails cost-benefit analysis. This type of analysis is more prominent in older cases. Nevertheless, modern cases seem to adopt the same cost-benefit perspective even when they are less explicit about it. The reader will be able to judge the validity of this point from the following discussion.

Adams v. Bullock[97] was a famous case that used the Learned Hand formula's reasoning well before the formula existed. The case was decided by Judge Cardozo in 1919 and concerned a young plaintiff who sued the defendant for injuries he sustained when a wire that he was swinging came into contact with the defendant's trolley wires.

[97] Adams v. Bullock, 125 N.E. 93, 93–94 (N.Y. 1919).

The defendant ran a trolley line in the city of Dunkirk, New York, employing an overhead wire system. At one point, the road was crossed by a bridge that carried the tracks of the Nickel Plate and Pennsylvania railroads. Pedestrians often used the bridge as a shortcut between streets, and children played on it. On April 21, 1916, the plaintiff, a twelve-year-old boy, came across the bridge, swinging an eight-foot wire. In swinging it, he hit the defendant's trolley wire, which ran beneath the structure. The side of the bridge was protected by a parapet eighteen inches wide. The trolley wire was strung four feet, seven and three-fourths inches below the top of the parapet. The plaintiff was shocked and burned when the wires came together.[98] The trial court sent the case to the jury, which returned a verdict for the plaintiff. The defendant appealed arguing that the evidence was insufficient to support the verdict.

The Court of Appeals of New York held for the defendant, finding insufficient evidence to support the plaintiff's verdict.[99] In rejecting liability, Judge Cardozo performed a cost-benefit analysis based on the low probability of the accident, given the precautions the defendant had already taken, and the impracticality of guarding the wires. He stressed that the trolley wires needed to be uninsulated to power the trolleys and that guards would be very costly because the actual location of the accident was not that much more likely than anyplace else along the trolley line. Given the low probability of any accident of the type that occurred, the potential reduction in risk from any further precaution would be small relative to the large cost of guarding the trolley wires throughout the system.[100] Therefore, the jury verdict of liability could not be accepted.

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98 *Id.* at 93.

99 *Id.*

100 *See id.* Cardozo wrote:

> The trolley wire was so placed that no one standing on the bridge or even bending over the parapet could reach it. Only some extraordinary casualty, not fairly within the area of ordinary prevision, could make it a thing of danger. Reasonable care in the use of a destructive agency imports a high degree of vigilance (Nelson v. Branford L. & W. Co., 75 Conn. 548, 551; Braun v. Buffalo Gen. El. Co., 200 N.Y. 484). But no vigilance, however alert, unless fortified by the gift of prophecy, could have predicted the point upon the route where such an accident would occur. It might with equal reason have been expected anywhere else. At any point upon the route, a mischievous or thoughtless boy might touch the wire with a metal pole, or fling another wire across it (Green v. W.P. Rys. Co., 246 Penn. St. 340). If unable to reach it from the walk, he might stand upon a wagon or climb upon a tree. No special danger at this bridge warned the defendant that there was need of special measures of precaution. No like accident had occurred before. No

Cooley v. Public Service Co.[101] was a similar case that also used the objective standard of cost-benefit analysis to reject the plaintiff's alleged untaken durable precautions. The plaintiff suffered trauma from a loud noise that came over her telephone line; the most immediate cause was a power company's high voltage line breaking in a storm and making contact with the telephone wire over which the plaintiff was speaking. She sued both the electric company and the power company. The plaintiff suggested two durable precautions as untaken and as alternatively constituting both defendants' breach of duty: (1) the power company's failure to insulate its power wires; and (2) both defendants' failure to place a mesh basket underneath the power wires at places where they were close to the telephone wires so that if the power wires broke they would not touch the adjacent telephone wire.[102] The jury returned a verdict for the telephone company, but against the power company, which appealed based on insufficiency of the evidence of breach of duty.

The New Hampshire Supreme Court rejected both untaken precautions under a cost-benefit analysis.[103] The court reasoned, based on the evidence, that both precautions would have increased the risk of electrocution to pedestrians underneath the power lines by keeping the lines live after they had been breached, increasing the likelihood that a pedestrian would become the ground that would break the circuit and cut off the electricity. Because the increased risk of electrocution would have been greater than the reduction in the risk from noise trauma, neither precaution was cost-beneficial and was therefore rejected.[104] The court

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> custom had been disregarded. We think that ordinary caution did not involve forethought of this extraordinary peril.

Id. Cardozo also said:

> There is, we may add, a distinction not to be ignored between electric light and trolley wires. The distinction is that the former may be insulated. Chance of harm, though remote, may betoken negligence, if needless. Facility of protection may impose a duty to protect. With trolley wires, the case is different. Insulation is impossible.

Id.

101 Cooley v. Pub. Serv. Co., 10 A.2d 673 (N.H. 1940).

102 *Id.* at 674–75.

103 *See id*. at 673.

104 *Id.* at 677. The court said:

> In the case before us, there was danger of electrocution in the street. As long as the Telephone Company's safety devices are properly installed and maintained, there is no danger of electrocution in the house. The only foreseeable danger to the telephone subscriber is from noise-fright and neurosis. Balancing the two, the danger to those such as the plaintiff is remote, that to those on the ground near the broken wires is obvious and immediate. The balance would not be improved by taking a chance to avoid traumatic neurosis of the plaintiff at the expense of greater risk to the lives of others.

stressed that some cost-beneficial untaken precaution might have existed, but it was the plaintiff's burden to offer and prove it. Again, the jury verdict of negligence could not be accepted.

The *Cooley* case is interesting from at least two points of view. First, the court used a more sophisticated economic analysis of breach of duty than Judge Hand when he announced his formula seven years later. The *Cooley* court understood the cost of precaution in its full economic sense, which is the "opportunity cost." The cost of a precaution, or of anything, is value forgone by having it. The value forgone by mesh baskets is not just their expense but also, and mainly, the lives that would be lost from electrocution if the mesh baskets were installed, just as the court reasoned. Second, *Cooley* seems in tension with at least some corrective justice theories of tort. The *Cooley* decision required the power company to use telephone subscribers as a means of providing benefits for pedestrians. Immanuel Kant would be concerned about this aspect of the case because he argued that one's first duty is to treat other humans as ends only and not as means to improve others' welfare.

Beginning in the last century, some courts have begun to develop a precedential standard of breach of duty. This is not the comprehensive standard that Holmes envisioned but instead a standard that gives guidance to courts about when it is proper for courts to order judgment as a matter of law for a defendant. Again, Holmes argued that courts should develop a precedential standard of breach of duty that would define three different zones for various accident types: (1) a zone in which judgment as a matter of law for the plaintiff was proper; (2) an ever-shrinking intermediate zone in which a jury would be permitted to find either for the plaintiff or the defendant; and (3) a zone in which precedent would indicate that judgment as a matter of law for the defendant is proper.[105] The relatively modern development concerns only the third zone. Thus, this body of law sets an upper limit for precaution requirements that juries may enforce. California, long known for its progressive jurisprudence, is a good example.

The most recent origin of California's limits on jury-established precaution requirements comes from the 1968 case of *Rowland v. Christian*,[106] which expanded duties of care in the context of premises liability. This case recited a list of "policy factors" that should be considered in deciding the negligence issue of "duty."[107] In its original

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Id. at 676.

105 *See generally* HOLMES, COMMON LAW, *supra* note 2.

106 *See* Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

107 *See id.* at 567. The court said:

use, the *Rowland* court used the policy list to reject a categorical rule of duty, namely, that apartment renters owe a very limited duty to their social guests. The *Rowland v. Christian* court replaced this rule with the policy list, thus expanding the realm in which juries could hold land occupiers liable to their social guests. Since *Rowland v. Christian* was decided in 1968, courts have used the policy list announced in that case to create semi-categorical rules that limit juries' powers to find negligence in different situations, virtually the opposite of the list's original use. In this modern use of the *Rowland* list, the two most important policy factors have been "the foreseeability of the harm" and "the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care." These two elements are the main components of Judge Hand's cost-benefit analysis in *Carroll Towing*.

As later California Supreme Court cases have recognized,[108] *Nevarez v. Thriftimart, Inc.*,[109] was one of the first cases in this new line defining limited "duties" based on cost-benefit considerations. The three-year-old plaintiff lived with his family directly across from a large shopping center at which the defendant held a grand opening of its new supermarket. As a part of the celebration, the defendant hired carnival rides, such as a Tinkertown train, a merry-go-round, and a Ferris wheel, and also gave away free treats, such as ice cream and popcorn. The plaintiff, supervised by his grandmother, attended the festival the morning of the accident. The group returned for lunch, and in the early afternoon the plaintiff escaped his minders to get back to the fun and jaywalked across the street dividing his home and the shopping center. A speeding car struck him immediately as he dashed out between two parked cars.[110] He sued both the driver who struck him and the supermarket, and the jury returned a verdict against both for negligence.[111] The reported case arose on the

> A departure from this fundamental principle [that, supposedly, everyone always owes a duty whenever his or her precaution could foreseeably reduce risk] involves the balancing of a number of considerations; the major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. at 564.

108 *See, e.g.*, Vasilenko v. Grace Family Church, 404 P.3d 1196, 1200–01 (Cal. 2017) (discussing *Nevarez* in a similar case).

109 *See* Nevarez v. Thriftman, 87 Cal. Rptr. 50 (Ct. App. 1970).

110 *See id.* at 51–52.

111 *Id.* at 51.

supermarket's motion for judgment n.o.v. On the appeal, the plaintiff analogized to then-recent cases in which roving ice cream and donut sellers were held liable for failing to protect the young customers they sought to attract. The *Nevarez* court reversed the judgment for the plaintiff against the supermarket because it owed no "duty." The court said that the burden of controlling the entire perimeter of a shopping center was much greater and less practical than the burden of controlling the relatively small area surrounding an ice cream truck.[112] Once again, a jury's verdict could not be accepted because the alleged untaken precaution exceeded the requirements of cost-benefit analysis.

The traditional idea is that negligence duties are defined by very general considerations such as whether the defendant committed an affirmative act, whether there was an undertaking, whether a special relationship existed between the parties, and so forth. Breach of duty, on the other hand, depends on "fact-specific" considerations such as whether under the detailed circumstances of the accident the defendant used sufficient precaution. The *Nevarez* court's analysis straddled these two levels. On the one hand, the court seemed to lay down a general rule finding no duty for stationary vendors that attracted children; on the other hand, the court based this conclusion on the cost-benefit considerations that are more traditional in breach of duty determinations. Still, the *Nevarez* court's holding made good sense as a duty rule because it was fairly categorical. Subsequent California cases have obliterated the categorical approach.

A good example of the latter type of case is *Parsons v. Crown Disposal Co.*[113] The defendant's trash collector clamorously emptied his bin near the Griffith Park Equestrian Trail when plaintiff was nearby on his horse. The driver could not easily see plaintiff behind his truck. When the bin emptied, the horse bolted and threw the plaintiff, causing the injuries for

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[112] *See id*. at 51. The *Nevarez* court's specific language was as follows:

> To impose a duty of care of the nature contended for by respondent would be to place an unjustifiable burden upon any businessman whose store displays toys or other things attractive to children. Indeed, since small children are notoriously curious about and attracted to anything and everything, the limits to such a duty, if imposed, are not readily visible. Retail establishment would be cast in the role of a modern-day Pied Piper and, as such, obligated to act as parent or babysitter for every tot in the neighborhood who might decide to dash across a public street in order to bask in the store's allure. The attractions offered by appellant and the generalized invitation to enjoy them, thus do not analogize to the conduct of a street vendor.

Id. at 54.

[113] Parsons v. Crown Disposal Co., 936 P.2d 70 (Cal. 1997).

which he sued.[114] This case would have been different if defendant had seen plaintiff because then the burden was relatively low to delay lift. Untaken precautions suggested by plaintiff were very burdensome. These included changing the hours of collection, temporarily blocking off the trash collection zone with warning signs, and providing collection schedules to equestrians.[115] The trial court granted summary judgment to defendant, which was affirmed by the California Supreme Court.[116] The California Supreme Court basically performed a Learned Hand formula analysis, stressing that it would be too great a burden to use any of the precautions that the plaintiff alleged as untaken.[117]

Although in this case there was "no duty," the court made clear that if the trash truck driver had seen the equestrian and his horse before dumping the load, the case would have been decided differently because then the burden of merely delaying the dump into the truck would have been low. Thus, although the purported rule related to "duty," it was not very categorical. The case basically held that failing to look for skittish horses could not be a breach of duty under the detailed circumstances of the case because that untaken precaution, and the others alleged by the plaintiff, flunked the Learned Hand formula.

2. The Risk that Harmed the Plaintiff was "Unforeseeable," which in this Context Usually Means Very Small from an Ex Ante Point of View

Under the Learned Hand formula and cost-benefit analysis more generally, the relevant question is whether some untaken precaution would have cost less than the risk it would have eliminated. In this context, the risk eliminated is inevitably estimated from an ex ante point of view as of a time before the accident when the untaken precaution could have been adopted. It follows that if, as of that time, no risk was foreseeable from failing to adopt the precaution, then no breach of duty can be based on the untaken precaution in question. Thus, judicial assertions that the risk was "unforeseeable" can be sensibly understood as a truncated form of cost-benefit analysis. Recall that the purpose of this analysis arises in some sort of summary adjudication or review of the evidence presented at trial to ensure that a jury does not exceed the requirements of cost-benefit analysis.

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114 *Id.* at 71.
115 *Id.* at 81.
116 *Id.* at 94.
117 *Id.* at 81.

A good example of this analysis is found in *Blyth v. Birmingham Waterworks Co.* (1856).[118] The defendant could have seen frosted plugs on its fire hydrant system as a danger sign because, if the plugs were frozen shut when the water around the plugs froze, the expanding ice could break the pipes.[119] If the defendant's employees had simply cleaned the frost off the stoppers, the accident would have been prevented because the stoppers would have been able to move forward in their iron tubes, which would have relieved the pressure of the expanding ice and prevented the bursting of the pipes and the plaintiff's damage. Although the untaken precaution was cheap, the court found it was not required because the defendant's employees had no practical way of foreseeing the probable consequences of their omitted precaution.[120] The cold spell of 1855 was unprecedented, so the water company employees reasonably lacked the knowledge that cleaning the plugs would have reduced any significant risk to those living close to the pipes.[121] There are many similar cases that have prevented juries from finding liability, just as in *Blyth*.[122]

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[118] The defendant had installed an early fire hydrant system that entailed punching fire plugs in its subterranean wooden water pipes. In 1855, when the system was still relatively new, the weather in England turned extraordinarily frigid, and the stoppers on the plugs frosted over. *See* Blyth v. Birmingham Waterworks Co. (1856) 156 Eng. Rep. 1047, 1047–49; 11 Exch. 781.

In this case, the court defined negligence in the highly objective way of which Holmes approved. One hundred and sixty years later this text from the opinion is still a common jury instruction in the United States:

> Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done.

Id. at 1049.

[119] That is what happened in the actual case, and a large quantity of water leaked from the municipal pipes into the basement of the plaintiff who sued for negligence. *Id*. at 1047–49.

[120] *Id*. at 1049.

[121] *See id*. A hydraulic engineer would have possessed this knowledge, but the employees were not chargeable with this degree of expertise. *Id*. at 1049.

[122] *See* Greene v. Sibley, Lindsay & Curr Co., 177 N.E. 416, 417 (N.Y. 1931) (Cardozo, J.) (holding that defendant's employee did not need to pre-announce changes in position because plaintiff should have looked where she was walking; risk from failure of employee to pre-announce was "unforeseeable"); Collins v. Noss, 15 N.Y.S.2d 475, 476 (App. Div. 1939) (holding that a risk that anyone would be hurt by small floor defect was "unforeseeable"); Danielenko v. Kinney Rent A Car, Inc., 441 N.E.2d 1073, 1075–76 (N.Y. 1982) (holding that risk to rental company that its car would contain bomb planted by saboteur was "not foreseeable"); Moeske v. Nalley, 744 N.Y.S.2d 251, 252–53 (App. Div. 2002) (holding that risk to plaintiff, who had unobviously jumped on defendant's back bumper to assist in emergency, was "unforeseeable" to defendant); Pitre v. Empl'rs Liab. Assurance Corp., 234 So. 2d 847, 853 (La. Ct. App. 1970) (finding risk that plaintiff's decedent would be hurt by

3. The Plaintiff Failed to Identify an Untaken Precaution or Other Fault by the Defendant in a Case in which Res Ipsa was Unavailable

The most traditional form of cost-benefit analysis examines the cost and benefit of a specific untaken precaution.[123] When the plaintiff has alleged no untaken precaution, this analysis becomes impossible, and courts often nonsuit plaintiffs for this reason.[124] A more basic reason for summary judgment for the defendant is when the plaintiff has failed unreasonably to identify any untaken precaution by the defendant that could have prevented the injury.[125]

4. The Risk that Harmed the Plaintiff was "Obvious" to the Plaintiff

Another common reason why defendants are granted summary judgment is when the hazard on the defendant's premises was obvious.[126]

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thrower's windup at carnival baseball throw was "unforeseeable" and did not require special precautions); Birchfield v. Sweatt, No. F052443, 2008 WL 698925, at *5–9 (Cal. Ct. App. Mar. 17, 2008) (finding risk of giving hair-trigger pistol to daughter to protect herself created "unforeseeable" risk that her boyfriend, trained as army sniper, would intentionally or accidentally shoot himself); Keith v. City of Pleasant Hill, No. A137044, 2013 WL 5569993, at *3 (Cal. Ct. App. Oct. 10, 2013) (declaring that risk of injury from driving over hose stretched across street "unforeseeable").

123 Some modern forms of judicial cost-benefit analysis conclude that a whole range of precautions by the defendant were not socially worthwhile. *See, e.g.*, Vasilenko v. Grace Family Church, 404 P.3d 1196, 1201–02 (Cal. 2017) (determining that landowner's cost-benefical precautions to prevent injury from invitees crossing a street from parking lot are limited and unproductive relative to their costs).

124 *See* Zachlod v. Seymour Beacon Falls, LLC, No. AANCV156019053S, 2017 WL 6997255, at *4 (Conn. Super. Ct. Dec. 18, 2017) (holding that defendant was entitled to summary judgment when plaintiff submitted no substantial evidence of floor defect upon which she allegedly slipped or defendant's untaken precaution); Morgan v. Nickowski, No. 334668, 2017 WL 5759789, at *7 (Mich. Ct. App. Nov. 28, 2017) (holding that defendant landlord was entitled to summary judgment when plaintiff submitted no evidence that he knew his tenants owned pit bulls that hurt plaintiff's dog).

125 *See* Rogers v. Santoro-Cotton, No. 1-17-0606, 2018 IL App. (1st) 170606-U, at *4 (Ill. App. Ct. Jan. 18, 2018) (holding that defendant was entitled to summary judgment because plaintiff failed to identify any potentially negligent untaken precaution that was cause of plaintiff's injury); Psillas v. Home Depot, U.S.A., Inc., 66 S.W.3d 860, 863, 866 (Tenn. Ct. App. 2001) (ruling that defendant was entitled to summary judgment when plaintiffs failed unreasonably to identify the object that cut their son and what, if anything, the defendant could have done to prevent the accident when the immediate cause was older sister rocking the boy on a roll of carpeting offered for sale); Czarnecki v. Hagenow, 477 N.E.2d 964, 968 (Ind. Ct. App. 1985) (ordering that summary judgment was proper for defendant because plaintiff failed to identify defendant's untaken precaution).

126 *See* Rosen v. Bronx Hosp., 127 N.E.2d 82, 82 (N.Y. 1955) (finding judgment as matter of law for defendant when plaintiff stuck his fingers into hinge area of closing door); Armstrong v. Best Buy Co., Inc., 788 N.E.2d 1088, 1092 (Ohio 2003) (holding that defendant retailer was entitled to summary judgment because bracket for store shopping-cart guardrail upon which plaintiff tripped was open and obvious).

The traditional rule was that an invitor's liability to an invitee depended on the hazard being nonobvious.[127] Usually cases finding judgment as a matter of law for the defendant on this ground involve small risks for which the efficient prevention is for the plaintiff to notice and avoid them. Another class of cases entails situations where the plaintiff voluntarily encountered a substantial and obvious risk out of recklessness.

5. The Undisputed Facts on the Judgment Record Showed that the Defendant Used All Cost-Beneficial Precautions

It was proper to enter judgment as a matter of law in favor of a dangerous nightclub whose security personnel and uniformed law enforcement personnel, in a two-step process, patted down all customers for concealed weapons but failed to notice the weapon the plaintiff's assailant was carrying.[128] The court did not stress cost-benefit analysis but rather the substantiality of the elaborate and costly precautions that the defendant used.[129] The court's decision suggested that a defendant who establishes an elaborate and costly precaution plan should not be held liable for every lapse in it. A contrary rule would punish investments in safety.

Often a court's conclusion that the defendant used cost-beneficial precaution follows from its judgment that the defendant lacked actual or constructive knowledge of the risk.[130] These cases are basically the same as those entering judgment as a matter of law for the defendant on the ground that the risk was unforeseeable.

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127 According to the *Restatement (Second) of Torts*:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

RESTATEMENT (SECOND) OF TORTS § 343 (AM. LAW INST. 1965). Subparagraph (b) is the "obviousness" requirement, which denies liability to an invitee for an "obvious" defect in the defendant's land.

128 *See* Yearwood v. Club Miami, Inc., 728 S.E.2d 790, 790–91 (Ga. Ct. App. 2012).

129 *Id.* at 791–92.

130 *See, e.g.*, De Leon v. AvalonBay Cmtys., Inc., No. B272008, 2018 WL 416539, at *3 (Cal. Ct. App. Jan. 16, 2018) (concluding summary judgment for defendant was proper because gas company had fixed gas leak a month before plaintiff became dizzy and fell on defendant's steps). *Compare* Gordon v. Am. Museum of History, 492 N.E.2d 774, 775 (N.Y. 1986) (finding that waxed paper on which plaintiff slipped was fresh, suggesting that defendant was patrolling steps reasonably), *with* Anjou v. Bos. Elevated Ry., 94 N.E. 386, 386 (Mass. 1911) (finding that banana peel upon which plaintiff slipped was blackened and gritty, suggesting that defendant was negligently patrolling its platform).

6. Expert Evidence was Required to Show Breach of Duty and was Absent on Record

Beyond cost-benefit analysis, another common reason for granting summary judgment to a defendant is when the plaintiff's claim requires expert testimony on the standard of care and that testimony is absent or inadequate.[131]

7. The Defendant's Act was Involuntary

Another ground for summary judgment for a party is that his or her act was involuntary. These cases entail situations in which the relevant party was not able to use reasonable precaution.[132]

B. A Correlative Role of Cost-Benefit Analysis

When an appellate court reviews the sufficiency of the evidence to support a plaintiff's verdict, the question can be the same as under a defense motion for summary judgment—namely, was the defendant entitled to judgment as a matter of law? Sometimes courts will use cost-benefit analysis in this setting to assure themselves that the burden of some untaken precaution was less than its reduction in risk.[133] When the appellate court finds that no untaken precaution proved at trial had a burden less than its benefit, the court will reverse the plaintiff's

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131 *See, e.g.*, Bondy v. Allen, 635 N.W.2d 244, 249, 251 (Minn. Ct. App. 2001) (holding summary judgment for defendant was proper because plaintiff's claim for aggravated harm against ambulance company required expert testimony, and expert testimony provided was inadequate); Upson Cty. Hosp., Inc. v. Head, 540 S.E.2d 626, 633 (Ga. Ct. App. 2000) (ruling that summary judgment for hospital was proper when plaintiff failed to file timely expert affidavit on standard of care in medical malpractice case).

132 *See, e.g.*, Ballew v. Aiello, 422 S.W.2d 396, 397–400 (Mo. Ct. App. 1967) (granting summary judgment for defendant who grabbed steering wheel when not fully awake); Alexander v. Allen, 538 So. 2d 1372, 1373 (Fla. Dist. Ct. App. 1989) (ruling that defendant was properly awarded summary judgment when she screamed in response to robber's demand, precipitating shooting of defendant's licensee in backyard). *Cf.* Lobert v. Pack, 9 A.2d 365, 368 (Pa. 1939) (holding evidence sufficient to support defendant's verdict and new trial was unwarranted when defendant kicked backseat of car while asleep, precipitating accident).

133 *See* Davis v. Consol. Rail Corp., 788 F.2d 1260, 1268 (7th Cir. 1986) (Posner, J.) (holding that blowing the train's horn plausibly would have reduced risk more than the burden of this precaution, so enough evidence existed to support jury's liability verdict); Fuentes v. Consol. Rail Corp., 789 F. Supp. 638, 646 (S.D.N.Y. 1992) (finding it is plausible that stopping the train sooner would have reduced risk more than the burden of this precaution so there was enough evidence to support jury's liability verdict); Sw. Telegraph & Telephone Co. v. Abeles, 126 S.W. 724, 726 (Ark. 1910) (holding that it is plausible that grounding surge protector would have reduced the risk of loud noises more than its burden).

judgment.[134] Again, just as before, the purpose is to set a ceiling on the precautionary requirements created by juries.

V. WHEN CAN COST-BENEFIT ANALYSIS BE A CEILING ON PRECAUTION REQUIREMENTS?

Cost-benefit analysis can establish a ceiling for precaution requirements only when the untaken precaution alleged as the breach is susceptible to the analysis. Some have argued that this point relates to the impossibility of measuring the value of human life, but instead it more fundamentally concerns the difficulty of seeing whether an actor was adopting an efficient rate of very common precautions that must be used repeatedly. When a surgical team leaves a sponge in a patient or a pharmacist misdispenses a drug, it does not necessarily follow that either has behaved inconsistently with cost-benefit analysis. NASA rockets crash because of human errors even when millions of dollars have been spent to avoid those errors. The same can be true, on a smaller scale, in the operating room and the pharmacy. Let us look first at the difficulties of evaluating human life and limb and then take up the more serious and informative question of which types of precautions are subject to reliable cost-benefit analysis and which are not.

A. The Inevitability of Valuations of Human Life and Limb

Cost-benefit analysis can be used to prevent or annul jury verdicts only when cost-benefit analysis can be sensibly used to assess the reasonableness of an untaken precaution. Some Kantians believe that cost-benefit analysis is inapposite when human life or serious human injury is at stake.[135] Even this concession may be inconsistent with Kant's ideas because practically all cost-benefit analysis is a justification for treating the victim of affirmative conduct as a "means" toward the actor's ends. Nevertheless, in the age of technology, when we often act in ways that could imperil human life or human flourishing, we inevitably place a value on life. A stroll through Königsberg may not place a value on human life or limb, but a drive down the freeway does. If a person routinely drives seventy-five miles per hour on freeways and an actuary knew from government data the fatality rate from this practice versus the fatality rate from driving at a reasonable or lawful speed and could also

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[134] Indeed, we have already mentioned these cases. *See, e.g.*, Adams v. Bullock, 125 N.E. 93, 93–94 (N.Y. 1919) (Cardozo, J.) (holding that plaintiff's verdict must be reversed because plaintiff failed to prove cost-beneficial precaution).

[135] *Cf.* Gregory C. Keating, *Is Cost-Benefit Analysis the Only Game in Town?*, 91 S. CAL. REV. 195, 207 (2018) (noting that Kant described humans as "above all price").

estimate how much value the person places on traveling at the higher speed, then the actuary could estimate the value that person places on human life. It is a simple algebraic calculation. Anyone who engages in any risky activity is implicitly placing a value on human life. When courts use cost-benefit analysis, they are not introducing any new idea but simply evaluating whether private valuations of human life are reasonable.

Let us turn now to the real problem with cost-benefit analysis in the context of negligence law. This problem requires a relatively simple taxonomy of potentially untaken precautions.

B. A Simple Taxonomy of Precautions

1. Durable and Nondurable Precautions

A "durable precaution" is basically capital. It is an asset that is purchased once (or infrequently) and yields a stream of safety benefits over time. A "durable precaution" is also a precaution that a defendant need not use repetitively because a single investment in it lasts for a long time. Examples are fire escapes, fences, life jackets, and so forth. By contrast, a "nondurable precaution" is basically labor. Such a precaution must normally be used repetitively. Nondurable precautions are usually complements to durable precautions. A fire escape will need to be periodically inspected and serviced to make sure that the last spring-loaded part of it still extends to the ground when a person steps on it; a fence must be periodically checked for holes; life jackets must be checked to see whether they are still on the boat. Nevertheless, nondurable precautions can occasionally be substitutes for durable precautions or productively independent of them. For instance, manually checking one's blind spot before changing lanes is a substitute for having a device that automatically checks the driver's blind spot; checking whether a boat's deck has any slippery places on it is a precaution that can be productive independently of whether the life jackets are still on the boat; having bright-colored strings on surgical sponges can reduce the marginal productivity of keeping an accurate count of them and thus is a precaution that substitutes for an accurate count. Just as capital and labor are used together to produce physical products, durable precaution and nondurable precaution are used together to produce safety.

2. Precaution Plans

It is also useful to distinguish between precautions and precaution plans. Courts typically bring a different analysis to faulty precaution

plans as compared to individual lapses in implementing a good plan. For instance, suppose a good plan is to count the sponges when placed into the patient, and then again before the patient is closed, to see whether the results tally. If a surgeon lacked this plan and never counted the sponges, it would lead to a conclusion of breach of duty under an objective analysis—the Learned Hand formula or some approximation of it.[136] If, on the other hand, a surgeon possessed this plan but simply failed on one occasion to notice that the number of sponges placed into the patient exceeded the number retrieved, it would lead to a more subjective analysis of breach of duty.

Theoretically, one could have a plan for both durable and nondurable precautions. One plan might be to replace your tires whenever they appear worn, and another plan might be to check your blind spot every time before you change lanes. As a practical matter, plans to use *nondurable* precautions are more salient in negligence cases.

3. Homogeneous and Heterogeneous Nondurable Precautions

We can also distinguish between "homogeneous" and "heterogeneous" nondurable precautions. If we posit some plan to use nondurable precaution repeatedly, such as to count the surgical sponges or to maintain a reasonable speed when driving, we can distinguish two different types of iterations: homogeneous and heterogeneous. Homogeneous iterations/precautions are uniform, and heterogeneous iterations/precautions are different in the sense that their required quality differs according to the variable amount of foreseeable risk avoided by each iteration and its cost. Lapses in either kind of nondurable precaution will be called "compliance errors."

C. How Does the Taxonomy Aid Our Understanding of Negligence Practice?

As we will soon see, U.S. courts allow juries to forgive all varieties of untaken precautions—durable, nondurable, homogeneous, and heterogeneous. Jury forgiveness is not allowed only in the rare instances in which courts find negligence as a matter of law. As previously mentioned, these judgments as a matter of law for plaintiffs—in jury-

[136] Judgments of breach of duty as a matter of law are very rare, but for a surgeon to adopt the plan never to count sponges, or ask anyone in the operating room to count sponges for him, would be an extremely dangerous plan that might well lead to liability as a matter of law. *See* Kesewaa v. Key Food Supermarket, 836 N.Y.S.2d 486, 486–87 (Sup. Ct. Aug. 16, 2006) (holding that negligence as a matter of law applies to a store putting shopping carts on top of a food freezer to which customers had frequent access).

eligible cases—are largely idiosyncratic across jurisdictions.[137] The main area of inconsistent practice is the violation of *selected* statutes in *some* jurisdictions. Nevertheless, a more general bar on jury forgiveness also exists, though the cases are so rare that it is difficult at this point to establish its importance. These are willful and wanton failures to use cost-beneficial durable precautions and precaution plans. In addition, some jurisdictions have begun to bar some impositions of liability for nondurable precautions under the rubric of "no duty." We will soon explore both legal themes.

The more significant implication of the taxonomy is that courts hardly ever limit impositions of liability for lapses in homogeneous nondurable precaution. Effectively, this means that courts allow juries to impose liability for some *efficient* lapses in nondurable precaution. This latter point is the key to much of the complexity of negligence doctrine. If only *in*efficient lapses were punished by the negligence system, there would be much less need for many of the judge-created limitations on negligence liability, including in the areas of duty, cause in fact, and proximate cause.

As a prelude to the subsequent analysis, we briefly explore how broadly allowable jury forgiveness extends over the various categories of untaken precautions. Juries can forgive almost all breaches of duty. Nevertheless, juries cannot require inefficient precaution except, mainly, in the area of nondurable precaution.

D. "The Quality of Mercy Is Not Strain'd"

1. Faulty or Omitted Durable Precautions

A jury was allowed to forgive the absence of highly productive anti-slip floor runners in a grocery store produce section even when the store's own safety standards required them and when store employees were conducting only the most sporadic inspections.[138] A jury was permitted to forgive a restaurant for maintaining a dangerously slippery and unlighted entrance.[139] Nevertheless, in highly similar cases, juries were also allowed to find defendants liable for the absence of durable precautions.[140]

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137 *See supra* Part III.B.

138 *See* Malaney v. Hannaford Bros. Co., 861 A.2d 1069, 1077–78 (Vt. 2004) (holding that the "question for the jury was simply whether defendant had taken reasonable steps to protect its customers, including plaintiff, from that foreseable hazard").

139 Stanford v. Bailey, Inc., 282 P.2d 992, 996–97 (Cal. Ct. App. 1955) (holding that jury was allowed to forgive dangerous entryway to café where plaintiff slipped and fell).

140 *See, e.g.*, Poloski v. Wal-Mart Stores, Inc., 68 S.W.3d 445, 448 (Mo. Ct. App. 2001) (holding that jury was permitted to find defendant retailer jointly liable with a distracted seventy-nine-year-old driver when, next to the front of the store, the driver ran over the

2. Faulty or Omitted Precaution Plans

A jury was allowed to forgive landlords who failed to comply with a regulatory procedure to abate lead that, because of the noncompliance, led to the injury of the plaintiff's infant son.[141] This was a New York case that did not entail New York's doctrine of negligence per se because the statute was not a traffic or labor code provision.[142] Similarly, juries have been allowed to forgive a faulty plan to care for an elder[143] and an omitted plan to monitor a hypertensive patient's blood pressure.[144] A jury would be permitted to forgive a faulty plan of taking an inebriated young person to the side of a cliff from which he fell.[145]

3. Faulty or Omitted Heterogeneous Nondurable Precautions

A jury was allowed to forgive a large retailer's faulty repair of a dangerous riding lawn mower that, after the supposed repair, burned the plaintiff's foot so badly that it ultimately became infected with gangrene,

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plaintiffs' decedent; plaintiffs relied on the store's failure to design the parking lot so as to reduce traffic in front of the store, absence of speed bumps, absence of crossing guards, absence of marked crosswalks, and so forth); Nin v. Bernard, 683 N.Y.S.2d 237, 238 (App. Div. 1999) (holding that jury was permitted to find that small depression in walkway was negligent); Barber v. Presbyterian Hosp., 555 S.E.2d 303, 308 (N.C. Ct. App. 2001) (jury permitted to find defendant liable for plaintiff's fall down unmarked "step-down" directly inside defendant's coffee shop door); Anderson v. Alberto-Culver USA, Inc., 740 N.E.2d 819, 828–29 (Ill. App. Ct. 2000) (jury permitted to find drainage ditch adjacent to runway was negligently placed).

141 *See* Vega v. Molina, 658 N.Y.S.2d 387, 400 (App. Div. 1997).

142 *Compare* Gonzalez v. Bishop, 68 N.Y.S.3d 454, 455–56 (App. Div. 2018) (holding that defendant, who failed to yield statutory right-of-way to through traffic, liable as a matter of law despite plaintiff's assertion the defendant was speeding, which court said was "speculative"), *with* Burns v. Marcellus Lanes, Inc., 92 N.Y.S.3d 824, 2019 WL 409216, at *1–2 (App. Div. Feb. 1, 2019) (holding that plaintiff worker who fell from backhoe bucket while cleaning snow and ice off roof was prima facie entitled to judgment as a matter of law under New York scaffold law).

143 *See* Lane v. Emeritus Corp., 855 N.W.2d 201, 2014 WL 3749425, at *5–6 (Iowa Ct. App. July 30, 2014) (unpublished table decision) (holding that jury was allowed to forgive defendant nursing home's clearly faulty plan to care for plaintiff's decedent).

144 *See* Terajima v. Torrance Memorial Med. Ctr., No. B195298, 2008 WL 192650, at *5 (Cal. Ct. App. Jan. 24, 2008) (jury allowed to forgive defendants for their faulty plan of failing to monitor plaintiff's blood pressure). *But see* Helling v. Carey, 519 P.2d 981, 983 (Wash. 1974) (holding defendant ophthalmologist negligent as a matter of law for failing to administer glaucoma test to plaintiff when such test was supposedly uncustomary for patients under forty years old).

145 *See* Carlsen v. Koivumaki, 174 Cal. Rptr. 3d 339, 354 (Ct. App. 2014) (holding that jury would be allowed to forgive defendants for faulty precaution plan of taking inebriated plaintiff to edge of cliff from which he fell). *But see* Keenan v. Smith, 197 Cal. Rptr. 32, 32 (Ct. App. 1983) (holding defendant landowner negligent as a matter of law for adopting plan not to cut down rotten tree).

which led to the amputation of both her foot and part of her leg.[146] A jury was allowed to forgive a home renter who probably failed to use reasonable precaution in escaping from a locked sunroom.[147]

4. Omitted Homogeneous Nondurable Precautions

Juries have been allowed to forgive motorists who have rear-ended cars stopped ahead of them even when the motorists have offered no excuse or justification for their lapses.[148] Juries have been allowed to forgive motorists who have struck pedestrians who were walking in the proper zone.[149] Juries may forgive surgeons who have failed to retrieve

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146 *See* Anderson v. Sears Roebuck & Co., 664 S.E.2d 911, 915 (Ga. Ct. App. 2008). *But see* Previs v. Dailey, 180 S.W.3d 435, 439 (Ky. 2005) (jury tried to absolve truck driver who failed to ensure that he had fully passed bicyclist before swinging back into her space, but court reversed and found driver negligent as a matter of law).

147 *See* Tyburski v. Stewart, 694 S.E.2d 422, 427 (N.C. Ct. App. 2010). Under the strict rule of contributory negligence that barred a plaintiff's recovery, courts often allowed juries to forgive plaintiffs for their negligence. *See, e.g.*, Granath v. Andrus, 160 P.2d 129 (Cal. Ct. App. 1945). The plaintiff in *Granath* made a mistake in judging the speed and distance of the defendant's trailer truck and collided with it; the defendant conceded that it was negligent operation of the truck, but the jury found for the plaintiff, and this judgment was affirmed because "every mistake of judgment is not negligence, for mistakes are made even in the exercise of ordinary care," and "[t]he circumstances under which a court can declare that certain acts constitute contributory negligence as a matter of law are rare." *Id.* at 130–31. *See also* Couchman v. Snelling, 295 P. 845, 846–47 (Cal. Ct. App. 1931). In *Couchman*, as plaintiff was trying to the cross street, he misjudged the closing rate of defendant's auto with the right-of-way, and a collision ensued. *Id.* The jury forgave plaintiff's alleged contributory negligence, which was affirmed on appeal because "[t]he circumstances under which a court can declare that certain acts constitute contributory negligence as a matter of law are rare." *Id.* at 847.

148 *See, e.g.*, Melgen v. Suarez, 951 So. 2d 916, 917 (Fla. Dist. Ct. App. 2007); Garcia v. Leftwich-Kitchen, 412 S.W.3d 348, 351–52 (Mo. Ct. App. 2013); Williams v. Thompson, 489 S.W.3d 823, 826, 828 (Mo. Ct. App. 2015) (holding the jury was allowed to forgive defendant for rear-end collision when she testified it was raining); Giles v. Riverside Transp., Inc., 266 S.W.3d 290, 294 (Mo. Ct. App. 2008); Capshaw v. Gulf Ins. Co., 107 P.3d 595, 604 (Okla. 2005) (holding that jury was allowed to forgive driver, who without apparent excuse or justification rear-ended plaintiff's vehicle, and reversed trial court's order for new trial); Hurt v. Chavis, 739 A.2d 924, 932 (Md. Ct. Spec. App. 1999) (stating that the jury has power to find no liability in a rear-end collision even when defendant has offered no excuse or justification); Stone v. Sulak, 994 S.W.2d 348, 351 (Tex. App. 1999) (concluding that the jury was allowed to forgive motorist who, without excuse or justification, rear-ended another vehicle; opinion collects other similar Texas cases). *But see* Guckian v. Fowler, 453 S.W.2d 323, 326 (Tex. App. 1970) (jury attempted to forgive motorist who rear-ended another car, but trial court entered judgment n.o.v. for plaintiff on issue of liability, and appellate court affirmed).

149 *See, e.g.*, Vincent v. Stinehour, 7 Vt. 62, 1835 WL 1732, at *4–5 (Vt. 1835) (holding that jury was allowed to forgive defendant who was driving his horse and sulky fast and ran down plaintiff, a pedestrian, who was walking in the pedestrian area); Kukuchka v. Ziemet, 710 P.2d 1361, 1363 (Mont. 1985) (holding that jury was allowed to forgive motorist who

surgical instruments from their patients before closing them.[150] Similarly, juries are often permitted to forgive pharmacists for dispensing the wrong drug or the wrong dosage from what was prescribed.[151]

A jury was allowed to forgive a wholesale bakery that baked and sold a brownie containing a dangerous knife blade that hurt the plaintiff's throat.[152] Another jury was allowed to forgive a teacher who, without excuse or justification, lost her grip on a piñata bat and struck the plaintiff, her first-grade student.[153]

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struck pedestrian from the rear on a dark night). *See also* Spriesterbach v. Holland, 155 Cal. Rptr. 3d 306, 313, 320 (Ct. App. 2013) (holding that jury was allowed to forgive motorist who struck bicyclist possessing right-of-way because "every mistake of judgment is not negligence, for mistakes are made even in the exercise of ordinary care, and whether such mistakes of judgment constitute negligence, is a question of fact").

150 *See, e.g.*, Houserman v. Garrett, 902 So. 2d 670, 675 (Ala. 2004) (holding that a foreign object left in a patient creates only prima facie showing of a surgeon's negligence that will allow jury to forgive the surgeon in a proper case), *rev'g* Ravi v. Williams, 536 So. 2d 1374, 1377 (Ala. 1988). *Houserman* held it proper to instruct the jury that to impute negligence it only had to find that defendant surgeon left the sponge inside the plaintiff and that she suffered damage from it. *See also* Deuel v. Surgical Clinic, PLLC, No. M2009-01551-COA-R3-CV, 2010 WL 3237297, at *17 (Tenn. Ct. App. Aug. 16, 2010). In *Deuel*, a defendant surgeon left a lap sponge in a patient during pancreatic surgery. *Id.* at *1–3. The parties cross-moved for summary judgment, the court denied both motions, and the court of appeals affirmed, making it clear that the jury possessed the power to either acquit the surgeon or not. *Id.* at *2; Estate of Deuel v. Surgical Clinic, PLLC, No. M2011-02610-COA-R3-CV, 2013 WL 11021322, at *4 (Tenn. Ct. App. Sept. 11, 2013) (in remanded case, jury did indeed forgive surgeon, and appellate court held that jury was properly instructed and again stressed that the jury possessed the power to acquit the surgeon). *See also* Warner v. Stewart, No. F037392, 2002 WL 1970072, at *1 (Cal. Ct. App. Aug. 27, 2002) (holding jury was allowed to forgive surgeon who left retractor in plaintiff). In *Chi Yun Ho v. Frye*, the defendant surgeon left a lap sponge in the plaintiff during a hysterectomy. Chi Yun Ho v. Frye, 865 N.E.2d 632, 633–34, 638–39 (Ind. Ct. App. 2007). The jury found for defendant, and the intermediate appellate court entered judgment as a matter of law for the patient on the ground that the surgeon said only that he relied entirely on the nurse's count of pads. *Id.* at 638–39, *rev'd*, Chi Yun Ho v. Frye, 880 N.E.2d 1192, 1198–99 (Ind. 2008) (remanding the cause for a new trial on ground that jury possessed power to acquit surgeon of any negligence).

151 *See, e.g.*, Cackowski v. Wal-Mart Stores, Inc., 767 So. 2d 319, 322 (Ala. 2000) (allowing jury to forgive pharmacy for misfill); Watkins v. Potts, 122 So. 416, 418 (Ala. 1929) (finding the jury was allowed to forgive pharmacist's misfill); Ohio Cty. Drug Co. v. Howard, 256 S.W. 705, 706 (Ky. 1923) (stating that pharmacist is not "insurer" of accuracy of his dispensing, and question of his negligence is for jury), *rev'g* Fleet & Semple v. Hollenkemp, 13 B. Mon. 219, 1852 WL 1716, at *7–8 (Ky. 1852). *See also* Harris v. Groth, 645 P.2d 1104, 1107 (Wash. Ct. App. 1982) (holding that jury was allowed to forgive pharmacist dispensing error supported by evidence that it caused harm even after trial court had instructed the same jury that dispensing error was negligence as a matter of law).

152 *See* McDermott v. Coffee Beanery, Ltd., 777 N.Y.S.2d 103, 112–13 (App. Div. 2004).

153 *See* A.C. *ex rel.* Cooper v. Bellingham Sch. Dist., 105 P.3d 400, 410–11 (Wash. Ct. App. 2005).

VI. WHAT NEGLIGENT CONDUCT CAN JURIES *NOT* FORGIVE?

There is little uniformity across the U.S. on what types of negligence juries cannot forgive. As already noted, judgments of negligence liability as a matter of law are much rarer than judgments of no liability as a matter of law.[154] Still, it is possible to generalize on this subject.

A. When a Party Engaged in Deliberate Gross Negligence

Suppose the evidence indicates that a defendant has deliberately acted, or not acted, so as to create a large amount of risk to others. In the language of the law, such a defendant has "willfully and wantonly" engaged in "gross negligence."[155] This is the type of conduct that often yields punitive as well as actual damages. Consistently, the courts often find such defendants "negligent as a matter of law" and thus prevent any possibility of jury forgiveness. These cases are uncommon in the case reports, probably because they often settle for full damages.

Here are two examples. In *Kesewaa v. Key Food Supermarket*,[156] the defendant had stored heavy, wheeled shopping carts on top of a freezer from which its customers retrieved food products. When the predictable occurred and a cart toppled onto the plaintiff, she sued. The court found the defendant negligent as matter of law.[157] The defendant had deliberately engaged in gross negligence. Similarly, in *Newing v. Cheatham*,[158] a civil aviation pilot failed to check his fuel gauge for several

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154 *See, e.g.*, Morejon v. Rais Constr. Co., 851 N.E.2d 1143, 1146 (N.Y. 2006) (explaining that liability as a matter of law cases are rare under res ipsa theory).

155 *See* Patrick H. Martin, *The BP Spill and the Meaning of "Gross Negligence or Willful Misconduct,"* 71 LA. L. REV. 957, 967 (2011) (defining gross negligence).

156 *See* Kesewaa v. Key Food Supermarket, 836 N.Y.S.2d 486, 2006 WL 3772314, at *2 (Sup. Ct. Aug. 16, 2006) (unpublished table decision). *See also* American Airlines, Inc. v. Ulen, 186 F.2d 529, 533–34 (D.C. Cir. 1949). In *American Airlines v. Ulen*, the court found the defendant negligent as a matter of law for adopting a flight plan in which its airliner would cross a 3910-foot mountain at 4000 feet when FAA regulations required at least 1000 feet of clearance, and the aircraft struck a mountain, injuring the plaintiff. *Id.* at 530–31. The court found liability as a matter of law existed notwithstanding the Warsaw Convention because defendant was guilty of "wilful misconduct." *Id.* at 533–34. *See also* Deep River Assocs., L.L.C. v. McCann, No. MMXCV156013881, 2016 WL 1397582, at *2 (Conn. Super. Ct. Mar. 15, 2016) (finding defendants, owners and operators of long-time dry-cleaning business, were guilty of negligence per se and personally liable to property purchasers for violating environmental statutes by dumping a dangerous chemical that plaintiffs had to remediate); Jacobs v. Westgate, 766 So. 2d 1175, 1180 (Fla. Dist. Ct. App. 2000) (per curiam) (holding the defendant negligent as a matter of law for removing plaintiff's possessions onto curb were they were stolen and ruined by rain).

157 *See* Kesewaa v. Key Food Supermarket, 836 N.Y.S.2d 486, 2006 WL 3772314, at *2 (Sup. Ct. 2004).

158 *See* Newing v. Cheatham, 540 P.2d 33, 36 (Cal. 1975).

hours. When the plane ran out of fuel it crashed, killing all aboard. A passenger's survivor sued the pilot's estate. There was also evidence that the pilot had stopped at a bar and drank beer the morning of the flight, and empty beer cans were strewn around the crash site. The investigators testified that the pilot's body smelled of alcohol but that the plaintiff's decedent's body did not.[159] The trial court entered judgment as a matter of law for the plaintiff, which was affirmed.[160] Again, the defendant had deliberately engaged in gross negligence.

Corresponding cases show that a plaintiff's deliberate act of gross negligence will often bar his or her recovery as a matter of law.[161]

B. When Jury Bias Was Probable

Courts will often find negligence as a matter of law when, despite the plaintiff presenting a strong case, the jury acquits the defendant, and it seems probable that the jury was biased either against the plaintiff or in favor of the defendant. A good example is *Huetter v. Andrews*.[162] That case involved an auto accident that occurred right after World War II when the defendant, who was twenty-two years old, had just been discharged from the Marine Corps. Failing to notice over a long period of time that the plaintiff's car was crossing the highway ahead of him,[163] the recently discharged Marine did not slow or brake his vehicle but ran directly into the plaintiff's car. At the trial, both the defendant and his lawyer conspicuously wore their Marine Corps discharge buttons, and the trial court also allowed the defendant's war record to be admitted into evidence.[164] The plaintiff was an elderly woman. The jury returned a verdict for the defendant, and the trial court entered judgment on it.[165]

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159 *Id.* at 38.

160 *Id.* at 44.

161 *See, e.g.*, Proffitt v. Gosnell, 809 S.E.2d 200, 213 (N.C. Ct. App. 2017) (finding contributory negligence as a matter of law after plaintiff stood on top of a tree that had fallen across the road until a car struck him); Quiktrip Corp. v. Fesenko, 491 S.E.2d 504, 505–06 (Ga. Ct. App. 1997) (finding contributory negligence as a matter of law when plaintiff stood for three to five minutes in a stream of gasoline from an allegedly malfunctioning retail pump); Horn v. Oh, 195 Cal. Rptr. 720, 724 (Ct. App. 1983) (after plaintiff's apparent settlement with other defendants involved in dangerous and reckless pickup-truck-pushing venture that hurt plaintiff bystander, jury attempted to absolve defendant who went to trial and who was gratuitous volunteer in venture, but court held jury could not forgive him and that this volunteer was negligent as a matter of law).

162 *See* Huetter v. Andrews, 204 P.2d 655 (Cal. Ct. App. 1949).

163 *Id.* at 656–57. The plaintiff's son, who was driving, began to cross the highway when it was safe to do so but traveled very slowly. *Id.* The road was straight, the weather good, and the defendant's forward view was unobstructed over the long period of time in which he was approaching the plaintiff's car. *Id.*

164 *Id.* at 657.

165 *Id.*

The appellate court reversed, holding that the defendant had been negligent as a matter of law and stressed that the jury may have been improperly sympathetic to the defendant.[166]

C. Idiosyncratic Statutory Violations

The main arena for negligence as a matter of law is compliance errors that also amount to traffic or labor code violations. New York possesses an especially rich jurisprudence of these cases dating from the famous Cardozo opinion in *Martin v. Herzog*.[167] In *Smith v. Omanes*,[168] the plaintiff assumed that the defendant would stop at a stop sign, but he instead ran the stop sign and collided with her. The court upheld partial summary judgment for the plaintiff on the issue of liability, stressing that the defendant had violated the state's vehicle code and that the plaintiff possessed the statutory right-of-way.[169] This is the standard result reached by New York courts in these cases so long as the plaintiff can show that she was free of comparative negligence, as in *Smith v. Omanes*, when plaintiff was entitled to assume that the defendant would obey the statute and had only seconds to react to his violation of it. Nevertheless, the picture is far from simple. Even in New York, many statutory violations, even traffic and labor code violations, yield upheld defense verdicts.[170]

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166 *Id.* at 658. *Ayala v. Lee* was a similar case. Ayala v. Lee, 81 A.3d 584, 587–88 (Md. Ct. Spec. App. 2013). During a severe rainstorm, the plaintiffs were parked on a highway shoulder, fixing a windshield wiper, when their car was struck by the defendant, who violated traffic laws by being off lane and not keeping a good lookout. *Id.* The plaintiffs were undocumented immigrants who were suing, inter alia, for lost wages. *Id.* at 588. The jury tried to acquit the defendant, but the appellate court found the defendant negligent as a matter of law and remanded for a trial on damages with detailed instructions on how plaintiffs' undocumented status should be handled. *Id.* at 599.

167 *See* Martin v. Herzog, 126 N.E. 814, 820 (N.Y. 1920) (concluding that plaintiff was contributorily negligent as a matter of law for violating a statute requiring his buggy to show a light after dark).

168 *See* Smith v. Omanes, 998 N.Y.S.2d 198, 198 (App. Div. 2014).

169 *See* N.Y. VEH. & TRAF. LAW § 1142(a) (McKinney, Westlaw through 2018).

170 Even in New York, when two defendants have each committed traffic violations, the jury can forgive one of them on proximate cause grounds. *See* Gibson v. Singh Towing, Inc., 155 A.D.3d 614, 616 (N.Y. App. Div. 2017); Pierre v. Andre, 151 A.D.3d 1089, 1090 (N.Y. App. Div. 2017); Kohler v. Barker, 147 A.D.3d 1037, 1037–38 (N.Y. App. Div. 2017). In New York, defendant who rear-ended plaintiff's vehicle and pleaded guilty to a traffic violation of traveling too closely could still be forgiven on evidence that the truck in front of plaintiff's vehicle stopped suddenly. Jones v. Egan, 585 A.D.2d 909, 912 (N.Y. App. Div. 1998). The strict New York rule may be changing. In *Zhubrak v. Petro*, a New York jury was allowed to forgive the defendant's apparent traffic violation in failing to yield the right-of-way. Zhubrak v. Petro, 48 N.Y.S.3d 704, 705–06 (App. Div. 2017), *aff'g* 998 N.Y.S.2d 85 (App. Div. 2014) (holding that a new trial was proper, as opposed to judgment as a matter of law for

California and other states allow juries to forgive even statutory violations. In *Minnegren v. Nozar*,[171] the plaintiff again had the statutory right-of-way when the defendant ran a stop sign and collided with her. Two independent witnesses testified that the defendant ran the stop sign and even accelerated through the intersection.[172] The defendant himself admitted on the stand that he caused the collision, but not "intentionally," and that he was "only human" and "made a mistake."[173] The investigating officer found that the collision was caused by his failing to yield at the stop sign, that the defendant was the "the party at fault," and that a contributing cause was the defendant's speed in running the stop sign.[174] The Los Angeles jury found for the defendant.[175] The plaintiff appealed on the ground of insufficiency of the evidence, that the evidence showed that the accident was caused by the defendant's negligence as a matter of law.[176] The California Court of Appeals instead affirmed the defense verdict and stressed that "not every mistake equates to negligence" and that it was the jury's role to determine whether this mistake should yield liability or not.[177] In California and many states, juries can forgive compliance errors, even compliance errors that violate traffic statutes designed to protect the type of plaintiff who sued.[178]

A notable exception to California's policy of requiring all compliance error cases to be tried to juries is violations of its crosswalk statutes. In *Gray v. Brinkerhoff*,[179] the defendant was turning his pickup truck left across a crosswalk and struck the plaintiff carrying groceries in the middle of a crosswalk. The jury found the plaintiff contributorily negligent

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plaintiff, when jury forgave defendant for striking plaintiff's car in intersection from stop-sign-controlled side street).

171 *See* Minnegren v. Nozar, 208 Cal. Rptr. 3d 655, 658 (Ct. App. 2016).

172 *Id.*

173 *Id.* at 660.

174 *Id.* at 659.

175 *Id.* at 660.

176 *Id.*

177 *Id.* at 664.

178 *See, e.g.*, Spriesterbach v. Holland, 155 Cal. Rptr. 3d 306, 321 (Ct. App. 2013) (defendant, without statutory right-of-way, ran directly into bicyclist with right-of-way; after the accident, plaintiff rudely complained to defendant; defense jury verdict was affirmed even with concededly erroneous instructions unfavorable to plaintiff, determined by appellate court to be "harmless error"); Safirstein v. Nunes, 50 Cal. Rptr. 642, 642 (Ct. App. 1966) (car without statutory right-of-way ran directly into car in which plaintiff was passenger; defense verdict affirmed). California courts often stress that "mistakes are made even in the exercise of ordinary care" and even with respect to statutory duties. *See* De Priest v. City of Glendale, 169 P.2d. 17, 21 (Cal. Ct. App. 1946). This doctrine seems to have arisen as a means of forgiving the plaintiff's contributory negligence. *Id.* ("[M]istakes are made even in the exercise of ordinary care."). This doctrine is now applied to primary negligence.

179 *See* Gray v. Brinkerhoff, 258 P.2d 834, 835 (Cal. 1953).

though there was little evidence to support that finding. The California Supreme Court found not only that the evidence was insufficient to show contributory negligence (in other words, that the plaintiff was not liable as a matter of law) but also that the defendant was negligent as a matter of law.[180] It seems from the opinion that the court's main concern was to limit jury findings of contributory negligence, but a corollary of that wish was to find the defendant negligent as a matter of law in this case. The defendant had offered two excuses for hitting the plaintiff: (1) that his attention was diverted by a fast-approaching car; and (2) that his vision of the plaintiff was obscured by the front part of his truck.[181] The court found both excuses legally insufficient and stressed that the plaintiff possessed the statutory right-of-way.[182]

Gray v. Brinkerhoff was immediately limited by *Callahan v. Gray*,[183] a case in which the plaintiff walked into the defendant's car, which was stopped in a crosswalk. In addition, there was no evidence of damages. The court affirmed the jury verdict for the defendant.[184] Subsequent California crosswalk collision cases entail a mixture of liability as a matter of law[185] and deference to the jury verdict.[186] Nevertheless, holdings of

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180 *Id.* at 836.

181 *Id.*

182 *Id.* ("'The driver of a vehicle shall yield the right of way to a pedestrian crossing the roadway within any marked crosswalk . . . .' It is undisputed that defendant did not yield the right of way to plaintiff. Such failure constitutes a violation of the statute and negligence as a matter of law in the absence of reasonable explanation for defendant's conduct.").

183 *See* Callahan v. Gray, 279 P.2d 963, 965 (Cal. 1955).

184 *See id*. (holding that evidence supported jury finding that plaintiff negligently walked into the side of defendant's car).

185 *See* Novak v. Dewar, 361 P.2d 709, 711 (Cal. 1961) (finding the defendant negligent as a matter of law and plaintiff nonnegligent as a matter of law). *See also* La Manna v. Stewart, 530 P.2d 1073, 1083 (Cal. 1975) (concluding that defendant motorist was negligent as a matter of law); Schmitt v. Henderson, 462 P.2d 30, 34 (Cal. 1969) (deciding that defendant motorist was negligent as a matter of law and plaintiff pedestrian nonnegligent as a matter of law).

186 *See* Shoemake v. Wilsey, 277 P.2d 17, 19 (Cal. 1954) (upholding a verdict for defendant motorist). *See also* Flores v. McCoy, 186 Cal. App. 2d 502 (1960) (holding that the jury was entitled to find pedestrian contributorily negligent); Myers v. Carini, 262 Cal. App. 2d 614 (1968) (upholding the jury verdict despite questioning the instruction given to the jury); Byrne v. County of San Francisco, 113 Cal. App. 3d 731 (1980) (holding that there was no abuse of discretion in denying plaintiff's motion for a new trial on sufficiency of evidence); Cohen v. Bay Area Pie Co., 217 Cal. App. 2d 69 (1963) (holding jury was entitled to find that the pedestrian had waived right-of-way in crosswalk); Mandakunian v. Zoller, No. B161836, 2004 WL 2712207 (Cal. Ct. App. Nov. 30, 2004) (upholding defense verdict for bus driver who never saw pedestrian); Vitushkina v. Luminalt Energy Corp., No. A140393, 2014 WL 5803935 (Cal. Ct. App. Nov. 10, 2014) (upholding defense verdict and distinguishing a case on which plaintiff relied); Webb v. Van Noort, 48 Cal. Rptr. 823 (Ct. App. 1966) (finding that, under the statute, the jury was entitled to excuse motorist lacking knowledge that his turn signal bulb was defective).

liability as a matter of law for motorist crosswalk violations extend into present times.[187]

VII. WHERE DOES THIS LEAVE US?

Cost-benefit analysis limits excessive requirements for durable precaution, precaution plans, and heterogeneous nondurable precautions. With respect to homogeneous nondurable precautions, like checking blind spots and retrieving surgical sponges, the only control on jury behavior is when the allegedly omitted nondurable precaution would have been part of a precaution plan that was not cost-justified. Nevertheless, it is surely uneconomic for the law to insist that people be perfect in their use of homogeneous nondurable precaution. This seems to be the primary justification for jury forgiveness of negligence, and jury forgiveness is indeed most prominent in this area, though it is available for other types of precaution as well. Whether the law creates too much liability for lapses in nondurable precaution is a question that depends partly on how frequently juries forgive.

It might be objected that a more appropriate remedy would be to allow the parties to explore the defendant's historical error rate. Courts have largely rejected this option, as the following analysis demonstrates.

A. Inadmissibility of Prior Similar Incidents of Negligence

A seemingly logical way for courts to solve the problem of whether a single error was negligent would be to allow plaintiffs to introduce evidence about the defendant's safety habits and reputation for safety, especially prior identical errors. For instance, if a surgeon had a record of leaving foreign objects in patients, then let the jury hear that evidence as relevant to whether he or she was maintaining a reasonable and efficient compliance rate. Surprisingly, the courts rarely allow this evidence to be introduced on the issue of liability because they say it could be too prejudicial.

Much of this doctrine can be explained by the hypothesis that courts believe juries would be too likely to find liability based on a small and possibly unlucky set of prior errors. Under this rule of evidence, a surgeon who has forgotten two sponges or a pharmacist who has misdispensed two prescriptions could be driven from his profession even though his actual error rate might be above average. The courts' logic appears to be

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187 *See* Asmelash v. Braga, No. H023824, 2003 WL 21437634 (Cal. Ct. App. June 23, 2003) (finding defendant motorist negligent as a matter of law in crosswalk violation case in which no comparative negligence issue existed).

that every surgeon[188] or pharmacist[189] must be exposed to suit for each error but that it is undesirable that juries should be influenced by a record of prior errors because such a record can be deceptive in a world in which all surgeons and pharmacists err. In fact, this same rule applies to nonprofessional errors, such as driving errors,[190] presumably for the same reason. On the other hand, once a jury has found liability, it is proper to allow evidence of the defendant's prior similar errors on the issue of punitive damages.[191] Nevertheless, normally evidence supporting punitive damages would be inadmissible unless there was also some evidence that the defendant had acted with a conscious and deliberate disregard of the interests of others.[192]

The concern seems to be restricted to limiting damage to reputation based on an unscientific sample. Where reputation is not involved, but instead the plaintiff wants to introduce evidence that prior pedestrians

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188 *See* Jackson v. Hajj, No. E030178, 2003 WL 21329772 (Cal. Ct. App. June 10, 2003) (holding evidence of prior bungled surgery inadmissible against surgeon on issue of negligence). Modern medical malpractice reform statutes sometimes prohibit a plaintiff seeking to discover prior similar error by a health care professional, including a pharmacist, which adds more force to the common-law rule in this arena. *See Ex parte* Rite Aid of Ala., Inc., 768 So. 2d 960, 963 (Ala. 2000) (holding that pharmacy was entitled to writ of mandamus against discovery order seeking evidence of pharmacist's prior dispensing errors similar to dispensing error that killed plaintiff's decedent).

189 *See* State *ex rel*. Malan v. Huesemann, 942 S.W.2d 424, 426 (Mo. Ct. App. 1997) (holding that evidence of pharmacist's prior errors was inadmissible against him to show that he probably made the error in question or for just about any other reason).

190 *See* Grenadier v. Surface Transp. Corp. N.Y., 271 A.D. 460, 461 (N.Y. App. Div. 1946) (holding driver's previous accidents inadmissible). *See also* Hartley v. Szadkowski, 32 A.D.2d 550, 551 (N.Y. App. Div. 1969) (holding evidence about plaintiff's prior auto accident inadmissible in subsequent auto accident case); Robinson v. Albany, 218 N.Y.S.2d 421 (App. Div. 1961) (holding that defendant police officer could not be asked about prior patrol car accidents in case involving another accident in which plaintiff's decedent was killed); Downing v. Barrett Mobile Home Transp., 113 Cal. Rptr. 277 (Ct. App. 1974) (holding it was reversible error to examine a party to an auto accident about prior accidents).

191 *See* Marjorie A. Shields, *Exemplary or Punitive Damages for Pharmacist's Wrongful Conduct in Preparing or Dispensing Medical Prescription – Cases Not under Consumer Product Safety Act (15 U.S.C.A. § 2072)*, 109 A.L.R. 5th 397 (2003) (describing standards for establishing liability against a pharmacist for compensatory and punitive damages for wrongful conduct in preparing or filling a medical prescription). *See also* McClure v. Walgreen Co., 613 N.W.2d 225, 237 (Iowa 2000) (holding prior incidents of misfilled prescriptions relevant to punitive damages); Harco Drugs v. Holloway, 669 So. 2d 878, 881 (Ala. 1995) (prior incidents of misfilled prescriptions relevent to punitive damages).

192 *See* Gregory v. Wal-Mart Stores East L.P., No. CV 212-042, 2013 WL 3976648 (S.D. Ga. Aug. 12, 2013) (holding that defendant, who misfilled prescription, was entitled to summary judgment on the issue of punitive damages unless there was evidence it possessed "such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (quoting Comcast Corp. v. Warren, 650 S.E.2d 307, 311 (Ga. Ct. App. 2007))). *See also* Mableton Parkway CVS, Inc. v. Salter, 615 S.E.2d 558, 564 (Ga. Ct. App. 2005) (holding that punitive damages were unavailable for a simple dispensing error).

had slipped on a particular cement divider, that evidence will be received.[193] Where a building had a prior fire, and there was independent evidence of construction and maintenance problems, evidence of prior fire was admissible relative to the issue of whether negligence had led to the current fire.[194] Consistently, the defendant in *Crafter v. Metropolitan Railway*, discussed above, was allowed to introduce evidence that no record existed of any other slip and fall on the steps in question since their construction.[195] When the defendant's similar barrel of sulfuric acid exploded on the same day as the barrel explosion that hurt the plaintiff, the prior explosion was admissible to show the defendant's negligence.[196] Nevertheless, when the proffered evidence goes more to the defendant's reputation for care than to a defined hazardous condition, the evidence is excluded.[197]

B. A Stochastic Tax

The common-law system imposes a stochastic tax on negligent behavior. Even obviously negligent behavior often earns jury forgiveness and sometimes yields large damages. The very uncertainty of this system encourages the settlement of claims. Very few plaintiffs can afford to roll the wheel between one state of the world in which they receive a million dollars and another state of the world in which they recover zero and even have to pay the defendant some significant amount of his or her court

193 *See* Gilbert v. Pessin Grocery Co., 282 P.2d 148, 160 (Cal. Ct. App. 1955) (concluding that prior trip and falls on cement divider in supermarket parking lot were admissible to show foreseeability of hazard). *See also* Martin v. Our Lady of Wisdom Reg'l Sch., 54 N.Y.S.3d 692 (App. Div. 2017) (holding that prior accidents with defendant's gate were admissible to prove defendant's negligence).

194 *See* Sivit v. Vill. Green of Beachwood, No. 98401, 2013 WL 177465 (Ohio Ct. App. Jan. 17, 2013) (holding that evidence of specific dangerous conditions at building and previously litigated fires were both admissible). *See also* Kelly v. GEPA Hotel Owner Indianapolis LLC, 993 N.E.2d 216 (Ind. Ct. App. 2013) (stating that with allegations of negligent inspection and maintenance, a juror could reasonably conclude that a more careful inspection of the elevator on the two incidents prior to the plaintiff's fall would have revealed a defeat in the motion controller).

195 *See* Crafter v. Metropolitan Ry. Co. (1866) 1 LRCP 300, 301–04 (Eng.) (holding evidence insufficient to show negligence).

196 *See* Gall v. Union Ice Co., 239 P.2d 48, 58–59 (Cal. Ct. App. 1951) (finding that when plaintiff was hurt by defendant's exploding barrel of sulfuric acid, evidence that another of defendant's barrels exploded on the same day was admissible to show negligence).

197 *See* Johnson v. Target Corp., 487 F. App'x 298 (7th Cir. 2012) (trial court's exclusion of evidence of similar slip and falls at the same store was proper).

costs.[198] The system also encourages potential injurers to become insured, either through market insurance or self-insurance.

The operation of the system is a far cry from the Euclidean conception of the classical legal economists who have now thoroughly modeled the conditions under which various liability rules will induce zero negligence. The actual negligence system generates thousands, probably hundreds of thousands, of negligent acts every day. Many of these are efficient in the sense that they cannot be prevented at reasonable cost. Still, it is very difficult for courts to assess whether they are efficient or not. The major problem is that most efficient negligent acts look the same as their inefficient counterparts. The ultimate issue is the rate of a person's negligent behavior, which cannot cheaply be measured. How well the negligence system performs in producing safety at reasonable cost has become an empirical question. The system is a decentralized system of social control that in some settings seems to produce a significant amount of safety. How else, with today's technology, would we create so much safety on public highways and elsewhere?

VIII. EXPLAINING DEFENDANTS' APPELLATE ADVANTAGE

The empirical literature has uncovered a puzzle. On appeal, defendants' verdicts seem much more secure than plaintiffs' verdicts, and defendants' verdicts after a bench trial seem much more secure than defendants' verdicts after a jury trial.[199] These findings extend across a

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198 *See, e.g.*, Minnegren v. Nozar, 4 Cal. App. 5th 500 (2016) (ordering plaintiff to pay defendant's court costs in a case in which defendant failed to yield right-of-way and t-boned plaintiff).

199 *See* Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts Redux – An Empirical Study of State Court Trials on Appeal*, 12 J. EMPIRICAL LEGAL STUD. 100, 114 (2015) [hereinafter Eisenberg & Heise Redux]. Other reports of different levels of defendants' appellate advantage for different types of cases are contained in Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 137 tbl.2 (2001) (reporting different levels of defendants' appellate advantage in different types of federal cases from 1988–97); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 954 tbl.2 (2002) (reporting appellate reversal rates in different types of federal cases from 1988–97); Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts – An Empirical Study of State Court Trials on Appeal*, 38 J. LEGAL STUD. 121, 127–28, 134 tbl.2 (2009) (reporting different levels of defendants' appellate advantage in different types of state cases, 2001–05); Theodore Eisenberg & Henry S. Farber, *Why Do Plaintiffs Lose Appeals? Biased Trial Courts, Litigious Losers, or Low Trial Win Rates?*, 15 AM. L. & ECON. REV. 73, 76, 99 tbl.7 (2013) (reporting different levels of defendants' appellate advantage in different types of federal cases from 1988–98) [hereinafter Eisenberg & Farber]; Michael Heise & Martin T. Wells, *Revisiting Eisenberg and Plaintiff Success: State Court Civil Trial and Appellate Outcomes*, 13 J. EMPIRICAL LEGAL STUD. 516, 516, 524 tbl.2 (2016) (reporting different levels of defendants' appellate advantage in different types of state cases from 2001–09).

variety of cases, including negligence cases. Among negligence "motor vehicle" cases tried in state courts between 2005 and 2009, defendants won 31.0% of their appeals, and plaintiffs won only 12.5% of their own.[200] During the same period, defendants won 32.1% of medical malpractice appeals, while plaintiffs in these cases won 24.2% of their appeals.[201] Empirical scholars have mainly argued that trial courts and their juries favor plaintiffs because they empathize with victims; then, to restore balance, appellate courts disfavor plaintiffs.[202] Because appellate courts perceive that juries favor plaintiffs more than trial judges do, appellate courts' favor of defendants is more pronounced when they review jury-tried, as opposed to bench-tried, cases.[203] Another theory is that plaintiffs often bring weak cases to trial, and these weak cases are then recognized as bad cases by appellate courts possibly, again, because trial courts are biased in favor of plaintiffs.[204]

If we think first of negligence law, we can better explain negligence defendants' appellate advantage with negligence law's inherent asymmetry in which, at all levels, judgments as a matter of law are much more common for defendants than for plaintiffs.[205] A basic purpose of judgment as a matter of law for plaintiffs is to prevent jury forgiveness of violations of recognized legal standards, and a corresponding purpose of judgments as a matter of law for defendants is to prevent juries from implementing their own excessive standards that go beyond the recognized legal standard. When a body of law like negligence allows many more judgments as a matter of law for defendants than for plaintiffs, it suggests that courts are more concerned about juries implementing an excessive legal standard than they are concerned about jury forgiveness.

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200 *See* Eisenberg & Heise Redux, *supra* note 199, at 114 tbl.2.

201 *See id*. The apparent defendants' advantage in medical malpractice cases possessed a lower statistical significance as compared to motor vehicle cases because of a smaller number of cases in the sample.

202 *See* Eisenberg & Farber, *supra* note 199, at 106 (providing several related theories for defendants' appellate advantage).

203 *See* Eisenberg & Heise Redux, *supra* note 199, at 105–06.

204 *See id*. at 105–08.

205 Further evidence for this asymmetry is that in federal court tort cases, defendants filed 85% of the motions for summary judgment, and plaintiffs filed only 14% of these motions. *See* Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr., to Judge Michael Baylson 6 tbl.1 (Aug. 13, 2008), https://www.uscourts.gov/sites/default/files/sujulrs2.pdf [https://perma.cc/RQU3-SN3N] [hereinafter Cecil & Cort Memorandum]. This statistic from federal courts probably understates the asymmetry in state courts because many of the tort cases tried in federal courts are FTCA cases, always tried to judges, which facilitates judgment as a matter of law for plaintiffs. Indeed, no other judgment is possible. *See also* Jonah B. Gelbach, *Rethinking Summary Judgment Empirics: The Life of the Parties*, 162 U. PA. L. REV. 1663, 1669 (2014) (finding that the "vast majority" of federal tort summary judgment motions are filed by defendants).

The desire of appellate courts to protect jury forgiveness could explain why negligence defendants' jury verdicts seem so secure on appeal, especially in areas in which jury forgiveness is prominent, such as negligence law.[206]

Think again of *Minnegren v. Nozar*,[207] which was discussed above.[208] In that case several witnesses testified that to get to an open parking space, the defendant ran a stop sign and then heedlessly accelerated through an intersection and struck the plaintiff. We know that the defendant offered over $20,000 to settle this case, but the plaintiff rejected it and went to trial where the jury returned a verdict for the defendant. Why the jury forgave the defendant we do not know. Perhaps the jurors inferred that the defendant had probably made a settlement offer, and they were angered that they had to take time to decide the case.[209] Or they could have just liked the defendant better than the plaintiff. In either event, once the jury found for the defendant, the verdict was fortified by the appellate court's procedural rules. This means the facts of the case became the *defendant's version* of the facts so long as they were supported by "substantial evidence," which in extreme cases like *Minnegren* can mean merely the evidence of a single self-serving witness, even when opposed by multiple independent witnesses. Because the defendant had testified that he did stop at the stop sign and that he looked for opposing traffic, those became the legally germane facts on appeal. If the plaintiff had won the jury verdict, the legally germane facts on appeal would have been the opposite. Thus, these fact-interpretative rules have an equal tendency to lock in both defendants' and plaintiffs' verdicts and do not, by themselves, solve the puzzle.

As suggested above, the root cause of defendants' appellate advantage may be that defendants possess many more arguments than plaintiffs for judgment as a matter of law. Most importantly, if a court thought that a plaintiff's alleged and proven untaken precaution against the defendant was not required by cost-benefit analysis, the court will

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206 As noted at the beginning of Part VIII, among negligence "motor vehicle" cases tried in state courts between 2005 and 2009, defendants won 31.0% of their appeals, and plaintiffs won only 12.5% of their own. *See supra* text accompanying note 200. During the same period, defendants won 32.1% of medical malpractice appeals, while plaintiffs in these cases won 24.2% of their appeals. *See supra* text accompanying note 201. *See, e.g.*, Eisenberg & Heise Redux, *supra* note 199, at 114 tbl.2 (providing statistics on motor vehicle and medical malpractice cases). Defendants' lesser appellate advantage in medical malpractice cases may suggest that courts are more concerned with jury forgiveness of medical negligence than with jury forgiveness of motorist negligence possibly because juries are more disposed to forgive medical negligence, perhaps excessively in the appellate courts' view.

207 Minnegren v. Nozar, 208 Cal. Rptr. 3d 655 (Ct. App. 2016).

208 *See supra* text accompanying notes 171–77.

209 The jury of course would not have been told about the plaintiff's settlement offered.

reverse a plaintiff's verdict. In medical and professional malpractice cases, a court will reverse a jury's verdict because of an absence or paucity of expert evidence showing that the untaken precaution proven by the plaintiff was required by the ruling professional standards. Plaintiffs who have lost verdicts possess no equivalent appellate arrows to aim at their victorious opponents. It seems that many bodies of substantive law create larger opportunity sets for no liability as a matter of law[210] than for its opposite. With these bodies of law, like negligence, the imbalance in appellate success suggests that courts are more concerned with preventing the implementation of excessive jury conceptions of the legal standard than they are about jury forgiveness of violations of the legal standard. This theory also suggests a prediction that can be empirically assessed. Defendants' appellate advantage should be least pronounced for bodies of substantive law in which judgments as a matter of law for plaintiffs are about as frequent as those for defendants.[211]

The ratios of plaintiff-to-defendant *appellate* wins famously fail to conform to the 50-50 ratio theorized by Priest and Klein.[212] Nevertheless, Priest and Klein expressly limited their theory and empirical evidence to trials.[213] Because appeals result only from tried cases,[214] and not from the much larger set of potential legal claims, these appeals are not intensively "selected" from a large pool as tried cases are. Under the Priest-Klein theory, the proportion of won and lost appeals should better reflect the overall proportion of wins and losses in the general population of similar appeals. Although defendants generally win more appeals than plaintiffs,

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210 *See* Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindskopf, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 886–89 (2007) (defendants make nearly three times more motions for summary judgment, and succeed on them more often, than plaintiffs); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010) (criticizing trends toward judgment as matter of law for defendants following the ruling in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

211 *See infra* text accompanying notes 212–22 (providing more predictors of defendants' appellate advantage within specific areas of law).

212 *See* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) [hereinafter Priest & Klein] (first theorizing that *trial* results should be distributed approximately 50% for plaintiffs and 50% for defendants); Donald Wittman, *Is the Selection of Cases for Trial Biased*, 14 J. LEGAL STUD. 185 (1985) (criticizing the Priest-Klein theory and offering a somewhat different theory); George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215 (1985) (defending the Priest-Klein theory).

213 Priest and Klein repeatedly refer to "trials" and "verdicts," and all their empirical evidence in support of their 50% theory relates to trial results. *See* Priest & Klein, *supra* note 212, at 30–51.

214 Under Priest-Klein and other studies following it, a trial can include a sustained motion for summary judgment or a sustained demurrer or motion to dismiss for failure to state a claim.

the degree of the appellate advantage possessed by defendants varies significantly across different bodies of law.[215]

Plaintiffs' judgments as a matter of law in *copyright infringement* cases are probably a much higher proportion relative to defendants' judgments as a matter of law when compared to the proportion between the two in negligence cases.[216] For instance, when a defendant makes a slavish or mechanical copy of a plaintiff's copyrighted work, the plaintiff can win partial summary judgment on the issue of liability without the need to send this part of the case to a jury.[217] Such copyright cases appear to be relatively common.[218] That the possibilities for judgment as a matter of law are equally balanced may be symptomatic of a body of law in which jury forgiveness of defendants is not a large factor, either because jury forgiveness would not promote the courts' objectives (so that courts prevent it) or because juries are not disposed to forgive violations of the body of law in question. In addition, unlike with negligence cases, juries in copyright cases may not be disposed to implement an excessive legal standard, which would be another factor that would bring copyright judgments as a matter law for defendants more into balance with similar judgments for plaintiffs. Consistently, and in contrast to negligence

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[215] *See* Eisenberg & Heise Redux, *supra* note 199, at 114 tbl.2. Defendants possess extreme appellate advantages in state court actions involving "assault, slander, libel"; "products liability"; and "employment contract." *Id.* In all of these substantive areas, it is plausible that courts would be more concerned about the implementation of excessive liability standards than with jury forgiveness.

[216] I have been unable to find what, if any, is defendants' appellate advantage in copyright cases. To my knowledge, the only area in which plaintiffs possess an appellate advantage is with federal "negotiable instruments" cases. *See* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 954 tbl.2 (2002). Because I know less about that body of law than copyright, I am using copyright as my example. The empirical literature does record a low defendants' appellate advantage in "intellectual property" cases.

[217] *See, e.g.*, Sanrio, Inc. v. Ronnie Home Textile, Inc., No. CV 14-06369-RSWL-JEMx, 2016 WL 5956096, at *5 (C.D. Cal. Jan. 5, 2016) (holding that summary judgment in favor of plaintiff is proper, inter alia, where the "works are so overwhelmingly identical that the possibility of independent creation is precluded"); Alan J. Hartnick, *Summary Judgment in Copyright: From Cole Porter to Superman*, 3 CARDOZO ARTS & ENT. L.J. 53 (1984).

[218] The search "adv: copyright & 'summary judgment #in favor #of plaintiff'" in the Westlaw All Federal library returned 339 cases on March 29, 2019. On the same date, the search "adv: negligence & 'summary judgment #in favor #of plaintiff'" in the Westlaw All States library yielded 1042 cases. The All States population of negligence cases must be much more than three times greater than the All Federal population of copyright cases, suggesting that judgment as a matter of law for plaintiffs is less common in negligence than in copyright cases. When I searched the respective Westlaw libraries for "copyright" and "negligence," to attempt to find the respective populations, the system returned 10,000 cases for each, the system default limit, which is uninformative.

appeals, intellectual property defendants possess practically no advantage on appeal.[219]

A legal area's ratio of judgments as a matter of law for defendants[220] to those for plaintiffs will not be the complete cause of defendants' appellate advantage, but this causative factor should correlate well with other causes, such as the extent to which defendants are entitled to jury instructions encouraging juries to forgive defendants' violations of legal standards and the like. In a rational system, the causes of defendants' appellate advantage should reflect courts' concerns in different substantive areas about the cost of further (*i.e.*, marginal) jury absolutions of violations together with the cost of marginal implementations by juries of excessive legal standards. Defendants' appellate success will be more related to the former and plaintiff's appellate success more related to the latter. Theoretically, however, either factor or both could influence either party's appellate success. An appellate court could find for a defendant

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[219] I have been unable to find the appellate win rates for copyright cases taken by themselves. As for "intellectual property" appeals, see Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659, 672 (2004) (reporting that in intellectual property cases from 1987–95, plaintiffs won 32.8% of their appeals and defendants won 36.7% of theirs, which is a much smaller disparity than for negligence and most other types of cases). It is possible that defendants' appellate advantage in copyright cases is even smaller than in the larger category of intellectual property cases. *See also* John R. Allison, Mark A. Lemley & David L. Schwartz, *Understanding the Realities of Modern Patent Litigation*, 92 TEX. L. REV. 1769 (2014) (depicting statistical analysis conducted on summary judgment rulings in patent litigation like, for example, patentees win a significant number of summary judgment motions in district courts on the issue of patent invalidity for most patents).

The most prominent comparison of cases in the literature is between employment discrimination cases for which defendants possess a large appellate advantage and negotiable instrument cases for which plaintiffs possess a modest appellate advantage. *See* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002). This result suggests that defendants in employment discrimination cases receive judgment as a matter of law much more commonly than do the plaintiffs in these cases but that in negotiable instrument cases, judgment as a matter of law is much more balanced between plaintiffs and defendants and even that plaintiffs get judgment as a matter of law more often than defendants, the opposite of the situation in negligence law and probably most other bodies of law. *See also* Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45 (2005) (reporting that a large proportion of employment discrimination cases settle because either summary judgment is granted for the defendant or the defendant has threatened to motion for summary judgment).

[220] A judgment as a matter of law for one party or the other can be ordered by an appellate court as well as a trial court. If, in a negligence case, an appellate court finds that all the defendant's untaken precautions, as alleged by the plaintiff, exceeded the requirements of cost-benefit analysis, the court will often order judgment as a matter of law for the defendant, as by reversing a trial court's refusal to enter judgment notwithstanding the verdict for the defendant after a plaintiff's verdict.

because it thought that juries in that area of law had adopted appropriate levels of forgiveness (and so this jury should be permitted to forgive) or because it thought that this jury had implemented an excessive legal standard. As noted at the beginning of the discussion, with almost the same level of appellate reversals in favor of defendants (31.0% and 32.1%, respectively), plaintiffs possess only a 12.5% reversal rate in motor vehicle negligence cases but a 24.2% reversal rate in medical malpractice cases. Appellate courts may be assessing that the current rate of jury forgiveness of defendants in motor vehicle negligence cases is appropriate with deterrence goals in mind but that jury forgiveness in medical malpractice cases is excessive in terms of what patients lose through diminished deterrence of medical errors.

This conception of the problem assumes that some positive benefit comes from jury decision-making because both excessive jury forgiveness and excessive jury standards impose unique costs vis à vis bench trials. Positive levels of jury forgiveness and excessive standards are probably beneficial in some areas of law for their own unique reasons and because both "errors" promote settlement by increasing the economic risk of trial, that is, the variance of different trial results upon the same or similar facts.[221]

With intellectual property, the contractual economy depends on certainty. Any uncertainty, which would certainly result from widespread jury forgiveness of copyright infringement, would operate as a tax upon the benefits of copyright law. Thus, courts may award judgment as a matter of law for plaintiffs in large numbers of copyright cases to prevent jury forgiveness of defendants. With negligence, by contrast, contractual certainty is not as important, largely because insurers—the main contractual players—can rely on the predictability of the large numbers of potential negligent auto accidents in their insurance books, whether juries forgive or not.[222] In addition, full liability for all inadvertent negligence—the most common type—could counterproductively incentivize overprecaution because inadvertent

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[221] *See* A. Mitchell Polinsky & Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J. ECON. 562 (1991) (noting that uncertainty in law can lead to positive legal results that both compensate the plaintiff and deter the defendant); Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443 (2004) (analyzing how uncertainty in law can lead to positive legal results in both criminal and tort law). *But see* J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates in Japan*, 18 J. LEGAL STUD. 263 (1989) (finding that Japanese courts produce so much certainty in auto accident cases that it promotes settlement).

[222] *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1540–43 (1987) (explaining why the law of large numbers often makes insured risks predictable to insurance companies).

negligence is sometimes efficient, notably in the auto-accident arena. Copyright infringement, by contrast, is more often intentional and more likely to be inefficient on its face. Thus, jury forgiveness of copyright infringement would be counterproductive from that perspective as well. Therefore, when the statistic is finally revealed, I predict a smaller appellate advantage for defendants in copyright cases than in motor vehicle negligence cases.

IX. CONCLUSION

The classical economic theory of negligence was basically a translation of Oliver Wendell Holmes's theory of negligence. It even extended it. Nevertheless, theories can blind us to reality as much as they can help us see it more clearly. It is a remarkable tribute to Holmes's analytical and rhetorical skills how influential his theory still remains even though legal practice falsifies it with practically every new negligence case.