

## THE NEGLIGENCE ISSUE

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It would be futile for the law to attempt to deal in detail by way of precise anticipatory rule with each of the infinite number of cases which can be classified as "negligence" cases.<sup>1</sup> The number of such situations in which the quality of conduct can be measured by standards stated in terms of conduct is relatively small.<sup>2</sup> The torrents of pertinent factors incident to any wholesale attempt along this line are beyond classification and statement.<sup>3</sup> The qualities of personality are themselves numerous; their shadings are countless; the conduct of individuals is incalculable at present in its variety; the possible combinations of these are literally infinite, as infinite as space and time. The number of instances of conduct which could be labelled either as negligent or non-negligent is beyond the limits of any catalog

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<sup>1</sup> The term "negligence" is employed in two distinct senses. In the first place it serves to cover that division of the field of tort liability roughly classified as "unintended harms" as opposed to "intended harms." But the division of "unintended harms" itself is made up of three segments which in turn are roughly classified as "accidental harms", "negligent harms," and harms on account of which "absolute liability" is imposed. The "negligence" category is the most important of this division and its dominance is reflected by the tendency to speak of all these cases as "negligence cases." It represents the most expansible and extensive single division of the law. Thousands of the most varied cases are so classified. A great many difficulties cluster about the devices employed for making distinctions between the cases of these neighboring categories.

The second usage of the term is more restricted. It indicates merely *one* of the elements disclosed by an analysis of a "negligence" case. These elements are: (1) the right—duty element, (2) invasion of plaintiff's right or violation of defendant's duty (the 'negligence' issue), (3) causal relation, and (4) damages. See *Newton Auto Co. v. Herrick*, 212 N. W. 680 (Iowa, 1927); *Illinois Cent. R. R. v. Cash's Adm'n*, 299 S. W. 590 (Ky. 1927); GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927) 2. The negligence issue is the distinguishing factor in this class of cases and tends to overshadow all the other elements.

<sup>2</sup> These instances are largely confined to police regulations as the "Stop, Look and Listen" rule, speed limits, sale of poisons, and the like. In these cases precision of conduct is highly desirable. But even here the possible situations are so many that the integrity of those hard and fast rules is not infrequently violated. See *Hinton v. Southern Ry.*, 172 N. C. 587, 90 S. E. 756 (1916); *Standard Oil Co. v. Roberts*, 107 S. E. 838 (Va. 1921).

<sup>3</sup> "But since it is impossible to anticipate the innumerable combinations of circumstances which may arise, it is impossible for the law to formulate in advance definite standards by which the propriety of conduct under every conceivable set of circumstances may be judged." Bohlen, *Mixed Questions of Law and Fact* (1924) 72 U. PA. L. REV. 111, 113.

the law can make. So it is not surprising that in the face of infinity the law does exactly what other sciences do in like situations. It adopts a formula; a formula in terms which will permit its problems to be reduced to a graspable size. This formula, like many other formulas, tends quickly to become ritual and it would seem that it is only this ritual which holds the law's interest. This much it insists upon rigorously, but this is as far as the law's science goes in this direction. It seems to have no interest in the "physical, mental and moral" qualities and characteristics of personality as such, nor in the qualities and characteristics of the "ordinary prudent person."<sup>4</sup> And while it is intellectually stimulating to inquire into the intelligence, experience, powers of memory, observation, coordination, the reaction time, self-control, courage, skill, ad infinitum, which the law might require of defendants, such inquiry is rendered utterly without profit for the purposes of determining the negligent conduct of any particular defendant in any particular case. The law does not make any attempt to require any of them in any one or more combinations. A formula in these terms has not been written which can be relied on to fit a single defendant in a single case.

Legal analysis and classification have two immediate functions. First, they develop and bring to the surface the significant factors of a problem so that judgment can be more readily passed. They discourage passing judgment in bulk, hence facili-

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<sup>4</sup> Two recent studies by able legal scholars have subjected "negligence" to most painstaking analyses. Edgerton, *Negligence, Inadvertence and Indifference; The Relation of Mental States to Negligence* (1926) 39 HARV. L. REV. 849; Seavey, *Negligence—Subjective or Objective* (1927) 41 HARV. L. REV. 1. See also Shulman, *The Standard of Care Required of Children* (1928) 37 YALE LAW JOURNAL 618. See also numerous writers on the general subject as listed by Professor Edgerton.

After surveying the views of a long list of writers to the effect that negligence is or involves or consists of a mental state, Professor Edgerton concludes: "I submit that all this is erroneous. 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." Edgerton, *ibid.* 852.

Professor Seavey undertakes to ascertain: ". . . how far the conduct of one charged with negligence is tested in the light of his individual qualities and how far his peculiar qualities are ignored, and incidentally to deal with certain terms which are in customary use." Seavey, *ibid.* 1.

Along with "the man of ordinary prudence" these writers consider at length such terms as care, reasonableness, risk, danger, foresight, intelligence, belief, knowledge, skill, memory, powers of observation, self-control, quickness of reaction, and a long list of other "physical, mental and moral" (Seavey) qualities and characteristics.

tate accuracy and consistency on the part of judge, counsel and scholar. Second, they permit the articulation of judgments so that they can be understood and employed for future guidance. They are at most machinery, but machinery for the employment of that ungraspable and indefinable power we call law by which the conduct of social beings is brought under control. As machinery there is nothing sacred about such devices, but their value cannot be over-emphasized, and if they are poorly designed the same harmful results follow as in the employment of poor machinery in making use of other highly dangerous forms of power.<sup>5</sup>

In the trial of a negligence case, the negligence issue may come to the surface at any one or more of five possible stages.<sup>6</sup> At four of these it demands the judgment of the judge; at the other, that of the jury. First, the judge may be called upon to determine whether some so-called definite standard set up by legislature or court, as for instance some traffic regulation,<sup>7</sup> controls this issue. If the case falls under such a crystallized rule, judgment on the negligence issue is automatic in those states which recognize the negligence per se doctrine, the inquiry being merely whether the party violated the terms of the regulation.<sup>8</sup> Second, the judge may be required in any case to

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<sup>5</sup> The abstractions of the laws are hard to handle. Concepts whether vague or precise are imperiled by the very words to which they are intrusted. Any adequate science of law awaits a science of statement. The definitions of scholars are sieves, the opinions of judges little more than a succession of mirages, even the precedents by which the course of judicial decision is determined are equally expendable and collapsible. But analysis and classification are indispensable. Though they retard the very progress they would promote, they are nevertheless the machinery through which the law and lawyers function. They are the most reliable aids to passing judgment, but they can never take the place of judgment.

<sup>6</sup> It is conceivable that there might be a sixth situation; that involved in the admission of evidence on this issue. The point will be adverted to later in the discussion.

<sup>7</sup> *B. & O. R. R. v. Goodman*, 275 U. S. 66, 48 Sup. Ct. 24 (1927), opinion by Justice Holmes, requiring a traveller approaching a blind railroad crossing to "stop, get out and go see," is a good example of this sort of formula set up by a court. Such formulas whether by court or legislature are of tremendous value, for they state the standard of conduct in terms of conduct itself. They make it possible to care for a large part of the every day business of the courts speedily, and especially so as to frequently recurring cases involving the violation of police regulations. But they may give rise to very difficult problems. For instance, it is not at all certain but that the formula announced by Justice Holmes is so belated as to be out of harmony with present day thinking. Are not underpass or overhead crossings or watchmen the price of exercising the high rights, powers and privileges of the railroad business? *Jones v. Boston & M. R. R.*, 139 Atl. 214 (N. H. 1927); see Green, *Contributory Negligence and Proximate Cause* (1927) 6 N. C. L. Rev. 3, 20.

<sup>8</sup> But not in those states which do not recognize the negligence per se

decide whether under all the evidence the case on this issue should go to the jury. Is there a negligence issue for decision? This question is resolved by the well understood "reasonable inference" formula,<sup>9</sup> or its equivalent. Third, if the issue is made by the evidence the judge is required to translate it to the jury for their judgment.<sup>10</sup> Fourth, the jury must pass their judgment on the issue. Fifth, the judge may write an opinion articulating the judgment passed on the whole case, including the negligence issue. At this last stage the scene of action normally has changed to the appellate court with the appellate judge either approving or disapproving, in so far as the negligence issue is involved, the trial judge's action in dealing with one of the situations in the trial court, most usually the second or third. What is said by judges at this stage cannot be taken too literally.<sup>11</sup>

Although the jury has been utilized to save the judge the pains of passing judgment on the negligence issue, relatively the most important of the so called "fact" issues, nevertheless, the problems raised by this issue must be translated to the jury in each case. The difficulties which the jury device creates for the law

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doctrine. In those states, the third situation is presented. See *Bourne v. Whitman*, 209 Mass. 155, 95 N. E. 404 (1911); *Knuffle v. Knickerbocker Ice Co.*, 84 N. Y. 488 (1881); *Ubelmann v. American Ice Co.*, 209 Pa. 398 (1904).

<sup>9</sup> *Metropolitan Ry. v. Jackson*, 3 App. Cas. 193 (1877); *McDonald v. Metropolitan St. Ry.*, 167 N. Y. 66, 60 N. E. 282 (1901); *Davis v. Margolis*, 140 Atl. 823 (Conn. 1928). See *infra* note 15 for discussion of the value of this formula.

<sup>10</sup> It is reasonably certain that Professor Edgerton was dealing with this situation. "The result of the case must many times depend on whether they (juries) are given to understand that negligence is indifference or inadvertence." Edgerton, *op. cit. supra* note 4, at 860. "Confronted with such a definition—the intelligent juryman will gather either that negligence is or that it necessarily involves, relative indifference or relative inattention. . . ." *Ibid.* 861. "Innocent of the law's Pickwickian senses, juries must often take literally the definitions which are given them, with the result that the law in action tends more strongly than the law in books to make particular mental phenomena necessary, if not sufficient, to negligence." *Ibid.* 870.

While Professor Seavey does not commit himself so clearly, inasmuch as he is dealing with the machinery incident to jury trial, he also must have this situation in mind. He says as much: "As will be pointed out later, the courts have not done this, but while asking the triers of fact to apply an external test as to some elements, as to others they have permitted consideration of the actor's qualities." Seavey, *op. cit. supra* note 4, at 5.

<sup>11</sup> "It is not always safe to take an excerpt from an opinion and embody it in an instruction, because the opinion is addressed to lawyers, while the instruction is addressed to laymen." *Magrane v. St. Louis & S. R. R.*, 183 Mo. 119, 128, 81 S. W. 1153, 1159 (1904). See *Birmingham Ry., Light & Power Co. v. Barrett*, 4 Ala. App. 347, 58 So. 760 (1912).

are seldom realized and cannot be exaggerated. The negligence issue gives its greatest difficulty in this translation process. The incisive studies of Professors Edgerton and Seavey have their relevancy, if at all, at this point.<sup>12</sup> These writers were inquiring into the quality or nature of the conduct which (the other elements being present) will impose or defeat responsibility, and how far the parties' own characteristics and qualities of personality affect the imposition or defeat of such responsibility. Since this is the jury's problem when there is any evidence raising the issue, how is the judge to translate it to the jury? This is a most practical question. Professor Edgerton objects to the instruction of juries in terms which make mental qualities and characteristics pertinent to the determination of the issue. He insists on "objective conduct" and "objective tests."<sup>13</sup> Professor Seavey, on the other hand, says that there is "only in part an objective test; that there is no such thing as reasonable conduct except as viewed with reference to certain qualities of the actor."<sup>14</sup> Under either view how can the jury be given its problem? Neither writer reaches this point.

Conceivably a judge might follow one of two radically opposite methods. He might make use of very accurate and precise rules, expressed in terms of conduct and qualities of personality by which the jury might measure the particular conduct of the person in question. For instance, he might say: "Gentlemen, if you find that defendant was possessed of an intelligence quotient of more than 90, and average reaction time to visual and auditory stimuli of .22 sec. and .2 sec. respectively, and a score of over 70 in mechanical abilities, and a grade of not less than C in caution and self control, and that he failed to conduct himself in accordance with these standards in the case before you, then you will find for plaintiff." Such instructions would be varied to suit the case. No doubt the judge would do some such thing if psychology could supply the law with dependable measurements and standards. On the other hand, the judge might merely say to the jury: "Gentlemen, this is your problem. You have heard the evidence. Give us your judgment." Either method might serve as well as the method which is now employed. But judges have employed neither:

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<sup>12</sup> See *supra* notes 4 and 10.

<sup>13</sup> Aside from other considerations, if Professor Edgerton in the excerpt first quoted, *supra* note 4, intended to lay down a formula for use in determining the negligence issue, it is very clear that it is too broad. If "negligence is unreasonably dangerous conduct," it would include "intended harms" as well. On the other hand, why "conduct *abnormally* likely to cause harm?" Is not "conduct *normally* dangerous" enough? Also if mental phenomena are factors in conduct, what is the point in excluding them from consideration?

<sup>14</sup> See *infra* note 24.

the one is clearly impossible, the other seems too dangerous. They have been more careful. Judges feel that laymen not only need assistance in handling these problems, but they must be kept within bounds. They cannot be permitted to roam at will nor to feel that they have an unlimited power in reaching judgment. Thus, judges have developed a technique of instructing juries as to the considerations (law) which shall guide them in their judgment. It is here, therefore, that there is a necessity for the ritualistic formula mentioned in the beginning. But in employing this ritual a judge is faced with two difficulties. In the first place, in order not to pass judgment himself on the very person and conduct involved in litigation, and thereby render the jury's function pointless, he must raise conduct to terms of the law's abstractions: "care", "prudence", "foreseeability", "reasonableness," and the like. But having converted the problem into such terms, he must then make these high abstractions intelligible to the jury. And to do this, judges attempt to objectify these abstractions. It was in this predicament that the "man of ordinary prudence" was conceived as a standard of conduct.<sup>15</sup> He looks like a real fellow, the model of mankind. He is generally so considered. He is called the "objective" as opposed to the "subjective" standard. But all of this is due to vivid language. He is a mere figure of speech.<sup>16</sup>

The "man of ordinary prudence" with slight variations in his verbal attire is used by all courts in testing the negligence issue unless precluded by an automatic formula as adverted to above. The court instructs the jury that "negligence is the failure to do what an ordinary prudent person would have done under the circumstances or the doing of that which an ordinarily prudent person would not have done."<sup>17</sup> If more is required

<sup>15</sup> See *Vaughn v. Menlove*, 3 Bing. N. C. 468 (1837) and cases there discussed. The law frequently adopts this sort of device when it comes face to face with an otherwise uncontrollable flood of factors which have to be considered in all sorts of cases. For instance, in determining whether a case shall go to a jury on the negligence, or other issue, the law gives the judge no help except by way of one of these formulas. The judge is told to determine whether the evidence will support two reasonable inferences, whether reasonable minds can differ on the evidence. It does this because there is no way of stating beforehand in the run of cases any exact test. The factors are too numerous and relative. Even rulings on analogous situations are likely to prove deceptive here. The judge cannot escape passing judgment at this point, and the formula does not give him any assistance in weighing the factors of the particular case. It merely tells him that he must do so. The same thing may be said of the "preponderance of evidence," and "beyond a reasonable doubt" rules, and many others.

<sup>16</sup> Thayer, *Public Wrong And Private Action* (1914) 27 HARV. L. REV. 317.

<sup>17</sup> See RANDALL, INSTRUCTIONS TO JURIES (1922) § 4049 *et seq.* for a long list of these monotonous instructions from many jurisdictions.

the court simply expands the same idea into other terms as "reasonableness", "care", "anticipation of harm", "danger," finally developing some such formula as Brett's generalization in *Heaven v. Pender*.<sup>18</sup> The courts do all they can to make these terms sound like vivid, living realities, but each is nothing more than an objectification of a major abstraction. These phrases differ slightly from jurisdiction to jurisdiction, but not materially so, and in any particular jurisdiction the pattern adopted will be found to be followed along the closest lines. In fact the insistence of the courts upon nice shadings of these terms tends to turn the science of law into a jargon of quibbles. Most remarkable of all, the courts will allow no explanation of the central figure of this constellation of figments, "the man of ordinary prudence," by comparison with any real person or by describing him as possessing any other qualities or combination of qualities.<sup>19</sup> The farthest extreme to which courts will go in this direction is illustrated in *Grand Trunk Ry. v. Ives*. After charging the jury in words practically identical with those indicated

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<sup>18</sup> "Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger." *Heaven v. Pender*, 11 Q. B. D. 503, 509 (1883). See also *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916). And a failure to use such care and skill is negligence.

<sup>19</sup> The care and prudence which the law regards as "ordinary" is such as prudent men are accustomed to exercise on like occasions—not such "as men generally," not such as "any man of ordinary care and attention," not "what a man of ordinary care would have done, riding as plaintiff was," etc., not "the usual order of ordinary care observed, by men generally." A man of *ordinary* care, of *ordinary* prudence, as expressed in common parlance, is not regarded by the law as being to the common understanding the same as characterized by the expression "a prudent man", "prudent men." *Reynolds v. City of Burlington*, 52 Vt. 300, 308 (1880). See numerous cases to the same general effect: *Hennesey v. Chicago & N. W. Ry.*, 99 Wis. 109, 74 N. W. 554 (1898); *City of Paris v. Tucker*, 93 S. W. 233 (Tex. Civ. App. 1906); *Cohn v. City of Kansas*, 108 Mo. 387, 18 S. W. 973 (1891); *Langhammer v. City of Manchester*, 99 Iowa 295, 68 N. W. 688 (1896); *Austin & N. W. R. R. v. Beatty*, 73 Tex. 592, 11 S. W. 858 (1889); *St. Louis, A. & T. R. R. v. Finley*, 79 Tex. 85, 15 S. W. 266 (1890); *Louisville R. R. v. Gower*, 85 Tenn. 465, 3 S. W. 824 (1887). See *Mertz v. Connecticut Co.*, 217 N. Y. 475, 112 N. W. 166 (1916). "While in some jurisdictions the ordinary usage or custom of the business or occupation is made the test of negligence, the weight of authority is that as negligence is the doing or failure to do what ordinarily prudent men would do under the same circumstances, the test of ordinary custom, while relevant and admissible in evidence is not controlling, especially when the custom is clearly a careless or dangerous one." *Sea Board Air Line Ry. v. Watson*, 113 So. 716, 718 (Fla. 1927); see *Commanche Duke Oil Co. v. Texas & Pac. C. & O. Co.*, 298 S. W. 554, 563 (Tex. Com. App. 1927).

above, the court gave this further instruction, which was claimed to be erroneous:

"You fix the standard for reasonable, prudent and cautious men under the circumstances of the case as you find them, according to your judgment and experience of what that class of men do under these circumstances, and then test the conduct involved and try it by that standard; and neither the judge who tries the case nor any other person can supply you with the criterion of judgment by any opinion he may have on that subject."<sup>20</sup>

This charge is somewhat too literal for most courts. They do not care to be so plain about a matter which at best has an air of mysticism about it. With more than the usual liberality shown by most courts, the Supreme Court in passing on this charge, said:

"But it seems to us that the instruction was correct, as an abstract principle of law, and was also applicable to the facts brought out at the trial of the case. There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care', 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case, may, under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury."<sup>21</sup>

Nothing is more obvious from a reading of the cases than that courts desire to pass the negligence issue to the jury as free from any commitments as possible and yet subjecting the jury to as much control as possible. That expansible and all inclusive phrase "under the same or similar circumstances"<sup>22</sup> is

<sup>20</sup> 144 U. S. 408, 416, 12 Sup. Ct. 679, 682 (1891). See *St. Louis, I. M. & So. Ry. v. Spearman*, 64 Ark. 332, 42 S. W. 406 (1897).

<sup>21</sup> *Accord*: *Gallagher v. G. N. Ry.*, 212 N. W. 839 (N. D. 1927); *Crowley v. Chicago B. & Q. R. R.*, 213 N. W. 403 (Iowa, 1927); *B. C. & A. Ry. v. Turner*, 136 Atl. 609 (Md. 1927); *Commanche Duke Oil Co. v. T. & P. Coal. & Oil Co.*, *supra* note 19; *Hults v. Miller*, 299 S. W. 85 (Mo. App. 1927).

<sup>22</sup> "The rule has been repeatedly laid down that no definition is complete or correct which does not embody that element." *Yerkes v. Northern Pac. R. R.*, 112 Wis. 184, 193, 88 N. W. 33, 36 (1901). See *Garland v. Boston*



employed as a blanket for every pertinent factor, and the courts seldom undertake to enumerate these factors. Under this phrase, the "ordinary prudent person" may be endowed if necessary with the very qualities of the party whose conduct is to be measured. If the party is blind, crippled, deaf, small, strong, nervous, experienced, aged, intelligent, stupid, or whatnot, this is but one of the circumstances under which the "ordinary prudent person" must act.<sup>23</sup> This personified standard sounds like

& M. R. R., 76 N. H. 556, 86 Atl. 141 (1913). As to duty to use "care and prudence of a prudent man in view of all the circumstances" in an emergency, see *Landry v. Hubert*, 137 Atl. 97 (Vt. 1927); *Peabody v. Northern Pac. Ry.*, 261 Pac. 261 (Mont. 1927). "The existence of an emergency is merely one of the factors in the light of which the conduct of the actor must be judged." *Jones v. Boston & M. R. R.*, *supra* note 7, at 221.

<sup>23</sup> There is nothing in *Vaughn v. Menlove*, *supra* note 15, contradictory of this statement or of the following numerous sustaining statements. In *Vaughn v. Menlove* the only question involved is as to the proper method of leaving the issue to the jury. But the "under the circumstances" of that case allowed the jury to consider defendant's bona fides, his judgment, knowledge, etc., as is done in other cases. The court very correctly perceived the impossibility of stating a rule for each person. But that impossibility does not in any manner avoid the fact that if defendant in such a case were a poor, ignorant "Brazos bottom" negro farmer on the one hand, or a prosperous agricultural chemist on the other, such would be a most vital factor in the case, although the judge would give the same formula in each instance.

"In other words, every person must use that degree of care which prudent persons of his class, taking all circumstances into account, including health, strength and habits of body and of mind, would use, when acting prudently." SHEARMAN & REDFIELD, NEGLIGENCE (Strat's 6th ed. 1913) § 88.

"The jury ought to be possessed of the real facts including the age, the condition, the knowledge, the experience and capacity of the person injured, and then ought to be allowed to say whether, under all the circumstances, he acted reasonably or unreasonably; and this, in point of fact, is the theory upon which nearly all cases are tried." THOMPSON, NEGLIGENCE (1901) § 338.

"If we apply to her the standard of what ordinarily careful women of her age and experience would do under like circumstances, how can we conclude that she was careless?" *Kitsap County Transp. Co. v. Harvey*, 15 F. (2d) 166, 168 (C. C. A. 9th), 48 A. L. R. 1420 (1927) annotation. (This was a woman 73 years old, who fell while getting out of her seat which was set on a platform 10 inches high from the floor of the boat. No doubt the jury had many experiences of this sort by which to set up a standard for the old lady).

"The plaintiff is to be held to the exercise of the degree of care of which he was capable. If he was merely a person of dull mind, who could labor for his own livelihood, and there was no apparent necessity of putting him under the protection of a guardian to keep him out of harm's way, he is chargeable with the same degree of care for his personal safety as one of brighter intellect, as any attempt to frame and adapt varying rules of responsibility to varying degrees of intelligence would necessarily involve confusion and uncertainty in the law." *Worthington & Co. v. Mencer*, 96

Ala. 310, 315, 11 So. 72, 73 (1891). (Plaintiff was mentally weak. The seeming contradiction between the first sentence and the last vanishes when it is considered that the court in the last sentence had in mind the difficulty of stating the law for varying situations). The courts constantly make the distinction between degree of care and quantum of diligence. See *Gulf, C. & S. Ry. v. Smith*, 87 Tex. 348, 28 S. W. 520 (1894).

In *Hassenyer v. Michigan Central R. R.*, 48 Mich. 205, 209 (1882) the court said: "But while the authorities permit all the circumstances to be taken into account, age and sex among the rest, in determining the degree of one to be reasonably required or looked for, no case, so far as we know, has ever laid it down as a rule of law that less care is required of a woman than of a man." Judge Cooley, for the court, was here commenting on a charge approved by *Snow v. Provincetown*, 120 Mass. 580, 585 (1876) to this effect: "Care implies attention and caution, and ordinary care in such a degree of attention and caution as a person of ordinary prudence of the plaintiff's sex and age would commonly and might reasonably be expected to exercise under like circumstances." Judge Cooley adds: "This no doubt is true."

"It would thus appear that though defendant was partially blind and illiterate, yet, if by the exercise of a prudent diligence and regard for his own rights, he might have protected himself against the fraud and imposition of the agent of the windmill company, it was his duty to do so; otherwise he will not be protected." *Kalamazoo Nat. Bank v. Clark*, 52 Mo. App. 593, 598 (1893). Again: "The evidence in this respect was, it seems to us, quite weak . . . The defendant seems to have blindly trusted the whole matter to the integrity of the agent, of the windmill company . . . Notwithstanding this, the jury may have concluded that since there was evidence before them tending to show that defendant was a man far advanced in life . . . whose mental powers were bordering on imbecility; whose sense of sight was so dimmed by the infirmities of his great age that he could not see to read, or if he could see he would be unable to do so on account of his illiteracy, that he had exercised ordinary care and prudence under the circumstances . . . These circumstances are elements that would naturally enter into the consideration by the jury of the question of negligence." *Ibid.* 599, 600.

"In determining the existence of such negligence, we are not to hold the plaintiff liable for faults which arise from inherent or mental defects, or want of capacity to appreciate what is and what is not negligence, but only to hold him to the exercise of such faculties and capacities as he is endowed with by nature for the avoidance of danger . . . Hence the plaintiff is liable only for the proper use of his own faculties and what may be justly held to be contributory negligence in one is not necessarily such in another. There is no hard and fast rule applicable to every one under like circumstances." *Baltimore & Potomac R. R. v. Cumberland*, 176 U. S. 232, 238, 20 Sup. Ct. 380, 382 (1899). (Plaintiff was a boy 12 years old). But the dictum is broad. It was applied to a mentally deficient adult in *Seattle Electric Co. v. Hovden*, 190 Fed. 7 (C. C. A. 9th, 1911).

See *Keith v. Worcester St. R. R.*, 196 Mass. 478, 82 N. E. 680 (1907); *Masterson v. Lennon*, 115 Wash. 305, 197 Pac. 38 (1921); *Balcom v. City of Independence*, 178 Iowa 685, 160 N. W. 305 (1916) (defective sight; the last case considers many cases). As to defective hearing, see *Kerr v. Connecticut Co.*, 140 Atl. 751 (Conn. 1928). "Age, defective vision, or hearing, or other infirmity, are circumstances to be considered by the jury in determining whether due care and caution have been exercised. The existence of one or more of these infirmities does not require a higher degree of care and caution than in the case of one having no infirmities."

an absolute one, but it turns out to be a variable. Nevertheless it enables the jury to pass judgment on the party's conduct in the light of the sort of person that party *is*. It is thus an adaptable standard, and thereby a workable one. Whether this be objective or subjective perhaps no two people could agree, but neither is it necessary that they should.<sup>24</sup>

In cases of children and extreme abnormals of any kind (whether above or below the normal) the "ordinary prudent person" places too big a strain on the imagination, so the courts make a very rational adjustment or "reconciliation." The standard then becomes in case of the child that of the "ordinary child of the particular child's age, intelligence and experience,"<sup>25</sup> while the physician must bestow "that reasonable care, skill and

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Rosenthal v. Chicago & A. R. R., 255 Ill. 552, 560, 99 N. E. 672, 675 (1912). But *cf.* Toledo P. & W. R. R. v. Hammet, 220 Ill. 9, 77 N. E. 72 (1906); O'Connor v. Hickey, 156 N. E. 838 (Mass. 1927). See Texas & N. O. R. R. v. Bean, 55 Tex. Civ. App. 341, 119 S. W. 328 (1909) (club foot of plaintiff merely one of the circumstances bearing on his contributory negligence).

<sup>24</sup> Professor Seavey concludes: "Reviewing the whole matter briefly, it would appear that there is no standardized man; that there is only in part an objective test; that there is no such thing as reasonable or unreasonable conduct except as viewed with reference to certain qualities of the actor—his physical attributes, probably, if superior, his intellectual powers, his knowledge and the knowledge he would have acquired had he exercised standard moral and at least average mental qualities at the time of action or at some connected time." Seavey, *op. cit. supra* note 4, at 27.

Certainly the party's conduct in question cannot be tested by his own lights, for no one besides himself can possibly know what they are. Hence the standard cannot be subjective in that sense. But on the other hand, this conduct can only be tested by the jury's capacity for passing judgment. Hence in this sense the standard cannot be other than subjective. It is difficult to see how the standard could be objective in any sense unless all that is meant is that the jury's standard is applied to the party's conduct. But is the point worth settling?

<sup>25</sup> "No court ever says that a child is to be held to the measure of care which the particular child in question ordinarily exercises. On the contrary, the courts always state the measure with some objectivity. The usual statement is that a child is held to the exercise of the degrees of care which ordinary children of his age, intelligence and experience (or whatever combination is used) ordinarily exercise under similar circumstances. Sometimes it is the care which is reasonably to be expected of children of his age, experience and intelligence. Sometimes it is the care of the class of persons to which the injured belongs. Sometimes it is the care of ordinary prudent and careful children of his age, experience and so forth; or of the great mass of children of his age, and so forth." Shulman, *The Standard of Care required of Children* (1928) 37 YALE LAW JOURNAL 618, 622. "The mental capacity, the knowledge and experience of the particular child, are to be taken in consideration in each case. These qualities are individualized—subjective—but *only* for the purpose of determining whether or not the child was capable of perceiving the risk of injury to himself and of avoiding the danger. Beyond that, there is an objective standard." *Ibid.* 625.

Is not the writer taking the objective method of stating the test too seriously?

diligence as physicians in the same neighborhood, in the same general line of practice, ordinarily have and exercise in like cases." <sup>26</sup> In other words, the courts come as near as they dare saying to the jury that they must pass judgment on the *particular* plaintiff or defendant. But courts do and must insist that this standard, however it may be adjusted, must be kept a pure abstraction. If it becomes anything else, then the courts would either be compelled to state a standard in terms of the qualities and characteristics of human conduct, a thing they cannot do and will not undertake to do, or else would be forced to admit that there is no standard which they can give the jury. This latter also, is unthinkable, as it would immediately give the jury too great latitude. The "man of ordinary prudence" can only serve his function as an abstraction. In this way he is a mere caution, pointing the jury in as dramatic a way as possible the

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<sup>26</sup> "The physician is bound to bring to the service of his patient and apply to the case that degree of knowledge, skill, care and attention ordinarily possessed and exercised by practitioners of the medical profession under like circumstances and in like localities." *Nelson v. Sandell*, 202 Iowa 109, 111, 209 N. W. 440, 441, 46 A. L. R. 1447 (1927) annotation.

"One who holds himself out as a specialist in the treatment of a certain organ, injury, or disease is bound to bring to the aid of one so employing him that degree of skill and knowledge which is ordinarily possessed by those who devote special study and attention to that particular organ, injury or disease, its diagnosis, and its treatment, in the same general locality, having regard to the state of scientific knowledge at the time." *Rann v. Twitchell*, 82 Vt. 79, 83, 71 Atl. 1045, 1046, 20 L. R. A. (N.S.) 1030 (1909) annotation. That is coming close home to the defendant. See generally 37 L. R. A. 830 (1897) annotation; *Kuechler v. Volgmann*, 180 Wis. 238, 192 N. W. 1015, 31 A. L. R. 826 (1924) annotation; *Loudon v. Scott*, 58 Mont. 645, 194 Pac. 488, 12 A. L. R. 1487 (1920) annotation. See (1928) 6 TEX. L. REV. 398.

As to banks, see *Bank of Monango v. Ellendale Nat. Bank*, 52 N. D. 8, 201 N. W. 839, 40 A. L. R. 889 (1926) annotation.

As to places of amusements, see *Carlin v. Smith*, 148 Md. 524, 133 Atl. 340, 44 A. L. R. 193 (1926) annotation.

As to druggists, see *Ohio County Drug Co. v. Howard*, 201 Ky. 346, 256 S. W. 705, 31 A. L. R. 1355 (1924) annotation.

As to power companies furnishing electricity, see *McAllister v. Pryor*, 187 N. C. 832, 123 S. E. 92, 34 A. L. R. 25 (1925) annotation; 17 A. L. R. 833 (1922) annotation.

As to carriers, see *Ormond v. Wisconsin Power & Light Co.*, 216 N. W. 489 (Wis. 1927); *Gulf, C. & S. Ry. v. Conley*, 113 Texas 472, 260 S. W. 561, 32 A. L. R. 1183 (1924) annotation.

In many of these cases the courts are unwilling to leave the jury to consider the great hazards of the activities involved merely as part of the "circumstances." They translate "ordinary care" into superlatives, doubtless for the greater emphasis. *Denver Electric Co. v. Simpson*, 21 Colo. 371 (1895). See excellent opinion by Lairy, J., in *Union Traction Co. v. Berry*, 188 Ind. 514, 121 N. E. 655, 32 A. L. R. 1171 (1924) annotation. Also see excellent article, Frederick Green, *High Care and Gross Negligence* (1928) 23 ILL. L. REV. 4.

directions their deliberations should take. The judge through him can indicate to the jury that they are dealing with society's power and not their own; therefore, they should act reasonably and not let their own desires run riot. The formula is as much for controlling the jury's deliberations as for measuring the party's conduct. Its beauty is that it can be used for both purposes without committing the judge to anything and without telling the jury anything that amounts to more than a sobering caution. It does exactly what any good ritual is designed to do; its function is psychological. It serves as a prophylaxis. Nothing more should be expected of it.

The "ordinary prudent person" seems, therefore, to have been taken too literally. Both judges and legal scholars have undertaken to analyze him into terms of human qualities. He and his accompanying retinue of phrases are much like the points, lines and spaces of geometry, and the *X*, *Y* and *Z*s of algebra. "Let *X* equal the distance and *Y* the time, etc." Suppose some one should suggest that this be analyzed, and should proceed to point out that *X* and *Y* are letters of the alphabet, and further propose to count the words in which each appears for the purpose of determining their nature and characteristics. Or suppose some one else should propose to put a ruler on all the *X*s and a stopwatch on all the *Y*s. Are not the "ordinary prudent person", "reasonableness", "foreseeability", "care", "danger", "same or similar circumstances" etc. merely the *X*s and *Y*s of the law employed in negligence cases? Are not they used purely for the purpose of reducing the problem to a storable form? First, statement by trial judge to a jury in translating the negligence issue for the jury's judgment. Second, statement in opinions so that the process may be articulated for the purposes of a record. The law's inability to deal with human behavior in detail and "in the raw" compels it to deal with such behavior for purposes of statement by the use of figures and symbols. But the figures and symbols employed being the same as some of those employed in describing specific details of human behavior, the two uses are confused.<sup>27</sup> It is much as if numerals

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<sup>27</sup> Professor Edgerton makes this point very clear in his analysis of "care" and other terms but complains about its "technical" meaning and use. He says: "They (juries) are charged in terms that are wholly ambiguous and left to make their own selections among the competing theories." Edgerton, *op. cit. supra* note 4, at 860. He correctly points out throughout his article that the law is administered through words used in "Pickwickian senses."

Professor Seavey makes similar points: "Prudence has a selfish connotation, obviously not intended here, except in the case of contributory negligence. 'Care' avoids this but obviously avoids reference to a possibility of error as to valuation of interests. 'Sense' refers only to intellectual elements. 'Skill' as will be indicated later, probably combines too many

were used in the place of letters for algebraic purposes. But does this use of these figures and symbols mean that the qualities and characteristics of the human beings involved in the litigation are not to be considered by the jury in passing judgment? Or does such use merely mean that such qualities and characteristics are of no moment in a statement of the law for use by the judge in translating the issue to the jury?<sup>28</sup>

On this point Professor Edgerton says:

"The individual's actual mental characteristics and qualities, capacities and habits, reactions and processes, are not, then, among the 'circumstances' which the law considers in determining whether his conduct was, under the circumstances, reasonably safe. He must behave as well (as safely) as if he were in all mental respects normal, though he may be in some respects super-normal. In fact, the broad proposition that no mental fact about the (same) individual is material would seem to require only one substantial qualification; his special knowledge is highly material."<sup>29</sup>

Further:

"As Mr. Justice Holmes has said, 'when men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare. If for instance, a man is born hasty and awkward, is always having accidents and hurting himself or his neighbors, no doubt his congenital defects will be allowed for in the courts of Heaven, but his slips are no less troublesome to his neighbors than if they sprang from guilty neglect. His neighbors accordingly require him, at his proper peril, to come up to their standard, and the courts which they establish decline to take his personal equation into account' (Holmes, *The Common Law* 108). Dean Pound has put as the 'jural postulate of civilized society' which underlies our doctrine of negligence, that 'men must be able to assume that their fellowmen, when they act affirmatively, will do so with due care, that is, with the care which the ordinary

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elements for us to require the actor to have a standardized skill in all situations." Seavey, *op. cit. supra* note 4, at 10.

See to same effect Shulman, *op. cit. supra* note 4, 625: "At any rate, it (prudence) is a conveniently vague term to admit of adjustment to particular situations in a field of law where certainty in advance is not all-important."

<sup>28</sup> The jury device is probably the principal reason why formulas and symbols must be used. In trial before a judge, nothing of this sort would ordinarily appear prior to judgment. That he should employ for his own purposes the rigmarole he uses in instructing juries, would only be understood by reason of some brain pattern which he has built up through which to think of such matters. But when he comes to articulate his judgment in the form of an opinion, he is compelled to use some terminology, and the same figures of speech which he employs for jury purposes are found to be useful here. In both instances, it will be noted they are for the purposes of statement, though with different ends in view.

<sup>29</sup> Edgerton, *op. cit. supra* note 4, at 857.

understanding and moral sense of the community exacts, with respect to consequences that may be anticipated.”<sup>30</sup>

These eminent authorities were doubtless postulating for the purposes of *statement*. For this purpose, clearly the personal qualities of each individual cannot be considered. But for the purpose of *judgment passing*, the jury is beyond the realm of statement, and that the awkwardness of the awkward man, the poverty of the poor man, the stupidity of the dunce as well as the skill of the expert, along with the special knowledge of the specialist and the numerous other qualities of the person involved, are all considered in our earthly courts is too well known to leave a doubt. The difference lies between law in statement and law in operation; between jural postulates and jury judgments.<sup>30a</sup>

What do the jury do with this terminology, “the ordinary prudent person” and his “attendants,” when they retire to the jury room? Do they take them seriously? Show them any consideration? Spend any time trying to determine that each juror has the same “ordinary prudent person” in mind, or do they merely assume that everyone is fully acquainted with him, and that they know what the court desires? How any particular jury arrive at their judgment is perhaps unknown even to themselves. But a “scientific” statement of law has very little if any interest in how they shall treat these terms. The law provides the jury with no table or key by which they can translate these symbols into the terms of human conduct and human qualities. The law recites its ritual and stops. Moreover, it closes the door on the jury and guards them with its officers. A few rules of etiquette are provided,<sup>31</sup> but no inquiry must be made of the jurors themselves into their deliberations. Whatever process they may go through, in the end the result is the product of the jury’s own judgment, and this is the law’s judgment so long as in reaching it the jury have observed the etiquette of the occasion. But it is only the law’s judgment in the particular case; it has no further currency. The next case will have a like body to pass judgment.<sup>32</sup> In short, having developed

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<sup>30</sup> *Ibid.* 867, 868.

<sup>30a</sup> Dean Pound appreciates this difference fully. See Pound, *Justice Without Law* (1913) 13 COL. L. REV. 696.

<sup>31</sup> These rules include such prohibitions as communicating with the judge except in open court, or discussing the case with third persons, accepting favors from litigants, taking liquor into the jury-room, giving evidence in the jury-room, deciding the case by the toss of a coin, the turn of a card or other trick. In a few states, inquiry can be made directly of the jury as to such objective conduct, but in no state can the factors impelling judgment be gone into. See MCBAIN, *CASES ON TRIAL PRACTICE* (1927) 853, 854.

<sup>32</sup> See Bohlen, *Mixed Questions of Law and Fact* (1924) 72 U. PA. L. REV. 111 *et seq.*; GREEN, *op. cit.* *supra* note 1, at 72 *et seq.*

an agency for giving judgment and a ritual for passing the negligence issue to that agency for judgment, the factors which the jury may take into account are of slight, if any, importance in any scientific statement of the law. Here science is satisfied with ritual; so long as the jury's judgment is not outrageous, it stands. The law has been satisfied by the translation of one of its important issues from judge to jury through the medium of a figure of speech. No one should expect this figure of speech to stand analysis except as a figure of speech. It cannot be dissected into bone and blood, virtues and emotions, any more than the motion picture we see on the screen. The particular figure here involved serves its function when the jury has taken the case. What *juries do* in reaching a judgment is wholly a different thing, entirely unrelated. They pass into one of the "laboratories of justice" and there deal with actual human beings—passing the judgment which the judge through the device of picturesque language calls upon them to pass. It is their *judgment* on the factors giving rise to the issue that the law desires—nothing less and nothing more. If the law could tell them how to pass this judgment it would have no need for them.

If the law (for purposes of statement) is merely interested in having the judge pass the negligence issue to the jury in doubtful cases under due cautions but without undue embarrassment of the jury's power to deal with the issue as their judgment may dictate, is it to be implied that the qualities and characteristics of the conduct of the persons in litigation are of no significance for the purposes of the jury? This cannot be. They are factors of importance. Negligence cases are decided every day in which they are considered by juries. Age, sex, color, temperament, indifference, courage, intelligence, power of observation, judgment, quickness of reaction, self control, imagination, memory, deliberation, prejudices, experience, health, education, ignorance, attractiveness, weakness, strength, poverty, and any of the other possible assortments of qualities and characteristics of the persons involved may each be a factor in the jury's judgment on the negligence issue. It would doubtless be safe to go further and suggest that these same qualities of both counsel and witnesses also have the greatest weight with the jury. Litigants act on this assumption at any rate. But the law does not undertake to analyze or weigh any of them for the jury except in the most timid fashion.<sup>33</sup> They seldom

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<sup>33</sup> The cautionary charges given by courts are in recognition that some of these factors are considered by juries. Charges that the jury must look only to the evidence in the case, that they must try a case against a railroad the same as against an individual, are to be influenced by the facts and not by sentiment, not to base their verdict upon own view of premises, and similar ones, are but the efforts of judges to restrict the jury's deliberations to the serious business of deciding the case in hand on the most



come to the surface either in the pleadings, the evidence, or the instructions given by the judge, and when they do, doubtless ordinarily they merely give color to some more important factor, or bundle of factors. But in whatever form they come up, the judges constantly recognize them by reiterating that the question was one for the jury and that they had the parties and witnesses before them and their basis for judgment was necessarily more complete than any paper record can provide. These factors in single units become articulate in rare instances. They are so normally common factors of every case that they are virtually ignored. They lie beneath the formal statements of pleading, and they are above the rules of evidence. How could they be kept from the jury where they fill the interstices of all that is done and said during a trial? The rules of evidence are primarily rules of exclusion. All relevant facts are admissible unless some specific rule forbids.<sup>34</sup> It may be that the factors in question are seldom "evidence" in the procedural sense; they may be mere "background" or "atmosphere." But what is weightier? The law of evidence is rational; it would not undertake a vain thing; it cannot deal with every factor pertinent to passing judgment. It could not take formal notice of such numerous and such variable details without wasting much effort to no purpose. It is only when some of the more comprehensive personal attributes as "knowledge" and "habit"<sup>35</sup> become involved in this type of case that the law of evidence takes a hand, and even then it more frequently refuses to do so.

What has been said as to the rules of evidence may be said

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rational basis possible. See RANDALL, *op. cit. supra* note 17, c. 30; *Dunlop v. United States*, 165 U. S. 486, 17 Sup. Ct. 375 (1897); *State v. Runyan*, 93 N. J. L. 16 (1919); THOMPSON, TRIALS (2d ed. 1912) § 2866 *et seq.* No one thinks that they have more than a sobering effect, or that the factors at the basis of judgment are erased in any such manner.

<sup>34</sup> See WIGMORE, EVIDENCE (2d ed. 1923) § 10. But also note the conclusion of Professor Edgerton: "The fact appears to be, not that the law of evidence is so inept and inconsistent as to exclude direct proof of these various mental facts while it admits direct proof of intention, but that, as a matter of substantive law, these mental facts have no bearing on negligence." Edgerton, *op. cit. supra* note 4, at 855.

<sup>35</sup> *State v. Manchester & Lawrence R. R.*, 52 N. H. 528, 532 (1872); *Brouillette v. Conn. River R. R.*, 162 Mass. 198, 38 N. E. 507 (1894). It would seem that psychologists could not find a richer nor a more fruitful study than the part these incidental factors play in jury verdicts. See Hutchins and Slesinger, *Some Observations on the Law of Evidence—Spontaneous Exclamations* (1928) 28 COL. L. REV. 432 and *Some Observations on the Law of Evidence—Memory* (1928) 41 HARV. L. REV. 860. It is true that much would have to depend upon the observer's capacity to interpret human behavior at large, but even so, such studies would be of incalculable value both as to assessing the importance of the factors and as to suggesting means for perfecting a technique for bringing them under some sort of control.

as to the giving of instructions. The law cannot deal with these factors in detail; therefore, it ignores them. They merely make up the "circumstances"<sup>36</sup> of the case, but here they get such recognition as the jury may give them in the particular case. It is only when a party wishes to get an advantage from stressing some one of these qualities or characteristics which stands out in a particular case that such a factor is given formal notice. The judge may think the factor of no pertinency or of the greatest pertinency in the particular case, but an admission or exclusion from the formal evidence, or a charge or a refusal to charge, in one instance, does not necessarily have any significance in some other instance where the same factor may be involved. The possible number of situations is so large that the law cannot deal with them in advance of trial. And doubtless the law is wise in not attempting to do poorly by rules what is already better cared for as the accepted but unnoticed incidents of every trial.

The difficulties of dealing with the other problems of negligence cases—the right-duty problem, the damage problem, and the causal relation problem—are not under consideration. Each of them has its own difficulties. The problem here is that of handling the issue of "wrongdoing", "breach of duty," the negligence issue. The most obvious conclusion is that in the great bulk of cases of this type there is no method of ascertaining in advance whether conduct is negligent or non-negligent. At most, a method has been devised for testing conduct after it becomes known. The method is not difficult to state, but its satisfactory employment must rest upon the capacity of judges to know when it is applicable, and the capacity of juries to exercise a fair judgment on all the factors involved. As an ele-

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<sup>36</sup> *City of Meridian v. McBeath*, 80 Miss. 485, 32 So. 53 (1902) (plaintiff's forgetfulness of a post, one of the circumstances); *Collins v. City of Janesville*, 111 Wis. 348, 87 N. W. 241 (1901); *Slaughter v. Metropolitan St. Ry.*, 116 Mo. 269, 278, 23 S. W. 760, 763 (1893) ("we know no rule of law requiring them (the jury) in measuring his conduct at the time to exclude from their consideration any of the natural instincts which usually affect the conduct of men").

"If in a moment of forgetfulness, with her aged mind intent upon disembarking, she did what otherwise she would not have done, she is not for that reason necessarily subject to a charge of carelessness. It is a familiar principle that one is not necessarily guilty of negligence who in a moment of forgetfulness is injured by reason of a defect in a sidewalk, or a street or other public place, though he had knowledge of its existence. 37 Cyc. 298. That people do in forgetfulness trip over unusual obstacles upon a floor with which they are familiar, or stumble over unusual steps under like circumstances, is a matter of common knowledge." *Kitsap County Transp. Co. v. Harvey*, *supra* note 23, at 168. Thus courts may take judicial notice of such things; *a fortiori*, a jury may also, when such matters are pertinent.

ment of legal responsibility it is at large, and defies the efforts of legal scientists to bring it under more definite control. As much as can be done is to state the process. The science of law at this point requires nothing more, nor will it accept anything less, than adherence to its process.<sup>37</sup>

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<sup>37</sup>In dealing with the problem of causal relation in his recent book, GREEN, *op. cit. supra* note 1, the writer found it necessary to deal somewhat with the other problems of tort responsibility. But each of them demands more than incidental treatment. So in the present article the negligence issue alone has been considered. Shortly, a study of the right-duty problem will be made by inquiring where the courts find the "duties" about which they talk so much. The two problems so far handled have developed little more than a "process;" they demand no set rules except in terms of procedure. It may well be that the "law of negligence" is so uncrystallized (except for an inconsequential part) that it cannot be subjected to statement other than in terms of an analysis through which the cases must be run as they arise. In other words, we may have a process for passing judgment in negligence cases, but practically no "law of negligence" beyond the process itself.