

CONTRIBUTORY NEGLIGENCE

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GENERAL RULE—ITS HISTORY AND EXPLANATIONS

In an action based on negligence, the contributory negligence of the plaintiff is a complete defense. So would run a general statement of the rule still widely prevailing in this country,¹ though, as we shall see, it must be taken with many qualifications.² For present purposes it is enough to notice that, even as thus simply formulated, the rule has two aspects: (1) that a plaintiff's contributory negligence will *affect* his recovery in an action for negligence; (2) that it will affect recovery to the extent of being a *complete bar* to defendant's liability in the action. In seeking the explanation and justification of the rule, from the point of view of both history and policy, it must constantly be borne in mind that there is no inherent logical or practical reason why the second aspect of the rule must accompany the first. It would of course be perfectly possible to have a rule of liability in which the plaintiff's contributory negligence would not count at all (as under workmen's compensation statutes and in many situations under the common law). But it would also be possible to have a rule that contributory negligence would diminish, but not defeat plaintiff's recovery.³ Probably the modern trend, both of judicial decision and of legislation, is towards one or the other of these alternative solutions to the problem.⁴ But before we can fully understand or appraise this trend we should first inquire into the reasons why the all-or-nothing (or stale-mate) rule came to dominate Anglo-American law.

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1. "Except as stated in §§ 479 and 480, the plaintiff's contributory negligence bars recovery against a defendant whose negligent conduct would otherwise make him liable to the plaintiff for the harm sustained by him." RESTATEMENT, TORTS § 467 (1934). (§§ 479 and 480 concern "last clear chance" situations.)

2. See pages 706 *et seq. infra*.

3. *E.g.*, Federal Employers' Liability Act, 35 STAT. 65 (1908), as amended, 53 STAT. 1404 (1939), 45 U.S.C. § 51 (1946). See pages 731 *et seq. infra*.

4. See, *e.g.*, Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Turk, *Comparative Negligence on the March*, 28 CHI-KENT REV. 189, 304 (1950); Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946).

Historical Background

Contributory negligence is a relatively late comer on the scene of our legal history. Most writers put its entry at 1809 with the now famous English case of *Butterfield v. Forrester*.⁵ Thereafter the doctrine was received in America hospitably enough;⁶ but in the important State of New York, for instance, it was not until mid-century (1850) and the rise of industrial enterprise (particularly railroading) that the rule really assumed significance and began to come into its own.⁷ Yet in spite of its novelty the announcement of the doctrine caused no stir at the time (as has often been noted), and was made with the off-hand manner of judges who are treading on familiar ground.⁸

In this connection we must remember that the concept of negligence, as an independent ground of legal liability, was itself a fairly late arrival in our law and was just beginning to take clear shape in the eighteenth and early nineteenth centuries.⁹ But earlier law had been much concerned with causation—

5. 11 East 60, 103 Eng. Rep. 926 (K.B. 1809). D negligently laid a pole across the highway and P ran into it, although he might have avoided doing so had he not been "riding violently." Said Lord Ellenborough, C.J.: "A party is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right. . . . One person being in fault will not dispense with another's using ordinary care for himself." The case illustrates the casualness with which the doctrine slipped into the common law. Professor Bohlen comments of it: "There is . . . no discussion of general principles, no logical argument applying such principles to the particular facts and showing that they necessitate the result reached by the court. All attempts to ascertain upon what legal principle the defense of contributory negligence is based, are therefore effort *ex post facto*, to explain and account for a result already reached apparently unconsciously." Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908).

6. Turk dates its American debut at 1824, with the case of *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824). Turk, *supra* note 4, at 198. The earliest reference in American treatises is a cursory observation in the 1811 American edition of Selwyn's *Law of Nisi Prius* that a plaintiff seeking to recover damages must show that he had acted with "common and ordinary caution," for which *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809), is cited as authority. 2 SELWYN, ABRIDGMENT OF THE LAW OF NISI PRIUS 1092 n.5 (1st Am. ed. 1811).

The reception accorded the new doctrine in Louisiana is noteworthy, as Louisiana, in common with other civil law jurisdictions, had been moving toward a doctrine of comparative negligence in the first part of the century. See Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945); Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

7. *Id.* at 152-5.

8. See note 5 *supra*; and compare the following statement: "It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for an injury caused by the mutual default of both parties." Black, C.J., in *Railroad Co. v. Aspell*, 23 Pa. 147, 149-50 (1854).

9. Winfield, *The History of Negligence in the Law of Torts*, 42 L.Q. REV. 184 (1926); 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 446-59 (2d ed. 1937) (hereinafter cited as HOLDSWORTH; edition number and date for the volume will be given only when the volume is first cited). Cf. 3 HOLDSWORTH 375 *et seq.* (5th ed. 1942) (early medieval civil liability); BUCKLAND & McNAIR, ROMAN LAW AND COMMON LAW 284-8 (1936)

indeed it was probably through the development of the concept of causation that the modern notion of negligence emerged.¹⁰ And medieval lawyers had been quite familiar with the defense that the cause of the harm was plaintiff's own act.¹¹ To be sure, contributory negligence (with its implication of a *concurrent* causation) would be a poor thing to call such a defense. "Rather, [plaintiff] failed to recover because his own act had been the direct cause of the accident."¹² Moreover, "the notion of negligence had not yet arisen."¹³ Yet it was probably because of this heritage that the concept seemed so familiar to the profession. Early statements of the rule abound in language referring it to principles of cause.¹⁴

The hypothesis as to the rule's heritage put forth in the last paragraph would help to explain why the rule, when it came, took the all-or-nothing form rather than one simply diminishing damages. Earlier legal thinking had been very much dominated, though perhaps never exclusively, by the notion that while there may be many causes of an injury in a lay or scientific sense, yet the law should quest for a sole or principal *proximate* cause. In a recent article, Lord Wright suggests that the form the rule took was more probably "due to pro-

(negligence in Roman law). Traces of a contributory negligence doctrine have been recognized in Roman law by some commentators. See 8 HOLDSWORTH 459. *But cf.* Bohlen, *supra* note 5, at 252 n.2. The point is discussed in BRICKLAND & McNAIR, *op. cit.* *supra* at 288, and documented in POLLOCK, TORTS App. D 592 (11th ed. 1920).

10. 8 HOLDSWORTH 449 *et seq.*

11. 3 HOLDSWORTH 377-80; 8 *id.* at 459-62.

12. Turk, *supra* note 4, at 196.

13. *Ibid.*

14. Thus in *Cruden v. Fentham*, 2 Esp. 685 (K.B. 1798), Lord Kenyon charged the jury that if plaintiff crossed over to the side of the road where defendant (wrongfully) was, simply to assert his right of way, "the injury was of his own seeking." In *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926, (K.B. 1809), Bayley, J., said: "If he [plaintiff] had used ordinary care he must have seen the obstruction; so that the accident appeared to happen *entirely from his own fault.*" (Emphasis supplied.) In *Flower v. Adam*, 2 Taunt. 314 (C.P. 1810), Mansfield, C.J., thought the defendant's wrong "too remote to affect him"; and Lawrence, J., stated that "the immediate and proximate cause is the unskillfulness of the driver." In *Bridge v. Grand Junction Ry.*, 3 M. & W. 244 (Ex. 1838), the court held bad in substance a plea that the injury was caused "in part by and through the . . . carelessness" of plaintiff's driver, "as well as in part by and through the . . . carelessness" of defendant. Parke, B., explained that plaintiff's negligence would bar him only if by ordinary care he might have avoided the consequences of defendant's negligence, for then "he is the author of his own wrong."

No doubt the transition from the older heritage to the newer idea was made easier by the historical accident that in all the earliest cases of contributory negligence plaintiff's negligence came later in time than defendant's (*i.e.*, it lay in failing to avoid the danger created by defendant's wrong). Thus in all of them plaintiff's act was the more direct or immediate cause of the harm. And since there was a distinct tendency in earlier law to regard the last wrongful act of a responsible human being as the sole *proximate* cause of injury, contributory negligence came in as simply a natural and logical application of this last wrongdoer rule. See 8 HOLDSWORTH 459, 460, 462; Bohlen, *supra* note 5, at 239; James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938).

cedural or pleading points. . . . The plaintiff could declare upon the defendant's negligence . . . or nuisance. . . . Against this declaration, the defendant would plead the general issue . . . , and that was a sufficient plea to entitle him to show that the accident was in part due to the plaintiff's own negligence; *thus the plaintiff who had alleged that the accident was due to the defendant's negligence failed.*"¹⁵ But the point is lost unless we assume, as Lord Wright does, that plaintiff's allegation that his injury was "due to the defendant's negligence" could only have meant that it was due *solely* to that cause. Once grant the possibility of *multiple* proximate causes and Lord Wright's pleading logic collapses.¹⁶ What the point really shows then is that the habit of thinking in terms of a single legal cause too often underlay procedural as well as substantive law.

Another factor which may have contributed to the all-or-nothing form of the rule was the nearly complete lack of precedent for any alternative solution, except perhaps in maritime law.¹⁷ It is probable that neither ancient law¹⁸ nor contemporaneous continental European law¹⁹ had developed any well defined procedure for dividing or apportioning loss in these situations.

15. Lord Wright, *Contributory Negligence*, 13 MOD. L. REV. 2, 5 (1950) (emphasis supplied).

Compare Green, *Proximate and Remote Cause*, 4 AM. L. REV. 201 (1870).

16. As I understand it, there runs through the whole of this article a strange compulsion to find a single "efficient, proximate or decisive" cause. The last opportunity rule is criticized only because it assumes that the last cause is always the decisive one. Lord Wright believes that its position in the time sequence is only one factor in deciding whether a cause is decisive. Yet he would find a decisive one as between plaintiff and defendant in many situations where the conduct of *each* would quickly be found a proximate cause of injury to any third person injured by the accident. The net effect of Lord Wright's thesis would be a great cutting down of the recent comparative negligence legislation in England. Contrast the attitude in WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE § 62 (1951) and *passim*.

17. Traces of a proportional damages rule, later to be articulated into the comparative negligence doctrine now prevailing in admiralty jurisdictions, may be found in medieval maritime law. The genesis and growth of the doctrine in the admiralty courts are described in Turk, *supra* note 4, at 218 *et seq.* See also references cited in SANBORN, ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW 117-8 (1930). A study of later admiralty developments in respect to proportional damages is presented in Franck, *Collisions at Sea in Relation to International Maritime Law*, 12 L.Q. REV. 260 (1896), and a supplementary article by the same author in 42 L.Q. REV. 25 (1926).

18. Turk, *supra* note 4, at 208-18, and sources therein cited. Hillyer, however, suggests that while English authorities have read into Roman law the all-or-nothing form of contributory negligence, continental commentators have found in Roman law the rudiments of a proportional damages doctrine. Hillyer, *Comparative Negligence in Louisiana*, 11 TULANE L. REV. 112, 119-21 (1936). Compare also Philbrick, *Loss Apportionment in Negligence Cases*, 99 U. OF PA. L. REV. 572, 766, 799 (1951) (rule of proportional damages "a rule more than two thousand years old").

19. Although a basis for proportional damages may be found in the 1784 Prussian Code and the Napoleonic Code of 1804, the major codifications of proportional damages rules occur later in the 19th century. See Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 337-8 (1932); Turk, *supra* note 4, at 238 *et seq.*

Doctrinal history alone, however, could scarcely account for so important a rule as contributory negligence in its entirety, though it might give it shape. It is very significant that during the nineteenth century tort law in practice was becoming very much involved with the course of the industrial revolution and the rise of business and industrial enterprise. The accidents of an earlier day had been pretty much occurrences between neighbor and neighbor. As the nineteenth century progressed they became increasingly the casualties of the newer system. The man of broad outlook began to perceive that liability for such accidents was a burden upon that system.²⁰ The typical jurymen, on the other hand, began to look on such accidents as misfortunes caused to men like himself by something impersonal, perhaps "foreign," and presumably rich: and juries became "incurably plaintiff minded."²¹

The economic developments of the times were accompanied by the growth of an individualistic political and economic philosophy which regarded as a great social good freedom of action, in nearly all directions, particularly on the part of the entrepreneurial class. Naturally this philosophy would decry the placing of serious burdens on the new and promising system and would deplore the tendency of juries to lose sight of broader philosophical objectives in their

20. The early 19th century in England was an era in which familiar and relatively safe industrial and agricultural techniques were replaced by strange and not yet perfected machinery with a far greater potentiality for danger. "The railroad, the steamboat, the saw mill, the cotton gin, the factories of all descriptions, gave the new legal setup all the work it could do." Green, *The Duty Problem in Negligence Cases*, 29 COL. L. REV. 255, 260 (1929).

Compounding the costs of industrialization was a rapid and mass migration from rural areas into urban centers, where an expanding industry sopped up the surplus of a declining agricultural economy. The new proletariat concentrated in unsanitary and hazardous "factory towns," built to meet the momentary needs of a new industrial employer class as yet unfettered by the paternalistic sense of social responsibility which had characterized its land-owning predecessors. See TREVELYAN, *ENGLISH SOCIAL HISTORY* c. xv (2d ed. 1946). Social tensions and an increase in legal conflicts of all sorts were, perhaps, an inevitable outgrowth of this situation.

The American equivalent of the Industrial Revolution came later in the century, was achieved at less social cost, and left less class hostility. But mechanization and urbanization, in America as in England, extracted a heavy toll from the lower economic class and vastly increased the burdens upon the courts. Most hazardous of the new developments, and most productive of legal conflict, was the growth of rapid transportation systems. In themselves a repository of substantial capital investment, the transportation systems were also a *sine qua non* of continued industrial and urban expansion. Malone reports that in Louisiana, from 1854 to 1888, 20 out of 21 contributory negligence cases arose from accidents in which street railways and other new forms of transportation were involved. "The courts could not escape observing that each controversy was invested with implications that extended to the welfare of the entire local economy. This called for caution lest the valuable new service be crippled. . . ." Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125, 139 (1945).

21. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 156-8 (1946).

sympathies in the single case before them.²² It was in this climate of opinion that the liability of defendants became limited by the fault principle and that courts came to be regarded as the refuge of those who could not protect themselves—not for those who could (according to the individualistic notions of the times), but simply failed to do so.²³ It is easy to see how such an atmosphere would generate a sense of fairness and morality which would take account of an individual plaintiff's fault, as well as an individual defendant's. Perhaps these feelings would have been satisfied by a rule that merely diminished plaintiff's damages because of his fault,²⁴ though the stricter rule gave the system even greater protection against burdens and greater opportunity to control the jury so as to prevent what were believed to be its vagaries.²⁵ However that may be, the combined pull of what was felt to be expediency and of the scholastic urge to find a single proximate cause produced the all-or-nothing rule.

Modern Justifications in Doctrine or Policy

Proximate cause. The contributory negligence rule is sometimes sought to be justified as a corollary of principles of proximate cause.²⁶ Plaintiff will not, of course, be barred by contributory negligence *unless* his negligence was a proximate cause of the damage sued for. But that has nothing to do with the *explanation* of the defense presently being considered. The proposed ex-

22. Freedom of action, as understood by the representative philosophers of 19th century liberalism, meant freedom from state intervention—judicial or legislative. And a dominant theme throughout their writings is the close identification of material progress and industrial expansion with the laws of nature and the hand of God. An excellent summary of some of these philosophies is found in HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT 1860-1915* (1945) (especially cc. 2, 3, 4). Armed with a social philosophy which relieved it of the care and responsibility for the less fortunate, flushed with visions of an ever-expanding economy, and reassured by its philosophers of the 'righteousness' of their role in society, the entrepreneurial class, understandably enough, developed a certain impatience with legal obstacles to the continued march of industrial innovation.

23. Bohlen, *supra* note 5, at 254-5.

24. Note the decision in one of the fairly early contributory negligence cases, *Raisin v. Mitchell*, 9 C. & P. 613 (C.P. 1839) (jury verdict for plaintiff but reduced damages, since "there was fault on both sides," upheld by court). See the observations of Lindley, L.J., in the *Bernina*, 12 P.D. 58, 88, 89 (C.A. 1887); and see discussion pages 731-5 *infra*.

25. The thesis of contributory negligence as an effective instrument of jury control is developed by Malone in the two articles cited note 6 *supra* and *passim*. For examples of criticism from the bench of jury vagaries, see especially Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 158-9 (1946).

26. "The theory of causation is the predominant [explanation of contributory negligence] and it is submitted that, upon the whole, it is the most satisfactory." WINFIELD, *TORTS* 414 (4th ed. 1948). See also Lord Atkin in *Caswell v. Powell Duffryn Assoc. Collieries*, [1940] A.C. 152, 164-5; POLLOCK, *TORTS* 370 (14th ed., Landon, 1939); LAW REVISION COMMITTEE, 8TH REPORT, CONTRIBUTORY NEGLIGENCE, CMD. NO. 6032 (1939).

planation is this: plaintiff is precluded from recovery by his contributory negligence because in the situations where the defense is applicable, his negligence is the sole proximate cause of his injury.²⁷ If this explanation were accepted, it would account fully for both aspects of the rule in its present form. The trouble with it is that it simply does not fit the facts. In the typical case of contributory negligence both plaintiff and defendant would be liable to any third person injured by the accident. Thus if two automobile drivers collide at an intersection because neither is keeping a lookout, both are everywhere held liable to a bystander hurt by the collision.²⁸ This of course means that the negligence of each is both a cause in fact and a proximate cause of the collision (and ensuing damage) under any tests having general currency among the courts today. Yet under the contributory negligence rule, neither driver can recover from the other for his own injuries.

There are situations, to be sure, where plaintiff's negligence is the sole proximate cause of his injury. But in such a case there is neither need nor room for the doctrine of contributory negligence.²⁹ Indeed the proposed explanation is precisely the opposite of the case under the present rule. Contributory negligence is *never* properly invoked when plaintiff's negligence alone causes the damage but only when the negligence of both the plaintiff and defendant are contributing proximate causes of it.³⁰

Of course it would be possible to construct a special definition of proximate cause that would apply only to the connection between a *plaintiff's* negligence and his own injury (and not to any other connection at all), and then to make that definition fit current judicial applications of the contributory negligence rule. Only in this way could the present explanation be validated.³¹ But this would be the height of fatuity, and what resulted could hardly be dignified

27. "It [contributory negligence] rests on the view that though the defendant had in fact been negligent, yet the plaintiff has by his own carelessness severed the causal connection between the defendant's negligence and the accident which has occurred and that the defendant's negligence accordingly is not the true proximate cause." Bowen, L.J., in *Thomas v. Quartermaine*, 18 Q.B.D. 685, 697 (1887).

28. *Lotesto v. Baker*, 246 Ill. App. 425 (1927); *McDonald v. Robinson*, 207 Iowa 1293, 224 N.W. 820 (1929); *Fraser v. Flanders*, 248 Mass. 62, 142 N.E. 836 (1924); *accord*, *Meyer v. Cincinnati Street Ry.*, 157 Ohio St. 38, 104 N.E.2d 173 (1952) (passenger may join allegedly negligent transit company and truck). See also additional cases cited in Notes, 16 A.L.R. 465 (1922), 62 A.L.R. 1425 (1929).

29. 65 C.J.S. 708-9 (1950).

30. *Ibid.* See also cases cited in CLARK, CODE PLEADING 307 n.76 (2d ed. 1947), in which the plea of contributory negligence was held to admit by necessary implication the defendant's negligence and hence was inconsistent with a denial thereof. Logically this is so, but a preferred rule of pleading does not limit a pleader to consistency, and generally both defenses are permitted. *Id.* at 303-7 and cases cited at n.76; see also FED. R. CIV. P. 8.

31. Bohlen, *supra* note 5, at 241 n.1; Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 677-8 (1934). Both commentators, of course, reject such analysis as anything more than a statement of result.

by calling it an explanation. Some of the earlier restrictive notions about cause, which have now been generally repudiated, have, however, persisted as *limitations* on the defense of contributory negligence.³² This carryover has brought confusion and caprice and some practical paradoxes, though in the main its results have been defensible as half-way measures in mitigating the harshness of the contributory negligence rule.³³

Although notions of cause are inextricably bound up with the historical explanation of contributory negligence, they will not serve as a justification of the rule today.³⁴

Assumption of risk. Contributory negligence has sometimes been thought to be no more than an aspect of assumption of risk,³⁵ so that plaintiff is barred from recovery under the maxim "*volenti non fit injuria.*" This explanation, too, would warrant the rule in its present form, as a complete bar to plaintiff's action. The two notions, however, do not cover the same ground and in many situations do not even overlap, though they may. Assumption of risk involves the negation of defendant's duty;³⁶ contributory negligence is a defense to a breach of such duty.³⁷ Assumption of risk may involve perfectly reasonable conduct on plaintiff's part;³⁸ contributory negligence never does.³⁹ Assumption of risk typically involves the voluntary or deliberate incurring of known peril;⁴⁰ contributory negligence frequently involves the inadvertent failure to notice danger.⁴¹ Only confusion can come from failure to keep separate these

32. Thus the last clear chance doctrine has often been reasoned in terms of whether or not plaintiff's contributory negligence was a proximate cause of his injury. Prentice, J., in introducing last clear chance doctrine to Connecticut jurisprudence, described it as "no independent principle operating by the side of, and possibly overstepping the bounds of, other principles but merely a logical and inevitable corollary of the long accepted doctrine of actionable negligence as affected by contributory negligence." *Nehring v. Connecticut Co.*, 86 Conn. 109, 115, 84 Atl. 301, 304 (1912). See Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3, 25 and n.50 (1927).

33. James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938). Compare, however, Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 473 (1953) ("its effect has been to freeze the transition rather than to speed it").

34. The attempt to justify contributory negligence in terms of proximate cause generally has been treated sympathetically by English commentators, (see sources cited *supra* notes 26-7) but critically by American commentators. See Bohlen, *supra* note 5, at 234-42; Lowndes, *supra* note 31, at 675-8; Green, *supra* note 32, at 11-13. The report of the Law Revision Committee, of which Lord Wright was chairman, was reviewed critically in Paton, *Contributory Negligence—Report of the Law Revision Committee*, 14 AUST. L.J. 379, 380-1 (1941).

35. "It is often said that the two defences . . . [assumption of risk and contributory negligence], the two principles, are identical; and throughout the cases there is the greatest confusion between them." Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 HARV. L. REV. 457, 459 (1895).

36. Bohlen, *supra* note 5, at 245.

37. *Id.* at 246.

38. *Ibid.*

39. *Id.* at 247.

40. *Id.* at 246.

41. *Id.* at 246-7.

two strands of legal doctrine.⁴² Yet they have this in common: both are manifestations of the philosophy of individualism which also underlay the concepts of caveat emptor and freedom of contract between the employer and employee of the last century.

The rule against contribution between (or among) wrongdoers and the more or less companion notion that one who seeks the court's help must come into court with clean hands, have also been suggested as reasons for the rule of contributory negligence.⁴³ If this were the case, it would explain why contributory negligence is a complete defense. Perhaps if the clean hands concept is taken in a very loose and general sense as describing the notion that in a system of liability based on fault it is fair to regard the plaintiff's negligence as well as defendant's, it would not be altogether irrelevant here. But in any stricter, more accurate, sense, this explanation (which rather indiscriminately fuses clean hands and no-contribution) also fails to deserve acceptance for the following reasons:

(1) There are situations in which a party will be barred as plaintiff by his negligence but where the same party could have contribution or indemnity with respect to a third person's claim under generally prevailing rules.⁴⁴

42. For an analysis of doctrinal distinctions between them, see Bohlen, *supra* note 5, at 243-52; Lowndes, *supra* note 31, at 679-81; Warren, *supra* note 35, at 458-61; James, *Assumption of Risk*, 61 YALE L.J. 141 (1952).

43. "Obviously it [contributory negligence] is a particular instance within the wider doctrine that a court of law will not give redress to a plaintiff whose case shows wrong in himself in the very matter whereof he complains. . . . And a familiar illustration is, that, if two persons join in a tort and one of them pays the damage, he cannot enforce contribution against the other. . . . To reject the rule of contributory negligence, therefore, would not only reverse a line of decisions extending back to early times, but it would likewise take away from our legal structure a foundation pillar whereon a much larger portion of it than mere negligence reposes."

BISHOP, COMMENTARIES ON THE NON-CONTRACT LAW § 460 (1st ed. 1889) (footnotes omitted). See also *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N.E. 350 (1887) (clean hands). But cf. Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. R. 1, 2-5 (1946).

44. Thus D1, who has satisfied P's judgment against him, may have contribution from D2, if D1's negligence was "passive" or "secondary" in comparison with D2's "active" or "primary" negligence. A typical statement is that contribution may be had if the parties are not in "*pari delicto*." But D1 could not recover from D2 for injuries to himself or to his property arising from the same accident, except in a jurisdiction in which the contributory negligence bar has been relaxed by a "degrees of negligence" or comparative negligence doctrine. Similarly, a negligent distributor of deficient materials has a right to indemnity from the negligent supplier of the goods, although his own negligence would preclude recovery for his own injuries, if any. See PROSSER, TORTS § 169 (1941); Note, 45 HARV. L. REV. 349 (1931). And cf. *Mitchell v. Raymond*, 181 Wis. 591, 195 N.W. 855 (1923), in which D1 had a statutory right of contribution from D2 for injury to D1's "pocketbook" (the judgment against him in favor of P) but no right to damages for injuries to his automobile. *Id.* at 600, 195 N.W. at 859.

(2) There are situations in which a party may not have contribution but where his negligence will not be a bar to an action for his own injuries.⁴⁵

(3) There are many situations in which a negligent plaintiff may recover from a wrongdoer, except perhaps under the (now largely discredited) out-law theory⁴⁶—which is indeed a fairly accurate reflection of some such notion as an insistence on clean hands and shows its unacceptable harshness. Thus a negligent plaintiff recovers in last clear chance cases;⁴⁷ in cases where the injury came from a risk not connected with his negligence (or, as some would say, not “proximately caused” by the negligence);⁴⁸ in cases where injury is wantonly or wilfully caused,⁴⁹ and so on. In truth there never has been a clean hands rule of general application in damage actions.^{49a}

(4) Any realistic appraisal of the no-contribution and contributory negligence rules in modern context will show that they serve very different, even opposed policies. Contributory negligence is a defendant’s doctrine which cuts down the chances of compensation for accident victims and checks prevailing tendencies to distribute accident losses widely; its abolition would be a move towards socialization of the loss. The no-contribution rule (though logically indefensible) in practice tends to help plaintiffs to a recovery; its abolition would thwart wide distribution of losses based on insurance principles.⁵⁰

Deterrence from careless conduct. Contributory negligence has often been defended on the ground that it tends to deter individuals (prospective plaintiffs) from careless conduct.⁵¹ Before testing this suggestion we should note two things: First, this would be a justification from policy or expediency rather than doctrine. Surely the claim that a rule of law will promote accident

45. Thus if both P and D1 are injured by the negligence of D1 and D2, D1 may have a right of recovery against D2 if D2 had the last opportunity of avoiding the accident, but may have no right of either contribution or indemnity in the event of a judgment against D1 in favor of P. See WILLIAMS, *op. cit. supra* note 16, at §4; Bohlen, *supra* note 5, at 243. But it has been increasingly suggested that the rule against contribution between tort-feasors be modified by the last clear chance doctrine. Nashua Iron & Steel Co. v. Worcester & N.R.R., 62 N.H. 159 (1882); Comment, 34 YALE L.J. 427 (1925). And see Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. OF PA. L. REV. 130, 151-4 (1932).

46. This theory would, for instance, hold the Sunday driver or hunter liable for injuries he caused because he was unlawfully profaning the Sabbath. *E.g.*, White v. Levarn, 93 Vt. 218, 108 Atl. 564 (1918). See James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 104 *et seq.* (1950).

47. RESTATEMENT, TORTS §§ 479-80 (1934).

48. *Id.* § 468.

49. *Id.* § 482.

49a. See Sutton v. Wanwatosa, 29 Wis. 21 (1871).

50. This appraisal of the no-contribution rule is treated at greater length in an exchange of views in James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941); Gregory, *Contribution Among Joint Tortfeasors: A Defense*, *id.* at 1170; James, *Replication*, *id.* at 1178; Gregory, *Rejoinder*, *id.* at 1184.

51. Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263, 270 (1890).

prevention is entitled to serious consideration. The factual basis of the claim deserves examination. Second, the reasoning from deterrence does not necessarily lead to the all-or-nothing rule—diminution of damages or comparative negligence would also serve as a deterrent.

The trouble with this attempted justification of contributory negligence is that abolition of the present rule would in all probability promote accident prevention more effectively than the present rule itself does.⁵² On a theoretical basis it will be seen that the defense of contributory negligence offers amnesty to a careless defendant every time it administers a deterrent lash to a careless plaintiff, so that its effect as a deterrent is exactly offset by its invitation to be careless without penalty.⁵³ But there are very practical considerations which mean that pressures of this kind are more effectively brought to bear against defendants as a class than plaintiffs as a class. In the first place plaintiff himself (or his property) is a jeopardized participant in every accident that injures him (or it), so that he is always subject to the strongest motives to escape personal injury (or damage to his own property) quite apart from any thought about civil liability. If the prospect of losing life or limb does not make a plaintiff careful, little further inducement to care will be added by speculations as to the outcome of a lawsuit. The same thing is often true of defendants. Yet today those who bear the burden of accident liability are increasingly absentee defendants—corporate and other employers or insurance companies, whose lives and limbs are not at stake in the accident.⁵⁴ And if their property sometimes is at stake, in many situations there is not even much danger to that: grade crossing accidents, motor vehicle-pedestrian collisions, and cases involving dangerous condition of premises afford examples of a pretty one-sided kind of risk. Defendants, then, will often lack a powerful incentive to carefulness—self-preservation—that is virtually always present with plaintiffs.⁵⁵ It follows that the secondary incentive furnished by concern about legal liability is more important for defendants as a class.

The foregoing argument would be valid even if prospective plaintiffs and prospective defendants were in an equally strategic position to prevent acci-

52. The thesis that follows is developed in greater detail, with citations to relevant empirical studies, in James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *YALE L.J.* 549 (1948); and James & Dickinson, *Accident Proneness and Accident Law*, 63 *HARV. L. REV.* 769 (1950).

53. Lowndes, *supra* note 31, at 681-3.

54. It is true that there is often an employee of defendant whose life is at stake in the accident, so that the servant will have same incentive to care that plaintiff does. And the imposition of liability on such employee would add as little extra incentive in his case as in plaintiff's. But for the master himself, this liability does add an incentive that would not exist without it. And the master is in a more strategic position than the servant to prevent accidents. See notes 56, 57 *infra*.

55. James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 *YALE L.J.* 549, 558 (1948); James & Dickinson, *Accident Proneness and Accident Law*, 63 *HARV. L. REV.* 769, 780 (1950).

dents. Recent studies into human behavior that produces accidents, however, show that this is decidedly *not* the case. These studies make it abundantly clear that large units, such as transportation companies, government, large industrial concerns, and insurance companies, are in a strategic position to reduce accidents and have done so very effectively—particularly since the advent of absolute liability for industrial accidents.⁵⁶ Conversely, these studies emphasize the relatively insignificant part which the individual's conscious free choice plays in causing or preventing accidents,⁵⁷ even where a court would find him negligent. Since the large unit is the perennial defendant in accident cases⁵⁸ and the individual the perennial plaintiff, contributory negligence puts its pressure on the wrong place and relieves the pressure where it will do the most good. It is a net incentive to carelessness, not to safety.

In passing it should be noted that these studies also show that stricter liability for accident need not put a greater burden on business and industry. It has often spurred the business man's ingenuity to find new devices and new ways of doing things that have increased not only safety but productivity as well.⁵⁹

Impracticability of apportioning damages. It has often been suggested that it is administratively impractical to apportion damages, particularly in cases

56. Insurance companies, for example, as depositories of large amounts of capital, are in a position to finance elaborate programs in safety research, inspection, and education. In certain fields of liability insurance, insurance companies have spent more for such programs than in the satisfaction of claims. Particular progress has been achieved in such heavily-insured activities as the operation of elevators, boilers, and industrial machinery generally. Industrial casualties have dropped from an annual average of 36,000 during the first world war to an annual average of 17,000 during the second war, despite the interim expansion of the economy. For a more detailed examination of these studies, see James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 559-63 (1948); James & Thornton, *The Impact of Insurance on the Law of Torts*, 15 LAW & CONTEMP. PROB. 431, 440-2 (1950).

It is noteworthy that the very studies referred to were financed and carried on by industrial enterprises interested in accident prevention. James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 780 (1950).

57. These studies suggest that a significantly large proportion of accidents are caused by a significantly small proportion of the population, designated as the "accident prone" group. Among this group, accidents are not due to "carelessness" but to innate personal characteristics operating without relevance to the individual's sense of responsibility and independent of his conscious behavior. James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950) *passim*.

58. It is true, of course, that in automobile cases the nominal defendant is often an individual. But where such an individual is worth suing he is almost invariably insured, so that the direct pressure of legal liability is against the insurer. For an account of the contribution by insurance companies to the cause of accident prevention, see James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

59. James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 781 *et seq.* (1950).

tried to a jury.⁶⁰ If this argument were accepted it would not justify a rule of contributory negligence. Given the rule, however, such impracticability would justify its taking an all-or-nothing form. The trouble with the argument is that it does not reflect the fact. Theoretically, it would be no harder for juries to make a rough but fair apportionment of faults than to perform many feats that are daily required of them.⁶¹ On the practical side, it may be pointed out that under statutes in many Anglo-American jurisdictions, juries have for years been apportioning damages according to fault, without any indication that they are less able to perform this task than any other.⁶² To be sure in many of these situations (*e.g.*, under the Federal Employers' Liability Act⁶³) the defendant has not suffered injury that might be the subject of a counterclaim. The complexity of apportionment is greatest—and the benefits of apportionment are least—where the parties are cross-claiming against each other.⁶⁴ But even these complexities (which arise in a surprisingly small proportion of the cases⁶⁵) are far from formidable and can be met by appropriate instructions and proper interrogatories.⁶⁶

60. Lowndes, *supra* note 31, at 683-5; BEACH, CONTRIBUTORY NEGLIGENCE § 12 (3d ed. 1899). The Beach treatise, written late in the last century, is obsolete as a definitive statement of the law, but is an interesting example of the legal thinking of the era. Beach regarded the law of contributory negligence as the "only possible" doctrine which could be applied, and without which the law would be an instrument "of oppression and injustice." *Id.* §§ 13, 35.

61. No harder, for example, than to determine the "proximate cause" of an accident, particularly since the concept of "proximate cause" is frequently explained to the jury in terms difficult for laymen to comprehend.

62. One commentator has observed: "Experience in Ontario indicates that our proposed system [based on comparative negligence] would function most ideally in trials before a court without a jury." GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS 121 (1936). This does not necessarily suggest, however, that juries function less ably in applying a comparative negligence doctrine than in applying the contributory negligence doctrine. American juries have had considerable experience in comparative negligence in cases arising under FELA, the Jones Act (seamen), and state statutes modeled upon them; in cases calling for application of crude "degrees of negligence" ("gross," "slight," "ordinary") doctrines; in cases involving more refined comparative negligence laws applying to specific situations, *e.g.*, grade-crossing statutes; or in negligence actions generally in a handful of states and in scattered applications of foreign comparative negligence statutes. Canadian and English juries have had considerably more experience in this task. And although there has been criticism of the jury system in negligence actions generally, no criticism has been specifically directed to the operation of the jury in comparative negligence situations. See, generally, *id.* App. A; Mole & Wilson, *supra* note 19; Turk, *supra* note 4; Whelan, Comparative Negligence, [1938] WIS. L. REV. 465; and also Elliott, *Degrees of Negligence*, 6 SO. CALIF. L. REV. 91 (1932).

63. 35 STAT. 65 (1908), as amended, 53 STAT. 1404 (1939), 45 U.S.C. § 51 (1946).

64. See Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 503 *et seq.* (1953); pages 733-5 *infra*.

65. *Id.* at 507.

66. Appropriate model instructions, based in part on foreign experience with similar statutes, are given in GREGORY, *op. cit. supra* note 62, c. 12; Mole & Wilson, *supra* note

Appraisal of Contributory Negligence

The foregoing, it is submitted, shows that there is no justification—in either policy or doctrine—for the rule of contributory negligence, except for the feeling that if one man is to be held liable because of his fault, then the fault of him who seeks to enforce that liability should also be considered. But this notion does not require the all-or-nothing rule, which would exonerate a very negligent defendant for even the slight fault of his victim. The logical corollary of the fault principle would be a rule of comparative or proportional negligence, not the present rule.⁶⁷ And almost from the very beginning there has been serious dissatisfaction with the Draconian rule⁶⁸ sired by a medieval concept of cause, out of a heartless *laissez-faire*. Occasionally this dissatisfaction took the form of a frank comparison of faults in one way or another.⁶⁹ So strong is the pull of doctrinal orthodoxy, however, that courts have more often assailed the rule indirectly by restricting its application or circumventing it altogether, in ways we shall presently examine.⁷⁰ Contributory negligence has now for a long while been a distinctly disfavored defense. Thus, even while the fault principle continues as a vital force in popular and judicial thinking about accident liability, we may expect to see the contributory negligence rule continually chiselled away.

Besides all that, the importance of fault itself is waning in our accident law.⁷¹ There has been an oft-noted growing feeling that accident loss in modern life should not be regarded as simply the individual concern of the participants in the accident, but as part of the social cost of the enterprise that causes it.⁷²

19, at 645-52. Interrogatories, use of which has expanded since publication of the above-named materials, would still further simplify the mechanics of apportionment.

67. See GREGORY, *op. cit. supra* note 62, at 72 *et seq.*

68. See GREEN, JUDGE AND JURY 119 *et seq.* (1930).

69. Courts have attempted, for example, to compare fault by establishing "degrees of negligence" correlated to "degrees of care." Perhaps the most advanced attempt at a judicially-created doctrine of comparative negligence is what Turk has called the "gallant attempt" of Illinois judges in the mid-nineteenth century. For its short history see Turk, *supra* note 4, at 305-13; Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36 *et seq.* (1944); Mole & Wilson, *supra* note 19, at 335; citations in 45 C.J. 1037 (1928). See, generally, Elliott, *supra* note 62.

Green suggests that a more precise scheme of comparative negligence may have been rejected because of the "violent reaction" to the "degrees of negligence" concept. "Nineteenth century morality was a severe thing. It demanded absolutes. Either a defendant was responsible or he was not. Compromises were not to be endured." GREEN, JUDGE AND JURY 122 (1930).

70. See discussion under text subheading: "THE RETREAT OF CONTRIBUTORY NEGLIGENCE" *infra*.

71. See, e.g., EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); Harris, *Liability Without Fault*, 6 TULANE L. REV. 337 (1932). For a less optimistic appraisal of this development see Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

72. Ehrenzweig, *Assurance Oblige—A Comparative Study*, 15 LAW & CONTEMP. PROB. 445 (1950); Malone, *Damage Suits and the Contagious Principle of Workmen's*

That would mean that the casualties of manufacturing or motoring, for instance, should be distributed equitably among those who benefit from the enterprise. This feeling has been strengthened by the perfecting of techniques for distributing such losses through insurance (even where the nominally liable party is an individual),⁷³ and by an increasing realization that accident-producing behavior on the part of individuals largely reflects human factors other than personal moral shortcoming (ethical fault).⁷⁴ This newer point of view has already given us liability without fault in workmen's compensation.⁷⁵ The chances are it will yield compensation schemes in other fields also.⁷⁶ But whether it does this or not, it has already worked itself into the woof and warp of our accident law to produce what one writer has called "enterprise liability" based on "negligence without fault."⁷⁷ In an atmosphere where the importance of fault itself is waning, contributory negligence will be bound to meet with rapidly mounting disfavor. To date this disapproval has been largely inarticulate in its reasoning, and also uneven in its incidence. But it has gone so far in actual practice that contributory negligence is well on its way to becoming a dead letter,⁷⁸ except as juries illicitly apply it to diminish a plaintiff's recovery.

Compensation, 12 LA. L. REV. 231 (1952) (Part I appears also in 9 NACCA L. REV. 20 (1952)).

73. James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948); Friedman, *Social Insurance and the Principles of Tort Liability*, 63 HARV. L. REV. 241 (1949) (referring to England).

74. James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769 (1950).

75. Citations to some of the abundant literature in the field of workmen's compensation statutes may be found in RIESENFELD & MAXWELL, *MODERN SOCIAL LEGISLATION*, 136 n.69 (1950).

76. A motor vehicle accident compensation plan modeled upon workmen's compensation plans was proposed some 35 years ago. For excellent discussion, see COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS, *REPORT TO THE COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN SOCIAL SCIENCES* (1932), generally known as the "Columbia Report." Such a plan has been adopted in Saskatchewan. See Grad, *Recent Developments in Automobile Accident Compensation*, 50 COL. L. REV. 300, 320 (1950). Also advocated is a similar plan for railway employees. See resolution adopted by House of Delegates, American Bar Association, 74 A.B.A. REP. 108 (1949).

77. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951) (a thoughtful historical and analytic treatment of the subject, and an examination of future probabilities in legislative and judicial law); see also Malone, *The Brave New World—A Review of "Negligence Without Fault"*, 25 SO. CALIF. L. REV. 14, 15 (1951).

78. "A decadent doctrine, which will ultimately disappear from the law," Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 243 (1913); "it has been looked upon with increasing disfavor by the courts," PROSSER, *TORTS* 394 (1941); "[f]or many years, juries have been deciding cases just as though there was no such rule of law," ULMAN, *A JUDGE TAKES THE STAND* 31 (1933); "[t]his tall timber in the legal jungle has been whittled down to toothpick size by the sympathetic sabotage of juries . . . by the emotional antagonism of judges . . . by the popular prejudices of legislators. . . ; little remains to be written about contributory negligence save its obituary." Lowndes, *supra* note 31, at 674.

THE RETREAT OF CONTRIBUTORY NEGLIGENCE

The rest of this Article will explore the ways in which contributory negligence is being undermined. These may be conveniently treated under three heads:

The first of these is easy to state. There are ever growing limitations on the kinds of actions in which the defense will be permitted.

The second needs a word of explanation. Under the formal structure of tort law the concept of negligence is to be found on both sides of the scale in these cases. This holds out a specious appearance of symmetry that has beguiled many a commentator into supposing that the concept has or should have pretty much the same connotation on either side.⁷⁹ A moment's reflections, however, will show that this would be most surprising if it were true. The shift in outlook towards accident liability that has taken place over the last century has led to an ever-increasing expansion of the concept of negligence where that will lead to compensating an accident victim for his loss. It would be strange indeed if there had been a concomitant expansion of the negligence which would cut that compensation off. Every practical man knows this has not been the case. What has emerged has been a double standard which in all candor ought to be recognized.⁸⁰

In addition to the two lines of attack on contributory negligence just described, there have been some miscellaneous procedural and substantive ameliorating doctrines. This century, for instance, has seen an almost complete abandonment of the older rule in some states which put on plaintiff the burden of pleading and proving his freedom from contributory negligence. Over a somewhat longer period the last clear chance doctrine has grown to make serious inroads on the defense.⁸¹ And there have been a few statutory ventures in comparative negligence.

Limitations on the Applicability of Contributory Negligence

The frequently made statement that, in general, contributory negligence is a defense only to actions grounded on negligence, is no more than a generali-

79. "[B]ut negligence is negligence, no matter who commits it, and what would be negligence if committed by a defendant would likewise be negligence if committed by a plaintiff." Layton, C.J., in *Willis v. Schlagenhauf*, 38 Del. (8 Harr.) 96, 102, 188 Atl. 700, 702 (1936). See also PROSSER, TORTS 395 (1941); RESTATEMENT, TORTS § 289 (1934).

One conceptual difference generally recognized is that the defendant's conduct should be judged in terms of the foreseeability of unreasonable risk to others, while the plaintiff's conduct should be judged in terms of foreseeability of unreasonable risk for himself. Often there will be no difference in result, but conceivably there may be conduct threatening harm only to the actor, or harm only to others and not to the actor. See PROSSER, TORTS 394-5 (1941).

80. See James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 786 *et seq.* (1950).

81. The last clear chance doctrine will not be treated in this Article. See James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938).

zation of what the courts do. It is not an explanation of *why* they do it. The only claim such a statement could make to being a *reason* for the result would have to rest on the balanced symmetry of a rule which deals negligence out so even-handedly to plaintiffs and defendants. But such reasoning, aside from the aesthetic appeal of the form of words in which it is cast, is more appropriate to the gaming table than the bench. Thus it remains to consider on the merits the applicability of the defense to various grounds of action. And it will be found that the refusal to apply it springs from different reasoning and different policies in different types of situations. There is probably one common thread that runs through them all—the strong and growing dissatisfaction on all hands with the contributory negligence rule in its present form.

Intentional wrongs. It is often said that contributory negligence is no defense to an action based on intentional wrongdoing.⁸² It would be more accurate to say that "if the consequences of which the plaintiff complains were intended by the defendant, contributory negligence is out of the case."⁸³ On this proposition all agree.⁸⁴ All agree, too, that the rule stems from a comparison of faults. Intentional wrongdoing is so much graver a wrong than negligence both in its social consequences and in the amount of resentment it arouses that the felt need both to deter and to punish it outweighs any social benefits that are thought to accrue from the rule of contributory negligence.⁸⁵

82. See, e.g., *Moore v. El Paso Chamber of Commerce*, 220 S.W.2d 327, 329 (Tex. Civ. App. 1949).

83. WILLIAMS, *op. cit. supra* note 16, at 198. Compare the similar statement in RESTATEMENT, TORTS § 481 (1934).

84. *Steinmetz v. Kelly*, 72 Ind. 442 (1880); *Ruter v. Foy*, 46 Iowa 132 (1877); *Reynolds v. Guthrie*, 145 Kan. 315, 65 P.2d 272 (1937); *Hawk v. Slusher*, 55 Ore. 1, 104 Pac. 883 (1909); PROSSER, TORTS 402 (1941); HARPER, LAW OF TORTS 323-4 (1933); Lowndes, *supra* note 31, at 686.

The rule that contributory negligence will not bar recovery for damages caused by intentional harm has not been uniformly applied to claims based on intentional fraud, misrepresentation, or deceit. Here the force of "caveat emptor" has not been entirely exhausted, despite its rejection by the commentators. See 5 WILLISTON, CONTRACTS § 1515-16B (Williston & Thompson ed. 1936), and cases cited therein and in its 1952 Cumulative Supplement. See also PROSSER, TORTS 747-51 (1941); Bauer, *Contributory Negligence as a Defense to an Action for Fraud*, 18 NOTRE DAME LAW. 331 (1943); Harper & McNeily, *A Synthesis of the Law of Misrepresentation*, 22 MINN. L. REV. 939, 957-9 (1938).

Even under the general rule which rejects contributory negligence as a defense in these actions, some of the potency of contributory negligence may lurk in such concepts as materiality, right to rely on the statement, and the notion that limitation periods run from the time when the fraud should have been discovered. Such problems are collateral to the present subject matter. See in general SHULMAN & JAMES, CASES AND MATERIALS ON TORTS c. 6 (2d ed. 1952), and citations there collected.

85. See PROSSER, TORTS 402 (1941); Cooley, *Problems in Contributory Negligence*, 89 U. OF PA. L. REV. 335, 348 (1941); Lowndes, *supra* note 31, at 686-8. The same values are reflected in other rules governing the intentionally harmful tortfeasor. See Bauer, *The Degree of Moral Fault as Affecting Defendant's Liability*, 81 U. OF PA. L. REV. 586 (1933) (broader scope of causation); Bauer, *The Degree of Defendant's Fault as Affect-*

The prohibition against comparison of negligence, which has had such a strong—almost compulsive—hold on the Anglo-American judicial mind, is propitiated by pointing to the clear difference in kind between the two wrongs involved;⁸⁶ it is only negligences that must not be compared, faults on a different plane may be.

It is only to the unavoidable or intended consequences of defendant's conduct that the above rule clearly applies. If a man is threatened with a battery, his failure to retreat (though unreasonable) will not prevent his recovery for the battery,⁸⁷ but if he heedlessly fails to care for his wounds so that gangrene sets in and he loses a limb, he cannot recover for that aggravation of his original injury.⁸⁸ The "duty"⁸⁹ to mitigate damages, that is, has relevance to the avoidable and unintended consequences of intentional acts, though the "duty" is often relaxed and modified when it is invoked by a wilful wrongdoer.⁹⁰

Although contributory negligence is not a defense to recovery for unavoidable consequences of intentionally harmful torts, consent may be.⁹¹ Con-

ing the Administration of the Law of Excessive Compensatory Damages, 82 U. OF PA. L. REV. 583 (1934); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931).

86. "The doctrine of contributory negligence has no application in an action for assault and battery. . . . An assault and battery is not negligence. The former is intentional; the latter is unintentional." Ruter v. Foy, 46 Iowa 132, 133 (1877).

87. MCCORMICK, LAW OF DAMAGES 137 (1935). The line may sometimes be a thin one between "failure to retreat," which does not affect recovery, and "provocation," which may go towards reducing damages. See RESTATEMENT, TORTS § 921 (1934).

88. *Id.* § 918(a), ill. 1.

89. Generally called the "duty" to mitigate damages, it is not strictly a "duty" in the Hohfeldian sense, since a failure to mitigate gives rise to no right of action in another. The tort victim's "duty" is only to himself. See MCCORMICK, LAW OF DAMAGES 128 (1935), and sources cited therein.

90. According to the *Restatement*, if the tort is one of negligence, P may not recover damages "for such harm as he could have avoided by the use of due care after the commission of the tort." RESTATEMENT, TORTS § 918(1) (1934). If the tort is intentionally harmful (or reckless) P may not recover damages for consequences following the tort if, knowing of the danger, he "intentionally or heedlessly failed" to avoid them. *Id.* § 918(2). And see *id.* § 918(a), ill. 6.

This distinction has been criticized as too rigid. Bauer, *The Administration of the Rule of Avoidable Consequences as Affected by the Degree of Blameworthiness of the Defendant*, 27 MINN. L. REV. 483 (1943) ("The degree of defendant's blameworthiness often modifies the operation of the general rule of avoidable consequences; but this modification, it is submitted, is nearly always one resulting from tendency rather than from the application of any rigid rule." *Id.* at 499). See also Note, 36 Ky. L.J. 134 (1937). A good many of the cases cited in these articles involve nuisances and the problems treated on pages 715-23 *infra*.

91. See Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace*, 24 COL. L. REV. 819 (1924); HARPER, LAW OF TORTS c. 3 (1933); PROSSER, TORTS 117 (1941); RESTATEMENT, TORTS §§ 18, 21 (1934) (definitions of battery and assault, respectively).

sent may render lawful that which would otherwise be unlawful (as in the case of a surgical operation), or it may not (as in the case of a prizefight or an abortion). In the former case it is a defense;⁹² in the latter cases the rulings diverge.⁹³

It is an interesting but not very important question whether contributory intent will bar an action for intended consequences.⁹⁴

The above discussion is confined to cases where defendant intended the harm or regarded it as inevitable. There are many situations in which defendant intended to do the very act or create the very condition that caused the injury, but intended no harm thereby. If the act or condition was unreasonably dangerous and harm results, defendant is liable to the victim, but under current notions his liability is premised on negligence,⁹⁵ and contributory negligence is a defense. In such a case it is not the intent which is controlling but the degree of danger that should be anticipated from the intended act or condition. Of course, the manifest danger may be so great that defendant's conduct will amount to wantonness.⁹⁶

Wilful, wanton, or reckless misconduct. Under the prevailing American rule contributory negligence is no defense to an action for an injury caused by

92. POLLOCK, TORTS 124 (14th ed., Landon, 1939).

93. Consent a defense to recovery (prizefight): *Lykins v. Hamrick*, 144 Ky. 89, 137 S.W. 852 (1911); *Hart v. Geysel*, 159 Wash. 632, 294 Pac. 570 (1930); RESTATEMENT, TORTS § 60, ill. 1 (1934).

Consent not a defense to recovery (prizefight): *Hudson v. Craft*, 33 Cal.2d 654, 204 P.2d 1 (1949); *Teeters v. Frost*, 145 Okla. 273, 292 Pac. 356 (1930); *Barhold v. Wright*, 45 Ohio St. 177, 12 N.E. 185 (1887). Compare *Hudson v. Craft*, *supra*, with the decision which it reversed, *Hudson v. Craft*, 195 P.2d 857 (Cal. Ct. of App. 1948).

Consent a defense to recovery (abortion): *Miller v. Bennett*, 190 Va. 162, 56 S.E.2d 217 (1949); *Goldnamer v. O'Brien*, 98 Ky. 569, 33 S.W. 831 (1896); *Szadwicz v. Cantor*, 257 Mass. 518, 154 N.E. 251 (1926); *Nash v. Meyer*, 54 Idaho 233, 31 P.2d 273 (1934).

Consent not a defense to recovery (abortion): *Martin v. Hardesty*, 91 Ind. App. 239, 163 N.E. 610 (1928); *Milliken v. Heddeshheimer*, 110 Ohio St. 381, 144 N.E. 264 (1924); *Miller v. Bayer*, 94 Wis. 123, 68 N.W. 869 (1896).

94. See WILLIAMS, *op. cit. supra* note 16, at 199-200. See also discussion in *Galveston H. & S.A. Ry. v. Zantzing*, 92 Tex. 365, 48 S.W. 563 (1898).

There is no civil liability for untrue statements in connection with the sale of securities under the Securities Act of 1933 if the purchaser knew the statements to be untrue. 48 STAT. 897 (1934), 15 U.S.C. § 78r(a) (1946).

Contributory intent may sometimes be assimilated to consent.

95. *Brown v. Kendall*, 60 Mass. 292 (1850); Prosser, *Contributory Negligence as a Defence to Violation of Statute*, 32 MINN. L. REV. 107, 112 (1948); James, *Chief Justice Maltbie & the Law of Negligence*, 24 CONN. B.J. 61, 74-5 (1950). Compare text pages 716, 721-2 *infra*.

96. As in *Alabam Freight Lines v. Phoenix Bakery, Inc.*, 64 Ariz. 101, 166 P.2d 816 (1946) (driver of defendant's truck passed another truck on blind curve approaching crest of hill, thereby blocking whole lane for oncoming traffic). See also RESTATEMENT, TORTS § 500 (1934).

such misconduct,⁹⁷ though this seems to be doubtful in England.⁹⁸ Here again (as in the case of intended consequences) the rule may be explained by the strong natural feeling that faults should be compared, that a serious wrongdoer should not escape liability because of the trivial misstep of his victim.⁹⁹ Here again courts justify comparison of faults by pointing out that wilful or wanton misconduct is different from negligence in kind, not merely in degree.¹⁰⁰ And here again the courts still apply the all-or-nothing rule; they compare plaintiff's fault with defendant's only to see whether it will be a defense at all, not for the purpose of diminishing damages.¹⁰¹

While contributory negligence does not bar an action for injury wantonly inflicted, plaintiff's conduct will bar such an action if it is itself a wanton or wilful exposure of his own person or property to the risk—wantonness will bar an action for wanton misconduct.¹⁰² Thus where a pedestrian who was signalling a trolley car to stop kept standing in the middle of the track while the car approached at unabated speed and finally hit him, his wanton self-exposure to peril barred his action for the motorman's wantonness.¹⁰³ This notion has been frequently invoked in actions under automobile guest statutes where plaintiff must prove wantonness and will not be barred by ordinary

97. Note, *Common Law Exceptions to the Defense of Contributory Negligence*, 32 COL. L. REV. 493, 500-1 (1932); HARPER, LAW OF TORTS 324-5 (1934); PROSSER, TORTS 402 (1941); RESTATEMENT, TORTS § 482(1) (1934) ("reckless disregard," which is defined in *id.* § 500). Extensive collections of cases in support of the proposition are in 45 C.J. 981 n.50 (1928); 65 C.J.S. 751 n.9 (1950); 38 Am. Jur. 854 n.8 (1941); and in the West Digest system under Key No. *Negligence 100*.

The doctrine has been rejected in one jurisdiction as involving the same administrative difficulties as would a rule of comparative negligence. *Wittstruck v. Lee*, 62 S.D. 290, 252 N.W. 874 (1934). The legislature subsequently enacted a comparative negligence statute, S.D. Laws 1941, c. 160, but judicial interpretation of it has been very strict. See *Freise v. Gulbrandson*, 69 S.D. 179, 8 N.W.2d 438 (1943); *Roberts v. Brown*, 72 S.D. 480, 36 N.W.2d 665 (1949).

98. WILLIAMS, *op. cit. supra* note 16, at 201-2 ("the rule . . . seems to receive no support from English authorities"). No discussion of the point has been found in other English sources.

99. *Atchison, T. & S.F.R.R. v. Baker*, 79 Kan. 183, 98 Pac. 804 (1908); *Lowndes, supra* note 31, at 686-8; PROSSER, TORTS 402 (1941).

100. "The whole doctrine that contributory negligence is no defense where the injury is the result of recklessness and wantonness is based upon the theory of a difference in kind." *Atchison, T. & S.F.R.R.*, 79 Kan. 183, 189, 98 Pac. 804, 807 (1908).

101. See, *e.g.*, *Kasanovich v. George*, 348 Pa. 199, 202, 34 A.2d 523, 525 (1943), the first definitive acceptance of the rule in that jurisdiction, in which the court rejects any suggestion that comparative negligence is involved.

102. *E.g.*, *Elliott v. Philadelphia Transportation Co.*, 356 Pa. 643, 53 A.2d 81 (1947).

103. *Elliott v. Philadelphia Transp. Co.*, 356 Pa. 643, 53 A.2d 81 (1947), *reversing* 160 Pa. Super. 291, 50 A.2d 537 (1947), 51 DICK. L. REV. 187, 21 TEMP. L.Q. 189, 96 U. OF PA. L. REV. 130, 9 U. OF PITTS. L. REV. 143. Pennsylvania has no last clear chance doctrine.

contributory negligence.¹⁰⁴ If plaintiff knows that his driver host is drunk, for instance,¹⁰⁵ or that he has a physical handicap which makes it dangerous for him to drive,¹⁰⁶ the guest's voluntary self-exposure to such a risk may be so unreasonable as to bar him under the present principle even if the court sees in defendant's conduct a wanton breach of a duty to use care towards plaintiff.¹⁰⁷ The same thing would be true if the host had engaged in persistent and obvious recklessness and the guest had acquiesced in it without remonstrance, or had failed to abandon the relationship.¹⁰⁸

The rule which excludes contributory negligence where defendant's conduct is wanton has been subjected to criticism.¹⁰⁹ Williams has called it "no more than an improvisation designed to limit the operation of the common-law rule denying recovery in cases of contributory negligence."¹¹⁰ An American court

104. See, generally, Rice, *The Automobile Guest and the Rationale of Assumption of Risk*, 27 MINN. L. REV. 323, 492 (1943); White, *The Liability of an Automobile Driver to a Non-Paying Passenger*, 20 VA. L. REV. 326 (1934); 4 BLASHFIELD, *CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE* pt. I, 356-67 (rev. ed. 1946). A similar result is obtained in a few jurisdictions without guest statutes by analogy to the law of bailments. *Id.* pt. I, at 352-6.

105. *Gill v. Arthur*, 69 Ohio App. 386, 43 N.E.2d 894 (1941); *Schubring v. Weggen*, 234 Wis. 517, 291 N.W. 788 (1940) (non-statutory); *Garrity v. Mangan*, 232 Iowa 1188, 6 N.W.2d 292 (1942); *Saxton v. Rose*, 201 Miss. 814, 29 So.2d 646 (1947); *Schneider v. Brecht*, 6 Cal. App.2d 379, 44 P.2d 662 (1935); *Price v. Schroeder*, 35 Cal. App.2d 700, 96 P.2d 949 (1939). See additional cases in Note, 15 A.L.R.2d 1165 (1951).

106. See *Doggett v. Lacey*, 121 Cal. App. 395, 9 P.2d 257 (1932) (one-armed driver); *Maybee v. Maybee*, 79 Utah 585, 11 P.2d 973 (1932) (near-sighted driver); 4 BLASHFIELD, *op. cit. supra* note 104, pt. I at 715-6.

107. In such a case assumption of risk would also bar the action. James, *Assumption of Risk*, 61 YALE L.J. 141, 150-1 (1952). The distinction between denying recovery because of assumption of risk and denying it because of P's wilful and wanton misconduct under the guest statutes is elaborated in *Gill v. Arthur*, 69 Ohio App. 386, 395, 43 N.E.2d 894, 899 (1941). Of the results reached in cases cited in note 105 *supra*, the first four were explained by the courts in terms of assumption of risk, the latter two in what the *Gill* court calls the "equal culpability rule." Compare cases cited in Note, 15 A.L.R.2d 1165, 1177 § 8 (1951), with those cited in *id.* at 1180 § 9.

108. See *Young v. Nunn, Bush & Weldon Shoe Co.*, 212 Wis. 403, 249 N.W. 278 (1933); cases cited in Note, 154 A.L.R. 924 (1945); 4 BLASHFIELD, *op. cit. supra* note 104, pt. I at 714-18.

109. See notes 110-12 *infra* and accompanying text. For different criticism, see the excellent analysis in Burrell, *A New Approach to the Problem of Wilful and Wanton Misconduct*, [1949] INS. L.J. 716 (particularly at pp. 723-6).

"The recognition of wilful and wanton misconduct stems from an inarticulate perception of a psychiatric truth. Our method of dealing with it is not only unscientific, but, more important, our purpose is primitive. Compensation for the injured person should be unrelated to the treatment of the malfactor, and this treatment should be curative, not vindictive." *Id.* at 726.

110. WILLIAMS, *op. cit. supra* note 16, at 202. See also GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS* 52 (1936) ("as objectionable as . . . contributory negligence. . . [; it] substitute[s] one harsh and arbitrary doctrine for another"); Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125, 141 (1941) ("another doubtful device to avoid . . . contributory negligence").

has found that it involves the same administrative difficulties as would a rule of comparative negligence, and so has repudiated it.¹¹¹ Commentators have complained that the rule calls for a line that is hard to draw in practice, and that the words employed in the test have not been used consistently.¹¹² In spite of all this the rule provides a much needed escape along fairly rational lines from an over-harsh doctrine.¹¹³ It is a step in the direction of comparative negligence, though a crude one.

Extra-hazardous activities. People do, of course, engage in some perfectly lawful activities at peril of liability for the damages they may cause.¹¹⁴ Where that is so, contributory negligence is generally not a defense. Such a result does not stem from a comparison of faults, for defendant has (often) been innocent and plaintiff negligent so that the fault principle would find contributory negligence to be a defense here more readily than in cases where defendant's conduct was blameworthy.¹¹⁵ Rather there is here the placing of liability on a basis other than fault. Often this is the extra-hazardous nature of defendant's lawful and desirable activity, coupled with the fact that its profits sometimes tend to put defendant in a better position to spread the loss from the enterprise's casualties than are its victims.¹¹⁶ Society has, in effect, permitted defendant's activity on condition that he compensate those injured by its peculiar hazards¹¹⁷ and has thereby transferred some of the duty to protect

111. *Wittstruck v. Lee*, 62 S.D. 290, 252 N.W. 874 (1934). The subsequently enacted Comparative Negligence Statute, S.D. Laws 1941, c. 160, has been strictly interpreted by the judiciary. See note 97 *supra*.

112. Turk, *supra* note 4, at 203-4 ("unworkable"); Note, *Those Weasel Words—“Wilful and Wanton,”* 92 U. OF PA. L. REV. 431 (1944) ("chameleon-like characteristics"); Cooley, *Problems in Contributory Negligence*, 89 U. OF PA. L. REV. 335, 348-50 (1941).

113. GREEN, JUDGE AND JURY 121 n.42 (1930).

114. See, e.g., HARPER, LAW OF TORTS c. 10 (1933); PROSSER, TORTS c. 10 (1941); RESTATEMENT, TORTS §§ 507, 519 (1934); Gregory, *Trespass to Nuisance to Absolute Liability*, 37 VA. L. REV. 359 (1951); Foster & Keeton, *Liability Without Fault in Oklahoma*, 3 OKLA. L. REV. 1, 172 (1950); Note, 61 HARV. L. REV. 515 (1948). Some recent cases are *Luthringer v. Moore*, 31 Cal.2d 489, 190 P.2d 1 (1948); *Whitman Hotel Corp. v. Elliott & Watrous E. Co.*, 137 Conn. 562, 79 A.2d 591 (1951).

115. This statement, to be sure, ignores the difficulty of calling plaintiff's negligence "contributory" when there is no negligence of defendant to which it can contribute. But the difficulty is no more than a play on words. On the verbal level it is readily avoided by noting that plaintiff's negligence may be called "contributory" if it contributes to his injury. And if it does, then plaintiff's fault is significant for the purpose of any valid policy that may underlie the concept of contributory negligence. See Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 689 *et seq.* (1934).

116. There are situations where the loss may be more efficiently distributed by property insurance (held by plaintiffs) than through the more cumbersome device of tort liabilities even where that is covered by liability insurance. This consideration would favor doctrines that withhold or restrict liability in such a case. See Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952); James, *Scope of Duty in Negligence Cases*, 47 N.U.L. REV. 778 (1953).

117. See authorities cited note 114 *supra*. Cf. James, *Nature of Negligence*, 4 UTAH L. REV. — (1953). Compare the excellent statement made nearly one hundred years ago

potential victims from the victims themselves to the entrepreneur. In such a context ordinary questions of negligence on either side of the scale become irrelevant.¹¹⁸ Human failings like inadvertence are simply part of the setting that makes a toll of the enterprise inevitable. The same philosophy underlies workmen's compensation acts.

Liability for the keeping—or at least for the escape—of dangerous animals is also strict,¹¹⁹ and here also ordinary contributory negligence is not a defense.¹²⁰ In these cases the defendant's activity is less often profitable, but it is dangerous and perhaps of more marginal social utility than, for example, blasting.¹²¹

Not all cases of liability at peril involve extra-hazardous activity. Some—such as liability for cattle trespass—are said to be vestigial traces of an earlier "amoral" period in our law, and it has been suggested that contributory negli-

by Baron Bramwell: "The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case—whenever a thing is for the public benefit, properly understood—the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss by the use of the land required for its site; and accordingly, no one thinks it would be right to take an individual's land without compensation to make a railway. It is for the public benefit that trains should run, but not unless they pay their expenses. If one of these expenses is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit they should if the wood is not their own. If, though the wood were their own, they still would find it compensated them to run trains at the cost of burning the wood, then they obviously ought to compensate the owner of such wood, not being themselves, if they burn it down in making their gains." *Bamford v. Turnley*, 3 Best & S. 66, 84, 85, 122 Eng. Rep. 25, 33 (Ex. 1862).

118. See Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 689 *et seq.* (1934); HARPER, LAW OF TORTS § 164 (1933); RESTATEMENT, TORTS § 525 (1934).

119. RESTATEMENT, TORTS § 507 (1934). Compare McNeely, *A Footnote on Dangerous Animals*, 37 MICH. L. REV. 1181 (1939).

120. *Wojewoda v. Rybarczyk*, 264 Mich. 641, 225 N.W. 555 (1929) (carelessly stepping on dog); *Muller v. McKesson*, 73 N.Y. 195 (1878) (forgetting presence of vicious watchdog); *Tidal Oil Co. v. Forcum*, 189 Okla. 268, 116 P.2d 572 (1941) (crawling under building to get dog not known by decedent to be vicious); *Moore v. McKay*, 55 S.W.2d 865 (Tex. Civ. App. 1932) (postman's ringing doorbell in spite of sign warning him this would arouse bad dog); Note, 69 A.L.R. 500, 513 (1930).

121. See McNeely, *A Footnote on Dangerous Animals*, 37 MICH. L. REV. 1181, 1193, 1199 (1939) (discussion of utility in connection with possible liability on a negligence basis). There is here a suggestion that public zoos should be treated tenderly, because they are educational and not for profit. See also Lowndes, *op. cit. supra* note 118, at 693. But surely they are not less dangerous for this reason, and the profit (though non-pecuniary) is to the public, which is exactly the body that would foot the bill for the casualties that are a cost of this profit.

gence should be a defense here.¹²² But why should it be? The suggestion presupposes the superiority of the fault principle over that of strict liability (a superiority which is far from clear¹²³) and ignores the fact that contributory negligence is the weakest spot in the fault principle even if that principle be thought desirable on the whole. At any rate the question is largely academic, for in this field most of the cases turn on the question whether plaintiff had the duty to fence cattle out, or defendant to fence them in, rather than on contributory negligence as we are using the term in the present discussion.¹²⁴

Even where liability is strict, however, plaintiff may be barred if he consents to or assumes the risk.¹²⁵ Thus one who engages to take care of defendant's dangerous animals or takes a job where he knows there is to be blasting could scarcely complain (under tort principles) of injuries caused by the animals or the blasting without defendant's negligence. Moreover if plaintiff actually knows of the risk and appreciates it, yet unreasonably encounters it, he will probably be barred even where the relationship between the parties is not one of voluntary association which either one is free to take or leave as he will.¹²⁶ Such conduct is often called "assumption of risk,"¹²⁷ but it does

122. Lowndes, *op. cit. supra* note 118, at 696.

123. See, e.g., Seavey, *Speculations as to "Respondeat Superior"* in HARVARD LEGAL ESSAYS, 433, 437 *et seq.* (1934); James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 777 *et seq.* (1950).

124. *Holgate v. Bleazard*, [1917] 1 K.B. 443, illustrates this and holds that even if plaintiff has covenanted with his own landlord to keep proper fences, his failure to do so is no defense to his action against a neighbor for trespass by the latter's cattle. *Wheeler v. Woods*, 205 Iowa 1240, 219 N.W. 407 (1928), approved an instruction denying recovery for cattle trespass if the animal escaped through plaintiff's portion of a partition fence. See Note, 34 IOWA L. REV. 318 (1949). For interesting background of the fence wars on our great plains, see WEBB, *THE GREAT PLAINS* (1931).

After noting the obligation to fence, Williams makes this interesting suggestion: "Nevertheless if a landowner actually sees his neighbors' cows approaching an open gate and making for his own cabbages, it is probable that the courts would throw upon him the onus of making reasonable efforts to prevent entry by the cows." WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* 286 (1951).

125. HARPER, *LAW OF TORTS* 348, 349 (1933). The case of *Eastern & S.A. Tel. Co. v. Cape Town Tramways Co.*, [1902] A.C. 381 (P.C.), cited by Harper, suggests that plaintiff by his own conduct may take himself outside the scope of the duty owed under the principle of *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868). Plaintiff in *Cape Town Tramways* maintained a telegraph cable whose operation was susceptible to disruption "by even minute currents of electricity." [1902] A.C. at 393. The court held that defendant's duty to prevent the escape of electricity from its tramway system did not extend to the protection of instrumentalities so sensitive. *Cf. Lake S. & M.S.R.R. v. Chicago, L.S. & S.B. R.R.*, 48 Ind. App. 584, 92 N.E. 989, 95 N.E. 596 (1910); Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 405 (1942).

126. The cases cited in note 120 *supra* all state this as to animal cases. See also 3 C.J.S. 1255 (1936); Note, 69 A.L.R. 500, 513 (1930); RESTATEMENT, TORTS § 515 (1934). Cases of injury by explosives where a similar rule is applied are *Worth v. Dunn*, 98 Conn. 51, 118 Atl. 467 (1922); *Wells v. Knight*, 32 R.I. 432, 80 Atl. 16 (1911). *Cf. RESTATEMENT, TORTS* § 525 (1934).

127. See, e.g., PROSSER, TORTS 463 (1941).

not constitute assumption of risk in the primary sense as do the illustrations given above.¹²⁸ It is a case where plaintiff is barred because his conduct is unreasonable and involves fault of a graver kind than mere inadvertence or carelessness. "Assumption of risk" here means wilful and unreasonable self-exposure to risk.¹²⁹

The defense just described simply represents the limit to which the law goes in transferring the duty of their own protection from the victims to the creator of extra-hazardous enterprise. It shows that there is felt to be room for some individualism even in a rule concerned primarily with the distribution of accident losses according to insurance principles. Perhaps an analogy may be found in provisions excluding a workman from compensation where his own misconduct has been serious and wilful.¹³⁰

Nuisance. The question whether contributory negligence is a defense to nuisance is complicated by the breadth and confusion that mark the concept of nuisance. In one of its aspects, this branch of the law seeks to adjust competing uses of land among different landowners and to determine the limits within which a defendant may use his land in a way that will result in some kind of injury to the beneficial use and enjoyment of other land.¹³¹ In this context contributory negligence does not play much of a part.¹³² To be sure defendant's conduct may involve negligence in the ordinary sense,¹³³ but it need not; and absence of negligence is no defense if the result of defendant's use of his land involves an unreasonable interference with plaintiff's use of his own, under the criteria of nuisance.¹³⁴

The inapplicability of contributory negligence here seems sound on principle. The case is often one where defendant is deliberately engaging in conduct or maintaining a condition which more or less inevitably invades plaintiff's interests to an extent which the law forbids.¹³⁵ The situation therefore

128. See James, *Assumption of Risk*, 61 YALE L.J. 141 (1952).

129. Cf. *Worth v. Dunn*, 98 Conn. 51, 118 Atl. 467 (1922) ("reckless and unnecessary exposure to risk of injury").

130. See, e.g., HOROVITZ, *WORKMEN'S COMPENSATION* 313 (1944).

131. See, e.g., PROSSER, *TORTS* § 73 (1941) (at page 585 this author aptly describes the law of private nuisance as a "process of judicial zoning").

132. See pages 716-18 *infra* and Notes, 19 MINN. L. REV. 249 (1935), 57 A.L.R. 7 (1928).

133. An example is afforded by the leaving of the carcass of an animal killed by a train to rot on the right of way, as in *Missouri K. & T.R.R. v. Burt*, 8 Tex. Civ. App. 406, 27 S.W. 948 (1894). See also WOOD, *LAW OF NUISANCES* § 143 (3d ed. 1893).

134. *Snow v. Marian Realty Co.*, 212 Cal. 622, 299 Pac. 720 (1931); *Bohan v. Port Jarvis Gas Light Co.*, 122 N.Y. 18, 25 N.E. 246 (1890); *Ohio Stock Food Co. v. Gintling*, 22 Ohio App. 82, 153 N.E. 341 (1926); JOYCE, *LAW OF NUISANCES* § 18 (1905); cf. WOOD, *LAW OF NUISANCES* § 130 (3d ed. 1893).

135. As by injunction. See *Kall v. Carruthers*, 59 Cal. App. 555, 211 Pac. 43 (1922); *Rindge v. Sargent*, 64 N.H. 294, 9 Atl. 723 (1887); cf. *Smith, Reasonable Use of One's Own Property as a Justification for Damages to a Neighbor*, 17 COL. L. REV. 333 (1917); Notes, 52 COL. L. REV. 781 (1952), 61 HARV. L. REV. 515, 520 (1948).

offers a tempting analogy to a wilful or intentional wrong (to which, as we have seen, contributory negligence is not a defense¹³⁶). And sometimes the analogy may be apt enough.¹³⁷ By no means all cases of this kind of private nuisance, however, involve the cavalier or deliberate willingness to inflict injury that would warrant treating the wrong as intentional. It is true that most of these defendants intend to do the very thing that causes the injury. But their attitude is often no more reprehensible or anti-social than the decision to run a railroad or a fleet of trucks in the face of statistical certainty that the enterprise will take a toll of life and limb. A sounder basis for excluding contributory negligence here is to treat defendant's activities in these cases as the kind one engages in at peril of having to compensate his neighbors for any unreasonable interference which his activities cause to their enjoyment of their own land.¹³⁸ This would account for those decisions which rule out the defense where defendant's conduct involves merely negligence,¹³⁹ as well as those which make him pay damages where his activity, though injurious, is nevertheless so valuable to society that it will not be enjoined.¹⁴⁰ Neither of these results may be satisfactorily explained by resort to the analogy of wilfulness.

There is another reason why contributory negligence is insignificant in these cases. They seldom in fact present any act or omission on plaintiff's part

136. See text at pages 707-9 *supra*.

137. *E.g.*, Paddock v. Somes, 102 Mo. 226, 14 S.W. 746 (1890) (wherein the complaint characterized defendant's maintenance of the offending pipe as "wilfully, wrongfully, and maliciously" done). Compare PROSSER, TORTS 597 (1941).

138. See HARPER, LAW OF TORTS § 181 (1933). As we have seen (pages 712-15 *supra*), the philosophy behind this kind of liability leaves little room for fault on either defendant's or plaintiff's side of the scale.

139. *E.g.*, Philadelphia & R.R. v. Smith, 64 Fed. 679 (3d Cir. 1894) (allowing drainage ditch to become clogged); Missouri K. & T.R.R. v. Burt, 8 Tex. Civ. App. 406, 27 S.W. 948 (1894) (leaving dead animal to rot on right of way); *cf.* Kafka v. Bozio, 191 Cal. 746, 218 Pac. 753 (1923) (contributory negligence no defense to nuisance apparently created by negligence). In Gould v. McKenna, 86 Pa. 297 (1878), defendant's tin roof sloped towards plaintiff's wall along which he had turned up the tin to a distance of 12 inches "as an apron or flashing." During heavy rain, water accumulated and overflowed or came through this flashing, and entered plaintiff's building. Under the charge, the jury must have found that defendant failed to protect this party wall "in a manner in which a prudent or cautious man would for this purpose." See *id.* at 300. The court held contributory negligence no defense.

It is often said that contributory negligence is a defense to a nuisance arising out of negligence. See, *e.g.*, HARPER, LAW OF TORTS 394 (1933). But this should not be true of a case where defendant would be liable for the condition he created even if there were no negligence. Where defendant is strictly liable, though innocent, his defenses are surely not increased by adding his negligence to the case. The statement referred to, I submit, has no proper application to the field of private nuisance.

140. See, *e.g.*, Rasch v. Nassau El. Co., 198 N.Y. 385, 91 N.E. 785 (1910); Story v. N.Y. El. Ry., 90 N.Y. 122 (1882); Barboglio v. Gibson, 61 Utah 314, 213 Pac. 385 (1923); Note, *Nuisance and Legislative Authorization*, 52 COL. L. REV. 781, 784 (1952); James, *Nature of Negligence*, 4 UTAH L. REV.—(1953). These cases do not involve the defense of contributory negligence.

which is comparable to contributory negligence in the ordinary accident case. This will be seen from a review of the kinds of situations where defendant has sought to invoke the defense. These include: (1) "Moving to a nuisance"—*e.g.*, buying or renting property exposed to the nuisance. If such conduct on plaintiff's part deprived him of his remedy, that fact would virtually allow defendant, by his wrongful conduct, to condemn part of the value of neighboring land without compensation. It is not a defense.¹⁴¹ (2) Use by plaintiff of his own land in a way that foreseeably increases his exposure to the nuisance. As a general proposition the law is unwilling to characterize such conduct as negligent (even where contributory negligence would concededly be a defense).¹⁴² To do so would require plaintiff to make an unreasonable sacrifice to avoid the consequences of an admitted wrong. He would have to refrain, for instance, from planting to crops that part of his land which was threatened with flood by defendant's inadequate culvert,¹⁴³ or to keep his windows forever closed to keep out the stench or smoke from defendant's factory.¹⁴⁴ Such sacrifices the law does not require. (3) Creation of a similar nuisance by plaintiff. Here of course, plaintiff may not recover for any damages that result from the condition which he himself has created, but his conduct does not bar him from recovering for that part of the damages which flow from the condition which defendant created.¹⁴⁵ (4) Failure to take reasonable steps to avert or minimize the consequences of the nuisance, or to abate the nuisance. These cases present the closest analogy to ordinary contributory negligence, and here that doctrine can make the most plausible claim for recognition. But the weight of authority rejects the defense even here, often quoting a passage from Wood that "[a] party is not bound to expend a dollar, or to do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by reason of the wrongful acts of another."¹⁴⁶ This expresses a policy to put on defendants in these cases the primary burden of protecting others from the consequences of conduct or a condition that amounts to a nuisance. Thus plaintiff is not bound to abate the nuisance (especially if this would involve

141. HARPER, LAW OF TORTS § 193 (1933); JOYCE, LAW OF NUISANCES § 49 (1906).

142. *Leroy Fibre Co. v. Chicago M. & St. P. Ry.*, 232 U.S. 340 (1914); *Taulbee v. Campbell*, 241 Ky. 410, 44 S.W.2d 275 (1931); *North Bend L. Co. v. Seattle*, 116 Wash. 500, 199 Pac. 988, 19 A.L.R. 415, 423 (1921); *Kellogg v. Chicago & N.W.R.R.*, 26 Wis. 223 (1870). *But cf. Willitts v. Chicago B. & K.C. Ry.*, 88 Iowa 281, 55 N.W. 313 (1893); *Emry v. Raleigh & G.R.R.*, 109 N.C. 589, 14 S.E. 352 (1891); *Smith v. Ogden & N.W. R.R.*, 33 Utah 129, 93 Pac. 185 (1907).

143. As in the cases cited in the preceding note.

144. See *Curtis v. Kastner*, 220 Cal. 185, 30 P.2d 26, 29 (1934).

145. *Bowman v. Humphrey*, 132 Iowa 234, 109 N.W. 714 (1906). Compare *Gould v. McKenna*, 86 Pa. 297 (1878). Compare also *Rozewski v. Simpson*, 9 Cal.2d 515, 71 P.2d 72 (1937) (water carefully impounded on defendant's rice field escaped onto plaintiff's land through cuts made by plaintiff himself).

146. WOOD, LAW OF NUISANCES § 435 (3d ed. 1893).

going on defendant's land), even though he is privileged to do so.¹⁴⁷ Nor need he take affirmative steps to arrange his premises so as to ward off the nuisance, as by making an embankment or fixing a wall to prevent seepage of water from defendant's land.¹⁴⁸ Another way to express the result in these cases is to say that plaintiff has no duty (or at least a limited duty) of self-protective care with respect to risks created by a nuisance.¹⁴⁹

No doubt in all these situations there are limits to the principle which excludes plaintiff's acts or omissions as a defense. Surely if that conduct amounts to consent or invitation to injury, or a wilful or reckless and unreasonable exposure to risk, that fact should preclude recovery for the item of damages (which might in a given case include all damages) resulting from such conduct on plaintiff's part.¹⁵⁰

All of the nuisance cases heretofore dealt with involved interference with the use and enjoyment of land, a field in which strict liability has, traditionally,

147. *Niagara Oil Co. v. Ogle*, 177 Ind. 292, 98 N.E. 60 (1912); *White v. Chapin*, 102 Mass. 138 (1869); *Jarvis v. St. Louis, I.M. & S.R.R.*, 26 Mo. App. 253 (1887); *Missouri K. & T.R.R. v. Burt*, 8 Tex. Civ. App. 406, 27 S.W. 948 (1894); *Gulf C. & S.F.R.R. v. Reed*, 22 S.W. 283 (Tex. Civ. App. 1893).

148. *Philadelphia & R.R.R. v. Smith*, 64 Fed. 679 (3d Cir. 1894); *Tennessee Coal & I. Co. v. Hamilton*, 100 Ala. 252, 14 So. 167 (1893); *Athens Mfg. Co. v. Rucker*, 80 Ga. 291, 4 S.E. 885 (1887); *T. A. Snider Preserve Co. v. Beemon*, 60 S.W. 849 (Ky. Ct. of App. 1901); *Underwood v. Waldron*, 33 Mich. 232 (1876); *Paddock v. Somes*, 102 Mo. 226, 14 S.W. 746 (1890); *Gould v. McKenna*, 86 Pa. 297 (1878). *But cf.* *Carroll Springs Dist. Co. v. Schnepfe*, 111 Md. 420, 74 Atl. 828 (1909).

149. See reasoning of Cooley, C.J., in *Underwood v. Waldron*, 33 Mich. 232 (1876).

150. In *Sherman v. Fall R. Iron Wks. Co.*, 2 Allen 524 (Mass. 1861), gas escaping from defendant's pipes fouled the well used by plaintiff in his livery business. In holding that plaintiff had made a case for the jury, the court said, "If the injury to the plaintiff's horses, and to his business, was occasioned by his own carelessness in allowing the horses to drink the water after he knew that it was corrupted by the gas, the effect would only be to exclude that particular element of damages." *Id.* at 526. See also *Willitts v. Chicago, B. & K.C. Ry.*, 88 Iowa 281, 55 N.W. 313 (1893); *Emry v. Raleigh & G.R.R.*, 109 N.C. 589, 14 S.E. 352 (1891).

It has been suggested that if a man "purchases land for the sole purpose of bringing an action against the defendant for a nuisance . . . he may be denied a remedy. . . ." HARPER, *LAW OF TORTS* 394 (1933). Such a result, however, seems highly questionable in policy, since it would adversely affect the innocent former owner of the injured land by further impairing its already damaged marketability. Even in "moving to a nuisance," however, plaintiff's conduct is not altogether irrelevant. If, for instance, he chooses to build a home in the heart of an industrial area he must put up with more discomfort than if he lived in the country. Winfield, *Nuisance as a Tort*, 4 *CAMB. L.J.* 189, 200 (1931). Compare also discussion of the *Cape Town Tramways* case, cited and discussed in note 125 *supra*.

It should be noted that assumption of risk in a primary sense could come into a case of private nuisance only where plaintiff obtained his interest in land from the defendant himself, with knowledge of the nuisance. Otherwise the relationship between the parties is not of the kind in which such assumption of risk is relevant. See James, *Assumption of Risk*, 61 *YALE L.J.* 141 (1952).

been more readily applied than in other cases of personal injury and property damage.¹⁵¹ The concept of nuisance has also been used where defendant's conduct unreasonably interferes with the exercise of a public right such as navigation or highway travel. And such a nuisance may afford an action for damages to one who suffers individual injury (*e.g.*, personal injury or property damage) from the nuisance.¹⁵² The situations in this field are of the type ordinarily found in accident litigation and abound with examples of conduct (by plaintiffs) involving typical contributory negligence, such as failure to observe and avoid apparent danger. It is here that the greatest confusion and diversity of views are found.¹⁵³

Nuisance is an older tort than negligence, but it has always been a broad and amorphous one.¹⁵⁴ As late as the nineteenth century, negligence was thought of as simply one way of committing one of the recognized torts—for example, nuisance.¹⁵⁵ This was the situation when contributory negligence appeared on the scene. Quite naturally, therefore, it was looked on as a defense to negligence wherever that was relied on as a ground of liability in any tort—including nuisance.¹⁵⁶ As the century wore on the tendency grew (especially in America) to look on negligence as the normal basis of liability in cases of accidental personal injury and property damage.¹⁵⁷ It is not surprising, therefore, to find our courts applying the companion notion of contributory negligence in these cases without attaching any particular significance to the fact that in many of them defendant's conduct also amounted to a nuisance.¹⁵⁸

151. All the instances of strict liability relied on by the judges in *Rylands v. Fletcher*, L.R. 1 Ex. 265 (1866), *aff'd*, L.R. 3 H.L. 330 (1868), for example, involved injury to interests in land. Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. OF PA. L. REV. 293, 373, 423 (1911). See also James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 366 *et seq.* (1946). Occasionally, of course, a private nuisance may cause personal injury to plaintiff or damage to his chattels while he is in the exercise of an interest in land. Fumes from a factory, for example, may make a neighbor ill. It has been suggested that the same rules be applied here, to the defense of contributory negligence, as are found in cases of public nuisance causing such injury. Comment, 24 IND. L.J. 402, 411 n.40 (1949). Since liability in private nuisance is strict, this would lead to exclusion of the defense in such case.

152. HARPER, LAW OF TORTS § 179 (1933); PROSSER, TORTS § 72 (1933); COMMENT, 24 IND. L.J. 402 (1949).

153. See Berger, *Contributory Negligence as a Defense to Nuisance*, 29 ILL. L. REV. 372 (1934); Comment, *Nuisance or Negligence; A Study in the Tyranny of Labels*, 24 IND. L.J. 402 (1949); Notes, 35 MICH. L. REV. 684 (1937), 38 MICH. L. REV. 1337 (1940), 19 MINN. L. REV. 249 (1935), 57 A.L.R. 7 (1928).

154. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 410 (1942); Winfield, *Nuisance as a Tort*, 4 CAMB. L.J. 189 (1931).

155. *Id.* at 197; Winfield, *History of Negligence in Torts*, 42 L.Q. REV. 184 (1926).

156. As in *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809), which is often referred to as the parent of all contributory negligence cases.

157. See Bohlen, *supra* note 151; James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365 (1946).

158. *E.g.*, *Pfau v. Reynolds*, 53 Ill. 212 (1870); *Irwin v. Sprigg*, 6 Gill 200 (Md 1847); *Casey v. Malden*, 163 Mass. 507, 40 N.E. 849 (1895); *Smith v. Smith*, 2 Pick.

And today where a nuisance is grounded on negligence, contributory negligence is generally held to be a defense.¹⁵⁹

A public nuisance, however, may also be grounded on some foundation of liability other than negligence. Defendant's conduct may involve extra-hazardous activity (like blasting) or the violation of a positive rule of law or a statute (such as the unlawful obstruction or excavation of the highway) and therefore be a nuisance. And very occasionally defendant may intend the harm as well as the obstruction. The weight of current authority characterizes all such nuisances as "absolute," and holds that ordinary contributory negligence is no defense to actions based on them¹⁶⁰ (though wilful or reckless exposure to risk would be¹⁶¹).

It remains to analyze and appraise the current distinction between nuisance grounded on negligence and absolute nuisance. Some aspects of it are easy enough to fit into the prevailing patterns of negligence law and are as justifiable as their analogues outside of the nuisance area. Thus, as we have seen, contributory negligence is generally no defense where defendant's activity is extra-hazardous, and there is no reason for applying a different rule where the term nuisance is used as a vehicle of strict liability in these cases.¹⁶² The same thing would be true in the rare case where the harmful result is intended.

On the other hand where defendant's conduct is actionable only because it entails an unreasonable likelihood of harm under all the circumstances—but not so great a likelihood that the conduct will be called wanton—it certainly violates no legal logic to hold that contributory negligence is a defense, even if the wrong fits into the technical dimensions of a nuisance. To be a nuisance it must, it is true, unreasonably jeopardize persons exercising a public right,

621 (Mass. 1823). See Note, 29 ILL. L. REV. 372 (1934). In *Crommelin v. Coxe*, 30 Ala. 318 (1857), a much mis-cited case, the court apparently accepted this notion quite readily (*id.* at 329), but found it inapplicable to a case where plaintiff failed to fill in a space with earth so as to protect his own land from water seeping from his neighbor's. The actual holding of the case was that defendant was not liable for a condition he had no part in creating (excavation that collected water).

159. The leading case is *McFarlane v. Niagara Falls*, 247 N.Y. 340, 160 N.E. 391 (1928). See also *Beckwith v. Stratford*, 129 Conn. 506, 29 A.2d 775 (1942); and authorities cited in note 153 *supra*.

160. *Hoffman v. Bristol*, 113 Conn. 386, 155 Atl. 499 (1931); *Flaherty v. Great Northern R.R.*, 218 Minn. 488, 16 N.W.2d 553 (1944); *Hanson v. Hall*, 202 Minn. 381, 279 N.W. 227 (1938); *Delaney v. Philhern Realty H. Corp.*, 280 N.Y. 461, 21 N.E.2d 507 (1939); *Clifford v. Dam*, 81 N.Y. 52 (1880); and authorities cited in note 153 *supra*.

161. *Worth v. Dunn*, 98 Conn. 51, 118 Atl. 467 (1922). Most of the cases cited in the preceding note recognize this. Compare also note 126 *supra*.

162. Winfield, has said, "[L]et us select what description of nuisance we may, we shall find that it will always cover the type of evil contemplated in *Rylands v. Fletcher*." Winfield, *Nuisance as a Tort*, 4 CAMB. L.J. 189, 194 (1931). Especially in America, where the *Rylands* case got a cold initial reception, nuisance is a much worked vehicle for the growing recognition of strict liability for extra-hazardous activities. See, *c.g.*, Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 (1942); SHULMAN & JAMES, *CASES AND MATERIALS ON TORTS* 61-82 (2d ed. 1952).

but careless automobile driving does the same thing. A nuisance must also be produced by affirmative conduct (in many states),¹⁶³ but so are many conditions that are actionable only under the head of negligence. A nuisance is usually a static and more or less permanent condition,¹⁶⁴ but many a wear-and-tear defect in a highway and many a danger on private premises have that quality too. A negligent nuisance may often carry far less threat of danger than many negligent acts or omissions that are not nuisances. All in all, there is nothing about the characteristics of such a nuisance, either singly or in combination, that affords a basis in formal logic for distinguishing it from other negligent conduct. If, therefore, contributory negligence represents a valid policy, it would be capricious to exclude it as a defense here. The weight of authority does not do so.¹⁶⁵

So far the distinctions seem rational enough, but there is more trouble in finding a reason to distinguish between merely negligent nuisances and those which involve violation of statute or ordinance. Generally the violation of a safety statute is treated as negligence to which contributory negligence is a defense.¹⁶⁶ Yet it is also true in cases where civil damages are sought for a public nuisance that the real significance of the statute lies in its safety aspect and the unreasonable likelihood of harm created by its breach. If that were not so, civil liability would be imposed here on a basis closely akin to the generally discredited "outlaw" theory.¹⁶⁷ Moreover the statutory breach may involve conduct or a condition no more dangerous than the negligent nuisance. Indeed the hole dug in the highway without permit, but fully guarded and lighted, may be less dangerous than the permitted excavation carelessly left without lights or guards. On any basis of logical consistency, therefore, contributory negligence should be a defense here¹⁶⁸ except where the breach of statute involves extra-hazardous or wanton and wilful conduct.

Some cases justify the finding of an absolute nuisance by stressing the *intent* to violate the statute—thereby assimilating defendant's conduct to wilfulness.¹⁶⁹ But this confuses intent to do an act with intent to do the harm that

163. See, *e.g.*, *Crommelin v. Cox*, 30 Ala. 318 (1857); *Bacon v. Rocky Hill*, 126 Conn. 402, 11 A.2d 399 (1940).

164. See Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 402 n.8 (1942); James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 369 (1946).

165. See notes 153 and 159 *supra*.

166. Prosser, *Contributory Negligence as a Defense to Violation of Statute*, 32 MICH. L. REV. 105 (1948); Note, 15 U. OF CHI. L. REV. 779 (1948).

167. See note 46 *supra*.

168. And some courts have yielded to the claims of consistency. *Curtis v. Castner*, 220 Cal. 185, 30 P.2d 26 (1934). Contrast with this view *Casey v. Malden*, 163 Mass. 507, 40 N.E. 849 (1895); *Pfau v. Reynolds*, 53 Ill. 212 (1870) (which apparently ignore the distinction, though it seems not to have been urged). On the other hand, New Jersey has apparently resolved the dilemma here by precluding the defense of ordinary contributory negligence from all cases of public nuisance. *Hammond v. Monmouth County*, 117 N.J.L. 11, 186 Atl. 452 (Sup. Ct. 1936), 35 MICH. L. REV. 684 (1937).

169. See *Flaherty v. Great Northern R.R.*, 218 Minn. 488, 16 N.W.2d 553 (1944); *Hanson v. Hall*, 202 Minn. 381, 279 N.W. 227 (1938).

flows from it.¹⁷⁰ Many motor vehicle cases, for example, involve intent to do an act that breaks a statute, but this is uniformly treated as no more than negligence unless the conduct intended—in addition to being unlawful—is pregnant with danger so manifest that the intent to engage in it involves wantonness.¹⁷¹ Here as under the “outlaw” theory it may reasonably be urged that any deviation from ordinary negligence principles involves a use of civil recovery to punish a wrongdoer in a manner not provided by the legislature.

The reasoning of the last two paragraphs, however, all proceeds on the assumption that contributory negligence represents enough of a valid policy so that it should be applied wherever consistency demands. This assumption—and therefore the reasoning—is probably false,¹⁷² and this may well be why so many courts apply the notion of “absolute nuisance” broadly to cases where breach of statute or ordinance is involved.¹⁷³ Indeed the tendency is to extend the concept still further, thereby cutting down even more the harsh and outgrown defense of contributory negligence. Thus Connecticut courts hold that even where no statute is involved the nuisance is “absolute” so long as defendant intended to create the very condition that is found to involve negligence and therefore (if other tests are met) to constitute a nuisance.¹⁷⁴

170. See Prosser, *Contributory Negligence as a Defense to Violation of Statute*, 32 MINN. L. REV. 105, 112-3 (1948) (“The intent which will preclude the defense of contributory negligence is not the intent to do an act, or to do a forbidden act; it is the intent to do harm to another, or to invade his rights.”). See also James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 367 (1946).

171. An example may be found in *Alabam Freight Lines v. Phoenix Bakery, Inc.*, 64 Ariz. 101, 166 P.2d 816 (1946); see note 96 *supra*.

172. See, e.g., Smith, *Sequel to Workmen's Compensation Acts I*, 27 HARV. L. REV. 235, 243 (1914) (“A decadent doctrine which will ultimately disappear from the law.”); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 342 (1914) (“The defense itself is crumbling at many points under attacks both legislative and judicial.”); Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946); James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 786 *et seq.* (1950).

173. Most of the cases cited in note 140 *supra*, are of this type. *Delaney v. Philhern Realty H. Corp.*, 280 N.Y. 461, 21 N.E.2d 507 (1939), involved two possible theories of liability, *viz.*, (1) that a pipe had been laid across the sidewalk without a permit, (2) that the pipe was covered by permit but that the boards that flanked it had been carelessly laid. The Court of Appeals said: “If no license has been issued, then an obstruction in the public way is an absolute nuisance . . . whereas if a permit has been issued but the privilege to obstruct the public way is exercised in an improper manner, then the resulting nuisance is of a kind which arises out of negligence.” *Id.* at 465; 21 N.E.2d at 509.

174. *De Lahunta v. Waterbury*, 134 Conn. 630, 59 A.2d 800 (1948); *Beckwith v. Stratford*, 129 Conn. 506, 29 A.2d 775 (1942); Werner, *Public Nuisance in Personal Injury Actions in Connecticut*, 15 CONN. B.J. 199 (1941); Mignone, *Nuisance and Negligence*, 11 CONN. B.J. 209 (1937); James, *Chief Justice Matlbic and the Law of Negligence*, 24 CONN. B.J. 61, 73 *et seq.* (1950); Comment, *Nuisance or Negligence: A Study in the Tyranny of Labels*, 24 IND. L.J. 402 (1949). Compare *United El. Light Co. v. Deliso Constr. Co.*, 315 Mass. 313, 52 N.E.2d 553 (1943) (for a similar abuse of the notion of “intent” to broaden strict liability); and *Hammond v. Monmouth County*, 117 N.J.L. 11, 186 Atl. 452 (Sup. Ct. 1936) (which would apparently exclude ordinary contributory negligence in all public nuisance cases).

Violation of statute. The question may also arise whether contributory negligence is a defense to an action based on the violation of statute. If the statute is one expressly providing for civil recovery, the answer is to be found either in the words of the act¹⁷⁵ (if they provide an answer) or in construction of the statute in the light of its purpose.¹⁷⁶ In the case of a purely criminal statute where the basis for recovery is negligence (in failing to satisfy the statutory standard of conduct), contributory negligence is generally a defense.¹⁷⁷ It will not be, however, where the statute is "enacted to protect a class of persons from their inability to exercise self-protective care" against the risks created by the statute's violation.¹⁷⁸

The Double Standard: Contributory Negligence and Negligence Compared

Negligence involves conduct which is fraught with unreasonable likelihood of harm to *others*. Contributory negligence involves such likelihood of harm to *oneself* or to *one's own interests*.¹⁷⁹ In other respects, as we have seen, formal reasoning treats the two concepts as being similar and parallel, although in important respects they serve in practice diametrically opposed policies.¹⁸⁰ The result of this anomaly has been twofold: (1) underneath the formal symmetry a double standard has in fact been applied, wherever there is room for elasticity within the logical framework, so as to extend the concept of negligence and contract that of contributory negligence; (2) even the formal symmetry is beginning to break down around the edges. The examples of these trends may best be seen by examining the requirements of and the tests for contributory negligence.

Standards of conduct. Like negligence, contributory negligence involves a standard of conduct which is that of the reasonably prudent person. This test is one that has traditionally been associated under our system with the role of the jury, and it has been increasingly administered of late so as to invoke the jury's function.¹⁸¹ This we have seen in the recession of fixed

175. *E.g.*, 35 STAT. 66 (1908), 45 U.S.C. § 53 (1946) (contributory negligence no defense where railroad violated safety statute).

176. See Note, 15 U. OF CHI. L. REV. 779 (1948).

177. Prosser, *Contributory Negligence as a Defense to Violation of Statute*, 32 MINN. L. REV. 105 (1948); Note, 15 U. OF CHI. L. REV. 779 (1948).

178. *Koenig v. Patrick Constr. Co.*, 298 N.Y. 313, 315, 83 N.E.2d 133, 134 (1948); RESTATEMENT, TORTS § 483 (1934).

179. RESTATEMENT, TORTS § 463 (1934).

180. See pages 704-6 *supra*.

181. For general treatments of this trend in accident cases, see Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476 (1936); Searl, *Automobile Liability Law Development & Trend*, 39 BEST'S INS. NEWS 583 (Fire & Cas. ed. 1938); James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949). See the excellent treatment in Green, *Illinois Negligence Law*, 39 ILL. L. REV. 116 *et seq.* (1944), which highlights some of the strict holdings (on contributory negligence) in the history of Illinois accident law, and emphasizes the importance of the jury's role here.

standards set by the court (such as the stop, look, and listen, and the range of vision rules)¹⁸² and in the growth of the "emerging doctrine of justifiable violation"¹⁸³ in states where breach of a safety statute is negligence *per se*. Other examples include the leniency with which momentary forgetfulness or inadvertence is viewed,¹⁸⁴ or the excuses for encountering unknown dangers.¹⁸⁵ These tendencies do not upset formal symmetry because they expand the jury's function on both sides of the scale. But the jury will exercise its function—in the generality of cases—so as to expand liability and cut down the defense.¹⁸⁶

"In the sort of case that commonly presents itself a jury will be quick enough to find against a defendant whose illegal conduct has caused the injury. . . . But when the plaintiff's conduct is in question the harshness of contributory negligence as a defense and the relative situation of the parties often makes the jury grasp at any opportunity to exonerate the plaintiff of negligence even though he broke the law."¹⁸⁷

The reasonable man standard is undergoing another change which has the same net effect. There is some tendency to relax the rigors of its objectivity and to take into account the individual shortcomings of the party concerned.¹⁸⁸ Some courts have frankly done this for the plaintiff and not for the defendant—notably where the infirmities of youth, old age, or insanity are concerned.¹⁸⁹ But even where there is no such open breach with formal consistency, the pragmatic result has been pretty much the same because only plaintiffs seem to be

182. See James & Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697, 705-07 (1952).

183. Morris, *Role of Criminal Statutes in Negligence Cases*, 49 COL. L. REV. 21, 32-4 (1949); James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 117 *et seq.* (1950).

184. James, *Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 7-9 (1951); James, *Chief Justice Matbie and the Law of Negligence*, 24 CONN. B.J. 61 (1950).

185. *Burk v. Corrado*, 116 Conn. 511, 165 Atl. 682 (1933); *Silvestro v. Walz*, 222 Ind. 163, 51 N.E.2d 629 (1934); *Boyce v. Brewington*, 49 N.M. 107, 158 P.2d 124 (1945); *Huus v. Ringo*, 76 N.D. 763, 39 N.W.2d 505 (1949); *Polm v. Hession*, 363 Pa. 494, 70 A.2d 311 (1950); Note, 163 A.L.R. 587 (1946).

186. James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 687 (1949).

187. Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 340 n.68 (1914). Thayer was writing about negligence based on violation of statute, but what he said is just as applicable to common-law negligence.

188. See James & Dickinson, *Accident Proneness and Accident Law*, 63 HARV. L. REV. 769, 782-6 (1950); James, *Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 2, 22-6 (1951).

189. *Neal v. Gillett*, 23 Conn. 437 (1855); *Roberts v. Ring*, 143 Minn. 151, 173 N.W. 437 (1919); *Sforza v. Green Bus Lines, Inc.*, 150 Misc. 180, 268 N.Y. Supp. 446 (Mun. Ct. 1934); RESTATEMENT, TORTS §§ 654 *et seq.* (Supp. 1948); *cf.* *Hill Transp. Co. v. Everett*, 145 F.2d 746 (1st Cir. 1944).

widely successful in urging their own infirmities as an excuse for the accident and injury.¹⁹⁰

Reasonableness of the risk. Contributory negligence, like negligence, must involve a risk that is *unreasonable* under all the circumstances, and this test again generally invokes the jury's function: to find and apply the dictates of the community conscience in the matter.¹⁹¹ Moreover, some of the crystallized rules that have evolved (for striking this balance) minimize contributory negligence.¹⁹² Here, as in the case of defendant's negligence, plaintiff's conduct is to be evaluated in its setting in the circumstances, and plaintiff will be entitled to make assumptions that are reasonable in the light of them. Negligence on either side of the scale is a term of relationship. Thus plaintiff may expect that defendant will obey the law and will act as a reasonable man would, unless the circumstances should warn him to the contrary.¹⁹³ And he may likewise assume that highways and premises ostensibly prepared for his reception are reasonably free from defects and pitfalls.¹⁹⁴ Reasonable expectations of safety are just as much a part of ordinary prudent conduct as are expectations of danger.

Scope of the risk. Negligence, as we have seen, is actionable only on account of harms which were within the scope of the risks that made the offending conduct negligent.¹⁹⁵ Similar restrictions hem in contributory negligence. Thus in *Kinderavich v. Palmer*,¹⁹⁶ the court held that plaintiff's conduct in going upon an eastbound railroad track without looking was negligent with respect to the hazard of being struck by an eastbound train, "but . . . was unrelated to the risk of injury from being run over by another train proceeding in the opposite direction after he had been thrown upon [another] track and lay there [for some time] in an unconscious condition." And a plaintiff's breach of statute will not bar him from recovery for an injury produced by a hazard which the statute was not designed to guard against.¹⁹⁷ Here again, while these restrictions are imposed evenhandedly by the law upon negligence

190. See Weisiger, *Negligence of the Physically Infirm*, 24 N.C.L. REV. 187, 193 (1946); James, *Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1, 21 (1951).

191. See *id.* at 4; James, *Nature of Negligence*, 4 UTAH L. REV.—(1953).

192. Such as those involving plaintiff's use of his own land in such a way as to increase its exposure to risk, and those involving self-exposure in rescue cases. See James, *Nature of Negligence*, 4 UTAH L. REV.—(1953) (particularly at nn.48, 51, 55).

193. *E.g.*, *Hill v. Stringer*, 116 Vt. 296, 75 A.2d 657 (1950) (pedestrian may assume motorist's careful lookout).

194. *E.g.*, *Johnson v. Rulon*, 363 Pa. 585, 70 A.2d 325 (1950), 2 ALA. L. REV. 373 (customer may assume reasonable safety of restaurant floor).

195. See James, *Scope of Duty in Negligence Cases*, 47 N.U.L. REV. 773 (1953).

196. 127 Conn. 85, 15 A.2d 83 (1940). The following quotation in the text is found *id.* at 98, 15 A.2d at 89-90.

197. *Berry v. Sugar Notch*, 191 Pa. 345, 43 Atl. 240 (1899); HARPER, LAW OF TORTS § 136 (1933); PROSSER, TORTS 277 (1941). *Cf.* *Mechler v. McMahon*, 184 Minn. 476, 239 N.W. 605 (1931).

and contributory negligence, they are often administered so as to call on the jury's function—a fact which by and large operates to favor accident victims.¹⁹⁸

Proximate cause. The plaintiff's negligence will not bar him unless it is a "proximate cause" of his injury.¹⁹⁹ This means, of course, that it must be at least a cause in fact; and the inquiry under this head is the same as the analogous one under the head of defendant's negligence. This, as we have seen, is largely concerned with the problem of proof,²⁰⁰ so that in difficult cases the placing of the burden of proof will be determinative. It is at this point, as we shall see, that the greatest liberalization on this cause issue has taken place. Beyond this the concept of "proximate cause" has no more legitimate place here than it has in connection with negligence, at least in terms of what is becoming increasingly recognized as the clearer, better integrated rationalization of liability for negligence.²⁰¹ Nevertheless the concept of "proximate cause" has been and still is widely used to cut down the defense of contributory negligence in the following ways:

(a) It is an alternative way of excluding from consideration conduct of plaintiff that did not entail an unreasonable likelihood of the risk or hazard that befell plaintiff. We have just noted that the limitations of the "scope of the risk" theory are put on plaintiff's as well as defendant's negligence. Here as elsewhere this limitation is often expressed in terms of proximate cause.²⁰² This is perhaps especially true where one of the risks contributing to injury comes from an intervening force or intervening conduct of a person or an animal.²⁰³

(b) The reasoning of proximate cause has often been used to justify the last clear chance doctrine. This often involves application of the narrow, old, and generally discarded last wrongdoer test to the "causal" link between *plaintiff's* negligence and his own injury.²⁰⁴

(c) The very confusion and lack of meaning in the term "proximate cause" has sometimes allowed courts to avoid the logical consequences of an undesir-

198. See notes 186 and 187 *supra*.

199. RESTATEMENT, TORTS § 465 (1934). Compare note 27 *supra* and accompanying text.

200. James & Perry, *Legal Cause*, 60 YALE L.J. 761, 762-83 (1951).

201. See *id.* at 762 n.4 for a collection of many of the authorities. See also Scavey, *Mr. Justice Cardozo and the Law of Torts*, 39 COL. L. REV. 20, 52 HARV. L. REV. 372, 48 YALE L.J. 390 (1939).

202. *E.g.*, *Hoadley v. International Paper Co.*, 72 Vt. 79, 47 Atl. 169 (1899); *Sutton v. Wanwatosa*, 29 Wis. 21 (1871). See Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3 (1927).

203. See James & Perry, *Legal Cause*, 60 YALE L.J. 761, 792-4 (1951).

204. James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938); PROSSER, TORTS § 54 (1941). Cf. Lord Wright, *Contributory Negligence*, 13 MOD. L. REV. 2 (1950); Green, *Contributory Negligence and Proximate Cause*, 6 N.C.L. REV. 3, 21 (1927).

able doctrine when they are unwilling to repudiate it or to undertake the intellectual rigor required for working out rational exceptions to it. This may happen, for example, where plaintiff has violated a statute and the court feels committed to a strict version of the negligence *per se* rule.²⁰⁵

The rule of avoidable consequences. While contributory negligence, in cases where it applies, is a complete defense to the recovery of damages to which such negligence contributes, these may not be all the damages which plaintiff has suffered from a single impact or injury. Plaintiff's negligence may have contributed only to some items of such damage, and if so it will bar recovery for those items only, where there is any practical basis for apportioning them.²⁰⁶ This situation may arise in one of three ways.

After the original impact or injury (to which plaintiff's negligence did not contribute), plaintiff's negligence may intervene to aggravate its consequences. Thus he may neglect or carelessly treat a wound, so that it gets infected and he loses his limb or his life.²⁰⁷ Or he may fail to take reasonable steps to protect property damaged or exposed by defendant's negligence.²⁰⁸ In cases like these plaintiff may not recover for that aggravation to his injury toward which his negligence contributes. This notion is sometimes referred to as the "duty" to mitigate damages or the rule of avoidable consequences.²⁰⁹

In a second class of cases, defendant's negligence (or wrong) and plaintiff's negligence each cause some separable damage to plaintiff.²¹⁰ This is not really a case of contributory negligence (or fault) at all but rather one in which each party is responsible for that part of the damage his own act caused. *Bowman v. Humphrey*²¹¹ is such a case. There each party separately polluted a stream

205. *E.g.*, *Hinton v. Southern R.R.*, 172 N.C. 587, 90 S.E. 756 (1916), discussed in *Green*, *supra* note 204, at 19-21. See also James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 121 (1950).

206. MCCORMICK, LAW OF DAMAGES c. 5 (1935); PROSSER, TORTS 397-400 (1941); RESTATEMENT, TORTS § 918 (1934).

207. MCCORMICK, LAW OF DAMAGES § 36 (1935); RESTATEMENT, TORTS § 918, ill. 1 (1934). As McCormick points out, serious questions may arise as to when reasonable prudence requires plaintiff to undergo an operation. See also *Lange v. Hoyt*, 114 Conn. 590, 159 Atl. 575 (1932) (belief in Christian Science may warrant failure to get medical or surgical aid).

208. *E.g.*, *Thompson v. DeLong*, 267 Pa. 212, 110 Atl. 251 (1920) (failure to protect or remove goods threatened by dampness because of removal of party wall); RESTATEMENT, TORTS § 918, ill. 2, 3 (1934).

In this connection, however, it must be remembered (1) that the courts are reluctant to require plaintiff to take onerous steps or to forego for long the beneficial use of his own property even where defendant's wrong amounts only to negligence (see pages 717-18 *supra*); (2) where defendant's wrong is nuisance or trespass, there is a distinct disposition to impose the burden of protecting plaintiff upon the defendant, rather than upon plaintiff himself. See pages 717-18 *supra*; MCCORMICK, LAW OF DAMAGES § 37 (1935).

209. MCCORMICK, LAW OF DAMAGES c. 5 (1935); PROSSER, TORTS 397 *et seq.* (1941); RESTATEMENT, TORTS § 918 (1934). See note 89 *supra*.

210. See page 717 *supra*.

211. 132 Iowa 234, 109 N.W. 714 (1906); see note 145 *supra* and accompanying text.

which flowed through lands of each. Plaintiff, the lower riparian owner, recovered for the pollution caused by defendant.

The most difficult question is presented by those cases in which plaintiff's conduct is negligent with respect to one kind of risk but not with respect to another kind, and where both risks emanate from defendant's negligence and each inflicts some injury on plaintiff. Four Connecticut cases pose the problem and its pitfalls. In *Smithwick v. Hall & Upson Co.*,²¹² plaintiff, who was helping to fill an ice house from a platform, was told to keep off the unfenced half of the platform because of the danger of falling. He was hurt when, because of defendant's negligence, the wall of the building collapsed largely on the unfenced portion of the scaffold, and he fell to the ground. The court held that plaintiff's conduct did not prevent recovery, since peril from the wall was not a risk which made it negligent to stand where he did. Defendant urged that if plaintiff had stayed where he should he would not have fallen. The court answered that if that were true it would affect the amount of recovery only, and would not bar the action. Quite consistent with this reasoning is *Kinderavich v. Palmer*²¹³ (discussed above²¹⁴) wherein plaintiff's negligence would prevent recovery for injury from the eastbound train but not from the later westbound train. The symmetry of these cases is marred by *Mahoney v. Beatman*.²¹⁵ There plaintiff was driving at an excessive speed when defendant's oncoming car suddenly swerved over onto its wrong side of the highway and struck plaintiff's car. This collision was trivial and caused only slight damage. Because of plaintiff's excessive speed, however, his car went out of control after the collision and ended up by striking a stone wall and tree a considerable distance away so that his automobile was badly damaged. The court wrote a learned and confusing dissertation on proximate cause and held in effect that since plaintiff's negligence did not contribute to the original impact and did not intervene thereafter it should not stand in the way of full recovery for all damage. Justice Maltbie dissented. The result has been widely criticized and seems quite inconsistent with the other Connecticut cases and the reasoning which generally prevails in this country today.²¹⁶ The rule

212. 59 Conn. 261, 21 Atl. 924 (1890).

213. 127 Conn. 85, 15 A.2d 83 (1940). Consistent also is the substantive law in *Deutsch v. Connecticut Co.*, 98 Conn. 490, 119 Atl. 891 (1923), where a trolley ran down a careless pedestrian and the motorman injured him again in trying to extricate him from his position of danger. While the company was theoretically liable for the second injury, it had a directed verdict because plaintiff was unable to prove how much of his total injury was attributable to the second phase of the tragedy.

214. See text at page 725 *supra*.

215. 110 Conn. 184, 147 Atl. 762 (1929).

216. See *Wright v. Illinois & M.T. Co.*, 20 Iowa 195 (1866); *O'Keefe v. Kansas C.W.R.R.*, 87 Kan. 322, 124 Pac. 416 (1912); Gregory, *Justice Maltbie's Dissent in Mahoney v. Beatman*, 24 CONN. B.J. 78 (1950); HARPER, LAW OF TORTS § 134 (1933); PROSSER, TORTS 399 (1941). Green's halfhearted defense of the case is probably the weakest thing he ever wrote. Green, *Mahoney v. Beatman: A Study in Proximate Cause*, 39 YALE L.J. 532 (1930); cf. Green, *Proximate Cause in Connecticut Negligence Law*, 24 CONN. B.J. 24, 45 (1950).

against excessive speed cannot protect a driver from having an oncoming car turn suddenly into him, but it surely is designed to protect him from loss of control in all sorts of traffic situations, including collisions. By all that is logical the excessive speed should have barred recovery for the damage done when the car hit the stone wall and the tree because it went out of control. The decision can be justified, if at all, only by the notion that a bad reason is good enough to use in knocking down a bad defense.

In all these situations where plaintiff's negligence will bar recovery for some—but not all—of his damages lurk serious problems of proof. We have already dealt elsewhere with these problems generally.²¹⁷ But again it should be noted that in cases where such problems are difficult, the question of who has the burden of proof on the issue of contributory negligence may be of the greatest importance.

Some Ameliorating Rules of Substance and Procedure

Burden of proof. The older rule, which prevailed in New York, the New England states, and a few others, put the burden of pleading²¹⁸ and proving²¹⁹ freedom from contributory negligence (in negligence cases) on the plaintiff. In other jurisdictions the burden of pleading and proving contributory negligence has always rested on defendant.²²⁰ The reasoning in support of the older rule was largely circular. Judge Cooley said, for instance, that the gravamen of plaintiff's "complaint is that he has been damnified by the wrongful and negligent action of the defendant, *without having contributed thereto by negligent conduct of his own.* The absence of contributory negligence is *therefore* a part of his case. . . ."²²¹ Obviously the second part of this statement would follow from the first—indeed it is almost a restatement of it—but we are given no help in seeing why the first part should be accepted. It would be just as logical—and just as circular—to say that the gist of plaintiff's complaint is injury done to him by defendant's wrong and that therefore it is part of defendant's defense to show contributory negligence.²²²

217. James & Perty, *Legal Cause*, 60 YALE L.J. 761, 762-83 (1951). And compare note 213 *supra*.

218. See CLARK, CODE PLEADING 303 *et seq.* (2d ed. 1947); Note, 33 L.R.A. (N.S.) 1085, 1152 (1911).

219. Kotler v. Lally, 112 Conn. 86, 151 Atl. 433 (1930), 44 HARV. L. REV. 292 (1930), 40 YALE L.J. 484 (1931). A valuable and exhaustive collection of the older cases is found in a Note, 33 L.R.A. (N.S.) 1085 (1911).

220. Washington & G.R. Co. v. Gladmon, 82 U.S. 401 (1872); cases collected in Note, 33 L.R.A. (N.S.) 1085, 1158 *et seq.* (1911). See HARPER, LAW OF TORTS § 135 (1933); PROSSER, TORTS 288 (1941).

221. Teipel v. Hilsendegen, 44 Mich. 461, 7 N.W. 82 (1880) (emphasis supplied).

222. Green, *Illinois Negligence Law II*, 39 ILL. L. REV. 116, 125-6 (1944). One writer has said of the older rule: "The situation is much the same as if, in every contract case, the plaintiff were required to plead and prove his freedom from insanity." Turk, *Comparative Negligence on the March*, 28 CHI-KENT REV. 189, 200 (1950).

Neither statement explains anything. The fact is that the divergent rules reflected divergent policies and attitudes towards the substantive defense. "It [was] a mere question of fairness, of justice, as between the parties."²²³ And the views differed, among our states, as to what this was.

The choice of rules made relatively little practical difference where there was direct or adequate circumstantial evidence as to plaintiff's conduct at the time of the accident.²²⁴ Under the older rule, it is true, plaintiff bore the risk of ultimate non-persuasion, but this applied—even theoretically—only to the relatively rare case where the evidence on both sides was in equipoise. And in any event it was to be administered by the jury. It was in the unwitnessed accident that the bite of the old rule was felt. Where there was no proof at all on the issue, he who had the burden of going forward with proof lost as a matter of law. This was not infrequently the situation in death cases (and some others), even where defendant's negligence could be shown to have contributed to the injury.²²⁵

To mitigate the harshness of this result some courts permitted an inference or presumption of due care to be drawn from the instinct of self-preservation,²²⁶ and some relaxed the ordinary rules of evidence to allow evidence of

223. Note, 33 L.R.A. (N.S.) 1085, 1099 (1911). An admirable treatment of the considerations bearing on the question of fairness may be found in Green, *supra* note 222, at 126-7.

224. Except, as we have seen, where plaintiff's negligence contributed to some but not all of his damages. See text at note 206 *supra*. Where the burden of proving freedom from contributory negligence lay on plaintiff, he was unable to recover for that part of his damages to which his negligence did *not* contribute unless he could show a basis for isolating that part. *Deutsch v. Connecticut Co.*, 98 Conn. 490, 119 Atl. 891 (1923). Where, however, the burden on that issue rests on defendant, he should also have the burden of resolving the difficulty of apportioning damages in such a case. *Cf. Golden v. Lerch Bros.*, 203 Minn. 211, 281 N.W. 249 (1937); Note, 8 ANN. CAS. 340 (1908); 34 AM. JUR. 352, 353 (1941) (where it appears that part of claim may be barred by statute of limitations, defendant has burden to show how much). See also *O'Keefe v. Kansas C.W.R.R.*, 87 Kan. 322, 124 Pac. 416 (1912) (instruction conditioning plaintiff's recovery upon his separating amount of damage caused by fall from damage caused by his intoxication—which did not contribute to his fall—*held* error). *But cf. Thane v. Scranton T. Co.*, 191 Pa. 249, 43 Atl. 136 (1899).

225. A dramatic case of this kind was *Kotler v. Lally*, 112 Conn. 86, 151 Atl. 433 (1930), 44 HARV. L. REV. 292 (1930), 40 YALE L.J. 484 (1931), which led to a statutory change of the older rule. Conn. Laws 1931, § 1654c. This statute originally applied to death actions only but was extended in 1939 to include all actions. CONN. GEN. STAT. § 7836 (1949).

226. *Way v. Illinois Cent. R.R.*, 40 Iowa 342 (1875); *Breker v. Rosema*, 301 Mich. 685, 4 N.W.2d 57 (1942); *Savage v. Rhode Island Co.*, 28 R.I. 391, 67 Atl. 633 (1907). See discussion of Iowa cases in Note, 6 IOWA L.J. 55 (1920). The presumption may not be utilized in Iowa where there is direct evidence of deceased's acts. *Vance v. Grohe*, 223 Iowa 1109, 274 N.W. 902 (1937).

There are collections of cases in Notes, 84 A.L.R. 1221 (1933), 116 A.L.R. 340 (1938), most of which are from jurisdictions where the burden of proving contributory negligence was (and is) on defendant. Many of the states which had the harsher rule rejected the presumption. *Mullen v. Mohican Co.*, 97 Conn. 97, 115 Atl. 685 (1921); *Newell v.*

a deceased's propensity to be careful.²²⁷ The principal attacks upon the older rule, however, have been made by statutes which in almost every state have changed it, either in death cases alone or in all negligence cases.²²⁸ The overwhelming weight of authority in this country today puts on the defendant the burden of pleading and proving (in both senses) contributory negligence.²²⁹

This does not mean that defendant must always introduce evidence on this defense to have it available to him. He is entitled to the benefit of any evidence or inferences favorable to him which appear from the presentation of plaintiff's case (either on direct or cross-examination).²³⁰ Indeed the plaintiff's own evidence occasionally shows him to be negligent as matter of law.²³¹ If it does not, however, defendant has the risk of non-persuasion upon the issue, whether the evidence upon it comes from his own case or his adversary's.²³²

Comparative or proportional negligence. We have noted that both modern policy and the logic of the fault principle point to a rule that plaintiff's fault—if it is to be counted at all—will diminish rather than defeat his recovery.²³³ It remains to consider the extent to which such a notion has found acceptance in our law.

First, it should be pointed out that a cruder—and perhaps simpler—way of attacking the defense would be to rule it out altogether in cases where defen-

Cleveland C.C. & St. L.R.R., 261 Ill. 505, 104 N.E. 223 (1914); *Wright v. Boston & M.R.R.*, 74 N.H. 128, 65 Atl. 687 (1907); *Wiwrowski v. Lake Shore & M.S.R.R.*, 124 N.Y. 420, 26 N.E. 1023 (1891); *Shumm v. Rutland Ry.*, 81 Vt. 186, 69 Atl. 945 (1903).

227. *Wallis v. Southern Pac. Co.*, 184 Cal. 662, 195 Pac. 408 (1921); *Chicago R.I. & P.R.R. v. Clark*, 108 Ill. 113 (1883). See Notes, 20 CALIF. L. REV. 208 (1932), 16 ILL. L. REV. 628 (1922), 15 A.L.R. 125 (1921), 18 A.L.R. 1109 (1922).

228. The rule remains unchanged by statute (except in cases of work injuries) in Illinois, Michigan, and Rhode Island. It has been changed in Iowa as to employees and passengers of common carriers. IOWA R. CIV. P. 97. Maine and New York have changed it in death actions only. MAINE REV. STAT. c. 100, § 50 (1944); N.Y. DEC. EST. LAW § 131.

Other states which once had the harsher rule have put the burden of proving contributory negligence on defendant in all cases. As to Connecticut, see note 225 *supra*. The story of the Massachusetts change appears in Note, 23 B.U.L. REV. 494 (1943). Older changes are noted in Note, 33 L.R.A. (N.S.) 1085, 1214 *et seq.* (1911). See also CLARK, CODE PLEADING 304-5 n.72 (2d ed. 1947); Green, *Illinois Negligence Law II*, 39 ILL. L. REV. 116, 125 n.33 (1944).

229. For the present situation in the federal courts, see FED. R. CIV. P. 8(c), *Palmer v. Hoffman*, 318 U.S. 109 (1943); CLARK, CODE PLEADING 305-7 (2d ed. 1947).

230. *Pittsburgh, C.C. & St. L.R.R. v. Reed*, 36 Ind. App. 67, 75 N.E. 50 (1905); *Goldstein v. Hotel Altman*, 4 N.J. Super. 78, 65 A.2d 356 (1949); Note, 33 L.R.A. (N.S.) 1085, 1178 (1911); 38 AM. JUR. 979 (1941); 65 C.J.S. 977 (1950).

231. *E.g.*, *Polly v. Oregon S.L.R.R.*, 51 Idaho 453, 6 P.2d 478 (1932) (a grade crossing case).

232. *Thompson v. Ft. Branch*, 204 Ind. 152, 178 N.E. 440 (1931); *Tresise v. Ashdown*, 118 Ohio 307, 160 N.E. 898 (1928); *McCracken v. Curwensville*, 309 Pa. 93, 163 Atl. 217 (1932).

233. See especially pages 691, 696, 701, 704 *supra*.

dant's negligence is graver than plaintiff's—which of course would still be a form of the all-or-nothing rule. As we have seen, something like this is now done where defendant's wrong is intentional, or wilful or wanton, and plaintiff is merely negligent.²³⁴ If defendant has been merely negligent, however, there is no room under modern American common law for this process of comparison. Thus plaintiff will be barred even by slight negligence if it is a proximate cause of his injury.²³⁵ A few older cases, however, did allow the jury to compare negligences and to disregard that of plaintiff where it was less than defendant's.²³⁶

A far more flexible and rational solution would be one that diminished but did not defeat plaintiff's recovery, where his fault contributed to an injury

234. See pages 707-12 *supra*. Compare also those cases in which wilful or reckless and unreasonable self-exposure to a risk is held to be a defense though ordinary contributory negligence is not. See pages 710-11, 714-15, 718 *supra*.

235. *E.g.*, *Atlanta & B.A.L.R.R. v. Wheeler*, 154 Ala. 530, 46 So. 262 (1908); *Astin v. Chicago M. & St. P.R.R.*, 143 Wis. 477, 128 N.W. 265 (1910). Cases are collected in a Note, 114 A.L.R. 830 (1938), which points out the analytical difference between an instruction to this effect and one which fails to require plaintiff's negligence to be a proximate cause of his injury. As the Note concedes, however, the distinction is blurred in practice. The vagueness of proximate cause, I suggest, increases the confusion and invites a kind of comparison of faults by comparing the directness and importance of contribution to the injury. This seems to be what has taken place in Tennessee. See Turk, *Comparative Negligence on the March II*, 28 CHI-KENT REV. 189, 304 at 313-17 (1950). *Cf. McCulloch v. Horton*, 105 Mont. 531, 74 P.2d 1 (1937); *Stucke v. Milwaukee & M.R.R.*, 9 Wis. 202 (1859). Compare also the reasoning in last clear chance cases.

236. Some such rule was adopted in *Galena & C.U.R.R. v. Jacobs*, 20 Ill. 478 (1858), which stressed the relativity in the concept of negligence and concluded "the degrees of negligence must be measured, and wherever it shall appear that plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action." The last vestiges of this ameliorating doctrine were dissipated in *Lake Shore & M.S.R.R. v. Hessions*, 150 Ill. 546, 37 N.E. 905 (1894). Good accounts of this bit of Illinois history may be found in Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36, 42 *et seq.* (1944); Turk, *supra* note 235, at 305 *et seq.*

See also *Augusta & S.R.R. v. McElmurry*, 24 Ga. 75 (1858); *Wichita & W.R.R. v. Davis*, 37 Kan. 743, 16 Pac. 78 (1887); Comment, 22 So. CALIF. L. REV. 276 (1949).

Other treatments of the problem are GREGORY, *LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE CASES* (1936); WILLIAMS, *JOINT TORTS AND CONTRIBUTORY NEGLIGENCE* (1951); Campbell, *Ten Years of Comparative Negligence*, [1941] WIS. L. REV. 289; Campbell, *Wisconsin's Comparative Negligence Law*, 7 WIS. L. REV. 222 (1932); Malone, *Comparative Negligence—Louisiana's Forgotten Heritage*, 6 LA. L. REV. 125 (1945); Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 604 (1932); Philbrick, *Loss Apportionment in Negligence Cases*, 99 U. OF PA. L. REV. 572, 766 (1951); Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465 (1953); Whelan, *Comparative Negligence*, [1938] WIS. L. REV. 465.

The term "comparative negligence" is used by some writers to refer only to a rule which disregards plaintiff's negligence where it is less than that of defendant. See Prosser, *supra*, at 465 n.2. Others use the term more broadly to include also various rules for diminishing plaintiff's damages because of his fault. *E.g.*, GREGORY, *op. cit. supra*, c. VIII; Turk, *supra*, at 304.

also caused in part by defendant's fault. Such a solution has been found in the maritime and continental law.²³⁷ A scattering of Anglo-American cases chose this solution as a matter of common law,²³⁸ but for the most part in our jurisprudence it has had to come—if at all—through legislation.²³⁹ Apportionment of damages might take the form of an equal division of damages between two negligent parties without any attempt to compare the degrees of their fault, and this is the rule of the admiralty law of the United States.²⁴⁰ Most statutes, however, go further than this and provide for apportionment of loss according to the degrees of negligence.²⁴¹ Such statutes have become pretty general in the British Commonwealth, England herself having provided for comparative negligence by the Law Reform (Contributory Negligence) Act of 1945.²⁴² In this country only a handful of states have any such legislation of general application to accident cases. Of these, the Mississippi statute is a model of brevity and simplicity. It provides that plaintiff's contributory negligence shall not bar recovery, "but damages shall be diminished by the jury in proportion to the amount of negligence attributable" to plaintiff.²⁴³ Under a Wisconsin statute there is to be a similar apportionment if plaintiff's contributory negligence "was not as great as" defendant's; if it is as great (or greater), plaintiff's negligence is still a bar.²⁴⁴ Nebraska provides for comparative negligence (apportionment) when "the contributory negligence . . . was slight and the negligence of the defendant was gross in comparison. . . ."²⁴⁵

The Federal Employers' Liability Act provides for comparative negligence (apportionment) in interstate railroad work injuries,²⁴⁶ and many states have similar provisions in statutes of limited scope.²⁴⁷ Statutes of this limited type apply to situations where there is regularly a single injured plaintiff and a single defendant. In such a situation the broad, simple provisions of the Federal Act or the Mississippi statute are adequate and admirable.

Statutes of general application, however, will also apply to three-and-four-cornered accidents, where several parties are hurt and there are multiple poten-

237. Extensive accounts of this may be found in Mole & Wilson, *supra* note 236; and Turk, *supra* note 235.

238. *Raisin v. Mitchell*, 9 C. & P. 613 (C.P. 1839); and see authorities cited note 236 *supra* (the Philbrick, Turk, and Mole & Wilson articles describe early American ventures of this kind).

239. Modern American statutes are collected in articles by Prosser and by Philbrick: (*supra* note 236) and by Turk (*supra* note 235). WILLIAMS, *op. cit. supra* note 236, treats the subject exhaustively for the various jurisdictions of the British Commonwealth.

240. See, *e.g.*, Turk, *supra* note 235, at 231.

241. Examples are the Mississippi statute and the Federal Employers' Liability Act. MISS. CODE ANN. § 1454 (1942); 35 STAT. 65 (1908), as amended, 45 U.S.C. § 51 (1946).

242. 8 & 9 Geo. 6, c. 28.

243. MISS. CODE ANN. § 1454 (1942).

244. WIS. STAT. § 331.045 (1951).

245. NEB. REV. STAT. § 25-1151 (1943).

246. 35 STAT. 65 (1908), as amended, 45 U.S.C. § 51 (1946). This does not have the limitations found in the Wisconsin and Nebraska statutes.

247. See, *e.g.*, statutes cited in Prosser, *supra* note 236, at 479.

tial claims and cross-claims. No American statute makes specific provisions for such a situation, and the problem has apparently not proved a serious one in practice.²⁴⁸ One school of thought, however, would combine comparative negligence with a rule of contribution among tort-feasors and provide a comprehensive substantive and procedural scheme for handling the whole matter in a single lawsuit.²⁴⁹ The actual result of this proposal would be a minor tragedy in accident law. Its least serious defect would be its almost fantastic complexity.²⁵⁰ As its proponents point out, there are rational ways of minimizing this, and of reducing the jury issues to manageable proportions.²⁵¹ If the system were a desirable one this objection, though serious, might not be insurmountable. But the substance of the system is *not* desirable. It diminishes the recovery of each accident victim not only by (1) the amount reflecting his own contributory negligence, but also by (2) his share of liability for the primary claims of the other persons hurt in the accident and (3) his liability for contribution claims. This might be fair enough where individuals only are concerned and each is paying the judgments against himself as well as collecting those in his favor. But in the usual case today, where a man has paid premiums to have his *liabilities* covered by insurance, this scheme would cause his personal recovery (which is meant to cover part of his own loss from the accident) to be diminished by liabilities that he has paid his insurance company to assume. Put another way, this would let the respective insurance carriers credit their cross-claims amongst themselves against the amounts they would have to pay each other's insureds—who are also victims in the accident. This is graphically shown by a hypothetical case put by Professor Williams in which the three drivers, A, B, and C, involved in a collision were all equally negligent. A's initial loss was £450, B's £600, and C's £750. Under a doctrine of comparative negligence this would entitle A to an award of £300 against B and C; B to an award of £400 against A and C; C to an award of £500 against A and B.²⁵² If each of these awards was paid by the respective insurance companies without set-off or cross-claim, the injured persons would get £1200. If the insurance companies were allowed to cancel out claims in the way proposed, *the only payment to any of the victims would be £150 paid by A's insurer to C.*²⁵³ If the initial losses suffered by each had been equal, the cancelling-out process would be complete.

248. Prosser notes that there are "astonishingly few cases in which the question of multiple parties has reached the appellate court under any 'comparative negligence' act." Prosser, *supra* note 236, at 507.

249. GREGORY, *op. cit. supra* note 236; WILLIAMS, *op. cit. supra* note 236, c. 16.

250. This consideration alone, however, seems enough to damn the scheme in Prosser's eyes. Prosser, *supra* note 236, at 503-8.

251. GREGORY, *op. cit. supra* note 236, cc. x, xi, xii; WILLIAMS, *op. cit. supra* note 236, c. 16.

252. These figures represent the loss of each party diminished by $33\frac{1}{3}$ percent; by hypothesis, the negligence of each party contributed $33\frac{1}{3}$ percent to the injury.

253. A will have a claim of £300 against B & C, B one of £400 against A & C, C one of £500 against A & B. Someone will have to take the initiative in satisfying his

To a certain extent, of course, this cancelling-out process might take place under any system of comparative negligence which retains the current fictitious identity of insurer and insured. But with individual suits, a rule forbidding contribution among tort-feasors, and procedural limits on defendant's ability to bring in new parties, the opportunity for cancelling-out is impeded, and in practice often ignored. The proposed scheme would aggravate the situation by (1) adding the substantively undesirable feature of contribution among tort-feasors;²⁵⁴ (2) affording better procedures for implementing a vicious process—one that ignores the fact and the function of liability insurance and cuts down compensation to accident victims²⁵⁵ by letting insurance companies shift part of their obligation (to pay their insured's legal liabilities) to the shoulders of accident victims.

It is a strange thing, perhaps, that the pressures towards compensating accident victims have wrought so little formal change in the concept of contributory negligence—concededly one of the weak spots in a system of liability based on fault. Indeed, nothing dramatic has taken place here at all. There has been no such ground swell of comparative negligence legislation in America as there has in the British Commonwealth. The only significant statutory change on any widespread basis has had to do with the burden of proof, and that has affected only a minority of states. Yet, in spite of all this, a gradual process of erosion has eaten away most of what was once a formidable obstruction to the approach towards "negligence without fault." This has been very much within the tradition of our common law; and, as so often has happened, the jury has made possible great change in fact with very little shift in theory. It may be, as some contend, that in the long run this capacity for growth retards comprehensive and carefully thought out changes to meet new needs. Yet the gradual common-law process may well yield a sounder and more indigenous development, continually tempered by experience. At any rate, this seems to be what we are destined to enjoy—or endure—in the field of accident liability for some time to come.

judgment. Assume it is B, who demands his £400 from A. A elects to set off his £300 claim and pays the balance of £100 to B. This will satisfy A's and B's judgment claims and give each of them a claim for contribution (A for £200 and B for £150) against C. C responds to these claims by putting forth his own £500 claim which not only wipes out A's and B's claim but leaves a £150 balance due to C which A pays. A then claims contribution from B. Since A has satisfied £350 of C's judgment (£200 by set-off and £150 by payment) while B has satisfied only £150 (by set-off), B owes A £100, being half the difference. This explanation is taken from WILLIAMS, *op. cit. supra* note 236, at 399, 400.

For other examples, see GREGORY, *op. cit. supra* note 236, c. x and App. A.

254. James, *Contribution Among Tort-feasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941).

255. Under the present system it is not at all unusual to have substantial settlements made to both potential plaintiff and defendant.