RESPONSABILIDAD SUBJETIVA
I. INTENTIONAL TORTS
A. ELEMENTOS DE LA ACCIÓN

BATTERY: INTENT

 VOSBURG, by guardian ad litem, Respondent, v. PUTNEY, by guardian ad litem, Appellant. SUPREME COURT OF WISCONSIN 80 Wis. 523; 50 N.W. 403 October 26, 1891, Argued November 17, 1891, Decided

[*527] [**403] LYON, J. Several errors are assigned, only three of which will be considered.

1. The jury having found that the defendant, in touching the plaintiff with his foot, did not intend to do him any harm, counsel for defendant maintain that the plaintiff has no cause of action, and that defendant's motion for judgment on the special verdict should have been granted. In support of this proposition counsel quote from 2 Greenl. Ev. § 83, the rule that "the intention to do harm is of the essence of an assault." Such is the rule, no doubt, in actions or prosecutions for mere assaults. But this is an action to recover damages for an alleged assault and battery. In such case the rule is correctly stated, in many of the authorities cited by counsel, that plaintiff must show either that the intention was unlawful, or that the defendant is in fault. If the intended act is unlawful, the intention to commit it must necessarily be unlawful. Hence, as applied to this case, if the kicking of the plaintiff by the defendant was an unlawful act, the intention of defendant to kick him was also unlawful.

Had the parties been upon the play-grounds of the school, engaged in the usual boyish sports, the defendant being free from malice, wantonness, or negligence, and intending no harm to plaintiff in what he did, we should hesitate to hold the act of [**404] the defendant unlawful, or that he could be held liable in this action. Some

consideration is due to the implied license of the playgrounds. But it appears that the injury was inflicted in the school, after it had been called to order by the teacher, and after the regular exercises of the school had commenced. Under these circumstances, no implied license to do the act complained of existed, and such act was a violation of the order and decorum of the [*528] school, and necessarily unlawful. Hence we are of the opinion that, under the evidence and verdict, the action may be sustained.

2. The plaintiff testified, as a witness in his own behalf, as to the circumstances of the alleged injury inflicted upon him by the defendant, and also in regard to the wound he received in January, near the same knee, mentioned in the special verdict. The defendant claimed that such wound was the proximate cause of the injury to plaintiff's leg, in that it produced a diseased condition of the bone, which disease was in active progress when he received the kick, and that such kick did nothing more than to change the location, and perhaps somewhat hasten the progress, of the disease. The testimony of Dr. Bacon, a witness for plaintiff (who was plaintiff's attending physician), elicited on cross-examination, tends to some extent to establish such claim. Dr. Bacon first saw the injured leg on February 25th, and Dr. Philler, also one of the plaintiff's witnesses, first saw it March 8th. Dr. Philler was called as a witness after the examination of the plaintiff and Dr. Bacon. On his direct examination he testified as follows: "I heard the testimony of *Andrew Vosburg* in regard to how he received the kick, February 20th, from his playmate. I heard read the testimony of Miss More, and heard where he said he received this kick on that day." (Miss More had already testified that she was the teacher of the school, and saw defendant standing in the aisle by his seat, and kicking across the aisle, hitting the plaintiff.) The following question was then propounded to Dr. Philler: "After hearing that testimony, and what you know of the case of the boy, seeing it on the 8th day of March, what, in your opinion,

was the exciting cause that produced the inflammation that you saw in that boy's leg on that day?" An objection to this question was overruled, and the witness answered: "The exciting cause was the injury received at that day by the kick on the shin-bone."

[*529] It will be observed that the above question to Dr. Philler calls for his opinion as a medical expert, based in part upon the testimony of the plaintiff, as to what was the proximate cause of the injury to plaintiff's leg. The plaintiff testified to two wounds upon his leg, either of which might have been such proximate cause. Without taking both of these wounds into consideration, the expert could give no intelligent or reliable opinion as to which of them caused the injury complained of; yet, in the hypothetical question propounded to him, one of these probable causes was excluded from the consideration of the witness, and he was required to give his opinion upon an imperfect and insufficient hypothesis,--one which excluded from his consideration a material fact essential to an intelligent opinion. A consideration by the witness of the wound received by the plaintiff in January being thus prevented, the witness had but one fact upon which to base his opinion, to wit, the fact that defendant kicked plaintiff on the shin-bone. Based, as it necessarily was, on that fact alone, the opinion of Dr. Philler that the kick caused the injury was inevitable, when, had the proper hypothesis been submitted to him, his opinion might have been different. The answer of Dr. Philler to the hypothetical question put to him may have had, probably did have, a controlling influence with the jury, for they found by their verdict that his opinion was correct.

Surely there can be no rule of evidence which will tolerate a hypothetical question to an expert, calling for his opinion in a matter vital to the case, which excludes from his consideration facts already proved by a witness upon whose testimony such hypothetical question is based, when

a consideration of such facts by the expert is absolutely essential to enable him to form an intelligent opinion concerning such matter. The objection to the question put to Dr. Philler should have been sustained. The error in permitting [*530] the witness to answer the question is material, and necessarily fatal to the judgment.

3. Certain questions were proposed on behalf of defendant to be submitted to the jury, founded upon the theory that only such damages could be recovered as the defendant might reasonably be supposed to have contemplated as likely to result from his kicking the plaintiff. The court refused to submit such questions to the jury. The ruling was correct. The rule of damages in actions for torts was held in *Brown v. C., M. & St. P. R. Co. 54 Wis. 342*, to be that the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. The chief justice and the writer of this opinion dissented from the judgment in that case, chiefly because we were of the opinion that the complaint stated a cause of action *ex contractu*, and not *ex delicto*, and hence that a different rule of damages--the rule here contended for--was applicable. We did not question that the rule in actions for tort was correctly stated. That case rules this on the question of damages.

The remaining errors assigned are upon the rulings of the court on objections to testimony. These rulings are not very likely to be repeated on another trial, and are not of sufficient importance to require a review of them on this appeal.

By the Court.--The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

 Prontamente enfrentamos en el caso de *Vosburg* una de las características más sobresalientes del ordenamiento jurídico privado estadounidense: la supervivencia y vigencia actual de los delitos civiles del derecho romano en este sistema europeo; como veremos, el *common law* no es

excepcional, sino que conforma una de las familias del derecho europeo, siendo el resultado de la combinación de todos los elementos del *ius commune* que se unen para darle forma, todos aquéllos a la par presentes en nuestra tradición jurídica: derecho romano vulgar, derecho feudal, derecho canónico, teología cristiana, aunque los encontraremos combinados de una manera distinta en el derecho de factura inglés.

 ¿No es la decisión del tribunal sobre la cuestión del *intent* en *Vosburg* una aberración, más aún vista desde nuestra perspectiva doctrinaria civil que distingue solamente entre dolo y culpa? ¿Evidentemente, Putney no actuó con dolo? ¿Por qué el *intent* de su compañero sí fue doloroso, aunque el niño no decisión causar el daño? ¿Qué hechos definen el comportamiento doloso del niño, aún sin el más mínimo deseo, ni siquiera previsibilidad, de que un contacto tan inocente pudiera ocasionar un daño semejante?

 KENDRA KNIGHT, Plaintiff and Appellant, v. MICHAEL JEWETT, Defendant and Respondent. No. S019021 SUPREME COURT OF CALIFORNIA 3 Cal. 4th 296; 834 P.2d 696; 11 Cal. Rptr. 2d 2 August 24, 1992, Decided

[*299] [**697] GEORGE, J. In this case, and in the companion case of *Ford v. Gouin*, *post*, page 339 [*11 Cal.Rptr.2d 30, 834 P.2d 724]*, we face the question of the [*300] proper application of the "assumption of risk" doctrine in light of this court's adoption of comparative fault principles in *Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]*. Although the *Li* decision itself addressed this issue, subsequent Court of Appeal decisions have differed in their interpretation of *Li*'s discussion of this point. We granted review to resolve the conflict among the Courts of Appeal.

I

We begin with a summary of the facts of this case, as set forth in the declarations and deposition transcripts submitted in support of and in opposition to defendant's motion for summary judgment.

On January 25, 1987, the day of the 1987 Super Bowl football game, plaintiff Kendra Knight and defendant Michael Jewett, together with a number of other social acquaintances, attended a Super Bowl party at the home of a mutual friend. During half time of the Super Bowl, several guests decided to play an informal game of touch football on an adjoining dirt lot, using a "peewee" football. Each team had four or five players and included both women and men; plaintiff and defendant were on opposing teams. No rules were explicitly discussed before the game.

Five to ten minutes into the game, defendant ran into plaintiff during a play. According to plaintiff, at that point she told defendant "not to play so rough or I was going to have to stop playing." Her declaration stated that "[defendant] seemed to acknowledge my statement and left me with the impression that he would play less rough prospectively." In his deposition, defendant recalled that plaintiff had asked him to "be careful," but did not remember plaintiff saying that she would stop playing.

On the very next play, plaintiff sustained the injuries that gave rise to the present lawsuit. As defendant recalled the incident, his team was on defense on that play, and he jumped up in an attempt to intercept a pass. He touched the ball but did not catch it, and in coming down he collided with plaintiff, knocking her over. When he landed, he stepped backward onto plaintiff's right hand, injuring her hand and little finger.

Both plaintiff and Andrea Starr, another participant in the game who was on the [**698] same team as plaintiff, recalled the incident differently from defendant. According to their declarations, at the time plaintiff was injured, Starr already had caught the pass. Defendant was running toward

Starr, when he ran into plaintiff from behind, knocked her down, and stepped on her hand. Starr also stated that, after knocking plaintiff down, defendant continued [*301] running until he tagged Starr, "which tag was hard enough to cause me to lose my balance, resulting in a twisting or spraining of my ankle."

The game ended with plaintiff's injury, and plaintiff sought treatment shortly thereafter. After three operations failed to restore the movement in her little finger or to relieve the ongoing pain of the injury, plaintiff's finger was amputated. Plaintiff then instituted the present proceeding, seeking damages from defendant on theories of negligence and assault and battery.

After filing an answer, defendant moved for summary judgment. Relying on the Court of Appeal decision in *Ordway v. Superior Court (1988) 198 Cal.App.3d 98 [243 Cal.Rptr. 536]*, defendant maintained that "reasonable implied assumption of risk" continues to operate as a complete defense after *Li v. Yellow Cab Co., supra, 13 Cal.3d 804* (hereafter *Li*), and that plaintiff's action was barred under that doctrine. In this regard, defendant asserted that "[b]y participating in [the touch football game that resulted in her injury], plaintiff ... impliedly agreed to reduce the duty of care owed to her by defendant ... to only a duty to avoid reckless or intentionally harmful conduct," and that the undisputed facts established both that he did not intend to injure plaintiff and that the acts of defendant which resulted in plaintiff's injury were not reckless. In support of his motion, defendant submitted his own declaration setting forth his version of the incident, as summarized above, and specifically stating that he did not intend to step on plaintiff's hand or to injure her. Defendant also attached a copy of plaintiff's deposition in which plaintiff acknowledged that she frequently watched professional football on television and thus was generally familiar with the risks associated with the sport of football,

and in which she conceded that she had no reason to believe defendant had any intention of stepping on her hand or injuring her.

In opposing the summary judgment motion, plaintiff first noted that, in contrast to the *Ordway* decision, the Court of Appeal decision in *Segoviano v. Housing Authority (1983) 143 Cal.App.3d 162 [191 Cal.Rptr. 578]* specifically held that the doctrine of "reasonable implied assumption of risk" had been eliminated by the adoption of comparative fault principles, and thus under *Segoviano* the basic premise of defendant's summary judgment motion was untenable and plaintiff was entitled to have the lawsuit proceed under comparative fault principles.

Furthermore, plaintiff maintained that even were the trial court inclined to follow the *Ordway* decision, there were numerous disputed material facts that precluded the granting of summary judgment in favor of defendant. First, plaintiff noted there was a clear dispute between defendant's and [*302] plaintiff's recollection of the specific facts of the play in which plaintiff was injured, and, in particular, of the details of defendant's conduct that caused plaintiff's injury. She claimed that under the facts as described by plaintiff and Starr, defendant's conduct was at least reckless.

Second, plaintiff vigorously disputed defendant's claim that, by participating in the game in question, she impliedly had agreed to reduce the duty of care, owed to her by defendant, to only a duty to avoid reckless or intentionally harmful conduct. Plaintiff maintained in her declaration that in view of the casual, social setting, the circumstance that women and men were joint participants in the game, and the rough dirt surface on which the game was played, she anticipated from the outset that it was the kind of "mock" football game in which there would be no forceful pushing or hard hitting or shoving. Plaintiff also asserted that the declarations and depositions of other players in the

game, included in her opposition papers, demonstrated that the other participants, including defendant, [**699] shared her expectations and assumptions that the game was to be a "mellow" one and not a serious, competitive athletic event. [1] Plaintiff claimed that there had been no injuries during touch football games in which she had participated on previous occasions, and that in view of the circumstances under which the game was played, "[t]he only type of injury which I reasonably anticipated would have been something in the nature of a bruise or bump."

1 The portion of defendant's deposition attached to plaintiff's opposition included the following passage:

> "Q: .... [F]rom your perspective--and I asked this same question of both of your friends yesterday--is the standard of care in which you were going to be dealing with people out there in the play field different, in your opinion, when you're playing in that kind of a game, that is, the one that happened on that day versus if you're out there playing in the exact same place and with a bunch of guys and no girls.
>
> "A: Yeah, it would be different. Yes.
>
> "Q: So, theoretically, you should be much more careful when the women are out there than if it was a bunch of guys?
>
> "A: Right."

In addition, in further support of her claim that there was at least a factual dispute as to whether she impliedly had agreed to assume the risk of injury from the type of rough play defendant assertedly engaged in, plaintiff relied on the portion of her declaration in which she stated that (1) she specifically had told defendant, immediately prior to the play in question, that defendant was playing too rough and that she would not continue to play in the game if he was going to continue such conduct, and (2) defendant had given plaintiff the impression he would refrain from such

conduct. Plaintiff maintained that her statement during the game established that a disputed factual issue existed as to whether she voluntarily had chosen to assume the risks of the type of conduct allegedly engaged in by defendant.

[*303] In his reply to plaintiff's opposition, defendant acknowledged there were some factual details--"who ran where, when and how"--that were in dispute. He contended, however, that the material facts were not in dispute, stating those facts were "that plaintiff was injured in the context of playing touch football."

After considering the parties' submissions, the trial court granted defendant's motion for summary judgment. On appeal, the Court of Appeal, recognizing the existing conflict in appellate court decisions with regard to the so-called "reasonable implied assumption of risk" doctrine, concluded that *Ordway v. Superior Court, supra, 198 Cal.App.3d 98*, rather than *Segoviano v. Housing Authority, supra, 143 Cal.App.3d 162*, should be followed, and further concluded that under the *Ordway* decision there were no disputed material facts to be determined. The Court of Appeal, holding that the trial court properly had granted summary judgment in favor of defendant, affirmed the judgment.

As noted, we granted review to resolve the conflict among Court of Appeal decisions as to the proper application of the assumption of risk doctrine in light of the adoption of comparative fault principles in *Li, supra, 13 Cal.3d 804*.

II

As every leading tort treatise has explained, the assumption of risk doctrine long has caused confusion both in definition and application, because the phrase "assumption of risk" traditionally has been used in a number of very different factual settings involving analytically distinct legal concepts. (See, e.g., Prosser & Keeton on Torts (5th ed. 1984) § 68, pp. 480-481; 4 Harper

et al., The Law of Torts (2d ed. 1986) § 21.0, pp. 187-189; Schwartz, Comparative Negligence (2d ed. 1986) § 9.1, p. 154; 3 Speiser et al., The American Law of Torts (1986) § 12:46- 12:47, pp. 636-640.) Indeed, almost a half-century ago, Justice Frankfurter described the term "assumption of risk" as a classic example of a felicitous phrase, "undiscriminatingly used to express different and sometimes contradictory ideas," and whose uncritical use "bedevils the law." (*Tiller v. Atlantic Coast Line R. Co. (1943) 318 U.S. 54, 68 [87 L.Ed. 610, 618, 63 S.* [**700] *Ct. 444, 143 A.L.R. 967]* (conc. opn. of Frankfurter, J.).)

In some settings--for example, most cases involving sports-related injuries--past assumption of risk decisions largely have been concerned with defining the contours of the legal duty that a given class of defendants--for example, owners of baseball stadiums or ice hockey rinks--owed to an [*304] injured plaintiff. (See, e.g., *Quinn v. Recreation Park Assn. (1935) 3 Cal.2d 725, 729 [46 P.2d 144]* [baseball stadium owner]; *Shurman v. Fresno Ice Rink (1949) 91 Cal.App.2d 469, 474-477 [205 P.2d 77]* [hockey rink owner].) In other settings, the assumption of risk terminology historically was applied to situations in which it was clear that the defendant had breached a legal duty of care to the plaintiff, and the inquiry focused on whether the plaintiff knowingly and voluntarily had chosen to encounter the specific risk of harm posed by the defendant's breach of duty. (See, e.g., *Vierra v. Fifth Avenue Rental Service (1963) 60 Cal.2d 266, 271 [32 Cal.Rptr. 193, 383 P.2d 777]* [plaintiff hit in eye by flying piece of metal in area adjacent to drilling]; *Prescott v. Ralphs Grocery Co. (1954) 42 Cal.2d 158, 161-162 [265 P.2d 904]* [plaintiff injured on wet sidewalk on store premises].)

Prior to the adoption of comparative fault principles of liability, there often was no need to distinguish between the different categories of assumption of risk cases, because if a case fell into either category, the plaintiff's recovery was

totally barred. With the adoption of comparative fault, however, it became essential to differentiate between the distinct categories of cases that traditionally had been lumped together under the rubric of assumption of risk. This court's seminal comparative fault decision in *Li, supra, 13 Cal.3d 804,* explicitly recognized the need for such differentiation, and attempted to explain which category of assumption of risk cases should be merged into the comparative fault system and which category should not. Accordingly, in considering the current viability of the assumption of risk doctrine in California, our analysis necessarily begins with the *Li* decision.

In *Li,* our court undertook a basic reexamination of the common law doctrine of contributory negligence. As *Li* noted, contributory negligence generally has been defined as " 'conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm.' " (*Li, supra, 13 Cal.3d at p. 809,* quoting *Rest.2d Torts, § 463*.) Prior to *Li,* the common law rule was that " '[e]xcept where the defendant has the last clear chance, 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.' " (*Li, supra, at pp. 809-810,* italics added, quoting *Rest.2d Torts, § 467*.)

In *Li, supra, 13 Cal.3d 804,* we observed that "[i]t is unnecessary for us to catalogue the enormous amount of critical comment that has been directed over the years against the 'all-or-nothing' approach of the doctrine of contributory negligence. The essence of that criticism has been constant and [*305] clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault .... *The basic objection to the doctrine--grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern*

the extent of liability--remains irresistible to reason and all intelligent notions of fairness." (*Id. at pp. 810-811*, italics added.) After taking additional note of the untoward practical consequences of the doctrine in the litigation of cases and the increasing rejection of the doctrine in other jurisdictions, the *Li* court concluded that "[w]e are likewise persuaded that logic, practical experience, and fundamental justice counsel against the retention of the doctrine rendering contributory negligence a complete bar to recovery--and that it should be replaced in this [**701] state by a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault." (*Id. at pp. 812-813*.)

After determining that the "all-or-nothing" contributory negligence doctrine should be replaced by a system of comparative negligence, the *Li* court went on to undertake a rather extensive discussion of the effect that the adoption of comparative negligence would have on a number of related tort doctrines, including the doctrines of last clear chance and assumption of risk. (*Li*, *supra, 13 Cal.3d at pp. 823-826*.)

Under the last clear chance doctrine, a defendant was rendered totally liable for an injury, even though the plaintiff's contributory negligence had played a role in the accident, when the defendant had the "last clear chance" to avoid the accident. With regard to that doctrine, the *Li* decision, *supra*, *13 Cal.3d 804*, observed: "Although several states which apply comparative negligence concepts retain the last clear chance doctrine [citation], the better reasoned position seems to be that when true comparative negligence is adopted, the need for last clear chance as a palliative of the hardships of the 'all-or-nothing' rule disappears and its retention results only in a windfall to the plaintiff in direct contravention of the principle of liability in proportion to fault. [Citations.]" (*Id. at p. 824*.) Accordingly, the court concluded that the doctrine should

be "subsumed under the general process of assessing liability in proportion to fault." (*Id. at p. 826*.)

(1a) With respect to the effect of the adoption of comparative negligence on the assumption of risk doctrine--the issue before us today--the *Li* decision, *supra, 13 Cal.3d 804*, stated as follows: "As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. 'To simplify greatly, it has been observed ... that in one kind of situation, to wit, where a plaintiff *unreasonably* undertakes to encounter a [*306] specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence .... Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care.' (*Grey v. Fibreboard Paper Products Co. (1966) 65 Cal.2d 240, 245-246 [53 Cal.Rptr. 545, 418 P.2d 153]*; see also *Fonseca v. County of Orange (1972) 28 Cal.App.3d 361, 368-369 [104 Cal.Rptr. 566]*; see generally, 4 Witkin, Summary of Cal. Law [(8th ed. 1974)], Torts, § 723, pp. 3013-3014; 2 Harper & James, The Law of Torts [(1st ed. 1956)] § 21.1, pp. 1162-1168; cf. Prosser, Torts [(4th ed. 1971)] § 68, pp. 439-441.) We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence. (See generally, Schwartz, [Comparative Negligence (1st ed. 1974)] ch. 9, pp. 153-175.)" (*Li. supra, 13 Cal.3d at pp. 824-825*, original italics.)

As this passage indicates, the *Li* decision, *supra, 13 Cal.3d 804*, clearly contemplated that the assumption of risk doctrine was to be *partially* merged or subsumed into the comparative negligence scheme. Subsequent Court of Appeal decisions have disagreed, however, in interpreting *Li*, as to what category of assumption of risk cases would be merged into the comparative negligence scheme.

A number of appellate decisions, focusing on the language in *Li* indicating that assumption of risk is in reality a form [**702] of contributory negligence "where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence" (*13 Cal.3d at p. 824*), have concluded that *Li* properly should be interpreted as drawing a distinction between those assumption of risk cases in which a plaintiff "unreasonably" encounters a known risk imposed by a defendant's negligence and those assumption of risk cases in which a plaintiff "reasonably" encounters a known risk imposed by a defendant's negligence. (See, e.g., *Ordway v. Superior Court, supra, 198 Cal.App.3d 98, 103-105.*) These decisions interpret *Li* as subsuming into the comparative fault scheme those cases in which the plaintiff acts *unreasonably* in encountering a specific known risk, but retaining the assumption of risk doctrine as a complete bar to recovery in those cases in which the plaintiff acts *reasonably* in encountering such a risk. Although aware of the apparent anomaly of a rule under which a plaintiff who acts *reasonably* is *completely barred* from recovery while a plaintiff who acts *unreasonably* [*307] only has his or her recovery *reduced*, these decisions nonetheless have concluded that this distinction and consequence were intended by the *Li* court. [2]

2 In *Ordway v. Superior Court, supra, 198 Cal.App.3d 98*, the court suggested that the differentiation in the treatment accorded reasonable and unreasonable plaintiffs under an approach

viewing "reasonable implied assumption of risk" as a complete bar to recovery was only "superficially anomalous" (*Id. at p. 104*), and could be explained by reference to "the expectation of the defendant. He or she is permitted to ignore reasonably assumed risks and is not required to take extraordinary precautions with respect to them. The defendant must, however, anticipate that some risks will be unreasonably undertaken, and a failure to guard against these may result in liability." (*Id. at p. 105*.)

Even when the matter is viewed from the defendant's perspective, however, this suggested dichotomy is illogical and untenable. From the standpoint of a potential defendant, it is far more logical to require that the defendant take precautions with respect to risks that the defendant reasonably can foresee being undertaken, than it would be to impose liability only for risks that the defendant is less likely to anticipate will be encountered.

Ordway also attempted to explain the anomaly by reformulating the distinction between reasonable and unreasonable assumption of risk as one between plaintiffs who make a "knowing and intelligent" choice and those who act "negligent[ly] or careless[ly]" (*Ordway v. Superior Court, supra, 198 Cal.App.3d 98, 105)*, and the dissenting opinion cites this reformulated terminology with approval. (See dis. opn. by Kennard, J., *post*, p. 332.) The *Li* decision, however, specifically subsumed within comparative fault those assumption of risk cases in which a defendant " 'unreasonably undertakes to encounter a specific *known* risk' " (*Li, supra, 13 Cal.3d 804, 824*, italics omitted and added), i.e., cases in which a defendant makes a *knowing*, but unreasonable, choice to undertake a risk. Indeed, in recasting the "unreasonable" assumption of risk category to include only those cases in which the

> plaintiff merely was careless and did not act with actual knowledge of the risk, *Ordway* inadvertently redefined the unreasonable assumption of risk category out of existence. The pre-*Li* decisions clearly held that where a plaintiff was injured as the result of a defendant's breach of duty, the assumption of risk doctrine applied only to those instances in which the plaintiff actually knew of and appreciated the specific risk and nonetheless chose to encounter the risk. (See, e.g., *Vierra v. Fifth Avenue Rental Service, supra, 60 Cal.2d 266, 271* ["Actual, and not merely constructive, knowledge of the danger is required."].)

In our view, these decisions--regardless whether they reached the correct result on the facts at issue--have misinterpreted *Li* by suggesting that our decision contemplated less favorable legal treatment for a plaintiff who reasonably encounters a known risk than for a plaintiff who unreasonably encounters such a risk. Although the relevant passage in *Li* indicates that the assumption of risk doctrine would be merged into the comparative fault scheme in instances in which a plaintiff " '*unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence' " (*13 Cal.3d at p. 824*), nothing in this passage suggests that the assumption of risk doctrine should survive as a total bar to the plaintiff's recovery whenever a plaintiff acts *reasonably* in encountering such a risk. Instead, this portion of our opinion expressly contrasts the category of assumption of risk cases which " 'involve contributory negligence' " (and which therefore [**703] should be merged into the comparative fault scheme) with those assumption of risk [*308] cases which involve " 'a reduction of defendant's duty of care.' " (*Id. at p. 825*.)

Indeed, particularly when the relevant passage in *Li, supra, 13 Cal.3d at pages 824-825*, is read as a whole *and in conjunction with the authorities it cites*, we believe it

becomes clear that the distinction in assumption of risk cases to which the *Li* court referred in this passage was not a distinction between instances in which a plaintiff unreasonably encounters a known risk imposed by a defendant's negligence and instances in which a plaintiff reasonably encounters such a risk. Rather, the distinction to which the *Li* court referred was between (1) those instances in which the assumption of risk doctrine embodies a legal conclusion that there is "no duty" on the part of the defendant to protect the plaintiff from a particular risk--the category of assumption of risk that the legal commentators generally refer to as "primary assumption of risk"--and (2) those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty--what most commentators have termed "secondary assumption of risk." [3] Properly interpreted, the relevant passage in *Li* provides that the category of assumption of risk cases that is not merged into the comparative negligence system and in which the plaintiff's recovery continues to be completely barred involves those cases in which the defendant's conduct did not breach a legal duty of care to the plaintiff, i.e., "primary assumption of risk" cases, whereas cases involving "secondary assumption of risk" properly are merged into the comprehensive comparative fault system adopted in *Li*. [4]

> 3 The introductory passage from the Harper and James treatise on The Law of Torts, that was cited with approval in *Li*, stated in this regard: "The term assumption of risk has led to no little confusion because it is used to refer to at least two different concepts, which largely overlap, have a common cultural background, and often produce the same legal result. But these concepts are nevertheless quite distinct rules involving slightly different policies and different conditions for their application. (1) In its primary sense the plaintiff's assumption of a risk is only the counterpart of the defendant's lack of duty to

protect the plaintiff from that risk. In such a case plaintiff may not recover for his injury even though he was quite reasonable in encountering the risk that caused it. Volenti non fit injuria. (2) A plaintiff may also be said to assume a risk created by defendant's breach of duty towards him, when he deliberately chooses to encounter that risk. In such a case, except possibly in master and servant cases, plaintiff will be barred from recovery only if he was unreasonable in encountering the risk under the circumstances. This is a form of contributory negligence. Hereafter we shall call this 'assumption of risk in a secondary sense.' " (2 Harper & James, The Law of Torts (1st ed. 1956) § 21.1, p. 1162, fns. omitted, cited in *Li, supra, 13 Cal.3d 804, 825*.)

4 Although in the academic literature "express assumption of risk" often has been designated as a separate, contract-based species of assumption of risk distinct from both primary and secondary assumption of risk (see, e.g., Prosser & Keeton on Torts (5th ed. 1984) § 68, p. 496), cases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk. One leading treatise describes express assumption of risk in the following terms: "In its most basic sense, assumption of risk means that the plaintiff, in advance, has given his *express* consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone .... *The result is that the defendant is relieved of legal duty to the plaintiff; and being under no duty, he cannot be charged with negligence*." (Prosser & Keeton on

> Torts, *supra,* § 68, pp. 480-481, fn. omitted, second italics added.)
>
> Since *Li,* California cases uniformly have recognized that so long as an express assumption of risk agreement does not violate public policy (see, e.g., *Tunkl v. Regents of University of California (1963) 60 Cal.2d 92, 95-101 [32 Cal.Rptr. 33, 383 P.2d 441, 6 A.L.R.3d 693]*), such an agreement operates to relieve the defendant of a legal duty to the plaintiff with respect to the risks encompassed by the agreement and, where applicable, to bar completely the plaintiff's cause of action. (See, e.g., *Madison v. Superior Court (1988) 203 Cal.App.3d 589, 597-602 [250 Cal.Rptr. 299],* and cases cited.)

[*309] Although the difference between the "primary assumption of risk"/"secondary [**704] assumption of risk" nomenclature and the "reasonable implied assumption of risk"/"unreasonable implied assumption of risk" terminology embraced in many of the recent Court of Appeal decisions may appear at first blush to be only semantic, the significance extends beyond mere rhetoric. First, in "primary assumption of risk" cases--where the defendant owes no duty to protect the plaintiff from a particular risk of harm--a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was reasonable *or unreasonable*. Second, in "secondary assumption of risk" cases--involving instances in which the defendant has breached the duty of care owed to the plaintiff--the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff's conduct in encountering the risk of such an injury was *reasonable* rather than unreasonable. Third and finally, the question whether the defendant owed a legal duty to protect the plaintiff from a particular risk of harm does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on

the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport. (2) (See fn. 5) For these reasons, use of the "reasonable implied assumption of risk"/"unreasonable implied assumption of risk" terminology, as a means of differentiating between the cases in which a plaintiff is barred from bringing an action and those in which he or she is not barred, is more misleading than helpful. [5]

> 5 In addition to the sports setting, the primary assumption of risk doctrine also comes into play in the category of cases often described as involving the "firefighter's rule." (See *Terhell v. American Commonwealth Associates (1985) 172 Cal.App.3d 434, 437 [218 Cal.Rptr. 256]*.) In its most classic form, the firefighter's rule involves the question whether a person who negligently has started a fire is liable for an injury sustained by a firefighter who is summoned to fight the fire; the rule provides that the person who started the fire is not liable under such circumstances. (See, e.g., *Walters v. Sloan (1977) 20 Cal.3d 199, 202 [142 Cal.Rptr. 152, 571 P.2d 609]*.) Although a number of theories have been cited to support this conclusion, the most persuasive explanation is that the party who negligently started the fire had no legal duty to protect the firefighter from the very danger that the firefighter is employed to confront. (See, e.g., *Baker v. Superior Court (1982) 129 Cal.App.3d 710, 719-721 [181 Cal.Rptr. 311]*; *Nelson v. Hall (1985) 165 Cal.App.3d 709, 714 [211 Cal.Rptr. 668]*. See generally 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 739, pp. 69-70 [discussing rule as one illustration of duty approach]; *Anicet v. Gant (Fla.Dist.Ct.App. 1991) 580 So.2d 273, 276* ["a person specifically hired to encounter and combat particular dangers is owed no independent tort duty by those who have created

> those dangers ...."].) Because the defendant in such a case owes no duty to protect the firefighter from such risks, the firefighter has no cause of action even if the risk created by the fire was so great that a trier of fact could find it was unreasonable for the firefighter to choose to encounter the risk. This example again demonstrates that primary assumption of risk is not the same as "reasonable implied assumption of risk."

[*310] (1b) Our reading of *Li, supra, 13 Cal.3d 804*, insofar as it draws a distinction between assumption of risk cases in which the defendant has not breached any legal duty to the plaintiff and those in which the defendant has breached a legal duty, is supported not only by the language of *Li* itself and the authorities it cites, but also, and perhaps most significantly, by the fundamental principle that led the *Li* court to replace the all-or-nothing contributory negligence defense with a comparative fault scheme. In "primary assumption of risk" cases, it is consistent with comparative fault principles totally to bar a plaintiff from pursuing a cause of action, because when the defendant has not breached a legal duty of care to the plaintiff, the defendant has not committed any conduct which would warrant the imposition of any liability whatsoever, and thus there is no occasion at all for invoking comparative fault principles. (See Prosser & Keeton on Torts, *supra*, § 68, at pp. 496-497.) By contrast, in the "secondary assumption of risk" context, the defendant has breached a duty of care owed to the plaintiff. When a risk of harm is created or imposed by a defendant's breach of duty, and a plaintiff who chose to encounter the risk is injured, comparative fault principles preclude automatically placing [**705] all of the loss on the plaintiff, because the injury in such a case may have been caused by the combined effect of the defendant's and the plaintiff's culpable conduct. To retain assumption of risk as a complete defense in such a case would fly in the face of *Li*'s basic holding that when both parties are partially at

fault for an injury, a rule which places all of the loss on one of the parties is inherently inequitable. (See *id.* at pp. 497-498.)

Thus, just as the court in *Li* reasoned it would be improper to retain the last clear chance doctrine as a means of imposing *all liability on a defendant* in cases in which the defendant is aware of the risk of harm created by the plaintiff's negligence but fails to take the "last clear chance" to avoid the injury (*Li, supra, 13 Cal.3d at p. 824*), we believe the *Li* court similarly recognized that, in the assumption of risk context, it would be improper to [*311] impose *all responsibility on a plaintiff* who is aware of a risk of harm created by the defendant's breach of duty but fails to avert the harm. In both instances, comparative fault principles call for a sharing of the burden of liability.

The dissenting opinion suggests, however, that, even when a defendant has breached its duty of care to the plaintiff, a plaintiff who reasonably has chosen to encounter a known risk of harm imposed by such a breach may be totally precluded from recovering any damages, without doing violence to comparative fault principles, on the theory that the plaintiff, by proceeding in the face of a known risk, has "impliedly consented" to any harm. (See dis. opn. by Kennard, J., *post*, pp. 331-333.) For a number of reasons, we conclude this contention does not withstand analysis.

First, the argument that a plaintiff who proceeds to encounter a known risk has "impliedly consented" to absolve a negligent defendant of liability for any ensuing harm logically would apply as much to a plaintiff who *unreasonably* has chosen to encounter a known risk, as to a plaintiff who *reasonably* has chosen to encounter such a risk. As we have seen, however, *Li* explicitly held that a plaintiff who " '*unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence' "

(*Li, supra, 13 Cal.3d at p. 824*) is *not* completely barred from recovery; instead, the recovery of such a plaintiff simply is reduced under comparative fault principles. Thus, the dissenting opinion's implied consent argument is irreconcilable with *Li* itself.

Second, the implied consent rationale rests on a legal fiction that is untenable, at least as applied to conduct that represents a breach of the defendant's duty of care to the plaintiff. It may be accurate to suggest that an individual who voluntarily engages in a potentially dangerous activity or sport "consents to" or "agrees to assume" the risks inherent in the activity or sport itself, such as the risks posed to a snow skier by moguls on a ski slope or the risks posed to a water skier by wind-whipped waves on a lake. But it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the activity or sport itself, even where the participating individual is aware of the possibility that such misconduct may occur.

A familiar example may help demonstrate this point. Although every driver of an automobile is aware that driving is a potentially hazardous activity and that inherent in the act of driving is the risk that he or she will be injured by the negligent driving of another, a person who voluntarily [*312] chooses to drive does not thereby "impliedly consent" to being injured by the negligence of another, nor has such a person "impliedly excused" others from performing their duty to use due care for the driver's safety. Instead, the driver reasonably expects that if he or she is injured by another's negligence, i.e., by the breach of the other person's duty to use due care, the driver will be entitled to compensation for his or her injuries. Similarly, although a patient who undergoes elective surgery is aware that inherent in such an operation is the risk of injury in the event the surgeon [**706] is negligent, the patient, by voluntarily encountering such a risk, does not "impliedly

consent" to negligently inflicted injury or "impliedly agree" to excuse the surgeon from a normal duty of care, but rather justifiably expects that the surgeon will be liable in the event of medical malpractice.

Thus, there is no merit to the dissenting opinion's general claim that simply because a person is aware an activity involves a risk of harm that may arise from another's negligence and voluntarily proceeds to participate in that activity despite such knowledge, that person should be barred from obtaining any recovery on the theory that he or she impliedly consented to the risk of harm. As we shall discuss in part III, legal liability for an injury which occurs during a sporting event *is* significantly affected by the assumption of risk doctrine, but only because the doctrine has been utilized in framing the duty of care owed by a defendant in the context of a sporting event, and not because the plaintiff in such a case has, in any realistic sense of the term, "consented" to relieve the defendant of liability.

Third, the dissenting opinion's claim that the category of cases in which the assumption of risk doctrine operates to bar a plaintiff's cause of action after *Li* properly should be gauged on the basis of an implied consent analysis, rather than on the duty analysis we have described above, is, in our view, untenable for another reason. In support of its implied consent theory, the dissenting opinion relies on a number of pre-*Li* cases, which arose in the "secondary assumption of risk" context, and which held that, in such a context, application of the assumption of risk doctrine was dependent on proof that the *particular* plaintiff *subjectively* knew, rather than simply should have known, of both the *existence* and *magnitude* of the *specific* risk of harm imposed by the defendant's negligence. (See *Vierra v. Fifth Avenue Rental Service, supra, 60 Cal.2d 266, 271- 275*; *Prescott v. Ralphs Grocery Co., supra, 42 Cal.2d 158, 161-162*.) Consequently, as the dissenting opinion

acknowledges, were its implied consent theory to govern application of the assumption of risk doctrine in the sports setting, the basic liability of a defendant who engages in a sport would depend on variable factors that the defendant frequently would have no way of ascertaining (for example, the particular plaintiff's subjective knowledge and expectations), rather than on [*313] the nature of the sport itself. As a result, there would be drastic disparities in the manner in which the law would treat defendants who engaged in precisely the same conduct, based on the often unknown, subjective expectations of the particular plaintiff who happened to be injured by the defendant's conduct.

Such an approach not only would be inconsistent with the principles of fairness underlying the *Li* decision, but also would be inimical to the fair and efficient administration of justice. If the application of the assumption of risk doctrine in a sports setting turned on the particular plaintiff's subjective knowledge and awareness, summary judgment rarely would be available in such cases, for, as the present case reveals, it frequently will be easy to raise factual questions with regard to a *particular* plaintiff's *subjective* expectations as to the *existence* and *magnitude* of the risks the plaintiff voluntarily chose to encounter. (3) By contrast, the question of the existence and scope of a defendant's duty of care is a *legal* question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury. (See, e.g., 6 Witkin, Summary of Cal. Law, *supra*, Torts, § 748, pp. 83-86 and cases cited.) Thus, the question of assumption of risk is much more amenable to resolution by summary judgment under a duty analysis than under the dissenting opinion's suggested implied consent approach.

(1c) An amicus curiae in the companion case has questioned, on a separate ground, the duty approach to the post-*Li* assumption of risk doctrine, suggesting that if a plaintiff's action may go forward whenever a defendant's

breach of duty has played some role, however minor, in a plaintiff's [**707] injury, a plaintiff who voluntarily engages in a highly dangerous sport--for example, skydiving or mountain climbing--will escape *any* responsibility for the injury so long as a jury finds that the plaintiff was not "unreasonable" in engaging in the sport. This argument rests on the premise that, under comparative fault principles, a jury may assign some portion of the responsibility for an injury to a plaintiff only if the jury finds that the plaintiff acted *unreasonably*, but not if the jury finds that the plaintiff knowingly and voluntarily, but reasonably, chose to engage in a dangerous activity. Amicus curiae contends that such a rule frequently would permit voluntary risk takers to avoid all responsibility for their own actions, and would impose an improper and undue burden on other participants.

Although we agree with the general thesis of amicus curiae's argument that persons generally should bear personal responsibility for their own actions, the suggestion that a duty approach to the doctrine of assumption of risk is inconsistent with this thesis rests on a mistaken premise. (4) Past [*314] California cases have made it clear that the "comparative fault" doctrine is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable apportionment or allocation of loss." (See *Daly v. General Motors Corp. (1978) 20 Cal.3d 725, 734-742 [144 Cal.Rptr. 380, 575 P.2d 1162]*; *Safeway Stores, Inc. v. Nest-Kart (1978) 21 Cal.3d 322, 328-332 [146 Cal.Rptr. 550, 579 P.2d 441]*; *Far West Financial Corp. v. D & S Co. (1988) 46 Cal.3d 796, 804, fn. 7 [251 Cal.Rptr. 202, 760 P.2d 399]*.)

(1d) Accordingly, contrary to amicus curiae's assumption, we believe that under California's comparative fault doctrine, a jury in a "secondary assumption of risk" case would be entitled to take into consideration a plaintiff's voluntary action in choosing to engage in an unusually risky sport, whether or not the plaintiff's decision to encounter the risk should be characterized as unreasonable, in determining whether the plaintiff properly should bear some share of responsibility for the injuries he or she suffered. (See, e.g., *Kirk v. Washington State University (1987) 109 Wn.2d 448 [746 P.2d 285, 290-291]*. See generally Schwartz, Comparative Negligence, *supra*, § 9.5, p. 180; Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine* (1991) *52 Ohio St. L.J. 717, 748-749*.) Thus, in a case in which an injury has been caused by both a defendant's breach of a legal duty to the plaintiff and the plaintiff's voluntary decision to engage in an unusually risky sport, application of comparative fault principles will not operate to relieve either individual of responsibility for his or her actions, but rather will ensure that neither party will escape such responsibility.

It may be helpful at this point to summarize our general conclusions as to the current state of the doctrine of assumption of risk in light of the adoption of comparative fault principles in *Li, supra, 13 Cal.3d 804*, general conclusions that reflect the view of a majority of the justices of the court (i.e., the three justices who have signed this opinion and Justice Mosk (see conc. and dis. opn. by Mosk, J., *post*, p. 321)). [6] In cases involving "primary assumption of [**708] risk"--where, by virtue of the nature of the activity and the parties' [*315] relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury--the doctrine continues to operate as a complete bar to the plaintiff's recovery. In cases involving "secondary assumption of risk"--where the defendant does owe a duty

of care to the plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty--the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties.

> 6 Although Justice Mosk agrees that, in this context, a defendant's liability should be analyzed under a duty analysis, he is of the view that the "primary" and "secondary" assumption of risk terminology is potentially confusing and would prefer entirely to eliminate the doctrine of implied assumption of risk as a bar to recovery and simply to apply comparative fault principles to determine liability. (See conc. and dis. opn. by Mosk, J., *post*, pp. 321-322.) Because the *Li* decision, *supra*, *13 Cal.3d 804, 824-825*, indicated that the preexisting assumption of risk doctrine was to be only partially merged into the comparative fault system, the analysis set forth in the present opinion (distinguishing between primary and secondary assumption of risk) in our view more closely reflects the *Li* holding than does Justice Mosk's proposal.

Accordingly, in determining the propriety of the trial court's grant of summary judgment in favor of the defendant in this case, our inquiry does not turn on the reasonableness or unreasonableness of plaintiff's conduct in choosing to subject herself to the risks of touch football or in continuing to participate in the game after she became aware of defendant's allegedly rough play. Nor do we focus upon whether there is a factual dispute with regard to whether plaintiff subjectively knew of, and voluntarily chose to encounter, the risk of defendant's conduct, or impliedly consented to relieve or excuse defendant from any duty of care to her. Instead, our resolution of this issue turns on whether, in light of the nature of the sporting activity in which defendant and plaintiff were engaged,

defendant's conduct breached a legal duty of care to plaintiff. We now turn to that question.

III

As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person. (See *Civ. Code, § 1714* .) (5) Thus, for example, a property owner ordinarily is required to use due care to eliminate dangerous conditions on his or her property. (See, e.g., *Rowland v. Christian (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496]*.) In the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself. (6a) Thus, although moguls on a ski run pose a risk of harm to skiers that might not exist were these configurations removed, the challenge and risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them. (See generally Annot. *(1987) 55 A.L.R.4th 632*.) In this respect, the nature of a sport is highly relevant in defining the duty of care owed by the particular defendant.

(7a) Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well [*316] established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. (6b) Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant. (See generally Annot. *(1979) 95 A.L.R.3d 203*.)

(7b) In some situations, however, the careless conduct of others is treated as an "inherent risk" of a sport, thus

barring recovery by the plaintiff. For example, numerous cases recognize that in a game of baseball, a player generally cannot recover if he or she is hit and injured by a carelessly thrown ball (see, e.g., *Mann v. Nutrilite, Inc. (1955) 136 Cal.App.2d 729, 734-735 [289 P.2d 282]*), and that in a game of basketball, recovery is not permitted for an injury caused by a carelessly extended elbow (see, e.g., *Thomas v. Barlow (1927) 5 N.J. Misc. 764 [138 A. 208]*). The divergent results of the foregoing cases lead naturally to the question how courts are to determine when careless conduct of another properly should be considered an "inherent [**709] risk" of the sport that (as a matter of law) is assumed by the injured participant.

Contrary to the implied consent approach to the doctrine of assumption of risk, discussed above, the duty approach provides an answer which does not depend on the particular plaintiff's subjective knowledge or appreciation of the potential risk. Even where the plaintiff, who falls while skiing over a mogul, is a total novice and lacks any knowledge of skiing whatsoever, the ski resort would not be liable for his or her injuries. (See *Brown v. San Francisco Baseball Club (1950) 99 Cal.App.2d 484, 488-492 [222 P.2d 19]* [baseball spectator's alleged ignorance of the game did not warrant imposing liability on stadium owner for injury caused by a carelessly thrown ball].) And, on the other hand, even where the plaintiff actually is aware that a particular ski resort on occasion has been negligent in maintaining its towropes, that knowledge would not preclude the skier from recovering if he or she were injured as a result of the resort's repetition of such deficient conduct. In the latter context, although the plaintiff may have acted with knowledge of the potential negligence, he or she did not consent to such negligent conduct or agree to excuse the resort from liability in the event of such negligence.

Rather than being dependent on the knowledge or consent of the particular plaintiff, resolution of the question of the defendant's liability in such cases turns on whether the defendant had a legal duty to avoid such conduct or to [*317] protect the plaintiff against a particular risk of harm. As already noted, the nature of a defendant's duty in the sports context depends heavily on the nature of the sport itself. Additionally, the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport.

The latter point is demonstrated by a review of one of the numerous cases involving an injury sustained by a spectator at a baseball game. In *Ratcliff v. San Diego Baseball Club (1938) 27 Cal.App.2d 733 [81 P.2d 625]*, a baseball spectator was injured when, walking in the stands between home plate and first base during a game, she was hit by an accidentally thrown bat. She sued both the player who threw the bat and the baseball stadium owner. The jury returned a verdict in favor of the player, but found the stadium owner liable. On appeal, the Court of Appeal affirmed.

Had the *Ratcliff* court utilized an implied consent analysis, the court would have looked only to the knowledge of the particular plaintiff (the spectator) to determine whether the risk of being hit by an accidentally thrown bat was an inherent risk of the sport of baseball assumed by the plaintiff, and would have treated the plaintiff's action against both defendants similarly with regard to such risk. The *Ratcliff* court did not analyze the case in that manner, however. Instead, the court implicitly recognized that two different potential duties were at issue--(1) the duty of the ballplayer to play the game without carelessly throwing his bat, and (2) the duty of the stadium owner to provide a reasonably safe stadium with regard to the relatively common (but particularly dangerous) hazard of a thrown bat. Because each defendant's liability rested on a separate duty, there was no inconsistency in the jury

verdict absolving the batter of liability but imposing liability on the stadium owner for its failure to provide the patron "protection from flying bats, at least in the area where the greatest danger exists and where such an occurrence is reasonably to be expected." (*Ratcliff v. San Diego Baseball Club, supra, 27 Cal.App.2d at p. 736*.)

Other cases also have analyzed in a similar fashion the duty of the owner of a ballpark or ski resort, in the process defining the risks inherent in the sport not only by virtue of the nature of the sport itself, but also by reference to the steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport. (See, e.g., *Quinn v. Recreation Park Assn., supra, 3 Cal.2d 725, 728-729* [discussing separately the potential liability of a player and a baseball stadium owner for injury to a spectator]; [**710] *Shurman v. Fresno Ice Rink, supra, 91 Cal.App.2d 469, 474-477* [discussing duty owed by owner of ice hockey rink to spectators].) [*318]

Even a cursory review of the numerous sports injury cases reveals the diverse categories of defendants whose alleged misconduct may be at issue in such cases. Thus, for example, suits have been brought against owners of sports facilities such as baseball stadiums and ski resorts (see, e.g., *Quinn v. Recreation Park Assn., supra, 3 Cal.2d 725*; *Danieley v. Goldmine Ski Associates, Inc. (1990) 218 Cal.App.3d 111 [266 Cal.Rptr. 749]*), against manufacturers and reconditioners of sporting equipment (see, e.g., *Holdsworth v. Nash Mfg., Inc. (1987) 161 Mich.App. 139 [409 N.W.2d 764]*; *Gentile v. MacGregor Mfg. Co. (1985) 201 N.J.Super. 612 [493 A.2d 647]*), against sports instructors and coaches (see, e.g., *Scroggs v. Coast Community College Dist. (1987) 193 Cal.App.3d 1399 [239 Cal.Rptr. 916]*; *Morris v. Union High School Dist. A (1931) 160 Wash. 121 [294 P. 998]*), and against coparticipants (see, e.g., [**716] *Tavernier v. Maes (1966)*

242 Cal.App.2d 532 [51 Cal.Rptr. 575]), alleging that such persons, either by affirmative misconduct or by a failure to act, caused or contributed to the plaintiff's injuries. These cases demonstrate that in the sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case.

In the present case, defendant was a participant in the touch football game in which plaintiff was engaged at the time of her injury, and thus the question before us involves the circumstances under which a participant in such a sport may be held liable for an injury sustained by another participant.

(8a) The overwhelming majority of the cases, both within and outside California, that have addressed the issue of coparticipant liability in such a sport, have concluded that it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport--for example, for an injury resulting from a carelessly thrown ball or bat during a baseball game--and that liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport. (See, e.g., *Gauvin v. Clark (1989) 404 Mass. 450 [537 N.E.2d 94, 96-97]* and cases cited.)

In reaching the conclusion that a coparticipant's duty of care should be limited in this fashion, the cases have explained that, in the heat of an active sporting event like baseball or football, a participant's normal energetic conduct often includes accidentally careless behavior. The courts have concluded that vigorous participation in such sporting events likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct. The cases have recognized that, in such a sport, even when a participant's conduct

violates a rule of the game and [*319] may subject the violator to internal sanctions prescribed by the sport itself, imposition of *legal liability* for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.

A sampling of the cases that have dealt with the question of the potential tort liability of such sports participants is instructive. In *Tavernier v. Maes, supra, 242 Cal.App.2d 532*, for example, the Court of Appeal upheld a verdict denying recovery for an injury sustained by the plaintiff second baseman as an unintended consequence of the defendant baserunner's hard slide into second base during a family picnic softball game. Similarly, in *Gaspard v. Grain Dealers Mutual Insurance Company (La.Ct.App. 1961) 131 So.2d 831*, the plaintiff baseball player was denied recovery when he was struck on the head by a bat which accidentally flew out of the hands of the defendant batter during a school game. (See also *Gauvin v. Clark, supra, 404 Mass. 450 [537 N.E.2d 94, 96-97]* [plaintiff hockey player injured when hit [**711] with hockey stick by opposing player; court held that defendant's liability should be determined by whether he acted "with reckless disregard of safety"]; *Marchetti v. Kalish (1990) 53 Ohio.St.3d 95 [559 N.E.2d 699, 703]* [child injured while playing "kick the can"; "we join the weight of authority ... and require that before a party may proceed with a cause of action involving injury resulting from recreational or sports activity, reckless or intentional conduct must exist"]; *Kabella v. Bouschelle (1983) 100 N.M. 461 [672 P.2d 290, 294]* [plaintiff injured in informal tackle football game; court held that "a cause of action for personal injuries between participants incurred during athletic competition must be predicated upon recklessness or intentional conduct, 'not mere negligence' "]; *Ross v. Clouser (Mo. 1982) 637 S.W.2d 11, 13-14* [plaintiff third baseman

injured in collision with baserunner; court held that "a cause of action for personal injuries incurred during athletic competition must be predicated on recklessness, not mere negligence"]; *Moe v. Steenberg (1966) 275 Minn. 448 [147 N.W.2d 587, 33 A.L.R.3d 311]* [plaintiff ice skater denied recovery for injury incurred when another skater, who was skating backwards, accidentally tripped over her after she had fallen on the ice]; *Thomas v. Barlow, supra, 5 N.J. Misc. 764 [138 A. 208]* [recovery denied when appellate court concluded that plaintiff's injury, incurred during a basketball game, resulted from an accidental contact with a member of the opposing team].)

By contrast, in *Griggas v. Clauson (1955) 6 Ill.App.2d 412 [128 N.E.2d 363]*, the court upheld liability imposed on the defendant basketball player who, during a game, wantonly assaulted a player on the opposing team, apparently out of frustration with the progress of the game. And, in *Bourque v. Duplechin (La.Ct.App. 1976) 331 So.2d 40*, the court affirmed a judgment [*320] imposing liability for an injury incurred during a baseball game when the defendant baserunner, in an ostensible attempt to break up a double play, ran into the plaintiff second baseman at full speed, without sliding, after the second baseman had thrown the ball to first base and was standing four to five feet away from second base toward the pitcher's mound; in upholding the judgment, the court stated that defendant "was under a duty to play softball in the ordinary fashion without unsportsmanlike conduct or wanton injury to his fellow players." (*Id. at p. 42*.) (See also *Averill v. Luttrell (1957) 44 Tenn.App. 56 [311 S.W.2d 812]* [defendant baseball catcher properly held liable when, deliberately and without warning, he hit a batter in the head with his fist]; *Hackbart v. Cincinnati Bengals, Inc. (10th Cir. 1979) 601 F.2d 516* [trial court erred in absolving defendant football player of liability when, acting out of anger and frustration, he struck a blow with his forearm to the back of the head of an opposing player, who was kneeling on the ground

watching the end of a pass interception play]; *Overall v. Kadella (1984) 138 Mich.App. 351 [361 N.W.2d 352]* [hockey player permitted to recover when defendant player intentionally punched him in the face at the conclusion of the game].)

In our view, the reasoning of the foregoing cases is sound. Accordingly, we conclude that a participant in an active sport breaches a legal duty of care to other participants--i.e., engages in conduct that properly may subject him or her to financial liability--only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport. [7]

7 As suggested by the cases described in the text, the limited duty of care applicable to coparticipants has been applied in situations involving a wide variety of active sports, ranging from baseball to ice hockey and skating. Because the touch football game at issue in this case clearly falls within the rationale of this rule, we have no occasion to decide whether a comparable limited duty of care

MOSK, J., PANELLI, J., Concurring and Dissenting.

Because I agreed with the substance of the majority opinion in *Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]* (see *id. at p. 830*), I concur generally with Justice George's analysis as set forth in part II of the lead opinion. And like the lead opinion, I conclude that the liability of sports participants should be limited to those cases in which their misconduct falls outside the range of the ordinary activity involved the sport. As part I of the lead opinion explains, the kind of overexuberant conduct that is alleged here was not of that nature. I therefore agree that defendant was entitled to summary judgment, for the reasons set forth in part III of the lead opinion.

But I would go farther than does the lead opinion. Though the opinion's interpretation of *Li v. Yellow Cab Co.* (*supra, 13 Cal.3d 804*) is reasonable, I believe the time has come to eliminate implied assumption of risk entirely. The all-or- nothing aspect of assumption of risk is as anachronistic as the all-or- nothing aspect of contributory negligence. As commentators have pointed out, the elements of assumption of risk "are accounted for already in the negligence prima facie case and existing comparative fault defense." (Wildman & Barker, *Time to Abolish Implied Assumption of a Reasonable Risk in California* (1991) 25 U.S.F. L.Rev. 647, 679.) Plaintiffs' behavior can be analyzed under comparative fault principles; no separate defense is needed. (See) Wildman and Barker explain cogently that numerous California cases invoke both a duty analysis--which I prefer--and an unnecessary implied assumption of risk analysis in deciding a defendant's liability. (See *id.* at p. 657 & fn. 58.) In the case before us, too, the invocation of assumption of risk is superfluous: far better to limit the [*322] analysis to concluding that a participant owes no duty to avoid conduct of the type ordinarily involved in the sport.

Were we to eliminate the doctrine of assumption of risk, we would put an end to the doctrinal confusion that now surrounds apportionment of fault in such cases. Assumption of risk now stands for so many different legal concepts that its utility has diminished. A great deal of the confusion surrounding the concept "stems from the fact that the term 'assumption of risk' has several different meanings and is often applied without recognizing these different meanings." (*Rini v. Oaklawn Jockey Club (8th Cir. 1988) 861 F.2d 502, 504-505*.) Courts vainly attempt to analyze conduct in such esoteric terms as primary assumption of risk, secondary assumption of risk, reasonable implied assumption of risk, unreasonable implied assumption of risk, etc. Since courts have difficulty in assessing [**713]

facts under the rubric of such abstruse distinctions, it is unlikely that juries can comprehend such distinctions.

Justice Frankfurter explained in a slightly different context, "The phrase 'assumption of risk' is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." (*Tiller v. Atlantic Coast Line R. Co. (1943) 318 U.S. 54, 68 [87 L.Ed. 610, 618, 63 S.Ct. 444, 143 A.L.R. 967]* (conc. opn. of Frankfurter, J.).) Thus the *Rini* court, in attempting to determine the viability of assumption of risk in light of the Arkansas comparative fault law, was forced to identify "four types of assumption of risk ...." (*Rini v. Oaklawn Jockey Club, supra, 861 F.2d at p. 505*.) These included "implied secondary reasonable assumption of risk" and "implied secondary unreasonable assumption of risk." (*Id. at p. 506*.)

I would eliminate the confusion that continued reliance on implied assumption of risk appears to cause, and would simply apply comparative fault principles to determine liability.

Concurring and Dissenting.

I concur in the majority opinion solely with respect to the result reached. The majority correctly affirms the judgment of the Court of Appeal, which upheld the summary judgment entered by the trial court. I dissent, however, from the reasoning of the majority opinion. Instead, I reach a like result by adopting and applying the "consent-based" analysis set forth in the dissenting opinion by Justice Kennard. While I subscribe to the analysis of the dissenting opinion with respect to the doctrine of implied assumption of the risk, I am not in accord [*323] with how it would dispose of this case. I believe that defendant met

the burden of demonstrating that plaintiff assumed the risk of injury by her participation in the touch football game.

As the dissenting opinion explains: "To establish the defense [of implied assumption of the risk], a defendant must prove that the plaintiff voluntarily accepted a risk with knowledge and appreciation of that risk. (*Prescott v. Ralphs Grocery Co*. [(1954)] *42 Cal.2d 158, 161 [265 P.2d 904]*.)" (Dis. opn., *post*, p. 326.) As the dissenting opinion further explains: "A defendant need not prove, however, that the plaintiff 'had the prescience to foresee the exact accident and injury which in fact occurred.' (*Sperling v. Hatch (1970) 10 Cal.App.3d 54, 61 [88 Cal.Rptr. 704]*.)" (*Ibid*.)

There is no question that plaintiff voluntarily chose to play touch football. [1] The undisputed facts in this case also show that plaintiff knew of and accepted the risks associated with the game. Plaintiff was an avid football fan. She had participated in games of touch football in the past. She was aware of the fact that in touch football players try to deflect the ball from receiving players. Plaintiff admitted that the players in the game in question could expect to receive "bumps" and "bruises." These facts indicate that plaintiff knew and appreciated that physical injury resulting from *contact*, such as being knocked to the ground, was possible when playing touch football. Defendant was not required to prove more, such as that plaintiff knew or appreciated that a "serious injury" or her particular injury could result from the expected physical contact.

> 1 Plaintiff points to her request to the defendant during the game to temper his roughness to demonstrate that she did not assume the risk of being injured. She claims that defendant "seemed to acknowledge [her] statement" and "left [her] with the impression that he would play less rough." Plaintiff's reported request to defendant does not defeat summary judgment. She continued to play the game. As demonstrated below, she knew that physical

contact and resulting injury could occur during a touch football game.

To support the conclusion that summary judgment be reversed under the consent-based approach, the dissenting opinion stresses the broad range of activities that [**714] can be part of a "touch football game" and that few rules were delineated for the particular game in which plaintiff was injured. I find these facts to be irrelevant to the question at hand. The risk of physical contact and the possibility of resulting injury is inherent in the game of football, no matter who is playing the game or how it is played. While the players who participated in the game in question may have wanted a "mellow" and "noncompetitive" game, such expectations do not alter the fact that anyone who has observed or played any form of football understands that it is a contact sport and that physical injury can result from such physical contact.

[*324] The undisputed facts of this case amply support awarding defendant summary judgment based upon plaintiff's implied assumption of the risk. I, therefore, concur in affirming the judgment of the Court of Appeal.

Baxter, J., concurred.

KENNARD, J.

I disagree with the plurality opinion both in its decision to affirm summary judgment for defendant and in its analytic approach to the defense of assumption of risk.

We granted review in this case and its companion, *Ford v. Gouin* (*post*, p. 339 [*11 Cal.Rptr.2d 30, 834 P.2d 724]*), to resolve a lopsided conflict in the Courts of Appeal on whether our adoption 17 years ago of a system of comparative fault in *Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]* (hereafter *Li*) necessarily abolished the affirmative defense of implied assumption of risk. [1] When confronted with this issue, the overwhelming majority of appellate courts in this

state have held that, except to the extent it was subsumed within the former doctrine of contributory negligence this court abolished in *Li*, implied assumption of risk continues as a complete defense. I would so hold in this case, adhering to the traditional analysis of implied assumption of risk established by a long line of California cases, both before and after *Li*.

> 1 Of the several Court of Appeal decisions that considered this issue, only one concluded that our adoption in *Li* of a system of comparative fault necessarily abolished the traditional defense of assumption of risk.

Not content with deciding the straightforward issue before us--whether the defense of implied assumption of risk survived *Li*--the plurality opinion uses this case as a forum to advocate a radical transformation of tort law. The plurality proposes to recast the analysis of implied assumption of risk from a subjective evaluation of what a particular plaintiff knew and appreciated about the encountered risk into a determination of the presence or absence of duty legally imposed on the defendant. By thus transforming an affirmative defense into an element of the plaintiff's negligence action, the plurality would abolish the defense without acknowledging that it is doing so.

The plurality opinion also announces a rule that those who engage in active sports do not owe coparticipants the usual duty of care--as measured by the standard of a reasonable person in like or similar circumstances--to avoid inflicting physical injury. According to the plurality, a sports participant has no duty to avoid conduct inherent in a particular sport. Although I agree that in organized sports contests played under well-established rules participants have no duty to avoid the very conduct that constitutes the sport, [*325] I cannot accept the plurality's nearly boundless expansion of this general principle to eliminate altogether the "reasonable person" standard as the measure of duty actually owed between sports participants.

The ultimate question posed by this case is whether the trial court properly granted summary judgment for defendant. Deriving the facts from the evidence that the parties presented to the trial court on defendant's motion for summary judgment, and relying on well-established summary judgment principles, I conclude that defendant is not entitled to summary judgment. In reaching a contrary conclusion, the plurality mischaracterizes the nature of the athletic contest during which plaintiff incurred [**715] her injury. The evidence reveals that rather than an organized match with well-defined rules, it was an impromptu and informal game among casual acquaintances who entertained divergent views about how it would be played. This inconclusive record simply does not permit a pretrial determination that plaintiff knew and appreciated the risks she faced or that her injury resulted from a risk inherent in the game.

I

To explain my conclusion that implied assumption of risk survives as an affirmative defense under the system of comparative fault this court adopted in *Li* in 1975, I first summarize the main features of the defense as established by decisions published before *Li*.

In California, the affirmative defense of assumption of risk has traditionally been defined as the voluntary acceptance of a specific, known and appreciated risk that is or may have been caused or contributed to by the negligence of another. (*Prescott v. Ralphs Grocery Co. (1954) 42 Cal.2d 158, 162 [265 P.2d 904]*; see *Hayes v. Richfield Oil Corp. (1952) 38 Cal.2d 375, 384-385 [240 P.2d 580]*.) Assumption of risk may be proved either by the plaintiff's spoken or written words (express assumption of risk), or by inference from the plaintiff's conduct (implied assumption of risk). Whether the plaintiff knew and appreciated the specific risk, and voluntarily chose to

encounter it, has generally been a jury question. (See 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 1110, p. 523.)

The defense of assumption of risk, whether the risk is assumed expressly or by implication, is based on consent. (*Vierra v. Fifth Avenue Rental Service (1963) 60 Cal.2d 266, 271 [32 Cal.Rptr. 193, 383 P.2d 777]*; see Prosser & Keeton, Torts (5th ed. 1984) § 68, p. 484.) Thus, in both the express and implied forms, the defense is a specific application of the maxim that one "who consents to an act is not wronged by it." (*Civ. Code, § 3515*.) This [*326] consent, we have explained, "will negative liability" (*Prescott v. Ralphs Grocery Co., supra, 42 Cal.2d 158, 161*; see also *Gyerman v. United States Lines Co. (1972) 7 Cal.3d 488, 498, fn. 10 [102 Cal.Rptr. 795, 498 P.2d 1043]* ["In assumption of the risk the negligent party's liability is negated ...."]), and thus provides a complete defense to an action for negligence.

The elements of implied assumption of risk deserve some explanation. To establish the defense, a defendant must prove that the plaintiff voluntarily accepted a risk with knowledge and appreciation of that risk. (*Prescott v. Ralphs Grocery Co., supra, 42 Cal.2d 158, 161*.) The normal risks inherent in everyday life, such as the chance that one who uses a public highway will be injured by the negligence of another motorist, are not subject to the defense, however, because they are general rather than specific risks. (See *Hook v. Point Montara Fire Protection Dist. (1963) 213 Cal.App.2d 96, 101 [28 Cal.Rptr. 560]*.)

The defense of implied assumption of risk depends on the plaintiff's "actual knowledge of the specific danger involved." (*Vierra v. Fifth Avenue Rental Service, supra, 60 Cal.2d 266, 274*.) Thus, one who "knew of the general danger in riding in a bucket of the mine owner's aerial tramway, did not assume the risk, of which he *had no specific knowledge*, that the traction cable was improperly

spliced." (*Id. at p. 272*, italics added, referring to *Bee v. Tungstar Corp. (1944) 65 Cal.App.2d 729, 733 [151 P.2d 537]*; see also *Carr v. Pacific Tel. Co. (1972) 26 Cal.App.3d 537, 542-543 [103 Cal.Rptr. 120]*.) A defendant need not prove, however, that the plaintiff "had the clairvoyance to foresee the exact accident and injury which in fact occurred." (*Sperling v. Hatch (1970) 10 Cal.App.3d 54, 61 [88 Cal.Rptr. 704]*.) "Where the facts are such that the plaintiff must have had knowledge of the hazard, the situation is equivalent to actual knowledge and there may be an assumption of the risk ...." (*Prescott v. Ralphs Grocery Co., supra, 42 Cal.2d at 162*.) Indeed, certain well-known risks of harm may be within the general "common knowledge. " (*Tavernier v. Maes (1966) 242 Cal.App.2d 532, 546 [51 Cal.Rptr. 575]*.)

As set forth earlier, a person's assumption of risk must be voluntary. "The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him [or her] no reasonable alternative course of conduct in order to [P] (a) avert harm to himself [or herself] or another, or [P] (b) exercise or protect a right or privilege of which the defendant has no right to deprive him [or her]." (*Rest.2d Torts, § 496E, subd. (2)*; see also *Curran v. Green Hills Country Club (1972) 24 Cal.App.3d 501, 505-506 [101 Cal.Rptr. 158]*.) [*327]

This requirement of voluntariness precludes assertion of the defense of assumption of risk by a defendant who has negligently caused injury to another through conduct that violates certain safety statutes or ordinances such as those designed to protect a class of persons unable to provide for their own safety for reasons of inequality of bargaining power or lack of knowledge. (See *Finnegan v. Royal Realty Co. (1950) 35 Cal.2d 409, 430-431 [218 P.2d 17]* [violation of fire- safety ordinance]; *Fonseca v. County of Orange (1972) 28 Cal.App.3d 361, 366, 368 [104 Cal.Rptr. 566]* [violation of safety order requiring scaffolding and

railings at bridge construction site]; see also *Mason v. Case (1963) 220 Cal.App.2d 170, 177 [33 Cal.Rptr. 710]*.) Thus, a worker who, to avoid loss of livelihood, continues to work in the face of safety violations does not thereby assume the risk of injury as a result of those violations. (See, e.g., *Lab. Code, § 2801*; *Fonseca v. County of Orange, supra, 28 Cal.App.3d 361*.) In such cases, the implied agreement upon which the defense is based is contrary to public policy and therefore unenforceable.

Our 1975 decision in *Li, supra, 13 Cal.3d 804*, marked a fundamental change in California law governing tort liability based on negligence. Before *Li*, a person's own lack of due care for his or her safety, known as contributory negligence, completely barred that person from recovering damages for injuries inflicted by the negligent conduct of another. In *Li*, we held that a lack of care for one's own safety would no longer entirely bar recovery, and that juries thereafter should compare the fault or negligence of the plaintiff with that of the defendant to apportion loss between the two. (*Id. at pp. 828-829*.)

Before it was abolished by *Li, supra, 13 Cal.3d 804*, the defense of contributory negligence was sometimes confused with the defense of implied assumption of risk. Although this court had acknowledged that the two defenses may "arise from the same set of facts and frequently overlap" (*Vierra v. Fifth Avenue Rental Service, supra, 60 Cal.2d 266, 271)*, we had emphasized that they were nonetheless "essentially different" (*Ibid*.) because they were "based on different theories" (*Prescott v. Ralphs Grocery Co., supra, 42 Cal.2d 158, 161)*. Contributory negligence was premised on a lack of due care or, stated another way, a departure from the reasonable person standard, whereas implied assumption of risk has always depended on a voluntary acceptance of a risk with knowledge and appreciation of that risk. (*Id. at pp. 161-162*; *Gonzalez v. Garcia (1977) 75 Cal.App.3d 874, 878 [142 Cal.Rptr. 503]*.)

The standards for evaluating a plaintiff's conduct under the two defenses were entirely different. Under contributory negligence, the plaintiff's conduct was measured against the objective standard of a hypothetical reasonable person. (*Gonzalez v. Garcia, supra, 75 Cal.App.3d 874, 879.*) Implied [*328] assumption of risk, in contrast, has always depended upon the plaintiff's subjective mental state; the relevant inquiry is whether the plaintiff actually knew, appreciated, and voluntarily consented to assume a specific risk of injury. (*Grey v. Fibreboard Paper Products Co. (1966) 65 Cal.2d 240, 243-245 [53 Cal.Rptr. 545, 418 P.2d 153].*)

We said in *Li*, albeit in dictum, that our adoption of a system of comparative fault would to some extent necessarily impact [**717] the defense of implied assumption of risk. (*Li, supra, 13 Cal.3d 804, 826.*) We explained: "As for assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. 'To simplify greatly, it has been observed ... that in one kind of situation, to wit, where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he [or she] may encounter that risk in a prudent manner, is in reality a form of contributory negligence .... Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him [or her]. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care.' [Citations.] We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk

involved is no more than a variant of contributory negligence." (*Li, supra, 13 Cal.3d 804, 824-825*, original italics.)

Although our adoption in *Li* of a system of comparative fault eliminated contributory negligence as a separate defense, it did not alter the basic attributes of the implied assumption of risk defense or call into question its theoretical foundations, as we affirmed in several cases decided after *Li*. For example, in *Walters v. Sloan (1977) 20 Cal.3d 199 [142 Cal.Rptr. 152, 571 P.2d 609]*, we said that "one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby." (*At p. 204*; see also *Ewing v. Cloverleaf Bowl (1978) 20 Cal.3d 389, 406 [143 Cal.Rptr. 13, 572 P.2d 1155]* [acknowledging the continued viability of the assumption of risk defense after the adoption of comparative fault].) Thereafter, in *Lipson v. Superior Court (1982) 31 Cal.3d 362 [182 Cal.Rptr. 629, 644 P.2d 822]*, we reiterated that "the defense of assumption of risk arises when the plaintiff voluntarily undertakes to encounter a specific known risk imposed by defendant's conduct." (*At p. 375*, fn. 8.)

The Courts of Appeal directly addressed this issue in several cases, which were decided after *Li, supra, 13 Cal.3d 804*, and which considered whether, [*329] and to what extent, implied assumption of risk as a complete defense survived our adoption in *Li* of a system of comparative fault. The first of these cases was *Segoviano v. Housing Authority (1983) 143 Cal.App.3d 162 [191 Cal.Rptr. 578]* (hereafter *Segoviano*).

In *Segoviano*, the plaintiff was injured during a flag football game when an opposing player pushed him to the ground as the plaintiff was running along the sidelines trying to score a touchdown. Although the jury found that the opposing player was negligent, and that this negligence was a legal cause of the plaintiff's injury, it also found that the plaintiff's participation in the game was a negligent act

that contributed to the injury. Applying the instructions it had been given on comparative negligence, the jury apportioned fault for the injury between the two players and reduced the plaintiff's award in accord with that apportionment. (*143 Cal.App.3d at p. 166*.)

To determine whether the jury had acted properly in making a comparative fault apportionment, the *Segoviano* court began its analysis by distinguishing those cases in which the plaintiff's decision to encounter a known risk was "unreasonable" from those in which it was "reasonable." (*Segoviano, supra, 143 Cal.App.3d 162, 164*.) In so doing, *Segoviano* relied on this court's language in *Li*, which I have quoted on page 328, *ante*, that a plaintiff's conduct in "unreasonably" undertaking to encounter a specific known risk was "a form of contributory negligence" that would be merged "into the general scheme of assessment of liability in proportion to [**718] fault." (*Li, supra, 13 Cal.3d 804, 824-825*.)

The *Segoviano* court defined an "unreasonable" decision to encounter a known risk as one that "falls below the standard of care which a person of ordinary prudence would exercise to avoid injury to himself or herself under the circumstances." (*Segoviano, supra, 143 Cal.App.3d 162, 175*, citing *Rest.2d Torts, § 463*.) The *Segoviano* court cited a person's voluntary choice to ride with a drunk driver as an example of an "unreasonable" decision. (*Id. at p. 175*; see *Gonzalez v. Garcia, supra, 75 Cal.App.3d 874, 881*; *Paula v. Gagnon (1978) 81 Cal.App.3d 680, 685 [146 Cal.Rptr. 702]*.) Because an "unreasonable" decision to risk injury is neglect for one's own safety, the *Segoviano* court observed, a jury can appropriately compare the negligent plaintiff's fault with that of the negligent defendant and apportion responsibility for the injury, applying comparative fault principles to determine the extent of the defendant's liability. (*Segoviano, supra, at pp. 164, 170*.)

By contrast, the plaintiff's decision to play flag football was, in the *Segoviano* court's view, an example of a "reasonable" decision to encounter a known risk of injury. Although the risk of being injured during a flag [*330] football game could be avoided altogether by choosing not to play, this did not render the plaintiff's decision to play "unreasonable." (*Segoviano, supra, 143 Cal.App.3d 162, 175*.) Rather, the court said, a person who participates in a game of flag football is not negligent in doing so, because the choice does not fall below the standard of care that a person of ordinary prudence would exercise to avoid being injured. The *Segoviano* court concluded that such cases, in which there is no negligence of the plaintiff to compare with the negligence of the defendant, cannot be resolved by comparative fault apportionment of the plaintiff's damages. (*Id. at pp. 174-175*.)

The *Segoviano* court next considered whether the defense of implied assumption of risk, to the extent it had not merged into comparative fault, continued to provide a complete defense to an action for negligence following our decision in *Li* (*supra, 13 Cal.3d 804*). The court asked, in other words, whether a plaintiff's voluntary and nonnegligent decision to encounter a specific known risk was still a complete bar to recovery, or no bar at all.

In resolving this issue, the court found persuasive a commentator's suggestion that " 'it would be whimsical to treat one who has unreasonably assumed the risk more favorably ... than one who reasonably assumed the risk ....' " (*Segoviano, supra, 143 Cal.App.3d 162, 169*, quoting Fleming, *The Supreme Court of California 1974-1975, Forward: Comparative Negligence at Last--By Judicial Choice* (1976) 64 Cal.L.Rev. 239, 262.) To avoid this "whimsical" result, in which "unreasonable" plaintiffs were allowed partial recovery by way of a comparative fault apportionment while "reasonable" plaintiffs were entirely barred from recovery of damages, the *Segoviano* court concluded that our decision in *Li, supra, 13 Cal.3d 804*,

must mean that the defense of implied assumption of risk had been abolished in all those instances in which it had not merged into the system of comparative fault, and that only express assumption of risk survived as a complete defense to an action for negligence. (*Segoviano, supra, 143 Cal.App.3d 162, 169-170*.) The *Segoviano* court thus held that the defense of implied assumption of risk "plays no part in the comparative negligence system of California." (*Id. at p. 164*.) Various Court of Appeal decisions soon challenged this holding of *Segoviano*.

One decision characterized *Segoviano*'s analysis as "suspect." (*Rudnick v. Golden West Broadcasters (1984) 156 Cal.App.3d 793, 800, fn. 4 [202 Cal.Rptr. 900]*.) Another case disregarded it entirely in reaching a contrary result (*Nelson v. Hall (1985) 165 Cal.App.3d 709, 714 [211 Cal.Rptr. 668]* [**719] ["Where assumption of the risk is not merely a form of contributory negligence," it remains "a complete defense."]; accord, *Neinstein v. Los Angeles Dodgers, Inc. (1986) 185 Cal.App.3d 176, 183 [229 Cal.Rptr. 612]*; *Willenberg v. Superior Court (1986) 185 Cal.App.3d 185, 186-187 [229 Cal.Rptr.* [*331] *625]*). And in *Ordway v. Superior Court (1988) 198 Cal.App.3d 98, 104 [243 Cal.Rptr. 536]* (hereafter *Ordway*), the court rejected *Segoviano* outright, holding instead that "reasonable" implied assumption of risk continued as a complete defense under the newly adopted system of comparative fault.

The Court of Appeal that decided *Ordway, supra*, interpreted *Li*'s reference to a form of assumption of risk under which " 'plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him [or her]' " (*Li, supra, 13 Cal.3d at p. 824*) as describing a doctrine that the *Ordway* court termed "reasonable" implied assumption of risk. This doctrine, the *Ordway* court concluded, was unaffected by *Li*'s adoption of a system of comparative negligence and remained a complete defense

after *Li*. (*Ordway, supra, 198 Cal.App.3d 98, 103-104*.) According to *Ordway*, a plaintiff who voluntarily and reasonably assumes a risk, "whether for recreational enjoyment, economic reward, or some similar purpose," is deemed thereby to have agreed to reduce the defendant's duty of care and "cannot prevail." (*Id. at p. 104*.)

After concluding that the defense of implied assumption of risk remained viable after this court's decision in *Li, supra, 13 Cal.3d 804*, the *Ordway* court discussed the preclusive impact of the defense on the facts of the case before it. *Ordway* involved a negligence action brought by a professional jockey who had been injured in a horse race when another jockey, violating a rule of the California Horse Racing Board, crossed into the plaintiff's lane. The court first noted that professional jockeys must be aware that injury-causing accidents are both possible and common in horse racing, as in other sports activities. (*Ordway, supra, 198 Cal.App.3d 98, 111*.) The court observed that although the degree of risk to be anticipated would vary with the particular sport involved, a plaintiff may not recover from a coparticipant for a sports injury if the coparticipant's injury-causing actions fell within the ordinary expectations of those engaged in the sport. (*Id. at pp. 111-112*.) On this basis, the *Ordway* court held that the plaintiff jockey's action was barred.

Other decisions by the Courts of Appeal that have addressed implied assumption of risk have followed *Ordway, supra, 198 Cal.App.3d 98*. (*Nunez v. R'Bibo (1989) 211 Cal.App.3d 559, 562- 563 [260 Cal.Rptr. 1]*; *Von Beltz v. Stuntman, Inc. (1989) 207 Cal.App.3d 1467, 1477-1478 [255 Cal.Rptr. 755]*; *King v. Magnolia Homeowners Assn. (1988) 205 Cal.App.3d 1312, 1316 [253 Cal.Rptr. 140]*.) In my view, *Ordway* was correct in its conclusions that the defense of implied assumption of risk survived this court's adoption in *Li* (*supra, 13 Cal.3d 804*) of a system of comparative fault, and that the defense remains a complete bar to recovery in negligence cases in

which the plaintiff has knowingly and voluntarily consented to encounter a specific risk. [*332]

Ordway was also correct in its observation that the terms "unreasonable" and "reasonable" are confusing when used to distinguish the form of implied assumption of risk that has merged into the system of comparative fault from the form that has not so merged. As *Ordway* suggested, the reasonable/unreasonable labels would be more easily understood by substituting the terms "knowing and intelligent," for "reasonable," and "negligent or careless" for "unreasonable." (*Ordway, supra, 198 Cal.App.3d 98, 105*.)

The defense of implied assumption of risk is never based on the "reasonableness" of the plaintiff's conduct, as such, but rather on a recognition that a person generally should be required to accept responsibility for the normal consequences of a freely chosen course of conduct. (See Simons, [**720] *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference* (1987) *67 B.U. L.Rev. 213, 258* ["consent is neither reasonable nor unreasonable[;] [i]t simply expresses what plaintiff wants or prefers"].) In implied assumption of risk situations, the plaintiff's conduct often defies legal characterization as either reasonable or unreasonable. Even when this is not so, and a court or jury could appropriately determine whether the plaintiff's conduct was reasonable, the distinction to be drawn is not so much between reasonable and unreasonable conduct. Rather, the essential distinction is between conduct that is deliberate and conduct that is merely careless. Referring to "reasonable" implied assumption of risk lends unwarranted credence to the charge that the law is "whimsical" in treating unreasonable behavior more favorably than behavior that is reasonable. There is nothing arbitrary or whimsical in requiring plaintiffs to accept responsibility for the consequences of their considered and deliberate choices, while at the same time apportioning

liability between a plaintiff and a defendant who have both exhibited carelessness.

In those cases that have merged into comparative fault, partial recovery is permitted, not because the plaintiff has acted unreasonably, but because the unreasonableness of the plaintiff's apparent choice provides compelling evidence that the plaintiff was merely careless and could not have truly appreciated and voluntarily consented to the risk, or because enforcement of the implied agreement on which the defense is based would be contrary to sound public policy. In these cases, implied assumption of risk is simply not available as a defense, although comparative negligence may be.

In those cases in which a plaintiff's decision to encounter a specific known risk was not the result of carelessness (that is, when the plaintiff's conduct is not merely a form of contributory negligence), nothing in this court's adoption in *Li* (*supra, 13 Cal.3d 804*) of a system of comparative fault suggests that implied assumption of risk must or should be eliminated [*333] as a complete defense to an action for negligence. I would hold, therefore, that the defense continues to exist in such situations unaffected by this court's adoption in *Li* of a comparative fault system.

II

The plurality opinion approaches the viability of implied assumption of risk after *Li, supra, 13 Cal.3d 804*, in a fashion altogether different from the traditional consent analysis I have described. It begins by conceding that *Li* effected only a partial merger of the assumption of risk defense into the system of comparative fault. It then concludes, with no foundational support in California law, that the actual effect of this partial merger was to bifurcate implied assumption of risk into two subcategories that the plurality calls "primary" and "secondary" assumption of risk.

The plurality's "secondary assumption of risk" category includes those situations in which assumption of risk is merely a variant of contributory negligence. In those situations, under the plurality approach, implied assumption of risk merges into comparative fault; a trial court presented with a "secondary" case would therefore instruct the jury only on the principles of damage apportionment based on comparative fault, but not on implied assumption of risk as a separate and complete defense. Thus, implied assumption of risk does not survive as a separate and complete defense in these "secondary" cases.

Under the plurality's approach, implied assumption of risk fares no better in the "primary assumption of risk" cases. That category includes only those cases in which the defendant owes no duty to the plaintiff. Without duty, of course, there is no basis for a negligence action and thus no need for an affirmative defense to negligence. Consequently, implied assumption of risk ceases to operate as an affirmative defense in these "primary" cases.

The plurality purports to interpret *Li, supra, 13 Cal.3d 804*, but instead works a sleight-of-hand switch on the assumption of risk defense. [**721] In those situations in which implied assumption of risk does not merge into comparative fault, the plurality recasts what has always been a question of the plaintiff's implied consent into a question of the defendant's duty. This fundamental alteration of well-established tort principles was not preordained by *Li* nor was it a logical evolution of California law either before or after this court's decision in *Li*. Seizing on *Li*'s statement that a plaintiff who assumes the risk thereby *reduces* a defendant's duty of care, the plurality concludes that defendants had no duty of care in the first place. The plurality presents its analysis as merely an integration of the defense of implied [*334] assumption of risk into the system of comparative fault, but this "integration" is in truth a complete abolition of a defense

that California courts have adhered to for more than 50 years. I see no need or justification for this drastic revision of California law.

III

On a motion for summary judgment, a defendant can establish implied assumption of risk as a complete defense to negligence by submitting uncontroverted evidence that the plaintiff sustained the injury while engaged in voluntarily chosen activity under circumstances showing that the plaintiff knew or must have known that the specific risks of the chosen activity included the injury suffered. (See *Code Civ. Proc., § 437c, subds. (a), (c), (f)*; *Garcia v. Rockwell Internat. Corp. (1986) 187 Cal.App.3d 1556, 1560 [142 Cal.Rptr. 503]*; *Fireman's Fund Ins. Co. v. City of Turlock (1985) 170 Cal.App.3d 988, 994 [216 Cal.Rptr. 796]*.) In this case, the trial court entered summary judgment for defendant, ruling that the evidence supporting the motion established assumption of risk under the traditional consent analysis.

The undisputed, material facts are as follows: Plaintiff, defendant, and six or eight other guests gathered at the home of a mutual friend to watch a television broadcast of the 1987 Super Bowl football game. During the game's half time, the group went to an adjacent dirt lot for an informal game of touch football. The participants divided into two teams, each including men as well as women. They used a child's soft, "peewee-size" football for the game. The players expected the game to be "mellow" and "noncompetitive," without any "forceful pushing, hard hitting or hard shoving."

Plaintiff and defendant were on opposing teams. Plaintiff was an avid fan of televised professional football, but she had played touch football only rarely and never with this particular group. When defendant ran into her early in the game, plaintiff objected, stating that he was playing too roughly and if he continued, she would not

play. Plaintiff stated in her declaration that defendant "seemed to acknowledge [her] statement" and "left [her] with the impression that he would play less rough." On the very next play, defendant knocked plaintiff down and inflicted the injury for which she seeks recovery.

We have held that summary judgment "is a drastic measure" that should "be used with caution." (*Molko v. Holy Spirit Assn. (1988) 46 Cal.3d 1092, 1107 [252 Cal.Rptr. 122, 762 P.2d 46]*.) On appeal from a summary judgment, well-settled rules dictate that the moving party's evidence supporting the motion be strictly construed and that doubts about granting the motion be [*335] resolved in favor of the party that opposed the motion. (*Ibid*.) Applying those rules here, I conclude that defendant has not established implied assumption of risk as a complete defense to plaintiff's action for negligence.

Notably missing from the undisputed facts is any evidence that plaintiff either knew or must have known that by participating in this particular game she would be engaging in a sport that would subject players to being knocked to the ground. She had played touch football only rarely, never with these players, and just before her injury had expressly told defendant that her participation in the touch football game was conditioned on him not being so rough. Moreover, the game was not even a regular game of touch football. When deposed, defendant conceded that this [**722] touch football game was highly unusual because the teams consisted of both men and women and the players used a child's peewee ball. He agreed that the game was not "regulation football," but was more of a "mock" football game.

"Touch football" is less the name of a game than it is a generic description that encompasses a broad spectrum of activity. At one end of the spectrum is the "traditional" aggressive sandlot game, in which the risk of being

knocked down and injured should be immediately apparent to even the most casual observer. At the other end is the game that a parent gently plays with young children, really little more than a game of catch. Here, defendant may prevail on his summary judgment motion only if the undisputed facts show that plaintiff knew this to be the type of game that involved a risk of being knocked to the ground. As explained above, such knowledge by the plaintiff was not established. Accordingly, the trial court erred in granting summary judgment for defendant on the ground that plaintiff had assumed the risk of injury.

IV

To uphold the grant of summary judgment for defendant, the plurality relies on a form of analysis virtually without precedent in this state. As an offshoot of its advocacy of the primary/secondary approach to implied assumption of risk, the plurality endorses a categorical rule under which coparticipants in active sports have no duty to avoid conduct "inherent" in the sport, and thus no liability for injuries resulting from such conduct. Applying the rule to the facts shown here, the plurality concludes that plaintiff's injury resulted from a risk "inherent" in the sport she played and that defendant owed her no duty to avoid the conduct that caused this injury.

Generally, a person is under a legal duty to use ordinary care, measured by the conduct of a hypothetical reasonable person in like or similar circumstances, to avoid injury to others. (*Civ. Code, § 1714, subd. (a)*.) Judicially [*336] fashioned exceptions to this general duty rule must be clearly supported by public policy. (*Burgess v. Superior Court (1992) 2 Cal.4th 1064, 1079 [9 Cal.Rptr.2d 615, 831 P.2d 1197]*.) The plurality's no-duty-for-sports rule is such a judicially fashioned exception to the general duty rule. Under the plurality's rule, a sports participant's conduct is not evaluated by the "reasonable person" standard. Rather, the player is exempted from negligence liability for all

injuries resulting from conduct that is "inherent" in the sport.

The plurality's no-duty-for-sports rule derives from cases in a few jurisdictions concluding that a participant's liability for injuries to a coparticipant during competitive sports must be based on reckless or intentional conduct. (See *Gauvin v. Clark (1989) 404 Mass. 450 [537 N.E.2d 94]*; *Kabella v. Bouschelle (1983) 100 N.M. 461 [672 P.2d 290]*; *Ross v. Clouser (Mo. 1982) 637 S.W.2d 11*; *Nabozny v. Barnhill (1975) 31 Ill.App.3d 212 [334 N.E.2d 258, 77 A.L.R.3d 1294]*.) Although these courts have chosen to explain the rule in terms of the absence of duty, the consent analysis of implied assumption of risk would provide an equally satisfactory explanation. (See *Ordway, supra, 198 Cal.App.3d 98, 110-112*.) The reason no duty exists in these competitive sports situations is that, as the Massachusetts Supreme Court has explained in *Gauvin*, each participant has a right to infer that the others have agreed to undergo a type of physical contact that would otherwise constitute assault and battery. [2] (*Gauvin v. Clark, supra, 537 N.E.2d at p. 96*.) Without some reference to mutual consent or implied agreement among coparticipants, the no-duty-for-sports rule would be difficult to explain and justify. Thus, the rationale of the rule, even in no-duty garb, is harmonious with the traditional logic of implied assumption of risk.

> 2 In adopting a rule of no duty for organized competitive sports, the Massachusetts court candidly acknowledged that legislative abolition of the assumption of risk defense had forced it to shift the focus of analysis from the plaintiff's knowing confrontation of risk to the scope of the defendant's duty of care. (*Gauvin v. Clark, supra, 537 N.E.2d at p. 97, fn. 5*.)

[**723] Although there is nothing inherently wrong with the plurality's no-duty rule as applied to organized,

competitive, contact sports with well- established modes of play, it should not be extended to other, more casual sports activities, such as the informal "mock" football game shown by the evidence in this case. Outside the context of organized and well-defined sports, the policy basis for the duty limitation--that the law should permit and encourage vigorous athletic competition (*Gauvin v. Clark, supra, 537 N.E.2d at p. 96*)--is considerably weakened or entirely absent. Thus, the no-duty-for-sports rule logically applies only to organized sports contests played under well-settled, official rules (*Gauvin v. Clark, supra, 537 N.E.2d 94* [college varsity hockey game]; *Ross v. Clouser, supra, 637 S.W.2d 11* [church league softball game]; *Nabozny v. Barnhill, supra, 334 N.E.2d 258* [organized, [*337] amateur soccer game]), or on unequivocal evidence that the sport as played involved the kind of physical contact that generally could be expected to result in injury (*Kabella v. Bouschelle, supra,* 670 P.2d 290).

The plurality may believe that its no-duty rule for sports participants will facilitate early resolution of personal injury actions by demurrer or motions for summary judgment and thus provide relief to overburdened trial courts by eliminating the need for jury trials in many of these cases. But the plurality fails to explain just how trial courts will be able to discern, at an early stage in the proceedings, which risks are inherent in a given sport.

Under the plurality's no-duty-for-sports rule, a sports participant is exempted from negligence liability for all injuries resulting from conduct that is within "the range of ordinary activity involved in the sport." (Plur. opn., *ante*, at p. 320.) Under this approach, as the plurality acknowledges, "the nature of a defendant's duty in the sports context depends heavily on the nature of the sport itself." (*Id., ante, at p. 317.*)

The issue framed by the plurality's no-duty approach can be decided on demurrer only if the plaintiff has alleged

in the complaint that the injury resulted from a risk inherent in an injury-causing sport, something careful pleaders are unlikely to do. And because summary judgment depends on uncontroverted material facts, early adjudication of the duty issue by summary judgment is equally doubtful. In cases involving all but the most well-known professional sports, plaintiffs will usually be able to counter defense evidence seeking to establish what risks are inherent in the sport. Cases that cannot be resolved by demurrer or summary judgment will, under the plurality's approach, proceed to trial solely under comparative fault, leaving the jury no opportunity to decide whether the plaintiff made a knowing and voluntary decision to assume the risk.

The plurality's resolution of this case amply illustrates the difficulty of attempting to decide the question of duty by motion for summary judgment. To sustain summary judgment under the plurality's approach, the defendant must have conclusively negated the element of duty necessary to the plaintiff's negligence case. (*Molko v. Holy Spirit Assn., supra, 46 Cal.3d 1092, 1107*.) Therefore, under the plurality approach, defendant here is entitled to summary judgment only if he negated the element of duty by presenting undisputed evidence showing that his injury-causing conduct was within the range of activity ordinarily involved in the sport he was then playing.

But what is "the range of the ordinary activity" involved in touch football? As I have previously explained, the generic term "touch football" encompasses such a broad range of activity that it is difficult to conceive of an [*338] "ordinary" game. Even if such a game could be identified, defendant offered no evidence in support of his motion for summary judgment to show that players are knocked to the ground in the "ordinary" game. In the absence of uncontroverted evidence on this material fact, defendant was not entitled to summary judgment.

[**724] As mentioned earlier, defendant admitted at his deposition that this was not a "regulation football" game, and that it was more of a "mock" game because it was played by both men and women using a child's peewee ball. Given the spontaneous and irregular form of the game, it is not surprising that the participants demonstrated uncertainty about the bounds of appropriate conduct. One participant, asked at deposition whether defendant had done anything "out of the normal," touched the nub of the problem by replying with this query: "Who's [*sic*; whose] normal? My normal?"

Defendant did not present uncontroverted evidence that his own rough level of play was "inherent" in or normal to the particular game being played. In the view of one of the players, defendant was playing "considerably rougher than was necessary." Other players described defendant as a fast runner and thought he might have been playing too hard. Absent uncontroverted evidence that defendant's aggressive style of play was appropriate, there is no basis for the plurality's conclusion that his injury-causing conduct in knocking plaintiff to the ground was within the range of ordinary and acceptable behavior for the ill-defined sports activity in which plaintiff was injured.

Defendant did not meet his burden to establish by undisputed evidence a legal entitlement to summary judgment. The record fails to support summary judgment under either the traditional consent approach to the defense of assumption of risk or the plurality's no-duty approach. Thus, the trial court erred in granting defendant's motion for summary judgment, and the Court of Appeal erred in affirming that judgment. I would reverse.

Kenneth F. WHITE and Carol S. White, husband and wife, Plaintiffs-Appellants, v. The UNIVERSITY OF IDAHO and Richard Neher, Defendants-Respondents No. 17292 Court of Appeals of Idaho 115 Idaho 564; 768 P.2d 827 February 3, 1989

[*564] [**827] PER CURIAM Carol and Kenneth White brought this action on a tort claim against the University of Idaho and Professor Richard Neher, alleging that the professor had caused injuries to Carol White. The district court granted the University's motion for summary judgment holding that, under the Idaho Tort Claims Act, a governmental entity [*565] [**828] has no liability "for any claim which . . . [a]rises out of . . . battery" committed by an employee. *I.C. § 6-904(3).* [1] The Whites' appeal presents a single issue of law: whether Professor Neher's intentional and unpermitted touching of Mrs. White constituted a battery. We agree with the district court that it did and we affirm.

1 An employee may also enjoy immunity under this section if acting within the course and scope of his employment. The district court's summary judgment order -- certified as final for purposes of appeal, *I.R.C.P. 54(b)* -- expressly did not decide whether Professor Neher was acting within the scope of his employment.

Summary judgment is an appropriate way to resolve this case. There are no genuine issues of material fact; the case simply calls for the application of law to undisputed facts. *I.R.C.P. 56(c).* In such cases we exercise free review.

Professor Neher and Mrs. White had long been acquainted because of their mutual interest in music, specifically, the piano. Professor Neher was a social guest at the Whites' home when the incident here occurred. One morning Mrs. White was seated at a counter writing a resume for inclusion in the University's music department newsletter. Unanticipated by Mrs. White, Professor Neher walked up behind her and touched her back with both of his hands in a movement later described as one a pianist would make in striking and lifting the fingers from a keyboard. The resulting contact generated unexpectedly harmful injuries, according to the Whites. For purposes of summary

judgment, we deem these allegations to be true. Mrs. White suffered thoracic outlet syndrome on the right side of her body, requiring the removal of the first rib on the right side. She also experienced scarring of the brachial plexus nerve which necessitated the severing of the scalenus anterior muscles.

Both Professor Neher and Mrs. White gave deposition testimony which is summarized as follows. Professor Neher stated he intentionally touched Mrs. White's back, but his purpose was to demonstrate the sensation of this particular movement by a pianist, not to cause any harm. Professor Neher explained that he has occasionally used this contact method in teaching his piano students. Mrs. White said Professor Neher's act took her by surprise and was non-consensual. Mrs. White further remarked that she would not have consented to such contact and that she found it offensive. The Whites argue that because Professor Neher did not intend to cause harm, injury or offensive contact, his act constitutes negligence rather than the intentional tort of battery. We disagree.

The tort of battery requires intentional bodily contact which is either harmful or offensive. *Doe v. Durtschi, 110 Idaho 466, 716 P.2d 1238 (1986)* (citing *RESTATEMENT (SECOND) OF TORTS § 13* (1965)). The intent element of the tort of battery does not require a desire or purpose to bring about a specific result or injury; it is satisfied if the actor's affirmative act causes an intended contact which is unpermitted and which is harmful or offensive. *See Rajspic v. National Mutual Ins. Co., 110 Idaho 729, 718 P.2d 1167 (1986)*; *RESTATEMENT (SECOND) OF TORTS §§ 8A, 16, 18* and *20* (1965). Indeed, the contact and its result may be physically harmless. Thus, a person may commit a battery when intending only a joke, or a compliment -- where an unappreciated kiss is bestowed without consent, or a misguided effort is made to render assistance. PROSSER & KEATON, THE LAW OF TORTS §§ 8, 9 (5th ed. 1984).

It is undisputed that Professor Neher intended to touch Mrs. White, though he did not intend to cause harm or injury. His lack of any specific intent to harm or injure Mrs. White is immaterial. Professor Neher's affirmative act caused an intended contact which was unpermitted, offensive and, apparently, harmful. Such voluntary contact constitutes the tort of battery. Accordingly, the district court's grant of summary judgment is affirmed. Costs to the University of Idaho. No attorney fees on appeal.
Ruth Garratt, Appellant, v. Brian Dailey, a Minor, by George S. Dailey, his Guardian ad Litem, Respondent No. 32841 Supreme Court of Washington, Department Two 46 Wn.2d 197; 279 P.2d 1091 February 14, 1955

[*198] [**1092] HILL The liability of an infant for an alleged battery is presented to this court for the first time. Brian [*199] Dailey (age five years, nine months) was visiting with Naomi Garratt, an adult and a sister of the plaintiff, Ruth Garratt, likewise an adult, in the backyard of the plaintiff's home, on July 16, 1951. It is plaintiff's contention that she came out into the backyard to talk with Naomi and that, as she started to sit down in a wood and canvas lawn chair, Brian deliberately pulled it out from under her. The only one of the three persons present so testifying was Naomi Garratt. (Ruth Garratt, the plaintiff, did not testify as to how or why she fell.) The trial court, unwilling to accept this testimony, adopted instead Brian Dailey's version of what happened, and made the following findings:

"III. . . . that while Naomi Garratt and Brian Dailey were in the back yard the plaintiff, Ruth Garratt, came out of her house into the back yard. Some time subsequent thereto defendant, Brian Dailey, picked up a lightly built wood and canvas lawn chair which was then and there located in the back yard of the above described premises, moved it sideways a few feet and seated himself therein, at which time he discovered the plaintiff, Ruth Garratt, about

to sit down at the place where the lawn chair had formerly been, at which time he hurriedly got up from the chair and attempted to move it toward Ruth Garratt to aid her in sitting down in the chair; that due to the defendant's small size and lack of dexterity he was unable to get the lawn chair under the plaintiff in time to prevent her from falling to the ground. That plaintiff fell to the ground and sustained a fracture of her hip, and other injuries and damages as hereinafter set forth.

"IV. That the preponderance of the evidence in this case establishes that when the defendant, Brian Dailey, moved the chair in question *he did not have any wilful or unlawful purpose* in doing so; that *he did not have any intent to injure the plaintiff, or any intent to bring about any unauthorized or offensive contact with her person* or any objects appurtenant thereto; that the circumstances which immediately preceded the fall of the plaintiff established that the defendant, *Brian Dailey, did not have purpose, intent or design to perform a prank or to effect an assault and battery upon the person of the plaintiff*." (Italics ours, for a purpose hereinafter indicated.)

It is conceded that Ruth Garratt's fall resulted in a fractured hip and other painful and serious injuries. To obviate [*200] the necessity of a retrial in the event this court determines that she was entitled to a judgment against Brian Dailey, the amount of [**1093] her damage was found to be eleven thousand dollars. Plaintiff appeals from a judgment dismissing the action and asks for the entry of a judgment in that amount or a new trial.

[1] The authorities generally, but with certain notable exceptions (see Bohlen, "Liability in Tort of Infants and Insane Persons," 23 Mich. L. Rev. 9), state that, when a minor has committed a tort with force, he is liable to be proceeded against as any other person would be. *Paul v. Hummel* (1868), 43 Mo. 119, 97 Am. Dec. 381; *Huchting v. Engel* (1863), 17 Wis. 237, 84 Am. Dec. 741; *Briese v.*

Maechtle (1911), 146 Wis. 89, 130 N. W. 893; 1 Cooley on Torts (4th ed.) 194, § 66; Prosser on Torts 1085, § 108; 2 Kent's Commentaries 241; 27 Am. Jur. 812, Infants, § 90.

In our analysis of the applicable law, we start with the basic premise that Brian, whether five or fifty-five, must have committed some wrongful act before he could be liable for appellant's injuries.

The trial court's finding that Brian was a visitor in the Garratt backyard is supported by the evidence and negatives appellant's assertion that Brian was a trespasser and had no right to touch, move, or sit in any chair in that yard, and that contention will not receive further consideration.

[2] It is urged that Brian's action in moving the chair constituted a battery. A definition (not all-inclusive but sufficient for our purpose) of a battery is the intentional infliction of a harmful bodily contact upon another. The rule that determines liability for battery is given in 1 Restatement, Torts, 29, § 13, as:

"An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if

"(a) the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to the other or a third person, and

"(b) the contact is not consented to by the other or the [*201] other's consent thereto is procured by fraud or duress, and

"(c) the contact is not otherwise privileged."

We have in this case no question of consent or privilege. We therefore proceed to an immediate consideration of intent and its place in the law of battery. In the comment on clause (a), the Restatement says:

"*Character of actor's intention*. In order that an act may be done with the intention of bringing about a harmful or offensive contact or an apprehension thereof to a particular person, either the other or a third person, the act must be done for the purpose of causing the contact or apprehension or with knowledge on the part of the actor that such contact or apprehension is substantially certain to be produced."

See, also, Prosser on Torts 41, § 8.

We have here the conceded volitional act of Brian, *i.e.*, the moving of a chair. Had the plaintiff proved to the satisfaction of the trial court that Brian moved the chair while she was in the act of sitting down, Brian's action would patently have been for the purpose or with the intent of causing the plaintiff's bodily contact with the ground, and she would be entitled to a judgment against him for the resulting damages. *Vosburg v. Putney* (1891), 80 Wis. 523, 50 N. W. 403; *Briese v. Maechtle*, *supra*.

The plaintiff based her case on that theory, and the trial court held that she failed in her proof and accepted Brian's version of the facts rather than that given by the eyewitness who testified for the plaintiff. After the trial court determined that the plaintiff had not established her theory of a battery (*i.e.*, that Brian had pulled the chair out from under the plaintiff while she was in the act of sitting down), it then became concerned with whether a battery was established under the facts as it found them to be.

In this connection, we quote another portion of the comment on the "Character of actor's intention," relating to clause (a) of the rule from the Restatement heretofore set forth:

"It is not enough that the act itself is intentionally done and this, even [**1094] though the actor realizes or should realize [*202] that it contains a very grave risk of bringing about the contact or apprehension. Such realization may make the actor's conduct negligent or even reckless but

unless he realizes that to a substantial certainty, the contact or apprehension will result, the actor has not that intention which is necessary to make him liable under the rule stated in this Section."

[3] A battery would be established if, in addition to plaintiff's fall, it was proved that, when Brian moved the chair, he knew with substantial certainty that the plaintiff would attempt to sit down where the chair had been. If Brian had any of the intents which the trial court found, in the italicized portions of the findings of fact quoted above, that he did not have, he would of course have had the knowledge to which we have referred. The mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve him from liability if in fact he had such knowledge. *Mercer v. Corbin (1889), 117 Ind. 450, 20 N. E. 132, 3 L. R. A. 221*. Without such knowledge, there would be nothing wrongful about Brian's act in moving the chair, and, there being no wrongful act, there would be no liability.

[4] While a finding that Brian had no such knowledge can be inferred from the findings made, we believe that before the plaintiff's action in such a case should be dismissed there should be no question but that the trial court had passed upon that issue; hence, the case should be remanded for clarification of the findings to specifically cover the question of Brian's knowledge, because intent could be inferred therefrom. If the court finds that he had such knowledge, the necessary intent will be established and the plaintiff will be entitled to recover, even though there was no purpose to injure or embarrass the plaintiff. *Vosburg v. Putney, supra*. If Brian did not have such knowledge, there was no wrongful act by him, and the basic premise of liability on the theory of a battery was not established.

[5] It will be noted that the law of battery as we have [*203] discussed it is the law applicable to adults, and no significance has been attached to the fact that Brian was a child less than six years of age when the alleged battery occurred. The only circumstance where Brian's age is of any consequence is in determining what he knew, and there his experience, capacity, and understanding are of course material.

From what has been said, it is clear that we find no merit in plaintiff's contention that we can direct the entry of a judgment for eleven thousand dollars in her favor on the record now before us.

Nor do we find any error in the record that warrants a new trial.

What we have said concerning intent in relation to batteries caused by the physical contact of a plaintiff with the ground or floor as the result of the removal of a chair by a defendant, furnishes the basis for the answer to the contention of the plaintiff that the trial court changed its theory of the applicable law after the trial, and that she was prejudiced thereby.

It is clear to us that there was no change in theory so far as the plaintiff's case was concerned. The trial court consistently from beginning to end recognized that, if the plaintiff proved what she alleged and her eyewitness testified, namely, that Brian pulled the chair out from under the plaintiff while she was in the act of sitting down and she fell to the ground in consequence thereof, a battery was established. Had she proved that state of facts, then the trial court's comments about inability to find any intent (from the connotation of motivation) to injure or embarrass the plaintiff, and the italicized portions of his findings as above set forth, could have indicated a change of theory. But what must be recognized is that the trial court was trying in those comments and in the italicized findings to express the law applicable, not to the facts as the plaintiff contended they

were, but to the facts as the trial court found them to be. The remand for clarification gives the plaintiff an opportunity to secure a judgment even though the trial court did not accept her version of the facts, if from all [**1095] the evidence the trial court can find that Brian knew with substantial [*204] certainty that the plaintiff intended to sit down where the chair had been before he moved it, and still without reference to motivation.

[6] The plaintiff-appellant urges as another ground for a new trial that she was refused the right to cross-examine Brian. Some twenty pages of cross-examination indicate that there was no refusal of the right of cross-examination. The only occasion that impressed us as being a restriction on the right of cross-examination occurred when plaintiff was attempting to develop the fact that Brian had had chairs pulled out from under him at kindergarten and had complained about it. Plaintiff's counsel sought to do this by asking questions concerning statements made at Brian's home and in a court reporter's office. When objections were sustained, counsel for plaintiff stated that he was asking about the conversations to refresh the recollection of the child, and made an offer of proof. The fact that plaintiff was seeking to develop came into the record by the very simple method of asking Brian what had happened at kindergarten. Consequently, what plaintiff offered to prove by the cross-examination is in the record, and the restriction imposed by the trial court was not prejudicial.

[7] It is argued that some courts predicate an infant's liability for tort upon the basis of the existence of an estate in the infant; hence it was error for the trial court to refuse to admit as an exhibit a policy of liability insurance as evidence that there was a source from which a judgment might be satisfied. In our opinion, the liability of an infant for his tort does not depend upon the size of his estate or even upon the existence of one. That is a matter of concern

only to the plaintiff who seeks to enforce a judgment against the infant.

[8] The motion for a new trial was also based on newly discovered evidence. The case having been tried to the court, the trial judge was certainly in a position to know whether that evidence would change the result on a new trial. It was not of a character that would make the denial of the motion an abuse of discretion.

[*205] [9] The plaintiff complains, and with some justice, that she was not permitted to take a pretrial deposition of the defendant, Brian Dailey. While Rule of Pleading, Practice, and Procedure 30 (b), 34A Wn. (2d) 91, gives the trial court the right "for good cause shown" to prevent the taking of a deposition, it seems to us that though it might well have been taken under the supervision of the court to protect the child from leading, misleading, and confusing questions, the deposition should have been allowed, if the child was to be permitted to testify at the trial. If, however, the refusal to allow the taking of the deposition was an abuse of discretion, and that we are not prepared to hold, it has not been established that the refusal constituted prejudicial error. (Parenthetically we would add that the right to a review of the rulings on pretrial procedure or with respect to depositions or discovery or incidental procedural motions preceding the trial seems to be limited to an appeal from a final judgment (2 Barron and Holtzoff, Federal Practice and Procedure (rules ed.), § 803; 3 *Id.* § 1552) and realistically such a review is illusory for the reasons given by Prof. David W. Louisell. See 36 Minn. L. Rev. 654.)

The cause is remanded for clarification, with instructions to make definite findings on the issue of whether Brian Dailey knew with substantial certainty that the plaintiff would attempt to sit down where the chair which he moved had been, and to change the judgment if the findings warrant it.

Costs on this appeal will abide the ultimate decision of the superior court. If a judgment is entered for the plaintiff, Ruth Garratt, appellant here, she shall be entitled to her costs on this appeal. If, however, the judgment of dismissal remains unchanged, the respondent will be entitled to recover his costs on this appeal.

Remanded for clarification.

 ¿Por qué el tribunal acepta la versión de los hechos de Knight, en esta decisión? ¿En la postura procesal del caso, acaba de presentar Jewett *una motion for summary judgment*? ¿Entendiendo por Jewett que no pretendía entrar en contacto con el dedo de Knight, hubiese el tribunal llegado a la misma conclusión?

 William R. Laidlaw, Respondent, v. Russell Sage, Appellant Court of Appeals of New York 158 N.Y. 73; 52 N.E. 679 December 1, 1898, Argued January 10, 1899, Decided

[*77] [**680] MARTIN This action was commenced May 26, 1892. Its purpose was to recover for personal injuries sustained by [*78] the plaintiff in consequence of an explosion which occurred in the defendant's office in the city of New York on the fourth day of December, 1891. There is no allegation in the complaint, nor was there any proof upon the trial, which even tended to show that the defendant was in any way responsible for the explosion which was the cause of the plaintiff's injury.

The evidence disclosed that a stranger, whose name was subsequently found to be Norcross, called at the defendant's office December 4, 1891, at about ten minutes past twelve o'clock, said he desired to see the defendant in relation to some railroad bonds and had a letter of introduction from Mr. Rockefeller. When asked to send it to the defendant, he stated that he preferred to present it in person and that he only wanted to say two or three words.

Upon receiving this message, the defendant stepped from his private office into the ante room, went to the window and looked into the lobby, where he saw Norcross sitting upon a settee. At that time the defendant met the plaintiff, who said he had a message from Mr. Bloodgood, and the defendant thereupon turned the knob of the door and the plaintiff passed into the ante room of the office. The former then spoke to Norcross, who instantly arose, took his carpet bag in his left hand, and, approaching him, handed him a letter which was supposed to be from Mr. Rockefeller, which he took, opened and read. It was a typewritten communication, the substance of which was: "The bag I hold in my hand contains ten pounds of dynamite. If I drop this bag on the floor, the dynamite will explode and destroy this building in ruins, and kill every human being in the building. I demand $ 1,200,000, or I will drop the bag. Will you give it? Yes or no?"

The defendant read the letter twice, folded it, handed it back to Norcross, and then commenced parleying with him, stating that he had an engagement with two gentlemen, that he was short of time, and if it was going to take much time he wanted him to come later in the day. Norcross, after a second, said: [**681] "Then, do I understand you to refuse my offer?" [*79] to which the defendant replied, "Oh, no, I don't refuse your offer. I have an appointment with two gentlemen. I think I can get through with them in about two minutes, and then I will see you." Norcross held the bag at the end of his fingers, walked backwards towards the door through which he came, and when he reached the threshold he stopped and looked at the defendant. The defendant stepped back a little towards the desk that was in the ante room, while Norcross was going the other way. As he reached the threshold he looked at the defendant and said: "I rather infer from your answers that you refuse my offer," to which the defendant answered: "Is there anything in my appearance that would cause you to think that I would not do as I say I would?" and repeated that he had an

appointment with two gentlemen, and that he could get through in about two minutes and would then see him. Norcross then gave one look, stepped to one side, when the flash came and it was all over in two seconds. In backing down the room, the defendant came to the desk, and was partially sitting upon the edge of it when the explosion occurred.

After the explosion it was found that everything in the office was wrecked. The partitions, floors, joists, plaster, desks, tables, chairs and other furniture were destroyed, the window sashes and window frames were blown out, even in the private office; Norcross was blown to pieces, and Norton, one of the clerks in the defendant's office, was hurled through the window to the street below, where he met his death. A steel safe which was locked and stood in an adjoining room was blown open, its contents scattered upon the floor with other debris, and every person who was in the room was either killed or seriously injured. Indeed, the explosion was so violent, so general and so destructive in its effect that it seems little less than miraculous that any person who was present should have escaped with his life. This portion of the transaction is undisputed in any essential or material particular.

The plaintiff claims that upon entering the office he passed the defendant and Norcross, who were conversing in the lobby near the door of the ante room; that he entered the ante room, [*80] which was about eight by sixteen feet, went to a table or desk near the center of the room, where he stood waiting for the defendant with his back to the door, looking towards Mr. Norton who stood by the ticker at the window looking out on Rector street; that while he stood there he once or twice glanced over his shoulder, saw that the defendant was inside the ante-room door, and that Norcross was just outside; that he heard nothing said, said nothing himself, and saw no paper in the defendant's hand; that he turned and looked towards the window with his

back to the defendant, when the latter suddenly came in range of his vision on his left side, came over and placed his hand on his shoulder; that afterwards he dropped his left hand and took the plaintiff's right hand in his and gently moved him over towards the direction in which he stood which was from the plaintiff's right to his left, and that he gently moved him about the width of his body, about fifteen inches, or probably more. He then testified: "I changed my position towards Mr. Sage about fifteen inches. I changed my position in his general direction, but in front of us. I still kept my position as far as Rector street was concerned and the door of the entry. I had my back to the door all the time. I was in a line between Mr. Sage and Mr. Norcross. * * * Mr. Sage rested one thigh on the corner of this table, and then said over my shoulder to this stranger: 'If I trust you why can you not trust me?' or, 'If you cannot trust me I cannot trust you,' or words in that general line and to that effect, and then the explosion immediately followed."

Upon cross-examination he testified: "I saw him (Mr. Sage) come within the range of my vision to my left. I can safely say that without looking at me he put his hand on my left shoulder, put his left hand on my left arm, and took my left hand in his left hand. It was not quite at that moment that he sat down on the corner of the desk. He did not let go of my left hand with his left hand after taking my left hand. He did not take my left hand in both hands at that moment; he did a moment later, and then he sat down on the [*81] corner of the desk with my left hand in both his hands. My hand was not held specially tight; it was covered by both his hands. At that time my position was changed from where I stood when he put his left hand on my shoulder. I was conscious at the time of force being used upon me sufficient to move me; I was conscious of force being used upon me to a certain extent. In a sense it was imperceptible, and in a sense it was not. I spoke of it as being a very gentle movement. I don't think I said it was so gentle as to be

imperceptible. I didn't say that. I said it was gentle. It was not violent. I don't think I said it was imperceptible. The whole change of my position was about the width of my body. Should think eighteen inches towards my left."

He also gave evidence to the effect that he had previously testified that the defendant did not use any force upon him, and he never thought of such a thing as that until after the explosion; that he did not think he was conscious that the defendant was pulling him at the time, and he could not say that he was exactly conscious of any force of Mr. Sage's hands in moving him; that he was moved easily and without resistance; that he moved voluntarily because he offered no resistance; that he did not think he was conscious of being pulled at the time, and that that testimony was true.

As to this part of the transaction the defendant testified that when he reached the [**682] corner of the table the plaintiff was about four feet from him towards the partition, and that they were in that position when the explosion occurred. He denied that he ever had his hands upon the person of the plaintiff in any manner whatever until after the explosion; testified that at the time the plaintiff was not between him and Norcross for an instant, and that he did not at any time intend or design interposing the body of the plaintiff between himself and Norcross; that he did not put himself behind the plaintiff, and that no portion of his body was behind the plaintiff; that he did not touch him at all, and made no such statement to Norcross as was testified to by the plaintiff; that, after the explosion, they were found thrown together, and [*82] that he lifted the plaintiff, which was the first time he had his hand upon him. The evidence of the defendant was corroborated in most of its essential particulars by the testimony of Frank Robertson, who was in the office at the time. There was also other proof which tended to corroborate him, and which was in conflict with the theory and testimony of the plaintiff.

This case has been tried four times, and passed upon three times by the intermediate appellate tribunal. The history of this litigation has shown an evolution in the law held to be applicable to it which is somewhat unusual. Upon the first trial, the complaint was dismissed by the trial court upon the ground that the plaintiff had failed to establish any proper connection between the act of the defendant and the independent act of Norcross which caused the injury. In other words, it held that, under the principles of law applicable to the subject, the acts of the defendant were not shown to be the proximate cause of the plaintiff's injury. That judgment was reversed by the General Term of the Supreme Court, which in effect held that no question of proximate cause was involved; that if the defendant put his hand upon or touched the plaintiff, and caused him to change his position with an intent to shield himself, he was guilty of a wrongful act towards him; that if the plaintiff was injured by the happening of the catastrophe, the burden of proof was upon the defendant to establish the fact that his wrongful act did not in the slightest degree contribute to any part of the injury which the plaintiff sustained by reason of the explosion, and that it was not necessary for the plaintiff to show that he would not have been so severely injured if he had been left standing in his original position.

Upon the second trial the plaintiff had a verdict. The court seems to have charged the jury in accordance with the principles laid down by the General Term upon the first appeal. Upon that trial, however, the defendant's counsel requested the court to charge: "If the jury find from the evidence that the defendant did take the plaintiff and use him [*83] as a shield, but that this action was involuntary, or such as would instinctively result from a sudden and irresistible impulse in the presence of a terrible danger, he is not liable to the plaintiff for the consequences of it." That request the court refused, but added: "I will charge it; that the essence of the liability must be a voluntary act." Upon

the second appeal that question having been thus sharply presented, the General Term again reversed the judgment, upon the ground that the court erred in refusing to charge that request.

Upon the third trial the jury disagreed.

Upon the last trial, which is now under review, the trial court disregarded the former decisions of the General Term, and charged that the measure of the plaintiff's damages was the difference between those he actually sustained, and such as he would have received if he had not been interfered with, and that the burden of proving such damages was upon the plaintiff. It also charged that, if the defendant involuntarily put his hands upon the plaintiff in a moment of great excitement, confronted with immediate and serious danger, without meaning to interfere with him, he would not be responsible. But it submitted the question whether the act of the defendant was deliberate and intentional to the jury, calling its attention to the fact that the defendant testified that "he was in perfect possession of his senses, recollected everything that was done, that everthing he did there was done intentionally," and then charged that if, under those circumstances, he voluntarily put out his hand and touched the plaintiff, a cause of action was made out, and the plaintiff was entitled to a verdict. In this portion of its charge the court assumed, and stated to the jury, that the defendant testified that everything he did was done intentionally, as proof of his having intentionally interfered with the person of the plaintiff. The propriety of this portion of the charge will be subsequently considered.

On the trial George Baillard was called as a witness, and testified to having seen some one in O'Connell's drugstore whom he believed to be the defendant; that some one stepped [*84] up to him and asked if he was injured very much; that he answered that he was not; that he understood him to say something about being protected, or

a protection that he had had from the explosion. This evidence was objected to, the objection was overruled and the defendant excepted. At the conclusion of the plaintiff's case, and again when the entire evidence was closed, the defendant moved that this testimony be stricken out. He also asked that the jury be instructed to disregard it. These motions were denied, and the defendant excepted.

When the plaintiff's evidence was closed the defendant moved for a nonsuit. Again, at the close of all the testimony, he moved for a nonsuit; that the plaintiff's complaint be dismissed, and that a verdict be directed in his favor upon sufficient grounds so that the exceptions of the defendant to the denial of those motions fully raise all the questions [**683] which are involved or have been discussed upon this appeal. At the conclusion of the charge the defendant excepted to portions of it, requested the court to charge certain propositions which were refused and by exceptions to those rulings again raised the questions involved. Therefore, in the consideration of the legal questions presented, it must be assumed that they were properly raised, not only by a motion to nonsuit and to dismiss the complaint, but also by motions to direct a verdict for the defendant and by exceptions to the charge and the refusal of the court to charge as requested.

Upon an appeal from the judgment entered upon the verdict rendered at the last trial, the Appellate Division obviously intended to follow the previous decisions of the General Term so far as they related to the plaintiff's right of recovery, to the end that the question of the liability of the defendant, under the facts and circumstances proved, might be properly presented to this court, and did not assume the responsibility of passing upon the correctness of the previous decisions in that respect. It, however, discussed many of the questions raised by the defendant's counsel, and among other things attempted to show that there was sufficient evidence to justify [*85] a jury in finding that there were two ascertained lines of direction which the

explosion followed, and that one of them was in the direction where the plaintiff claims that he and the defendant stood. But when we refer to the evidence bearing upon that question and which is said to justify that conclusion, we are unable to discover its existence in the record. Indeed, in the discussion following, which involved the improbability of the plaintiff's theory that the defendant drew him in front of himself as a shield, when examined in the light of the injuries to the defendant and their location upon his person, the learned judge delivering the opinion advanced as an argument that it was not impossible that "in the titanic whirlwind of the explosion" those injuries might have occurred. He said that there was nothing more extraordinary in that incident than in the circumstance that the force of the explosion blew open a large steel safe and scattered its contents about the room, adding, "No one can account for the eccentricities of such an occurrence. If there were known and provable unvarying incidents of such phenomenal events, some ascertained physical law acting uniformly and equally on all such occasions, we might be able to say what was or what was not impossible within the operation of such law, but we have no such guides or criteria." We think the last suggestions made by the learned judge are entitled to much more weight, and are much more probable than the theory which precedes them, and with which the latter are utterly inconsistent. Indeed, the whole discussion seems to be based upon the idea that the defendant was bound to establish the impossibility of the theory upon which the plaintiff relied, and in its argument that court did not seem to consider that any burden rested upon the plaintiff to prove his theory with any certainty, notwithstanding the lack of substantial proof to show its correctness or existence. That opinion can hardly be read without reaching the conclusion that the learned judge was wrestling with inconsistencies impossible to harmonize, and yet that the purpose of the court was to place the case in a position where the questions of law relating to the right

of the plaintiff [*86] to a recovery in this action should be presented to, and determined by, the Court of Appeals.

There are certain questions of law involved, which were discussed upon the argument, that we are called upon to decide. We have deemed it necessary to state the facts and history of this protracted litigation somewhat fully, to the end that the legal questions may be plainly presented and clearly understood in their connection with them.

The first question of law presented relates to our jurisdiction to hear and determine this appeal. The respondent contends that, inasmuch as the record does not show affirmatively that the justices of the Appellate Division were divided upon the question as to whether there was evidence supporting, or tending to sustain, the verdict, that question, at least, cannot be considered by this court, and relies upon section 1337 of the Code of Civil Procedure as sustaining his position.

In examining the question of the appealability of this case and the questions which may be determined upon this appeal, it becomes necessary to consider the provisions of the Constitution and statutes, as well as the decisions of this court relating to the subject. Section nine of article six of the Constitution declares: "No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals." After the adoption of that provision the legislature amended section 190 of the Code of Civil Procedure so as to provide: "From and after the last day of December, eighteen hundred and ninety-five, the jurisdiction of the court of appeals shall, in civil actions and proceedings, be confined to the review upon appeal of the actual determinations made by the appellate division of the supreme court in either of the following cases and no others: 1. Appeals may be taken as of right to said court, from judgments or orders finally determining actions or

special proceedings, and from orders granting new trials on exceptions, where the appellants stipulate that upon affirmance, judgment absolute shall be rendered against [*87] them." The second subdivision of that section provides for the certification by the Appellate Division of questions of law for determination by [**684] the Court of Appeals. Then follows section 191, which contains certain limitations, exceptions and conditions to the provisions of section 190, and in that section is found a provision in which the same language is employed as in the provision of the Constitution above cited. It also provides that no appeal shall be taken from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, when the decision of the Appellate Division is unanimous, unless that court shall certify that in its opinion a question of law is involved which ought to be reviewed by the Court of Appeals, or unless in case of its refusal to so certify, an appeal is allowed by a judge of the Court of Appeals. It likewise provides that the jurisdiction of the court is limited to the review of questions of law.

Here, then, we find that both the Constitution and the statutes provide that no unanimous decision of the Appellate Division, that there is evidence supporting or tending to sustain a finding or verdict not directed, shall be reviewed by this court. But the provisions of section 190 are general and declare that appeals may be taken as of right to this court from judgments or orders finally determining actions or special proceedings. This confers upon a party the absolute right to appeal in those cases, unless it falls within some of the limitations contained in the subsequent section. The question here presented is how or in what manner the fact that the case falls within some limitation, if it does, is to be made to appear. Inasmuch as section 190 in general terms confers the right of appeal, the question is if it is limited by some other provision of the statute, upon whom is the burden of showing that fact. It

would seem that inasmuch as the appellant in this case was given the right of appeal in express terms, he might rely upon that general provision, and if it fell within any of the limitations of the statute and the respondent claimed that the appeal was not well taken, the burden of showing that fact rested upon him. In *Kaplan v. N.* [*88] *Y. Biscuit Co. (151 N. Y. 171*) this court held that the burden of showing that a judgment of affirmance in an action for a personal injury was by a unanimous decision of the Appellate Division, rested upon the party asserting it, and that in order to deprive the Court of Appeals of the power to review the case under section 191 of the Code of Civil Procedure, the fact should be established by the party claiming it, either by the judgment or by a certificate of the court appearing in the record. It is true that question arose under the amendment of section 191, made in 1896, and not under subdivision four. Nor were the provisions of section 1337 passed upon in determining that case. Still, we think the principle of that decision is applicable here; that we should hold now, as we held there, that the judgment is reviewable in this court, unless the affirmance was by the unanimous decision of the Appellate Division, and that the burden of showing that fact rests upon the party asserting it, and should appear in the record. We think that section 1337 does not in any way interfere with the principle of the decision in that case, but that the provision that where the justices of the Appellate Division from which the appeal is taken are divided as to whether there is evidence supporting or tending to sustain a finding or verdict not directed by the court, a question for review is presented, is but another way of stating what is contained in subdivision four of section 191 of the Code, and in no way relieves the party who asserts it from the burden of establishing the unanimity of the decision. Hence, we are of the opinion that the contention of the respondent in this respect cannot be sustained, and that the question whether there is evidence supporting or tending to sustain the verdict may be reviewed upon this appeal. We think we should so hold,

especially when we consider the fact that the Appellate Division refused to certify that its decision was unanimous, and has so plainly indicated a desire and purpose to have the questions involved decided by this court. Manifestly the amendment to section 191, passed in 1896, limiting appeals in cases of personal injury, has no application, because the judgment appealed from was rendered [*89] March 12, 1896, before the passage of that act. (*Croveno v. Atlantic Ave. R. R. Co., 150 N. Y. 225*.)

As bearing upon the contention of the respondent as to the appealability of this case, it may be properly added that here every point or question upon which the appellant relies was raised by an exception to the denial of a proper motion to direct a verdict for the defendant, by an exception to the charge of the court, to its refusal to charge as requested, or by some other ruling upon the trial to which a proper exception was taken. Therefore, in its farther examination all the questions of law which are presented by the appellant must be regarded as properly before us for consideration.

The primary question which lies at the foundation of the respondent's right of recovery is whether there was sufficient evidence to justify the court in refusing to direct a verdict for the defendant, or in submitting to the jury the question of the defendant's liability. This general question seems to depend for its solution upon several subordinate ones. These questions are, *first*, was there sufficient evidence that the defendant performed any act or was guilty of any omission which rendered him even technically liable to the plaintiff; *second*, if so, was the proof sufficient to justify the court in submitting to the jury the question of substantial damages; and, *third*, were the alleged [**685] acts of the defendant the proximate cause of the plaintiff's injury? A consideration of these questions in the order in which they are stated seems necessary to a proper determination of the original one.

First. That at the time of the occurrence which was the subject of this action, the defendant suddenly and unexpectedly found himself confronted by a terrible and impending danger which would naturally, if not necessarily, terrify and appall the most intrepid, is shown by the undisputed evidence. If with this awful peril before him, he maintained any great degree of self-control, it indicated a strength of nerve and personal bravery quite rare indeed.

That the duties and responsibilities of a person confronted with such a danger are different and unlike those which follow [*90] his actions in performing the ordinary duties of life under other conditions, is a well established principle of law. The rule applicable to such a condition is stated in Moak's Underhill on Torts (p. 14), as follows: "The law presumes that an act or omission done or neglected under the influence of pressing danger, was done or neglected involuntarily." It is there said that this rule seems to be founded upon the maxim that self-preservation is the first law of nature, and that where it is a question whether one of two men shall suffer, each is justified in doing the best he can for himself. This principle of pressing danger and an act or omission in its presence was discussed in the squib case (*Scott* v. *Shepherd*, 2 W. Black. 894) and in the wine case (*Vandenburgh v. Truax, 4 Denio, 464*). That principle has been many times affirmed by the decisions of the courts of this state as well as others. Indeed, the trial court recognized this doctrine in its charge, but submitted to the jury the question whether the act of the defendant was involuntary and induced by impending danger, adding that the testimony of the defendant that everything he did he did intentionally was sufficient to justify it in finding that he voluntarily moved the plaintiff in the manner claimed by him. But when we examine the defendant's evidence, we find he testified that he never had his hands on the person of the plaintiff in any manner whatever until after the explosion, and that he did not at

any time have any intent or design of interposing the body of the plaintiff between himself and the stranger. The testimony of the defendant, to which the court referred in its charge, seems to have been substantially that he was as cool and collected as any man could well be *with the intimation* made by Norcross; that he exercised his best judgment *under the circumstances;* that he did nothing unconsciously, spontaneously or without deliberation, but did the best he could and exercised the best judgment he could to avoid any accident; that he did nothing by impulse, and that what he did he did as deliberately *as he could under the circumstances*. This evidence seems to fall short of justifying the statement of the [*91] court that he testified he was in perfect possession of his senses, recollected everything that was done, and that everything he did there was intentional, as it very materially differed from and essentially modified the statement contained in the charge. The statement of the court as to the admission of the defendant can hardly be said to be a fair deduction from his evidence. Nor is the justice of eliminating from its statement to the jury the fact that the admissions he did make were accompanied by evidence that he in no way touched the plaintiff and had no intention of doing so, quite appreciated. If the court desired to use the admission of the defendant as evidence of such a fact, the evidence should have been correctly stated and the attention of the jury called to the entire admission and not to a part alone. Here, as where there is an introduction of any other conversation or admission by a party, the remainder which tends to qualify or explain the portion relied upon should be considered as a part of it, especially where it is a qualification of the other, and rebuts or destroys the inference to be drawn or the use to be made of the portion put in evidence or relied upon. While it is, doubtless, true that a portion of the testimony of a witness may be credited by a jury and a portion discredited, still, when a part of the evidence is modified or qualified by another portion, it is

far from clear that one portion may be rejected and the other given credit. But, be that as it may, it is extremely difficult, upon a consideration of all the evidence in the record relating to this subject, to see how a jury was justified in finding that the defendant voluntarily interfered with the person of the plaintiff.

The only witness whose testimony is relied upon to show any interference with the plaintiff by the defendant was the plaintiff himself. He not only had all the interest of a party to the action, but the undisputed proof disclosed that his memory had been very seriously impaired, and to such an extent that he was unable to remember from day to day or hour to hour what he was told to do, and that this condition of his mind continued from the time of the accident until [*92] the last trial of this case. Upon the other hand, the defendant clearly and positively denied that he interfered with his person at all, and he is corroborated by at least one unbiased witness upon that subject, and in many of the details of the transaction by the witnesses Osborne, James and Hummel, whose evidence was in direct conflict with that given by the plaintiff. Moreover, when the testimony of the plaintiff is read, it is quite manifest that it does not clearly disclose any movement of his body, if any occurred, that was not his own voluntary act, uncontrolled by any force upon the part of the defendant. There were also certain physical facts established by the proof and uncontradicted, which tend to show that the plaintiff's [**686] theory that he was in front of the defendant was impossible. If, as is claimed by the plaintiff, the defendant employed his body as a shield, and it was between him and the place of the explosion, it is quite difficult to comprehend how the missiles, which were found in the defendant's body in front and near the median line, could have reached him, especially if, as is the plaintiff's theory, the explosion followed two straight lines. Nor can we quite understand how, if, when the explosion occurred, the plaintiff's left hand was in both of the

defendant's, resting upon the defendant's left thigh, the defendant's hands could have been so seriously injured and wounded by flying substances, as the proof shows they were. With this condition of the proof, it is quite difficult to say that there was any such evidence of the defendant's intentional interference with the plaintiff as would entitle him to recover in this action or have the question submitted to a jury. The evidence which appears to be in conflict with the position of the defendant, to say the most, is nothing more than a mere scintilla and was met not only by the positive testimony of disinterested witnesses, but also by well-known and recognized physical facts about which there is no conflict. Therefore, it would seem that the plaintiff was not entitled to even nominal damages, and that it was the duty of the court to have directed a verdict for the defendant.

[*93] *Second*. Was there sufficient evidence to justify the court in submitting to the jury the question of substantial damages? If, for the purpose of this discussion, it be admitted that the plaintiff was moved as testified to by him, and that the act of the defendant was voluntary and intentional, yet we are unable to find any sufficient evidence in the record to justify the court in submitting to the jury the question whether the plaintiff's injuries arose in consequence of the act of the defendant in moving him. The court in effect charged the jury that if the defendant interfered with the body of the plaintiff and his injuries were inflicted because of a change in his position, then it might allow the plaintiff for the injuries which he sustained in consequence of the wounds which it found were caused by his change of position, and the jury was permitted to pass upon the question whether he sustained more or different injuries than he would if he had not been moved. The contention of the respondent is that the evidence disclosed that there were two straight and well-defined lines of explosion, and that it tended to show that the

plaintiff was drawn into one of them. But we find no proof either that the lines of explosion claimed did not include the place where the plaintiff originally stood, or that a wave of explosion did not pass over that portion of the room which was as forceful and destructive as that passing in any other direction.

The evidence relied upon by the plaintiff to show that there were these two defined lines was the location of the wounds upon the body of the plaintiff and the testimony of the witness Reeves. When we examine the evidence bearing upon the character and location of the plaintiff's wounds, it falls far short of establishing any well-defined line of explosion. Nor do we think any such inference can be drawn from the situation as described by the plaintiff and other witnesses. And when we examine the evidence of the witness Reeves, we find in it nothing to sustain the contention of the plaintiff. He testified that there were thirty-five to forty joists or beams, which ran north and south, that were injured, and that the breakage ran through the joists in a northeasterly direction. [*94] He was then asked whether there were fractures in any other direction in the beams or joists from that hole, to which he answered that he had put in new beams on the Rector street side of the partition leading into Mr. Sage's office; that he put in about twenty-eight or thirty new ones, and that the balance were not so badly fractured, so that they were reinforced without taking the old beams out. We find nothing in this evidence to indicate that there was any distinct line of explosion in any other direction than northeasterly. That the splitting of the joists, if it occurred, would naturally extend lengthwise of them there can be little doubt. But the plaintiff's claim that there is anything in this evidence which shows a second distinct line of explosion within which he was drawn, even if he was moved as he testified, surely cannot be sustained. Consequently, there was nothing but the merest conjecture upon which the jury could base any finding that he was more severely injured

by being moved. That he was bound to establish some wrongful act upon the part of the defendant, and that that act was the cause of the injury for which he sought to recover, there can be no doubt. Nor is there any doubt that the burden of proof upon both of those questions rested upon him. The courts below have so held, but, notwithstanding their view of the law, they have submitted those questions to the jury.

In *Baulec v. N. Y. & H. R. R. Co. (59 N. Y. 356, 366)* Judge Allen said: " It is not enough to authorize the submission of a question, as one of fact, to a jury, that there is some evidence. A scintilla of evidence, or a mere surmise, * * * would not justify the judge in leaving the case to the jury," and in that case it was held that as "at most the jury could only conjecture that the defendant might have been wanting in the care and caution proper to be exercised in such a case, * * * the case was properly withheld from the jury."

In *Pollock v. Pollock (71 N. Y. 137, 153)* Folger, J., said: "Insufficient evidence is, in the eye of the law, no evidence," and then cited the language of Maule, J., in *Jewell* [*95] v. *Parr* (13 C. B. 916), where he said: "When we say that there is no evidence to go to a jury, we do not mean literally none; but that there is none that ought reasonably to satisfy a jury, that [**687] the fact sought to be proved is established."

Again, in *Bond v. Smith (113 N. Y. 378, 385)* Earl, J., stated the duties of the court in considering such a question as follows: "We have no right to guess that he was free from fault; it was incumbent upon the plaintiff to show it by a preponderance of evidence. She furnished the jury with nothing from which they could infer the freedom of the intestate from fault. She simply furnished them food for speculation, and that will not do for the basis of a verdict. The law demands proof, and not mere surmises. The

authorities are ample to show in such a case the plaintiff should have been nonsuited," citing *Cordell v. N. Y. C. & H. R. R. R. Co. (75 N. Y. 330*); *Dubois v. City of Kingston (102 N. Y. 219*).

In *Pauley v. S. G. & L. Co. (131 N. Y. 90, 98)*, which was an action for negligence by which it was claimed that the plaintiff's intestate lost his life, Judge Finch, in delivering the opinion of the court, said: "But the respondent and the General Term insist that some other theory may be adopted, and in order to do so, enter upon the realm of conjecture, and ask that a jury, in the utter absence of proof, may be allowed to guess that there was some negligence on the part of the defendant which might have tended to cause the death of the intestate. * * * What is claimed is that there is proof that some of the operatives fled to this escape, but could not use it on account of the blinds, and we are asked to permit a jury to guess or conjecture that Pauley was one of these, without any proof of the fact, and in the face of the evidence that no one who did use it or approach it saw him at all," and then adds: "We think the duty imposed by the statute was fairly and fully performed, and even if it was not, that we are not to resort to conjecture and permit a verdict to be based on bare possibilities alone. * * * A mere conjecture built upon a bare possibility will not suffice to transfer the money or property of one man to the possession and profit of another. [*96] As we said in *Bond v. Smith (113 N. Y. 378*) food for speculation will not serve as the basis of a verdict."

Again, in discussing this question in *Linkhauf v. Lombard (137 N. Y. 417, 425)* Judge Gray, writing for this court, declared: "To permit a jury to speculate and surmise upon a question of responsibility, is to withdraw from the litigant a safeguard intended for the protection of his rights. He is entitled to the judgment of the court upon questions, to which the character of the evidence admits of but one answer. No such possibilities of a failure of justice should be countenanced," and then quotes from the opinion of

Justice Clifford in *Improvement Company v. Munson (14 Wall. 442*) the following: "Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. Formerly it was held that if there was what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury; but recent decisions of high authority have established a more reasonable rule; that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof rests," and adds: "The rule should be regarded as settled, under all the authorities, as well by the decisions of the courts of this state as by those of England, that, where there is no evidence upon an issue before the jury, or the weight of the evidence is so decidedly preponderating in favor of one side, that a verdict contrary to it would be set aside, it is the duty of the trial judge to nonsuit, or to direct the verdict, as the case may require."

In the case of *Hemmens v. Nelson (138 N. Y. 517*) this court again asserted the doctrine so clearly stated in the *Linkhauf* case.

In discussing that question in *Hudson v. R., W & O. R. R.* [*97] *Co. (145 N. Y. 408, 412)*, Haight, J., said: "But where the evidence, which appears to be in conflict, is nothing more than a mere scintilla, or where it is met by well-known and recognized scientific facts, about which there is no conflict, this court will still exercise jurisdiction to review and reverse if justice requires," citing *People ex rel. Coyle v. Martin (142 N. Y. 352*); *Hemmens* v. *Nelson* and *Linkhauf* v. *Lombard* (*supra*). (See, also, *Cadwell v. Arnheim, 152 N. Y. 182*; *Hannigan v. L. & H. R. R. Co.*,

157 N. Y. 244.) Thus we see that this court has, in a long line of decisions, uniformly held that, to justify the submission to the jury of any issue, there must be sufficient proof to sustain the claim of the party upon whom the onus rests, and that mere conjecture, surmise, speculation, bare possibility or a mere scintilla of evidence, is not enough. When the principle of these cases is applied, it becomes obvious that the court was not justified in submitting to the jury the question whether the plaintiff suffered any substantial damages by reason of his having been moved in the manner claimed, even though it should find that the defendant moved him. No one can read the evidence in the record as to the nature, power and effect of the explosion, and the results that followed, without reaching the conclusion that it utterly failed to show that the plaintiff was more seriously injured than he would have been if he had remained where he claims to have first stood. Indeed, we can find no proof sufficient to justify the conclusion that there was any place of safety, or comparative safety, in any of the rooms occupied by the defendant. The explosion swept with terrific force over them [**688] all, destroying or seriously injuring every person or thing with which it came in contact. Under such circumstances, to permit a jury to guess or conjecture that the plaintiff's injuries were more serious or severe than they would have been if his position had not been changed, is, in the language of Judge Gray, "to withdraw from the litigant a safeguard intended for the protection of his rights." We think the court erred in not directing a verdict for the defendant, at least so far as substantial damages were concerned, upon the ground that there [*98] was no sufficient proof that the plaintiff sustained any injury in consequence of the alleged conduct of the defendant.

Third. We are next brought to the consideration of the question whether the alleged acts of the defendant were the proximate cause of the plaintiff's injury. As has already been suggested, there is no allegation or proof which tends

to show that the defendant was in any way responsible for the explosion, or that there was any connection whatever between the defendant's acts and the explosion which followed. Indeed, the counsel for the respondent frankly states in his brief: "It has never been claimed, either in the pleadings or in the argument, that Mr. Sage's liability can be predicated on the fact that any act of his caused or invited a catastrophe, or that he used defiant or injudicious language." Nor does the respondent claim that the defendant was in any way responsible, directly or indirectly, for the explosion itself. Therefore, if the explosion was the proximate cause of the plaintiff's injury, the defendant cannot be held responsible. While the learned General Term stated that there was no question of proximate cause in this case, we are unable to indorse that statement or to understand the basis for it. The doctrine of proximate cause is a fundamental rule of the law of damages, to the effect that damages are to be allowed in general only for the proximate consequences of the wrong, although sometimes the question of proximate cause is applied to consequential damages for the breach of a contract, as well as to damages for negligence or tort. That the principle of proximate cause is applicable in an action for tort seems to be established by all the authorities, and we find none holding a contrary doctrine. While there may be a degree of uncertainty as to the plain signification of the term "proximate cause," or rather in its application to various cases, still in this case there can be no question as to what was the proximate and immediate cause of the plaintiff's injury. Bishop, in his work on Non-Contract Law (§ 42), in discussing this question, after remarking as to the uncertainty with which the term "proximate cause" may have been used and applied, and after defining [*99] the terms "proximate" and "remote" cause, says: "If, after the cause in question has been in operation some independent force comes in and produces an injury not its natural or probable effect, the author of the cause is not responsible."

In Shearman & Redfield on the Law of Negligence (§ 26) it is said: " The breach of duty upon which an action is brought must be not only the cause but the proximate cause of the damage to the plaintiff. * * * The proximate cause of an event must be understood to be that which, in a natural and continuous sequence, unbroken by any new cause, produces that event, and without which that event would not have occurred."

Wharton thus discusses the question: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor and insulates my negligence so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured." (Wharton on Negligence, § 134.)

As has been said in an anonymous article in the American Law Review: "A proximate cause is one in which is involved the idea of necessity. It is one the connection between which and the effect is plain and intelligible; it is one which can be used as a term by which a proposition can be demonstrated, that is, one which can be reasoned from conclusively. A remote cause is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the connection between [*100] which and the effect is uncertain, vague or indeterminate. It does not contain in itself the element of

necessity between it and its effect. From the remote cause the effect does not necessarily flow. * * * This idea of necessity -- the necessary connection between the cause and the effect -- is the prime distinction between a proximate and a remote cause. The proximate cause being given, the effect must follow. But although the existence of the remote cause is necessary for the existence of the effect (for unless there has been a remote cause there can be no effect) still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow." (4 Am. Law Review, 201, 205.)

In *Marble* v. *City of Worcester* (4 Gray, 396) Chief Justice Shaw said: " On account of the difficulty in unraveling a combination of causes, and of tracing each result, as a matter of fact, to its true, real and efficient cause, the law has adopted the rule before stated, of regarding the proximate, [**689] and not the remote cause of the occurrence which is the subject of inquiry."

In *Crain v. Petrie (6 Hill, 522, 524)* the question of special damages was involved, and, consequently, the question of proximate cause; that is, whether the special damages were the legal and natural consequences of the wrong complained of. Nelson, Ch. J., in that case said: "To maintain a claim for *special damages* they must appear to be the legal and natural consequences arising from the tort, and not from the wrongful act of a third party remotely induced thereby. In other words, the damages must proceed wholly and exclusively from the injury complained of."

In *Milwaukee & Saint Paul Railway Co. v. Kellogg (94 U.S. 469*) it was said: "The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury."

In *Hofnagle v. N. Y. C. & H. R. R. R. Co. (55 N. Y. 612*) it was held that the act of one person cannot be said to [*101] be the proximate cause of an injury when the act of another person has intervened and directly inflicted it.

Another principle of proximate cause which seems to be well established is that an accident or injury cannot be attributed to a cause unless, without its operation, it would not have happened. (*Ring v. City of Cohoes, 77 N. Y. 83*; *Taylor v. City of Yonkers, 105 N. Y. 202*; *Ayres v. Village of Hammondsport, 130 N. Y. 665*; *Grant v. Pa. & N. Y. Canal & R. R. Co., 133 N. Y. 657*.) When damages claimed in an action are occasioned by one of two causes, for one of which the defendant is responsible, and for the other of which he is not responsible, the plaintiff must fail if his evidence does not show that the damage was produced by the former cause, and the jury must not be left to mere conjecture, and a bare possibility that the damage was caused in consequence of the act of the defendant is not sufficient. (*Searles v. Manhattan Railway Co., 101 N. Y. 662*.) The plaintiff must fail if the evidence does not show that the injury was the result of some cause for which the defendant is responsible, and where the proof is by circumstances, the circumstances themselves must be shown and not left to rest in conjecture, and when shown it must appear that the inference sought is the only one which can fairly and reasonably be drawn from the facts. (*Ruppert v. Brooklyn Heights R. R. Co., 154 N. Y. 94*.)

When we apply to the undisputed facts of this case these rules relating to proximate cause, it becomes quite manifest that the judgment in this action cannot be upheld. All the injuries which the plaintiff sustained were caused directly and immediately by the act of Norcross in exploding the dynamite. That was clearly the proximate, and we think the only, cause of the plaintiff's injury. It was the only efficient cause, as, confessedly, without the explosion the plaintiff would not have been injured, and under no circumstances can it be properly said that the act

of the defendant in changing the plaintiff's position a few inches to the left of where he previously stood caused the explosion or occasioned the catastrophe. Surely that was not an act, without which the explosion [*102] would not have occurred, nor can it be held to have been the proximate cause of the explosion. The most that can be said is that it produced a situation which existed at the moment it occurred. Obviously, the explosion would have occurred if the defendant had moved the plaintiff in an opposite direction, or had not moved him at all. Nothing which the defendant did could have produced the injury sustained by the plaintiff without another independent intervening cause. There was no evidence in the case of any necessary relation of cause and effect between the act of which the plaintiff complains and the explosion which caused his injury. Under the proof, we think the question whether the defendant's act was the proximate cause of the plaintiff's injury was a question of law, and that the court erred in not directing a verdict for the defendant on that ground.

Another ground upon which the defendant seeks to sustain this appeal is that the court erred in refusing to strike out and in not instructing the jury to disregard the evidence of George Baillard, to which we have already referred. While it is possible that there was sufficient proof to justify the jury in finding that the "elderly stranger" to whom the witness referred was the defendant, still it is obvious that the evidence admitted was so general and inconclusive as to render it only conjectural as to whether it related to the subject at issue at all. It was that the witness understood this "elderly stranger" to say something about being protected -- about a protection he had had from the explosion. As to the nature of the protection, its extent, whether by physical matter or an overruling Providence, or a protection of some other character, nothing was attempted to be shown. It seems to us quite clear that no such uncertain statement should have been submitted to a jury or

permitted to become the basis of a verdict involving the rights of parties. It was too uncertain, indefinite and vague to be permitted to serve any such purpose.

Our attention is also called to various rulings of the trial court which arose upon the cross-examination of the defendant. His cross-examination was a severe and rigorous one. [*103] While perhaps it was not objectionable upon that ground alone, we think the plaintiff's counsel was permitted to go beyond the legitimate bounds of a proper cross-examination in several respects, to which we cannot call attention in detail within the proper limits of this opinion. Counsel was permitted to prove upon the cross-examination of the defendant, or at least to attempt to do so, that the defendant had not shown proper sympathy or paid proper attention to the plaintiff after he was injured. How that evidence could properly [**690] bear upon the legal rights of the parties it is extremely difficult to understand. The only purpose it could serve was to prejudice and excite the passions of the jury.

Again, we find rulings which were made on the cross-examination of the defendant in regard to the article in the New York *World*, which we think cannot be upheld.

It has ever been the theory of our government and a cardinal principle of our jurisprudence that the rich and poor stand alike in courts of justice, and that neither the wealth of the one nor the poverty of the other shall be permitted to affect the administration of the law. Evidence of the wealth of a party is never admissible, directly or otherwise, unless in those exceptional cases where position or wealth is necessarily involved in determining the damages sustained. As to this general proposition there can be no doubt, and no authorities need be cited. Notwithstanding this well-established principle, the plaintiff was permitted to show by the defendant upon his cross-examination substantially, or at least to a great extent, the amount of property possessed by him, its character and

his business. He was permitted to show the number of railroads the defendant operated, the banks in which he was a director, that he dealt in stocks, that he loaned money, and other details of his affairs. We think much of this evidence was improperly received, and that the exceptions were valid. But we deem it both unnecessary and unwise to extend this necessarily protracted opinion by either discussing those questions or considering the various other exceptions contained in the record which present questions that are serious, if not fatal, to this [*104] judgment. No good purpose could be served by such a course, as the judgment must be reversed upon the more substantial grounds which have been fully discussed.

It is impossible to consider the plaintiff's injuries without a feeling of profound sympathy. His misfortune was a severe one, but sympathy, although one of the noblest sentiments of our nature, which brings its reward to both the subject and actor, has no proper place in the administration of the law. It is properly based upon moral or charitable considerations alone, and neither courts nor juries are justified in yielding to its influence in the discharge of their important and responsible duties. If permitted to make it the basis of transferring the property of one party to another, great injustice would be done, the foundation of the law disturbed and anarchy result. Hence, every proper consideration requires us to disregard our sympathy and decide the questions of law presented according to the well-established rules governing them.

The judgments of the Appellate Division and of the trial court should be reversed and a new trial granted, with costs to abide the event.

Robert KEEL, Plaintiff, v. Forrest A. HAINLINE, Jr., Guardian of the Estate of Patricia Ann Burge, Defendant in Error No. 37888 Supreme Court of Oklahoma 1958 OK 201; 331 P.2d 397 September 16, 1958

[*398] WILLIAMS, Justice. In this action, Patricia Ann Burge, a minor, [**2] hereinafter referred to as plaintiff, obtained a judgment against Larry Jennings, Robert Keel, Harry Grove, A. C. Saint III, Dick Polite, Jr., and Don Cummings, all of whom are minors, for damages for personal injury. Defendant Keel alone appeals.

As his first proposition of error defendant asserts that the court erred in overruling defendant's demurrer to the evidence and his motion for a directed verdict because there was no evidence that the injury was willfully or intentionally inflicted or that the injury was the proximate result of wrongful and unlawful activity on the part of Keel and the other defendants.

The evidence reveals that on February 1, 1956, some thirty five to forty students attending the Woodrow Wilson Junior High School at Tulsa, Oklahoma, went to a class room for instruction in music. The class met at the hour of 10:30 a. m., but, for some unknown reason, their instructor did not make an appearance until some thirty or forty minutes later. During the absence of the instructor, several of the male students indulged in what they termed 'horse play'. This activity consisted of throwing wooden blackboard erasers, chalk, cardboard drum covers, and, in one instance, [**3] a 'coke' bottle, at each other. It appears [*399] that two or three of the defendants went to the north end of the class room and the remaining defendants went to the south end of the room. From vantage points behind the blackboard on the north end and the piano on the south end, they threw the erasers and chalk back and forth at one another. This activity was carried on for a period of some 30 minutes, and terminated only when an eraser, thrown by defendant Jennings, struck plaintiff in the eye, shattering her eye glasses, and resulting in the loss of the use of such eye. Plaintiff was sitting in her chair near the center of the room engaged in studying her lessons at the time she was struck by the eraser, and had not been participating in the so called 'horse play' in any manner. None of the

defendants intended to strike or injure plaintiff. They were, however, throwing at each other, with the intention of striking each other, although in sport and apparently without intent to cause injury.

The case of *Peterson v. Haffner, 59 Ind. 130, 26 Am.Rep. 81*, involved a situation in which the defendant, between 13 and 14 years of age, was playing in the street with some boys, [**4] and in sport threw a piece of mortar at another boy, and the mortar hit a third boy in the eye, putting it out. In the opinion affirming the judgment for the plaintiff, the court held that it was clear that an assault and battery had been committed. In the body of the opinion it is stated:

'He did not intend to inflict the injury, but he intended to do the wrongful act from which the injury resulted and he is answerable for that result. 3 Cooley's Bl.Com. 120, n. 4. The fact that the act was done in sport, it having been intentionally done, will not relieve the perpetrator from liability. See *Adams v. Waggoner, 33 Ind. 531*.'

The case of *Singer v. Marx, 144 Cal.App.2d 637, 301 P.2d 440, 442*, involved a situation in which a 9 year old boy threw a rock which struck and injured an 8 year old girl. In the body of the opinion the court said:

'An infant who forceably invades the person of another is liable for a battery regardless of an intent to inflict injury; the only intent which is necessary is that of doing the particular act in question -- in this case throwing a rock at somebody.'

In the same opinion the court also said:

'While throwing rocks at trees or into the street [**5] ordinarily is an innocent and lawful pastime, that same act when directed at another person is wrongful. The evidence at bar (combining that of Barbara with portions of Tim's own testimony) warrants an inference that Tim threw at

Barbara and inadvertently struck Denise. In such circumstances the doctrine of 'transferred intent' renders him liable to Denise.'

Defendant strenuously argues that the class had not been called to order by the teacher and that the defendants were merely playing until the teacher arrived, and therefore could not be said to have been engaged in any wrongful or unlawful acts. We do not agree. We do not believe and are not willing to hold that the willful and deliberate throwing of wooden blackboard erasers at other persons in a class room containing 35 to 40 students is an innocent and lawful pastime, even though done in sport and without intent to injure. Such conduct is wrongful, and we so hold. Under such circumstances the rule applicable to this case is well stated at 4 Am.Jur. 128, Assault and Battery, sec. 5, as follows:

'Where, however, the basis of an action is assault and battery, the intention with which the injury was done is immaterial so [**6] far as the maintenance of the action is concerned, provided the act causing the injury was wrongful, for if the act was wrongful, the intent must necessarily have been wrongful. The fact that an act was done with a good intention, or without any unlawful intention, cannot change that which, by reason of its unlawfulness, is essentially an assault and battery into a lawful act, thereby releasing the aggressor from liability.'

[*400] See also *Peterson v. Haffner, supra*; *Mohr v. Williams, 95 Minn. 261, 104 N.W. 12, 1* L.R.A.,N.S., 439; *Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403, 14 L.R.A. 226*; *Rolater v. Strain, 39 Okl. 572, 137 P. 96, 50* L.R.A.,N.S., 880. We therefore conclude that there is no merit in the first proposition.

As his second proposition of error, defendant asserts that there is no evidence that he aided, abetted or encouraged defendant Jennings to throw the eraser in such

a manner as to injure Burge or that he aided, abetted or encouraged an assault and battery on Burge.

It is undisputed that defendant Keel participated in the wrongful activity engaged in by the other defendants of throwing wooden blackboard erasers at each other back and forth across a class [**7] room containing 35 to 40 students, although most of the testimony indicates that defendant Keel's participation was limited to the retrieving of such erasers and handing them to other defendants for further throwing. Keel aided and abetted the wrongful throwing by procuring and supplying to the throwers the articles to be thrown. It is immaterial whether defendant Keel aided, abetted or encouraged defendant Jennings in throwing the eraser in such a manner as to injure Burge, or not, since it is virtually undisputed that defendant Keel aided, abetted or encouraged the wrongful activity of throwing wooden erasers at other persons, which resulted in the injury to Burge. In this connection see *Selby v. Lindstrom, 59 Okl. 227, 158 P. 1127*; *Williams v. Townsend, 15 Kan. 563*, 27 Pac.States Rep. 424; 4 Am.Jur. 127, Assault and Battery, sec. 4; 52 Am.Jur. 455, Torts, sec. 116.

As his last assignment of error defendant asserts that the court erred in giving instruction No. 9. Such instruction is as follows:

'You are instructed that if you find and believe, from a preponderance of the evidence, that plaintiff was struck by a blackboard eraser thrown by one of the defendants, and that plaintiff [**8] did not provoke the striking or consent thereto, that such act would be an assault and battery upon the plaintiff; and if you further find and believe from a preponderance of the evidence that Patricia Ann Burge was injured and sustained damages as a result thereof, then you are instructed that you should find the issues for the plaintiff and against the defendant that threw the eraser.

'If you find for the plaintiff and against the defendant who actually threw the eraser, then you are instructed that if you should further find and believe from a preponderance of the evidence, that one or more of the remaining defendants, did by their acts, signs, gestures, words or demeanor, either aid, abet, encourage, procure, promote or instigate the assault and battery, then your verdict should be against all of the defendants who participated in the assault and battery, if any, either as the actual assailant or by aiding, abetting, encouraging, procuring, promoting or instigating the throwing of the eraser by the actual assailant.'

The first paragraph of such instruction deals with the responsibility of the one defendant who actually threw the eraser that caused the injury. The indisputed [**9] evidence is that defendant Jennings threw that eraser at defendants Saint and Keel, missing them and hitting plaintiff. As a matter of law, this constitutes assault and battery, and the instruction correctly states the law in that regard. *Peterson v. Haffner, supra*; *Singer v. Marx, supra*; 6 C.J.S. Assault and Battery § 10(2), page 804.

The second paragraph of such instruction deals with the responsibility of those defendants who may have aided, abetted, encouraged, procured, promoted or instigated the act which caused the injury, and is a correct statement of the law and was proper under the evidence in this case. 4 Am.Jur. 127, Assault and Battery, Sec. 4; 6 C.J.S. Assault and Battery § 27a, page 830; *Hirschman v. Emme, 81 Minn. 99, 83 N.W.* [*401] *482*; *Turner v. Whittel, 2 Cal.App.2d 585, 38 P.2d 835*; *Acree v. North, 110 Neb. 92, 192 N.W. 947*; *Walker v. Keller, Tex.Civ.App., 226 S.W. 796*; *Shear v. Woodrick, 181 Wis. 30, 193 N.W. 968*; *Garrett v. Garrett, 228 N.C. 530, 46 S.E.2d 302*. As is well stated at 52 Am.Jur. 454, Torts, Sec. 114;

'One who commands, directs, advises, encourages, procures, instigates, promotes, controls, aids, or abets a

wrongful act by another has [**10] been regarded as being as responsible as the one who commits the act so as to impose liability upon the former to the same extent as if he had performed the act himself.'

Judgment affirmed.

 Si bien es claro que Sage actuó con *intent* en tanto en cuanto pretendió poner sus manos sobre Laidlaw para utilizarlo como un escudo humano, ¿por que concluye el tribunal que este acto no fue voluntario?

 DAVID MANNING, JR., PLAINTIFF-APPELLANT v. ROSS GRIMSLEY AND THE BALTIMORE BASEBALL CLUB, INC., DEFENDANTS-APPELLEES. No. 80-1145 UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT 643 F.2d 20 January 8, 1981, Argued February 27, 1981, Decided

[*21] WYZANSKI In this diversity action involving the law of Massachusetts the plaintiff, complaining that he as a spectator at a professional baseball game was injured by a ball thrown by a pitcher, sought in a battery count and in a negligence count to recover damages from the pitcher and his employer. The district judge directed a verdict for defendants on the battery count and the jury returned a verdict for defendants on the negligence count. [**2] The district court having entered judgment for defendants on both counts, the plaintiff appeals from the judgment on the battery count.

In deciding whether the district court correctly directed a verdict for defendants [*22] on the battery count, we are to consider the evidence in the light most favorable to the plaintiff. That evidence was to the following effect.

On September 16, 1975 there was a professional baseball game at Fenway Park in Boston between the defendant, the Baltimore Baseball Club, Inc. playing under

the name the Baltimore Orioles, and the Boston Red Sox. The defendant Ross Grimsley was a pitcher employed by the defendant Baltimore Club. Some spectators, including the plaintiff, were seated, behind a wire mesh fence, in bleachers located in right field. In order to be ready to pitch in the game, Grimsley, during the first three innings of play, had been warming up by throwing a ball from a pitcher's mound to a plate in the bullpen located near those right field bleachers. The spectators in the bleachers continuously heckled him. On several occasions immediately following heckling Grimsley looked directly at the hecklers, not just into the stands. At [**3] the end of the third inning of the game, Grimsley, after his catcher had left his catching position and was walking over to the bench, faced the bleachers and wound up or stretched as though to pitch in the direction of the plate toward which he had been throwing but the ball traveled from Grimsley's hand at more than 80 miles an hour at an angle of 90 degrees to the path from the pitcher's mound to the plate and directly toward the hecklers in the bleachers. The ball passed through the wire mesh fence and hit the plaintiff.

We, unlike the district judge, are of the view that from the evidence that Grimsley was an expert pitcher, that on several occasions immediately following heckling he looked directly at the hecklers, not just into the stands, and that the ball traveled at a right angle to the direction in which he had been pitching and in the direction of the hecklers, the jury could reasonably have inferred that Grimsley intended (1) to throw the ball in the direction of the hecklers, (2) to cause them imminent apprehension of being hit, and (3) to respond to conduct presently affecting his ability to warm up and, if the opportunity came, to play in the game itself.

The foregoing [**4] evidence and inferences would have permitted a jury to conclude that the defendant Grimsley committed a battery against the plaintiff. This case falls within the scope of *Restatement Torts 2d § 13* [1]

which provides, inter alia, that an actor is subject to liability to another for battery if intending to cause a third person to have an imminent apprehension of a harmful bodily contact, the actor causes the other to suffer a harmful contact. Although we have not found any Massachusetts case which directly supports that aspect of *§ 13* which we have just set forth, we have no doubt that it would be followed by the Massachusetts Supreme Judicial Court. *§ 13* has common law roots that precede the American Revolution, Scott v. Shepherd, 2 Wm.Bl. 892, 96 Eng.Rep. 525 (1773). It is supported by a substantial body of American cases conveniently noted in Prosser, Torts, 4th ed., 1971, pp. 32-34, of which *Singer v. Marx, 144 Cal.App.2d 637, 301 P.2d 440, 443 (1956)* is the one most clearly relevant to the case at bar. The whole rule and especially that aspect of the rule which permits recovery by a person who was not the target of the defendant embody a strong social policy including obedience [**5] to the criminal law by imposing an absolute civil liability to anyone who is physically injured as a result of an intentional harmful contact or a threat thereof directed either at him or a third person. See Prosser, supra. It, therefore, was error for the district court to have directed a verdict for defendant Grimsley on the battery count.

1 The full text of *§ 13* provides:

> An actor is subject to liability to another for battery if
>
> (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and
>
> (b) a harmful contact with the person of the other directly or indirectly results.

Grimsley contends that even if it was error for the district judge to have directed [*23] a verdict on the battery

count for the defendants, the plaintiff cannot now recover on that count because he is collaterally estopped by the unappealed judgment for the defendants on the negligence count.

In Massachusetts, as elsewhere, [**6] where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is ordinarily conclusive between the parties in a subsequent action; but a judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action. Restatement Judgments § 68; *Com. v. Mondano, 352 Mass. 260, 225 N.E.2d 318 (1967)*; *Drain v. Brookline Sav. Bk., 327 Mass. 435, 99 N.E.2d 160 (1951)*; *Wishnewsky v. Saugus, 325 Mass. 191, 194-195, 89 N.E.2d 783 (1950)*.

Grimsley's contention is that in the negligence action there actually was litigated the issue whether Grimsley threw the ball intentionally in the direction of the bleachers, and that the jury determined as a fact that he did not intend to do so.

We shall assume that the foregoing issue was one of those litigated. But the record does not show that the jury determined as a fact that the defendant Grimsley did not throw the ball intentionally in the direction of the bleachers. As the case was submitted to it, the jury, in order to return a verdict for the plaintiff, would have [**7] been required impliedly to find both (1) that Grimsley intended to throw toward the bleachers, and (2) that a ball so thrown involved an unreasonable risk of injuring the plaintiff. Familiar principles of tort law, reflected in the judge's instructions to the jury [2], made the second factor as essential as the first. Cf. *Restatement Torts 2d § 284(a). LaClair v. Silberline Mfg. Co., Mass., 379 Mass. 21, 393 N.E.2d 867, 871 (1979)*; *Goldstein v. Gontarz, 364 Mass. 800, 805, 309 N.E.2d 196 (1974)*; *Kane v. Fields Corner Grille, Inc., 341*

Mass. 640, 641-643, 171 N.E.2d 287 (1961). In returning a general verdict for the defendants the jury left us uninformed whether the plaintiff failed to persuade them on the first or the second of the issues. So far as we know, the jury may have determined that Grimsley threw the ball intentionally in the direction of the bleachers, but the jury may have been of the view that such a throw presented no unreasonable risk to the plaintiff because he was located behind a net intended to protect him. Since the defendant Grimsley has not borne the burden of proving that the judgment in the negligence action was based on the determination of the factual [**8] question whether Grimsley threw the ball intentionally in the direction of the bleachers, that judgment is not conclusive in the [*24] battery action. Restatement Judgments § 68 comment 1.

2 The trial judge in reference to Grimsley's potential negligence said merely the following:

> ... You have in mind that in his complaint David Manning alleged that while he was lawfully a spectator watching a Red Sox/Orioles game in Fenway Park he was injured because the defendant, Ross Grimsley, threw a baseball in a careless and negligent manner so that it struck Mr. Manning, who was then sitting in the bleachers. (Tr. vol. 4, pp. 93-94)
>
> ... When I talk about negligence, what I mean is the failure to exercise ordinary or due care. That is what the plaintiff has to establish by a preponderance of the evidence to your unanimous satisfaction; that is, he has to establish that Ross Grimsley at the time in question failed to exercise ordinary care or due care.
>
> The words "ordinary care" or "due care" mean the care that a reasonably prudent person would use

> under circumstances similar to those shown to have existed by the evidence in this case.
>
> The law doesn't say how a reasonably careful or prudent person would act under those circumstances. That is for you to decide. In other words, you jurors are the barometer of what is the care that a reasonably prudent person in the situation that Mr. Grimsley was in what a reasonably prudent pitcher would have done in a like circumstance. You jurors have to decide that.
>
> The degree of care required of a defendant is reasonable care and due care that standard never varies but the care which it is reasonable to require of a defendant varies with the danger involved and is proportionate thereto. In other words, the greater the potential danger, the greater the care which must be exercised by a reasonably prudent person, but always remember that the standard is the same: reasonable care. (Tr. vol. 4, pp. 95-96) (Emphasis added.)

[**9] Nor is the plaintiff estopped by the rule that "where a judgment on the merits is rendered in favor of the defendant, the plaintiff is precluded from subsequently maintaining an action on the same cause of action although he presents a ground for the relief asked other than those presented in the original action, except where the defendant's fraud or misrepresentation prevented the plaintiff from such other ground in the original action." Restatement Judgments § 63 and comment c. *Ratner v. Rockwood Sprinkler Co., 340 Mass. 773, 776, 166 N.E.2d 694 (1960)*; *Willett v. Webster, 337 Mass. 98, 102, 148 N.E.2d 267 (1958)*; *Mackintosh v. Chambers, 285 Mass. 594, 596-597, 190 N.E. 38 (1934)*; *Cotter v. Boston & Northern Street Railway, 190 Mass. 302, 76 N.E. 910 (1906)*. The obvious purpose of the rule is to coerce the plaintiff to present all of his grounds of recovery in the first proceeding so as not to subject the defendant and the court

to the burden of two different actions involving a single invasion of the plaintiff's primary right to be free from injury to his person. See Restatement Judgments § 63 comment a. Hence, under that rule a judgment on the merits rendered in favor of a [**10] defendant in an action alleging merely that his negligence caused the plaintiff to suffer personal injuries precludes the plaintiff from a subsequent action alleging that defendant's intentional conduct caused the identical injury. *Cotter v. Boston & Northern Street Railway, supra* (the facts of which serve as the unacknowledged source of Restatement Judgments § 63 comment c).

The case at bar does not fall within the letter or the purpose of the rule. Here the plaintiff brought a complaint alleging that a single invasion of his right to be free from injury to his person was subject to recovery on two alternate grounds: battery or negligence. Thus the battery claim was, in the words of Restatement Judgments § 63, "presented in the original action." The reason that the jury did not consider the plaintiff's battery claim for recovery was not that he failed to allege it, but that the trial judge erroneously kept the claim from them. Under such circumstances, the plaintiff, after the trial judge's error has been corrected, is not precluded from maintaining that battery count.

It follows that the plaintiff is entitled to a vacation of the judgment on the battery count in favor of [**11] the defendant Grimsley.

The plaintiff is also entitled to a vacation of the judgment on the battery count in favor of the Baltimore Club, Grimsley's employer.

In Massachusetts "where a plaintiff seeks to recover damages from an employer for injuries resulting from an employee's assault ... (W)hat must be shown is that the employee's assault was in response to the plaintiff's conduct

which was presently interfering with the employee's ability to perform his duties successfully. This interference may be in the form of an affirmative attempt to prevent an employee from carrying out his assignments, as in the Levi and Rego cases ..." *Miller v. Federated Department Stores, Inc., 364 Mass. 340, 349-350, 304 N.E.2d 573 (1973)*. (Emphasis added.)

The defendant Baltimore Club, relying on its reading of the Miller case, contends that the heckling from the bleachers constituted words which annoyed or insulted Grimsley and did not constitute "conduct" and that those words did not "presently" interfere with his ability to perform his duties successfully so as to make his employer liable for his assault in response thereto.

Our analysis of the Miller case leads us to reject the contention. There [**12] a porter, whose duties consisted of cleaning the floors and emptying the trash cans in Filene's basement store, slapped a customer who had annoyed or insulted him by a remark that "If you would say "excuse me', people could get out of your way." The Massachusetts Supreme Judicial Court held that while the employee "may have been annoyed or insulted by" the customer's remark, "that circumstance alone does not [*25] justify imposition of liability on" the employer. *364 Mass. 350-351, 304 N.E.2d 573*.

Miller's holding that a critical comment by a customer to an employee did not in the circumstances constitute "conduct" interfering with the employee's performance of his work is obviously distinguishable from the case at bar. Constant heckling by fans at a baseball park would be, within the meaning of Miller, conduct. The jury could reasonably have found that such conduct had either the affirmative purpose to rattle or the effect of rattling the employee so that he could not perform his duties successfully. Moreover, the jury could reasonably have found that Grimsley's assault was not a mere retaliation for

past annoyance, but a response to continuing conduct which was "presently [**13] interfering" with his ability to pitch in the game if called upon to play. Therefore, the battery count against the Baltimore Club should have been submitted to the jury.

Vacated and remanded for a new trial on the battery count.

ON PETITIONS FOR REHEARING

The defendants petition for rehearing on the ground that "there was no evidence whatsoever that Grimsley appeared to be irritated on any of the occasions when he looked up at the stands."

Our re-examination of the record discloses the following.

The witness Murphy who was a spectator in the bleachers testified that "On several occasions I saw him (Grimsley) immediately respond to some verbal outcries by looking up into the stands directly at people, myself included." (A.136) "The times that I saw Mr. Grimsley look into the stands were the times immediately following verbal remarks." (A.137) Murphy also testified on direct examination that when Grimsley in the critical pitch "released the ball, he had an angry, frustrated look on his face, as though he were releasing tension." (A.142) On cross-examination, Murphy admitted that he did not make the observation of the face "right at the moment" he thought the ball was coming toward [**14] him (A.153) or "between the time" he saw Grimsley releasing the ball and the time the ball was picked up (A.154), but Murphy never withdrew his statement that when Grimsley released the ball he had an angry look.

The witness Goldsmith, who also was a spectator in the bleachers was asked "And did you have occasion to observe Mr. Grimsley respond ... to this heckling."

Goldsmith answered "He looked into the crowd, not specifically at me, I don't think, but he looked up at the crowd a number of times." (A.239) On cross-examination Goldsmith added "He looked right directly at us. He didn't just look up into the stands." (A.245) "It looked an awful lot like he was looking right at us, and it just so happens it was right after the comments we yelled. So I assumed he was looking at us."

It is our opinion that on that testimony the jury could reasonably have found that some, if not all, of the times Grimsley looked toward the bleachers, he did so because he was irritated at the hecklers.

In the interest of accuracy, we strike from page 2, lines 18-20, the sentence reading "On several occasions Grimsley, apparently irritated, looked over at the hecklers." and we substitute "On several [**15] occasions immediately following heckling Grimsley looked directly at the hecklers, not just into the stands." And we strike from page 2, lines 30-31, the clause reading "that he appeared to be irritated at the hecklers," and we substitute "that on several occasions immediately following heckling he looked directly at the hecklers, not just into the stands."

 ¿Determina el tribunal en este caso que el pelotero Grimsley actúo con un *intent*, susceptible de transferirse, justamente, hacia el demandante que era un espectador neutral, cuando arrojo la pelota como una advertencia más bien hacia el núcleo duro de aficionados más fanáticos que empezaron a proferirle graves insultos? ¿Para transferirse, en qué sentido deberá ser este *intent* doloso?

BATTERY: CONTACT

 LEICHTMAN, Appellant, v. WLW JACOR COMMUNICATIONS, INC. et al., Appellees No. C-920922 Court of Appeals of Ohio, First Appellate District, Hamilton County 92 Ohio App. 3d 232; 634 N.E.2d 697 January 26, 1994, Decided January 26, 1994, Entered

[*234] [**698] PER CURIAM The plaintiff-appellant, Ahron Leichtman, appeals from the trial court's order dismissing his complaint against the defendants-appellees, WLW Jacor Communications ("WLW"), William Cunningham and Andy Furman, for battery, invasion of privacy, and a violation of Cincinnati Bd. of Health Reg. No. 00083. In his single assignment of error, Leichtman contends that his complaint was sufficient to state a claim upon which relief could be granted and, therefore, the trial court was in error when it granted the defendants' *Civ.R. 12(B)(6)* motion. We agree in part.

In his complaint, Leichtman claims to be "a nationally known" antismoking advocate. Leichtman alleges that, on the date of the Great American Smokeout, he was invited to appear on the WLW Bill Cunningham radio talk show to discuss the harmful effects of smoking and breathing secondary smoke. He also alleges that, while he was in the studio, Furman, another WLW talk-show host, lit a cigar and repeatedly blew smoke in Leichtman's face "for the purpose of causing physical discomfort, humiliation and distress."

Under the rules of notice pleading, *Civ.R. 8(A)(1)* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." When construing a complaint for failure to state a claim, under *Civ.R. 12(B)(6),* the court assumes that the factual allegations on the face of the complaint are true. *O'Brien v. Univ. Community Tenants Union, Inc. (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753,* syllabus. For the court to grant a motion to dismiss, "it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery." *Id.* A court cannot dismiss a complaint under *Civ.R. 12(B)(6)* merely because it doubts the plaintiff will prevail. *Slife v. Kundtz Properties, Inc. (1974), 40 Ohio App.2d 179, 69 O.O.2d 178, 318 N.E.2d 557.* Because it is so easy for the pleader

to satisfy the standard of *Civ.R. 8(A)*, few complaints are subject to dismissal. *Id. at 182, 69 O.O.2d at 180, 318 N.E.2d at 560.*

Leichtman contends that Furman's intentional act constituted a battery. The Restatement of the Law 2d, Torts (1965), states:

"An actor is subject to liability to another for battery if

"(a) he acts intending to cause a harmful or offensive contact with the person of the other * * *, and

"(b) a harmful contact with the person of the other directly or indirectly results[; or] [1]

[*235] "[c] an offensive contact with the person of the other directly or indirectly results." [2] (Footnote added.)

1 Harmful contact: *Restatement of the Law 2d, Torts (1965) 25, Section 13*, cited with approval in *Love v. Port Clinton (1988), 37 Ohio St.3d 98, 99, 524 N.E.2d 166, 167*.

2 Offensive contact: Restatement, *supra*, at 30, Section 18. See, generally, *Love at 99-100, 524 N.E.2d at 167*, in which the court: (1) referred to battery as "intentional, offensive touching"; (2) defined offensive contact as that which is "offensive to a reasonable sense of personal dignity"; and (3) commented that if "an arrest is made by a mere touching * * * the touching is offensive and, unless privileged, is a 'battery.'" *Id., 37 Ohio St.3d at 99, 524 N.E.2d at 167, fn. 3*. See, also, *Schultz v. Elm Beverage Shoppe (1988), 40 Ohio St.3d 326, 328, 533 N.E.2d 349, 352, fn. 2* (citing Restatement, *supra*, at 22, Chapter 2, Introductory Note), in which the court identified an interest in personality as "freedom from offensive bodily contacts"; *Keister v. Gaker* (Nov. 8, 1978), Warren App. Nos. 219 and 223, unreported (battery is offensive touching).

[**699] In determining if a person is liable for a battery, the Supreme Court has adopted the rule that "[c]ontact which is offensive to a reasonable sense of personal dignity is offensive contact." *Love v. Port Clinton (1988), 37 Ohio St.3d 98, 99, 524 N.E.2d 166, 167*. It has defined "offensive" to mean "disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultingness." *State v. Phipps (1979), 58 Ohio St.2d 271, 274, 12 O.O.3d 273, 275, 389 N.E.2d 1128, 1131*. Furthermore, tobacco smoke, as "particulate matter," has the physical properties capable of making contact. *R.C. 3704.01(B)* and *5709.20(A)*; *Ohio Adm.Code 3745-17*.

As alleged in Leichtman's complaint, when Furman intentionally blew cigar smoke in Leichtman's face, under Ohio common law, he committed a battery. No matter how trivial the incident, a battery is actionable, even if damages are only one dollar. *Lacey v. Laird (1956), 166 Ohio St. 12, 1 O.O.2d 158, 139 N.E.2d 25*, paragraph two of the syllabus. The rationale is explained by Roscoe Pound in his essay "Liability": "[I]n civilized society men must be able to assume that others will do them no intentional injury -- that others will commit no intentioned aggressions upon them." Pound, An Introduction to the Philosophy of Law (1922) 169.

Other jurisdictions also have concluded that a person can commit a battery by intentionally directing tobacco smoke at another. *Richardson v. Hennly (1993), 209 Ga.App. 868, 871, 434 S.E.2d 772, 774-775*. We do not, however, adopt or lend credence to the theory of a "smoker's battery," which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a nonsmoker. Ezra, Smoker Battery: An Antidote to Second-Hand Smoke (1990), *63 S.Cal.L.Rev. 1061, 1090*. Also, whether the "substantial certainty" prong of [*236] intent from the Restatement of Torts translates to liability for secondary smoke via the intentional tort doctrine in

employment cases as defined by the Supreme Court in *Fyffe v. Jeno's, Inc. (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108*, paragraph one of the syllabus, need not be decided here because Leichtman's claim for battery is based exclusively on Furman's commission of a deliberate act. Finally, because Leichtman alleges that Furman deliberately blew smoke into his face, we find it unnecessary to address offensive contact from passive or secondary smoke under the "glass cage" defense of *McCracken v. Sloan (1979), 40 N.C.App. 214, 217, 252 S.E.2d 250, 252*, relied on by the defendants.

Neither Cunningham nor WLW is entitled to judgment on the battery claim under *Civ.R. 12(B)(6)*. Concerning Cunningham, at common law, one who is present and encourages or incites commission of a battery by words can be equally liable as a principal. *Bell v. Miller (1831), 5 Ohio 250*; 6 Ohio Jurisprudence 3d (1978) 121-122, Assault, Section 20. Leichtman's complaint states, "At Defendant Cunningham's urging, Defendant Furman repeatedly blew cigar smoke in Plaintiff's face."

With regard to WLW, an employer is not legally responsible for the intentional torts of its employees that do not facilitate or promote its business. *Osborne v. Lyles (1992), 63 Ohio St.3d 326, 329-330, 587 N.E.2d 825, 828-829*. However, whether an employer is liable under the doctrine of *respondeat superior* because its employee is acting within the scope of employment is ordinarily a question of fact. *Id. at 330, 587 N.E.2d at 825*. Accordingly, Leichtman's claim for battery with the allegations against the three defendants in the second count of the complaint is sufficient to withstand a motion to dismiss under *Civ.R. 12(B)(6)*.

By contrast, the first and third counts of Leichtman's complaint do not state claims upon which relief can be granted. The trial court correctly granted the *Civ.R. 12(B)(6)* motion as to both counts. In his first count,

Leichtman alleged a tortious invasion of his privacy. See, generally, Restatement, *supra*, at 376, Section 652B, as adopted by *Sustin v. Fee (1982), 69 Ohio St.2d 143, 145, 23 O.O.3d 182, 183-184, 431 N.E.2d 992, 993*. A claim for invasion of privacy may involve any one of four distinct torts. Prosser, Privacy (1960), 48 Cal.L.Rev. 383. The tort that is relevant here requires some substantial intrusion into a plaintiff's solitude, seclusion, habitation, or affairs that would be highly [**700] offensive to a reasonable person. See, *e.g.*, Restatement, *supra*, at 378-379, Section 652B, Comments *a* to *d; Killilea v. Sears Roebuck & Co. (1985), 27 Ohio App.3d 163, 166, 27 OBR 196, 198-199, 499 N.E.2d 1291, 1294*. Leichtman acknowledges that he willingly entered the WLW radio studio to make a public radio appearance with Cunningham, who is known for his blowtorch rhetoric. Therefore, Leichtman's [*237] allegations do not support his assertion that Furman, Cunningham, or WLW intruded into his privacy.

In his third count, Leichtman attempts to create a private right of action for violation of Cincinnati Bd. of Health Reg. No. 00083, which makes it illegal to smoke in designated public places. Even if we are to assume, for argument, that a municipal regulation is tantamount to public policy established by a statute enacted by the General Assembly, the regulation has created rights for nonsmokers that did not exist at common law. Bd. of Health Reg., *supra*, at Sections 00083-7 and 00083-13. Therefore, because sanctions also are provided to enforce the regulation, there is no implied private remedy for its violation. *R.C. 3707.99, 3707.48(C)*; *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9 (1991), 59 Ohio St.3d 167, 169, 572 N.E.2d 87, 89-90*; *Fawcett v. G.C. Murphy & Co. (1976), 46 Ohio St.2d 245, 248-250, 75 O.O.2d 291, 293-294, 348 N.E.2d 144, 147* (superseded by statute on other grounds).

Arguably, trivial cases are responsible for an avalanche of lawsuits in the courts. They delay cases that are important to individuals and corporations and that involve important social issues. The result is justice denied to litigants and their counsel who must wait for their day in court. However, absent circumstances that warrant sanctions for frivolous appeals under *App.R. 23*, we refuse to limit one's right to sue. *Section 16, Article I, Ohio Constitution* states, "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

This case emphasizes the need for some form of alternative dispute resolution operating totally outside the court system as a means to provide an attentive ear to the parties and a resolution of disputes in a nominal case. Some need a forum in which they can express corrosive contempt for another without dragging their antagonist through the expense inherent in a lawsuit. Until such an alternative forum is created, Leichtman's battery claim, previously knocked out by the trial judge in the first round, now survives round two to advance again through the courts into round three.

We affirm the trial court's judgment as to the first and third counts of the complaint, but we reverse that portion of the trial court's order that dismissed the battery claim in the second count of the complaint. This cause is remanded for further proceedings consistent with law on that claim only.

Judgment accordingly.

Doan, P.J., Hildebrandt and Gorman, JJ., concur.

 ¿Qué tipo de contacto imputa el tribunal a Furman en este caso?

 ¿No es una ocurrencia casi cotidiana el contacto entre conocidos y familiares? De igual manera, ¿no es inevitable

el contacto cercano entre individuos en los lugares concurridos o de asistencia masiva, como cines, antros, estadios, balnearios, plazas y teatros?

 ERIC VAN SCOY, Plaintiff and Appellant, v. VALERO OIL COMPANY, Defendant and Respondent. A118435 COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115. September 15, 2008, Filed

Pollak, Acting P. J.; Siggins, J., Jenkins, J. concurred. Plaintiff Eric Van Scoy appeals from a judgment in favor of defendant Valero Oil Company (Valero) in his action seeking to recover damages for personal injuries allegedly suffered when inhaling fumes from a fire on Valero's property. He contends that the trial court erroneously (1) sustained a demurrer eliminating causes of action for battery and nuisance, (2) granted a summary adjudication motion removing his claim for punitive damages, and (3) denied his motion for a new trial on the grounds that the evidence was insufficient to support the jury's finding that Valero was not negligent, and that he should be entitled to allege additional causes of action for nuisance and strict liability. We conclude that plaintiff's second amended complaint failed to state a cause of action for battery or nuisance and that substantial evidence supports the finding that defendant was not negligent. Moreover, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial to allege additional causes of action. Because we affirm the judgment imposing no [*2] liability, it is unnecessary to consider the court's ruling striking the punitive damage allegations.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's second amended complaint alleged causes of action for battery, nuisance, and negligence resulting from

a fire that occurred at Valero's refinery in Benicia. Plaintiff alleged that on June 25, 2005, a fire at the refinery emitted smoke that caused him coughing and breathing problems, pain and suffering, and medical expenses. Plaintiff alleged that on the afternoon of the fire, while at work approximately three-eighths to one-half mile east of the refinery, he smelled burning plastic. Around 2:30 p.m., he observed a large smoke plume rising from the refinery. Around 3:45 p.m. he left work, experiencing coughing, burning eyes, and soar throat. Plaintiff claimed and Valero disputed that his symptoms were caused by smoke inhalation, but because the judgment that we affirm ascribes no fault to Valero, it is unnecessary to summarize the precise allegations or the evidence concerning plaintiff's alleged injury and causation.

According to testimony at trial, on June 25, 2003, a fire burned at Valero's refinery from approximately 2:00 p.m. to 4:00 p.m. [*3] The fire was caused by the ignition of styrene block copolymer (SBS), a thermoplastic rubber material used to produce asphalt. Valero employees testified that Valero purchased about 1.5 million pounds of SBS in March 2003and stored the material in large cardboard boxes in an outdoor parking lot, covered with tarps. Plaintiff alleged that Valero stored the SBS negligently and in a manner that the manufacturer's material safety data sheet (MSDS) warned was likely to cause a fire which, he asserted, was in conscious disregard of his rights.

Valero demurred to the second amended complaint on the ground that it failed to allege facts constituting battery, nuisance or negligence. The court sustained the demurrer to the battery and nuisance causes of action, without leave to amend. Following trial, a jury returned a special verdict finding Valero not negligent. Plaintiff filed motions for a new trial and for judgment notwithstanding the verdict, contending there was insufficient evidence to justify the verdict and seeking leave to amend the complaint to

include additional causes of action for strict liability and nuisance. [1] The court denied the motions and plaintiff has timely appealed the [*4] judgment in Valero's favor.

1 Plaintiff's motion for a new trial was based on several additional grounds, but we discuss only those grounds that plaintiff asserts on appeal..

DISCUSSION

1. Battery

Plaintiff contends that the court erroneously sustained Valero's demurrer to the cause of action for battery. A battery is generally defined as "any intentional, unlawful and harmful contact by one person with the person of another." (*Ashcraft v. King (1991) 228 Cal.App.3d 604, 612*.) To establish a battery, one must prove, among other elements of the tort, that the defendant touched the plaintiff, or caused the plaintiff to be touched, "with the intent to harm or offend" him. (*CACI No. 1300*; *Austin B. v. Escondido Union School Dist. (2007) 149 Cal.App.4th 860, 872-873*.) Although we have been cited to no California authority directly on point, we assume, along with decisions in other jurisdictions, that causing a person to inhale noxious smoke involves sufficient personal contact to support a battery. (*DeNardo v. Corneloup (Alaska 2007) 163 P.3d 956, 960*; *Leichtman v. WLW Jacor Communications, Inc. (Ohio Ct.App. 1994) 634 N.E.2d 697, 699*; *Richardson v. Hennly (Ga. Ct.App 1993) 434 S.E.2d 772, 775*, [*5] reversed on other grounds by *Hennly v. Richardson (Ga. Ct.App. 1994) 444 S.E.2d 317*.) The trial court considered plaintiff's allegations to be insufficient, however, because, in his third pleading, plaintiff failed to allege that Valero or its agents intended to harm him.

The second amended complaint alleges that defendant "knew or should have known of the abilities of certain styrene polymer product to self-ignite due to static electricity under certain conditions, but intentionally did

not take the proper precautions, in conscious disregard of the safety of others including plaintiff." Plaintiff claimed that Valero "intentionally, negligently, and/or improperly discharged noxious and injurious substances, fumes, particles, and/or smoke from the refinery in the vicinity of Benicia, CA," and that Valero acted with "reckless [or wanton] disregard of the consequences" and with "conscious disregard of the rights or safety of others including plaintiff." Plaintiff does not dispute the trial court's observation that what he alleged was not an intent to harm him, but conduct in conscious disregard of safety standards. He argues that conscious disregard is sufficient but cites no authority [*6] for this proposition. The authority disclosed by our own research that comes closest to supporting this view is distinguishable. (*Ashcraft v. King, supra, 228 Cal.App.3d at p. 613* [physician given consent to use only family-donated blood in surgery but who instead used blood from hospital's general supply could be found to have acted with "an intent to willfully disregard plaintiff's conditional consent." Such willful disregard of plaintiff's rights is sufficient to support civil battery]; *Lopez v. Surchia (1952) 112 Cal.App.2d 314, 318* [intent to harm not necessary if defendant's act is unlawful].) The *Restatement Second of Torts section 13* provides explicitly that the commission of a battery requires the person to act "intending to cause a harmful or offensive contact" and that is the view of current California authority. (*CACI No. 1300*; *Austin B. v. Escondido Union School Dist., supra, 149 Cal.App.4th at p. 872*.) We adopt that view.

Thus, we conclude that the trial court properly sustained the demurrer to the battery cause of action. Moreover, even if this ruling was erroneous, the error was harmless. As discussed *infra,* plaintiff's negligence claim went to the jury on three distinct [*7] theories, each of which was rejected. Having found that Valero did not act negligently, there is no possibility under the circumstances

of this case that the jury would have found that it acted with conscious disregard of the rights of others.

2. Nuisance

Plaintiff contends that the trial court erred in sustaining Valero's demurrer to the nuisance cause of action. A nuisance is "[a]nything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property." (*Civ. Code, § 3479.*) California recognizes both public and private forms of nuisance. (See *Civ. Code, §§ 3480, 3481.*)

Under *Civil Code section 3480*, "a public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." To state a cause of action for a public nuisance, one must allege facts showing "special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto v. Owens-Corning Fiberglas Corp. (1971) 22 Cal.App.3d 116, 124* [*8] [plaintiffs claiming that pollution aggravated allergies and respiratory disorders failed to state public nuisance cause of action because injury was different only in degree from injury to health of general population].) As in *Venuto,* the second amended complaint here failed to allege special injuries to plaintiff different in kind from those likely to be suffered by any member of the general public near the refinery at the time of the fire.

Every nuisance not a public nuisance is a private nuisance. (*Civ. Code, § 3481.*) Although one may recover for personal harm based on a public nuisance, "a *private* nuisance can support recovery only for harm to a property interest, not for personal injury." (*Institoris v. City of Los Angeles (1989) 210 Cal.App.3d 10, 20* [no private nuisance

because no interference with the use and enjoyment of land].) Plaintiff alleged no invasion of any property interest, and thus stated no claim based upon a private nuisance.

The demurrer to the nuisance cause of action therefore was properly sustained.

3. Substantial Evidence Supports the Finding that Defendant Was Not Negligent

The thrust of plaintiff's case was that Valero was negligent in storing SBS outdoors [*9] in the sun, and not in a covered area as recommended by the MSDS from the manufacturer. The court's instructions included three theories on which the jury could have found Valero negligent. The jury was given the standard instruction that "[a] person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation." The jury was also instructed on the theory of res ipsa loquitur. [2] And finally, the jury was also instructed on the theory of negligence per se, based on plaintiff's contention that Valero failed to establish a workplace hazard communication program and communicate to its employees the information contained in the MSDS concerning the proper storage methods and safety hazards of the SBS, as required by federal regulations (*29 C.F.R. § 1910.1200*). The court instructed: "If you decide that Valero Oil Company violated [title *29 Code of Federal Regulations part 1910.1200*] and that the violation was a substantial factor in bringing about the harm then you must find that Valero Oil Company was negligent unless you also find that the violation was [*10] excused." The special verdict form asked simply whether Valero was negligent, to which the jury responded "No."

2 The jury was instructed: "In this case Eric Van Scoy may prove that Valero Oil Company's negligence caused his harm if he proves all of the following: 1, that Eric Van Scoy's harm ordinarily

> would not have happened unless someone was negligent. 2, that the harm was caused by something that only Valero Oil Company controlled. And, 3, that Eric Van Scoy's voluntary actions did not cause or contribute to the events that harmed him. If you decide that Eric Van Scoy did not prove one or more of these three things, then your verdict must be in favor of Valero Oil."
>
> Plaintiff makes no argument on appeal that the evidence established the elements necessary to prove his claim on this theory.

Plaintiff moved for a new trial on the ground that there was no substantial evidence to support the jury's finding, and on appeal challenges the trial court's denial of the motion. He contends the MSDS instructed that the SBS be stored in a covered area and that Valero's failure to follow this instruction must be regarded as negligence. However, the relevant portion of the MSDS reads as follows: [*11] "As a general indication, exposure of the product to a temperature over 70 [degrees] C (160 [degrees] F) for more that 10 days could start a degradation process that could create local overheating followed by self-ignition. [P] It is therefore suggested to store the product (in the original packaging) in a covered area, not exposed to sunlight and/or heat sources. Proper ventilation of the storage area must be ensured." As appears, storing the product in a covered area is only a suggestion. What the MSDS indicates is essential is that the SBS not be exposed to a temperature over 160 [degrees] F for more than 10 days. The instructions recommend that that the product not be exposed to the sunlight and that proper ventilation "must be ensured."

Defendant's employees testified that Valero followed the MSDS guidelines by storing the SBS material in its original packaging without ever exposing it to 160

[degrees] F temperatures for 10 consecutive days. According to the testimony of three employees, Valero employees checked to ensure proper tarp coverage over the SBS boxes twice a day. Valero's in-box tests revealed that the temperature was within 5 degrees of ambient temperature, and the [*12] high temperature recorded on the day of the fire was 97 [degrees] F, well below the MSDS 160 [degrees] F temperature warning. The employees in charge of purchasing and storing SBS believed that there was no risk of fire from storing SBS outside on a gravel parking lot. The asphalt plant unit team leader, Robert Yarbrough, testified that he had multiple contacts with the manufacturer's sales representative, who expressed no concerns or criticism about the manner in which Valero was storing the SBS. The manager of technical services for asphalt products, Robert Rivers, testified that Valero had purchased SBS over the past decade and stored it under similar conditions without incident. The day after the fire the manufacturer's sales representatives stated that Valero's storage methods did not cause the fire. Thus, there is substantial evidence to support the jury's finding that Valero acted reasonably and did not disregard the MSDS instructions.

Appellate review of a jury's determination of a factual issue "'begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and [*13] when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.'" (*Hiser v. Bell Helicopter Textron Inc. (2003) 111 Cal.App.4th 640, 652*.) *Substantial evidence* qualifies as any evidence which is not "unbelievable per se." (*Andrade v. Jennings (1997) 54 Cal.App.4th 307, 328*.) The reviewing court grants all inferences in favor of the non-moving party and may not "reweigh the evidence, redetermine the credibility of witnesses, or resolve conflicts

in the evidence." (*Hiser v. Bell Helicopter Textron Inc., supra, at p. 652*.)

The jury's rejection of plaintiff's negligence per se theory is also supported by the evidence. Plaintiff's argument is based largely on the premise that failure to observe safety requirements specified in the MSDS would constitute a per se violation of federal regulations, a proposition neither embraced in the court's instructions nor supported by any authority that plaintiff has cited. In all events, as indicated above, there is substantial evidence that Valero did comply with the MSDS recommendations.

The federal regulation plaintiff asserts Valero violated, *29 Code of Federal Regulations part 1910.1200(b)(1)* [*14] instructs "all employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a hazard communication program, labels and other forms of warning, material safety data sheets, and information and training." This is the provision that the trial court instructed might establish per se liability here, and plaintiff argues that the acknowledgement of two employees that they had not read the MSDS necessarily established his claim. However, Valero's evidence showed that copies of the MSDS were maintained in its operations office, the laboratory and in its computer files and that other employees, including Doug Byrone, the modified asphalt plant foreman, had read the document. Several employees testified that Valero conducted training sessions to update its employees on MSDS requirements, maintained a "Management of Change" procedure to inform employees of modifications to materials used at the refinery, and enforced strict security requirements. Substantial evidence therefore supports the finding that defendant did not violate the federal regulation.

Thus, the trial court did not err in denying the new trial motion insofar as it was [*15] based on the asserted

insufficiency of the evidence (much less in denying judgment notwithstanding the verdict).

4. Motion for New Trial

Plaintiff also contends that the trial court erroneously denied his motion for a new trial based on the ground of accident or surprise and seeking leave to amend the pleadings to allege a strict liability cause of action. [3] Plaintiff argued that "defendant first advised the court that it would not argue the SBS material was somehow defective, but then changed its position at closing argument" and that he therefore should be permitted to allege a new cause of action alleging strict liability based on the product defect. When the trial court has denied a motion for a new trial, "we must determine whether the court abused its discretion by examining the entire record and making an independent assessment of whether there were grounds for granting the motion." (*ABF Capital Corp. v. Berglass (2005) 130 Cal.App.4th 825, 832*; *City of Los Angeles v. Decker (1977) 18 Cal.3d 860, 872*.) Reversal is appropriate only "where no reasonable basis for the action is shown.'" (*Williams v. City of Los Angeles (1988) 47 Cal.3d 195, 204*.)

> 3 Plaintiff also sought to re-allege [*16] a nuisance claim, but makes no argument on appeal why the court erred in denying that request.

There are multiple reasons for which plaintiff's motion on this ground was properly denied. Plaintiff provided no compelling excuse for failing to assert a cause of action based on a product defect until almost three years after filing the original complaint. (See *Bernstein v. Financial Indem. Co. (1968) 263 Cal.App.2d 324, 328* [denying right to amend because there was no showing why additional cause of action not brought until almost three years after commencement of the action].) The fact that plaintiff did not expect Valero to contend that the SBS was defective provides no explanation for his failure to consider such a claim and include it in the initial complaint if there were a

basis for doing so. Moreover, it seems clear that plaintiff has no supportable claim against Valero based on a defect in the SBS because, among other reasons, Valero was not in the chain of distribution of the SBS. Valero was not the manufacturer of the SBS product. Plaintiff asserted that "defendant would still be liable to plaintiff as a bystander because defendant was in the chain of manufacture of a consumer [*17] product." (See *Price v. Shell Oil Co. (1970) 2 Cal.3d 245, 250-251*.) California law extends strict liability to retail dealers (*Vandermark v. Ford Motor Co. (1964) 61 Cal.2d 256, 262-263)*, as well as to component manufactures and suppliers (*Jimenez v. Superior Court (2002) 29 Cal.4th 473, 479*; *Gonzalez v. Autoliv ASP, Inc. (2007) 154 Cal.App.4th 780, 788)* under conditions of "normal storage and movement of the product while it is still on the market" (*Stein v. Southern Cal. Edison Co. (1992) 7 Cal.App.4th 565, 570)*. Moreover, "a sale is not an absolute prerequisite to a finding that a product has been placed in the stream of commerce." (*Ibid*.) However, plaintiff made no showing, either in the evidence at trial or in support of the new trial motion, that Valero either resold the SBS or incorporated it into a product that it resold. There was, in short, no showing that Valero placed SBS "on the market" and, thus, no basis for the imposition of strict liability based on a product defect. (*Cronin v. J.B.E. Olson Corp. (1972) 8 Cal.3d 121, 129-130*; *Greenman v. Yuba Power Products, Inc. (1963) 59 Cal.2d 57, 63 -64*; *Nelson v. Superior Court (2006) 144 Cal.App.4th 689, 695*; *Scott v. Metabolife Internat., Inc. (2004) 115 Cal.App.4th 404, 415*.) [*18] Hence, plaintiff's desire to plead such a cause of action provided no basis for granting the new trial motion.

DISPOSITION

The judgment is affirmed.

 ¿El demandante en este caso imputó a Valero un contacto doloso?

TRESPASS: INTENT

 W. W. PEGG v. J. S. GRAY No. 668 SUPREME COURT OF NORTH CAROLINA 240 N.C. 548; 82 S.E.2d 757 July 9, 1954, Filed

[*550] [**758] JOHNSON We are not dealing here with a trespass committed by a dog of its own volition while roaming abroad.

It may be conceded as a well-established principle of law that where a dog roams abroad on another's land of its own accord and does damage or inflicts injury to persons, animals, or property there can be no recovery therefor in the absence of special statutory enactment, unless it be shown that (1) the dog was possessed of a propensity to commit the depredation complained of and (2) the owner knew, or was chargeable with knowledge, of such propensity. *Buckle v. Holmes*, 2 K. B. (Eng.) 125, [**759] 54 [*551] A.L.R. 89. See also: *S. v. Smith, 156 N.C. 628, 72 S.E. 321*; *Banks v. Maxwell, 205 N.C. 233, 171 S.E. 70*.

This principle of law is grounded upon a recognition that by natural instinct and habit an ordinary dog of most breeds is inclined to roam around and stray at times from its immediate habitat without causing injury or doing damage to persons or property. And in deference to this natural instinct of dogs the processes of the early common law eschewed the idea of requiring that they be kept shut up, and instead promulgated the foregoing rule which allows a reputable dog a modicum of liberty to follow his roaming instincts without imposing liability on its master. And so, since early times the law has been and still is that the owner of a reputable dog is not answerable in damages for its entry upon the lands of another upon its own volition under circumstances amounting to an unprovoked trespass. *Buckle v. Holmes, supra; Mason v. Keeling,* 1 Ld. Raym.

606, 91 Eng. Reprint, 1305; *Brown v. Giles*, 1 Car. & P. 118, 171 Eng. Reprint, 1127; *Buck v. Moore,* 35 Hun. (N.Y.) 338; *State v. Donohue, 49 N.J.L. 548, 10 A. 150, 60 Am. Rep. 652*; 2 Am. Jur., Animals, Sec. 105; Annotation: 107 A.L.R. 1323.

However, the rule is different where a dog owner or keeper for the purpose of sport intentionally sends a dog on the lands of another or releases a dog or pack of dogs with knowledge, actual or constructive, that it or they likely will go on the lands of another or others in pursuit of game. In such cases the true rule would seem to be that the owner or keeper, in the absence of permission to hunt previously obtained, is liable for trespass, and this is so although the master does not himself go upon the lands, but instead sends or so allows his dog or dogs to go thereon in pursuit of game.

The gist of the leading English decisions on the subject, with footnote citations of the decided cases, may be found in Halsbury's Laws of England (1911), Vol. 1, page 395, where it is said: "The owner of a dog is not answerable in trespass for its unauthorized entry into the land of another, often described as an unprovoked trespass. . . . But if a man wilfully send a dog on another man's land in pursuit of game he is liable in trespass, although he did not himself go on the land . . . So also if he allow a dog to roam at large, knowing it to be addicted to destroying game . . ." And, further, we find this, with supporting note citations of cases, in Halsbury's, Vol. 15, page 226: ". . . or, again, if a person while hunting enters on the land of another without his consent, he commits an act of trespass . . . *Further, the entry need not be personal in order to be actionable.* A man who himself does not enter, but invites or authorizes others to do so, is liable to an action for trespass . . . So, too, . . . the sending of a dog on to such land in pursuit of game . . ." (Italics added.) See *Paul v. Summerhayes,* 4 Q. B. (Eng.) 9; *Beckwith v. Shordike,* 4 Bun. 2092, [*552] 98

Eng. Reprint, 91; *Baker v. Howard County Hunt, 171 Md. 159, 188 A. 223, 107 A.L.R. 1312*; Annotation: 107 A.L.R. 1323; Annotation: 21 Ann. Cas. 915. See also 2 Am. Jur., Animals, Sec. 105, p. 770.

We have not overlooked the following statement to which our attention has been directed in 24 Am. Jur., p. 377: "The trespass of a hunter in pursuit of game on another's premises may be made a crime, *but it has been held that such offense is not committed by the sending of a dog on the premises in search or pursuit of game."* (Italics added.) An examination of the two cases on which this text-statement is based discloses that in each instance the court was dealing with a criminal prosecution for alleged violation of a statute making it unlawful to hunt on the lands of another person. This latter portion of the text-statement, ". . . but it has been held that such offense is not committed by the sending of a dog on the premises in search or pursuit of game," is based solely upon the decision in *Pratt v. Martin* (1911), 2 K. B. (Eng.) 90, 21 Ann. Cas. 914, wherein the statute at hand made it a criminal offense for any person to commit a trespass by "entering or being upon" any land in search [**760] or pursuit of game. There, the facts were that the appellant hunter was lawfully on the lands of one Babb for the purpose of shooting game. Appellant with gun and dog came to a brook which divided Babb's land from that of another. He waved the dog across the brook into a spinney -- a thicket -- where the dog "put up a pheasant" which the appellant shot and killed, the bird dropping into the spinney. The dog retrieved the bird and carried it across the brook to the appellant. There was no evidence he was ever off the land of Babb. The lower court convicted. On appeal, the judgment below was reversed upon the theory that the provisions of the statute, as a criminal enactment, did not expressly cover the act of sending a dog on another person's land. The case decides nothing as bearing upon the question of civil trespass in respect to such conduct. It is

manifest that the decision in *Pratt v. Martin* is not at variance with the well-established rule that one who intentionally sends his dog on another person's land in pursuit of game may be held civilly liable therefor on the theory of trespass.

This view is in accord with the decision of the English Court in *Paul v. Summerhayes, supra* (4 Q. B. 9), in construing the proviso in Section 35 of the English Game Act of 1831 (1 and 2 Wm. 4, c. 32; Halsbury's Statutes of England, 1929, Vol. 9, p. 1079). The Act makes certain trespasses in pursuit of game criminal offenses, whereas the proviso excepts fox hunting from the provisions of the Act in these words: ". . . that the aforesaid provisions against trespassers and persons found on any land shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare, or fox already started upon any other land, . . ." In *Paul v. Summerhayes* the [*553] appellants, who had been following a pack of foxhounds in the heat of chase, sought to justify entry on the lands of another by virtue of the foregoing proviso contained in the Game Act of 1831. However, it was held that the proviso was intended only to prevent the penal provisions of the Act from being applied against fox hunters, thus leaving the law of civil trespass unaffected by the Act. Said *Lord Coleridge, C. J.* -- great nephew of Coleridge the poet -- in delivering his opinion: "There is nothing, . . . in the Act to alter the common law with regard to trespass so far as concerns foxhunting." And *Meller, J.,* by way of concurrence had this to say: "In any case the exception in favour of foxhunting in the 35th Section could only apply to the special provisions of the Act for the protection of game, and could not affect the question whether a trespass could be justified at common law in the course of hunting a fox, . . ."

In recognition that the law of trespass as fixed by the principles of the common law affords no immunity to fox

hunting as a sport, it has become the established custom in England for the master of the hunt to raise funds, by subscription of the members of the hunt, with which to pay farmers for damage done their poultry, fences, crops, etc., by the hunt. These funds are known as "Poultry," "Damage," and "Wire" Funds. See Brock, The A.B.C. of Fox-Hunting (American edition by Scribner's, 1936), p. 17.

To the established rule which holds one liable for trespass for sending his dog on another's land in pursuit of game we are advertent to this statement apparently *contra* appearing in Ingham, The Law of Animals (1900), Sec. 41, p. 121: "A person may justify trespass in following a fox with hounds over the grounds of another if he does no more than is necessary to kill the fox." This text-statement is based solely on the decision in *Gundry v. Feltham,* 1 T. R. 334, 99 Eng. Reprint 1125. That case was an action for trespass for entering the plaintiff's closes with horses and dogs and following a fox with hounds. It was decided by a three-member court composed of *Lord Mansfield, C. J., Willes* and *Buller, JJ.* The case was disposed of by this terse statement of *Mansfield, C. J.:* "By all the cases as far back as in the reign of Henry 8th, it is settled that a man may follow a fox into the grounds of another." However, *Buller, J.,* concurring, had this to say: "The question on this record is, whether the defendant be [**761] justified in following the fox at all over another man's grounds. The demurrer admits that which is averred in the plea, namely, that this was the only means of killing the fox. This case does not determine that a person may unnecessarily trample down another person's hedges, or maliciously ride over his grounds: if he do more than is absolutely necessary (to kill the fox), he cannot justify it; . . ." Thus the decision in *Gundry v. Feltham* was confined to narrow limits at the time of its rendition. It has been much criticized and has been treated by [*554] the English courts as virtually unauthoritative since the notable decision in *Paul v. Summerhayes, supra* (4 Q. B. 9), decided in 1878. In the

latter case, as we have seen, the appellants had been engaged in hunting with a pack of foxhounds. They sought to justify entry on the lands of another while in pursuit of a fox. They urged as authority in justification of their asserted right of entry (1) the proviso contained in Section 35 of the English Game Act of 1831 (1 and 2 Wm. 4, c. 32) which, as we have previously pointed out, was held inapplicable, and (2) the decision in *Gundry v. Feltham, supra,* decided in 1786. In holding that the decision in *Gundry v. Feltham* does not justify trespass in hunting on the lands of another with a pack of foxhounds, *Lord Coleridge, C. J.,* said in part:

"It was suggested that there is authority that foxhunting in the popular, well understood, sense of the term, that is, as a sport, can be carried on over the land of a person without his consent and against his will, and the case of *Gundry v. Feltham* was cited as authority for that proposition. I am of opinion that no such right as that claimed exists. The sport of foxhunting must be carried on in subordination to the ordinary rights of property. Questions such as the present fortunately do not often arise, because those who pursue the sport of foxhunting do so in a reasonable spirit, and only go upon the lands of those whose consent is expressly, or may be assumed to be tacitly, given. There is no principle of law that justifies trespassing over the lands of others for the purpose of foxhunting. The case of *Gundry v. Feltham* is distinguishable from the present case, and can be supported, if it is to be supported at all, only on the grounds suggested by *Lord Ellenborough* in the case of *Lord Essex v. Capel,* to which we have been referred. The demurrer admitted that what was done was the only means for destroying the fox, and *Buller, J.,* expressly puts his decision on that ground. The case was brought under the consideration of *Lord Ellenborough* in *Lord Essex v. Capel,* and he was distinctly of opinion that, where any other

object was involved than that of the destruction of a noxious animal, an entry on the land of another, against his will, could not be justified. In the case of *Lord Essex v. Capel* it had been pleaded that the means adopted were the only means, and also that they were the ordinary and proper means of destroying the fox. But the evidence clearly shewed that in the case of foxhunting, as ordinarily pursued, the object of destroying the animal is only collateral. The interest and excitement of the chase is the main object. *Lord Ellenborough,* than whom there could be no higher authority on such a point, was of opinion that where this was the case, and where the real object was not the mere destruction of a noxious animal, a trespass could not be justified. If persons pursue the fox for the purpose of sport or diversion, they must do so subject to the ordinary rights of property. It would seem that there [*555] may be some doubt as to the validity of the justification even where the only object is the destruction of a noxious animal. The idea that there was such a right as that of pursuing a fox on another's land appears to have been based on a mere dictum of *Brook, J.,* in the Year Book, 12 Hen. 8, p. 10. This dictum was not necessary for the decision of the case, for there the chasing of a fox was not in question, and the case went off on an entirely different point. It may well be doubted in my opinion whether, even if the case were one in which the destruction of a fox as a noxious animal was the sole object, there would be any justification. That question, however, does not, I think, arise here. It is enough to say that the case of *Gundry v. Feltham,* and the dictum of *Brook, J.,* in the Year Book, 12 Hen. 8, [**762] p. 10, do not at all conflict with the opinion expressed by *Lord Ellenborough* in *Lord Essex v. Capel,* which appears to me to be the true view of the law, viz., that a person has no right, in the pursuit of a fox as a sport, to come upon the land of another against his will. For these reasons our judgment must be for the respondent."

It may be conceded that since Samson, according to the folk tale of Biblical lore, tied the firebrands to the tails of 300 foxes and sent them into the grain fields of the Philistines (Judges 15:4, 5) the fox has been looked upon by many persons as a noxious animal, to be exterminated. Nevertheless, to countless thousands of devotees of the chase the death of a fox, unless it be in front of hounds, is regarded as a social crime. We embrace the view of *Lords Ellenborough* and *Coleridge*, as stated by the latter in *Paul v. Summerhayes, supra*, that fox hunting as ordinarily pursued -- certainly as shown by the record in this case -- is pure sport to be followed in subordination to established property rights and subject to the principles governing the law of trespass. See also *Baker v. Howard County Hunt, supra;* 24 Am. Jur., Game and Game Laws, Sec. 8; 52 Am. Jur., Trespass, Sec. 12, p. 845.

In the case at hand the evidence is sufficient to justify the inference that the defendant, without permission of the plaintiff, on numerous occasions intentionally and for the purpose of sport sent his pack of dogs, or released them knowing they likely would go, on, over, and across the lands of the plaintiff in pursuit of foxes, whereby the plaintiff sustained substantial damage to his fences and other property. Without further elaboration it is enough to say that the evidence when tested by the applicable principles of law is sufficient to carry the case to the jury on the theory of trespass. The record discloses that the case was cast by the pleadings and developed by the evidence on that theory. The rule is that an appeal of necessity follows the theory of the trial. *Lyda v. Marion, 239 N.C. 265, 79 S.E. 2d 726*; *Parrish v. Bryant, 237 N.C. 256, 74 S.E. 2d 726*. Hence it is not necessary to treat of the statutes, *G.S. 67-2* and 113-104, referred to in the briefs and discussed on the argument.

[*556] The judgment below is

Reversed.

 ¿Por qué considera el tribunal que Gray actuó con *intent*, cuando soltó a sus perros de caza a sabiendas de que probablemente invadirían el predio del vecino?

 In Re: AIR CRASH DISASTER AT COVE NECK, LONG ISLAND, NEW YORK ON JANUARY 25, 1990. SAMUEL TISSENBAUM and NETTIE TISSENBAUM, Plaintiffs against AEROVIAS NACIONALES DE COLOMBIA, S.A., doing business as AVIANCA AIRLINES, Defendant. 90 CV 2354 (TCP) UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK 885 F. Supp. 434 March 28, 1995, Decided

PLATT, Chief Judge.

Plaintiffs seek to recover from Aerovias Nacionales De Columbia ("AVIANCA") for the negligent infliction of emotional distress allegedly caused when AVIANCA Flight 052 crashed into the plaintiffs' property and for the property damage sustained by the crash. Defendant moves for summary judgment pursuant to *Fed. R. Civ. P. 56* on the grounds that New York law does not allow recovery for purely emotional distress injuries, negligently inflicted, under the facts set forth in this case and that plaintiffs have already recovered for the property damage from Aetna Casualty and Surety Company ("Aetna"), their home insurer.

This Court partially grants defendant's motion for summary judgment. Summary judgment is granted in favor of the defendants on the emotional injury issue as plaintiffs failed to provide evidence that the defendant owed them a direct duty of [**2] care, that the defendant breached that duty, and that the breach was the cause of their injuries. Additionally, plaintiffs' alternative tortious theory of intentional trespass does not preserve their personal injury

claims. This Court denies summary judgment on the issue of the property damage claims to the extent plaintiffs seek to recover for uninsured losses.

BACKGROUND:

I. FACTS:

On January 25, 1990, Avianca Airlines Flight 052, a Boeing 707 aircraft, crashed in the Village of Cove Neck, Nassau County, New York, killing sixty five passengers and eight crew members, and injuring eighty four passengers and one crew member. As the plane crashed into a residential neighborhood, injuries were sustained by non-passengers who were on the ground at the time of the accident.

[*437] Samuel and Nettie Tissenbaum, husband and wife, [1] were in their home located at 16 Tennis Court Road, Cove Neck, New York, at about 9:25 pm on January 25, 1990, when Avianca Flight 052 crashed into their backyard. At the time of the crash, Nettie Tissenbaum, who was seventy one years old, was in the shower and Samuel Tissenbaum, who was seventy six years old, was watching TV in a nearby room. At the moment [**3] of impact, Mrs. Tissenbaum heard what she thought was a "tremendous clap of thunder," felt the house shake and realized the power was out. *See* Deposition of Nettie Tissenbaum, August 21, 1991 at 13, Exhibit F to Holland Affidavit (hereinafter N.T. dep.). Mr. Tissenbaum thought an earthquake had occurred. *See* Deposition of Samuel Tissenbaum, August 21, 1991 at 94, 97, Exhibit F to Holland Affidavit (hereinafter S.T. dep.).

1 Samuel Tissenbaum passed away on September 22, 1993.

Upon hearing the loud noise, Nettie Tissenbaum ran out of the shower and into the room where her husband was. N. T. dep. at 14-16. Plaintiffs procured flashlights and went downstairs to see what had caused the loud noise and

power outage. As they walked down the stairs, plaintiffs began to hear "weird" noises, "like animals caught in a trap," coming from the back of the house. S.T. dep., p. 94; N.T. dep. p. 17. When they arrived downstairs, Mr. Tissenbaum shone the flashlight through the glassdoors leading to their deck and [**4] plaintiffs were shocked to see that a plane had crashed into the deck and backyard. N.T. dep. at 19; S.T. dep. at 95.

Upon realizing the tragic situation, plaintiffs went back inside to call for emergency help but the phone was dead. Mr. Tissenbaum ran to his car to drive to the nearby police station when a neighbor told him help was on the way. S.T. dep. at 95.

When the firefighters first arrived they sprayed the deck with a chemical foam to protect it from any possible fire damage if there were a post-crash explosion. N.T. dep. at 23, 26. After securing the house against possible fire damage, rescue workers were in and out of the Tissenbaum household all night asking for water, using the bathrooms, and borrowing their linens and tools. N.T. dep. at 24-26; S.T. dep. at 103-104. The Tissenbaum garage became in effect "command central." Curious observers also entered the Tissenbaum property all through the night. S.T. dep. at 101.

The evacuation of the passengers finally ended at about 6:00 am. The dead bodies were placed on the Tissenbaums' driveway and in their garage. N.T. dep. at 29; S.T. dep. at 102. For days plaintiffs had no electricity, telephone service or running water, [**5] N.T. dep. at 29, and they could not leave their home as rescue vehicles blocked their passage. S.T. dep. at 103. For weeks the wreckage of the plane and heavy equipment remained on their property. N.T. dep. at 32-33.

II. Claims

A. Claims for Personal Injury

Plaintiffs contend that from the moment they heard the loud noise and throughout the ordeal that followed they were in great fear for their safety. Mrs. Tissenbaum claims she still suffers from great anxiety, fearfulness, phobias, premonitions of disaster, disorientation and depression, N.T. dep. at 31-32, and that her pre-existing diabetes condition was exacerbated by the accident so that it is difficult to stabilize her blood sugar levels and weight. [2] N.T. dep. at 80, 86-87. Allegedly, the crash caused Mr. Tissenbaum to suffer from anxiety, depression, insomnia and increased angina pains affecting his ability to perform routine tasks. [3] S.T. dep. at 126-27. Neither plaintiff suffered any direct physical injuries from the plane crash.

2 Nettie Tissenbaum had been a diabetic for approximately twenty years prior to the accident.

[**6]

3 Mr. Tissenbaum had suffered three heart attacks prior to the time of the accident. S.T. dep. at 104, 138-144.

Plaintiffs sought psychiatric treatment from Carl Saviano, M.D. to help them cope with the emotional stress caused by the accident. According to Dr. Saviano, Mr. and Mrs. Tissenbaum suffered from post-traumatic stress disorder resulting from the Avianca [*438] plane crash from the date of the accident through and beyond February, 1991, the date they ended their psychiatric treatment. *See* Affidavit of Carl Saviano, August 2, 1994, Exhibit 10 to B. Rodriguez affidavit.

In light of the stress and emotional harm plaintiffs suffered as a result of this plane crash, plaintiffs seek personal injury damages on the theories that defendant committed negligent infliction of emotional distress, and intentional trespass.

B. Property Damage Claim

The Tissenbaums submitted a claim for property damage to Aetna, their homeowner's insurer, and received $ 58,037.00 for the insured property damage they sustained. Plaintiffs claim that their insurance did not adequately compensate them as they [**7] sustained $ 152,926.00 in actual property damages. Additionally, the submitted claim did not include recovery for uninsured losses of interference with use of and enjoyment of their property.

At the time of the insurance settlement, the plaintiffs signed a subrogation statement in favor of Aetna but not a release. Aetna settled its subrogation claim with Avianca for $ 40,000 and released Avianca expressly for the subrogation claim only, but not for any claims made by plaintiffs for personal injury or uninsured losses resulting from the Avianca crash.

At the time of the accident, plaintiffs' home was for sale and they were receiving offers for approximately $ 700,000. In late 1989, after the crash, they sold the house in an "as is" condition for $ 575,000.

DISCUSSION

I. *Summary Judgment Standard:*

A motion for summary judgment may be granted if the pleadings, admissions and affidavits read together "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(c)*. Summary judgment is to be entered against a party "who fails to make a showing sufficient to establish the existence of an [**8] element essential to that party's case." *Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. The court considers the evidence before it in the light most favorable to the non moving party.

II. *Negligent Infliction of Emotional Distress:*

A. Legal Standard

The New York State Court of Appeals [4] has permitted plaintiffs to recover in cases of purely emotional injury in extremely limited circumstances *[Lancellotti v. Howard, 155 A.D.2d 588, 547 N.Y.S.2d 654, 655* (2d Dep't. 1989)] in which (1) a "bystander" who was in the "zone of danger" suffers emotional trauma as a result of their observations or (2) the defendant breaches a direct duty to plaintiff which results in emotional injury to the plaintiff. New York State is reluctant to extend the boundaries of the narrowly drawn rules for recovery of negligent infliction of emotional distress. *See Bravman v. Baxter Health Care Corp., 794 F. Supp. 96, 100 (S.D.N.Y. 1992), aff'd in part, rev'd in part on other grounds, remanded, 984 F.2d 71 (2nd Cir. 1993), remanded, 842 F. Supp. 747 (S.D.N.Y. 1994).*

4 New York State law applies in this case.

[**9] B. Bystander Rule

According to New York common law, damages for purely emotional injury are recoverable when the plaintiff is threatened with bodily harm as a result of defendant's negligence and the plaintiff suffers emotional injury "from viewing the death or serious physical injury of a member of his or her immediate family." *Bovsun v. Sanperi, 61 N.Y.2d 219, 461 N.E.2d 843, 847, 473 N.Y.S.2d 357 (N.Y. 1984).* Plaintiffs concede they cannot recover pursuant to the bystander rule as no member of their immediate family was injured in the accident.

C. Direct Duty Cases

New York State recognizes claims for negligent infliction of emotional distress in instances in which the plaintiff's emotional [*439] injury results from "'a breach of duty which "unreasonably (endangers) the plaintiff's physical safety.'" *Wilson v. Consolidated Rail Corp., 810 F. Supp. 411, 416 (N.D.N.Y. 1993)* (quoting *Green v. Leibowitz, 118 A.D.2d 756, 500 N.Y.S.2d 146 (2d Dept. 1986), reh'g. denied, 815 F. Supp. 585 (N.D.N.Y. 1993).* A prerequisite to recovering for a claim of emotional injury is

the existence of a duty owed directly to the claimant by one from whom recovery is sought. [**10] *Lahann v. Cravotta, 228 N.Y.S.2d 371, 372-3 (1962)*; *see, Battalla v. State of New York, 10 N.Y.2d 237, 176 N.E.2d 729, 730, 219 N.Y.S.2d 34 (1961)*.

The gravamen of this claim is whether the plaintiffs can prove the defendant owed them a specific duty, rather than just a general duty to society. *See, Johnson v. Jamaica Hospital, 62 N.Y.2d 523, 467 N.E.2d 502, 503, 478 N.Y.S.2d 838 (1984)*. As this Court contemplates the duty airlines owe non-passengers, it must take into account that New York law narrowly defines the scope of an alleged tortfeasor's duty in order to ensure that '"the legal consequences of wrongs [are limited] to a controllable degree.'" *Waters v. New York City Housing, 69 N.Y.2d 225, 505 N.E.2d 922, 924, 513 N.Y.S.2d 356 (1987)* (quoting *Tobin v. Grossman, 24 N.Y.2d 609, 301 N.Y.S.2d 554, 249 N.E.2d 419 (1969))*.

Plaintiffs contend that Avianca owed them a direct duty to operate its aircraft in a manner which would not cause harm to non passengers or their property. Defendant contends that it did not owe a direct duty to the Tissenbaums as they were merely bystanders to this accident who unfortunately were in the vicinity of the accident site and [**11] witnessed the aftermath of the collision.

In the New York cases in which defendant owes a direct duty to plaintiff for the purposes of collecting purely emotional damages the parties share a relationship analogous to an implied contractual relationship. For example, an infant plaintiff recovered for purely emotional damages against a state-owned ski resort when a negligent employee placed the child in a chair lift without securing the child's safety belt and the child suffered emotional trauma. *Battalla v. State of New York, 176 N.E.2d at 730*. In that instance, there was an implied understanding

between the parties that the State would ensure the chair lift was operated safely and that understanding provided the basis of the State's liability. *Id.* Parent plaintiffs were denied damages for purely emotional damages when there four and one-half (4 1/2) month old infant was kidnapped from the defendant hospital. *Johnson v. Jamaica Hospital, 467 N.E.2d at 503-4*. The court held the parents were not entitled to recover as the hospital's duty ran to the infant patient, the party with which the hospital had an implicit contractual relationship, and not to the parents. *Id.*

[**12] This Court views the Tissenbaums' situation as analogous to the parents in *Jamaica Hospital*, and not the infant plaintiff in *Battalla.* The Tissenbaums are similar to the parent plaintiffs in that they undoubtedly suffered emotional injury resulting from the tortious activity at issue, but they are not in the kind of implied contractual relationship required to recover for negligently inflicted emotional distress. Unlike the infant plaintiff in *Battalla* and the infant patient in *Jamaica,* the Tissenbaums never placed themselves in the care of Avianca prior to the accident. It is the passengers on the airplane who share the type of relationship necessary to recover emotional damages, not the people on the ground who had the unfortunate experience of being in the wrong place at the wrong time.

To support the proposition that passenger airlines owe a direct duty to non-passengers on the ground below the plane's flight path, plaintiffs cite *Rehm v. United States, 196 F. Supp. 428 (E.D.N.Y. 1961)*. In that case, a plane operated by agents of the United States collided with an automobile driven by the plaintiffs, husband and wife, when the aircraft was forced to make an [**13] emergency landing on the Southern State Parkway. *Id. at 429*. During the course of the accident, plaintiffs witnessed the crash as it occurred, and suffered physical and emotional injuries.

Id. at 430-31. The Court allowed the plaintiffs to recover for their physical and emotional harms. *Id. at 431*.

[*440] The *Rehm* case differs dramatically from the case at issue, as it was not a case for purely emotional damages. If the Tissenbaums had suffered physical and emotional injury, as the plaintiffs in *Rehm* did, there would be no question as to the viability of their tort claims against Avianca. Additionally, the plaintiffs in *Rehm* had a stronger case for recovery because they witnessed the accident as it occurred, while the Tissenbaum's injuries emanate from witnessing the aftermath of the collision. *See Battalla 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34* (plaintiff's awareness of the possible harm and dangerous incident were simultaneous); *see also Shanahan v. Orenstein, 52 A.D.2d 164, 383 N.Y.S.2d 327* (1st Dep't. 1976) (plaintiff was permitted to recover for negligently inflicted emotional injuries where she was a participant in the accident), *appeal dismissed,* [**14] *40 N.Y.2d 985, 359 N.E.2d 435, 390 N.Y.S.2d 927 (1976).*

D. Outrageous Conduct

Additionally, plaintiffs set forth an infliction of emotional distress claim based on the outrageousness of the events in this case. To maintain such a claim there must be a genuine issue of fact as to whether defendant "who by extreme and outrageous conduct causes severe emotional distress to (plaintiff) is subject to liability for such emotional distress." *Murphy v. American Home Products Corp., 58 N.Y.2d 293, 448 N.E.2d 86, 90, 461 N.Y.S.2d 232 (1983), rev'd on other grounds, 136 A.D.2d 229, 527 N.Y.S.2d 1* (1st Dep't. 1988). Liability exists when "'the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as so atrocious, and utterly intolerable in a civilized community." *Id.* (citing *Restatement of Torts, Second § 46(1),* comment (d)). Avianca's actions with regards to this tragic accident do not rise to the level extreme and reckless conduct necessary to

maintain a claim for emotional damages based on outrageous conduct.

This Court recognizes that Avianca owed its passengers and crew a direct duty [**15] to provide them with safe passage from Columbia to New York. This Court is not prepared to extend Avianca's direct duty to all the non-passengers it's planes fly over on a daily basis. To hold airlines responsible for the possible emotional injury for such a large and indeterminate group of people would be to expose airlines to "virtually limitless . . . tort liability" and to create untold economic and social burdens. *Bacon v. Mussaw, 167 A.D.2d 741, 563 N.Y.S.2d 854, 856* (3d Dep't. 1990).

III. *Tort of Trespass*

The tort of trespass is the intentional and unlawful invasion of another's land. To meet the intent requirement the tortfeasor "need not intend or expect the damaging consequences of his intrusion," rather he need only "intend the act which amounts to or produces the unlawful invasion, and the intrusion must be . . . the immediate or inevitable consequence of what . . . he does so negligently as to amount to wilfulness." *Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249, 250 (1954).*

Plaintiffs maintain that their complaint sets forth a prima facie case for the intentional tort of trespass: to wit, that the Avianca flight #052 crashed onto plaintiffs' [**16] property and that the crash was the result of defendant's knowing, reckless and willful misconduct in exhausting its fuel supply so as to inevitably result in a crash. Defendant's response is that no evidence was adduced that suggests Avianca acted with deliberate disregard for life and that the crew of Flight 052 intentionally grounded the plane into the plaintiff's property.

This Court holds that there is no genuine issue of fact to support a claim for the tort of intentional trespass as there is

no evidence to prove the necessary intent to invade unlawfully. There was never a legal finding in this case that Avianca acted in a manner which rose to the level of wilful misconduct in the invasion of property or that the crew in this case, all of whom perished but one, voluntarily crashed the flight into the plaintiffs' yard. Rather, when the plane ran out of gas, after holding over the airport for hours, it became impossible for any human being to act voluntarily and control the aircraft and it unfortunately and [*441] accidentally crashed into the Tissenbaum's yard.

IV. *Property Damage Claims*

Plaintiffs contend that whether their property damages are measured by the cost to restore [**17] the property to its original condition or by the diminution in the market value of their property the $ 58,037.00 they received from Aetna did not compensate them adequately for the damage to their property. [5] Plaintiffs' total claim for property damage, supported by consultant's estimates for repair and restoration, was $ 152,926.00. [6] (Exh. 1, Affidavit of Blanca Rodriguez, Esq.) Alternatively, plaintiffs claim that if damages are measured by the diminution of the property value they were undercompensated because before the accident someone offered $ 725,000.00 to purchase their home and after the crash it sold for $ 575,000.00. Plaintiffs seek to recover from defendants either the difference between the amount paid by the insurer and the amount they claim is due them, or the difference in the pre and post accident amounts offered for the sale of their home. Additionally, plaintiffs seek to recover for the interference with their normal use and enjoyment of the property, which was not covered by their homeowner's policy.

5 Defendant argues that plaintiffs are seeking to recover for both diminution of property value and cost to restore, which is not permissible under New York law. *See, Benavie v. Baker, 72 A.D.2d 541, 420 N.Y.S.2d 735, 736* (2d Dep't. 1979). This Court disagrees with defendant's interpretation of plaintiffs'

papers. It appears plaintiff is stating whichever method is used to measure damages they have thus far been undercompensated and that they would be satisfied to recover fully under either formula.

[**18]

6 The following are estimates to repair plaintiffs' property damage caused by the crash of Avianca #052:

1. Electrical - $ 997.00 plus tax,

2. Driveway - $ 12,210.00 plus tax,

3. Redwood Deck - $ 23,140.00 plus tax,

4. Landscape Damages:

a. Area A - $ 104,100.00 + 23,000 for trees.

b. Area B - $ 8,198.00

c. Area C - $ 2,756.00

5. Miscellaneous Carpentry Repairs - $ 925.00.

The estimates for items 1-4 were prepared by Dodds & Eder, Inc., 221 South Street, P.O. Box 150, Oyster Bay, New York 11771. The estimates in item 5 were prepared by Richard C. Heinl, 92 Brixton Road South, West Hempstead, New York 11552.

Defendant contends the plaintiffs' claim for property damage should be dismissed because in June, 1990, plaintiffs recovered $ 58,037 from their insurer and then assigned their rights to Aetna to recover from Avianca for the monies paid to plaintiff from Aetna. Ultimately, Aetna and Avianca entered a settlement agreement for the monies

paid from Aetna to the plaintiffs whereby Avianca paid Aetna $ 40,000 for the property damage and Aetna released [**19] Avianca in the settlement of its subrogated claims only. [7]

> 7 The release states "This release is given by THE AETNA CASUALTY AND SURETY COMPANY in settlement of its subrogation claims only. It has no force or effect against those claims made by SAMUEL TISSENBAUM or other members of his family for personal injuries or uninsured losses arising from the Avianca Flight #052 crash on January 25, 1990.

The extent of an insurer's liability to the insured "does not delineate absolutely the extent of the legal liability of a tortfeasor to the insured." 6A JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW and PRACTICE § 4103 (1972). The fact that the insured plaintiffs assigned their rights to recover from Avianca for property damage to their insurance carrier does not affect plaintiffs' status as real parties in interest and therefore does not affect their ability to pursue a claim against the tortfeasor. *CPLR § 1004* [8]; *Feeter v. Van Scott Bros., Inc., 74 Misc. 2d 388, 345 N.Y.S.2d 374, 375-76 (1973)* (Where [**20] approximately 12% of fire loss was uninsured, insureds, who had executed a "loan receipt" (or subrogation receipt) in favor of the insurer in consideration of receipt of $ 43,500 under home owner's policy, could maintain claims against the tortfeasor in their own names, for the amount paid by the insurer and for their uninsured loss.).

> 8 *§ 1004* When joinder unnecessary. Except where otherwise prescribed by order of court, . . . a trustee of an express insured person who has executed to his insurer either a loan or subrogation receipt, . . or other similar agreement, . . . may sue or be sued without joining with him the person for or against whose interest the action was brought.

[*442] To interpret the release given to Avianca by Aetna the Court is governed by the principles of contract law so that "'where the language of a release is clear, effect must be given to the intent of the parties as indicated by the language employed.'" *Dury v. Dunadee, 52 A.D.2d 206, 383 N.Y.S.2d 748, 750* (4th Dep't. 1976) [**21] (quoting *Matter of Schaefer, 18 N.Y.2d 314, 221 N.E.2d 538, 540, 274 N.Y.S.2d 869 (1966))*. If the language of an instrument limits the release to certain claims, "then the release will be operative as to those matters only." *Herman v. Malamed, 110 A.D.2d 575, 487 N.Y.S.2d 791, 793 (1985)* (citing *Lanni v. Smith, 89 A.D.2d 782, 453 N.Y.S.2d 497* (4th Dep't. 1982), *appeal withdrawn, 65 N.Y.S.2d 925 (1985))*.

The fact that plaintiffs recovered from Aetna and subrogated to Aetna the right to sue the tortfeasor for recovery of Aetna's insurance payment does not destroy plaintiffs' status as real parties in interest or preclude plaintiffs from bringing claims for uninsured losses against the tortfeasor. The release between Aetna and Avianca states that it is for the subrogated claims only and that it does not release Avianca from its responsibility for claims by the plaintiffs for personal injury and uninsured claims. This Court is bound to abide by the specific release language. In accordance with New York law, this Court holds that to the extent the plaintiffs are seeking recovery for uninsured repair and restoration expenses or diminution of property value together with [**22] interference with the quiet enjoyment of their land those claims are valid and defendant's motion for summary judgement is denied.

CONCLUSION

This Court sympathizes with the plaintiffs and believes they suffered emotional injury as a result of the tragic air disaster which ended up in their backyard. Nonetheless, summary judgment is granted in favor of the defendant on the issue of emotional damages as plaintiffs failed to

establish the existence of an essential element of their case, specifically a direct duty running from the defendant airline to the plaintiffs. Additionally, this Court finds plaintiff, as a matter of law, may not maintain a claim of intentional trespass. Summary judgment is denied to the extent that the plaintiffs seek to bring claims against the tortfeasor to recover for uninsured losses which were never subrogated to Aetna.

SO ORDERED.

 ¿Por qué el tribunal determina que la compañía Avianca no actuó con *intent*, cuando su aeronave cayó en picada y se estrelló en la propiedad de los Tissenbaum?

 Avianca acababa de tener cuatro accidentes en muy poco tiempo: Barranquilla, Calúcuta, Madrid y Nueva York.

 EDWARD J. MALOUF, HARRY HOLLANDER, & C.M. PRESLEY, Appellants V. DALLAS ATHLETIC COUNTRY CLUB, Appellee No. 05-91-00562-CV COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS 837 S.W.2d 674 July 21, 1992, filed

Opinion By Justice Lagarde

Appellants own homes adjacent to the number six hole of one of appellee's (DAC) two golf courses. Appellants sued DAC for damages caused by golf balls spiking their property. After a bench trial, the trial court entered findings of fact and conclusions of law. Based thereon, the trial court rendered a take-nothing judgment in favor of DAC. Appellants argue that this was not a fair way to dispose of the case. In four points of error, appellants contend, generally, that the trial court erred in finding that (1) DAC did not trespass upon the property; and (2) DAC was not negligent in redesigning the golf course. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Edward Malouf, Harry Hollander, [**2] and C.M. Presley bought houses which abut the number six hole of the "Gold" golf course owned and managed by DAC. Each appellant complains of damage to his car and home caused by errant golf balls from unidentified golfers. Although each appellant complained to DAC, each was told it was not DAC's policy to reimburse for damage caused by unidentified third parties.

At trial, DAC general manager Robert Jones testified that the club has a procedure it follows when a golfer hits a stray shot. If notified, management will go out and inquire of groups three holes forward and three holes backward, if anyone hit the stray shot. If someone steps forward, then DAC either charges that person for the damage or puts the two parties together. DAC followed this procedure when a golf ball broke appellant Presley's window. On that day, the person who hit the ball spoke up. The Mesquite Chamber of Commerce had rented the club for that day and it reimbursed Presley on his claim.

Appellants initially filed individual lawsuits in a justice of the peace court. The justice of the peace entered judgments in favor of appellants. DAC appealed to the Dallas County Court at Law Number Two. In that court, [**3] the cases were consolidated for trial. After a trial de novo, the trial court entered a take-nothing judgment against appellants.

LEGAL ANALYSIS

Standards of Review

Appellants raise both legal and factual sufficiency points. A legal-sufficiency [*676] or conclusive-evidence point is a question of law. *City of Dallas v. Moreau, 718 S.W.2d 776, 778* (Tex. App.--Corpus Christi 1986, writ ref'd n.r.e.). Appellants had the burden of proof at trial to show that DAC trespassed and was negligent in its design

of the course. Thus, appellants have the burden of demonstrating on appeal that the evidence conclusively established all vital facts in support of those issues. *See Ritchey v. Crawford, 734 S.W.2d 85, 86* (Houston [1st Dist.] 1987, no writ). The initial review of a matter-of-law point is the same as that required for a no-evidence point. *A.B.F. Freight Sys. v. Austrian Import, 798 S.W.2d 606, 612* (Tex. App.--Dallas 1990, writ denied). However, in addition to finding no probative evidence to support the trial court's finding, this Court must also find that the contrary proposition to the finding is established as a matter of law. *Holley v. Watts,* [**4] *629 S.W.2d 694, 696 (Tex. 1982)*; *A.B.F. Freight Sys., 798 S.W.2d at 612*.

In reviewing a factual-sufficiency or great-weight-and-preponderance point of error, this Court must consider and weigh all of the evidence relevant to the fact being challenged to determine whether the verdict is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Harco Nat'l Ins. Co. v. Villanueva, 765 S.W.2d 809, 810* (Tex. App.--Dallas 1988, writ denied); *Ellsworth v. Bishop Jewelry & Loan Co., 742 S.W.2d 533, 535* (Tex. App.--Dallas 1987, writ denied). However, this Court is not a fact finder, and we do not pass upon the credibility of the witnesses or substitute our judgment for that of the trier of fact, even if there is conflicting evidence that would support a different conclusion. *Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986)*; *Harco Nat'l Ins. Co., 765 S.W.2d at 810*. When both legal and factual insufficiency points are raised, we are to rule upon the legal-insufficiency point first. *Glover v. Texas Gen. Indem. Co., 619 S.W.2d 400, 401 (Tex. 1981)*; *Stiles v. Royal Ins. Co. of Am., 798 S.W.2d 591, 593* (Tex. App.--Dallas 1990, writ [**5] denied).

Trespass

In points of error one and three, appellants argue that they established the elements of trespass and that, because DAC filed a general denial, there was no affirmative

defense. The gist of trespass to personalty is an injury to, or interference with, possession, unlawfully, with or without the exercise of physical force. *Mountain States Tel. & Tel. Co. v. Vowell Constr. Co., 161 Tex. 432, 341 S.W.2d 148, 150 (Tex. 1960)*. Destruction of, or injury to, personal property, regardless of negligence, may be a trespass. *Id.* A trespass is usually regarded as an intentional tort in the sense that it involves an intent to commit an act which violates a property right, or would be practically certain to have that effect, although the actor may not know that the act he intends to commit is such a violation. *General Tel. Co. v. BI-Co Pavers, Inc., 514 S.W. 2d 168, 170* (Tex. Civ. App.--Dallas 1974, no writ). Unless the intended act *would* violate a property right, the actor's liability for unintended consequences ordinarily depends upon proof of negligence. *Id.* (emphasis added). [2] [**6]

> 2 Although appellants asserted a negligence cause of action, it was only for negligent design and construction of the course and for failure to properly train and monitor the individual golfers--not for negligence in the hitting of the golf balls.

Appellants contend that DAC is liable for trespass. The trial court made the following findings of fact:

> 1. C.M. Presley suffered damage to his . . . Ford Mustang . . . and his fiberglass awning from a golfball(s).
>
> 2. Harry Hollander suffered damage to his Porsche . . . and his window from a golfball(s).
>
> 3. Edward J. Malouf suffered damage to his . . . Cutlass stationwagon from a golfball(s).
>
> 4. Dallas Athletic Club Country Club extensively revised and redesigned the layout of fairway No. 6 on the Gold course after 1987

> to make it less possible for golfballs to move right off of the tee of fairway No. 6.

[*677] Additionally, the trial court made the following conclusions of law:

> 1. Dallas Athletic Club Country Club was not negligent in the original design of fairway No. 6 on its Gold course.
>
> 2. [**7] Dallas Athletic Club Country Club was not negligent in the redesign, after 1987, of fairway No. 6 of the Gold course.
>
> 3, 4, 5. Dallas Athletic Club Country Club did not trespass, severally or jointly, onto the property, real or personal, of C.M. Presley, Harry Hollander, or Edward J. Malouf.

The evidence supports the trial court's findings and conclusions that appellants suffered destruction of, or injury to, personal property. *See Mountain States Tel. & Tel. Co., 341 S.W.2d at 150*. Each appellant testified concerning his individual damages and supplied a repair bill documenting the cost of the damages. However, the record reflects neither legal nor factual evidence that either DAC or the individual golfers intended to commit an act which violated a property right. *Id.* During a game of golf, on the Gold course, the individual golfers intend to hit golf balls toward hole number six. This does not violate a property right. The fact that the ball may "slice" or "hook" onto appellants' properties is an unintended consequence. [3] Appellants had the burden of proof at trial and on appeal of showing that the evidence conclusively established the elements of trespass. Because [**8] appellants failed to demonstrate that DAC or the individual golfers intentionally caused the golf balls to damage appellants' personal property, we cannot say that the trial court's

conclusion of law that the DAC did not trespass is erroneous.

> 3 Where one or more elements of a ground of recovery or defense have been found by the trial court, omitted unrequested elements, where supported by the evidence, will be supplied by presumption in support of the judgment. TEX. R. CIV. P. 299; *Smith v. Smith, 757 S.W.2d 422, 427* (Tex. App.--Dallas 1988, writ denied).

Appellants maintain, however, that liability for trespass is not dependent upon personal participation and that one who aids, assists, advises, or gives encouragement to the actual trespasser, or concert and cooperation in the commission of a trespass, or subsequent ratification or adoption by one of an act of another for his benefit or in his interest is equally liable with him who does the act complained of. *Parker v. Kangerga, 482 S.W.2d 43,* [**9] *47* (Tex. Civ. App.--Tyler 1972, writ ref'd n.r.e.). Specifically, appellants assert that DAC is liable because it provides the course, physical plant, and services necessary to enable the golfers to play, and it receives an economic benefit from green fees. Because we have held, however, that the golfers did not trespass, DAC cannot be jointly or severally liable.

Appellants argue further that other jurisdictions have held country clubs liable for damages to adjacent homeowners caused by golfers. However, appellants concede that the cases they cite were not brought under a theory of trespass. In *Nussbaum v. Lacopo, 27 N.Y.2d 311, 265 N.E.2d 762, 317 N.Y.S.2d 347 (N.Y. 1970),* a stray golf ball caused personal injury to a plaintiff homeowner. The plaintiff sued the country club on theories of nuisance and negligence in design. The plaintiff also sued the golfer, who was a trespasser on the golf course, for failure to give a warning. *Id., at 764*. The court held for the defendants and found no negligence and no nuisance. *Id.; see also*

Sierra Screw Prod. v. Azusa Greens, Inc., 88 Cal. App. 3d 358, 151 Cal. Rptr. 799, 801 (Cal. Ct. App. 1979) (plaintiffs sued owners of a [**10] public golf course for an injunction under theories of nuisance, trespass, and negligence; the trial court found in favor of plaintiffs on the nuisance cause of action; the court of appeals affirmed). *Cf. Fenton v. Quaboag Country Club, Inc., 353 Mass. 534, 233 N.E.2d 216, 219 (Mass. 1968)* (golf balls landing on plaintiff's property was a trespass of such a nature that it might be terminated by injunction).

We conclude that there was probative evidence developed in this record that supports the trial court's factual finding of damage to appellants' property. Further, we conclude that appellants did not establish [*678] the elements of trespass as a matter of law. We also conclude that the trial court's conclusion of law that DAC did not trespass was not against the great weight and preponderance of the evidence. Consequently, we overrule points one and three.

Requested Additional Findings of Fact and Conclusions of Law

In their second point of error, appellants argue that the trial court erred in refusing to enter the additional findings of fact and conclusions of law which they requested. A point of error is sufficient if it directs the attention of the appellate [**11] court to the error about which the complaint is made. *TEX. R. APP. P. 74(d).* The argument shall include: (1) a fair, condensed statement of the facts pertinent to such point of error, with reference to the pages in the record where the same may be found; and (2) such discussion of the facts and the authorities relied upon as may be requisite to maintain the point at issue. TEX. R. APP. 74(j). Appellants fail to cite any authority in support of their argument. We overrule point two.

Negligence

In their fourth point, appellants complain that the trial court erred in finding that DAC was not negligent in redesigning the golf course. The trial court specifically found that:

> Dallas Athletic Club Country Club extensively revised and redesigned the layout of fairway No. 6 on the Gold course after 1987 to make it less possible for golfballs to move right off of the tee of fairway No. 6.

and

> Dallas Athletic Club Country Club was not negligent in the redesign, after 1987, of fairway No. 6 of the Gold course.

Appellants appear to ground their argument on the six-foot photinia hedges and a fence which DAC installed as part of the redesign. Appellants contend that DAC [**12] did not act as a reasonably prudent person in putting up the fence and hedge because the hedges handicap their view of the green. Thus, there is no way for appellants to be forewarned of an impending, speeding ball. We disagree.

A review of the trial testimony and exhibits reveals that DAC redesigned fairway number six to make the golfers aim left and away from the homes on the right by doing the following:

> (1) Commissioned Jack Nicklaus to redesign the course.
>
> (2) Held meetings about the redesign, specifically in changing hole number six to aim the golfer left.
>
> (3) Moved the fairway approximately 20 to 30 yards left.

(4) Moved the tee box and changed its direction to point left.

(5) Moved the member's tees up and aimed left.

(6) Added mounds, berms, and a sand bunker approximately one hundred yards from the tee box. The mounds and berms run the length of the cart path which is between the fence line and the alley and the homes.

(7) Planted trees.

(8) Moved all hazards from the left side to the right side.

(9) Planted six-foot tall photinias.

DAC's general manager testified that he had played hole number six before and after the reconstruction. [**13] After the redesign, he had to aim left; otherwise, he would take a stroke penalty. Additionally, DAC entered into evidence a blueprint diagram of the Gold course that illustrated how the hole was changed.

We conclude that there was probative evidence supporting the trial court's factual finding and its conclusion of no negligence in redesign of the golf course. Moreover, we conclude that appellants did not establish the elements of negligent redesign as a matter of law. We also conclude that the trial court's factual finding was not against the great weight and preponderance of the evidence. Accordingly, we overrule point four. We affirm the trial court's judgment.

 ¿No son los perros que suelta Gray análogos, acaso, a las pelotas que arrojan los golfistas del Club Atlético de Dallas?

¿Qué hechos presume un tribunal en la instancia de la apelación? En *Malouf*, a diferencia de *Pegg*, por la postura procesal de la decisión, los miembros del jurado ya habían realizado la determinación de qué hechos quebaban probados y qué hechos no.

TRESPASS: ENTRY

J.H. DESNICK, M.D., EYE SERVICES, LIMITED; MARK A. GLAZER; and GEORGE V. SIMON, Plaintiffs-Appellants, v. AMERICAN BROADCASTING COMPANIES, INCORPORATED; JON ENTINE; and SAM DONALDSON, Defendants-Appellees. No. 94-2399 UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 44 F.3d 1345 November 1, 1994, Argued January 10, 1995, Decided

[*1347] POSNER, *Chief Judge.* The plaintiffs--an ophthalmic clinic known as the "Desnick Eye Center" after its owner, Dr. Desnick, and two ophthalmic surgeons employed by the clinic, Glazer and Simon--appeal from the dismissal of their suit against the ABC television network, a producer of the ABC program *PrimeTime Live* named Entine, and the program's star reporter, Donaldson. The suit is for trespass, defamation, and other torts arising out of the production and broadcast of a program segment of *PrimeTime Live* that was highly critical of the Desnick Eye Center. Federal jurisdiction is based primarily on diversity of citizenship (though there is one federal claim), with Illinois law, and to a lesser extent Wisconsin and Indiana law, supplying the substantive rules on which decision is to be based. The suit was dismissed for failure to state a claim. See *Desnick v. Capital Cities/ABC, Inc., 851 F. Supp. 303 (N.D. Ill. 1994).* [**2] The record before us is limited to the complaint and to a transcript, admitted to be accurate, of the complained-about segment.

In March of 1993 Entine telephoned Dr. Desnick and told him that *PrimeTime Live* wanted to do a broadcast segment on large cataract practices. The Desnick Eye Center has 25 offices in four midwestern states and performs more than 10,000 cataract operations a year, mostly on elderly persons whose cataract surgery is paid for by Medicare. [*1348] The complaint alleges--and in the posture of the case we must take the allegations to be true, though of course they may not be--that Entine told Desnick that the segment would not be about just one cataract practice, that it would not involve "ambush" interviews or "undercover" surveillance, and that it would be "fair and balanced." Thus reassured, Desnick permitted an ABC crew to videotape the Desnick Eye Center's main premises in Chicago, to film a cataract operation "live," and to interview doctors, technicians, and patients. Desnick also gave Entine a videotape explaining the Desnick Eye Center's services.

Unbeknownst to Desnick, Entine had dispatched persons equipped with concealed cameras to offices of the Desnick Eye [**3] Center in Wisconsin and Indiana. Posing as patients, these persons--seven in all--requested eye examinations. Plaintiffs Glazer and Simon are among the employees of the Desnick Eye Center who were secretly videotaped examining these "test patients."

The program aired on June 10. Donaldson introduces the segment by saying, "We begin tonight with the story of a so-called 'big cutter,' Dr. James Desnick. . . . In our undercover investigation of the big cutter you'll meet tonight, we turned up evidence that he may also be a big charger, doing unnecessary cataract surgery for the money." Brief interviews with four patients of the Desnick Eye Center follow. One of the patients is satisfied ("I was blessed"); the other three are not--one of them says, "If you got three eyes, he'll get three eyes." Donaldson then reports on the experiences of the seven test patients. The two who were under 65 and thus not eligible for Medicare

reimbursement were told they didn't need cataract surgery. Four of the other five were told they did. Glazer and Simon are shown recommending cataract surgery to them. Donaldson tells the viewer that *PrimeTime Live* has hired a professor of ophthalmology to examine the [**4] test patients who had been told they needed cataract surgery, and the professor tells the viewer that they didn't need it--with regard to one he says, "I think it would be near malpractice to do surgery on him." Later in the segment he denies that this could just be an honest difference of opinion between professionals.

An ophthalmic surgeon is interviewed who had turned down a job at the Desnick Eye Center because he would not have been "able to screen who I was going to operate on." He claims to have been told by one of the doctors at the Center (not Glazer or Simon) that "as soon as I reject them [i.e., turn down a patient for cataract surgery], they're going in the next room to get surgery." A former marketing executive for the Center says Desnick took advantage of "people who had Alzheimer's, people who did not know what planet they were on, people whose quality of life wouldn't change one iota by having cataract surgery done." Two patients are interviewed who report miserable experiences with the Center--one claiming that the doctors there had failed to spot an easily visible melanoma, another that as a result of unnecessary cataract surgery her "eye ruptured," producing "running [**5] pus." A former employee tells the viewer that Dr. Desnick alters patients' medical records to show they need cataract surgery--for example, changing the record of one patient's vision test from 20/30 to 20/80--and that he instructs all members of his staff to use pens of the same color in order to facilitate the alteration of patients' records.

One symptom of cataracts is that lights of normal brightness produce glare. Glazer is shown telling a patient, "You know, you're getting glare. I would say we could do

significantly better [with an operation]." And Simon is shown asking two patients, "Do you ever notice any glare or blurriness when you're driving, or difficulty with the signs?" Both say no, and immediately Donaldson tells the viewer that "the Desnick Center uses a very interesting machine, called an auto-refractor, to determine whether there are glare problems." Donaldson demonstrates the machine, then says that "Paddy Kalish is an optometrist who says that when he worked at the Desnick clinic from 1987 to 1990, the machine was regularly rigged. He says he watched a technician tamper with the machine, this way"--and then Kalish gives a demonstration, adding, "This happened [**6] routinely for all the older patients that came in [*1349] for the eye exams." Donaldson reveals that Dr. Desnick has obtained a judgment against Kalish for defamation, but adds that "Kalish is not the only one to tell us the machine may have been rigged. PrimeTime talked to four other former Desnick employees who say almost everyone failed the glare test."

There is more, including mention of a proceeding begun by the Illinois Medical Board in which Dr. Desnick is charged with a number of counts of malpractice and deception--and an "ambush" interview. Donaldson accosts Desnick at O'Hare Airport and cries, "Is it true, Doctor, that you changed medical records to show less vision than your patients actually have? We've been told, Doctor, that you've changed the glare machine so we have a different reading. Is that correct? Doctor, why won't you respond to the questions?"

The plaintiffs' claims fall into two distinct classes. The first arises from the broadcast itself, the second from the means by which ABC and Entine obtained the information that they used in the broadcast. The first is a class of one. The broadcast is alleged to have defamed the three plaintiffs by charging that the glare machine [**7] is tampered with. No other aspect of the broadcast is claimed to be tortious. The defendants used excerpts from the

Desnick videotape in the broadcast, and the plaintiffs say that this was done without Dr. Desnick's permission. But they do not claim that in showing the videotape without authorization the defendants infringed copyright, cast the plaintiffs in a false light, or otherwise invaded a right, although they do claim that the defendants had obtained the videotape fraudulently (a claim in the second class). And they do not claim that any of the other charges in the broadcast that are critical of them, such as that they perform unnecessary surgery or that Dr. Desnick tampers with patients' medical records, are false.

We begin with the charge of defamation, which the parties agree is governed by Illinois law. The district judge ruled that Glazer and Simon could not establish defamation concerning the tampering with the glare machine because the viewer would not think that *they* were being accused of doing the tampering. Courts used to strain to find that a defamatory statement that did not actually name the plaintiff might reasonably be understood to be about someone else; this [**8] was the "innocent construction" rule. *John v. Tribune Co., 24 Ill. 2d 437, 181 N.E.2d 105, 108 (Ill. 1962).* But in modern law it is enough if the audience would be likely to think that the defendant was talking about the plaintiff. *Chapski v. Copley Press, 92 Ill. 2d 344, 442 N.E.2d 195, 65 Ill. Dec. 884 (Ill. 1982)*; *Haynes v. Alfred A. Knopf, Inc., 8 F.3d 1222, 1226 (7th Cir. 1993)* (applying Illinois law).

Whether it would think that or not is treated by the Illinois courts as a question of law, to be decided by the judge subject to plenary appellate review. *Chapski v. Copley Press, supra, 442 N.E.2d at 199.* We have done the same in diversity cases in which Illinois law supplies the rule of decision, *Babb v. Minder, 806 F.2d 749, 757 and n. 3 (7th Cir. 1986)*; *Action Repair, Inc. v. American Broadcasting Cos., 776 F.2d 143, 145 (7th Cir. 1985)*, but without remarking that *this* question--whether application

of the innocent construction rule is a question [**9] of fact or of law, and the scope of appellate review--is one of federal, not of state, law. For it is a question about the control of the jury and the relation of the appellate to the trial court, rather than about the substantive law of defamation. See *Mayer v. Gary Partners & Co., 29 F.3d 330 (7th Cir. 1994)*; *Coplay Cement Co. v. Willis & Paul Group, 983 F.2d 1435, 1438 (7th Cir. 1993)*. But as no party in the present case has questioned the propriety of plenary review, we shall leave the question whether the federal rule should be identical to Illinois's rule for another day.

The part of the broadcast about the tampering with the glare machine follows immediately upon Dr. Simon's asking test patients about glare; and earlier Dr. Glazer had been shown asking the same thing of another test patient. The inference that Glazer and Simon are mixed up in the tampering is not inevitable, but it is sufficiently probable to entitle them to sue. *Rosner v. Field Enterprises, Inc., 151 Ill. Dec. 154, 564 N.E.2d 131, 153 (Ill. App. 1990)*. Kalish tells the viewer that the glare machine is tampered with [**10] in all cases involving [*1350] elderly patients, and hence by implication in cases handled by Drs. Glazer and Simon. And elsewhere the broadcast segment has insinuated that any doctor who works for the Desnick Eye Center is unethical. It is true that Kalish says that *technicians* do the tampering. But presumably they do so under a doctor's direction. Most viewers would infer that Glazer and Simon, if they did not actually change the setting on the machine themselves, were complicit with the actual tamperer. And even if this were wrong, it would not justify dismissal of the defamation count with respect to the other plaintiff, the Desnick Eye Center itself.

The judge also ruled, however, that the defamation count failed because the allegation that the plaintiffs tampered with the glare machine did not significantly increase the damage to their reputations inflicted by the

parts of the broadcast segment they do not challenge. If a false accusation cannot do any incremental harm to the plaintiff's deserved reputation because the truth if known would have demolished his reputation already, he has not been harmed *by the false accusation* and therefore has no remedy. *Haynes v. Alfred A. Knopf, Inc., supra, 8 F.3d at 1227-29.* [**11] This is provided, however, that the false accusation is closely related to the true facts. A sexual deviant might have a worse reputation than an embezzler, but it would not be a defense to a charge of falsely accusing a person of being an embezzler that while he is not an embezzler, he is a sexual deviant, and that is worse. Such a rule "would strip people who had done bad things of any legal protection against being defamed; they would be defamation outlaws." *Id. at 1228*; see also *Liberty Lobby, Inc. v. Anderson, 241 U.S. App. D.C. 246, 746 F.2d 1563, 1568 and n. 6 (D.C. Cir. 1984),* vacated on other grounds, *477 U.S. 242 (1986).*

The doctrine that we have been describing goes by the name of "substantial truth." *Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 516-17, 115 L. Ed. 2d 447, 111 S. Ct. 2419 (1991)*; *Lemons v. Chronicle Publishing Co., 253 Ill. App. 3d 888, 625 N.E.2d 789, 791, 192 Ill. Dec. 634 (Ill. App. 1993)*; *Moldea v. New York Times Co., 304 U.S. App. D.C. 406, 15 F.3d 1137, 1150,* [**12] modified on other grounds, *22 F.3d 310, 313 (D.C. Cir. 1994).* Here is an example from *Haynes.* The defendants' book said that Haynes had lost a job or jobs because of drinking. What was true was that, during a period in which he was indeed drinking heavily, he lost his job because his supervisor found an unopened bottle of liquor (which Haynes had received from a friend) in his pocket. Moreover, the author had left out of the book a number of very damaging facts about Haynes that later emerged in pretrial discovery, including the fact that he had been arrested and jailed for assaulting a police officer after

drinking. Everything considered, the literal truth about Haynes's drinking was neither materially different from, nor significantly less damning than, the falsehood.

Haynes had been decided on summary judgment, after the defendants had obtained the complete facts about Mr. Haynes in discovery. We said that the question whether a defamatory work is substantially true although erroneous in some details is ordinarily a jury question but that given the facts that had emerged in discovery no reasonable jury could find a significant incremental harm. *8 F.3d at 1228*. [**13] In this case there has been no discovery, so dismissal was justified only if it is clear from the transcript of the broadcast segment itself that the plaintiffs could not have been harmed by the charge that they tampered with the glare machine. This may *seem* clear because they do not challenge the other charges in the broadcast--such as that the Desnick Eye Center performs unnecessary surgery, sometimes with harmful results, that it preys on ignorant old people, and that Dr. Desnick alters patients' records to show a need for cataract surgery where there is none. These are serious charges, but unlike the situation in the *Haynes* case they neither are admitted nor are established by uncontested affidavits or other undisputed or indisputable evidence. Given the obstacles to proving defamation, the failure to mount a legal challenge to a defamatory statement cannot be considered an admission that the statement is true.

And even if all these other charges had been admitted or demonstrated to be true, [*1351] we could not say on this bare record that the charge of rigging the glare machine adds nothing to them. The other charges, even the alteration of patients' records, either fall into a gray [**14] area where disagreement merges with misconduct and disappointment in results with charges of malpractice, or are easily explained away without having to be denied--Desnick claimed merely to be correcting erroneous entries in patients' records made by his technicians. There can be no

explaining away the alteration of the settings on an ophthalmic machine so that a person with normal eyesight (Donaldson, who demonstrated the effect of the tampering with the machine on himself) experiences the symptoms of cataract. It is a particularly shocking charge to make against a clinic and its physicians. It would be one thing to accuse a radiologist of misreading x-rays, and another to accuse him of altering his x-ray machine so that a normal person was shown with a tumor on his lung.

Of course, when additional facts about the Desnick Eye Center are brought to light in discovery, it may turn out either that the machine was indeed tampered with or that, even if it was not, the plaintiffs did so many other bad things in the line of Medicare fraud that the tampering fades into insignificance. But this is not so clear at this stage that the defamation count of the complaint can properly be dismissed.

[**15] The second class of claims in this case concerns, as we said, the methods that the defendants used to create the broadcast segment. There are four such claims: that the defendants committed a trespass in insinuating the test patients into the Wisconsin and Indiana offices of the Desnick Eye Center, that they invaded the right of privacy of the Center and its doctors at those offices (specifically Glazer and Simon), that they violated federal and state statutes regulating electronic surveillance, and that they committed fraud by gaining access to the Chicago office by means of a false promise that they would present a "fair and balanced" picture of the Center's operations and would not use "ambush" interviews or undercover surveillance.

To enter upon another's land without consent is a trespass. The force of this rule has, it is true, been diluted somewhat by concepts of privilege and of implied consent. But there is no journalists' privilege to trespass. *Prahl v. Brosamle, 98 Wis. 2d 130, 295 N.W.2d 768, 780-81 (Wis.*

App. 1980); *Le Mistral, Inc. v. Columbia Broadcasting System, 61 A.D.2d 491, 402 N.Y.S.2d 815 (App. Div. 1978)*. [**16] And there can be no implied consent in any nonfictitious sense of the term when express consent is procured by a misrepresentation or a misleading omission. The Desnick Eye Center would not have agreed to the entry of the test patients into its offices had it known they wanted eye examinations only in order to gather material for a television expose of the Center and that they were going to make secret videotapes of the examinations. Yet some cases, illustrated by *Martin v. Fidelity & Casualty Co., 421 So. 2d 109, 111 (Ala. 1982)*, deem consent effective even though it was procured by fraud. There must be *something* to this surprising result. Without it a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in the dealer's showroom. Some of these might be [**17] classified as privileged trespasses, designed to promote competition. Others might be thought justified by some kind of implied consent--the restaurant critic for example might point by way of analogy to the use of the "fair use" defense by book reviewers charged with copyright infringement and argue that the restaurant industry as a whole would be injured if restaurants could exclude critics. But most such efforts at rationalization would be little better than evasions. The fact is that consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent.

[*1352] The law's willingness to give effect to consent procured by fraud is not limited to the tort of trespass. The *Restatement* gives the example of a man who obtains consent to sexual intercourse by promising a woman $ 100, yet (unbeknownst to her, of course) he pays her with a counterfeit bill and intended to do so from the start. The man is not guilty of battery, even though unconsented-to sexual intercourse is a battery. *Restatement (Second) of Torts § 892B,* [**18] *illustration 9,* pp. 373-74 (1979). Yet we know that to conceal the fact that one has a venereal disease transforms "consensual" intercourse into battery. *Crowell v. Crowell, 180 N.C. 516, 105 S.E. 206 (N.C. 1920)*. Seduction, standardly effected by false promises of love, is not rape, *Pletnikoff v. State, 719 P.2d 1039, 1043 (Alaska App. 1986)*; intercourse under the pretense of rendering medical or psychiatric treatment is, at least in most states. Compare *State v. Tizard,* 1994 WL 630498, * 8-10 (Tenn. Crim. App. Nov. 10, 1994), with *Boro v. Superior Court, 163 Cal. App. 3d 1224, 210 Cal. Rptr. 122 (Ct. App. 1985)*. It certainly is battery. *Bowman v. Home Life Ins. Co., 243 F.2d 331 (3d Cir. 1957)*; *Commonwealth v. Gregory, 132 Pa. Super. 507, 1 A.2d 501 (Pa. Super. 1938)*. Trespass presents close parallels. If a homeowner opens his door to a purported meter reader who is in fact nothing of the sort--just a busybody curious about the interior of the home--the homeowner's consent to his entry is not a defense [**19] to a suit for trespass. See *State v. Donahue, 93 Ore. App. 341, 762 P.2d 1022, 1025 (Or. App. 1988)*; *Bouillon v. Laclede Gaslight Co., 148 Mo. App. 462, 129 S.W. 401, 402 (Mo. App. 1910)*. And likewise if a competitor gained entry to a business firm's premises posing as a customer but in fact hoping to steal the firm's trade secrets. *Rockwell Graphic Systems, Inc. v. DEV Industries, Inc., 925 F.2d 174, 178 (7th Cir. 1991)*; *E.I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012, 1014 (5th Cir. 1970)*.

How to distinguish the two classes of case--the seducer from the medical impersonator, the restaurant critic from the meter-reader impersonator? The answer can have nothing to do with fraud; there is fraud in all the cases. It has to do with the interest that the torts in question, battery and trespass, protect. The one protects the inviolability of the person, the other the inviolability of the person's property. The woman who is seduced wants to have sex with her seducer, and the restaurant owner wants to have customers. The woman who is victimized [**20] by the medical impersonator has no desire to have sex with her doctor; she wants medical treatment. And the homeowner victimized by the phony meter reader does not want strangers in his house unless they have authorized service functions. The dealer's objection to the customer who claims falsely to have a lower price from a competing dealer is not to the physical presence of the customer, but to the fraud that he is trying to perpetuate. The lines are not bright--they are not even inevitable. They are the traces of the old forms of action, which have resulted in a multitude of artificial distinctions in modern law. But that is nothing new.

There was no invasion in the present case of any of the specific interests that the tort of trespass seeks to protect. The test patients entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves). The activities of the offices were not disrupted, as in *People v. Segal, 78 Misc. 2d 944, 358 N.Y.S.2d 866 (Crim. Ct. 1974),* another case of gaining entry by false pretenses. [**21] See also *Le Mistral, Inc. v. Columbia Broadcasting System, supra,* 402 N.Y.S.2d at 81 n. 1. Nor was there any "inva[sion of] a person's private space," *Haynes v. Alfred A. Knopf, Inc., supra, 8 F.3d at 1229,* as in our hypothetical meterreader case, as in the famous case of *De May v. Roberts, 46 Mich. 160, 9 N.W. 146 (Mich. 1881)* (where a

doctor, called to the plaintiff's home to deliver her baby, brought along with him a friend who was curious to see a birth but was not a medical doctor, and represented the friend to be his medical assistant), as in one of its numerous modern counterparts, *Miller v. National Broadcasting Co., 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668, 679 (Ct. App. 1986)*, and as in *Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971)*, on which the plaintiffs in our case rely. *Dietemann* involved a home. True, the portion [*1353] invaded was an office, where the plaintiff performed quack healing of nonexistent ailments. The parallel to this case is plain enough, but there is a difference. Dietemann was not in business, [**22] and did not advertise his services or charge for them. His quackery was private.

No embarrassingly intimate details of anybody's life were publicized in the present case. There was no eavesdropping on a private conversation; the testers recorded their own conversations with the Desnick Eye Center's physicians. There was no violation of the doctor-patient privilege. There was no theft, or intent to steal, trade secrets; no disruption of decorum, of peace and quiet; no noisy or distracting demonstrations. Had the testers been undercover FBI agents, there would have been no violation of the *Fourth Amendment*, because there would have been no invasion of a legally protected interest in property or privacy. *United States v. White, 401 U.S. 745, 28 L. Ed. 2d 453, 91 S. Ct. 1122 (1971)*; *Lewis v. United States, 385 U.S. 206, 211, 17 L. Ed. 2d 312, 87 S. Ct. 424 (1966)*; *Forster v. County of Santa Barbara, 896 F.2d 1146, 1148-49 (9th Cir. 1990)*; *Northside Realty Associates, Inc. v. United States, 605 F.2d 1348, 1355 (5th Cir. 1979)*. [**23] "Testers" who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers even if they are private persons not acting under color of law. Cf. *id. at 1355*. The situation of the defendants' "testers" is analogous. Like testers seeking evidence of violation of

antidiscrimination laws, the defendants' test patients gained entry into the plaintiffs' premises by misrepresenting their purposes (more precisely by a misleading omission to disclose those purposes). But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference with the ownership or possession of land. We need not consider what if any difference it would make if the plaintiffs had festooned the premises with signs forbidding the entry of testers or other snoops. Perhaps none, see *United States v. Centennial Builders, Inc., 747 F.2d 678, 683 (11th Cir. 1984),* but that is an issue for another day.

What we have said largely disposes of two other claims--infringement of the right of privacy, and illegal wiretapping. The right of privacy [**24] embraces several distinct interests, but the only ones conceivably involved here are the closely related interests in concealing intimate personal facts and in preventing intrusion into legitimately private activities, such as phone conversations. *Haynes v. Alfred A. Knopf, Inc., supra, 8 F.3d at 1229*; *Zinda v. Louisiana Pacific Corp., 149 Wis. 2d 913, 440 N.W.2d 548, 555 (Wis. 1989)*; *Doe v. Methodist Hospital, 639 N.E.2d 683, 685 (Ind. App. 1994)*. As we have said already, no intimate personal facts concerning the two individual plaintiffs (remember that Dr. Desnick himself is not a plaintiff) were revealed; and the only conversations that were recorded were conversations with the testers themselves. *Thomas v. Pearl, 998 F.2d 447, 452 (7th Cir. 1993)*.

The federal and state wiretapping statutes that the plaintiffs invoke allow one party to a conversation to record the conversation unless his purpose in doing so is to commit a crime or a tort or (in the case of the state, but not the federal, law) to do "other injurious acts." *18 U.S.C. § 2511* [**25] *(2)(d)*; *Wis. Stat. § 968.31(2)(c)*; *Thomas v. Pearl, supra, 998 F.2d at 451*; *State v. Waste Management of Wisconsin, Inc., 81 Wis. 2d 555, 261 N.W.2d 147, 154*

(Wis. 1978). The defendants did not order the camera-armed testers into the Desnick Eye Center's premises in order to commit a crime or tort. Maybe the program as it was eventually broadcast was tortious, for we have said that the defamation count was dismissed prematurely. But there is no suggestion that the defendants sent the testers into the Wisconsin and Illinois offices for the purpose of defaming the plaintiffs by charging tampering with the glare machine. The purpose, by the plaintiffs' own account, was to see whether the Center's physicians would recommend cataract surgery on the testers. By the same token it was not to injure the Desnick Eye Center, unless the public exposure of misconduct is an "injurious act" within the meaning of the Wisconsin statute. Telling the world the truth about a Medicare [*1354] fraud is hardly what the framers of the statute could have had in mind in forbidding a person to record his own conversations if he was trying to commit [**26] an "injurious act." See *id. at 154* and n. 17.

Last is the charge of fraud in the defendants' gaining entry to the Chicago office and being permitted while there to interview staff and film a cataract operation, and in their obtaining the Desnick Eye Center's informational videotape. The alleged fraud consists of a series of false promises by the defendants--that the broadcast segment would be fair and balanced and that the defendants would not use "ambush" interviews or undercover surveillance tactics in making the segment. Since the promises were given in exchange for Desnick's permission to do things calculated to enhance the value of the broadcast segment, they were, one might have thought, supported by consideration and thus a basis for a breach of contract suit. That we need not decide. The plaintiffs had a claim for breach of contract in their complaint and it survived the motion to dismiss, but they voluntarily dismissed the claim so that there would be a final judgment from which they could appeal. The only issue before us is fraud.

Unlike most states nowadays, Illinois does not provide a remedy for fraudulent promises ("promissory fraud")--unless they are part of a "scheme" [**27] to defraud. *Willis v. Atkins, 412 Ill. 245, 106 N.E.2d 370, 377-78 (Ill. 1952)*; *Stamatakis Industries, Inc. v. King, 165 Ill. App. 3d 879, 520 N.E.2d 770, 772-73, 117 Ill. Dec. 419 (Ill. App. 1987)*; *Bower v. Jones, 978 F.2d 1004, 1011-12 (7th Cir. 1992)*. The distinction between a mere promissory fraud and a scheme of promissory fraud is elusive, and has caused, to say the least, considerable uncertainty, as even the Illinois cases acknowledge. E.g., *Stamatakis Industries, Inc. v. King, supra, 520 N.E.2d at 772-73*; *Vance Pearson, Inc. v. Alexander, 86 Ill. App. 3d 1105, 408 N.E.2d 782, 787, 42 Ill. Dec. 204 (Ill. App. 1980)*. Some cases suggest that the exception has swallowed the rule. *Id. at 787*; *Lovejoy Electronics, Inc. v. O'Berto, 873 F.2d 1001, 1004 (7th Cir. 1989)*; *Price v. Highland Community Bank, 722 F. Supp. 454, 460 (N.D. Ill. 1989)*. Others seem unwilling to apply the exception. For [**28] a good discussion, see Michael J. Polelle, "An Illinois Choice: Fossil Law or an Action for Promissory Fraud?" 32 *DePaul L. Rev.* 565, 578-88 (1983).

The distinction certainly is unsatisfactory, but it reflects an understandable ambivalence, albeit one shared by few other states, about allowing suits to be based on nothing more than an allegation of a fraudulent promise. There is a risk of turning every breach of contract suit into a fraud suit, of circumventing the limitation that the doctrine of consideration is supposed however ineptly to place on making all promises legally enforceable, and of thwarting the rule that denies the award of punitive damages for breach of contract. A great many promises belong to the realm of puffery, bragging, "mere words," and casual bonhomie, rather than to that of serious commitment. They are not intended to and ordinarily do not induce reliance; a healthy skepticism is a better protection against being fooled by them than the costly remedies of the law. In any event it is not our proper role as a federal court in a

diversity suit to read "scheme" out of Illinois law; we must give it some meaning. Our best interpretation [**29] is that promissory fraud is actionable only if it either is particularly egregious or, what may amount to the same thing, it is embedded in a larger pattern of deceptions or enticements that reasonably induces reliance and against which the law ought to provide a remedy.

We cannot view the fraud alleged in this case in that light. Investigative journalists well known for ruthlessness promise to wear kid gloves. They break their promise, as any person of normal sophistication would expect. If that is "fraud," it is the kind against which potential victims can easily arm themselves by maintaining a minimum of skepticism about journalistic goals and methods. Desnick, needless to say, was no tyro, or child, or otherwise a member of a vulnerable group. He is a successful professional and entrepreneur. No legal remedies to protect him from what happened are required, or by Illinois provided. It would be different if the false promises were stations on the way to taking [*1355] Desnick to the cleaners. An elaborate artifice of fraud is the central meaning of a scheme to defraud through false promises. The only scheme here was a scheme to expose publicly any bad practices that the investigative team [**30] discovered, and that is not a fraudulent scheme.

Anyway we cannot see how the plaintiffs could have been harmed by the false promises. We may assume that had the defendants been honest, Desnick would have refused to admit the ABC crew to the Chicago premises or given Entine the videotape. But none of the negative parts of the broadcast segment were supplied by the visit to the Chicago premises or came out of the informational videotape, and Desnick could not have prevented the ambush interview or the undercover surveillance. The socalled fraud was harmless.

One further point about the claims concerning the making of the program segment, as distinct from the content of the segment itself, needs to be made. The Supreme Court in the name of the *First Amendment* has hedged about defamation suits, even when not brought by public figures, with many safeguards designed to protect a vigorous market in ideas and opinions. Today's "tabloid" style investigative television reportage, conducted by networks desperate for viewers in an increasingly competitive television market (see *Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994))*, constitutes--although it [**31] is often shrill, one-sided, and offensive, and sometimes defamatory--an important part of that market. It is entitled to all the safeguards with which the Supreme Court has surrounded liability for defamation. And it is entitled to them regardless of the name of the tort, see, e.g., *Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988)*, and, we add, regardless of whether the tort suit is aimed at the content of the broadcast or the production of the broadcast. If the broadcast itself does not contain actionable defamation, and no established rights are invaded in the process of creating it (for the media have no general immunity from tort or contract liability, *Cohen v. Cowles Media Co., 501 U.S. 663, 669-70, 115 L. Ed. 2d 586, 111 S. Ct. 2513 (1991)*; *Le Mistral, Inc. v. Columbia Broadcasting System, supra)*, then the target has no legal remedy even if the investigatory tactics used by the network are surreptitious, confrontational, unscrupulous, and ungentlemanly. In this case, there may have been--it is too early to tell--an actionable [**32] defamation, and if so the plaintiffs have a remedy. But none of their established rights under either state law or the federal wiretapping law was infringed by the making, as opposed to the dissemination, of the broadcast segment of which they complain, with the possible and possibly abandoned exception of contract law.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

G. B. Van Alstyne, Plaintiff, v. Rochester Telephone Corporation, Defendant City Court of Rochester of New York, Civil Branch 163 Misc. 258; 296 N.Y.S. 726 February 24, 1937

[*259] [**727] WILDER The plaintiff sues for damages suffered through the death of his two dogs, alleged to be due to the acts of the defendant.

The plaintiff was the owner of a valuable hunting dog, Nancy. He kept it in an inclosure at the rear of the lot upon which he lived. Within the inclosure or run there was a kennel. At the rear of the lot, the rear of the run, was a concrete pole upon which the defendant, under permit or easement, maintained a lead cable.

On May 4, 1936, the defendant's servants opened the cable by removing the lead for a space. Other work was done on later days. Nancy had been kept in the inclosure off and on for two years. On May eighteenth she showed signs of illness and was taken to Dr. Clarence Webber, a veterinarian. Despite his efforts the dog died on June third. Dr. Webber performed an autopsy and found "metallic poisoning of the lead type."

On June thirtieth the defendant completed its work and sealed the cable and sealed the joint by wiping it with molten lead or solder. Meantime the defendant had purchased another dog, Pooch, which he kept in the inclosure. It, too, became ill on July fifth and was taken to Dr. Webber. He testified that its symptoms were like those of Nancy. Pooch died, and the autopsy also disclosed lead poison. A chemical analysis of the viscera disclosed the lead.

At or shortly before the death of Pooch, the plaintiff made a careful inspection of the inclosure and found three handfuls of small pieces of lead. A quantity of them was introduced in evidence. It appears that some of them were lead parings and that the others were formed by striking the

ground after falling in a molten state. Also in evidence was a piece of iron pipe that had lain for a considerable time. Upon it were numerous spatters of lead such as occur from the precipitation of the molten metal. Although the lead was not discovered until after the death of the first dog, Nancy, it is naturally, and, therefore, appropriately, to be inferred that the lead was deposited in the run by the defendant's operations on the cable, and that the dogs died as a result of eating some of that lead. There is no evidence which so much as points to an inconsistent possibility.

[*260] [**728] May the defendant be held responsible as for negligence in permitting the lead to fall upon the plaintiff's premises? This question is both complex and perplexing. It involves numerous elements which, perhaps, may best be indicated by reference to various passages in the Restatement of the Law of Torts (Vol. 2): To what extent is one charged with knowledge of the operation of natural forces and the habits and capacities of animals? (§§ 290 and 302 and comments.) What is the effect of the fact that the defendant was engaged in the extension or repair of an instrument of public utility? (§§ 291, 292 and 293 and comments.) What of the intervening action of the dogs and was it a dependent or superseding cause? (§§ 437, 441 to 443, inclusive, and comments.)

Generally speaking, was the defendant guilty of negligence at all? Certainly its acts were not essentially or obviously dangerous. Were the setting and surrounding conditions such as to suggest to a person of average prudence and foresight that the acts done or omitted might have the results which ensued? (§§ 283, 284, 435 and comments.) Is a person of average wisdom and experience aware that a dog may be poisoned by lead when introduced by ingestion? Does he know or should he know that a dog would eat such a substance? These are some of the queries that arise in connection with the question whether the results should, in reason, have been foreseen. Reasonable minds might well differ on the foreseeability of the

consequences in this case, just as they differed in their opinions upon a kindred question in *Palsgraf v. Long Island R. R. Co. (248 N. Y. 339, at pp. 346, 347)*.

It cannot be said with assurance that the hazard was more apparent in the present instance than in that case whose prevailing opinion declares that "negligence in the abstract, apart from things related, is not a tort," that "the orbit of danger as disclosed to the eye of reasonable vigilance would be the orbit of duty" (*Palsgraf v. Long Island R. R. Co., supra, at p. 343*), and, with respect to holding one to the duty of foreseeing the consequences, that "life will have to be made over, and human nature transformed before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behaviour must conform." (*Palsgraf v. Long Island R. R. Co., supra, at p. 343*.)

I am unable to perceive between the two cases any distinction of sufficient merit to hold the defendant upon the ground of negligence.

[**729] There remains, however, the fact that there was an invasion of the plaintiff's premises. True, the defendant had an easement for the maintenance of its line, and presumably this expressly [*261] conferred the right of access to the plaintiff's land for purposes of repairs or extensions. But it is not to be presumed, nor is it shown, that the defendant had an express right to cast unnecessarily, or to leave in any event, articles or substances upon the premises. Lacking such an express right, the law gives him none.

Such an invasion of the premises of another renders the invader liable whether it be intentional or not or whether the loss resulting to the owner be direct or consequential. He is liable regardless of the existence or non-existence of negligence. That is one of the grounds for holding one liable when, for instance by blasting, he casts material upon

the land of another to the injury of buildings (*Hay v. Cohoes Co., 2 N. Y. 159*), or to a person rightfully thereon. (*St. Peter v. Denison, 58 N. Y. 416*.)

It does not matter that the plaintiff here seeks recovery not for direct damage to his soil or to vegetation or structures, but for consequential damages. Recovery does not depend upon directness of the damage. The test is whether there was a direct invasion. Given that, responsibility follows. (*Atwater v. Trustees of Canandaigua, 124 N. Y. 602*; *Huffmire v. City of Brooklyn, 162 id. 584*; *Gordon v. Ellenville & Kingston R. R. Co., 119 App. Div. 797*; recognized in *Waterloo Woolen Mfg. Co. v. State, 118 Misc. 516*.)

Radcliff v. Mayor of Brooklyn (4 N. Y. 195) contains what is apparently the original extended exposition of the doctrine in this State. Holding that a municipality is not liable in the absence of negligence or direct trespass, for consequential damage from grading a street, this decision has been cited and followed down through the years. Relative to the right of a man to enjoy or use his own property, the opinion states (at p. 200): "He may set fire to his fallow-ground; and though the fire run into and burn the woodland of his neighbor, no action will lie. * * * He may open and work a coal mine on his own land, though it injure the house which another has built. * * * And he may do the same thing though it cut an underground stream of water which [**730] before supplied his neighbor's well." On the other hand, the opinion says (at p. 198): "He may not, however, under color of enjoying his own, set up a nuisance which deprives another of the enjoyment of his property. Nor can he rightfully enter or cast anything on the land of another, unless he have a license from the owner or authority in law for doing the act. And the absence of bad motive will not save him from an action. Thus if one having a hedge on his own land adjoining anothers close cut the thorns, and they fall against his will on his

neighbor's land, from which he removes them as soon as possible, he may be treated as a trespasser."

[*262] And if, before removal, a thorn should injure the foot of the neighbor's barefoot boy, the invader would be responsible for that as well as for the technical trespass. Likewise, if the projectile from blasting should pass through a neighbor's roof, overturning a stove and firing the building, it would not be seriously urged that the owner, while entitled to recover for the direct injury to the roof could not recover the consequential damage caused by the fire.

The present case is not one of acts committed after a permissive entry (See Restatement of the Law of Torts, vol. 1, § 214 [1]), although even that situation entails liability "where the actor deliberately abuses his privilege by doing an act which he recognizes as unnecessary." (See comment [a] on § 214.) The entry under license was not an invasion. The trespass consisted in the unnecessary deposit of material upon the land in the process of the licensed operation. That is the "unprivileged intrusion" which "makes him liable for any harm caused to any legally protected interest which the possessor has in the land, * * * or to any third person or thing in the security of which the possessor has a legally protected interest, * * * irrespective of whether it was caused by conduct which, were the actor not a trespasser, would have subjected him to liability." (Restatement of The Laws of Torts, vol. 1, § 163 and comment F.) For example, one who has a license to store trucks in another's barn becomes a trespasser when he essays to repair them and in doing so, sets the barn on fire. (Illustration 7 to § 168.)

It follows that the defendant, by depositing lead on the plaintiff's premises became an intruder, and is liable for the consequences regardless of whether the results could or

should reasonably have been foreseen, or whether the acts constituted negligence.

[**731] After all a rule of law is but the outcome of an effort to give effect to the general sense of right, duty and justice, and expression to the common experience of men n their everyday affairs -- no matter how laboriously formulated or with what seemingly technical phrases expressed.

It requires no fine-spun reasoning to hold one responsible for a wrong done another who is without fault. But in a practical world, there must be practical limits. The law says a man in an ordinary situation should not, although in the wrong, be held for consequences which a reasonably attentive and careful man would not foresee. That rule found expression, and it endures, because it accords with the opinion of the average man.

It is a rule of action in the world at large. The immunity which it grants does not accompany the actor when he intrudes upon the property of another. There the owner is supreme. His house is [*263] his castle, and his estate his exclusive domain. There, not all the rules which govern in the world at large apply. No intrusion is so trifling as to be overlooked, and no result of the intrusion is to be without remedy because it was unusual or unexpected.

It does not seem that the average man of affairs would favor relieving the intruder from the results of his invasion, upon his plea that he did not or could not foresee the consequences. Rather would he say that the intrusion is at the peril of the intruder, in harmony with the conclusions of the authorities which so declare.

There remains the matter of damages. The plaintiff placed Nancy's value at $ 500. Mr. Hill, who had hunted over her, valued her at from $ 300 to $ 350; Mr. Crawford, at $ 300 to $ 400. Considering that she was but three years old, had received expensive and valuable training, was very

proficient, the sum of $ 400 would seem a fair and reasonable value.

On the other hand, Pooch, although still better in the field, was twelve years old. While Mr. Hill who raised and trained him, valued him at from $ 400 to $ 500, he sold him to the plaintiff in June for $ 100. However, this was with the understanding that both should use him. It appears that his usefulness as a hunter is nearing the end. The sum of $ 150 fairly represents his value.

The defendant contends that recovery with reference to Pooch is forbidden by *section 114 of the Agriculture and Markets Law* that "no action shall be maintained for the possession or value of a dog, or for damages for injury or destruction of a dog not wearing a tag attached to a collar as provided in this article." [**732] Pooch had been licensed and bore a tag, issued upon the application of Hill before the sale to the plaintiff. The plaintiff had not applied for another license and tag and stated he did not know it was necessary.

Section 114 deals generally with the seizure of untagged dogs by peace officers and representatives of the commissioner. The owner is given three days to redeem the dog by producing a license and paying a seizure fee; and if he fails to do so, he "shall forfeit all title to the dog and the dog shall be sold or killed" and "in the case of sale, the purchaser * * * must * * * obtain a license for the dog."

It seems plain that the inhibition against recovery of possession or value is confined to instances where there has been a seizure under the section. Relating to "untagged" as distinguished from "unlicensed" dogs, it cannot be intended to exonerate persons who, not being seizing agents take, kill or injure a dog through trespass or negligence. The limit of its effect is to protect an agent against liability for damage caused either in the seizure or while holding the dog for redemption by production of a license.

[*264] Furthermore there is no express language in the entire article (7) which required this plaintiff to procure another license and tag. It is the dog which must be licensed, not the owner, as indicated by the recurrent phrase "unlicensed dog." Section 109, relating to the application, does not require it to show the name and address of the owner, but merely "the name, sex, breed, age, color and marking of the dog." It provides that the owner upon transfer of possession and ownership to another, "may" surrender the license and tag to the clerk and the new owner "shall thereupon" file an application for a new license. Contrast this with the provision of *section 114*, that in case of sale by a seizing officer after failure to redeem, the purchaser "must" pay the purchase price and obtain a license.

This statute clearly does not limit the recovery in this case. In addition to the $ 550 which is found to be the value of the dogs, the plaintiff expended $ 19.50 for their treatment, exclusive of autopsies and chemical analyses.

 Si bien concluye que la clínica de optalmología, de haber sabido las verdaderas intenciones de los reporteros, no hubieran consentido a su ingreso, ¿por qué el tribunal considera que esta invasión *no* afecte la inviolabilidad de su propiedad?

 ¿Hasta qué punto informa el análisis económico del derecho las resoluciones judiciales del juez Posner?

CONVERSION: INTENT

 L. R. Spooner vs. Andrew J. Manchester. SUPREME COURT OF MASSACHUSETTS 133 Mass. 270 October 7, 1880, Argued May 5, 1881; September 7, 1882, Decided

[*272] Field, J. This case apparently falls within the decision in *Hall v. Corcoran, 107 Mass. 251*, except that this defendant unintentionally took the wrong road on his return from Clinton to Worcester, and when, after travelling on it five or six miles, he discovered his mistake, he

intentionally took what he considered the best way back to Worcester, which was by a circuit through Northborough.

The case has been argued as if it were an action of tort in the nature of trover, and, although the declaration is not strictly in the proper form for such an action, both parties desire that it should be treated as if it were, and we shall so consider it.

[**4] As the horse was hired and used on Sunday, and it does not appear that this was done from necessity or charity, and also as it does not appear that the horse was injured in consequence of any want of due care on the part of the defendant, or that the defendant was not in the exercise of ordinary care when he lost his way, the question whether the acts of the defendant amounted to a conversion of the horse to his own use is vital. The distinction between acts of trespass, acts of misfeasance and acts of conversion is often a substantial one. In actions in the nature of trespass or case for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but, in actions in the nature of trover, the general rule of damages is the value of the property at the time of the conversion, diminished when, as in this case, the property has been returned to and received by the owner, by the value of the property at the time it was returned, so that after the conversion and until the delivery to the owner the property is absolutely at the risk of the person who has converted it, and he is liable to pay for any depreciation in value, whether [**5] that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or the act of God. *Perham v. Coney, 117 Mass. 102*.

[*273] The satisfaction by the defendant of a judgment obtained for the full value of the property vests the title to the property in him, by relation, as of the time of the

conversion. Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property, that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property, such as a sale, letting or destruction of it, amount to a conversion, even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, [**6] or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant in withholding it claims the right to withhold it, which is a claim of a right of dominion over it.

In *Spooner v. Holmes, 102 Mass. 503,* Mr. Justice Gray says that the action of trover "cannot be maintained without proof that the defendant either did some positive, wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property," and the authorities are there cited. *Fouldes* v. *Willoughby*, 8 M. & W. 540, is a leading case, establishing the necessity, in order to constitute a conversion, of proving an intention to exercise some right or control over the property inconsistent with the right of the lawful owner, when the act done is equivocal in its nature. See also *Simmons* v. *Irillystone*, 8 Exch. 431; *Wilson v. McLaughlin, 107 Mass. 587.*

It is argued that the act of the defendant in this case was a user of the horse for his own benefit, inconsistent with the terms of the bailment, and that the defendant's mistake [**7] in taking the wrong road was immaterial, and these

cases are cited: *Wheelock v. Wheelwright, 5 Mass. 104*. *Homer* v. *Thwing*, 3 Pick. 492. *Lucas* v. *Trumbull*, 15 Gray 306. *Hall* v. *Corcoran, ubi supra* In each of these cases, there was an intentional act of dominior [*274] exercised over the horse hired, inconsistent with the right of the owner.

In *Wellington* v. *Wentworth*, 8 Met. 548, a cow, going at large in the highway without a keeper, joined a drove of cattle, in May or June 1842, without the knowledge of the owner of the drove, and was driven into New Hampshire and pastured there, during the season, with the defendant's cattle, and in the autumn returned with the drove and was delivered to the plaintiff; and it was held that there was no conversion. Chief Justice Shaw says, however, that "it was the plaintiff's own fault that his cow was at large in the highway, and entered the defendant's drove." Yet if the defendant had driven the cow to New Hampshire and pastured her there with his cattle, knowing that she belonged to the plaintiff and intending to deprive him of her, there can be no doubt that it would have been a conversion.

Parker [**8] *v. Lombard, 100 Mass. 405*, and *Loring* v. *Mulcahy*, 3 Allen 575, were both decided upon the ground that the defendant neither assumed to dispose of the property as his own, nor intended to withhold the property from the plaintiff.

Nelson v. *Whetmore*, 1 Rich. 318, was an action of trover for the conversion of a slave, who was travelling as free in a public conveyance, and was taken as a servant by the defendant; and the decision was, that to constitute a conversion the defendant must have known that he was a slave.

In *Gilmore* v. *Newton*, 9 Allen 171, the defendant not only exercised dominion over the horse, by holding him as a horse to which he had the title by purchase, but also by

letting him to a third person. The defendant actually intended to treat the horse as his own.

If a person wrongfully exercises acts of ownership or of dominion over property under a mistaken view of his rights, the tort, notwithstanding his mistake, may still be a conversion, because he has both claimed and exercised over it the rights of an owner; but whether an act involving the temporary use, control or detention of property implies an assertion of a right of dominion over [**9] it, may well depend upon the circumstances of the case and the intention of the person dealing with the property. *Touldes* v. *Willoughby*, *ubi supra*. *Wilson* v. *McLaughlin*, *ubi* [*275] *supra*. *Nelson* v. *Merriam*, 4 Pick. 249. *Houghton* v. *Butler*, 4 T. R. 364. *Heald* v. *Carey*, 11 C. B. 977.

In the case at bar, the use made of the horse by the defendant was not of a different kind from that contemplated by the contract between the parties, but the horse was driven by the defendant, on his return to Worcester, a longer distance than was contemplated, and on a different road. If it be said that the defendant intended to drive the horse where in fact he did drive him, yet he did not intend to violate his contract or to exercise any control over the horse inconsistent with it. There is no evidence that the defendant was not at all times intending to return the horse to the plaintiff, according to his contract, or that whatever he did was not done for that purpose, or that he ever intended to assume any control or dominion over the horse against the rights of the owner. After he discovered that he had taken the wrong road, he did what seemed best to him in order [**10] to return to Worcester. Such acts cannot be considered a conversion.

Whether a person who hires a horse to drive from one place to another is not bound to know or ascertain the roads usually travelled between the places, and is not liable for all damages proximately caused by any deviation from the usual ways, need not be considered.

An action on the case for driving a horse beyond the place to which he was hired to go, was apparently known to the common law a long time before the declaration in trover was invented. 21 Edw. IV. 75, pl. 9.
Exceptions sustained.
RUSSELL-VAUGHN FORD, INC., et al. v. E. W. ROUSE
6 Div. 379 Supreme Court of Alabama 281 Ala. 567; 206 So. 2d 371 January 11, 1968

[**372] [*569] SIMPSON, Justice.

The plaintiff in this case filed suit against Russell-Vaughn Ford, Inc. and several individuals. All individual defendants were stricken by plaintiff before trial except the appellant James Parker, and one Virgil Harris who has not participated in this appeal.

The complaint was amended several times but ultimately issue was joined and the case went to the jury on a common count for conversion of plaintiff's 1960 Falcon automobile and a second count charging the defendants with conspiracy to convert the automobile.

Essentially the facts are as follows:

On April 24, 1962, the appellee went to the place of business of Russell-Vaughn Ford, Inc., to discuss trading his Falcon automobile in on a new Ford. He talked with one of the salesmen for a while who offered to trade a new Ford for the Falcon, plus $1,900. The trade was not consummated on this basis, but Mr. Rouse went to his house and picked up his wife and children and returned to the dealer. With his wife and children there Mr. Rouse discussed further the trade but no deal was made that night.

The following night he returned with a friend where further discussions on the trade were had. At the time of this visit one of the salesmen, Virgil Harris, asked Mr. Rouse for the keys to his Falcon. The keys were given to him and Mr. Rouse, his friend, and appellant Parker looked

at the new cars for a time and then proceeded with the negotiations with regard to the trade. The testimony indicates that in this conversation the salesman offered to trade [**373] a new Ford for the Falcon, plus $2,400. The plaintiff declined to trade on this basis.

At this stage of the negotiations, Mr. Rouse asked for the return of the keys to the Falcon. The evidence is to the effect that both salesmen to whom Rouse had talked said that they did not know where [*570] the keys were. Mr. Rouse then asked several people who appeared to be employees of Russell-Vaughn for the keys. He further asked several people in the building if they knew where his keys were. The testimony indicates that there were a number of people around who were aware of the fact that the appellee was seeking to have the keys to his car returned. Several mechanics and salesmen were, according to plaintiff's testimony, sitting around on cars looking at him and laughing at him.

After a period of time the plaintiff called the police department of the City of Birmingham. In response to his call Officer Montgomery came to the showroom of Russell-Vaughn Ford and was informed by the plaintiff that he was unable to get his keys back. Shortly after the arrival of the policeman, according to the policeman's testimony, the salesman Parker threw the keys to Mr. Rouse with the statement that he was a cry baby and that "they just wanted to see him cry a while".

The evidence is abundant to the effect that Mr. Rouse made a number of efforts to have his keys returned to him. He talked to the salesmen, to the manager, to mechanics, etc. and was met in many instances with laughter as if the entire matter was a "big joke".

As noted, the case was tried to a jury, and submitted on a conversion count in code form and on a second count charging conspiracy to convert. The jury returned a general verdict in favor of the plaintiff in the amount of $5,000.

This appeal followed, after the trial court denied a motion for new trial.

The appellants have made several assignments of error. Initially it is argued that the facts of this case do not make out a case of conversion. It is argued that the conversion if at all, is a conversion of the keys to the automobile, not of the automobile itself. It is further contended that there was not under the case here presented a conversion at all. We are not persuaded that the law of Alabama supports this proposition. As noted in *Long-Lewis Hardware Co. v. Abston, 235 Ala. 599, 180 So. 261*,

"It has been held by this court that 'the fact of conversion does not necessarily import an acquisition of property in the defendant.' *Howton v. Mathias, 197 Ala. 457, 73 So. 92, 95*. The conversion may consist, not only in an appropriation of the property to one's own use, but in its destruction, *or in exercising dominion over it in exclusion or defiance of plaintiff's right. McGill v. Hollman, 208 Ala. 9, 93 So. 848, 31 A.L.R. 941, 948*; *Conner v. Allen, 33 Ala. 515*; *St. Louis & S.F.Ry.Co. v. Georgia, F. & A.Ry.Co., 213 Ala. 108, 104 So. 33*."

It is not contended that the plaintiff here had no right to demand the return of the keys to his automobile. Rather, the appellants seem to be arguing that there was no conversion which the law will recognize under the facts of this case because the defendants did not commit sufficient acts to amount to a conversion. We cannot agree. A remarkable admission in this regard was elicited by the plaintiff in examining one of the witnesses for the defense. It seems that according to salesman for Russell-Vaughn Ford, Inc. it is a rather usual practice in the automobile business to "lose keys" to cars belonging to potential customers. We see nothing in our cases which requires in a conversion case that the plaintiff prove that the defendant appropriated the property to his own use; rather, as noted in the cases

referred to above, it is enough that he show that the defendant exercised dominion over it in [**374] exclusion or defiance of the right of the plaintiff. We think that has been done here. The jury so found and we cannot concur that a case for conversion has not been made on these facts.

Further, appellants argue that there was no conversion since the plaintiff could have called his wife at home, who [*571] had another set of keys and thereby gained the ability to move his automobile. We find nothing in our cases which would require the plaintiff to exhaust all possible means of gaining possession of a chattel which is withheld from him by the defendant, after demanding its return. On the contrary, it is the refusal, without legal excuse, to deliver a chattel, which constitutes a conversion. *Compton v. Sims, 209 Ala. 287, 96 So. 185*.

We find unconvincing the appellants contention that if there were a conversion at all, it was the conversion of the automobile keys, and not of the automobile. In *Compton v. Sims, supra*, this court sustained a finding that there had been a conversion of cotton where the defendant refused to deliver to the plaintiff "warehouse tickets" which would have enabled him to gain possession of the cotton. The court spoke of the warehouse tickets as a symbol of the cotton and found that the retention of them amounted to a conversion of the cotton. So here, we think that the withholding from the plaintiff after demand of the keys to his automobile, without which he could not move it, amounted to a conversion of the automobile.

It is next argued by appellants that the amount of the verdict is excessive. It is not denied that punitive damages are recoverable here in the discretion of the jury. In *Roan v. McCaleb, 264 Ala. 31, 84 So.2d 358*, this court held:

"If the conversion was committed in known violation of the law and of plaintiff's rights with circumstances of insult, or contumely, or malice, punitive damages were recoverable in the discretion of the jury."

We think that the evidence justifies the jury's conclusion that these circumstances existed in this case.

We have carefully considered each assignment of error made and argued by appellants. We are clear to the conclusion that the evidence supports the verdict of the jury and find no error in the court's refusal to grant a new trial. In our opinion no assignment justifies a reversal.

Affirmed.

MERRILL, COLEMAN, and HARWOOD, JJ., concur.

 ¿Por qué determina el tribunal que Manchester no actuó con *intent*, cuando se perdió al retomar el camino?

 ¿Existía en el derecho romano el delito civil nominado de hurto?

FALSE IMPRISONMENT: INTENT

 BAGGETT v. NATIONAL BANK & TRUST COMPANY; and vice versa Nos. 69330, 69331 Court of Appeals of Georgia 174 Ga. App. 346; 330 S.E.2d 108 March 13, 1985, Decided

[*346] [**109] POPE Richard Baggett sued The National Bank and Trust Company to recover damages for the bank's alleged action in causing him to be arrested and detained as a suspected bank robber. The complaint was grounded on theories of both false imprisonment and negligence. The trial court granted the bank's motion for summary judgment with respect to the false imprisonment count but denied the motion with respect to the negligence count. Baggett appeals from the former ruling, and the bank cross-appeals from the latter ruling.

The salient facts are undisputed for purposes of this appeal. At approximately 10:00 a.m. on February 11, 1981, Baggett entered the bank's Columbus East Branch seeking to deposit a portion of his paycheck into his checking

account and to obtain cash for the remainder. He took a deposit slip from a supply provided for customer use, filled it out, and handed it to a teller, along with his paycheck and his driver's license. Unbeknownst to him, on the reverse side of the deposit slip someone had written the words, "This is a stek [sic] up." Upon seeing this message, the teller handling the transaction walked to the rear of the teller area, phoned the acting branch manager, whose office was located directly across the lobby from the teller area, and told her, "I've got a note, call the police." The teller then returned to Mr. Baggett and completed his transaction, whereupon Baggett departed the bank, got into his vehicle, and drove off, without taking or demanding anything to which he was not entitled.

Upon receiving the phone call from the teller, the acting branch manager immediately sounded the bank's silent alarm, which had the effect of alerting the local police department that a robbery or attempted robbery was in progress. Officer Lewis Steward arrived at the bank in response to the alarm shortly after Baggett had left and received from bank personnel an accurate report of what had transpired, including the information that Baggett had a checking account at the bank, had not appeared to be nervous or upset, and had not taken anything that did not belong to him. Officer Steward nevertheless issued a radio bulletin for Baggett's arrest. Baggett was arrested approximately 15 minutes later in response to this bulletin and was brought back to the bank, where bank employees verified that he was in fact the person who had presented the deposit slip. He was then [*347] questioned by police in the bank's conference room, at which time he supplied several handwriting samples. During this phase of the investigation, it was determined that the deposit slip used by Baggett was not the only one in the banking area which contained a "stick up" note on the back. Baggett was subsequently taken to police headquarters, where he was questioned further and finally released about three hours

after his arrest, with no formal charges having been lodged against him. Both the arresting officer and the officer who issued the radio bulletin testified by affidavit that no officer, employee, or agent of the bank had requested at any time that Baggett be arrested or detained. *Held*:

1. "The law draws a fine line of demarcation between cases where a party directly or indirectly urges a law enforcement official to begin criminal proceedings and cases where a party merely relays facts to an official who then makes an independent decision to arrest or prosecute. In the former case there is potential liability for false imprisonment or malicious prosecution [cit.]; in the latter case there is not. [Cit.]" *Ginn v. C & S Nat. Bank, 145 Ga. App. 175, 178 (243 SE2d 528) (1978)*. "[A]s stated in Prosser, Law of Torts, § 119 at 837 (4th Ed. 1971): 'If the defendant . . . merely states what he believes, leaving the decision to prosecute entirely to the uncontrolled discretion of the officer, or if the officer makes an independent investigation, or prosecutes for an offense [**110] other than the one charged by the defendant, the latter is not regarded as having instigated the proceeding; but if it is found that his persuasion was the determining factor in inducing the officer's decision, or that he gave information which he knew to be false and so unduly influenced the authorities, he may be held liable.'" *Melton v. LaCalamito, 158 Ga. App. 820, 822 (282 SE2d 393) (1981)*. See also *Hammond v. D.C. Black, Inc., 53 Ga. App. 609 (186 SE 775) (1936)*; *Restatement, Second, Torts § 45A, Comment c* at 70 (1965).

The evidence submitted by the bank in support of its motion for summary judgment establishes without dispute that the decision to arrest Baggett was made solely by the police, based on the bank employees' accurate and good faith account of what had transpired, and without any request on their part that he be detained or held in custody. We reject Baggett's contention that contrary evidence is

created by two averments in his own affidavit, one to the effect that he was told by a police detective that the teller had identified him as "the guy who tried to rob her" and another to the effect that the acting manager asked him as he was being transported to the bank's conference room, "'Ricky, why did you do it?'" The former statement is double hearsay and consequently without probative value, while the latter statement does not conflict with the evidence showing that the bank employees provided accurate information to police and made no [*348] effort to procure the arrest. It follows that the trial court did not err in granting summary judgment to the bank with respect to the false imprisonment claim. Accord *Moses v. Revco Discount Drug Centers &c. of Ga., 164 Ga. App. 73, 75 (296 SE2d 384) (1982)*; *C & S Bank of Houston v. McDowell, 160 Ga. App. 69 (286 SE2d 58) (1981)*; *Dixie Beer Co. v. Boyett, 158 Ga. App. 622 (281 SE2d 356) (1981).*

2. We further conclude that the bank was entitled to summary judgment on the negligence claim. While it is certainly true that the owner of a business has a duty to protect its customers from injury caused by the tortious misconduct of its employees (see, e.g., *Jacobs v. Owens, 96 Ga. App. 318, 320 (99 SE2d 895) (1957)*; *Southern Grocery Stores v. Keys, 70 Ga. App. 473 (2) (28 SE2d 581) (1944))*, the undisputed evidence refutes the existence of such misconduct in this case. Although it may perhaps be said with the benefit of hindsight that the teller overreacted to the "stek up" note, it is quite clear that in doing so she was merely acting in good faith to a perceived threat of criminal activity.

"Statements made in good faith to police officers or others investigating criminal activity cannot be the basis of a tort action. [Cit.]" *Moses v. Revco Discount Drug Centers*, supra at 75. Accord *Manis v. Miller, 327 S2d 117 (Fla. App. 1976).* "To allow an action in negligence to lie against a citizen if he makes an honest mistake in reporting

to the police would have a chilling effect on an important source of information about crime. Citizen cooperation is essential to efficient police operation and should not be stifled." *LaFontaine v. Family Drug Stores, 33 Conn. Supp. 66 (360 A2d 899, 905)* (1976). Accord *Meyers v. Glover, 152 Ga. App. 679, 683-684 (263 SE2d 39) (1979)*, overruled on other grounds, *McCord v. Jones, 168 Ga. App. 891, 893 (311 SE2d 209) (1983)*.

The case at bar is factually distinguishable from our recent decision in *Oden & Sims Used Cars, Inc. v. Thurman, 165 Ga. App. 500 (3) (301 SE2d 673) (1983)*. In the case at bar, as we have noted above, Baggett's arrest occurred as the result of an "honest mistake" in reporting to the police a perceived threat of criminal activity. The bank's actions in this regard cannot form the basis of an action in negligence. In *Oden & Sims Used Cars, Inc. v. Thurman, supra*, defendant Martin Burks Chevrolet, Inc. reported as stolen a vehicle which had been erroneously picked up at the Martin Burks lot by defendant Oden & Sims Used Cars, Inc. Oden & Sims subsequently sold the vehicle to plaintiff Thurman. Oden & Sims discovered the error, notified Martin Burks thereof, and reimbursed Martin Burks for the vehicle. However, no effort was made to notify the police that the matter of the stolen vehicle had been resolved, and Thurman, who was unaware of the Martin Burks -- Oden & Sims error, was arrested and incarcerated on the basis of the stolen vehicle report *two* [*349] *days after* the matter had been resolved. Unlike the case at bar, Thurman's arrest and incarceration were not, as a matter of law, merely the result of an "honest mistake."

[**111] We take this opportunity to amplify and reaffirm our holding in *Oden & Sims Used Cars v. Thurman, 165 Ga. App. 500 (3) (301 SE2d 673) (1983).* A minority of this court now argues that the decision in Division 3 of the opinion may be construed as authority for the proposition that there is such a tort as "negligent false

imprisonment," and thus is mistaken. This argument has as its foundation the decision in *Stewart v. Williams, 243 Ga. 580 (1) (255 SE2d 699) (1979),* in which our Supreme Court adopted the view espoused by Harper and James in their treatise on torts: '"To constitute a false imprisonment, the act of the defendant in confining the plaintiff must be done with the intention of causing a confinement. If the confinement is due to the defendant's negligence, the latter may be liable as for negligence, but the action is then governed by the rules and principles of the tort of negligence, according to which the plaintiff is required to show actual damage. In other words, there can be no such tort as a negligent false imprisonment which of itself makes the defendant liable without proof of the invasion of some interest other than the bare interest in freedom from confinement.' 1 Harper & James, The Law of Torts, § 3.7, p. 228 (1956)." *Stewart v. Williams, supra at 581-82*. This view is echoed by *Restatement, Second, Torts § 35 (2), Comment h* at 53, 54 (1965): "The mere dignitary interest in feeling free to choose one's own location and, therefore, in freedom from the realization that one's will to choose one's location is subordinated to the will of another is given legal protection only against invasion by acts done with the intention [to confine another within bounds fixed by the actor] . . . So too, the actor whose conduct is negligent or reckless because of the risk which it involves to the other's bodily security [,] or some more perfectly protected interest, is not subject to liability if his conduct causes nothing more than the imposition of a transitory and harmless confinement." Thus, under these authorities, liability for negligence may obtain in a case in the factual posture of *Oden & Sims Used Cars v. Thurman, supra*, provided the plaintiff can establish *actual* damages. Prosser, Law of Torts, § 11 at 48 (4th ed. 1971).

What, then, are actual damages? Black's Law Dictionary at 467 (Rev. 4th ed. 1972) defines "actual damages" as "[r]eal, substantial and just damages, or the

amount awarded to a complainant in compensation for his actual and real loss or injury, as opposed on the one hand to 'nominal' damages, and on the other to 'exemplary' or 'punitive' damages." Under Georgia law such "actual damages" are known as "special damages." See *O.C.G.A. § 51-12-2 (b)*. Did the evidence in *Oden & Sims Used Cars v. Thurman, supra*, disclose any "actual" or "special" damages suffered by the plaintiff Thurman? In *Mouse v.* [*350] *Central Savings &c. Co., 120 Ohio St. 599 (167 NE 868) (1929)*, the Supreme Court of Ohio was presented with a comparable factual situation to that in *Oden & Sims Used Cars v. Thurman*. In *Mouse* the defendant bank mistakenly refused payment of plaintiff Mouse's check payable to a third party who, after investigation at the bank where he was assured by the bank that Mouse had no account, swore out a warrant for Mouse, who was arrested and jailed. "The question . . . arises as to whether, conceding the arrest, and the fact that there is evidence tending to show that the arrest is caused by the act of the bank, the plaintiff has failed to make out a cause of action, because he has alleged no other damage than the arrest, confinement in jail, and the humiliation consequent thereon." *Mouse v. Central Savings &c. Co*., supra at 871. After discussing what may constitute "actual damages," the court concluded: "What could be a more real and existing damage to a person of good reputation than confinement in the county jail upon a charge concededly erroneous? Such damage is actual, so real, present, and existing, in fact, that the unlawful restraint by one person of the physical liberty of another gives rise to a cause of action all its own, namely that of false [imprisonment]. We have little sympathy with the proposition that a genuine damage would be proved here if the bank's act had resulted in a damage to the plaintiff in his trade or occupation, but that the dishonor thrust upon him by this act of negligence has no existence in fact." *Id. at 871*. Like the Ohio court we view the circumstances leading to Thurman's arrest by the police, his incarceration

in the county jail on an erroneous charge, and his resultant humiliation as "actual damages," not merely the invasion of a "bare interest in freedom from confinement" or "the imposition of a transitory and harmless confinement." See also *Weaver v. Bank of America &c.* [**112] *Assn., 59 Cal. 2d 428 (380 P2d 644 (8), 30 Cal. Rptr. 4* (8)) (1963); *Collins v. City Nat. Bank &c., 131 Conn. 167, 172-73 (38 A2d 582 (7, 8), 153 ALR 1030) (1944).* The decision in *Oden & Sims Used Cars v. Thurman, supra*, properly held that plaintiff Thurman had presented sufficient evidence to withstand defendants' motion for directed verdict on the issue of negligence.

Judgment affirmed in Case No. 69330; reversed in Case No. 69331.

Banke, Chief Judge, concurring specially.

Regardless of what the law of Ohio may be, in Georgia "'there can be no such tort as a negligent false imprisonment which of itself makes the defendant liable without proof of the invasion of some interest other than the bare interest in freedom from confinement.'" *Stewart v. Williams, 243 Ga. 580* (1), 581-582 *(255 SE2d 699) (1979)*, [*351] quoting from 1 Harper & James, The Law of Torts, § 3.7, p. 228 (1956). This court's recent decision in Division 3 of *Oden & Sims Used Cars v. Thurman, 165 Ga. App. 500 (301 SE2d 673) (1983)*, clearly purports to hold otherwise, and to that extent it should be overruled. (Although the plaintiffs in the *Oden & Sims* case may indeed have had a cause of action, that cause of action was not for simple negligence but for false imprisonment, based on the defendants' wanton and reckless disregard of the consequences of their failure to rescind a stolen car report which one of them had mistakenly made to police with respect to a car the plaintiff had purchased.)

If the majority truly believes that a plaintiff may recover damages in this state from one who negligently but in good faith gives information to police which results in

his arrest and confinement, then logic dictates that it should affirm rather than reverse the denial of the bank's motion for summary judgment with regard to Baggett's claim of negligence in the present case. Instead, by reaffirming the *Oden & Sims* decision but denying Baggett the right to present his negligence claim to a jury, the majority appears to be saying one thing while doing another.
I am authorized to state that Presiding Judge Deen and Judge Carley join in this special concurrence.

 ¿Por qué el tribunal en Baggett determinó que el banco no había actuado con *intent*, cuando los agentes de policía procedieron a la detención del presunto asaltante?

ASSAULT: INTENTION

 Tuberville against Savage (1669) 1 Mod Rep 3, 86 ER 684, KING'S BENCH 30 January 1669
Action of assault, battery, and wounding. The evidence to prove a provocation was, that the plaintiff put his hand upon his sword and said, "If it were not assize-time, I would not take such language from you." The question was if that were an assault. The Court agreed that it was not; for the declaration of the plaintiff was, that he would not assault him, the Judges being in town; and the intention as well as the act makes an assault. Therefore if one strike another upon the hand, or arm, or breast in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault: so if he hold up his hand against another in a threatening manner and say nothing, it is an assault. In the principal case the plaintiff had judgment.

 ¿Por qué el tribunal apunta que este intercambio de gestos y de palabras no surte los efectos de una verdadera amenaza, a pesar de haber exhibido Tuberville una actitud más que beligerante hacia Savage?

 SARAH J. NEWELL v. J. C. WHITCHER. SUPREME COURT OF VERMONT, CALEDONIA COUNTY 53 Vt. 589 October, 1880, Decided

[*590] The opinion of the court was delivered by

REDFIELD, J. The plaintiff, an unfortunate girl, blind from her birth, gave lessons in music one day in each week to defendant's daughters, and lodged there over night. A certain room in defendant's house was assigned to plaintiff by defendant and his wife, as a private lodging room. On the occasion in question, she [*591] was awakened about the middle of the night, in the dark, by the rustle and footsteps of some person in her room; presently the defendant sat down upon [**4] her bed and bedclothes in which she was wrapped, leaned over her person, and made repeated and persistent solicitations to her for sexual intimacy, which she repelled, and urged him to leave her room. She got up from her bed, dressed herself and sat up the residue of the night. And by these acts of the defendant she was so excited, alarmed, and put in fear, and her feelings so outraged that she was made sick, and so continued for a long space of time. The declaration is in three counts. Trespass, trespass *quare clausum,* and a count in case.

I. It is claimed that the entry into the plaintiff's private apartments did not support the action of trespass *quare clausum;* but we think that her right to her private sleeping room during the night under the circumstances of this case, was as ample and exclusive against the inmates of the house, as if the entry had been made into her private dwelling house through the outer door. Her right of quiet occupancy and privacy was absolute and exclusive; and the entry by stealth in the night into such apartments without license or justifiable cause, was a trespass; and, if with felonious intent, was a crime. *State v. Clark, 42 Vt. 629*.

[**5] II. The approach to her person in the manner her testimony tends to prove--sitting on the bed and bed-clothes that covered her person, and leaning over her with the proffer of criminal sexual intercourse; so near as to excite the fear and apprehension of force in the execution of his felonious purpose, was an assault. The whole act and motive was unlawful, sinister and wicked. The act of stealing stealthily into the bed-room of a virtuous woman at midnight to seek gratification of criminal lust, is sufficiently dishonorable and base in purpose and in act; but especially so, when the intended victim is a poor, blind girl under the protecting care of the very man who would violate every injunction of hospitality, that he might dishonor and ruin at his own hearthstone this unfortunate child, who had the right to appeal to [*592] him to defend her from such outrage. *Alexander v. Blodgett, 44 Vt. 476*.

III. The court charged the jury that if the plaintiff was so frightened and shocked in her feelings as to injure her health by defendant's conduct, as described in her testimony, that she could receive damages for such injury. The defendant's counsel asked the court to [**6] charge, in substance, that if defendant's acts and conduct would not have injured a person of ordinary nerve and courage, then there can be no recovery.

When the acts of the party complained of are of themselves innocent and harmless, and may become wrongful by the manner in which they are done, then a man is to be judged by the common and ordinary effect of such acts. But when a married man breaks into the bedroom of a chaste and honest woman at midnight, and proposes to her sexual and criminal commerce with her, the act is wholly wrongful; the aim and purpose is wrongful, and the act if perpetrated is criminal; and the party offending must answer in damages for all actual injuries. And we think in this case, if all the facts claimed by the plaintiff in her testimony were found to be true, the plaintiff had a right to

recover. And the charge of the court as to exemplary damages, was sound.
The judgment of the County Court is affirmed.

 ¿Por qué el tribunal en este caso determina que la propuesta indecorosa a voz en cuello que le hace Whitcher a la señorita Newell sin duda surte los efectos de una amenaza?

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS: EXTREME AND OUTRAGEOUS CONDUCT

 IRMA WHITE v. MONSANTO COMPANY AND GARY McDERMOTT No. 91-C-0148 SUPREME COURT OF LOUISIANA 585 So. 2d 1205 September 9, 1991

[*1207] HALL Writs were granted in this case to review a judgment of the court of appeal affirming an award of $ 60,000 damages to an employee against her employer and a supervisory co-employee for intentional infliction of emotional distress occasioned by the supervisor's profane outburst while dressing down the employee and two other employees for not working as he thought they should. Finding that the supervisor's conduct, although crude and uncalled for, was not of such an extreme or outrageous nature as to give rise to a cause of action for an intentional tort, we reverse and render judgment for the defendants.
I.

Plaintiff, Irma White, [**2] a church-going woman in her late forties with grown children, was employed in the labor pool at Monsanto Company's refinery for several years. In the spring of 1986, she had been assigned to work in the canning department for several weeks. Defendant, Gary McDermott, a long-time Monsanto employee, was industrial foreman of that department. On the date of the incident in question, plaintiff and three other employees were assigned at the beginning of the work day to transfer a

certain chemical from a large container into smaller containers. When they arrived at their work station and noticed that the container was marked "hazardous-corrosive," they requested rubber gloves and goggles before starting their assigned task. A supervisor sent for the safety equipment. Shop rules required that employees busy themselves while waiting for equipment. One of the employees went to another area to do some work. Plaintiff started doing some clean-up or pick-up work around the area. The other two employees were apparently sitting around waiting for the equipment. Someone reported to McDermott that the group was idle, causing McDermott to become angry. He went to the work station and launched a profane [**3] tirade at the three workers present, including plaintiff, referring to them as "mother fuckers," accusing them of sitting on their "fucking asses," and threatening to "show them to the gate." The tirade lasted for about a minute, and then McDermott left the area.

Plaintiff was upset and began to experience pain in her chest, pounding in her head, and had difficulty breathing. She went to McDermott's office to discuss the incident. He said he apologized to her; she said he did not. She went to the company nurse, who suggested that plaintiff see a doctor. Plaintiff's family physician met her at the hospital, at which time plaintiff had chest pains, shortness of breath, and cold clammy hands. Fearing that she was having a heart attack, the doctor admitted her to the hospital. Plaintiff spent two days in the coronary care unit and another day in a regular room, during which time she had intravenous fluids, had blood drawn, and had an EKG and other tests done. A heart attack was ruled out and the doctor's diagnosis was acute anxiety reaction, a panic attack. Plaintiff was released from the hospital after three days without restriction, but with medication to take if she had further trouble.

[**4] Ms. White returned to work within a week. She was paid her regular pay while off from work, and her medical bills, totaling about $ 3,200, were paid by the company's medical benefits program. Plaintiff has continued to work at Monsanto, later transferring to McDermott's department at her own request. She occasionally becomes upset thinking about or dreaming about the incident, and has occasionally taken the prescribed medicine, but is not one to take medication.
II.

Ms. White sued Monsanto and McDermott, alleging that McDermott's conduct amounted to the intentional infliction of mental anguish and emotional distress upon plaintiff for which she was entitled to recover damages. After trial, the jury awarded her $ 60,000. Defendants appealed to the court of appeal, which affirmed, with one judge dissenting in part as to the amount of damages. *White v. Monsanto Company, 570 So. 2d 221 (La. App. 5th Cir. 1990)*. Defendants' writ application was [*1208] granted by this court. *575 So. 2d 381 (La. 1991)*.
III.

LSA-R.S. 23:1032 makes worker's compensation an employee's exclusive remedy for a work-related injury caused by a co-employee, except for a suit based on an [**5] intentional act. The words "intentional act" mean the same as "intentional tort." The legislative aim was to make use of the well-established division between intentional torts and negligence in common law. The meaning of "intent" is that the person who acts either (1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) knows that that result is substantially certain to follow from his conduct, whatever his desire may be as to that result. Thus, intent has reference to the consequences of an act rather than to the act itself. Only where the actor entertained a desire to bring about the consequences that followed or where the actor believed that the result was

substantially certain to follow has an act been characterized as intentional. *Bazley v. Tortorich, 397 So. 2d 475 (La. 1981)*.

The exclusive remedy rule is inapplicable to intentional torts or offenses. The meaning of intent in this context is that the defendant either desires to bring about the physical results of his act, or believes they were substantially certain to follow from what he did. Intent is not, however, limited to consequences [**6] which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. *Bazley, supra.*

When an employee seeks to recover from his employer for an intentional tort, a court must apply the legal precepts of general tort law related to the particular intentional tort alleged in order to determine whether he has proved his cause of action and damages recoverable thereunder. *Caudle v. Betts, 512 So. 2d 389 (La. 1987)*.

IV.

The particular intentional tort alleged in this case is the intentional infliction of emotional distress. Thus, the legal precepts of general tort law related to this tort must be applied to determine whether plaintiff has proved her cause of action and damages recoverable thereunder.

Most states now recognize intentional infliction of emotional distress as an independent tort, not "parasitic" to a physical injury or a traditional tort such as assault, battery, false imprisonment or the like. See Annotation, *Modern Status of Intentional Infliction of Mental Distress As Independent* [**7] *Tort; "Outrage", 38 A.L.R. 4th 998 (1985)*, and cases cited therein. Discussed in the late 1930's by commentators [1] who synthesized earlier cases, [2] the tort was included in the 1948 supplement to the American Law Institute's *Restatement (Second) of Torts § 46*. [3] The

elements of the tort as described in the text and comments of the Restatement have been widely accepted and quoted.

1 See Magruder, *Mental and Emotional Disturbance in the Law of Torts,* 49 Harvard Law Review 1033 (1936); Prosser, *Intentional Infliction of Mental Suffering: A New Tort,* 37 Mich. L.Rev. 874 (1939).

2 Often mentioned was the Louisiana pot-of-gold case, *Nickerson v. Hodges, 146 La. 735, 84 So. 37 (1920),* in which nominal damages were awarded to a middle-aged mentally deficient woman who suffered severe mental distress as the result of a cruel practical joke.

3 *Restatement (Second) of Torts, § 46 (1)* provides:

> "Outrageous Conduct Causing Severe Emotional Distress
>
> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

[**8] Several Louisiana court of appeal decisions have recognized and defined the tort, generally in accordance with the Restatement. See *Steadman v. South Cent. Bell Telephone Co., 362 So. 2d 1144 (La.* [*1209] *App. 2d Cir. 1978)*; *Maggio v. St. Francis Medical Center, Inc., 391 So. 2d 948 (La. App. 2d Cir. 1980),* writ denied *396 So. 2d 1351 (La. 1981)*; *Ferlito v. Cecola, 419 So. 2d 102 (La. App. 2d Cir. 1982),* writ denied *422 So. 2d 157 (La. 1982)*; *Breaux v. South Louisiana Elec. Co-Op. Ass'n., 471 So. 2d 967 (La. App. 1st Cir. 1985)*; *Smith v. Mahfouz, 489 So. 2d 409 (La. App. 3d Cir. 1986),* writ denied *494 So. 2d 1181 (La. 1986)*; *Muslow v. A.G. Edwards & Sons, Inc., 509 So. 2d 1012 (La. App.2d Cir. 1987),* writ denied *512 So. 2d 1183 (1987)*; *Engrum v. Boise Southern Co., 527 So. 2d 362 (La. App. 3d Cir. 1988)*; *Boudoin v. Bradley, 549 So. 2d 1265 (La. App. 3d Cir. 1989).* See also this court's

decision in *Moresi v. Dept. of Wildlife & Fisheries, 567 So. 2d 1081 (La. 1990),* [**9] which distinguished between the general rule of recovery for the intentional infliction of mental distress and the general rule of no recovery for emotional disturbance unaccompanied by physical injury, caused by mere negligence unless arising under special circumstances.

As noted in *Steadman, supra,* the Restatement is not binding on a Louisiana court, but it may be considered in determining whether liability exists under the fault-reparation principles of *LSA-C.C. Art. 2315*. Generally speaking, labels of specific torts and strictures attached thereto do not always coincide with Louisiana's broad and more flexible notion of fault under the Civil Code article. See *Jones v. Soileau, 448 So. 2d 1268, 1271 (La. 1984)*; *Joyner v. Weaver, 337 So. 2d 635 (La. App. 3d Cir. 1976)*; *Whittington v. Gibson Discount Center, 296 So. 2d 375 (La. App. 2d Cir. 1974)*; *Jones v. Simonson, 292 So. 2d 251 (La. App. 4th Cir. 1974)*. Nevertheless, restrictions and guidelines established for policy reasons can give practical guidance in deciding cases, particularly those involving relatively new and developing causes [**10] of action such as those for emotional distress injuries unaccompanied by physical injury. See *Lejeune v. Rayne Branch Hosp., 556 So. 2d 559, 569 (La. 1990)*. Compare *Clomon v. Monroe City School Board, 572 So. 2d 571, 574, 576 (La. 1990).*

Drawing on the background described, including consideration of Article 2315 and duty-risk principles, we affirm the viability in Louisiana of a cause of action for intentional infliction of emotional distress, generally in accord with the legal precepts set forth in the Restatement text and comments.

One who by extreme and outrageous conduct intentionally causes severe emotional distress to another is

subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm. [4]

> 4 Since the viability of plaintiff's claim in this case depends on the existence of an intentional act as distinguished from a reckless act, we do not deal with the Restatement's reference to "recklessly" causing severe emotional distress.

[**11] Thus, in order to recover for intentional infliction of emotional distress, a plaintiff must establish (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct.

The conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Persons must necessarily be expected to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. Not every verbal encounter may be converted into a tort; on the contrary, "some safety valve must be left through which irascible tempers may blow off relatively harmless steam." Restatement, *supra,* comment d, *§ 46*; Prosser and Keaton, *The Law of Torts,* § 12, p. 59 (5th ed. 1984).

The extreme [**12] and outrageous character of the conduct may arise from an [*1210] abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. Restatement, *supra*, comment e, *§ 46*. Thus, many of the cases have involved circumstances arising in the workplace. See Annotation, *Liability of*

Employer, Supervisor, or Manager for Intentionally or Recklessly Causing Employee Emotional Distress, 52 A.L.R. 4th 853 (1987); *Atchison, Topeka and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 569, 107 S. Ct. 1410, 1417, 94 L.Ed. 2d 563 (1987)*; *Merrick v. Northern Natural Gas Co., 911 F.2d 426 (10th Cir. 1990)*; *Sterling v. Upjohn Healthcare Services, 299 Ark. 278, 772 S.W.2d 329, 79 N.C. App. 483 (Ark. 1989)*; *Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 340 S.E.2d 116 (N.C. App. 1986)*; *Byrnes v. Orkin Extermination Co., Inc., 562 F.Supp. 892 (1983)*; *Continental Cas. Co. v. Mirabile, Md. App., 52 Md. App. 387, 449 A.2d 1176 (1982)*; *Hall v. May Department Stores Co., 292 Or. 131, 637 P.2d 126 (1981)*; [**13] *Contreras v. Crown Zellerbach Corp., 88 Wash. 2d 735*; *565 P.2d 1173 (1977)*; *Alcorn v. Anbro Engineering, Inc., 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P.2d 216 (1970).* A plaintiff's status as an employee may entitle him to a greater degree of protection from insult and outrage by a supervisor with authority over him than if he were a stranger. *Hall*, *Contreras*, and *Alcorn*, *supra*.

On the other hand, conduct which may otherwise be extreme and outrageous, may be privileged under the circumstances. Liability does not attach where the actor has done no more than to insist upon his legal rights in a permissible way, even though he is aware that such insistence is certain to cause emotional stress. Restatement, *supra*, comment g, *§ 46*. Thus, disciplinary action and conflict in a pressure-packed workplace environment, although calculated to cause some degree of mental anguish, is not ordinarily actionable. Recognition of a cause of action for intentional infliction of emotional distress in a workplace environment has usually been limited to cases involving a pattern of deliberate, repeated harassment [**14] over a period of time. See, for example, *Maggio v. St. Francis Medical Center, Inc., supra.*

The distress suffered must be such that no reasonable person could be expected to endure it. Liability arises only where the mental suffering or anguish is extreme. Restatement, *supra*, comment j, *§ 46*. See *Lejeune v. Rayne Branch Hosp., supra, at p. 570*.

The defendant's knowledge that plaintiff is particularly susceptible to emotional distress is a factor to be considered. But the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough. Restatement, *supra*, comment f, *§ 46*. It follows that unless the actor has knowledge of the other's particular susceptibility to emotional distress, the actor's conduct should be judged in the light of the effect such conduct would ordinarily have on a person of ordinary sensibilities.

Liability can arise only where the actor desires to inflict severe emotional distress or where he knows that such distress is certain or substantially certain to result from his conduct. Restatement, *supra*, comment i, *§ 46*. The conduct must be intended or [**15] calculated to cause severe emotional distress and not just some lesser degree of fright, humiliation, embarrassment, worry, or the like.

V.

Applying these precepts of law to the facts of the instant case, we find that plaintiff has failed to establish her right to recover from the defendants for an intentional tort.

The one-minute outburst of profanity directed at three employees by a supervisor in the course of dressing them down for not working as he thought they should does not amount to such extreme and outrageous conduct as to give rise to recovery for intentional infliction of emotional distress. The vile language used was not so extreme or outrageous as to go beyond all possible bounds of decency and to be regarded as utterly intolerable in a civilized [*1211] community. Such conduct, although crude, rough and uncalled for, was not tortious, that is, did not give rise

to a cause of action for damages under general tort law or *LSA-C.C. Art. 2315*. The brief, isolated instance of improper behavior by the supervisor who lost his temper was the kind of unpleasant experience persons must expect to endure from time to time. The conduct was not more than a person of ordinary sensibilities [**16] can be expected to endure. The tirade was directed to all three employees and not just to plaintiff specifically. Although the evidence certainly supports a finding that plaintiff was a decent person and a diligent employee who would not condone the use of vulgar language and who would be upset at being unjustifiably called down at her place of work, there was no evidence that she was particularly susceptible to emotional distress, or that McDermott had knowledge of any such susceptibility. It was obviously his intention to cause some degree of distress on the part of the employees, but there is no indication that his spontaneous, brief, intemperate outburst was intended to cause emotional distress of a severe nature.

The duty here was to not engage in extreme or outrageous conduct intended or calculated to cause severe emotional distress. The duty was not breached because the conduct was not extreme or outrageous to a degree calculated to cause severe emotional distress to a person of ordinary sensibilities and the supervisor did not intend to inflict emotional distress of a severe nature, nor did he believe such a result was substantially certain to follow from his conduct.

VI.

For [**17] the reasons expressed in this opinion, the judgments of the district court and court of appeal are reversed, and judgment is rendered in favor of defendants dismissing plaintiff's suit, at plaintiff's cost.

REVERSED AND RENDERED.

Watson, J., respectfully dissents.

LEMMON, Justice, concurring in Denial of Rehearing. The application for rehearing presents a compelling argument that a reviewing court should accord great deference to the factual finding of the properly instructed jury that the supervisor's conduct was outrageous. Nevertheless, in this claim against her employer and co-employee, plaintiff's exclusive remedy is for worker's compensation benefits because the evidence does not establish that the supervisor desired to bring about the consequences which resulted from his act or believed the result was substantially certain to follow from his act.

 ¿Por qué el tribunal determina que el lenguaje torpe, soez y vulgar del supervisor McDermott no es tan extremo como para que vulnere los más elementales límites de la decencia?

TORTIOUS INTERFERENCE WITH CONTRACT

 Lumley v Gye COURT OF QUEEN'S BENCH [1843-1860] All ER Rep 208; [1843-60] All ER Rep 208 HEARING-DATES: 4, 5 FEBRUARY 1853 3 JUNE 1853 CROMPTON J:

The declaration in this case consisted of three counts. The two first stated a contract between the plaintiff, the proprietor of the Queen's Theatre, and Miss Wagner, for the performance by her for a period of three months at the plaintiff's theatre; and it then stated that the defendant, knowing the premises and with a malicious intention, while the agreement was in full force and before the expiration of the period for which Miss Wagner was engaged, wrongfully and maliciously enticed and procured Miss Wagner to refuse to sing or perform at the theatre and to depart from and abandon her contract with the plaintiff and all service thereunder, whereby Miss Wagner wrongfully, during the full period of the engagement, refused and made default in performing at the theatre. Special damage arising from the breach of Miss Wagner's engagement was then

stated. The third count stated that Miss Wagner had been hired and engaged by the plaintiff, then being the owner of the Queen's Theatre, to perform at the theatre for a specified period as the dramatic artiste of the plaintiff for reward to her in that behalf, and had become and was such dramatic artiste for the plaintiff at his theatre for profit to the plaintiff in that behalf, and that the defendant, well knowing the premises and with a malicious intention while Miss Wagner was such artiste of the plaintiff, wrongfully and maliciously enticed and procured her, so being such artiste of the plaintiff, to depart from and out of the employment of the plaintiff, whereby she wrongfully departed from and out of the service and employment of the plaintiff, and remained and continued absent from such service and employment until the expiration of her said hiring and engagement to the plaintiff by effluxion of time. Special damage arising from the breach of Miss Wagner's engagement was then stated. To this declaration the defendant demurred, and the question for our decision is whether all or any of the counts are good in substance.

The effect of the two first counts is that a person under a binding contract to perform at a theatre is induced by the malicious act of the defendant to refuse to perform and entirely abandon bar contract, whereby damage arises to the plaintiff, the proprietor of the theatre. The third count differs in stating expressly that the performer had agreed to perform as the dramatic artiste of the plaintiff, and had become and was the dramatic artiste of the plaintiff for reward to her, and that the] defendant maliciously procured her to depart out of the employment of the plaintiff as such dramatic artiste, whereby she did depart out of the employment and service of the plaintiff, whereby damage was suffered by the plaintiff. It was said, in support of the demurrer, that it did not appear in the declaration that the relation of master and servant ever subsisted between the plaintiff and Miss Wagner; that Miss Wagner was not

averred, especially in the two first counts, to have entered upon the service of the plaintiff; and that the engagement of a theatrical performer, even if the performer has entered upon the duties, is not of such a nature as to make the performer a servant within the rule of law which gives an action to the master for the wrongful enticing away of his servant. It was laid down broadly, as a general proposition of law, that no action will lie for procuring a person to break a contract, although such procuring is with a malicious intention and causes great and immediate injury. The law as to enticing servants was said to be contrary to the general rule and principle of law, to be anomalous, and probably to have had its origin from the state of society when serfdom existed and to be founded upon, or upon the equity of, the Statute of Labourers. It was said that it would be dangerous to hold that an action was maintainable for persuading a third party to break a contract unless some boundary or limits could be pointed out; that the remedy for enticing away servants was confined to cases where the relation of master and servant, in a strict sense, subsisted between the parties; and that, in all other cases of contract, the only remedy was against the party breaking the contract.

Whatever may have been the origin or foundation of the law as to enticing of servants, and whether it be, as contended by the plaintiff, an instance and branch of a wider rule, or, as contended by the defendant, an anomaly and an exception from the general rule of law on such subjects, it must now be considered clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation subsisting between master and servant by procuring the servant to depart from the master's service, or by harbouring and keeping him as servant after be has quitted it and during the time stipulated for as the period of service, whereby the master is injured, commits a wrongful act for which he is responsible at law. I think that the rule applies wherever the wrongful

interruption operates to prevent the service during the time for which the parties have contracted that the service shall continue, and I think that the relation of master and servant subsists, sufficiently for the purpose of such action, during the time for which there is in existence a binding contract of hiring and service between the parties. I think that it is a fanciful and technical and unjust distinction to say that the not having actually entered into the service, or that the service is not actually continuing, can make any difference. The wrong and injury are surely the same whether the wrongdoer entices away the gardener, who has hired himself for a year, the night before he is to go to his work, or after be has planted the first cabbage on the first morning of his service. I should be sorry to support a distinction so unjust, and so repugnant to common sense, unless bound to do so by some rule or authority of law plainly showing that such distinction exists.

The proposition of the defendant, that there must be a service actually subsisting, seems to be inconsistent with the authorities that show these actions to be maintainable for receiving or harbouring servants after they have left the actual service of the master. In Blake v Lanyon (1) it was held by the Court of King's Bench, in accordance with the opinion of GAWDY, J, in Adams and Bafealds Case (2) and against the opinion of the two other judges who delivered their opinions in that case, that an action will lie for continuing to employ the servant of another after notice, without having enticed him away and although the defendant had received the servant innocently. It is there said (6 Term Rep at p 222):

"A person who contracts with another to do certain work for him is the servant of that other till the work is finished, and no other person can employ such servant to the prejudice of the first master; the very act of giving him employment is affording him the means of keeping him out of his former service."

This appears to me to show that we are to look to the time during which the contract of service exists, and not to the question whether an actual service subsists at the time. In Blake v Lanyon (1) the party, so far from being in the actual service of the plaintiff, had abandoned that service, and entered into the service of the defendant in which he actually was, but, inasmuch as there was a binding contract of service with the plaintiffs, and the defendant kept the party after notice he was held liable to an action. Since this decision actions for wrongfully hiring or harbouring servants after the first actual service had been put an end to have been frequent: see Pilkington v Scott (8) and Hartley v Cummings (9). In Sykes v Dixon (7) where the distinction as to the actual service having been put an end to was relied upon for another purpose, it does not seem to have occurred to the Bar or the court that the action would fail on account of there having been no actual service at the time of the second hiring or the harbouring; but the question as to there being, or not being, a binding contract of service in existence at the time seems to have been regarded as the real question.

The objection as to the actual employment not having commenced would not apply in the present case to the third count, which states that Miss Wagner had become the artiste of the plaintiff and that the defendant had induced her to depart from the employment. But it was further said that the engagement, employment, or service, in the present case was not of such a nature as to constitute the relation of master and servant, so as to warrant the application of the usual rule of law giving a remedy in case of enticing away servants. The nature of the injury and of the damage being the same, and the supposed right of action being in strict analogy to the ordinary case of master and servant, I see no reason for confining the case to services or engagements under contracts for services of any particular description; and I think that the remedy, in the absence of any legal reason to the contrary, may well apply to all cases where

there is an unlawful and malicious enticing away of any person employed to give his personal labour or service for a given time under the direction of a master or employer who is injured by the wrongful act, more especially when the party is bound to give such personal services exclusively to the master or employer though I by no means say that the service need be exclusive.

Two nisi prius decisions were cited by the counsel for the defendant in support of this part of the argument. One of these cases, Ashley v Harrison (3) was an action against the defendant for having published a libel against a performer, whereby she was deterred from appearing on the stage, and LORD KENYON held the action not maintainable. This decision appears, especially from the report of the case in ESPINASSE, to have proceeded on the ground that the damage was too remote to be connected with the defendant's act. This was pointed out as the real reason of the decision by MR ERSKINE in Tarleton v McGawley (4) tried at the same sittings as Ashley v Harrison (3). The other case, Taylor v Neri (5) was an action for an assault on a performer, whereby the plaintiff lost the benefit of his services, and EYRE, CJ, said that he did not think that the court had ever gone further than the case of a menial servant, for that, if a daughter had left the service of her father, no action per quod servitium amisit would lie. He afterwards observed that, if such action would lie, every man whose servant, whether domestic or not, was kept away a day from his business could maintain an action, and he said that the record stated that Breda was a servant hired to sing, and, in his judgment, he was not a servant at all, and he nonsuited the plaintiff.

Whatever may be the law as to the class of actions referred to, for assaulting or debauching daughters or servants per quod servitium amisit, which differ from actions of the present nature for the wrongful enticing or harbouring with notice, as pointed out by LORD KENYON

in Force v Wilson (6) it is clear from Blake v Lanyon (1) and other subsequent cases, Sykes v Dixon (7) Pilkington v Scott (8) and Hartley v Cummings (9) that the action for maliciously interfering with persons in the employment of another is not confined to menial servants, as suggested in Taylor v Neri (5). In Blake v Lanyon (1) a journeyman who was to work by the piece, and had left his work unfinished, was held to be a servant for the purposes of such an action, and I think that it was most properly laid down by the court in that case that a person who contracts to do certain work for another is the servant of that other (of course with reference to such an action) until the work be finished. It appears to me that Miss Wagner had contracted to do work for the plaintiff within the meaning of this rule, and I think that, where a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employed, or master and servant, within the meaning of this rule. I see no reason for narrowing such a rule, but I should rather, if necessary, apply such a remedy to a case "new in its instance, but" "not new in the reason and principle of it": Per HOLT, CJ, in Keeble v Hickeringill (10); that is, to a case where the wrong and the damage are strictly analogous to the wrong and the damage in a well recognised class of cases.

In deciding this case on the narrower ground, I wish by no means to be considered as deciding that the larger ground taken by counsel for the plaintiff is not tenable, or as saying that in no case except that of master and servant is an action maintainable for maliciously inducing another to break a contract to the injury of the person with whom such contract has been made. It does not appear to me to be a sound answer to say that the [actionable] act in such cases is the act of the party who breaks the contract, for that reason would apply in the acknowledged case of master and servant. Nor is it an answer to say that there is a remedy against the contractor and that the party relies on the contract, for, besides that reason also applying to the

case of master and servant, the action on the contract and the action against the malicious wrongdoer may be for a different matter, and the damages payable for such malicious injury might be calculated on a very different principle from the amount of the debt which might be the only sum recoverable on the contract. Suppose a trader, with a malicious intent to ruin a rival trader, goes to a banker or other party who owes money to his rival, and begs him not to pay the money which he owes him, and by that means ruins or greatly prejudices the party. I am by no means prepared to say that an action could not be maintained, and that damages, beyond the amount of the debt if the injury were great, or much less than such amount if the injury were less serious, might not be recovered. Where two or more parties were concerned in inflicting such injury, an indictment, or a writ of conspiracy at common law, might, perhaps, have been maintainable. Where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie, and in such an action on the case the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action: see note (4) to Skinner v Gunton (11) 1 Woes Saund at p 230. In this class of cases it must be assumed that it is the malicious act of the defendant, and that malicious act only, which causes the servant or contractor not to perform the work or contract which he would otherwise have done. The servant or contractor may be utterly unable to pay for anything like the amount of the damage sustained entirely from the wrongful act of the defendant, and it would seem unjust, and contrary to the general principles of law, if such a wrongdoer were not responsible for the damage caused by his wrongful and malicious act.

Without, however, deciding any such more general question, I think that we are justified in applying the

principle of the action for enticing away servants to a case where the defendant maliciously procures a party, who is under a valid contract to give her exclusive personal services to the plaintiff for a specified period, to refuse to give such services during the period for which she had so contracted, whereby the plaintiff was injured. I think, therefore, that our judgment should be for the plaintiff.

ERLE J:

The question raised upon this demurrer is whether an action will lie by the proprietor of a theatre against a person who maliciously procures an entire abandonment of a contract to perform exclusively at that theatre for a certain time, whereby damage was sustained? It seems to me that it will. The authorities are numerous and uniform that an action will lie by a master against a person who procures that a servant should unlawfully leave his service. The principle involved in these cases comprises the present, for, there, the right of action in the master arises from the wrongful act of the defendant in procuring; that the person hired should break his contract by putting an end to the relation of employer and employed, and the present case is the same.

If it is objected that this class of actions for procuring a breach of contract of hiring rests upon no principle and ought not to be extended beyond the cases heretofore decided, and that, as those have related to contracts respecting trade, manufactures, or household service, and not to performance at a theatre, therefore, they are no authority for an action in respect of a contract for such performance, the answer appears to me to be that the class of cases referred to rests upon the principle that the procurement of the violation of the right is a cause of action, and that when this principle is applied to a violation of a right arising upon a contract of hiring, the nature of the service contracted for is immaterial. It is clear that the procurement of the violation of a right is a cause of action

in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security. He who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of. Where a right to the performance of a contract has been violated by a breach thereof, the remedy is upon the contract against the contracting party. If he is made to indemnify for such breach, no further recourse is allowed, and, as in case of the procurement of a breach of contract the action is for a wrong and cannot be joined with the action on the contract, and as the act itself is not likely to be of frequent occurrence nor easy of proof, therefore, the action for this wrong, in respect of other contracts than those of hiring, are not numerous, but still they seem to me sufficient to show that the principle has been recognised.

In Winsmore v Greenbank (12) it was decided that the procuring of a breach of the contract of a wife is a cause of action [the action was for enticement. The only distinction in principle between this case and other cases of contracts is that the wife is not liable to be sued, but the judgment rests on no such grounds. The procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong. In Green v Button (13) it was decided that the procuring a breach of it contract of sale of goods by a false claim of lien is an actionable wrong. Shepherd v Wakeman (14) is to the same effect, where the defendant procured a breach of a contract of marriage by asserting that the woman was already married. In Ashley v Harrison (3) and in Taylor v Neri (5) it was properly decided that the action did not lie because the battery, in the first case, and the libel, in the second case, upon the contracting parties were not shown to be with intent to cause those persons to break their contracts, and so the defendants by their wrongful acts did not procure the breaches of contract

which were complained of. If they had so acted for the purpose of procuring those breaches, it seems to me, they would have been liable to the plaintiffs. To these decisions, founded on the principle now relied upon, the cases for procuring breaches of contracts of hiring should be added. At least LORD MANSFIELD'S judgment in Bird v Randall (15) is to that effect.

This principle is supported by good reason. He who maliciously procures a damage to another by violation of his right ought to be made to indemnify, and that whether he procures an actionable wrong or a breach of contract. He who procures the non-delivery of goods according to contract may inflict an injury, the same as he who procures the abstraction of goods after delivery, and both ought on the same ground to be made responsible. The remedy on the contract may be inadequate, as where the measures of damages is restricted; or in the case of nonpayment of a debt where the damage may be bankruptcy to the creditor who is disappointed, but the measure of damages against the debtor is interest only; or, in the case of the non-delivery of the goods, the disappointment may lead to a heavy forfeiture under a contract to complete a work within a time, but the measure of damages against the vendor of the goods for non-delivery may be only the difference between the contract price and the market value of the goods in question at the time of the breach. In such cases, he who procures the damage maliciously might justly be made responsible beyond the liability of the contractor.

With respect to the objection that the contracting party had not begun the performance of the contract, I do not think it a tenable ground of defence. The procurement of the breach of the contract may be equally injurious, whether the service has begun or not, and, in my judgment, ought to be equally actionable as the relation of employer and employed is constituted by the contract alone and no act of service is necessary thereto. The result is that there ought to be, in my opinion, judgment for the plaintiff.

WIGHTMAN J: (read by LORD CAMPBELL CJ)

This was a demurrer to a declaration in an action against the defendant for, maliciously, and with intent to injure the plaintiff, causing, procuring and enticing Miss Wagner, who had Contracted with the plaintiff to sing at his theatre, to break her contract and refuse to sing, by which he sustained damage.

It was contended for the defendant that an action is not maintainable for inducing another to break a contract although the inducement is malicious and with intent to injure; and that the breach of contract complained of is, in contemplation of law, the wrongful act of the contracting party and not the consequence of the malicious persuasion of the party charged which ought not to have had any effect or influence; and that the damage is not the legal consequence of the acts of the defendant. It was further urged that the cases in which actions have been held maintainable for seducing servants and apprentices from the employ of their masters are exceptions to the general rule and are not to be extended, and that the present case, as it appears upon the declaration, is not within any of the excepted cases.

With respect to the first and second counts of the declaration, it was contended for the plaintiff that an action on the case is maintainable for maliciously procuring a person to refuse to perform a contract into which he has entered, by which refusal the plaintiff has sustained an injury; and though no case was cited upon the argument in which such an action had been brought, or directly held to be maintainable, it was said that on principle such an action was maintainable. The authority of COMYNS, CB, was cited, that in all cases where a man has a temporal loss or damage by the wrong of another he may have an action on the case. In the present case there is the malicious procurement of Miss Wagner to break her contract, and the

consequent loss to the plaintiff. Why then may not the plaintiff maintain an action on the case? Because, as it is said, the loss or damage is not the natural or legal consequence of the acts of the defendant. There is the injuria, and the damnum, but it is contended that the damnum is neither the natural nor legal consequence of the injuria, and that, consequently, the action is not maintainable as the breaking her contract was the spontaneous act of Miss Wagner herself, who was under no obligation to yield to the persuasion or procurement of the defendant.

Vicars v Wilcocks (16) which although it has been much brought into question has never been directly overruled, was relied upon as an authority upon this point for the defendant. That case, however, is clearly distinguishable from the present upon the ground, suggested by TINDAL, CJ, in Wand v Weeks (17) that the damage in that case, as well as in Vicars v Wilcocks (16) was not the necessary consequence of the original slander uttered by the defendants, but the result of spontaneous and unauthorised communications made by those to whom the words were uttered by the defendants. The distinction is taken in Green v Button (13) in which it was held that an action was maintainable against the defendant for maliciously and wrongfully causing certain persons to refuse to deliver goods to the plaintiff by asserting that he had a lien upon them and ordering these persons to retain the goods until further orders from him. It was urged for the defendant in that case that, as the persons in whose custody the goods were were under no legal obligation to obey the orders of the defendant, it was the mere spontaneous act of these persons which occasioned the damage to the plaintiff, but the court held the action to be maintainable though the defendant did make the claim as of right, he having done so maliciously and without any reasonable cause and the damage accruing thereby.

In Winsmore v Greenbank (12) the plaintiff in his first count alleged that, his wife having unlawfully left him and lived apart from him during which time a considerable fortune was left for her separate use, and she being willing to return to the plaintiff whereby he would have had the benefit of her fortune, the defendant, in order to prevent the plaintiff from receiving any benefit from the wife's fortune and the wife from being reconciled to him, unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent from the plaintiff, and she did by means thereof continue absent from him, whereby he lost the comfort and society of the wife and her aid in his domestic affairs and the profit and advantage he would have had from her fortune. Upon motion in arrest of judgment this count was held good and that it sufficiently appeared that there was both damnum and injuria: it was prima facie an unlawful act of the wife to live apart from her husband, and it was unlawful, and, therefore, tortious, in the defendant to procure and persuade her to do an unlawful act: and as the damage to the plaintiff was occasioned thereby, an action on the case was maintainable. This case appears to in, to be an exceedingly strong authority in the plaintiff's favour in the present rose. It was undoubtedly prima facie an unlawful act on the part of Miss Wagner to break her contract, and, therefore, a tortious act of the defendant maliciously to procure her to do so, and, if damage to the plaintiff followed in consequence of that tortious act of the defendant, it would seem, upon the authority of Green v Button (13) and Winsmore v Greenbank (12) as well as upon general principle, that an action on the case is maintainable.

A doubt was expressed by LORD ELDON, in Morris v Langdale (18) whether in an action on the case for slander the plaintiff could succeed upon an allegation of special damage that, by reason of the speaking of the words, other persons refused to perform their contracts with him, LORD

ELDON observing that that was a damage which might be compensated in actions by the plaintiff against such persons. It had, however, been remarked with much force by MR STARKIE, in his TREATISE ON THE Law or LIBEL (2nd Edn) vol 1, p 205, that such a doctrine would be productive of much hardship in many cases, as a mere right of action for damages for non-performance of a contract can hardly be considered a full compensation ton person who has lost the immediate benefit of the performance of it. The doubt, indeed, is hardly sustainable on principle, and there are many cases in which actions have been maintained for slanderous words, not in themselves actionable on the ground of the speaking of the words having induced other persons to act wrongfully towards the plaintiffs, as in Newman v Zachary (19) where an action on the case was held to be maintainable for wrongfully representing to the bailiff of a manor that a sheep was an estray, in consequence of which it was wrongfully seized. On the whole, therefore, I am of opinion that, on the general principles on which actions on the case ore founded, as well as on authority, the present action is maintainable.

It is not, however, necessary, for the maintenance of the third count of the declaration at least, to rely upon so general a principle, for the case, at all events, appears to me to fall within the cases, which the defendant considers are exceptions to a general rule and in which actions have been held maintainable, for procuring persons to quit the service in which they had been retained and employed. The defendant contends that the exception is limited to the cases of apprentices and menial servants and others to whom the provisions of the Statutes of Labourers would be applicable. It appears to me, however, upon consideration of the cases cited upon the argument, that the right of an employer to maintain an action on the case for procuring or inducing persons in his service to abandon their employment iv not so limited, but that it extends to the case

of persons who have contracted for personal service for a time, and who during the period have been wrongfully procured and incited to abandon such service, to the loss of the persons whom they had contracted to serve. The right to maintain such an action is by the common low, and not by the Statute of Labourers, which, however, gives a remedy, which the common law did not, in cases where persons within the purview of the statute have voluntarily left the service in which they were engaged and have been retained by another who knew of their previous employment. In BROOKE'S ABRIDGEMENT, tit LABORERS, pl 21, it is said:

"In trespass it was agreed that at common law, if a man had taken my servant from me, trespass lay vi et armis; but if he had procured the servant to depart and he retained him, action lay not at common law vi et armis, but it lay upon the case upon the departure by procurement."

In Adams and Bafealds Case (2) where the plaintiff declared that his servant departed his service without cause and the defendant knowing him to be his servant retained him, two judges out of three held that the action did not lie at common law unless the defendant procured him to leave the service. In all these cases the words "servant" and "service" are used, but there is nothing to indicate the kind of servant or of service in respect of which the dicta and decisions occurred. There is a case in the YEAR BOOK Mich 10 Hen 68, fol 8 B, pl 30, in which it is said that an action does not lie against a chaplain upon the Statute of Labourers for not chaunting the mass, for it is said he may not be always disposed to sing and can no more be coerced by force of the statute than a knight, esquire or gentleman. There is no doubt but that the Statute of Labourers only applied to persons whose only means of living was by the labour of their hands. It was passed in the twenty-third year of Edward III [1349], and it recited that so many of the people, especially workmen and servants, had died of the

plague that those that remained required excessive wages so that there was lack of ploughmen and such labourers, and it then obliged every person within the age of sixty, not living in merchandise, nor exercising any craft, nor having of his own whereof he might live, nor proper land which he might till himself, to serve whoever might require him at such wages as were paid in the twentieth year of the king's reign or some three years before. The remedies and penalties given by this and the next subsequent Statute of Labourers [25 Edw 3, St 2: 1350] were limited to the persons described in then, but the remedies given by the common law are not in terms limited to any description of servant or service.

The more modern cases give instances and contain dicta of judges which appear to warrant a more extended application of the right of action for procuring a servant to leave his employment than that contended for by the defendant. In Hart v Aldridge (20) the plaintiff brought an action for enticing away the plaintiff's servants who worked for him as journeymen shoemakers. It appeared that they worked for the plaintiff for no determinate time, but only by the piece, and had, at the time of the enticing away, each a pair of shoes of the plaintiff unfinished. It was contended that a journeyman hired not for time but by the piece was not a servant, but LORD MANSFIELD said that by being found to be the plaintiff's "journeymen" they were found to be the plaintiff's servants (I Cowp at p 56):

"The point turns upon the jury finding that the persons enticed away were employed by the plaintiff as his journeymen. It might, perhaps, have been different if the men had taken work for everybody."

In the present case, Miss Wagner was, as stated in the third count and admitted by the demurrer, employed by the plaintiff as his dramatic artiste. Can it make any real difference that in Hart v Aldridge (20) the persons enticed were employed by the plaintiff as his journeymen

shoemakers, and that in the present case Miss Wagner was employed by the plaintiff as his dramatic artiste? In both cases the services were the personal services of the persons engaged, and, though the description of the services was very different, the personal service being in the one case to make shoes and in the other to sing songs, it seems to me difficult to distinguish the cases upon any principle. It is the exclusive personal service that gives the right. In Blake v Lanyon (1) which was a case very similar in respect to the nature of the service to that of Hart v Aldridge (20) it was stated by the court, as a general proposition, that "a person who contracts with another to do certain work for him is the servant of that other till the work is finished."

These cases appear to me to be very strong authorities in favour of the plaintiff, as far at least as regards the third count. Two cases, however, were cited for the defendant, as direct authorities against the maintenance of the present action. The first was that of Ashley v Harrison (3) in which the plaintiff declared that he had retained Madam Mara to sing publicly for him in certain musical performances which he exhibited for profit at Covent Garden Theatre, but that the defendant, contriving to lessen his profits and to deter Madam Mara from singing, published a libel concerning her which deterred her from singing as she could not sing without danger of being assaulted and ill treated in consequence of the libel. LORD KENYON held, at nisi price, that the action was not maintainable as the injury was too remote. The case does not appear to have undergone much discussion. It was only a decision at nisi pries, but it is clearly distinguishable from the present, as Madam Mara was deterred from singing, not directly in consequence of anything done by the defendant, but in consequence of her fear that what he did might induce somebody else to assault and ill treat her. The injury in that case may have been well held to be too remote, but it does

not at all resemble this, where the loss is the direct consequence of the defendant's act.

The other case was Taylor v Neri (5) which certainly bears more directly upon the present. The declaration stated that the plaintiff, being manager of the Opera House, had engaged Breda to sing, and that the defendant beat him, whereby the plaintiff lost his service. EYRE, CJ, expressed a doubt whether the action was maintainable, observing that, if such an action could be supported, every person whose servant, whether domestic, or not, was kept away a day from his business could maintain an action. He was of opinion that Breda was not a servant at all. The case was very little discussed, was a decision at nisi prius, and does not appear to have undergone much consideration; and, without adverting to some distinctions between that and the present case, it can hardly be considered as an authority of mach weight for the defendant. I am, therefore, of opinion that upon the whole case, as it appears upon these pleadings, the plaintiff is entitled to our judgment.

COLERIDGE J:

The plaintiff in this case, by the first count of his declaration, shapes his case in substance as follows. He alleges a contract made between himself and Johanna Wagner for her to perform in his theatre in operas for a specified time, ie, from April 15 to July 15 on certain terms, and, among these, one that she was not during the time to sing or use her talents elsewhere than in his theatre without his written authority. He then complains that the defendant, knowing the premises, and maliciously intending to injure him and to prevent Johanna Wagner from performing according to her contract, while the agreement was in full force, but before the commencement of the term, on April 8, enticed and procured her to make default in singing or performing at the theatre, and to depart from and abandon her contract, against his will and without his written authority, by means of which enticement and

procurement she unlawfully and wrongfully wholly refused to perform her contract, and he sustained special damage. The second count, applies to an enticement, after certain proceedings in equity, to Johanna Wagner to continue her default for the residue of the term. The third count states that Johanna Wagner was hired and engaged by the plaintiff to sing and perform at his theatre, for a certain time, as his dramatic artiste for reward, and had become and was such dramatic artiste, and complains that the defendant, maliciously intending to injure him, enticed and procured her to depart from and out of his employment. These counts are demurred to, and the demurrers raise the questions whether an action will lie against a third party for maliciously and injuriously enticing and procuring another to break a contract for exclusive service as a singer and theatrical performer, in the first place, while the contract is merely executory, and, in the second, after it is in course of execution? I make no distinction between the counts, and am of opinion that the defendant is entitled to our judgment generally.

To maintain this action, one of two propositions must be maintained - either that an action will lie against any one by whose persuasions one party to a contract is induced to break it to the damage of the other party, or that the action for seducing a servant from the master or persuading one who has contracted for service from entering into the employ, is of so wide application as to embrace the case of one in the position and profession of Johanna Wagner. After much consideration and enquiry I am of opinion that neither of these propositions is true, and they are both of them so important, and, if established by judicial decision, will lead to consequences so general, that, though I regret the necessity, I must not abstain from entering into remarks of some length in support of my view of the law.

It may simplify what I have to say, if I first state what are the conclusions which I seek to establish. They are that

in respect of breach of contract the general rule of our law is to confine its remedies by action to the contracting parties and to damages directly and proximately consequential on the act of him who is sued; that, as between master and servant, there is an admitted exception; that this exception dates from the Statute of Labourers, 1349, and both on principle and according to authority is limited by it. If I am right in these propositions, the conclusion will be for the defendant, because enough appears on this record to show, as to the first, that be, and, as to the second, that Johanna Wagner, is not within the limits so drawn.

First then, that the remedy for breach of contract is by the general rule of our law confined to the contracting parties. I need not argue that, if there be any remedy by action against a stranger, it must be by action on the case. To found this, there must be both injury in the strict sense of the word (that is a wrong done) and loss resulting from that injury; the injury or wrong done must be the act of the defendant; and the loss must be a direct and natural, not a remote, and indirect, consequence of the defendant's act. Unless there be a loss thus directly and proximately connected with the act, the mere intention, or even the endeavour, to produce it will not found the action. The existence of the intention, that is the malice, will in some cases be an essential ingredient in order to constitute the wrongfulness or injurious nature of the act, but it will neither supply the want of the act itself, or its hurtful consequence; however complete the injuria, and whether with malice or without, if the act be after all sine damno, no action on the case will lie. The distinction between civil and criminal proceedings in this respect is clear and material, and a recollection of the different objects of the two will dispose of any argument founded merely on the allegation of malice in this declaration if I shall be found right in thinking that the defendant's act has not been the direct or proximate cause of the damage which the plaintiff

alleges he has sustained. If a contract has been made between A and B that the latter should go supercargo for the former on a voyage to China, and C, however maliciously, persuades B to break his contract, but in vain, no one, I suppose, would contend that any action would lie against C. On the other hand, suppose a contract of the same kind made, between the same parties to go to Sierra Leone, and C urgently and bona fide advises B to abandon his contract, which on consideration B does, whereby loss results to A. I think no one will be found hold enough to maintain that an action would lie against C. In the first case no loss has resulted - the malice has been ineffectual; in the second, though a loss has resulted from the act, that act was not C's, but entirely and exclusively B's own. If so, let malice be added, and let C have persuaded, not bona fide but mala fide and maliciously, still, all other circumstances remaining the same, the same reason applies, for it is malitia sine damno, if the hurtful act is entirely and exclusively B's, which last circumstance cannot be affected by the presence or absence of malice in C.

Thus far I do not apprehend much difference of opinion. There would be such a manifest absurdity in attempting to trace up the act of a free agent breaking a contract to all the advisers who may have influenced his mind, more or less honestly, more or less powerfully, and to make them responsible civilly for the consequences of what after all is his own act, and for the whole of the hurtful consequences of which the law makes him directly and fully responsible, that I believe it will never be contended for seriously. This was the principle on which LORD KENYON proceeded in Ashley v Harrison (3). There the defendant libelled Madame Mara, and the plaintiff alleged that, in consequence, she, from apprehension of being hissed and ill-treated, forbore to sing for him, though engaged, whereby he lost great profits. LORD KENYON nonsuited the plaintiff: he thought the

defendant's act too remote from the damage assigned. But it will be said that this declaration charges more than is stated in the case last supposed, because it alleges, not merely a persuasion or enticement, but a procuring. In Winsmore v Greenbank (12) the same word was used in the first count of the declaration, which alone is material to the present case. The Chief Justice, who relied on it and distinguished it from enticing, defined it to mean "persuading with effect"; and he held that the husband might sue a stranger for persuading with effect his wife to do a wrongful act directly hurtful to himself.

Although I should hesitate to be bound by every word of the judgment, yet I am not called on to question this definition or the decision of the case. Persuading w with effect, or effectually or successfully persuading, may, no doubt, sometimes be actionable - as in trespass - even where it is used towards a free agent. The maxims, qui facit per alium facit per se, and respondeat superior, are unquestionable, but where they apply the wrongful act done is properly charged to be the act of him who has procured it to be done. He is sued as a principal trespasser, and the damage, if proved, flows directly and immediately from his act, though it was the hand of another, and he a free agent, that was employed. But, when you apply the term of effectual persuasion to the breach of a contract, it has obviously a different meaning. The persuader has not broken and could not break the contract, for he had never entered into any; he cannot be sued upon the contract; and yet it is the breach of the contract only that is the cause of damage. Neither can it be said that in breaking the contract the contractor is the agent of him who procures him to do so; it is still his own act; he is principal in so doing, and is the only principal. This answer may seem technical, but it really goes to the root of the matter. It shows that the procurer has not done the hurtful act; what he has done is too remote from the damage to make him answerable for it.

Winsmore v Greenback (12) seems to me to have little or no bearing on the present case. A wife is not, as regards her husband, a free agent or separate person [but see now Law Reform (Married Women and Tortfeasors) Act, 1935, s 1, and Married Women (Restraint upon Anticipation) Act, 1949, s 1). If to be considered so for the present purpose, she is rather in the character of a servant, with this important peculiarity, that, if she be induced to withdraw from his society and cohabit with another or do him any wrong, no action is maintainable by him against her. In the case of criminal conversation [abolished by Matrimonial Causes Act, 1857], trespass lies against the adulterer as for an assault on her, however she may in fact have been a willing party to all that the defendant had done. No doubt, therefore, effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing her, and so, in other counts of the declaration, was it charged in this very case of Winsmore v Greenbank (12). A case explainable and explained on the same principle is that of ravishment of ward. The writ for this lay against one who procured a man's ward to depart from him, and, where this was urged in a case hereafter to be cited (YEAR BOOR, Mich 11 Hen 4, fol 23 A, pl 46) HANKFORD, J, gives the answer. The reason is, he says, because the ward is a chattel, and vests in him who has the right.

None of this reasoning applies to the case of a breach of contract: if it does, I should be glad to know how any treatise on the law of contract could be complete without a chapter on this head, or how it happens that we have no decisions upon it. Certainly no subject could well be more fruitful or important; important contracts are more commonly broken with than without persuaders or procurers, and these often responsible persons when the principals may not be so. I am aware that with respect to an action on the case the argument prime impressionis is

sometimes of no weight. If the circumstances under which the action would be brought have not before arisen, or are of rare occurrence, it will be of none, or only of inconsiderable weight, but if the circumstances have been common, if there has been frequently occasion for the action, I apprehend it is important to find that the action has yet never been tried.

We find a plentiful supply both of text and decision in the case of seduction of servants, and what inference does this lead to, contrasted with the silence of the books and the absence of decisions on the case of breached ordinary contracts? Let this too be considered - that, if by the common law it was actionable effectually to persuade another to break his contract to the damage of the contractor, it would seem on principle to be equally so to uphold him, after the breach, in continuing it. Upon this the two conflicting cases of Adams and Bafealds Case (2) and Blake v Lanyon (1) are worth considering. In the first, two judges against one decided that an action does not lie for retaining the servant of another unless the defendant has first procured the servant to leave his master; in the second, this was overruled; and, although it was taken as a fact that the defendant had hired the servant in ignorance, and, as soon as be knew that he had left his former master with work unfinished, requested him to return, which we must understand to have been a real, earnest request, and only continued him after his refusal, which we must take to have been his independent refusal, it was held that the action lay, and this reason is given: "The very act of giving him employment is affording him the means of keeping out of his former service." Would the judges who laid this down have held it actionable to give a stray servant food or clothing or lodging out of charity? Yet these would have been equally means of keeping him out of his former service.

The true ground on which this action was maintainable, if at all, was the Statute of Labourers, to which no reference

was made. But I mention this case now as showing how far courts of justice may be led if they allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts. To draw a line between advice, persuasion, enticement and procurement is practically impossible in a court of justice. Who shall say how much of a free agents' resolution flows from the interference of other minds or the independent resolution of his own? This is a matter for the casuist rather than the jurist; still less is it for the juryman. Again, why draw the line between bad and good faith? If advice given mala fide and loss sustained entitle me to damages, why, though the advice be given honestly, but under wrong information, with a loss sustained, am I not entitled to them. According to all legal analogies, the bona fides of him who, by a conscious wilful act, directly injures me will not relieve him from the obligation to compensate me in damages for my lose. Again, where several persons happen to persuade to the same effect, and in the result the party persuaded acts upon the advice, how is it to be determined against whom the action may be brought, whether they are to be sued jointly or severally, in what proportions damages are to be recovered? Again, if, instead of limiting our recourse to the agent, actual or constructive, we will go back to the person who immediately persuades or procures him one step, why are we to stop there? The first mover, and the malicious mover too, may be removed several steps backward from the party actually induced to break the contract: why are we not to trace him out? Morally be may be the most guilty. I adopt the arguments of LORD ABINGER and ALDERSON, B, in Winterbottom v Wright (21); if we go the first step, we can show no good reason for not going fifty. And, again, I ask how is it that, if the law really be as the plaintiff contends, we have no discussions upon such

questions as these in our books, no decisions in our reports? Surely such cases would not have been of rare occurrence they are not of slight importance, and could hardly have been decided without reference to the courts in bane. Not one was cited in the argument bearing closely enough upon this point to warrant me in any further detailed examination of them.

I conclude, therefore, what occurs to me on the first proposition on which the plaintiff's case rests.

I come now to the second proposition, that the decisions in respect of master and servant, and the seducing of the latter from the employ of the former, are exceptions grafted on the general law traceable up to the Statute of Labourers. This is, of course, distinct from the question of the extent of the exception, that is, to what classes of servants it applies, but the enquiries are so connected together hl fact, and the latter has so obvious a bearing in support of the former, that it will be better to take them both together.

In the first place, I cannot find any instance of this action having been brought before the statute passed, the weight of which fact is much increased by finding that it was of common occurrence very soon after. The evidence, for it is not merely negative, for the mischief and the cause of action appear to have been well known before and the want of the remedy felt. The common law did give a remedy in certain cases, and judges are found pointing out what that remedy was, and to what cases it applied. From the cases collected in FITZHERBERT'S ABRIDGEMENT, tit LABORERS, it appears that the distinction between the action in common law and the action upon the statute was well known. Wherever the former action lay it was in trespass, and not on the case, in saying which I do not rely merely on the words, writ of trespass, which might be applicable to trespass on the case, but 1 rely on the operative words of the writ which stated a taking vi et armis. It might be joined with trespass quare clausum fregit

or trespass for the asportation of chattels or false imprisonment. The count necessarily charged the taking of the servant out of the service of the plaintiff, whereas the writ upon the statute, as appears from FITZHERBERT'S NATURA BREVIUM, 167 B, charges the retainer and admission of the servant into the defendant's service after he has been induced to withdraw, or has withdrawn without reasonable cause, from that of the plaintiff.

I do not wish unnecessarily to multiply citations from the YEAR BOOKS, but it will be necessary to refer to some, and at greater length than they are found in the abridgments. I begin with one out of the order of time, because it is so full to the purpose, and because it may be referred to as abridged by BROOKE (ABRIDGEMENT, tit LABORERS, pl 21.) I think incorrectly in a material point. He says that it was agreed in it that case lay for the departure by procurement, but not where the servant departed without procurement and was afterwards retained. The case is YEAR BOOK Mich 11 Hen 4 [1409], fol 23 A, pl 46. Not, as he cites it with a slight inaccuracy, 21.22.

"Thomas Frome brings writ of trespass at the common law against defendant for his close broken, and one J his servant taken out of his service. (prix hers de son service) and certain sheep driven away with force and arms."

There were different pleadings and much discussion as to the separate causes of action, which introduces some confusion into the case. As to the servant, Tremain pleaded:

"We found him wandering in a certain place in soother county; and there he came and offered his service to us, and made covenant with us to serve us; and so demands judgment."

Skrene, for the plaintiff, replies:

"He has admitted that the servant was in our service, and that he has received him into his service; and so he has admitted our action."

HANKFORD, J, said, however:

"When the servant was wandering, if the defendant had not cognizance that he was in your service, then this first receiver cannot be adjudged a wrong done by the defendant but by the servant."

Upon this Skrene amends his pleading, and says that the servant made a covenant with the plaintiff to serve him in the office of "berchier" [shepherd] "for a whole year, within which year the defendant procured our servant to go out of our service, by force of which procurement he went out of our service within the year, and the defendant retains him in his service; which matter we wish to aver;" and demands judgment. On which HILL, J, says:

"His writ of trespass as to the servant does not lie upon the matter shown; for the plaintiff says that the defendant did nothing but procure the servant to go out of his service, by which procurement he went out of his service, and was retained with the defendant, in which case action on the Statute of Labourers is given, and not this action."

Skrene argues:

"If a man procures my servant to go not of my service, and retains him upon that, he does me wrong."

HANKFORD, J, and HILL, J, both say:

"True it is that he does you wrong: but you shall not have, a remedy on this manner of writ as it is here."

CULPEPER, J:

"This action is taken upon an action at the common law ... the actions which were at the common law before the Statute of Labourers are not taken away by that statute;

and, if a man procure and abet my servant to go with him in his service, action at common law lies well."

HILL, J:

"No, certes, action at common law of trespass does not lie on such a case; for such a procurement cannot be said in any manner to be, against the peace."

THIRNING, CJ:

"If my servant before the statute went out of my service, I suppose well that no action is given to the master; but if a man took my servant out of my service, there action of trespass lay at the common law, and still lies; and, if I am beaten by the abettment and command of a man, the commander is guilty of trespass: so in the case here, when he shall procure the servant to depart and retains him with him, he seems guilty of trespass."

But HILL, J, answers him:

"Sir, in your case there is no marvel, because the principal actor in your case is guilty of trespass: but the case at Bar is different; for the procurement only is not a trespass against the peace, nor is the departure of the servant a trespass against the peace; then, if the cause of action is not against the peace, the remainder which follows after it is not trespass against the peace: and I well agree that the defendant in this case is guilty, as of a thing done against the provisions of the statute; and this matter is as clearly within the statute as it could be, both as to the servant, who has departed from his service, and as to the defendant, who has presumed to retain him in his service against the statute."

HANKFORD, J:

"I am of the same opinion, as my master has expressed, that, if my servant depart out of my service, at common law I have no action, and the cause was for that between my

servant and me the contract sounds in the manner of a covenant in itself (en luy meme) upon which no action was given at the common law without a specialty; and for this mischief was the statute ordained and action given on it; wherefore, if you will not say that he took your servant out of your service, as you have supposed by your writ, this writ is not maintainable."

CULPEPER, J, says:

"If a man procure my ward to go from me, and he goes by his procurement, I shall have ravishment of ward against him."

HANKFORD, J, admits this, and says the reason is, because the ward "is a chattel and vests in him who has the right." After some more discussion, Skrene amends, and says: "He came to our house, and procured our servant, and took him, as we have supposed by our writ." '('remain, being ordered to answer, pleads:

"He was wandering, and offered his service to us; and we received him: without this that we took him in manner as he has alleged."

On this, in the end, they seem to have gone to the country.

There were several points in this case, and it is not clear whether on this part the court was ultimately divided or not, but it is clear that the judges who argued in support of the count as first pleaded contended only that it showed a trespass. THIRNING, CJ, admits that, before the statute, if a servant went out of the service no action lay, but if he was taken trespass did; and then contends that the procuring in the case at Bar was a taking and made the party guilty of trespass, in which he was clearly wrong. If at this time case lay at common law for procuring the servant to depart, what becomes of the argument of the necessity for the statute. Or if, where one party broke a covenant at the instigation of another case lay, why was not that applicable

to the case of a covenanted servant. But it is clear that all agreed in this - if the defendant has taken the servant under such circumstances, you may have trespass at common law now as before the statute, but, if you cannot lay it as a trespass, your only remedy is under the statute.

I may as well add FITZHERBERT'S ABRIDGEMENT (tit LABORERS, pl 16) which is fuller, and I think more accurate, than BROOKE'S.

"Trespass at common law of his servant taken out of his service with force. Tremain: We found him vagrant in a certain place in another county, and there he came and proffered his service to us, and made covenant with us to serve. Judgment if action, etc Skrene: He was retained with us to serve us in the office of a bergier for a year, within which the defendant procured him to go out of our service; by reason of which he went out of our service within the year and hired himself with the defendant. HILL, J: This action does not lie on the matter. Skrene: If a man procure my servant to go out of my service, and retains him, he does me wrong. HILL and HANKFORD, JJ: That is true; but you shall not have remedy on such a writ as this is. CULPEPER, J: The action which was at common law is not taken away by the Statute of Labourers. THIRNING, CJ: At common law, before the statute, if my servant went out of my service, no action was given me; but, if a man took him out of my service, an action was given at the common law, and still is; and, if I am beaten by the command of another, the commander is a trespasser. HILL, J: The procurement only is not trespass against the peace, nor the departure of the servant: then, if the cause of the action is not against the peace, the remnant, to wit the retainer, cannot be: but this case here is openly within the statute, as it may be against the servant upon the departure, and against the master upon the retainer. HANKFORD and HILL, JJ: There was no action at the common law upon the departure, because the contract between the servant and me

sounds in covenant in a manner; and for that mischief was the statute made; wherefore, if you will not say that he took your servant, this action does not lie. Whereupon the plaintiff said that the defendant procured his servant etc and took him: and the other side traversed this: et alii a contra."

But, says FITZHERBERT, it seems that the defendant should have traversed the taking at first in his plea in bar. In a case in YEAR BOOK, Mich 47 Edw 3 [1373], fol 14 A, pl 15, which was on the Statute of Labourers against a servant for departing within the term for which he was retained, the plea was "we were never in your service." The question was whether that was good without a traverse of

the retainer, and FINCHDEN, CJ, said this, which was agreed to by the whole court:

"At common law, before the statute, if a man took my servant out of my service, I should have writ of trespass there, where he was in my service bodily now the statute was made for this mischief, that if he never comes into my service, after he has made covenant to serve me, but he eloignes himself from me, I shall have such writ and suggest that he was retained in my service and departed, as here is: wherefore it is necessary to traverse the retainer;" which accordingly was done by the defendant, issue taken, and sic ad patriam.

Any one, I am certain, who will go through the cases abstracted by FITZHERBERT under the title LABORERS, will be satisfied that at common law, before the statute, such an action as the present could not be maintained. Under that title sixty-one cases are abridged. Many of them are for the seduction of servants, but there is no instance of any one in which the action at common law was sustained unless an actual trespass was charged, and it is clear from the case which I have cited at so much length that the distinction between taking and procuring to go was familiar to the lawyers of that day. I can hardly imagine that this could have been said if the common law would have given

relief in such a case, and, if it could, the rapid growth of the action after the Statute of Labourers had passed would be difficult to account for.

I come then to the Statute of Labourers, 1349, and my object now is to show that nothing in the provisions or policy of that statute will warrant the action under the circumstances of this case, and that the older authorities are decidedly against it. As we learn from the preamble, it was enacted in consequence of the great mortality among the lower classes, especially workmen and servants, in a pestilence which had prevailed in 1348-9. This pestilence will be found mentioned in our historians. In the preamble it is said:

"Many seeing the necessity of masters, and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness, than by labour to get their living; we considering the grievous incommodities, which of the lack especially of ploughmen and such labourers may hereafter come, have ... ordained."

This preamble is followed by an enactment, that every person of whatever condition, free or bond, able in body, and under the age of sixty, not living by merchandise nor having any certain craft, nor having of his own wherewith to live, nor land of his own on the cultivation of which he may occupy himself, and not being in service, shall be compelled to enter into service when required on customary wages. By s 2 it is made penal by imprisonment for any mower, reaper, or other labourer or servant of whatsoever state or condition he shall be, to depart from service before the expiration of the term agreed on, and no one is to receive or retain such offender in his service under like pain of imprisonment. This ordinance is the foundation of the action for the seduction of a hired servant. Upon reference to FITZHERBERT, NATURA BREVIUM 167 B, it will be

seen that the writ in such an action always recited the statute.

It will be observed that, in order to bring a person within the first section, be must have been one who was not living by merchandise, nor having any certain craft, "certum habens artificium," nor having of his own wherewith to live, "habens de sue proprio unde vivere possit," or land of his own in the culture of which he can occupy himself, and these limitations are more pointed by the second statute [25 Edw 3, St 2: 1350], which speaks of "messor falcator out alius operator vel serviens." Looking at these words and the language of the preamble, it is clear that mechanics and labourers in husbandry were the principal objects of the statute, and the decisions were accordingly. FITZHERBERT (NATURA BREVIUM, 168 E) says:

"And so a gentleman by his covenant shall be bound to serve, although he were not compellable to serve. For if a gentleman, or chaplain, or carpenter, or such which should not he compelled to serve, etc, covenant to serve, they shall be bound by their covenant, and an action will lie against them for departing from their service."

And LORD HALE in a note refers to YEAR BOOK, Mich 10 Hen 6 [1431], fol 8 13, pl 30, as showing that a writ does not lie on the statute for the departure of a chaplain who is retained to say the mass. Several cases will be found earlier in the YEAR Boors to the same effect. In YEAR BOOK, Trin 50 Edw 3 [1376], fol 13 A, pl 3, is a case in which the parson of B sued Thomas F, a chaplain, on the Statute of Labourers, and counted of a covenant made with him to serve in the office of seneschal and to be his parochial chaplain for a certain term, and complained of a departure within the term. As to the office of seneschal, the defendant traversed the covenant, and, as to the residue, contended that the statute was only made for labourers and artificers, and he was neither the one nor the other, but the

servant of God, and so was not bound by the statute. Clopton, for the plaintiffs, took a distinction between a parochial and a private chaplain, contending that the former, from the variety and daily pressure of his duties, was in many respects to be regarded as a labourer, and within the statute "as any other person of the people." The case was adjourned, the judges of the King's Bench were consulted, the decision was that a chaplain was not bound by the statute, and as to that part of the writ he was discharged. The same law will be found in YEAR Boor, Mich 4 Hen 4 [1402], fol 2 B, ph 7, where the count on the statute, against a chaplain, was that he was retained by the plaintiff to be his chaplain and also his proctor and collector of tithes and to serve him "as pees et as maines" for a certain time. The retainer to be proctor and collector was specially traversed, and it was pleaded that his retainer as chaplain was only to do divine service. The decision is not very clearly stated: but FITZHERBERT (ABRIDGEMENT tit LABORERS, pl 51) appears to have understood that it was against the defendant, for he abstracts the case very shortly, and adds:

"quod mirum, for he shall not be compelled to serve, but the statute is in servitio congruo."

Immediately after this he abstracts PASCH 12 Hen 6 [1434] thus: "Action on the Statute of Labourers is not maintainable against an esquire." And in YEAR BOOK Hil 19 Hen 6, fol 53 B, pl 15 [1441], is a case on the statute, where the count charged a retainer in the office of labourer, and the plea was that "he retained us to collect his rents in a certain place, without this that we were retained with him in the office of labourer.

NEWTON, J, says:

"He cannot be required to serve him in the office of collecting his rents, nor to be his seneschal; which proves that he cannot be punished by this action; for this action

lies only against those who can be required to serve the party as a labourer."

Then, by the advice of all, the issue was held well tendered.

I am tempted to add one case more from YEAR BOOK, Mich 10 Hen 6, [1431] fol 8 B, pl 30. The Prior of W brings writ on the Statute of Labourers against a chaplain, and counts that he was retained in his service with him for a year to do divine service and that he departed within the year. The defendant's counsel demands judgment of the writ:

"for you see well how he brings this action against a chaplain upon the Statute of Labourers; and the statute is only to be understood against labourers in husbandry. STRANGEWAYS, J: The writ is not maintainable by the statute; for you cannot compel a chaplain to sing in mass; for that at one time he is disposed to sing it, and at another not; wherefore you cannot compel him by the statute. COTTESMORE, J: To the same intent; for it was not made but for labourers in husbandry: as in case of a knight, an esquire, or gentleman, you cannot compel them to be in your service by the statute, for that the statute is not to be understood but of labourers, who are vagrant, and have nothing whereby to live; these shall be compelled to be in service; but a chaplain bath whereof he may live in common understanding as a gentlemen:"

Wherefore the writ is abated, by the whole court. BROOKE (ABRIDGEMENT, fol 57, tit LABORERS, pl 47) abstracting this, gives, as the reason of the judgment: "for it is to be understood that he hath whereof he may live, and is not al" aye disposed to celebrate divine service."

It will be observed that many of these cases are with respect to chaplains. In one of them it is said that a chaplain is the servant of God; in another that the service for which the retainer is alleged must be a service congruous to his condition. At this distance of time it may be difficult,

without more inquiry into history, to assign a reason why there should be such a majority of cases relating to chaplains. It must be referable of course to some circumstances in the state of society at those periods. It may be collected from a royal mandate to the archbishops and bishops that the services of stipendiary chaplains were at the date of the statute much in request. The bishops are required to enforce their serving for their accustomed salary under pain of suspension and interdict. This mandate is printed in the statutes at large at the end of the statute, but none of the cases refers to it. It is, however, clear that the courts were not laying down any rule of law applicable to chaplains only. They are repeatedly put in the same category with knights, squires, and gentlemen, all who must be understood to have means of living of their own. The courts construed the statute, and as it seems to me quite correctly. They said that if any of these covenants to serve, he will be bound by his covenant, and an action will lie at common law for the breach, but if you rely on the compulsion of the statute, such persons are not within it. These authorities, of a date when the statute must have been well understood, might be multiplied, and, whatever may be said of the uncertainty and often conflicting nature of decisions from the YEAR BOOKS, and, however we may now smile at some of the reasonings of the judges, probably not without their weight when uttered, they seem to me satisfactorily to establish the principle that actions framed on the statute were governed by a consideration of the object and language of the statute, and that these pointed only to the compulsion of labourers, handicraftsmen, and people of low degree who had no means of their own to live upon, and who, if they did not live by wages earned by their labour, would be vagrants, mendicants or worse. If this be so, I apprehend it is quite clear that Johanna Wagner could not have been compelled, while the statute was unrepealed, to serve the plaintiff in any of the capacities stated in this declaration.

Nor, I think, can it be successfully contended that we may not take judicial cognisance of the nature of the service spoken of in the declaration. Judges are not necessarily to be ignorant in court of what everyone else, and they themselves out of court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early and strict times. We find in the YEAR BOOKS the judges reasoning about the ability of knights, esquires and gentlemen to maintain themselves without wages, and distinguishing between private chaplains and parochial chaplains from the nature of their employments. And in later days we have ventured to take judicial cognisance of the moral qualities of Robinson Crusoe's "man Friday" [see Forbes v King (22)] and Esop's "frozen snake" [see Hoare v Silverlock (23)]. We may certainly, therefore, take upon ourselves to pronounce that a singer at operas, or a dramatic artiste to the owner and manager of the Queen's theatre, is not a messor, falcator, aut alive operarius vel services, within either the letter or the spirit of the Statute of Labourers. If we were to hold to the contrary as to the profession of Garrick and Siddons, we could not refuse to hold the same with regard to the sister arts of painting, sculpture and architecture. We must lay it down that Reynolds when he agreed to paint a picture, or Flaxman when he agreed to model a statue, had entered into a contract of service, and stood in the relation of servant to him with whom he had made the agreement.

Here we are not without authority. In Taylor v Neri (5) where the declaration in case stated that the plaintiff, being manager of the Opera House, had engaged one Breda as a public singer during the season at a salary, that the defendant had assaulted and beaten Breda, by which plaintiff lost his service as a public performer, EYRE, CJ, nonsuited the plaintiff, saying the record stated Breda was a servant hired to sing, and he was of opinion he was not a servant at all. It seems to me that this is the language of common sense; and no case has been cited which conflicts

with it. But, if Johanna Wagner be not within the statute, and could only have been sued, as at common law, upon her contract for the breach of it, it will follow, I conceive, that the present action could not have been maintained against the defendant while the statute was in force, and, of course, cannot now if, as I contend, the action arises from and is limited by the purview of the statute. Under the statute the one depended on the other: if a party sued on the second branch of the second section, he was bound to show the servant, received or retained wrongfully, was such a one as was spoken of in the first branch, for so were the words, talem in servitio suo recipere vel retinere presumat. In the action, accordingly, against the seducer, the condition of the servant seduced and the character of the service, were always material; if not stated in the count, the defendant introduced them in his plea, where they were such as were thought to take the servant out of the statute.

I conclude then that this action cannot be maintained because (I) merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another, for the reasons I have stated, is not actionable; (ii) that the law with regard to seduction of servants from their master's employ, in breach of their contract, is an exception, the origin of which is known, and that that exception does not reach the case of a theatrical performer. I know not whether it may be objected that this judgment is conceived in a narrow spirit, and tends unnecessarily to restrain the remedial powers of the law. In my opinion, it is not open to this objection. It seems to me wiser to ascertain the powers of the instrument with which you work, and employ it only on subjects to which they are equal and suited, and that, if you go beyond this, you strain and weaken it, and attain but imperfect and unsatisfactory, often only unjust, results. But, whether this be so or not, we are limited by the principles and analogies which we find laid down for us, and are to declare, not to make, the rule of

law. I think, therefore, with the greatest and most real deference for the opinions of my brethren, and with all the doubt as to the correctness of my own which those opinions, added to the novelty and difficulty of the case itself, cannot but occasion, that our judgment ought to be for the defendant: though it must be pronounced for the plaintiff.

Judgment for plaintiff.

 Si el análisis económico del derecho propone que el incumplimiento de las promesas contractuales es eficiente, donde el coste de cumplir es mayor para el promisor que el beneficio que deriva el estipulante, ¿cómo se explica la acción de responsabilidad civil extracontractual para dar estabilidad a las relaciones contractuales?

B. DEFENSAS

BATTERY: CONSENT

 ANNA MOHR v. CORNELIUS WILLIAMS Nos. 14,807 - (184) Supreme Court of Minnesota 98 Minn. 494; 108 N.W. 818 July 13, 1906

[*494] [**818] LEWIS, J. [2]

2 JAGGARD, J., took no part.

Upon a former appeal of this case (*95 Minn. 261, 104 N.W. 12*) it was held (1) that in the absence of consent, express or implied, respondent had no authority to perform the operation on appellant's left ear; (2) that it did not conclusively appear from the evidence that such consent was conferred, either expressly or by implication; (3) [*495] that, if the operation was performed without either express or implied authority, it was wrongfully and unlawfully done, and in law constituted assault and battery, in which case the amount of recoverable damages would depend upon the character and extent of the injury inflicted, considering the nature of the malady intended to be cured, the beneficial nature of the operation, and the good faith of

respondent. The cause, being remanded, was retried, resulting in a verdict for appellant in the sum of $3,500. Respondent made a motion for judgment notwithstanding the verdict, and, if that was denied, for an order granting a new trial upon the ground that the verdict was excessive, appearing to have been given under the influence of passion and prejudice, not justified by the evidence and contrary to law. The trial court did not pass upon the motion for a new trial, but granted the motion for judgment notwithstanding the verdict, which order was appealed from. The learned trial court apparently granted the motion upon the ground that the evidence conclusively proved that an emergency existed which called for immediate treatment, and that the operation was justified on that ground, conceding no consent had been given, either expressly or by implication.

Respondent does not question the propositions of law determined on the previous appeal, but insists that the facts elicited at the last trial were more complete and explicit with reference to the condition of appellant's left ear, and demonstrate that he was justified in performing the operation, as the only thing to do under the circumstances to relieve the patient from a critical situation. Appellant concedes that she cannot recover except upon the ground that no authority was granted, express or implied. From an examination of the record we are again of opinion that the evidence does not conclusively establish the fact that the left ear was in such a serious condition as to call for an immediate operation. If the patient placed herself in respondent's care for general ear treatment, why did he not in the first instance make a thorough examination of the left, as well as the right, ear? -- is a pertinent inquiry. He testified that he found an obstruction in the left ear which, in itself, was unnatural, and yet he did nothing to ascertain the real condition for nearly three weeks thereafter. If the critical condition discovered at the time of the operation

was such as to be reasonably anticipated, then the long delay without attention or treatment [*496] is not readily explained, and is suggestive of inattention and negligence, and has some bearing upon the subsequent conduct of respondent and his explanation of what occurred.

Dr. Davis was not present as the family physician with the right, express or implied, to consent for appellant to an operation on her left ear. The record discloses the fact that Dr. Davis was not appellant's physician, but had treated her sister, and was asked to be present at the operation simply to guard against the effects of the anaesthetic. There is no evidence in the record to justify the conclusion that Dr. Davis had any authority to consult with respondent and speak for the patient as to what might be necessary to do. We do not mean by this that the fact that he was consulted and expressed an opinion may not be given weight in determining the real condition of the left ear, and the good faith of Dr. Williams in operating, but Dr. Davis did not qualify as an expert in that class of diseases, made no [**819] personal examination, and simply made the statement that, upon respondent's request to take hold of the probe and detect the presence of dead bone, he did so and found it gave the impression of decayed bone in the ear.

All the doctors who testified on behalf of respondent were called as experts, but only one qualified as such in diseases of the ear. Some of the witnesses were physicians and surgeons, but not specialists in this line of work, and others were general practitioners, but giving special attention to surgery. Inasmuch as the expert witnesses based their opinions mainly upon the testimony of respondent as to the condition found in the ear operated on, such evidence, as in all cases of expert testimony, was only entitled to such weight as the jury might give it, provided they found the essential facts upon which it was based to be true.

In view of all the facts brought out at the trial, it was error to order judgment for respondent notwithstanding the verdict, but we are also of the opinion that he should have an opportunity to have his motion for a new trial passed upon by the trial court.

It is therefore ordered that the order appealed from be reversed, with leave to respondent to apply to the court below for a new trial.

 ¿El cirujano en este caso obtuvo el consentimiento de Mohr para someterse al tratamiento de cuál de sus oídos?

 THOMAS A. NEAL, Plaintiff-Counterdefendant - Respondent, v. MARY NEAL, Defendant-Counterplaintiff - Appellant, and JILL LAGASSE, Counterdefendant-Respondent. Docket No. 20770, 1994 Opinion No. 51 SUPREME COURT OF IDAHO 125 Idaho 617; 873 P.2d 871 April 22, 1994, Filed

[*619] [**873] TROUT, J.

This is an appeal from an order dismissing appellant's action for damages allegedly suffered as a result of an adulterous relationship between her husband and his mistress. We consider herein the following issues: (1) whether Idaho law recognizes a cause of action for criminal conversation based upon an alleged right to an exclusive sexual relationship with a spouse; (2) whether a party may recover for mental anguish resulting from the fear of contracting a sexually transmitted disease where there is no allegation of exposure to such disease; and (3) whether the facts alleged are sufficient to state a prima facie claim of civil battery. We answer the first two questions in the negative and affirm the dismissal as to those causes of action. As to the third issue, we believe sufficient facts have been alleged and we remand for further proceedings.
BACKGROUND

In January of 1990, defendant Thomas A. Neal filed for divorce after his wife became aware that he was having an extramarital affair. Mary Neal, his wife, counterclaimed for divorce and also asserted tort claims against Thomas Neal and Jill LaGasse. The gravamen of the claims against Thomas Neal and Jill LaGasse center upon allegations of an adulterous relationship between them. [1]

> 1 Count I of Mary Neal's complaint involved issues solely related to her divorce petition. The district court bifurcated the action, remanding to the magistrate the issues pertaining to the divorce. Those matters were decided by the magistrate and are not before us on this appeal. Counts II and III against Thomas Neal and the third party complaint against LaGasse allege the causes of action considered here. Mary Neal's complaint is not a model of clarity. Both the district court and the Court of Appeals characterized her causes of action as: (1) tortious interference with her marital contract, including a claim of criminal conversation (although that term was never used in the pleadings); (2) intentional or negligent infliction of emotional distress, including the fear of contracting a sexually transmitted disease; and (3) battery in the form of non-consensual sexual intercourse. Because this characterization accurately describes what we believe to be Mary Neal's allegations, our resolution of the issues before us is made in terms thereof.

Respondents moved to dismiss under *I.R.C.P. 12(b)(6)*. The trial court treated the motion as one for summary judgment as provided in *I.R.C.P. 12(b)* based on the submission by Thomas Neal of his affidavit and extracts of Mary Neal's deposition. Mary Neal did not file any brief in response to the defendants' motions to dismiss. Following the district court's grant of the motions to dismiss, she filed a motion for reconsideration in which she extensively briefed her legal theories of recovery. Over objection by

defendants, the district court accepted the brief and permitted oral argument. After reviewing the submissions and argument, the district court denied the motion to reconsider without further opinion. The Court of Appeals affirmed. Mary Neal petitioned for and was granted review by this Court.

I.

STANDARD OF REVIEW

When a case comes before this Court on a petition for review from an opinion of the Court of Appeals, "we do not focus on the opinion of the Court of Appeals, but rather on the decision of the district court." *Eastern Idaho Regional Medical Center v. Board of Comm'rs of Bonneville County, Idaho, 122 Idaho 241, 244, 833 P.2d 99, 102 (1992)*. The district court's dismissal was in the form of a summary judgment and we therefore review it under standards applicable to a summary judgment. On appeal from an order granting summary judgment, we review the pleadings, depositions and admissions on file, together with the affidavits, if any, to determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *I.R.C.P. 56(c)*; *Ray v. Nampa School Dist. No. 131, 120 Idaho 117, 814 P.2d 17 (1991)*.

II.

RECOVERY FOR CRIMINAL CONVERSATION

Mary Neal seeks to recover for the respondents' adulterous conduct which she [**874] [*620] contends is actionable under tort theories of criminal conversation, invasion of privacy, interference with contract, violation of a statutory duty of fidelity and negligence. All of these causes of action are based, factually, on the alleged adulterous affair between Thomas Neal and Jill LaGasse. In addition, although Mary Neal alleged the various torts cited, the focus of her argument throughout this case has

been on her claim of criminal conversation. For these reasons, our discussion here centers on the criminal conversation issue.

Mary Neal contends that criminal conversation remains a viable cause of action under Idaho law, thereby allowing her to maintain an action for interference with her exclusive sexual relationship with her husband. She further contends that this cause of action, based on her husband's adultery, is grounded in *I.C. § 32-901*, which provides that a spouse has a marital duty of mutual respect, fidelity and support, and *I.C. § 18-6001*, which provides a criminal penalty for adultery. We address these issues in turn.

Black's Law Dictionary 373 (6th ed. 1990), defines "criminal conversation" as

sexual intercourse of an outsider with husband or wife, or a breaking down of the covenant of fidelity. Tort action based on adultery, considered in its aspect of a civil injury to the husband or wife entitling him or her to damages; the tort of debauching or seducing of a wife or husband. . . .
Criminal conversation was recognized in Idaho as a common law tort in *Watkins v. Lord, 31 Idaho 352, 171 P. 1133 (1918)*. It has its genesis in the proposition that a husband has a property right in his wife and her services. This property interest in his wife could be "stolen" by a third party through adultery. Since a wife was her husband's property and servant, her consent to the adultery was no defense to her husband's suit against her paramour. Prosser comments on the basis of criminal conversation from 8 Holdsworth, *History of English Law* 430 (2d ed. 1937), and states that "it was considered that she [the wife] was no more capable of giving a consent which would prejudice the husband's interest than would his horse." W. Prosser, *Law of Torts* § 124 at 875 (4th ed. 1971). This Court, and the courts of other states, have condemned this reasoning as archaic. *O'Neil v. Schuckardt, 112 Idaho 472, 476, 733 P.2d 693, 697 (1986)* (where this Court abolished

the related cause of action of alienation of affections); *see also Irwin v. Coluccio, 32 Wash. App. 510, 648 P.2d 458 (Wash. App. 1982)*; *Fundermann v. Mickelson, 304 N.W.2d 790 (Iowa 1981)*.

Not since *Watkins v. Lord* was decided in 1918 has there been a reported case in Idaho involving criminal conversation. We believe that the change in societal views toward women which has occurred since then may have much to do with this total absence of case law. Here we take the opportunity presented us to hold that criminal conversation has been abolished as a cause of action in Idaho. [2]

> 2 This Court has not had the opportunity until now to reconsider the common law holding of *Watkins* since it was decided in 1918. Our decision herein, however, is not without precedent. In *O'Neil v. Schuckardt, 112 Idaho 472, 733 P.2d 693 (1986)*, in which we abolished the cause of action for alienation of affections, we discussed the archaic premise of a cause of action based on the notion of women as chattels and traced the change of attitude which led this Court and others to abolish causes of action based thereon. Thus, although we have only now been presented with a case involving criminal conversation, we are satisfied that the premise for such a cause of action has been recognized as invalid for several years.

The medieval rationale for the viability of the tort offers the very reason to abolish it. The notion that a wife is the property of her husband offends the right of every woman to be treated as an equal member of society. In abolishing criminal conversation we join a number of jurisdictions which have already done so. *See Irwin, 648 P.2d at 460-461* (listing some eighteen jurisdictions which have abolished, legislatively or judicially, criminal conversation). [3]

> 3 We also note that a claim of criminal conversation, were such to be valid, could not be asserted against the unfaithful spouse but is a claim brought against a third party. Here, Mary Neal purports to bring her criminal conversation claim against both her husband Thomas Neal and against Jill LaGasse. We find no support, and Mary Neal has not directed us to any, for her argument that a claim of criminal conversation may be asserted against Thomas Neal. *See also* W. Prosser, *Law of Torts* § 124 at 873 (4th ed. 1971) (noting that a claim for interference with familial relations was founded on the relation which the plaintiff had with third persons).

[**875] [*621] Mary Neal contends that the obligation of fidelity imposed by *I.C. § 32-901* provides the basis for an actionable claim for damages for the invasion of her exclusive sexual relationship with her husband. We disagree.

Idaho Code § 32-901 is contained in the domestic relations title of the Idaho Code and provides that "husband and wife contract toward each other obligations of mutual respect, fidelity and support." Chapter 9 covers the law of community and separate property. *Sheppard v. Sheppard, 104 Idaho 1, 3, 655 P.2d 895, 897 (1982)*. The remedy for the breach of an obligation imposed in Chapter 9, including a breach of fidelity, is provided in the divorce statutes. The statute specifically provides that adultery - which surely could be considered a breach of the duty of fidelity - is grounds for divorce. *See I.C. § 32-603*. Further, the fault of one spouse, including engaging in adulterous conduct, is a factor which may be considered by the court in awarding maintenance. *I.C. § 32-705*. We hold, therefore, that divorce is the exclusive remedy for a breach of any duty imposed by *I.C. § 32-901*. We reject Mary Neal's argument that her civil tort claims are also available to recompense her for her husband's adultery.

Finally, we reject Mary Neal's contention that the adultery statute results in the codification of criminal conversation as a tort and that this Court cannot abolish the tort of criminal conversation absent legislative abolition of the crime of adultery. The existence of a criminal statute proscribing adultery seeks recompense for a public wrong. A civil action arises from the violation of a private right. The existence of the former does not prevent the elimination of the latter. *Lynn v. Shaw, 620 P.2d 899, 903 n.13 (Okla. 1980)* (where the court abolished criminal conversation, noting that criminal sanctions for adultery had not been abolished). In addition, the tort of criminal conversation has its origins in common law and this Court may modify such law. *See O'Neil, 112 Idaho 472, 733 P.2d 693* (judicially abolishing the common law tort of alienation of affections).

While this Court does not condone adultery and continues to hold marriage in the highest esteem, we are persuaded, for the reasons given, that the action pursued by Mary Neal does not serve to protect the institution of marriage. To the contrary, as noted by this Court in a related context, "a marriage is not likely to falter without the active participation of one of its members." *O'Neil, 112 Idaho at 477, 733 P.2d at 698*. Further, once such cause of action is brought, it can only serve to add more tension to the family relationship.

There are other reasons to abolish the tort of criminal conversation. Revenge, which may be a motive for bringing the cause of action, has no place in determining the legal rights between two parties. Further, this type of suit may expose the defendant to the extortionate schemes of the plaintiff, since it could ruin the defendant's reputation. Deterrence is not achieved; the nature of the activities underlying criminal conversation, that is sexual activity, are not such that the risk of damages would likely be a deterrent. Finally, since the injuries suffered are intangible,

damage awards are not governed by any true standards, making it more likely that they could result from passion or prejudice. *O'Neil, 112 Idaho at 477, 733 P.2d at 698*. These negative aspects, combined with the archaic basis for the tort, convince us that the ill effects of a suit for criminal conversation outweigh any benefit it may have.

Mary Neal's alternative theories of recovery all seek damages for the infringement of her claimed right to an exclusive sexual relationship. Because in abolishing criminal conversation we conclude that Idaho civil law does not afford a party a cause of action outside divorce, for adultery, we conclude that the district court correctly dismissed Mary Neal's other claims based on this alleged right.

[**876] [*622] III.

RECOVERY FOR EMOTIONAL DISTRESS FROM FEAR OF CONTRACTING A SEXUALLY TRANSMITTED DISEASE

Independent of her attempt to recover for the interference with her marital relationship, Mary Neal seeks to recover from Thomas Neal, under theories of negligent and intentional infliction of emotional distress, for emotional distress resulting from the fear that she may have contracted a sexually transmitted disease. For purposes herein, we accept that Thomas Neal's sexual relationship with LaGasse subjected his wife to the risk of acquiring such diseases *if* carried by LaGasse. However, Mary Neal has not alleged that either Thomas Neal or LaGasse has any sexually transmitted disease nor has she alleged that she has in fact contracted any such disease. In fact, the record reveals that she does not have any such disease.

Damages are recoverable for emotional distress claims resulting from the present fear of developing a future disease only if the mental injury alleged is shown to be sufficiently genuine and the fear reasonable. We hold that there can be no reasonable fear of contracting such a

disease absent proof of actual exposure. *See Carroll v. Sisters of St. Francis Health Services,* 1993 WL 532592 (Tenn.) (in order to recover emotional damages based on the fear of contracting AIDS, the plaintiff must prove, at a minimum, actual exposure to AIDS); *Burk v. Sage Products, Inc., 747 F. Supp. 285 (E.D. Pa. 1990)* (summary judgment granted for defendants where paramedic pricked with a discarded needle could not demonstrate that the needle had been used by an AIDS patient and paramedic had tested negative for HIV); *Funeral Services by Gregory, Inc. v. Bluefield Community Hosp., 186 W. Va. 424, 413 S.E.2d 79 (W.Va. 1991)* (no recovery for mortician who embalmed an AIDS-infected corpse where he had worn protective gear and had not alleged any avenue of exposure); *Doe v. Doe, 136 Misc.2d 1015, 519 N.Y.S.2d 595 (N.Y. Sup. Ct. 1987)* (no recovery to wife based upon husband's homosexual affair because wife failed to allege that husband was infected with AIDS or that she had contracted it).

Because Mary Neal has not even alleged actual exposure to any sexually transmitted disease, she cannot satisfy the requirement of a reasonable fear to recover for emotional distress. Therefore, the district court properly dismissed her cause of action in this regard. We further conclude that because Mary Neal cannot satisfy the reasonable fear requirement for recovery for emotional distress, we do not consider whether she has satisfied the additional requirement that her fear be sufficiently genuine.

IV.

RECOVERY FOR BATTERY

Finally, Mary Neal contends that she has alleged a prima facie case of battery against Thomas Neal. Her battery claim is founded on her assertion that although she consented to sexual intercourse with her husband during the time of his affair, had she known of his sexual involvement

with another woman, she would not have consented, as sexual relations under those circumstances would have been offensive to her. Therefore, she contends that his failure to disclose the fact of the affair rendered her consent ineffective and subjects him to liability for battery.

Civil battery consists of an intentional, unpermitted contact upon the person of another which is either unlawful, harmful or offensive. *White v. University of Idaho, 118 Idaho 400, 797 P.2d 108 (1990).* The intent necessary for battery is the intent to commit the act, not the intent to cause harm. *Id.* Further, lack of consent is also an essential element of battery. W. Prosser & W. Keeton, *The Law of Torts* § 9 at 41 and § 18 at 112 (5th ed. 1984). Consent obtained by fraud or misrepresentation vitiates the consent and can render the offending party liable for a battery. W. Prosser & W. Keeton, *The Law of Torts* § 18 at 119; *Bowman v. Home Life Insurance Co. of America, 243 F.2d 331, 333 (3d Cir. 1957).*

The district court concluded that Thomas Neal's failure to disclose the fact of his sexual [**877] [*623] relationship with LaGasse did not vitiate Mary Neal's consent to engage in sexual relations with him, such consent being measured at the time of the relations. We do not agree with the district court's reasoning. To accept that the consent, or lack thereof, must be measured by only those facts which are known to the parties at the time of the alleged battery would effectively destroy any exception for consent induced by fraud or deceit. Obviously if the fraud or deceit were known at the time of the occurrence, the "consented to" act would never occur.

Mary Neal's affidavit states that: "If the undersigned had realized that her husband was having sexual intercourse with counterdefendant LaGasse, the undersigned would not have consented to sexual intercourse with counterdefendant Neal and to do so would have been offensive." The district court opined that because the act was not actually offensive

at the time it occurred, her later statements that it would have been offensive were ineffective. This reasoning ignores the possibility that Mary Neal may have engaged in a sexual act based upon a substantial mistake concerning the nature of the contact or the harm to be expected from it, and that she did not become aware of the offensiveness until well after the act had occurred. Mary Neal's affidavit at least raises a genuine issue of material fact as to whether there was indeed consent to the alleged act of battery.

The district court also noted that Mary Neal's later sexual relations with her husband after becoming aware of his infidelity, extinguished any offensiveness or lack of consent. The fact that she may have consented to sexual relations on a later occasion cannot be said to negate, as a matter of law, an ineffective consent to prior sexual encounters. Again, her affidavit raises a question of fact regarding whether these prior sexual encounters were non-consensual. This factual issue precluded the dismissal of the battery claim by the district court.

V.

CONCLUSION

For the reasons discussed herein, the district court's order of dismissal is affirmed as to all causes of action alleged against Jill LaGasse, and against Thomas Neal with the exception of the allegation of battery. As to that cause of action the case is remanded to the district court for further proceedings consistent herewith. Costs to respondents. No attorney fees on appeal.

BISTLINE and JOHNSON, JJ. and REINHARDT, J. (Pro Tem.) concur. McDEVITT, CJ. concurs in I, III, IV and V, and concurs in the result in II.

 El marido admitió haber mantenido relaciones sexuales con su mujer, pero en forma consensual. ¿Qué alega ella en *Neal*?

TRESPASS: DEFENSE OF PROPERTY

 MARVIN KATKO, Appellee v. EDWARD BRINEY and BERTHA L. BRINEY, Appellants No. 54169 Supreme Court of Iowa 183 N.W.2d 657 February 9, 1971, Filed

[*657] MOORE The primary issue presented here is whether an owner may protect personal property in an unoccupied boarded-up farm house against trespassers and thieves by a spring gun capable of inflicting death or serious injury.

We are not here concerned with a man's right to protect his home and members of his family. Defendants' home was several miles from the scene of the incident to which we refer infra.

[*658] Plaintiff's action is for damages resulting from serious injury caused by a shot from a 20-gauge spring shotgun set by defendants in a bedroom of an old farm house which had been uninhabited for several years. Plaintiff and his companion, Marvin McDonough, had [**2] broken and entered the house to find and steal old bottles and dated fruit jars which they considered antiques.

At defendants' request plaintiff's action was tried to a jury consisting of residents of the community where defendants' property was located. The jury returned a verdict for plaintiff and against defendants for $20,000 actual and $10,000 punitive damages.

After careful consideration of defendants' motions for judgment notwithstanding the verdict and for new trial, the experienced and capable trial judge overruled them and entered judgment on the verdict. Thus we have this appeal by defendants.

I. In this action our review of the record as made by the parties in the lower court is for the correction of errors at law. We do not review actions at law de novo. Rule 334,

Rules of Civil Procedure. Findings of fact by the jury are binding upon this court if supported by substantial evidence. Rule 344(f) 1, R.C.P.

II. Most of the facts are not disputed. In 1957 defendant Bertha L. Briney inherited her parents' farm land in Mahaska and Monroe Counties. Included was an 80-acre tract in southwest Mahaska County where her grandparents and parents had lived. No one occupied the [**3] house thereafter. Her husband, Edward, attempted to care for the land. He kept no farm machinery thereon. The outbuildings became dilapidated.

For about 10 years, 1957 to 1967, there occurred a series of trespassing and housebreaking events with loss of some household items, the breaking of windows and "messing up of the property in general". The latest occurred June 8, 1967, prior to the event on July 16, 1967 herein involved.

Defendants through the years boarded up the windows and doors in an attempt to stop the intrusions. They had posted "no trespass" signs on the land several years before 1967. The nearest one was 35 feet from the house. On June 11, 1967 defendants set "a shotgun trap" in the north bedroom. After Mr. Briney cleaned and oiled his 20-gauge shotgun, the power of which he was well aware, defendants took it to the old house where they secured it to an iron bed with the barrel pointed at the bedroom door. It was rigged with wire from the doorknob to the gun's trigger so it would fire when the door was opened. Briney first pointed the gun so an intruder would be hit in the stomach but at Mrs. Briney's suggestion it was lowered to hit the legs. He admitted he did [**4] so "because I was mad and tired of being tormented" but "he did not intend to injure anyone". He gave no explanation of why he used a loaded shell and set it to hit a person already in the house. Tin was nailed over the bedroom window. The spring gun could not be

seen from the outside. No warning of its presence was posted.

Plaintiff lived with his wife and worked regularly as a gasoline station attendant in Eddyville, seven miles from the old house. He had observed it for several years while hunting in the area and considered it as being abandoned. He knew it had long been uninhabited. In 1967 the area around the house was covered with high weeds. Prior to July 16, 1967 plaintiff and McDonough had been to the premises and found several old bottles and fruit jars which they took and added to their collection of antiques. On the latter date about 9:30 p.m. they made a second trip to the Briney property. They entered the old house by removing a board from a porch window which was without glass. While McDonough was looking around the kitchen area plaintiff went to another part of the house. As he started to open the north bedroom door the shotgun went off striking him in the right leg [**5] above the ankle bone. Much of his leg, including part of the tibia, was blown away. Only by McDonough's [*659] assistance was plaintiff able to get out of the house and after crawling some distance was put in his vehicle and rushed to a doctor and then to a hospital. He remained in the hospital 40 days.

Plaintiff's doctor testified he seriously considered amputation but eventually the healing process was successful. Some weeks after his release from the hospital plaintiff returned to work on crutches. He was required to keep the injured leg in a cast for approximately a year and wear a special brace for another year. He continued to suffer pain during this period.

There was undenied medical testimony plaintiff had a permanent deformity, a loss of tissue, and a shortening of the leg.

The record discloses plaintiff to trial time had incurred $710 medical expense, $2056.85 for hospital service, $61.80 for orthopedic service and $750 as loss of earnings.

In addition thereto the trial court submitted to the jury the question of damages for pain and suffering and for future disability.

III. Plaintiff testified he knew he had no right to break and enter the house with intent to steal [**6] bottles and fruit jars therefrom. He further testified he had entered a plea of guilty to larceny in the nighttime of property of less than $20 value from a private building. He stated he had been fined $50 and costs and paroled during good behavior from a 60-day jail sentence. Other than minor traffic charges this was plaintiff's first brush with the law. On this civil case appeal it is not our prerogative to review the disposition made of the criminal charge against him.
IV. The main thrust of defendants' defense in the trial court and on this appeal is that "the law permits use of a spring gun in a dwelling or warehouse for the purpose of preventing the unlawful entry of a burglar or thief". They repeated this contention in their exceptions to the trial court's instructions 2, 5 and 6. They took no exception to the trial court's statement of the issues or to other instructions.

In the statement of issues the trial court stated plaintiff and his companion committed a felony when they broke and entered defendants' house. In instruction 2 the court referred to the early case history of the use of spring guns and stated under the law their use was prohibited except to prevent the [**7] commission of felonies of violence and where human life is in danger. The instruction included a statement breaking and entering is not a felony of violence.

Instruction 5 stated: "You are hereby instructed that one may use reasonable force in the protection of his property, but such right is subject to the qualification that one may not use such means of force as will take human life or inflict great bodily injury. Such is the rule even though the

injured party is a trespasser and is in violation of the law himself."

Instruction 6 stated: "An owner of premises is prohibited from willfully or intentionally injuring a trespasser by means of force that either takes life or inflicts great bodily injury; and therefore a person owning a premise is prohibited from setting out 'spring guns' and like dangerous devices which will likely take life or inflict great bodily injury, for the purpose of harming trespassers. The fact that the trespasser may be acting in violation of the law does not change the rule. The only time when such conduct of setting a 'spring gun' or a like dangerous device is justified would be when the trespasser was committing a felony of violence or a felony punishable [**8] by death, or where the trespasser was endangering human life by his act."

Instruction 7, to which defendants made no objection or exception stated: "To entitle the plaintiff to recover for compensatory damages, the burden of proof is upon him to establish by a preponderance of the evidence each and all of the following propositions:

"1. That defendants erected a shotgun trap in a vacant house on land owned by defendant, [*660] Bertha L. Briney, on or about June 11, 1967, which fact was known only by them, to protect household goods from trespassers and thieves.

"2. That the force used by defendants was in excess of that force reasonably necessary and which persons are entitled to use in the protection of their property.

"3. That plaintiff was injured and damaged and the amount thereof.

"4. That plaintiff's injuries and damages resulted directly from the discharge of the shotgun trap which was set and used by defendants."

The overwhelming weight of authority, both textbook and case law, supports the trial court's statement of the applicable principles of law.

Prosser on Torts, Third Edition, pages 116-118, states:

"* * * the law has always placed a higher value upon human [**9] safety than upon mere rights in property, it is the accepted rule that there is no privilege to use any force calculated to cause death or serious bodily injury to repel the threat to land or chattels, unless there is also such a threat to the defendant's personal safety as to justify self-defense. * * * spring guns and other man-killing devices are not justifiable against a mere trespasser, or even a petty thief. They are privileged only against those upon whom the landowner, if he were present in person would be free to inflict injury of the same kind."

Restatement of Torts, section 85, page 180, states: "The value of human life and limb, not only to the individual concerned but also to society, so outweighs the interest of a possessor of land in excluding from it those whom he is not willing to admit thereto that a possessor of land has, as is stated in § 79, no privilege to use force intended or likely to cause death or serious harm against another whom the possessor sees about to enter his premises or meddle with his chattel, unless the intrusion threatens death or serious bodily harm to the occupiers or users of the premises. * * * A possessor of land cannot do indirectly and [**10] by a mechanical device that which, were he present, he could not do immediately and in person. Therefore, he cannot gain a privilege to install, for the purpose of protecting his land from intrusions harmless to the lives and limbs of the occupiers or users of it, a mechanical device whose only purpose is to inflict death or serious harm upon such as may intrude, by giving notice of his intention to inflict, by mechanical means and indirectly, harm which he could not, even after request, inflict directly were he present."

In Volume 2, Harper and James, The Law of Torts, section 27.3, pages 1440, 1441, this is found: "The possessor of land may not arrange his premises intentionally so as to cause death or serious bodily harm to a trespasser. The possessor may of course take some steps to repel a trespass. If he is present he may use force to do so, but only that amount which is reasonably necessary to effect the repulse. Moreover if the trespass threatens harm to property only - even a theft of property - the possessor would not be privileged to use deadly force, he may not arrange his premises so that such force will be inflicted by mechanical means. If he does, he will be liable [**11] even to a thief who is injured by such device."

Similar statements are found in 38 Am.Jur., Negligence, section 114, pages 776, 777, and 65 C.J.S., Negligence, § 63(23), pages 678, 679; Anno. *44 A.L.R.2d 383*, entitled "Trap to protect property".

In *Hooker v. Miller, 37 Iowa 613*, we held defendant vineyard owner liable for damages resulting from a spring gun shot although plaintiff was a trespasser and there to steal grapes. At pages 614, 615, this statement is made: "This court has held that a mere trespass against property other than a dwelling is not a sufficient justification to authorize the use of a deadly [*661] weapon by the owner in its defense; and that if death results in such a case it will be murder, though the killing be actually necessary to prevent the trespass. *The State v. Vance, 17 Iowa 138*." At page 617 this court said: "Trespassers and other inconsiderable violators of the law are not to be visited by barbarous punishments or prevented by inhuman inflictions of bodily injuries."

The facts in *Allison v. Fiscus, 156 Ohio St. 120, 100 N.E.2d 237, 44 A.L.R.2d 369*, decided in 1951, are very similar to the case at bar. There plaintiff's right to damages was recognized [**12] for injuries received when he feloniously broke a door latch and started to enter

defendant's warehouse with intent to steal. As he entered a trap of two sticks of dynamite buried under the doorway by defendant owner was set off and plaintiff seriously injured. The court held the question whether a particular trap was justified as a use of reasonable and necessary force against a trespasser engaged in the commission of a felony should have been submitted to the jury. The Ohio Supreme Court recognized plaintiff's right to recover punitive or exemplary damages in addition to compensatory damages.

In *Starkey v. Dameron, 96 Colo. 459, 45 P.2d 172*, plaintiff was allowed to recover compensatory and punitive damages for injuries received from a spring gun which defendant filling station operator had concealed in an automatic gasoline pump as protection against thieves.

In *Wilder v. Gardner, 39 Ga. App. 608, 147 S.E. 911*, judgment for plaintiff for injuries received from a spring gun which defendant had set, the court said: "A person in control of premises may be responsible even to a trespasser for injuries caused by pitfalls, mantraps, or other like contrivances so dangerous in character [**13] as to imply a disregard of consequences or a willingness to inflict injury."

In *Phelps v. Hamlett, Texas Civil Court of Appeals, 207 S.W. 425*, defendant rigged a bomb inside his outdoor theater so that if anyone came through the door the bomb would explode. The court reversed plaintiff's recovery because of an incorrect instruction but at page 426 said: "While the law authorizes an owner to protect his property by such reasonable means as he may find to be necessary, yet considerations of humanity preclude him from setting out, even on his own property, traps and devices dangerous to the life and limb of those whose appearance and presence may be reasonably anticipated, even though they may be trespassers."

In *United Zinc and Chemical Co. v. Britt, 258 U.S. 268, 275, 66 L. Ed. 615, 617, 42 S. Ct. 299,* the court states: "The liability for spring guns and mantraps arises from the fact that the defendant has * * * expected the trespasser and prepared an injury that is no more justified than if he had held the gun and fired it."

In addition to civil liability many jurisdictions hold a land owner criminally liable for serious injuries or homicide caused by spring guns or other set devices. [**14] See *State v. Childers, 133 Ohio St. 508, 14 N.E.2d 767* (melon thief shot by spring gun); *Pierce v. Commonwealth, 135 Va. 635, 115 S.E. 686* (policeman killed by spring gun when he opened unlocked front door of defendant's shoe repair shop); *State v. Marfaudille, 48 Wash. 117, 92 P. 939* (murder conviction for death from spring gun set in a trunk); *State v. Beckham, 306 Mo. 566, 267 S.W. 817* (boy killed by spring gun attached to window of defendant's chili stand); *State v. Green, 118 S.C. 279, 110 S.E. 145, 19 A.L.R. 1431* (intruder shot by spring gun when he broke and entered vacant house. Manslaughter conviction of owner -- affirmed); *State v. Barr, 11 Wash. 481, 39 P. 1080* (murder conviction affirmed for death of an intruder into a boarded up cabin in which owner had set a spring gun).

In Wisconsin, Oregon and England the use of spring guns and similar devices is specifically made unlawful by statute. 44 A.L.R., section 3, pages 386, 388.

[*662] The legal principles stated by the trial court in instructions 2, 5 and 6 are well established and supported by the authorities cited and quoted supra. There is no merit in defendants' objections and exceptions thereto. Defendants' various [**15] motions based on the same reasons stated in exceptions to instructions were properly overruled.

V. Plaintiff's claim and the jury's allowance of punitive damages, under the trial court's instructions relating thereto, were not at any time or in any manner challenged by

defendants in the trial court as not allowable. We therefore are not presented with the problem of whether the $10,000 award should be allowed to stand.

We express no opinion as to whether punitive damages are allowable in this type of case. If defendants' attorneys wanted that issue decided it was their duty to raise it in the trial court.

The rule is well established that we will not consider a contention not raised in the trial court. In other words we are a court of review and will not consider a contention raised for the first time in this court. *Ke-Wash Company v. Stauffer Chemical Company, Iowa, 177 N.W.2d 5, 9*; *In re Adoption of Moriarty, 260 Iowa 1279, 1288, 152 N.W.2d 218, 223*; *Verschoor v. Miller, 967 Iowa 170, 176, 143 N.W.2d 385, 389*; *Mundy v. Olds, 254 Iowa 1095, 1100, 120 N.W.2d 469, 472*; *Bryan v. Iowa State Highway Commission, 251 Iowa 1093, 1096, 104 N.W.2d 562, 563*, and citations.

In our most recent [**16] reference to the rule we say in *Cole v. City of Osceola, 179 N.W.2d 524, 527 (Iowa 1970)*: "Of course, questions not presented to and not passed upon by the trial court cannot be raised or reviewed on appeal."

Under our law punitive damages are not allowed as a matter of right. *Sebastian v. Wood, 246 Iowa 94, 100, 101, 66 N.W.2d 841, 844.* When malice is shown or when a defendant acted with wanton and reckless disregard of the rights of others, punitive damages may be allowed as punishment to the defendant and as a deterrent to others. Although not meant to compensate a plaintiff, the result is to increase his recovery. He is the fortuitous beneficiary of such an award simply because there is no one else to receive it.

The jury's findings of fact including a finding defendants acted with malice and with wanton and reckless

disregard, as required for an allowance of punitive or exemplary damages, are supported by substantial evidence. We are bound thereby.

This opinion is not to be taken or construed as authority that the allowance of punitive damages is or is not proper under circumstances such as exist here. We hold only that question of law not having been properly raised cannot [**17] in this case be resolved.

Study and careful consideration of defendants' contentions on appeal reveal no reversible error.

Affirmed.

All Justices concur except Larson, J., who dissents.

Larson, J.

I respectfully dissent, first, because the majority wrongfully assumes that by installing a spring gun in the bedroom of their unoccupied house the defendants intended to shoot any intruder who attempted to enter the room. Under the record presented here, that was a fact question. Unless it is held that these property owners are liable for any injury to an intruder from such a device regardless of the intent with which it is installed, liability under these pleadings must rest upon two definite issues of fact, i.e., did the defendants intend to shoot the invader, and if so, did they employ unnecessary and unreasonable force against him?

It is my feeling that the majority oversimplifies the impact of this case on the law, not only in this but other jurisdictions, [*663] and that it has not thought through all the ramifications of this holding.

There being no statutory provisions governing the right of an owner to defend his property by the use of a spring gun or [**18] other like device, or of a criminal invader to recover punitive damages when injured by such an instrumentality while breaking into the building of another,

our interest and attention are directed to what should be the court determination of public policy in these matters. On both issues we are faced with a case of first impression. We should accept the task and clearly establish the law in this jurisdiction hereafter. I would hold there is no absolute liability for injury to a criminal intruder by setting up such a device on his property, and unless done with an intent to kill or seriously injure the intruder, I would absolve the owner from liability other than for negligence. I would also hold the court had no jurisdiction to allow punitive damages when the intruder was engaged in a serious criminal offense such as breaking and entering with intent to steal.

It appears to me that the learned trial court was and the majority is now confused as to the basis of liability under the circumstances revealed. Certainly, the trial court's instructions did nothing to clarify the law in this jurisdiction for the jury. Timely objections to Instructions Nos. 2, 5 and 6 were made by the defendants, [**19] and thereafter the court should have been aware of the questions of liability left unresolved, i.e., whether in this jurisdiction we by judicial declaration bar the use in an unoccupied building of spring guns or other devices capable of inflicting serious injury or death on an intruder regardless of the intent with which they are installed, or whether such an intent is a vital element which must be proven in order to establish liability for an injury inflicted upon a criminal invader.

Although the court told the jury the plaintiff had the burden to prove "That the force used by defendants was in excess of that force reasonably necessary and which persons are entitled to use in the protection of their property", it utterly failed to tell the jury it could find the installation was not made with the intent or purpose of striking or injuring the plaintiff. There was considerable evidence to that effect. As I shall point out, both defendants

stated the installation was made for the purpose of scaring or frightening away any intruder, not to seriously injure him. It may be that the evidence would support a finding of an intent to injure the intruder, but obviously that important issue [**20] was never adequately or clearly submitted to the jury.

Unless, then we hold for the first time that liability for death or injury in such cases is absolute, the matter should be remanded for a jury determination of defendant's intent to installing the device under instructions usually given to a jury on the issue of intent.

I personally have no objection to this court's determination of the public policy of this state in such a case to ban the use of such devices in *all* instances where there is no intruder threat to human life or safety, but I do say we have never done so except in the case of a mere trespasser in a vineyard. *Hooker v. Miller, 37 Iowa 613 (1873).* To that extent, then, this is a case of first impression, and in any opinion we should make the law in this jurisdiction crystal clear. Although the legislature could pronounce this policy, as it has in some states, since we have entered this area of the law by the Hooker decision, I believe it proper for us to declare the applicable law in cases such as this for the guidance of the bench and bar hereafter. The majority opinion utterly fails in this regard. It fails to recognize the problem where such a device is installed [**21] in a building housing valuable property to ward off criminal intruders, and to clearly place the burden necessary to establish liability.

My second reason for this dissent is the allowance of an award of punitive damages herein. Plaintiff claimed a remedy which [*664] our law does not allow, and the trial court should not have submitted that issue to the jury. Like the law establishing liability for installing a spring gun or other similar device, the law recognizing and allowing punitive or exemplary damages is court-made law, not

statutory law. As to the property owner's liability for exemplary damages where one is engaged in a serious criminal offense at the time of his injury, we also have a case of first impression. We have never extended this right to such a claimant, and I would not do so now. Unless we do, or there is a compelling reason or authority for such a right, which I fail to find, the trial court erred in submitting that issue to the jury. Like the case where a judgment is entered without jurisdiction of the subject matter, I would hold the award of $10,000 to plaintiff is void.

I do not wish to criticize, but believe the factual statement of the majority fails [**22] to give a true perspective of the relative facts and issues to be considered.

Plaintiff's petition at law asking damages alleged willful and malicious setting of a trap or device for the purpose of killing or inflicting great bodily harm upon any trespasser on defendants' property. We are, therefore, factually concerned with how such force may be properly applied by the property owner and whether his intent is relevant to liability. Negligent installation of a dangerous device to frighten and ward off an intruder or thief is not alleged, so unless the proof submitted was sufficient to establish a willful setting of the trap with a purpose of killing or seriously injuring the intruder, no recovery could be had. If the evidence submitted was such that a jury could find defendants had willfully set the spring gun with a purpose to seriously injure the plaintiff intruder, unless they were privileged under the law to set the gun under these circumstances, liability for the injury would follow.

From the record we learn that plaintiff and a companion made a second trip to a furnished but uninhabited house on defendants' farmland in Mahaska County on the night of July 16, 1967. They tore [**23] a plank from a porch window, entered the house with an intent to steal articles therein, and in search of desired articles plaintiff came to a

closed bedroom door where he removed a chair braced under the door knob and pulled the door toward him. This action triggered a single shot 20-gauge shotgun which defendants had wired to the bottom of a bed. The blast went through the door and struck plaintiff two or three inches above the right ankle.

The Mahaska County Grand Jury issued a true bill charging plaintiff with breaking and entering in the nighttime, but the county attorney accepted a plea of guilty to the lessor offense of larceny in the nighttime of property of a value of less than $20 and did not press the greater charge.

At the trial of this case Mr. Briney, one of the defendants, testified that the house where plaintiff was injured had been the home of Mrs. Briney's parents. He said the furniture and other possessions left there were of considerable value and they had tried to preserve them and enjoy them for frequent visits by Mrs. Briney. It appeared this unoccupied house had been broken into repeatedly during the past ten years and, as a result, Mr. Briney said "things [**24] were pretty well torn up, a lot of things taken." To prevent these intrusions the Brineys nailed the doors and some windows shut and boarded up others. Prior to this time Mr. Briney testified he had locked the doors, posted seven no trespassing signs on the premises, and complained to the sheriffs of two counties on numerous occasions. Mr. Briney further testified that when all these efforts were futile and the vandalism continued, he placed a .20-gauge shotgun in a bedroom and wired it so that it would shoot downward and toward the door if anyone opened it. He said he first aimed it straight at the door but later, at his wife's suggestion, reconsidered the aim and pointed the gun down in a way he thought would only scare [*665] someone if it were discharged. On cross-examination he admitted that he did not want anyone to know it was there in order to preserve the element of surprise.

Plaintiff testified he knew the house was unoccupied and admitted breaking into it in the nighttime without lawful reason or excuse. He claimed he and his companion were seeking old bottles and dated fruit jars. He also admitted breaking in on one prior occasion and stated the reason for the return [**25] visit was that we decided we would go out to this place again and see if there was something we missed while we was out there the first time." An old organ fascinated plaintiff. Arriving this second time, they found that the window by which they had entered before was now a "solid mass of boards" and walked around the house until they found the porch window which offered less resistance. Plaintiff said they crawled through this window. While searching the house he came to the bedroom door and pulled it open, thus triggering the gun that delivered a charge which struck him in the leg.

Plaintiff's doctor testified that he treated the shotgun wound on the night it was sustained and for some period thereafter. The healing process was successful and plaintiff was released after 40 days in the hospital. There was medical testimony that plaintiff had a permanent deformity, a loss of tissue, and a shortening of the leg.

That plaintiff suffered a grievous wound is not denied, and that it constituted a serious bodily injury cannot be contradicted.

As previously indicated, this appeal presents two vital questions which are as novel as they are difficult. They are, (1) is the owner of a building [**26] in which are kept household furniture, appliances, and valuables, but not occupied by a person or persons, liable in damages to an intruder who in the nighttime broke into and entered the building with the intent to steal and was shot and seriously injured by a spring gun allegedly set by the owner to frighten intruders from his property, and (2) if he is liable

for compensatory damages, is this a proper case for the allowance of exemplary or punitive damages?

The trial court overruled all objections to the instructions and denied defendants' motion for a new trial. Thus, the first question to be resolved is the status of the law in this jurisdiction as to the means of force a property owner is privileged to use to repel (1) a mere trespasser, (2) a criminal invader, thief or burglar, where he presents no threat to human life or safety, and (3) an intruder or criminal breaking and entering a dwelling which poses a threat to human life and safety. Overlooked by the majority is the vital problem relating to the relevancy and importance of the owner's intent in placing the device.

I have been unable to find a case exactly like the case at bar, although there have been many cases which [**27] consider liability to a mere trespasser for injuries incurred by a spring gun or other dangerous instruments set to protect against intrusion and theft. True, some of these cases seem to turn on the negligence of the party setting the trap and an absence of adequate warning thereof, but most of them involve an alleged intentional tort. It is also true some hold as a matter of public policy there is liability for any injury following the setting of a device which is intended to kill or inflict great bodily injury on one coming on the owner's property without permission, unless the invader poses a threat to human life, and this is so even though there is no statutory prohibition against the setting of spring guns in the jurisdiction.

Since our decision in *Hooker v. Miller*, *supra*, we have recognized in this state the doctrine that the owner of a premise is liable in damages to a mere trespasser coming upon his property for any injury occasioned by the unsafe condition of the property which the owner has intentionally permitted to exist, such as installed spring guns, unless adequate warning is given thereof. In [*666] Hooker, which involved stealing grapes from a vineyard, we held [**28] a

property owner had no right to resist such a trespass by means which may kill or inflict great bodily injury to the trespasser. But it does appear therein that we recognized some distinction between a mere trespass against property and a trespass involving a serious crime or involving a dwelling. Except when the trespass involves a serious crime, a crime posing a threat to human life, it may be argued that the law in this jurisdiction should limit the right of one to protect his property, that he does not have a privilege to resist a mere trespass by using a spring gun or other device which poses a threat to life.

However, left unsettled by this and other court pronouncements is the means which may be used to repel, prevent, or apprehend a trespasser engaged in a more serious criminal offense. True, there is a line of cases which seem to apply the same rule to all criminal trespasses except those involving arson, rape, assault, or other acts of violence against persons residing on the property invaded. *State v. Vance, 17 Iowa 138 (1864)*; *State v. Plumlee, 177 La. 687, 149 So. 425 (1933)*; *Pierce v. Commonwealth, 135 Va. 635, 115 S.E. 686* (Virginia, 1923); *Simpson v. State, 59 Ala.* [**29] *1, 31 Am.Rep. 1 (1877)*; *State v. Barr, 11 Wash. 481, 39 P. 1080 (1895)*; *Starkey v. Dameron, 92 Colo. 420, 21 P.2d 1112 (1933)*; *State v. Beckham, 306 Mo. 566, 267 S.W. 817 (1924)*; Bird v. Holbrook, 4 Bingham's Reports 628 (England, 1828). Also see annotation, 44 A.L.R.2d 391, § 5, and citations. There are others which at least infer that any serious law violation by the trespasser might permit the reasonable use of dangerous instrumentalities to repel the intruder and prevent loss or damage to one's valuable property. *Scheuermann v. Scharfenberg, 163 Ala. 337, 50 So. 335*; *Marquis v. Benfer, 298 S.W.2d 601 (Texas 1956)*; *Grant v. Hass, 31 Tex. Civ. App. 688, 75 S.W. 342 (1903)*; Gray v. Combs, 7 J.J. Marshall 478 (Ky., 1832), 23 Am.Dec. 431; Ilott v. Wilkes, 3 B.&A. 304 (1820 K.B.).

Also see the following articles on this subject: 68 Yale Law Journal 633, Duties to Trespassers: A Comparative Survey and Revaluation; 35 Yale Law Journal 525, The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices; annotation, *44 A.L.R.2d 383*, Use of Set Gun, Trap, or Similar Device on Defendant's Own Property.

Most of these discussions center around what should be public policy [**30] regarding a property owner's right to use a dangerous weapon or instrumentality to protect his premises from intruders or trespassers, and his duty to protect the trespasser from serious injury while upon his premises.

Some states, including Wisconsin, have statutes which announce the jurisdiction's public policy. Often they prohibit the use of spring guns or such devices to protect real and personal property, and of course in those instances a property owner, regardless of his intent or purpose, has no right to make use of them and is liable to anyone injured thereby. Since there has been no such statutory prohibition or direct judicial pronouncement to that effect prior to this time in this state, it could not be said as a matter of law that the mere placing of a spring gun in a building on one's premises is unlawful. Much depends upon its placement and purpose. Whether an owner exceeds his privilege to reasonably defend his property by such an installation, and whether liability is incurred in a given case, should therefore depend upon the circumstances revealed, the intent of the property owner, and his care in setting the device. In any event, I question whether it should be [**31] determined solely by the results of his act or its effect upon the intruder.

It appears there are cases and some authority which would relieve one setting a spring gun on his premises of any liability if adequate warning had been given an intruder and he ignores the warning. In all of these cases there is a

question as to [*667] the *intent* of the property owner in setting the device. Intent, of course, may be determined from both direct and indirect evidence, and it is true the physical facts may be and often are sufficient to present a jury issue. I think they were here, but no clear instruction was given in this regard.

If, after proper instructions, the finder of fact determines that the gun was set with an intent and purpose to kill or inflict great bodily injury on an intruder, then and only then may it be said liability is established unless the property so protected is shown to be an occupied dwelling house. Of course, under this concept, if the finder of fact determines the gun set in an unoccupied house was intended to do no more than to frighten the intruder or sting him a bit, no liability would be incurred under such pleadings as are now presented. If such a [**32] concept of the law were adopted in Iowa, we would have here a question for the fact-- finder or jury as to whether the gun was willfully and intentionally set so as to seriously injure the thief or merely scare him away.

I feel the better rule is that an owner of buildings housing valuable property may employ the use of spring guns or other devices intended to repel but not seriously injure an intruder who enters his secured premises with or without a criminal intent, but I do not advocate its general use, for there may also be liability for negligent installation of such a device. What I mean to say is that under such circumstances as we have here the issue as to whether the set was with an intent to seriously injure or kill an intruder is a question of fact that should be left to the jury under proper instructions, and that the mere setting of such a device with a resultant serious injury should not as a matter of law establish liability.

In the case of a mere trespass able authorities have reasoned that absolute liability may rightfully be fixed on

the landowner for injuries to the trespasser because very little damage could be inflicted upon the property owner and the danger [**33] is great that a child or other innocent trespasser might be seriously injured by the device. In such matters they say no privilege to set up the device should be recognized by the courts regardless of the owner's intent. I agree.

On the other hand, where the intruder may pose a danger to the inhabitants of a dwelling, the privilege of using such a device to repel has been recognized by most authorities, and the mere setting thereof in the dwelling has not been held to create liability for an injury as a matter of law. In such cases intent and the reasonableness of the force would seem relevant to liability.

Although I am aware of the often-repeated statement that personal rights are more important than property rights, where the owner has stored his valuables representing his life's accumulations, his livelihood business, his tools and implements, and his treasured antiques as appears in the case at bar, and where the evidence is sufficient to sustain a finding that the installation was intended only as a warning to ward off thieves and criminals, I can see no compelling reason why the use of such a device alone would create liability as a matter of law.

For cases considering the [**34] devices a property owner is or is not privileged to use to repel a mere trespasser, see *Hooker v. Miller, supra, 37 Iowa 613* (trap gun set in orchard to repel); *State v. Vance, supra, 17 Iowa 138 (1864)*; *Phelps v. Hamlett, 207 S.W. 425 (1918)* (bomb set in open air theater); *State v. Plumlee, supra, 149 So. 425 (1933)* (trap gun set in open barn); *Starkey v. Dameron, supra, 21 P.2d 1112 (1933)* (spring gun in outdoor automatic gas pump); *State v. Childers, 133 Ohio St. 508, 14 N.E.2d 767* (Ohio, 1938) (trap gun in melon patch); *Weis v. Allen, 147 Ore. 670, 35 P.2d 478 (Ore. 1934)* (trap gun in junkyard); *Johnson v. Patterson, 14 Conn. 1(1840)*

[*668] (straying poultry poisoned); Bird v. Holbrook, supra, 4 Bingham's Reports 628 (England, 1828) (spring gun in garden enclosed by wall of undisclosed height).

For cases apparently holding dangerous devices may be used to ward off and prevent a trespasser from breaking and entering into an inhabited dwelling, see *State v. Vance, supra*; Grant v. Hass, supra; *Scheuermann v. Scharfenberg, supra*; *Simpson v. State, supra*; *United States v. Gilliam, 1 Hayw. & H. 109, 25 Fed.Cas. 1319, 1320 (D.C. 1882)*; *State v. Childers, supra*; *Gramlich v. Wurst,* [**35] *86 Pa. 74, 80 (1878).*

Also, for cases considering the devices a property owner is privileged to use to repel an invader where there is no threat to human life or safety, see *Allison v. Fiscus, 156 Ohio St. 120, 100 N.E.2d 237, 44 A.L.R.2d 369*; *State v. Barr, 11 Wash. 481, 39 P. 1080 (1895)*; *State v. Childers, supra, Weis v. Allen, supra*; *Pierce v. Commonwealth, supra*; *Johnson v. Patterson, supra*; *Marquis v. Benfer, supra.*

In *Allison v. Fiscus, supra, at page 241 of 100 N.E.2d*, it is said: "Assuredly * * * the court had no right to hold as a matter of law that defendant was liable to plaintiff, as the *defendant's good faith* in using the force which he did to protect his building and the good faith of his belief as to the nature of the force he was using were questions for the jury to determine under proper instructions." (Emphasis supplied.)

In *State v. Barr, supra, at page 1081 of 39 P.*, the court said: "* * * whether or not what was done in a particular case was justified under the law must be a question of fact, or mixed law and fact, and not a pure question of law."

In *State v. Childers, supra*, it is said *at page 768 of 14 N.E.2d*: "Of course the act in question must be done [**36] maliciously * * * and *that fact must be proved and found by the jury to exist*." (Emphasis supplied.)

Also see *State v. Metcalfe, 203 Iowa 155, 212 N.W. 382*, where this court discussed the force that a property owner may use to oppose an unlawful effort to carry away his goods, and held the essential issue in such matters which must be explained to the jury is not the nature of the weapon employed but whether the defendant employed only that degree of force to accomplish such purpose which a reasonable person would deem reasonably necessary under the circumstances as they appeared in good faith to the defendant.

Like the Ohio Supreme Court in *Allison v. Fiscus, supra*, I believe that the basis of liability, if any, in such a case should be either the intentional, reckless, or grossly negligent conduct of the owner in setting the device.

If this is not a desirable expression of policy in this jurisdiction, I suggest the body selected and best fitted to establish a different public policy would be the State Legislature.

The next question presented is, which view of the law set out above did the trial court take, the view that the mere setting of a spring gun or like device in defendants' [**37] building created liability for the resulting injury, or the view that there must be a setting of the device with an intent to shoot, kill, or seriously injure one engaged in breaking and entering this house? Appellants argue this was not made clear in the court's instructions to the jury and, being material, is error. I agree.

They contend Instructions Nos. 2, 5 and 6, to which proper and timely exceptions were taken, are improper, that they were so inadequate and confusing as to constitute reversible error and required the trial court to grant their motion for a new trial.

Instruction No. 5 provides:

"You are hereby instructed that one may use reasonable force in the protection of his property, but such right is

subject to the qualification that one may not *use such means of force* as will take human life [*669] or inflict great bodily injury. Such is the rule even though the injured party is a trespasser and is in violation of the law himself." (Emphasis supplied.)

Instruction No. 6 provides:

"An owner of premises is prohibited from willfully or intentionally injuring a trespasser by means of force that either takes life or inflicts great bodily injury; and therefore [**38] a person owning a premise is prohibited from setting out 'spring guns' and like dangerous devices which will likely take life or inflict great bodily injury, *for the purpose of harming trespassers*. The fact that the trespasser may be acting in violation of the law does not change the rule. The only time when such conduct of setting a 'spring gun' or a like dangerous device is justified would be when the trespasser was committing a felony of violence or a felony punishable by death, or where the trespasser was endangering human life by his act." (Emphasis supplied.)

Specific objections were made to Instruction No. 2, inter alia, to the statement that in this jurisdiction the use of force which may take life or inflict serious bodily injury might be used was restricted to occupied dwellings or where specific statutes permitted its use; to the reference to an Iowa case wherein the subject related to a *simple trespass* in a vineyard where no breaking and entry of a building was involved, without pointing out the difference as to permissible force permitted to repel one entering the owner's buildings with intent to ravish and steal valuable personal property; and to the error resulting [**39] when the court wrongfully directed the jury to find defendants' acts were illegal by stating "that in so doing he violated the law and became liable for injuries sustained by the plaintiff -"

In other words, defendants contended that this instruction failed to tell the jury the extent of defendants' rights to defend against burglary in buildings other than their dwelling, inferring they have no right to employ a device which is dangerous to life and limb, regardless of its intended purpose only to ward off or scare the intruder.

Defendants also specifically objected to Instruction No. 5 because it also limited the right or privilege of one to use dangerous devices in any way to protect his property, and made it applicable to cases where the invader was in violation of the law, without classifying his offense.

Instruction No. 6 was specifically objected to as not being a proper statement of the law, as being inadequate, confusing, and misleading to the jury in regard to the vital issues in this case, because it would not be possible for a jury to understand the court when it told the jurors an owner of premises is prohibited from willfully or intentionally injuring a trespasser by [**40] means of force that either takes life or inflicts great bodily injury, and then told them a person owning premises is prohibited from setting out spring guns and like dangerous devices which will "likely" take life or inflict great bodily injury, *for the purpose of harming trespassers*.

Appellants argue from these instructions the jury could conclude it must find any setting of a spring gun or such other device to protect his property from a burglar or other criminal invader made the owner *absolutely liable* for injuries suffered by the intruder, unless the building being so protected was a dwelling, regardless of the owner's intent and purpose in setting the device in his building. On the other hand, in Instruction No. 6 the court refers to such a *setting with the intent and purpose* of killing or seriously injuring the intruder in order to make the owner liable for damages.

I too find these instructions are confusing. If the court was telling the jury, as appellants contend, that an owner of

a premise may not set a spring gun to protect his property unless the trespasser's act amounts to a felony of violence and [*670] endangers human life, the phrase used, "for the [**41] purpose of harming trespassers", introduces the element of intent and would tend to confuse the jury as to the law on that issue. If the issue here was that such an intent was necessary to establish liability, the instruction was erroneous and confusing; otherwise the error was without prejudice.

I would, therefore, conclude there is merit in appellants' contention that the law was not made clear to the jury as to whether the act of placing a spring gun on this premise was prohibited by law, or whether the act of placing such a device requires a finding of intention to shoot the intruder or cause him great bodily injury to establish liability. I cannot tell whether the jury found liability on the mere act of placing the gun as Mr. Briney did in this house or on the fact that he did so with the intent to seriously harm a trespasser.

In the case at bar, as I have pointed out, there is a sharp conflict in the evidence. The physical facts and certain admissions as to how the gun was aimed would tend to support a finding of intent to injure, while the direct testimony of both defendants was that the gun was placed so it would "hit the floor eventually" and that it was set "low so it couldn't [**42] kill anybody." Mr. Briney testified, "My purpose in setting up the gun was not to injure somebody. I thought more or less that the gun would be at a distance of where anyone would grab the door, it would scare them", and in setting the angle of the gun to hit the lower part of the door, he said, "I didn't think it would go through quite that hard."

If the law in this jurisdiction permits, which I think it does, an explanation of the setting of a spring gun to repel invaders of certain private property, then the intent with

which the set is made is a vital element in the liability issue.

In view of the failure to distinguish and clearly give the jury the basis upon which it should determine that liability issue, I would reverse and remand the entire case for a new trial.

As indicated, under these circumstances the trial court should not have submitted the punitive damage issue to the jury in this case. By Instruction No. 14 the learned trial judge wrongfully instructed the jury that the law of Iowa allows a jury in such a case to award exemplary damages if it is found that the act complained of is wanton and reckless or where the defendants are guilty of malice. True, this instruction [**43] was in accordance with certain past pronouncements of this court and no objection was taken to the substance of the instruction, but defendants have always contended under these circumstances the court should not have submitted the question of exemplary damages to the jury. We have never extended the exemplary damage law to cover such cases and I maintain we should not do so now, directly or indirectly. Without such a pronouncement to that extent, or some legislation extending that right to a person engaged in a serious criminal offense at the time of his injury, I believe the trial court possessed no jurisdiction to permit the jury to pass on such a claim, even though no objections thereto were made by the defendants.

Although this subject has been considered and discussed in several Iowa cases, including *Sebastian v. Wood, 246 Iowa 94, 66 N.W.2d 841,* and citations, granting exemplary damages for injury due to alleged reckless driving, and *Amos v. Prom, 115 F. Supp. 127*, relating to alleged mental suffering and humiliation when denied admission to a public dance hall, none seem to consider whether punitive damages are permitted where the injured party was, as here, engaged in a criminal [**44] act such as breaking and entering, burglary, or other serious offense.

Also see *Morgan v. Muench, 181 Iowa 719, 156 N.W. 819,* and *Stricklen v. Pearson Construction Co., 185 Iowa 95, 169 N.W. 628,* and citations in each.

[*671] Although I have found no authority to assist me in my view, I am convinced it is correct in principle and should be adopted in this jurisdiction. In so doing, I adhere to the rule recognized in *Amos v. Prom, supra, at 137,* et seq., where it is stated: "* * * the principle that intentional wrongful action in disregard for the rights of others amounts to conduct to which the law will attach a penalty and deterrent by way of exemplary damages." However, I would not extend this privilege to a case where the injured party's conduct itself was criminal and extremely violative of good public behavior.

From a general review of the subject of exemplary or punitive damages beginning with Wilkes v. Wood (1763), Lofft 1, 98 English Rep. 489, 498, which stated such "Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, * * *", I find that both in England and [**45] the United States the purpose of this law was to restrain arbitrary and outrageous use of power. See 70 Harvard L.Rev. 517, 519 (1957), Exemplary Damages in the Law of Torts.

In *Hawk v. Ridgway, 33 Ill. 473, 475 (1864),* the Illinois court said, "Where the wrong is wanton, or it is willful, the jury are authorized to give an amount of damages beyond the actual injury sustained, as a punishment, and to preserve the public tranquillity."

Some courts rationalize punitive damages on the basis that they provide an outlet for the injured party's desire for revenge and thereby help keep the peace. Some others rationalize it as a punishment to defendant and to deter him and others from further antisocial conduct. It has also been said punitive damages are ordinarily a means of increasing

the severity of the admonition inherent in the compensatory award. See 44 Harvard L.Rev. 1173 (1931).

A further study of this law indicates punitive damages have a direct relation to the criminal law. Historically, it was undoubtedly one of the functions of tort law *to deter* wrongful behavior. However, in modern times its priority has become that of compensating the victim of the injury. The business [**46] of punishing wrongdoers has increasingly become the exclusive purview of the criminal law. See Pollock and Maitland, History of English Law, Vol. II, 2d Ed. (1898), § 1, pp. 449-462.

The award of punitive damages in modern tort law gives rise to considerable anomalies. Such damages, of course, go to the private purse of the individual plaintiff and may be classified a windfall as to him in excess of his actual losses due entirely to a social judgment about defendant's conduct.

In properly applying this law Professor McCormick, in his treatise on damages found on pages 276 and 277 in McCormick on Damages (1935), said "Perhaps the principal advantage is that it does tend to bring to punishment a type of cases of oppressive conduct, such as slanders, assaults, minor oppressions, and cruelties, which are theoretically criminally punishable, but which in actual practice go unnoticed by prosecutors occupied with more serious crimes. * * * The self-interest of the plaintiff leads to the actual prosecution of the claim for punitive damages, where the same motive would often lead him to refrain from the trouble incident to appearing against the wrongdoer in criminal proceedings."

So understood, [**47] punitive damages are an adjunct to the criminal law, yet one over which the criminal law has no control, and in the United Kingdom, the land of its birth, punitive damages are close to extinct. In Rookes v. Barnard, Appeal Cases (House of Lords, 1964) 1129, at 1221 et seq., the English court of last resort confined the

award of punitive damages to a very narrow range of situations. It ruled in an intentional tort case that exemplary [*672] damages could be awarded only in cases (1) for oppressive, arbitrary, or unconstitutional acts by government servants, (2) for defendant's conduct which had been calculated by him to make a profit for himself which might well exceed the compensation payable to the injured party, and (3) where expressly authorized by statute.

In the case at bar the plaintiff was guilty of serious criminal conduct, which event gave rise to his claim against defendants. Even so, he may be eligible for an award of compensatory damages which so far as the law is concerned redresses him and places him in the position he was prior to sustaining the injury. The windfall he would receive in the form of punitive damages is bothersome to the principle of damages, because [**48] it is a response to the conduct of the defendants rather than any reaction to the loss suffered by plaintiff or any measurement of his worthiness for the award.

When such a windfall comes to a criminal as a result of his indulgence in serious criminal conduct, the result is intolerable and indeed shocks the conscience. If we find the law upholds such a result, the criminal would be permitted by operation of law to profit from his own crime.

Furthermore, if our civil courts are to sustain such a result, it would in principle interfere with the purposes and policies of the criminal law. This would certainly be ironic since punitive damages have been thought to assist and promote those purposes, at least so far as the conduct of the defendant is concerned.

We cannot in good conscience ignore the conduct of the plaintiff. He does not come into court with clean hands, and attempts to make a claim to punitive damages in part on his own criminal conduct. In such circumstances, to enrich him would be unjust, and compensatory damages in such a case

itself would be a sufficient deterrent to the defendant or others who might intend to set such a device.

The criminal law can take whatever [**49] action is appropriate in such cases, but the civil law should not compound the breach of proper social conduct by rewarding the plaintiff for his crime. I conclude one engaged in a criminal activity is an unworthy object of largesse bestowed by punitive damages and hold the law does not support such a claim to enrichment in this case.

The admonitory function of the tort law is adequately served where the compensatory damages claimed are high and the granted award itself may act as a severe punishment and a deterrence. In such a case as we have here there is no need to hold out the prospect of punitive damages as an incentive to sue and rectify a minor physical damage such as a redress for lost dignity. Certainly this is not a case where defendants might profit in excess of the amount of reparation they may have to pay.

In a case of this kind there is no overwhelming social purpose to be achieved by punishing defendants beyond the compensatory sum claimed for damages.

Being convinced that there was reversible error in the court's instructions, that the issue of intent in placing the spring gun was not clearly presented to the jury, and that the issue as to punitive damages should [**50] not have been presented to the jury, I would reverse and remand the matter for a new trial.

The majority seem to ignore the evident issue of punitive policy involved herein and uphold the punitive damage award on a mere technical rule of civil procedure.

HULL v. SCRUGGS. No. 34535. SUPREME COURT OF MISSISSIPPI 191 Miss. 66; 2 So. 2d 543 May 26, 1941, Decided

[*70] [**543] Griffith, J., delivered the opinion of the court.

On April 4, 1940, appellant killed a dog then on his premises, the dog being the property of appellee, as it was afterwards learned. In an action against appellant, the defendant in the trial court, the jury, on what amounted in practical effect to peremptory instructions for plaintiff, returned a verdict in favor of the plaintiff, and the defendant has appealed.

The ownership and the killing are admitted, and in defense appellant plead justification. Plaintiff resided in the City of Greenwood and defendant's home was about a mile away and near the outside of the city limits. About three weeks before the date aforementioned, according to the evidence introduced in behalf of defendant, the dog took up his abode on the premises around defendant's home, and made himself a nuisance by howling at night, chasing the turkeys and guineas owned by the defendant and by demeaning himself so as to frighten the children and their nurses. The evidence on plaintiff's part was to the effect that the dog was not absent from plaintiff's premises in such manner as to be constantly or continuously somewhere else, although it was admitted by plaintiff that the dog was absent at recurrent times and hours.

In this situation we lay aside as unnecessary, but not because unimportant, all the above mentioned complaints [*71] as regards the conduct of the dog, and lay aside also the assertion that during all the three weeks the dog was constantly or continuously on the premises of the defendant, because as to complete continuity there is a dispute of fact; and we proceed to a determination of the controversy upon undisputed evidence of facts and circumstances which conclusively disclose that, throughout the period of three weeks aforesaid, the dog sucked all the eggs which were laid by the turkeys and guineas on defendant's premises and that his presence there was of sufficient frequency or continuity, both day and night, that none of the eggs were left until after the dog was killed.

It is a fact of common knowledge that when a dog has once acquired the habit of egg-sucking there is no available way by which he may be broken of it, and that there is no calculable limit to his appetite in the indulgence of the habitual propensity. And generally he has a sufficient degree of intelligence that he will commit the offense, and return to it upon every clear opportunity, in such a stealthy way that he can seldom be caught in the act itself.

When a dog of that character has for three weeks taken up his abode upon the premises of one not his owner, or else from time to time during the course of such a period and from day to day as well as often during the night, has returned to and entered upon the premises of one not his owner, and has destroyed and continued to destroy all the eggs of the fowls kept [**544] by the owner of the premises, what shall the victimized owner of the premises do? Nobody will contend that he shall be obliged to forego the privilege to own and keep fowls and to obtain and have the eggs which they lay; nor will it be contended that he is obliged to build extra high fences, so high as to keep out the trespassing dog, even if fences could be so built. The premises and its privileges belong to the owner thereof, not to the dog.

He must then, as the most that could be required of [*72] him, take one or the other, and when necessary all, of the three following courses: (1) He must use reasonable efforts to drive the dog away and in such appropriate manner as will probably cause him to stay away; or (2) he must endeavor to catch the dog and confine him to be dealt with in a manner which we do not enter upon because not here before us; or (3) he must make reasonable efforts to ascertain and notify the owner of the dog, so that the latter may have opportunity to take the necessary precautions by which to stop the depredations. It is undisputed in this record that the owner of the premises resorted in a reasonably diligent manner and for a sufficient length of time to each and all of the three foregoing courses of

action, but his reasonable efforts in that pursuit resulted, every one of them, in failure.

What else was there reasonably left but to kill the animal? There was nothing else; and we reject the contention, which seems to be the main ground taken by appellee, that admitting all that has been said, the dog could not lawfully be killed except while in the actual commission of the offense. This is a doctrine which applies in many if not most cases, but is not available under facts such as presented by this record. After such a period of habitual depredations as shown in this case, and having taken the alternative steps aforementioned, the owner of the premises is not required to wait and watch with a gun until he can catch the predatory dog in the very act. Such a dog would be far more watchful than would the watcher himself, and the depredation would not occur again until the watcher had given up his post and had gone about some other task, but it would then recur, and how soon would be a mere matter of opportunity.
Reversed and judgment here for appellant.

 Si lo hace para defender su propiedad, ¿le está permitido al dueño montar una trampa, consistente en una escopeta que se dispare al paso del ladrón, quien acabará llevándose el tiro?

TRESPASS: NECESSITY

 SYLVESTER A. PLOOF v. HENRY W. PUTNAM SUPREME COURT OF VERMONT 81 Vt. 471; 71 A. 188; 1908 Vt. LEXIS 165 October 30, 1908 May Term, 1908. Opinion filed October 30, 1908.

[**188] [*473] MUNSON The count in trespass contains the allegation: "Yet the said defendant, by his said agent and servant, with force and arms, wilfully and designedly cast off and unmoored the said sloop from the said wharf or dock." And the corresponding allegation of

the count in case is: "Yet the said defendant, by his said agent and servant, disregarding his duty in this behalf, negligently, carelessly, and wrongfully cast off," etc. The opinion states the other material allegations.

It is alleged as the ground of recovery that on the 13th day of November, 1904, the defendant was the owner of a certain island in Lake Champlain, and of a certain dock attached thereto, which island and dock were then in charge of the defendant's servant; that the plaintiff was then possessed of and sailing upon said lake a certain loaded sloop, on which were the plaintiff and his wife and two minor children; that there then arose a sudden and violent tempest, whereby the sloop and the property and persons therein were placed in great danger of destruction; that to save these from destruction or injury the plaintiff was compelled to, and did, moor the sloop to defendant's dock; that the defendant by his servant unmoored the sloop, whereupon [**189] it was driven upon the shore by the tempest, without the plaintiff's fault; and that the sloop and its contents were thereby destroyed, and the plaintiff and [*474] his wife and children cast into the lake and upon the shore, receiving injuries.

This claim is set forth in two counts; one in trespass, charging that the defendant by his servant with force and arms wilfully and designedly unmoored the sloop; the other in case, alleging that it was the duty of the defendant by his servant to permit the plaintiff to moor his sloop to the dock, and to permit it to remain so moored during the continuance of the tempest, but that the defendant by his servant, in disregard of this duty, negligently, carelessly and wrongfully unmoored the sloop. Both counts are demurred to generally.

There are many cases in the books which hold that necessity, and an inability to control movements inaugurated in the proper exercise of a strict right, will justify entries upon land and interferences with personal

property that would otherwise have been trespasses. A reference to a few of these will be sufficient to illustrate the doctrine.

In *Miller* v. *Fandrye*, Poph. 161, trespass was brought for chasing sheep, and the defendant pleaded that the sheep were trespassing upon his land, and that he with a little dog chased them out, and that as soon as the sheep were off his land he called in the dog. It was argued that, although the defendant might lawfully drive the sheep from his own ground with a dog, he had no right to pursue them into the next ground. But the court considered that the defendant might drive the sheep from his land with a dog, and that the nature of a dog is such that he cannot be withdrawn in an instant, and that as the defendant had done his best to recall the dog trespass would not lie.

In trespass of cattle taken in A, defendant pleaded that he was seized of C, and found the cattle there damage feasant, and chased them toward the pound, and that they escaped from him and went into A, and he presently retook them; and this was held a good plea. 21 Edw. IV. 64; Vin. Ab. Trespass, H. a 4 pl. 19. If one have a way over the land of another for his beasts to pass, and the beasts, being properly driven, feed the grass by morsels in passing, or run out of the way and are promptly pursued and brought back, trespass will not lie. See Vin. Ab. Trespass, K. a. pl. 1.

A traveller on a highway, who finds it obstructed from a sudden and temporary cause, may pass upon the adjoining land [*475] without becoming a trespasser, because of the necessity. *Henn's Case*, W. Jones 296; *Campbell v. Race, 61 Mass. 408, 54 Am. Dec. 728*; *Hyde v. Jamaica, 27 Vt. 443* (459); *Morey v. Fitzgerald, 56 Vt. 487, 48 Am. Rep. 811*.

An entry upon land to save goods which are in danger of being lost or destroyed by water or fire is not a trespass. 21 Hen. VII, 27; Vin. Ab. Trespass, H. a. 4, pl. 24, K. a. pl.

3. In *Proctor v. Adams, 113 Mass. 376, 18 Am. Rep. 500*, the defendant went upon the plaintiff's beach for the purpose of saving and restoring to the lawful owner a boat which had been driven ashore and was in danger of being carried off by the sea; and it was held no trespass. See also *Dunwich* v. *Sterry*, 1 Barn. & Adol. 831.

This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. 37 Hen. VII, pl. 26. One may sacrifice the personal property of another to save his life or the lives of his fellows. In *Mouse's Case*, 12 Coke 63, the defendant was sued for taking and carrying away the plaintiff's casket and its contents. It appeared that the ferryman of Gravesend took forty-seven passengers into his barge to pass to London, among whom were the plaintiff and defendant; and the barge being upon the water a great tempest happened, and a strong wind, so that the barge and all the passengers were in danger of being lost if certain ponderous things were not cast out, and the defendant thereupon cast out the plaintiff's casket. It was resolved that in case of necessity, to save the lives of the passengers, it was lawful for the defendant, being a passenger, to cast the plaintiff's casket out of the barge; that if the ferryman surcharge the barge the owner shall have his remedy upon the surcharge against the ferryman, but that if there be no surcharge, and the danger accrue only by the act of God, as by tempest, without fault of the ferryman, every one ought to bear his loss, to safeguard the life of a man.

It is clear that an entry upon the land of another may be justified by necessity, and that the declaration before us discloses a necessity for mooring the sloop. But the defendant questions the sufficiency of the counts because they do not negative the existence of natural objects to which the plaintiff [*476] could have moored with equal safety. The allegations are, in substance, that the stress of a sudden and violent tempest compelled the plaintiff to moor

to defendant's dock to save his sloop and the people in it. The averment of necessity is complete, for it covers not only the necessity of mooring, but the necessity of mooring to the dock; and the details of the situation which created this necessity, whatever the legal requirements regarding them, are matters of proof and need not be alleged. It is certain that the rule suggested cannot be held applicable irrespective of circumstance, and the question must be left for adjudication upon proceedings had with reference to the evidence or the charge.

The defendant insists that the counts are defective in that they fail to show that the servant, in casting off the rope, was acting within the scope of his employment. It is said that the allegation that the island and dock were in charge of the servant does not [**190] imply authority to do an unlawful act; and that the allegations as a whole fairly indicate that the servant unmoored the sloop for a wrongful purpose of his own, and not by virtue of any general authority or special instruction received from the defendant. But we think the counts are sufficient in this respect. The allegation is that the defendant did this by his servant. The words "wilfully and designedly" in one count, and "negligently, carelessly and wrongfully" in the other, are not applied to the servant, but to the defendant acting through the servant. The necessary implication is that the servant was acting within the scope of his employment. 13 Ency. Pl. & Pr. 922; *Voegeli v. Pickel Marble etc. Co., 49 Mo. App. 643*; *Wabash Ry. Co. v. Savage, 110 Ind. 156, 9 N.E. 85*. See also *Palmer v. St. Albans, 60 Vt. 427, 13 A. 569, 6 Am. St. Rep. 125*.

R. C. VINCENT and Another v. LAKE ERIE TRANSPORTATION COMPANY Nos. 16,262 - (102) Supreme Court of Minnesota 109 Minn. 456; 124 N.W. 221 January 14, 1910

[*457] [**221] O'BRIEN, J.

The steamship Reynolds, owned by the defendant, was for the purpose of discharging her cargo on November 27, 1905, moored to plaintiffs' dock in Duluth. While the unloading of the boat was taking place a storm from the northeast developed, which at about ten o'clock p.m., when the unloading was completed, had so grown in violence that the wind was then moving at fifty miles per hour and continued to increase during the night. There is some evidence that one, and perhaps two, boats were able to enter the harbor that night, but it is plain that navigation was practically suspended from the hour mentioned until the morning of the twenty ninth, when the storm abated, and during that time no master would have been justified in attempting to navigate his vessel, if he could avoid doing so. After the discharge of the cargo the Reynolds signaled for a tug to tow her from the dock, but none could be obtained because of the severity of the storm. If the lines holding the ship to the dock had been cast off, she would doubtless have drifted away; but, instead, the lines were kept fast, and as soon as one parted or chafed it was replaced, sometimes with a larger one. The vessel lay upon the outside of the dock, her bow to the east, the wind and waves striking her starboard quarter with such force that she was constantly [*458] being lifted and thrown against the dock, resulting in its damage, as found by the jury, to the amount of $500.

We are satisfied that the character of the storm was such that it would have been highly imprudent for the master of the Reynolds to have attempted to leave the dock or to have permitted his vessel to drift away from it. One witness testified upon the trial that the vessel could have been warped into a slip, and that, if the attempt to bring the ship into the slip had failed, the worst that could have happened would be that the vessel would have been blown ashore upon a soft and muddy bank. The witness was not present in Duluth at the time of the storm, and, while he may have been right in his conclusions, those in charge of

the dock and the vessel at the time of the storm were not required to use the highest human intelligence, nor were they required to resort to every possible experiment which could be suggested for the preservation of their property. Nothing more was demanded of them than ordinary prudence and care, and the record in this case fully sustains the contention of the appellant that, in holding the vessel fast to the dock, those in charge of her exercised good judgment and prudent seamanship.

It is claimed by the respondent that it was negligence to moor the boat at an exposed part of the wharf, and to continue in that position after it became apparent that the storm was to be more than usually severe. We do not agree with this position. The part of the wharf where the vessel was moored appears to have been commonly used for that purpose. It was situated within the harbor at Duluth, and must, we think, be considered a proper and safe place, and would undoubtedly have been such during what would be considered a very severe storm. The storm which made it unsafe was one which surpassed in violence any which might have reasonably been anticipated.

The appellant contends by ample assignments of error that, because its conduct during the storm was rendered necessary by prudence and good seamanship under conditions over which it had no control, it cannot be held liable for any injury resulting to the property of others, and claims that the jury should have been so instructed. An analysis of the charge given by the trial court is not necessary, as in our opinion the only question for the jury was the amount of damages [*459] which the plaintiffs were entitled to recover, and no complaint is made upon that score.

The situation was one in which the ordinary rules regulating property rights were suspended by forces beyond human control, and if, without the direct intervention of

some act by the one sought to be held liable, [**222] the property of another was injured, such injury must be attributed to the act of God, and not to the wrongful act of the person sought to be charged. If during the storm the Reynolds had entered the harbor, and while there had become disabled and been thrown against the plaintiffs' dock, the plaintiffs could not have recovered. Again, if while attempting to hold fast to the dock the lines had parted, without any negligence, and the vessel carried against some other boat or dock in the harbor, there would be no liability upon her owner. But here those in charge of the vessel deliberately and by their direct efforts held her in such a position that the damage to the dock resulted, and, having thus preserved the ship at the expense of the dock, it seems to us that her owners are responsible to the dock owners to the extent of the injury inflicted.

In *Depue v. Flatau, 100 Minn. 299, 111 N.W. 1, 8 L.R.A. (N.S.) 485*, this court held that where the plaintiff, while lawfully in the defendants' house, became so ill that he was incapable of traveling with safety, the defendants were responsible to him in damages for compelling him to leave the premises. If, however, the owner of the premises had furnished the traveler with proper accommodations and medical attendance, would he have been able to defeat an action brought against him for their reasonable worth?

In *Ploof v. Putnam (Vt.) 71 Atl. 188, 20 L.R.A. (N.S.) 152*, the supreme court of Vermont held that where, under stress of weather, a vessel was without permission moored to a private dock at an island in Lake Champlain owned by the defendant, the plaintiff was not guilty of trespass, and that the defendant was responsible in damages because his representative upon the island unmoored the vessel, permitting it to drift upon the shore, with resultant injuries to it. If, in that case, the vessel had been permitted to remain, and the dock had suffered an injury, we believe the shipowner would have been held liable for the injury done.

[*460] Theologians hold that a starving man may, without moral guilt, take what is necessary to sustain life; but it could hardly be said that the obligation would not be upon such person to pay the value of the property so taken when he became able to do so. And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.

Let us imagine in this case that for the better mooring of the vessel those in charge of her had appropriated a valuable cable lying upon the dock. No matter how justifiable such appropriation might have been, it would not be claimed that, because of the overwhelming necessity of the situation, the owner of the cable could not recover its value.

This is not a case where life or property was menaced by any object or thing belonging to the plaintiffs, the destruction of which became necessary to prevent the threatened disaster. Nor is it a case where, because of the act of God, or unavoidable accident, the infliction of the injury was beyond the control of the defendant, but is one where the defendant prudently and advisedly availed itself of the plaintiffs' property for the purpose of preserving its own more valuable property, and the plaintiffs are entitled to compensation for the injury done.

Order affirmed.

LEWIS, J. (dissenting).

I dissent. It was assumed on the trial before the lower court that appellant's liability depended on whether the master of the ship might, in the exercise of reasonable care, have sought a place of safety before the storm made it impossible to leave the dock. The majority opinion assumes that the evidence is conclusive that appellant moored its boat at respondents' dock pursuant to contract, and that the vessel was lawfully in position at the time the additional

cables were fastened to the dock, and the reasoning of the opinion is that, because appellant made use of the stronger cables to hold the boat in position, it became liable under the rule that it had voluntarily made use of the property of another for the purpose of saving its own.

[*461] In my judgment, if the boat was lawfully in position at the time the storm broke, and the master could not, in the exercise of due care, have left that position without subjecting his vessel to the hazards of the storm, then the damage to the dock, caused by the pounding of the boat, was the result of an inevitable accident. If the master was in the exercise of due care, he was not at fault. The reasoning of the opinion admits that if the ropes, or cables, first attached to the dock had not parted, or if, in the first instance, the master had used the stronger cables, there would be no liability. If the master could not, in the exercise of reasonable care, have anticipated the severity of the storm and sought a place of safety before it became impossible, why should he be required to anticipate the severity of the storm, and, in the first instance, use the stronger cables?

I am of the opinion that one who constructs a dock to the navigable line of waters, and enters into contractual relations with the owner of a vessel to moor the same, takes the risk of damage to his dock by a boat caught there by a storm, which event could not have been avoided in the exercise of due care, and further, that the legal status of the parties in such a case is not changed by renewal of cables to keep the boat from being cast adrift at the mercy of the tempest.

JAGGARD, J.
I concur with Lewis, J.

 ¿En este caso, la necesidad es una defensa, o más bien constituye la base de acción del demandante, después que el empleado de Putnam empujara la embarcación de los

Ploofs, que intentaban atarla al pie del muelle en medio de la peligrosa tormenta?

 Si la embarcación de los Ploofs hubiera dañado el muelle, ¿hubiera tenido que pagar esta familia los daños ocasionados después de salvar la vida?

TRESPASS: PUBLIC NECESSITY

 PASCAL SUROCCO et al. v. JOHN W. GEARY
SUPREME COURT OF CALIFORNIA 3 Cal. 69 8 January 1853

[*72] MURRAY This was an action, commenced in the court below, to recover damages for blowing up and destroying the plaintiff's house and property, during the fire of the 24th of December, 1849.

Geary, at that time Alcalde of San Francisco, justified, on the ground that he had authority, by virtue of his office, to destroy said building, and also that it had been blown up by him to stop the progress of the conflagration then raging.

It was in proof, that the fire passed over and burned beyond the building of the plaintiffs, and that at the time said building was destroyed, [**6] they were engaged in removing their property, and could had they not been prevented have succeeded in removing more, if not all of their goods.

The cause was tried by the Court sitting as a jury, and a verdict rendered for the plaintiffs, from which the defendant prosecutes this appeal under the Practice Act of 1850.

The only question for our consideration is, whether the person who tears down or destroys the house of another, in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings

adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed.

[*73] This point has been so well settled in the courts of New York and New Jersey, that a reference to those authorities is all that is necessary to determine the present case.

The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. "It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though [**7] the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the lands of another, to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium quod jura privata*."

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity. (See American Print Works *v.* Lawrence, 1 Zab. 258, 264, and the cases there cited.)

This principle has been familiarly recognized by the books from the time of the saltpetre case, and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defence of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times, the individual rights of property give way to the higher laws of impending necessity.

A house on fire, or those in its immediate vicinity which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience and the interests of society. [**8] Were it otherwise, one stubborn person might involve a whole city

in ruin, by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed.

The respondent has invoked the aid of the constitutional provision which prohibits the taking of private property for public use, without just compensation being made therefor. This is not "a taking of private property for public use," within the meaning of the Constitution.

The right of taking individual property for public purposes [*74] belongs to the State, by virtue of her right of eminent domain, and is said to be justified on the ground of State necessity; but this is not a taking or a destruction for a public purpose, but a destruction for the benefit of the individual or the city, but not properly of the State.

The counsel for the respondent has asked, who is to judge of the necessity of the destruction of property?

This must, in some instances, be a difficult matter to determine. The necessity of blowing up a house may not exist, or be as apparent to the owner, whose judgment is clouded by interest, [**9] and the hope of saving his property, as to others. In all such cases the conduct of the individual must be regulated by his own judgment as to the exigencies of the case. If a building should be torn down without apparent or actual necessity, the parties concerned would undoubtedly be liable in an action of trespass. But in every case the necessity must be clearly shown. It is true, many cases of hardship may grow out of this rule, and property may often in such cases be destroyed, without necessity, by irresponsible persons, but this difficulty would not be obviated by making the parties responsible in every case, whether the necessity existed or not.

The legislature of the State possess the power to regulate this subject by providing the manner in which buildings may be destroyed, and the mode in which

compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty, and prevent the happening of such events as those supposed by the respondent's counsel.

In the absence of any legislation on the subject, we are compelled to fall back upon the rules of the common law.

The evidence in this case clearly establishes, the fact, that the blowing [**10] up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs cannot recover for the value of the goods which they might have saved: they were as much subject to the necessities of the occasion as the house in which they were situate; and if in such cases a party was held liable, it would too frequently happen, that the delay caused by the removal of the goods would render the destruction of the house useless.

[*75] The Court below clearly erred as to the law applicable to the facts of this case. The testimony will not warrant a verdict against the defendant.
Judgment reversed.

¿Deberá responder el burgomaestre de San Francisco por los daños que ocasionó a la familia Surocco, cuando dinamitó la casa de esta familia como única posibilidad real de detener un incendio de grandes dimensiones que arrasaría toda la ciudad?

II. TORT OF NEGLIGENCE O RESPONSABILIDAD POR CULPA

A. ELEMENTOS DE LA ACCIÓN

BREACH: REASOANABLE PERSON

Vaughan against Menlove (1837) Court of Common Pleas 3 Bing NC 468, 132 ER 490 (CP)

The declaration stated, that before and at the time of the grievance and injury, hereinafter mentioned, certain premises, to wit, two cottages with the appurtenances

situated in the county of Salop, were respectively in the respective possessions and occupations of certain persons as tenants thereof to the plaintiff, to wit, one thereof in the possession and occupation of one Thomas Roscoe as tenant thereof to the plaintiff, the reversion of and in the same with the appurtenances then belonging to the plaintiff, and the other thereof in the possession and occupation of one Thomas Bickley as tenant thereof to the plaintiff, the reversion of and in the same with the appurtenances then belonging to the plaintiff: that the defendant was then possessed of a certain close near to the said cottages, and of certain buildings of wood and thatch, also near to the said cottages; and that the defendant was then also possessed of a certain rick or stack of hay before then heaped, stacked, or put together, and then standing, and being in and upon the said close of the defendant. That on the 1st of August 1835, while the said cottages so were in the occupation of the said tenants, and while the reversion thereof respectively so belonged to the plaintiff as aforesaid, the said rick or stack of hay of the defendant was liable and likely to ignite, take fire, and break out into a flame, and there had appeared, and were just grounds to apprehend and believe that the same would ignite, take fire, and break out into a flame; and by reason of such liability, and of the state and condition of the said rick or stack of hay, the same then was and continued [to be] dangerous to the said cottages ; of which said several premises the defendant then had notice ; yet the defendant well knowing the premises, but not regarding his duty in that behalf, on &c., and from thence until and upon a certain day, to wit, on &c. wrongfully, negligently, and improperly, kept and continued the said rick or stack of hay, so likely and liable to ignite and take fire, and in a state and condition dangerous to the said cottages, although he could, and might, and ought to have removed and altered the same, so as to prevent the same from being and continuing so dangerous as aforesaid; and by reason thereof the said

cottages for a long time, to wit, during all the time aforesaid, were in great danger of being consumed by fire. That by reason of the premises, and of the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick or stack, in a state or condition so dangerous as aforesaid, and so liable and likely to ignite and take fire and break out into flame, on &c., and while the said cottages so were occupied as aforesaid, and the reversion thereof respectively so belonged to the plaintiff, the said rick or stack of hay of the defendant, standing in the close of the defendant, and near the said cottages, did ignite, take fire, and break out into flame, and by fire and flame thence issuing and arising, the said buildings of the defendant so being of wood and thatch as aforesaid, and so being near to the said rick or stack as aforesaid, were set on fire; and thereby and by reason of the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick or stack in such condition as aforesaid, fire and flame so occasioned as aforesaid by the igniting and breaking out into flame, of the said rick or stack, was thereupon then communicated unto the said cottages in which the plaintiff was interested as aforesaid, which were thereby then respectively set on fire, and then, to wit on &c., by reason of such carelessness, negligence, and improper conduct of the defendant in so continuing the said rick or stack in such a dangerous condition as aforesaid, in manner aforesaid, were consumed, damaged, and wholly destroyed, the cottages being of great value, to wit, the value of 500£. And by means of the premises, the plaintiff was greatly and permanently injured in his said reversionary estate and interest of and in each of them: to the plaintiff's damage of 500£.

The defendant pleaded, first, not guilty. Secondly, that the said rick or stack of hay was not likely to ignite, take fire, and break out into flame; nor was the same by reason of such liability, and of the state or condition of the said

rick and stack of hay, dangerous to the said cottages; nor had the defendant notice of the said premises, in manner and form as the plaintiff had in and by his declaration in that behalf alleged. Thirdly, that the defendant did not, well knowing the premises in the declaration in that behalf mentioned, wrongfully, negligently, or improperly, keep or continue the said rick or stack of hay, in a state and condition dangerous to the said cottages. Fourthly, that the said rick or stack of hay, did not by reason of the carelessness, negligence and improper conduct of the defendant in that behalf, ignite, take fire, and break out into flame. And fifthly, that the said cottages were not consumed, damaged, and destroyed by reason of the carelessness, negligence, and improper conduct of the defendant.

At the trial it appeared that the rick in question had been made by the defendant near the boundary of his own premises; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire: that though there were conflicting opinions on the subject, yet during a period of five weeks, the defendant was repeatedly warned of his peril; that his stock was insured; and that upon one occasion, being advised to take the rick down to avoid all danger, he said " he would chance it." He made an aperture or chimney through the rick; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials; the flames communicated to the defendant's barn and stables, and thence to the plaintiff's cottages, which were entirely destroyed.

Patterson, J., before whom the cause was tried, told the jury that the question for them to consider, was, whether the fire had been occasioned by gross negligence on the part of the defendant; adding, that he was bound to proceed

with such reasonable caution as a prudent man would have exercised under such circumstances.

A verdict having been found for the plaintiff, a rule nisi for a new trial was obtained, on the ground that the jury should have been directed to consider, not, whether the defendant had been guilty of gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion; but whether he had acted bona fide to the best of his judgment; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence. The action under such circumstances, was of the first impression.

Talfourd, Serjit, and Whateley, showed cause.

The pleas having expressly raised issues on the negligence of the defendant, the learned judge could not do otherwise than leave that question to the jury. The declaration alleges that the defendant knew of the dangerous state of the rick, and yet negligently and improperly allowed it to stand. The plea of not guilty, therefore, puts in issue the scienter, it being of the substance of the issue: Thomas v. Morgan,2 Cr. M. & R. 496. And the action, though new in specie, is founded on a principle fully established, that a man must so use his own property as not to injure that of others. On the same circuit a defendant was sued a few years ago, for burning weeds so near the extremity of his own land as to set fire to and destroy his neighbors' wood. The plaintiff recovered damages, and no motion was made to set aside the verdict. Then, there were no means of estimating the defendant's negligence except by taking as a standard, the conduct of a man of ordinary prudence: that has been the rule always laid down, and there is no other that would not be open to much greater uncertainties.

R. V. Richards, in support of the rule.

First, there was no duty imposed on the defendant, as there is on carriers or other bailees, under an implied

contract, to be responsible for the exercise of any given degree of prudence: the defendant had a right to place his stack as near to the extremity of his own lands as he pleased: Wyatt v. Harrison, 3 B. & Adol. 871: under that right, and subject to no contract, he can only be called on to act bona fide to the best of his judgment: if he has done that, it is a contradiction in terms, to inquire whether or not he has been guilty of gross negligence. At all events what would have been gross negligence ought to be estimated by the faculties of the individual, and not by those of other men. The measure of prudence varies so with the varying faculties of men, that it is impossible to say what is gross negligence with reference to the standard of what is called ordinary prudence. lo Crook v. Jadis, 5 B. & Adol. 910, Patterson, J., says, "I never could understand what is meant by parties taking a bill under circumstances which ought to have excited the suspicion of a prudent man:" and Taunton, J., "I cannot estimate the degree of care which a prudent man should take."

In Foster v. Pearson, 1 C. M. & R. 855, too, it appears that the rule which called on persons taking negotiable instruments to act with the circumspection of a prudent man, has at length been abandoned. There, the judge left it to the jury to say whether the holder of bills took them with due care and caution and in the ordinary course of business ; and upon a motion to set aside a verdict for the plaintiff, the Court said: "Of the mode in which the question was left, the defendant has certainly no right to complain; but, if the verdict has been in his favour, it would have become necessary to consider whether the learned judge was correct in adopting the rule first laid down by the Court of Common Pleas, in the case of Snow v. Peacock, 3 Bingh. 406, and which was founded upon the dicta, rather than the decision, of the judges of the King's Bench in the case of Gill v. Cubitt, 5 D. & R. 324, 3 B. & C. 466; more especially since the opinion of the latter Court has been so

strongly intimated in the late cases of Crook v. Jadis, 3 N. & M. 257, and Blackhouse v. Harrison, ibid. 188. The rule of law was long considered as being firmly established, that the holder of bills of exchange indorsed in blank or other negotiable securities transferable by delivery, could give a title which he himself did not possess to a bona fide holder for value; and it may well be questioned whether it has been wisely departed from in the case to which reference has been made, and other subsequent cases in which care and caution in the taker of such securities has been treated as essential to the validity of his title, besides, and independently of, honesty of purpose."

TIndal, C. J.—I agree that this is a case primae impressionis; but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind. Undoubtedly this is not a case of contract, such as bailment or the like where the bailee is responsible in consequence of the remuneration he is to receive: but there is a rule of law which says you must so enjoy your own property as not to injure that of another; and according to that rule the defendant is liable for the consequence of his own neglect; and though the defendant did not himself light the tire, yet immediately, he is as much the cause of it as if he had himself put a candle to the rick; for it is well known that hay will ferment and take tire if it be not carefully stacked. lt has been decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbor, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee: Turbervill v. Stamp, 1 Salk. 13. But put the case of a chemist making experiments with ingredients, singly innocent, but when combined, liable to ignite; if he leaves them together, and injury is thereby occasioned to the property of his neighbor, can anyone doubt that an action on the case would lie?

lt is contended, however, that the learned judge was wrong in leaving this to the jury as a case of gross

negligence, and that the question of negligence, was so mixed up with reference to what would be the conduct of a man of ordinary prudence, that the jury might have thought the latter the rule by which they were to decide; that such a rule would be too uncertain to act upon; and that the question ought to have been whether the defendant had acted honestly and bona fide to the best of his own judgment. That, however, would]eave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various: and though it has been urged that the care which a prudent man would take is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in Coggs v. Bernard, 2 Ld. Raym. 909. Though in some cases a greater degree of care is exacted than in others, yet in "the second sort of bailment, viz. commodatum or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable; as if a man should lend another a horse to go westward, or for a month ; if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him; but if he or his servant leaves the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse." The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question.

Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the

rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.

Park, J.—I entirely concur in what has fallen from his lordship. Although the facts in this case are new in specie, they fall within a principle long established, that a man must so use his own property as not to injure that of others. In Turbervill v. Stamp, 1 Salk. 13, which was "an action on the case upon the custom of the realm, quare negligenter custodivit ignem suum in clauso suo, ita quod per flammas blada Quer. in quodam clauso ipsius Quer. combusta fuerunt; after verdict pro Quer. it was objected that the custom extended only to fire in his house, or curtilage (like goods of guests) which were in his power: Non alloc. For the fire in his field was his tire as well as that in his house; he made it, and must see that it did no harm, and must answer the damage if he did. Every man must use his own so as not to hurt another: but if a sudden storm had risen which he could not stop, it was matter of evidence, and he should have shown it. And Holt, and Rokesby, and Eyre were against the opinion of Turton, who went upon the difference between fire in a house which was in a man's custody and power, and fire in a field which was not properly so; and that it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment according to the opinion of the other three." That case, in its principles, applies closely to the present.

As to the direction of the learned judge, it was perfectly correct. Under the circumstances of the case it was proper to leave it to the jury whether with reference to the caution which would have been observed by a man of ordinary prudence, the defendant had not been guilty of gross negligence. After he had been warned repeatedly during five weeks as to the consequences likely to happen, there is

no colour for altering the verdict, unless it were to increase the damages.

Gaselee, J., concurred in discharging the rule.

Vaughan, J.—The principle on which this action proceeds, is by no means new. lt has been urged that the defendant in such a case takes no duty on himself; but I do not agree in that position: everyone takes upon himself the duty of so dealing with his own property as not to injure the property of others. It was, if anything, too favorable to the defendant to leave it to the jury whether he had been guilty of gross negligence ; for when the defendant upon being warned as to the consequences likely to ensue from the condition of the rick, said, "he would chance it," it was manifest he adverted to his interest in the insurance office. The conduct of a prudent man has always been the criterion for the jury in such cases: but it is by no means confined to them. In insurance cases, where a captain has sold his vessel after damage too extensive for repairs, the question has always been, whether he has pursued the course which a prudent man would have pursued under the same circumstances. Here, there was not a single witness whose testimony did not go to establish gross negligence in the defendant. He had repeated warnings of what was likely to occur, and the whole calamity was occasioned by his procrastination.

Rule discharged.

 Causa cierta indignada perplejidad el concepto de lo que es *reasonable* en el *common law*, hasta que se uno da cuenta que el *reasonable man* es sencillamente un hombre normal que cuida de sus propios asuntos e intereses; en otras palabras, es el buen padre de familia o propietario. Ni más ni menos.

La norma del *reasonable man* se establece, de manera objetiva y razonada y no subjetiva y caprichosa, por lo que

la supuesta tozudez y falta de inteligencia de Menlove no lo excusa.

 Paul Williams, Respondent, v. William Hays, Appellant Court of Appeals of New York 157 N.Y. 541; 52 N.E. 589 November 22, 1898, Argued January 10, 1899, Decided

[*542] [**590] HAIGHT This action was brought by the plaintiff, as assignee of the Phoenix Insurance Company, to recover the [*543] amount of insurance paid by the company to Parsons and Loud under a policy of insurance issued to them as the owners of one-sixteenth of the brig "Emily T. Sheldon."

The brig had been wrecked on Peaked Hill bar on Cape Cod near Provincetown, Mass., and it is alleged that the loss occurred through the negligence of the defendant, who was the master and part owner of the brig, and who commanded her at the time of the loss.

The plaintiff claims the right to recover in this action upon the theory that the insurance company became subrogated to the rights of the owners, whom it had insured. The answer denied the allegations of the complaint that the loss was caused through the negligence, carelessness, misconduct and improper navigation of the defendant, and alleges that at the time of the wreck he was unconscious of his acts and irresponsible therefor, and was not in a condition to navigate the brig on account of sickness, etc. At the conclusion of the evidence the trial court directed a verdict in favor of the plaintiff, holding that the insanity of the defendant furnished no defense. The defendant's counsel objected to the direction of the verdict and asked to go to the jury upon the questions: "*First*, whether or not the defendant became insane solely in consequence of his efforts to save the vessel during the storm. *Second*, whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm and the quinine which was

taken therefor. *Third*, whether the mate was so cognizant of the condition of the master, of the insanity or other incompetency of the master, as to require him to take the command of the vessel away from the master. *Fourth*, whether the mate exercised due judgment in regard to the condition of the master. *Fifth*, whether the defendant, in consequence of his efforts to save the vessel during the storm became mentally and physically incompetent to give the vessel any further care than he did." These requests were refused by the court and a verdict was directed, to which rulings the defendant's counsel duly excepted.

[*544] On Thursday, the 18th day of March, 1886, the brig "Emily T. Sheldon" left Boothbay, Maine, with a cargo of ice bound for Annapolis, Md. At the time of sailing the weather was fair and remained so for about sixteen hours, at which time a storm commenced with high winds and rain, with a light snow. At the time of the commencement of the storm the vessel was in George's channel, and the defendant tacked to work her about, trying to find his way out, until it became practically impossible to tell where he was. He headed her in what was supposed to be the direction of Cape Cod, but not being able to make the cape, she was hove to to ride out the gale. This was about 4 o'clock in the afternoon of the 20th, and she remained hove to until about that time in the afternoon of the 21st, and then the defendant stood her off for what was supposed to be Cape Cod. On Monday morning, the 22d, between 4 and 5 o'clock, Thatcher island lights were sighted by the defendant. The storm had then abated, but there was a heavy roll of the sea. The defendant then turned the vessel over to the mate, telling him to keep her by the wind until he made Cape Cod light. He then went below and laid down upon a lounge in his cabin, but before doing so, took fifteen grains of quinine. It appears that during the storm he had had but little rest; had not gone to his berth or undressed; had eaten but little, and that for the last forty-

eight hours he had been constantly upon deck; that he was worn out, exhausted, felt sick, and feared he was to have an attack of malaria. At about 11 o'clock, the second mate, to whom the vessel had been turned over, called the mate, saying that the vessel did not act very well. The mate then went upon deck, and about half-past eleven the steward called the defendant. He was lying, dressed, upon the lounge. He did not get up at the first call, and subsequently the steward pulled him off from the lounge in order to arouse him. He then got up, but within a few minutes was again found lying upon the lounge, and the steward went to him again and finally succeeded in getting him up on the deck of the vessel. There is some little difference in the testimony [*545] of the witnesses in reference to the order of events thereafter occurring. According to the recollection of some of the witnesses, the captain came on deck about half-past twelve, after the crew had been at dinner. After he came on deck, the tug "Storm King" came up on their weather quarter and said that the rudderpost of the brig was split, and asked the captain if he did not want a tow. He said that he did not; that he guessed "we are all right." The Storm King then went away, and about one o'clock another boat came up under the stern of the brig and offered a tow, but was refused by the captain. McDonald, who kept the log of the vessel, testified: "After the boats went away, the vessel began to go off and come to, and she would not mind her helm at all, and the sea was edging her into the beach all the time. Then I went over and looked over the stern, but I could see nothing; then I got into the bowline, that is a rope with a noose in it, being around my waist and I was let down over the stern, and I looked at the rudderpost and it was split, but I could not tell how badly. I went back on deck and said that the rudderpost was split, and the captain said he didn't think it was, and said 'I can't see it and you can't, I think.' Then I began to [**591] think there was something wrong with the captain, that he did not act as he used to; still, I could not see anything wrong with his manner, except when he spoke to me about the vessel,

and he then told me to square the yards to see if the vessel would go off again and we did, and she did go off, but she came right back again, and I lowered the main trysail down again and hove the helm up again, but she did not go off, she went sideways in on to the beach and struck," at about 2:30 o'clock.

Considerable evidence was taken with reference to the condition of the captain, all of which tends to show that he staggered about the vessel, making irresponsive answers to questions, appeared to be in a dazed condition, and to be either drunk or insane. After the brig struck, a life saving boat came alongside and offered to take him ashore, but he refused to go, and the crew of the life boat had to remain for several [*546] hours before they finally succeeded in coaxing him to go with them. He was taken ashore, but, according to his testimony, remembers nothing that occurred until the next day. The brig became a total wreck.

This action was considered in this court on a former review (*143 N. Y. 442*), at which time the law of the case was settled, except upon two points. It was then held that the defendant, as charterer of the brig, was liable for losses which occurred through his want of care or skill in the navigation of the vessel; that he was required to exercise such care and skill as a reasonably careful and prudent owner would ordinarily give to his own vessel, and that an insane person is responsible for his torts the same as if sane. The opinion contains some comments of the judge, which have been understood as indicating an intention to do away with any distinction between misfeasance and nonfeasance, and to hold that lunatics and infants were just as liable for their failure to act as they were for their affirmative torts. But when the judge comes to sum up the result of his examination of the authorities, he concludes by stating the rule to be that, if the defendant "caused her destruction by what in sane persons would be called willful or negligent conduct, the law holds him responsible." The

final conclusion reached by the judge we accept as the law of this case. Whether a lunatic or a person mentally incapacitated should be held responsible in all instances for his nonfeasance or failure to act we will not now stop to consider.

The judge, then, proceeds in his opinion to say: "If the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with. He was not responsible for the storm, and, while it was raging, his efforts to save the vessel were tireless and unceasing; and if he thus became mentally and physically incompetent to give the vessel any further care, it might be claimed that his want of care ought not to be attributed to him as a fault. In reference to such a case we do not now express any opinion. * * * If it should be [*547] found upon the new trial of this action that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held that no fault could be attributed to him on account of what he personally did or omitted to do, then the question would still remain whether the carelessness of his mate and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their carelessness." We thus have two questions presented for consideration, *first*, did the defendant become mentally and physically incompetent to care for and navigate the vessel solely in consequence of his efforts to save the vessel during the storm, and, *second*, if he was thus mentally and physically incapacitated, were his mate and crew guilty of negligence in not taking the command of the vessel and procuring a tow?

Upon directing a verdict in favor of the plaintiff the trial court said: "Assuming, as we must, for such purpose, that the condition of the defendant was the result of exhaustion, caused by his efforts to save the ship from the perils of the storm and the heavy dose of quinine which he took as a remedy, I fail to see how that presents any exception to the

principle laid down by the Court of Appeals that a person of unsound mind is responsible for the consequences of acts which in the case of a sane person would be negligent. In other words, the standard by which he is to be judged is the same as that which must be applied to the actions of a sane person. It certainly seems to be a cruel doctrine, but as it is apparently based upon the principle that, as between two innocent persons, the loss must fall upon him who caused it rather than upon the other, the best that can be said about it is that it is a rule which serves the convenience of the public to which individual rights must give way."

It will thus be observed that the case was disposed of below upon the ground that the defendant was liable even though assuming that his condition was the result of exhaustion caused by his efforts to save the ship from the perils of the storm, and the question as to whether the mate was guilty of [*548] negligence was not considered. The Appellate Division has affirmed, following in its opinion, the reasoning of the trial judge.

We cannot give our assent to such a view of the law. To our minds it is carrying the law of negligence to a point which is unreasonable, and, prior to this case, unheard of, and is establishing a doctrine abhorent to all principles of equity and justice. In this case, as we have seen, the storm commenced on Friday, continued through Saturday and Sunday, and it was not until 5 o'clock Monday morning that the defendant was relieved from the care of his vessel. For three days and nights he had been upon duty almost continuously, [**592] and for the last forty-eight hours had not been below the deck. The man is not yet born in whom there is not a limit to his physical and mental endurance, and when that limit has been passed, he must yield to laws over which man has no control. When the case was here before, it was said that the defendant was bound to exercise such reasonable care and prudence as a careful and prudent man would ordinarily give to his own vessel. What careful

and prudent man could do more than to care for his vessel until overcome by physical and mental exhaustion? To do more was impossible. And yet we are told that he must, or be responsible. Among the familiar legal maxims are the following: The law intends what is agreeable to reason; it does not suffer an absurdity. Impossibility is an excuse in law, and there is no obligation to perform impossible things. (Coke Litt. 78; 9 Coke, 22; Coke Litt. 29; 1 Pothier Obl. pt. 1, c. 1, s. 4, § 3.) Applying these maxims to the case under consideration, we think the fallacy of the reasoning below is apparent, and that it cannot and ought not to be sustained.

As to whether the mate should be chargeable with negligence, is a question, which has not, as yet, been determined. It is said that he did nothing to save the vessel. It appears that he was on deck obeying the orders of the captain. The circumstances surrounding him were peculiar. Possibly he might have put the captain in irons and taken the command [*549] of the vessel, but mutiny at sea is criminal and heavily punished. In order to justify such action he must be satisfied of the derangement of his superior officer, and be able to command the assistance of the crew. Whether the condition of the captain was so apparent at the time as to charge the mate with negligence in not resorting to strong measures, we think, was a question of fact for the determination of the jury, and that it was not within the province of the court to dispose of it as a question of law.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Bartlett, J. (dissenting). I am of opinion there was no question for the jury in this case.

The learned counsel for the defendant asked to go to the jury on two questions: *First.* "Whether or not the defendant became insane solely in consequence of his effort to save the vessel during the storm."

It is true that Judge Earl, writing in this case for the court on the former appeal, stated that if the defendant had become insane solely in consequence of his efforts to save the vessel during the storm, we would have had a different case to deal with.

It is, however, undisputed that the record now before us is identical in all essential respects with the one then under examination, and it, therefore, follows that the determination of this court that the insanity of the defendant was no defense, is the law of this case, and was properly followed by the trial judge when he directed a verdict for the plaintiff.

Second. "Whether the defendant became insane solely in consequence of a sickness occasioned by his efforts to save the vessel during the storm, and the quinine which was taken therefor."

Judge Earl stated in his opinion upon the former appeal that if it were found upon a new trial that the defendant's mental condition was produced wholly by his efforts to save the vessel during the storm, and it should, therefore, be held [*550] that no fault could be attributed to him on account of what he personally did, or omitted to do then the question would still remain whether the carelessness of his mates and crew, who were his servants, could not be attributed to him, and his liability be thus based upon their failure to act.

There is no conflict of evidence on this latter point, and only a question of law is presented to this court on undisputed facts, whether the captain was not liable for this loss, not only on account of his insanity, but for the reason that the mates and crew, having full knowledge of the captain's mental incapacity, and that the rudder was useless, failed to intervene and save the vessel, but allowed her to drift with the dead swell upon the beach, with all sail set and no anchors out, in a light wind blowing off shore, in the

middle of a pleasant afternoon, with two steam tugs lying by and offering a tow to a port nine miles distant. There was no request to go to the jury as to the conduct of the crew.

The liability of the captain for the acts of his mates and crew is well settled.

Story on Agency (§ 314) states: "The policy of the maritime law has, therefore, indissolubly connected his (the master's) personal responsibility with that of all the other persons on board, who are under his command and are subjected to his authority."

With the same record before us as on the former appeal, I am unable to understand why the decision of this court should not be followed (*143 N. Y. 442*).
I vote for affirmance.

 ¿El error acá imputado, acaso, no entra dentro lo normal de lo que pudiera esperarse en un capitán, sobre todo por agotamiento mental y físico, después de semejante travesía en pos de salvar la nave?

 ELIZA KERR, ADMINISTRATRIX, vs. THE CONNECTICUT COMPANY. SUPREME COURT OF ERRORS OF CONNECTICUT, FIRST JUDICIAL DISTRICT, HARTFORD, OCTOBER TERM, 1927 107 Conn. 304; 140 A. 751; 1928 Conn. LEXIS 21 October 5, 1927, Argued February 17, 1928, Decided

[**752] [*305] HAINES, J. The plaintiff's decedent, William H. Kerr, was in his fifty-eighth year at the time of the injury complained of, and in good physical condition save his hearing, which was very poor, and such that he could not hear a trolley gong or bell. He was employed in Hartford, and when leaving his place of business on the evening of October 15th, 1926, he was wearing a light gray overcoat, and stated that he intended to walk to his home in Quaker Lane in West Hartford by way of Asylum Avenue. While walking westerly on Asylum Avenue in West

Hartford about six o'clock, and between trolley poles # 161 and # 163, he was struck by a car of the defendant company. At that point [*306] there is an oiled macadam roadway about sixteen feet wide, and on the south side of this there is a shoulder about two feet wide, and south of that the trolley tracks. This two-foot shoulder cannot readily be distinguished from the macadam roadway and is used as a part of the roadway. There are no sidewalks on either side of the street at this point. Though it is a much used thoroughfare for automobiles, there was no traffic there at the time. Starting east of pole # 161 there was a down grade of about two per cent, and from pole # 161 to pole # 163 about one per cent. East of the point of the accident, the trolley track is straight and the view unobstructed, and in the daytime it can be seen for a long distance. Going westerly and approaching the decedent from the rear, was a double truck trolley car, operated by one man and moving about fifteen miles per hour. It was equipped with a lamp throwing its light about one hundred feet, and when the decedent first came within range of this light, he was walking about two feet from the north rail, just outside the space between the rails and so close to the track that a passing trolley car would hit him. The weather was clear but it was very dark. The motorman was keeping a proper lookout and saw the decedent as soon as he could with reasonable care have seen him, and realized that the decedent would be struck if both continued in their respective courses. He sounded his gong or bell several times, immediately applied his brakes, sanded the rails and did all he could to stop the car, but it slid on the rails. The decedent continued on his course, but seemed to move a little nearer the track as the car reached him. The speed of the car slackened, but it struck him with the right front corner and threw him violently to the macadam roadway, and he died from his injuries the next morning without regaining consciousness. The [*307] car stopped about thirty-five to forty feet beyond the point where the decedent

lay. It was not shown that the motorman, in the exercise of reasonable care, could have stopped the car before striking the decedent, after he first saw or should have seen him.

On this state of facts the trial court decided that the decedent was contributorily negligent; that the motorman knew or should have known of the decedent's peril and that he would not avail himself of an opportunity to escape, but that the motorman himself had no opportunity, in the exercise of due care, to save the decedent from injury. The final conclusion of the trial court is thus stated: "The defendant did not fail to exercise reasonable care to avoid the injury to the plaintiff's intestate after he became aware, or in the exercise of ordinary prudence ought to have become aware, not only of the fact that the plaintiff's intestate had already come into a position of peril, but also that he apparently would not avail himself of opportunities open to him for escaping therefrom."

The burden was upon the plaintiff to prove (a) that the decedent was not guilty of contributory negligence, and (b) that the defendant's motorman was guilty of negligence which was a proximate cause of the injury. Failure to establish either of these things must result in judgment for the defendant.

The law required the decedent to exercise that care for his own safety which a reasonably prudent man would exercise under the same circumstances. It is true that he had a legal right to walk where he was walking, just as any traveler has a right to walk in any part of the public highway. *Laufer v. Bridgeport Traction Co., 68 Conn. 475, 488, 37 A. 379.* But as a reasonable man he was charged with knowledge that the place, close to the trolley rail, where he was walking was dangerous, and that a passing trolley car would [*308] necessarily strike him, and he also knew that he could not hear the bell or gong of an approaching car from the rear. It was his duty therefore to take such care as a reasonably prudent deaf man would take

under those conditions. *Buttelli v. Jersey City H. & R. Elec. Ry. Co., 59 N.J.L. 302, 36 A. 700*; *Robb v. Quaker City Cab Co., 283 Pa. 454, 129 A. 331*; *Robbins v. Springfield Street Ry. Co., 165 Mass. 30. 42 N.E. 334*.

There is nothing in the finding of facts to show that he took any precautions whatever. So far as appears, he took this position of danger and continued in it, without looking back up the "long stretch" of straight and unobstructed track from which an overtaking car would come. It is within common knowledge that a headlight which throws its beams one hundred feet ahead, can be seen by a pedestrian for a much greater distance than one hundred feet. We cannot assume that he did look either before or after he entered the position of danger, and if he did, the burden was on the plaintiff to establish that fact. This was not done and the question is therefore presented whether a deaf man, taking and retaining a position of danger such as this, without any precaution by looking or [**753] otherwise to learn the possible approach of a trolley car from the rear, is in the exercise of that care which the law requires. As a general rule, the answer to a question of this character is one of fact, and not reviewable. *Lose v. Fitzgerald, 105 Conn. 247, 248, 135 A. 42*; *Farrell v. Waterbury Horse R. Co., 60 Conn. 239, 251, 21 A. 675, 22 id. 544*. Where reasonable men may reasonably differ as to whether the conduct was or was not negligent, it is a question of fact upon which we cannot pass. *Bunnell v. Waterbury Hospital, 103 Conn. 520, 526, 131 A. 501*. But there is a recognized exception where "the reasonableness of a particular precaution against danger, arising from conditions well [*309] defined and constantly recurring, may be a question of law." *Murphy v. Derby Street Ry. Co., 73 Conn. 249, 253, 47 A. 120*.

In *Hizam v. Blackman, 103 Conn. 547, 131 A. 415*, the plaintiff was walking across a roadway from the westerly side to the easterly in a diagonal or northeasterly direction,

at the same time that an automobile was approaching from the south. The plaintiff neither saw nor heard the automobile approaching nor saw its lights, and he was struck and injured. The night was clear but dark, and the plaintiff was sixty-eight years old and quite deaf. There were no vehicles on the street at the time which in any way interfered with the movements of either party or obstructed their view. In that case we said: "The law is firmly established that it was the plaintiff's duty to exercise ordinary care both to avoid dangers known to him and to discover dangers or conditions of danger to which he might become exposed, and in the performance of that duty to be watchful of his surroundings and of the way in which he was going," and that he was required to act upon what he should have known as well as upon what he did know. Citing *Radwick v. Goldstein, 90 Conn. 701, 710, 98 A. 583*; *Mezzi v. Taylor, 99 Conn. 1, 11, 120 A. 871, Suga v. Haase, 95 Conn. 208, 110 A. 837*; *Seabridge v. Poli, 98 Conn. 297, 301, 119 A. 214*; *Plona v. Connecticut Co., 101 Conn. 445, 126 A. 529*; *Worden v. Anthony, 101 Conn. 579, 126 A. 919*; *Simenauskas v. Connecticut Co., 102 Conn. 676, 129 A. 790*. Our conclusion was that "under the evidence the jury could not reasonably have found otherwise than that the plaintiff should have known, if he had exercised due care as he crossed Noble Avenue, that the defendant, in an automobile with lights aglow, was approaching from the south on the easterly side of the avenue, and that the plaintiff's [*310] failure to see that automobile and avoid it was negligence on his part, which was a contributory cause of the collision and injury."

The circumstance of the case at bar, bring it within the reasoning of *Hizam v. Blackman, supra,* and lead us unerringly to the conclusion that the decedent was guilty of contributory negligence. The first of the reasons of appeal cannot therefore be sustained and we need not discuss the question of the defendant's negligence.

However, under further reasons of appeal, the plaintiff contends that even if the decedent was thus negligent in entering and remaining in a place of danger, the conduct of the motorman was such that the negligence of the decedent was not a proximate cause of the injury; in other words, it is claimed that the facts established require the application of the doctrine of supervening negligence, thus rendering the decedent's negligence a remote rather than a proximate cause.

That principle rests upon four conditions, the first two of which are clearly met by the finding, viz., that the decedent had already come into a position of peril, and that the motorman then or thereafter became, or by ordinary prudence ought to have become aware of that fact, and of the further fact that the decedent could not or apparently would not avail himself of opportunities open to him for escape. *Fine v. Connecticut Co., 92 Conn. 626, 631, 103 A. 901*; *Rooney v. Levinson, 95 Conn. 466, 111 A. 794*; *Omiccioli v. Connecticut Co., 96 Conn. 716, 115 A. 475*.

But it was necessary for the plaintiff also to show (a) that the motorman subsequently had the opportunity by the exercise of reasonable care to avoid striking the decedent and (b) that he failed to exercise that care. The trial court reached the conclusion that [*311] the motorman "had no opportunity by the exercise of reasonable care to have saved the plaintiff's intestate from injury"; and further that he "did not fail to exercise reasonable care to avoid the injury to the plaintiff's intestate after he became aware, or in the exercise of ordinary prudence ought to have become aware, not only of the fact that the plaintiff's intestate had already come into a position of peril, but also that he apparently would not avail himself of opportunities open to him for escaping therefrom."

It appears from the unchallenged finding that the car was one hundred feet from the decedent when the

motorman saw he was in a position of danger. Obviously a brief interval of time must have elapsed before he also saw that the decedent would not escape from that position.

It was necessary for the plaintiff to prove that after the latter fact became known to the motorman, he could by due care, have avoided striking the decedent. There is nothing in the finding to support this claim. On the contrary, the trial court has found that from the time the motorman saw the decedent in a place of danger he "did all he could to stop the car." This conclusively refutes the plaintiff's claim that by due care, after seeing the decedent would not escape, the motorman could have saved him from harm.

It thus is not proved that the motorman [**754] was guilty of supervening negligence, but the contributory negligence of the decedent, on the other hand, is established.

There is no error.
In this opinion the other judges concurred.

 ¿Qué cuidados serían normales para que esperemos de aquél que padece de una discapacidad sensorial?

 Davis v. Feinstein, Appellant The Supreme Court of Pennsylvania 370 Pa. 449; 88 A.2d 695 Argued April 15, 1952 May 26, 1952

[*450] [**695] OPINION BY MR. JUSTICE ALLEN M. STEARNE

This is an appeal from judgment entered on a jury's verdict for plaintiff in an action of trespass. Defendants concede that there was sufficient evidence of negligence to submit the case to the jury but rest their motion for judgment *non obstante veredicto* on the sole ground that plaintiff was guilty of contributory negligence as matter of law. We agree with the learned court below that a jury question was presented.

Plaintiff is a blind man. While walking south on 60th Street between Market and Arch Streets in Philadelphia, he fell into an open cellarway in front of the furniture store maintained by defendants. The opening was equipped with a cellar door, flush with the pavement when closed, and consisting of two sections each about two and one-half feet wide. When the [**696] door was open, an iron bar about five feet in length usually connected the two sections at the front, holding them erect and thus presenting a barrier which would ordinarily prevent a pedestrian from stepping into the opening. At the time of the accident, the north section was closed and even with the sidewalk; the connecting bar was not in place; and the south section of the door was standing erect. It was into the aperture thus left uncovered that the plaintiff fell and suffered the injuries which were the basis of this suit. Defendant introduced testimony to contradict the plaintiff's testimony that one door was closed at the time of the accident.We must, however, accept plaintiff's version [*451] under the familiar rule that in considering defendants' motion for judgment n.o.v. all reasonable inferences from the testimony must be taken most favorably to plaintiff: *Guca v. Pittsburgh Railways Company, 367 Pa. 579, 581, 80 A. 2d 779.*

Plaintiff further testified that on the morning of the accident he carried a white cane customarily employed by blind persons.He described his use of it as follows: "A. As I walked down, I touched this way to guide myself to see if I am walking straight. I had the cane in front of me. I touched over here to see if I went from one side to the other. Q. You are referring to the fact that you moved your cane to the right? A. Yes. Q. What did you do with respect to your front distance? A. I put it up at least two or three feet like that and as I step, I put it two steps ahead as I step one step. Q. In front of you? A. Yes."

Both sides agree with the statement of the learned court below that the controlling authority is *Smith v. Sneller, 345 Pa. 68, 26 A. 2d 452*. In that case the blind plaintiff employed no cane or other compensatory aid. Speaking through Mr. Chief Justice DREW (then Justice) we said (p. 72): "While it is not negligence per se for a blind person to go unattended upon the sidewalk of a city, he does so at great risk and must always have in mind his own unfortunate disadvantage and do what a reasonably prudent person in his situation would do to ward off danger and prevent an accident. The fact that plaintiff did not anticipate the existence of the ditch across the sidewalk, in itself, does not charge him with negligence. But, it is common knowledge, chargeable to plaintiff, that obstructions and defects are not uncommon in the sidewalks of a city, any one of which may be a source of injury to the blind.Plaintiff's vision was so defective that he could not see a dangerous condition immediately in front of him. In such circumstances he was bound [*452] to take precautions which one not so afflicted need not take. In the exercise of due care for his own safety it was his duty to use one of the common, well-known compensatory devices for the blind, such as a cane, a 'seeing-eye' dog, or a companion."

In the instant case plaintiff testified that he was employing his cane as a guide, moving it laterally in order to touch the walls of abutting buildings and keep on a straight course, and also tapping the ground before him to search out obstacles in his path.Defense counsel argues: "Even as a man with sight cannot say he did not observe that which was open and obvious, neither can a blind man say that he made proper use of the cane and was unable to learn of the existence of the defect. It necessarily follows that he did not have a proper instrument, that is to say, the cane was not adequate or he did not use it properly."

We did not so decide in *Smith v. Sneller, supra.* A blind person is not bound to discover *everything* which a person

of normal vision would. He is bound to use due care under the circumstances. Due care for a blind man includes a reasonable effort to compensate for his unfortunate [**697] affliction by the use of artificial aids for discerning obstacles in his path. When an effort in this direction is made, it will ordinarily be a jury question whether or not such effort was a *reasonable* one. The general rule applies that "Contributory negligence may be declared as a matter of law only when it is so clearly revealed that fair and reasonable persons cannot disagree as to its existence...": *Guca v. Pittsburgh Railways Company , 367 Pa. 579, 583, 80 A. 2d 779.*

It was not unreasonable for the jury to have concluded that plaintiff exercised due care for his safety when he used his cane in the manner which he described. The uncontroverted physical facts did not effectively disprove plaintiff's testimony.

Judgment affirmed.

Robert A. PURTLE, Individually and As Next Friend of Jerry Purtle, A Minor v. Kenneth SHELTON, Jr., and Kenneth SHELTON No. 5-5705 Supreme Court of Arkansas 251 Ark. 519; 474 S.W.2d 123 December 6, 1971, Opinion delivered

[*519] [**124] SMITH This is an action for personal injuries suffered by Jerry Purtle, a sixteen-year-old minor, in a hunting accident during the 1969 deer hunting season. The defendants are Kenneth Shelton and his son, Kenneth, Jr., who was seventeen at the time of the accident. The jury attributed half the negligence to Jerry Purtle and half to young Shelton, so there was no [*520] recovery. For reversal the appellant, Jerry's father and next friend, contends that the trial court erred in its instructions defining the standard of care to be observed by a minor while hunting deer with a high-powered rifle.

There were some conflicts in the testimony, but the salient facts are not really in dispute. Jerry and young Kenneth had spent the night at the home of L. D. McMullen, who owned a deer camp in Union county. Early the next morning, before daylight, McMullen took the two youths (and a third lad not involved in the case) to the area where they were to hunt. Kenneth's deer stand was next to the road, but Jerry had to walk a short distance through the woods to his stand. McMullen had cautioned both boys to make their presence known when they were walking in the woods and not to shoot at anything without knowing it to be a deer.

Jerry failed to find his stand immediately and actually walked toward Kenneth's stand, without making his presence known. Kenneth thought he saw a deer and fired at it with his 30.06 rifle. The soft projectile apparently hit a tree, broke into shrapnel, and ricocheted toward Jerry, causing serious injuries to both his eyes.

The trial court submitted the case to the jury upon the theory that Kenneth was required to use that degree of care which a 17-year-old minor would use in the same circumstances. Specifically, the court gave AMI 301, defining negligence by reference to a reasonably careful person, AMI 304, defining reasonable care with respect to a minor as that degree of care which a reasonably careful minor of his age and intelligence [**125] would use in similar circumstances, AMI 305 (B), putting the duty on both persons to use reasonable care, and AMI 602 explaining the right of one person to assume that another person will use reasonable care.

The appellant first contends that the court should have instructed the jury that Kenneth, in using a high-powered rifle, was required to use the same degree of care that would be observed by an adult in like circumstances. In making that argument counsel cite our holding [*521] in *Harrelson v. Whitehead, 236 Ark. 325, 365 S. W. 2d 868*

(1963), where we adopted the general rule that a minor operating a motor vehicle must use the same degree of care as an adult would use. The appellant argues that motor vehicles and rifles are both dangerous and should therefore be treated alike as far as their use by a minor is concerned.

We cannot accept that argument. To begin with, the motor vehicle rule was not adopted, as our opinion in *Harrelson* reflects, solely because the driving of an automobile entails danger to others. There are other factors to be considered. A minor must be at least sixteen to operate a car by himself. Ark. Stat. Ann. § 75-309 (Supp. 1969). He must pass an examination to demonstrate his ability to operate the vehicle on the highways. Section 75-318. The rules governing the operation of motor vehicles are largely statutory and make no distinction, express or implied, between the degree of care to be exercised by a minor and that to be exercised by an adult. A measure of financial responsibility is required. Section 75-309. In view of all those tactors, the cases in other jurisdictions, as we pointed out in *Harrelson*, have consistently held minors to the same degree of care as adults in driving upon the highways.

In the second place, we considered the subject anew in *Jackson v. McCuiston, 247 Ark. 862, 448 S. W. 2d 33 (1969)*. There a farm boy almost fourteen years old was operating a tractor-propelled stalk cutter -- a large piece of machinery having a dangerous cutting blade. In holding that minor to an adult standard of care we quoted from three authorities: The Restatement of Torts (2d), Prosser on Torts, and Harper & James on Torts. All three authorities recognize the identical rule, that if a minor is to be held to an adult standard of care he must be engaging in an activity that is (*a*) dangerous to others and (*b*) normally engaged in only by adults. In the course of that opinion we stated that the minor "was performing a job normally expected to be done by adults."

We are unable to find any authority holding that a minor should be held to an adult standard of care merely [*522] because he engages in a dangerous activity. There is always the parallel requirement that the activity be one that is normally engaged in only by adults. So formulated, the rule is logical and sound, for when a youth is old enough to engage in adult activity there are strong policy reasons for holding him to an adult standard of care. In that situation there should be no magic in the attainment of the twenty-first birthday.

We have no doubt that deer hunting is a dangerous sport. We cannot say, however, either on the basis of the record before us or on the basis of common knowledge, that deer hunting is an activity normally engaged in by adults only. To the contrary, all the indications are the other way. A child may lawfully hunt without a hunting license at any age under sixteen. Arkansas Game & Fish Commission's 1971-1972 Hunting Regulations, p. 4. We know, from common knowledge, that youngsters only six or eight years old frequently use .22 caliber rifles and other lethal firearms to hunt rabbits, birds, and other small game. We cannot conscientiously declare, without proof and on the basis of mere judicial notice, that only adults normally go deer hunting.

In refusing to apply an adult standard of care to a minor engaged in hunting deer, we do not imply that a statute to that effect would be unwise. Indeed, we express no [**126] opinion upon that question. As judges, we cannot lay down a rule with the precision and inflexibility of a statute drafted by the legislature. If we should declare that a minor hunting deer with a high-powered rifle must in all instances be held to an adult standard of care, we must be prepared to explain why the same rule should not apply to a minor hunting deer with a shotgun, to a minor hunting rabbits with a high-powered rifle, to a twelve-year-old shooting crows with a .22, and so on down to the six-year-old shooting at tin cans with an air rifle. Not to mention other

dangerous activities, such as the swinging of a baseball bat, the explosion of firecrackers, or the operation of an electric train. All we mean to say in this case is that we are unwilling to lay down a brand-new rule of law, without precedent and without any logical or practical means of even surmising [*523] where the stopping point of the new rule might ultimately be reached.

In the other two points for reversal the appellant argues that the trial court should have instructed the jury not in terms of reasonable care (AMI 301, 304, 305 [B], and 602) but in terms of a high degree of care commensurate with the dangers involved in the use of a high-powered rifle. Counsel cite *Manning v. Jones, 95 Ark. 359, 129 S. W. 791 (1910),* a hunting accident case, but we do not read that opinion as requiring the trial judge to submit to the jury some standard of care exceeding that of reasonableness. In fact, we there said: "Here, as in other cases, the test of the liability of the defendant is whether, in what he did, he failed to exercise reasonable or ordinary care." We think the correct rule of law to have been stated in the Comment to AMI 1301: "The Committee believes that the *Bennett* case is well reasoned and follows a rule which eliminates the exercise in semantics that results when the circumstances are judicially viewed as converting ordinary care to 'a higher degree of care.' Logically the duty enunciated in an instruction should be ordinary care under the circumstances, and the contention that the circumstances dictate a high degree of caution should be left to arguments of counsel."

Affirmed.

John A. Fogleman, Justice, dissenting.

I disagree with the majority in one important particular. That difference means that I would reverse the judgment. I feel that the instruction requested by appellant which would

have held young Shelton to the degree of care of an adult should have been given instead of AMI 304.

It is admitted that Bubba Shelton was hunting deer in the woods at Quinn Deer Club when he fired the shot [*524] from his .30'06 rifle by which Jerry Purtle was wounded. He told the investigating officer that he was using soft-point core-lock ammunition with 180 (108?) grains of powder. In this same statement he said that the incident occurred about 6:30 a.m. -- just before daylight. Jerry Purtle said that it was pretty dark at the time. A gunsmith testified that:

> The rifle being used by young Shelton ranked close to the top among high-powered rifles in velocity and killing power; the muzzle velocity with a 150 grains bullet is close to 3,000 feet per second, and a little slower; the average killing distance is 300 yards, although a fatal wound might be inflicted at a greater range, but accuracy would be affected by loss of velocity; the soft-nosed bullet mushrooms to two or three times its normal diameter immediately upon striking an animal of any size, but may disintegrate when it hits a tree or glances.

This was not a toy for child's play in the deer woods. An engineer who platted the area described the woods and underbrush as so thick that it was necessary to cut one's way through to the deer stands.

[**127] L. D. McMullan, 41, an agent for State Farm Insurance Company, who had been deer hunting for 15 years, was more or less in charge of the hunt. McMullan said that more care was necessary in deer hunting than squirrel hunting because more people were scattered in a fixed area. He was certain that it was a law violation to shoot a deer while it was still dark. See Arkansas Game and

Fish Commission Code § 25.01, and Commission Order of April 14, 1969.

Bubba Shelton had been instructed in the skill of deer hunting by his grandfather, Melvin Tucker, a deer hunter for 30 years. Tucker testified that he had taken his grandson hunting ever since the boy was big enough to follow him in the woods with a dog, and before Bubba was big enough to carry a gun. Young Shelton, he said, had been carrying a gun ever since he was 12 or 13 years old. Tucker said that he taught the boy the safety rules [*525] of handling, shooting, loading and unloading a gun. He also taught Bubba what he called the most important thing in hunting in the woods -- a certain knowledge of the identity of his target. Young Shelton, a high school senior, said that he had been deer hunting for about eight years. He had previously killed a deer. He also testified that McMullan had told all of the deer hunters at the camp to be sure to know what they were shooting at. At least five of those engaged in the hunt on the day young Purtle was shot were minors. On the preceding day there had been 13 minors, five of whom were under 18.

This court had no qualms about taking judicial notice of the hazards of automobile traffic, the frequency of accidents, often having catastrophic results, and the fact that immature individuals are no less prone to accidents than adults, in reaching the conclusion that the time had come to require a minor to observe the same standards of care as an adult when operating an automobile. I find no logical reason for not doing the same when the use of a high-powered rifle is the implement endangering the lives of all who now flock to the woods in the limited deer hunting season. Logic seems to dictate that an even higher standard be required when firearms are the death-dealing instrument than is expected when the potential danger arises from the negligent use of a motor vehicle.

We have never considered an automobile a dangerous instrumentality in keeping with the decided weight of authority. *White v. Sims, 211 Ark. 499, 201 S. W. 2d 21*; 60A C. J. S. 932, Motor Vehicles, § 428(1); 7 Am. Jur. 2d 896, Automobiles and Highway Traffic, § 350. It is commonly held that a loaded firearm (particularly a high-powered hunting rifle) is a dangerous instrumentality. *Seabrook v. Taylor, 199 So. 2d 315 (Fla. 1967)*; *American Ry. Express Co. v. Tait, 211 Ala. 348, 100 So. 328 (1924)*; *Skinner v. Ochiltree, 148 Fla. 705, 5 So. 2d 605, 140 A. L. R. 410 (1941)*; *Normand v. Normand, 65 So. 2d 914 (La. App. 1953)*; *Huber v. Collins, 38 Ohio L. Abs. 551, 50 N. E. 2d 906 (1942)*; *Gibson v. Payne, 79 Ore. 101,* [*526] *154 P. 422 (1916)*; *Edwards v. Johnson, 269 N. C. 30, 152 S. E. 2d 122, 25 A. L. R. 3d 502 (1967)*; *Naegele v. Dollen, 158 Neb. 373, 63 N. W. 2d 165, 42 A. L. R. 2d 1099 (1954)*; *Warner v. Santa Catalina Island Company, 44 Cal. 2d 310, 282 P. 2d 12 (1955)*. The matter has been said to be beyond question or well settled. *Hart v. Lewis, 187 Okla. 394, 103 P. 2d 65 (1940)*; *State v. Hedges, 8 Wash. 2d 652, 113 P. 2d 530 (1941)*; *People v. Walls, 49 Cal. Rptr. 82 (1966)*. It has also been held that firearms are more than ordinarily dangerous or inherently dangerous. *Rudd v. Byrnes, 156 Cal. 636, 105 P. 957, 26 L. R. A. (n.s.) 134*; 20 Ann. Cas. 124 (1909); *Fowler v. Monteleone, 153 So. 490 (La. App. 1934)*; *Fabre v. Lumbermen's Casualty Co., 167 So. 2d 448 (La. App. 1964)*; *Yusko v. Remizon, 199 Misc. 1116, 106 N. Y. S. 2d 285 (1951)*, rev'd on other grounds, *280 App. Div. 637, 116 N. Y. S. 2d 922 (1952)*. While we have not specifically so held, we certainly gave recognition to the hazards involved in *Manning v. Jones, 95 Ark. 359, 129 S. W. 791*, when we said that a hunter using firearms is governed by the principle that he who does what is more than [**128] ordinarily dangerous is bound to use more than ordinary care. We have even held that it was proper for a jury to find, as a matter of fact, that an air rifle is a dangerous instrumentality, relying upon cases from other jurisdictions wherein it was held that an air rifle was such

an instrument. *Williams v. Davidson, 241 Ark. 699, 409 S. W. 2d 311*.

The majority finds distinctions between this case and the rule stated in *Harrelson v. Whitehead, 236 Ark. 325, 365 S. W. 2d 868*, that seem to me of questionable validity. The fact that an unrestricted driver's license is not granted to minors under 16, or that an examination is required before the license is issued seems of little consequence. No distinction was made in *Harrelson* between licensed and unlicensed minors, those who passed the driver examination and those who failed, or those 16 and over and those under 16. Certainly the court would not say that an unlicensed minor was held to a lower standard of care than one licensed. The significance of the statutory requirement of financial responsibility escapes me. Our act only comes into play after an accident. Liability [*527] exists whether or not there is insurance coverage or financial responsibility. The fact that there are no exceptions for minors in statutory rules of the road may be the most persuasive argument for the majority position, but I find none in those statutes we have pertaining to firearms and their use. Ark. Stat. Ann. §§ 47-301G (Repl. 1964), 41-507 par. 4 (Repl. 1964), 47-408 (Repl. 1964), 41-4507-45-4517 (Repl. 1964), 41-4501 (Repl. 1964), 41-507.5 (Repl. 1964), 41-3109 (Supp. 1969), 59-316 (Supp. 1969), 41-4001 (Repl. 1964). The act prohibiting the negligent discharge of firearms while hunting deer in such circumstances as to endanger the person or property of another does not make any such exception. Ark. Stat. Ann. § 47-535 (Supp. 1969). I have been unable to find any exceptions for minors in Arkansas Game and Fish Commission Code, except for licensing requirements, from which a nonresident minor is not exempt after he kills a deer. See Arkansas Game and Fish Commission Code § 40.01. There are no such exceptions in those regulations governing use of firearms.

See Arkansas Game and Fish Commission Code §§ 15.01, 30.01 -- 30.05, 40.01, 71.01, 100.01, 100.03.

Still the reasoning of the majority opinion furnished no impediment to the extension of this adult standard of care to a youthful tractor driver in *Jackson v. McCuiston, 247 Ark. 862, 448 S. W. 2d 33,* although most of the distinctions applied here could have been made there. There the tractor driver was two years younger than the age required for driver licensing and three years younger than Bubba Shelton. Young McCuiston had been trained to operate tractors, Shelton to handle firearms. McCuiston had been operating tractors for two years, Shelton, firearms, for at least twice as long. The tractor-propelled stalk cutter operated by McCuiston was more dangerous than some types of farm equipment, less than others. The Shelton rifle was among the most deadly. No licensing or financial responsibility requirements existed for the tractor driver. But *Harrelson v. Whitehead, supra*, was deemed our nearest precedent for holding the minor tractor operator to adult standards. There we said:

> [*528] In the case before us the adult defendants trained the minor defendant in the operation of a dangerous machine -- dangerous particularly to third persons who found themselves in proximity during operation. Young McCuiston regularly operated all different types of farm tractors since he was twelve years of age. Unquestionably he was performing a job normally expected to be done by adults. Since he had been made proficient in the operation of the equipment it was his responsibility, and that of his masters, to see that he was apprised of those safeguards for others which would be possessed by an adult operator. If he is negligent in that important aspect of the operation then neither the minor

> operator nor his master should be permitted to invoke the aid of his minority. We therefore conclude that within the [**129] ambit of this case, the defendant operator should be held to the standard of care of a reasonably careful adult.

How can we say differently in this case? Many more people are exposed to the dangers of use of high-powered rifles by minors than can ever be expected to risk the hazards of minors operating farm equipment.

As stepping stones from *Harrelson* to *Jackson* the court used authorities illustrating the trend in the law, saying:

> The trend in the law points to further relaxation of the general rule.
>
> "An exception [to the general rule] may arise where the child engages in an activity which is normally undertaken by adults, and for which adult qualifications are required." 2 *Restatement of Torts 2d § 283* A c.
>
> "There is more support for the proposition that whenever a child, whether as plaintiff or as defendant, engages in an activity which normally is one for adults only, such as driving an automobile or flying an airplane, the public interest and the public [*529] safety require that any consequences due to his own incapacity shall fall upon him rather than the innocent victim, and that he must be held to the adult standard, without any allowance for his age." Prosser Torts 3rd Ed. HB, p. 159.
>
> "It is our conclusion that courts should and probably will (for the most part) hold the child

> defendant who is engaging in dangerous adult activities (such as driving a car) to the standard of the reasonably prudent adult." 2 Harper & James Torts, p. 927.
>
> The Minnesota court, citing Restatement, has extended the requirement of adult care to a minor when he is operating a motorboat. *Dellwo v. Pearson, 107 N.W. 2d 859 (1961).*

True enough, this court, and the Minnesota Court in *Dellwo,* found it unnecessary to adopt a rule as broad as stated by the above authorities, because it found it wiser to solve the problem as presented in the setting of a given case. If this case does not present a setting for an exception to the usual rule as to the standard of care required of a minor, we have found the stopping place troubling the majority. We should now never go further than the automobile and farm equipment relaxation, however dangerous the instrument or activity, regardless of whether we are able to rationalize distinctions. It will be much simpler that way, even if we may have trouble with airplanes and motorboats which the Minnesota court was unable to differentiate from automobiles in *Dellwo*. We will only have to remember motor vehicles and farm equipment as giving rise to the exceptions to the general rule, and not be troubled with cataloging classifications or resorting to logical reasoning.

The majority suggests that another distinction exists because it is unable to say that deer hunting is an activity normally engaged in by adults *only*. Neither is motor vehicle driving. Neither is the operation of tractor-drawn stalk cutters or other such farm equipment. [*530] I am unaware of any evidence on the subject in either *Harrelson* or *Jackson*. Judicial notice that sees driving a motor vehicle as an activity normally engaged in by adults only and operation of tractor-drawn farm equipment a job normally

expected to be done by adults only, but does not see hunting with a high-powered rifle loaded with soft-nosed bullets in dense woods and underbrush in the same category, is astigmatic indeed. The immense numbers of minor motor vehicle drivers and farm equipment operators are plainly visible. And the farm equipment operators are most often in a field alone where they hazard the lives of themselves only. Not nearly so many innocent and helpless people are subject to hazards created by them as are potential victims of a hunter under 21 years old equipped with one of the deadliest of all firearms.

[**130] The necessity of protection of minors against losses on account of immaturity and the desirability of compensating innocent persons injured through fault of another are conflicting considerations in a case such as this. Public interest and public safety should permit a lowering of the shield protecting the immature, whenever serious injuries are incurred through fault of a minor who knowingly uses a dangerous instrumentality in an adult's activity in which the law requires more than ordinary care. It is time to recognize, and we have recognized in at least two cases, that arbitrary statutory age of legal maturity is not an adequate guide in such cases. In *Harrelson*, the court could see no valid distinction between the responsibility of a minor driving a motor vehicle and that of an unskilled or inexperienced or reckless adult driver, who is not excused from liability because of his inexperience and unskillfulness. What is the distinction here?

I would reverse and remand for a new trial, because I think that any differentiation as to standards of care should require that the standard applied in the case of a minor user of a deadly hunting weapon in dense woods and underbrush where many other hunters are to be expected should be at least as high as that required of the minor automobile or farm tractor driver.

[*531] I am authorized to state that Chief Justice Harris and Justice Byrd join in this dissent.

Conley Byrd, Justice, dissenting.

I would reverse this case for the reasons stated by Justice Fogleman with respect to instruction No. 9. However I agree with the majority that the trial court did not err in instructing the jury in terms of reasonable care as defined in AMI 301, 304, 305 B and 602. However since I would grant a new trial, it appears that appellant, instead of his request relative to the "care" required of a hunter, would be entitled to an instruction relative to the "duty" of a deer hunter in firing a rifle in the woods. In *Welch v. Durand, 36 Conn. 182 (1869)*, the court stated the matter in this language:

> ". . . The injury was a battery within the strictest definition. It resulted to the person of the plaintiff from a ball put in motion by the agency of the defendant without due care. It is an immaterial fact that the injury was unintentional and that the ball glanced from the intended direction. Shooting at a mark is lawful, but not necessary, and may be dangerous, and the law requires extraordinary care to prevent injury to others; and if the act is done where there are objects from which the balls may glance and endanger others, the act is wanton, reckless, without due care, and grossly negligent. . . ."

While appellant did not offer a correct instruction on "duty" and the trial court properly denied those offered for that reason, it appears to me that appellant was entitled to an instruction to the effect that:

> "A loaded gun is a dangerous instrumentality and one deer hunting therewith has a duty to take precautions to control the weapon with a skill and standard of care proportionate to the danger created to prevent injury to others."

Because a bullet fired from the gun by a minor is just as deadly as a bullet fired by an adult, I'm at a loss to understand why one with "buck fever" because of his [*532] minority is entitled to exercise any less care than any one else deer hunting. One killed by a bullet so fired would be just as dead in one instance as the other and without any more warning.
For the reasons stated, I respectfully dissent.

 ¿Cómo podríamos fácticamente comparar el cuidado que demostró Kerr por su sordera y el que extremó Feinstein por su ceguera?

BREACH: COST-EFFECTIVE PRECAUTIONS

 UNITED STATES et al. v. CARROLL TOWING CO., Inc., et al. Nos. 96, 97, Dockets 20371, 20372 UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 159 F.2d 169 January 9, 1947

[*170] HAND These appeals concern the sinking of the barge, 'Anna C,' on January 4, 1944, off Pier 51, North River. The Conners Marine Co., Inc., was the owner of the barge, which the Pennsylvania Railroad Company had chartered; the Grace Line, Inc., was the charterer of the tug, 'Carroll,' of which the Carroll Towing Co., Inc., was the owner. The decree in the limitation proceeding held the Carroll Company liable to the United States for the loss of the barge's cargo of flour, and to the Pennsylvania Railroad Company, for expenses in salving the cargo and barge; and it held the Carroll Company also liable to [**2] the Conners Company for one half the damage to the barge;

these liabilities being all subject to limitation. The decree in the libel suit held the Grace Line primarily liable for the other half of the damage to the barge, and for any part of the first half, not recovered against the Carroll Company because of limitation of liability; it also held the Pennsylvania Railroad secondarily liable for the same amount that the Grace Line was liable. The Carroll Company and the Pennsylvania Railroad Company have filed assignments of error.

The facts, as the judge found them, were as follows. On June 20, 1943, the Conners Company chartered the barge, 'Anna C.' to the Pennsylvania Railroad Company at a stated hire per diem, by a charter of the kind usual in the Harbor, which included the services of a bargee, apparently limited to the hours 8 A.M. to 4 P.M. On January 2, 1944, the barge, which had lifted the cargo of flour, was made fast off the end of Pier 58 on the Manhattan side of the North River, whence she was later shifted to Pier 52. At some time not disclosed, five other barges were moored outside her, extending into the river; her lines to the pier were not then strengthened. At [**3] the end of the next pier north (called the Public Pier), lay four barges; and a line had been made fast from the outermost of these to the fourth barge of the tier hanging to Pier 52. The purpose of this line is not entirely apparent, and in any event it obstructed entrance into the slip between the two piers of barges. The Grace Line, which had chartered the tug, 'Carroll,' sent her down to the locus in quo to 'drill' out one of the barges which lay at the end of the Public Pier; and in order to do so it was necessary to throw off the line between the two tiers. On board the 'Carroll' at the time were not only her master, but a 'harbormaster' employed by the Grace Line. Before throwing off the line between the two tiers, the 'Carroll' nosed up against the outer barge of the tier lying off Pier 52, ran a line from her own stem to the middle bit of that barge, and kept working her engines 'slow ahead' against the ebb tide which was making at that time. The captain of

the 'Carroll' put a deckhand and the 'harbormaster' on the barges, told them to throw off the line which barred the entrance to the slip; [*171] but, before doing so, to make sure that the tier on Pier 52 was safely [**4] moored, as there was a strong northerly wind blowing down the river. The 'harbormaster' and the deckhand went aboard the barges and readjusted all the fasts to their satisfaction, including those from the 'Anna C.' to the pier.

After doing so, they threw off the line between the two tiers and again boarded the 'Carroll,' which backed away from the outside barge, preparatory to 'drilling' out the barge she was after in the tier off the Public Pier. She had only got about seventy-five feet away when the tier off Pier 52 broke adrift because the fasts from the 'Anna C,' either rendered, or carried away. The tide and wind carried down the six barges, still holding together, until the 'Anna C' fetched up against a tanker, lying on the north side of the pier below- Pier 51- whose propeller broke a hole in her at or near her bottom. Shortly thereafter: i.e., at about 2:15 P.M., she careened, dumped her cargo of flour and sank. The tug, 'Grace,' owned by the Grace Line, and the 'Carroll,' came to the help of the flotilla after it broke loose; and, as both had syphon pumps on board, they could have kept the 'Anna C' afloat, had they learned of her condition; but the bargee had left her [**5] on the evening before, and nobody was on board to observe that she was leaking. The Grace Line wishes to exonerate itself from all liability because the 'harbormaster' was not authorized to pass on the sufficiency of the fasts of the 'Anna C' which held the tier to Pier 52; the Carroll Company wishes to charge the Grace Line with the entire liability because the 'harbormaster' was given an over-all authority. Both wish to charge the 'Anna C' with a share of all her damages, or at least with so much as resulted from her sinking. The Pennsylvania Railroad Company also wishes to hold the

barge liable. The Conners Company wishes the decrees to be affirmed.

The first question is whether the Grace Line should be held liable at all for any part of the damages. The answer depends first upon how far the 'harbormaster's' authority went, for concededly he was an employee of some sort. Although the judge made no other finding of fact than that he was an 'employee,' in his second conclusion of law he held that the Grace Line was 'responsible for his negligence.' Since the facts on which he based this liability do not appear, we cannot give that weight to the conclusion which we should to [**6] a finding of fact; but it so happens that on cross-examination the 'harbormaster' showed that he was authorized to pass on the sufficiency of the facts of the 'Anna C.' He said that it was part of his job to tie up barges; that when he came 'to tie up a barge' he had 'to go in and look at the barges that are inside the barge' he was 'handling'; that in such cases 'most of the time' he went in 'to see that the lines to the inside barges are strong enough to hold these barges'; and that 'if they are not' he 'put out sufficient other lines as are necessary.' That does not, however, determine the other question: i.e., whether, when the master of the 'Carroll' told him and the deckhand to go aboard the tier and look at the fasts, preparatory to casting off the line between the tiers, the tug master meant the 'harbormaster' to exercise a joint authority with the deckhand. As to this the judge in his tenth finding said: 'The captain of the Carroll then put the deckhand of the tug and the harbor master aboard the boats at the end of Pier 52 to throw off the line between the two tiers of boats after first ascertaining if it would be safe to do so.' Whatever doubts the testimony of the 'harbormaster' [**7] might raise, this finding settles it for us that the master of the 'Carroll' deputed the deckhand and the 'harbormaster,' jointly to pass upon the sufficiency of the 'Anna C's' fasts to the pier. The case is stronger against the Grace Line than Rice v. The Marion A. C. Meseck, [1] was against the tug

there held liable, because the tug had only acted under the express orders of the 'harbormaster.' Here, although the relations were reversed, that makes no difference in principle; and the 'harbormaster' was not instructed what he should do about the fast, but was allowed [*172] to use his own judgment. The fact that the deckhand shared in this decision, did not exonerate him, and there is no reason why both should not be held equally liable, as the judge held them.

We cannot, however, excuse the Conners Company for the bargee's failure to care for the barge, and we think that this prevents full recovery. First as to the facts. As we have said, the deckhand and the 'harbormaster' jointly undertook to pass upon the 'Anna C's' fasts to the pier; and even though we assume that the bargee was responsible for his fasts after the other barges were added outside, there is not the slightest [**8] ground for saying that the deckhand and the 'harbormaster' would have paid any attention to any protest which he might have made, had he been there. We do not therefore attribute it as in any degree a fault of the 'Anna C' that the flotilla broke adrift. Hence she may recover in full against the Carroll Company and the Grace Line for any injury she suffered from the contact with the tanker's propeller, which we shall speak of as the 'collision damages.' On the other hand, if the bargee had been on board, and had done his duty to his employer, he would have gone below at once, examined the injury, and called for help from the 'Carroll' and the Grace Line tug. Moreover, it is clear that these tugs could have kept the barge afloat, until they had safely beached her, and saved her cargo. This would have avoided what we shall call the 'sinking damages.' Thus, if it was a failure in the Conner Company's proper care of its own barge, for the bargee to be absent, the company can recover only one third of the 'sinking' damages from the Carroll Company and one third from the Grace Line. For this reason the question arises

whether a barge owner is slack in the care of his barge if the bargee [**9] is absent.

As to the consequences of a bargee's absence from his barge there have been a number of decisions; and we cannot agree that it it never ground for liability even to other vessels who may be injured. As early as 1843, Judge Sprague in Clapp v. Young, [2] held a schooner liable which broke adrift from her moorings in a gale in Provincetown Harbor, and ran down another ship. The ground was that the owners of the offending ship had left no one on board, even though it was the custom in that harbor not to do so. Judge Tenney in Fenno v. The Mary E. Cuff, [3] treated it as one of several faults against another vessel which was run down, to leave the offending vessel unattended in a storm in Port Jefferson Harbor. Judge Thomas in The On-the-Level, [4] held liable for damage to a stake-boat, a barge moored to the stake-boat 'south of Liberty Light, off the Jersey shore,' because she had been left without a bargee; indeed he declared that the bargee's absence was 'gross negligence.' In the Kathryn B. Guinan, [5] Ward, J., did indeed say that, when a barge was made fast to a pier in the harbor, as distinct from being in open waters, the bargee's absence would not be the basis for [**10] the owner's negligence. However, the facts in that case made no such holding necessary; the offending barge in fact had a bargee aboard though he was asleep. In the Beeko, [6] Judge Campbell exonerated a power boat which had no watchman on board, which boys had maliciously cast loose from her moorings at the Marine Basin in Brooklyn and which collided with another vessel. Obviously that decision has no bearing on the facts at bar. In United States Trucking Corporation v. City of New York, [7] the same judge refused to reduce the recovery of a coal hoister, injured at a foul berth, because the engineer was not on board; he had gone home for the night as was apparently his custom. We reversed the decree, [8] but for another reason. In The Sadie, [9] we affirmed Judge Coleman's holding [10] that it was

actionable negligence to leave without a bargee on board a barge made fast outside another barge, in the face of storm warnings. The damage was done to the [*173] inside barge. In The P. R. R. No. 216, [11] we charged with liability a lighter which broke loose from, or was cast off, by a tanker [**11] to which she was moored, on the ground that her bargee should not have left her over Sunday. He could not know when the tanker might have to cast her off. We carried this so far in The East Indian, [12] as to hold a lighter whose bargee went ashore for breakfast, during which the stevedores cast off some of the lighter's lines. True, the bargee came back after she was free and was then ineffectual in taking control of her before she damaged another vessel; but we held his absence itself a fault, knowing as he must have, that the stevedores were apt to cast off the lighter. The Conway No. 23 [13] went on the theory that the absence of the bargee had no connection with the damage done to the vessel itself; it assumed liability, if the contrary had been proved. In The Trenton, [14] we refused to hold a moored vessel because another outside of her had overcharged her fasts. The bargee had gone away for the night when a storm arose; and our exoneration of the offending vessel did depend upon the theory that it was not negligent for the bargee to be away for the night; but no danger was apparently then to be apprehended. In Bouker Contracting Co. v. Williamsburgh Power Plant Corporation [**12] [15] , we charged a scow with half damages because her bargee left her without adequate precautions. In O'Donnell Transportation Co. v. M. & J. Tracy, [16] we refused to charge a barge whose bargee had been absent from 9 A.M. to 1:30 P.M., having 'left the vessel to go ashore for a time on his own business.'

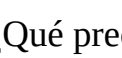
It appears from the foregoing review that there is no general rule to determine when the absence of a bargee or other attendant will make the owner of the barge liable for injuries to other vessels if she breaks away from her

moorings. However, in any cases where he would be so liable for injuries to others obviously he must reduce his damages proportionately, if the injury is to his own barge. It becomes apparent why there can be no such general rule, when we consider the grounds for such a liability. Since there are occasions when every vessel will break from her moorings, and since, if she does, she becomes a menace to those about her; the owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that she [**13] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL. Applied to the situation at bar, the likelihood that a barge will break from her fasts and the damage she will do, vary with the place and time; for example, if a storm threatens, the danger is greater; so it is, if she is in a crowded harbor where moored barges are constantly being shifted about. On the other hand, the barge must not be the bargee's prison, even though he lives aboard; he must go ashore at times. We need not say whether, even in such crowded waters as New York Harbor a bargee must be aboard at night at all; it may be that the custom is otherwise, as Ward, J., supposed in 'The Kathryn B. Guinan,' supra; [17] and that, if so, the situation is one where custom should control. We leave that question open; but we hold that [**14] it is not in all cases a sufficient answer to a bargee's absence without excuse, during working hours, that he has properly made fast his barge to a pier, when he leaves her. In the case at bar the bargee left at five o'clock in the afternoon of January 3rd, and the flotilla broke away at about two o'clock in the afternoon of the following day, twenty-one hours afterwards. The bargee had been away all the time, and we hold that his fabricated story was affirmative evidence [*174] that he had no excuse for his absence. At the locus

in quo- especially during the short January days and in the full tide of war activity- barges were being constantly 'drilled' in and out. Certainly it was not beyond reasonable expectation that, with the inevitable haste and bustle, the work might not be done with adequate care. In such circumstances we hold- and it is all that we do hold- that it was a fair requirement that the Conners Company should have a bargee aboard (unless he had some excuse for his absence), during the working hours of daylight.

The decrees will be modified as follows. In the libel of the Conners Company against the Pennsylvania [**15] Railroad Company in which the Grace Line was impleaded, since the Grace Line is liable in solido, and the Carroll Company was not impleaded, the decree must be for full 'collision damages' and half 'sinking damages,' and the Pennsylvania Railroad Company will be secondarily liable. In the limitation proceeding of the Carroll Company (the privilege of limitation being conceded), the claim of the United States and of the Pennsylvania Railroad Company will be allowed in full. Since the claim of the Conners Company for 'collision damages' will be collected full in the libel against the Grace Line, the claim will be disallowed pro tanto. The claim of the Conners Company for 'sinking damages' being allowed for one half in the libel, will be allowed for only one sixth in the limitation proceeding. The Grace Line has claimed for only so much as the Conners Company may recover in the libel. That means that its claim will be one half the 'collision damages' and for one sixth the 'sinking damages.' If the fund be large enough, the result will be to throw one half the 'collision damages' upon the Grace Line and one half on the Carroll Company; and one third of the 'sinking damages' on the [**16] Conners Company, the Grace Line and the Carroll Company, each. If the fund is not large enough, the Grace Line will not be able altogether to recoup itself in the

limitation proceeding for its proper contribution from the Carroll Company.
Decrees reversed and cause remanded for further proceedings.

 ¿Qué precauciones debería exigirnos el sistema jurídico al cuidar de los asuntos e intereses ajenos? Cabalmente, las mismas precauciones que tomamos cuando se trata de nuestros propios asuntos intereses, sólo que el análisis del coste de la precaución y del beneficio de tomarla lo subsumimos como dueños del negocio. Esto significa la manida *Hand rule*: es el mismísimo cuidado del *paterfamilias* del derecho romano traspasado al *common law*. Ni más ni menos.

 De manera corriente, ¿tomamos todas las precauciones posibles? ¿O sólo aquellas que se justifican en términos de costo o beneficio?

 Leo Adams, an Infant, by Marcy E. Adams, His Guardian ad Litem, Respondent, v. George Bullock, as Receiver of the Buffalo and Lake Erie Traction Company, Appellant Court of Appeals of New York 227 N.Y. 208; 125 N.E. 93 October 23, 1919, Argued November 18, 1919, Decided

[*209] [**93] CARDOZO The defendant runs a trolley line in the city of Dunkirk, employing the overhead wire system. At one point, the road is crossed by a bridge or culvert which carries the tracks of the Nickle Plate and Pennsylvania railroads. Pedestrians often use the bridge as a short cut between streets, and children play on it. On April 21, 1916, the plaintiff, a boy of twelve years, came across the bridge, swinging a wire about eight feet long. In swinging it, he brought it in contact with the defendant's trolley wire, which ran beneath the structure. The side of the bridge was protected by a parapet eighteen inches wide. Four feet seven and three-fourths inches below the top of the parapet, the trolley wire was strung. The plaintiff was

shocked and burned when the wires came together. He had a verdict at Trial Term, which has been affirmed at the Appellate Division by a divided court.

We think the verdict cannot stand. The defendant in using an overhead trolley was in the lawful exercise of its [*210] franchise. Negligence, therefore, cannot be imputed to it because it used that system and not another (*Dumphy* v. *Montreal L., H. & P. Co.*, 1907 A. C. 454). There was, of course, a duty to adopt all reasonable precautions to minimize the resulting perils. We think there is no evidence that this duty was ignored. The trolley wire was so placed that no one standing on the bridge or even bending over the parapet could reach it. Only some extraordinary casualty, not fairly within the area of ordinary prevision, could make it a thing of danger. Reasonable care in the use of a destructive agency imports a high degree of vigilance (*Nelson v. Branford L. & W. Co., 75 Conn. 548, 551*; *Braun v. Buffalo Gen. El. Co., 200 N. Y. 484*). But no vigilance, however alert, unless fortified by the gift of prophecy, could have predicted the point upon the route where such an accident would occur. It might with equal reason have been expected anywhere else. At any point upon the route, a mischievous or thoughtless boy might touch the wire with a metal pole, or fling another wire across it (*Green v. W. P. Rys. Co., 246 Penn. St. 340*). If unable to reach it from the walk, he might stand upon a wagon or climb upon a tree. No special danger at this bridge warned the defendant that there was need of special measures of precaution. No like accident had occurred before. No custom had been disregarded. We think that ordinary caution did not involve forethought of this extraordinary peril. It has been so ruled in like circumstances by courts in other jurisdictions [**94] (*Green v. W. P. Rys. Co., supra; Vannatta v. Lancaster L. & P. Co., 164 Wis. 344*; *Parker v. Charlotte Elec. Ry. Co., 169 N. C. 68*; *Kempf v. S. & I. E. R. R. Co., 82 Wash. 263*; *Sheffield Co. v. Morton, 161 Ala. 153*). Nothing to the

contrary was held in *Braun v. Buffalo Gen. El. Co. (200 N. Y. 484*) or *Wittleder v. Citizens Electric Ill. Co. (47 App. Div. 410*). In those cases, the accidents were well within the range of prudent foresight (*Braun v. Buffalo Gen. El. Co., supra, at p.* [*211] *494*). That was also the basis of the ruling in *Nelson v. Branford Lighting & Water Co. (75 Conn. 548, 551)*. There is, we may add, a distinction, not to be ignored, between electric light and trolley wires. The distinction is that the former may be insulated. Chance of harm, though remote, may betoken negligence, if needless. Facility of protection may impose a duty to protect. With trolley wires, the case is different. Insulation is impossible. Guards here and there are of little value. To avert the possibility of this accident and others like it at one point or another on the route, the defendant must have abandoned the overhead system, and put the wires underground. Neither its power nor its duty to make the change is shown. To hold it liable upon the facts exhibited in this record would be to charge it as an insurer.
The judgment should be reversed and a new trial granted, with costs to abide the event.

 ¿Tomarías esta precaución si tendrías que sufragar el costo en tu propiedad para evitar la posibilidad de que ocurra este siniestro con tu propio hijo? ¿No tomarías otro tipo de precauciones?

 BOLTON AND OTHERS APPELLANTS; AND STONE RESPONDENT HOUSE OF LORDS. [1951] AC 850 HEARING-DATES: 5, 6, March 10 May 1951 10 May 1951

LORD PORTER: [after stating the facts in the terms set out above]:- My Lords, in the action and on appeal the respondent contended that the appellants were negligent or guilty of creating a nuisance in failing to take any sufficient precautions to prevent the escape of cricket balls from the ground and the consequent risk of injury to persons in Beckenham Road. In her submission it was enough that a

ball had been driven into the road even once: such an event gave the appellants warning that a ball might be hit into the road, and the appellants knowing this must, as reasonable men also know that an injury was likely to be caused to anyone standing in the road or to a passer-by. The argument was however, as she said, strengthened when it was remembered that a ball had been driven over the fence from time to time even though at somewhat remote intervals. Such an event was known to the appellants to have occurred, and if they had considered the matter they ought to have envisaged the possibility of its repetition.

But the question remains: Is it enough to make an action negligent to say that its performance may possibly cause injury, or must some greater probability exist of that result ensuing in order to make those responsible for its occurrence guilty of negligence?

n(31) [1905] 2 K. B. 597.

n(32) 14 Ch. D. 542.

n(33) 38 T. L. R. 615.

n(34) 3 B. & Ad. 184.

n(35) [1941] 1 All E. R. 355, 356, 357, 359.

n(36) [1911] 2 K. B. 633, 635, 637.

n(37) [1940] A. C. 880, 904-5.

n (38) L.R. 3 H. L. 330.

In the present case the appellants did not do the act themselves, but they are trustees of a field where cricket is played, are in control of it, and invite visiting teams to play there. They are, therefore, and are admitted to be responsible for the negligent action of those who use the field in the way intended that it should be used.

The question then arises: What degree of care must they exercise to escape liability for anything which may occur as a result of this intended use of the field?

Undoubtedly they knew that the hitting of a cricket ball out of the ground was an event which might occur and, therefore, that there was a conceivable possibility that someone would be hit by it. But so extreme an obligation of care cannot be imposed in all cases. If it were, no one could safely drive a motor car since the possibility of an accident could not be overlooked and if it occurred some stranger might well be injured however careful the driver might be. It is true that the driver desires to do everything possible to avoid an accident, whereas the hitting of a ball out of the ground is an incident in the game and, indeed, one which the batsman would wish to bring about; but in order that the act may be negligent there must not only be a reasonable possibility of its happening but also of injury being caused. In the words of Lord Thankerton in Bourhill v. Young n(39) the duty is to exercise "such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care", and Lord Macmillan used words to the like effect n(40) . So, also, Lord Wright in Glasgow Corporation v. Muir n(41) quoted the well-known words of Lord Atkin in Donoghue v. Stevenson n(42) : "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour". It is not enough that the event should be such as can reasonably be foreseen; the further result that injury is likely to follow must also be such as a reasonable man would contemplate, before he can be convicted of actionable negligence. Nor is the remote possibility of injury occurring enough; there must be sufficient probability to lead a reasonable man to anticipate it. The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken.

It must be remembered and cannot too often be repeated that

n(39) [1943] A. C. 92, 98.

n(40) Ibid. 104.

n(41) [1943] A. C. 448, 460.

n(42) [1932] A. C. 562, 580.

there are two different standards to be applied when one is considering whether an appeal should be allowed or not. The first is whether the facts relied upon are evidence from which negligence can in law be inferred; the second, whether, if negligence can be inferred, those facts do constitute negligence. The first is a question of law upon which the judge must actually or inferentially rule; the second, a question of fact upon which the jury, if there is one, or, if not, the judge, as judge of fact, must pronounce. Both to some extent, but more particularly the latter, depend on all the attendant circumstances of the case.

In the present instance the learned trial judge came to the conclusion that a reasonable man would not anticipate that injury would be likely to result to any person as a result of cricket being played in the field in question and I cannot say that that conclusion was unwarranted. In arriving at this result I have not forgotten the view entertained by Singleton, L.J. n(43) , that the appellants knew that balls had been hit out of the ground into the road, though on very rare occasions - I think six were proved in twenty-eight years - and it is true that a repetition might at some time be anticipated But its happening would be a very exceptional circumnstance, the road was obviously not greatly frequented and no previous accident had occurred. Nor do I think that the respondent improves her case by proving that a number of balls were hit into Mr. Brownson's garden. It is danger to persons in the road not to Mr. Brownson or his visitors which is being considered. In these circumstances I

cannot say that as a matter of law the decider of fact, whether judge or jury, must have come to the conclusion that the possibility of injury should have been anticipated. I cannot accept the view that it would tend to exonerate the appellants if it were proved that they had considered the matter and decided that the risks were very small and that they need not do very much. In such a case I can imagine it being said that they entertained an altogether too optimistic outlook. They seem to me to be in a stronger position, if the risk was so small that it never even occurred to them.

Nor am I assisted by any reliance upon the doctrine of "res ipsa loquitur". Where the circumstances giving rise to the cause of the accident are unknown that doctrine may be of great assistance, but where, as in the present case, all the facts are known, it cannot have any application. It is known exactly how the accident happened and it is unnecessary to ask whether this

n(43) [1950] 1 K. B. 201, 207.

accident would have happened had there been no negligence; the only question is, do the facts or omissions which are known and which led up to the injury amount to negligence.

I may add that the suggestion that it would have been a wise precaution to move the pitch to a position equally between the north and south boundaries to my mind has little force. I do not think that it would have occurred to anyone that such an alteration would make for greater safety or that there was any danger in allowing things to remain as they were. The golf club case (Castle v. St. Augustine's Links Ld. n(44)) rested upon a different set of circumstances in which a succession of players driving off alongside a road might be expected from time to time to slice their ball over or along the road and, therefore, the possibility of injury to those using the highway was much greater. The quantum of danger must always be a question of degree. It is not enough that there is a remote possibility

that injury may occur: the question is, would a reasonable man anticipate it? I do not think that be would, and in any case, unless an appellate body are of opinion that no clearly ought to have done so, the tribunal upon whom lies the duty of finding the facts is the proper judge of whether he would or not. I need not discuss the alternative claim based upon unisance, since it is admitted on behalf of the respondent that in the circumstances of this case nuisance cannot be established unless negligence is proved.

My Lords, for the reasons I have given I nm of opinion that the appeal should be allowed, the judgment of the learned judge in the court of first instance should be restored, and the respondent should pay the costs in your Lordships' House and in the Court of Appeal.

LORD NORMAND: My Lords, it is not questioned that the occupier of a cricket ground owes a duty of care to persons on an adjacent highway or on neighbouring property who may be in the way of balls driven out of the ground by the batsman. But it is necessary to consider the measure of the duty owed. In the Court of Appeal Jenkins, L.J., said n(45) that it was "a duty to prevent balls being hit into Beckenham Road so far as there was any reasonably foreseeable risk of that happening". There can be no quarrel with this proposition, but one must not overlook the importance of the qualification "reasonably".

It is not the law that precautions must be taken against every

n(44) (1922) 38 T. L. R. 615.

n(45) [1950] 1 K. B. 201, 210.

peril that can be foreseen by the timorous. In Glasgow. Corporation v. Muir n(46) the decision turned on the standard of care, and Lord Thankerton held n(47) that a person is bound to foresee only the reasonable and probable consequences of the failure to take care, judged by the

standard of the ordinary reasonable man". He observed that the question whether a defender had failed to take the precautions which an ordinary reasonable man would take is essentially a jury question, and that it is the duty of the court to approach the question as if it were a jury and that a Court of Appeal should be slow to interfere with the conclusions of the trial judge. Lord Macmillan n(48) agreed that the standard of duty was the reasonable man of ordinary intelligence and experience contemplating the reasonable and probable consequences of his acts. What ought to have been foreseen is the test accepted by Lord Wright n(49) , who quoted Lord Atkins words in Donoghue v. Stevenson n(50) : "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour". Lord Clauson n(51) stated as the test whether the person having the duty of care ought, as a reasonable person, "to have had in contemplation that, unless some further precautions were taken, such an unfortunate occurrence as that which in fact took place might well be expected". It is therefore not enough for the plaintiff to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road; she must go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence.

Among the facts found by Oliver, J., are:- (1.) that a house substantially nearer the ground than the place where the plaintiff was injured had been hit by a cricket ball driven out of the ground on certain occasions (vaguely estimated at five or six by a witness) in the previous few years; (2.) that the hit which occasioned the plaintiff's injury was altogether exceptional; and (3.) that it was very rarely indeed that a ball was hit over the fence between the road and the ground. It is perhaps not surprising that there should be differences of opinion about the defendants' liability even if the correct test is applied. The whole issue

is, indeed, finely balanced. On the one side there are, as we were told, records of much longer hits by famous

n(46) [1943] A. C. 448.

n(47) Ibid. 454.

n(48) Ibid. 457.

n(49) Ibid. 460.

n(50) [1932] A. C. 562, 580.

n(51) [1943] A. C. 448, 468.

cricketers than the drive which caused the injury to the plaintiff and it is, of course, the object of every batsman to hit the ball over the boundary if he can. Again, the serious injury which a cricket ball might cause must not be left out of account. But on the other side the findings of fact show that the number of balls driven straight out of the ground by the players who use it in any cricket season is so small as to be almost negligible, and the probability of a ball so struck hitting anyone in Beckenham Road is very slight. The issue is thus one eminently appropriate for the decision of a jury, and Oliver, J., dealt with it in a jury would and gave his decision without elaborating his reasons. I think that the observations of Lord Thankerton in Glasgow Corporation v. Muir n(52) are apposite and that it is unfortunate that the Court of Appeal should have reversed the decision.

I do not think that the change which took place in 1910, when Beckenham Road a as made and a small strip next to it was taken from the ground in exchange for a strip at the other end, has much relevance. That change was made thirty-seven years before this accident, and the evidence about the infrequency of hits out of the ground is directed to the period since 1910, and is a sufficient basis for a judgment on the degree of risk and on the duty resting on the defendants. It was said by Singleton, L.J. n(53) , that the defendants might have escaped liability if in 1910 they

had considered the matter and decided that the risks were so small that nothing need be done, but that since they did not consider it at all they must bear the consequences. I am not, with respect, disposed to agree with this reasoning. We are concerned with the practical results of deliberation, and the consequences of failing to consider the risk and of considering this risk but deciding to do nothing are the same. The precautions suggested by the plaintiff, being either the moving of the wickets a few steps further away from the Beckenham Road end or the heightening of the fencing, would have had little or no effect in averting the peril. The only practical way in which the possibility of danger could have been avoided would have been to stop playing cricket on this ground. I doubt whether that fairly comes within paragraph (c) of the particulars of negligence - "failure to ensure that cricket balls would not be hit into the said road". That seems to point to some unspecified method of stopping balls from reaching the road while a game is in progress on the ground. But whatever view may be taken on

n(52) [1943] A. C. 448.

n(53) [1950] 1 K. B. 201, 207.

these matters, my conclusion is that the decision of Oliver, J., should have been respected as equivalent to a verdict of a jury on a question of fact.

I agree that the appeal should be allowed.

LORD OAKSEY: My Lords, I have come to the conclusion in this difficult case that Oliver, J.'s decision ought to be restored.

Cricket has been played for about ninety years on the ground in question and no ball has been proved to have struck anyone on the highways near the ground until the respondent was struck, nor has there been any complaint to the appellants. In such circumstances was it the duty of the appellants, who are the committee of the club, to take some

special precautions other than those they did take to prevent such an accident as happened? The standard of care in the law of negligence is the standard of an ordinarily careful man, but in my opinion an ordinarily careful man does not take precautions against every foreseeable risk. He can, of course, foresee the possibility of many risks, but life would be almost impossible if he were to attempt to take precautions against every risk which he can foresee. He takes precautions against risks which are reasonably likely to happen. Many foreseeable risks are extremely unlikely to happen and cannot be guarded against except by almost complete isolation. The ordinarily prudent owner of a dog does not keep his dog always on a lead on a country highway for fear it may cause injury to a passing motor cyclist, nor does the ordinarily prudent pedestrian avoid the use of the highway for fear of skidding motor cars. It may very well be that after this accident the ordinarily prudent committee man of a similar cricket ground would take some further precaution, but that is not to say that he would have taken a similar precaution before the accident. The case of Castle v. St. Augustine's Links Ld. n(54) is obviously distinguishable on the facts and there is nothing in the judgment to suggest that a nuisance was created by the first ball that fell on the road there in question.

There are many footpaths and highways adjacent to cricket grounds and golf courses on to which cricket and golf balls are occasionally driven, but such risks are habitually treated both by the owners and committees of such cricket and golf courses and by the pedestrians who use the adjacent footpaths and highways as negligible and it is not, in my opinion, actionable negligence not to take precautions to avoid such risks.

n(54) (1922) 38 T. L. R. 615.

LORD REID: My Lords, it was readily foreseeable that an accident such as befell the respondent might possibly

occur during one of the appellants' cricket matches Balls had been driven into the public road from time to time and it was obvious that, if a person happened to be where a ball fell, that person would receive injuries which might or might not be serious. On the other hand it was plain that the chance of that happening was small. The exact number of times a ball has been driven into the road is not known, but it is not proved that this has happened more than about six times in about thirty years. If I assume that it has happened on the average once in three seasons I shall be doing no injustice to the respondent's ease. Then there has to be considered the chance of a person being hit by a ball falling in the road. The road appears to be an ordinary side road giving access to a number of private houses, and there is no evidence to suggest that the traffic on this road is other than what one might expect on such a road. On the whole of that part of the road where a ball could fall there would often be nobody and seldom any great number of people. It follows that the chance of a person ever being struck even in a long period of years was very small.

This ease, therefore raises sharply the question what is the nature and extent of the duty of a person who promotes on his land operations which may cause damage to persons on an adjoining highway. Is it that he must not carry out or permit an operation which he knows or ought to know clearly can cause such damage, however improbable that result may be, or is it that he is only bound to take into account the possibility of such damage if such damage is a likely or probable consequence of what he does or permits, or if the risk of damage is such that a reasonable man, careful of the safety of his neighbour, would regard that risk as material?

I do not know of any case where this question has had to be decided or even where it has been fully discussed. Of course there are many cases in which somewhat similar questions have arisen. but generally speaking if injury to another person from the defendants' acts is reasonably

foreseeable the chance that injury will result is substantial and it does not matter in which way the duty is stated. In such cases I do not think that much assistance is to be got from analysing the language which a judge has used. More assistance is to be got from cases where judges have clearly chosen their language with care in setting out a principle, but even so, statements of the law must be read in

light of the facts of the particular case. Nevertheless, making all allowances for this, I do find at least a tendency to base duty rather on the likelihood of damage to others than on its foreseeability alone.

The definition of negligence which has perhaps been most often quoted is that of Alderson, B., in Blyth v. Birmingham Waterworks Co. n(55) : "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do". I think that reasonable men do in fact take into account the degree of risk and do not act on a bare possibility as they would if the risk were more substantial.

A more recent attempt to find a basis for a man's legal duty to his neighbour is that of Lord Atkin in Donoghue v. Stevenson n(56) . I need not quote the whole passage: for this purpose the important part is: "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour". Parts of Lord Atkin's statement have been criticized as being too wide, but I am not aware that it has been stated that any part of it is too narrow. Lord Atkin does not say "which you can reasonably foresee could injure your neighbour": he introduces the limitation "would be likely to injure your neighbour".

Lord Macmillan said in Bourhill v. Young n(57) : "The duty to take care is the duty to avoid doing or omitting to

do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed". Lord Thankerton in Glasgow Corporation v. Muir n(58) , after quoting this statement, said: "In my opinion, it has long been held in Scotland that all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man ... The court must be careful to place itself in the position of the person charged with the duty and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened". The law of Scotland does not differ in this matter from the law of England.

n(55) (1856) 11 Ex. 781, 784.

n(56) [1932] A. C. 562, 580.

n(57) [1943] A. C. 92, 104.

n(58) [1943] A. C. 448, 454-5.

There are other statements which may seem to differ but which I do not think are really inconsistent with this. For example, in Fardon v. Harcourt-Rivington n(59) , Lord Dunedin said: "This is such an extremely unlikely event that I do not think any reasonable man could be convicted of negligence if he did not take into account the possibility of such an occurrence and provide against it ... People must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities". I doubt whether Lord Dunedin meant the division into reasonable probabilities and fantastic possibilities to be exhaustive, so that anything more than a fantastic possibility must be regarded as a reasonable probability. What happened in that case was that a dog left in a car broke the window and a splinter from the glass entered the plaintiff's eye. Before

that had happened it might well have been described as a fantastic possibility, and Lord Dunedin did not have to consider a case nearer the borderline. I do not think it necessary to discuss other statements which may seem to be at variance with the trend of authority which I have quoted because I have not found any which is plainly inconsistent with it; and I have left out of account cases where the defendant clearly owed a duty to the plaintiff and by his negligence caused damage to the plaintiff. In such cases questions have arisen as to whether damages can only be recovered in respect of consequences which were foreseeable or were natural and probable, or whether damages can be recovered in respect of all consequences whether foreseeable or probable or not; but remoteness of damage in this sense appears to me to be a different question from that which arises in the present case.

Counsel for the respondent in this case had to put his case so high as to say that, at least as soon as one ball had been driven into the road in the ordinary course of a match, the appellants could and should have realized that that might happen again and that, if it did, someone might be injured; and that that was enough to put on the appellants a duty to take steps to prevent such an occurrence. If the true test is foreseeability alone I think that must be so. Once a ball has been driven on to a road without there being anything extraordinary to account for the fact, there is clearly a risk that another will follow, and if it does there is clearly a chance, small though it may be, that someone may be injured. On the theory that it is foreseeability alone that matters it would be irrelevant to consider how often a ball might be expected to land in the road and it would not matter whether

n(59) (1932) 146 L. T. 391, 392.

the road was the busiest street, or the quietest country lane; the only difference between these cases is in the degree of risk.

It would take a good deal to make me believe that the law has departed so far from the standards which guide ordinary careful people in ordinary life. In the crowded conditions of modern life even the most careful person cannot avoid creating some risks and accepting others. What a man must not do, and what I think a careful man tries not to do, is to create a risk which is substantial. Of course there are numerous cases where special circumstances require that a higher standard shall be observed and where that is recognized by the law. But I do not think that this case comes within any such special category. It was argued that this case comes within the principle in Rylands v. Fletcher n(60) , but I agree with your Lordships that there is no substance in this argument. In my judgment the test to be applied here is whether the risk of damage to a person on the road was so small that a reasonable man in the position of the appellants, considering the matter from the point of view of safety, would have thought it right to refrain from taking steps to prevent the danger.

In considering that matter I think that it would be right to take into account not only how remote is the chance that a person might be struck but also how serious the consequences are likely to be if a person is struck; but I do not think that it would be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all. I think that this is in substance the test which Oliver, J., applied in this case. He considered whether the appellants' ground was large enough to be safe for all practical purposes and held that it was. This is a question not of law but of fact and degree. It is not an easy question and it is one on which opinions may well differ. I can only say that having given the whole

matter repeated and anxious consideration I find myself unable to decide this question in favour of the respondent. But I think that this case is not far from the borderline. If this appeal is allowed, that does not in my judgment mean that in every case where cricket has been played on a ground for a number of years without accident or complaint those who organize matches there are safe to go on in reliance on past immunity. I would have reached a different conclusion if I had thought that the risk here had been other than extremely

n(60) (1868) L. R. 3 H. L. 330.

small, because I do not think that a reasonable man considering the matter from the point of view of safety would or should disregard any risk unless it is extremely small.

This case was also argued as a case of nuisance, but counsel for the respondent admitted that he could not succeed on that ground if the case on negligence failed. I therefore find it unnecessary to deal wi th the question of nuisance and reserve my opinion as to what constitutes unisance in cases of this character. In my judgment the appeal should be allowed.

LORD RADCLIFFE: My Lords, I agree that this appeal must be allowed. I agree with regret, because I have much sympathy with the decision that commended itself to the majority of the members of the Court of Appeal. I can see nothing unfair in the appellants being required to compensate the respondent for the serious injury that she has received as a result of the sport that they have organized on their cricket ground at Cheetham Hill. But the law of negligence is concerned less with what is fair than with what is culpable, and I cannot persuade myself that the appellants have been guilty of any culpable act or omission in this case.

I think that the case is in some respects a peculiar one, not easily related to the general rules that govern liability for negligence. If the test whether there has been a breach of duty were to depend merely on the answer to the question whether this accident was a reasonably foreseeable risk, I think that there would have been a breach of duty, for that such an accident might take place some time or other might very reasonably have been present to the minds of the appellants. It was quite foreseeable, and there would have been nothing unreasonable in allowing the imagination to dwell on the possibility of its occurring. But there was only a remote, perhaps I ought to say only a very remote, chance of the accident taking place at any particular time, for, if it was to happen, not only had a ball to carry the fence round the ground but it had also to coincide in its arrival with the presence of some person on what does not look like a crowded thoroughfare and actually to strike that person in some way that would cause sensible injury.

Those being the facts, a breach of duty has taken place if they show the appellants guilty of a failure to take reasonable care to prevent the accident. One may phrase it as "reasonable care" or "ordinary care" or "proper care" - all these phrases are to be found in decisions of authority - but the fact remains that,

unless there has been something which a reasonable man would blame as falling beneath the standard of conduct that he would set for himself and require of his neighbour, there has been no breaks of legal duty. And here, I think, the respondent's ease breaks down. It seems to me that a reasonable man, taking account of the chances against an accident happening, would not have felt himself called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the appellants did: in other words, he would have done nothing. Whether, if the unlikely event of an accident did occur and his play turn to

another's hurt, he would have thought it equally proper to offer no more consolation to his victim than the reflection that a social being is not immune from social risks, I do not say, for I do not think that that is a consideration which is relevant to legal liability.

I agree with the others of your Lordships that if the respondent cannot succeed in negligence she cannot succeed on any other head of claim.

Appeal allowed.

 ¿Cuál es el costo de la precaución? ¿Cuál es la probabilidad de que ocurra el daño?

 THE MARGHARITA; BOERO v. MARTINEZ No. 1,421 Circuit Court of Appeals, Fifth Circuit 140 F. 820 October 26, 1905

[*821] Before PARDEE, Circuit Judge, and NEWMAN and MEEK, District Judges.

MEEK, District Judge. On the 23d day of July, 1903, Martinez, the appellee, sailed in the bark Margharita, as a seaman, from Pisagua, in the republic of Chile, on a voyage to Savannah, Ga. On the 15th day of August, 1903, at half past 10 o'clock in the evening, when the bark was in the region of latitude 34 degrees 35' south and longitude 91 degrees west of Greenwich, he was sent aloft to assist in reefing a sail. While aloft about this work he lost his footing and was precipitated into the sea. He was rescued by his fellow sailors, and when hauled onto the deck it was found that while in the water his left leg had been bitten off about four inches below the knee by a shark or some other marine monster. The vessel did not deviate from its course, but continued on its voyage to Savannah, where it arrived on November 11, 1903.

The record does not disclose sufficient evidence to support appellee's first [**2] ground of complaint as set

forth in the libel, to the effect that he was thrown into the sea and received his injury because of the negligent manner in which the yardarm, upon and about which he had to work in reefing the sail, was fastened. There is much evidence that the yardarm was held by proper fastenings in a steady and taut position, as it should have been. The sailor who jumped overboard and rescued appellee from the deep soon afterward went aloft and made fast the foreroyal, the work appellee started to do, and he testifies the yardarm was secure and in order. The evidence of the appellee upon this subject is unsatisfactory and inconclusive, leaving the mind in doubt as to the cause and manner of his fall and as to the place from which he fell. We conclude, with the trial judge, that the accident resulting in the loss of appellee's leg must be attributed to the ordinary perils of navigation, the risk of which he assumed, and that therefore there can be no recovery on this ground.

The second ground of complaint relates to the duty of the master of the vessel to appellee after the happening of the accident, and presents a more serious and difficult question. The libel [**3] charges, in substance, that the master of the bark, in view of the accident to appellee and his consequent suffering, was in duty bound to provide him at the earliest moment possible with surgical aid; and, there being no surgeon or other person competent to deal with the emergency on board the bark, it became the duty of the master to put into the nearest port where such aid could be obtained; that the course of the bark lay in the direction of the Falkland Islands, and that the master should have put into Port Stanley in those islands, and, if not, then into one of the many ports lying intermediate between Port Stanley and Savannah, Ga., where surgical aid could have been obtained. Mr. Justice Brown, in *The Iroquois, 194 U.S. 240, 24 Sup. Ct.* 640, *48 L. Ed. 955,* says:

"The duty to provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners

by all maritime nations. It appears in the earliest codes [*822] of continental Europe and was expressly recognized by this court in the recent case of *The Osceola, 189 U.S. 158, 23 Sup. Ct.* 483, *47 L. Ed. 760*. Upon large passenger steamers a [**4] physician or surgeon is always employed, whose duty it is to minister to the passengers and crew in cases of sickness or accident.Of course, this would be impracticable upon an ordinary freighting vessel, where the master is presumed to have some knowledge of the treatment of diseases, and in ordinary cases stands in the place of a physician or surgeon (*The Wensleydale [D.C.], 41 Fed. 602*); but for the further protection of seamen vessels of the class of the Iroquois are compelled by law to be provided with a chest of medicines and with such anti-scorbutics, clothing, and slop chests as the climate, particular trade, and length of the voyage may require. U.S. Comp. St. 1901, pp. 3100-3102, §§ 4569, 4572, 4573."

The evidence locates the Margharita at the time of the accident off the west coast of South America, and about to round Cape Horn. Because of the distance and the prevailing winds, it would have taken her at least 23 days to have come into the region of the Falkland Islands. The bark was provided with a chest of medicines, with appropriate antiseptic dressings for wounds, with bandages, and with the necessary instructions for the use of these things. The acute conditions [**5] resulting from the amputation or biting off of appellee's leg were serious. Hemorrhage, swelling, inflammation, and fever followed. The hemorrhage was checked and controlled within four days by placing the stump in tar. The symptoms of spetic infection soon disappeared. The fever lasted but three or four days, and thereafter his temperature was normal. The logbook of the vessel shows this, and it finds support in the evidence of the appellee. He says about four days after the accident, when he was not feeling so very bad, he took a small map of the world which he had, and by the aid of

information secured from the sailors he made calculations as to where the vessel was at the time of the accident. This would indicate the subsidence of both hemorrhage and fever. The wound was regularly cleansed and bound in linen, with antiseptic applications. By direction of the master the man on watch regularly attended him and supplied his wants. He was provided a diet of light edibles, broth, and teas suitable to a person in his condition.

Only one action of the master in his treatment of the wounded seaman while on board the vessel is subject to criticism. He was placed in a cabin [**6] forward in the vessel and adjoining the water-closet. While the evidence discloses this fact, it is not shown that his location caused any special discomfort or added to his suffering.It would, however, have been more in harmony with his treatment in other regards, as well as more considerate and humane, to have given him a more favorable and cheerful location. After the expiration of 26 days the appellee began going on deck, where he sat at times for as much as six hours. Upon the arrival of the vessel at quarantine off Savannah, he was immediately sent to the hospital on the quarantine boat.There it was found that the soft parts of his leg had healed, leaving the bones exposed and protruding beyond the soft parts, which had contracted somewhat in the healing process. The exposed ends of the bones were in a necrotic condition. About one and one-half inches, or enough of the leg to secure what is termed a surgical flap, was amputated. The result obtained was satisfactory, and according to the surgeon who performed the operation and testified for appellee [*823] he now has a fairly good stump. The surgeon also testified appellee's general condition of health was good upon [**7] his arrival at the hospital; that he was not debilitated, as he stood the operation well and rallied well. Further, it was his opinion, and it is manifest to the common understanding, that an additional amputation would have been necessary, had the bones of libelant's leg not been cut or bitten off even with

the soft parts, unless surgical aid had been soon at hand after the accident and before the bones should get in a necrotic condition.

From this review of the history of the case, certain deductions can safely be drawn. Before surgical aid could have been obtained by putting into Port Stanley in the Falkland Islands, the nearest available point, the acute and dangerous stage resulting from the injury had passed. Before that port could have been reached the healing processes of nature were under way and had made progress. Putting into Port Stanley, or any other port intermediate between the place of the accident and Savannah, would not have avoided the necessity of an additional amputation. No permanent loss or disability was occasioned by the long delay in securing surgical aid. The appellee's leg was gone, and all that a surgeon could do was to put it in condition to heal [**8] properly with the soft parts covering the ends of the bones. Therefore, the only injury resulting from the delay was the prolongation of the suffering occasioned by the healing wound. With these conditions obtaining as to the appellee, was the master bound to deviate from his course and put into Port Stanley? The measure of a master's obligation to a seaman who is severely injured with the ship at sea is discussed by *Mr. Justice Brown in The Iroquois, supra.* He says:

"We cannot say, in every instance where a serious accident occurs, the master is bound to disregard every other consideration and put into the nearest port, though, if the accident happened within a reasonable distance of such port, his duty to do so would be manifest. Each case must depend upon its own circumstances, having reference to the seriousness of the injury, the care that can be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the shipowner, the direction of the wind and the probability of its continuing in the same direction, and the fact whether a

surgeon is likely to be found with competent skill to take charge of the case. With reference [**9] to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman with the geography and resources of the country. He is not absolutely bound to put into such port if the cargo be such as would be seriously injured by the delay. Even the claims of humanity must be weighed in a balance with the loss that would probably occur to the owners of the ship and cargo. A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen."

It is not shown the master knew of Port Stanley and its facilities for caring for the wounded, and no competent evidence was given as to these. The Supreme Court holds that masters plying upon vessels between New York and Pacific ports would be presumed to know of such familiar harbors as those of *Port Stanley and Valparaiso. The Iroquois, supra.* But it is not shown that the master of the Margharita ever plied upon any vessel around Cape Horn between any Atlantic American [**10] and Pacific ports. Whether, in view of the very [*824] general dissemination of information concerning world points and harbors and the consequent increasing exactions upon those who follow the sea, this presumption of knowledge should be held as well to pertain to and include masters of itinerant vessels and tramp ships, we do not deem necessary now to determine. The vessel's cargo was nitrate of soda, not perishable. The accident occurred upon "one of the loneliest and most tempestuous seas in the world," and in winter. The making of an unknown harbor would have been fraught with uncertainty, and possibly with difficulties of navigation. The delay incident to a deviation from the course and stoppage would have been of somewhat indefinite duration.

During this time the owners of the bark would sustain heavy loss in the wages and provisions of the crew and the demurrage of the bark.

We have examined the cases cited by appellee in support of the contention the master should have put into some intermediate harbor to secure surgical aid and relief, and it is worthy of note that in each of them, where this was held to be the duty of the master, permanent injuries and disabilities [**11] resulted from his failure to pursue this course. This is also true of all the reported cases that have come under our observation. See the *Iroquois, supra*; *Brown v. Overton, 1 Spr. 462*, Fed. Cas. No. 2,024; *The Chandos (D.C.) 4 Fed. 645*; *Whitney v. Olsen, 108 Fed. 292*, 47 C.C.A. 331; *The Troop (D.C.) 118 Fed. 769*. In *The Erskine M. Phelps, 131 Fed. 1*, 65 C.C.A. 239, it was held the master of the vessel was not negligent in failing to put back to Port Stanley to secure surgical aid for a seaman who received an injury in which both bones of his leg below the knee were broken, and who for want of expert surgical assistance may have suffered a permanent shortening of his leg. In that case the ship was within 540 miles and four days' sail of the port; but the ship was shorthanded, it was midwinter, and it was shown that, because of the hazardous nature of the entrance to Port Stanley, vessels made that harbor only as a last resort and in cases of dire necessity.

Having in contemplation the whole case, and especially considering that the appellee received all the care and attention from the master and his fellow seamen it was possible to give on a freighting ship, that he was not caused [**12] any additional permanent injury by reason of the delay in the treatment of his leg, that because of the failure to make Port Stanley or some intermediate port he simply experienced a prolongation of such suffering as would result from a healing wound, and that he finally received efficient and successful surgical aid at the expense of the

bark at Savannah, we conclude that the master is not chargeable with fault or neglect in failing to deviate from his course to procure such aid.

The decree is reversed, and the cause remanded to the District Court, with instructions to dismiss the libel.
NOTE. The following is the opinion of the court below:

SPEER, District Judge. The remarkable facts in view of which the libel is filed in this case are as follows: The libelant, Juan de la Cruz Silva Martinez, is a Chilian sailor, and was in the service of the Italian bark Margharita. On a voyage from Pisagua, Chile, to Savannah, he was sent aloft at night to [*825] reef one of the sails. Through some means, alleged by him to be the negligence with which the yard was fastened, he lost his footing and fell overboard. A member of the crew, Massimo Chiesa, an Italian, very bravely sprang [**13] overboard to his assistance and succeeded in supporting Martinez until a rope was thrown, when both were hauled aboard. As soon as the libelant reached the deck it was found that a "shark or other marine monster," to use the language of the libel, in the brief interval in which he had remained in the water, had bitten off his leg a few inches below the knee. The bark proceeded on her voyage to Savannah, which was a distance of about 7,000 miles from the point where the accident above narrated occurred. After that city was reached, Martinez brought his libel, ascribing his injuries to the negligence of the master and officers of the bark and seeks damages therefor.

The first assignment of negligence is that he had the right to rely on the fact that the yardarm was held taut, in a steady position, by the usual ropes and appliances for that purpose; that he had no reason to suspect that it was not properly secured; that he had no opportunity to avoid the effect of a sudden lurch of the vessel, which threw him into the ocean; that he did not contribute in any way to the accident; and that, had the yardarm been secure in its

proper position, he would not have been injured. With regard [**14] to this assignment the court is not at all satisfied, in view of the testimony, that it is supported by the evidence. There is much evidence to the effect that the yard was properly secured. We are also convinced from the evidence that the libelant himself does not know how he came to fall, and so far as that feature of the case is involved we are also convinced that the accident is probably ascribable to one of the ordinary perils of navigation, and it follows that no recovery can be had on this ground.

The second assignment is that the master of the bark, well knowing the terrible pain which libelant was suffering, the danger to his life from said injury, the loss of blood which had ensued, and the shock which necessarily followed, was in duty bound to see that the libelant was furnished at the earliest moment with competent and effective medical and surgical treatment, there being no surgeon on said bark or any person with knowledge or experience to deal with such emergencies; that it was the imperative duty of said master to proceed with all dispatch to the nearest port where libelant could receive proper attention; that libelant, knowing his critical condition and the further [**15] danger to him in crossing the tropics in such a condition, besought the master to land him at the nearest port or to place him on some passing steamer. In connection with the same assignment it is alleged that the bark was distant at the time of the accident only about 300 miles from Port Stanley in the Falkland Islands, that her course lay in the direction of said islands, and that Port Stanley could have been reached in about 72 hours. It is also alleged that there are numerous other towns along the coast of South America, in Cuba, Hayti, and Florida, where libelant could have received surgical treatment; but in the opinion of the court it is not essential to consider the averments with regard to ports other than Port Stanley. It is

further alleged that, instead of stopping at the nearest port where libelant could receive prompt and intelligent surgical treatment, in disregard of the tortures which he was hourly undergoing and the grave peril to life which resulted therefrom, the master did not touch any port until he reached his destination at Savannah on November 11, 1903.The injury having occurred on August 15th, it appears that nearly four months of suffering were endured [**16] by the libelant before he had proper surgical treatment. He alleges that the only treatment received by him was the application of such rude appliances as ropes and bits of sheets and shirts and a salve of unknown composition. He alleges that he suffered indescribable pain, and that when he reached Savannah his leg was in a horrible condition, the tibia protruding from the flesh for two inches or more, and the flesh, muscles, and tissues being in a decomposed condition, involving further risk to the libelant's life, and necessitating a further amputation, which has been made. He alleges that this great and continued suffering was gratuitous, and inflicted upon him by the failure of the master to land him at Port Stanley.

The grounds of defense to this feature of the libelant's claim are that the course of the Margharita was not to the west of the Falkland Islands, but was to its eastward some 150 miles; that sailing vessels do not ordinarily go between [*826] the Falkland Islands and South America; that the libelant made a contract to go to Savannah; that there was a medicine chest on board; that the leg was properly bound up, the flow of blood was stopped, and it was properly [**17] dressed; that libelant received all needed and proper attention; that on account of the ship and the condition of the winds it would have consumed months to have taken the libelant to any port; and that under the law of Italy and by the dictates of humanity this was not required. It is denied that the libelant besought the master of the ship to land him at the nearest port or place him on some passing steamer. On the contrary, he expressed himself as entirely

satisfied with what was being done for him and expressed the desire to be taken to Savannah. It is alleged that at the time the accident occurred that the bark was not within 300 miles of Port Stanley but was about 17 days distant, or about 1,800 or more miles therefrom, and that it would have been a dangerous thing for a sailing vessel to have gone to the Falkland Islands at this time.

The law upon this subject is clearly settled. In the case of *The Troop, 118 Fed. 769* (District Court of the District of Washington), where on a British ship a seaman fell to the deck and fractured the bones of his thigh and arm, and where, instead of sending libelant to the hospital, the captain undertook to reduce the fractures, and then [**18] sent libelant to his bunk in the forecastle and continued the voyage, giving him no further attention until reaching another port, 36 days later, it was held that the captain was guilty of gross inhumanity and violation of duty imposed on him by libelant's contract for service, which rendered the ship liable in damages for libelant's suffering and permanent injury.The court assessed damages at $4,000. In the case of *Whitney v. Olsen, 108 Fed. 292*, 47 C.C.A. 331, when 500 miles from Port Townsend, a sailor who had signed for a cod-fishing cruise was struck by the main boom, without fault on the part of any one, and his leg was broken in two places. There was no surgeon on board, nor any one competent to treat the injury. Libelant asked to be taken to shore, but the master proceeded to Unalaska, 1,750 miles from the place of injury, which he reached in 16 days, and from that port libelant was sent back to San Francisco. It was in that case held that it was the duty of the master under the facts shown to at once proceed to Port Townsend, which was the nearest available port where libelant could have received proper care and treatment, and that his failure to do so rendered the owners [**19] liable in damages. This case was decided by the Circuit Court of

Appeals of the Ninth Circuit, Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

A case singularly like that at bar is *The Iroquois, 118 Fed. 1003*, 55 C.C.A. 497.This also was decided by the Circuit Court of Appeals of the Ninth Circuit upon appeal from the District Court of the United States for the Northern District of California. There the appellee was an able-bodied seaman, one of the crew of the American ship Iroquois, on a voyage from New York to San Francisco. On February 23, 1900, while assisting in furling the mainsail during a gale, he accidentally, and without fault of his own or fault of the ship, fell from the mainyard to the deck, and sustained a fracture of two ribs and of both bones of his right leg below the knee. The vessel was then a few miles to the southward of Cape Horn, not distant from the point where Martinez was injured. The appellee was carried to carpenter's room, where the master set his leg in splints. He was then removed to the forecastle, where he remained during the remainder of the voyage. The vessel proceeded to San Francisco, arriving there on May 7, 1900. (This [**20] voyage was in duration a month shorter than that Martinez was compelled to endure.) Appellee was sent to the marine hospital. There it was found necessary to amputate his leg about three inches below his knee. The master of the Iroquois had no skill or experience in treating fractures. It appears that he set appellee's leg as well as he could and bound it and placed it upon a cushion, in order to elevate it above the body, and instructed the steward to give the appellee gruel, mush, and other light food. Appellee made no complaint of the treatment. The District Court found, and held under the circumstances of the case as disclosed by the evidence, that it was the absolute duty of the master of the ship to deviate from the course [*827] of the voyage for the purpose of procuring surgical aid for the appellee, and that the master was guilty of negligence in failing so to do. This finding was affirmed by that Circuit Court of Appeals which perhaps has had more opportunity

to acquire experience in maritime law as affecting sailing vessels than any other save that having jurisdiction in New York. Circuit Judge Gilbert, in rendering the opinion of the court, observes: "We entertain [**21] no doubt, in view of the evidence in the case and the law applicable thereto, that it was the duty of the master to bear away to some port of distress as soon as possible after the occurrence of the accident. There were several ports to which the appellee might have been taken for surgical treatment. The vessel could have returned to Port Stanley, the chief port of the East Falkland Islands. The District Court found that to have returned there would have involved a loss of time of there or four weeks, and in so finding made, we think, more than liberal allowance for probable delay and adverse winds." The court further holds: "It is no excuse that the master was ignorant, or that he believed the broken leg was healing properly, nor that the appellee made no complaint of the treatment. The duty of the master to the appellee was a positive one. In Robertson v. Baldwin, 165 U.S. 287, *17 Sup. Ct.* 331, *41 L. Ed. 715*, Mr. Justice Brown, referring to the protection accorded to seamen, observed that they are treated 'as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians.' The appellee had been disabled [**22] while in the service of the ship, and without any fault on his part. By the maritime law he was entitled to be healed at the expense of the ship. This obligation was imposed upon the ship in consideration of the appellee's services, and his undertaking to engage in possibly perilous voyages, and encounter hazards, if necessary, in the protection of the ship and cargo. The injury to the appellee was a serious one, and the master must be presumed to have known that it required careful and scientific treatment."

This case has been reviewed in an instructive opinion by Mr. Justice Brown for the Supreme Court of the United

States reported in June number, 1904, of the Advance Sheets, Lawyers' Co-operative Publishing Company, p. 640 et seq. Upon the measure of the master's obligation where a seaman is severely injured while the ship is at sea, the learned justice remarks: "We cannot say that in every instance where a serious accident occurs the master is bound to disregard every other consideration and put into the nearest port, though, if the accident happens within a reasonable distance of such port, his duty to do so would be manifest. Each case must depend upon its own circumstances, [**23] having reference to the seriousness of the injury, the care that can be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the shipowner, the direction of the wind, and the probability of its continuing in the same direction, and the fact whether a surgeon is likely to be found with competent skill to take charge of the case. With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman with the geography and resources of the country. He is not absolutely bound to put into such port if the cargo be such as would be seriously injured by the delay. Even the claims of humanity must be weighed in a balance with the loss that would probably occur to the owners of the ship and cargo. A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen." The court proceeds, in substance, to hold that the duty of the master [**24] of the Iroquois to put back to Port Stanley or to deviate from his course to San Carlos or the Evangelist Islands is very indefinite, remarking: "While masters plying upon vessels between New York and Pacific ports would be presumed to know of such familiar harbors as those of Port Stanley and Valparaiso, it by no means follows that they are chargeable with knowledge of every

port upon the southwest coast of South America or of their surgical facilities." It appearing that the prevailing winds were unfavorable to making Port Stanley his port of distress, he was held not chargeable with fault in failing to put back to Port Stanley. "With respect to [*828] Valparaiso," said the learned justice, "the case is different. This port appears to be about 1,500 miles from the place of the accident, and with favorable winds could have been reached in 14 days. It is true that the direct course from Cape Horn to San Francisco passes Valparaiso at a distance of about 600 miles; but the testimony all shows that if the Iroquois had borne away and hugged the South American coast she might have put into Valparaiso, left the libelant there and resumed her course without more than five or six [**25] days' detention. Valparaiso is a large city, with ample hospital facilities." The court also holds that no criticism was to be made of the treatment of the libelant, except it was thought that he should have been taken into the cabin, where he could have been more comfortably provided for. "The real question in the case is," said Justice Brown, "whether the master, knowing his ignorance of surgery, the serious nature of the libelant's injury, the poor accommodations for him in the forecastle, the liability of inflammation setting in and of the bones not uniting, the fact that he was to be carried through the tropics, where to an invalid confined in the forecastle the heat would be almost intolerable, he should not, even at the sacrifice of a week, have put into Valparaiso and left the libelant there in charge of the American consul." No importance is attached to the fact that the libelant made no complaint of his injuries, and none to the contention that he did not ask to be taken into an intermediate port. The master was held under the circumstances to be as if his legal guardian. Holding that the case was not entirely free from doubt, the decree of the court below holding that [**26] the master should have put into Valparaiso to secure aid for the seaman, was affirmed.

This deliverance seems to be authoritative as to the duty of this court in the case now before it. Taking the testimony of the master of the Margharita as conclusive, his vessel was as close to Port Stanley as was the Iroquois to Valparaiso. The deviation to Port Stanley from his course would not have been so great as that of the Iroquois to the Chilean city. According to other testimony he was in a very short distance of Port Stanley and this we believe to be true. As in the case of the Iroquois, he knew that he must cross the tropics. There could be no doubt of the grave seriousness of the injury, none that he was unable to give the wounded sailor the proper care. The consequences of delay to the interests of the shipowner must have been trivial. The direction of the wind was favorable and continuous. A competent English surgeon would certainly have been found in the marine hospital at Port Stanley. That port is in a healthful climate and is widely known as a harbor to which vessels experiencing calamities of one sort and another in rounding Cape Horn repair for assistance. As far back [**27] as the date of the latest publication of the Encyclopaedia Britannica it is stated that as many as 50 vessels a year put in there on account of injuries. The British government keeps up a considerable military post at that point. How much stronger, then, is the case against the master of the Margharita than against the master of the Iroquois. It is not difficult to conceive the unspeakable agony -- indeed, torture -- which the libelant must have experienced in his long voyage of more than 7,000 miles to Savannah with the ragged extremity of his cruelly wounded leg incased at times in a box of hot tar and at other times rudely bandaged by the kind, but inexperienced, hands of his shipmates. According to his own testimony his sufferings were so great that he often lost consciousness. This seems to have been inevitable from the nature of his injury and the terrible shock to body and mind it must have occasioned. According to the testimony of the physician in Savannah, his leg was in a lamentable condition when he reached that port.It is indispensable that in cases of serious

injuries to seamen, or in case of their dangerous sickness, that in order to obtain proper surgical or medical [**28] assistance for them, the courts of admiralty, which proceed ever upon the broadest principles of humanity and justice, should enforce the reasonable rules so frequently announced by the courts, and as we have seen so clearly stated in the opinion of the *Supreme Court in Re The Iroquois, supra.* Such is the duty of the courts, not only to compensate the seaman for his unnecessary and unmerited suffering when the duty of the ship is disregarded, but to emphasize the importance of humane and correct judgment under the circumstances on the part of the master.
Under the circumstances we feel constrained to render a decree in favor of the libelant and assess his damages at $1,500.

 ¿Cuál es el costo de la precaución? ¿Cuál es la probabilidad de que ocurra el daño?

 BALTIMORE & OHIO RAILROAD COMPANY v. GOODMAN, ADMINISTRATRIX No. 58 SUPREME COURT OF THE UNITED STATES 275 U.S. 66; 48 S. Ct. 24; 72 L. Ed. 167 October 20, 1927, Argued October 31, 1927, Decided

[*69] [**25] MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit brought by the widow and administratrix of Nathan Goodman against the petitioner for causing his death by running him down at a grade crossing. The defence is that Goodman's own negligence caused the death. At the trial, the defendant asked the Court to direct a verdict for it, but the request, and others looking to the same direction, were refused, and the plaintiff got a verdict and a judgment which was affirmed by the Circuit Court of Appeals. *10 F.2d 58.*

Goodman was driving an automobile truck in an easterly direction and was killed by a train running southwesterly across the road at a rate of not less than sixty miles an hour. The line was straight, but it is said by the respondent that Goodman 'had no practical view' beyond a section house two hundred and forty-three feet north of the crossing until he was about twenty feet from the first rail, or, as the respondent argues, twelve feet from danger, and that then the engine was still obscured by the section house. He had been driving at the rate of ten or twelve miles an hour, but had cut down his rate to five or six miles at about forty feet from the crossing. It is thought that there was an emergency in which, so far as appears, Goodman did all that he could.

We do not go into further details as to Goodman's precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that [*70] he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman found himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop. It is true as said in *Flannelly v. Delaware & Hudson Co., 225 U.S. 597, 603*, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for

all by the Courts. See *Southern Pacific Co*. v. *Berkshire, 254 U.S. 415, 417, 419*.
Judgment reversed.

¿Cuál era el coste para el tren de detenerse? ¿Cuál era la probabilidad de que algún motorista estuviera cruzando allí en ese momento?

Goodman debiera haber tomado la precaución de detenerse para ver si se aproximaba el tren antes de cruzar las rieles, tratándose del cuidado de su propia vida. ¿Pero, por qué? ¿Quién es el *least cost avoider*?

BREACH: CUSTOM

THE T. J. HOOPER; THE NORTHERN NO. 30 AND NO. 17; THE MONTROSE; In re EASTERN TRANSP. CO.; NEW ENGLAND COAL & COKE CO. v. NORTHERN BARGE CORPORATION; H. N. HARTWELL & SON, Inc., v. SAME. No. 430 Circuit Court of Appeals, Second Circuit 60 F.2d 737 July 21, 1932

[*737] Before L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges.
L. HAND, Circuit Judge.

The barges No. 17 and No. 30, belonging to the Northern Barge Company, had lifted cargoes of coal at Norfolk, Virginia, for New York in March, 1928. They were towed by two tugs of the petitioner, the "Montrose" and the "Hooper," and were lost off the Jersey Coast on March tenth, in an easterly gale. The cargo owners sued the barges under the contracts of carriage; the owner of the barges sued the tugs under the towing contract, both for its own loss and as bailee of the cargoes; the owner of the tug filed a petition to limit its liability. All the suits were joined and heard together, and the judge found that all the vessels were unseaworthy; the tugs, because they did not carry

radio receiving sets by which they could have seasonably got warnings of a change in the weather which should have caused them to seek shelter in the Delaware Breakwater en route. He therefore entered an interlocutory decree holding each tug and barge jointly liable to each cargo owner, and each [**2] tug for half damages for the loss of its barge. The petitioner appealed, and the barge owner appealed and filed assignments of error.

Each tug had three ocean going coal barges in tow, the lost barge being at the end. The "Montrose," which had the No. 17, took an outside course; the "Hooper" with the No. 30, inside. The weather was fair without ominous symptoms, as the tows passed the Delaware Breakwater about midnight of March eighth, and the barges did not get into serious trouble until they were about opposite Atlantic City some sixty or seventy miles to the north. The wind began to freshen in the morning of the ninth and rose to a gale before noon; by afternoon the second barge of the Hooper's tow [*738] was out of hand and signalled the tug, which found that not only this barge needed help, but that the No. 30 was aleak.Both barges anchored and the crew of the No. 30 rode out the storm until the afternoon of the tenth, when she sank, her crew having been meanwhile taken off. The No. 17 sprang a leak about the same time; she too anchored at the Montrose's command and sank on the next morning after her crew also had been rescued. The cargoes and the tugs maintain that [**3] the barges were not fit for their service; the cargoes and the barges that the tugs should have gone into the Delaware Breakwater, and besides, did not handle their tows properly.

The evidence of the condition of the barges was very extensive, the greater part being taken out of court. As to each, the fact remains that she foundered in weather that she was bound to withstand. A March gale is not unusual north of Hatteras; barges along the coast must be ready to meet one, and there is in the case at bar no adequate explanation for the result except that these were not well-

found. The test of seaworthiness, being ability for the service undertaken, the case might perhaps be left with no more than this. As to the cargoes, the charters excused the barges if "reasonable means" were taken to make them seaworthy; and the barge owners amended their answers during the trial to allege that they had used due diligence in that regard. As will appear, the barges were certainly not seaworthy in fact, and we do not think that the record shows affirmatively the exercise of due diligence to examine them. The examinations at least of the pumps were perfunctory; had they been sufficient the [**4] loss would not have occurred.

To take up the evidence more in detail, the bargee of the No. 30 swore that she was making daily about a foot to eighteen inches of water when she left Norfolk, and Hutson, her owner's agent in charge of her upkeep, testified that a barge which made five inches was unseaworthy. Some doubt is thrown upon the bargee's testimony because he had served upon upon moulded barges and the No. 30 was flat-bottomed; from which it is argued that he could not have known just how much she really leaked. Nevertheless, he was a man of experience, who swore to a fact of his own observation. We cannot discredit him merely upon the hypothesis that he did not know how to sound his boat. It is not however necessary to depend upon the proof of her leaking when she left Norfolk; she began to leak badly under stress of weather before which she should have been staunch, at least so far that her pumps could keep her alive, and her pumps failed. She had two kinds, hand and steam, but the first could not be manned. While the leaks had been gaining a little before the breakdown, it is probable, or at least possible, that had the tubes not burst, she would have lived, for [**5] the gale moderated on Friday night. The tubes were apparently sound when put in about a year before, and it does not appear why they burst; Hutson was very ambiguous as to how long they should

last. The barge answers that it was the cold water which burst them, but the bargee gave no such explanation. Moreover, if she leaked so badly that the water gained until it reached the tubes, this was itself evidence of unseaworthiness. If a vessel is to be excused for leaking, she must at least be able to keep the leak down so as not to flood the pumps.

The unseaworthiness of the No. 17 is even clearer. Not only did she begin to leak under no greater stress of weather than the No. 30, but her pumps also failed, though for quite another reason. Part of her cargo was held back from the chain locker by a temporary bulkhead, which carried away because of the barge's pounding. She had begun to leak early in the morning of the ninth, but her bargee believed that he could have kept down the water if he could have used his pumps. When the bulkhead gave, the coal fell into the chain locker and clogged the suction, letting the bow fill without relief, putting the barge by the head and making [**6] her helpless. In addition a ventilator carried away, the water finding entrance through the hole; and the judge charged her for the absence of a proper cover, on which however we do not rely; the failure of the bulkhead was quite enough. As already intimated, we need not hold that a barge is necessarily unseaworthy because she leaks in a gale; the heaving and straining of the seams will often probe weak spots which no diligence can discover. It is, however, just against that possibility that the pumps are necessary; whatever impedes their action, or might reasonably be anticipated to do so, is a defect which makes her unfit for her service. As to both barges, therefore, we do not resort to the admissions put in the mouths of both bargees, some of them too extravagant for credence. We do not believe for instance that the No. 30 had six feet of water in her when she broke [*739] ground at Norfolk, or that she leaked as well when light as when loaded. We doubt also whether the No. 17 was leaking two inches an hour at Norfolk, or that her bargee complained of

an overload. Admissions, especially in cases of this kind, are notoriously unreliable; and watermen are not given to [**7] understatement.

A more difficult issue is as to the tugs. We agree with the judge that once conceding the propriety of passing the Breakwater on the night of the eighth, the navigation was good enough. It might have been worse to go back when the storm broke than to keep on. The seas were from the east and southeast, breaking on the starboard quarter of the barges, which if tight and well found should have lived. True they were at the tail and this is the most trying position, but to face the seas in an attempt to return was a doubtful choice; the masters' decision is final unless they made a plain error. The evidence does not justify that conclusion; and so, the case as to them turns upon whether they should have put in at the Breakwater.

The weather bureau at Arlington broadcasts two predictions daily, at ten in the morning and ten in the evening. Apparently there are other reports floating about, which come at uncertain hours but which can also be picked up. The Arlington report of the morning read as follows: "Moderate north, shifting to east and southeast winds, increasing Friday, fair weather to-night." The substance of this, apparently from another source, reached [**8] a tow bound north to New York about noon, and, coupled with a falling glass, decided the master to put in to the Delaware Breakwater in the afternoon. The glass had not indeed fallen much and perhaps the tug was over cautious; nevertheless, although the appearances were all fair, he thought discretion the better part of valor. Three other tows followed him, the masters of two of which testified. Their decision was in part determined by example; but they too had received the Arlington report or its equivalent, and though it is doubtful whether alone it would have turned the scale, it is plain that it left them in an indecision which needed little to be resolved on the side of

prudence; they preferred to take no chances, and chances they believed there were. Courts have not often such evidence of the opinion of impartial experts, formed in the very circumstances and confirmed by their own conduct at the time.

Moreover, the "Montrose" and the "Hooper" would have had the benefit of the evening report from Arlington had they had proper receiving sets. This predicted worse weather; it read: "Increasing east and southeast winds, becoming fresh to strong, Friday night and increasing [**9] cloudiness followed by rain Friday." The bare "increase" of the morning had become "fresh to strong." To be sure this scarcely foretold a gale of from forty to fifty miles for five hours or more, rising at one time to fifty-six; but if the four tows thought the first report enough, the second ought to have laid any doubts. The master of the "Montrose" himself, when asked what he would have done had he received a substantially similar report, said that he would certainly have put in. The master of the "Hooper" was also asked for his opinion, and said that he would have turned back also, but this admission is somewhat vitiated by the incorporation in the question of the statement that it was a "storm warning," which the witness seized upon in his answer. All this seems to us to support the conclusion of the judge that prudent masters, who had received the second warning, would have found the risk more than the exigency warranted; they would have been amply vindicated by what followed. To be sure the barges would, as we have said, probably have withstood the gale, had they been well found; but a master is not justified in putting his tow to every test which she will survive, if she [**10] be fit. There is a zone in which proper caution will avoid putting her capacity to the proof; a coefficient of prudence that he should not disregard. Taking the situation as a whole, it seems to us that these masters would have taken undue chances, had they got the broadcasts.

They did not, because their private radio receiving sets, which were on board, were not in working order. These belonged to them personally, and were partly a toy, partly a part of the equipment, but neither furnished by the owner, nor supervised by it. It is not fair to say that there was a general custom among coastwise carriers so as to equip their tugs. One line alone did it; as for the rest, they relied upon their crews, so far as they can be said to have relied at all. An adequate receiving set suitable for a coatwise tug can now be got at small cost and is reasonably reliable if kept up; obviously it is a source of great protection to their tows. Twice every day they can receive these predictions, [*740] based upon the widest possible in formation, available to every vessel within two or three hundred miles and more. Such a set is the ears of the tug to catch the spoken word, just as the [**11] master's binoculars are her eyes to see a storm signal ashore. Whatever may be said as to other vessels, tugs towing heavy coal laden barges, strung out for hald a mile, have little power to maneuvre, and do not, as this case proves, expose themselves to weather which would not turn back stauncher craft. They can have at hand protection against dangers of which they can learn in no other way.

Is it then a final answer that the business had not yet generally adopted receiving sets? There are yet, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence; we have indeed given some currency to the notion ourselves. *Ketterer v. Armour & Co. (C.C.A.) 247 F. 921, 931*, L.R.A. 1918D, 798; *Spang Chalfant & Co. v. Dimon, etc., Corp. (C.C.A.) 57 F.(2d) 965, 967*. Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions

so imperative that even their universal disregard will [**12] not excuse their omission. *Wabash R. Co. v. McDaniels, 107 U.S. 454, 459-461, 2 S. Ct. 932, 27 L. Ed. 605*; *Texas & P. R. Co. v. Behymer, 189 U.S. 468, 470, 23 S. Ct. 622, 47 L. Ed. 905*; *Shandrew v. Chicago, etc., R. Co., 142 F. 320, 324, 325* (C.C.A. 8); *Maynard v. Buck, 100 Mass. 40*. But here there was no custom at all as to receiving sets; some had them, some did not; the most that can be urged is that they had not yet become general. Certainly in such a case we need not pause; when some have thought a device necessary, at least we may say that they were right, and the otghers too slack. The statute (*section 484, title 46, U.S. Code* [*46 USCA § 484*]) does not bear on this situation at all. It prescribes not a receiving, but a transmitting set, and for a very different purpose; to call for help, not to get news. We hold the tugs therefore because had they been properly equipped, they would have got the Arlington reports. The injury was a direct consequence of this unseaworthiness.

Decree affirmed.

 ¿Cuál era el coste de la precaución de equipar los botes con aparatos de radio, capaces de recibir el aviso de que se acercaba una tormenta?

 El ordenamiento jurídico establece como baremo la costumbre para saber si, en las actuales circunstancias, debería extremarse una precaución o no. Sin embargo, ¿cuándo el desarrollo tecnológico deberá desplazar a la costumbre en la determinación de la culpa?

 Theresa Brune & another v. Stanton Belinkoff Supreme Judicial Court of Massachusetts 354 Mass. 102; 235 N.E.2d 793 January 4, 1968, Argued April 3, 1968, Decided

[*102] [**794] SPALDING In this action of tort for malpractice Theresa Brune (plaintiff) seeks to recover from the defendant because of alleged negligence in

administering a spinal anesthetic. There is a count by the plaintiff's husband for consequential [*103] damages. The jury returned verdicts for the defendant on each count. The case comes here on the plaintiffs' exceptions to the judge's refusal to grant certain requests for instructions, to portions of the charge, and to the denial of the plaintiffs' motion for a new trial.

The plaintiff was delivered of a baby on October 4, 1958, at St. Luke's Hospital in New Bedford. During the delivery, the defendant, a specialist in anesthesiology [**795] practising in New Bedford, administered a spinal anesthetic to the plaintiff containing eight milligrams of pontocaine in one cubic centimeter of ten per cent solution of glucose. When the plaintiff attempted to get out of bed eleven hours later, she slipped and fell on the floor. The plaintiff subsequently complained of numbness and weakness in her left leg, an affliction which appears to have persisted to the time of trial.

Testimony was given by eight physicians. Much of it related to the plaintiff's condition. There was ample evidence that her condition resulted from an excessive dosage of pontocaine.

There was medical evidence that the dosage of eight milligrams of pontocaine was excessive and that good medical practice required a dosage of five milligrams or less. There was also medical evidence, including testimony of the defendant, to the effect that a dosage of eight milligrams in one cubic centimeter of ten per cent dextrose was proper. There was evidence that this dosage was customary in New Bedford in a case, as here, of a vaginal delivery. [1]

1 The defendant testified that such variations as there were in the dosages administered in Boston and New York, as distinct from New Bedford, were due to differences in obstetrical technique. The New

> Bedford obstetricians use suprafundi pressure (pressure applied to the uterus during delivery) which "requires a higher level of anesthesia."

1. The plaintiffs' exception to the refusal to give their first request for instruction and their exception to a portion of the charge present substantially the same question and will be considered together. The request reads: "As a specialist, the defendant owed the plaintiff the duty to have and use the care and skill commonly possessed and used by similar specialist[s] in like circumstances." The relevant [*104] portion of the charge excepted to was as follows: "[The defendant] must measure up to the standard of professional care and skill ordinarily possessed by others in his profession in the community, which is New Bedford, and its environs, of course, where he practices, having regard to the current state of advance of the profession. If, in a given case, it were determined by a jury that the ability and skill of the physician in New Bedford were fifty percent inferior to that which existed in Boston, a defendant in New Bedford would be required to measure up to the standard of skill and competence and ability that is ordinarily found by physicians in New Bedford."

The basic issue raised by the exceptions to the charge and to the refused request is whether the defendant was to be judged by the standard of doctors practising in New Bedford.

The instruction given to the jury was based on the rule, often called the "community" or "locality" rule first enunciated in *Small v. Howard, 128 Mass. 131*, a case decided in 1880. There the defendant, a general practitioner in a country town with a population of 2,500, was consulted by the plaintiff to treat a severe wound which required a considerable degree of surgical skill. In an action against the defendant for malpractice this court defined his duty as follows: " It is a matter of common knowledge that a physician in a small country village does not usually make

a specialty of surgery, and, however well informed he may be in the theory of all parts of his profession, he would, generally speaking, be but seldom called upon as a surgeon to perform difficult operations. He would have but few opportunities of observation and practice in that line such as public hospitals or large cities would afford. The defendant was applied to, being the practitioner in a small village, and we think it was correct to rule that 'he was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practising in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree [**796] of art and skill possessed by eminent surgeons practising in large cities, and [*105] making a specialty of the practice of surgery.'" The rule in *Small* v. *Howard* has been followed and applied in a long line of cases, some of which are quite recent. *Ernen v. Crofwell, 272 Mass. 172, 175. Bouffard v. Canby, 292 Mass. 305, 309. Vigneault v. Dr. Hewson Dental Co. 300 Mass. 223, 225. Berardi v. Menicks, 340 Mass. 396, 400. Ramsland v. Shaw, 341 Mass. 56, 61. Riggs v. Christie, 342 Mass. 402, 405-406. Delaney v. Rosenthall, 347 Mass. 143, 146.* Although in some of the later decisions the court has said that the doctor must exercise the care prevailing in "the locality where he practiced" it is doubtful if the court intended to narrow the rule in *Small* v. *Howard* where the expression "similar localities" was used. [2]

2 For a general collection of cases dealing with the community or locality rule, see Annotation, *8 A. L. R. 2d 772*.

The rationale of the rule of *Small* v. *Howard* is that a physician in a small or rural community will lack opportunities to keep abreast with the advances in the profession and that he will not have the most modern facilities for treating his patients. Thus, it is unfair to hold the country doctor to the standard of doctors practising in

large cities. The plaintiffs earnestly contend that distinctions based on geography are no longer valid in view of modern developments in transportation, communication and medical education, all of which tend to promote a certain degree of standardization within the profession. Hence, the plaintiffs urge that the rule laid down in *Small* v. *Howard* almost ninety years ago now be reexamined in the light of contemporary conditions.

The "community" or "locality" rule has been modified in several jurisdictions and has been subject to critical comment in legal periodicals. [3]

> 3 See note, 14 Stanford L. Rev. 884; note 36 Iowa L. Rev. 681; note, 35 Minn. L. Rev. 186, 190; note, 60 Northwestern L. Rev. 834, 837; note, 36 Marquette L. Rev. 392; McCoid, The Care Required of Medical Practitioners, 12 Vanderbilt L. Rev. 549, 569 et. seq. See also Prosser, Torts (3d ed.) § 32 (pp. 166-167).

One approach, in jurisdictions where the "same community rule" obtains, has been to extend the geographical area which [*106] constitutes the community. The question arises not only in situations involving the standard of care and skill to be exercised by the doctor who is being sued for malpractice, but also in the somewhat analogous situations concerning the qualifications of a medical expert to testify. See *Sampson v. Veenboer, 252 Mich. 660, 666-667* (expert from another State permitted to testify as to standards in Grand Rapids, in view of evidence that he was familiar with standards in similar localities). In Connecticut which has the "same locality rule," it was said by the Supreme Court of Errors, "Our rule does not restrict the territorial limitation to the confines of the town or city in which the treatment was rendered, and under modern conditions there is perhaps less reason than formerly for such restriction. There is now no lack of opportunity for the physician or surgeon in smaller communities to keep abreast of the advances made in his profession, and to be familiar with the latest methods and practices adopted. It is

not unreasonable to require that he have and exercise the skill of physicians and surgeons in similar localities in the same general neighborhood. It may not be sufficient if he exercise only that degree of skill possessed by other practitioners in the community in which he lives." *Geraty v. Kaufman, 115 Conn. 563, 573-574.*

Other courts have emphasized such factors as accessibility to medical facilities and experience. See *Tvedt v. Haugen, 70 N. D. 338*, where the defendant doctor recognized that the [**797] plaintiff's injury required the care of a specialist but failed to call this to the attention of the plaintiff. The court said at p. 349: "The duty of a doctor to his patient is measured by conditions as they exist, and not by what they have been in the past or may be in the future. Today, with the rapid methods of transportation and easy means of communication, the horizons have been widened, and the duty of a doctor is not fulfilled merely by utilizing the means at hand in the particular village where he is practicing. So far as medical treatment is concerned, the borders of the locality and community have, in effect, been extended so as to include those centers readily accessible where appropriate [*107] treatment may be had which the local physician, because of limited facilities or training, is unable to give." And in *Cavallaro v. Sharp, 84 R. I. 67*, a medical expert formerly of Philadelphia was allowed to testify as to required degree of care in Providence, the court saying at page 72, "The two localities cannot be deemed so dissimilar as to preclude an assumption that mastoidectomies are performed by otologists in Providence with the same average degree of careful and skillful technique as in Philadelphia. It is to be remembered in this connection that Providence is not a small city but is the metropolitan center of upwards of a million people, and moreover is in reasonable proximity to Boston, one of the principal medical centers of the country."

Other decisions have adopted a standard of reasonable care and allow the locality to be taken into account as one of the circumstances, but not as an absolute limit upon the skill required. See *McGulpin v. Bessmer, 241 Iowa, 1119*; *Viita v. Fleming, 132 Minn. 128, 135-137*. In the case last cited the court said at page 137, "Frequent meetings of medical societies, articles in the medical journals, books by acknowledged authorities, and extensive experience in hospital work, put the country doctor on more equal terms with his city brother. . . . [W]e are unwilling to hold that he is to be judged only by the qualifications that others in the same village or similar villages possess."

Recently the Supreme Court of Washington (sitting en banc) virtually abandoned the "locality" rule in *Pederson v. Dumouchel, 72 Wash. 2d 73*. There the trial judge charged that the defendant doctor was required to exercise the care and skill of others in the same or similar localities. This instruction, on appeal, was held to be erroneous. In the course of its well reasoned opinion the court said, "The 'locality rule' has no present-day vitality except that it may be considered as *one* of the elements to determine the degree of care and skill which is to be expected of the average practitioner of the class to which he belongs. The degree of care which must be observed is, of course, that of an average, competent practitioner acting in the same or similar circumstances. [*108] In other words, local practice within geographic proximity is one, but not the only factor to be considered. No longer is it proper to limit the definition of the standard of care which a medical doctor or dentist must meet solely to the practice or custom of a particular locality, a similar locality, or a geographic area." In another recent case the Supreme Court of Appeals of West Virginia criticised the "locality" rule and appears to have abandoned it in the case of specialists. *Hundley v. Martinez, 151 W. Va. 977*.

In cases involving specialists the Supreme Court of New Jersey has abandoned the "locality" rule. See *Carbone*

v. Warburton, 11 N. J. 418, where it was said at page 426, "'[O]ne who holds himself out as a specialist must employ not merely the skill of a general practitioner, but also the special degree of skill normally possessed by the average physician who devotes special study and attention to the particular organ or disease or injury involved, [**798] having regard to the present state of scientific knowledge.'" [4]

> 4 The decreasing importance of local communities in relation to the qualification of real estate experts was discussed by this court in *Muzi v. Commonwealth, 335 Mass. 101, 105-106*.

Because of the importance of the subject, and the fact that we have been asked to abandon the "locality" rule we have reviewed the relevant decisions at some length. We are of opinion that the "locality" rule of *Small* v. *Howard* which measures a physician's conduct by the standards of other doctors in similar communities is unsuited to present day conditions. The time has come when the medical profession should no longer be Balkanized by the application of varying geographic standards in malpractice cases. Accordingly, *Small* v. *Howard* is hereby overruled. The present case affords a good illustration of the inappropriateness of the "locality" rule to existing conditions. The defendant was a specialist practising in New Bedford, a city of 100,000, which is slightly more than fifty miles from Boston, one of the medical centers of the nation, if not the world. This is a far cry from the country doctor in *Small* v. *Howard*, who ninety years ago was called upon to perform difficult surgery. [*109] Yet the trial judge told the jury that if the skill and ability of New Bedford physicians were "fifty percent inferior" to those obtaining in Boston the defendant should be judged by New Bedford standards, "having regard to the current state of advance of the profession." This may well be carrying the rule of *Small* v. *Howard* to its logical conclusion, but it is, we submit, a reductio ad absurdum of the rule.

The proper standard is whether the physician, if a general practitioner, has exercised the degree of care and skill of the average qualified practitioner, taking into account the advances in the profession. In applying this standard it is permissible to consider the medical resources available to the physician as *one* circumstance in determining the skill and care required. Under this standard some allowance is thus made for the type of community in which the physician carries on his practice. See Prosser, Torts (3d ed.) § 32 (pp. 166-167); compare *Restatement 2d: Torts, § 299A, comment g*.

One holding himself out as a specialist should be held to the standard of care and skill of the average member of the profession practising the specialty, taking into account the advances in the profession. And, as in the case of the general practitioner, it is permissible to consider the medical resources available to him.

Because the instructions permitted the jury to judge the defendant's conduct against a standard that has now been determined to be incorrect, the plaintiffs' exceptions to the charge and to the refusal of his request must be sustained.

2. The plaintiffs excepted to the refusal of the judge to give certain other requests for instructions. Of these we shall deal with only the eleventh, as the others are not likely to arise on a retrial of the case. [5] The ruling arose in this setting. There was evidence that in a brochure published by the manufacturers of pontocaine the use of two to five milligrams in dextrose was recommended for a vaginal [*110] (saddle block) delivery, and the defendant testified that he was familiar with the contents of this brochure. There was medical evidence that it was good medical practice to follow the recommendations of the manufacturer with respect to dosages for spinal anesthetics. There was, however, testimony by an anesthesiologist that the recommendations contained in the brochure were "intended as a guide to physicians, not to

anesthesiologists." In support of their request the plaintiffs invoke the decisions holding that a violation of a rule previously adopted by a defendant [**799] in relation to the safety of third persons is admissible as tending to show negligence of the defendant's disobedient servant. *Stevens v. Boston Elev. Ry. 184 Mass. 476*. We think that this principle has no application here. The statement concerning dosages in the brochure was quite different from the rule adopted for the safety of third persons in the *Stevens* case. It was no more than a recommendation, and there was a difference of opinion among the anesthesiologists as to whether the failure to follow it was improper practice. The judge rightly refused to give the requested instruction.

> 5 The eleventh request was: "The failure of the defendant to follow the instructions of the manufacturer in the use of Pontocaine is evidence of negligence."

Exceptions sustained.

 ¿Cómo utilizan la costumbre los tribunales para determinar, en el ejercicio de la medicina, qué precauciones deberían extremarse en el cuidado de un paciente?

 ¿Cómo ha pervertido el desarrollo tecnológico el sistema de responsabilidad civil en Estados Unidos por impericia profesional o *malpractice*?

BREACH: NEGLIGENCE PER SE

 Elizabeth Martin, as Administratrix of the Estate of William J. Martin, Deceased, Appellant, v. Samuel A. Herzog, Respondent, Impleaded with Another Court of Appeals of New York 228 N.Y. 164; 126 N.E. 814 December 11, 1919, Argued February 24, 1920, Decided

[*166] [**814] CARDOZO The action is one to recover damages for injuries resulting in death.

Plaintiff and her husband, while driving toward Tarrytown in a buggy on the night of August 21, 1915, were struck by the defendant's automobile coming in the opposite direction. They were thrown to the ground, and the man was killed. At the point of the collision the highway makes a curve. The car was rounding the curve when suddenly it came upon the buggy, emerging, the defendant tells us, from the gloom. Negligence is charged against the defendant, the driver of the car, in that he did not keep to the right of the center of the highway (*Highway Law, sec. 286, subd. 3*; sec. 332; Consol. Laws, ch. 25). Negligence is charged against the plaintiff's interstate, the driver of the wagon, in that he was traveling without lights (*Highway Law, sec. 329*a, as amended by L. 1915, ch. 367). There is no evidence [*167] that the defendant was moving at an excessive speed. There is none of any defect in the equipment of his car. The beam of light from his lamps pointed to the right as the wheels of his car turned along the curve toward the left; and looking in the direction of the plaintiff's approach, he was peering into the shadow. The case against him must stand, therefore, if at all, upon the divergence of his course from the center of the highway. The jury found him delinquent and his victim blameless. The Appellate Division reversed, and ordered a new trial.

We agree with the Appellate Division that the charge to the jury was erroneous and misleading. The case was tried on the assumption that the hour had arrived when lights were due. It was argued on the same assumption in this court. In such circumstances, it is not important whether the hour might have been made a question for the jury (*Todd v. Nelson, 109 N. Y. 316, 325)*. A controversy put out of the case by the parties is not to be put into it by us. We say this by way of preface to our review of the contested rulings. In the body of the charge the trial judge said that the [**815] jury could consider the absence of light "in determining whether the plaintiff's intestate was guilty of contributory negligence in failing to have a light upon the buggy as

provided by law. I do not mean to say that the absence of light necessarily makes him negligent, but it is a fact for your consideration." The defendant requested a ruling that the absence of a light on the plaintiff's vehicle was "*prima facie* evidence of contributory negligence." This request was refused, and the jury were again instructed that they might consider the absence of lights as some evidence of negligence, but that it was not conclusive evidence. The plaintiff then requested a charge that "the fact that the plaintiff's intestate was driving without a light is not negligence in itself," and to this the court acceded. The defendant saved his rights by appropriate exceptions.

[*168] We think the unexcused omission of the statutory signals is more than some evidence of negligence. It *is* negligence in itself. Lights are intended for the guidance and protection of other travelers on the highway (*Highway Law, sec. 329*a). By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform. That, we think, is now the established rule in this state (*Amberg v. Kinley, 214 N. Y. 531*; *Karpeles v. Heine, 227 N. Y. 74*; *Jetter* v. *N. Y. & H. R. R. Co.*, 2 Abb. Ct. App. Dec. 458; *Cordell v. N. Y. C. & H. R. R. R. Co., 64 N. Y. 535, 538*; *Marino v. Lehmaier, 173 N. Y. 530, 536*; cf. *Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 39, 40*; *Prest-O-Lite Co. v. Skeel, 182 Ind. 583, 600, 601*; *Newcomb v. Boston Protective Dept., 146 Mass. 596*; *Bourne v. Whitman, 209 Mass. 155, 163)*. Whether the omission of an absolute duty, not willfully or heedlessly, but through unavoidable accident, is also to be characterized as negligence, is a question of nomenclature into which we need not enter, for it does not touch the case before us. There may be times, when if jural niceties are to be preserved, the two wrongs, negligence and breach of

statutory duty, must be kept distinct in speech and thought (Pollock Torts [10th ed.], p. 458; Clark & Linseil Torts [6th ed.], p. 493; Salmond Jurisprudence [5th ed.], pp. 351, 363; *Texas & Pac. Ry. Co. v. Rigsby, supra, p. 43*; *Chicago, B. & Q. Ry. Co. v. U. S., 220 U.S. 559*). In the conditions here present they come together and coalesce. A rule less rigid has been applied where the one who complains of the omission is not a member of the class for whose protection the safeguard is designed (*Amberg v. Kinley, supra; Union Pac. Ry. Co. v. McDonald, 152 U.S. 262, 283*; *Kelley v. N. Y. State Rys. 207 N. Y. 342*; *Ward* v. *Hobbs*, 4 App. Cas. 13). Some relaxation there has also been where the [*169] safeguard is prescribed by local ordinance, and not by statute (*Massoth v. D. & H. C. Co., 64 N. Y. 524, 532*; *Knupfle v. Knickerbocker Ice Co., 84 N. Y. 488*). Courts have been reluctant to hold that the police regulations of boards and councils and other subordinate officials create rights of action beyond the specific penalties imposed. This has led them to say that the violation of a statute is negligence, and the violation of a like ordinance is only evidence of negligence. An ordinance, however, like a statute, is a law within its sphere of operation, and so the distinction has not escaped criticism (*Jetter* v. *N. Y. & H. R. R. Co., supra; Knupfle v. Knickerbocker Ice Co., supra; Newcomb v. Boston Protective Dept., supra; Prest-O-Lite Co. v. Skeel, supra*). Whether it has become too deeply rooted to be abandoned, even if it be thought illogical, is a question not now before us. What concerns us at this time is that even in the ordinance cases, the omission of a safeguard prescribed by statute is put upon a different plane, and is held not merely some evidence of negligence, but negligence in itself (*Massoth v. D. & H. Canal Co., supra;* and cf. *Cordell v. N. Y. C. & H. R. R. R. Co., supra*). In the case at hand, we have an instance of the admitted violation of a statute intended for the protection of travelers on the highway, of whom the defendant at the time was one. Yet the jurors were instructed in effect that they were at liberty in their discretion to treat the omission of lights

either as innocent or as culpable. They were allowed to "consider the default as lightly or gravely" as they would (Thomas, J., in the court below). They might as well have been told that they could use a like discretion in holding a master at fault for the omission of a safety appliance prescribed by positive law for the protection of a workman (*Scott v. International Paper Co., 204 N. Y. 49*; *Fitzwater v. Warren, 206 N. Y. 355*; *Texas & Pac. Ry. Co. v. Rigsby, 241 U.S. 33*). Jurors have no dispensing power by which they may relax the duty that one traveler on the highway owes [*170] under the statute to another. It is error to tell them that they have. The omission of these lights was a wrong, and being wholly unexcused was also a negligent wrong. No license should have been conceded to the triers of the facts to find it anything else.

[**816] We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury. A defendant who travels without lights is not to pay damages for his fault unless the absence of lights is the cause of the disaster. A plaintiff who travels without them is not to forfeit the right to damages unless the absence of lights is at least a contributing cause of the disaster. To say that conduct is negligence is not to say that it is always contributory negligence. "Proof of negligence in the air, so to speak, will not do" (Pollock Torts [10th ed.], p. 472). We think, however, that evidence of a collision occurring more than an hour after sundown between a car and an unseen buggy, proceeding without lights, is evidence from which a causal connection may be inferred between the collision and the lack of signals (*Lambert v. Staten Island R. R. Co., 70 N. Y. 104, 109, 110*; *Walsh v. Boston & Maine Railroad, 171 Mass. 52, 58*; *The Pennsylvania, 19 Wall. 125, 136, 137*; *Fisher v. Village of Cambridge, 133 N. Y. 527, 532).* If nothing else is shown to break the connection, we have a case, *prima facie* sufficient, of negligence contributing to

the result. There may indeed be times when the lights on a highway are so many and so bright that lights on a wagon are superfluous. If that is so, it is for the offender to go forward with the evidence, and prove the illumination as a kind of substituted performance. The plaintiff asserts that she did so here. She says that the scene of the accident was illumined by moonlight, by an electric lamp, and by the lights of the approaching car. Her position is that if the defendant did not see the buggy thus illumined, a jury might reasonably infer that he would not have seen [*171] it anyhow. We may doubt whether there is any evidence of illumination sufficient to sustain the jury in drawing such an inference, but the decision of the case does not make it necessary to resolve the doubt, and so we leave it open. It is certain that they were not required to find that lights on the wagon were superfluous. They might reasonably have found the contrary. They ought, therefore, to have been informed what effect they were free to give, in that event, to the violation of the statute. They should have been told not only that the omission of the lights was negligence, but that it was "*prima facie* evidence of contributory negligence," *i. e.*, that it was sufficient in itself unless its probative force was overcome (Thomas, J., in court below) to sustain a verdict that the decedent was at fault (*Kelly* v. *Jackson*, 6 Pet. 622, 632). Here, on the undisputed facts, lack of vision, whether excusable or not, was the cause of the disaster. The defendant may have been negligent in swerving from the center of the road, but he did not run into the buggy purposely, nor was he driving while intoxicated, nor was he going at such a reckless speed that warning would of necessity have been futile. Nothing of the kind is shown. The collision was due to his failure to see at a time when sight should have been aroused and guided by the statutory warnings. Some explanation of the effect to be given to the absence of those warnings, if the plaintiff failed to prove that other lights on the car or the highway took their place as equivalents, should have been put before the jury. The explanation was asked for, and refused.

We are persuaded that the tendency of the charge and of all the rulings following it, was to minimize unduly, in the minds of the triers of the facts, the gravity of the decedent's fault. Errors may not be ignored as unsubstantial when they tend to such an outcome. A statute designed for the protection of human life is not to be brushed aside as a form of words, its commands reduced [*172] to the level of cautions, and the duty to obey attenuated into an option to conform.

The order of the Appellate Division should be affirmed, and judgment absolute directed on the stipulation in favor of the defendant, with costs in all courts.

Hogan, J. (dissenting). Upon the trial of this action, a jury rendered a verdict in favor of the plaintiff. Defendant appealed from the judgment entered thereon and an order made denying an application to set aside the verdict and for a new trial to the Appellate Division. The latter court reversed the judgment on the law and granted a new trial on questions of law only, the court having examined the facts and found no error therein. The decision thus made was equivalent to a determination by the court that it had passed upon the question of the sufficiency of the evidence and as to whether the verdict rendered by the jury was against the weight of evidence. The effect of that decision was that the order denying the motion to set aside the verdict and grant a new trial was upon the facts properly denied. (*Judson v. Central Vt. R. R. Co., 158 N. Y. 597, 602*.) A jury and the Appellate Division having determined that upon the facts developed on the trial of the action, the plaintiff was entitled to recover, in view of certain statements in the prevailing opinion, and for the purpose of explanation of my dissent, I shall refer to the facts which were of necessity found in favor of plaintiff and approved by the Appellate Division.

The following facts are undisputed. Leading from Broadway in the village of Tarrytown, Westchester county, is a certain public highway known as Neperham road, [**817] which runs in an easterly direction to East View, town of Greenburg. The worked portion of the highway varies in width from twenty-one and one-half feet at the narrowest point a short distance easterly of the place of the collision hereinafter mentioned, to a width of [*173] twenty-seven and one-half feet at the point where the collision occurred.

On the evening of August 21st, 1915, the plaintiff, together with her husband, now deceased, were seated in an open wagon drawn by a horse. They were traveling on the highway westerly towards Tarrytown. The defendant was traveling alone on the highway in the opposite direction, viz., from Tarrytown easterly towards East View in an automobile which weighed about three thousand pounds, having a capacity of seventy horse power, capable of developing a speed of seventy-five miles an hour. Defendant was driving the car.

A collision occurred between the two vehicles on the highway at or near a hydrant located on the northerly side of the road. Plaintiff and her husband were thrown from the wagon in which they were seated. Plaintiff was bruised and her shoulder dislocated. Her husband was seriously injured and died as a result of the accident.

The plaintiff, as administratrix, brought this action to recover damages arising by reason of the death of her husband caused as she alleged solely by the negligence of defendant in operating, driving and running the automobile at a high, unlawful, excessive and unsafe rate of speed, in failing to blow a horn or give any warning or signal of the approach of said automobile and in operating, driving and riding said automobile at said time and place upon his left-hand or wrongful side of said road or highway, thereby causing the death of her husband.

Defendant by his answer admitted that he was operating the automobile, put in issue the remaining allegations of the complaint and affirmatively alleged that any injury to plaintiff's intestate was caused by his contributory negligence.

As indicated in the prevailing opinion, the manner in which the accident happened and the point in the highway where the collision occurred are important facts in this case, for as therein stated: "The case against him (defendant) [*174] must stand, therefore, if at all, upon the divergence of his course from the center of the highway." The evidence on behalf of plaintiff tended to establish that on the evening in question her husband was driving the horse at a jogging gait along on their right side of the highway near the grass which was outside of the worked part of the road on the northerly side thereof; that plaintiff observed about one hundred twenty feet down the road the automobile operated by defendant approaching at a high rate of speed, two searchlights upon the same, and that the car seemed to be upon her side of the road; that the automobile ran into the wagon in which plaintiff and her husband were seated at a point on their side of the road while they were riding along near the grass. Evidence was also presented tending to show that the rate of speed of the automobile was eighteen to twenty miles an hour and the lights upon the car illuminated the entire road. The defendant was the sole witness on the part of the defense upon the subject under consideration. His version was: "Just before I passed the Tarrytown Heights Station, I noticed a number of children playing in the road. I slowed my car down a little more than I had been running. I continued to drive along the road, probably I proceeded along the road three hundred or four hundred feet further, I do not know exactly how far, when suddenly there was a crash and I stopped my car as soon as I could after I realized that there had been a collision. Whether I saw

anything in that imperceptible fraction of space before the wagon and car came together I do not know. I have an impression, about a quarter of a second before the collision took place, I saw something white cross the road and heard somebody call 'whoa' and that is all I knew until I stopped my car. * * * My best judgment is I was travelling about twelve miles an hour. * * * At the time of the collision I was driving on the right of the road."

[*175] The manner in which and the point in the highway where the accident occurred presented a question of fact for a jury. If the testimony of defendant was accredited by the jury, plaintiff and her intestate having observed the approaching automobile deliberately, thoughtlessly or with an intention to avoid the same left their side of the road at a moment when an automobile was rapidly approaching with lights illuminating the road, to cross over to the side of the highway where the automobile should be, and as claimed by defendant was traveling, and thereby collided with the same, or, on the contrary, defendant was driving upon his left side of the road and caused the collision. The trial justice charged the jury fully as to the claims of the parties and also charged that the plaintiff in her complaint specifically alleged the acts constituting negligence on the part of defendant (amongst which was that he was driving on the wrong side of the road thereby causing the death of her husband, the alleged absence of signals having been eliminated from the case) and in order to recover the plaintiff must show that the accident happened in the way and in the manner she has alleged in her complaint. "It is for you to determine whether the defendant was driving on the wrong side of the road at the time he collided with the buggy; whether his lights did light up the road and the whole road ahead of him to the extent that the buggy was visible, and so, if he negligently approached the buggy in which plaintiff and her husband were driving at the time. If you find from the evidence here, he was driving on the [**818] wrong side of

the road and that for this reason he collided with the buggy which was proceeding on the proper side, or if you find that as he approached the buggy the road was so well lighted up that he saw or should have seen the buggy and yet collided with it then you may say, if you so find, that the defendant was careless and negligent." No exception was taken by the defendant to that charge, but at the [*176] close of the charge counsel for defendant made certain requests to charge upon the subject as follows:

"(1) If the jury find that Mr. Martin was guilty of any negligence, no matter how slight, which contributed to the accident, the verdict must be for defendant.

"(2) In considering the photographs and consideration of which side of the vehicle, wagon, was damaged, that the jury have no right to disregard physical facts, and unless they find the accident happened as described by Mrs. Martin and Mrs. Cain, the verdict must be for the defendant.

"(3) The plaintiff must stand or fall on her claim as made, and if the jury do not find that the accident happened as substantially claimed by her and her witnesses, that the verdict of the jury must be for defendant.

"(4) It was the duty of Mr. Martin to keep to the right."

Each one of the several requests was charged, and in addition the trial justice charged that if the deceased, Mr. Martin, collided with the automobile while the wagon was on the wrong side of the road, the verdict must be for defendant.

The principal issue of fact was not only presented to the jury in the original charge made by the trial justice, but emphasized and concurred in by counsel for defendant.

The prevailing opinion in referring to the accident and the highway at the point where the accident occurred describes the same in the following language: "At the point

of the collision, the highway makes a curve. The car was rounding the curve when suddenly it came upon the buggy emerging the defendant tells us from the gloom." Such in substance was the testimony of the defendant but his version was rejected by the jurors and the Appellate Division, and the evidence in the record is ample to sustain a contrary conclusion. As to the statement that the car was rounding "a curve," [*177] two maps made by engineers from actual measurements and surveys for defendant were put in evidence by counsel for plaintiff. Certain photographs made for the purposes of the trial were also before the jury. I think we may assume that the jurors gave credence to the maps and actual measurements rather than to the photographs and failed to discover therefrom a curve of any importance or which would interfere with an unobstructed view of the road. As to the "buggy emerging the defendant tells us from the gloom," evidence was adduced by plaintiff tending to show that the searchlights on defendant's car lighted up the entire roadway to the extent that the vehicle in which plaintiff and her husband were riding was visible, that the evening was not dark, though it appeared as though a rainfall might be expected. Some witnesses testified it was moonlight. The doctor called from Tarrytown who arrived within twenty minutes after the collision, testified that the electric lights all along the highway were burning as he passed over the road. The width of the worked part of the highway at the point of the accident was twenty-seven and one-half feet. About twenty-five feet westerly on the southerly side was located an electric light which was burning. A line drawn across the highway from that light to the point of the accident would be about forty-two feet. One witness called by plaintiff lived in a house directly across the highway from the point of the accident. Seated in a front room it was sufficiently light for her to see plaintiff's intestate when he was driving along the road at a point near a telegraph pole which is shown on the map some ninety or one hundred feet easterly of the point of the accident, when she observed

him turn his horse into the right towards the fence. Soon thereafter she heard the crash of the collision and immediately went across the highway and found Mr. Martin in a sitting position on the grass. A witness called by the [*178] defendant testified that she was on the stoop of her house, which is across the highway from the point of the accident and about forty feet distant from said point and while seated there she could see the body of Mr. Martin. While she testified the evening was dark, the lights on the highway were sufficient to enable her to see the body of Mr. Martin lying upon the grass forty feet distant. The defendant upon cross-examination was confronted with his testimony given before the coroner where he testified that the road was "fairly light."

The facts narrated were passed upon by the jury under a proper charge relating to the same, and were sustained by the Appellate Division. The conclusions deducible therefrom are: (A) Defendant was driving his car upon the wrong side of the road. (B) Plaintiff and her intestate were driving a horse attached to the wagon in which they were seated upon the extreme right side of the road. (C) The highway was well lighted. The evening was not dark. (D) Defendant collided with the vehicle in which plaintiff and her husband were riding and caused the accident.

I must here note the fact that concededly there was no light upon the wagon in which plaintiff and her husband were riding, in order that I may express my views upon additional phrases in the prevailing opinion. Therein it is stated: " [**819] There may indeed be times when the lights on a highway are so many and so bright that lights on a wagon are superfluous." I am in accord with that statement, but I dissent from the suggestion we may doubt whether there is any evidence of illumination sufficient to sustain the jury in drawing the inference that if defendant did not see the buggy thus illumined it might reasonably infer that he would not have seen it anyway. Further the

opinion states: "Here, on the undisputed facts, lack of vision, whether excusable or not, was the cause of the disaster. The defendant may have been negligent in swerving from the center of the road, but he [*179] did not run into the buggy purposely, nor was he driving while intoxicated, nor was he going at such a reckless rate of speed that warning would of necessity be futile. Nothing of the kind is shown." As to the rate of speed of the automobile, the evidence adduced by plaintiff's witnesses was from eighteen to twenty miles an hour, as "very fast," further that after the collision the car proceeded one hundred feet before it was stopped. The defendant testified that he was driving about twelve miles an hour, that at such rate of speed he thought the car should be stopped in five or six feet and though he put on the foot brake he ran twenty feet before he stopped. The jury had the right to find that a car traveling at the rate of twelve miles an hour which could be stopped within five or six feet, and with the foot brake on was not halted within one hundred feet must at the time of the collision have been running "very fast" or at a reckless rate of speed, and, therefore, warning would of necessity be futile. No claim was made that defendant was intoxicated or that he purposely ran into the buggy. Nor was proof of such facts essential to plaintiff's right to recover. This case does not differ from many others wherein the failure to exercise reasonable care to observe a condition is disclosed by evidence and properly held a question of fact for a jury. In the earlier part of the prevailing opinion, as I have pointed out, the statement was: "The case against him (defendant) must stand or fall, if at all, upon the divergence of his course from the center of the highway." It would appear that "lack of vision whether excusable or not was the cause of the disaster" had been adopted in lieu of divergence from the center of the highway. I have, therefore, discussed divergence from the center of the road. My examination of the record leads me to the conclusion that lack of vision was not on the undisputed facts the sole cause of the disaster. Had the

defendant been upon his right side of the road, upon the plaintiff's theory he might have been driving recklessly [*180] and the plaintiff and her intestate being near to the grass on the northerly side of a roadway twenty-seven feet and upwards in width the accident would not have happened and the presence of or lack of vision would not be material. If, however, as found by the jury, defendant was wrongfully on plaintiff's side of the road and caused the accident, the question of whether or not under the facts in the exercise of reasonable care he might have discovered his error and the presence of plaintiff and thereupon avoid the collision was for the jury. The question was presented whether or not as defendant approached the wagon the roadway was so well lighted up that defendant saw or in the exercise of reasonable care could have seen the wagon in time to avoid colliding with the same, and upon that proposition the conclusion of the jury was adverse to defendant, thereby establishing that the lights of the car on the highway were equivalent to any light which if placed upon the wagon of plaintiff would have aroused the attention of defendant, and that no causal connection existed between the collision and absence of a light on the wagon.

At the close of the charge to the jury the trial justice was requested by counsel for defendant to charge "that the failure to have a light on plaintiff's vehicle is *prima facie* evidence of contributory negligence on the part of plaintiff." The justice declined to charge in the language stated, but did charge that the jury might consider it on the question of negligence, but it was not in itself conclusive evidence of negligence. For the refusal to instruct the jury as requested, the judgment of the Trial Term was reversed by the Appellate Division.

The request to charge was a mere abstract proposition. Even assuming that such was the law, it would not bar a recovery by plaintiff unless such contributory negligence

was the proximate and not a remote contributory cause of the injury. (*Laidlaw v. Sage, 158 N. Y. 73*; *Rider v. Syracuse R. T. Ry. Co., 171 N. Y. 139*, and cases cited.) The [*181] request to charge excluded that important requisite. The trial justice charged the jury that the burden rested upon plaintiff to establish by the greater weight of evidence that plaintiff's intestate's death was caused by the negligence of the defendant and that such negligence was the proximate cause of his death; that by "proximate cause" is meant that cause without which the injury would not have happened, otherwise she could not recover in the action. In the course of his charge the justice enlarged on the subject of contributory negligence, and in connection therewith read to the jury the provisions of the Highway Law and then charged that the jury should consider the absence of a light upon the wagon in which plaintiff and her intestate were riding *and whether the absence* [**820] *of a light on the wagon contributed to the accident.* At the request of counsel for defendant, the justice charged that, if the jury should find any negligence on the part of Mr. Martin, no matter how slight, contributed to the accident, the verdict must be for the defendant. I cannot concur that we may infer that the absence of a light on the front of the wagon was not only the cause but the proximate cause of the accident. Upon the evidence adduced upon the trial and the credence attached to the same, the fact has been determined that the accident would have been avoided had the defendant been upon his side of the road or attentive to where he was driving along a public highway, or had he been driving slowly, used his sense of sight and observed plaintiff and her intestate as he approached them, they being visible at the time. The defendant's request to charge which was granted, "that plaintiff must stand or fall on her claim as made, and if the jury do not find that the accident happened as substantially claimed by her and her witnesses that the verdict of the jury must be for the defendant," presented the question quite succinctly. The jury found that the accident happened as claimed by the plaintiff and her

witnesses and we cannot surmise or [*182] infer that the accident would not have happened had a light been located on the wagon.

In my opinion the charge of the trial justice upon the subject of proximate cause of the accident was a full and complete statement of the law of the case, especially when considered in connection with the charge that the slightest negligence on the part of the intestate contributing to the accident would require a verdict for defendant.

It would not be profitable to refer to and analyze the numerous decisions of this court upon the effect of a violation of an ordinance or a statute. A large number of cases were cited in the opinions in the *Amberg* case. That case was decided upon the principle that where a duty is imposed by statute and a violation of the duty *causes an injury*, such violation is evidence of negligence as matter of law. That proposition was clearly discussed in the *Amberg* case (*Amberg v. Kinley, 214 N. Y. 531*) as will appear by the result therein. The doctrine of causal connection therein declared was but a reiteration of the rule laid down in *Willy v. Mulledy (78 N. Y, 310*); *Briggs v. N. Y. C. & H. R. R. R. Co. (72 N. Y. 26*), and numerous other cases.
The charge requested and denied in this case was in effect that a failure to have a light upon the intestate's wagon was as matter of law such negligence on his part as to defeat the cause of action irrespective of whether or not such negligence was the proximate cause of the injury. My conclusion is that we are substituting form and phrases for substance and diverging from the rule of causal connection.

 ¿Se justifica en el derecho privado la presunción rebatible de culpa por la infracción de una norma de interés público?

BREACH: RES IPSA LOQUITUR

 Byrne v. Boadle, 159 E.R. 299 Exchequer Court November 25, 1863

Opinion by POLLOCK, C.B. BRAMWELL, B.; CHANNELL, B.; and PIGOTT, B. concurred, with CHANNELL writing separately.

Reporter: The plaintiff was walking in a public street past the defendant's shop when a barrel of flour fell upon him from a window above the shop, and seriously injured him. Held sufficient primâ facie evidence of negligence for the jury, to cast on the defendant the onus of proving that the accident was not caused by his negligence.

Declaration: For that the defendant, by his servants, so negligently and unskilfully managed and lowered certain barrels of flour by means of a certain jigger-hoist and machinery attached to the shop of the defendant, situated in a certain highway, along which the plaintiff was then passing, that by and through the negligence of the defendant, by his said servants, one of the said barrels of flour fell upon and struck against the plaintiff, whereby the plaintiff was thrown down, wounded, lamed, and permanently injured, and was prevented from attending to his business for a long time, to wit, thence hitherto, and incurred great expense for medical attendance, and suffered great pain and anguish, and was otherwise damnified.

At the trial before the learned Assessor of the Court of Passage at Liverpool, the evidence adduced on the part of the plaintiff was as follows: A witness named Critchley said: "On the 18th July, I was in Scotland Road, on the right side going north, defendant's shop is on that side. When I was opposite to his shop, a barrel of flour fell from a window above in defendant's house and shop, and knocked the plaintiff down. He was carried into an adjoining shop. A horse and cart came opposite the defendant's door. Barrels of flour were in the cart. I do not

think the barrel was being lowered by a rope. I cannot say: I did not see the barrel until it struck the plaintiff. It was not swinging when it struck the plaintiff. It struck him on the shoulder and knocked him towards the shop. No one called out until after the accident." The plaintiff said: "On approaching Scotland Place and defendant's shop, I lost all recollection. I felt no blow. I saw nothing to warn me of danger. I was taken home in a cab. I was helpless for a fortnight." (He then described his sufferings.) "I saw the path clear. I did not see any cart opposite defendant's shop." Another witness said: "I saw a barrel falling. I don't know how, but from defendant's." The only other witness was a surgeon, who described the injury which the plaintiff had received. It was admitted that the defendant was a dealer in flour.

It was submitted, on the part of the defendant, that there was no evidence of negligence for the jury. The learned Assessor was of that opinion, and nonsuited the plaintiff, reserving leave to him to move the Court of Exchequer to enter the verdict for him with 50l. damages, the amount assessed by the jury.

POLLOCK, Chief Baron. There are certain cases of which it may be said res ipsa loquitur, and this seems one of them. I think it would be wrong to lay down as a rule that in no case can presumption of negligence arise from the fact of an accident. Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford primâ facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous. So in the building or repairing a house, or putting pots on the

chimneys, if a person passing along the road is injured by something falling upon him, I think the accident alone would be prima facie evidence of negligence. Or if an article calculated to cause damage is put in a wrong place and does mischief, I think that those whose duty it was to put it in the right place are prima facie responsible, and if there is any state of facts to rebut the presumption of negligence, they must prove them. The present case upon the evidence comes to this, a man is passing in front of the premises of a dealer in flour, and there falls down upon him a barrel of flour. I think it apparent that the barrel was in the custody of the defendant who occupied the premises, and who is responsible for the acts of his servants who had the controul of it; and in my opinion the fact of its falling is prima facie evidence of negligence, and the plaintiff who was injured by it is not bound to show that it could not fall without negligence, but if there are any facts inconsistent with negligence it is for the defendant to prove them.

 ¿Por qué el tribunal establece la presunción rebatible de culpa en este caso de algún barril que rodó por la vía?

 ¿Quien era más probable de poseer información de cómo pudo haber sucedido este accidente, el demandante o el demandado? ¿Por qué?

 COMBUSTION ENGINEERING COMPANY, INC., v. JACOB HUNSBERGER, Individually and to Use of STATE ACCIDENT FUND No. 6, October Term, 1936 Court of Appeals of Maryland 171 Md. 16; 187 A. 825 November 11, 1936, Decided

[*18] [**826] BOND An employee of a subcontractor on construction work in a building, after having been awarded compensation for an injury under the Workmen's Compensation Act, has sued over and recovered a judgment against another subcontractor on the ground of negligence of the defendant causing the injury. Code, art.

101, sec. 58. The defendant on appeal questions the refusal of the trial court to direct a verdict in its favor, and the granting of instructions to the jury on prayers of the plaintiff which are thought to have excluded a defense from consideration.

The work was reconstruction of a boiler room for the United States Industrial Alcohol Company, and it had been going on for three months or more. The Combustion Engineering Company was finishing erecting on each side of the boiler, from the first floor up to a height of thirty to thirty-five feet, an iron air duct, or preheater of air for the furnace, consisting of a shaft or chamber inclosed on the sides and surmounted by a box cover, also inclosed except for a small door for cleaning out, near the top. Within the preheater there were plates extending throughout the length, twenty-seven in number, spaced about an inch or an inch and a half apart, and supported by angle irons at intervals. Inside the top were shelves for workmen to lie on when cleaning out. The plates, or elements, as they were called, were to be welded at the top, and that was the work being done at the time of the accident. Below the preheaters, in the basement, the plaintiff's employer, McNamara & Co., had recently started work of constructing connections of the preheaters with the boiler. The basement was open, no floor boards having been laid above it.

At the beginning of the day's work on the morning of the accident, Walter Durdella, one of the Combustion Company's workmen, climbed the ladder to the top [**827] of the particular preheater they had been working on at the close of the last preceding working day, and began the work of forcing the tops of the plates, or elements, in [*19] position for his brother to weld them together from outside the box. The force was applied by means of a metal wedge, in size about a quarter of an inch by about one inch and a half, and ten or eleven inches long, hammered in between

two plates. The restriction on the space required Durdella to do the work lying on his stomach. While he was doing this, twenty to thirty minutes after starting work, a wedge fell down through the preheater and struck and injured the plaintiff working underneath it. Durdella's explanation of the occurrence -- and he was the only man who had knowledge of what occurred at the top -- was that he first drove the wedge in until he was sure it was held fast in place, then, resting his weight on one arm, with the other gave it a hard stroke; and as he did so the wedge jumped out and found its way down through the preheater. At the time Durdella supposed that it must have lodged in the preheater somewhere.

The plaintiff's case was rested on an assumption that the mere fact of the falling of the wedge afforded evidence of negligence, and the trial court, on a prayer of the plaintiff's, instructed the jury that this was true. But this court does not agree in that view. There must be evidence from which the jury might reasonably and properly conclude that there was negligence. *Annapolis & Balto. Short Line R. Co. v. Pumphrey, 72 Md. 82, 19 A. 8*; *Gans Salvage Co. v. Byrnes, 102 Md. 230, 245, 62 A. 155*; *Serio v. Murphy, 99 Md. 545, 556, 58 A. 435*; *Benedick v. Potts, 88 Md. 52, 40 A. 1067*. And apart from any question of the effect on a *prima facie* presumption, if there should be one, of evidence of the facts produced by a defendant (*Byrne v. Boadle*, 2 H. & C. 722; *Heim v. Roberts*, *135 Md. 600, 605, 109 A. 329*), the court is of opinion that the mere fall of a tool being used within the building, in work of construction, cannot be presumed to result from negligence, because it cannot be supposed that such a thing is probably the result of negligence every time it occurs. On the contrary, it would seem likely that, with workmen handling loose tools continually, the falling of some of them at times must be expected despite [*20] all precautions. To presume otherwise would be to presume a perfection in men's work which we know does not exist. Precautions that will ordinarily keep falling objects from an

adjacent highway are required, for the work should not invade the highway. And temporary covered walks built below construction work are common sights. When objects have dropped on highways it has been presumed, *prima facie*, that the dropping resulted from lack of the requisite precautions to keep them off. *Decola v. Cowan, 102 Md. 551, 62 A. 1026*; *Strasburger v. Vogel, 103 Md. 85, 63 A. 202*. And there may also be material used in construction work which would not be dropped inside the building if ordinary care were exercised. The case of the fall of scantling, *Clough & Molloy v. Shilling , 149 Md. 189, 131 A. 343*, is an instance. In a Massachusetts case cited, even the fall of a piece of scantling has been viewed as a normal incident of construction work, not to be presumed negligent. *Kimball v. George A. Fuller Co., 258 Mass. 232, 154 N. E. 762*. But, as stated, it seems to the court plain that there must be some falling of small tools and other objects handled with ordinary care in the course of the work, and that therefore a particular fall cannot, of itself and without more, afford proof of negligence. Unless facts appear to indicate negligence, it must be taken as no more than one of the incidents of the work, to be expected. Error is found in the instruction to the contrary in this case.

The facts given in Durdella's evidence leave it open to speculation whether, despite his belief that the wedge was held fast, he had driven it in more lightly than usual, or whether the plates offered unusual and unexpected resistance. That the wedge jumped out when struck would seem to indicate unexpected resistance. If there was a miscalculation on Durdella's part as to the resistance, or otherwise, that fact alone would not indicate negligence unless it could be said that every such miscalculation on the part of a workman is probably due to lack of ordinary care. And plainly, we think, it cannot. It is conceivable that with the greatest practicable care a workman [*21] might be surprised at the resistance of metal, and evidence would be

needed to show the contrary in this instance. *South Baltimore Car Works v. Schaeffer, 96 Md. 88, 53 A. 665*. If one cause, free from negligence, remains possible, the [**828] evidence not permitting the ascertainment of another, negligent cause, the case for negligence in the fall of the wedge is not proved. "In matters of proof we are not justified in inferring from mere possibilities the existence of facts." *Balto. & O. R. Co. v. State, 71 Md. 590, 599, 18 A. 969, 971*; *Harford County v. Wise, 75 Md. 38, 41, 23 A. 65*; *Regent Realty Co. v. Ford, 157 Md. 514, 521, 146 A. 457*.

In the opinion of the court, negligence, if there was any, causing the accident, must have consisted in doing the work above without some adjustment of the two jobs of work, with due care for the safety of men working below in case of a fall. There is evidence that pieces or rods of heated metal were expected to fall down through the preheater, and that fall of a tool was anticipated as a possibility, although apparently not so likely in view of the obstruction by plates and angles inside a preheater.

The defendant's foreman and Durdella testified that, before McNamara's men worked there, boards had been placed under and about the bottom of the preheater to protect workmen laying a concrete floor in the basement, principally, at least, to protect them from hot metal, and that the McNamara men had to remove the boards under the preheater to do their work. At that time, says the foreman, he discussed the removal with the McNamara foreman, and the latter undertook to watch the defendant's men, and, while they were at work on the preheater, to keep his own men from under them. The McNamara foreman and one of his men testify that they never saw any boards under this preheater, but the foreman, though called in rebuttal, was not questioned on an undertaking to watch and keep his men from under.

It would have been a defense to the action, preventing a finding of negligence on the defendant's part, if it should have been found that the McNamara foreman had in fact [*22] undertaken to avoid injury to his men in this way. Receiving the assurance of it, the defendant would have been justified in relying on the arrangement, and failure to observe it would have been negligence on the part of the McNamara foreman alone. *Hilton Quarries v. Hall, 161 Md. 518, 524, 158 A. 19.* On the plaintiff's prayers, however, the trial court instructed the jury that if they should find that the defendant's employees above on the preheater negligently dropped the tool, and the plaintiff without negligence on his own part was injured by it, the verdict should be for the plaintiff. Concerned only with possible negligence of the workmen above, which we find unsupported on the evidence, the instructions allowed no bearing to the defense of an arrangement between the foremen by which danger should be avoided. And as the instructions in themselves defined for the jury a complete ground of recovery, they were erroneous, assuming that the case was one for the jury. *Hilton Quarries v. Hall, 161 Md. 518, 530, 158 A. 19*; *Philadelphia, W. & B. R. Co. v. State, 66 Md. 501, 509, 8 A. 272.*

The jury would not be required to accept the testimony of defendant's witnesses that there was the safeguarding arrangement. But could the jury, rejecting it, then positively find negligence in the defendant's carrying on its work above without a safeguarding arrangement, adjusting the two jobs so as to avoid injury to men working below? They could, we think, find that, notwithstanding the fact of the climbing up the ladder, in sight of the McNamara men if they had looked, and notwithstanding the subsequent presence of the welder in view outside the box cover, and whatever noise and glare there was from the work above, the McNamara foreman did not have the presence of the workmen above at that particular time brought to his notice.

But notification at the particular time would be only one means of adjusting the work of the one set of men to the other, as has been said. A previous general arrangement instructing the adjustment to the McNamara foreman would be another possible means of accomplishing it. Disbelieving defendant's testimony [*23] on the point, the jury would have before them no evidence on the subject, neither that such a previous provision was or was not made; and this would be so notwithstanding an opportunity to the plaintiff to show any and all facts on the point when his witness who knew them was on the stand. In that situation, we conclude, the jury was not presented with facts essential to a finding on the question of failure to exercise care required, and the burden on the plaintiff to produce evidence from which they might reasonably find failure on the defendant's part would not be met. [**829] In the opinion of the court, no evidence legally sufficient to prove negligence of the defendant has been produced, and prayers of the defendant for direction of a verdict in its favor on the evidence in the record should have been granted.

This conclusion renders decision of other questions argued unnecessary.
Judgment reversed, without a new trial, with costs.

 ¿Acaso en *Combustion Engineering Company, Inc.* el demandante o el demandado, indistintamente, era más probable de adelantar opiniones e información acerca de cómo pudo ocurrir este accidente? Explique.

 Marcella A. Connolly v. The Nicollet Hotel and Others No. 37,180 Supreme Court of Minnesota 254 Minn. 373; 95 N.W.2d 657; 1959 Minn. LEXIS 560; 74 A.L.R.2d 1227 February 27, 1959

[*376] [**660] MURPHY Action by Marcella A. Connolly against The Nicollet Hotel, a copartnership, and Alice Shmikler, as trustee of Joseph Shmikler, and others, doing business as The Nicollet Hotel, for the loss of the

sight of her left eye alleged to have been caused by defendants' negligence.

The accident occurred about midnight June 12, 1953, during the course of the 1953 National Junior Chamber of Commerce Convention which had its headquarters [**661] at The Nicollet Hotel in Minneapolis. It was occasioned when plaintiff was struck in her left eye by a substance falling from above her as she walked on a public sidewalk on Nicollet Avenue adjacent to the hotel.

The 1953 National Junior Chamber of Commerce Convention, Inc., was joined as a defendant in the action, but at the close of the testimony a verdict was directed in its favor. The jury returned a verdict against The Nicollet Hotel copartnership, which will hereinafter be designated defendants, in the sum of $ 30,000. This is an appeal from an order of the trial court granting judgment for such defendants notwithstanding the verdict. On appeal plaintiff contends that defendants were negligent in failing to maintain order and control the conduct of their guests with respect to persons using the sidewalk adjacent to the hotel building and that hence the court erred in granting judgment notwithstanding the verdict.

The evidence, presented entirely by plaintiff inasmuch as defendants rested at the conclusion of plaintiff's case, established the following: The easterly side of The Nicollet Hotel is adjacent to Nicollet Avenue. The hotel lies between Washington Avenue to the north and Third Street to the south. It is a 12-story building, but on the Nicollet Avenue side it [*377] is limited to eight stories in height. It has a capacity of approximately 490 sleeping rooms on the upper eleven floors. There are no other high buildings in its vicinity. Just south of the hotel on Nicollet Avenue is The Nicollet Hotel garage also operated by defendants. On the east side of Nicollet Avenue opposite the hotel were two 4-story buildings. To the south of these is a parking lot.

Nicollet Avenue in this block is about 50 feet in width. The sidewalks adjacent to it on each side are about 10 feet in width from curb line to building line. At the time of the accident that half of the west sidewalk nearest to the hotel was blocked off by a barricade from the Nicollet Avenue hotel entrance south for about 95 feet, leaving an area about 5 feet in width for pedestrian traffic for such distance. The hotel entrance on Nicollet Avenue is about midway between Washington Avenue and the entrance to the hotel garage.

At the time of the accident there was nothing unusual about the weather. Plaintiff, in company with one Margaret Hansen, had just left the hotel via its Nicollet Avenue entrance and was walking southerly toward Third Street on the west side of Nicollet Avenue. When she had traveled approximately six to ten steps from the canopy extending over such entrance, she observed two people walking toward her. She then heard a noise which sounded like a small explosion and saw something strike the walk in front of her. She observed that one of the persons approaching her was struck on the left shoulder by some substance. She then exclaimed, "We better get off this sidewalk, * * * or somebody is going to get hit." Immediately thereafter she glanced upward and was struck in the left eye by a substance she described as a mud-like substance or a "handful of dirt." Margaret Hansen testified that she also saw the substance falling from eye level to the sidewalk a step or two in front of her. She described the sound made by the striking object as explosive and accompanied by a splattering. The only place from which the article might have fallen from above was the hotel building.

The blow which struck plaintiff caused her to lose her balance but not to fall. Her knees buckled and she was caught by Margaret Hansen and held on her feet. Following the blow, she stated that she could not open her left eye and the left side of her face and head became numb, [*378] and her shoulders, hair, and the left side of her face were

covered with dirt. A dark substance which looked like mud was found imbedded in her left eye. After the accident the assistant manager of the hotel attempted to remove a "mud like substance" [**662] from plaintiff's eye by using a cotton applicator. As a result of the foregoing accident, plaintiff lost the sight of the injured eye.

As stated above, the 1953 National Junior Chamber of Commerce Convention occupied a substantial portion of the hotel at the time of the accident. In connection therewith various delegates and firms maintained hospitality centers there where intoxicants, beer, and milk were served to guests and visitors. Two of such centers were located on the Nicollet Avenue side of the building.

The assistant manager of the hotel on duty at the time of the accident and in charge of maintaining order had received notice that water bags had been thrown from the hotel during the previous days of the convention. The night engineer testified that on the Hennepin Avenue side of the hotel he had observed liquor and beer bottles and cans on the sidewalk and described the accumulation in this area as greater than he had ever witnessed during the 18-month period he had been employed at the hotel. He also testified that he had found cans and beer bottles upon the fire escape at the third-floor level during the convention.

Arthur Reinhold, an employee of the garage, had been informed that objects had fallen or been thrown from the hotel and that a window screen had fallen from the building, first striking the barricade covering the sidewalk next to the garage, and then falling upon a pedestrian. He also was advised that ice cubes had been thrown from the hotel and that a bottle had been thrown or had fallen therefrom during the course of the convention.

Since in reviewing an order upon a motion granting judgment notwithstanding the verdict we are required to view the evidence in the light most favorable to the verdict,

it is material to point out these additional facts: A floral shop was maintained on the premises where potted plants were sold. During the course of the convention a mule was stabled in the lobby of the hotel, and a small alligator was kept on the fourth floor. There was firing of guns in the lobby. Broken bottles and broken glass [*379] were found on the sidewalk near the garage adjacent to the building so that it was necessary to clean the sidewalk near the garage as frequently as twice a day during the course of the convention. The doorman at the hotel was equipped with a shovel and broom which he used for this sidewalk maintenance. Property of the hotel was damaged on the third, fourth, fifth, sixth, eighth, ninth, tenth, and eleventh floors. The window of the office of the credit manager was broken. From the testimony of the executive housekeeper of the hotel the damage consisted of wet carpets, broken chairs, broken screens, molding torn loose from connecting doors, and walls spotted with liquor and water. The inspection of the building made after the accident indicated that there were three missing window screens, mirrors pulled off the walls in bathrooms, light fixtures were broken, signs were broken, hall lights were broken, exit lights were broken, the bowl in the men's washroom was torn off the wall, holes were drilled through door panels, and 150 face towels had to be removed from service. Broken glass and bottles were found on landings and stair wells, a condition which existed almost every night at all floor levels. It became apparent to the general manager of the hotel on June 11, 1953, the day prior to the happening of the accident to the plaintiff, that the disorderly behavior of the hotel guests created a hazard to the defendant's property. He issued the following memorandum to his staff:

"We have almost arrived at the end of the most harrowing experience we have had in the way of conventions, at least in my experience! When we became involved and saw what the situation was, we had no alternative but to proceed and 'turn the other cheek.'

However, it involves certain expenses that I do not propose to forego without at least an argument -- and maybe legal suit.

* * *

"I, of course, am speaking of any damage, which for the most part will be reported by the Housekeeping Department. However, that I may draw up a comprehensive case, please have the information in my office not later than noon, Friday. We will, [*380] incidentally, start to take down all signs, etc., at 9:00 AM, Friday morning."

In granting the defendants' motion for judgment notwithstanding the verdict, the trial court was of the view that there was no evidence which would support a finding that the defendants had knowledge of the particular risk of injury to a member of the public and that by the exercise of ordinary care they could not know that a guest's conduct would naturally result in injury to others. The trial court apparently agreed with the defendants' contention that prior to the plaintiff's injury there was no time to ascertain the location of the room from which the object fell or from which it was thrown and to evict therefrom the person or persons responsible therefor. *Bruner v. Seelbach Hotel Co. 133 Ky. 41, 117 S.W. 373, 19 Ann. Cas. 217*.

1. It is generally agreed that a hotel owner or innkeeper owes a duty to the public to protect it against foreseeable risk of danger attendant upon the maintenance and operation of his property (*Wolk v. Pittsburgh Hotels Co. 284 Pa. 545, 131 A. 537, 42 A.L.R. 1081*; *Kapphahn v. Martin Hotel Co. 230 Iowa 739, 298 N.W. 901*); and to keep it in such condition that it will not be of danger to pedestrians using streets adjacent thereto. *Gore v. Whitmore Hotel Co. 229 Mo. App. 910, 83 S.W. (2d) 114*.

The failure of a hotel owner and operator to take reasonable precautions to eliminate or prevent conditions of which he is or should be aware and which might reasonably

be expected to be dangerous to the public may constitute negligence. *Wolk v. Pittsburgh Hotels Co. supra.* In *Holly v. Meyers Hotel & Tavern, Inc. 9 N.J. 493, 495, 89 A. (2d) 6, 7*, the Supreme Court of New Jersey has stated the rule this way:

"We accept the general doctrine that if the defendant hotel knew, or had reason to know, of the danger of injury to passers-by from the acts of its transient guests within the hotel, then it was under the duty to take reasonable steps to avoid such injury. See *Wolk v. Pittsburgh Hotels Co., 284 Pa. 545, 131 A. 537, 42 A.L.R. 1081 (Sup. Ct. 1925)*; *Gore v. Whitmore Hotel Co., 229 Mo. App. 910, 83 S.W. 2d 114 (Ct. App. 1935)*; *Bruner v. Seelbach Hotel Co., 133 Ky. 41, 117 S.W. 373, 376 (Ct. App. 1909)*; 43 C.J.S., p. 1176 (1945); 28 Am. Jur., p. 636 [*381] (1940)."

The plaintiff contends that the act which caused the injury was foreseeable and that the defendants failed in their duty to exercise reasonable care to restrain their guests or to prevent the injury.

2. There are certain controlling principles of law which must be kept in mind in considering the merits of the plaintiff's claims as they are established by the record. It is recognized that one who assembles a large number of people upon his premises for the purpose of financial gain to himself assumes the responsibility for using all reasonable care to protect others from injury from causes [**664] reasonably to be anticipated. [1] In the exercise of this duty it is necessary for him to furnish a sufficient number of guards or attendants and to take other precautions to control the actions of the crowd. [2] Whether the guards furnished or the precautions taken are sufficient is ordinarily a question for the jury to determine under all of the circumstances.

1 *Pfeifer v. Standard Gateway Theater, Inc. 259 Wis. 333, 48 N.W. (2d) 505.*

2 Ibid.

3. The common-law test of duty is the probability or foreseeability of injury to the plaintiff. As expressed by Chief Judge Cardozo, "The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Palsgraf v. Long Island R. Co. 248 N.Y. 339, 344, 162 N.E. 99, 100, 59 A.L.R. 1253, 1256*; 13 Dunnell, Dig. (3 ed.) § 6973, note 25. In Restatement, Torts, § 348, the same rule is expressed with respect to liability of one who holds out his property for use of the public. It is said that in the exercise of reasonable care the owner of a public place has a "duty to police the premises" and to furnish a sufficient number of servants to afford reasonable protection "if the place is one or the character of the business is such that the utility or other possessor should expect careless or criminal third persons to be thereon either generally or at some particular time." *Schubart v. Hotel Astor, Inc. 168 Misc. 431, 438, 5 N.Y.S. (2d) 203, 210*.

4. For the risk of injury to be within the defendants' "range of apprehension," it is not necessary that the defendants should have had [*382] notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the person of ordinary prudence. [3]

> 3 *Zurich General Acc. & Lia. Ins. Co. v. Childs Co. 253 N.Y. 324, 328, 329, 171 N.E. 391, 392*, and cases there cited.

5. It should further be emphasized that, while the standard of care remains constant, the degree of care varies with the facts and circumstances surrounding each particular case. And, in considering the degree of care to be exercised by the defendants under the circumstances in the case before us, it is relevant to consider authorities dealing with the liability of hotelkeepers and bar operators. [4]

4 28 Am. Jur., Innkeepers, §§ 54 and 55; *Peck v. Gerber, 154 Ore. 126, 59 P. (2d) 675, 106 A.L.R. 996*; 65 C.J.S., Negligence, § 45c; *Weihert v. Piccione, 273 Wis. 448, 78 N.W. (2d) 757*.

6. Since the defendants are not only hotel operators but are engaged as well in the sale of intoxicating liquor, it is material to point out that they are under the duty to use reasonable care to protect guests and patrons from injury at the hands of irresponsible persons whom they knowingly permit to be in and about the premises on which their business is conducted. In *Mastad v. Swedish Brethren, 83 Minn. 40, 42, 85 N.W. 913, 914, 53 L.R.A. 803, 805,* 85 A.S.R. 446, 448, we said:

"* * * All who engage in a public business of that nature are bound to protect their guests, both in person and property, from acts and misconduct of wrongdoers permitted to remain upon the premises; and the rules of law applicable to the common carrier are applicable alike to them."

See, also, *Windorski v. Doyle, 219 Minn. 402, 18 N.W. (2d) 142*; *Priewe v. Bartz, 249 Minn. 488, 83 N.W. (2d) 116*. Although it appears from the record that the defendants doubted the wisdom of permitting free liquor and beer to be served upon the premises, they nevertheless permitted it.

[**665] It is the policy of the law, both statutory and decisional, to protect the public from social consequences of intoxicating liquor. There is perhaps no field of business activity more hedged about with state and municipal laws and regulations designed to protect the public. When a [*383] person engaged in that business permits crowds to gather upon his premises for profit, he must recognize the risks which flow from the nature of the business.

7. In the light of the foregoing observations we may examine the record for the purpose of determining whether or not the act causing the injury was within the range of

foreseeability and, if so, whether the defendants exercised the required degree of care to protect the public from the consequences of such an act. Since the act causing the injury must be considered in the light of the circumstances and conditions under which it is alleged to have occurred, it should be observed that the defendants not only furnished room accommodations for from 350 to 400 delegates but also provided their rooms and facilities as headquarters for a convention attended by more than 4,000 young men. This use differed from the ordinary commercial business of the hotel in that its rooms and facilities were turned over to the convention for meetings, caucuses, and social purposes. An officer of the convention described the delegates as a group of young men who "work hard and * * * play hard." It may be expected that in the light of human experience the defendants were aware of the fact that among this number, as in any group of young men, would be a certain number not concerned with the serious work of the convention. It must have been apparent to the defendants that the ready availability of free intoxicants would not tend to repress the urges of this element. After the convention had been in session for several days, it came to the attention of the management of the hotel that the premises, both inside and out, had been littered with the debris of broken glasses and bottles. They became aware of the considerable damage to their property and received complaints from a pedestrian and policemen that water bags were being thrown from the hotel upon the sidewalk. The accumulated effect of these happenings was to the executive director of the hotel a "harrowing experience." This was all before the accident to the plaintiff occurred. That the dropping of objects from the hotel windows by certain of those occupying the premises was within the range of foreseeability is evidenced by the fact that the hotel company, prior to the convention, took the precaution of cutting the corners out of hotel laundry bags so as to [*384] prevent their use as water containers. Moreover, it seems to us that in light of what had happened

prior to the accident the management of the hotel must have been aware of the fact that in the indiscriminate throwing of glasses, bottles, and other objects in and about the hotel they might expect as part of that course of conduct that objects might be thrown from the windows to the sidewalk below. It is our view that these facts and circumstances presented a question for the jury to determine as to whether the negligent act which caused the plaintiff's injuries was within the defendants' range of foreseeability.

8. We turn next to inquire as to what precautions were taken by the defendants to protect the plaintiff as a member of the public from such foreseeable risk. It appears from the record that, after the hotel manager received the report that water bags had been dropped to the street, he said they patrolled the house and in rooms where they found "they were doing entertaining we told them to be careful about throwing out anything." He said that it wouldn't have done any good to try to find out the room from which the water bags were thrown, apparently for the reason that the convention was "out of control." He said the loss of control occurred every night "Any time after seven o'clock in the evening, from seven on." There is this testimony:

" [**666] Q. Would you say yes or no that it was the most harrowing experience you had as a hotel operator of that hotel?

"A. Well, I would say yes.

"Q. And isn't it true that you and the other officers of the hotel were all of that view even before the convention was over?

* * *

"A. Well, I would say, yes.

* * *

"Q. Now, is it true at the conclusion of this convention that you and the other members of the hotel management

were shocked by the damage done to your premises during the course of this convention?

"A. Yes, we were."

The manager of the hotel was asked if, when Miss Connolly was injured, he did not say, "Well, here is another of those incidents. I will be glad when this * * * convention is over." He did not deny making [*385] that statement and admitted that he might have made it because that was the way he felt at the time it happened. There is this testimony from the housekeeper:

"Q. But when you have in combination in a matter of a couple days time mirrors broken, recessed lights in the hallway broken, permanent quiet signs attached to the wall torn off, when you have the exit lights damaged, when you have the hall fixtures damaged, when you have the screens damaged, as you described, when you have wash bowls torn off of the wall in the men's room, when you have doors kicked in, when you have mouldings torn off, when you have seven holes drilled into a door of the hotel, wouldn't you say that is a shocking experience over a two day period of time?

* * *

"A. Yes, I think it is.

"Q. The like of which you had never seen before in that interval of time with any convention in that hotel.

"A. That's right. It really is true."

The record establishes that the defendants made no complaint as to the conduct of the guests and invitees to any responsible official of the Junior Chamber of Commerce. Had one been made, it may be assumed that the officers of the convention could have controlled their own members. Neither did the management of the hotel complain to the authorities or ask for additional police

protection. On the record we are satisfied that it was plainly a question for the jury to say whether under these unusual circumstances the defendants should have anticipated an accident such as happened and whether they should have taken some precautions by way of securing additional police or watchmen to supervise the conduct of their patrons. It is apparent from the record that, after the hotel management became aware of the disorderly character of the convention, it took no further affirmative action to protect the interests of the public. We are of the view that, once it became apparent to the defendants that the preliminary precautions which had been taken were not sufficient to protect the public from foreseeable risks which might arise from the disorderly character of the convention, the hotel had an affirmative duty to take further precautions [*386] to protect the public. Without undertaking to state precisely what precautions should have been taken by the defendants under the circumstances, we think that evidence of the defendants' failure to hire additional guards, to secure additional police protection, or to appeal to responsible officers of the convention presented a fact question as to whether the defendants exercised due care commensurate with the circumstances. The argument may well be advanced that by "turning the other cheek," to use an expression of the hotel's managing director, the defendants acquiesced in the misuse of their [**667] property and became for all practical purposes participants in such misuse.

9. The defendants further contend that there can be no liability to the plaintiff for the reason that she was neither an invitee nor patron of their establishment. They argue that they cannot be held liable for the unauthorized acts of a third person who, while on their premises, causes injury to an occupant of a public sidewalk. It may be briefly said that, even though the plaintiff was not a patron or a guest of the defendants, a relationship existed between them at the time and place of the injury which gave rise to a legal duty

on the part of the defendants. That relationship imposed an affirmative duty upon the defendants to guard the public from danger flowing from the use of their property by their guests and invitees, even though that use was not authorized by the defendants. There was a duty on the part of the defendants to members of the public at large to protect them from injury by forces set in motion as a result of the use which the defendants permitted to be made of their property. Here the plaintiff was a pedestrian within her rights as an occupant of the sidewalk on a street adjacent to the defendants' hotel. There was evidence from which a jury could find that she was injured as a result of disorderly conduct upon the premises, the risk of which was foreseeable and in regard to which the defendants after notice failed to take measures to protect her as a member of the public. In *Priewe v. Bartz, 249 Minn. 488, 491, 83 N.W. (2d) 116, 119*, in discussing the rights of a patron of a 3.2 beer establishment we said that such a person "has a right to rely on the belief that he is in an orderly house and that its operator, personally or by his delegated employee, will exercise reasonable care 'to the end that the doings in [*387] the house shall be orderly.'" By the same token it may be said that a pedestrian using a sidewalk adjacent to a hotel where intoxicating liquor is sold and dispensed may assume that the owner will exercise reasonable care to the end that the acts and conduct permitted upon the property will not expose a member of the public to the risk of bodily harm.

10. The conclusions we reach are supported by respected authority. In *Gore v. Whitmore Hotel Co. 229 Mo. App. 910, 83 S.W. (2d) 114*, a pedestrian was injured in an accident resulting from the throwing of a paper bag containing water from an upper floor of the defendant hotel while a convention of the Veterans of Foreign Wars was in progress. The manager of the hotel admitted that objects had been thrown from the hotel on every night of the

convention. It was the contention of the defendant that in order to impose liability it was necessary to establish that the proprietor of the hotel had reason to foresee that the object would be dropped or thrown so that the proprietor would have notice and an opportunity to exercise reasonable care to prevent the occurrence; that the guests to whom the defendant had assigned rooms were entitled to courteous treatment; and that the defendant had no right of access to the rooms of guests. The court held, however, that the guests were under a duty to refrain from unlawful and disorderly conduct which endangered the safety of others; that a willful violation of that duty forfeited the right of the guest to possession of the room; and that when the defendant became aware of the existence of the disorderly conduct of the guest it was its duty to exercise reasonable care to abate the condition. There, as here, there was no evidence to identify the particular room from which the object was thrown. Nevertheless, the court held that it was the duty of the defendant in the exercise of reasonable care to identify the offenders and the rooms used by them in the perpetration of the wrong. In that case the house officer had checked various rooms occupied by the guests and made inquiry as to whether or not they had thrown water into the streets. The night manager also went across the street and watched windows of the hotel but could not [**668] identify any of the rooms from which the objects were thrown. The court there said (*229 Mo. App. 916, 83 S.W. [2d] 118*):

[*388] "The mere failure of defendant to exercise ordinary care to identify the rioters was not sufficient to fix liability upon it. The defendant was not liable unless it could by the exercise of ordinary care have abated the condition in time to have prevented the injury to plaintiff. The evidence was sufficient to allow the jury to find that the defendant, though it had the right to evict the wrongdoers, negligently failed to identify them and, hence, never attempted to exercise such right. Having the legal

right to evict the offenders, this court cannot say as a matter of law that the defendant could not by the exercise of reasonable care have enforced this right prior to the time plaintiff was injured. The question was one for the jury."

See, also, *Weihert v. Piccione, 273 Wis. 448, 78 N.W. (2d) 757*; *Pfeifer v. Standard Gateway Theater, Inc. 259 Wis. 333, 48 N.W. (2d) 505*; *Fortier v. Hibernian Bldg. Assn. 315 Mass. 446, 53 N.E. (2d) 110*; *Southern Enterprises, Inc. v. Marek (Tex. Civ. App.) 68 S.W. (2d) 384*. Admittedly under the facts in the Gore case there were more frequent incidents of objects having been thrown from the hotel by its occupants. But it does not seem to us that the duration or frequency of the disorderly acts is determinative. The issue is whether the proprietors of the hotel had notice of the disorderly behavior of their guests and, after having had such notice, whether they took such steps as a person of ordinary prudence would take to protect others from foreseeable hazards resulting from the disorderly conduct of their guests.

We think the authorities relied upon by the defendants may be distinguished. *Wolk v. Pittsburgh Hotels Co. 284 Pa. 545, 131 A. 537, 42 A.L.R. 1081*, where it was held that an innkeeper is not liable for injuries caused by a transient guest's placing of objects on a window sill, which objects fell to the street injuring a person in an automobile, and *Larson v. St. Francis Hotel, 83 Cal. App. (2d) 210, 211, 188 P. (2d) 513, 514*, where a pedestrian was injured when a guest of the defendant hotel as "the result of the effervescence and ebullition of San Franciscans in their exuberance of joy on V-J Day" tossed an armchair out of a hotel window, may be distinguished in that they deal with instances of sporadic or isolated acts of which the owner did not have notice and in regard to which he had no opportunity to take steps to [*389] remove the danger. We think that *Holly v. Meyers Hotel & Tavern, Inc. 9 N.J. 493,*

89 A. (2d) 6, may also be distinguished. Under the facts in that case the court concluded (*9 N.J. 496, 89 A. [2d] 7*): "* * * there was no occasion for any affirmative action" during the 2-hour period between the time the guests of the hotel who were responsible for the accident were warned by the hotel management and the time the accident occurred. These cases do not deal with facts establishing a course of disorderly conduct continuing over a period of days and under circumstances where the defendants admitted that they had lost control of the orderly management of their property and failed to do anything about it.

11. The defendants contend that the proof is circumstantial and that there is no evidence that the object which struck the plaintiff came from the hotel. The plaintiff was struck in the eye by a mass of moist dirt or earth. The jury could find that this object was not an accumulation of dirt which fell from the structure. The record indicates that periodic inspections were made of the exterior of the building so that there would be no sizeable collection of dirt on it. Nor was it likely that the mass of dirt or earth came from some other building. From the physical location of the place where the accident occurred and the surrounding structures, there was ample evidence from which the jury could find that the place from which the mass of dirt or earth came would be the Nicollet [**669] Hotel property. The record before us indicates that the Nicollet Hotel is a 12-story structure. The accident occurred approximately 100 feet from Washington Avenue and 100 feet from the garage entrance south of the hotel. Across the street from the hotel on Nicollet Avenue are two 4-story buildings. Nicollet Avenue is 50 feet in width. There was nothing unusual about the weather conditions and no evidence of a wind which might carry a mass of mud from a distant source. There is no evidence to indicate that the mass of mud came from a vehicle or other pedestrian. We think that under the facts in this case the

evidence presents inferences which make the question of where the mass of mud came from one for the jury.

We have said many times that the law does not require every fact and circumstance which make up a case of negligence to be proved by [*390] direct and positive evidence or by the testimony of eyewitnesses, and that circumstantial evidence alone may authorize a finding of negligence. Negligence may be inferred from all the facts and surrounding circumstances, and where the evidence of such facts and circumstances is such as to take the case out of the realm of conjecture and into the field of legitimate inference from established facts, a prima facie case is made. *Standafer v. First Nat. Bank, 243 Minn. 442, 448, 68 N.W. (2d) 362, 366*; 38 Am. Jur., Negligence, § 333; *Westling v. Holm, 239 Minn. 191, 58 N.W. (2d) 252*.

Reversed.

Thomas Gallagher, Justice (dissenting).

1. The question presented is whether defendant should have reasonably anticipated that someone would throw or drop some substance from a window on the Nicollet Avenue side of the hotel shortly after midnight the last day of the convention and whether it had taken reasonable precautions to prevent such conduct.

It is well settled that an innkeeper is liable to third persons for the act of a guest only where he knew, or by the exercise of ordinary care could have known, that the guest was likely to do some act that would result in injury to such third person. 28 Am. Jur., Innkeepers, § 138; Annotation, 42 A.L.R. 1088. The duty rests upon him to protect such persons from foreseeable risks attendant upon the maintenance and operation of the property and to exercise reasonable care to keep it in such condition so as not to endanger them. He is not required to guard against every conceivable or possible danger, but only against those which appear reasonably probable. *Kapphahn v. Martin*

Hotel Co. 230 Iowa 739, 298 N.W. 901; *Gore v. Whitmore Hotel Co. 229 Mo. App. 910, 83 S.W. (2d) 114*; *Wolk v. Pittsburgh Hotels Co. 284 Pa. 545, 131 A. 537, 42 A.L.R. 1081*; *Holly v. Meyers Hotel & Tavern, Inc. 9 N.J. 493, 89 A. (2d) 6.*

2. When plaintiff was injured shortly after midnight, the convention had been in progress for 3 days and had reached its final stages. It had been quite disorderly. There is testimony that on previous days some of the guests had thrown or dropped ice cubes and in one instance a screen from the upper windows of the hotel. There is no evidence that [*391] acts of this kind had been a continuous practice during the convention, or that they had been engaged in at all on the day of plaintiff's injury. There is no evidence that defendant knew that any such misconduct was taking place just prior to the time of the occurrence involved. Defendant had retained two men regularly employed at the hotel and had six more men to patrol its corridors and prevent disorders during the convention. In addition the convention corporation had employed two men for this purpose, and the police of the city continued to maintain a regular 24-hour beat on the sidewalks adjacent to the hotel. During previous days of the convention, when defendant's manager had been notified that objects had been thrown from hotel windows, he had promptly [**670] checked the rooms in which he suspected such misconduct was occurring, but in each instance their occupants had denied that anyone therein had been guilty of the offenses described.

3. It is difficult to speculate as to what further precautions should reasonably have been required of defendant without making it an absolute insurer. Obviously, it could not direct its employees to enter guest rooms at random or to remain therein to prevent possible misconduct when it lacked evidence that any misconduct was occurring or was contemplated by room occupants. Not only would such procedure deprive guests of room privileges for which they had paid, but, if carried to its

logical conclusion, it would require that defendant, to be exonerated from any claim of negligence, employ and station a guard in every convention guest room of the hotel during the entire convention. As stated in *Larson v. St. Francis Hotel, 83 Cal. App. (2d) 210, 213, 188 P. (2d) 513, 515*:

"* * * The most logical inference * * * is that the chair was thrown * * * from a window. * * * this occurrence is not such as ordinarily does not happen without the negligence of the party charged, but, rather, one in which the accident ordinarily might happen despite the fact that the defendants used reasonable care and were totally free from negligence. To keep guests and visitors from throwing furniture out windows would require a guard to be placed in every room in the hotel, and no one would contend that there is any rule of law requiring a hotel to do that."

[*392] 4. The situation here is distinguishable from that in *Gore v. Whitmore Hotel Co. 229 Mo. App. 910, 83 S.W. (2d) 114*, where convention guests had thrown placards, feathers, telephone books, pillows, water-filled sacks, laundry bags, and like items from hotel windows for 3 days in a "regular deluge"; and from that in *Pfeifer v. Standard Gateway Theater, Inc. 259 Wis. 333, 48 N.W. (2d) 505*, where, for some time prior to plaintiff's injury, objects were being thrown about a theater and the theater owner had done nothing to stop such misconduct.

5. The majority opinion recites a number of acts of misconduct on the part of the convention guests which seem to be entirely irrelevant to the issue to be determined. The fact that on a previous day, following the convention parade, beer bottles and beer cans had been left on the sidewalk adjacent to the Hennepin Avenue side of the hotel is not evidence that such articles had been thrown or dropped from the hotel windows. The same is true as to beer bottles and beer cans placed upon the third-floor fire

escape on the day prior to the accident. Evidence of objects being dropped or thrown from the hotel on two or three isolated occasions is far from evidence of a deluge which might require prompt and positive preventative measures by a hotel proprietor as in *Gore v. Whitmore Hotel Co. 229 Mo. App. 910, 915, 83 S.W. (2d) 114, 117*. An animal mascot in the hotel lobby and others on an upper floor of the hotel; broken glass on the sidewalk near the garage; and the firing of guns in the hotel lobby bear no relationship to defendant's obligation to use reasonable care to prevent articles from being thrown from its upper windows. Evidence of wet carpets, broken chairs, broken screens, and soiled walls inside the hotel, all resulting from misconduct on the part of convention guests, is likewise totally unrelated to the issue to be determined here.

6. It is suggested that *all* such factors might support a finding of negligence based upon defendant's failure to "properly police the premises" or to "furnish a sufficient number of servants to afford reasonable protection." As pointed out above, to satisfy such a requirement would impose upon a hotel owner the obligation of stationing a guard in each room in which a convention guest was quartered so that its occupants might be kept under constant surveillance [**671] day and night. [*393] Such is not the obligation which has been imposed upon innkeepers or hotel owners by any decision on this subject. As stated in *Bruner v. Seelbach Hotel Co. 133 Ky. 41, 49, 117 S.W. 373, 376*, where a hotel owner was absolved from liability for the action of a guest in throwing a beer bottle into the street:

"* * * It is only when they [the hotel owners] know, or by the exercise of ordinary care could know, that the guest's conduct is such that injury will naturally result to others, that they have the right to eject the guest, or take precautions to control his conduct."

The rule of conduct prescribed by the majority opinion would seem to eliminate any possibility of an innkeeper or hotel owner escaping the charge of negligence in connection with any injuries which might occur during a hotel convention regardless of any reasonable care or precautions taken by them.

CHARLES C. JUDSON, Executor, et al., Respondents, v. GIANT POWDER COMPANY, Appellant No. 15792 Supreme Court of California, Department One 107 Cal. 549; 40 P. 1020 June 28, 1895

[*552] [**1020] GAROUTTE Respondents recovered judgment for the sum of forty-one thousand one hundred and sixty-four dollars and seventy-five cents, as damages for acts of negligence. This appeal is prosecuted from such judgment and from an order denying a motion for a new trial. The damages to respondents' property were occasioned by an explosion of nitro-glycerine, in process of manufacture into dynamite, in appellant's powder factory, situated upon the shore of the bay of San Francisco. Appellant's factory buildings were arranged around the slope of a hill facing the bay. Nearest to respondents' property was the nitro-glycerine house; next was the washing-house; next were the mixing-houses; then came the packing-houses, and finally the two magazines used for storing dynamite. These various buildings were situated from fifty to one hundred and fifty feet apart, and a tramway ran in front of them. The explosion occurred in the morning during working hours, and originated in the nitro-glycerine house. There followed, within a few moments of time, in regular order, the explosion of the other buildings, the two [*553] magazines coming last; but, though last, they were not least, for their explosion caused the entire downfall and destruction of respondents' factory, residences, and stock on hand. There is no question but that the cause of this series of explosions following the first is directly traceable, by reason of fire or concussion, to the

nitro-glycerine explosion. Of the many employees of appellant engaged in and about the nitro-glycerine factory at the time of the disaster none were left to tell the tale. Hence, any positive testimony as to the direct cause of the explosion is not to be had. The witnesses who saw and knew, like all things else around, save the earth itself, were scattered to the four winds.

1. Respondents sold the premises to appellant for the manufacture of dynamite, and it is claimed that the maxim, *Volenti non fit injuria*, applies, and therefore no recovery can be had. We attach but little importance to this contention. The grant of these premises for the purposes of a dynamite factory in no way carried to appellant the right to conduct its factory, as against the grantors, in any and every way it might see fit. There is no principle of law sustaining such a proposition. Let it be conceded that respondents, by reason of their grant, could not invoke the aid of a court of equity to prevent the appellant from conducting its business; still that concession proves nothing. This action is not based upon the theory that appellant's business is a nuisance *per se*, but negligence in the manner in which the business was conducted was alleged in the complaint, and is now insisted upon as having been proved at the trial. In making the grant respondents had a right to assume that due care would be exercised in the conduct of the business, and certainly they have a right to demand that such care be exercised.

It is argued that the explosion of all powder-works is a mere matter of time; that such explosions are necessarily contemplated by every one who builds beside such works, or who brings dynamite into his dooryard. It [*554] is further contended that appellant gave to respondents actual notice of the dangerous character of its business by a previous explosion, which damaged respondents' property, and that respondents, by still continuing in business after such notice, in a degree assumed and ratified the risk, and cannot now be heard to complain. The only element of

strength in this line of argument is its originality. The contention that in the ordinary course of events all powder factories explode, conceding such to be the fact, presents an element foreign to the case. The doctrine of fatalism is not here involved. In the ordinary course of events the time for this explosion had not arrived, and appellant had no legal right to hasten that event [**1021] by its negligent acts. Neither do we think respondents lost any legal rights by continuing to do business in this locality after being served with notice of the danger that surrounded them. While the notice was in the form of an object lesson, which came to them in no uncertain tones, yet appellant was not justified in serving it, nor were respondents negligent in disregarding it. Respondents were not bound to abandon their property, though negligence of appellant in the conduct of its factory was ever a menace and danger to their lives and property. Conceding that respondents, by their grant, thereby assumed certain risks and dangers which may be said to always surround the manufacture of dynamite, still they assumed no risks and waived no action for damages which might arise through appellant's negligence. Both reason and authority support this conclusion.

2. It is contended that respondents offered no evidence tending to show that the explosion of the nitro-glycerine factory was occasioned by the negligence of appellant, and this contention brings us to the consideration of a most important principle of law. In addition to the fact of an explosion being established, the respondent offered expert testimony to the effect that if the factory was properly conducted, and the employees careful during the process of manufacturing, an explosion [*555] would not occur. For the present we lay aside the evidence of the experts, and meet squarely and directly the question presented: Does the proof of the explosion draw with it a presumption of negligence sufficient to establish a *prima facie* case for a

recovery? While the cases are not in entire accord in holding that a presumption of negligence arises from the fact of the explosion, still they largely preponderate upon that side, and we think but few well-considered cases can be found looking the other way. All courts agree that, where contractual relations exist between the parties, as in cases of common carriers, proof of the accident carries with it the presumption of negligence, and makes a *prima facie* case. This proposition is elementary and uncontradicted; therefore, the citation of authority is unnecessary. Yet we know of no sound reason, and have found none stated in the books, why this principle of presumptions should be applicable to cases involving contractual relations and inapplicable to cases where no contractual relations exist. It is intimated in some Indiana case that the presumption arises, upon proof of the accident, by reason of the carrier's contract to safely deliver the passenger at his destination, but there is no such contract. The carrier is not an insurer of his passengers; if he were, this presumption of negligence arising from the accident, aside from the act of God, would be conclusive and irrebuttable; but such is not the fact, for it is only *prima facie* and always disputable. As was well said by the court in *Rose v. Stephens etc. Co., 11 Fed. Rep. 438*: "Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties." The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is a duty which the law enjoins upon him; but the law also enjoins the [*556] duty upon this appellant and all others, in the conduct of their business, to exercise a certain degree of care toward this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the

reason of the rule is not found in the relations existing between the party injuring and the party injured. The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions, will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown.

Based upon the foregoing principles a rule of law has been formulated, bearing upon a certain class of cases, where damages either to person or property form the foundation of the action. This rule is well declared in Shearman and Redfield on Negligence, section 60: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." Tested by this rule, no question of contractual relation could ever form an element in the case. With the same reason it might as well be said that cases of contract were excluded from the effect of the rule as that cases of pure tort were excluded; but, upon the contrary, it is plainly evident that both classes of actions come equally within its provisions. In speaking to this question, it is said in Cooley on Torts, 799: "The rule applied to carriers of passengers is not a special rule to govern only their conduct, but is a general rule which may be applied wherever the circumstances impose [*557] upon one party alone the obligation of special care." The author then cites the case of a householder engaged in repairing his roof; a piece of slate falls therefrom and injures a traveler upon the street. He then says: "True, the act of God, or some excusable accident, may [**1022] have

caused the slate to fall, but the explanation should come from the party charged with the special duty of protection."

The important question here involved, and the want of harmony in the decisions of courts bearing upon it, seem to demand a citation somewhat in detail of the many authorities which hold against appellant's views of the law. In England the authorities are in entire accord. Plaintiff was passing along a highway, under a railroad bridge, when a brick used in the construction of the bridge fell and injured him. Negligence in the railroad was presumed. (*Kearney* v. *London Ry. Co*., L. R. 5 Q. B. 411.) A barrel of flour rolled out of the window of a warehouse, injuring a person passing upon the street. Negligence in the warehouseman was presumed. (*Byrne* v. *Boadle*, 2 Hurl. & C. 722.) The same rule was declared, upon a similar state of facts, in *Scott* v. *London Docks Co*., 3 Hurl. & C. 596; likewise in *Briggs* v. *Oliver*, 4 Hurl. & C. 403. The explosion of a boiler of a steamboat is *prima facie* evidence of negligence. (*Posey v. Scoville, 10 Fed. Rep. 140*; *Rose v. Stephens etc. Co., 11 Fed. Rep. 438*; *Grimsley v. Hawkins, 46 Fed. Rep. 400*.) In the Rose case it is said: "In the present case the boiler which exploded was in the control of the employees of the defendant. As boilers do not usually explode when they are in a safe condition, and are properly managed, the inference that this boiler was not in a safe condition, or was not properly managed, was justifiable." The same general principle is declared in *Cummings v. National Furnace Co., 60 Wis. 603*; *Mulcairns v. City of Janesville, 67 Wis. 24*; *Kirst v. Milwaukee etc. Ry. Co., 46 Wis. 489*; *Thomas v. Western Telegraph Co ., 100 Mass. 156*; *Howser v. Cumberland etc. Ry. Co., 80 Md. 146*; 45 Am. St. Rep. 332. In the case of [*558] *Dixon v. Pluns, 98 Cal. 385, 35 Am. St. Rep. 180,* a case which, in its facts, is an exact photograph of one of the New York cases hereafter cited, a chisel, used by a workman upon a building, fell upon and injured a girl while passing upon the street below. It was held that a *prima facie* case of negligence was established,

and that the rule as declared in section 60 of Shearman and Redfield on Negligence was sound law and controlling.

While there is some discord existing in the New York authorities as to the true doctrine upon this question, still they are largely in line with the cases we have above cited. *Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530*, is a leading case upon the question, and, while it has been vigorously assaulted at various times during the past twenty years, it still stands as a declaration of law by the courts of that state, not weakened and mutilated by such assaults, but rather strengthened and unscathed. In *Cahalin* v. *Cochran*, 1 N. Y. St. Rep. 583, negligence was inferred from the fact of a chisel falling from a building where workmen were engaged, and striking plaintiff when walking upon the street. A case to the same effect is *Gall v. Manhattan Ry. Co., 5 N. Y. Supp. 185*; 24 N. Y. St. Rep. 24. *Mullen v. St. John, supra*, is expressly approved, and the doctrine for which we are here contending ratified to its full limits in the very recent case of *Volkmar v. Manhattan Ry. Co., 134 N. Y. 418*; 30 Am. St. Rep. 678.

As supporting a contrary doctrine, one of the leading cases is *Young* v. *Bransford*, 12 Lea, 232. Yet, in the report of that case, we find the following language: "At the same time the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by Judge Wallace: 'That from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the [*559] boiler, or some defect in its condition.'" Another case is *Huff v. Austin, 46 Ohio St. 386, 15 Am. St. Rep. 613*, a case which relies for support in part upon *Losee v. Buchanan, 51 N. Y. 476*; 10 Am. Rep. 623. Yet, in *Mullen v. St. John, supra*, the Losee case was expressly held to be

not in point by reason of the presence of other evidence. *Cosulich v. Standard Oil Co., 122 N. Y. 118, 19 Am. St. Rep. 475*, is the latest authority to which our attention had been directed holding these views. It cites the Tennessee and Ohio cases, and also relies, as do other of these cases, upon a general statement found in Thompson on Negligence, page 1227, namely: "But it is believed that it is never true, except in contractual relations, that the proof of the mere fact that the accident happened to the plaintiff, without more, will amount to evidence of negligence on the part of the defendant." The case cited by Mr. Thompson in no way supports this text, if the text is to be construed as the Cosulich case seems to construe it, and the learned author's illustrations which immediately follow conclusively indicate that, in making the statement quoted, he never contemplated for it any such construction as the New York court seems to give it. This is doubly apparent when we see that upon the same page he indorses the doctrine of *Byrne* v. *Boadle, supra*. Indeed, the author prefaces his whole discussion of the question of *res ipsa loquitur* by a report in full of the celebrated case of *Kearney* v. *London Ry. Co., supra*, the doctrine of which he fully indorses, and which in no sense was a case of contractual relation. Beyond all this, the Volkmar case, already cited, is a later expression emanating from the New York court, and earlier cases coming from the same source, if opposed to the doctrine there declared, must give way.

There is another class of cases in all essentials fully supporting our views upon this question of negligence. These cases arise in the destruction of property caused by fire escaping from locomotive engines, and, while there is some conflict in the authorities as to the true [*560] rule, it is said in Shearman and Redfield on Negligence, section 676: "The decided [**1023] weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of

proving that it had used all those precautions for confining sparks and cinders (as the case may be) which have been already mentioned as necessary. This is the common law of England, and the same rule has been followed in New York, Maryland," etc. (Citing many other states.) While we have not deemed it necessary to verify the correctness of the statement of the authors as to all the states mentioned, we do say there are numberless cases supporting the text. (See *Pigott* v. *Eastern Counties Ry. Co*., 3 Com. B. 228; *Louisville etc. R. R. Co. v. Reese, 85 Ala. 497*; 7 Am. St. Rep. 66; *Spaulding v. Chicago etc. Ry. Co., 30 Wis. 110*; 11 Am. Rep. 550, citing many cases.)

In this state the question has never been directly passed upon as to whether or not negligence will be presumed from the fact of sparks escaping from a locomotive engine, and the destruction of grain fields resulting therefrom. In *Butcher v. Vaca Valley etc. R. R. Co., 67 Cal. 518,* the doctrine is inferentially favored, although in that case the plaintiff placed an expert witness upon the stand, who testified that "a perfect engine, properly equipped and properly run, will not ordinarily throw out sparks sufficient to start a fire." This line of evidence was also held sufficient to establish a *prima facie* case of negligence in *Hull v. Sacramento Valley R. R. Co., 14 Cal. 387, 73 Am. Dec. 656,* and *Henry v. Southern Pac. R. R. Co., 50 Cal. 176*. For our purpose it is not necessary to enter into a prolonged investigation to determine why this evidence of the expert strengthened plaintiff's case. But, taking the converse of the proposition, let us assume that defendant's engine was a perfect engine, properly equipped and properly run, and that, notwithstanding such conditions, it would ordinarily, when in use, throw out sparks of fire, leaving in [*561] its wake, as it passed through the country, property destroyed and possibly lives lost. Certainly this could hardly be tolerated in law. Hence we fail to fully appreciate the importance of this line of evidence. Such

conduct upon the part of a railroad company would render it guilty of the commission of a nuisance, and liable in damages for property destroyed. Certainly it is no answer to such a condition of things to say that the legislative grant to the corporation to do business with the aid of steam locomotives carries with it the right to destroy the property of adjoining owners; but rather we must assume that the grant was made only after a prior determination by the same legislative power that a perfect locomotive engine, properly equipped and properly run, will not ordinarily throw out sufficient sparks to destroy adjoining property. It is only upon such a theory that the right to do business by the use of this character of implement was ever granted; and, hence, we again say that it may be considered doubtful if this class of evidence strengthens the plaintiff's case. For it is but proving as a fact some thing of which the courts, and possibly all the world, take full notice.

In the case at bar, following the lines marked out by the cases last cited, respondents placed before the court expert evidence to the effect that, if the correct process of manufacturing and handling dynamite was carefully carried out, an explosion would not occur. This evidence is stronger than in the smokestack cases, for here it declares as a certainty what there is only stated to be the probable or ordinary result; but, be that as it may, if this character of evidence was relevant and material in the smokestack cases, it is equally relevant and material here. If it was sufficient there to complete and perfect a *prima facie* case of negligence it is ample here to do the same. Again, if appellant had the right under the laws of the state to manufacture dynamite (which is conceded), and if, by reason of the existence of such right, courts may assume that, if dynamite is properly handled in the process of manufacture, explosions will [*562] not probably occur, then respondents' case is doubly proven, for here we have, not only the presumption of the existence of certain

conditions, but the evidence of witnesses as to the existence of them.

In concluding this branch of the case we can only reiterate that the true rule appears to be found in section 60 of Shearman and Redfield on Negligence, which we have already quoted; and, gauging this case by the test there prescribed, a *prima facie* case of negligence was established by respondents' evidence. This case seems to clearly come within the provisions of the rule there declared. There is nothing to distinguish it in principle from the army of cases that have been held to come directly within its provisions. Appellant was engaged in the manufacture of dynamite. In the ordinary course of things an explosion does not occur in such manufacture if proper care is exercised. An explosion did occur; *ergo*, the real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care. The logic is unassailable, and the principle of law of presumptions of fact erected thereon is as sound as the logic upon which it is based.

3. Questions of negligence in the storage of the gunpowder become unnecessary to consider, owing to our views upon the main question discussed. Neither do we find any thing in the record bearing upon the measure or amount of damages declared and decreed by the court demanding a new trial of the case.

For the foregoing reasons the judgment and order are affirmed.

 Observe que el common law establece la presunción rebatible de culpa de *res ipsa loquitur* en una situación, *deiectum uel effusum*, que el derecho romano, a este tenor, trataba como un cuasidelito, es decir, como una instancia de responsabilidad objetiva. ¿Cuál cree que podría ser la razón?

 HAASMAN v. PACIFIC ALASKA AIR EXPRESS et al. MANDERS v. PACIFIC ALASKA AIR EXPRESS, Inc. et al. (two cases). BACKMAN v. DES MARAIS et al. Nos. A-5930, A-6531, A-6554, A-6599 UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, THIRD DIVISION 100 F. Supp. 1 October 5, 1951

[*661] ELY, Circuit Judge:

Appellee and her husband were the owners of a seagoing vessel known as "Frank L. III". They had caused the vessel to be constructed in 1955, and it was built in the knowledge that it would be used for two purposes, namely, sports fishing and crab fishing. It was built of wood, had a gross tonnage of thirteen tons and a net tonnage of twelve tons, and its dimensions were 38.8 feet in length, 14 feet in width, and 3.4 feet depth in hull. On February 21, 1959, the vessel sank off the coast of the State of Washington. She was engaged in crab fishing operations at the time, and her master and the only two crewmen were drowned. Appellant, the widow of one of the crewmen, instituted an action for damages in a Washington state court alleging that the loss of her husband's life resulted from unseaworthiness of the vessel and from negligence in its maintenance, construction, and operation.

Appellee, whose husband and co-owner of the vessel died following the tragedy at sea, filed a petition in the court below seeking, under the provisions of Sections 183-189 of Title 46 U. [**2] S.C. (1958), to exonerate herself from liability or to limit the extent of her liability. Issue was joined, trial was had, and a judgment exonerating the petitioner from liability was entered upon, and based upon, the trial court's conclusions of law as follows:

"CONCLUSIONS OF LAW

1. There is no evidence to establish negligence on the part of the petitioners Lambertsen nor of the master or crew of the vessel 'Frank L. III'.

2. There is no evidence to establish unseaworthiness of the vessel at or prior to the time of the loss.

3. There is no evidence of any negligence, incompetence or other defect in the planning and construction of the vessel or in any changes subsequent thereto to establish that it was unseaworthy at the time of departure on its last voyage.

4. There is no presumption of unseaworthiness of the vessel since there is no evidence indicating either negligence or unseaworthiness in one or more particulars at or prior to the time of the loss.

5. Neither the petitioner, Thelma Lambertsen, nor her deceased husband, Frank L. Lambertsen, had the slightest privity or knowledge of any condition of unseaworthiness or negligence which might be alleged to have [**3] existed with respect to the vessel and which might be alleged to have been the proximate cause of the loss."

Appellant seriously and ably contends that the trial court's conclusions are not supported by the evidence, but we, convinced to the contrary, must affirm.

The actual cause of the sinking of the vessel could not be proved. It disappeared on a day when only a light breeze was blowing and when the seas were calm, the weather was clear, and the visibility was about six miles. When last seen by other fishermen on other boats in the area of their common crabbing operations, one of the fishermen observed that there was "nothing out of line" as to the loading of the vessel and that it "was being maneuvered in its normal manner". This fisherman, the master of his own vessel, observed that the "Frank L. III" "was going along just like a duck, easy, had all the time of the world, it appeared". The master of another crab fishing boat, produced as a witness by the appellant, when asked whether or not on the day of the sinking he had noticed the "Frank L. III" "heading up to any extent while picking up

pots", replied, "Absolutely not. If I would have, we would have went over there".

[**4] Appellant endeavored to support her claim by proving that for the "Frank L. III's" use as a crab fishing vessel, a live crab tank, designed to contain [*662] 5000 pounds of crabs, had been installed on the deck of the vessel and had adversely affected its seagoing stability. It was urged, in effect, that the trial court might infer that the vessel's sinking resulted from negligence in the alteration, by addition, in the ship's equipment and that the additional weight of the crab tank with an undetermined amount of crabs, plus the weight of crab pots, created an unseaworthy condition which proximately caused the capsizing and sinking of the vessel. The appellant contends that the district court erroneously failed to apply the doctrine of *res ipsa loquitur* to her advantage. Our court has held that if a claimant establishes that a vessel is unseaworthy, the trial court may presume that the unseaworthiness was the proximate cause of the sinking, otherwise unexplained, of a vessel in calm seas. *Admiral Towing Co. v. Woolen, 290 F.2d 641, 1961 Am.Mar.Cas. 2333* (9th Cir.). The appellant relies heavily upon this decision, and she also directs our attention to [**5] *Roth v. Bird, 239 F.2d 257, 1957 Am.Mar.Cas. 112 (5th Cir. 1956); The Cleveco, 154 F.2d 605, 1946 Am.Mar.Cas. 933* (6th Cir.); *Sabine Towing Co. v. Brennan, 72 F.2d 490, 1934 Am.Mar.Cas. 1122* (5th Cir.), cert. denied, *293 U.S. 611, 55 S. Ct. 141, 79 L. Ed. 701, 1934 Am.Mar.Cas. 1414*; and *Petition of Midwest Towing Co., 203 F. Supp. 727, 1962 Am.Mar.Cas. 2438* (E.D.Ill.), aff'd sub nom. *Midwest Towing Co. v. Anderson, 317 F.2d 270, 1963 Am.Mar.Cas. 2376* (7th Cir.). A review of the opinions in these cases and all others which might seem somewhat analogous to the case at bar makes it clear that the presumption which appellant would apply has been indulged only when the claimant has been able to establish to the satisfaction of the trial court that the vessel was unseaworthy at the time it departed on its last voyage. The

sea itself contains many hazards, [1] and an inference of liability of the shipowner for the mysterious loss of his vessel should not be lightly drawn. The court below obviously and properly believed that there could be no foundation for the inference absent satisfactory proof of an unseaworthy [**6] condition which might reasonably be expected to relate directly to the sinking of the vessel. [2]

1 The existence of one hazard is shown by the following testimony:

"Q. Mr. Stedman, from your experience in the area where this fishing was going on at the time, what is the situation with respect to the general situation with respect to debris in the water or deadheads or whatever types of things are in the water as foreign material?

A. Well, this is a question that has been asked everybody, about deadheads, or did you see any deadheads at this particular time, but driftwood and deadheads are a common occurrence. Every day -- there isn't one day, not one day out of the year that you can go out of Grays Harbor and not have quite a number of deadheads.

Q. What is a deadhead?

A. It's a log or even a piece of wood that sinks partially under the water and partially out of the water. When there is a little chop, they are very hard to see.

Q. Have you had any experience or encounters with that type of thing? A. Yes. With the vessel that we are discussing, I holed it one time.

Q. You mean by that you put a hole in it?

A. Yes.

Q. Have you had any other experiences with this type of debris in that area?

A. Yes, I had an experience with my own vessel that I have now, but I have been very fortunate; I have hit them right, so I haven't done any harm except to my wheel. I had to have my wheel straightened out.

THE COURT: Are these experiences in the general vicinity of where the fishing was, the crabbing was going on the day of this accident?

THE WITNESS: Yes. Where this North Whistler was that the gear was near is a tide rip that comes from the harbor, that runs around the harbor, and that general area is quite noted for sticks and deadheads. We had a boat this summer that was busted wide open there, two, in fact, but one of them was very lucky. They got the Coast Guard boat on each side and managed to save it."

[**7]

2 The "Frank L. III" was not equipped with a life boat, but it would hardly be reasonable to infer that the absence of such equipment proximately contributed to the sinking of the vessel. The body of appellant's intestate, when discovered, was floating in a life jacket. In the absence of more proof than was available to appellant, to infer that her intestate's life would have been saved if a life boat or a life raft had been available would be to indulge in mere conjecture. *The Princess Sophia, 61 F.2d 339, 1932 Am.Mar.Cas. 1562* (9th Cir.) See *Powers v. New York Central Railroad Co., 251 F.2d 813, 1958 Am.Mar.Cas. 614* (2d Cir.) and *Wilhelm Sea Foods Inc. v. Moore, 328 F.2d 868, 1964 Am.Mar.Cas. 2264* (5th Cir.), affirming per curiam, *Moore v. The O/S Fram, 226 F. Supp. 816, 1964 Am.Mar.Cas. 2265 (S.D.Tex.1963),* wherein the evidence justified

> findings that lack of adequate equipment bore a direct causal relationship to the deaths of the seamen.

[*663] In the admiralty proceeding in which a shipowner seeks to exonerate himself from [**8] liability or to limit his liability, the burden of proving negligence or unseaworthiness rests upon the claimant. *Lieberman v. Matson Navigation Co., 300 F.2d 661, 1962 Am.Mar.Cas. 1281* (9th Cir.); *Ramos v. Matson Navigation Co., 316 F.2d 128, 1963 Am.Mar.Cas. 1134* (9th Cir.). Findings of lack of negligence and of seaworthiness may be upheld as not clearly erroneous either because affirmative evidence supports the findings or because sufficient evidence to the contrary has not been presented by the one upon whom rests the burden of proof. *Ramos v. Matson Navigation Co., supra.* In our review of the evidence, we have noted that the history of the construction of the "Frank L. III" and its alteration for crab fishing purposes was fully developed. It was shown that in the construction stage, it was planned that the vessel be made adequate for both sports fishing and crab fishing purposes. The trial judge, in announcing his conclusion, remarked,

> "The vessel was built by one of the best-known boat builders in the Northwest, highly competent and experienced, and the evidence shows that the builder took special precautions to make the vessel [**9] suitable for the combined purposes indicated. The adding of the 'live tank' to the vessel was at the instance of a competent and long-experienced skipper, accomplished by a construction firm of good repute, and there is not the slightest indication that it was improper or negligently done in any particular."

There was evidence that the boat, while engaged in prior crab fishing operations and when much more heavily loaded than it would appear to have been at the time of its loss, safely rode out heavy seas. Considering the whole body of testimony, we are of the opinion that the trial court was fully justified in arriving at the determinations which are fatal to the contentions of appellant.

In *Ramos v. Matson Navigation Co., supra,* Judge Duniway, for our court, wrote, *316 F.2d at page 131, 1963 Am.Mar.Cas. at 1137,*

> "We are committed to the proposition that a finding as to negligence, or as to unseaworthiness, is one of fact, not to be upset by us unless clearly erroneous. (See, as to negligence: *Pacific Tow Boat Co. v. States Marine Corp., 9 Cir., 1960, 276 F.2d 745*; *Albina Engine & Mach. Works v. American Mail Line, Ltd., 9 Cir., 1959, 263 F.2d 311*; [**10] *Amerocean S.S. Co. v. Copp, 9 Cir., 1957, 245 F.2d 291*; and as to unseaworthiness: *Admiral Towing Co. v. Woolen, 9 Cir., 1961, 290 F.2d 641*.)"

Here, we have pointed to evidence which together with, if not apart from, other persuasive testimony which appears in the record was adequate to support affirmatively the conclusions of absence of the shipowners' negligence and absence of an unseaworthy condition in the vessel.

In the court below, the thrust of appellant's case was to the proposition that the "Frank L. III" was unseaworthy. As we analyze the evidence, it was entirely insufficient to support a finding of negligence, had such a finding been made. It is only upon the basis of negligence that a claim arising from a seaman's death within territorial waters can rest. *Lindgren v. United States, 281 U.S. 38,* [*664] *50 S. Ct. 207, 74 L. Ed. 686, 1930 Am.Mar.Cas. 399*; *Gillespie v.*

United States Steel Corp., 379 U.S. 148, 85 S. Ct. 308, 13 L. Ed. 2d 199, 1965 Am.Mar.Cas. 1 (1964). In our court, the appellant urges for the first time that her claim be evaluated in the light of the so-called Death on the High Seas [**11] Act. *46 U.S.C. § 761 et seq.* Suffice it to say that liability under that Act must also rest upon adequate proof of negligence or unseaworthiness. [3].

> 3 Appellant did not prove that the vessel sank beyond a marine league from shore and thus without the territorial waters of the United States. Moreover, while the Death on the High Seas Act confers jurisdiction "in the district courts of the United States, in admiralty," and prescribes a limitation period of two years, the appellant instituted her suit in the state court almost twenty-eight months after the vessel sank.

Our conclusion that the appellee was properly exonerated from liability renders it unnecessary to consider the question as to whether or not her evidence supported the district court's conclusion that neither she nor her husband was privy to or knowledgeable of any alleged negligence or condition of unseaworthiness.

Affirmed.

IRENE COX, Administratrix of the Estate of RANDALL S. COX, Deceased, Libellant-Appellee v. NORTHWEST AIRLINES, INC., Respondent-Appellant. No. 15897 UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 379 F.2d 893 May 16, 1967

[*894] CASTLE, Circuit Judge.

The appellant, Northwest Airlines, Inc., prosecutes this appeal from a judgment entered against it in an admiralty action instituted in the District Court by the libellant-appellee, Irene Cox, administratrix. Libellant sought recovery of damages under the Death on the High Seas Act (*46 U.S.C.A. § 761 et seq.*) for the death of her husband.

The action was tried to the court without a jury. The court made and entered findings of fact and conclusions of law, and awarded judgment against the appellant for $329,956.59.

The record discloses that the libellant's decedent, her husband, Randall S. Cox, a Captain in the United States Army, 29 years of age, was a passenger on appellant's Douglas DC-7C airplane N290, flight 293, which crashed in the Pacific Ocean on June 3, 1963 during a flight from McChord Air Force Base, near Seattle, Washington, to Elmendorf, Alaska, at approximately 11:12 A.M. at a point about one hundred sixteen miles west-southwest of Annette [**2] Island off the west coast of Canada. The flight had taken off from McChord at about 8:32 A.M. after having been briefed on the weather by both its dispatch office at the Seattle Airport and by a U.S. Air Force weather specialist at McChord, and having followed the usual procedures in preparation for flight. The crew reported by radio at 11:07 A.M. that it had been over Domestic Annette at an altitude of 14,000 feet and requested clearance to climb to 18,000 feet. No reason for the requested change in altitude was given. Domestic Annette is a fix-point at which directional radio bearings are obtained along the air route from McChord to Elmendorf. This was the last known transmission made by the crew of the aircraft. On the following day, June 4, 1963, floating debris was sighted in the Pacific Ocean about 35 nautical miles west of Domestic Annette. Approximately 1,500 pounds of wreckage identified as being from the aircraft, including life vests still encased in their plastic containers and extremely deformed seat frames, was recovered. The bodies of none of the crew or passengers were ever recovered.

The District Court made a number of findings with respect to facts and circumstances [**3] concerning the flight. But none of these subsidiary findings afford, or were relied upon by the court as affording, a basis for finding

and concluding that any specific conduct attributable to the appellant constituted negligence and was a proximate cause of the crash. The court's conclusion that the negligence of appellant was the proximate cause of decedent's death is predicated upon the court's finding that:

> "As a result of the occurrence Randall S. Cox met his death. The instrumentality which produced the death of Randall S. Cox was under the exclusive control and management of the [appellant] and that the occurrence in question was such as does not ordinarily occur in the absence of negligence, and, further, that there is no possibility of contributing conduct which would make Randall S. Cox responsible; [*895] that the facts herein justify a finding of negligence."

The appellant recognizes that the doctrine of res ipsa loquitur may properly have application in actions involving airline accidents. But the appellant contends that in the instant case it was error to apply that doctrine in resolving the issue of liability because there is substantial [**4] proof of the exercise of due care by the appellant and no countervailing evidence of specific negligence or even of unusual circumstances. Appellant urges that evidence of due care on its part precludes any inference of negligence arising from the occurrence in the absence of at least minimal supporting evidence and, therefore, libellant has not sustained the burden of proof requisite to an ultimate finding of negligence and has failed to prove her case by a preponderance of the evidence.

The evidence of due care to which appellant alludes concerns its maintenance records and procedures with respect to the aircraft involved; the qualified and certified status, and the competence, of the operating personnel of

the aircraft and of the dispatcher; the safety training received by the crew; and the evidence that the flight was properly dispatched and the weather normal.

There is no evidence as to the cause of the aircraft's crash into the ocean or concerning what happened to affect the operation of the aircraft during the period following 11:07 A. M. and prior to the crash. In the absence of such evidence, the probative value of appellant's general evidence of due care is not of substantial [**5] import. Whether due care was exercised by the operating personnel of the aircraft in the face of whatever occurred to affect the operation of the aircraft can be appraised only in the light of knowledge of what that occurrence was, whether human or mechanical failure or some other incident, and of what if anything was or could have been done about it.

We perceive nothing in appellant's due care evidence which precludes an application of the res ipsa loquitur doctrine or conditions such application upon the libellant's responding with evidence to support some specific negligent act or omission on the part of appellant. Here the cause of the crash which resulted in the death of Randall S. Cox is wholly unexplained. And, as was cogently observed in *Johnson v. United States, 333 U.S. 46, 49, 92 L. Ed. 468, 68 S. Ct. 391*:

> "No act need be explicable only in terms of negligence in order for the rule of *res ipsa loquitur* to be invoked. The rule deals only with permissible inferences from unexplained events."

We are of the opinion that the court properly applied [**6] the doctrine of res ipsa loquitur and that its finding of negligence was a permissible one -- warranted though not compelled (*Sweeney v. Erving, 228 U.S. 233, 240, 57 L. Ed. 815, 33 S. Ct. 416*) -- and that the court's conclusion on

the issue of appellant's liability is thus supported by the evidence and the application of correct legal criteria. *Haasman v. Pacific Alaska Air Express, D.C.D. Alaska, 100 F. Supp. 1,* affirmed sub nom*, Des Marais v. Beckman, 9 Cir., 198 F.2d 550*. Cf. *Blumenthal v. United States, 3 Cir., 306 F.2d 16, 19*; *Trihey v. Transocean Air Lines, 9 Cir., 255 F.2d 824*.

We turn to consideration of appellant's contentions that the District Court erred in its computation of the amounts of certain of the specific elements of damage it included in the $329,956.59 award it made.

Although the awards made on certain of the elements of damage here allowed appear to be generous we cannot say that they are clearly excessive. But this does not preclude us from reviewing the amount allowed for a given element from the standpoint of determining whether the court made an error in the manner of its computation [**7] of "a fair and just compensation for the pecuniary loss sustained" by the widow and two minor children of the decedent with respect to an otherwise proper element of damage. [*896] And, in this connection, our review of the record, and of the court's findings and computations, convinces us that the court erred in two respects.

The court's computation of the loss of future contributions to the widow and children on the basis of what the court found the decedent's probable future earnings plus retirement income would have been was predicated on probable earnings and income increasing to amounts ranging from $15,655 to $20,608 per annum for the twenty-year period commencing with 1979. No reduction was made for income tax the decedent would have paid on the earnings and income so attributed to this twenty-year period. The deceased's beneficiaries could not logically and reasonably have expected to receive the money he would have paid in such taxes had he lived. Only

the net income would have been available for their support. And there can be no pecuniary loss of income which would not have been available for contribution.

We agree with the rationale of the United States Court [**8] of Appeals for the Second Circuit as it appears to have been finally crystallized in *Petition of Marina Mercante Nicaraguense, S.A., 364 F.2d 118*, and conclude that the income level here attributed to the twenty-year period commencing with 1979 is such that a reduction for income tax is required to be made from the annual gross income during that period. [1] This is a case where the impact of income tax has a significant and substantial effect in the computation of probable future contributions and may not be ignored. While mathematical certainty is not possible, any more than it is in a prognosis of life expectancy and probable future earnings, nevertheless, an estimate may be made based generally on current rates, from which there should be computed the future income of the deceased after payment of Federal Income Taxes rather than before. *O'Connor v. United States, 2 Cir., 269 F.2d 578, 584.*

1 The decedent's probable income level attributed to the period from his death until the year 1979 is not such that the impact of income tax need be considered.

[**9] The damages award also embraces an item of loss of inheritance to the widow predicated upon the court's findings that the deceased, had he lived his life expectancy at age 29.14, would have been survived by his wife and would have left an estate valued at $30,000. The court did not indicate or specify that this figure represented present value, and the record will not support an assumption that it did. The court's failure to discount this amount to its present value was error. A finding of loss based on a future expectancy must be reduced to present value when measuring pecuniary loss in federal wrongful death cases. *Montellier v. United States, D.C.E.D.N.Y., 202 F. Supp. 384, 424.*

The appellant advances certain additional contentions with respect to the propriety of the damages awarded. While we are not unimpressed by the merits of these arguments, they concern neither errors of computation nor the legal permissibility of the element of damage involved. These matters were peculiarly within the province of the trier of the facts, and we refuse to disturb his considered [**10] judgment thereon. Suffice it to say that we perceive no basis for a conclusion that the factual findings on which these allowances rest are clearly erroneous. Nor do they result in making the award of damages clearly excessive. We, therefore, will not extend this opinion to discuss these additional contentions.

The judgment of the District Court is affirmed insofar as it adjudicates the issue of the liability of the appellant, Northwest Airlines, Inc., to the libellant, and the cause is remanded to the District Court with directions that the court modify the judgment by reducing the amount of damages awarded therein to conform with the views herein expressed.

A motion of the libellant-appellee to strike from an additional appendix incorporated in appellant's reply brief copies of certain post-trial correspondence [*897] addressed to appellant's counsel from an actuarial firm was taken with the case at the time of oral argument. The material to which the motion is addressed purports to review and analyze the computations contained in the District Court's findings and to supply further actuarial computations. The motion to strike is granted. An attempt to so supply matter [**11] dehors the record is improper.

In view of the disposition we have made of the appeal it is ordered that no costs on appeal be allowed to the libellant-appellee and that one-third of the appellant's costs on appeal be taxed and allowed against the libellant-appellee.

Affirmed in part and remanded with directions to modify damages awarded.

JOSEPH ROMAN YBARRA, Appellant, v. LAWRENCE C. SPANGARD et al., Respondents L. A. No. 19067 Supreme Court of California 25 Cal. 2d 486; 154 P.2d 687 December 27, 1944

[*487] [**688] GIBSON This is an action for damages for personal injuries alleged to have been inflicted on plaintiff by defendants during the course of a surgical operation. The trial court entered judgments of nonsuit as to all defendants and plaintiff appealed.

On October 28, 1939, plaintiff consulted defendant Dr. Tilley, who diagnosed his ailment as appendicitis, and made arrangements for an appendectomy to be performed by defendant Dr. Spangard at a hospital owned and managed by defendant Dr. Swift. Plaintiff entered the hospital, was given a hypodermic injection, slept, and later was awakened by Doctors Tilley and Spangard and wheeled into the operating room by a nurse whom he believed to be defendant Gisler, an employee of Dr. Swift. Defendant Dr. Reser, the anesthetist, also an employee of Dr. Swift, adjusted plaintiff for [*488] the operation, pulling his body to the head of the operating table and, according to plaintiff's testimony, laying him back against two hard objects at the top of his shoulders, about an inch below his neck. Dr. Reser then administered the anesthetic and plaintiff lost consciousness. When he awoke early the following morning he was in his hospital room attended by defendant Thompson, the special nurse, and another nurse who was not made a defendant.

Plaintiff testified that prior to the operation he had never had any pain in, or injury to, his right arm or shoulder, but that when he awakened he felt a sharp pain about half way between the neck and the point of the right shoulder. He complained to the nurse, and then to Dr. Tilley, who gave him diathermy treatments while he

remained in the hospital. The pain did not cease, but spread down to the lower part of his arm, and after his release from the hospital the condition grew worse. He was unable to rotate or lift his arm, and developed paralysis and atrophy of the muscles around the shoulder. He received further treatments from Dr. Tilley until March, 1940, and then returned to work, wearing his arm in a splint on the advice of Dr. Spangard.

Plaintiff also consulted Dr. Wilfred Sterling Clark, who had X-ray pictures taken which showed an area of diminished sensation below the shoulder and atrophy and wasting away of the muscles around the shoulder. In the opinion of Dr. Clark, plaintiff's condition was due to trauma or injury by pressure or strain, applied between his right shoulder and neck.

Plaintiff was also examined by Dr. Fernando Garduno, who expressed the opinion that plaintiff's injury was a paralysis of traumatic origin, not arising from pathological causes, and not systemic, and that the injury resulted in atrophy, loss of use and restriction of motion of the right arm and shoulder.

Plaintiff's theory is that the foregoing evidence presents a proper case for the application of the doctrine of res ipsa loquitur, and that the inference of negligence arising therefrom makes the granting of a nonsuit improper. Defendants take the position that, assuming that plaintiff's condition was in fact the result of an injury, there is no showing that the act of any particular defendant, nor any particular instrumentality, was the cause thereof. They attack plaintiff's [*489] action as an attempt to fix liability "en masse" on various defendants, some of whom were not responsible for the acts of others; and they further point to the failure to show which defendants had control of the instrumentalities that may have been involved. Their main defense may be briefly stated in two propositions: (1) that

where there are several defendants, and there is a division of responsibility in the use of an instrumentality causing the injury, and the injury might have resulted from the separate act of either one of two [**689] or more persons, the rule of res ipsa loquitur cannot be invoked against any one of them; and (2) that where there are several instrumentalities, and no showing is made as to which caused the injury or as to the particular defendant in control of it, the doctrine cannot apply. We are satisfied, however, that these objections are not well taken in the circumstances of this case.

(1) The doctrine of res ipsa loquitur has three conditions: "(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." (Prosser, Torts, p. 295.) It is applied in a wide variety of situations, including cases of medical or dental treatment and hospital care. (*Ales v. Ryan, 8 Cal.2d 82 [64 P.2d 409]*; *Brown v. Shortlidge, 98 Cal.App. 352 [277 P. 134]*; *Moore v. Steen, 102 Cal.App. 723 [283 P. 833]*; *Armstrong v. Wallace, 8 Cal.App.2d 429 [47 P.2d 740]*; *Meyer v. McNutt Hospital, 173 Cal. 156 [159 P. 436]*; *Vergeldt v. Hartzell, 1 F.2d 633*; *Maki v. Murray Hospital, 91 Mont. 251 [7 P.2d 228]*; *Whetstine v. Moravec, 228 Iowa 352 [291 N.W. 425]*; see Shain, *Res Ipsa Loquitur*, 17 So.Cal.L. Rev. 187, 196.)

There is, however, some uncertainty as to the extent to which res ipsa loquitur may be invoked in cases of injury from medical treatment. This is in part due to the tendency, in some decisions, to lay undue emphasis on the limitations of the doctrine, and to give too little attention to its basic underlying purpose. The result has been that a simple, understandable rule of circumstantial evidence, with a sound background of common sense and human experience, has occasionally been transformed into a rigid

legal formula, which [*490] arbitrarily precludes its application in many cases where it is most important that it should be applied. If the doctrine is to continue to serve a useful purpose, we should not forget that "the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person." (9 Wigmore, Evidence [3d ed.], § 2509, p. 382; see, also, *Whetstine v. Moravec, 228 Iowa 352 [291 N.W. 425, 432]*; *Ross v. Double Shoals Cotton Mills, 140 N.C. 115 [52 S.E. 121*; 1 L.R.A.N.S. 298]; *Maki v. Murray Hospital, 91 Mont. 251 [7 P.2d 228, 231]*.) In the last-named case, where an unconscious patient in a hospital received injuries from a fall, the court declared that without the doctrine the maxim that for every wrong there is a remedy would be rendered nugatory, "by denying one, patently entitled to damages, satisfaction merely because he is ignorant of facts peculiarly within the knowledge of the party who should, in all justice, pay them."

(2a) The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. The passenger sitting awake in a railroad car at the time of a collision, the pedestrian walking along the street and struck by a falling object or the debris of an explosion, are surely not more entitled to an explanation than the unconscious patient on the operating table. Viewed from this aspect, it is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who received permanent injuries of a serious character, obviously the result of someone's

negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability. (See *Maki v. Murray Hospital, 91 Mont. 251 [7 P.2d 228]*.) If this were the state of the law of negligence, the courts, to avoid gross injustice, would be forced to invoke the principles of absolute liability, irrespective of negligence, in actions by persons suffering injuries [*491] during the course of treatment under anesthesia. But we think this juncture has not yet been reached, and that the doctrine of res ipsa loquitur is properly applicable to the case before us.

The condition that the injury must not have been due to the plaintiff's voluntary action is of course fully satisfied under the evidence produced herein; and the same is true of the condition that the accident must be one which ordinarily does not [**690] occur unless someone was negligent. We have here no problem of negligence in treatment, but of distinct injury to a healthy part of the body not the subject of treatment, nor within the area covered by the operation. The decisions in this state make it clear that such circumstances raise the inference of negligence, and call upon the defendant to explain the unusual result. (See *Ales v. Ryan, 8 Cal.2d 82 [64 P.2d 409]*; *Brown v. Shortlidge, 98 Cal.App. 352 [277 P. 134]*.)

The argument of defendants is simply that plaintiff has not shown an injury caused by an instrumentality under a defendant's control, because he has not shown which of the several instrumentalities that he came in contact with while in the hospital caused the injury; and he has not shown that any one defendant or his servants had exclusive control over any particular instrumentality. Defendants assert that some of them were not the employees of other defendants, that some did not stand in any permanent relationship from which liability in tort would follow, and that in view of the nature of the injury, the number of defendants and the

different functions performed by each, they could not all be liable for the wrong, if any.

We have no doubt that in a modern hospital a patient is quite likely to come under the care of a number of persons in different types of contractual and other relationships with each other. For example, in the present case it appears that Doctors Smith, Spangard and Tilley were physicians or surgeons commonly placed in the legal category of independent contractors; and Dr. Reser, the anesthetist, and defendant Thompson, the special nurse, were employees of Dr. Swift and not of the other doctors. But we do not believe that either the number or relationship of the defendants alone determines whether the doctrine of res ipsa loquitur applies. (3) Every defendant in whose custody the plaintiff was placed for any period was bound to exercise ordinary care to see that no unnecessary harm came to him and each would be liable for [*492] failure in this regard. Any defendant who negligently injured him, and any defendant charged with his care who so neglected him as to allow injury to occur, would be liable. The defendant employers would be liable for the neglect of their employees; and the doctor in charge of the operation would be liable for the negligence of those who became his temporary servants for the purpose of assisting in the operation.

In this connection, it should be noted that while the assisting physicians and nurses may be employed by the hospital, or engaged by the patient, they normally become the temporary servants or agents of the surgeon in charge while the operation is in progress, and liability may be imposed upon him for their negligent acts under the doctrine of *respondeat superior*. Thus a surgeon has been held liable for the negligence of an assisting nurse who leaves a sponge or other object inside a patient, and the fact that the duty of seeing that such mistakes do not occur is delegated to others does not absolve the doctor from

responsibility for their negligence. (See *Ales v. Ryan, 8 Cal.2d 82 [64 P.2d 409]*; *Armstrong v. Wallace, 8 Cal.App.2d 429 [47 P.2d 740]*; *Ault v. Hall, 119 Ohio St. 422 [164 N.E. 518, 60 A.L.R. 128]*; and see, also, *Maki v. Murray Hospital, 91 Mont. 251 [7 P.2d 228, 233]*.)

(2b) It may appear at the trial that, consistent with the principles outlined above, one or more defendants will be found liable and others absolved, but this should not preclude the application of the rule of res ipsa loquitur. The control, at one time or another, of one or more of the various agencies or instrumentalities which might have harmed the plaintiff was in the hands of every defendant or of his employees or temporary servants. This, we think, places upon them the burden of initial explanation. Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants; it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act.

The other aspect of the case which defendants so strongly emphasize is that plaintiff has not identified the instrumentality any more than he has the particular guilty defendant. Here, again, there is a misconception which, if carried to the extreme for which defendants contend, would unreasonably limit the application of the res ipsa loquitur rule. It should be enough that the plaintiff can show an injury resulting [*493] from an external force applied while he lay unconscious in the hospital; this is as clear a case of identification [**691] of the instrumentality as the plaintiff may ever be able to make.

(4) An examination of the recent cases, particularly in this state, discloses that the test of actual exclusive control of an instrumentality has not been strictly followed, but exceptions have been recognized where the purpose of the doctrine of res ipsa loquitur would otherwise be defeated. Thus, the test has become one of right of control rather than actual control. (See *Metz v. Southern Pac. Co., 51*

Cal.App.2d 260, 268 [124 P.2d 670].) In the bursting bottle cases where the bottler has delivered the instrumentality to a retailer and thus has given up actual control, he will nevertheless be subject to the doctrine where it is shown that no change in the condition of the bottle occurred after it left the bottler's possession, and it can accordingly be said that he was in constructive control. (*Escola v. Coca Cola Bottling Co., 24 Cal.2d 453 [150 P.2d 436]*.) Moreover, this court departed from the single instrumentality theory in the colliding vehicle cases, where two defendants were involved, each in control of a separate vehicle. (See *Smith v. O'Donnell, 215 Cal. 714 [12 P.2d 933]*; *Godfrey v. Brown, 220 Cal. 57 [29 P.2d 165, 93 A.L.R. 1072]*; Carpenter, 10 So.Cal.L.Rev. 170.) Finally, it has been suggested that the hospital cases may properly be considered exceptional, and that the doctrine of res ipsa loquitur "should apply with equal force in cases wherein medical and nursing staffs take the place of machinery and may, through carelessness or lack of skill, inflict, or permit the infliction of, injury upon a patient who is thereafter in no position to say how he received his injuries." (*Maki v. Murray Hospital, 91 Mont. 251 [7 P.2d 228, 231]*; see, also, *Whetstine v. Moravec, 228 Iowa 352 [291 N.W. 425, 435]*, where the court refers to the "instrumentalities" as including "the unconscious body of the plaintiff.")

(2c) In the face of these examples of liberalization of the tests for res ipsa loquitur, there can be no justification for the rejection of the doctrine in the instant case. As pointed out above, if we accept the contention of defendants herein, there will rarely be any compensation for patients injured while unconscious. A hospital today conducts a highly integrated system of activities, with many persons contributing their efforts. There may be, e.g., preparation for surgery by nurses [*494] and internes who are employees of the hospital; administering of an anesthetic by a doctor who may be an employee of the

hospital, an employee of the operating surgeon, or an independent contractor; performance of an operation by a surgeon and assistants who may be his employees, employees of the hospital, or independent contractors; and post surgical care by the surgeon, a hospital physician, and nurses. The number of those in whose care the patient is placed is not a good reason for denying him all reasonable opportunity to recover for negligent harm. It is rather a good reason for re-examination of the statement of legal theories which supposedly compel such a shocking result.

We do not at this time undertake to state the extent to which the reasoning of this case may be applied to other situations in which the doctrine of res ipsa loquitur is invoked. We merely hold that where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.

The judgment is reversed.

DUTY: UNDERTAKINGS

DUSTIN SOLDANO, a Minor, etc., Plaintiff and Appellant, v. HOWARD O'DANIELS, Defendant and Respondent Civ. No. 5900 Court of Appeal of California, Fifth Appellate District 141 Cal. App. 3d 443; 190 Cal. Rptr. 310; 1983 Cal. App. LEXIS 1539; 37 A.L.R.4th 1183 March 28, 1983

[*445] [**311] ANDREEN Does a business establishment incur liability for wrongful death if it denies use of its telephone to a good samaritan who explains an emergency situation occurring without and wishes to call the police?

(1) This appeal follows a judgment of dismissal of the second cause of action [1] of a complaint for wrongful death upon a motion for summary judgment. The motion was

supported only by a declaration of defense counsel. Both briefs on appeal adopt the defense averments:

"This action arises out of a shooting death occurring on August 9, 1977. Plaintiff's father [2] [Darrell Soldano] was shot and killed by one Rudolph Villanueva [**312] on that date at defendant's Happy Jack's Saloon. This defendant owns and operates the Circle Inn which is an eating establishment located [*446] across the street from Happy Jack's. Plaintiff's second cause of action against this defendant is one for negligence.

"Plaintiff alleges that on the date of the shooting, a patron of Happy Jack's Saloon came into the Circle Inn and informed a Circle Inn employee that a man had been threatened at Happy Jack's. He requested the employee either call the police or allow him to use the Circle Inn phone to call the police. That employee allegedly refused to call the police and allegedly refused to allow the patron to use the phone to make his own call. Plaintiff alleges that the actions of the Circle Inn employee were a breach of the legal duty that the Circle Inn owed to the decedent." We were advised at oral argument that the employee was the defendant's bartender. [3] The state of the record is unsatisfactory in that it does not disclose the physical location of the telephone -- whether on the bar, in a private office behind a closed door or elsewhere. The only factual matter before the trial court was a verified statement of the defense attorney which set forth those facts quoted above. Following normal rules applicable to motions for summary judgment, we strictly construe the defense affidavit. (*Stationers Corp. v. Dun & Bradstreet, Inc. (1965) 62 Cal.2d 412, 417 [42 Cal.Rptr. 449, 398 P.2d 785].*) Accordingly, we assume the telephone was not in a private office but in a position where it could be used by a patron without inconvenience to the defendant or his guests. We also assume the call was a local one and would not result in expense to defendant.

1 This was only cause of action against defendant Howard O'Daniels. The judgment is therefore an appealable order. (*Justus v. Atchison (1977) 19 Cal.3d 564, 568 [139 Cal.Rptr. 97, 565 P.2d 122]*.)

2 Any right of the plaintiff to recover would, of course, be derivative.

3 The defendant's liability would be affixed, if at all, by the concept of respondeat superior.

(2) There is a distinction, well rooted in the common law, between action and nonaction. (*Weirum v. RKO General, Inc. (1975) 15 Cal.3d 40, 49 [123 Cal.Rptr. 468, 539 P.2d 36]*.) It has found its way into the prestigious Restatement Second of Torts (hereafter cited as Restatement), which provides in *section 314*: "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action." *Comment c of section 314* is instructive on the basis and limits of the rule and is set forth in the footnote. [4] The distinction between [*447] malfeasance and nonfeasance, between active misconduct working positive injury and failure to act to prevent mischief not brought on by the defendant, is founded on "that attitude of extreme individualism so typical of anglo-saxon legal thought." (Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, pt. I, (1908) 56 U.Pa.L.Rev. 217, 219-220.)

4 "The rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection.

"The origin of the rule lay in the early common law distinction between action and inaction, or 'misfeasance' and 'non-feasance.' In the early law one who injured another by a positive affirmative act was held liable without any great regard even for his fault. But the courts were far too much occupied with

the more flagrant forms of misbehavior to be greatly concerned with one who merely did nothing, even though another might suffer serious harm because of his omission to act. Hence liability for non-feasance was slow to receive any recognition in the law. It appeared first in, and is still largely confined to, situations in which there was some special relation between the parties, on the basis of which the defendant was found to have a duty to take action for the aid or protection of the plaintiff.

"The result of the rule has been a series of older decisions to the effect that one human being, seeing a fellow man in dire peril, is under no legal obligation to aid him, but may sit on the dock, smoke his cigar, and watch the other drown. Such decisions have been condemned by legal writers as revolting to any moral sense, but thus far they remain the law. It appears inevitable that, sooner or later, such extreme cases of morally outrageous and indefensible conduct will arise that there will be further inroads upon the older rule." (*Rest.2d Torts, supra, § 314, com. c.*)

[**313] Defendant argues that the request that its employee call the police is a request that it *do* something. He points to the established rule that one who has not created a peril ordinarily does not have a duty to take affirmative action to assist an imperiled person. (*Winkelman v. City of Sunnyvale (1976) 59 Cal.App.3d 509, 511-512 [130 Cal.Rptr. 690]*.) It is urged that the alternative request of the patron from Happy Jack's Saloon that he be allowed to use defendant's telephone so that he personally could make the call is again a request that the defendant do something -- assist another to give aid. Defendant points out that the Restatement sections which impose liability for negligent interference with a third person giving aid to another do not impose the additional duty to *aid* the good samaritan. [5]

> 5 "One who knows or has reason to know that a third person is giving or is ready to give to another aid necessary to prevent physical harm to him, and negligently prevents or disables the third person from giving such aid, is subject to liability for physical harm caused to the other by the absence of the aid which he has prevented the third person from giving." (*Rest.2d Torts, § 327*.)

The refusal of the law to recognize the moral obligation of one to aid another when he is in peril and when such aid may be given without danger and at little cost in effort has been roundly criticized. Prosser describes the case law sanctioning such inaction as a "[refusal] to recognize the moral obligation of common decency and common humanity" and characterizes some of these decisions as "shocking in the extreme . . . . [para.] Such decisions are revolting to any moral sense. They have been denounced with vigor by legal writers." (Prosser, Law of Torts (4th ed. 1971) § 56, pp. 340-341, fn. omitted.) A similar rule has been termed "morally questionable" by our Supreme Court. (*Tarasoff v. Regents of University of California (1976) 17 Cal.3d 425, 435, fn. 5 [131 Cal.Rptr. 14, 551 P.2d 334, 83 A.L.R.3d 1166]*.)

Francis H. Bohlen, in his article *The Moral Duty to Aid Others as a Basis of Tort Liability*, commented: "Nor does it follow that because the law has not as yet recognized the duty to repair harm innocently wrought, that it will continue indefinitely to refuse it recognition. While it is true that the common law does not attempt to enforce all moral, ethical, or humanitarian duties, it is, it is submitted, [*448] equally true that all ethical and moral conceptions, which are not the mere temporary manifestations of a passing wave of sentimentalism or puritanism, but on the contrary, find a real and permanent place in the settled convictions of a race and become part of the normal habit of thought thereof, of necessity do in time color the judicial conception of legal obligation . . . .

". . . .

"While courts of law should not yield to every passing current of popular thought, nonetheless, it appears inevitable that unless they adopt as legal those popular standards which they themselves, as men, regard as just and socially practicable, but which, as judges, they refuse to recognize solely because they are not the standards of the past of Brian, of Rolle, of Fineux, and of Coke; they will more and more lose their distinctive common law character as part of the machinery whereby free men do justice among themselves." (Bohlen, *op. cit. supra*, pt. II, 56 U.Pa.L.Rev. 316, 334-337.)

As noted in *Tarasoff v. Regents of University of California, supra, 17 Cal.3d at page 435*, footnote 5, the courts have increased the instances in which affirmative duties are imposed not by direct rejection of the common law rule, but by expanding the list of special relationships which will justify departure from that rule. For instance, California courts have found special relationships in *Ellis v. D'Angelo (1953) 116 Cal.App.2d 310 [253 P.2d 675]* (upholding a cause of action against parents who failed to warn a babysitter of the violent proclivities of their child), *Johnson v. State of California (1968) 69 Cal.2d 782 [73 Cal.Rptr. 240, 447 P.2d 352]* (upholding suit against the state for failure to warn foster parents of the dangerous tendencies of their ward), *Morgan v. County* [**314] *of Yuba (1964) 230 Cal.App.2d 938 [41 Cal.Rptr. 508]* (sustaining cause of action against a sheriff who had promised to warn decedent before releasing a dangerous prisoner, but failed to do so). (*Tarasoff, supra, at p. 436, fn. 9.*)

And in *Tarasoff*, a therapist was told by his patient that he intended to kill Tatiana Tarasoff. The therapist and his supervisors predicted the patient presented a serious danger of violence. In fact he did, for he carried out his threat. The

court held the patient-therapist relationship was enough to create a duty to exercise reasonable care to protect others from the foreseeable result of the patient's illness.

Section 314A of the Restatement lists other special relationships which create a duty to render aid, such as that of a common carrier to its passengers, an innkeeper to his guest, possessors of land who hold it open to the public, or one who has a custodial relationship to another. A duty may be created by an undertaking to give assistance. (See *Rest.2d Torts, supra, § 321 et seq.*)

[*449] Here there was no special relationship between the defendant and the deceased. It would be stretching the concept beyond recognition to assert there was a relationship between the defendant and the patron from Happy Jack's Saloon who wished to summon aid. But this does not end the matter.

It is time to reexamine the common law rule of nonliability for nonfeasance in the special circumstances of the instant case.

Besides well-publicized actions taken to increase the severity of punishments for criminal offenses, [6] the Legislature has expressed a societal imperative to diminish criminal activity. Thus, in 1965, it enacted a provision for indemnification of citizens for injuries or damages sustained in crime suppression efforts. (Former *Pen. Code, § 13600*, added by Stats. 1965, ch. 1395, § 1, p. 3315.) In that section the Legislature declared that "[direct] action on the part of private citizens in preventing the commission of crimes against the person or property of others, or in apprehending criminals, benefits the entire public." The section does not require direct action by a private citizen; it merely recognizes the societal benefit if one does so. It was designed to stimulate active public involvement in crime control. [7] (Note, *California Enacts Legislation To Aid Victims of Criminal Violence* (1965) 18 Stan.L.Rev. 266.)

6 See, e.g., *Penal Code sections 667* (enhancement of sentence for habitual criminals, added by initiative measure, approved by the people, June 8, 1982), 667.5 (additional sentence enhancement for prior violent felonies), 667.7 (life term for certain habitual criminals), 667.6, subdivisions (c), (d) (full, separate, and consecutive sentences for multiple sex crimes), 1170.1 et seq. (Uniform Determinate Sentencing Act), 12022 et seq. (additional penalties for firearm use during a felony).

7 Former *Penal Code section 13600* was reenacted in 1969 as *Government Code section 13970* and, among other changes, the Legislature added that "rescuing a person in immediate danger of injury or death as a result of fire, drowning, or other catastrophe" also benefits the entire public. (Stats. 1969, ch. 1111, § 3, p. 2168.)

Crime is a blight on our society and a matter of great citizen concern. The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police (1967) recognized the importance of citizen involvement in crime prevention: "[Crime] is not the business of the police alone . . . . The police need help from citizens, . . ." (*Op. cit. supra,* The Community's Role in Law Enforcement, ch. 9, p. 221, fn. omitted.) The commission identified citizen crime reporting programs in some cities. These have proliferated in recent years. (*Id*., at p. 223.)

The National Advisory Commission on Criminal Justice Standards and Goals, Report on Community Crime Prevention (1973) stated: "Criminal justice professionals readily and repeatedly admit that, in the absence of citizen assistance, neither more manpower, nor improved technology, nor additional money will enable law enforcement to shoulder the monumental burden [**315] of [*450] combating crime in America." (*Op. cit. supra*, pt. I,

Crime Prevention and The Citizen, ch. 1, Citizen Action, pp. 7-8.)

The Legislature has recognized the importance of the telephone system in reporting crime and in summoning emergency aid. *Penal Code section 384* makes it a misdemeanor to refuse to relinquish a party line when informed that it is needed to call a police department or obtain other specified emergency services. This requirement, which the Legislature has mandated to be printed in virtually every telephone book in this state, [8] may have wider printed distribution in this state than even the Ten Commandments. It creates an affirmative duty to do something -- to clear the line for another user of the party line -- in certain circumstances.

8 *Penal Code section 384, subdivision (c).*

In 1972the Legislature enacted the Warren-911-Emergency Assistance Act. This act expressly recognizes the importance of the telephone system in procuring emergency aid. "The Legislature further finds and declares that the establishment of a uniform, statewide emergency [telephone] number is a matter of statewide concern and interest to all inhabitants and citizens of this state." (*Gov. Code, § 53100, subd. (b).*) The act also impliedly recognizes that "police, fire, medical, rescue, and other emergency services" are frequently sought by use of the telephone. (*Ibid*.) Further acknowledgment of the importance of the telephone system for summoning emergency aid is found in the act's provision that, by a specified date, all pay telephones "shall . . . enable a caller to dial '911' for emergency services, and to reach an operator by dialing 'O', without the necessity of inserting a coin." (*Gov. Code, § 53112*.) Moreover, Pacific Telephone, the largest telephone company in California, recognizing that the telephone can at times be a lifeline, has provided since 1968 a basic minimum rate "designed for the customer needing inexpensive low-usage residential telephone service for essential calls (Lifeline Service)."

(Cal. P.U.C. Tariff 4-T (Rate Practice 4-T, 1st Revised Sheet 12).)

The above statutes are cited without the suggestion that the defendant violated a statute which would result in a presumption of a failure to use due care under *Evidence Code section 669*. Instead, they, and the quotations from the prestigious national commissions, demonstrate that "that attitude of extreme individualism so typical of anglo-saxon legal thought" may need limited reexamination in the light of current societal conditions and the facts of this case to determine whether the defendant owed a duty to the deceased to permit the use of the telephone.

(3a) We turn now to the concept of duty in a tort case. The Supreme Court has identified certain factors to be considered in determining whether a duty is [*451] owed to third persons. These factors include: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian (1968) 69 Cal.2d 108, 113 [70 Cal.Rptr. 97, 443 P.2d 561, 32 A.L.R.3d 496]*; cf. *Raymond v. Paradise Unified School Dist. (1963) 218 Cal.App.2d 1, 8-9 [31 Cal.Rptr. 847]*.)

We examine those factors in reference to this case. (1) The harm to the decedent was abundantly foreseeable; it was imminent. The employee was expressly told that a man had been threatened. The employee was a bartender. As such he knew it is foreseeable that some people who drink alcohol in the milieu of a bar setting are prone to violence. (2) The certainty of decedent's injury is undisputed. (3)

There is arguably a close connection between the employee's conduct and the injury: the patron [**316] wanted to use the phone to summon the police to intervene. The employee's refusal to allow the use of the phone prevented this anticipated intervention. If permitted to go to trial, the plaintiff may be able to show that the probable response time of the police would have been shorter than the time between the prohibited telephone call and the fatal shot. (4) The employee's conduct displayed a disregard for human life that can be characterized as morally wrong: [9] he was callously indifferent to the possibility that Darrell Soldano would die as the result of his refusal to allow a person to use the telephone. Under the circumstances before us the bartender's burden was minimal and exposed him to no risk: all he had to do was allow the use of the telephone. It would have cost him or his employer nothing. It could have saved a life. (5) Finding a duty in these circumstances would promote a policy of preventing future harm. A citizen would not be required to summon the police but would be required, in circumstances such as those before us, not to impede another who has chosen to summon aid. (6) We have no information on the question of the availability, cost, and prevalence of insurance for the risk, but note that the liability which is sought to be imposed here is that of employee negligence, which is covered by many insurance policies. (7) The extent of the burden on the defendant was minimal, as noted.

> 9 The moral right of plaintiff's decedent to have the defendant's bartender permit the telephone call is so apparent that legal philosophers treat such rights as given and requiring no supporting argument. (See Dworkin, Taking Rights Seriously (Harv.U. Press 1978) p. 99.) The concept flows from the principle that each member of a community has a right to have each other member treat him with the minimal respect due a fellow human being. (*Id., at p. 98.*)

(4) The consequences to the community of imposing a duty, the remaining factor mentioned in *Rowland v. Christian, supra*, is termed "the administrative [*452] factor" by Professor Green in his analysis of determining whether a duty exists in a given case. (Green, *The Duty Problem in Negligence Cases,* I (1929) 28 Colum. L. Rev. 1014, 1035-1045; reprinted in Green, The Litigation Process in Tort Law; No Place to Stop in the Development of Tort Law (2d ed. 1977) pp. 174-184.) The administrative factor is simply the pragmatic concern of fashioning a workable rule and the impact of such a rule on the judicial machinery. It is the policy of major concern in this case.

As the Supreme Court has noted, the reluctance of the law to impose liability for nonfeasance, as distinguished from misfeasance, is in part due to the difficulties in setting standards and of making rules workable. (*Tarasoff v. Regents of University of California, supra, 17 Cal.3d at p. 435, fn. 5*.)

Many citizens simply "don't want to get involved." No rule should be adopted which would require a citizen to open up his or her house to a stranger so that the latter may use the telephone to call for emergency assistance. As Mrs. Alexander in Anthony Burgess' A Clockwork Orange learned to her horror, such an action may be fraught with danger. It does not follow, however, that use of a telephone in a public portion of a business should be refused for a legitimate emergency call. Imposing liability for such a refusal would not subject innocent citizens to possible attack by the "good samaritan," for it would be limited to an establishment open to the public during times when it is open to business, and to places within the establishment ordinarily accessible to the public. Nor would a stranger's mere assertion that an "emergency" situation is occurring create the duty to utilize an accessible telephone because the duty would arise if and only if it were clearly conveyed

that there exists an imminent danger of physical harm. (See *Rest.2d Torts, supra, § 327*.)

Such a holding would not involve difficulties in proof, overburden the courts or unduly hamper self-determination or enterprise.

A business establishment such as the Circle Inn is open for profit. The owner encourages the public to enter, for his earnings depend on it. A telephone is a necessary [**317] adjunct to such a place. It is not unusual in such circumstances for patrons to use the telephone to call a taxicab or family member.

We acknowledge that defendant contracted for the use of his telephone, and its use is a species of property. But if it exists in a public place as defined above, there is no privacy or ownership interest in it such that the owner should be permitted to interfere with a good faith attempt to use it by a third person to come to the aid of another.

The facts of this case come very nearly within *section 327 of the Restatement* (see fn. 5, *ante*) which provides that if one knows that a third person is ready to [*453] give aid to another and negligently prevents the third person from doing so, he is subject to liability for harm caused by the absence of the aid. *Section 327* is contained in topic 8 of the Restatement, "Prevention of Assistance by Third Persons." The scope note for this topic provides that the "actor can prevent a third person from rendering aid to another in many ways including the following: . . . second, by interfering with his efforts to give aid; third, by injuring or destroying the usefulness of a thing which the third person is using to give aid *or by otherwise preventing him from using it* . . . ." [10] (Rest.2d Torts, *supra*, scope note, p. 145, italics added.)

10 Prosser states: "Even though the defendant may be under no obligation to render assistance himself, he is at least required to take reasonable care that he

does not prevent others from giving it." (Prosser, *op. cit. supra, at p. 348*.)

(3b) We conclude that the bartender owed a duty to the plaintiff's decedent to permit the patron from Happy Jack's to place a call to the police or to place the call himself.

It bears emphasizing that the duty in this case does not require that one must go to the aid of another. That is not the issue here. The employee was not the good samaritan intent on aiding another. The patron was.

It would not be appropriate to await legislative action in this area. The rule was fashioned in the common law tradition, as were the exceptions to the rule. (See Prosser, *op. cit. supra, at pp. 340-343*.) To the extent this opinion expands the reach of *section 327 of the Restatement*, it represents logical and needed growth, the hallmark of the common law. It does not involve the sacrifice of other respectable interests.

(5) The courts have a special responsibility to reshape, refine and guide legal doctrine they have created. (*People v. Drew (1978) 22 Cal.3d 333, 347 [149 Cal.Rptr. 275, 583 P.2d 1318]*.) As our Supreme Court summarized in *People v. Pierce (1964) 61 Cal.2d 879, 882 [40 Cal.Rptr. 845, 395 P.2d 893]*, in response to an argument that any departure from common law precedent should be left to legislative action, "In effect the contention is a request that courts abdicate their responsibility for the upkeep of the common law. That upkeep it needs continuously, as this case demonstrates."

The words of the Supreme Court on the role of the courts in a common law system are well suited to our obligation here: "'The inherent capacity of the common law for growth and change is its most significant feature. Its development has been determined by the social needs of the community which it serves. It is constantly expanding and developing in keeping with advancing civilization and

the new conditions and progress of society, and adapting itself to the gradual change of trade, commerce, arts, inventions, and the needs of the country.' . . .

[*454] "In short, as the United States Supreme Court has aptly said, 'This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.' (*Hurtado v. California (1884) 110 U.S. 516, 530* . . . .) But that vitality can flourish only so long as the courts remain alert to their obligation and opportunity to change the common law when reason and equity demand it: 'The nature of the common law requires that each time a [**318] rule of law is applied, it be carefully scrutinized to make sure that the conditions and needs of the times have not so changed as to make further application of it the instrument of injustice. Whenever an old rule is found unsuited to present conditions or unsound, it should be set aside and a rule declared which is in harmony with those conditions and meets the demands of justice.' (Fns. omitted.) (*15 Am.Jur.2d, Common Law, § 2*, p. 797.) Although the Legislature may of course speak to the subject, in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them." (*Rodriguez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382, 394 [115 Cal.Rptr. 765, 525 P.2d 669]*, fn. omitted.)

Examples of the growth of the common law in recent California cases are abundant. [11]

> 11 See, e.g., *Turpin v. Sortini (1982) 31 Cal.3d 220 [182 Cal.Rptr. 337, 643 P.2d 954]* -- creating "wrongful life" cause of action for special damages; *Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 [119 Cal.Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]* -- adoption of rule of comparative negligence; *Rodriguez v. Bethlehem Steel Corp., supra, 12 Cal.3d 382* -- permitting spousal action for loss of consortium; *Rowland v. Christian, supra, 69 Cal.2d*

> *108* -- termination of distinctions between trespassers, licensees and invitees to determine liability of possessor of land; *Greenman v. Yuba Power Products, Inc. (1963) 59 Cal.2d 57 [27 Cal.Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049]* -- introduction of strict products liability; *Muskopf v. Corning Hospital Dist. (1961) 55 Cal.2d 211 [11 Cal.Rptr. 89, 359 P.2d 457]* -- abrogation of governmental immunity; *Silva v. Providence Hospital of Oakland (1939) 14 Cal.2d 762 [97 P.2d 798]* -- overruling the doctrine of charitable immunity; *Scott v. McPheeters (1939) 33 Cal.App.2d 629 [92 Cal.Rptr. 678, 93 P.2d 562]* -- establishing that child may sue for prenatal injury.

The creative and regenerative power of the law has been strong enough to break chains imposed by outmoded former decisions. What the courts have power to create, they also have power to modify, reject and re-create in response to the needs of a dynamic society. The exercise of this power is an imperative function of the courts and is the strength of the common law. It cannot be surrendered to legislative inaction.

Prosser puts it this way: " New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before . . . . The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself [*455] operate as a bar to the remedy." (Prosser, *op. cit. supra, at pp. 3-4*, fns. omitted.)

The possible imposition of liability on the defendant in this case is not a global change in the law. It is but a slight

departure from the "morally questionable" rule of nonliability for inaction absent a special relationship. It is one of the predicted "inroads upon the older rule." (*Rest.2d Torts, supra, § 314, com. c.*) It is a logical extension of *Restatement section 327* which imposes liability for negligent interference with a third person who the defendant knows is attempting to render necessary aid. However small it may be, it is a step which should be taken.

(3c) We conclude there are sufficient justiciable issues to permit the case to go to trial and therefore reverse.

UNITED STATES of America, Appellant and Cross-Appellee, v. Oren LAWTER, Appellee and Cross-Appellant. Oren LAWTER, Appellee and Cross-Appellant, v. UNITED STATES of America, Appellant and Cross-Appellee No. 15050 UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT 219 F.2d 559 March 2, 1955

[*560] HUTCHESON Claiming under the Public Vessels Act, Title *46 U.S.C.A. § 781 et seq.*, and the Tort Claims Act, Title *28 U.S.C. § 1346(b)*, the suit was for damages for the death of plaintiff's wife. The claim was that the death was caused by the negligence of Coast Guard personnel in the conduct of a helicopter air-sea rescue.

The defenses were: (1) that the United States was not liable and had not consented to be sued for the negligence of the Coast Guard in the conduct of such rescues; (2) that the death was not caused or contributed to by any fault, [**2] negligence, or want of care on the part of the United States, the 1292 *2 helicopter, or those in charge or control of it; and (3) that it was caused by the negligence and fault of the deceased and of the plaintiff, her husband, in not securing her firmly by the straps on the helicopter cable before permitting her to be drawn up.

The evidence concluded, there were findings of fact and conclusions of law [1] in favor of, and a judgment for, plaintiff.

[*561] Defendant, appealing from the judgment, is here insisting that the complaint does not state a cause of action and the judgment must, therefore, be reversed and remanded with instructions to dismiss, or that at least the findings [*562] that the Coast Guard was, and plaintiff was not, negligent should be set aside as clearly erroneous.

Appellee, attacking the quantum of the finding and award of damages as inadequate and clearly erroneous, seeks an increase of the award here.

A careful examination and consideration of the findings of fact, in the light of the record as a whole, and of the conclusions of law, in the light of settled legal principle, convinces us that they are well supported and that, as against [**3] appellant's attack upon them, they should and must be sustained.

As appellee correctly 1292 *3 points out, the case made is not one of omission or failure on the part of the Coast Guard to act, but of a definite and affirmative act causing death, an act deliberately undertaken and negligently performed by it.

Whatever then might be said of the liability of the United States, if the case had to do with mere negligent omission or inaction of the Coast Guard, as was the case in *Indian Towing Co. v. U.S., 5 Cir., 211 F.2d 886*, is not controlling here. For the uncontradicted evidence shows that the Coast Guard, pursuant to long established policy, [2] affirmatively took over the rescue mission, excluding others therefrom, and thus not only placed the deceased in a worse position than when it took charge, but negligently brought about her death, and it is hornbook law that under such circumstances the law imposes an obligation upon everyone who attempts to do anything, even gratuitously,

for another not to injure him by the negligent performance of that which he has undertaken. 38 Am.Jur., 'Negligence', Sec. 17, p. 659.

As to appellee's attack upon the quantum of [**4] the finding and award of damages as clearly erroneous, we have held in *Sanders v. Leech, 5 Cir., 158 F.2d 486*, at 1292 *4 page 487, [3] this court has the power in a case tried to a court without a jury to review findings as to damages. However for the reasons stated in the Sanders case, we feel here, as we felt there, that we cannot say that the findings are clearly erroneous.

The judgment is affirmed.

Judge RUSSELL sat during the argument of this case but, due to illness, he took no part in its decision.

1. Findings of Fact:

(1) The Court has jurisdiction of the parties and subject matter.

(2) On or about April 18, 1953, the deceased, Loretta Jean Lawter, her husband and libelant herein, Oren Lawter, his brother Andrew Lawter and his wife, Susan Lawter, were in a 16 foot skiff in Biscayne Bay, when a wave drowned out the outboard motor attached to the skiff and further waves resulted in the swamping of the boat. As a result thereof, the four passengers were cast into water approximately 500 yards from the nearest shore. The water at that particular point was approximately four feet deep.

(3) At the time of the accident small craft warnings were posted and the wind was blowing at a sufficient rate to cause whitecaps and rough water.

(4) At this time a U.S. Coast Guard helicopter, Model HO4S-2G, was making a routine patrol flight over the Biscayne Bay area. The pilot of the helicopter was Eugene Farley, Lt., J.G., U.S. Coast

Guard. Sitting in the co-pilot seat, as a passenger, was Petty Officer First Class Nathaniel Passmore. The crewman in the cabin of the ship was Lloyd S. Antle, Jr.

(5) The flight by the helicopter was make for the purpose of determining if any vessels or people in the area were in the need of aid or assistance, so that such aid or assistance could be rendered before darkness set in.

(6) The crew of the helicopter saw the four Lawters in the water. There were no boats or vessels nearby to rescue them. The crew of the helicopter proceeded to undertake the rescue.

(7) The helicopter was equipped for air-sea rescue work by having as a part of its equipment a cable and a hoist to lower and raise such cable. The hoist was operated by a manual switch and also had an automatic switch stopping the raising of the cable when a weight attached thereto made contact with the boom to which the cable was attached.

(8) Lloyd S. Antle, Jr., had never taken part in any rescue mission and had had no training in such work or the operation of the hoist. Nathaniel Passmore had taken part in several air-sea rescues and was experienced in such operations.

(9) The pilot of the helicopter, due to the construction of the ship, was unable too see directly under it when engaged in hoisting people from the sea.

(10) The pilot did not order Passmore to operate the hoist or conduct the rescue from the cabin of the ship. Instead, be allowed Antle, an untrained man, to perform such duties.

(11) After undertaking the rescue, Antle directed the pilot until the helicopter was over the four Lawters. The cable was dropped and Susan Lawter took hold of the cable. The belt or sling attached to the cable was not attached to her.

(12) The cable was dropped again. Oren Lawter secured it and took it over to the deceased. Oren and Andrew Lawter were engaged in the process of attaching the belt or sling to her when Antle began raising the cable. The belt or sling was not attached to deceased and she was merely holding on with her hands. She was raised until her head and shoulders were above the bottom of the door in the helicopter, when Antle stopped the cable. Deceased had not been raised high enough to be brought into the cabin. Before the cable could be raised further, she lost her grip and fell.

(13) The respondent was guilty of negligence under all of the circumstances. The Court recognizes that the helicopter was not particularly sent to conduct this rescue and that the situation giving rise to the attempt arose suddenly and was in the nature of an emergency. However, there was an experienced man on board in the person of Passmore, and it was negligence of permit Antle to attempt to conduct such rescue operations when Passmore was available. It is clear to the Court that Antle, in his inexperience, began hoisting too soon, stopped raising the deceased before she reached a proper height and, in general, failed to act as an experienced man, such as Passmore would have acted under the circumstances.

The Court does not mean by this finding that Antle, in view of his inexperience and lack of training, did not act to the best of his ability under the circumstances. The actionable negligence lies in not having the rescue operation conducted by the

available experienced man who could have conducted it in a much safer manner.

(14) The libelant, the deceased, Andrew Lawter and Susan Lawter, and none of them, were guilty of any negligence proximately contributing to the death of the deceased.

(15) As a direct and proximate result of respondent's negligence, libelant suffered damages in the amount of $ 10,000.

Conclusions of Law:

(1) A duty is imposed upon respondent to act with due and reasonable care in the performance of rescue operations once such rescue operations are undertaken.

(2) The libelant should have and recover of the respondent the sum of $ 10,000.

[**5] 1292 *5

2. Cf. Act of Dec., 1837, 5 Stat. 208, *14 U.S.C.A. § 53*, and the 1947 Revision and Recodification of the Laws pertaining to the Coast Guard, *14 U.S.C.A. § 88*.

3. '* * * Under (*rule 52(a)*), as it plainly reads and has been interpreted by the courts, it is not for the appellate court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the finding. It may reverse, though, under the rule (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3) if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.' Cf. what was later said by the Supreme

Court in *United States v. United States Gypsum Co., 333 U.S. 364 at page 395, 68 S.Ct. 525, 92 L.Ed. 746*.

 ¿Quien era más probable de poseer información de cómo pudo haber sucedido este accidente, el demandante o el demandado? ¿Por qué?

DUTY: TRESPASSER

 Arthur M. Haskins, administrator, v. John Grybko Supreme Judicial Court of Massachusetts 301 Mass. 322; 17 N.E.2d 146 September 21, 1938, Argued October 26, 1938, Decided

[*322] [**146] RONAN This is an action of tort brought under *G.L. (Ter. Ed.) c. 229, § 5*, by a public administrator to recover for the death of his intestate. There was a finding for the plaintiff upon the first count of the declaration which, in substance, alleged that the defendant shot and killed the intestate and that "the death of the plaintiff's intestate [*323] was caused by the negligence of the defendant." The judge made findings and rulings which contained the following: "(8) There was no evidence of any sort that tended to show why the plaintiff's intestate was in that general locality. The plaintiff's intestate was a trespasser either on lands of a third party who owned to the north of the leased premises or was a trespasser on the lot leased by the defendant. Neither tract of land was posted against trespassing. . . . (10) I find on all of the evidence that the defendant was negligent and that the degree of negligence was ordinary negligence." The defendant excepted to the ruling that the plaintiff could recover for ordinary negligence although the intestate was a trespasser as to the defendant or to some third person.

The defendant was in possession, as lessee, of a tract of land containing about twenty acres. The land was bounded on the south by a public highway and extended northerly about thirteen hundred feet. It was approximately eight hundred feet wide. It was all under cultivation except

within fifty feet of its northerly boundary where there was a growth of brush and trees. The land was used to raise squash, and the defendant's crop had suffered from the ravages of woodchucks. The defendant went to the northwesterly corner of his lot on the evening of July 7, 1933, for the purpose of shooting woodchucks. Itwas dusk. He was standing beside his automobile on his own lot when he heard a rustling noise in the brush about fifty feet away, and then saw a moving object about eighteen inches high in the brush. Believing that the object was a woodchuck, he shot at it. After staying a few minutes he left the tract. When he returned the next morning, he discovered the body of the intestate.

The legal duty owed by the defendant to the intestate depended upon the relation of the intestate to him at the time of the shooting. If the intestate was merely a trespasser upon the land of a third person, then the defendant was bound to exercise reasonable care so that no harm would be incurred by the intestate on account of the defendant's negligence. *Buckley v. Arthur J. Hickey Family* [*324] *Laundry Co. 261 Mass. 348, 158 N.E. 769. Falardeau v. Malden & Melrose Gas Light Co. 275 Mass. 196, 199, 175 N.E. 471. Sarna v. American Bosch Magneto Corp. 290 Mass. 340, 195 N.E. 328. Royal Indemnity Co. v. Pittsfield Electric Co. 293 Mass. 4, 199 N.E. 69.* If the intestate was a trespasser upon the defendant's land, the latter was not liable for mere negligence. He was, however, under an obligation to refrain [**147] from intentional injury and from wilful, wanton and reckless conduct. *O'Brien v. Union Freight Railroad, 209 Mass. 449, 95 N.E. 861. Romana v. Boston Elevated Railway, 218 Mass. 76, 83, 105 N.E. 598. Adamowicz v. Newburyport Gas & Electric Co. 238 Mass. 244, 130 N.E. 388.* As the plaintiff failed to show that his intestate was not a trespasser upon the defendant's land when the shooting occurred, he was not entitled to recover by proving that the defendant was guilty of mere

negligence, and the ruling in favor of the plaintiff was erroneous.

The defendant has argued that there was also error in the ruling of the trial judge, who was unable to determine "the identity or degree of kinship of any heir at law or next of kin," and ruled "that the question of establishing who the heirs at law or next of kin are is one to be determined by the Probate Court." The defendant took no exception to this ruling (see *Fidelity & Casualty Co. v. Huse & Carleton, Inc. 272 Mass. 448, 453, 172 N.E. 590*).

Exceptions sustained.

 ¿Cuál es el deber de cuidado que, generalmente, le incumbe al propietario hacia el intruso que entró sin autorización?

 Patrick Keffe, an Infant, by his Guardian, vs. Milwaukee & St. Paul Railway Company. SUPREME COURT OF MINNESOTA 21 Minn. 207 January 11, 1875, Decided

[*209] Young, J. In the elaborate opinion of the court [**4] below, which formed the basis of the argument for the defendant in this court, the case is treated as if the plaintiff was a mere trespasser, whose tender years and childish instincts were no excuse for the commission of the trespass, and who had no more right than any other trespasser to require the defendant to exercise care to protect him from receiving injury while upon its turn-table. But we are of opinion that, upon the facts stated in the complaint, the plaintiff occupied a very different position from that of a mere voluntary trespasser upon the defendant's property, and it is therefore unnecessary to consider whether the proposition advanced by the defendant's counsel, viz, that a land-owner owes no duty of care to trespassers, is not too broad a statement of a rule which is true in many instances.

[*210] To treat the plaintiff as a voluntary trespasser is to ignore the averments of the complaint, that the turn-table, which was situate in a public (by which we understand an open, frequented) place, was, when left unfastened, very attractive, and, when put in motion by them, was dangerous to young children, by whom it could be easily put in motion, and many of whom were [**5] in the habit of going upon it to play. The turn-table, being thus attractive, presented to the natural instincts of young children a strong temptation; and such children, following, as they must be expected to follow, those natural instincts, were thus allured into a danger whose nature and extent they, being without judgment or discretion, could neither apprehend nor appreciate, and against which they could not protect themselves. The difference between the plaintiff's position and that of a voluntary trespasser, capable of using care, consists in this, that the plaintiff was induced to come upon the defendant's turn-table by the defendant's own conduct, and that, as to him, the turntable was a hidden danger, a trap.

While it is held that a mere licensee "must take the permission with its concomitant conditions, it may be perils," (*Hounsell* v. *Smith*, 7 C. B. (N. S.) 731; *Bolch* v. *Smith*, 7 H. & N. 836,) yet even such licensee has a right to require that the owner of the land shall not knowingly and carelessly put concealed dangers in his way. *Bolch* v. *Smith*, *per* Channell and Wilde, B B.; *Corby* v. Hill 4 C. B. (N. S.) 556, *per* Willes, J.

And where one [**6] goes upon the land of another, not by mere license, but by invitation from the owner, the latter owes him a larger duty. "The general rule or principle applicable to this class of cases is that an owner or occupant is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any inducement, invitation or allurement, either express or implied, by

which they have been led to enter thereon." *Per* Bigelow, C. J., in *Sweeny* v. *Old Colony and Newport R. Co.*, 10 Allen 368, reviewing [*211] many cases. And see *Indermann* v. *Dawes*, L. R. 1 C. P. 274; L. R. 2 C. P. 311.

Now, what an express invitation would be to an adult, the temptation of an attractive plaything is to a child of tender years. If the defendant had left this turn-table unfastened *for the purpose* of attracting young children to play upon it, knowing the danger into which it was thus alluring them, it certainly would be no defence to an action by the plaintiff, who had been attracted upon the turn-table and injured, to say that the plaintiff was a trespasser, and that his childish instincts were no excuse for his trespass. [**7] In *Townsend* v. *Wathen*, 9 East, 277, it was held to be unlawful for a man to tempt even his neighbor's dogs into danger, by setting traps on his own land, baited with strong-scented meat, by which the dogs were allured to come upon his land and into his traps. In that case, Lord Ellenborough asks, "What is the difference between drawing the animal into the trap by his natural instinct, which he cannot resist, and putting him there by manual force?" And Grose, J., says, "A man must not set traps of this dangerous description in a situation to invite his neighbor's dogs, and, as it were, to compel them by their instinct to come into the traps."

It is true that the defendant did not leave the turn-table unfastened, *for the purpose* of injuring young children; and if the defendant had no reason to believe that the unfastened turn-table was likely to attract and to injure young children, then the defendant would not be bound to use care to protect from injury the children that it had no good reason to suppose were in any danger. But the complaint states that the defendant knew that the turn-table, when left unfastened, was easily revolved; that, when left unfastened, it was very [**8] attractive, and when put in motion by them, dangerous, to young children: and knew also that many children were in the habit of going upon it to

play. The defendant therefore knew that by leaving this turn-table unfastened and unguarded, it was not merely inviting young children to come upon the turn-table, but was holding out an allurement, [*212] which, acting upon the natural instincts by which such children are controlled, drew them by those instincts into a hidden danger; and having thus knowingly allured them into a place of danger, without their fault, (for it cannot blame them for not resisting the temptation it has set before them,) it was bound to use care to protect them from the danger into which they were thus led, and from which they could not be expected to protect themselves.

We agree with the defendant's counsel that a railroad company is not required to make its land a safe play-ground for children. It has the same right to maintain and use its turntable that any landowner has to use his property. It is not an insurer of the lives or limbs of young children who play upon its premises. We merely decide that when it sets before young children a temptation which [**9] it has reason to believe will lead them into danger, it must use ordinary care to protect them from harm. What would be proper care in any case must, in general, be a question for the jury, upon all the circumstances of the case.

The position we have taken is fully sustained by the following cases, some of which go much farther in imposing upon the owner of dangerous articles the duty of using care to protect from injury children who may be tempted to play near or meddle with them, than it is necessary to go in this case. *Lynch* v. *Nurdin*, 1 Q. B. 29; *Birge v. Gardner, 19 Conn. 507*; *Whirley* v. *Whiteman*, 1 Head 610.

It is true that, in the cases cited, the principal question discussed is not whether the defendant owed the plaintiff the duty of care, but whether the defendant was absolved from liability for breach of duty, by reason of the fact that

the plaintiff was a trespasser, who, by his own act, contributed to the injury; and the distinction is not sharply drawn between the effect of the plaintiff's trespass, as a bar to his right to require care, and the plaintiff's contributory negligence, as a bar to his right to recover for the defendant's failure to [**10] exercise such care as it was his duty to use. But as a young child, whom the defendant knowingly tempts to [*213] come upon his land, if anything more than a technical trespasser, is led into the commission of the trespass by the defendant himself, and thus occupies a position widely different from that of an ordinary trespasser, the fact that the courts, in the cases referred to, assumed, instead of proving, that the defendant owed to a young child, under such circumstances, a duty he would not owe to an ordinary trespasser, for whose trespass he was not in any way responsible, does not weaken the authority of those cases. And in *Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745*, (a case in all respects similar to the present,) the distinction insisted on by counsel is taken by Mr. Justice Hunt, and the circumstance that the plaintiff was in some sense a trespasser is held not to exempt the defendant from the duty of care. In the charge of the learned circuit judge at the trial of the last named case, (reported under the title of *Stout* v. *Sioux City & Pacific R. Co.*, 2 Dillon 294,) the elements which must concur to render the defendant liable, in a case like [**11] the present, are clearly stated.

In *Hughes* v. *Macfie*, 2 Hurlst. & Coltm. 744, and *Mangan* v. *Atterton*, L. R. 1 Exch. 239, cited by defendant's counsel, there was nothing to show that the defendants knew or had reason to apprehend that the cellar lid in the one case, or the crushing machine in the other, would be likely to attract young children into danger. It must be conceded that *Hughes* v. *Macfie* is not easily to be reconciled with *Birge* v. *Gardiner*, and that *Mangan* v. *Atterton* seems to conflict with *Lynch* v. *Nurdin*; but

whether correctly decided or otherwise, they do not necessarily conflict with our decision in this case.

Much reliance is placed by defendant on *Phila. & Reading R. Co. v. Hummell, 44 Pa. 375*, and *Gillis v. Penn. R. Co., 59 Pa. 129*. In the first of these cases, the plaintiff, a young child, was injured by coming upon the track while the cars were in motion. The only negligence charged upon the defendant was the omission to give any signal at or after the starting of the train. If the plaintiff [*214] had been crossing the track, through one of the openings which the company had suffered the people [**12] in the neighborhood to make in the train while standing on the track, and the cars had then been run together upon him, without any warning, the case would more nearly resemble the present; but the facts, as they appear, show that the company used abundant care, and that it had no reason to suppose that the plaintiff was exposed to danger; and the decision is put upon the latter ground, although Strong, J., delivering the opinion of the court, uses language which lends some support to the defendant's contention in this case. *Gillis* v. *Penn. R. Co.* was properly decided, on the ground that the company did nothing to invite the plaintiff upon the platform, by the fall of which he was injured, and that the platform was strong enough to bear the weight of any crowd of people which the company might reasonably expect would come upon it. Neither of these cases is an authority against, while a later case in the same court, (*Kay v. Penn. R. Co., 65 Pa. 269*,) tends strongly to support, the plaintiff's right of action in this case; and the recent case of *Pittsburg A. & M. Passenger R. Co. v. Caldwell, 74 Pa. 421*, points in the same direction.

It was not urged upon the [**13] argument that the plaintiff was guilty of contributory negligence, and we have assumed that the plaintiff exercised, as he was bound to do, such reasonable care as a child of his age and understanding was capable of using, and that there was no

negligence on the part of his parents or guardians, contributing to his injury.
Judgment reversed.

 ¿Qué es lo que hace al peligro tan atractivo? El niño es un intruso finalmente. ¿Cuál es el deber de cuidado del propietario que creo esta situación de peligro?

DUTY: LICENSEE

 PASCAL M. LORDI, PLAINTIFF-APPELLEE, v. JOSEPH SPIOTTA, DEFENDANT-APPELLANT NEW JERSEY SUPREME COURT 133 N.J.L. 581; 45 A.2d 491 October 2, 1945, Submitted January 30, 1946, Decided

[*582] [**492] The opinion of the court was delivered by

BROGAN, CHIEF JUSTICE. The defendant, at the conclusion of the plaintiff's case, moved for a directed verdict on the ground that the plaintiff, at the time of his injury, was a social guest in the defendant's home in which circumstance the measure of duty towards the plaintiff rose no higher than "to refrain from any wanton or willful injury." The denial of that motion by the learned trial judge is the sole ground of appeal in this case. The following facts were proved: The plaintiff, Pascal M. Lordi, was employed by the defendant, Joseph Spiotta, and they were on very friendly terms. On June 19th, 1943, the defendant invited the plaintiff to come to his summer bungalow in Mine Hill, New Jersey. The hot water boiler in the bungalow was heated by natural gas which in this instance was contained in a cylinder, attached to the outside of the dwelling and connected to a burner in the cellar by means of a pipe. This is the normal method of operation and use. This natural gas as such is odorless. A federal government regulation requires the manufacturer to introduce into such gas a sulphur compound to give it a strong odor in the event that it escapes from the container or conduit. There was no such compound in this gas. If permitted to escape and

accumulate in a confined area it will explode in the presence of a lighted match. The plaintiff was asked by the defendant, at about ten o'clock in the evening of the day in question, to light the gas heater to provide hot water for one of the defendant's nephews, a lad of tender years, who wanted to take a shower bath. The plaintiff went to the cellar, accompanied by the boy and, upon striking a match to light the gas burner, a violent explosion occurred which seriously injured the boy and the plaintiff. The boy died from his injuries shortly thereafter. It seems that earlier in the day the defendant's son, Roland, had lighted the [*583] gas heater to get hot water for a bath. When he was leaving the house, about five P.M., he asked the defendant, his father, who was on the porch of the house, to "turn off" the heater. The defendant went into the cellar and turned off the heater or "thought he had." As he himself said, "I learned afterwards that I didn't." At all events, when the plaintiff went to the cellar, about five hours later and struck a match to apply its flame to the burner, the explosion just mentioned took place, due obviously to the fact that a quantity of gas had accumulated in and around the heater. From all of which the jury could conclude, as it did, that the defendant had not, earlier in the evening, entirely closed the valve which permitted the gas to feed into the burner. None of these facts or circumstances is open to debate. The defendant offered no evidence to defend.

There is a noticeable dearth of authority in this and other states on this precise question -- the liability of a host for injury to guests in his house.

[**493] The appellant, in asking for a direction of verdict after the plaintiff rested, relied upon *Morril v. Morril, 104 N.J.L. 557*; *Gregory v. Loder, 116 N.J.L. 451*; *Lewis v. Dear, 120 N.J.L. 244*, and *Cosgrave v. Malstrom, 127 N.J.L. 505*. Most of these cases are rested upon or make reference to the rule of the case decided in England in 1856 -- *Southcote* v. *Stanley, I Hurles & N.* 247; 156 *Eng.*

Reprint 1195; 25 *L.J. Exch. (N.S.)* 339. In that case the plaintiff was a guest in the defendant's hotel in which there was a glass door. It was necessary for the plaintiff to open that door to leave the hotel and the complaint or declaration stated that through the carelessness, negligence and fault of the defendant the door was left in an insecure and dangerous condition and by reason of such condition a large piece of glass fell from the door and injured the plaintiff. The declaration was held to be insufficient. In the court's opinion it was held that the same principle was involved as that which exists between master and servant, namely, assumption of risk of the condition of the premises; that a servant, under such circumstances, would have no cause of action because he undertakes the [*584] ordinary risk attaching to the service, including those arising from the negligence of the master and his fellow servants. And it was said that this principle is the one to apply to the case of a visitor at a house; that his position while there is no better than any other member of the establishment so far as the negligence of the master or his servants be concerned. The insufficiency of the declaration or complaint in that case was further upheld in another opinion on the theory that the facts pleaded did not involve a "trap" and, further, on the ground that there was no act of commission charged, *i.e.*, active negligence.

Those who enter the lands or premises of another are either invitees, licensees or trespassers. The first come by invitation, express or implied; the second are those who are not invited but whose presence is suffered; the third are neither invited nor suffered. The English cases limit the term " invitee" to those who were invited into the premises by the owner or occupier for some purpose, either business or of mutual interest; and those who are invited as guests, whether from benevolence or for social reasons, are not considered in law invitees but licensees. *Latham* v. *R. Johnson, &c.* (1913), 1 *K.B.* 398. The duty of an owner or occupier of premises towards invitees is to exercise

reasonable care to have the premises in safe condition. The duty towards licensees is considerably less and obliges the host to give notice of unforeseen dangers such as traps, and the overall duty regarding trespassers amounts only to abstaining from willful or wanton injury.

In cases of this kind it is usually a matter of cardinal importance to ascertain just what status the plaintiff occupied in the defendant's home at the time when he suffered his injury. Here the defendant said that on Friday afternoon he invited the plaintiff to come to his Mine Hill house on Saturday. He said: "I told him [the plaintiff] I expected some company Sunday morning, some people from New York I do business with. They like to see my farm and would like to come up with my boys to look at the garden, with my two boys and nephew." The defendant's family and the plaintiff reached the bungalow Saturday after lunch time. The defendant [*585] continued: "My wife started to cook for the next day. Mr. Lordi [plaintiff], I, my nephew and my son were working in the garden trying to get the Victory garden." The plaintiff testified that he didn't recollect whether he rode to the bungalow in his own automobile or that of the defendant but testified that upon reaching the place, "After 1:30 we unloaded the car, took the provisions and things out of the car, and then I went to look at the Victory garden that the boys were having * * * and around 5:30 Roland said he had an appointment in South Orange that evening and if I would go down to the station with him and drive the car back, so I said I would. At that time Mrs. Spiotta, Robert and Alex, Jr. -- Mrs. Spiotta said she had to go into town and buy some odds and ends she needed for the following day, so we all got into the car for Dover and Roland was driving the car and he hollered out of the window and said: 'Pop, will you turn off the gas heater.' Pop said he would. Then we drove to Dover, did our shopping, had something to eat, and then drove back and we played this bowling after that." The

plaintiff had visited the employer on four or five occasions. He had never been to the cellar and had had no experience with this particular [**494] heater. Furthermore, plaintiff undertook, on the defendant's request, to light the gas heater.

The learned trial judge determined that plaintiff's status was that of "invitee" in the legal sense, to whom the duty on the part of the defendant was "to use reasonable care commensurate with the danger known or by reasonable anticipation the defendant should have known."

The court's charge to the jury on the matter of negligence laid down the rule of care required towards an invitee. No objection to the charge was voiced or exception entered by the defendant. Whether the facts in proof justified the court's notion of the status of the plaintiff, as invitee in the home of the defendant, we need not decide. Assuming that the plaintiff was a guest and as such had to take the place as he found it, so to speak -- yet the so-called guest rule cannot hold the proprietor of the establishment immune from answering in damages where the guest is injured by an unknown danger created by the proprietor's active negligence. Compare *Brigman v.* [*586] *Fiske-Carter Con. Co., 192 N.C. 791*; *136 S.E. Rep. 125* (see *Notes* 49 *A.L.R.* 779). The dangerous condition surrounding this gas heater is analogous to creating a trap for the plaintiff. The defendant, on asking the plaintiff to go into the cellar to light the heater, certainly held out the place, for the performance of the service requested, to be free from concealed peril. We conclude that the defendant's act in regard to closing the valve controlling the gas flow, and doing it so imperfectly as to permit a gas leakage which was bound to make an accumulation of this dangerous agency, amounted to active negligence.
The judgment is affirmed, with costs.

 ¿Tiene, acaso, el propietario un deber de inspección de su predio, a fin de identificar eventuales situaciones que

pudieran revistir un peligro para el licenciatario que entró con su autorización? ¿Por qué el tribunal le señaló una responsabilidad civil a Spiotta en este caso?

DUTY: INVITEE

 DIEFENBACH v. GREAT ATLANTIC & PACIFIC TEA CO. Docket No. 9 SUPREME COURT OF MICHIGAN 280 Mich. 507; 273 N.W. 783 April 7, 1937, Submitted (Calendar No. 39,264) June 7, 1937, Decided

[*508] [**784] CHANDLER, J. The defendant, The Great Atlantic & Pacific Tea Company, hereinafter referred to as the A. & P. Co., is a New Jersey corporation duly licensed to transact business in the State of Michigan, owning and operating a number of stores in this State. The defendant, Earl Hester, was an employee [*509] of said company, being manager of the meat department in a combination grocery store and meat market located in the city of Saginaw.

On October 16, 1934, plaintiff was sitting in a barber shop directly across from the A. & P. Co. store in which the facts involved in this case arose. The proprietor of the barber shop noticed a disturbance in the store and remarked that "they must be chasing a rat over there." Very shortly thereafter plaintiff went across the street and entered the store. He testified that as he entered someone instructed him to hold the door closed. At this moment he noted that the clerks were engaged in pursuing a rat and were using clubs and broom sticks for this purpose.

The store in question faces the south and the window space between the doorway entered by plaintiff and the east wall of the building is used for the purpose of a meat display. There is also a glass meat display case and counter extending along the east side of the room at an angle to the wall, leaving a space or aisle between the window and the meat case or counter. On the day in question this space was

at least partially filled with leaves, cornstalks and pumpkins for decorative purposes.

Plaintiff held the door shut for a short time in accordance with the request that had been made when he entered. The rat had selected the corn stalks, leaves and pumpkins as a haven of refuge. One or two of the clerks were in the aisle or space at the end of the meat counter attempting to locate the rat. The plaintiff claims that the rat ran from its place of hiding directly toward him and that he jumped upon it. According to the plaintiff this action on his part was not motivated by a desire to participate in any sport which might have existed in [*510] exterminating the unfortunate rat but rather to prevent the rat from biting him or running up his pant leg. Plaintiff then stepped off the rat which started to move around whereupon plaintiff stepped forward into the corn stalks and leaves and jumped upon him for the second time. At this point, the defendant Hester, who, unlike the other clerks, had selected a large fish knife as his weapon, approached in a crouching position from the end of the meat counter, saw the rat, dealt a blow with the fish knife, missed the rat and struck plaintiff's left foot for which he seeks damages in this action. Defendant Hester testified that he saw the rat but did not see the plaintiff and that he "didn't dream there was a foot there."

Motions on behalf of both defendants for a directed verdict were taken under advisement by the court under the Empson act (3 Comp. Laws 1929, §§ 14531-14534). The jury returned a verdict for the plaintiff. Motions for a judgment notwithstanding the verdict and for a new trial were denied. Defendants appeal.

Numerous reasons are set forth by defendants for reversal of the judgment. It is first contended that at the time plaintiff sustained the injury of which he complains he was a mere volunteer and that therefore the defendant A. & P. Co. is not liable [**785] for the act of its servant. On the

other hand, it is plaintiff's claim that he enjoyed the status and rights of an invitee, that the defendant Hester, was guilty of negligence, and that the A. & P. Co. should be held to respond to him in damages therefor.

The plaintiff testified that when he left the barber shop and entered the store of the defendant that he did so for the purpose of purchasing groceries and denies that he entered the store merely for the purpose [*511] of observing the rat hunt or to participate therein. Although the plaintiff actually purchased no groceries, if he entered the store for the purpose of transacting business mutual to himself and the A. & P. Co., he would undoubtedly enjoy the rights and status of an invitee and such a finding by the jury under those facts and circumstances alone would not be disturbed. But whatever may have been his status upon entering the store, we are of the opinion that when he participated in the killing of the rat he became a mere volunteer and under such circumstances the A. & P. Co. is not liable for his injuries.

He was under no obligation to assist the clerks in the performance of their duties. Neither did any emergency exist which would justify him in volunteering his services in behalf of the A. & P. Co. It would be unreasonable to suppose that four or five clerks intent upon destroying the rat could not have accomplished their purpose without the assistance of the plaintiff.

Plaintiff claims that he jumped upon the rat to prevent him from biting him or running up his pant leg. Assuming that the rat entertained such an uncharitable intention while plaintiff was near the door, having jumped upon him once, it was scarcely necessary for him to step into the corner with the corn stalks and leaves to jump upon him a second time and complete the kill.

Various reasons are assigned by the courts in denying recovery to a volunteer for injuries sustained. In *Johnson v.*

E.C. Clark Motor Co., 173 Mich. 277 (44 L.R.A. [N.S.] 830), numerous cases are collected and discussed. The reasoning adopted by some of the authorities there cited is that the volunteer cannot recover for the reason that were [*512] he permitted to do so he would be granted a better legal position than would be enjoyed by one servant injured through the negligence of a fellow servant. The reasoning of such cases is rendered somewhat doubtful due to the provisions of the various workmen's compensation acts declaring that the negligence of a fellow servant shall be no defense to an action against the employer for injuries sustained in the course of the employment. The better view would appear to be that the volunteer cannot recover because no duty is owed to him other than not to injure him by wilful or wanton acts. In *Atlanta & West Point R. Co. v. West, 121 Ga. 641 (49 S.E. 711, 67 L.R.A. 701, 104 Am. St. Rep. 179*) it is said:

" One who, without any employment whatever or at the request of a servant who has no authority to employ other servants, voluntarily undertakes to perform service for the master, is a mere volunteer and not entitled to that degree of diligence on the part of the master which the latter is bound to exercise with reference to his servants. There are a great many cases which state that such a volunteer stands in the place of a servant, but in each such case which we have examined this position was taken in order to defeat the claim of the volunteer. In other words, the court held that the volunteer certainly stood in no better position than that of a servant, and that, conceding he stood in the position of a servant, he could not recover. Such cases not infrequently arise where, if the volunteer had been a servant, he could not recover because injured by the negligence of a fellow servant in the course of their common employment. A number of such cases will be found in the notes to 2 Labatt on Master and Servant (1st Ed.), § 631. In Georgia the rule as to the liability of the master for the negligence of fellow-servants has been abrogated in railroad cases and the claim

of a volunteer cannot be defeated by [*513] treating him as though he were a servant. It is necessary to assign him to his true position. He is not a servant, and cannot charge the defendant with the obligations of a master. The defendant, does not, as master, owe the volunteer any duty whatever. The obligations of master and servant do not arise between them. The defendant is only bound not to injure the volunteer wilfully and to use care not to injure him after notice of his peril."

Having volunteered his services, the A. & P. Co. owed plaintiff no duty other than not to injure him by wilful or wanton acts. It is neither alleged, nor do the proofs indicate that plaintiff's injuries were the result of such action.

[**786] On the subject of volunteers generally, see 18 R.C.L. p. 578; *Kelly v. Tyra, 103 Minn. 176 (114 N.W. 750, 115 N.W. 636, 17 L.R.A. [N.S.] 334*); notes in 16 L.R.A. 861; 22 L.R.A. 663; 13 L.R.A. [N.S.] 561; 43 L.R.A. [N.S.] 187.

Moreover, we are of the opinion that the judgment must be reversed for still another reason as it does not appear that there was any actionable negligence on the part of the defendant Hester. It is clear from the record that simultaneously with the blow struck by Hester with the fish knife, plaintiff jumped upon the rat. Even if Hester had seen plaintiff, he could not have anticipated that plaintiff would jump upon the rat at the precise moment he attempted to kill the animal with the knife. Plaintiff's injuries were the result of an unavoidable accident.

The judgment is reversed without a new trial, with costs to the defendants.
FEAD, C.J., and NORTH, WIEST, BUTZEL,
BUSHNELL, SHARPE, and POTTER, JJ., concurred.

 ¿Por qué el tribunal en *Diefenbach* no le imputa a la carnicería el deber de cuidado que generalmente se exige hacia los clientes invitados de un establecimiento?

DUTY: PRIVITY

 H. R. Moch Company, Inc., Appellant, v. Rensselaer Water Company, Respondent Court of Appeals of New York 247 N.Y. 160; 159 N.E. 896 December 9, 1927, Submitted January 10, 1928, Decided

[*163] [**896] CARDOZO The defendant, a water works company under the laws of this State, made a contract with the city of Rensselaer for the supply of water during a term of years. Water was to be furnished to the city for sewer flushing and street sprinkling; for service to schools and public buildings; and for service at fire hydrants, the latter service at the rate of $ 42.50 a year for each hydrant. Water was to be furnished to private takers within the city at their homes and factories and other industries at reasonable rates, not exceeding a stated schedule. While this contract was in force, a building caught fire. The flames, spreading to the plaintiff's warehouse near by, destroyed it and its contents. The defendant according to the complaint was promptly notified of the fire, "but omitted and neglected after such notice, to supply or furnish sufficient or adequate quantity of water, with adequate pressure to stay, suppress or extinguish the fire before it reached the warehouse of the plaintiff, although the pressure and supply which the defendant was equipped to supply and furnish, and had agreed by said contract to supply and furnish, was adequate and sufficient [**897] to prevent the spread of the fire to and the destruction of the plaintiff's warehouse and its contents." By reason of the failure of the defendant to "fulfill the provisions of the contract between it and the city of Rensselaer," the plaintiff is said to have suffered damage, for which judgment is demanded. A motion, in the nature

of a demurrer, to dismiss the complaint, was denied at Special Term. The Appellate Division reversed by a divided court.

Liability in the plaintiff's argument is placed on one or other of three grounds. The complaint, we are told, is to be viewed as stating: (1) A cause of action for breach of contract within *Lawrence v. Fox (20 N. Y. 268*); (2) a cause of action for a common-law tort, within *MacPherson v. Buick Motor Company (217 N. Y. 382*); or (3) a cause of action for the breach of a statutory duty. These several grounds of liability will be considered in succession.

[*164] (1) We think the action is not maintainable as one for breach of contract.

No legal duty rests upon a city to supply its inhabitants with protection against fire (*Springfield Fire Ins. Co. v. Village of Keeseville, 148 N. Y. 46*). That being so, a member of the public may not maintain an action under *Lawrence* v. *Fox* against one contracting with the city to furnish water at the hydrants, unless an intention appears that the promisor is to be answerable to individual members of the public as well as to the city for any loss ensuing from the failure to fulfill the promise. No such intention is discernible here. On the contrary, the contract is significantly divided into two branches: one a promise to the city for the benefit of the city in its corporate capacity, in which branch is included the service at the hydrants; and the other a promise to the city for the benefit of private takers, in which branch is included the service at their homes and factories. In a broad sense it is true that every city contract, not improvident or wasteful, is for the benefit of the public. More than this, however, must be shown to give a right of action to a member of the public not formally a party. The benefit, as it is sometimes said, must be one that is not merely incidental and secondary (cf. *Fosmire v. Nat. Surety Co., 229 N. Y. 44*). It must be

primary and immediate in such a sense and to such a degree as to bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost. The field of obligation would be expanded beyond reasonable limits if less than this were to be demanded as a condition of liability. A promisor undertakes to supply fuel for heating a public building. He is not liable for breach of contract to a visitor who finds the building without fuel, and thus contracts a cold. The list of illustrations can be indefinitely extended. The carrier of the mails under contract with the government is not answerable to the merchant who has lost the benefit of a bargain through [*165] negligent delay. The householder is without a remedy against manufacturers of hose and engines, though prompt performance of their contracts would have stayed the ravages of fire. "The law does not spread its protection so far" (*Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303*).

So with the case at hand. By the vast preponderance of authority, a contract between a city and a water company to furnish water at the city hydrants has in view a benefit to the public that is incidental rather than immediate, an assumption of duty to the city and not to its inhabitants. Such is the ruling of the Supreme Court of the United States (*German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220*). Such has been the ruling in this State (*Wainwright v. Queens County Water Co., 78 Hun, 146*; *Smith v. Great South Bay Water Co., 82 App. Div. 427*), though the question is still open in this court. Such with few exceptions has been the ruling in other jurisdictions (Williston, Contracts, § 373, and cases there cited; Dillon, Municipal Corporations [5th ed.]., § 1340). The diligence of counsel has brought together decisions to that effect from twenty-six States. Typical examples are Alabama (*Ellis v. Birmingham Water Co., 187 Ala. 552*); California (*Nichaus Bros. Co. v. Contra Costa Water Co., 159 Cal. 305*); Georgia (*Holloway v. Macon G. & W. Co., 132 Ga.*

387); Connecticut (*Nickerson v. Bridgeport H. Co., 46 Conn. 24*); Kansas (*Mott v. Cherryvale W. & M. Co., 48 Kan. 12*); Maine (*Hone v. Presque Isle Water Co., 104 Me. 217*); New Jersey (*Hall v. Passaic Water Co., 83 N. J. L. 771*), and Ohio (*Blunk v. Dennison Water Co., 71 Ohio St. 250*). Only a few States have held otherwise (Page, Contracts, § 2401). An intention to assume an obligation of indefinite extension to every member of the public is seen to be the more improbable when we recall the crushing burden [**898] that the obligation would impose (cf. *Hone v. Presque Isle Water Co., 104 Me. 217, at 232)*. The consequences invited would bear [*166] no reasonable proportion to those attached by law to defaults not greatly different. A wrongdoer who by negligence sets fire to a building is liable in damages to the owner where the fire has its origin, but not to other owners who are injured when it spreads. The rule in our State is settled to that effect, whether wisely or unwisely (*Hoffman v. King, 160 N. Y. 618*; *Rose v. Penn. R. R. Co., 236 N. Y. 568*; *Moore v. Van Beuren & N. Y. Bill Posting Co., 240 N. Y. 673*; cf. *Bird v. St. Paul F. & M. Ins. Co., 224 N. Y. 47*). If the plaintiff is to prevail, one who negligently omits to supply sufficient pressure to extinguish a fire started by another, assumes an obligation to pay the ensuing damage, though the whole city is laid low. A promisor will not be deemed to have had in mind the assumption of a risk so overwhelming for any trivial reward.

The cases that have applied the rule of *Lawrence* v. *Fox* to contracts made by a city for the benefit of the public are not at war with this conclusion. Through them all there runs as a unifying principle the presence of an intention to compensate the individual members of the public in the event of a default. For example, in *Pond v. New Rochelle Water Co. (183 N. Y. 330*) the contract with the city fixed a schedule of rates to be supplied not to public buildings but to private takers at their homes. In *Matter of International*

Railway Co. v. Rann (224 N. Y. 83, 85) the contract was by street railroads to carry passengers for a stated fare. In *Smyth v. City of N. Y. (203 N. Y. 106*) and *Rigney v. N. Y. C. & H. R. R. R. Co. (217 N. Y. 31*) covenants were made by contractors upon public works, not merely to indemnify the city, but to assume its liabilities. These and like cases come within the third group stated in the comprehensive opinion in *Seaver v. Ransom (224 N. Y. 233, 238)*. The municipality was contracting in behalf of its inhabitants by covenants intended to be enforced by any of them severally as occasion should arise.

[*167] (2) We think the action is not maintainable as one for a common-law tort.

"It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all" (*Glanzer v. Shepard, 233 N. Y. 236, 239*; *Marks v. Nambil Realty Co., Inc., 245 N. Y. 256, 258)*. The plaintiff would bring its case within the orbit of that principle. The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all. A time-honored formula often phrases the distinction as one between misfeasance and non-feasance. Incomplete the formula is, and so at times misleading. Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result as well from acts of omission as of commission in the fulfillment of the duty thus recognized by law (Pollock, Torts [12th ed.], p. 555; *Kelley* v. *Met. Ry. Co.*, 1895, 1 Q. B. 944). What we need to know is not so much the conduct to be avoided when the relation and its attendant duty are established as existing. What we need to know is the conduct that engenders the relation. It is here that the formula, however incomplete, has its value and significance. If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which

arises a duty to go forward (Bohlen, Studies in the Law of Torts, p. 87). So the surgeon who operates without pay, is liable though his negligence is in the omission to sterilize his instruments (cf. *Glanzer v. Shepard, supra*); the engineer, though his fault is in the failure to shut off steam (*Kelley* v. *Met. Ry. Co., supra;* cf. *Pittsfield Cottonwear Mfg. Co. v. Shoe Co., 71 N. H. 522, 529, 533)*; the maker of automobiles, at the suit of some one other than the buyer, though his negligence is merely in inadequate inspection (*MacPherson* [*168] *v. Buick Motor Co., 217 N. Y. 382*). The query always is whether the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good (cf. *Fowler v. Athens Waterworks Co., 83 Ga. 219, 222)*.

The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with every one who might potentially be benefited through the supply of water at the hydrants as to give to negligent performance, without reasonable notice of a refusal to continue, the quality of a tort. There is a suggestion of this thought in *Guardian Trust Co. v. Fisher (200 U.S. 57*), but the *dictum* was rejected in a [**899] later case decided by the same court (*German Alliance Ins. Co. v. Home Water Supply Co., 226 U.S. 220*) when an opportunity was at hand to turn it into law. We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty. The dealer in coal who is to supply fuel for a shop must then answer to the customers if fuel is lacking. The manufacturer of goods, who enters upon the performance of his contract, must answer, in that view, not only to the buyer, but to those who to his knowledge are looking to the buyer for their own sources of supply. Every one making a promise having the quality of a contract will be under a duty to the promisee by virtue of

the promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun. The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together. Again we may say in the words of the Supreme Court of the United States, "The law does not spread its protection so far" (*Robins Dry Dock & Repair Co. v. Flint, supra;* cf. *Byrd v. English, 117 Ga. 191*; *Dale v. Grant, 34 N. J. L. 142*; *Conn. Ins.* [*169] *Co. v. N. Y. & N. H. R. R. Co., 25 Conn. 265*; *Anthony* v. *Slaid*, 11 Metc. 290). We do not need to determine now what remedy, if any, there might be if the defendant had withheld the water or reduced the pressure with a malicious intent to do injury to the plaintiff or another. We put aside also the problem that would arise if there had been reckless and wanton indifference to consequences measured and foreseen. Difficulties would be present even then, but they need not now perplex us. What we are dealing with at this time is a mere negligent omission, unaccompanied by malice or other aggravating elements. The failure in such circumstances to furnish an adequate supply of water is at most the denial of a benefit. It is not the commission of a wrong.

(3) We think the action is not maintainable as one for the breach of a statutory duty.

The defendant, a public service corporation, is subject to the provisions of the Transportation Corporations Act. The duty imposed upon it by that act is in substance to furnish water, upon demand by the inhabitants, at reasonable rates, through suitable connections at office, factory or dwelling, and to furnish water at like rates through hydrants or in public buildings upon demand by the city, all according to its capacity (Transportation Corporations Law [Cons. Laws, ch. 63*], § 81*; *Staten Island Water Supply Co. v. City of N. Y., 144 App. Div. 318*; *People ex rel. City of N. Y. v. Queens Co. Water Co., 232 N. Y. 277*; *People ex rel. Arthur v. Huntington Water Works*

Co., 208 App. Div. 807, 808). We find nothing in these requirements to enlarge the zone of liability where an inhabitant of the city suffers indirect or incidental damage through deficient pressure at the hydrants. The breach of duty in any case is to the one to whom service is denied at the time and at the place where service to such one is due. The denial, though wrongful, is unavailing without more to give a cause of action to another. We may find a helpful analogy in the law of common carriers. [*170] A railroad company is under a duty to supply reasonable facilities for carriage at reasonable rates. It is liable, generally speaking, for breach of a duty imposed by law if it refuses to accept merchandise tendered by a shipper. The fact that its duty is of this character does not make it liable to some one else who may be counting upon the prompt delivery of the merchandise to save him from loss in going forward with his work. If the defendant may not be held for a tort at common law, we find no adequate reason for a holding that it may be held under the statute.

The judgment should be affirmed with costs.

 ¿Por qué el tribunal exige la existencia de algún tipo de relación contractual para la imputación de responsabilidad civil a la compañía de suministro de agua?

B. DEFENSAS

CONTRIBUTORY NEGLIGENCE

 Butterfield v. Forrester, 11 East. 60, 103 Eng. Rep. 926 (K.B. 1809) King's Bench Saturday, April 22d, 1809

One who is injured by an obstruction in a highway against which he fell, cannot maintain an action if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. This was an action on the case for obstructing a highway, by means of which obstruction the plaintiff, who was riding along the road, was thrown down with his

horse, and injured, &c. At the trial before Bayley J. at Derby, it appeared that the defendant, for the purpose of making some repairs to his house, which was close by the road side at one end of the town, had put up a pole across this part of the road, a free passage being left by another branch or street in, the .same direction. That the plaintiff left a public house not far distant from the place in question at 8 o'clock in the evening in August, when they were just beginning to light candles, but while there was light enough left to discern the obstruction at 100 yards distance: and the witness, who- proved this, said that if the plaintiff had not been riding very hard he might have observed and avoided it: the plaintiff however, who was riding violently, did not observe it, but rode against it, and fell with his horse and was which hurt in consequence of the accident; and there was no evidence of his" being intoxicated at the time. On this evidence Bayley J. directed the jury, that if a person riding with reasonable and ordinary care could have seen and avoided the obstruction; and if they were satisfied that the plaintiff was riding along the street extremely hard, and without ordinary care, they should find a verdict for the defendant: which they accordingly did.

Vaughan Serjit now objected to this direction, on moving for a new trial; and referred to Buller's Ni Pri 26 (a), where the rule is laid down, that "if a man lay logs of wood across a highway; though a person may with care ride safely by, yet if by means thereof my horse stumble and fling me, I may bring an action."

Bayley J. The plaintiff was proved to be riding as fast as his horse could go, and this was through the streets of Derby. If he had used ordinary care he must have seen the obstruction ; so that the accident appeared -to happen entirely from his own fault.

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. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary c¡¡,re for himself. Two things must concur to support this action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

Per Curiam. Rule refused.

 ¿Por qué es eficiente que el ordenamiento jurídico anule del todo la responsabilidad civil en el supuesto de la culpa concurrente de la víctima? ¿El sistema de responsabilidad civil contractual funciona para compensar la víctima, o para publicitar las precauciones a tomar en cada caso?

 E. L. FULLER ET AL. v. ILLINOIS CENTRAL RAILROAD COMPANY. SUPREME COURT OF MISSISSIPPI 100 Miss. 705; 56 So. 783 October, 1911, Decided

[**784] [*712] MCLAIN, J., delivered the opinion of the court.

The plaintiffs in the court below brought suit against the railroad company for the killing of their father, Mr. S. A. Fuller.

The facts in evidence are these: There is a private road intersecting the right of way and track of the railroad company at practically right angles. The railroad runs east and west; the dirt road, practically north and south at the point of the intersection. This dirt road had been in use for a long period of time, variously estimated at from ten to twenty years; had been used by the people in that section for this period of time; and was the road which Mr. S. A. Fuller habitually used, and had been using for many years

in going to and from his farm and back to his home, his farm being on the south side of the railroad and his home on the north side. The railroad company kept in repair the approaches to its right of way and crossing over its tracks of this dirt road. For a distance of five hundred and ten feet west of where the dirt road crosses the railroad, the track of the defendant is straight, and for an additional distance of one hundred and fifty feet west the track is almost straight, having a slight curve, and the evidence is that the parties in charge of an approaching train from the west can easily see and discover, for a distance of six hundred and sixty feet west of the crossing, a person approaching the crossing when he gets within seventeen feet south of the crossing. South of the crossing, on the dirt road and seventeen feet three inches from the southern rail of the railroad track, was a pile of cross-ties placed there by the defendant on its right of way; these cross-ties being some six or seven feet in height. A little further south of this pile of [*713] cross-ties the dirt road, leading to the railroad, sinks to some few feet below the surrounding surface of the ground. The effect of the pile of cross-ties is that a party approaching the railroad track from the south must pass beyond the pile of cross-ties in order to see an approaching train from the west, and the evidence is that those in charge of an approaching train for a distance of six hundred and sixty feet west of the crossing can easily see and discover a person approaching the crossing from the south after he had passed from behind the pile of cross-ties, which was seventeen feet three inches south of the southern rail of the track. Mr. Fuller, on the evening of December 2, 1909, between 5:30 and 6 o'clock p. m., approached and drove upon and undertook to cross the railroad track. He was seated in a one-horse wagon, and the wagon was being drawn by one horse. The evidence is that he was driving slowly; that he neither stopped, looked, nor listened for any approaching train before he got upon the crossing; that he never turned his head either to the right or to the left, but, upon the other hand, was facing the direction in which he was going, almost north. The train

which killed Mr. Fuller was about thirty minutes late. It was a passenger train consisting of two passenger coaches, a baggage, and express car and an engine and tender, and was running at a high rate of speed--at a speed greater than it was in the habit of running. At a distance of nine hundred feet from this crossing was the whistling board for Kosciusko. The crossing at which the injury occurred was just outside of the corporate limits of the city of Kosciusko. When the train reached this whistling board, it gave the signal for the station, which was a long blast of the whistle. No other signal or warning whatever was given until just before the collision between the engine and the wagon in which Mr. Fuller was, when two short blasts of the whistle were given, and immediately thereafter [*714] the wagon in which Mr. Fuller was driving was struck and the wagon demolished, the pieces scattered for a long distance up the track, and Mr. Fuller was hurled some feet and instantly killed. At the time of the collision the horse had passed over the crossing, and the wagon, that portion of it wherein Mr. Fuller was seated, was in the center of the track. The uncontradicted evidence is that by the proper application of the air brakes and the sanding of the track this train could have been stopped within a distance of two hundred feet. The train was running at the time of the collision from thirty-five to forty miles an hour. There. was no evidence at all that those in charge of the train made any effort whatever either to stop or check the train. The record is absolutely silent as to what those in charge of the train saw or did. Mr. Fuller [**785] was an old man, had passed his three score years and ten; and from the evidence it is clear that he was unconscious of his danger, being probably absorbed in other matters. At the close of plaintiff's evidence, the defendant made a motion to exclude from the jury all of the evidence which was sustained, and thereupon a peremptory instruction was given to the jury to find for the defendant, and the jury so found. From this an appeal is prosecuted to this court, and the exclusion of the evidence

from the jury and the granting of the peremptory instruction are the errors assigned.

There are two counts in the declaration: First, the gravamen of the first count is that Mr. S. A. Fuller, at the hour of about 5:20 o'clock p. m., was riding across said railroad and over said crossing in a certain wagon drawn by one horse, and while on said track at said crossing and in plain view of the engineer and fireman of said train of defendant, the said railroad being at this point and for a distance of about two thousand feet almost straight from whence said train was coming. The said defendant then and there, by its servants, willfully, [*715] wantonly, negligently, and in utter disregard of the rights of plaintiff's father, drove and ran its engine and train willfully, wantonly, and negligently, in this: That, while it was the duty of said engineer of said train to keep a lookout for persons on said track or those crossing said track at said crossing, yet while said engineer saw said S. A. Fuller in his attempt to cross the track at said crossing in his said one-horse wagon, or could have seen him by the exercise of reasonable diligence and prudence, and knew or could have known the imminent danger he was in and peril to which he was exposed, willfully, wantonly, and negligently failed to sound the whistle or ring the bell so as to warn him of his impending danger, and wantonly and negligently failed to apply the emergency brakes which could have reasonably and safely been done, and which, if done, would have lessened the speed of said train, and plaintiff could have crossed said track in all safety; and further, having willfully, wantonly, and negligently disregarded its duty caused the injury. The second count charges practically the same as in the first count, and, in addition thereto, that the said S. A. Fuller was a licensee, and that the engineer in charge of the train negligently failed to sound his whistle at the whistling post which was about nine hundred feet west of the crossing, and, further, that the engineer willfully, wantonly, and negligently failed, after passing said

whistling post, to sound the whistle or to ring the bell or to warn said Fuller, who was then on the track at said crossing, of his imminent danger after being in full view of him, or where he could have seen him with the exercise of reasonable care. The defendant pleaded, first, the general issue; and, second, contributory negligence of the deceased, to which the plaintiff replied by tendering issue.

Let us say, as we swing around the circle, that the plea of contributory negligence is bad for the reason [*716] that it simply alleges that: "The alleged injuries complained of in plaintiff's declaration and each count thereof, if any, were the direct and proximate result or cause of deceased, S. A. Fuller's, own contributory negligence, without any fault whatever on the part of the defendant." The plea is bad because it does not set up the facts which constitute the contributory negligence. However, as no point was made on this plea in the court below, we discuss the case as if the plea were properly drawn.

Evidently the action of the court below was predicated because of the contributory negligence of the injured party, Mr. S. A. Fuller. It may be conceded, and, in fact, we think, that the deceased was guilty of negligence. The appellant practically admits this, but takes the position that, by virtue of section 1985 of the Code of 1906, which says that "in all actions against railroad companies for damages done to persons or property, proof of injury inflicted by the running of the locomotive or cars of such company shall be prima facie evidence of the want of reasonable skill and care on the part of the servants of the company in reference to such injury," it may be said that Fuller was not a trespasser, but a licensee; and, without adverting to the proposition of any difference as to the degree of care required as to avoid injury upon a trespasser or licensee, we will for the present discuss the question as if the same degree of care is required towards Mr. Fuller as if he were a trespasser.

The rule is settled beyond controversy or doubt, first, that all that is required of the railroad company as against a trespasser is the abstention from wanton or willful injury, or that conduct which is characterized as gross negligence; second, although the injured party may be guilty of contributory negligence, yet this is no defense if the injury were willfully, wantonly, or recklessly done or the party inflicting the injury was guilty of such conduct as to characterize it as gross; and, third, that the [*717] contributory negligence of the party injured will not defeat the action if it is shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequence of the injured party's negligence. This last principle is known as the doctrine of the "last clear chance." The origin of this distrain is found in the celebrated case of *Davies v. Mann,* 10 Mees & Welsb. 545. The plaintiff in that case fettered the front feet of his donkey, and turned him into the public highway to graze. The defendant's wagon, coming down a slight descent at a "smartish" pace, ran against the donkey, and knocked it down, the wheels of the wagon passing over it, and the donkey [**786] was killed. In that case Lord Abinger, C. B., says: "The defendant has not denied that the ass was lawfully in the highway, and therefore we must assume it to have been lawfully there. But, even were it otherwise, it would have made no difference, for, as the defendant might by proper care have avoided injuring the animal and did not, he is liable for the consequences of his negligence, though the animal might have been improperly there." While Park, B., says: "Although the ass might have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on the public highway or even a man lying asleep there, or probably running against the carriage going on the wrong side of the road." It is impossible to follow this case through its numerous citations in nearly every jurisdiction subject to Anglo-American jurisprudence. For

the present it will be sufficient to say that the principle therein announced has met with practically almost universal favor. It has been severely criticized by some text-writers. The groans, ineffably and mournfully sad, of Davies' dying donkey, have resounded around the earth. The last lingering gaze from the soft, mild eyes of this docile [*718] animal, like the last parting sunbeams of the softest day in spring, has appealed to and touched the hearts of men. There has girdled the globe a band of sympathy for Davies' immortal "critter." Its ghost, like Banquo's ghost, will not down at the behest of the people who are charged with inflicting injuries, nor can its groanings be silenced by the rantings and excoriations of carping critics. The law as enunciated in that case has come to stay. The principle has been clearly and accurately stated in 2 Quarterly Law Review, p. 207, as follows: "The party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." *Pickett v. Railroad, 117 N.C. 616, 23 S.E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611*; *Thompson v. Railroad, 16 Utah 281, 52 P. 92, 40 L. R. A. 172, 67 Am. St. Rep. 621*.

An analytical examination of the adjudged cases upon this subject will demonstrate the correctness of the above analysis, and, in addition, establish the soundness and technical accuracy announced in *Davies* v. *Mann, supra.* This case has been criticized most severely and assailed from its four corners, not only by reputable text-writers and by courts of high authority, but these courts have utterly and entirely failed to appreciate the base upon which the principle is bottomed, and in repudiating the principle do so upon the idea that *Davies* v. *Mann* establishes the much-abused comparative negligence doctrine, a doctrine repudiated by this court, but established in this state by Laws 1910, ch. 135, p. 125. (But this statute has no reference to the instant case because passed subsequent to the injuries complained of.) In order for the injured party's

negligence to bar recovery, all of the authorities hold that it must be the proximate cause; otherwise, it is not contributory. Now, when it is fully understood that the negligence of the injured party must be the proximate [*719] cause in order to bar the remedy (and, as said above, all authorities everywhere, ancient and modern, so affirm), the principle announced in *Davies* v. *Mann*, must, from necessity, be the correct and true rule. If the proximate and immediate cause of the injury--the *causa causans*--is the controlling and determining factor in ascertaining whether the injured party has the right to recover or whether the injuring party is not liable, then it must follow, as night the day, that the party who has the last opportunity to avoid the injury is the one upon whom the blame shall fall. To express the idea differently: If the injured party's negligence be remote, and not proximate, he can recover against the party who is guilty of negligence proximately contributing or causing the injury. The North Carolina courts have perhaps more satisfactorily and more clearly elucidated this question than have any opinions that have come under the writer's eye. In *Smith v. N. & S. R. R. Co., 114 N.C. 728, 19 S. E. 863, 923, 25 L. R. A. 287*, it is said that the rule in *Davies* v. *Mann* simply furnishes a means for ascertaining whether the plaintiff's negligence is a remote or proximate cause of the injury; that, before the introduction of this rule, any negligence on the part of the plaintiff, which in any degree contributes to the injury, was judicially treated as the proximate cause, and constituted contributory negligence which barred recovery. The same is clearly stated in *Nashua Iron & Steel Co. v. W. & N. R. R. Co., 62 N.H. 159, 163, et seq.* The antecedent negligence of the injured party, having been thus relegated to the position of a condition or remote cause of the accident, it cannot be regarded as contributory, since it is well established that negligence, in order to be contributory, must be at least one of the proximate causes. The New Hampshire court, *supra,* uses this language: "Mann (referring to *Davies* v. *Mann*) would be no more liable for

unlawfully shooting the fettered ass which Davies [*720] has carelessly left on the public highway than he is for running over it, which by ordinary care he could avoid. One's negligence in permitting the ox to stray and in leaving the ass fettered in the street, although without it the injury would not happen, is no more the cause, in a legal sense, of the negligence than of the willful wrong. In each case alike, as in that of the broken leg, it merely affords the wrongdoer an opportunity to do the mischief," referring to *Bartlett v. Boston Gaslight Co., 117 Mass. 533, 19 Am. Rep. 42*, and 12 QB 439. This court again says on the same page: "The [**787] question of contributory negligence is not involved. The wrong, if any, is the negligent injuring of property exposed to danger. The only question is whether the defendant could have prevented it by ordinary care. If he could not, he is without fault, and not liable. If he could, his negligence is in law the sole cause of the injury"--referring to quite a number of authorities. This case is luminating upon this question, and so, also, are the following authorities: Patterson's Ry. Ace. Law, section 58, and cases cited in note 1, p. 54; Elliott on Railroads, section 109 cq, and eases cited in notes; 29 Cyc. p. 531, and cases cited in notes. As has been clearly stated in the note to *Bogan* v. *C. C. R. R. Co.*, reported in 55 L.R.A. 419; "Since, therefore, the function of the doctrine is merely to strip from the negligence of the plaintiff or deceased the attribute expressed by the word 'contributory,' it follows that there is no opportunity or occasion for its application, unless and until it has been independently determined that there has been some breach of duty on the defendant's part intervening between the antecedent negligence of the plaintiff, or deceased, to the accident. If there was no such breach of duty, there could be no recovery, even if the doctrine of contributory negligence were to be repudiated altogether. Comparatively few even of the cases in which there has been an opportunity or occasion to apply the doctrine [*721] have recognized and discussed it as a

separate and distinct doctrine under the name of 'last chance' doctrine."

Our conclusion is that the predicate upon which the principle in *Davies* v. *Mann* and the cases following that authority is based is that the defendant's liability is enforced because his negligence is the proximate cause of the injury. If, therefore, we be correct in this deduction, it must necessarily follow that our statute (section 1985 of the Code of 1906) is applicable and applies in cases where there is evidence of what may be termed the plaintiff's contributory negligence, as well in cases where there is no evidence of plaintiff's negligence. Since the statute makes the proof of injury presumptive evidence of defendant's negligence, why should it not apply when the issue is whether the plaintiff's or the defendant's negligence was the proximate cause of the injury? Is not plaintiff entitled to the benefit of the presumption in the one instance as in the other? If, however, we have failed to extract out of *Davies* v. *Mann* and that numerous line of authorities which have followed that memorable and remarkable opinion (memorable for its converts and remarkable for its lucidity, force and justice) the true predicate upon which it is based, it nevertheless follows that the peremptory instruction should not have been given because of the interpretation placed upon this statute (section 1985) by this court in numerous decisions. It will be noted later on in this opinion that there has been some oscillation of the judicial pendulum upon this question caused by this court attempting to adjust this statute to the ever-varying facts of particular cases as they arise, in order to enforce what this court supposed to be the purpose of the legislature. The purpose of the legislature was to in all cases make the proof of any injury caused by the running of the cars *prima facie* evidence of liability, regardless of the character of negligence requisite to [*722] fasten liability upon the railroad company. This statute is first found in the Code of 1871, and was brought forward in the same phraseology

until 1906, when a new class of persons was added, to whom was given the right to invoke the wise and beneficent rule of evidence introduced thereby. Prior to 1906 the rule as construed by this court was not applicable to either employees or passengers, but, strange to say, trespassers had the right to invoke it, and in so doing were shielded by the statute; and in such cases liability of the railroad company could not be established except where the act of the company or its employees was willful, reckless, or such as to come under the characterization of gross. *Phillips' case, 64 Miss. 693, 2 So. 537*; *Christian's case, 71 Miss. 237, 15 So. 71*; *Landrum's case, 89 Miss. 399, 42 So. 675*. In *Phillips' case, supra*, there were numerous eyewitnesses to the injury, and yet the court held (Phillips was a trespasser, and the company owed him no duty except to abstain from willful, wanton injury) that he could invoke this statute, "though a cloud of witnesses were present and testified to the injury." The same was held in *Railroad v. Murry, 91 Miss. 550, 44 South. 785*. The last utterance upon this subject is found in the recent case of *Hollinshed* v. *Y. & M. V. R. R. Co.* (decided May, 1911) *99 Miss. 464, 55 So. 40*, wherein the court uses this language: "The statute applies regardless of whether the facts attending the injury are in evidence or not." In *V. & M. R. R. Co. v. Phillips, 64 Miss. 693, 2 So. 537*, the court said: "The statute was enacted to meet cases where the manner of injury inflicted is not known to others than the employees of the railroad company, but it is equally applicable where a cloud of witnesses see the injury. It is not needed there it is true, but it is not error to invoke it, for the law affects the railroad company with liability *prima facie* in every case of injury inflicted by the running of its locomotives or cars. If the evidence showing the injury inflicted [*723] rebuts the presumption, well, but, if it does not, the presumption created by law from the fact of the injury in this mode is to stand."

Presumptions in all cases must yield to facts, yet they fail, not because of the law, but because of the facts, and completely destroy the presumption; and hence when the statute, which is the law, gives this presumption, the courts have no right to make or charge a different rule. In so doing the [**788] court is substituting judge-made law for statutory law. Of course, when all the facts relating to the injury are in evidence, the court has a right to draw a conclusion based upon the facts, and in proper cases to give a peremptory instruction as these facts may justify.

The track was as straight as a string for a distance of five hundred and ten feet west of the crossing where Mr. Fuller was killed, and for an additional distance of one hundred and fifty feet the evidence shows the engineer could have seen a person crossing, or attempting to cross, the track, after he had passed from behind the pile of ties, seventeen feet to the south of the track; and the evidence is uncontradicted that the train was a light train consisting of two passenger coaches and a baggage and express car, and that this identical train, running at the rate of speed shown by the evidence, could have been stopped within two thousand feet. The whistle was sounded, two short blasts, just about the time of the collision. There was no evidence that those in charge of the train did or did not see Mr. Fuller. There is no evidence that any effort was made to stop or even check the train. There is nothing in the evidence to exculpate the defendant, except simply the presumption that those in charge of the train were not negligent (this would be the law in all cases except for the statute); but the statute, like a scimitar, cold, gleaming, and glistening in the light of expediency and of a great public policy, descends, cuts away this presumption, and says that the proof of injury [*724] by the running of the cars is *prima facie* evidence of liability. As has been held by this court in *Railroad Co. v. Brooks, 85 Miss. 269, 38 So. 40* (and one of the questions there presented was whether the plaintiff was guilty of contributory negligence, it being

contended that the facts of the case showed beyond dispute that Brooks, the person injured, was guilty of such recklessness as to preclude recovery by him), the court says: "There is yet another principle of law well settled in this state, which requires the submission of the case to the jury. It was shown beyond peradventure that the injury was inflicted by the running of the train. This is *prima facie* proof of negligence, authorizing a recovery by the plaintiff. To overcome this statutory presumption, it devolved upon the appellant to exculpate itself by establishing to the satisfaction of the jury such circumstances or excuse as would relieve it from liability. But this statutory presumption cannot be overcome by conjecture. The circumstance of the accident must be clearly shown and the facts so proven must exonerate the company from blame. If the facts be not proven and the attendant circumstances remain doubtful, the company is not relieved from liability, and the presumption controls." To the same effect are the following authorities: *Railroad v. Landrum, 89 Miss. 399, 42 So. 675*; *Combs v. M. & O. R. R. Co., 92 Miss. 532, 46 So. 168*; *M. J. & K. C. R. R. Co. v. Hicks, 91 Miss. 273, 46 So. 360, 124 Am. St. Rep. 679*; *Southern Ry. Co. v. Murray, 91 Miss. 546, 44 So. 785*; *Easley v. A. G. S. R. R. Co., 96 Miss. 396, 50 So. 491*. We note especially the *Hicks case, supra*,. In this case the court, construing the statute, says: "The statute should be interpreted precisely as if it were written thus: 'Proof of injury inflicted by the running of locomotives or cars of such company, shall be *prima facie* evidence of *liability* on the part of the company.'" The Hicks case was a suit by an employee, and the argument was made [*725] that the statute should not apply unless the evidence showed that the negligence was not the negligence of a fellow servant. We emphasize the proposition that this court in numerous cases has interpreted this statute so that *prima facie* evidence of *liability* is placed upon the railroad company by the proof of the injury. This construction has met with the approval

of the legislature as it has not changed the statute, although it has had many opportunities so to do. The statute, which was born of necessity in order to establish the truth by placing the burden upon those who know, or who are supposed to know, the facts, should not be restricted by ingrafting upon it exceptions which destroy its usefulness; but, upon the other hand, should be rigidly enforced in all cases where any of the material facts are not supplied by the evidence, either direct or circumstantial. In truth, it was designed to meet just such an emergency. The purpose of the legislature is manifest; in fact, it may be said that this is as clear as "the brook that brings down the greetings of the mountains to the meadows, and sings a serenade all the way to the faces that watch themselves in its brightness."

We have thus seen that the statute is applicable in every conceivable case, even in cases where the party injured was a trespasser, and in such case, in order to fix the liability upon the railroad company, it is necessary that the defendant should be guilty of willful, reckless, or wanton conduct. This court in *Drake v. Railroad Co., 79 Miss. 84, 29 So. 788*, approves the statement laid down in 13 Am. & Eng. Ency. of Law, 504, to wit: "For the purpose of rebutting the presumption, the evidence must be as broad as the presumption itself, and must satisfactorily rebut every negligent act or commission which might, under the circumstances of the case, reasonably or naturally have caused the fire." In this case the court further says: "The presumption of negligence from the escape of fire, however, cannot be [*726] rebutted by merely showing that the machinery and appliances were of proper character and were at the time in good condition, without further showing that due care was employed to avoid such injuries; to accomplish which it should be shown, not only that the engine was in charge of competent and skillful servants, [**789] but also at the particular time and under the circumstances in question it was carefully managed and controlled." The fact that the question of contributory

negligence was not presented in some of the cases above cited does not and cannot affect the question under consideration, for the plain and simple reason that the statute is intended to cover every conceivable case of injury which is the result of the running of the cars. To say that the statute does not apply because the injured party without excuse placed himself in a perilous position is to assume conclusively that the negligence of the party injured was the approximate cause of the injury, forgetting entirely the principle that the railway company may be liable under certain circumstances, even though the party injured was guilty of contributory negligence. In this connection we refer to *Railroad v. Hawkins, 82 Miss. 209, 34 So. 323*, which was a suit for the killing of a dog. This court, speaking through Calhoon, J., says: "If the engineer was on the lookout, as he says he was, in coming around a curve debauching into a cut, he must have seen the men and dogs. The jury manifestly thought that he did see them, or should have seen them by proper lookout in entering so dangerous a piece of road. One toot of his whistle would in all probability have prevented the damage. From the evidence the jury must have thought that he did see, and in that case the carelessness was so gross as to be tantamount to design." See, also, *Staggs v. Railroad, 77 Miss. 507, 27 So. 597*; *Harrison v. Railroad, 93 Miss. 40, 46 So. 408*; *I. C. Co. v. Tolson, 139 U.S. 551, 11 S. Ct. 653, 35 L. Ed. 270*.

[*727] So far as the point involved in the instant case is concerned. *Ensley R. R. Co. v. Chewning, 93 Ala. 24, 9 So. 458*, is directly in point. The defense in that case was that the plaintiff was guilty of contributory negligence. The court says on this subject: "The court instructed the jury that, 'if the plaintiff himself were negligent or at an improper place when he was struck, yet if the engineer saw his peril in time to stop the train and could have stopped it before the plaintiff was struck and failed to do so, and plaintiff did not know of his danger, then the defendant is

liable and the jury should so find.' We have repeatedly held that, when persons in charge of a train discover the perilous position of one on the track though a trespasser, it becomes their duty to use reasonable care to prevent the injury, and the failure to do so is reckless or wanton negligence. *Railroad v. Womack, 84 Ala. 149, 4 So. 618*; *Frazer v. Railroad, 81 Ala. 185, 1 So. 85, 60 Am. Rep. 145*. This is the proposition of the charge, but defendant insists that there is no evidence tending to show reckless, wanton, or wilful negligence. The insistence is rested on the ground that, 'if the engineer be believed, he did everything in his power to save him, and that his evidence is uncontradicted; on the other hand, if his testimony be disregarded, then there is no evidence tending to show that plaintiff was ever discovered, or that the engineer did not make every effort in his power to prevent the accident. In either event, that the charge was abstract.' Positive, direct evidence as to the time when plaintiff was first seen, and as to the skill and diligence used thereafter to avoid injury, is not indispensable. These facts may be proved by circumstances, and are inferences to be drawn by the jury in applying common observation and experience, to whom the question was submitted." To the same effect, see *Southern Ry. Co. v. Shelton, 136 Ala. 191, 34 So. 194*, and *L. & N. R. R. Co. v. Trammell, 93 Ala. 350,* [*728] *9 So. 870*. The facts in the instant case show that for a distance of six hundred and sixty feet west of the crossing where Mr. Fuller was run over and injured the track was perfectly straight; that there were no obstructions; that there was nothing to prevent those in charge of the train from seeing the perilous position of the plaintiff, and it may be that, if the engineer and fireman were on the lookout, they saw, or by the exercise of reasonable care and diligence might have seen, the perilous position of the plaintiff. No alarm was given. Nothing was done to warn deceased of the approaching train. He evidently was unconscious of its approach.

The only warning that was given him was too late to be of any benefit whatever, as the train was upon him at the time the two short blasts of the whistle were given. "Warning in all such cases" (and Mr. Fuller under the circumstances did not forfeit his right to be warned simply because he went upon the railroad track in front of an approaching train), as was said by the supreme court of the United States in *C. I. Co. v. Stead, 95 U.S. 161, 24 L. Ed. 403*, "must be reasonable and timely, but what is reasonable and timely warning may depend on many circumstances. It cannot be such if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be warning of the coming shot, but the velocity of the former generally outstrips the latter." Even if the engineer had not made an effort to stop or check his train, but had contented himself with giving the alarm at the point when he did see, or could have seen by the exercise of reasonable care on his part, the catastrophe in all probability would have been averted.

It must be observed that this is not the case of a pedestrian who approaches or who is on the track. In such cases the engineer has the right ordinarily to act upon the assumption that the party will get out of [*729] danger. Mr. Fuller was in a wagon, and the engineer could have seen that he was going to cross the track, and could only [**790] with difficulty extricate himself from his perilous position. Everything shown by the evidence may be true, and *non constat* those in charge of the train may have seen and realized the perilous position of Mr. Fuller in time to have prevented injuring him by the exercise of reasonable care. On this point the evidence is silent, and consequently all the facts and circumstances relating to the injury are not in evidence.

We have discussed this question from the standpoint that Mr. Fuller, who was a licensee, was entitled to no greater rights than if he had been a trespasser. We do not

mean to hold that Mr. Fuller under the circumstances, being upon a private road that had been used by the community for a long period of time with full knowledge of the railroad company, was not entitled to demand the exercise of more care and caution than the law demands shall be exercised towards trespassers. This question is pretermitted entirely from the opinion. It may possibly arise later on, when the question will be met and decided.

Reversed and remanded.

 ¿Por qué el tribunal en Fuller frustra la operación de la norma de no imputabilidad por culpa concurrente cuando el autor del hecho ilícito afronta una última oportunidad para evitar el daño?

 HARRY DOUGLAS McINTYRE, Plaintiff-Appellant, V. CLIFFORD BALENTINE and EAST-WEST MOTOR FREIGHT, INC., Defendants-Appellees. No. 1 SUPREME COURT OF TENNESSEE, AT JACKSON 833 S.W.2d 52 May 4, 1992, Decided May 4, 1992, Filed
[*53] *OPINION*

DROWOTA In this personal injury action, we granted Plaintiff's application for permission to appeal in order to decide whether to adopt a system of comparative fault [**2] in Tennessee. We are also asked to determine whether the criminal presumption of intoxication is admissible evidence in a civil case. We now replace the common law defense of contributory negligence with a system of comparative fault. Additionally, we hold that the criminal presumption of intoxication established by *T.C.A. § 55-10-408(b)* (1988) is admissible evidence in a civil case.

In the early morning darkness of November 2, 1986, Plaintiff-Harry Douglas McIntyre and Defendant-Clifford Balentine were involved in a motor vehicle accident resulting in severe injuries to Plaintiff. The accident occurred in the vicinity of Smith's Truck Stop in Savannah,

Tennessee. As Defendant-Balentine was traveling south on Highway 69, Plaintiff entered the highway (also traveling south) from the truck stop parking lot. Shortly after Plaintiff entered the highway, his pickup truck was struck by Defendant's Peterbilt tractor. At trial, the parties disputed the exact chronology of events immediately preceding the accident.

Both men had consumed alcohol the evening of the accident. After the accident, Plaintiff's blood alcohol level was measured at .17 percent by weight. Testimony suggested that Defendant [**3] was traveling in excess of the posted speed limit.

Plaintiff brought a negligence action against Defendant-Balentine and Defendant-East-West Motor Freight, Inc. [1] Defendants answered that Plaintiff was contributorially negligent, in part due to operating his vehicle while intoxicated. After trial, the jury returned a verdict stating: "We, the jury, find the plaintiff and the defendant equally at fault in this accident; therefore, we rule in favor of the defendant."

> 1 Defendant East-West Motor Freight, Inc., is a party to this action as lessee of the Peterbilt tractor Defendant-Balentine was operating at the time of the accident. Defendant-Balentine is the owner-lessor of the tractor.

After judgment was entered for Defendants, Plaintiff brought an appeal alleging the trial court erred by (1) refusing to instruct the jury regarding the doctrine of comparative negligence, and (2) instructing the jury that a blood alcohol level greater than .10 percent creates an inference of [*54] intoxication. The Court of Appeals affirmed, [**4] holding that (1) comparative negligence is not the law in Tennessee, and (2) the presumption of intoxication provided by *T.C.A. § 55-10-408(b)* (1988) is admissible evidence in a civil case.

I.

The common law contributory negligence doctrine has traditionally been traced to Lord Ellenborough's opinion in *Butterfield v. Forrester,* 11 East 60, 103 Eng. Rep. 926 (1809). There, plaintiff, "riding as fast as his horse would go," was injured after running into an obstruction defendant had placed in the road. Stating as the rule that "one person being in fault will not dispense with another's using ordinary care," plaintiff was denied recovery on the basis that he did not use ordinary care to avoid the obstruction. *See* 11 East at 61, 103 Eng. Rep. at 927.

The contributory negligence bar was soon brought to America as part of the common law, *see Smith v. Smith, 19 Mass. 621, 624 (1824),* and proceeded to spread throughout the states. *See* H.W. Woods, The Negligence Case: Comparative Fault § 1:4 (1978). This strict bar may have been a direct outgrowth of the common law system of issue pleading; issue pleading posed questions to be [**5] answered "yes" or "no," leaving common law courts, the theory goes, no choice but to award all or nothing. *See* J.W. Wade, W.K. Crawford, Jr., and J.L. Ryder, *Comparative Fault In Tennessee Tort Actions: Past, Present and Future, 41 Tenn. L. Rev. 423, 424-25 (1974).* A number of other rationalizations have been advanced in the attempt to justify the harshness of the "all-or-nothing" bar. Among these: the plaintiff should be penalized for his misconduct; the plaintiff should be deterred from injuring himself; and the plaintiff's negligence supersedes the defendant's so as to render defendant's negligence no longer proximate. *See* W. Keeton, *Prosser and Keeton On The Law Of Torts,* § 65, at 452 (5th ed. 1984); J.W. Wade, *supra,* at 424.

In Tennessee, the rule as initially stated was that "if a party, by his own gross negligence, brings an injury upon himself, or contributes to such injury, he cannot recover;" for, in such cases, the party "must be regarded as the author of his own misfortune." *Whirley v. Whiteman, 38 Tenn.*

610, 619 (1858). In subsequent decisions, we have continued to follow the general rule that a plaintiff's contributory [**6] negligence completely bars recovery. *See, e.g., Hudson v. Gaitan, 675 S.W.2d 699, 704 (Tenn. 1984)*; *Talbot v. Taylor, 184 Tenn. 428, 432, 201 S.W.2d 1, 3 (1935)*; *Nashville Ry. v. Norman, 108 Tenn. 324, 333, 67 S.W. 479, 481 (1902)*; *Railroad v. Pugh, 97 Tenn. 624, 627, 37 S.W. 555, 557 (1896)*; *Postal Telegraph-Cable Co. v. Zopfi, 93 Tenn. 369, 373, 24 S.W. 633, 634 (1894)*; *East Tennessee V. & G.R.R. v. Conner, 83 Tenn. 254, 258 (1885)*; *Louisville & N.R.R. v. Robertson, 56 Tenn. 276, 282 (1872)*; *Nashville & C.R.R. v. Carroll, 53 Tenn. 347, 366-67 (1871)*; *Cogdell v. Yett, 41 Tenn. 230, 232 (1860)*.

Equally entrenched in Tennessee jurisprudence are exceptions to the general all-or-nothing rule: contributory negligence does not absolutely bar recovery where defendant's conduct was intentional, *see, e.g., Stagner v. Craig, 159 Tenn. 511, 514, 19 S.W.2d 234, 234-35 (1929)*; *Memphis St. Ry. v. Roe, 118 Tenn. 601, 612-13, 102 S.W. 343, 346 (1907)*; [**7] where defendant's conduct was "grossly" negligent, *see, e.g., Ellithorpe v. Ford Motor Co., 503 S.W.2d 516, 522 (Tenn. 1973)*; *Carroll, 53 Tenn. at 366-67*; where defendant had the "last clear chance" with which, through the exercise of ordinary care, to avoid plaintiff's injury, *see, e.g., Roseberry v. Lippner, 574 S.W.2d 726, 728 (Tenn. 1978)*; *Kansas City, M. & B.R.R. v. Williford, 115 Tenn. 108, 120-21, 88 S.W. 178, 181-82 (1905)*; *Davies v. Mann*, 152 Eng. Rep. 588 (1842); or where plaintiff's negligence may be classified as "remote." *See, e.g., Arnold v. Hayslett, 655 S.W.2d 941, 945 (Tenn. 1983)*; *Street v. Calvert, 541 S.W.2d 576, 585 (Tenn. 1976)*; *Norman, 108 Tenn. at 333, 67 S.W. at 481*; *East Tennessee, V. & G. Ry. v. Hull, 88 Tenn. 33, 36, 12 S.W. 419, 419-20 (1889)*.

In contrast, comparative fault has long been the federal rule in cases involving [*55] injured employees of

interstate railroad carriers, *see* Federal Employers' Liability Act, ch. 149, § 3, 35 Stat. 66 [**8] (1908) (codified at *45 U.S.C. § 53 (1988)*), and injured seamen. *See Death On The High Seas Act,* ch. 111, § 6, 41 Stat. 537 (1920) (codified at *46 U.S.C. § 766 (1988)*); Jones Act, ch. 250, § 33, 41 Stat. 1007 (1920) (codified as amended at *46 U.S.C. § 688 (1988)*). *See generally* V. Schwartz, *Comparative Negligence* § 1.4(A) (2d ed. 1986).

Similarly, by the early 1900s, many states, including Tennessee, had statutes providing for the apportionment of damages in railroad injury cases. *See* V. Schwartz, *supra,* at § 1.4. While Tennessee's railroad statute did not expressly sanction damage apportionment, it was soon given that judicial construction. In 1856, the statute was passed in an effort to prevent railroad accidents; it imposed certain obligations and liabilities on railroads "for all damages accruing or resulting from a failure to perform said duties." Act of Feb. 28, 1856, ch. 94, § 9, 1855-56 Tenn. its 104. *See generally* J.W. Wade, *supra,* at 431-33. Apparently this strict liability was deemed necessary because "the consequences of carelessness and want of due skill [in the operation of railroads at speeds previously unknown] . . . are so frightful and appalling [**9] that the most strict and rigid rules of accountability must be applied." *See East Tennessee & G.R.R. v. St. John, 37 Tenn. 524, 527 (1858)*; Note, *Railroads--Precautions Act--Effect of 1959 Amendment,* 28 Tenn. L. Rev. 437, 439 (1961). The statute was then judicially construed to permit the jury to consider "negligence of the person injured, which caused, or contributed to cause the accident . . . in determining the amount of damages proper to be given for the injury." *Louisville & N.R.R. v. Burke, 46 Tenn. 45, 51-52 (1868)*. This system of comparative fault was utilized for almost a century until 1959 when, trains no longer unique in their "astonishing speeds," the statute was overhauled, its strict liability provision being replaced by negligence per se and the common law contributory negligence bar. *See* Act of

Mar. 10, 1959, ch. 130, § 2, 1959 Tenn. Pub. Acts 419; Note, *supra*, 28 Tenn. L. Rev. at 439.

Between 1920 and 1969, a few states began utilizing the principles of comparative fault in all tort litigation. *See* C. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions* [**10] *for Tennessee, 57 Tenn. L. Rev. 199, 227 n.127 (1990)*. Then, between 1969 and 1984, comparative fault replaced contributory negligence in 37 additional states. *Id. at 228*. In 1991, South Carolina became the 45th state to adopt comparative fault, *see Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991)*, leaving Alabama, [2] Maryland, North Carolina, Virginia, and Tennessee as the only remaining common law contributory negligence jurisdictions.

> 2 While not entirely clear, Alabama may be preparing to abandon contributory negligence. The Alabama Supreme Court recently stated that it would soon select a case and grant review for the sole purpose of considering "when, how, and in what form" comparative negligence should be adopted. *See Williams v. Delta Int'l Mach. Corp.*, No. 1901255 (Ala., Dec. 13, 1991) (1991 WL 261449). However, the *Williams* opinion was later ordered withdrawn.

Eleven states have judicially adopted comparative fault. [**11] [3] Thirty-four states [*56] have legislatively adopted comparative fault. [4]

> 3 In the order of their adoption, these states are Florida, California, Alaska, Michigan, West Virginia, New Mexico, Illinois, Iowa, Missouri, Kentucky, and South Carolina.
>
> Nine courts adopted pure comparative fault: *See Hoffman v. Jones, 280 So.2d 431 (Fla. 1973)*; *Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975)*; *Kaatz v. State, 540 P.2d 1037*

(Alaska 1975); *Placek v. City of Sterling Heights, 405 Mich. 638, 275 N.W.2d 511 (1979)*; *Scott v. Rizzo, 96 N.M. 682, 634 P.2d 1234 (1981) Alvis v. Ribar, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill. Dec. 23 (1981)*; *Goetzman v. Wichern, 327 N.W.2d 742 (Iowa 1982)*; *Gustafson v. Benda, 661 S.W.2d 11 (Mo. 1983)*; *Hilen v. Hays, 673 S.W.2d 713 (Ky. 1984)*. In two of these states, legislatures subsequently enacted a modified form. *See* Ill. Ann. Stat. ch. 110, para. 2-1116 (Supp. 1991); *Iowa Code Ann. § 668.3* (West 1987).

Two courts adopted a modified form of comparative fault. *See Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879 (1979)* (plaintiff may recover if his negligence is less than defendants'); *Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E.2d 783 (1991)* (plaintiff may recover if his negligence is not greater than defendants').

The "pure" and "modified" forms are discussed in Part III *infra.*

[**12]

4 Six states have legislatively adopted pure comparative fault: Mississippi, Rhode Island, Washington, New York, Louisiana, and Arizona; Eight legislatures have enacted the modified "49 percent" rule (plaintiff may recover if plaintiff's negligence *is less than* defendant's): Georgia, Arkansas, Maine, Colorado, Idaho, North Dakota, Utah, and Kansas; Eighteen legislatures have enacted the modified "50 percent" rule (plaintiff may recover so long as plaintiff's negligence *is not greater than* defendant's): Wisconsin, Hawaii, Massachusetts, Minnesota, New Hampshire, Vermont, Oregon, Connecticut, Nevada, New Jersey, Oklahoma, Texas, Wyoming, Montana, Pennsylvania, Ohio, Indiana, and Delaware; Two legislatures have enacted statutes

that allow a plaintiff to recover if plaintiff's negligence is slight when compared to defendant's gross negligence: Nebraska and South Dakota. *See* V. Schwartz, *supra,* at § 2.1.

Following is a list of statutes for those states who have codified their comparative fault systems, including the statutes of those states where comparative fault was initially adopted by judicial action:

See Alaska Stat. § 09.17.060 (Supp. 1991); *Ariz. Rev. Stat. Ann. § 12-2505(A)* (Supp. 1991); Ark. Stat. Ann. § 16-64-122 (Supp. 1991); *Colo. Rev. Stat. § 13-21-111* (1987); *Conn. Gen. Stat. Ann. § 52-572h* (1991); *Del. Code Ann. tit. 10, § 8132* (Supp. 1990); *Fla. Stat. Ann. § 768.81* (West Supp. 1992); Ga. Code Ann. § 105-603 (Harrison 1984); *Haw. Rev. Stat. § 663-31* (1985); *Idaho Code § 6-801* (1990); Ill. Ann. Stat. ch. 110, para. 2-1116 (Smith-Hurd Supp. 1991); Ind. Code Ann. § 34-4-33-3, 4 (West Supp. 1991); *Iowa Code Ann. § 668.3* (West 1987); *Kan. Stat. Ann. § 60-258a* (Supp. 1991); *La. Civ. Code Ann. art. 2323* (West Supp. 1992; *Me. Rev. Stat. Ann. tit. 14, § 156* (1980); Mass. Gen. laws Ann. ch. 231 § 85 (West 1985); *Minn. Stat. Ann. § 604.01(1)* (West Supp. 1992); *Miss. Code Ann. § 11-7-15* (1972); *Mont. Code Ann. § 27-1-702* (1991); Neb. Rev. Stat. § 25-21, 185.01 to .06 (Supp. 1991); *Nev. Rev. Stat. § 41.141* (1991); N.H. Rev. Stat. Ann. § 507; 7-d (Supp. 1991); N.J. Stat. Ann. § 2A: 15-5.1 (West 1987); *N.Y. Civ. Prac. L. & R. 1411* (McKinney 1976); *N.D. Cent. Code § 32-03.2-01* to -03 (Supp. 1991); *Ohio Rev. Code Ann. § 2315.19* (Anderson 1991); *Okla. Stat. Ann. tit. 23, §§ 13, 14* (West 1987); *Or. Rev. Stat. § 18.470* (1988); *42 Pa. Cons. Stat. Ann. § 7102* Purdon 1982 & Supp. 1991); R.I. Gen. laws § 9-20-4 (1985); S.D. Codified laws

Ann. § 20-9-2 (1987); *Tex. Civ. Prac. & Rem. Code Ann. §§ 33.001, 33.012* (Vernon Supp. 1992); Utah Code Ann. § 78-27-38 (1992); *Vt. Stat. Ann. tit. 12, § 1036* (Supp. 1991); *Wash. Rev. Code Ann. § 4.22.005* (1988); *Wis. Stat. Ann. § 895.045* (West 1983); *Wyo. Stat. § 1-1-109* (1988).

[**13] II.

Over 15 years ago, we stated, when asked to adopt a system of comparative fault:

We do not deem it appropriate to consider making such a change unless and until a case reaches us wherein the pleadings and proof present an issue of contributory negligence accompanied by advocacy that the ends of justice will be served by adopting the rule of comparative negligence.

Street v. Calvert, 541 S.W.2d at 586. Such a case is now before us. After exhaustive deliberation that was facilitated by extensive briefing and argument by the parties, amicus curiae, and Tennessee's scholastic community, we conclude that it is time to abandon the outmoded and unjust common law doctrine of contributory negligence and adopt in its place a system of comparative fault. Justice simply will not permit our continued adherence to a rule that, in the face of a judicial determination that others bear primary responsibility, nevertheless completely denies injured litigants recompense for their damages.

We recognize that this action could be taken by our General Assembly. However, legislative inaction has never prevented judicial abolition of obsolete common law doctrines, especially those, [**14] such as contributory negligence, conceived in the judicial womb. *See Hanover v. Ruch, 809 S.W.2d 893, 896 (Tenn. 1991)* (citing cases). Indeed, our abstinence would sanction "a mutual state of inaction in which the court awaits action by the legislature and the legislature awaits guidance from the court," *Alvis v.*

Ribar, 85 Ill. 2d 1, 421 N.E.2d 886, 896, 52 Ill. Dec. 23 (1981), thereby prejudicing the equitable resolution of legal conflicts.

Nor do we today abandon our commitment to *stare decisis.* While "confidence in our courts is to a great extent dependent on the uniformity and consistency engendered by allegiance to *stare decisis,* . . . mindless obedience to this precept can confound the truth and foster an attitude of contempt." *Hanover, 809 S.W.2d at 898.*

[*57] III.

Two basic forms of comparative fault are utilized by 45 of our sister jurisdictions, these variants being commonly referred to as either "pure" or "modified." In the "pure" form [5], a plaintiff's damages are reduced in proportion to the percentage negligence attributed to him; for example, a plaintiff responsible for 90 percent of the negligence that caused [**15] his injuries nevertheless may recover 10 percent of his damages. In the "modified" form [6], plaintiffs recover as in pure jurisdictions, but only if the plaintiff's negligence either (1) does not exceed ("50 percent" jurisdictions) or (2) is less than ("49 percent" jurisdictions) the defendant's negligence. *See generally* V. Schwartz, *supra,* at §§ 3.2, 3.5.

5 The 13 states utilizing pure comparative fault are Alaska, Arizona, California, Florida, Kentucky, Louisiana, Mississippi, Missouri, Michigan, New Mexico, New York, Rhode Island, and Washington. *See* V. Schwartz, *supra,* at § 2.1

6 The 21 states using the "50 percent" modified form: Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Wisconsin, and Wyoming. The 9 states using the "49 percent" form: Arkansas,

> Colorado, Georgia, Idaho, Kansas, Maine, North Dakota, Utah, and West Virginia. Two states, Nebraska and South Dakota, use a slight-gross system of comparative fault. *See* V. Schwartz, *supra*, at § 2.1.

[**16] Although we conclude that the all-or-nothing rule of contributory negligence must be replaced, we nevertheless decline to abandon totally our fault-based tort system. We do not agree that a party should necessarily be able to recover in tort even though he may be 80, 90, or 95 percent at fault. We therefore reject the pure form of comparative fault.

We recognize that modified comparative fault systems have been criticized as merely shifting the arbitrary contributory negligence bar to a new ground. *See, e.g., Li v. Yellow Cab Co., 13 Cal.3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).* However, we feel the "49 percent rule" ameliorates the harshness of the common law rule while remaining compatible with a fault-based tort system. *Accord Bradley v. Appalachian Power Co., 163 W. Va. 332, 256 S.E.2d 879, 887 (1979).* We therefore hold that so long as a plaintiff's negligence remains less than the defendant's negligence the plaintiff may recover; in such a case, plaintiff's damages are to be reduced in proportion to the percentage of the total negligence attributable to the plaintiff.

In all trials where the issue [**17] of comparative fault is before a jury, the trial court shall instruct the jury on the effect of the jury's finding as to the percentage of negligence as between the plaintiff or plaintiffs and the defendant or defendants. *Accord Colo. Rev. Stat. § 13-21-111.5(5)* (1987). The attorneys for each party shall be allowed to argue how this instruction affects a plaintiff's ability to recover.

IV.

Turning to the case at bar, the jury found that "the plaintiff and defendant [were] equally at fault." Because the jury, without the benefit of proper instructions by the trial court, made a gratuitous apportionment of fault, we find that their "equal" apportionment is not sufficiently trustworthy to form the basis of a final determination between these parties. Therefore, the case is remanded for a new trial in accordance with the dictates of this opinion.

V.

We recognize that today's decision affects numerous legal principles surrounding tort litigation. For the most part, harmonizing these principles with comparative fault must await another day. However, we feel compelled to provide some guidance to the trial courts charged with implementing this new system.

First, and most obviously, the [**18] new rule makes the doctrines of remote contributory negligence and last clear chance obsolete. The circumstances formerly taken into account by those two doctrines will henceforth be addressed when assessing relative degrees of fault.

[*58] Second, in cases of multiple tortfeasors, plaintiff will be entitled to recover so long as plaintiff's fault is less than the combined fault of all tortfeasors.

Third, today's holding renders the doctrine of joint and several liability obsolete. Our adoption of comparative fault is due largely to considerations of fairness: the contributory negligence doctrine unjustly allowed the entire loss to be borne by a negligent plaintiff, notwithstanding that the plaintiff's fault was minor in comparison to defendant's. Having thus adopted a rule more closely linking liability and fault, it would be inconsistent to simultaneously retain a rule, joint and several liability, which may fortuitously impose a degree of liability that is out of all proportion to fault. [7]

7 Numerous other comparative fault jurisdictions have eliminated joint and several liability. *See, e.g., Alaska Stat. § 09.17.080(d)* (Supp. 1991); *Colo. Rev. Stat. § 13-21-111.5(1)* (1987); *Kan. Stat. Ann. § 60-258a(d)* (Supp. 1991); *N.M. Stat. Ann. § 41-3A-1* (1989); *N.D. Cent. Code § 32-03.2-02* (Supp. 1991); Utah Code Ann. § 78-27-38, -40 (1992); *Wyo. Stat. Ann. § 1-1-109(d)* (1988).

[**19] Further, because a particular defendant will henceforth be liable only for the percentage of a plaintiff's damages occasioned by that defendant's negligence, situations where a defendant has paid more than his "share" of a judgment will no longer arise, and therefore the Uniform Contribution Among Tort-feasors Act, *T.C.A. §§ 29-11-101* to 106 (1980), will no longer determine the apportionment of liability between codefendants.

Fourth, fairness and efficiency require that defendants called upon to answer allegations in negligence be permitted to allege, as an affirmative defense, that a nonparty caused or contributed to the injury or damage for which recovery is sought. In cases where such a defense is raised, the trial court shall instruct the jury to assign this nonparty the percentage of the total negligence for which he is responsible. However, in order for a plaintiff to recover a judgment against such additional person, the plaintiff must have made a timely amendment to his complaint and caused process to be served on such additional person. Thereafter, the additional party will be required to answer the amended complaint. The procedures shall be in accordance with the Tennessee [**20] Rules of Civil Procedure.

Fifth, until such time as the Tennessee Judicial Conference Committee on Civil Pattern Jury Instructions promulgates new standard jury instructions, we direct trial courts' attention to the suggested instructions and special verdict form set forth in the appendix to this opinion.

VI.

The principles set forth today apply to (1) all cases tried or retried after the date of this opinion, and (2) all cases on appeal in which the comparative fault issue has been raised at an appropriate stage in the litigation.

VII.

The remaining issue involves Plaintiff's assertion that the trial court impermissibly instructed the jury as to the presumption of intoxication established by *T.C.A. § 55-10-408(b)* (1988). We find no error.

Section 55-10-408(b) provides that:

Evidence that there was, at the time alleged, ten-hundredths of one percent (.10 %), or more, by weight of alcohol in the defendant's blood, shall create a presumption that the defendant was under the influence of such intoxicant, and that his or her ability to drive was impaired thereby, sufficiently to constitute a violation of § 55-10-401 [the criminal statute prohibiting driving under the influence of an intoxicant].

[**21]

The results of a properly conducted blood test indicating ten-hundredths of one percent or more in a person's blood thus creates a presumption which assists a lay jury in determining whether a person was under the influence of an intoxicant. If the evidence is not rebutted, a jury may then permissibly find that the person was under [*59] the influence sufficiently to violate the criminal provisions regarding driving while intoxicated.

In Tennessee, violation of a penal statute is negligence per se, and is admissible evidence in a civil action. *See Brookins v. The Round Table, Inc., 624 S.W.2d 547, 550 (Tenn. 1981)*. However, a jury may not base its verdict on this per se negligence unless it affirmatively appears that the statutory violation was a proximate cause of the injury

for which recovery is sought. *See id.; Barr v. Charley, 215 Tenn. 445, 387 S.W.2d 614, 617 (1964).* A trial court does not err when, as here, it instructs the jury accordingly.

For the foregoing reasons, the judgment of the Court of Appeals is reversed in part and affirmed in part, and the case is remanded to the trial court for a new trial in accordance with the [**22] dictates of this opinion. The costs of this appeal are taxed equally to the parties.

FRANK F. DROWOTA, III

JUSTICE

Concur:

Reid, C.J.

O'Brien, Daughtrey and Anderson, JJ.

APPENDIX

The following instructions may be used in cases where the negligence of the plaintiff is at issue. These instructions are intended for two-party litigation. Appropriate modifications would be necessary for more complex litigation.

Suggested Jury Instructions

[The following instructions should be preceded by instructions on negligence, proximate cause, damages, etc.]

1. If you find that defendant was not negligent or that defendant's negligence was not a proximate cause of plaintiff's injury, you will find for defendant.

2. If you find that defendant was negligent and that defendant's negligence was a proximate cause of plaintiff's injury, you must then determine whether plaintiff was also negligent and whether plaintiff's negligence was a proximate cause of his/her injury.

3. In this state, negligence on the part of a plaintiff has an impact on a plaintiff's right to recover damages. Accordingly, if you find that each party was negligent and

that the negligence of each party was a proximate cause [**23] of plaintiff's damages, then you must determine the degree of such negligence, expressed as a percentage, attributable to each party.

4. If you find from all the evidence that the percentage of negligence attributable to plaintiff was equal to, or greater than, the percentage of negligence attributable to defendant, then you are instructed that plaintiff will not be entitled to recover any damages for his/her injuries. If, on the other hand, you determine from the evidence that the percentage of negligence attributable to plaintiff was less than the percentage of negligence attributable to defendant, then plaintiff will be entitled to recover that portion of his/her damages not caused by plaintiff's own negligence.

5. The court will provide you with a special verdict form that will assist you in your duties. This is the form on which you will record, if appropriate, the percentage of negligence assigned to each party and plaintiff's total damages. The court will then take your findings and either (1) enter judgment for defendant if you have found that defendant was not negligent or that plaintiff's own negligence accounted for 50 percent or more of the total negligence proximately [**24] causing his/her injuries or (2) enter judgment against defendant in accordance with defendant's percentage of negligence.

SPECIAL VERDICT FORM

We, the jury, make the following answers to the questions submitted by the court:

1. Was the defendant negligent?

Answer: (Yes or No)

(If your answer is "No," do not answer any further questions. Sign this form and return it to the court.)

2. Was the defendant's negligence a proximate cause of injury or damage to the plaintiff?

Answer: (Yes or No)

[*60] (If your answer is "No," do not answer any further questions. Sign this form and return it to the court.)

3. Did the plaintiff's own negligence account for 50 percent or more of the total negligence that proximately caused his/her injuries or damages?

Answer: (Yes or No)

(If your answer is "Yes," do not answer any any further questions. Sign this form and return it to the court.)

4. What is the total amount of plaintiff's damages, determined without reference to the amount of plaintiff's negligence? Amount in dollars: $

5. Using 100 percent as the total combined negligence which proximately caused the injuries or damages to the plaintiff, what are [**25] the percentages of such negligence to be allocated to the plaintiff and defendant?

Plaintiff %

Defendant %

(Total must equal 100%)

 ¿Por qué la doctrina de la culpa comparativa en Estados Unidos ha generado una crisis de proporciones insospechadas?

ASSUMPTION OF RISK

 James Murphy, an Infant, by John Murphy, His Guardian ad Litem, Respondent, v. Steeplechase Amusement Co., Inc., Appellant Court of Appeals of New York 250 N.Y. 479; 166 N.E. 173 March 25, 1929, Submitted April 16, 1929, Decided

[*480] [**173] CARDOZO The defendant, Steeplechase Amusement Company, maintains an amusement park at Coney Island, New York.

One of the supposed attractions is known as "The Flopper." It is a moving belt, running upward on an inclined plane, on which passengers sit or stand. Many of them are unable to keep their feet because of the movement of the belt, and are thrown backward or aside. The belt runs in a groove, with padded walls on either side to a height of four feet, and [**174] with padded flooring [*481] beyond the walls at the same angle as the belt. An electric motor, driven by current furnished by the Brooklyn Edison Company, supplies the needed power.

Plaintiff, a vigorous young man, visited the park with friends. One of them, a young woman, now his wife, stepped upon the moving belt. Plaintiff followed and stepped behind her. As he did so, he felt what he describes as a sudden jerk, and was thrown to the floor. His wife in front and also friends behind him were thrown at the same time. Something more was here, as every one understood, than the slowly-moving escalator that is common in shops and public places. A fall was foreseen as one of the risks of the adventure. There would have been no point to the whole thing, no adventure about it, if the risk had not been there. The very name above the gate, the Flopper, was warning to the timid. If the name was not enough, there was warning more distinct in the experience of others. We are told by the plaintiff's wife that the members of her party stood looking at the sport before joining in it themselves. Some aboard the belt were able, as she viewed them, to sit down with decorum or even to stand and keep their footing; others jumped or fell. The tumbling bodies and the screams and laughter supplied the merriment and fun. "I took a chance," she said when asked whether she thought that a fall might be expected.

Plaintiff took the chance with her, but, less lucky than his companions, suffered a fracture of a knee cap. He states in his complaint that the belt was dangerous to life and limb in that it stopped and started violently and suddenly and

was not properly equipped to prevent injuries to persons who were using it without knowledge of its dangers, and in a bill of particulars he adds that it was operated at a fast and dangerous rate of speed and was not supplied with a proper railing, guard or other device to prevent a fall therefrom. No other negligence is charged.

[*482] We see no adequate basis for a finding that the belt was out of order. It was already in motion when the plaintiff put his foot on it. He cannot help himself to a verdict in such circumstances by the addition of the facile comment that it threw him with a jerk. One who steps upon a moving belt and finds his heels above his head is in no position to discriminate with nicety between the successive stages of the shock, between the jerk which is a cause and the jerk, accompanying the fall, as an instantaneous effect. There is evidence for the defendant that power was transmitted smoothly, and could not be transmitted otherwise. If the movement was spasmodic, it was an unexplained and, it seems, an inexplicable departure from the normal workings of the mechanism. An aberration so extraordinary, if it is to lay the basis for a verdict, should rest on something firmer than a mere descriptive epithet, a summary of the sensations of a tense and crowded moment (*Matter of Case, 214 N. Y. 199*; *Dochtermann v. Brooklyn Heights R. R. Co., 32 App. Div. 13, 15*; *164 N. Y. 586*; *Foley v. Boston & Maine R. R. Co., 193 Mass. 332, 335*; *Work v. Boston El. Ry. Co., 207 Mass. 447, 448*; *N. & W. Ry. Co. v. Birchett, 252 Fed. Rep. 512, 515)*. But the jerk, if it were established, would add little to the case. Whether the movement of the belt was uniform or irregular, the risk at greatest was a fall. This was the very hazard that was invited and foreseen (*Lumsden v. Thompson Scenic Ry. Co., 130 App. Div. 209, 212, 213)*.

Volenti non fit injuria. One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the

chance of contact with the ball (Pollock, Torts [11th ed.], p. 171; *Lumsden v. Thompson Scenic Ry. Co., supra; Godfrey v. Conn. Co., 98 Conn. 63*; *Johnson v. City of N. Y., 186 N. Y. 139, 148*; *McFarlane v. City of Niagara Falls , 247 N. Y. 340, 349*; cf. 1 Beven, Negligence, [*483] 787; Bohlen, Studies in the Law of Torts, p. 443). The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

A different case would be here if the dangers inherent in the sport were obscure or unobserved (*Godfrey v. Conn. Co., supra; Tantillo v. Goldstein Bros. Amusement Co., 248 N. Y. 286*), or so serious as to justify the belief that precautions of some kind must have been taken to avert them (cf. *O'Callaghan v. Dellwood Park Co., 242 Ill. 336*). Nothing happened to the plaintiff except what common experience tells us may happen at any time as the consequence of a sudden fall. Many a skater or a horseman can rehearse a tale of equal woe. A different [**175] case there would also be if the accidents had been so many as to show that the game in its inherent nature was too dangerous to be continued without change. The president of the amusement company says that there had never been such an accident before. A nurse employed at an emergency hospital maintained in connection with the park contradicts him to some extent. She says that on other occasions she had attended patrons of the park who had been injured at the Flopper, how many she could not say. None, however, had been badly injured or had suffered broken bones. Such testimony is not enough to show that the game was a trap

for the unwary, too perilous to be endured. According to the defendant's estimate, two hundred and fifty thousand visitors were at the Flopper in a year. Some quota of accidents was to be looked for in so great a mass. One might as well say that a skating rink should be abandoned because skaters sometimes fall.

[*484] There is testimony by the plaintiff that he fell upon wood, and not upon a canvas padding. He is strongly contradicted by the photographs and by the witnesses for the defendant, and is without corroboration in the testimony of his companions who were witnesses in his behalf. If his observation was correct, there was a defect in the equipment, and one not obvious or known. The padding should have been kept in repair to break the force of any fall. The case did not go to the jury, however, upon any such theory of the defendant's liability, nor is the defect fairly suggested by the plaintiff's bill of particulars, which limits his complaint. The case went to the jury upon the theory that negligence was dependent upon a sharp and sudden jerk.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and a new trial granted, with costs to abide the event.

 ¿Deberá imputarse la reciprocidad civil en el caso de la víctima que, por imprudente que sea, asume voluntariamente una situación de riesgo?

RESPONSABILIDAD ESTRICTA U OBJETIVA

I. DANGEROUS ACTIVITIES

 Rylands and another v Fletcher HOUSE OF LORDS AND COURT OF EXCHEQUER CHAMBER [1861-1873] All ER Rep 1; [1861-73] All ER Rep 1 HEARING-DATES: 6, 7 July 1868 17 July 1868

BLACKBURN J:

(read the following judgment of the court)

This was a Special Case stated by an arbitrator under an order of nisi prius, in which the question for the court is stated to be whether the plaintiff is entitled to recover any, and, if any, what, damages from the defendants by reason of the matters thereinbefore stated. In the Court of Exchequer, POLLOCK, CB, and MARTIN, B, were of opinion that the plaintiff was not entitled to recover at all, BRAMWELL, B, being of a different opinion. The judgment in the Court of Exchequer was, consequently, given for the defendants in conformity with the opinion of the majority of the court. The only question argued before us was whether this judgment was right, nothing being said about the measure of damages in case the plaintiff should be held entitled to recover.

We have come to the conclusion that the opinion of BRAMWELL, B, was right, and that the answer to the question should be that the plaintiff was entitled to recover damages from the defendants by reason of the matters stated in the Case, and consequently that the judgment below should be reversed; but we cannot, at present, say to what damages the plaintiff is entitled. It appears from the statement in the Case, that the plaintiff was damaged by his property being flooded by water which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants' orders and maintained by the defendants. It appears from the statement in the Case, that the coal under the defendants' land had, at some remote period, been worked out, but that this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. It further appears from the Case that the defendants selected competent engineers and contractors to make the reservoir, and themselves

personally continued in total ignorance of what we have called the latent defect in the subsoil, but that the persons employed by them, in the course of the work, became aware of the existence of ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings. It is found that the defendants personally were free from all blame, but that, in fact, proper care and skill was not used by the persons employed by them to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was, that the reservoir, when filled with water, burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief. The plaintiff, though free from all blame on his part, must bear the loss, unless

he can establish that it was the consequence of some default for which the defendants are responsible.

The question of law, therefore, arises: What is the liability which the law casts upon a person who, like the defendants, lawfully brings on his land something which, though harmless while it remains there, will naturally do mischief if it escape out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land, and keep it there in order that it may not escape and damage his neighbour's, but the question arises whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no morn. If the first be the law, the person who has brought on his land and kept there something dangerous, and failed to keep it in, is responsible for all the natural consequences of its escape. If the second be the limit of his duty, he would not be answerable except on proof of negligence, and consequently would not be answerable for escape arising from any latent defect which ordinary prudence and skill

could not detect. Supposing the second to be the correct view of the law, a further question arises subsidiary to the first, namely, whether the defendants are not so far identified with the contractors shorn they employed as to be responsible for the consequences of their want of skill in making the reservoir in fact insufficient with reference to the old shafts, of the existence of which they were aware, though they had not ascertained where the shafts went to.

We think that the true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of vis major, or the act of God; but, as nothing of this sort exists bore, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on principle just. The person whose grass or corn is eaten down by the escaped cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be, obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated

consequences. On authority this, we think, is established to be the law, whether the thing so brought be beasts or water, or filth or stenches.

The case that has most commonly occurred, and which is most frequently to be found in the books, is as to the obligation of the owner of cattle which he has brought on his land to prevent their escaping and doing mischief. The law as to them seems to be perfectly settled from early times; the owner must keep them in at his peril, or he will be answerable for the natural consequences of their escape, that is, with regard to tame beasts, for the grass they eat and trample upon, although nor for any injury to the person of others, for our ancestors have settled that it is not the general nature of horses to kick or bulls to gore, but if the owner knows that the beast has a vicious propensity to attack man he will be answerable for that too. As early as 1480 (Anon (1)) BRIAN, CJ, lays

down the doctrine in terms very much resembling those used by LORD HOLT in Tenant v Goldwin (2) which will be referred to later. It was trespass with cattle. Plea: that the plaintiff's land adjoined a place where the defendant had common; that the cattle strayed from the common, and the defendant drove them back as soon as he could. It was held a bad plea. BRIAN, CJ, says:

"It behoves him to use his common so that it shall do no hurt to another man, and if the land in which he has common be not inclosed, it behoves him to keep the beasts in the common, and out of the land of any other."

He adds, when it was proposed to amend by pleading that they were driven out of the common by dogs,

"that although that might give a right of action against the master of the dogs, it was no defence to the action of trespass by the person on whose land the cattle went."

In Cox v Burbidge (3) WILLIAMS, J, says (13 CBNS at p 438):

"I apprehend the law to be perfectly plain. If I am the owner of an animal in which, by law, the right of property can exist, I am bound to take care that it does not stray into the land of my neighbour, and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass. Whether or not the escape of the animal is due to my negligence is altogether immaterial."

So in May v Burdett (4) the court, after an elaborate examination of the old precedents and authorities, came to the conclusion that a person keeping a mischievous animal is bound to keep it secure at his peril. And in 1 HALE'S PLEAS OF THE CROWN, p 430, LORD HALE states that where one keeps a beast knowing that its nature or habits were such that the natural consequence of his being loose is that he will harm men, the owner

"must at his peril keep him up safe from doing hurt, for though he uses his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages";

though, as he proceeds to show, he will not be liable criminally without proof of want of care.

In these latter authorities the point under consideration was damage to the person, and what was decided was that where it was known that hurt to the person was the natural consequence of the animal being loose, the owner should be responsible in damages for such hurt, though where it was not known to be so the owner was not responsible for such damages, but where the damage is like eating grass, and other ordinary ingredients in damage feasant, the natural consequence of the escape, the rule as to keeping in the animal is the same. In COMYN'S DIGEST, "Droit" M 2, it is said that "if the owner of 200 acres in a common moor enfeoffs B of fifty acres, B ought to inclose at his peril to prevent damage by his cattle to the other 150 acres, for if his cattle escape thither they may be distrained damage feasant. So the owner of the 150 acres ought to

prevent his cattle from doing damage to the fifty acres at his peril."

The authority cited is Anon (5) where the decision was that the cattle might be distrained. The inference from that decision that the owner was bound to keep in his cattle at his peril is, we think, legitimate, and we have the high authority of COMYNS for saying that such is the law. In the note to FITZHERBERT, NATURA BREVIUM, 128, which is attributed to LORD HALE, it is said:

"If A and B have lands adjoining, where there is no inclosure, the one shall have trespass against the other on an escape of their beasts respectively (3 Dyer, 372b, pl 10; Rastal Ent p 621; and YB 20 Edw 4, fo 10, pl 10) although wild dogs, etc, drive the cattle of the one into the lands of the other."

No case is known to us in which, on replevin, it has even been attempted to plead in bar to an avowry for distress damage feasant that the cattle had escaped without any negligence on the part of the plaintiff; and surely, if that could have been a good plea in bar, the facts must often have been such as would lave supported it. These authorities, and the absence of any authority to the contrary, justify WILLIAMS, J, in saying, as he does in Cox v Burbidge (3) that

"the law is clear that in actions for damage occasioned by animals that not been kept in by their owners, it is quite immaterial whether the escape is by negligence or not."

As has been already said, there does not appear to be any difference in principle between the extent of the duty cast on him who brings cattle on his land to keep them in, and the extent of the duty imposed on him who brings on his land water, filth, or stenches, or any other thing which will, if it escape, naturally do damage, to prevent their escaping and injuring his neighbour. Tenant v Goldwin (2) is an express authority that the duty is the same, and is to keep them in at his peril. As MARTIN, B, in his judgment

below, appears not to have understood that case in the same manner as we do, it is proper to examine it in sonic detail. It was a motion in arrest of judgment after judgment by default, and, therefore, all that was well pleaded in the declaration was admitted to be true. The declaration is set out at full length in the report in 6 Mod 311. It alleged that the plaintiff had a cellar which lay contiguous to a messuage of the defendant, "and used (solebat) to be separated and fenced from a privy house of office, parcel of the said messuage of defendant, by a thick and close wall which belongs to the said messuage of the defendant, and by the defendant of right ought to have been repaired (de jure debuit reparari)."

Yet he did not repair it, and for want of repair filth flowed into plaintiff's cellar.

The case is reported both by SALKELD, who argued it, in 6 MODERN REPORTS, and by LORD RAYMOND whose report is the fullest. The objection taken was that there was nothing to show that the defendant was under any obligation to repair the wall, that, it was said, being a charge not of common right, and the allegation that the defendant de jure debuit reparari being an inference of law which did not arise, from the facts alleged. SALKELD argued that this general mode of stating the right was sufficient in a declaration, and also that the duty alleged did, of common right, result from the facts stated. It is not now material to inquire whether lm was or was not right on the pleading point. All three reports concur in saying that LORD HOLT, during the argument, intimated an opinion against him on that, but that after consideration the court gave judgment for him on the second ground.

In the report in 6 Mod Rep at p 314, it is stated:

"And at another day per totem curiam the declaration is good, for there is a sufficient cause of action appearing in it, but not upon the word solebat. If the defendant has a

house of office enclosed with a wall which is his, he is, of common right, bound to use it so as not to annoy another ... The reason here is, that one must use his own so as thereby not to hurt another, and as of common right one is bound to keep his cattle from trespassing on his neighbour, so he is bound to use anything that is his so as not to hurt another by such user ... Suppose one sells a piece of pasture lying open to another piece of pasture which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; so of dung or anything else."

There is here an evident allusion to the same case in DYER as is referred to in COMYNS DIGEST, "Droit" M 2.

LORD RAYMOND, in his report, says (2 Ld Raym at p 1092):

"The last day of term, HOLT, CJ, delivered the opinion of the court that the declaration was sufficient. he said that upon the face of this declaration there appeared a sufficient cause of action to entitle the plaintiff to have his judgment; that they did not go upon the solebat or the jure debuit reparari, as if it were enough to Say that the plaintiff had a house, and the defendant had a wall, and he ought to repair the wall; but if the defendant has a house of office, and the wall which separates the house of office from the plaintiff's house is all the defendant's, he is, of common right, bound to repair it. The reason of this case is upon this account, that every one must so use his own as not to do damage to another; and as every man is bound so to look to his cattle as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth of his house of office that it may not flow in upon and damnify his neighbour. So if a man has two pieces of pasture which he open to one another, and sells one piece, the vendee must keep in his cattle so as they shall not trespass upon the vendor. So a man shell not lay his dung so high as to damage his neighbour, and the reason of these cases is

because every man must so use his own as not to damnify another."

SALKELD, who had been counsel in the case, reports the judgment much more concisely, but to the same effect. He says (1 Salk at p 361):

"The reason he gave for his judgment was because it was the defendant's wall, and the defendant's filth, and he was bound of common right to keep his wall so as his filth might not damnify his neighbour, and that it was a trespass on his neighbour, as if his beasts should escape, or one should make a great heap on the border of his ground, and it should tumble and roll down upon his neighbour's... he must repair the wall of his house of office, for be, whose dirt it is must keep it, that it may not trespass."

It is worth noticing how completely the reason of LORD HOLT corresponds with that of BRIAN, CJ, in Anon (1) already cited.

MARTIN, B, in the court below says that he thinks this was a case without difficulty, because the defendant bad, by letting judgment go by default, admitted his liability to repair the wall, and that be cannot see how it is an authority for any case in which no such liability is admitted. But a perusal of the report will show that it was because LORD HOLT and his colleagues thought (no matter, for this purpose, whether rightly or wrongly) that the liability was not admitted that they took so much trouble to consider what liability the law would raise from the admitted facts, and it does, therefore, seem to us to be a very weighty authority in support of the position that be who brings and keeps anything, no matter whether beasts, or filth, or clean water, or a heap of earth or dung, on his premises, must at his peril prevent if from getting on his neighbour's, or make good all the damage which is the natural consequence, of its doing so.

No case has been found in which the question of the liability for noxious vapours escaping from a man's works by inevitable accident has been discussed, but the following case will illustrate it. Some years ago several actions were brought against the occupiers of some alkali works at Liverpool for the damage alleged to be caused by the chlorine fumes of their works. The defendants proved that they had, at great expense, erected a contrivance by which the fumes of chlorine were condensed, and sold as muriatic acid, and they called a great body of scientific evidence to prove that this apparatus was so perfect that no fumes possibly could escape from the defendants' chimneys. On this evidence it was pressed upon the juries that the plaintiff's damage must have been due to some of the numerous other chimneys in the neighbourhood. The juries, however, being satisfied that the mischief was occasioned by chlorine, drew the conclusion that it had escaped from the defendants' works somehow, and in each case found for the plaintiff. No attempt was made to disturb those verdicts on the ground that the defendants had taken every precaution which prudence or skill could suggest to keep these fumes in, and that they could not be responsible unless negligence were shown, yet if the law be as laid down by the majority of the Court of Exchequer it would have been a very obvious defence. If it had been raised, the answer would probably have been that the uniform course of pleading in actions for such nuisances is to say that the defendant caused the noisome vapours to arise on his premises and suffered them to come on the plaintiff's without stating that there was any want of care or skill on the defendant's part; and that Tenant v Goldwin (3) showed that this was founded on the general rule of law that he whose stuff it is must keep it so that it may not trespass. There is no difference in this respect between chlorine and water; both will, if they escape, do damage, the one by scorching and the other by drowning, and he who brings them on his land must at his peril see that they do not escape and do that mischief.

What is said by GIBBS, CJ, in Sutton v Clarke (6) 6 Taunt at p 44, though not necessary for the decision of the case, shows that that very learned judge took the same view of the law that was taken by LORD HOLT. But it was further said by MARTIN, B, that when damage is done to personal property, or even to the person by collision, either upon land or at sea, there must be negligence in the party doing the damage to render him legally responsible. This is no doubt true, and this is not confined to cases of collision, for there are many cases in which proof of negligence is essential, as, for instance, where an unruly horse gets on the footpath of a public street and kills a passenger: Hammack v White (7) or where a person in a dock is struck by the falling of a bale of cotton which the defendant's servants are lowering: Scott v London Dock Co (6). Many other similar cases may be found. But we think these cases distinguishable from the present. Traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and, that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger, and persons who, by the licence of the owners, pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what prima facie was a trespass can be explained on the same principle, namely, that the circumstances were such as to show that the plaintiff had taken the risk upon himself. But there is no ground for saying that the plaintiff here took upon himself any risk arising from the uses to which the defendants should choose to apply their land. He neither knew what there might be, nor could he in any way control the defendants, or hinder their building what reservoirs they

liked, and storing up in them what water they pleased, so long as the defendants succeeded in preventing the water which they there brought from interfering with the plaintiff's property.

The view which we take of the first point renders it unnecessary to consider whether the defendants would or would not be responsible for the want of care and skill in the persons employed by them. We are of opinion that the plaintiff is entitled to recover, but as we have not heard any argument as to the amount, we are not able to give judgment for what damages. The parties probably will empower their counsel to agree on the amount of damages; should they differ on the Principle the case may be mentioned again.

The defendants appealed to the House of Lords.

LORD CAIRNS LC:

The plaintiff in this case is the occupier of a mine and works under a close of land. The defendants are the owners of a mill in his neighbourhood, and they proposed to make a reservoir for the purpose of keeping and storing water to be used about their mill upon another close of land, which, for the purposes of this case, may be taken as being adjoining to the close of the plaintiff, although in point of fact some intervening land lay between the two. Underneath the close of land of the defendants on which they proposed to construct their reservoir there were old and disused mining passages and works. There were five vertical shafts, and some horizontal shafts communicating with them. The vertical shafts had been filled up with soil and rubbish; and, it does not appear that any person was aware of the existence either of the vertical shafts or of the horizontal works communicating with them. In the course of the working by the plaintiff of his mine, he had gradually worked through the seams of coal underneath the close, and had come into contact with the old and disused works underneath the close of the defendants.

In that state of things the reservoir of the defendants was constructed. It was constructed by them through the agency and inspection of an engineer and contractor. Personally the defendants appear to lave taken no part in the works, nor to have been aware of any want of security connected with them. As regards the engineer and the contractor, we must take it from the Case that they did not exercise, as far as they were concerned, that reasonable care and caution which they might have exercised, taking notice, as they appear to have taken notice, of the vertical shafts filled up in the manner which I have mentioned. However, when the reservoir was constructed and filled, or partly filled, with water, the weight of the water, bearing upon the imperfectly filled-up and disused vertical shafts, broke through those shafts. The water passed down them and into the horizontal workings and from the horizontal workings under the close of the defendants, it passed on into the workings under the close of the plaintiff and flooded his mine, causing considerable damage, for which this action was brought. The Court of Exchequer, when the Special Case stating the facts to which I have referred was argued before them, were of opinion that the plaintiff had established no cause of action. The Court of Exchequer Chamber, before whom an appeal from their judgment was argued, were of a contrary opinion, and unanimously arrived at the conclusion that there was a cause of action, and that the plaintiff was entitled to damages.

The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed, might lawfully have used that close for any purpose for which it might, in the ordinary course of the enjoyment of land, be used, and if, in what I may term the natural user of that land, there had been any accumulation of water, either on the surface or underground, and if by the operation of the laws of nature

that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not have

complained that that result had taken place. If he had desired to guard himself against it, it would have lain on him to have done so by leaving or by interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature.

As an illustration of that principle, I may refer to a case which was cited in the argument before your Lordships, Smith v Kenrick (9) in the Court of Common Pleas. On the other hand, if the defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which, in its natural condition, was not in or upon it - for the purpose of introducing water, either above or below ground, in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that that which the defendants were doing they were doing at their own peril; and if in the course of their doing it the evil arose to which I have referred - the evil, namely, of the escape of the water, and its passing away to the close of the plaintiff and injuring the plaintiff - then for the consequence of that, in my opinion, the defendants would be liable. As Smith v Kenrick (9) is an illustration of the first principle to which I have referred, so also the second principle to which I have referred is well illustrated by another case in the same court, Baird v Williamson (10) which was also cited in the argument at the Bar.

These simple principles, if they are well founded, as it appears to me they are, really dispose of this case. The same result is arrived at on the principles referred to by BLACKBURN, J, in his judgment in the Court of

Exchequer Chamber, where he states the opinion of that court as to the law in these words:

"We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of via major or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule as above stated seems on principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbour who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows will be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there, so that no mischief may accrue, or answer for the natural and anticipated consequence. On authority this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

In that opinion, I must say, I entirely concur. Therefore, I have to move your Lordships that the judgment of the

Court of Exchequer Chamber be affirmed, and that the present appeal be dismissed with costs.

LORD CRANWORTH:

I concur with my noble and learned friend in thinking that the rule of law was correctly stated by BLACKBURN, J, in delivering the opinion of the Exchequer Chamber. If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbour, he does so at his peril. If it does escape and cause damage, he is responsible, however careful be may have been, and whatever precautions be may have taken to prevent the damage. In considering whether a defendant is liable to a plaintiff for damage which the plaintiff may have sustained, the question in general is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. This is all well explained in the old case of Lambert and Olliot v Bessey (11). The doctrine is founded on good sense, for when one person in managing his own affairs causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer. He is bound sic uti suo ut non laedat alienum. This is the principle of law applicable to cases like the present, and I do not discover in the authorities which were cited anything conflicting with it.

The doctrine appears to me to be well illustrated by the two cases in the Court of Common Pleas referred to by my noble and learned friend - I allude to Smith v Kenrick (9) and Baird v Williamson (10). In the former, the owner of a coal mine on the higher level worked out the whole of his coal, leaving no barrier between his mine, and the mine on the lower level, so that the water percolating through the upper mine flowed into the lower mine, and obstructed the owner of it in getting his coal. It was held that the owner of the lower mine had no ground of complaint. The defendant, the owner of the upper mine, had a right to remove all his coal; the damage sustained by the plaintiff was occasioned

by the natural flow or percolation of water from the upper strata. There was no obligation on the defendant to protect the plaintiff against this. It was the plaintiff's business to erect or leave a sufficient barrier to keep out the water, or to adopt proper means for so conducting the water that it should not impede him in his workings. The water in that case was only left by the defendant to flow in its natural course. But in the later case of Baird v Williamson (10) the defendant, the owner of the upper mine, did not merely suffer the water to flow through his mine without leaving a barrier between it and the mine below, but in order to work his own mine beneficially he pumped up large quantities of water, which passed into the plaintiff's mine in addition to that which would have naturally reached it, and so occasioned him damage. Though this was done without negligence, and in the due working of his own mine, yet he was held to be responsible for the damage so occasioned. It was in consequence of his act, whether skilfully or unskilfully performed, that the plaintiff had been damaged, and he was, therefore, held liable for the consequences. The damage in the former case may be treated as having arisen from the act of God - in the latter from the act of the defendant.

Applying the principles of these decisions to the case now before the House, I come without hesitation to the conclusion that the judgment of the Exchequer Chamber was right. The plaintiff had a right to work his coal through the lands of Mr Whitehead and up to the old workings. If water naturally rising in the defendants' land (we may treat the land as the land of the defendants for the purpose of this case) had by percolation found its way down to the plaintiff's mine through the old workings and so had impeded his operations, that would not have afforded him any ground of complaint. Even if all the old workings had been made by the defendants they would have done no more than they were entitled to do, for, according to the

principle acted on in Smith v Kenrick (9) the person working the mine under the close in which the reservoir was made had a right to win and carry away all the coal without leaving any wall or barrier against W Whitehead's land. But that is not the real state of the case. The defendants, in order to effect an object of their own, brought on to their land, or on to land which for this purpose may be treated as being theirs, a large accumulated mass of water, and stored it up in a reservoir. The consequence of this was damage, to the plaintiff, and for that damage, however skilfully and carefully the accumulation was made, the defendants, according to the principles and authorities to which I have adverted, were certainly responsible. I concur, therefore, with my noble and learned friend in thinking that the judgment below must be affirmed, and that there must be judgment for the defendant in error.

Appeal dismissed.

 ¿Por qué el sistema jurídico establece la responsabilidad objetiva, no culposa, cuando alguien realiza una actividad extremadamente peligrosa?

 INDIANA HARBOR BELT RAILROAD COMPANY, Plaintiff-Appellee, Cross-Appellant, v. AMERICAN CYANAMID COMPANY, Defendant-Appellant, Cross-Appellee Nos. 89-3703, 89-3757 UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 916 F.2d 1174 September 7, 1990, Argued October 18, 1990, Decided

[*1175] POSNER, Circuit Judge

American Cyanamid Company, the defendant in this diversity tort suit governed by Illinois law, is a major manufacturer of chemicals, including acrylonitrile, a chemical used in large quantities in making acrylic fibers, plastics, dyes, pharmaceutical chemicals, and other intermediate and final goods. On January 2, 1979, at [**2]

its manufacturing plant in Louisiana, Cyanamid loaded 20,000 gallons of liquid acrylonitrile into a railroad tank car that it had leased from the North American Car Corporation. The next day, a train of the Missouri Pacific Railroad picked up the car at Cyanamid's siding. The car's ultimate destination was a Cyanamid plant in New Jersey served by Conrail rather than by Missouri Pacific. The Missouri Pacific train carried the car north to the Blue Island railroad yard of Indiana Harbor Belt Railroad, the plaintiff in this case, a small switching line that has a contract with Conrail to switch cars from other lines to Conrail, in this case for travel east. The Blue Island yard is in the Village of Riverdale, which is just south of Chicago and part of the Chicago metropolitan area.

The car arrived in the Blue Island yard on the morning of January 9, 1979. Several hours after it arrived, employees of the switching line noticed fluid gushing from the bottom outlet of the car. The lid on the outlet was broken. After two hours, the line's supervisor of equipment was able to stop the leak by closing a shut-off valve controlled from the top of the car. No one was sure at the time just how [**3] much of the contents of the car had leaked, but it was feared that all 20,000 gallons had, and since acrylonitrile is flammable at a temperature of 30 degrees Fahrenheit or above, highly toxic, and possibly carcinogenic (*Acrylonitrile*, 9 International Toxicity Update, no. 3, May-June 1989, at 2, 4), the local authorities ordered the homes near the yard evacuated. The evacuation lasted only a few hours, until the car was moved to a remote part of the yard and it was discovered that only about a quarter of the acrylonitrile had leaked. Concerned nevertheless that there had been some contamination of soil and water, the Illinois Department of Environmental Protection ordered the switching line to take decontamination measures that cost the line $ 981,022.75, which it sought to recover by this suit.

One count of the two-count complaint charges Cyanamid with having maintained the leased tank car negligently. The other count asserts that the transportation of acrylonitrile in bulk through the Chicago metropolitan area is an abnormally dangerous activity, for the consequences of which the shipper (Cyanamid) is strictly liable to the switching line, which bore the financial brunt of [**4] those consequences because of the decontamination measures that it was forced to take. After the district judge denied Cyanamid's motion to dismiss the strict liability count, *517 F. Supp. 314 (N.D. Ill. 1981)*, the switching line moved for summary judgment on that count -- and won. *662 F. Supp. 635 (N.D. Ill. 1987)*. The judge directed the entry of judgment for $ 981,022.75 under *Fed. R. Civ. P. 54(b)* to permit Cyanamid to take an immediate appeal even though the negligence count remained pending. We threw out the appeal on the ground that the negligence and strict liability counts were not separate claims but merely separate theories involving the same facts, making *Rule 54(b)* inapplicable. *860 F.2d 1441 (7th Cir. 1988)*. The district [*1176] judge then, over the switching line's objection, dismissed the negligence claim with prejudice, thus terminating proceedings in the district court and clearing the way for Cyanamid to file an appeal of which we would have jurisdiction. There is no doubt about our appellate jurisdiction this time. Whether or not the judge was correct to dismiss the negligence claim merely to terminate the lawsuit [**5] so that Cyanamid could appeal (the only ground he gave for the dismissal), he did it, and by doing so produced an incontestably final judgment. The switching line has cross-appealed, challenging the dismissal of the negligence count.

The question whether the shipper of a hazardous chemical by rail should be strictly liable for the consequences of a spill or other accident to the shipment en route is a novel one in Illinois, despite the switching line's contention that the question has been answered in its favor

by two decisions of the Illinois Appellate Court that the district judge cited in granting summary judgment. In both *Fallon v. Indian Trail School, 148 Ill. App. 3d 931, 934, 500 N.E.2d 101, 103, 102 Ill. Dec. 479 (1986)*, and *Continental Building Corp. v. Union Oil Co., 152 Ill. App. 3d 513, 516, 504 N.E.2d 787, 789-90, 105 Ill. Dec. 502 (1987)*, the Illinois Appellate Court cited the district court's first opinion in this case with approval and described it as having held that the transportation of acrylonitrile in the Chicago metropolitan area is an abnormally dangerous activity, for which the shipper is strictly liable. These discussions [**6] are dicta. The cases did not involve acrylonitrile -- or for that matter transportation -- and in both cases the court held that the defendant was not strictly liable. The discussions were careless dicta, too, because the district court had not in its first opinion, the one they cited, held that acrylonitrile was in fact abnormally dangerous. It merely had declined to grant a motion to dismiss the strict liability count for failure to state a claim. We do not wish to sound too censorious; this court has twice made the same mistake in interpreting the district court's first opinion. *Martin v. Harrington & Richardson, Inc., 743 F.2d 1200, 1203 (7th Cir. 1984)*; *City of Bloomington v. Westinghouse Elec. Corp., 891 F.2d 611, 615 (7th Cir. 1989)*. But mistake it is. The dicta in *Fallon* and *Continental* cannot be considered reliable predictors of how the Supreme Court of Illinois would rule if confronted with the issue in this case. We are not required to follow even the *holdings* of intermediate state appellate courts if persuaded that they are not reliable [**7] predictors of the view the state's highest court would take. *Williams v. Lane, 826 F.2d 654, 662-63 (7th Cir. 1987)*; *Williams, McCarthy, Kinley, Rudy & Picha v. Northwestern National Ins. Group, 750 F.2d 619, 624-25 (7th Cir. 1984)*; *Klippel v. U-Haul Co., 759 F.2d 1176, 1181 (4th Cir. 1985)*. No court is required to follow another court's dicta. Cf. *Wood v. Armco, Inc., 814 F.2d 211, 213-14 (5th Cir. 1987)*. Here they are not even considered or

well-reasoned dicta, founded as they are on the misreading of an opinion.

The parties agree that the question whether placing acrylonitrile in a rail shipment that will pass through a metropolitan area subjects the shipper to strict liability is, as recommended in *Restatement (Second) of Torts § 520, comment l* (1977), a question of law, so that we owe no particular deference to the conclusion of the district court. They also agree (and for this proposition, at least, there is substantial support in the *Fallon* and *Continental* opinions) that the Supreme Court of Illinois [**8] would treat as authoritative the provisions of the Restatement governing abnormally dangerous activities. The key provision is *section 520*, which sets forth six factors to be considered in deciding whether an activity is abnormally dangerous and the actor therefore strictly liable.

The roots of *section 520* are in nineteenth-century cases. The most famous one is *Rylands v. Fletcher*, 1 Ex. 265, aff'd, L.R. 3 H.L. 300 (1868), but a more illuminating one in the present context is *Guille v. Swan, 19 Johns. (N.Y.) 381 (1822)*. A man took off in a hot-air balloon and landed, without intending to, in a vegetable garden in New York City. A crowd that [*1177] had been anxiously watching his involuntary descent trampled the vegetables in their endeavor to rescue him when he landed. The owner of the garden sued the balloonist for the resulting damage, and won. Yet the balloonist had not been careless. In the then state of ballooning it was impossible to make a pinpoint landing.

Guille is a paradigmatic case for strict liability. (a) The risk [**9] (probability) of harm was great, and (b) the harm that would ensue if the risk materialized could be, although luckily was not, great (the balloonist could have crashed into the crowd rather than into the vegetables). The confluence of these two factors established the urgency of seeking to prevent such accidents. (c) Yet such accidents

could not be prevented by the exercise of due care; the technology of care in ballooning was insufficiently developed. (d) The activity was not a matter of common usage, so there was no presumption that it was a highly valuable activity despite its unavoidable riskiness. (e) The activity was inappropriate to the place in which it took place -- densely populated New York City. The risk of serious harm to others (other than the balloonist himself, that is) could have been reduced by shifting the activity to the sparsely inhabited areas that surrounded the city in those days. (f) Reinforcing (d), the value to the community of the activity of recreational ballooning did not appear to be great enough to offset its unavoidable risks.

These are, of course, the six factors in *section 520*. They are related to each other in that each is a different facet of [**10] a common quest for a proper legal regime to govern accidents that negligence liability cannot adequately control. The interrelations might be more perspicuous if the six factors were reordered. One might for example start with (c), inability to eliminate the risk of accident by the exercise of due care. *Erbrich Products Co. v. Wills, 509 N.E.2d 850, 857 n. 3 (Ind. App. 1987)*. The baseline common law regime of tort liability is negligence. When it is a workable regime, because the hazards of an activity can be avoided by being careful (which is to say, nonnegligent), there is no need to switch to strict liability. Sometimes, however, a particular type of accident cannot be prevented by taking care but can be avoided, or its consequences minimized, by shifting the activity in which the accident occurs to another locale, where the risk or harm of an accident will be less ((e)), or by reducing the scale of the activity in order to minimize the number of accidents caused by it ((f)). *Bethlehem Steel Corp. v. EPA, 782 F.2d 645, 652 (7th Cir. 1986)*; Shavell, *Strict Liability versus Negligence*, 9 J. Legal Stud. 1 (1980). By making the [**11] actor strictly liable -- by denying him in other words

an excuse based on his inability to avoid accidents by being more careful -- we give him an incentive, missing in a negligence regime, to experiment with methods of preventing accidents that involve not greater exertions of care, assumed to be futile, but instead relocating, changing, or reducing (perhaps to the vanishing point) the activity giving rise to the accident. *Anderson v. Marathon Petroleum Co., 801 F.2d 936, 939 (7th Cir. 1986)*. The greater the risk of an accident ((a)) and the costs of an accident if one occurs ((b)), the more we want the actor to consider the possibility of making accident-reducing activity changes; the stronger, therefore, is the case for strict liability. Finally, if an activity is extremely common ((d)), like driving an automobile, it is unlikely either that its hazards are perceived as great or that there is no technology of care available to minimize them; so the case for strict liability is weakened.

The largest class of cases in which strict liability has been imposed under the standard codified in the Second Restatement of Torts involves the use of dynamite and other explosives [**12] for demolition in residential or urban areas. Restatement, *supra,* § 519, comment d; *City of Joliet v. Harwood, 86 Ill. 110 (1877)*. Explosives are dangerous even when handled carefully, and we therefore want blasters to choose the location of the activity with care and also to explore the feasibility of using safer substitutes (such as a wrecking ball), as well as to be careful in the blasting itself. Blasting is not a commonplace activity [*1178] like driving a car, or so superior to substitute methods of demolition that the imposition of liability is unlikely to have any effect except to raise the activity's costs.

Against this background we turn to the particulars of acrylonitrile. Acrylonitrile is one of a large number of chemicals that are hazardous in the sense of being flammable, toxic, or both; acrylonitrile is both, as are many others. A table in the record, drawn from Glickman &

Harvey, Statistical Trends in Railroad Hazardous Material Safety, 1978 to 1984, at pp. 63-65 (Draft Final Report to the Environmental & Hazardous Material Studies Division of the Association of American Railroads, April 1986) (tab. 4.1), contains a list of the 125 hazardous [**13] materials that are shipped in highest volume on the nation's railroads. Acrylonitrile is the fifty-third most hazardous on the list. Number 1 is phosphorus (white or yellow), and among the other materials that rank higher than acrylonitrile on the hazard scale are anhydrous ammonia, liquified petroleum gas, vinyl chloride, gasoline, crude petroleum, motor fuel antiknock compound, methyl and ethyl chloride, sulphuric acid, sodium metal, and chloroform. The plaintiff's lawyer acknowledged at argument that the logic of the district court's opinion dictated strict liability for all 52 materials that rank higher than acrylonitrile on the list, and quite possibly for the 72 that rank lower as well, since all are hazardous if spilled in quantity while being shipped by rail. Every shipper of any of these materials would therefore be strictly liable for the consequences of a spill or other accident that occurred while the material was being shipped through a metropolitan area. The plaintiff's lawyer further acknowledged the irrelevance, on her view of the case, of the fact that Cyanamid had leased and filled the car that spilled the acrylonitrile; all she thought important is that Cyanamid [**14] introduced the product into the stream of commerce that happened to pass through the Chicago metropolitan area. Her concession may have been incautious. One might want to distinguish between the shipper who merely places his goods on his loading dock to be picked up by the carrier and the shipper who, as in this case, participates actively in the transportation. But the concession is illustrative of the potential scope of the district court's decision.

No cases recognize so sweeping a liability. Several reject it, though none has facts much like those of the

present case. *Hawkins v. Evans Cooperage Co., 766 F.2d 904, 907 (5th Cir. 1985)*; *New Meadows Holding Co. v. Washington Power Co., 102 Wash. 2d 495, 687 P.2d 212 (1984)*; *Ozark Industries, Inc. v. Stubbs Transports, Inc., 351 F. Supp. 351, 357 (W.D. Ark. 1972)*. With *National Steel Service Center v. Gibbons, 693 F.2d 817 (8th Cir. 1982)*, which held a railroad strictly liable for transporting propane gas -- but under Iowa law, which uses a different standard from that of the Restatement -- we may pair *Seaboard Coast Line R.R. v. Mobil Chemical Co., 172 Ga. App. 543, 323 S.E.2d 849 (1984)*, [**15] which refused to impose strict liability on facts similar to those in this case, but again on the basis of a standard different from that of the Restatement. *Zero Wholesale Co. v. Stroud, 264 Ark. 27, 571 S.W.2d 74 (1978)*, refused to hold that the delivery of propane gas was not an ultrahazardous activity as a matter of law. But the delivery in question was to a gas-storage facility, and the explosion occurred while gas was being pumped from the tank truck into a storage tank. This was a highly, perhaps unavoidably, dangerous activity.

Siegler v. Kuhlman, 81 Wash. 2d 448, 502 P.2d 1181 (1972), also imposed strict liability on a transporter of hazardous materials, but the circumstances were again rather special. A gasoline truck blew up, obliterating the plaintiff's decedent and her car. The court emphasized that the explosion had destroyed the evidence necessary to establish whether the accident had been due to negligence; so, unless liability was strict, there would be no liability -- and this as the very consequence of the defendant's hazardous activity. *81 Wash. 2d at 454-55, 502 P.2d at 1185*. But when the Supreme Court of Washington [**16] came to decide the *New Meadows* case, *supra*, it did not distinguish *Siegler* on this ground, perhaps realizing [*1179] that the plaintiff in *Siegler* could have overcome the destruction of the evidence by basing a negligence claim on the doctrine of res ipsa loquitur. Instead it stressed that the transmission of natural gas through underground

pipes, the activity in *New Meadows*, is less dangerous than the transportation of gasoline by highway, where the risk of an accident is omnipresent. *102 Wash. 2d at 502-03, 687 P.2d at 216-17*. We shall see that a further distinction of great importance between the present case and *Siegler* is that the defendant there was the transporter, and here it is the shipper.

Cases such as *McLane v. Northwest Natural Gas Co., 255 Ore. 324, 467 P.2d 635 (1970)*; *Langlois v. Allied Chemical Corp., 258 La. 1067, 249 So. 2d 133 (1971)*; *State Dept. of Environmental Protection v. Ventron, 94 N.J. 473, 488, 468 A.2d 150, 157-60 (N.J. 1983)*; *Cities Service Co. v. State, 312 So. 2d 799 (Fla. App. 1975)*, and *Sterling v. Velsicol Chemical Corp., 647 F. Supp. 303, 315-16 (W.D. Tenn. 1986)*, [**17] aff'd in part and rev'd in part, on other grounds, *855 F.2d 1188 (6th Cir. 1988)*; but see *Standard Equipment, Inc. v. Boeing Co., 1987 U.S. Dist. LEXIS 15137*, at pp. *19-20 (W.D. Wash. 1987), that impose strict liability for the storage of a dangerous chemical provide a potentially helpful analogy to our case. But they can be distinguished on the ground that the storer (like the transporter, as in *Siegler*) has more control than the shipper.

So we can get little help from precedent, and might as well apply *section 520* to the acrylonitrile problem from the ground up. To begin with, we have been given no reason, whether the reason in *Siegler* or any other, for believing that a negligence regime is not perfectly adequate to remedy and deter, at reasonable cost, the accidental spillage of acrylonitrile from rail cars. Cf. *Bagley v. Controlled Environment Corp., 127 N.H. 556, 560, 503 A.2d 823, 826 (1986)*. Acrylonitrile could explode and destroy evidence, but of course did not here, making imposition of strict liability on the theory of the *Siegler* decision premature. More important, although acrylonitrile is flammable even [**18] at relatively low temperatures, and toxic, it is not so

corrosive or otherwise destructive that it will eat through or otherwise damage or weaken a tank car's valves although they are maintained with due (which essentially means, with average) care. No one suggests, therefore, that the leak in this case was caused by the *inherent* properties of acrylonitrile. It was caused by carelessness -- whether that of the North American Car Corporation in failing to maintain or inspect the car properly, or that of Cyanamid in failing to maintain or inspect it, or that of the Missouri Pacific when it had custody of the car, or that of the switching line itself in failing to notice the ruptured lid, or some combination of these possible failures of care. Accidents that are due to a lack of care can be prevented by taking care; and when a lack of care can (unlike *Siegler*) be shown in court, such accidents are adequately deterred by the threat of liability for negligence.

It is true that the district court purported to find as a fact that there is an inevitable risk of derailment or other calamity in transporting "large quantities of anything." *662 F. Supp. at 642*. This is [**19] not a finding of fact, but a truism: anything can happen. The question is, how likely is this type of accident if the actor uses due care? For all that appears from the record of the case or any other sources of information that we have found, if a tank car is carefully maintained the danger of a spill of acrylonitrile is negligible. If this is right, there is no compelling reason to move to a regime of strict liability, especially one that might embrace all other hazardous materials shipped by rail as well. This also means, however, that the amici curiae who have filed briefs in support of Cyanamid cry wolf in predicting "devastating" effects on the chemical industry if the district court's decision is affirmed. If the vast majority of chemical spills by railroads are preventable by due care, the imposition of strict liability should cause only a slight, not as they argue a substantial, rise in liability insurance rates, because the incremental liability should be slight. The amici have momentarily lost sight of the fact that the

feasibility of avoiding accidents simply [*1180] by being careful is an argument *against* strict liability.

This discussion helps to show why [**20] *Siegler* is indeed distinguishable even as interpreted in *New Meadows*. There are so many highway hazards that the transportation of gasoline by truck is, or at least might plausibly be thought, inherently dangerous in the sense that a serious danger of accident would remain even if the truckdriver used all due care (though *Hawkins* and other cases are *contra*). Which in turn means, contrary to our earlier suggestion, that the plaintiff really might have difficulty invoking res ipsa loquitur, because a gasoline truck might well blow up without negligence on the part of the driver. The plaintiff in this case has not shown that the danger of a comparable disaster to a tank car filled with acrylonitrile is as great and might have similar consequences for proof of negligence. And to repeat a previous point, if the reason for strict liability is fear that an accident might destroy the critical evidence of negligence we should wait to impose such liability until such a case appears.

The district judge and the plaintiff's lawyer make much of the fact that the spill occurred in a densely inhabited metropolitan area. Only 4,000 gallons spilled; what if all 20,000 had done so? Isn't [**21] the risk that this might happen even if everybody were careful sufficient to warrant giving the shipper an incentive to explore alternative routes? Strict liability would supply that incentive. But this argument overlooks the fact that, like other transportation networks, the railroad network is a hub-and-spoke system. And the hubs are in metropolitan areas. Chicago is one of the nation's largest railroad hubs. In 1983, the latest date for which we have figures, Chicago's railroad yards handled the third highest volume of hazardous-material shipments in the nation. East St. Louis, which is also in Illinois, handled the second highest volume. Office of Technology

Assessment, Transportation of Hazardous Materials 53 (1986). With most hazardous chemicals (by volume of shipments) being at least as hazardous as acrylonitrile, it is unlikely -- and certainly not demonstrated by the plaintiff -- that they can be rerouted around all the metropolitan areas in the country, except at prohibitive cost. Even if it were feasible to reroute them one would hardly expect shippers, as distinct from carriers, to be the firms best situated to do the rerouting. Granted, the usual view is that common carriers [**22] are not subject to strict liability for the carriage of materials that make the transportation of them abnormally dangerous, because a common carrier cannot refuse service to a shipper of a lawful commodity. Restatement, *supra*, § 521. Two courts, however, have rejected the common carrier exception. *National Steel Service Center, Inc. v. Gibbons, 319 N.W.2d 269 (Ia. 1982)*; *Chavez v. Southern Pacific Transportation Co., 413 F. Supp. 1203, 1213-14 (E.D. Cal. 1976)*. If it were rejected in Illinois, this would weaken still further the case for imposing strict liability on shippers whose goods pass through the densely inhabited portions of the state.

The difference between shipper and carrier points to a deep flaw in the plaintiff's case. Unlike *Guille*, and unlike *Siegler*, and unlike the storage cases, beginning with *Rylands* itself, here it is not the actors -- that is, the transporters of acrylonitrile and other chemicals -- but the manufacturers, who are sought to be held strictly liable. Cf. *City of Bloomington v. Westinghouse Elec. Corp., supra, 891 F.2d at 615-16*. A shipper can in the bill of lading designate [**23] the route of his shipment if he likes, *49 U.S.C. § 11710(a)(1)*, but is it realistic to suppose that shippers will become students of railroading in order to lay out the safest route by which to ship their goods? Anyway, rerouting is no panacea. Often it will increase the length of the journey, or compel the use of poorer track, or both. When this happens, the probability of an accident is increased, even if the consequences of an accident if one

occurs are reduced; so the expected accident cost, being the product of the probability of an accident and the harm if the accident occurs, may rise. Glickman, Analysis of a National Policy for Routing Hazardous Materials on Railroads (Department of Transportation, Research and Special Programs Administration, Transportation Systems Center, May 1980). It is easy to see how [*1181] the accident in this case might have been prevented at reasonable cost by greater care on the part of those who handled the tank car of acrylonitrile. It is difficult to see how it might have been prevented at reasonable cost by a change in the activity of transporting the chemical. This is therefore not an apt case for strict liability.

[**24] We said earlier that Cyanamid, because of the role it played in the transportation of the acrylonitrile -- leasing, and especially loading, and also it appears undertaking by contract with North American Car Corporation to maintain, the tank car in which the railroad carried Cyanamid's acrylonitrile to Riverdale -- might be viewed as a special type of shipper (call it a "transporter"), rather than as a passive shipper. But neither the district judge nor the plaintiff's counsel has attempted to distinguish Cyanamid from an ordinary manufacturer of chemicals on this ground, and we consider it waived. Which is not to say that had it not been waived it would have changed the outcome of the case. The very fact that Cyanamid participated actively in the transportation of the acrylonitrile imposed upon it a duty of due care and by doing so brought into play a threat of negligence liability that, for all we know, may provide an adequate regime of accident control in the transportation of this particular chemical.

In emphasizing the flammability and toxicity of acrylonitrile rather than the hazards of transporting it, as in failing to distinguish between the active and the passive shipper, [**25] the plaintiff overlooks the fact that

ultrahazardousness or abnormal dangerousness is, in the contemplation of the law at least, a property not of substances, but of activities: not of acrylonitrile, but of the transportation of acrylonitrile by rail through populated areas. *Cropper v. Rego Distribution Center, Inc., 542 F. Supp. 1142, 1149 (D. Del. 1982).* Natural gas is both flammable and poisonous, but the operation of a natural gas well is not an ultrahazardous activity. Cf. *Williams v. Amoco Production Co., 241 Kan. 102, 115, 734 P.2d 1113, 1123 (1987).* Whatever the situation under products liability law (*section 402A of the Restatement*), the manufacturer of a product is not considered to be engaged in an abnormally dangerous activity merely because the product becomes dangerous when it is handled or used in some way after it leaves his premises, even if the danger is foreseeable. *City of Bloomington v. Westinghouse Elec. Corp., supra, 891 F.2d at 616-17*; [**26] *Erbrich Products Co. v. Wills, supra.* The plaintiff does not suggest that Cyanamid should switch to making some less hazardous chemical that would substitute for acrylonitrile in the textiles and other goods in which acrylonitrile is used. Were this a feasible method of accident avoidance, there would be an argument for making manufacturers strictly liable for accidents that occur during the shipment of their products (how strong an argument we need not decide). Apparently it is not a feasible method.

The relevant activity is transportation, not manufacturing and shipping. This essential distinction the plaintiff ignores. But even if the plaintiff is treated as a transporter and not merely a shipper, it has not shown that the transportation of acrylonitrile in bulk by rail through populated areas is so hazardous an activity, even when due care is exercised, that the law should seek to create -- perhaps quixotically -- incentives to relocate the activity to nonpopulated areas, or to reduce the scale of the activity, or to switch to transporting acrylonitrile by road rather than by rail, perhaps to set the stage for a replay of *Siegler v.*

Kuhlman. It is no more [**27] realistic to propose to reroute the shipment of all hazardous materials around Chicago than it is to propose the relocation of homes adjacent to the Blue Island switching yard to more distant suburbs. It may be less realistic. Brutal though it may seem to say it, the inappropriate use to which land is being put in the Blue Island yard and neighborhood may be, not the transportation of hazardous chemicals, but residential living. The analogy is to building your home between the runways at O'Hare.

The briefs hew closely to the Restatement, whose approach to the issue of strict liability is mainly *allocative* rather than *distributive*. By this we mean that the emphasis is on picking a liability regime [*1182] (negligence or strict liability) that will control the particular class of accidents in question most effectively, rather than on finding the deepest pocket and placing liability there. At argument, however, the plaintiff's lawyer invoked distributive considerations by pointing out that Cyanamid is a huge firm and the Indiana Harbor Belt Railroad a fifty-mile-long switching line that almost went broke in the winter of 1979, when the accident occurred. Well, so what? [**28] A corporation is not a living person but a set of contracts the terms of which determine who will bear the brunt of liability. Tracing the incidence of a cost is a complex undertaking which the plaintiff sensibly has made no effort to assume, since its legal relevance would be dubious. We add only that however small the plaintiff may be, it has mighty parents: it is a jointly owned subsidiary of Conrail and the Soo line.

The case for strict liability has not been made. Not in this suit in any event. We need not speculate on the possibility of imposing strict liability on shippers of more hazardous materials, such as the bombs carried in *Chavez v. Southern Pacific Transportation Co., supra*, any more than we need differentiate (given how the plaintiff has shaped its

case) between active and passive shippers. We noted earlier that acrylonitrile is far from being the most hazardous among hazardous materials shipped by rail in highest volume. Or among materials shipped, period. The Department of Transportation has classified transported materials into sixteen separate classes by the degree to which transporting them is hazardous. Class number 1 is radioactive material. [**29] Class number 2 is poisons. Class 3 is flammable gas and 4 is nonflammable gas. Acrylonitrile is in Class 5. *49 C.F.R. §§ 172.101*, Table; 173.2(a).

Ordinarily when summary judgment is denied, the movant's rights are not extinguished; the case is simply set down for trial. If this approach were followed here, it would require remanding the case for a trial on whether Cyanamid should be held strictly liable. Yet that would be a mistake. The parties have agreed that the question whether the transportation of acrylonitrile through densely populated areas is abnormally dangerous is one of law rather than of fact; and trials are to determine facts, not law. More precisely -- for there is no sharp line between "law" and "fact" -- trials are to determine adjudicative facts rather than legislative facts. The distinction is between facts germane to the specific dispute, which often are best developed through testimony and cross-examination, and facts relevant to shaping a general rule, which, as the discussion in this opinion illustrates, more often are facts reported in books and other documents not prepared specially for litigation or refined in its fires. Again the line should not be viewed [**30] as hard and fast. If facts critical to a decision on whether a particular activity should be subjected to a regime of strict liability cannot be determined with reasonable accuracy without an evidentiary hearing, such a hearing can and should be held, though we can find no reported case where this was done. Some courts treat the question whether an activity is abnormally dangerous as one of fact, and then there must

be an evidentiary hearing to decide it. An example is *Zero Wholesale Gas Co. v. Stroud, supra, 264 Ark. at 31, 571 S.W.2d at 76*. Here we are concerned with cases in which the question is treated as one of law but in which factual disputes of the sort ordinarily resolved by an evidentiary hearing may be germane to answering the question. An evidentiary hearing would be of no use in the present case, however, because the plaintiff has not indicated any facts that it wants to develop through such a hearing.

Other issues are raised, but need not be decided. The plaintiff's claim that it is entitled to prejudgment interest is premature, since the judgment it obtained must be set aside. The defendant's alternative ground for reversal, that the switching yard [**31] assumed the risk of the abnormally dangerous activity by voluntarily participating (through its contract with Conrail) in the transportation of the tank car filled with acrylonitrile, Restatement, *supra*, § 523; *Clark v. Rogers, 137 Ill. App. 3d 591, 484 N.E.2d 867, 92 Ill. Dec. 136 (1985)*, is academic. (The argument is that the switching line was a participant in the activity -- [*1183] even a joint tortfeasor -- that has become transmogrified into a victim only because it incurred costs to prevent harm to the real potential victims of the accident.) Similarly, we need not decide whether the comprehensive regulations issued by the Department of Transportation under the Hazardous Materials Transportation Act, 49 U.S.C. App. §§ 1801 *et seq.*, which prescribe standards for the safe shipment of acrylonitrile by rail and, by requiring that such shipments be expedited, could be thought to authorize shipments via the most convenient rail hub even if it is located in a metropolitan area, would preempt a finding of common law liability premised on the assumption that such shipments should be rerouted. Those regulations are, however, relevant [**32] to showing that the shipments in question are not abnormally dangerous, and so support our rejection of strict liability whether or not the regulations are

given preemptive effect. *New Meadows Holding Co. v. Washington Water Power Co., supra, 102 Wash. 2d at 501-02, 687 P.2d at 216*; *Perkins v. F.I.E. Corp., 762 F.2d 1250, 1265-66 n. 43 (5th Cir. 1985)*.

The defendant concedes that if the strict liability count is thrown out, the negligence count must be reinstated, as requested by the cross-appeal. We therefore need not consider the plaintiff's argument that the district judge was wrong to throw out the negligence count merely to create an appealable order. But we concede that the strong-arming that he had to do in order to create an appealable judgment casts doubt on the correctness of our previous decision. In refusing to accept the *Rule 54(b)* appeal, that decision emphasized the factual overlap between the negligence and strict liability counts. More recently we have suggested that factual overlap has been an overemphasized factor in our decisions interpreting and applying the rule. *Olympia Hotels Corp. v. Johnson Wax Development Corp., 908 F.2d 1363, 1367 (7th Cir. 1990)*. [**33] Perhaps we were thrown off the track in this case by the district judge's mention of the rule. We are now inclined to think that once he entered a judgment giving the plaintiff all the relief that it was seeking, the plaintiff's remaining ground merged in the judgment, which ended the case in the district court and therefore was appealable without the aid of *Rule 54(b)*, even though, should such a judgment be reversed on appeal, the lawsuit would not be over, because the plaintiff had an alternative theory of liability. It is not over now. But with damages having been fixed at a relatively modest level by the district court and not challenged by the plaintiff, and a voluminous record having been compiled in the summary judgment proceedings, we trust the parties will find it possible now to settle the case. Even the Trojan War lasted only ten years.

The judgment is reversed (with no award of costs in this court) and the case remanded for further proceedings,

consistent with this opinion, on the plaintiff's claim for negligence.
REVERSED AND REMANDED, WITH DIRECTIONS.

¿Hasta qué punto informa el análisis económico del derecho las resoluciones judiciales del juez Posner?

II. RESPONDEAT SUPERIOR

GAIL D. KONRADI, Personal Representative of the Estate of GLENN J. KONRADI, Plaintiff-Appellant, v. UNITED STATES OF AMERICA and ROBERT E. FARRINGER, Defendants-Appellees No. 89-3532 UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 919 F.2d 1207 September 18, 1990, Argued November 29, 1990, Decided

[*1208] POSNER, Circuit Judge

While driving to work early one morning Robert Farringer, a rural mailman, struck a car driven by the plaintiff's decedent, Glenn Konradi, killing him. The suit is against the United States under the Federal Tort Claims Act, *28 U.S.C. §§ 1346(b), 2671 et seq.*, with a pendent-party claim under state law against Farringer. The basis of both claims is that [**2] Farringer's negligence in failing to yield the right of way to Konradi at an intersection was the cause of the accident. The district judge dismissed the suit on the government's motion for summary judgment. He ruled that the accident had not occurred within the scope of Farringer's employment by the Postal Service, which let off the Service; he then relinquished jurisdiction over the pendent party claim.

The parties agree that the question whether the accident occurred within the scope of Farringer's employment is governed [*1209] by Indiana law, *28 U.S.C. § 1346(b)*; *Williams v. United States, 350 U.S. 857, 76 S. Ct. 100, 100 L. Ed. 761 (1955)* (per curiam), that under Indiana law it is a question of fact, *Gibbs v. Miller, 152 Ind. App. 326, 329,*

283 N.E.2d 592, 594 (1972), and therefore that the judge was right to dismiss the case on summary judgment only if no reasonable jury, presented with the evidence that was before the judge when he ruled, could have answered the question in the plaintiff's favor. One could quarrel with "therefore," since whether a question is one of fact or of law has been held to fall on the procedure side of the substance/procedure divide that *Erie R. Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938)*, [**3] established. *Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 2 L. Ed. 2d 953, 78 S. Ct. 893 (1958)*; *Nunez v. Superior Oil Co., 572 F.2d 1119, 1125 (5th Cir. 1978)*; *Deland v. Old Republic Life Ins. Co., 758 F.2d 1331, 1335 (9th Cir. 1985)*. Although the present case is not a diversity case, *Erie* was an interpretation of the Rules of Decision Act, *28 U.S.C. § 1652*, and its principles apply to any case in federal court in which state law supplies the rule of decision, *Morgan v. South Bend Community School Corp., 797 F.2d 471, 474 (7th Cir. 1986)*; *Hernas v. City of Hickory Hills, 507 F. Supp. 103, 105 (N.D. Ill. 1981)*; Wright, Miller & Cooper, Federal Practice and Procedure § 4515 (1982), as it does here by virtue of *28 U.S.C. § 1346(b)*. Still, circumstances alter cases -- or at least may. *Byrd* and the cases following it rely heavily on the *Seventh Amendment*, which has no application to the Federal Tort Claims Act, for the proposition that federal law determines when a question is factual, and therefore a jury issue, in a case tried in a federal court; the case for applying federal law to the law-fact issue in this case is therefore weakened. But so is the case for applying state law to [**4] the issue. Congress has given the federal courts exclusive jurisdiction over tort claims against the federal government, incorporating local law for the convenience of the federal government rather than to vindicate state policies -- though on the other hand the states do have an interest in conduct of federal employees that injures the state's citizens.

All this is as academic as it is interesting. No party argues in this case that federal law rather than state law should determine whether scope of employment is to be treated as a legal or as a factual question -- perhaps believing, plausibly enough, that the question would be decided the same way under either law. Without further ado, therefore, we can turn to the merits.

The general rule is that an employee is not within the scope of his employment when commuting to or from his job. As the Supreme Court of Indiana put it the last time it addressed the issue, more than three decades ago, "an employee on his way to work is normally not in the employment of the corporation." *Biel, Inc. v. Kirsch, 240 Ind. 69, 73, 161 N.E.2d 617, 618 (1959)* (per curiam). The rub is "normally," and though omitted in the statement of the rule in [**5] *Pursley v. Ford Motor Co., 462 N.E.2d 247, 249 (Ind. App. 1984)*, this weasel word is definitely required for the sake of accuracy. In *State v. Gibbs, 166 Ind. App. 387, 336 N.E.2d 703 (1975)*, the employer furnished the employee with a car for use on the job but also allowed him to take it home at night. The accident occurred while he was driving home, and the employer was held liable. In *Gibbs v. Miller, supra*, the employer was held liable for an accident that occurred when its traveling salesman, who used his own car to make his rounds, was driving home for lunch from an appointment with a customer; he had other appointments scheduled for that afternoon. On the other hand, in *City of Elkhart v. Jackson, 104 Ind. App. 136, 10 N.E.2d 418 (1937)*, which also involved an employee driving the company car at lunch time -- this time he was returning to work after lunch when the accident occurred -- the accident was held to be outside the scope of employment. *Biel, Inc. v. Kirsch, supra*, was another company-car case, and again the accident (which occurred while the employee was driving the car to work one morning) was held to be outside the scope of

employment -- but the [**6] employee happened also to be the employer's owner, [*1210] and, it seems, was using the car for her personal convenience rather than on company business. In *City of Crawfordsville v. Michael, 479 N.E.2d 102 (Ind. App. 1985)*, the employee was using the company car (actually truck) for personal business on his day off when the accident occurred; he too was held not to have been acting within the scope of his employment.

It is impossible to find the pattern in this carpet without a conception of what the law is trying to accomplish by making an employer liable for the torts of his employees committed within the scope of their employment and by excluding commuting from that scope -- "normally." The Indiana decisions are few and not articulate on these issues, and although there are plenty of cases in other states, they use a similar approach and are similarly reticent about the considerations that animate their decisions. Annot., *Employer's Liability for Negligence of Employee in Driving His Own Car, 52 A.L.R.2d 287, 303, 311 (1957)*; Annot., *Employer's Liability for Employee's Negligence in Operating Employer's Car in Going to or from Work or Meals, 52 A.L.R.2d 350, 354, 362-63 (1957)*. [**7] There is however a rich scholarly literature on vicarious liability, specifically of employers, from which clues can be gleaned. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines, 101 Harv. L. Rev. 563 (1988)*, is particularly helpful; we have relied on it previously, in an opinion by Judge Manion, *Wilson v. Chicago, Milwaukee, St. Paul & Pac. R.R., 841 F.2d 1347, 1352, 1356 n. 2 (7th Cir. 1988)*, to help decide a scope of employment issue.

Often an employer can reduce the number of accidents caused by his employees not by being more careful -- he may already be using as much care in hiring, supervising, monitoring, etc. his employees as can reasonably be demanded -- but by altering the nature or extent of his operations: in a word by altering not his *care* but his

activity. This possibility is a consideration in deciding whether to impose strict liability generally. *Anderson v. Marathon Petroleum Co., 801 F.2d 936, 939 (7th Cir. 1986)*; *Bethlehem Steel Corp. v. EPA, 782 F.2d 645, 652 (7th Cir. 1986)*; Shavell, *Strict Liability versus Negligence*, 9 J. Legal Stud. 1 (1980). The liability of [**8] an employer for torts committed by its employees -- without any fault on his part -- when they are acting within the scope of their employment, the liability that the law calls "respondeat superior," is a form of strict liability. It neither requires the plaintiff to prove fault on the part of the employer nor allows the employer to exonerate himself by proving his freedom from fault. The focus shifts from changes in care to changes in activity. For example, instead of dispatching its salesmen in cars from a central location, causing them to drive a lot and thus increasing the number of traffic accidents, a firm could open branch offices closer to its customers and have the salesmen work out of those offices. The amount of driving would be less (an activity change) and with it the number of accidents. Firms will consider these trade-offs if they are liable for the torts of their employees committed within the scope of their employment, even if the employer was not negligent in hiring or training or monitoring or supervising or deciding not to fire the employee who committed the tort. This liability also discourages employers from hiring judgment-proof employees, which they might otherwise [**9] have an incentive to do because a judgment-proof employee, by definition, does not have to be compensated (in the form of a higher wage) for running the risk of being sued for a tort that he commits on his employer's behalf. He runs no such risk; he is not worth suing.

If it is true that one objective of the doctrine of respondeat superior is to give employers an incentive to consider changes in the nature or level of their activities, then "scope of employment" can be functionally defined by

reference to the likelihood that liability would induce beneficial changes in activity. It becomes apparent for example that the employer should not be made liable for a tort committed by the employee in the employee's home, for there is no plausible alteration in the activity of [*1211] the employer that would substantially reduce the likelihood of such a tort. This overstates the case a bit; one can imagine a plaintiff's arguing that if the employer had not made the employee work so hard the employee would have been more alert and therefore more careful and the accident would not have occurred. But the law has to draw some lines for ease of administration, and a rough-and-ready one is between accidents [**10] on the job and accidents off the job -- including accidents while commuting -- in recognition of the fact that the employer's ability to prevent accidents by employees is normally much less when the employees are not at work. Indiana recognizes, however, that the line is indeed a rough one, and it allows juries to cross it when particular circumstances make the line inapt to the purpose that it seeks to implement. Whether it is wise to give juries such discretion is not our business, at least given the parties' agreement that the state rule empowering the jury to decide whether the accident was within the scope of the employment governs this case.

The Postal Service, Farringer's employer, requires its rural postal carriers to furnish their own vehicle (Farringer's was a pick-up truck) in making their rounds. Postal Operations Manual § 634.21(1985). The alternative would be for the Service to buy or lease mail trucks for these carriers to use. A possible consequence of the choice it has made is to increase the amount of driving over what it would be if the Service furnished the vehicles. No family with one car (and precious few with two) would want to leave its car at work and thereby [**11] have to find an alternative method of commuting. The Postal Service's rule pretty much guarantees that its mailmen will drive to and from work, and by doing this it increases the amount of

driving compared to a system in which, since the mailman does not need to have his own car at work, he can take a train or bus or join a car pool. One cost of more driving is more accidents, and this cost can be made a cost to the Postal Service, and thus influence its choice between furnishing its mailmen with vehicles and requiring them to furnish their own, if the scope of employment is defined for purposes of tort law as including commuting in all cases in which the employee is required to furnish a vehicle for use at work. The argument for liability might actually seem stronger than if the employer had furnished the vehicle. But it must be borne in mind that the question of the employer's liability in cases involving a company-owned vehicle arises only when the vehicle is being used outside of work time; and here it can be argued that a person furnished with a company car is apt to drive more, and more carelessly, than if he were using his own car.

All this is highly speculative. The Postal [**12] Service's rule is limited to *rural* deliverymen, and neither public transportation nor car pooling is common in rural America. Especially since any expansion in tort liability is bound to be a source of litigation costs and judicial burdens, we could not be sufficiently confident concerning the effects of liability to be justified in laying down a general rule that employers who require their employees to use their own vehicle on the job, or permit them to use a company vehicle off the job, are liable for the employees' accidents while commuting in that vehicle; nor would that be a plausible extrapolation from the Indiana cases. But additional evidence in this case points to employer liability. According to testimony that for purposes of this appeal (only) we must take to be true, Farringer's postmaster required the postal carriers to take the most direct route in driving to and from work, and hence not to divagate for personal business. Nor was the carrier to stop for such business, or give anyone a ride. And he was to fasten his

seatbelt (this was before Indiana passed a seatbelt law). The record does not reveal the reasons for these requirements. They may just reflect the Postal [**13] Service's fear of being held liable for commuting accidents and its concomitant desire to minimize the length of the trip and number of persons in the employee's car in order to reduce the likelihood of accidents. If this is right the plaintiff can do nothing with the requirements, because a person's fear of being held liable is not a reason for the law's [*1212] holding the person liable. An employer should not be held liable, and therefore penalized, for taking steps rationally designed to minimize its liability by increasing the safety of its operations.

Another possibility, however, is that the Postal Service was trying to minimize time lost by its employees from work and its workers' compensation costs, for the government interprets the federal employees' compensation law to include the commuting accidents of postal workers. U.S. Dept. of Labor, Wage and Labor Standards Administration, Bureau of Employees' Compensation, FECA Memorandum No. 104 (Oct. 24, 1969), interpreting *5 U.S.C. § 8102(a)*; but see *Avasthi v. United States, 608 F.2d 1059 (5th Cir. 1979)*. This is not to suggest that the scope of liability for workers' compensation purposes is identical to that for liability to third-party [**14] victims of those workers' torts; in fact it is broader. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L.J. 499, 544-45 (1961). The point is different. If the Postal Service insists for time's sake that the carrier always travel to and from work by the most direct route, which may not be the safest route, the Service should be liable for the accidents that result from this directive; it has made them more likely.

The rules of commuting that the postmaster has imposed upon his carriers may also or instead reflect a belief that the work of a rural deliveryman begins when he gets into his car in the morning and ends when he gets out

of it in the evening. For during all that time he has control over an essential instrumentality of postal service -- the delivery van -- albeit supplied by the deliverer. This underscores the earlier point that the Postal Service has made a choice between buying its own fleet of vans and pressing its employees' vans into service, and may bring the case within the orbit of *State v. Gibbs*. It is as if the Postal Service had decided to store its vans at night in its employees' garages. But against this is the fact that the [**15] mileage allowance which the Service gives its employees when they use their own vehicle on the job does not include the use of the vehicle in commuting. Moreover, there is no general rule making the employer liable for a commuting accident merely because he supplied the vehicle. *Biel* no doubt is a special case, and so is *Michael*, where the employer-owned car was being used purely for personal business, since it was the employee's day off; and in *State v. Gibbs* the employer was held liable. On the other hand *Jackson* seems indistinguishable from *State v. Gibbs*, yet was decided in favor of the employer. The analysis sketched above suggests that there is no magic to the employer's supplying the car; the functional argument (promotion of safety) for employer liability is as strong if he makes the employee bring his own car. *Gibbs v. Miller* imposed liability in such a case. Of course the two *Gibbs* cases are factually different from our case -- every case is factually different from every other case -- but that is no warrant for refusing to follow them in this case unless the factual differences between them and this case are connected with a difference in principle.

After [**16] and because of the accident, the Postal Service fired Farringer. This may have been because it feared that he might have a similar accident, for which the Service would incontestably be liable, while on the job; another possibility however is that the Service considered the tort he did commit to have occurred on the job. But this

consideration seems merely to duplicate the one discussed in the preceding paragraph, and it is therefore entitled to no weight.

Not only may the imposition of liability on the Postal Service be consistent with most of the Indiana cases (indeed all but Michael); it is consistent with all three of the formulas that courts in Indiana and elsewhere intone when they are trying to generalize about scope of employment. *Reed v. House of Decor, Inc., 468 So. 2d 1159, 1161 (La. 1985)*. By driving to and from work Farringer conferred a *benefit* on his employer because he was bringing an essential instrumentality of the employer's business. (True, the employer would not have cared if Farringer had left his truck in the post office parking lot and [*1213] thumbed a ride to work, but few employees would thus forgo all personal use of their vehicle.) The employer exerted [**17] substantial *control* over the employee's commuting, as shown by the regulations discussed earlier. And finally the employee while commuting was in the *service* of the employer because he was keeping and maintaining the instrumentality.

These "tests" should not be thought conclusive. Tests divorced from purposes tend not to be useful, let alone conclusive, and the linkage between the tests and what the discussion in this opinion conjectures is the underlying purpose of the scope of employment concept is obscure. The law has drawn a line between at work and at home but treats commuting as an intermediate zone that can be placed within or outside the scope of employment depending on circumstances, though the presumption is in favor of outside. The purpose of a doctrine determines what circumstances are relevant. The purpose of this doctrine may be to induce the employer to consider activity changes that might reduce the number of accidents. One possible change might be to substitute a fleet of postal vans for the employees' personal vehicles driven to and from work daily perhaps over substantial distances.

In attempting to predict how the Indiana courts would have decided this case had [**18] it been brought in such a court (which it could not have been, of course, because the federal government has not consented to be sued in state courts), this court necessarily is speculating. There is no reason to apologize for this acknowledgment. The decision of a federal court in a diversity case, or in any other case in which state law supplies the rule of decision, is an exercise in predicting how the highest court of the state would decide the case if it were presented to it. When the relevant decisions of the state's courts do not articulate the grounds that animate their results, and the issue is not suitable for certification to the state supreme court (perhaps because as here it is highly fact-specific), the federal court has no choice but to speculate as to what the true grounds might be or to supply grounds that it thinks might recommend themselves to the state's courts in the future. It is in that spirit that this opinion has sought to bring modern scholarship to bear on the vexing issue of scope of employment in commuting cases.

The unavoidably speculative character of the analysis furnishes an additional reason for believing that the district court acted prematurely [**19] in granting summary judgment. The more nebulous or unsettled the legal standard, the more difficult it should be to exclude contested facts from consideration on the ground that they are immaterial. If the Indiana rule excluding commuting from the scope of employment were strict, the Postal Service would be right to argue that it is immaterial why it fired Farringer. But as it is not strict, the question may be material. Perhaps the Postal Service fired Farringer because it considers commuting to be part of working and because it has a policy of firing people who kill tortiously in the course of their employment with the Service. The scope of federal employees' compensation may be irrelevant to scope of employment for liability purposes, but then again

it may not be. Perhaps as the facts are developed it will become evident that Farringer was not acting within the scope of his employment, but on the basis of the record compiled thus far it cannot be said that no reasonable jury could find that he was.

It should go without saying that the recitation of facts in this opinion is tentative; the facts may appear quite different after further proceedings. In particular the nature of and [**20] authority for the various rules to which the Knightstown Post Office where Farringer worked, as distinct from the Postal Service itself, subjected Farringer are wholly unclear.

One final point. The plaintiff joined Farringer as a pendent party defendant, and the district court dismissed Farringer from the suit without prejudice after deciding to dismiss the main claim, that is, the claim against the United States. The court did this on the familiar ground that, with immaterial exceptions, when the main claim [*1214] drops out before trial the court should relinquish jurisdiction over all pendent claims. *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*. The result was right, but not the reasoning. The Supreme Court had held several months before the judgment in this case that there is no pendent party jurisdiction in cases brought under the Tort Claims Act. *Finley v. United States, 490 U.S. 545, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989)*. The district court never acquired jurisdiction over Farringer (for he and the decedent, whose citizenship is what counts for diversity purposes although his personal representative is the actual party, *28 U.S.C. § 1332(c)(2)*, are both citizens of Indiana) -- against whom, by [**21] the way, the plaintiff has filed a parallel suit in state court. Although *Finley* was decided after the present suit was brought, there is no reason not to apply it to this case; the harm to the plaintiff is slight, since she has another and solvent defendant (the United States) to pursue in this case, and a suit against *Farringer* in state court.

The dismissal of Farringer (without prejudice, of course) is affirmed, albeit on a different ground from the district judge's; but the dismissal of the United States is reversed and the case remanded for further proceedings consistent with this opinion. Costs in this court to the plaintiff.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

RIPPLE, Circuit Judge, concurring.

I concur in the judgment of the court. The record before us certainly contains a genuine issue of triable fact as to whether Mr. Farringer was in the scope of his employment. It is not at all clear whether, at the time of the accident, Mr. Farringer was acting for and on behalf of the Postal Service or was under the control of the Postal Service. In dealing with this issue on remand, the district court must assess, in my view, the totality of the [**22] circumstances -- not simply the reason for Mr. Farringer's discharge.

MANION, Circuit Judge, concurring.

The majority opinion examines several scenarios of what might have occurred. As with any summary judgment appeal, however, we examine one question -- is there any genuine issue as to any material fact that precludes summary judgment as a matter of law? In my view there may be one, and thus I am willing to concur in the remand.

Indiana law is clear that, with very limited exceptions, an employee is not within the scope of his employment while driving to and from work. The facts in this case present fewer "incidental benefits" than the facts of the Indiana Supreme Court case setting forth this general rule. See *Biel, Inc. v. Kirsch, 240 Ind. 69, 161 N.E.2d 617 (1959)*. Unless we have some exceptional circumstance, a rural postal worker driving to work is on his own and not within the scope of his employment. [1]

> 1 As we recognized in *Pace v. Southern Express Company, 409 F.2d 331, 333 (7th Cir. 1969)*, Indiana law is "well settled" that an employee travelling to or from work is not within the scope of his employment. This rule has been applied in a variety of cases under a variety of factual circumstances. *See e.g.: City of Crawfordsville v. Michael, 479 N.E.2d 102* (Ind. App. 1 Dist. 1985); *Pursley for Benefit of Clark v. Ford Motor, 462 N.E.2d 247* (Ind. App. 2 Dist. 1984); *Pace v. Couture, 150 Ind. App. 220, 276 N.E.2d 213 (1972)*; *Marion Trucking Co. v. Byers, 121 Ind. App. 592, 97 N.E.2d 635 (1951)*; *North Side Chevrolet, Inc. v. Clark, 107 Ind. App. 592, 25 N.E.2d 1011 (1940)*; *Neyenhaus v. Daum, 102 Ind. App. 106, 1 N.E.2d 281 (1936)*; *Haynes v. Stroh, 99 Ind. App. 595, 193 N.E. 721 (1935)*.

[**23] In an attempt to circumvent this rule, the plaintiff alleges that Farringer's postmaster required him and other carriers who drove their own car to conduct no personal business en route to and from work, to take the most direct route, not to carry any passengers, and to fasten their seatbelts. Although these are simply allegations, even if taken as true the majority opinion appropriately minimizes their consequence (*ante* p. 1212). These allegations are not sufficient to invoke the two narrow factbound exceptions to *Biel* as established by the Indiana Court of Appeals.

[*1215] In *Gibbs v. Miller, 152 Ind. App. 326, 283 N.E.2d 592 (3d Dist. 1972)*, a salesman was in an accident while returning home for lunch from an appointment with a customer. He was not expected in the office that day. He had another appointment scheduled following lunch, and also planned to do some paperwork at home during lunch. He was being reimbursed for mileage from his home to the morning appointment and back. A jury found the employer liable, and the appeals court, although troubled by the

paucity of evidence, refused to overturn the jury verdict as a matter of law.

In *State v. Gibbs, 166 Ind. App. 387, 336 N.E.2d 703 (1st Dist.* [**24] *1975),* a jury held the state liable for $ 100,000 following an accident involving an employee of the Indiana State Highway Commission. The employee's job involved considerable driving, so the state furnished him with a car that was checked out to him at all times. He was allowed to drive it home after work and to lunch during the work day, but was not to use it for other personal business. Although he worked a 7:30 to 5:00 day, he considered himself on call 24 hours a day. He finished conducting tests at 5 p.m. on the night of the accident and drove to the office to speak with his supervisor. The supervisor wasn't there, so after reading notes left on his desk the employee headed for several local restaurants where his supervisor sometimes went after work. He still could not find the supervisor, and eventually drove to another town to eat dinner. The injury occurred after dinner on his way home. Again, the appeals court refused to reverse the jury verdict despite its concern over the slight evidence of employer liability. The court emphasized that the employee was driving a state vehicle home from work so he could return directly to his job in the morning, and that he was on call [**25] 24 hours a day. Inexplicably, the *Biel* case was not even cited. [2]

2 *State v. Gibbs* was explicitly narrowed by a later court of appeals case. In *City of Crawfordsville, supra, 479 N.E.2d at 104,* the court held that "*Gibbs* is an exception to the well-settled rule" of *Biel,* and that, "as such, we are hesitant to apply it beyond its specific facts."

Our case is factually different than either of those narrow exceptions to the general rule -- there is virtually no evidence that Farringer was in the scope of his employment. Farringer was driving his own car to work,

not the government's. He was not providing any benefit to the government while en route; his job did not begin until he reached the post office to sort and pick up his mail for delivery. He was not, as in *Gibbs v. Miller*, going home for lunch and to do some paperwork in between business appointments, while receiving payment for mileage incurred on the trip. [3] He was not, as in *State v. Gibbs*, properly driving a state-owned vehicle home [**26] from work following the day's activities, while on call 24 hours a day. Rather, he was simply travelling to work. Until he is at work, Indiana does not impose his misdeeds on the employer.

> 3 In addition to salary and benefits Farringer did receive an allowance for mileage and maintenance. However, this allowance was based only on the miles covered by the mail carrier during delivery of his route, and not on the distance he travelled to and from work. See Supplemental Appendix of Appellee at 122.

This case is much closer to *Biel*. In *Biel*, a woman who served as president of a corporation was in the habit of driving a company car to and from work. Although the company paid for the oil and gas, taxes and upkeep on the vehicle, the Indiana Supreme Court held that Mrs. Biel was not within the scope of her employment when driving the company car to work. Even if we accept Farringer's unsupported (and illogical) contentions that he was required to follow a certain route, to wear a seat belt, and to not take passengers [**27] on his way to work, this case is not factually close to the two state appellate court cases providing narrow exceptions to the rule set out by the Indiana Supreme Court.

The only pertinent question having some bearing on whether Farringer was in the scope of his employment centers on his termination, supposedly because of the accident. If he was terminated because of some policy regulating his travel to and from work, and if that policy is

so encumbering that it puts him in the scope of [*1216] employment even while driving to work, a trial may be warranted to determine if those facts merit an exception under Indiana law. But if that policy is nothing more than a provision that drivers with poor driving records cannot remain as rural postal drivers, or something similarly general, summary judgment would be appropriate. Aside from that one possibility, I do not agree with this court that the "employer exerted substantial control over the employee's commuting, as shown by the regulations discussed. . . ." The opinion acknowledges those tests are not conclusive and that "we necessarily are speculating." Indiana law is clear that "an employee on his way to work is normally not in the employment [**28] of the corporation." *Biel, 161 N.E.2d at 618.* Unless Farringer was terminated for violating some specific driving policy covering rural postal drivers on their way to and from work, the normal rule should apply and summary judgment in favor of the government is entirely appropriate.

 ¿Hasta qué punto informa el análisis económico del derecho las resoluciones judiciales del juez Posner?

III. PRODUCTS LIABILITY

 RICHARD WELGE, Plaintiff-Appellant, v. PLANTERS LIFESAVERS COMPANY, et al., Defendants-Appellees. No. 93-2080 UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 17 F.3d 209 January 3, 1994, Argued February 22, 1994, Decided

[*210] POSNER, *Chief Judge.* Richard Welge, forty-something but young in spirit, loves to sprinkle peanuts on his ice cream sundaes. On January 18, 1991, Karen Godfrey, with whom Welge boards, bought a 24-ounce vacuum-sealed plastic-capped jar of Planters peanuts for him at a K-Mart store in Chicago. To obtain a $ 2 rebate that the maker of Alka-Seltzer was offering to anyone who

bought [**2] a "party" item, such as peanuts, Godfrey needed proof of her purchase of the jar of peanuts; so, using an Exacto knife (basically a razor blade with a handle), she removed the part of the label that contained the bar code. She then placed the jar on top of the refrigerator, where Welge could get at it without rooting about in her cupboards. About a week later, Welge removed the plastic seal from the jar, uncapped it, took some peanuts, replaced the cap, and returned the jar to the top of the refrigerator, all without incident. A week after that, on February 3, the accident occurred. Welge took down the jar, removed the plastic cap, spilled some peanuts into his left hand to put on his sundae, and replaced the cap with his right hand--but as he pushed the cap down on the open jar the jar shattered. His hand, continuing in its downward motion, was severely cut, and is now, he claims, permanently impaired.

Welge brought this products liability suit in federal district court under the diversity jurisdiction; Illinois law governs the substantive issues. Welge named three defendants (plus the corporate parent of one--why we don't know). They are K-Mart, which sold the jar of peanuts to Karen [**3] Godfrey; Planters, which manufactured the product--that is to say, filled the glass jar with peanuts and sealed and capped it; and Brockway, which manufactured the glass jar itself and sold it to Planters. After pretrial discovery was complete the defendants moved for summary judgment. The district judge granted the motion on the ground that the plaintiff had failed to exclude possible causes of the accident other than a defect introduced during the manufacturing process.

No doubt there are men strong enough to shatter a thick glass jar with one blow. But Welge's testimony stands uncontradicted that he used no more than the normal force that one exerts in snapping a plastic lid onto a jar. So the jar must have been defective. No expert testimony and no fancy doctrine are required for such a conclusion. A nondefective jar does not shatter when normal force is used

to clamp its plastic lid on. The question is when the defect was introduced. It could have been at any time from the manufacture of the glass jar by Brockway (for no one suggests that the defect might have been caused by something in the raw materials out of which the jar was made) to moments before the accident. But testimony [**4] by Welge and Karen Godfrey, if believed--and at this stage in the proceedings we are required to believe it--excludes all reasonable possibility that the defect was introduced into the jar after Godfrey plucked it from a shelf in the K-Mart store. From the shelf she put it in her shopping cart. The checker at the check-out counter scanned the bar code without banging the jar. She then placed the jar in a plastic bag. Godfrey carried the bag to her car and put it on the floor. She drove directly home, without incident. After the bar-code portion of the label was removed, the jar sat on top of the refrigerator except for the two times Welge removed it to take peanuts out of it. Throughout this process it was not, so far as anyone knows, jostled, dropped, bumped, or otherwise subjected to stress beyond what is to be expected in the ordinary use of the product. Chicago is not Los Angeles; there were no earthquakes. Chicago is not Amityville either; no supernatural interventions are alleged. So the defect must have been introduced earlier, when the jar was in the hands of the defendants.

But, they argue, this overlooks two things. One is that Karen Godfrey took a knife to the jar. And [**5] no doubt one can weaken a glass jar with a knife. But nothing is more common or, we should have thought, more harmless than to use a knife or a razor [*211] blade to remove a label from a jar or bottle. People do this all the time with the price labels on bottles of wine. Even though mishandling or misuse, by the consumer or by anyone else (other than the defendant itself), is a defense, though a limited and (subject to a qualification noted later) partial defense, to a products

liability suit in Illinois as elsewhere, e.g., *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc., 118 Ill. 2d 447, 516 N.E.2d 260, 266, 114 Ill. Dec. 105 (Ill. 1987)*; *King v. American Food Equipment Co., 160 Ill. App. 3d 898, 513 N.E.2d 958, 965, 112 Ill. Dec. 349 (Ill. App. 1987)*; *Early- Gary, Inc. v. Walters, 294 So. 2d 181, 186-87 (Miss. 1974)*; Annot., "Products Liability: Sufficiency of Evidence to Support Product Misuse Defense in Actions Concerning Bottles, Cans, Storage Tanks, or Other Containers," *58 A.L.R.4th 160 (1987)*, and even if, as we greatly doubt, such normal mutilation as occurred in this case could be thought a species of mishandling or misuse, [**6] a defendant cannot defend against a products liability suit on the basis of a misuse that he *invited*. The Alka-Seltzer promotion to which Karen Godfrey was responding when she removed a portion of the label of the jar of Planters peanuts was in the K-Mart store. It was there, obviously, with K-Mart's permission. By the promotion K-Mart invited its peanut customers to remove a part of the label on each peanut jar bought, in order to be able to furnish the maker of Alka-Seltzer with proof of purchase. If one just wants to efface a label one can usually do that by scraping it off with a fingernail, but to remove the label intact requires the use of a knife or a razor blade. Invited misuse is no defense to a products liability claim. Invited misuse is not misuse.

The invitation, it is true, was issued by K-Mart, not by the other defendants; and we do not know their involvement, if any, in the promotion. As to them, the defense of misuse must fail, at this stage of the proceedings, for two other reasons. The evidence does not establish with the certitude required for summary judgment that the use of an Exacto knife to remove a label from a jar is a misuse of the jar. And in a regime [**7] of comparative negligence misuse is not a defense to liability but merely reduces the plaintiff's damages, unless the misuse is the sole cause of the accident.

Even so, the defendants point out, it is always *possible* that the jar was damaged while it was sitting unattended on the top of the refrigerator, in which event they are not responsible. Only if it had been securely under lock and key when not being used could the plaintiff and Karen Godfrey be *certain* that nothing happened to damage it after she brought it home. That is true--there are no metaphysical certainties--but it leads nowhere. Elves may have played ninepins with the jar of peanuts while Welge and Godfrey were sleeping; but elves could remove a jar of peanuts from a locked cupboard. The plaintiff in a products liability suit is not required to exclude every possibility, however fantastic or remote, that the defect which led to the accident was caused by someone other than one of the defendants. The doctrine of res ipsa loquitur teaches that an accident that is unlikely to occur unless the defendant *was* negligent is itself circumstantial evidence that the defendant was negligent. The doctrine is not strictly [**8] applicable to a products liability case because unlike an ordinary accident case the defendant in a products case has parted with possession and control of the harmful object before the accident occurs. *St. Paul Fire & Marine Ins. Co. v. Michelin Tire Corp., 12 Ill. App. 3d 165, 298 N.E.2d 289, 297-98 (Ill. App. 1973).* But the doctrine merely instantiates the broader principle, which is as applicable to a products case as to any other tort case, that an accident can itself be evidence of liability. *Id. at 298*; *Doyle v. White Metal Rolling & Stamping Corp., 249 Ill. App. 3d 370, 618 N.E.2d 909, 916, 188 Ill. Dec. 339 and n. 3 (Ill. App. 1993).* If it is the kind of accident that would not have occurred but for a defect in the product, and if it is reasonably plain that the defect was not introduced after the product was sold, the accident is evidence of the defect. The second condition (as well as the first) has been established here, at least to a probability sufficient to defeat a motion for summary judgment. Normal people do not lock up their jars and cans lest something happen to damage these containers while no

one is [*212] looking. The probability of such [**9] damage is too remote. It is not only too remote to make a rational person take measures to prevent it; it is too remote to defeat a products liability suit should a container prove dangerously defective.

Of course, unlikely as it may seem that the defect was introduced into the jar after Karen Godfrey bought it if the plaintiffs' testimony is believed, other evidence might make their testimony unworthy of belief--might even show, contrary to all the probabilities, that the knife or some mysterious night visitor caused the defect after all. The fragments of glass into which the jar shattered were preserved and were examined by experts for both sides. The experts agreed that the jar must have contained a defect but they could not find the fracture that had precipitated the shattering of the jar and they could not figure out when the defect that caused the fracture that caused the collapse of the jar had come into being. The defendants' experts could neither rule out, nor rule in, the possibility that the defect had been introduced at some stage of the manufacturing process. The plaintiff's expert noticed what he thought was a preexisting crack in one of the fragments, and he speculated [**10] that a similar crack might have caused the fracture that shattered the jar. This, the district judge ruled, was not enough.

But if the probability that the defect which caused the accident arose after Karen Godfrey bought the jar of Planters peanuts is very small--and on the present state of the record we are required to assume that it is--then the probability that the defect was introduced *by one of the defendants* is very high. In principle there is a third possibility--mishandling by a carrier hired to transport the jar from Brockway to Planters or Planters to K-Mart--but we do not even know whether a carrier was used for any of these shipments, rather than the shipper's own trucks. Apart from that possibility, which has not been mentioned in the litigation so far and which in any event, as we are about to

see, would not affect K-Mart's liability, the jar was in the control of one of the defendants at all times until Karen Godfrey bought it.

Which one? It does not matter. The strict-liability element in modern products liability law comes precisely from the fact that a seller subject to that law is liable for defects in his product even if those defects were introduced, without [**11] the slightest fault of his own for failing to discover them, at some anterior stage of production. *Crowe v. Public Building Comm'n, 74 Ill. 2d 10, 383 N.E.2d 951, 952, 23 Ill. Dec. 80 (Ill. 1978)*; *Thomas v. Kaiser Agricultural Chemicals, 81 Ill. 2d 206, 407 N.E.2d 32, 36, 40 Ill. Dec. 801 (Ill. 1980)*; *Flaminio v. Honda Motor Co., 733 F.2d 463, 467 (7th Cir. 1984)*. So the fact that K-Mart sold a defective jar of peanuts to Karen Godfrey would be conclusive of K-Mart's liability, and since it is a large and solvent firm there would be no need for the plaintiff to look further for a tortfeasor. This point seems to have been more or less conceded by the defendants in the district court--the thrust of their defense was that the plaintiff had failed to show that the defect had been caused by *any* of them--though this leaves us mystified as to why the plaintiff bothered to name additional defendants.

And even if, as we doubt, the plaintiff took on the unnecessary burden of proving that it is more likely than not that a given defendant introduced the defect into the jar, he might be able to avail himself of the rule of *Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (Cal. 1944)*, [**12] and force each defendant to produce some exculpatory evidence. *Hessel v. O'Hearn, 977 F.2d 299, 305 (7th Cir. 1992)*. In fact K-Mart put in some evidence on the precautions it takes to protect containers of food from being damaged by jarring or bumping. A jury convinced by such evidence, impressed by the sturdiness of jars of peanuts (familiar to every consumer), and perhaps perplexed at how the process of filling a jar with peanuts

and vacuum-sealing it could render a normal jar vulnerable to collapsing at a touch, might decide that the probability that the defect had been introduced by either K-Mart or Planters was remote. So what? Evidence of K-Mart's care in handling peanut jars would be relevant only to whether the defect was introduced after sale; if it was introduced at any [*213] time before sale--if the jar was defective when K-Mart sold it--the source of the defect would be irrelevant to K-Mart's liability. In exactly the same way, Planters' liability would be unaffected by the fact, if it is a fact, that the defect was due to Brockway rather than to itself. To repeat an earlier and fundamental point, a seller who is subject to strict products liability [**13] is responsible for the consequences of selling a defective product even if the defect was introduced without any fault on his part by his supplier or by his supplier's supplier.

In reaching the result she did the district judge relied heavily on *Erzrumly v. Dominick's Finer Foods, Inc., 50 Ill. App. 3d 359, 365 N.E.2d 684, 8 Ill. Dec. 446 (Ill. App. 1977)*. A six-year-old was injured by a Coke bottle that she was carrying up a flight of stairs to her family's apartment shortly after its purchase. The court held that the plaintiff had failed to eliminate the possibility that the Coke bottle had failed because of something that had happened after it left the store. If, as the defendants in our case represent, the bottle in *Erzrumly* "exploded," that case would be very close to this one. A nondefective Coke bottle is unlikely to explode without very rough handling. The contents are under pressure, it is true, but the glass is strengthened accordingly. But it was unclear in *Erzrumly* what had happened to the bottle. There was testimony that the accident had been preceded by the sound of a bottle exploding but there was other evidence that the bottle may simply have been dropped and have [**14] broken--the latter being the sort of accident that happens commonly after purchase. Although the opinion contains some broad language helpful to the defendants in the present case, the

holding was simply that murky facts required the plaintiff to make a greater effort to determine whether the product was defective when it left the store. Here we know to a virtual certainty (always assuming that the plaintiff's evidence is believed, which is a matter for the jury) that the accident was not due to mishandling after purchase but to a defect that had been introduced earlier.

Even the narrow holding of *Erzrumly* is probably wrong, in light of bottle and other container cases decided by Illinois courts both before and after, *Tweedy v. Wright Ford Sales, Inc., 64 Ill. 2d 570, 357 N.E.2d 449, 2 Ill. Dec. 282 (Ill. 1976)*; *Mabee v. Sutliff & Case Co., 404 Ill. 27, 88 N.E.2d 12 (Ill. 1949)*; *Fullreide v. Midstates Beverage Co., 70 Ill. App. 3d 758, 388 N.E.2d 1070, 27 Ill. Dec. 107 (Ill. App. 1979)*; *Roper v. Dad's Root Beer Co., 336 Ill. App. 91, 82 N.E.2d 815 (Ill. App. 1948)*, as well as by courts of other states. E.g., *Van Duzer v. Shoshone Coca Cola Bottling Co., 103 Nev. 383, 741 P.2d 811 (Nev. 1987)* [**15] (per curiam); *Virgil v. "Kash N' Karry" Service Corp., 61 Md. App. 23, 484 A.2d 652, 657 (Md. App. 1984)*; *Renninger v. Foremost Dairies, Inc., 171 So. 2d 602, 604 (Fla. App. 1965)*. Right or wrong, *Erzrumly* is plainly contrary to *Fullreide;* and obviously when state courts of the same level reach opposite conclusions, a federal court in a diversity case is not bound to follow either.
REVERSED AND REMANDED.

¿Hasta qué punto informa el análisis económico del derecho las resoluciones judiciales del juez Posner?

CAUSALIDAD: ELEMENTO COMÚN DE LA RESPONSABILIDAD CIVIL

I. FACTUAL CAUSATION: BUT-FOR CAUSE

NEW YORK CENT. R. CO. v. GRIMSTAD No. 140
Circuit Court of Appeals, Second Circuit 264 F. 334
February 18, 1920

[*334] Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an action under the federal Employers' Liability Act (Comp. St. §§ 8657-8665) to recover damages for the death of Angell Grimstad, captain of the covered barge Grayton, owned by the defendant railroad company. The charge of negligence is failure to equip the barge with proper life-preservers and other necessary and proper appliances, for want of which the decedent, having fallen into the water, was drowned.

The barge was lying on the port side of the steamer Santa Clara, on the north side of Pier 2, Erie Basin, Brooklyn, loaded with sugar in transit from Havana to St. John, N. B. The tug Mary M, entering the slip between Piers 1 and 2, bumped against the barge. The decedent's wife, feeling the shock, came out from the cabin, looked on one side of the barge, and saw nothing, and then went across the deck to the other side, and discovered her husband in the water about 100 feet from the barge holding up his hands out of the water. He did not know how to swim. She immediately ran back [**2] into the cabin for a small line, and when she returned with it he had disappeared.

It is admitted that the decedent at the time was engaged in interstate [*335] commerce. The court left it to the jury to say whether the defendant was negligent in not equipping the barge with life-preservers and whether, if there had been a life-preserver on board, Grimstad would have been saved from drowning.

The jury found as a fact that the defendant was negligent in not equipping the barge with life-preservers. Life-preservers and life belts are intended to be put on the body of a person before getting into the water, and would have been of no use at all to the decedent. On the other hand, life buoys are intended to be thrown to a person when

in the water, and we will treat the charge in the complaint as covering life buoys.

Obviously the proximate cause of the decedent's death was his falling into the water, and in the absence of any testimony whatever on the point, we will assume that this happened without negligence on his part or on the part of the defendant. On the second question, whether a life buoy would have saved the decedent from drowning, we think the jury were left to [**3] pure conjecture and speculation. A jury might well conclude that a light near an open hatch or a rail on the side of a vessel's deck would have prevented a person's falling into the hatch or into the water, in the dark. But there is nothing whatever to show that the decedent was not drowned because he did not know how to swim, nor anything to show that, if there had been a life buoy on board, the decedent's wife would have got it in time, that is, sooner than she got the small line, or, if she had, that she would have thrown it so that her husband could have seized it, or, if she did, that he would have seized it, or that, if he did, it would have prevented him from drowning.

The court erred in denying the defendant's motion to dismiss the complaint at the end of the case.
Judgment reversed.

Más concretamente, imaginemos si la embarcación vendría equipada con una boya de salvamento, qué es más probable: ¿Grimstad igual se hubiera ahogado, o no hubiera perecido?

HELEN J. STOLESON, Plaintiff-Appellant, v. UNITED STATES OF AMERICA, Defendant-Appellee No. 82-1714 UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT 708 F.2d 1217 April 15, 1983, Argued May 20, 1983, Decided

[*1219] POSNER, Circuit Judge.

This appeal brings before us for the second time the celebrated case of Helen Stoleson and her "dynamite heart." See, e.g., *Time*, July 12, 1971, at 41. The issues on appeal this time concern the causal relationship, if any, between the defendant's now conceded negligence and the symptoms that Mrs. Stoleson has continued to experience long after the elimination of their organic cause.

Mrs. Stoleson, now 64 years old, began working in a federal munitions plant in Wisconsin in 1967 as an employee of the contractor operating the plant. Within a few months she began experiencing the characteristic chest pains of coronary artery disease -- but, oddly, only on weekends. One weekend in [**2] February 1968 the chest pains were so severe that she was hospitalized. She was diagnosed as having suffered either an actual heart attack (myocardial infarction) or an episode of coronary insufficiency (meaning that the coronary arteries were not supplying the heart with an adequate supply of blood). She returned to work shortly after this incident but continued having weekend chest pains with increasing frequency till she left the plant in 1971.

Her work at the plant required her to handle nitroglycerin and she became convinced that this was causing her heart problem. But the doctors she consulted rejected her theory until she came under the care of a Dr. Lange in 1971. He was convinced by her experience and that of several of her coworkers, who had similar symptoms, that [*1220] excessive exposure to nitroglycerin had caused their coronary arteries to expand -- much as nitroglycerin tablets given for the treatment of coronary artery disease do -- and that the sudden withdrawal of nitroglycerin on the weekends had caused the arteries to contract violently. See Lange, et al., *Nonatheromatous Ischemic Heart Disease Following Withdrawal from Chronic Industrial Nitroglycerin* [**3] *Exposure* , 46 Circulation 666 (1972).

Mrs. Stoleson brought suit under the Federal Tort Claims Act, *28 U.S.C. §§ 1346(b), 2671 et seq.*, in 1974, alleging that the government had been negligent in failing to protect the workers at the plant from excessive exposure to nitroglycerin. The district judge dismissed the suit at the close of the plaintiff's evidence, on the basis of the statute of limitations, but this court reversed, *Stoleson v. United States, 629 F.2d 1265 (7th Cir. 1980)*, and the case was retried in 1981. At the conclusion of the retrial the district judge found that the government had been negligent and that its negligence had caused Mrs. Stoleson's heart disease, and he awarded her $ 53,000 in damages. But he declined to award any damages for her psychosomatic illness after she left the plant, and she appeals.

Although Mrs. Stoleson's heart disease should have abated completely soon after she left the plant, her health at the time of the second trial was poor. She had chest pains, though not so acute as when she was working at the plant and not more frequent on weekends than at other times; she was often dizzy and [**4] short of breath, and easily fatigued; she had bouts of high blood pressure, and coughing spells leading to vomiting; she was extremely obese, having gained 100 pounds in 10 years; and she was unshakably convinced that her health was ruined and that she could no longer work full time. These complaints have no organic basis, unless it is her obesity. Her heart disease from nitroglycerin exposure did no medically significant lasting damage. Dr. Goldbloom, the psychiatrist who testified for her, diagnosed her condition as "hypochondriacal neurosis" -- what is more commonly referred to just as hypochondria -- that had been induced by her heart disease at the plant, particularly the possible heart attack in February 1968, and that had been aggravated both by Dr. Lange's having incorrectly advised her that she had serious, permanent heart damage and by this lawsuit. (Lange did not testify; he died before the first trial.) Dr.

Roberts, the psychiatrist who testified for the government, testified that Mrs. Stoleson was indeed a hypochondriac but had probably been one all her adult life.

The district judge found that "the matter of the hypochondriacal neurosis, the presence of which today [**5] is agreed upon by both experts, is difficult to resolve. Dr. Roberts seemed to me to be on shaky ground when, based upon his 1981 observations and the other information available to him, he undertook to testify that this neurosis existed prior to February, 1968. On the other hand, while intending no disrespect, Dr. Goldbloom seemed to me to be scrambling when he undertook to elevate the 1968 heart episode itself to the level of a substantial factor in causing the neurosis. I do not believe plaintiff met the burden of proof in this latter respect." The judge found that if Mrs. Stoleson had proved a causal linkage between the defendant's negligence and her neurotic symptoms, she would have been entitled to additional damages for lost earnings and for pain and suffering (physical and emotional) of $ 238,000. A predicate for this finding was the judge's view that these symptoms had begun no earlier than November 1975, when the first trial had ended. Mrs. Stoleson disagrees with this predicate but does not challenge the adequacy of the $ 238,000 damage figure.

The district judge's finding on causation presents an interpretive problem. It can be read to mean that he thought the important [**6] thing was whether Mrs. Stoleson's possible heart attack in February 1968, which was due to the government's negligence in failing to protect her from excessive exposure to nitroglycerin, had caused her hypochondria, and that if it had [*1221] not she could not recover damages for her hypochondriacal illness. So read, the finding would be inconsistent with the "thin skull" or "eggshell skull" or "you take your victim as you find him" rule of the common law. The substantive law of Wisconsin is conceded to govern this case, see *28 U.S.C. § 1346(b)*; and, by an odd coincidence, what has come to be the

leading case announcing the eggshell skull rule is a Wisconsin case, *Vosburg v. Putney, 80 Wis. 523, 50 N.W. 403 (1891),* though it is not the earliest eggshell skull case even in Wisconsin, see *Stewart v. City of Ripon, 38 Wis. 584, 590-91 (1875).* In *Vosburg,* one school boy kicked another in the shin, in circumstances that made the kicking a battery. The kick would not have seriously injured a normal person, but the victim had an infection in his tibia and the kick aggravated the infection, causing serious injury. The [**7] court held the defendant liable for the entire damages. Although we cannot find any modern eggshell skull cases from Wisconsin, the rule is so well established in tort law (see, e.g., Prosser, Handbook of the Law of Torts 261 (4th ed. 1971)) that the government would have a heavy burden of persuading us that Wisconsin has abandoned it, and as a matter of fact has made no effort to persuade us of this.

It would therefore make no difference to the extent of the government's liability that a normal person in Mrs. Stoleson's situation would have recovered her health completely once she found out that her heart disease had been caused by an environmental factor that had been eliminated before it could do any permanent damage. That Mrs. Stoleson's vulnerability was psychological, rather than, as in *Vosburg,* physical, is irrelevant. *Thomas v. United States, 327 F.2d 379, 381 (7th Cir. 1964)*; *Mizell v. State, Through Louisiana Dept. of Highways, 398 So. 2d 1136, 1143 (La. App. 1980).* And though a distinct principle of Wisconsin law bars recovery of damages where the only consequence of the defendant's negligence is emotional distress, *McMahon v. Bergeson, 9 Wis. 2d 256, 272, 101 N.W.2d 63, 71 (1960)*; [**8] *Ver Hagen v. Gibbons, 47 Wis. 2d 220, 227, 177 N.W.2d 83, 87 (1970),* with an immaterial exception discussed in *La Fleur v. Mosher, 109 Wis. 2d 112, 325 N.W.2d 314 (1982),* this principle is inapplicable here, both because Mrs. Stoleson's

hypochondria is alleged to have been the result of the physical injury she sustained from the nitroglycerin exposure and because the hypochondria produced physical symptoms.

Even if the February 1968 episode did not trigger Mrs. Stoleson's hypochondriacal symptoms, the government might still be liable if the symptoms were triggered by Dr. Lange's having alarmed her, whether or not he committed professional malpractice in exaggerating the extent of her organic impairment. A principle distinct from that of *Vosburg* but equally the law in Wisconsin makes a tortfeasor liable for aggravation of the injury he inflicted, even aggravation brought about by the treatment -- even the negligent treatment -- of the injury by a third party. See *Heims v. Hanke, 5 Wis. 2d 465, 471, 93 N.W.2d 455, 459 (1958)*; *Butzow v. Wausau Memorial Hospital, 51 Wis. 2d 281, 187 N.W.2d 349 (1971)*. If a pedestrian [**9] who has been run down by a car is taken to a hospital and because of the hospital's negligence incurs greater medical expenses or suffers more pain and suffering than he would have if the hospital had not been negligent, he can collect his incremental as well as his original damages from the person who ran him down, since they would have been avoided if that person had used due care. So here, if the government had been careful Mrs. Stoleson would have had no occasion to consult Dr. Lange and might therefore not have become a hypochondriac.

If we were persuaded that the district judge had misapplied any of these principles the logical course would be to remand the case for new findings, but we think an alternative reading of his findings on causation is not only possible but more plausible in light of the evidence: that he was unpersuaded that Mrs. Stoleson had established causation as a matter not of law but of fact. On this reading, when he referred to Mrs. [*1222] Stoleson's "hypochondriacal neurosis" he meant her symptoms, not the underlying psychological condition on which a

traumatic event might act to produce symptoms of ill health. This usage would not be surprising. [**10] Hypochondria is usually defined in terms of its symptoms rather than its underlying psychological structure, which anyway is not well understood. "Hypochondriasis is a term used to refer to a psychoneurotic pattern of overconcern and focusing of interest on sickness or bodily symptoms. Hypochondriacal individuals are preoccupied with the functioning of their bodies and tend to interpret even minimal alterations or disturbances as ominous portents of deadly diseases or other impending disaster. Their attention may be focused at various times on breathing, bowel movements, the color of their tongues, or a host of minor aches, pains, and other sensations which in fact are within the range of normal. The essential element is a deep conviction that illness exists, which no amount of reassurance can dispel." 4 Gray, Attorneys' Textbook of Medicine P178,14 at p. 178-9 (3d ed. 1982). "*Hypochondriasis*, or hypochondria, is an exaggerated concern for one's health that is not based on any physical illness, although the patient feels ill." The Harvard Guide to Modern Psychiatry 35 (Nicholi ed. 1978). "It is a chronic disorder characterized by a persistent preoccupation with the functions [**11] of one's body and intractable fears that one is suffering from physical illness." *Id. at 195*. "Little is known about the cause, nature, or effective treatment of hypochondria." See *id. at 195-96*.

Mrs. Stoleson's counsel acknowledged at oral argument that it would be appropriate to require a plaintiff to prove by clear and convincing evidence that the defendant's negligence had caused hypochondriacal symptoms. We treat this acknowledgment not as a binding concession upon which to base decision of this appeal but as a recognition of the dangers of allowing proof of hypochondria to magnify the damages in personal injury suits. Since the physical symptoms of hypochondria have

by definition no organic basis, and since so "little is known about the cause, nature, or effective treatment of hypochondria," the condition is impossible to diagnose with confidence. There is no way of verifying Mrs. Stoleson's claim that she has chest pains, or of confidently attributing them to hypochondria rather than to an undiagnosed physical condition. The claim invites the trier of fact to speculate. Moreover, if a person has a tendency to transform mental distress into physical symptoms, awarding [**12] damages for hypochondria too freely might aggravate those symptoms and thus make litigation itself a source of illness. This danger is underscored by Dr. Goldbloom's testimony ascribing Mrs. Stoleson's hypochondria in part to "the difficulties that she was encountering pursuing a lawsuit [this lawsuit] against the United States," remarking her "involvement of too much energy in these legal proceedings," and acknowledging that "winning the lawsuit . . . in the sense of feeling that her position has been vindicated by a higher authority" could lead to a big improvement in her health. Dr. Roberts thought that both Dr. Lange and Mrs. Stoleson's lawyer had aggravated her physical symptoms by encouraging her to sue the government; Roberts accused Lange of "encouraging her belief in her disability."

Without going so far as to hold that liability for hypochondria must be proved by clear and convincing evidence, we advise our district judges to approach such claims with the healthy skepticism necessary to prevent excessive and unfounded damage awards, bearing in mind that there is not much difficulty in finding a medical expert witness to testify to virtually any theory of medical causation [**13] short of the fantastic. It is only a partial reply that there is no right to jury trial in Federal Tort Claims Act suits unless individual defendants are joined and demand it. 9 Wright & Miller, Federal Practice and Procedure § 2337 at p. 130 (1971).

Evaluated in light of these general considerations, the finding by the able and experienced district judge that Mrs. Stoleson failed to prove a causal linkage between [*1223] the government's negligence and her present ill health must be affirmed. The testimony of both experts was speculative, neither having examined her before 1980 -- nine years after she left the munitions plant. Dr. Goldbloom's testimony was also inconsistent. He began by saying, "I think that the whole thing started with a heart attack that she suffered in 1968," but then he said that the onset of her hypochondriacal symptoms "probably began sometime after Dr. Lange's death" in 1972. Dr. Goldbloom's uncertainty about the date of the onset allowed the district court to conclude that Mrs. Stoleson had not proved that it preceded the end of the first trial in November 1975. Hypochondria had not been so much as mentioned at the first trial, though the trial [**14] had taken place four years after she left the plant and she had put in her entire case on damages as well as liability before the suit was dismissed.

With the date of onset pushed forward to November 1975 or later it became a matter of conjecture whether Mrs. Stoleson's hypochondriacal illness really was the delayed consequence of a "dynamite heart" problem that ended in 1971 or whether it was the result of other stress factors, including the litigation itself, which Dr. Goldbloom testified had contributed to her continuing ill health. It would be strange if stress induced by litigation could be attributed in law to the tortfeasor. An alleged tortfeasor should have the right to defend himself in court without thereby multiplying his damages more than five-fold -- the damage multiple if Mrs. Stoleson prevails on this appeal.

There are other grounds for doubting whether the causal connection between the government's negligence and Mrs. Stoleson's present condition was proved. Until the second trial Dr. Goldbloom was diagnosing that condition not as hypochondria but as depression and paranoia. Mrs.

Stoleson has dropped the contention that her depression and paranoia were caused or [**15] aggravated by the government's negligence but it is admitted that she does suffer from depression, paranoia, and delusions (both doctors mentioned her belief that the government had caused or at least hastened Dr. Lange's death from cancer to punish him for exposing the government's negligence), and all of these could be factors in her bad health. Furthermore, Dr. Roberts testified without contradiction that the only one of Mrs. Stoleson's symptoms that is unequivocally a cardiac symptom -- a pain in the left side of her chest that radiates down her left arm -- she herself attributes not to heart disease but to some undefined, and apparently nonexistent, lung ailment. Dr. Roberts thought many of her symptoms might be due to her obesity, which he refused to ascribe to her hypochondria, and to her poor mental health, which had worsened after and he thought because of her mother's death in 1975. He also testified that hypochondria is a reaction to stress and that he suspected that Mrs. Stoleson had reacted to stress hypochondriacally throughout her adult life. Because Dr. Roberts had no evidence that Mrs. Stoleson had thought herself in ill health before 1967 the district court thought [**16] him on shaky ground in testifying that her hypochondria had preceded her exposure to nitroglycerin. But the burden of proof was on her, and Dr. Roberts' testimony, shaky as it may have been in some respects, went far to rebut an inference that her hypochondria had been caused by nitroglycerin.

There is another reason for concluding that Mrs. Stoleson failed to carry her burden of proof. A companion principle to the eggshell skull rule, discussed in our recent decision in *Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963 at 973 (7th Cir. 1983)*, is that in calculating damages in an eggshell skull case the trier of fact must make an adjustment for the possibility that the preexisting condition would have resulted in harm to the plaintiff even if there had been no tort. The necessity for such an

adjustment was argued in *Vosburg* although rejected on the facts. But in *Abernathy*, where the victim of a tortious back injury already had a back disease that might eventually have produced symptoms similar to those produced by the tortious [*1224] injury, we held that this possibility had to be considered in calculating the victim's damages from the tort. We [**17] were interpreting Indiana law in that case but Wisconsin law is to the same effect. See *Helleckson v. Loiselle, 37 Wis. 2d 423, 430, 155 N.W.2d 45, 49 (1967).* If we assume, as the judge and both medical witnesses did, that Mrs. Stoleson has long been prone to exaggerate her health problems, it is likely that sooner or later some symptom unrelated to the defendant's misconduct would have triggered the neurosis and led to psychosomatic symptoms similar to those she is suffering from. Few people go through middle age without some health problems and a good deal of other stress. If Mrs. Stoleson was so vulnerable that a heart ailment from which she recovered completely, in circumstances that gave no rational basis for thinking it would recur, nevertheless caused the permanent and complete disability of which she complains, the chances are that some lesser trauma, highly likely for a woman of her age, would have caused some lesser disability; and the expected costs of this nontortious injury would have to be subtracted from the damages that she claims. She made no attempt to make this calculation. We do not question the district court's finding that the damages from [**18] her neurotic condition amount to $ 238,000, but not all of this amount can be attributed to the defendant's misconduct, and it was her burden to show what part could be.

Mrs. Stoleson's claim for damages from hypochondria may also be barred on grounds of remoteness of damage. Even when it is reasonably certain that a tort made a particular adverse consequence more likely and that the consequence in fact came to pass -- even if, in short, there

is no question of cause and effect -- the tortfeasor may be excused from liability under Wisconsin law because "the claim of damages . . . is so remote and so out of proportion to the culpability of the tortfeasor that, as a matter of public policy, [the court] conclude[s] that the defendants are not to be held liable for this element of damages." *Howard v. Mt. Sinai Hospital, Inc., 63 Wis. 2d 515, 519, 217 N.W.2d 383, 385*, reh. denied, 63 Wis. 2d 523a, *219 N.W.2d 576 (1974)*. In *Howard* an intern negligently allowed a catheter that he was inserting into the plaintiff's shoulder to break off, and two pieces remained in the plaintiff's body. The plaintiff claimed that as a result of the incident she developed [**19] an irrational fear of getting cancer. Though it was undisputed that the intern had been negligent, that the plaintiff had developed the fear of which she was complaining, and that the intern's negligence was a substantial factor causing the fear, the Wisconsin Supreme Court held that she could not recover damages for the fear. The decision cannot be explained on the basis of the principle noted earlier that in Wisconsin the negligent infliction of purely emotional injuries is not actionable; the plaintiff in *Howard* was suing for the physical as well as emotional consequences of the breaking off of the catheter in her arm. The decision seems to stand for an independent principle limiting the scope of liability; and since its facts are not unlike those of the present case we are surprised that the government did not cite *Howard* to us. Although there is no impropriety in relying on a ground not argued by the parties to affirm, the vagueness of the test employed by the Wisconsin Supreme Court in *Howard* makes it difficult to predict how that court would decide the present case. *Howard* merely gives us some additional confidence that we are correct in concluding that [**20] the judgment appealed from must be

AFFIRMED.

CHARLES A. SUMMERS, Respondent, v. HAROLD W. TICE et al., Appellants L. A. Nos. 20650, 20651 Supreme

Court of California 33 Cal. 2d 80; 199 P.2d 1 November 17, 1948

[*82] [**1] CARTER Each of the two defendants appeals from a judgment against them in an action for personal injuries. Pursuant to stipulation the appeals have been consolidated.

Plaintiff's action was against both defendants for an injury to his right eye and [**2] face as the result of being struck by bird shot discharged from a shotgun. The case was tried by the court without a jury and the court found that on November 20, 1945, plaintiff and the two defendants were hunting quail on the open range. Each of the defendants was armed with a 12 gauge shotgun loaded with shells containing 7 1/2 size shot. Prior to going hunting plaintiff discussed the hunting procedure with defendants, indicating that they were to exercise care when shooting and to "keep in line." In the course of hunting plaintiff proceeded up a hill, thus placing the hunters at the points of a triangle. The view of defendants with reference to plaintiff was unobstructed and they knew his location. Defendant Tice flushed a quail which rose in flight to a 10-foot elevation and flew between plaintiff and defendants. Both defendants shot at the quail, shooting in plaintiff's direction. At that time defendants were 75 yards from plaintiff. One shot struck plaintiff in his eye and another in his upper lip. Finally it was found by the court that as [*83] the direct result of the shooting by defendants the shots struck plaintiff as above mentioned and that defendants were negligent in so shooting and plaintiff was not contributorily negligent.

(1) First, on the subject of negligence, defendant Simonson contends that the evidence is insufficient to sustain the finding on that score, but he does not point out wherein it is lacking. There is evidence that both defendants, at about the same time or one immediately after

the other, shot at a quail and in so doing shot toward plaintiff who was uphill from them, and that they knew his location. That is sufficient from which the trial court could conclude that they acted with respect to plaintiff other than as persons of ordinary prudence. The issue was one of fact for the trial court. (See, *Rudd v. Byrnes, 156 Cal. 636 [105 P. 957, 20 Ann.Cas. 124, 26 L.R.A.N.S. 134]*.)

Defendant Tice states in his opening brief, "we have decided not to argue the insufficiency of negligence on the part of defendant Tice." It is true he states in his answer to plaintiff's petition for a hearing in this court that he did not concede this point but he does not argue it. Nothing more need be said on the subject.

(2) Defendant Simonson urges that plaintiff was guilty of contributory negligence and assumed the risk as a matter of law. He cites no authority for the proposition that by going on a hunting party the various hunters assume the risk of negligence on the part of their companions. Such a tenet is not reasonable. (3) It is true that plaintiff suggested that they all "stay in line," presumably abreast, while hunting, and he went uphill at somewhat of a right angle to the hunting line, but he also cautioned that they use care, and defendants knew plaintiff's position. We hold, therefore, that the trial court was justified in finding that he did not assume the risk or act other than as a person of ordinary prudence under the circumstances. (See, *Anthony v. Hobbie, 25 Cal.2d 814, 818 [155 P.2d 826]*; *Rudd v. Byrnes, supra.*) None of the cases cited by Simonson are in point.

The problem presented in this case is whether the judgment against both defendants may stand. It is argued by defendants that they are not joint tort feasors, and thus jointly and severally liable, as they were not acting in concert, and that there is not sufficient evidence to show which defendant was guilty of the negligence which caused the injuries -- the shooting by Tice or that by Simonson.

Tice argues that there is [*84] evidence to show that the shot which struck plaintiff came from Simonson's gun because of admissions allegedly made by him to third persons and no evidence that they came from his gun. Further in connection with the latter contention, the court failed to find on plaintiff's allegation in his complaint that he did not know which one was at fault -- did not find which defendant was guilty of the negligence which caused the injuries to plaintiff.

(4) Considering the last argument first, we believe it is clear that the court sufficiently found on the issue that defendants were jointly liable and that thus the negligence of both was the cause of the injury or to that legal effect. It found that both defendants were negligent and "That as a direct and proximate result of the shots fired by *defendants, and each of them*, a [**3] birdshot pellet was caused to and did lodge in plaintiff's right eye and that another birdshot pellet was caused to and did lodge in plaintiff's upper lip." In so doing the court evidently did not give credence to the admissions of Simonson to third persons that he fired the shots, which it was justified in doing. It thus determined that the negligence of both defendants was the legal cause of the injury -- or that both were responsible. Implicit in such finding is the assumption that the court was unable to ascertain whether the shots were from the gun of one defendant or the other or one shot from each of them. The one shot that entered plaintiff's eye was the major factor in assessing damages and that shot could not have come from the gun of both defendants. It was from one or the other only.

(5) It has been held that where a group of persons are on a hunting party, or otherwise engaged in the use of firearms, and two of them are negligent in firing in the direction of a third person who is injured thereby, both of those so firing are liable for the injury suffered by the third person, although the negligence of only one of them could

have caused the injury. (*Moore v. Foster, 182 Miss. 15 [180 So. 73]*; *Oliver v. Miles, 144 Miss. 852 [110 So. 666*; 50 A.L.R. 357]; *Reyher v. Mayne, 90 Colo. 586 [10 P.2d 1109]*; *Benson v. Ross, 143 Mich. 452 [106 N.W. 1120, 114 Am.St.Rep. 675]*.) The same rule has been applied in criminal cases (*State v. Newberg, 129 Ore. 564 [278 P. 568, 63 A.L.R. 1225]*), and both drivers have been held liable for the negligence of one where they engaged in a racing contest causing an injury to a third person (*Saisa v. Lilja, 76 F.2d 380*). These cases speak of the action of defendants as being in concert as the ground [*85] of decision, yet it would seem they are straining that concept and the more reasonable basis appears in *Oliver v. Miles, supra*. There two persons were hunting together. Both shot at some partridges and in so doing shot across the highway injuring plaintiff who was travelling on it. The court stated they were acting in concert and thus both were liable. The court then stated: "We think that . . . each is liable for the resulting injury to the boy, although no one can say definitely who actually shot him. *To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence*." [Emphasis added.] (P. 668 [110 So.].) It is said in the Restatement: "For harm resulting to a third person from the tortious conduct of another, a person is liable if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." (Rest., Torts, § 876(b) (c).) Under subsection (b) the example is given: "A and B are members of a hunting party. Each of them in the presence of the other shoots across a public road at an animal, this being negligent as to persons on the road. A hits the animal. B's bullet strikes C, a traveler on the road. A is liable to C." (Rest., Torts, § 876 (b), com., illus. 3.) An illustration given under subsection (c) is the same as above

except the factor of both defendants shooting is missing and joint liability is not imposed. It is further said that: "If two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about harm to another, the actor's negligence may be held by the jury to be a substantial factor in bringing it about." (Rest., Torts, § 432.) Dean Wigmore has this to say: "When two or more persons by their acts are possibly the sole cause of a harm, or when two or more acts of the same person are possibly the sole cause, and the plaintiff has introduced evidence that the one of the two persons, or the one of the same person's two acts, is culpable, then the defendant has the burden of proving that the other person, or his other act, was the sole cause of the harm. (b) . . . The real reason for the rule that each joint tortfeasor is responsible for the whole damage is the practical unfairness of denying the injured person redress simply because he cannot prove how [*86] much damage each did, when it is certain that between them they did all; let them be the [**4] ones to apportion it among themselves. Since, then, the difficulty of proof is the reason, the rule should apply whenever the harm has plural causes, and not merely when they acted in conscious concert. . . ." (Wigmore, Select Cases on the Law of Torts, § 153.) Similarly Professor Carpenter has said: "[Suppose] the case where A and B independently shoot at C and but one bullet touches C's body. In such case, such proof as is ordinarily required that either A or B shot C, of course fails. It is suggested that there should be a relaxation of the proof required of the plaintiff . . . where the injury occurs as the result of one where more than one independent force is operating, and it is impossible to determine that the force set in operation by defendant did not in fact constitute a cause of the damage, and where it may have caused the damage, but the plaintiff is unable to establish that it was a cause." (20 Cal.L.Rev. 406.)

(6) When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers -- both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury. This reasoning has recently found favor in this court. In a quite analogous situation this court held that a patient injured while unconscious on an operating table in a hospital could hold all or any of the persons who had any connection with the operation even though he could not select the particular acts by the particular person which led to his disability. (*Ybarra v. Spangard, 25 Cal.2d 486 [154 P.2d 687, 162 A.L.R. 1258]*.) There the court was considering whether the patient could avail himself of res ipsa loquitur, rather than where the burden of proof lay, yet the effect of the decision is that plaintiff has made out a case when he has produced evidence which gives rise to an inference of negligence which was the proximate cause of the injury. It is up to [*87] defendants to explain the cause of the injury. It was there said: "If the doctrine is to continue to serve a useful purpose, we should not forget that 'the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.'" (P. 490.) Similarly in the instant case plaintiff is not able to establish which of defendants caused his injury.

The foregoing discussion disposes of the authorities cited by defendants such as *Kraft v. Smith, 24 Cal.2d 124 [148 P.2d 23]*, and *Hernandez v. Southern California Gas Co., 213 Cal. 384 [2 P.2d 360]*, stating the general rule that one defendant is not liable for the independent tort of the other defendant, or that ordinarily the plaintiff must show a causal connection between the negligence and the injury. There was an entire lack of such connection in the Hernandez case and there were not several negligent defendants, one of whom must have caused the injury.

(7) Defendants rely upon *Christensen v. Los Angeles Electrical Supply Co., 112 Cal.App. 629 [297 P. 614]*, holding that a defendant is not liable where he negligently knocks down with his car a pedestrian and a third person then ran over the prostrate person. That involves the question of intervening cause which we do not have here. Moreover it is out of harmony with the current rule on that subject and was properly questioned in *Hill v. Peres, 136 Cal.App. 132 [28 P.2d 946]* (hearing in this Court denied), and must be deemed disapproved. (See, *Mosley v. Arden Farms Co., 26 Cal. 2d 213 [157 P.2d 372, 158 A.L.R. 872]*; *Sawyer v. Southern California Gas Co., 206 Cal. 366 [274 P. 544]*; 2 Cal.Jur. 10-Yr. Supp. Automobiles, § 349; 19 Cal.Jur. 570-572.)

[**5] (8) Cases are cited for the proposition that where two or more tort feasors acting independently of each other cause an injury to plaintiff, they are not joint tort feasors and plaintiff must establish the portion of the damage caused by each, even though it is impossible to prove the portion of the injury caused by each. (See, *Slater v. Pacific American Oil Co., 212 Cal. 648 [300 P. 31]*; *Miller v. Highland Ditch Co., 87 Cal. 430 [25 P. 550, 22 Am.St.Rep. 254]*; *People v. Gold Run D. & M. Co., 66 Cal. 138 [4 P. 1152, 56 Am.Rep. 80]*; *Wade v. Thorsen, 5 Cal.App.2d 706 [43 P.2d 592]*; *California O. Co. v. Riverside P. C. Co., 50 Cal.App. 522 [195 P. 694]*; [*88] *City of Oakland v.*

Pacific Gas & E. Co., 47 Cal.App.2d 444 [118 P.2d 328].) In view of the foregoing discussion it is apparent that defendants in cases like the present one may be treated as liable on the same basis as joint tort feasors, and hence the last-cited cases are distinguishable inasmuch as they involve independent tort feasors.

(9) In addition to that, however, it should be pointed out that the same reasons of policy and justice shift the burden to each of defendants to absolve himself if he can -- relieving the wronged person of the duty of apportioning the injury to a particular defendant, apply here where we are concerned with whether plaintiff is required to supply evidence for the apportionment of damages. If defendants are independent tort feasors and thus each liable for the damage caused by him alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of his right to redress. The wrongdoers should be left to work out between themselves any apportionment. (See, *Colonial Ins. Co., v. Industrial Acc. Com., 29 Cal.2d 79 [172 P.2d 884]*.) Some of the cited cases refer to the difficulty of apportioning the burden of damages between the independent tort feasors, and say that where factually a correct division cannot be made, the trier of fact may make it the best it can, which would be more or less a guess, stressing the factor that the wrongdoers are not in a position to complain of uncertainty. (*California O. Co. v. Riverside P. C. Co., supra.*)

(10) It is urged that plaintiff now has changed the theory of his case in claiming a concert of action; that he did not plead or prove such concert. From what has been said it is clear that there has been no change in theory. The joint liability, as well as the lack of knowledge as to which defendant was liable, was pleaded and the proof developed the case under either theory. We have seen that for the reasons of policy discussed herein, the case is based upon the legal proposition that, under the circumstances here presented, each defendant is liable for the whole damage

whether they are deemed to be acting in concert or independently.
The judgment is affirmed.

¿Hasta qué punto informa el análisis económico del derecho las resoluciones judiciales del juez Posner?

KINGSTON, Respondent, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant. SUPREME COURT OF WISCONSIN 191 Wis. 610; 211 N.W. 913 December 9, 1926, Argued January 11, 1927, Decided

[**914] [*612] OWEN, J. The jury found that both fires were set by sparks emitted from locomotives on and over defendant's right of way. Appellant contends that there is no evidence to support the finding that either fire was so set. We have carefully examined the record and have come to the conclusion that the evidence does support the finding that the northeast fire was set by sparks emitted from a locomotive then being run on and over the right of way of defendant's main line. We conclude, however, that the evidence does not support the finding that the northwest fire was set by sparks [*613] emitted from defendant's locomotives or that the defendant had any connection with its origin. A review of the evidence to justify these conclusions would seem to serve no good purpose, and we content ourselves by a simple statement of the conclusions thus reached.

We therefore have this situation: The northeast fire was set by sparks emitted from defendant's locomotive. This fire, according to the finding of the jury, constituted a proximate cause of the destruction of plaintiff's property. This finding we find to be well supported by the evidence. We have the northwest fire, of unknown origin. This fire, according to the finding of the jury, also constituted a proximate cause of the destruction of the plaintiff's

property. This finding we also find to be well supported by the evidence. We have a union of these two fires 940 feet north of plaintiff's property, from which point the united fire bore down upon and destroyed the property. We therefore have two separate, independent, and distinct agencies, each of which constituted the proximate cause of plaintiff's damage, and either of which, in the absence of the other, would have accomplished such result.

It is settled in the law of negligence that any one of two or more joint tortfeasors, or one of two or more wrongdoers whose concurring acts of negligence result in injury, are each individually responsible for the entire damage resulting from their joint or concurrent acts of negligence. This rule also obtains "where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other, . . . because, whether the concurrence be intentional, actual, or constructive, each wrongdoer, in effect, adopts the conduct of his co-actor, and for the further reason that it is impossible to apportion the damage or to say that either perpetrated any distinct injury [*614] that can be separated from the whole. The whole loss must necessarily be considered and treated as an entirety." *Cook v. M., St. P. & S. S. M. R. Co., 98 Wis. 624 (74 N.W. 561)*, at p. 642. That case presented a situation very similar to this. One fire, originating by sparks emitted from a locomotive, united with another fire of unknown origin and consumed plaintiffs' property. There was nothing to indicate that the fire of unknown origin was not set by some human agency. The evidence in the case merely failed to identify the agency. In that case it was held that the railroad company which set one fire was not responsible for the damage committed by the united fires because the origin of the other fire was not identified. In that case a rule of law was announced, which is stated in the syllabus prepared by the writer of the opinion as follows:

"A fire started by defendant's negligence, after spreading one mile and a quarter to the northeast, near plaintiffs' property, met a fire having no responsible origin, coming from the northwest. After the union, fire swept on from the northwest to and into plaintiffs' property, causing its destruction. Either fire, if the other had not existed, would have reached the property and caused its destruction at the same time. *Held:*

"(1) That the rule of liability in case of joint wrongdoers does not apply.

"(2) That the independent fire from the northwest became a superseding cause, so that the destruction of the property could not, with reasonable certainty, be attributed in whole or in part to the fire having a responsible origin; that the chain of responsible causation was so broken by the fire from the northwest that the negligent fire, if it reached the property at all, was a remote and not the proximate cause of the loss."

Emphasis is placed upon the fact, especially in the opinion, that one fire had "no responsible origin." At other times in the opinion the fact is emphasized that it had no "known [*615] responsible origin." The plain inference from the entire opinion is that if both fires had been of responsible origin, or of known responsible origin, each wrongdoer would have been liable for the entire damage. The conclusion of the court exempting the railroad company from liability seems to be based upon the single fact that one fire had no responsible origin or no known responsible origin. It is difficult to determine just what weight was accorded to the fact that the origin of the fire was unknown. If the conclusion of the court was founded upon the assumption that the fire of unknown origin had no responsible origin, the conclusion announced may be sound and in harmony with well settled principles of negligence.

From our present consideration of the subject we are not disposed to criticise the doctrine [**915] which exempts from liability a wrongdoer who sets a fire which unites with a fire originating from natural causes, such as lightning, not attributable to any human agency, resulting in damage. It is also conceivable that a fire so set might unite with a fire of so much greater proportions, such as a raging forest fire, as to be enveloped or swallowed up by the greater holocaust, and its identity destroyed, so that the greater fire could be said to be an intervening or superseding cause. But we have no such situation here. These fires were of comparatively equal rank. If there was any difference in their magnitude or threatening aspect, the record indicates that the northeast fire was the larger fire and was really regarded as the menacing agency. At any rate there is no intimation or suggestion that the northeast fire was enveloped and swallowed up by the northwest fire. We will err on the side of the defendant if we regard the two fires as of equal rank.

According to well settled principles of negligence, it is undoubted that if the proof disclosed the origin of the northwest fire, even though its origin be attributed to a third person, [*616] the railroad company, as the originator of the northeast fire, would be liable for the entire damage. There is no reason to believe that the northwest fire originated from any other than human agency. It was a small fire. It had traveled over a limited area. It had been in existence but for a day. For a time it was thought to have been extinguished. It was not in the nature of a raging forest fire. The record discloses nothing of natural phenomena which could have given rise to the fire. It is morally certain that it was set by some human agency.

Now the question is whether the railroad company, which is found to have been responsible for the origin of the northeast fire, escapes liability because the origin of the northwest fire is not identified, although there is no reason to believe that it had any other than human origin. An

affirmative answer to that question would certainly make a wrongdoer a favorite of the law at the expense of an innocent sufferer. The injustice of such a doctrine sufficiently impeaches the logic upon which it is founded. Where one who has suffered damage by fire proves the origin of a fire and the course of that fire up to the point of the destruction of his property, one has certainly established liability on the part of the originator of the fire. Granting that the union of that fire with another of natural origin, or with another of much greater proportions, is available as a defense, the burden is on the defendant to show that by reason of such union with a fire of such character the fire set by him was not the proximate cause of the damage. No principle of justice requires that the plaintiff be placed under the burden of specifically identifying the origin of both fires in order to recover the damages for which either or both fires are responsible.

Speaking of the decision in the *Cook Case*, Thompson, in his work on Negligence, § 739, says:

"The conclusion is so clearly wrong as not to deserve discussion. It is just as though two wrongdoers, not acting in [*617] concert, or simultaneously, fire shots from different directions at the same person, each shot inflicting a mortal wound. Either wound being sufficient to cause death, it would be a childish casuistry that would engage in a debate as to which of the wrongdoers was innocent on the ground that the other was guilty."

His illustration does not exactly answer the reason which we conceive to underlie the decision in the *Cook Case*. It would exactly fit it, as we understand the *Cook Case*, if the one who was known to have fired one of the shots should be permitted to escape liability for death because he who fired the other shot had not been identified, although it was certain that the other shot had been fired by some other human being. We are not disposed to apply the

doctrine of the *Cook Case* to the instant situation. There being no attempt on the part of the defendant to prove that the northwest fire was due to an irresponsible origin, that is, an origin not attributable to a human being, and the evidence in the case affording no reason to believe that it had an origin not attributable to a human being, and it appearing that the northeast fire, for the origin of which the defendant is responsible, was a proximate cause of plaintiff's loss, the defendant is responsible for the entire amount of that loss. While under some circumstances a wrongdoer is not responsible for damage which would have occurred in the absence of his wrongful act, even though such wrongful act was a proximate cause of the accident, that doctrine does not obtain "where two causes, each attributable to the negligence of a responsible person, concur in producing an injury to another, either of which causes would produce it regardless of the other." This is because "it is impossible to apportion the damage or to say that either perpetrated any distinct injury that can be separated from the whole," and to permit each of two wrongdoers to plead the wrong of the other as a defense to his own wrongdoing would permit both [*618] wrongdoers to escape and penalize the innocent party who has been damaged by their wrongful acts.

The fact that the northeast fire was set by the railroad company, which fire was a proximate cause of plaintiff's damage, is sufficient to affirm the judgment. This conclusion renders it unnecessary to consider other grounds of liability stressed in respondent's brief.

By the Court.--Judgment affirmed.

JUDITH SINDELL, Plaintiff and Appellant, v. ABBOTT LABORATORIES et al., Defendants and Respondents. MAUREEN ROGERS, Plaintiff and Appellant, v. REXALL DRUG COMPANY et al., Defendants and Respondents L.A. No. 31063 Supreme Court of California 26 Cal. 3d 588; 607 P.2d 924; 163 Cal. Rptr. 132 March 20, 1980

[*593] [**925] MOSK This case involves a complex problem both timely and significant: may a plaintiff, injured as the result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, hold liable for her injuries a maker of a drug produced from an identical formula?

Plaintiff Judith Sindell brought an action against eleven drug companies and Does 1 through 100, on behalf of herself and other women similarly situated. The complaint alleges as follows:

Between 1941 and 1971, defendants were engaged in the business of manufacturing, promoting, and marketing diethylstilbesterol (DES), a drug which is a synthetic compound of the female hormone estrogen. The drug was administered to plaintiff's mother and the mothers of the class she represents, [1] for the purpose of preventing miscarriage. In 1947, the Food and Drug Administration authorized the marketing of DES as a miscarriage preventative, but only on an experimental basis, with a requirement that the drug contain a warning label to that effect.

> 1 The plaintiff class alleged consists of "girls and women who are residents of California and who have been exposed to DES before birth and who may or may not know that fact or the dangers" to which they were exposed. Defendants are also sued as representatives of a class of drug manufacturers which sold DES after 1941.

[*594] DES may cause cancerous vaginal and cervical growths in the daughters exposed to it before birth, because their mothers took the drug during pregnancy. The form of cancer from which these daughters suffer is known as adenocarcinoma, and it manifests itself after a minimum latent period of 10 or 12 years. It is a fast-spreading and

deadly disease, and radical surgery is required to prevent it from spreading. DES also causes adenosis, precancerous vaginal and cervical growths which may spread to other areas of the body. The treatment for adenosis is cauterization, surgery, or cryosurgery. Women who suffer from this condition must be monitored by biopsy or colposcopic examination twice a year, a painful and expensive procedure. Thousands of women whose mothers received DES during pregnancy are unaware of the effects of the drug.

In 1971, the Food and Drug Administration ordered defendants to cease marketing and promoting DES for the purpose of preventing miscarriages, and to warn physicians and the public that the drug should not be used by pregnant women because of the danger to their unborn children.

During the period defendants marketed DES, they knew or should have known that it was a carcinogenic substance, that there was a grave danger after varying periods of latency it would cause cancerous and precancerous growths in the daughters of the mothers who took it, and that it was ineffective [**926] to prevent miscarriage. Nevertheless, defendants continued to advertise and market the drug as a miscarriage preventative. They failed to test DES for efficacy and safety; the tests performed by others, upon which they relied, indicated that it was not safe or effective. In violation of the authorization of the Food and Drug Administration, defendants marketed DES on an unlimited basis rather than as an experimental drug, and they failed to warn of its potential danger. [2]

> 2 It is alleged also that defendants failed to determine if there was any means to avoid or treat the effects of DES upon the daughters of women exposed to it during pregnancy, and failed to monitor the carcinogenic effects of the drug.

Because of defendants' advertised assurances that DES was safe and effective to prevent miscarriage, plaintiff was

exposed to the drug prior to her birth. She became aware of the danger from such exposure within one year of the time she filed her complaint. As a result of the DES ingested by her mother, plaintiff developed a malignant bladder [*595] tumor which was removed by surgery. She suffers from adenosis and must constantly be monitored by biopsy or colposcopy to insure early warning of further malignancy.

The first cause of action alleges that defendants were jointly and individually negligent in that they manufactured, marketed and promoted DES as a safe and efficacious drug to prevent miscarriage, without adequate testing or warning, and without monitoring or reporting its effects.

A separate cause of action alleges that defendants are jointly liable regardless of which particular brand of DES was ingested by plaintiff's mother because defendants collaborated in marketing, promoting and testing the drug, relied upon each other's tests, and adhered to an industry-wide safety standard. DES was produced from a common and mutually agreed upon formula as a fungible drug interchangeable with other brands of the same product; defendants knew or should have known that it was customary for doctors to prescribe the drug by its generic rather than its brand name and that pharmacists filled prescriptions from whatever brand of the drug happened to be in stock.

Other causes of action are based upon theories of strict liability, violation of express and implied warranties, false and fraudulent representations, misbranding of drugs in violation of federal law, conspiracy and "lack of consent."

Each cause of action alleges that defendants are jointly liable because they acted in concert, on the basis of express and implied agreements, and in reliance upon and ratification and exploitation of each other's testing and marketing methods.

Plaintiff seeks compensatory damages of $ 1 million and punitive damages of $ 10 million for herself. For the members of her class, she prays for equitable relief in the form of an order that defendants warn physicians and others of the danger of DES and the necessity of performing certain tests to determine the presence of disease caused by the drug, and that they establish free clinics in California to perform such tests.

Defendants demurred to the complaint. While the complaint did not expressly allege that plaintiff could not identify the manufacturer of the precise drug ingested by her mother, she stated in her points and authorities [*596] in opposition to the demurrers filed by some of the defendants that she was unable to make the identification, and the trial court sustained the demurrers of these defendants without leave to amend on the ground that plaintiff did not and stated she could not identify which defendant had manufactured the drug responsible for her injuries. Thereupon, the court dismissed the action. [3] This appeal involves only five of ten defendants named in the complaint. [4]

> 3 There are minor variations in the procedures employed as to the various defendants. Thus, for example, Eli Lilly and Company filed a motion for summary judgment, or alternatively judgment on the pleadings, rather than a demurrer; the court treated the motion as a demurrer.
>
> The demurrer of Abbott Laboratories, the first defendant to file a demurrer and the first to secure a dismissal, was sustained with leave to amend on the ground that plaintiff had failed to allege that a product manufactured by Abbott had caused her injuries (as opposed to the reason given by the trial court for sustaining the demurrers of the other defendants that plaintiff expressly stated that she could not identify a particular manufacturer). Upon plaintiff's failure to amend the complaint, the action

was dismissed as to Abbott. A few days after the dismissal, plaintiff stated in a brief in opposition to the demurrers filed by defendants other than Abbott that she could not make the identification.

Abbott asserts that as to it the issue we consider on the appeal is not properly raised because plaintiff's statement that she could not identify the manufacturer was not made until after the action had been dismissed as to Abbott. This contention is without merit. Plaintiff's failure to amend her complaint after Abbott's demurrer was sustained with leave to amend was based upon her inability to identify a specific manufacturer. Clearly, Abbott interpreted the complaint in this fashion, for it moved for dismissal on the ground that the complaint alleges that plaintiff "does not know the identity of the drug . . . ingested" by her mother. Thus, Abbott may not now claim that the complaint is insufficient to raise the issue involved in this appeal.

The trial court did not determine other issues raised by the complaint, such as whether the case was properly brought as a class action.

4 Abbott Laboratories, Eli Lilly and Company, E.R. Squibb and Sons, the Upjohn Company, and Rexall Drug Company are respondents. The action was dismissed or the appeal abandoned on various grounds as to other defendants named in the complaint; e.g., one defendant demonstrated it had not manufactured DES during the period plaintiff's mother took the drug.

Plaintiff [**927] Maureen Rogers filed a complaint containing allegations generally similar to those made by Sindell. She seeks compensatory and punitive damages on her own behalf, and on behalf of a class described in substantially the same terms as in Sindell's complaint, as

well as equitable relief comparable to that sought by Sindell. The trial court sustained demurrers of E.R. Squibb & Sons, the Upjohn Company, and Rexall Drug Company. [5] Subsequent to the dismissal of her action [*597] against these defendants, Rogers amended the complaint to allege that Eli Lilly and Company, one of the defendants named in her complaint, had manufactured the drug used by her mother. Although Sindell's action and the present case have been consolidated on appeal, much of the discussion which follows will apply to Rogers only if she does not succeed in establishing that Eli Lilly and Company manufactured the DES taken by her mother. "Plaintiff" as used in this opinion refers to Sindell, and we discuss only the allegations of Sindell's complaint.

> 5 While the trial court did not specify the ground upon which the demurrers were sustained, the points and authorities filed by the parties emphasized the failure of Rogers to identify a particular manufacturer as the source of her injuries, and we may assume for the purpose of this appeal that this was the basis of the court's order.

This case is but one of a number filed throughout the country seeking to hold drug manufacturers liable for injuries allegedly resulting from DES prescribed to the plaintiffs' mothers since 1947. [6] According to a note in the Fordham Law Review, estimates of the number of women who took the drug during pregnancy range from 1 1/2 million to 3 million. Hundreds, perhaps thousands, of the daughters of these women suffer from adenocarcinoma, and the incidence of vaginal adenosis among them is 30 to 90 percent. (Comment, *DES and a Proposed Theory of Enterprise Liability* (1978) 46 Fordham L. Rev. 963, 964-967 [hereafter Fordham Comment].) Most of the cases are still pending. With two exceptions, [7] those that have been decided resulted in judgments in favor of the drug company defendants because of the failure of the plaintiffs [**928] to identify the manufacturer of the DES prescribed to their

mothers. [8] The same result was reached in a recent California case. (*McCreery v. Eli Lilly & Co. (1978) 87 Cal. App. 3d 77, 82-84 [150 Cal. Rptr. 730]*.) The present action is another attempt to overcome this obstacle to recovery.

6 DES was marketed under many different trade names.

7 In a recent New York case a jury found in the plaintiff's favor in spite of her inability to identify a specific manufacturer of DES. An appeal is pending. (*Bichler* v. *Eli Lilly and Co*. (Sup. Ct. N.Y. 1979).) A Michigan appellate court recently held that plaintiffs had stated a cause of action against several manufacturers of DES even though identification could not be made. (*Abel* v. *Eli Lilly and Co*. (decided Dec. 5, 1979) Dock. No. 60497.) That decision is on appeal to the Supreme Court of Michigan.

8 E.g., *Gray v. United States (S.D. Tex. 1978) 445 F. Supp. 337*. In their briefs, defendants refer to a number of other cases in which trial courts have dismissed actions in DES cases on the ground stated above.

(1) We begin with the proposition that, as a general rule, the imposition of liability depends upon a showing by the plaintiff that his or her injuries were caused by the act of the defendant or by an instrumentality under the defendant's control. The rule applies whether the injury [*598] resulted from an accidental event (e.g., *Shunk v. Bosworth (6th Cir. 1964) 334 F.2d 309*) or from the use of a defective product. (E.g., *Wetzel v. Eaton Corporation (D. Minn. 1973) 62 F.R.D. 22, 29-30*; *Garcia v. Joseph Vince Co. (1978) 84 Cal. App. 3d 868, 873-875 [148 Cal. Rptr. 843]*; and see Annot. collection of cases in *51 A.L.R.3d 1344, 1351*; 1 Hursh & Bailey, American Law of Products Liability (2d ed. 1974) p. 125.)

There are, however, exceptions to this rule. Plaintiff's complaint suggests several bases upon which defendants may be held liable for her injuries even though she cannot demonstrate the name of the manufacturer which produced the DES actually taken by her mother. The first of these theories, classically illustrated by *Summers v. Tice (1948) 33 Cal.2d 80 [199 P.2d 1, 5 A.L.R.2d 91],* places the burden of proof of causation upon tortious defendants in certain circumstances. The second basis of liability emerging from the complaint is that defendants acted in concert to cause injury to plaintiff. (2) There is a third and novel approach to the problem, sometimes called the theory of "enterprise liability," but which we prefer to designate by the more accurate term of "industry-wide" liability, [9] which might obviate the necessity for identifying the manufacturer of the injury-causing drug. We shall conclude that these doctrines, as previously interpreted, may not be applied to hold defendants liable under the allegations of this complaint. However, we shall propose and adopt a fourth basis for permitting the action to be tried, grounded upon an extension of the *Summers* doctrine.

9 The term "enterprise liability" is sometimes used broadly to mean that losses caused by an enterprise should be borne by it. (Klemme, *Enterprise Liability Theory of Torts* (1976) 47 Colo. L. Rev. 153, 158.)

I

Plaintiff places primary reliance upon cases which hold that if a party cannot identify which of two or more defendants caused an injury, the burden of proof may shift to the defendants to show that they were not responsible for the harm. This principle is sometimes referred to as the "alternative liability" theory.

The celebrated case of *Summers v. Tice, supra, 33 Cal.2d 80,* a unanimous opinion of this court, best exemplifies the rule. In *Summers,* the plaintiff was injured when two hunters negligently shot in his direction. It could

not be determined which of them had fired the shot that [*599] actually caused the injury to the plaintiff's eye, but both defendants were nevertheless held jointly and severally liable for the whole of the damages. We reasoned that both were wrongdoers, both were negligent toward the plaintiff, and that it would be unfair to require plaintiff to isolate the defendant responsible, because if the one pointed out were to escape liability, the other might also, and the plaintiff-victim would be shorn of any remedy. In these circumstances, we held, the burden of proof shifted to the defendants, "each to absolve himself if he can." (*Id., p. 86.*) We stated that under these or similar circumstances a defendant is ordinarily in a "far better position" to offer evidence to determine whether he or another defendant caused the injury.

In *Summers*, we relied upon *Ybarra v. Spangard (1944) 25 Cal.2d 486 [154 P.2d 687, 162 A.L.R. 1258]*. There, the plaintiff was injured while he [**929] was unconscious during the course of surgery. He sought damages against several doctors and a nurse who attended him while he was unconscious. We held that it would be unreasonable to require him to identify the particular defendant who had performed the alleged negligent act because he was unconscious at the time of the injury and the defendants exercised control over the instrumentalities which caused the harm. Therefore, under the doctrine of res ipsa loquitur, an inference of negligence arose that defendants were required to meet by explaining their conduct. [10]

10 Other cases cited by plaintiff for the proposition stated in *Summers* are only peripherally relevant. For example, in *Ray v. Alad Corp. (1977) 19 Cal.3d 22 [136 Cal. Rptr. 574, 560 P.2d 3]*, the plaintiff brought an action in strict liability for personal injuries sustained when he fell from a defective ladder manufactured by the defendant's predecessor corporation. We held that, although under the general

> rule governing corporate succession the defendant could not be held responsible, nevertheless a "special departure" from that rule was justified in the particular circumstances. The defendant had succeeded to the good will of the manufacturer of the ladder, and it could obtain insurance against the risk of liability, whereas the plaintiff would be left without redress if he could not hold the defendant liable. The question whether one corporation should, for policy reasons, be answerable for the products manufactured by its predecessor is a different issue than that we describe above.

The rule developed in *Summers* has been embodied in the Restatement of Torts. (*Rest.2d Torts, § 433B, subd. (3)*.) [11] Indeed, the *Summers* facts are used as an illustration (p. 447).

> 11 Section 433B, subdivision (3) of the Restatement provides: "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." The reason underlying the rule is "the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm." (*Rest.2d Torts, § 433B, com. f,* p. 446.)

[*600] Defendants assert that these principles are inapplicable here. First, they insist that a predicate to shifting the burden of proof under *Summers-Ybarra* is that the defendants must have greater access to information regarding the cause of the injuries than the plaintiff, whereas in the present case the reverse appears.

(3) Plaintiff does not claim that defendants are in a better position than she to identify the manufacturer of the drug taken by her mother or, indeed, that they have the ability to do so at all, but argues, rather, that *Summers* does not impose such a requirement as a condition to the shifting of the burden of proof. In this respect we believe plaintiff is correct.

In *Summers*, the circumstances of the accident themselves precluded an explanation of its cause. To be sure, *Summers* states that defendants are "[ordinarily] . . . in a far better position to offer evidence to determine which one caused the injury" than a plaintiff (*33 Cal.2d 80, at p. 86)*, but the decision does not determine that this "ordinary" situation was present. Neither the facts nor the language of the opinion indicate that the two defendants, simultaneously shooting in the same direction, were in a better position than the plaintiff to ascertain whose shot caused the injury. As the opinion acknowledges, it was impossible for the trial court to determine whether the shot which entered the plaintiff's eye came from the gun of one defendant or the other. Nevertheless, burden of proof was shifted to the defendants.

Here, as in *Summers*, the circumstances of the injury appear to render identification of the manufacturer of the drug ingested by plaintiff's mother impossible by either plaintiff or defendants, and it cannot reasonably be said that one is in a better position than the other to make the identification. Because many years elapsed between the time the drug was taken and the manifestation of plaintiff's injuries she, and many other daughters of mothers who took DES, are unable to make such identification. [12] [**930] Certainly there can be no implication that plaintiff [*601] is at fault in failing to do so -- the event occurred while plaintiff was *in utero*, a generation ago. [13]

12 The trial court was not required to determine whether plaintiff had made sufficient efforts to

> establish identification since it concluded that her failure to do so was fatal to her claim. The court accepted at face value plaintiff's assertion that she could not make the identification, and for purposes of this appeal we make the same assumption.
> 13 Defendants maintain that plaintiff is in a better position than they are to identify the manufacturer because her mother might recall the name of the prescribing physician or the hospital or pharmacy where the drug originated, and might know the brand and strength of dosage, the appearance of the medication, or other details from which the manufacturer might be identified, whereas they possess none of this information. As we point out in footnote 12, we assume for purposes of this appeal that plaintiff cannot point to any particular manufacturer as the producer of the DES taken by her mother.

On the other hand, it cannot be said with assurance that defendants have the means to make the identification. In this connection, they point out that drug manufacturers ordinarily have no direct contact with the patients who take a drug prescribed by their doctors. Defendants sell to wholesalers, who in turn supply the product to physicians and pharmacies. Manufacturers do not maintain records of the persons who take the drugs they produce, and the selection of the medication is made by the physician rather than the manufacturer. Nor do we conclude that the absence of evidence on this subject is due to the fault of defendants. While it is alleged that they produced a defective product with delayed effects and without adequate warnings, the difficulty or impossibility of identification results primarily from the passage of time rather than from their allegedly negligent acts of failing to provide adequate warnings. Thus *Haft v. Lone Palm Hotel (1970) 3 Cal.3d 756 [91 Cal. Rptr. 745, 478 P.2d 465]*, upon which plaintiff relies, is distinguishable. [14]

> 14 In *Haft*, a father and his young son drowned in defendants' swimming pool. There were no witnesses to the accident. Defendants were negligent in failing to provide a lifeguard, as required by law. We held that the absence of evidence of causation was a direct and foreseeable result of the defendants' negligence, and that, therefore, the burden of proof on the issue of causation was upon defendants. Plaintiff attempts to bring herself within this holding. She asserts that defendants' failure to discover or warn of the dangers of DES and to label the drug as experimental caused her mother to fail to keep records or remember the brand name of the drug prescribed to her "since she was unaware of any reason to do so for a period of 10 to 20 years." There is no proper analogy to *Haft* here. While in *Haft* the presence of a lifeguard on the scene would have provided a witness to the accident and probably prevented it, plaintiff asks us to speculate that if the DES taken by her mother had been labelled as an experimental drug, she would have recalled or recorded the name of the manufacturer and passed this information on to her daughter. It cannot be said here that the absence of evidence of causation was a "direct and foreseeable result" of defendants' failure to provide a warning label.

It is important to observe, however, that while defendants do not have means superior to plaintiff to identify the maker of the precise drug [*602] taken by her mother, they may in some instances be able to prove that they did not manufacture the injury-causing substance. In the present case, for example, one of the original defendants was dismissed from the action upon proof that it did not manufacture DES until after plaintiff was born.

Thus we conclude the fact defendants do not have greater access to information that might establish the

identity of the manufacturer of the DES which injured plaintiff does not per se prevent application of the *Summers* rule.

(4) Nevertheless, plaintiff may not prevail in her claim that the *Summers* rationale should be employed to fix the whole liability for her injuries upon defendants, at least as those principles have previously been applied. [15] There is an important difference [**931] between the situation involved in *Summers* and the present case. There, all the parties who were or could have been responsible for the harm to the plaintiff were joined as defendants. Here, by contrast, there are approximately 200 drug companies which made DES, any of which might have manufactured the injury-producing drug. [16]

15 Plaintiff relies upon three older cases for the proposition that the burden of proof may be shifted to defendants to explain the cause of an accident even if less than all of them are before the court. (*Benson v. Ross (1906) 143 Mich. 452 [106 N.W. 1120]*; *Moore v. Foster (1938) 182 Miss. 15 [180 So. 73]*; *Oliver v. Miles (1927) 144 Miss. 852 [110 So. 666]*.) These cases do not relate to the shifting of the burden of proof; rather, they imposed liability upon one of two or more joint tortfeasors on the ground that they acted in concert in committing a negligent act. This theory of concerted action as a basis for defendants' liability will be discussed *infra*. In *Summers*, we stated that these cases were "straining" the concept of concerted action and that the "more reasonable" basis for holding defendants jointly liable when more than one of them had committed a tort and plaintiff could not establish the identity of the party who had caused the damage was the danger that otherwise two negligent parties might be exonerated. (*Summers, 33 Cal.2d 80, at pp. 84-85*.)

16 According to the Restatement, the burden of proof shifts to the defendants only if the plaintiff can

> demonstrate that all defendants acted tortiously and that the harm resulted from the conduct of one of them. (*Rest.2d Torts, § 433B, com. g,* p. 446.) It goes on to state that the rule thus far has been applied only where all the actors involved are joined as defendants and where the conduct of all is simultaneous in time, but cases might arise in which some modification of the rule would be necessary if one of the actors is or cannot be joined, or because of the effects of lapse of time, or other circumstances. (*Id*., com. h, p. 446.)

Defendants maintain that, while in *Summers* there was a 50 percent chance that one of the two defendants was responsible for the plaintiff's injuries, here since any one of 200 companies which manufactured DES [*603] might have made the product that harmed plaintiff, there is no rational basis upon which to infer that any defendant in this action caused plaintiff's injuries, nor even a reasonable possibility that they were responsible. [17]

> 17 Defendants claim further that the effect of shifting the burden of proof to them to demonstrate that they did not manufacture the DES which caused the injury would create a rebuttable presumption that one of them made the drug taken by plaintiff's mother, and that this presumption would deny them due process because there is no rational basis for the inference.

These arguments are persuasive if we measure the chance that any one of the defendants supplied the injury-causing drug by the number of possible tortfeasors. In such a context, the possibility that any of the five defendants supplied the DES to plaintiff's mother is so remote that it would be unfair to require each defendant to exonerate itself. There may be a substantial likelihood that none of the five defendants joined in the action made the DES which caused the injury, and that the offending producer not named would escape liability altogether. While we propose, *infra*, an adaptation of the rule in *Summers* which

will substantially overcome these difficulties, defendants appear to be correct that the rule, as previously applied, cannot relieve plaintiff of the burden of proving the identity of the manufacturer which made the drug causing her injuries. [18]

18 *Garcia v. Joseph Vince Co., supra, 84 Cal. App. 3d 868*, relied upon by defendants, presents a distinguishable factual situation. The plaintiff in *Garcia* was injured by a defective saber. He was unable to identify which of two manufacturers had produced the weapon because it was commingled with other sabers after the accident. In a suit against both manufacturers, the court refused to apply the *Summers* rationale on the ground that the plaintiff had not shown that either defendant had violated a duty to him. Thus in *Garcia*, only one of the two defendants was alleged to have manufactured a defective product, and the plaintiff's inability to identify which of the two was negligent resulted in a judgment for both defendants. (See also *Wetzel v. Eaton Corporation, supra, 62 F.R.D. 22*.) Here, by contrast, the DES manufactured by all defendants is alleged to be defective, but plaintiff is unable to demonstrate which of the defendants supplied the precise DES which caused her injuries.

II

The second principle upon which plaintiff relies is the so-called "concert of action" theory. Preliminarily, we briefly describe the procedure a drug manufacturer must follow before placing a drug on the market. Under federal law as it read prior to 1962, a new drug was defined as one "not generally [**932] recognized as . . . safe." (§ 102, 76 Stat. 781 (Oct. 10, 1962).) Such a substance could be marketed only if a new drug application [*604] had been filed with the Food and Drug Administration and had become "effective." [19] If the agency determined that a product was no longer a "new drug," i.e., that it was

"generally recognized as . . . safe," (*21 U.S.C.A. § 321(p)(1)* it could be manufactured by any drug company without submitting an application to the agency. According to defendants, 123 new drug applications for DES had been approved by 1952, and in that year DES was declared not to be a "new drug," thus allowing any manufacturer to produce it without prior testing and without submitting a new drug application to the Food and Drug Administration.

> 19 A new drug application became "effective" automatically if the Secretary of Health, Education and Welfare failed within a certain period of time to disapprove the application. If the agency had insufficient information to decide whether the drug was safe or had information that it was unsafe, the application was denied. (§ 505, 52 Stat. 1052 (June 25, 1938).) Since 1962, affirmative approval of an application has been required before a new drug may be marketed. (*21 U.S.C.A. § 355(c)*.)

(5a) With this background we consider whether the complaint states a claim based upon "concert of action" among defendants. (6) The elements of this doctrine are prescribed in *section 876 of the Restatement Second of Torts*. The section provides, "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person." With respect to this doctrine, Prosser states that "those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify

and adopt his acts done for their benefit, are equally liable with him. [para.] Express agreement is not necessary, and all that is required is that there be a tacit understanding . . . ." (Prosser, Law of Torts (4th ed. 1971) § 46, p. 292.)

(5b) Plaintiff contends that her complaint states a cause of action under these principles. She alleges that defendants' wrongful conduct "is the result of planned and concerted action, express and implied agreements, collaboration in, reliance upon, acquiescence in and ratification, exploitation and adoption of each other's testing, marketing [*605] methods, lack of warnings . . . and other acts or omissions . . ." and that "acting individually and in concert, [defendants] promoted, approved, authorized, acquiesced in, and reaped profits from sales" of DES. These allegations, plaintiff claims, state a "tacit understanding" among defendants to commit a tortious act against her.

In our view, this litany of charges is insufficient to allege a cause of action under the rules stated above. The gravamen of the charge of concert is that defendants failed to adequately test the drug or to give sufficient warning of its dangers and that they relied upon the tests performed by one another and took advantage of each others' promotional and marketing techniques. These allegations do not amount to a charge that there was a tacit understanding or a common plan among defendants to fail to conduct adequate tests or give sufficient warnings, and that they substantially aided and encouraged one another in these omissions.

The complaint charges also that defendants produced DES from a "common and mutually agreed upon formula," allowing pharmacists to treat the drug as a "fungible commodity" and to fill prescriptions from whatever brand of DES they had on hand at the time. It is difficult to understand how these allegations can form the basis of a cause of action for wrongful conduct by [**933] defendants, acting in concert. The formula for DES is a

scientific constant. It is set forth in the United States Pharmacopoeia, and any manufacturer producing that drug must, with exceptions not relevant here, utilize the formula set forth in that compendium. (*21 U.S.C.A. § 351(b)*.)

What the complaint appears to charge is defendants' parallel or imitative conduct in that they relied upon each others' testing and promotion methods. But such conduct describes a common practice in industry: a producer avails himself of the experience and methods of others making the same or similar products. Application of the concept of concert of action to this situation would expand the doctrine far beyond its intended scope and would render virtually any manufacturer liable for the defective products of an entire industry, even if it could be demonstrated that the product which caused the injury was not made by the defendant.

None of the cases cited by plaintiff supports a conclusion that defendants may be held liable for concerted tortious acts. They involve [*606] conduct by a small number of individuals whose actions resulted in a tort against a single plaintiff, usually over a short span of time, and the defendant held liable was either a direct participant in the acts which caused damage, [20] or encouraged and assisted the person who directly caused the injuries by participating in a joint activity. [21]

20 *Weinberg Co. v. Bixby (1921) 185 Cal. 87, 103 [196 P. 25]*, involved a husband who was held liable with his wife for wrongful diversion of flood waters although he had given his wife title to the land upon which the outlet causing the diversion was constructed. He not only owned land affected by the flood waters, but he was his wife's agent for the purpose of reopening the outlet which caused the damage. In *Meyer v. Thomas (1936) 18 Cal. App. 2d 299, 305-306 [63 P.2d 1176]*, both defendants

participated in the conversion of a note and deed of trust.

21 In *Agovino v. Kunze (1960) 181 Cal. App. 2d 591, 599 [5 Cal. Rptr. 534],* a participant in a drag race was held liable for injuries to a plaintiff who collided with the car of another racer. In *Loeb v. Kimmerle (1932) 215 Cal. 143, 151 [9 P.2d 199],* a defendant who encouraged another defendant to commit an assault was held jointly liable for the plaintiff's injuries. Also see *Weirum v. RKO General, Inc. (1975) 15 Cal.3d 40 [123 Cal. Rptr. 468, 539 P.2d 36]*.

Orser v. George (1967) 252 Cal. App. 2d 660 [60 Cal. Rptr. 708], upon which plaintiff primarily relies, is also distinguishable. There, three hunters negligently shot at a mudhen in decedent's direction. Two of them shot alternately with the gun which released the bullet resulting in the fatal wound, and the third, using a different gun, fired alternately at the same target, shooting in the same line of fire, perhaps acting tortiously. It was held that there was a possibility the third hunter knew the conduct of the others was tortious toward the decedent and gave them substantial assistance and encouragement, and that it was also possible his conduct, separately considered, was a breach of duty toward decedent. Thus, the granting of summary judgment was reversed as to the third hunter.

The situation in *Orser* is similar to *Agovino v. Kunze, supra, 181 Cal. App. 2d 591,* in which liability was imposed upon a participant in a drag race, rather than to the facts alleged in the present case. There is no allegation here that each defendant knew the other defendants' conduct was tortious toward plaintiff, and that they assisted and encouraged one another to inadequately test DES and to provide inadequate warnings. Indeed, it seems dubious whether liability on the concert of action theory can be predicated upon substantial assistance and encouragement given by one alleged tortfeasor to another pursuant to a

tacit understanding to fail to perform an act. Thus, there was no concert of action among defendants within the meaning of that doctrine.

[*607] III

A third theory upon which plaintiff relies is the concept of industry-wide liability, or according to the terminology of the parties, "enterprise liability." This theory was suggested in *Hall v. E. I. Du Pont de Nemours &* [**934] *Co., Inc. (E.D.N.Y. 1972) 345 F. Supp. 353*. In that case, plaintiffs were 13 children injured by the explosion of blasting caps in 12 separate incidents which occurred in 10 different states between 1955 and 1959. The defendants were six blasting cap manufacturers, comprising virtually the entire blasting cap industry in the United States, and their trade association. There were, however, a number of Canadian blasting cap manufacturers which could have supplied the caps. The gravamen of the complaint was that the practice of the industry of omitting a warning on individual blasting caps and of failing to take other safety measures created an unreasonable risk of harm, resulting in the plaintiffs' injuries. The complaint did not identify a particular manufacturer of a cap which caused a particular injury. [22]

22 We deliberately employ the term "suggested" to describe the effect of the *Hall* opinion because of the uncertain posture of the decision as authority. The defendants moved to dismiss the action on the ground that the plaintiffs had not stated a claim, and they also sought to sever the claims of the various plaintiffs and transfer them to the district court in the place where each accident occurred. The opinion discusses various possible bases of liability, including industry-wide liability, upon the assumption that there existed a national body of state tort law. (*345 F. Supp. at p. 360.*) At the conclusion of its opinion, the court called for briefs on the

> choice-of-law issues involved in the case. In a subsequent opinion, the same court decided, after briefs had been filed on the choice-of-law question, that the plaintiffs' claims should be severed, and it transferred each one to the federal court sitting in the district where the accident occurred. (*Chance v. E. I. Du Pont de Nemours & Co., Inc. (E.D.N.Y 1974) 371 F. Supp. 439*.) Thereafter, the transferred cases resulted in judgments for defendants upon various grounds unrelated to the theory of industry-wide liability. (*Lehtonen v. E. I. Du Pont de Nemours & Co., Inc. (D. Mont. 1975) 389 F. Supp. 633* [failure to amend complaint within 30 days]; *Davis v. E. I. Du Pont de Nemours & Co., Inc. (W.D.N.C. 1974) 400 F. Supp. 1347* [statute of limitations]; *Ball v. E. I. Du Pont de Nemours & Co., Inc. (6th Cir. 1975) 519 F.2d 715* [jury verdict in favor of defendant after plaintiff identified the manufacturer of the blasting cap which caused his injuries].) The parties have not indicated the status of the remaining cases transferred.

The court reasoned as follows: there was evidence that defendants, acting independently, had adhered to an industry-wide standard with regard to the safety features of blasting caps, that they had in effect delegated some functions of safety investigation and design, such as labelling, to their trade association, and that there was industry-wide cooperation in the manufacture and design of blasting caps. In these circumstances, the evidence supported a conclusion that all the defendants [*608] jointly controlled the risk. Thus, if plaintiffs could establish by a preponderance of the evidence that the caps were manufactured by one of the defendants, the burden of proof as to causation would shift to all the defendants. The court noted that this theory of liability applied to industries composed of a small number of units, and that what would be fair and reasonable with regard to an industry of five or

ten producers might be manifestly unreasonable if applied to a decentralized industry composed of countless small producers. [23]

23 In discussing strict liability, the *Hall* court mentioned the drug industry, stating, "In cases where manufacturers have more experience, more information, and more control over the risky properties of their products than do drug manufacturers, courts have applied a broader concept of foreseeability which approaches the enterprise liability rationale." (*345 F. Supp. 353 at p. 370*.)

(7) Plaintiff attempts to state a cause of action under the rationale of *Hall*. She alleges joint enterprise and collaboration among defendants in the production, marketing, promotion and testing of DES, and "concerted promulgation and adherence to industry-wide testing, safety, warning and efficacy standards" for the drug. We have concluded above that allegations that defendants relied upon one another's testing and promotion methods do not state a cause of action for concerted conduct to commit a tortious act. Under the theory of industry-wide liability, however, each manufacturer could be liable for all injuries caused by DES by virtue of adherence to an industry-wide standard of safety.

In the Fordham Comment, the industry-wide theory of liability is discussed and [**935] refined in the context of its applicability to actions alleging injuries resulting from DES. The author explains causation under that theory as follows, ". . . [The] industrywide standard becomes itself the cause of plaintiff's injury, just as defendants' joint plan is the cause of injury in the traditional concert of action plea. Each defendant's adherence perpetuates this standard, which results in the manufacture of the particular, unidentifiable injury-producing product. Therefore, each industry member has contributed to plaintiff's injury." (Fordham Comment, *supra*, at p. 997.)

The comment proposes seven requirements for a cause of action based upon industry-wide liability, [24] and suggests that if a plaintiff [*609] proves these elements, the burden of proof of causation should be shifted to the defendants, who may exonerate themselves only by showing that their product could not have caused the injury. [25]

24 The suggested requirements are as follows:

1. There existed an insufficient, industry-wide standard of safety as to the manufacture of the product.

2. Plaintiff is not at fault for the absence of evidence identifying the causative agent but, rather, this absence of proof is due to defendant's conduct.

3. A generically similar defective product was manufactured by all the defendants.

4. Plaintiff's injury was caused by this defect.

5. Defendants owed a duty to the class of which plaintiff was a member.

6. There is clear and convincing evidence that plaintiff's injury was caused by a product made by one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury.

7. All defendants were tortfeasors.

25 The Fordham Comment takes exception to one aspect of the theory of industry-wide liability as set forth in *Hall*, i.e., the conclusion that a plaintiff is only required to show by a preponderance of the evidence that one of the defendants manufactured the product which caused her injury. The comment suggests that a plaintiff be required to prove by clear and convincing evidence that one of the defendants before the court was responsible and that this standard of proof would require that the plaintiff join

> in the action the producers of 75 or 80 percent of the DES prescribed for prevention of miscarriage. It is also suggested that the damages be apportioned among the defendants according to their share of the market for DES. (Fordham Comment, *supra*, at pp. 999-1000.)

We decline to apply this theory in the present case. At least 200 manufacturers produced DES; *Hall*, which involved 6 manufacturers representing the entire blasting cap industry in the United States, cautioned against application of the doctrine espoused therein to a large number of producers. (*345 F. Supp. at p. 378*.) Moreover, in *Hall*, the conclusion that the defendants jointly controlled the risk was based upon allegations that they had delegated some functions relating to safety to a trade association. There are no such allegations here, and we have concluded above that plaintiff has failed to allege liability on a concert of action theory.

Equally important, the drug industry is closely regulated by the Food and Drug Administration, which actively controls the testing and manufacture of drugs and the method by which they are marketed, including the contents of warning labels. [26] To a considerable degree, therefore, the standards followed by drug manufacturers are suggested or compelled by the government. Adherence to those standards cannot, of course, absolve a manufacturer of liability to which it would otherwise be subject. (*Stevens v. Parke, Davis & Co. (1973) 9 Cal.3d 51, 65 [107* [*610] *Cal. Rptr. 45, 507 P.2d 653, 94 A.L.R.3d 1059]*.) But since the government plays such a pervasive role in formulating the criteria for the testing and marketing of drugs, it would be unfair to impose upon a manufacturer liability for injuries resulting from the use of a drug which it did not supply simply because it followed the standards of the industry. [27]

26 Federal regulations may specify the type of tests a manufacturer must perform for certain drugs (21 C.F.R. § 436.206 et seq.), the type of packaging used (§ 429.10), the warnings which appear on labels (*§ 369.20*), and the standards to be followed in the manufacture of a drug (*§ 211.22 et seq.*).

27 *Abel* v. *Eli Lilly and Company*, the Michigan case referred to above which held that the plaintiffs had stated a cause of action against several manufacturers of DES even though they could not identify a particular manufacturer as the source of a particular injury (see fn. 7, *ante*), relied upon the theories of concerted action and alternative liability.

IV

[**936] (8) If we were confined to the theories of *Summers* and *Hall*, we would be constrained to hold that the judgment must be sustained. Should we require that plaintiff identify the manufacturer which supplied the DES used by her mother or that all DES manufacturers be joined in the action, she would effectively be precluded from any recovery. As defendants candidly admit, there is little likelihood that all the manufacturers who made DES at the time in question are still in business or that they are subject to the jurisdiction of the California courts. There are, however, forceful arguments in favor of holding that plaintiff has a cause of action.

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in *Escola v. Coca Cola Bottling Co. (1944) 24 Cal.2d 453, 467-468 [150 P.2d 436],* recognized that in an era of mass production and

complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances. The Restatement comments that modification of the *Summers* rule may be necessary in a situation like that before us. (See fn. 16, *ante*.)

The most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: as between an innocent plaintiff and [*611] negligent defendants, the latter should bear the cost of the injury. Here, as in *Summers*, plaintiff is not at fault in failing to provide evidence of causation, and although the absence of such evidence is not attributable to the defendants either, their conduct in marketing a drug the effects of which are delayed for many years played a significant role in creating the unavailability of proof.

From a broader policy standpoint, defendants are better able to bear the cost of injury resulting from the manufacture of a defective product. As was said by Justice Traynor in *Escola*, "[the] cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." (*24 Cal.2d p. 462*; see also *Rest.2d Torts, § 402A, com. c*, pp. 349-350.) The manufacturer is in the best position to discover and guard against defects in its products and to warn of harmful effects; thus, holding it liable for defects and failure to warn of harmful effects will provide an incentive to product safety. (*Cronin v. J.B.E. Olson Corp. (1972) 8 Cal.3d 121, 129 [104 Cal. Rptr. 433, 501 P.2d 1153]*; *Beech Aircraft Corp. v. Superior Court (1976) 61 Cal. App. 3d 501, 522-523 [132 Cal. Rptr. 541]*.) These considerations are particularly significant where medication is involved, for

the consumer is virtually helpless to protect himself from serious, sometimes permanent, sometimes fatal, injuries caused by deleterious drugs.

Where, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff, a modification of the rule of *Summers* is warranted. As we have seen, an undiluted *Summers* rationale is inappropriate to shift the burden of proof of causation to defendants because if we measure the chance that any particular manufacturer supplied the injury-causing product by the number of producers of DES, there is a possibility that none of the five defendants in this case produced [**937] the offending substance and that the responsible manufacturer, not named in the action, will escape liability.

But we approach the issue of causation from a different perspective: we hold it to be reasonable in the present context to measure the likelihood that any of the defendants supplied the product which allegedly injured plaintiff by the percentage which the DES sold by each of them for the purpose of preventing miscarriage bears to the entire production [*612] of the drug sold by all for that purpose. Plaintiff asserts in her briefs that Eli Lilly and Company and five or six other companies produced 90 percent of the DES marketed. If at trial this is established to be the fact, then there is a corresponding likelihood that this comparative handful of producers manufactured the DES which caused plaintiff's injuries, and only a 10 percent likelihood that the offending producer would escape liability. [28]

> 28 The Fordham Comment explains the connection between percentage of market share and liability as follows: "[If] X Manufacturer sold one-fifth of all the DES prescribed for pregnancy and identification could be made in all cases, X would be the sole defendant in approximately one-fifth of all cases and

> liable for all the damages in those cases. Under alternative liability, X would be joined in all cases in which identification could not be made, but liable for only one-fifth of the total damages in these cases. X would pay the same amount either way. Although the correlation is not, in practice, perfect [footnote omitted], it is close enough so that defendants' objections on the ground of fairness lose their value." (Fordham Comment, *supra*, at p. 994.)

If plaintiff joins in the action the manufacturers of a substantial share of the DES which her mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished. While 75 to 80 percent of the market is suggested as the requirement by the Fordham Comment (at p. 996), we hold only that a substantial percentage is required.

The presence in the action of a substantial share of the appropriate market also provides a ready means to apportion damages among the defendants. Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries. In the present case, as we have seen, one DES manufacturer was dismissed from the action upon filing a declaration that it had not manufactured DES until after plaintiff was born. Once plaintiff has met her burden of joining the required defendants, they in turn may cross-complain against other DES manufacturers, not joined in the action, which they can allege might have supplied the injury-causing product.

Under this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products. Some minor discrepancy in the

correlation between market share and liability is inevitable; therefore, a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate [*613] market would justify. It is probably impossible, with the passage of time, to determine market share with mathematical exactitude. But just as a jury cannot be expected to determine the precise relationship between fault and liability in applying the doctrine of comparative fault (*Li v. Yellow Cab Co. (1975) 13 Cal.3d 804 [119 Cal. Rptr. 858, 532 P.2d 1226, 78 A.L.R.3d 393]*) or partial indemnity (*American Motorcycle Assn. v. Superior Court (1978) 20 Cal.3d 578 [146 Cal. Rptr. 182, 578 P.2d 899]*), the difficulty of apportioning damages among the defendant producers in exact relation to their market share does not seriously militate against the rule we adopt. As we said in *Summers* with regard to the liability of independent tortfeasors, where a correct division of liability cannot be made "the trier of fact may make it the best it can." (*33 Cal.2d at p. 88*.)

We are not unmindful of the practical problems involved in defining the market and determining market share, [29] but these [**938] are largely matters of proof which properly cannot be determined at the pleading stage of these proceedings. Defendants urge that it would be both unfair and contrary to public policy to hold them liable for plaintiff's injuries in the absence of proof that one of them supplied the drug responsible for the damage. Most of their arguments, however, are based upon the assumption that one manufacturer would be held responsible for the products of another or for those of all other manufacturers if plaintiff ultimately prevails. But under the rule we adopt, each manufacturer's liability for an injury would be approximately equivalent to the damage caused by the DES it manufactured. [30]

29 Defendants assert that there are no figures available to determine market share, that DES was provided for a number of uses other than to prevent

> miscarriage and it would be difficult to ascertain what proportion of the drug was used as a miscarriage preventative, and that the establishment of a time frame and area for market share would pose problems.
>
> 30 The dissent concludes by implying the problem will disappear if the Legislature appropriates funds "for the education, identification, and screening of persons exposed to DES." While such a measure may arguably be helpful in the abstract, it does not address the issue involved here: damages for injuries which have been or will be suffered. Nor, as a principle, do we see any justification for shifting the financial burden for such damages from drug manufacturers to the taxpayers of California.

The judgments are reversed.

[*614] RICHARDSON, J. I respectfully dissent. In these consolidated cases the majority adopts a wholly new theory which contains these ingredients: The plaintiffs were not alive at the time of the commission of the tortious acts. They sue a generation later. They are permitted to receive substantial damages from multiple defendants without any proof that any defendant caused or even probably caused plaintiffs' injuries.

Although the majority purports to change only the required burden of proof by shifting it from plaintiffs to defendants, the effect of its holding is to guarantee that plaintiffs will prevail on the causation issue because defendants are no more capable of disproving factual causation than plaintiffs are of proving it. "Market share" liability thus represents a new high water mark in tort law. The ramifications seem almost limitless, a fact which prompted one recent commentator, in criticizing a substantially identical theory, to conclude that "Elimination of the burden of proof as to identification [of the

manufacturer whose drug injured plaintiff] would impose a liability which would exceed absolute liability." (Coggins, *Industry-Wide Liability* (1979) 13 Suffolk L. Rev. 980, 998, fn. omitted; see also, pp. 1000-1001.) In my view, the majority's departure from traditional tort doctrine is unwise.

The applicable principles of causation are very well established. A leading torts scholar, Dean Prosser, has authoritatively put it this way: "An *essential* element of the plaintiff's cause of action for negligence, *or for that matter for any other tort*, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." (Prosser, Torts (4th ed. 1971) § 41, p. 236, italics added.) With particular reference to the matter before us, and in the context of products liability, the requirement of a causation element has been recognized as equally fundamental. "It is clear that any holding that a producer, manufacturer, seller, or a person in a similar position, is liable for injury caused by a particular product, must necessarily be predicated upon proof that the product in question was one for whose condition the defendant was in some way responsible. Thus, for example, if recovery is sought from a manufacturer, *it must be shown that he actually was the manufacturer of the product which caused the injury*; . . ." (1 Hursh & Bailey, American Law of Products Liability (2d ed. 1974) § 1:41, p. 125, italics added; accord, *Prosser, supra,* § 103, at pp. 671-672; 2 Dooley, [**939] Modern Tort Law (1977) § 32.03, p. 243.) Indeed, an inability to prove this causal link between defendant's conduct and plaintiff's injury has proven fatal in prior cases [*615] brought against manufacturers of DES by persons who were situated in positions identical to those of plaintiffs herein. (See *McCreery v. Eli Lilly & Co. (1978) 87 Cal. App. 3d 77, 82 [150 Cal. Rptr. 730]*; *Gray v. United States (S.D. Tex. 1978) 445 F. Supp. 337, 338*.)

The majority now expressly abandons the foregoing traditional requirement of some causal connection between

defendants' act and plaintiffs' injury in the creation of its new modified industry-wide tort. Conceptually, the doctrine of absolute liability which heretofore in negligence law has substituted only for the requirement of a breach of defendant's duty of care, under the majority's hand now subsumes the additional necessity of a causal relationship.

According to the majority, in the present case plaintiffs have openly conceded that they are unable to identify the particular entity which manufactured the drug consumed by their mothers. In fact, plaintiffs have joined only *five* of the approximately *two hundred* drug companies which manufactured DES. Thus, the case constitutes far more than a mere factual variant upon the theme composed in *Summers v. Tice (1948) 33 Cal.2d 80 [199 P.2d 1]*, wherein plaintiff joined as codefendants the *only* two persons who could have injured him. As the majority must acknowledge, our *Summers* rule applies only to cases in which ". . . it is proved that harm has been caused to the plaintiff by . . . one of [the named defendants], but there is uncertainty as to which one has caused it, . . ." (*Rest.2d Torts, § 433B, subd. (3)*.) In the present case, in stark contrast, it remains wholly speculative and conjectural whether *any* of the five named defendants actually caused plaintiffs' injuries.

The fact that plaintiffs cannot tie defendants to the injury-producing drug does not trouble the majority for it declares that the *Summers* requirement of proof of actual causation by a named defendant is satisfied by a joinder of those defendants who have *together* manufactured "*a substantial percentage*" of the DES which has been marketed. Notably lacking from the majority's expression of its new rule, unfortunately, is any definition or guidance as to what should constitute a "substantial" share of the relevant market. The issue is entirely open-ended and the answer, presumably, is anyone's guess.

Much more significant, however, is the consequence of this unprecedented extension of liability. Recovery is permitted from a handful of defendants *each* of whom *individually* may account for a comparatively [*616] small share of the relevant market, so long as the *aggregate* business of those who have been sued is deemed "substantial." In other words, a particular defendant may be held proportionately liable *even though mathematically it is much more likely than not that it played no role whatever in causing plaintiffs' injuries*. Plaintiffs have strikingly capsulated their reasoning by insisting ". . . that while one manufacturer's product may not have injured a particular plaintiff, we can assume that it injured a different plaintiff and all we are talking about is a mere matching of plaintiffs and defendants." (Counsel's letter (Oct. 16, 1979) p. 3.) In adopting the foregoing rationale the majority rejects over 100 years of tort law which required that before tort liability was imposed a "matching" of defendant's conduct and plaintiff's injury was absolutely essential. Furthermore, in bestowing on plaintiffs this new largess the majority sprinkles the rain of liability upon all the joined defendants alike -- those who may be tortfeasors and those who may have had nothing at all to do with plaintiffs' injury -- and an added bonus is conferred. Plaintiffs are free to pick and choose their targets.

The "market share" thesis may be paraphrased. Plaintiffs have been hurt by *someone* who made DES. Because of the lapse of time no one can prove who made it. Perhaps it was not the named defendants who made it, but they did make some. Although DES was apparently safe at the [**940] time it was used, it was subsequently proven unsafe as to some daughters of some users. Plaintiffs have suffered injury and defendants are wealthy. There should be a remedy. Strict products liability is unavailable because the element of causation is lacking. Strike that requirement and label what remains "alternative" liability, "industry-wide" liability, or "market share" liability, proving thereby

that if you hit the square peg hard and often enough the round holes will really become square, although you may splinter the board in the process.

The foregoing result is directly contrary to long established tort principles. Once again, in the words of Dean Prosser, the applicable rule is: "[Plaintiff] must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. *A mere possibility of such causation is not enough*; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (*Prosser, supra*, § 41, at p. 241, italics added, fns. [*617] omitted.) Under the majority's new reasoning, however, a defendant is fair game if it happens to be engaged in a similar business and causation is *possible*, even though remote.

In passing, I note the majority's dubious use of market share data. It is perfectly proper to use such information to assist in proving, circumstantially, that a particular defendant probably caused plaintiffs' injuries. Circumstantial evidence may be used as a basis for proving the requisite probable causation. (*Id., at p. 242*.) The majority, however, authorizes the use of such evidence for an entirely different purpose, namely, to impose and allocate liability among multiple defendants only one of whom *may* have produced the drug which injured plaintiffs. Because this use of market share evidence does not implicate *any* particular defendant, I believe such data are entirely irrelevant and inadmissible, and that the majority errs in such use. In the absence of some statutory authority there is no legal basis for such use.

Although seeming to acknowledge that imposition of liability upon defendants who probably did not cause

plaintiffs' injuries is unfair, the majority justifies this inequity on the ground that "each manufacturer's liability for an injury would be approximately equivalent to the damages caused by the DES it manufactured." (*Ante*, p. 613.) In other words, because each defendant's liability is proportionate to its market share, supposedly "each manufacturer's liability would approximate its responsibility for the injuries caused by his own products." (*Ante*, p. 612.) The majority dodges the "practical problems" thereby presented, choosing to describe them as "matters of proof." However, the difficulties, in my view, are not so easily ducked, for they relate not to evidentiary matters but to the fundamental question of liability itself.

Additionally, it is readily apparent that "market share" liability will fall unevenly and disproportionately upon those manufacturers who are amenable to suit in California. On the assumption that no other state will adopt so radical a departure from traditional tort principles, it may be concluded that under the majority's reasoning those defendants who are brought to trial in this state will bear effective joint responsibility for 100 percent of plaintiffs' injuries despite the fact that their "substantial" aggregate market share may be considerably less. This undeniable fact forces the majority to concede that, "a defendant may be held liable for a somewhat different percentage of the damage than its share of the appropriate market would justify." (*Ante*, pp. 612-613.) [*618] With due deference, I suggest that the complete unfairness of such a result in a case involving only five of two hundred manufacturers is readily manifest.

Furthermore, several other important policy considerations persuade me that the majority holding is both inequitable and [**941] improper. The injustice inherent in the majority's new theory of liability is compounded by the fact that plaintiffs who use it are treated far more favorably than are the plaintiffs in routine tort actions. In most tort cases plaintiff knows the identity

of the person who has caused his injuries. In such a case, plaintiff, of course, has no option to seek recovery from an entire industry or a "substantial" segment thereof, but in the usual instance can recover, if at all, only from the particular defendant causing injury. Such a defendant may or may not be either solvent or amenable to process. Plaintiff in the ordinary tort case must take a chance that defendant can be reached and can respond financially. On what principle should those plaintiffs who wholly fail to prove any causation, an essential element of the traditional tort cause of action, be rewarded by being offered both a wider selection of potential defendants and a greater opportunity for recovery?

The majority attempts to justify its new liability on the ground that defendants herein are "better able to bear the cost of injury resulting from the manufacture of a defective product." (*Ante*, p. 611.) This "deep pocket" theory of liability, fastening liability on defendants presumably because they are rich, has understandable popular appeal and might be tolerable in a case disclosing substantially stronger evidence of causation than herein appears. But as a general proposition, a defendant's wealth is an unreliable indicator of fault, and should play no part, at least consciously, in the legal analysis of the problem. In the absence of proof that a particular defendant caused or at least probably caused plaintiff's injuries, a defendant's ability to bear the cost thereof is no more pertinent to the underlying issue of liability than its "substantial" share of the relevant market. A system priding itself on "*equal* justice under law" does not flower when the *liability* as well as the *damage* aspect of a tort action is determined by a defendant's wealth. The inevitable consequence of such a result is to create and perpetuate two rules of law -- one applicable to wealthy defendants, and another standard pertaining to defendants who are poor or who have modest means. Moreover, considerable doubts have been expressed

regarding the ability of the drug industry, and especially its smaller members, to bear the substantial economic costs (from both damage awards and [*619] high insurance premiums) inherent in imposing an industry-wide liability. (See Coggins, *supra,* 13 Suffolk L. Rev. at pp. 1003-1006, 1010-1011.)

An important and substantial countervailing public policy in defendants' favor was very recently expressed in a similar DES case, *McCreery v. Eli Lilly & Co., supra, 87 Cal. App. 3d 77, 86-87.* Although the majority herein impliedly rejects the appellate court's holding, in my opinion pertinent language of the *McCreery* court, based upon the Restatement of Torts and bearing on the majority's "market share" theory, is well worth repeating: "Application of the comments to the *Restatement Second of Torts, section 402A*, to this situation compels a rejection of the imposition of liability. As the comment states, '. . . It is also true in particular of many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk. The seller of such products, again, with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.' (*Rest. 2d Torts, § 402A, com. k.*) *This section implicitly recognizes the social policy behind the development of new pharmaceutical preparations.* As one commentator states, '[the] social and economic benefits from mobilizing the industry's resources in [**942] the war against disease and in reducing the costs of medical care are potentially enormous. The development of new drugs in

the last three decades has already resulted in great social benefits. The potential gains from further advances remain large. To risk such gains is unwise. Our major objective should be to encourage a continued high level of industry investment in pharmaceutical R & D [research and development].' (Schwartzman, The Expected Return from Pharmaceutical Research: Sources of New Drugs and the Profitability of R & D Investment (1975) p. 54.)" (*McCreery v. Eli Lilly & Co., supra, 87 Cal. App. 3d 77, 86-87*, italics added; see also Coggins, *supra* , 13 Suffolk L. Rev. at p. 1004.)

In the present case the majority imposes liability more than 20 years after ingestion of drugs which at the time they were used, after careful [*620] testing, had the full approval of the United States Food and Drug Administration. It seems to me that liability in the manner created by the majority must inevitably inhibit, if not the research or development, at least the dissemination of new pharmaceutical drugs. Such a result, as explained by the Restatement, is wholly inconsistent with traditional tort theory.

I also suggest that imposition of so sweeping a liability may well prove to be extremely shortsighted from the standpoint of broad social policy. Who is to say whether, and at what time and in what form, the drug industry upon which the majority now fastens this blanket liability, may develop a miracle drug critical to the diagnosis, treatment, or, indeed, cure of the very disease in question? It is counterproductive to inflict civil damages upon *all* manufacturers for the side effects and medical complications which surface in the children of the users a generation after ingestion of the drugs, particularly when, at the time of their use, the drugs met every fair test and medical standard then available and applicable. Such a result requires of the pharmaceutical industry a foresight, prescience and anticipation far beyond the most exacting

standards of the relevant scientific disciplines. In effect, the majority requires the pharmaceutical research laboratory to install a piece of new equipment -- the psychic's crystal ball.

I am not unmindful of the serious medical consequences of plaintiffs' injuries, and the equally serious implications to the class which she purports to represent. In balancing the various policy considerations, however, I also observe that the incidence of vaginal cancer among "DES daughters" has been variously estimated at one-tenth of 1 percent to four-tenths of 1 percent. (13 Suffolk L. Rev., *supra*, p. 999, fn. 92.) These facts raise some penetrating questions. Ninety-nine plus percent of "DES daughters" have never developed cancer. Must a drug manufacturer to escape this blanket liability wait for a generation of testing before it may disseminate drugs similar to DES? If a drug has beneficial purposes for the majority of users but harmful side-effects are later revealed for a small fraction of consumers, will the manufacturer be absolutely liable? If adverse medical consequences, wholly unknown to the most careful and meticulous of present scientists, surface in *two* or *three* generations, will similar liability be imposed? In my opinion, common sense and reality combine to warn that a "market share" theory goes too far. Legally, it expects too much.

[*621] I believe that the scales of justice tip against imposition of this new liability because of the foregoing elements of unfairness to some defendants who may have had nothing whatever to do with causing any injury, the unwarranted preference created for this particular class of plaintiffs, the violence done to traditional tort principles by the drastic expansion of liability proposed, the injury threatened to the public interest in continued unrestricted basic medical research as stressed by the Restatement, and the other reasons heretofore expressed.

The majority's decision effectively makes the entire drug industry (or at least its California members) an insurer of all injuries attributable to defective drugs of uncertain or unprovable origin, including [**943] those injuries manifesting themselves a generation later, and regardless of whether particular defendants had any part whatever in causing the claimed injury. Respectfully, I think this is unreasonable overreaction for the purpose of achieving what is perceived to be a socially satisfying result.

Finally, I am disturbed by the broad and ominous ramifications of the majority's holding. The law review comment, which is the wellspring of the majority's new theory, conceding the widespread consequences of industry-wide liability, openly acknowledges that "The DES cases are only the tip of an iceberg." (Comment, *DES and a Proposed Theory of Enterprise Liability* (1978) 46 Fordham L. Rev. 963, 1007.) Although the pharmaceutical drug industry may be the first target of this new sanction, the majority's reasoning has equally threatening application to many other areas of business and commercial activities.

Given the grave and sweeping economic, social, and medical effects of "market share" liability, the policy decision to introduce and define it should rest not with us, but with the Legislature which is currently considering not only major statutory reform of California product liability law in general, but the DES problem in particular. (See Sen. Bill No. 1392 (1979-1980 Reg. Sess.), which would establish and appropriate funds for the education, identification, and screening of persons exposed to DES, and would prohibit health care and hospital service plans from excluding or limiting coverage to persons exposed to DES.) An alternative proposal for administrative compensation, described as "a limited version of no-fault products liability" has been suggested by one commentator. (Coggins, *supra*, 13 Suffolk L. Rev. at pp. 1019-1021.) Compensation under such a plan would be awarded by an

administrative [*622] tribunal from funds collected "via a tax paid by all manufacturers." (P. 1020, fn. omitted.) In any event, the problem invites a legislative rather than an attempted judicial solution.
I would affirm the judgments of dismissal.

 ¿La compañía ferroviaria causó o no el incendio que calcinó el predio de Kingston?

II. LEGAL CAUSATION: PROXIMATE CAUSE

 Scott v Shepherd COURT OF COMMON PLEAS [1558-1774] All ER Rep 295, Also reported 2 Wm Bl 892; 3 Wils 403; 96 ER 525 HEARING-DATES: 4 July 1773 4 July 1773

NARES J:

I am of opinion that trespass would well lie in the present case. The natural and probable consequence of the act done by the defendant was injury to somebody, and, therefore, the act was illegal at common law. The throwing of squibs has by 9 Will 3, c 7 [Fireworks Act, 1697: repealed], been since made a nuisance. Being, therefore, unlawful, the defendant was liable to answer for theconsequences, be the injury mediate or immediate. YEAR BOOK 21 Hen 7, 28, is express that malus animus is not necessary to constitute a trespass. So, too, Underwood v Hewson (1); Weaver v Ward (2); Dickenson v Watson (3); YB 6 Edw 4, 7, 8; FITZ ABR Trespass, 110. The principle I go on is what is laid down in Reynolds v Clark (4) (1 Stra 634) that if the act in the first instance be unlawful, trespass will lie. Wherever, therefore, an act is unlawful at first, trespass will lie for the consequences of it. So, in YB 12 Hen 4, fo 3, pl 4, trespass lay for stopping a sewer with earth so as to overflow the plaintiff's land. In YB 26 Hen 8, 8, for going on the plaintiff's land to take the boughs off which had fallen thereon in lopping. See also Preston v Mercer (5); REG 108, 95; YB 6 Edw 4, fo 7, pl 18; Courtney v Collet (6); Wheatley v Stone (7); Dent v

Oliver (8); FITZHERBERT'S NATURA BREVIUM 202. I do not think it necessary, to maintain trespass, that the defendant should personally touch the plaintiff; if he does it by a mean it is sufficient. Qui facit per aliud facit per se. He is the person who, in the present case, gave the mischievous faculty to the squib. That mischievous faculty remained in it until the explosion. No new power of doing mischief was communicated to it by Willis or Ryal. It is like the case of a mad of turned loose in a crowd. The person who turns him loose is answerable in trespass for whatever mischief he may do. The intermediate acts of Willis and Ryal will not purge the original tort in the defendant. But he who does the first wrong is answerable for all the consequential damages: so held in R v Higgins (9) (2 Ld Raym 1574); Parkhurst v Foster (10) (1 Ld Raym 480); Rosewell v Prior (11) (12 Mod Rep 639). And it was declared by this court, in Slater v Baker (12) that they would not look with eagle's eyes to see whether the evidence applies exactly or not to the case; but if the plaintiff has obtained a verdict for such damages as he deserves, they will establish it if possible.

BLACKSTONE J:

(dissenting)

I am of opinion that an action of trespass does not lie for the plaintiff against the defendant on this Case. I take the settled distinction to be that, where the injury is immediate, an action of trespass will lie; where it is only consequential, it must be an action on the Case: Reynolds v Clark (4); Haward v Bankes (13); Harker v Birkbeck (14). The lawfulness or unlawfulness of the original act is not the criterion, although something of that sort is put into LORD RAYMOND'S mouth in Reynolds v Clark (4) (1 Stra 635) where it can only mean that if the act then in question, of erecting a spout, had been in itself unlawful, trespass might have lain; but as it was a lawful act (on the defendant's own ground) and the injury to the plaintiff only consequential, it

must be an action on the case. But this cannot be the general rule, for it is held by the court in the same case that if I throw a log of timber into the highway (which is an unlawful act) and another man tumbles over it and is hurt, an action on the case only lies, it being a consequential damage; but if in throwing it I hit another man, he may bring trespass because it is an immediate wrong. Trespass may sometimes lie for the consequences of a lawful act. If in lopping my own trees a bough accidentally falls on my neighbour's ground and I go thereon to fetch it, trespass lies. This is the case cited from YB 6 Edw 4, fo 7, pl 18. But then the entry is of itself an immediate wrong. And case will sometimes lie for the consequence of an unlawful act. If by false imprisonment I have a special damage, as if I forfeit my recognisance thereby, I shall have an action on the case per POWELL, J, in Bourden v Alloway (15) (11 Mod Rep 180). Yet here the original act was unlawful, and in the nature of trespass. So that lawful or unlawful is quite out of the case.

The solid distinction is between direct or immediate injuries on the one hand and mediate or consequential on the other, and trespass never lay for the latter. If this be so, the only question will be whether the injury which the plaintiff suffered was immediate, or consequential only; and I hold it to be the latter. The original act was, as against Yates, a trespass; not as against Ryal or the plaintiff. The tortious act was complete when the squib lay at rest on Yates's stall. He, or any bystander, had, I allow, a right to protect themselves by removing the squib, but should have taken care to do it in such a manner as not to en. danger others. But the defendant, I think, is not answerable in an action of trespass and assault for the mischief done by the squib in the new motion impressed on it, and the new direction given it, by either Willis or Ryal, who both were free agents and acted on their own judgment. This distinguishes it from the cases put of turning loose a wild beast or a madman. They are only instruments in the hand

of the first agent. Nor is it like diverting the course of an enraged ox, or of a stone thrown, or an arrow glancing against a tree; because there the original motion, the vis impressa, is continued, though diverted. Here the instrument of mischief was at rest until a new impetus and a new direction are given it, not once only, but by two successive rational agents. But it is said that the act is not complete, nor the squib at rest, until after it is spent or exploded. It certainly has a power of doing fresh mischief, and so has a stone that has been thrown against my windows and now lies still. Yet if any person gives that stone a new motion and does further mischief with it, trespass will not lie for that against the original thrower. No doubt but Yates may maintain trespass against the defendant. And, according to the doctrine contended for, so may Ryal and the plaintiff. Three actions for one single act! nay, it may be extended in infinitum. If a man tosses a football into the street and, after being kicked about by one hundred people, it at last breaks a tradesman's windows, shall he have trespass against the man who first produced it? Surely only against the man who gave it that mischievous direction. But it is said, if the plaintiff has no action against the defendant, against whom must he seek his remedy? I give no opinion whether case would lie against the defendant for the consequential damage; though, as at present advised, I think that on the circumstances, it would. But I think that, in strictness of law, trespass would lie against Ryal, the immediate actor in this unhappy business. Both he and Willis have exceeded the bounds of self-defence and not used sufficient circumspection in removing the danger from themselves. The throwing it across the market-house instead of brushing it down, or throwing it out of the open sides into the street (if it was not meant to continue the sport, as it is called) was at least an unnecessary and incautious act. Not even menaces from others are sufficient to justify a trespass against a third person, much less a fear of danger to either

his goods or his person; nothing but inevitable necessity: Weaver v Ward (2); Dickenson v Watson (3); Gilbert v Stone (16). So in the case put by BRIAN, J, and assented to by LITTLETON, J, and CHOKE, CJ [in YB 6 Edw 4, fo 7, pl 18], and relied on in Bessey v Olliot and Lambert (17) (T Raym at p 468):

"If a man assaults me, so that I cannot avoid him, and I lift up my staff to defend myself, and, in lifting it up, undesignedly hit another who is behind me, an action lies by that person against me; and yet I did a lawful act in endeavouring to defend myself."

But none of these great lawyers ever thought that trespass would lie by the person struck against him who first assaulted the striker. The cases cited from the REGISTER and HARDRES are all of immediate acts, or the direct and inevitable effects of the defendant's immediate acts. And I admit that the defendant is answerable in trespass for all the direct and inevitable effects caused by his own immediate act.

But what is his own immediate act? The throwing the squib to Yates's stall. Had Yates's goods been burnt or his person injured, the defendant must have been responsible in trespass. But he is not responsible for the acts of other men. The subsequent throwing across the market-house by Willis is neither the act of the defendant nor the inevitable effect of it; much less the subsequent throwing by Ryal Slater v Baker (12) was first a motion for a new trial after verdict. In our case the verdict is suspended until the determination of the court. And though after verdict the court will not look with eagle's eyes to spy out a variance, yet, when a question is put by the jury on such a variance and it is made the very point of the cause, the court will not wink against the light and say that evidence, which at most is only applicable to an action on the case, will maintain an action of trespass. It was an action on the case that was brought, and the court held the special case laid to be fully proved.

So that the present question could not arise on that action. The same evidence that will maintain trespass may also frequently maintain case, but not a converse. Every action of trespass with a "per quod" includes an action on the case. I may bring trespass for the immediate injury and subjoin a "per quod" for the consequential damages; or may bring case for the consequential damages and pass over the immediate injury, as in Bourdon v Alloway (15) before cited. But if I bring trespass for an immediate injury and prove at most only a consequential damage, judgment must be for the defendant: Gates v Bayley (18). It is said by LORD RAYMOND, and very justly, in Reynolds v Clark (4):

"We must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion."

As I, therefore, think no immediate injury passed from the defendant to the plaintiff (and without such immediate injury no action of trespass can be maintained) I am of opinion that in this action judgment ought to be for the defendant.

GOULD J:

I am of the same opinion with NARES, J, that this action is well maintainable. The whole difficulty lies in the form of the action and not in the substance of the remedy. The line is very nice between case and trespass on these occasions. I am persuaded that there are many instances wherein both or either will lie. I agree with NARES, J, that, wherever a man does an unlawful act, he is answerable for all the consequences; and trespass will lie against him if the consequence be in nature of trespass. But, exclusive of this, I think that the defendant may be considered in the same view as if he himself had personally thrown the squib in the plaintiff's face. The terror impressed on Willis and Ryal excited self-defence and deprived them of the power of recollection. What they did was, therefore, the inevitable

consequence of the defendant's unlawful act. Had the squib been thrown into a coach full of company, the person throwing it out again would not have been answerable for the consequences. What Willis and Ryal did was by necessity, and the defendant imposed that necessity on them. As to the case of the football, I think that if all the people assembled act in concert they are all trespassers (i) from the general mischievous intent; (ii) from the obvious and natural consequences of such an act; which reasoning will equally apply to the case before us. And that actions of trespass will lie for the mischievous consequences of another's act, whether lawful or unlawful, appears from their being maintained for acts done in the plaintiff's own land: Preston v Mercer (5); Courtney v Collet (6). I shall not go over again the ground which NARES, J, has relied on and explained, but concur in his opinion that this action is supported by the evidence.

DE GREY CJ:

This case is one of those wherein the line drawn by the law between actions on the case and actions of trespass is very nice and delicate. Trespass is an injury accompanied with force, for which an action of trespass vi et armis lies against the person from whom it is received. The question here is whether the injury received by the plaintiff arises from the force of the original act of the defendant, or from a new force by a third person. I agree with BLACKSTONE, J, as to the principles he has laid down but not in his application of those principles to the present case. The real question certainly does not turn on the lawfulness or unlawfulness of the original act; for actions of trespass will lie for legal acts when they become trespasses by accident, as in the cases cited of cutting thorns, lopping of a tree, shooting at a mark, defending oneself by a stick which strikes another behind, etc. They may also not lie for the consequences even of illegal acts, as that of casting a log in the highway, etc. But the true question is whether the injury is the direct and immediate

act of the defendant; and I am of opinion that in this case it is. The throwing the squib was an actunlawful and tending to affright the bystanders. So far, mischief was originally intended; not any particular mischief, but mischief indiscriminate and wanton. Whatever mischief, therefore, follows he is the author of it; egreditur personam, as the phrase is in criminal cases. And though criminal cases are no rule for civil ones, yet in trespass I think that there is an analogy. Everyone who does an unlawful act is considered as the doer of all that follows; if done with a deliberate intent, the consequence may amount to murder; if incautiously, to manslaughter: FOST 261. So, too, in 1 VENT 295 (Anon (19)) a person breaking a horse in Lincoln's Inn Fields hurt a man; held, that trespass lay: and, 2 LEV 172 (same case sub nom Michael v Alestree (19)) that it need not be laid scienter. I look on all that was done subsequent to the original throwing as a continuation of the first force and first act which will continue until the squib was spent by bursting. I think that any innocent person removing the danger from himself to another is justifiable; the blame lights on the first thrower. The new direction and new force flow out of the first force, and are not a new trespass. The writ in the REGISTER, 95 a, for trespass in maliciously cutting down a head of water which thereupon flowed down to and overwhelmed another's pond shows that the immediate act need not be instantaneous, but that a chain of effects connected together will be sufficient. It has been urged that the intervention of a free agent will make a difference; but I do not consider Willis and Ryal as free agents in the present case, but acting under a compulsive necessity for their own safety and self-preservation. On these reasons I concur with GOULD and NARES, JJ, that the present action is maintainable.

Judgment for plaintiff.

 ¿Se podría considerar o no que intervino una nueva causa necesaria en la consecución del trágico hecho?

 Re Polemis and Furness, Withy & Co, Ltd COURT OF APPEAL [1921] All ER Rep 40, Also reported [1921] 3 KB 560; 90 LJKB 1353; 126 LT 154 HEARING-DATES: 7 and 8 july 1921 15 July 1921

BANKES LJ:

By a time charterparty, dated 21 February 1917, the respondents chartered their vessel to the appellants. The vessel was employed by the charterers to carry a cargo to Casablanca in Morocco. The cargo included a quantity of benzine or petrol in cases. While discharging at Casablanca a heavy plank fell into the hold in which the petrol was stowed, and caused an explosion, which set fire to the vessel and completely destroyed her. The owners claimed the value of the vessel from the charterers, alleging that the loss of the vessel was due to the negligence of the charterers' servants. The charterers contended that they were protected by the exception of fire contained in cl 21 of the charterparty, and they also contended that the damages claimed were too remote. The claim was referred to arbitration, and the arbitrators stated a Special Case for the opinion of the court. [His Lordship read the arbitrators' findings and said that they stated the damages as 196,165 pounds 1s 11d.]

These findings are, no doubt, intended to raise the question whether the view taken, or said to have been taken, by POLLOCK, CB, in Rigby v Hewitt (1) (5 Exch at p 243) and Greenland v Chaplin (2) (5 Exch at p 248) or the view taken by CHANNELL, B, and BLACKBURN, J, in Smith v London and South Western Rail Co (3) (LR 6 CP at p 21) is the correct one The doubt which I have indicated in reference to what POLLOCK, CB, really said is due to the fact that, as reported in the LAW JOURNAL (19 LJ Ex at p 295) the Chief Baron does not use the words

on which reliance is placed and which were quoted with approval by VAUGHAN WILLIAMS, LJ, in Cory v France (4) ([1911] 1 KB at p 122) Assuming the Chief Baron to have been correctly reported in the EXCHEQUER REPORTS, the difference between the two views is this. According to the one view, the consequences which may reasonably be expected to result from a particular act are material only in reference to the question whether the act is or is not a negligent act; according to the other view, those consequences are the test whether the damages resulting from the act, assuming it to be negligent, are or are not too remote to be recoverable SIR F POLLOCK in his LAW OF TORTS (11th Edn, pp 39, 40) refers to this difference of view, and calls attention to the fact that the late MR BEVEN, in his book on NEGLIGENCE, supports the view founded on Smith v London and South Western Rail Co (3) In two recent judgments dealing with the question, the view taken by the court in Smith v London and South Western Rail Co (3) has been adopted - namely, by the late President (SIR SAMUEL EVANS) in HMS London (5) [1914] P at p 76) and by LORD SUMNER in Weld-Blundell v Stephens (6) [1920] AC at p 983) In the former case the President said:

"The court is not concerned in the present case with any inquiry as to the chain of causes resulting in the creation of a legal liability from which such damages as the law allows would flow. The tortious act - ie, the negligence of the defendants, which imposes upon them a liability in law for damages - is admitted. This gets rid at once of an element which requires consideration in a chain of causation in testing the question of legal liability - namely, the foresight or anticipation of the reasonable man. In Smith v London and South Western Rail Co (8) CHANNELL, B, said:

'Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is

evidence for the jury of negligence or not but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not.'

And BLACKBURN, J, in the same case said:

'What the defendants might reasonably anticipate is only material with reference to the question, whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence.'

After referring to the various phrases used in connection with remoteness of damages he said:

"But it must be remembered, to use the words of a well-known American author (SEDGWICK) that 'the legal distinction between what is proximate and what is remote is not a logical one, nor does it depend upon relations of time and space; it is purely practical, the reason for distinguishing between the proximate and remote causes and consequences being a purely practical one'; and again, to use the words of an eminent English jurist (SIR F POLLOCK, 11th Edn, pp 35, 36) 'In whatever form we state the rule of "natural and probable consequences," we must remember that it is not a logical definition, but only a guide to the exercise of common sense. The lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause.'"

In the latter case - Weld-Blundell v Stephens (6) - LORD SUMNER said:

"What are 'natural, probable and necessary' consequences? Everything that happens happens in the order of nature and is therefore 'natural.' Nothing that happens by the free choice of a thinking man is 'necessary,' except in the sense of predestination. To speak of 'probable' consequence is to throw everything upon the jury. It is tautologous to speak of 'effective' cause, or to say that

damages too remote from the cause are irrecoverable, for an effective cause is simply that which causes, and in law what is ineffective or too remote is not a cause at all. I still venture to think that direct cause is the best expression. Proximate cause has acquired a special connotation through its use in reference to contracts of insurance. Direct cause excludes what is indirect, conveys the essential distinction, which causa causans and causa sine qua non rather cumbrously indicate, and is consistent with the possibility of the concurrence of more direct causes than one, operating at the same time and leading to a common result as in Burrows v March Gas and Coke Co (7) and Hill v New River Co (8). As, however, these different epithets and formula? are used almost indiscriminately, something more must be done than to choose an epithet which has been used in a decided case. It is necessary to consider whether the facts of the case cited raise a question of causation belonging to the same category as that under discussion. The crux of the present question is the intervention of Mr Hurst between the respondent and Messrs Comins and Lowe. Further, no want of care has to be proved here against the respondent, for he accepts the decision that he broke his contract by his partner's omission to be careful, though not by any deliberate, intentional, or wanton breach. This at once makes it possible to lay aside large classes of authorities. What a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence, that is, of want of due care according to the circumstances. This, however, goes to culpability, not to compensation: Blyth v Birmingham Waterworks (9); Smith v London and South Western Rail Co (3) per BLACKBURN, J Again, what ordinarily happens, or may reasonably be expected to happen, is material where a more series of physical phenomena has to be investigated and the remoteness of the damage or the reverse is to be decided accordingly. Such a case is Sharp v Powell (10) unless indeed it be regarded as

a decision on negligence or no negligence. At any rate it is not this case."

In the present case the arbitrators have found as a fact that the falling of the plank was due to the negligence of the defendants' servants. The fire appears to me to have been directly caused by the falling of the plank. In these circumstances I consider that it is immaterial that the causing of the spark by the falling of the plank could not have been reasonably anticipated. The charterers' junior counsel sought to draw a distinction between the anticipation of the extent of damage resulting from a negligent act, and the anticipation of the type of damage resulting from such an act. He admitted that it could not lie in the

mouth of a person whose negligent act had caused damage to say that he could not reasonably have foreseen the extent of the damage, but be contended that the negligent person was entitled to rely upon the fact that he could not reasonably have anticipated the type of damage which resulted from his negligent act. I do not think that the distinction can be admitted. Given the breach of duty which constitutes the negligence, and given the damage as a direct result of that negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant. I consider that the damages claimed are not too remote.

The other point relied upon by the charterers was that, the damage having been caused by fire, they were protected by cl 21 of the charter. To this it was replied that the clause had no application in the case of a fire caused by the negligence of the charterers' servants. I see no reason why a different rule of construction of this exception contained in the charterparty should be adopted in the case of the charterer than would undoubtedly be adopted in the case of the shipowner. In the case of the latter clear words would be required excluding negligence. No such words are found

in this clause. Neither shipowner nor charterer can, in my opinion, under this clause claim to be protected against the consequences of his own negligence. For these reasons I think that the appeal fails.

WARRINGTON LJ:

A ship owned by the respondents was destroyed by fire while under a time charter to the appellants. The owners claimed as damages the value of the ship and some incidental expenses. The charterers disputed the claim and the matter was referred to arbitrators, who made their award in the form of a Special Case in favour of the owners, subject, of course, to the opinion of the court. The only question for the court is whether on the findings of the arbitrators as to facts they were justified in law in making an award in favour of the shipowners SANKEY, J, has held that they were so justified The charterers appealed.

The accident happened in the port of Casablanca, in Morocco, to which the ship had been directed by the charterers with a cargo which included cases of benzine and/or petrol stored in No 1 hold. These cases had leaked on the voyage and there was a considerable quantity of petrol vapour in the hold. Arab stevedores employed by the charterers were engaged in shifting certain cargo in the hold, and for the purpose of their work had placed some heavy planks across the forward end of the hatchway. In the course of the work one of the planks came in contact with the sling or the rope by which the sling was worked, was thereby dislodged, and fell into the hold. The fall was instantly followed by a rush of flames, and the result was the total destruction of the ship. The charterers contend, first, that they are relieved from liability by the exception clause in the charterparty; and, secondly, that damages for the loss of the ship cannot be recovered, inasmuch as the causing of the spark was something that could not reasonably have been anticipated, and, therefore, the

destruction of the ship was not the natural or probable consequence of the negligent act, and the damage was too remote. As to the first point, the exception clause does not contain any express exception of loss by fire caused by negligence. The present claim is based on negligence. It appears to be well settled that in such a contract as the present the exceptions would not be construed so as to excuse the shipowner for loss of the nature described if caused by the negligence of himself or his servants, unless expressly so framed: CARVER ON CARRIAGE BY SEA (ss 14, 22); and as to bills of lading per BOWEN, LJ, in Steinman v Angier Line (11); and, in my opinion, the same construction must be given to the clause when it is the liability of the charterers which is in question. This defence therefore fails. As to the second point, it is contended that "a person guilty of negligence is not responsible in respect of mischief which could by no possibility have been foreseen and which no reasonable person would have anticipated" (5 Ex 248). We are asked, in effect, to say that the doubt on this point expressed by POLLOCK, CB, in Greenland v Chaplin (2) (5 Exch at p 248) is well-founded and that his tentative view set forth in that

case and in Rigby v Hewitt (1) (5 Exch at p 243) ought to prevail. There is some doubt whether the words of the Chief Baron in Greenland v Chaplin (2) are correctly reported in the EXCHEQUER REPORTS, for in the report in the LAW JOURNAL (19 LJ Ex at p 295) the words "guilty of negligence" are omitted, So that in the LAW JOURNAL report the passage reads:

"I entertain considerable doubt whether a man is responsible in respect of mischief,"

and so on, leaving out the words "guilty of negligence." However this may be, the law on this point is, in my opinion, correctly stated in BEVEN ON NEGLIGENCE, 3rd Edn, vol i, p 85. I need not read the passage. The result may be summarised as follows. The presence or absence of

reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequence of the act. Sufficient authority for the proposition is afforded by Smith v London and South Western Rail Co (3) in the Exchequer Chamber, and particularly by the judgments of CHANNELL, B, and BLACKBURN, J CHANNELL, B, says:

"I quite agree that where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by BRAMWELL, B, in his judgment in Blyth v Birmingham Waterworks Co (9) referred to by Mr Kingdon; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."

BLACKBURN, J, says:

"I also agree that what the defendants might reasonably anticipate is, as my BROTHER CHANNELL has said, only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence."

In the present case it is clear that the act causing the plank to fall was in law a negligent act, because soma damage to the ship might reasonably be anticipated. If this is so then the charterers are liable for the actual loss, that being on the findings of the arbitrators the direct result of the falling board: see per LORD SUMNER in Weld-Blundell v Stephens (6) ([1920) AC at p 983). On the whole, in my opinion, the appeal must be dismissed with costs.

SCRUTTON LJ:

The steamship Thrasyvoulos was lost by fire while being discharged by workmen employed by the charterers. Experienced arbitrators, by whose findings of fact we are bound, have decided that the fire was caused by a spark igniting petrol vapour in the hold, the vapour coming from leaks from cargo shipped by the charterers, and that the spark was caused by the Arab workmen employed by the charterers negligently knocking a plank out of a temporary staging erected in the hold, so that the plank fell into the hold, and in its fall by striking something made the spark which ignited the petrol vapour. On these findings the charterers contend that they are not liable for two reasons: first, that they are protected by an exception of "fire" which in the charter is "mutually excepted"; secondly, that as the arbitrators have found that it could not be reasonably anticipated that the falling of the board would make a spark, the actual damage is too remote to be the subject of a claim.

In my opinion, both these grounds of defence fail. An excepted perils clause, if fully expanded, runs that one of the parties undertakes to do something unless prevented by an excepted peril, in which case he is excused. But where he has an obligation to do some act carefully, if he fails in his obligation, and by his negligence an excepted peril comes into operation and does damage, the excepted

peril does not prevent him from acting carefully, and he is liable for damages directly flowing from his breach of his obligation to act carefully, though the breach acts through the medium of an excepted peril. It is a commonplace of mercantile law that if a peril of the sea is brought into operation by the carelessness of the shipowner or his servants, he is liable, though perils of the sea are excepted perils, unless he has also a clause excepting the negligence of his servants. In the same way, though the charterer has an exception of fire in his favour, he will be liable if the fire

was directly caused by his servants' negligence, for it was not fire that prevented them from being careful. This disposes of the first defence. The second defence is that the damage is too remote from the negligence, as it could not be reasonably foreseen as a consequence. On this head we were referred to a number of well-known cases in which vague language, which I cannot think to be really helpful, has been used in an attempt to define the point at which damage becomes too remote from, or not sufficiently directly caused by, the breach of duty, which is the original cause of action, to be recoverable. For instance, I cannot think it useful to say the damage must be the natural and probable result. This suggests that there are results which are natural but not probable, and other results which are probable but not natural. I am not sure what either adjective means in this connection; if they mean the same thing, two need not be used; if they mean different things, the difference between them should be defined. And as to many cases of fact in which the distinction has been drawn, it is difficult to see why one case should be decided one way and one another. Perhaps the House of Lords will some day explain why, if a cheque is negligently filled up, it is a direct effect of the negligence that someone finding the cheque should commit forgery: London Joint Stock Bank v Macmillan (12); while if someone negligently leaves a libellous letter about, it is not a direct effect of the negligence that the finder should show the letter to the person libelled: Weld- Blundell v Stephens (6). In this case, however, the problem is simpler. To determine whether an act is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact caused sufficiently directly by the negligent act, and not by the operation of independent causes having no connection

with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial. This is the distinction laid down by the majority of the Exchequer Chamber in Smith v London and South Western Rail Co, and by the majority of the court in bane in Rigby v Hewitt (1) and Greenland v Chaplin (2) and approved recently by LORD SUMNER in Weld-Blundell v Stephens (6) and SIR SAMUEL EVANS in HMS London (5). In the present case it was negligent in discharging cargo to knock down the planks of the temporary staging, for they might easily cause some damage either to workmen, or cargo, or the ship. The fact that they did directly produce an unexpected result, a spark in an atmosphere of petrol vapour which caused a fire, does not relieve the person who was negligent from the damage which his negligent act directly caused. For these reasons the experienced arbitrators and the judge appealed from came, in my opinion, to a correct decision, and the appeal must be dismissed with costs.

Appeal dismissed.

 ¿Era previsible, acaso, el riesgo de una eventual explosión del petróleo en el Thrasyvoulus?

 UNITED NOVELTY CO., Inc. v. DANIELS et al. No. 37203. SUPREME COURT OF MISSISSIPPI 42 So. 2d 395 October 24, 1949, Decided

In Banc.

ALEXANDER, Justice.

The decisive principles here involved are, while important, not novel. Appellees include the members of the family of William Daniels, a minor aged nineteen years, who was fatally burned while cleaning coin-operated machines as an employee of appellant.

The work was being performed in a room eight by ten feet in area, in which there was a gas heater then lighted

with an open flame. The cleaning was being done with gasolene. The testimony yields the unique circumstance that the immediate activating cause of a resultant explosion was the escape of a rat from the machine, and its disappointing attempt to seek sanctuary beneath the heater whereat it overexposed itself and its impregnated coat, and returned in haste and flames to its original hideout. Even though such be a fact, it is not a controlling fact, and serves chiefly to ratify the conclusion that the room was permeated with gasolene vapors. Negligence would be predicated of the juxtaposition of the gasolene and the open flame. Under similar circumstances, the particular detonating agency, whether, as here, an animate version of the classic lighted [*2] squib, or as in *Johnson v. Kosmos Portland Cement Co., 6 Cir., 64 F.2d 193*, a bolt of lightning, was incidental except as illustrating the range of foreseeability. 38 Am.Jur., Negligence, Secs. 60, 62, 65. *Richards v. Kansas Electric Power Co., 126 Kan. 521, 268 P. 847*; *Whitaker v. Pitcairn, 351 Mo. 848, 174 S.W.2d 163*. Compare *Cumberland Tel. & Tel. Company v. Woodham, 99 Miss. 318, 54 So. 890*.

[2] It is argued that the deceased disobeyed instructions in using gasolene. Without discussing the efficacy of such contention as a complete bar, the record fails to show that any such orders were ever given the deceased. The insistent and consistent testimony of defendants' witnesses that there were repeated admonitions to employees not to use gasolene is more relevant to the foreseeability, even expectancy, of defendant that resort would be made to this cleaning agency, than to the fact of disobedience, since there is no showing that deceased himself was warned.

Negligence and disobedience of a servant are not excluded from the outreach of a master's duty to foresee probable conduct. The duty of the master is not met by the adoption [*3] of rules for safety, but includes a duty

reasonably to enforce them. *Walters v. Stonewall Cotton Mills, 136 Miss. 361, 101 So. 495*; *Loper v. Yazoo & M. V. R. Company, 166 Miss. 79, 145 So. 743*; *Albert v. Doullut & Ewin, 180 Miss. 626, 178 So. 312*; *Southern Package Corporation v. Mitchell, 5 Cir., 109 F.2d 609*.

We do not set out the instructions complained of as given or refused. Those refused the defendant either were peremptory in character or invoked the doctrine of assumption of risk. An instruction for plaintiff which postulates the issue of negligence vel non upon acts set forth in the declaration and supported by the testimony is proper. *McDonough Motor Express, Inc., v. Spiers, 180 Miss. 78, 176 So. 723, 725, 177 So. 655*. It is not to be condemned as unduly emphasizing testimony nor as comment upon the weight of evidence, but is to be commended as '[informing] the jury what was necessary to make out the case stated in the declaration.' Other instructions requested by defendant and refused excluded the concept of the master's duty as nondelegable.

We have examined the other assignments and found in them no reversible [*4] error.
Affirmed.
Alexander v. The Town of New Castle. No. 13,225.
SUPREME COURT OF INDIANA 115 Ind. 51; 17 N.E. 200 May 29, 1888, Filed

[*52] [**201] Niblack, C. J.--This was an action brought by Harvey W. Alexander against the town of New Castle, for injuries alleged to have resulted from negligently permitting a sidewalk to be out of repair.

The first paragraph of the complaint charged that the town allowed a pit to be dug, or an excavation to be made, in the side of one of its streets, and wrongfully and negligently suffered and permitted such pit or excavation, with full knowledge of its dangerous character, to remain open and uninclosed, whereby the plaintiff, without any fault on his part, fell into the same and was injured.

The second, and only other paragraph, contained some additional averments not material to any question involved in this appeal.

The town answered: First. In denial. Second. That one Heavenridge was found upon one of its streets in possession of a gaming apparatus; that the plaintiff engaged with the said Heavenridge in a game of chance for the purpose of procuring evidence against him and causing his arrest; that, thereupon, the plaintiff filed his affidavit before a justice of the peace, charging Heavenridge with gaming, and obtained a warrant for the latter's arrest; that the plaintiff then induced the justice to appoint him a special constable to make the arrest, which he made accordingly; that the justice, after hearing the evidence, adjudged Heavenridge to be guilty as charged, and ordered him to be committed to the jail of the county; that the plaintiff, as such special constable, proceeded to take Heavenridge to jail as ordered, and, in doing so, attempted to pass the pit or excavation in question; that, when opposite the same, Heavenridge seized the plaintiff and threw him into the pit or excavation, whereby he was injured, as charged in the complaint; that by this means Heavenridge was enabled to escape, and did escape, from the custody of the plaintiff.

A demurrer to this second paragraph of answer, for the alleged insufficiency of its facts as a defence, was overruled, [*53] and a trial terminated in a verdict and judgment for the town, the defendant below.

Complaint is first made of the overruling the demurrer to the second paragraph of the answer, and this complaint is based upon the claim that, as the pit or excavation so wrongfully and negligently permitted to remain open and uninclosed afforded Heavenridge the opportunity of throwing the plaintiff into it as a means of escape, it was, in legal contemplation, the proximate cause of the injuries which the plaintiff received.

However negligent a person, or a corporation, may have been in some particular respect, he, or it, is only liable to those who may have been injured by reason of such negligence, and the negligence must have been the proximate cause of the injury sued for.

Where some independent agency has intervened and been the immediate cause of the injury, the party guilty of negligence in the first instance is not responsible. On that subject Wharton, in his work on the Law of Negligence, at section 134, says: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that casual connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I can not be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, [*54] but I am not liable to others for the negligence which he alone was the cause of making operative."

So, if a house has been negligently set on fire, and the fire has spread beyond its natural limits by means of a new agency; for example, if a high wind arose after its ignition, and carried burning brands to a great distance, thus causing a [**202] fire and a loss of property at a place which would have been safe but for the wind, the loss so caused by the wind will be set down as a remote consequence, for which the person setting the fire should not be held responsible. 1 Thompson Negligence, 144.

Our cases are in harmony with the general principles herein announced. *Smith v. Thomas, 23 Ind. 69*; *Pennsylvania Co. v. Hensil, 70 Ind. 569 (36 Am. R. 188*); *City of Greencastle v. Martin, 74 Ind. 449 (39 Am. R. 93*); *Billman v. Indianapolis, etc., R. R. Co., 76 Ind. 166 (40 Am. R. 230*); *City of Crawfordsville v. Smith, 79 Ind. 308 (41 Am. R. 612*); *Terre Haute, etc., R. R. Co. v. Buck, 96 Ind. 346 (49 Am. R. 168*); *Bloom v. Franklin Life Ins. Co., 97 Ind. 478 (49 Am. R. 469*); *Pennsylvania Co. v. Whitlock, 99 Ind. 16 (50 Am. R. 71*).

Heavenridge was clearly an intervening, as well as an independent, human agency in the infliction of the injuries of which the plaintiff complained. The circuit court, consequently, did not err in overruling the demurrer to the second paragraph of the answer.

The circuit court gave the jury several instructions, one of which was as follows:

"If the sidewalk and street named in the complaint were in ordinarily safe condition for ordinary public travel, the plaintiff can not recover, the town not being bound to provide against extraordinary conditions or circumstances of travel or passage along its streets or sidewalks."

As an abstract proposition this instruction stated the law correctly. 2 Dillon Munic. Corp., section 1006.

However inapplicable, therefore, it may have been to the [*55] controlling facts or the distinctive features of the present case, the plaintiff had no cause to complain of it as an erroneous instruction.

A question is sought to be made upon the sufficiency of the evidence to support the verdict, but no failure in that respect has been specifically pointed out. There was evidence tending to sustain the defence set up by the second paragraph of the answer. We can not, therefore,

rightly disturb the verdict upon the evidence. 2 Dillon Munic. Corp., section 1007.

The judgment is affirmed, with costs.

 ¿No era previsible el riesgo de una eventual explosión de los vapores de gasolina emitidos mientras el empleado limpiaba la maquinaria con gasolina, cuando la rata se prendió fuego en el lugar?

TABLA DE LOS CASOS