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Contributory negligence is certainly not a very popular doctrine today. Assaults upon it are fast becoming commonplace, and I suspect that any serious defender of contributory negligence faces the risk of being branded as a reactionary. Indeed, most of the apologies that have been offered in behalf of the doctrine are thin and non-persuasive. It has not, however, been utterly devoid of effective championship. Sixty years ago Francis Bohlen offered the only rationale of contributory negligence that strikes me with a true ring of conviction.[1] Directing himself first to the ideas of assumption of risk and consent, Bohlen observed:

> The state has no interest in [the individual's] getting the utmost benefit from his merely private rights. It protects him in his right to do what he pleases with them—so it prohibits their invasion without his consent—it does not attempt to protect him from his own folly in dealing with them.[2]

The common law with which Bohlen was dealing in 1908 was sharply individualistic. Anyone—rich or poor, capable or incapable, suspicious or gullible—was free to toss his rights deliberately to the wind if he so chose. Hence, *volenti non fit injuria.* However this may be, mere careless self-exposure to danger, if it were to upset recovery in an otherwise appropriate case, would require that the law demonstrate its individualist point of view even further. This, Bohlen pointed out, significantly, is what it does. "It throws on the individual the primary burden of protecting his own interest. The courts are the last resort of him who not merely does not, but cannot, protect himself."[3]

Under this view, contributory negligence is something more than a mere distorted anomaly in delictual law. Instead, as Bohlen observes, "This conception is part of the very atmosphere of English legal thought—it is not peculiar in the law of tort to negligence alone, nor is it even confined to the law of torts."[4]

This stands in sharp contrast with the shallow but frequently voiced apology that the object of the defense of contributory negligence is to visit appropriate retribution on the careless victim and

* Boyd Professor of Law, Louisiana State University Law School. A.B. 1928, J.D. 1931 University of North Carolina; LL.M. 1933, Harvard University. Advisor to Reporter, RESTATEMENT (SECOND), TORTS.

1. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908).
2. *Id.* at 252.
3. *Id.* at 253.
4. *Id.*

to prevent his profiting from his own wrongdoing. For Bohlen it is no such thing. It is, rather, one device among many for giving effect to the sharply limited character of the duties owed for the protection of others. "[Each individual is] his own first bulwark against outside interference, and . . . the function of remedial law takes on where the power of self-protection ceases."[5] The same limitation that finds its voice in contributory negligence can be expressed from the defendant's viewpoint by the observation that the full extent of the defendant's duty of due care is to abstain from harmful conduct under such circumstances that the victim may be denied his usual capacity to protect himself; but so long as the latter is not deprived of his normal ability to watch out for his own safety, he has not suffered a legally compensable harm at the hands of the defendant.

Of course, we do not necessarily bolster the case for contributory negligence or render it less impervious to criticism merely by shifting the rationale behind it. As a matter of fact, we may even sharpen the hostility toward the defense by suggesting that the doctrine be stamped with the label of nineteenth century individualism, rather than being regarded merely as an awkward way of handling the situation where bad man meets bad man. I suggest, however, that by shifting the rationale to the broader policy base, we invite a new appraisal of the arguments both favoring and disparaging contributory negligence. If its weakness is rooted in the fact that it rests upon the same (possibly discreditable) foundation of individualism that underlies the entire torts system, it cannot be readily loosened at will from the remaining mass of individualistically oriented tort law and singled out for special attack.

Again, our assumption concerning the basic policy that underlies contributory negligence may influence us to accept or to reject the competing device of comparative negligence. So long as the problem is conceptualized in terms of what to do when plaintiff's misbehavior and defendant's similar misbehavior collide and bring about a single loss, we may be attracted by the possibility of reconciling the two wrongs through an adjustment of damages. Hence we would look with favor upon some comparative negligence scheme or other. If, however, the significant problem is solely one of determining the outside limits of the duty that the defendant should be required to shoulder, the solution of comparative negligence may seem a bit absurd. A duty approach, such as Bohlen's, suggests that the prospect of the plaintiff's own heedlessness should be either wholly protected by the defendant's duty of care, or wholly outside the ambit of protection.

5. *Id.*

Quite apart from contributory negligence, duty-limiting devices that take the victim's behavior into account are familiar in suits against occupiers of premises. The licensee or social guest cannot recover for an injury resulting from some danger which he would have discovered for himself had he been alert.[6] The occupier's duty is merely to warn or to make reasonably certain that the defect is an obvious one. In such cases any suggestion that a fair adjustment could be made by allowing the heedless guest 25 cents on the dollar for his loss would sound strange, indeed, to the common law ear. The situation is the same with reference to the rights of the gratuitous passenger in an automobile,[7] and until fairly recently, there could be no recovery by even the business patron for defects on the premises which would be obvious to a reasonably alert person.[8]

One characteristic common to all the situations described above is the fact that attention is centered upon the question of whether advance preparation should be demanded of the defendant who makes his property or facilities available to others. The decisions, in effect, deny that there is any affirmative duty to make the surroundings safe. A complex of duty language, talk about causation, and affirmative defenses such as assumed risk and contributory negligence all serve somewhat indiscriminately to protect the defendant, and the choice of doctrine may be largely a matter of personal preference or result from some fortuity in the pleadings. One judge may stress that the occupier or owner owed only a duty to avoid concealment of the defects on his premises or in his vehicle; another may emphasize that the plaintiff was aware of the danger and assumed the risk, or that the accident must be attributed to his heedlessness as the responsible cause; while a third judge may direct the jury to return a verdict for the defendant on the ground that the plaintiff was contributorily negligent as a matter of law. But whatever the rationale may be, recovery should be denied so long as legal policy tolerates this limited view of the defendant's obligation. It is difficult to discover any role here for an adjustment in terms of the amount of damage to be awarded.

It is important to note that with respect to injuries to the business guest or invitee the law's demands upon the occupier have become considerably more exacting in recent years. The proprietor who throws his premises open indiscriminately to the public is no longer privileged to rely upon his guests to watch out for themselves. The host must now take reasonable steps to obviate dangers which he should expect

6. RESTATEMENT (SECOND) OF TORTS §§ 341A, 342.
7. PROSSER, TORTS 392 (3d ed. 1964).
8. *See, e.g.*, RESTATEMENT OF TORTS § 343(c)(ii).

the patron to encounter despite their obviousness.[9] We are here saying, in effect, that the prospect of customer heedlessness in appropriate cases may be a risk that is wholly embraced within the scope of the duty properly owed by the defendant. Whenever this is the case, the guest should recover the full amount of his damage. If the customer's carelessness is a risk against which the proprietor must afford affirmative protection, we can hardly justify trimming down the amount of recovery because the customer failed to use reasonable care.

Again, even where it is clear that the proprietor owes an affirmative duty to prepare for the reception of customers, the extent of the preparation expected of him is limited by the dictates of reasonableness. It follows that unless the host is expected to provide a fool's paradise, he should be entitled to anicipate some modicum of intelligent cooperation on the part of the guest. The patron, for example, who walks backward along a store aisle until he finally reaches a place where he falls down an open stairwell should clearly be denied recovery for the simple reason that no storekeeper should be expected to provide a safe haven against risks of this character. No damages whatsoever should be awarded when it is found that the defendant's conduct measures up to the standard of reasonable care.

This writer cannot escape the impression that the parent of all contributory negligence cases, *Butterfield v. Forrester*,[10] is, in truth, only an illustration of an extravagant risk created by the plaintiff's conduct. Here, it will be recalled, Forrester had allowed a pile of timber to lie in a public road in such a position as to partially obstruct passage. Sufficient room was left, however, so that the ordinarily alert traveler could pass safely and without serious inconvenience. The obstruction was visible for one hundred yards. At twilight young Butterfield, returning from the town tavern, was pressing his horse violently. In his heedlessness he failed to observe the timber and ran his steed against it. A denial of recovery was entirely to be expected, and the only novel feature of the case was Ellenborough's historic pronouncement that in order for a plaintiff to recover it must appear that he himself was without fault. It should be borne in mind that the suit was essentially for a public nuisance which would exist only if there were an unreasonable interference with the public right. Forrester's obstruction was probably no substantial frustration of the travel needs of the ordinary highway user. Travelers during this period in English history were fortunate if the public highways were even passable. Butterfield's extravagant horsemanship demanded more

9. RESTATEMENT (SECOND) OF TORTS § 343A.
10. 103 Eng. Rep. 926 (K.B. 1809).

in the way of road safety than he was entitled to at that time.

Perhaps the above rambling observations betray the fact that I am somewhat concerned over the prospect of regarding the negligence of the tort victim universally as a matter merely to be considered in reduction of damages. As I see it, the plaintiff's own conduct represents an aspect of the torts controversy that may exert its influence upon the character of the duty owed by the defendant, or upon the issue of his negligence, or upon the nature of the risk for which he should be made answerable. There are times when the plaintiff's carelessness should be wholly ignored. There are other times when it must be regarded as a risk factor that should preclude recovery entirely.

At still other times it is equally clear that the victim's fault should serve only to mitigate his damages. Characteristic of this class of situations are cases arising from the operation of motor vehicles. The human failings upon which attention is focused in the typical traffic cases are those involving active misconduct at the very scene of the tragedy, and the observation, alertness, coordination, responsiveness, and judgment of both parties is sharply involved. Characteristically, both the victim and the alleged wrongdoer are in motion simultaneously, and, at least whenever a collision of vehicles is involved, both litigants are engaged in conduct that exposes them mutually to the risk of injury or death. Hence, personal behavior is dramatically prominent in these cases, and the impact of personal fault upon personal fault is vivid. The urge to compare the respective behavior of the parties and to adjust damages accordingly is likely to be compelling in this type of litigation.

Certainly the comparative approach is the attack that would be favored by the layman. Forty years ago an experienced trial judge observed that "juries have knocked this theoretical law of contributory negligence into a cocked hat . . . . Anyone with open eyes directed either to the front or to the rear, can plainly see that, on this point at least, the living law is jury-made far more truly than it is judge-made."[11] Speaking of contributory negligence as early as 1934, Professor Charles Lowndes noted that "this tall timber in the legal jungle has been whittled down to toothpick size by the sympathetic sabotage of juries."[12]

There is every reason to believe that judges not only are aware of the consistent jury tendency merely to compare fault in fixing the

11. ULMAN, A JUDGE TAKES THE STAND 31 (1932). The writer's interest in this statement prompted him to inquire of other trial judges seeking their reactions to Judge Ulman's observation. The results will be found in Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 64-66 (1945).

12. Lowndes, *Contributory Negligence*, 22 Geo. L.J. 674 (1934).

damage award, but likewise generally approve of it. They appear to be content with the practice of instructing the jury one way while confidently expecting it to disregard what it was told to do. Why, then, do courts consistently adhere to contributory negligence in their formal pronouncements and refuse to acknowledge openly an approach which they privately condone? The answer, I believe, lies in the subtleties of the judge-jury relationship and in the court's realization of the necessity of preserving its ultimate power of control over the issue of plaintiff fault.

I suspect that a tally of those instances in which courts have resorted to their power to non-suit or direct verdicts on the issue of plaintiff carelessness in the area of automobile accidents would not result in a very impressive list. The characteristic features of traffic mishaps mentioned above would probably exert their influence upon judge and jury alike. Also, the ready availability of last chance rules encourages jury participation in these controversies.

However, there is no discernible reluctance by courts to direct verdicts on the issue of the plaintiff's carelessness in suits by invitees against proprietors of business premises. The writer has had occasion to examine a representative group of about two hundred cases in this area where contributory negligence was seriously in issue.[13] In more than a third of these disputes the appellate courts had either approved the trial judge's action in directing a defendant verdict, or had reversed a judgment for plaintiff because the trial court had allowed the controversy to reach the jury on the contributory negligence issue. I have already ventured my suggestion as to why the courts assume rigorous control in these cases. Issues of duty, negligence, and assumed risk have been too closely intervolved here to justify the simple expedient of a homely adjustment of damages. I strongly suspect that the same would hold true in suits against manufacturers by injured consumers. Whenever misuse of the product by the claimant is set up as a defense, the problem presented is often a difficult one requiring a policy determination as to the adaptability of the product to a market of users some of whom may be inept, incautious, or ignorant. Fortunately, the rejection of negligence as the basis of recovery in products liability cases should remove any temptation to mitigate damages because of customer carelessness. The prospect of a misuse of the product is an appropriate factor for consideration in determining whether the products is, or is not, "defective."

There is little reason to doubt that an alert judge can effectively

13. Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61, 67 (1945).

isolate issues of duty and breach of duty, on the one hand, from issues of contributory negligence, on the other, and the courts will maintain such jury control as they deem advisable. The fact remains, however, that an open inauguration of comparative negligence invites a fuller participation by the jury in the decisional process. It indicates a tendency to depart from specific limits on liability imposed through restrictive statements of law formulated by judges, and the substitution therefore of broad formulae administered largely by the lay juryman.

The same tendency to curtail the judge's law-declaring function and to enlarge the jury's area of operations finds a dramatic demonstration in the recent action by the California Supreme Court which virtually demolishes for that state the entire framework of circumscribed duties owed those who enter upon the premises of others.[14] The traditional classifications of trespasser, licensee and invitee—each of which calls into play its own peculiar context of duties—appear to have been abolished. The general duty owed to all who enter the premises of the California proprietor is now characterized as that of reasonable care. Whether the victim enters as welcome customer, social visitor, or unwanted trespasser is a matter of importance only as it may serve to influence the trier of fact as he ponders the reasonableness or unreasonableness of the defendant's behavior. Here again, as with comparative negligence, the law-making power of the judge is subordinated to an individualized judgment tailored to each controversy under a broad and elastic formula. Although this is a task eminently suited to the talents of the juryman, yet the importance of the shift lies not so much in the possible substitution of lay opinion in place of professional judgment, as in the fact that the discretionary element in the decisional process is enormously increased as arbitrary rule yields to broad formula. Thus the change is highly significant even for the single trier who sits as both judge and jury.

How should we appraise this obvious enhancement of the discretionary element in decisions? Does emphasis on the personal character of the judgment indicate a new infusion of "morality" into the process? Is there thus demonstrated a revived interest in the personal blameworthiness of the individuals involved in each accident? Or, on the other hand, does the shift away from rule and toward discretion serve only to highlight the artificiality of what the fault system has become? By catering more directly to the trier's uninhibited sense of justice, do we merely give freer play to the instinct that demands compensation for harm, because the victim is in need and because machinery is being made available for a distribution of the

14. Rowland v. Christian, 69 Cal. 2d 89, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

accident costs in diluted form throughout society? Are these liberalizing tendencies merely way stations on the road leading toward the eventual socialization of risk?