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PARTICULARIZING STANDARDS OF CONDUCT IN NEGLIGENCE TRIALS

FLEMING JAMES, JR.* and DAVID K. SIGERSON†

The general principles to be applied by court or jury in deciding whether conduct is reasonable have been examined elsewhere.¹ The problem to be dealt with here concerns the specific application of the law's standard of conduct to concrete cases. How, that is, may it be shown what a party or his opponent *should* have done, in the way of taking precautions or the like, in the situation presented by the evidence? What kinds of proof or argument are available to make this showing? When must such a showing be made by proof? Is the jury or court to determine what would be reasonable conduct? If the jury, what limitations are to be placed on its sphere of decision? In analyzing these problems it must be borne constantly in mind that rules which enlarge the jury's function work on the whole towards expanding liability, while rules whereby the law fixes specific standards or requires special modes of proof tend to narrow the jury's role and, on the whole, to restrict liability and the possibilities for compensating accident victims.²

THE JURY'S OWN JUDGMENT—WHAT THEY MAY DETERMINE UPON COMMON KNOWLEDGE AND EXPERIENCE

As a general proposition it is not essential to a party's case that he prove or otherwise show what his opponent *should have done* under the circumstances. It is enough to show *what he did*, and what the circumstances were.³

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1. See, e.g., Terry, *Negligence*, 29 HARV. L. REV. 40 (1915); Edgerton, *Negligence, Inadvertence and Indifference*, 39 HARV. L. REV. 849 (1926); Seavey, *Negligence—Subjective or Objective*, 41 HARV. L. REV. 1 (1927); James, *Qualities of the Reasonable Man in Negligence Cases*, 16 MO. L. REV. 1 (1951).

A valuable and provocative treatment of the nature of legal standards—as distinguished from rules—is to be found in Pound, *The Administrative Application of Legal Standards*, 44 A.B.A. REP. 445 (1919).

2. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476 (1936); James, *Functions of Judge & Jury in Negligence Cases*, 58 YALE L. J. 667, 689 (1949).

3. The plaintiff, of course, has the burden of proving defendant's negligence. What is meant in the text is that plaintiff will usually be able to meet that burden (and make out a prima facie case on the negligence issue) without making any specific showing (e.g., by proof) of what defendant should have done. In the ordinary highway collision case, for example, to the extent that common law negligence is relied on, plaintiff meets

It is then for the jury to determine whether, in the light of their common experience in the affairs of men, they find he failed to act as a reasonable man would have acted. This implies that there was some concrete thing that he could have done or omitted to do, and that such act or such omitted precaution was reasonable and feasible, and would have been effective to prevent injury under the circumstances. But if it is within the competence of men of affairs generally to make this judgment in a given case, the jury may make it even though there is no proof or statute or regulation in the case which points directly to any specific precaution that could reasonably have been taken and even though the jury themselves are not satisfied as to the precise nature of what ought to have been done. In this sense the jury need not fix or agree upon a standard of conduct of precautions to be taken, but need only find that the conduct of the party falls short of *any* standard which they would agree upon as reasonable. The jury's finding of negligence is thus always that the actor *should not* have acted as he did; this implies a finding that he *should have acted otherwise, but not necessarily in any specific*

this burden of proof if his evidence shows what defendant's conduct was and its setting in the circumstances, provided only the court believes that reasonable men might characterize that conduct as something less than reasonable. The law will supply the general standard of conduct, by means of the judge's charge. The jury will then translate this into a specific rule of conduct for the particular case—*e.g.*, a reasonably prudent man would not have driven *this* automobile around this curve at a speed of 40 miles an hour under all the circumstances disclosed *here*, therefore defendant should not have done so. The point made here is simply that this rule of conduct is generally supplied by the jury's common knowledge, and not by proof. *Cf.* *Kelly v. City of Waterbury*, 96 Conn. 494, 114 Atl. 530 (1921); *Cone v. Davis*, 66 Ga. App. 229, 17 S.E.2d 849 (1941) (rejecting opinion evidence as to careful automobile driving). "Possessed of a yardstick with which the law presumes them to be familiar—the reasonably prudent man—the jury apply it to the conduct in question and determine whether it measures up to that standard." *Marfyak v. New England Transp. Co.*, 120 Conn. 46, 49, 179 Atl. 9, 10 (1935).

The same thing is true where plaintiff complains of the dangerous condition of goods or of premises. Thus in *Campbell v. Hughes Prov. Co.*, 87 Ohio App. 151, 94 N.E.2d 273 (1949), *aff'd* 153 Ohio St. 9, 90 N.E.2d 694 (1950), defendant urged that the jury could not find the arrangement of counters and doors in a store to be negligent without "competent evidence of the departure from some standard, and that it was not up to a jury, in the absence of such evidence, to fix the standard such as was done in the instant case." The court, however, disagreed and held the jury competent to make such determination from their general experience. This point seldom becomes articulate, but it is assumed in all the myriad cases where the negligence issue is left to the jury, over an objection to the sufficiency of evidence, where there is no applicable statute and no evidence (as of custom or by experts) of what should be done. Some typical examples are *Giliberto v. Yellow Cab Co.*, 177 F.2d 237 (7th Cir. 1949) (leaving two similar doors in garage unlocked without indicating that one of them opened into place of immediate danger); *Zinnel v. U. S. Shipping Bd. E. F. Corp.*, 10 F.2d 47 (2d Cir. 1925) (deck without railing or other guard in heavy seas); *Evans v. Sears Roebuck & Co.*, 104 S.W.2d 1035 (Mo. App. 1937); *Burke v. Kenny*, 6 N.J. Super. 524, 69 A.2d 757 (1949) (failure to tell plaintiff to get out of way of asphalt about to crupt); *East Tenn. L. & P. Co. v. Gose*, 23 Tenn. App. 280, 130 S.W.2d 984 (E.S. 1939) (leaving trap door open in store floor).

In many cases, a standard or rule of conduct is furnished by an applicable statute. For treatment of such cases, see Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914); Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); Morris, *The Relation of Criminal Statutes and Tort Liability*, 46 HARV. L. REV. 453 (1933); James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95 (1950).

manner.⁴ Suppose, for instance, a plaintiff while walking slowly through a strange dark hallway holding out his hands in front of him, falls down an unguarded elevator shaft and hurts himself. There are certain easily understood precautions that either party might have taken. The plaintiff might have stayed out of the hallway altogether, on seeing its darkness, or insisted on a light, or felt ahead of himself in the dark with a stick or with his foot before he took each step. He whose hallway it was might have lighted it, or put barriers around the shaftway, and so on. In the hypothetical case men of ordinary understanding can think of, and assay the feasibility of possible precautions. The jury will therefore be permitted to find negligence on the part of either party, or both, in the absence of specific evidence, by expert opinion or otherwise, on the point.⁵ Nor does it seem that in such a case the jurors would all have to agree that this or that omitted precaution should have been taken if only they are unanimous in finding that something more than was done should have been done.

4. "It is not incumbent upon the plaintiff to show what precautions the defendant should take; that duty devolved upon the defendant, who was liable for negligence in putting such dangerous goods upon the market without sufficient precaution to make them safe." *Grant v. Graham Chero-Cola B. Co.*, 176 N.C. 256, 97 S.E. 27, 28 (1918) (court then proceeds to list possible precautions which might prevent carbonated bottled drink from exploding). In *Wolf v. Des Moines El. Co.*, 126 Iowa 659, 98 N.W. 301 (1904), 102 N.W. 517 (1905) the question was whether a gasoline engine with an exhaust pipe standing up through the roof of the engine room 40 feet from a traveled way, which emitted loud, sharp puffs, was unreasonably likely to frighten horses. Plaintiff showed that the noise could be materially reduced if the exhaust pipe were *either* carried to the rear of the building, *or* conducted through a tube of water. In holding the issue of negligence was for the jury, the court said ". . . we are not to be understood as holding that the law imposes upon one operating a gasoline engine the abstract duty of adopting any particular method of muffling the sound of the exhaust, or, for that matter, of employing any method whatever. The question is one of negligence, in any event. . . ." 102 N.W. at 517. If the jury then found the arrangement in evidence before them to be negligent, they need not agree upon what steps defendant should have taken to remedy the situation.

There is dearth of discussion on the precise point, but it has often been assumed by instructions letting a jury find negligence if they thought due care required certain precautions *stated alternatively*. *Graves v. May Dep't Stores Co.*, 153 S.W.2d 778 (Mo. App. 1941) (question whether escalator safe—instruction upheld which "did not restrict the protection to requiring mechanical guards . . . and was broad enough to include the use of attendants, mechanical guards, or any protection 'in such a way that plaintiff's injuries, if any, would not have occurred'"); *Evans v. Sears Roebuck & Co.*, 104 S.W.2d 1035 (Mo. App. 1937) (charge predicating negligence on "failing to remove or to cover" ice on driveway upheld). Compare the reasoning of the court in *Rankin v. S. S. Kresge Co.*, 59 F. Supp. 613 (N.D. W. Va. 1945) (listing possible precautions to avoid danger to customers from litter left by school children on store floor); *Schubart v. Hotel Astor, Inc.*, 168 Misc. 431, 5 N.Y.S. 2d 203 (Sup. Ct. 1938), *aff'd* 255 App. Div. 1012, 8 N.Y.S. 2d 567 (2d Dep't 1938), *aff'd mem.*, 281 N.Y. 597, 22 N.E.2d 167 (1939) (whether hotel should have attendant or take some other precaution to protect patrons using revolving door on night of football crowd, held for jury); *Cardell v. Shartenberg's, Inc.*, 69 R.I. 97, 31 A.2d 12 (1943) (whether terazzo floor needed mat or other protection when wet, held for jury).

5. There is no doubt that a jury would at least be *allowed* to find negligent each party in this hypothetical situation. Some courts would hold plaintiff negligent as matter of law, but the tendency today is to make this determination depend upon all the circumstances. *Burk v. Corrado*, 116 Conn. 511, 165 Atl. 682 (1933); *Silvestro v. Walz*, 222 Ind. 163, 51 N.E.2d 629 (1943); *Boyce v. Brewington*, 49 N.M. 107, 158 P.2d 124 (1945); *Huus v. Ringo*, 76 N.D. 763, 39 N.W.2d 505 (1949); *Polm v. Hession*, 363 Pa. 494, 70 A.2d 311 (1950); *Note*, 163 A.L.R. 587 (1946).

This is by far the most common type of situation. But the field within which the jury will be allowed to find negligence without some showing by proof or otherwise, bearing on the proper standard of conduct has its limits. Principally these are transcended (1) where the matter to be dealt with is so esoteric that men of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable, and (2) where the court is satisfied that all reasonable precautions have been taken (whether or not it is within the realm of common experience to judge the matter).

Except for malpractice cases (against a doctor, dentist etc.) there is no general rule or policy *requiring* expert testimony as to the standard of care, and this is true even in the increasingly broad area wherein expert opinion will be received.⁶ On the other hand, any given matter may conceivably be so far out of the range of general experience that a jury will not be allowed to decide upon the reasonableness of an actor's conduct without the aid of expert testimony which at least explains the esoteric problems and the possibility and practicability of precautions to the layman. A probable example of this sort of case is presented by the situation in *Air Reduction Co. v. Philadelphia Storage Battery Co.*⁷ The defendant there furnished oxygen gas under pressure to plaintiff and constructed a manifold for this purpose at plaintiff's plant. This was made of steel and was bored. While oxygen was being delivered fire broke out at the manifold which destroyed plaintiff's factory. Plaintiff's experts testified that when a steel surface was exposed to oxygen under pressure there was likelihood of combustion, and that the presence of a bored surface increased this danger. They stated that the use of brass or copper, or cast pipe of any material would reduce the danger. Defendant's experts gave a diametrically opposed opinion, but plaintiff had a verdict. The case was held to be properly one for the jury, but it is doubtful indeed that they would have been allowed to speculate on the comparative dangers of different metals or of bored or cast surfaces simply on the basis of common experience.⁸ Courts could very easily expand the area in which expert testimony is required to establish the standard of conduct, but the tendency has been instead to resolve doubtful questions

6. Cf. *Cackowski v. Jack A. Halprin, Inc.*, 133 Conn. 631, 53 A.2d 649 (1947).

7. 14 F.2d 734 (3d Cir. 1926).

8. The court said that the issue of proximate cause would not have been for the jury had there been no expert testimony; probably this would have applied also to the standard of conduct. See comments on this case in Morris, *Role of Expert Testimony in the Trial of Negligence Issues*, 26 TEXAS L. REV. 1, 2 (1947). Cf. also *Heublein, Inc. v. Second Nat. Bank*, 115 Conn. 168, 160 Atl. 898 (1932) (not a negligence case). The *East Ohio Gas Co.* cases also furnish a good example of a situation where expert evidence was no doubt necessary. *Moran v. Pittsburgh—Des Moines Co.*, 166 F.2d 908 (3d Cir. 1948); *Foley v. Pittsburgh—Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949). Cf. also *Grammer v. Mid-Continent Petroleum Corp.*, 71 F.2d 38 (10th Cir. 1934); *Cooley v. Public Service Co.*, 90 N.H. 460, 10 A.2d 673 (1940).

in favor of allowing the jury to decide the issue of negligence without its aid.⁹ Thus the clearance to be required between a train and a mail crane,¹⁰ the feasibility of carrying electric wires on cross-arms that protrude from one side of a pole only,¹¹ the proper safeguards for the construction and operation of an escalator in a department store,¹² have all been held to be matters within a jury's unaided competence to decide. In the mail crane case the court pertinently suggested that if there were reasons for such close clearance which might be hidden from the ordinary mind, it was up to the party who created the danger to explain its necessity,¹³ a proposition which reflects something both of the reasoning and the policy of *res ipsa loquitur*. And wherever that doctrine is applied, or a presumption of negligence is indulged, it will be seen that the jury is allowed to find the standard of conduct as well as its breach, usually without the necessity for expert testimony.¹⁴

As to the standard of conduct for professional men in malpractice cases, the same underlying principles are said to apply, but in applying them the courts have gone counter to their general tendency to resolve doubtful questions in favor of enlarging the jury's sphere. In this field expert testimony is required to make a prima facie case "unless the negligence is so grossly apparent that a layman would have no difficulty in recognizing it."¹⁵

9. Opposing points of view were pungently expressed in *Zinnel v. U. S. Shipping Bd. E. F. Corp.*, 10 F.2d 47 (2d Cir. 1925). The question was whether a deck without guard or railing was a reasonably safe place to work in heavy seas. L. Hand, J., for the court, thought "Without some guard line we need no expert to show us that a case was presented, which a jury must decide, as to the safety of the place where the intestate was ordered to work." *Id.* at 48. But Judge Hough, dissenting, said "Whenever a jury is asked to declare whether a certain act or omission of 'lack of care according to the circumstances'—i.e. negligent—proof of the circumstances includes proof as to what skilled men habitually do under similar circumstances, unless the occurrence at bar is so familiar to a jury of the vicinage as to need no such exposition. Injury by a vehicle to a foot passenger on a New York street crossing is an instance of such familiarity. But the present decision invites, by easy possibility, a jury of tailors and haberdashers to pass judgment on how to make a wet and rolling deck in a seaway a 'safe place to work'; for there is no evidence at all as to what good seamanship, not the fears of tailors, require on such a ship at such a time." *Id.* at 49.

Of course in many situations plaintiff would be well advised both to bolster his case and avoid questions, by calling experts. In the very able article cited in the last note, Professor Morris develops this point with well chosen instances. Some of the cases, however, in which he seems to suggest that expert testimony was needed to make out a prima facie case (See, e.g., those cited in note 2 of his article) represent only milestones in the progressive tendency to enlarge the scope of matters upon which expert testimony will be received. They involved the admissibility of such evidence and did not rule upon its necessity.

10. *Missouri K. & T. Ry. v. Williams*, 103 Tex. 228, 125 S.W. 881 (1910).

11. *Harris v. Central P. Co.*, 109 Neb. 500, 191 N.W. 711 (1922), discussed in Morris, *supra* note 8, at 20.

12. *Reynolds v. May Dep't Stores Co.*, 127 F.2d 396 (8th Cir. 1942); *Graves v. May Dep't Stores Co.*, 153 S.W.2d 778 (Mo. App. 1941).

13. *Missouri K. & T. Ry. v. Williams*, 103 Tex. 228, 125 S.W. 881, 882 (1910).

14. See James, *Proof of the Breach in Negligence Cases*, 37 VA. L. REV. 179, 197 n.55, 202 (1951).

15. 7 WIGMORE, EVIDENCE § 2090 (3d ed. 1940); James, *Accident Liability: War-time Developments*, 55 YALE L.J. 365, 376-77 (1946). Examples of malpractice so obvious

And this exception has generally been applied sparingly, so that a jury has been forbidden, for instance, to find in the absence of expert testimony that a doctor should use an X-ray to discover trouble at the site of an old fracture,¹⁶ or that a dentist should disinfect a cut accidentally made.¹⁷ Moreover, the expert (one qualified in medicine, or dentistry, as the case may be), must go further than to say that he would take the precaution in question; he must say that defendant's treatment deviated from any of the methods of treatment approved by the standard of the profession in that community.¹⁸ This tenderness accorded to professional men (which may perhaps be attributed to the serious consequences to their professional standing from a successful malpractice suit) has few analogies in modern accident law.¹⁹

Even where courts require expert testimony before they will allow the negligence issue to go to the jury, they will if the requirement is met permit the jury to resolve conflicts of opinion among expert witnesses, and come to their own conclusions about the proper standard of conduct.²⁰

The court will also take the negligence issue from the jury whenever it is satisfied that all reasonable precautions have been taken—that is, when it thinks reasonable men could not prescribe a standard of conduct of which

that expert testimony was unnecessary, are *Lanier v. Trammell*, 207 Ark. 372, 180 S.W.2d 818 (1944) (failure to sterilize instruments before operations); *Armstrong v. Wallace*, 8 Cal. App. 2d 429, 47 P.2d 740 (1935) (sponge left in abdomen); *Smith v. Zeagler*, 116 Fla. 628, 157 So. 328 (1934) (same); *Gill v. Selling*, 125 Ore. 587, 267 Pac. 812 (1928).

16. *Boyce v. Brown*, 51 Ariz. 416, 77 P.2d 455 (1938).

17. *Chubb v. Holmes*, 111 Conn. 482, 150 Atl. 516 (1930).

18. *Boyce v. Brown*, 51 Ariz. 416, 77 P.2d 455 (1938); *Lett v. Smith*, 6 La. App. 248 (1928); *Rytkonen v. Lojaco*, 269 Mich. 270, 257 N.W. 703 (1934).

19. Not long ago there were frequent manifestations of tenderness to employers in master-servant cases. Cf., e.g., *Tiller v. Atlantic Coast Line R.R.*, 318 U.S. 54, 63 Sup. Ct. 444, 87 L. Ed. 610 (1943); *James, Assumption of Risk*, 61 YALE L.J. 141, 154 (1952). But these were largely swept away by workmen's compensation laws. Within the past generation, however, there were many such rulings under the Federal Employers' Liability Act. One such line of cases produced a result at least as extreme as those dealing with professional malpractice under which the employer railroad could not be held negligent by a jury for choosing one device or method rather than another where there were more schools of thought than one among the experts. *Baltimore & Ohio R.R. v. Groeger*, 266 U.S. 521, 45 Sup. Ct. 261, 69 L. Ed. 419 (1925) (death of an engineman from locomotive boiler explosion). Negligence was claimed in construction of crown sheet of boiler without fusible plugs. It was held that although competent evidence as to the safety of the competing methods of construction was in dispute the question was an engineering one that "may well be left to [the railroads] to decide" and was not one for the jury. Cf. *Southern Pac. Co. v. Berkshire*, 254 U.S. 415, 41 Sup. Ct. 162, 65 L. Ed. 335 (1921) (court should not leave to jury question of proper clearance of mail crane; opinion by Holmes, J.; strong dissent by Clarke, J.). It is at least questionable whether such rulings would be sustained by the Supreme Court today. Cf., for example, *Tiller v. Atlantic C.L.R.R.*, *supra*.

20. See cases cited, notes 7 and 8, *supra*. An admirable treatment of this question appears in 3 VAND. L. REV. 669 (1950), which carefully distinguishes this rule from a situation where there are two opposed schools of thought among admittedly competent and respectable doctors. One state, however, fails to make this distinction and confuses the two situations. *Dishman v. Northern Pac. Ben. Ass'n*, 96 Wash. 182, 164 Pac. 943 (1917). Cf. also note 19, *supra*.

the actor fell short. It is true that plaintiff does not have the burden of showing what specific omitted precautions would have been reasonable and would have averted harm, and that neither court nor jury need necessarily fix upon any such precaution before a defendant may be held negligent. Yet if upon the whole case the court cannot see the possibility of *any* feasible and effective precaution which the actor omitted (either as a matter of common experience,²¹ or upon the expert evidence adduced²²), it will direct a verdict for the defendant. For that reason it is often advisable for plaintiffs to prove²³ or to suggest in argument to the court one or more such precautions where there is danger that they will not be obvious. And of course this often is a very effective line of argument to the jury.

Not only may courts hold as a matter of law that a party was careful (under the reasoning just set forth) but they may also thus hold him negligent. In terms of standards of conduct, this amounts to a decision that his conduct fell below the minimum standard that reasonable men could find the circumstances called for. Here again the law does not always fix upon any specific precaution as the one to be taken (though it sometimes does, as we shall see). If a danger is readily discoverable and avoidable, the court as a matter of law may hold a party to perceive and remedy it *in some fashion* (without prescribing a particular method) just as we have seen the jury may do as a matter of fact if the issue is submitted to them.²⁴

It has elsewhere been pointed out²⁵ how the courts decide what is clearly reasonable or unreasonable under this rule of limitation, and could so administer it as to cut down the jury's role to little or nothing. The actual course of decision has been quite otherwise, however, and the courts have restrained themselves so as to preserve to the jury the lion's share of the debatable ground.²⁶

21. Estate of Held, 231 Iowa 85, 300 N.W. 699 (1941); Pennsylvania R.R. v. Cook, 180 Md. 633, 26 A.2d 384 (1942); Noll v. Marian, 347 Pa. 213, 32 A.2d 18 (1943).

22. Lewis v. Texas & N.O.R.R., 199 S.W.2d 185 (Tex. Civ. App. 1946); cf. Williams v. N.Y. Rapid Transit Corp., 272 N.Y. 366, 6 N.E.2d 58 (1936).

23. If the plaintiff offers such proof by appropriate testimony, it will be error to exclude it. Cardall v. Shartenberg's, Inc., 69 R.I. 97, 31 A.2d 12 (1943). The cases admitting evidence of custom are also of this kind. See notes 69-71 *infra*. The tactical problem is treated at length in Morris, *supra* note 8.

24. See, e.g., Lake S. & M.S.R.R. v. Miller, 25 Mich. 274 (1872). Cf. note 4, *supra*; Knapp v. Barrett, 216 N.Y. 226, 110 N.E. 428, 429 (1915).

25. James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 677 (1949).

26. See articles cited note 59 *infra*. Some illustrative modern cases are Lutzen v. Henry Jenkins Transp. Co., 133 Conn. 669, 54 A.2d 267 (1947); Doty v. So. Pac. Co., 186 Ore. 308, 207 P.2d 131 (1949), 29 ORE. L. REV. 55; Finn v. Spokane, P. & S. Ry., 214 P.2d 354 (Ore. 1950), 29 ORE. L. REV. 352; Heber v. Puget Sound Power & Light Co., 34 Wash.2d 231, 208 .2d 886 (1949), 25 NOTRE DAME LAW. 181.

"[T]he standard of due care in our law of negligence is the work of the nineteenth century. . . . Moreover, nineteenth-century courts distrusted these standards and sought to put them into straight-jackets. Degrees of negligence, attempts to lay down that

THE COURT'S JUDGMENT

Whenever the court takes the negligence issue from the jury it either expressly or impliedly makes a judgment as to the proper standard of conduct under the circumstances. It does this, for instance, whenever it holds that reasonable men could not find the actor to have been either careful or negligent (as the case may be) under the reasoning set forth in the preceding paragraphs. It does the same thing whenever it prescribes for a party a standard established by custom, as we shall see, or by a criminal statute. But beyond all this there has been a substantial school of thought in tort law which favors the progressive working out of detailed minimum and maximum standards of conduct as situations continue to recur and become crystallized.²⁷ This is to be done by the court out of judicial notions of what is proper.²⁸ The chief exponent of this position was the late Mr. Justice Holmes.²⁹ The

this or that was negligent 'as a matter of law,' and the 'stop, look and listen' rule bear witness to distrust of standards and desire to subject conduct to fixed detailed rules. But elimination of the circumstances in order to get a rule makes the rule impossible as a practical compromise between the interests of the several participants in the infinitely variable situations of human conduct. In framing standards the law seeks neither to generalize by eliminating the circumstance nor to particularize by including them; instead, the law seeks to formulate the general expectation of society as to how individuals will act in the course of their undertakings, and thus to guide the common sense or expert intuition of jury or commission when called on to judge of particular conduct under particular circumstances." Pound, *The Administrative Application of Legal Standards*, 44 A.B.A. REP. 445, 456-57 (1919).

27. Clearly the subject matter of all the parts of this article (as well as the matter of statutory standards) overlap. Many of the considerations that favor specific standards from one source, favor them generally in greater or less degree; and the opposite is also true, *mutatis mutandis*. Moreover, while this section deals with standards derived from judicial notions of what is proper, these in turn may draw on what industry practice or criminal law prescribes in any given situation. See for example the analysis in *Clinkscales v. Carver*, 22 Cal.2d 72, 136 P.2d 777 (1943); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 458 *et seq.* (1933); James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 374 *et seq.* (1946). Even greater is the overlap between the notion dealt with in the text at this point and that treated in the two paragraphs immediately preceding.

28. "A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury. He should be able to lead and to instruct them in detail, even where he thinks it desirable on the whole to take their opinion. Furthermore, the sphere in which he is able to rule without taking their opinion at all should be continually growing." HOLMES, *THE COMMON LAW* 124 (1881).

29. See, e.g., HOLMES, *THE COMMON LAW* 110 *et seq.* (1881). A different point of view was expressed by Judge Cooley in *Detroit & M. R.R. v. Van Steinberg*, 17 Mich. 99, 120, 121 (1868): "The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility. For when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury collected from the different occupations of society, and perhaps better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge trying a similar case may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury. . . . The difficulty in these cases of negligent injuries is, that it very seldom happens that injuries

argument for it is that the greater experience and acumen of the judge give him a sounder basis than a jury has for determining what should be done and further that if men are told in advance just what they may and may not do, the inhibiting fear of uncertainty will be removed as a stumblingblock in the way of desirable affirmative activity. Moreover, moral fault is clearer when there has been disobedience to a definite instruction than where a man has been told simply to use his judgment at peril that some jury will later agree that he did so wisely. It is apparent that these reasons are bound up with the fault principle and the desire to refine it,³⁰ and with notions of expediency associated with *laissez faire*. But, as we have seen,³¹ the setting of specific standards tends by and large to restrict accident liability and, therefore, to work against the compensation of accident victims. It is small wonder, then, that Holmes' view has never become widely accepted by the courts and has lost ground in recent years.

The Pennsylvania stop-look-and-listen rule for travelers at grade crossings perhaps best illustrates the fixing of minimum standards by the court.³² It is held everywhere, of course, that a traveler must notice where there is the existence of a grade crossing, and must take some precautions to perceive whether a train is coming.³³ And where the presence of the train could readily have been observed and no special factor of excuse is shown, the great majority of courts today hold the traveler negligent as a matter of law if he does not observe the train, on the ground that it could not reasonably be found that reasonable men would fail to take some effective precaution to perceive and avoid so obvious and so great a danger.³⁴ But where there are unusual circumstances, such as obstructions to view at the crossing,³⁵ distracting noise,³⁶ smoke or fog,³⁷ or reliance upon some protecting device which

are repeated under the same circumstances; and, therefore, no common standard of conduct by prudent men becomes fixed or known.

30. HOLMES, THE COMMON LAW 112 (1881).

31. Note 2, *supra*.

32. Pennsylvania R.R. v. Aiken, 130 Pa. 380, 18 Atl. 619 (1889); Pennsylvania R.R. v. Beale, 73 Pa. 504 (1873); *cf.* Tiffin v. St. Louis, I.M. & S. Ry., 78 Ark. 55, 93 S.W. 564 (1906); Smith v. Wabash R.R., 141 Ind. 92, 40 N.E. 270 (1895); Union Pac. Ry. v. Adams, 33 Kan. 427, 6 Pac. 529 (1885). *Contra*: Metcalf v. Central Vermont R.R., 78 Conn. 614, 63 Atl. 633 (1906); City of Elkins v. Western Maryland Ry., 76 W. Va. 733, 86 S.E. 762 (1915). See Notes, 15 CORNELL, L.Q. 136 (1929), 43 HARV. L. REV. 926 (1930), 11 TEXAS L. REV. 383 (1933), 37 YALE L.J. 532 (1928).

33. Compare Piscitello v. N.Y.N.H. & H.R.R., 116 Conn. 638, 166 Atl. 61 (1933) with Harwood v. Missouri Pac. R.R., 118 Kan. 332, 234 Pac. 990 (1925). See Note, 40 A.L.R. 1309 (1926), for collection of cases as to when the plaintiff will be excused for failing to notice a railroad crossing.

34. Typical recent rulings are Chicago B. & Q.R.R. v. Ruan Transp. Corp., 171 F.2d 781 (8th Cir. 1949); and Spendlove v. Pac. E. Ry., 177 P.2d 27, 29 (Cal. App. 1947).

35. Gleaton v. Southern Ry., 308 S.C. 507, 38 S.E.2d 710 (1946) (box cars obstructing motorist's view); R.J. Reynolds Tobacco Co. v. Atlantic Coast Line R.R., 131 S.C. 208, 126 S.E. 449 (1924). See Notes, 56 A.L.R. 647 (1928), 14 Mo. L. Rev. 124 (1949).

36. Townshend v. Mo. Pac. R.R., 163 La. 872, 113 So. 130 (1927) (plaintiff not negligent for failing to shut off truck motor when stopping at crossing). See DeBow v. Cleveland, C.C. & St. L.R.R., 245 Ill. App. 158, 164 (1924).

37. Malone v. St. Louis-San Francisco Ry., 270 Mo. App. 9, 285 S.W. 123 (1926) (foggy weather).

failed to work,³⁸ or upon an actual invitation to cross,³⁹ many courts have held the traveler's failure to observe a train to be a question for the jury if there are indications that he took *some* precautions. A Pennsylvania case presents a typical illustration of this kind of situation. The traveler at a city crossing had several tracks to cross, the first a siding. The view at this track was blocked by standing box cars. For that reason the traveler did not stop before crossing the siding, though he did before going upon the main line track on which he was hit by a train proceeding at high speed without warning signals. The trial court submitted the issue of contributory negligence to the jury, which found for plaintiff. The Supreme Court, however, over a strong dissent, reversed and declared as matter of law that the traveler must stop before crossing *any* track.⁴⁰ This "is not a rule of evidence, but a rule of law, peremptory, absolute and unbending; and the jury can never be permitted to ignore it, to evade it, or to pare it away by distinctions and exceptions."⁴¹ And if the traveler cannot see where he must stop, he must alight and "walk to a point where the prospect is clear."⁴² In 1927 Mr. Justice Holmes and the United States Supreme Court put their prestige behind this rule,⁴³ but even before *Erie Railroad v. Tompkins*,⁴⁴ the dictum in the *Goodman* case was repudiated and the federal rule brought into harmony with that prevailing in most states.⁴⁵ Nor is it entirely clear that even Pennsylvania will today follow all the implications of the language quoted above.

Another example of minimum standards fixed rigidly by the courts is found in the rule adopted by some states that it is necessarily negligence to

38. *Wabash R.R. v. Glass*, 32 F.2d 697 (6th Cir. 1929); *Lindekugel v. Spokane P. & S.R.R.*, 149 Ore. 634, 42 P.2d 907 (1935). Cf. *Pennsylvania R.R. v. Ackerson*, 183 F.2d 662 (6th Cir. 1950); *Crowley v. Chicago, B. & Q.R.R.*, 204 Iowa 1385, 213 N.W. 403 (1927). Cases are collected in Notes, 53 A.L.R. 973 (1928), 99 A.L.R. 729 (1935).

39. *Spendlove v. Pacific Electric R.R.*, 30 Cal.2d 632, 184 P.2d 873 (1947) (cessation of wigwag). Even in Pennsylvania, such an invitation is to be considered in evaluating the conduct of a highway traveler who has stopped, looked and listened (but at a place where the view was imperfect). *Hoffman v. Pittsburgh & L.E.R.R.*, 278 Pa. 246, 122 Atl. 274 (1923); *Siever v. Pittsburgh C.C. & St. L.R.R.*, 252 Pa. 1, 97 Atl. 116 (1916). Contrast, however, *Hayes v. New York, N.H. & H.R.R.*, 91 Conn. 301, 99 Atl. 694 (1917).

40. *Benner v. Philadelphia & R. Ry.*, 262 Pa. 307, 105 Atl. 283 (1918).

41. *Benner v. Philadelphia & R. Ry.*, 262 Pa. 307, 105 Atl. 283, 284 (1918).

42. 105 Atl. at 285. Cf. *Kinter v. Pennsylvania R.R.*, 204 Pa. 497, 54 Atl. 276 (1903); *Lohrey v. Pennsylvania R.R.*, 36 Pa. Super. 287 (1908) (even where safety gates open). Probably, however, Pennsylvania has retreated from this extreme aspect of the rule. See Pennsylvania cases cited in note 39, *supra*; *Sharpless v. Delaware L. & W. R.R.*, 286 Pa. 439, 133 Atl. 636 (1926).

43. *Baltimore & O. R.R. v. Goodman*, 275 U.S. 66, 48 Sup. Ct. 24, 72 L. Ed. 167 (1927).

44. 304 U.S. 64, 59 Sup. Ct. 817, 82 L. Ed. 1188 (1938).

45. *Pokora v. Wabash R.R.*, 292 U.S. 98, 54 Sup. Ct. 346, 78 L. Ed. 1149 (1934). For the rule elsewhere, see *Torgesen v. Missouri K. & T. R.R.*, 124 Kan. 798, 262 Pac. 564 (1928); *Doyel v. Thompson*, 357 Mo. 963, 211 S.W.2d 704 (1948); *R.J. Reynolds Tobacco Co. v. Atlantic C.L.R.R.*, 121 S.C. 208, 126 S.E. 449 (1924); cases collected in Note, 56 A.L.R. 647 (1928).

be unable to stop at all times within the range of vision afforded by automobile headlights.⁴⁶ Here again, of course, there have been many cases simply holding the motorist's conduct clearly unreasonable under all the circumstances.⁴⁷ But there has been a marked tendency on the part of a few courts to substitute a "mathematical form" for "the rule of ordinary prudence," and to ignore special conditions and factors of excuse,⁴⁸ such as dust,⁴⁹ smoke,⁵⁰ or the glare of other headlights.⁵¹ In such cases, however, the trend seems to have been, in the absence of statute, to leave the issue to the jury.⁵²

There are other miscellaneous situations where similar reasoning has been used. Thus, it has occasionally been held that a motorist must blow his horn when a pedestrian is "either in or about to enter [the automobile's] course";⁵³ that a power company must insulate high tension wires unless it is clear that no contact with them is to be anticipated;⁵⁴ that a person must not

46. The leading case is *Lauson v. Town of Fond du Lac*, 141 Wis. 57, 123 N.W. 629 (1909) (driver ran into unlighted excavation on a dark, rainy night). See also *Remmenga v. Selk*, 150 Neb. 401, 34 N.W.2d 757 (1948); *Weston v. Southern R.R.*, 194 N.C. 210, 139 S.E. 237 (1927); *Nixon, Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476, 479 (1936); *Notes*, 27 N.C.L. REV. 153 (1948), 5 VAND. L. REV. 250 (1952), 133 A.L.R. 967 (1941), 97 A.L.R. 546 (1935), 87 A.L.R. 900 (1933), 58 A.L.R. 1493 (1929), 44 A.L.R. 1403 (1926).

47. Examples are *Car & Gen. Ins. Corp. v. Thibaut*, 161 F.2d 657 (5th Cir. 1947); *Pittman v. Smith*, 34 So.2d 639 (La. App. 1948); *Toenges v. Schleihauf*, 368 Pa. 247, 82 A.2d 15 (1951); *Palmer v. Marceille*, 106 Vt. 500, 175 Atl. 31 (1934).

48. *Clarkson, J.*, dissenting in *Beck v. Hooks*, 218 N.C. 105, 10 S.E.2d 608, 614 (1940). Plaintiff in that case was held contributorily negligent as a matter of law for not applying brakes as soon as parked truck *could* have been seen, regardless of whether he *actually* saw it. See also *Lett v. Summerfield & Hecht*, 239 Mich. 699, 214 N.W. 939, 940 (1927) ("We do not think the rule should be weakened by ingrafting exceptions on it or modifying it").

49. *Coe v. Hough*, 42 Ariz. 293, 25 P.2d 547 (1933); *Castille v. Richard*, 157 La. 274, 102 So. 398 (1924). See cases collected in *Notes*, 73 A.L.R. 1020 (1931), 37 A.L.R. 587 (1925).

50. *Dominick v. Haynes Bros.*, 13 La. App. 434, 127 So. 31 (1930); *Palmer v. Marceille*, 106 Vt. 500, 175 Atl. 31 (1934); *cf. Russell v. Szczawinski*, 268 Mich. 112, 255 N.W. 731 (1934) (dense fog).

51. *Rachal v. Balthazar*, 32 So.2d 483 (La. App. 1947); *Holsaple v. Superintendent of Poor*, 232 Mich. 603, 206 N.W. 529 (1925); *Beck v. Hooks*, 218 N.C. 105, 10 S.E.2d 608 (1940); *Note*, 23 CALIF. L. REV. 498 (1935).

52. *Coca-Cola Bottling Co. v. Shipp*, 174 Ark. 130, 297 S.W. 856 (1927), 12 MINN. L. REV. 283; *Rozycki v. Yantic Grain & Products Co.*, 99 Conn. 711, 122 Atl. 717 (1923); *Tresise v. Ashdown*, 118 Ohio St. 307, 160 N.E. 898 (1928); *Miller v. Duffee T. Co.*, 165 Pa. Super. 64, 67 A.2d 809 (1949); *Moss v. Christensen-Gardner, Inc.*, 98 Utah 253, 98 P.2d 363 (1940); *Morehouse v. City of Everett*, 141 Wash. 399, 252 Pac. 157 (1926); *Nixon, supra* note 46, at 479; *James, Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 375-76 (1946); *Note*, 27 N.C.L. REV. 153 (1948).

53. *Demonde v. Targett*, 97 Conn. 59, 115 Atl. 470 (1921); *Murphy v. Derby St. Ry.*, 73 Conn. 249, 47 Atl. 120 (1900) (similar rule as to going of street car). In both these cases the court characterized the conditions as "well defined and constantly recurring." But the application of the rule is confined to this narrow type of situation. *Lane v. Ludeman*, 131 Conn. 112, 38 A.2d 178 (1944) (question of warning for jury where not clear whether child, if visible at all, would proceed into auto's course).

54. *Thompson v. City of Lamar*, 322 Mo. 514, 17 S.W.2d 960 (1929) (upholding instruction to the jury that if they found that defendant's uninsulated wires were placed where persons might reasonably be expected, they must find negligence); *Geismann v. Missouri-Edison Electric Co.*, 173 Mo. 654, 73 S.W. 654 (1903) (death of plaintiff was conclusive proof of the negligence being left for the jury).

ride on the running board of an auto⁵⁵ or the tail board of a truck.⁵⁶ Also, there are some older cases holding that a patron, or other invitee, who has been over a stairway, hallway, or the like, and then returns must as a matter of law remember defects.⁵⁷

These holdings do not represent the weight of authority, however, and the very courts which adopt them tend to confine the application of the mechanical rule to a very narrow set of circumstances and send the issue to the jury wherever there are deviations from the facts of the original case or factors of excuse.⁵⁸ And in most situations in which the adoption of such a rule has been urged on the court, there has been a pretty widespread and consistent refusal to adopt mechanical rules limiting the jury's sphere.⁵⁹ Thus, one who uses a place where he has a right to be (such as a highway or common hallway in an apartment house where he is tenant) is not necessarily negligent in using it in spite of known defects, even where there is a safer place which he might also use.⁶⁰ A pedestrian is not negligent as a matter of

55. *Barnes v. Maryland Casualty Co.*, 197 So. 639 (La. App. 1940); *Valente v. Lindner*, 340 Pa. 508, 17 A.2d 371 (1941); *cf. Taylor v. Morgan*, 54 Ga. App. 426, 188 S.E. 44 (1936). *Contra: Alpine Tel. Corp. v. McCall*, 195 S.W.2d 585 (Tex. Civ. App. 1946), 26 TEXAS L. REV. 101 (1947). In such cases, Pennsylvania holds plaintiff negligent as matter of law in regard to the driver of his car, but leaves the question of contributory negligence to the jury as between plaintiff and a third party driver. *Srednick v. Sylak*, 343 Pa. 486, 23 A.2d 333 (1941). And even as to his own driver plaintiff may get this issue to the jury if he had a good excuse for taking his dangerous position. *De Gregorio v. Malloy*, 356 Pa. 511, 52 A.2d 195 (1947) (police officer clearing way to hospital where injured man stretched across seat of truck). *But cf. Valente v. Lindner*, *supra* (similar, but there was room for policeman inside auto).

56. *Earll v. Wichser*, 346 Pa. 357, 30 A.2d 803 (1943).

57. *Heston v. Jefferson Bldg. Corp.*, 332 Ill. App. 585, 76 N.E.2d 248 (1948) (judgment notwithstanding the verdict for defendant affirmed where plaintiff noticed six inch step-up when entering rest room but fell on step when she left five minutes later); *Lepley v. Von Dorn*, 139 Neb. 410, 297 N.W. 642 (1941) (upholding directed verdict for defendant where plaintiff's intestate stumbled in dark on rise in floor entering bathroom although she had noticed rise when she entered). *Contra: Deacy v. McDonald*, 131 Conn. 101, 38 A.2d 181 (1944); *Butland v. City of Caldwell*, 51 Idaho 483, 6 P.2d 493 (1931); *Hoss v. Nestor Bldg. & Loan Ass'n*, 164 Pa. Super. 77, 63 A.2d 435 (1949). See also James, *Qualities of the Reasonable Man in Negligence Cases*, 16 Mo. L. Rev. 1, 6-9 (1951).

58. See *e.g.*, cases cited note 53, *supra*.

59. Examples are: *Cardell v. Tennessee Electric Power Co.*, 79 F.2d 934 (5th Cir. 1935) (proper distance at which to follow another vehicle on highway, for jury); *Egan v. Connecticut Co.*, 131 Conn. 152, 38 A.2d 282 (1944) (not necessarily negligent to stop trolley 20 feet beyond stop pole); *Piper v. Adams Express Co.*, 270 Pa. 54, 113 Atl. 562 (1918) (motorist passing on right not necessarily negligent); *Hoss v. Nestor Bldg. & Loan Ass'n*, 164 Pa. Super. 47, 63 A.2d 435 (1949); *Alpine Tel. Corp. v. McCall*, 195 S.W.2d 585 (Tex. Civ. App. 1946); *City of Elkins v. Western Maryland Ry.*, 76 W. Va. 733, 86 S.E. 762 (1915) (refusing to apply stop-look-and-listen rule).

For general treatments, see Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476 (1936); Searl, *Automobile Liability Law Development and Trend*, 39 BEST'S INS. NEWS 585 (Fire & Cas. ed. 1938). I have also sought elsewhere to describe this trend. See, *e.g.*, James, *Accident Liability: Some Wartime Developments*, 55 YALE L.J. 365, 374-80 (1946); *id.*, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 676-79 (1949); *id.*, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95 (1950); *id.*, *Chief Justice Maltbie and the Law of Negligence*, 24 CONN. B.J. 61, 63-65 (1950).

60. *Garvin v. Pittsburgh*, 161 Pa. Super. 140, 53 A.2d 906 (1907), 9 U. OF PITT. L. REV. 54 (plaintiff not negligent as a matter of law for walking on defective sidewalk

law for crossing a street at a place other than the intersection,⁶¹ or for walking along the highway.⁶² A child is not negligent *per se* for coasting on a residential street.⁶³

Besides setting minimum standards in the way just outlined, courts have very occasionally fixed maximum standards—that is, they have declared that in certain well defined and oft recurring situations certain prescribed precautions are sufficient as a matter of law.⁶⁴ Perhaps the leading decisions along this line are those in which Mr. Justice Holmes himself must have persuaded the majority of a divided court to his views in the matter. Thus, in *Lorenzo v. Wirth*,⁶⁵ it was held that a proprietor who was having coal delivered through a coal hole in a sidewalk in Boston could rely on the presence of the coal and the workmen to warn all pedestrians (even foreigners ignorant of our ways) of the open hole. And in *Southern Pacific Co. v. Berkshire*,⁶⁶ the Court declared a 14-inch clearance between a mail crane and the side of the engine cab sufficient as a matter of law, though the device to catch the mail bag would readily reach any distance up to 26 inches. In both cases there were strong dissents. Such holdings today are rare,⁶⁷ though a court may occasionally arrive at a similar result by an over readiness to characterize suggested precautions as unreasonable.⁶⁸

CUSTOM AND HABIT

Custom usually refers to a fairly well defined and regular usage or way of doing a specific thing, among a group of people such as a trade, calling

even though alternative path was relatively safer, court indicating that if the danger were sufficiently clear and apparent that a prudent person would regard it as dangerous, plaintiff *might* be negligent for not taking the safer path); *Bland v. Gross*, 10 N.J. Misc. 446, 159 Atl. 392 (Sup. Ct. 1932) (plaintiff not negligent as a matter of law for using kitchen with defective ceiling during period in which landlord had promised to repair).

61. *Casalegno v. Leonard*, 40 Cal. App.2d 575, 105 P.2d 125 (1940); *Hart v. Chicago*, 315 Ill. App. 214, 42 N.E.2d 887 (1942); *cf. Aaron v. Strausser*, 360 Pa. 82, 59 A.2d 910 (1948).

62. *Blumb v. Getz*, 366 Ill. 273, 8 N.E.2d 620 (1937); *Pfisterer v. Key*, 218 Ind. 521, 33 N.E.2d 330 (1941).

63. *Kovacs v. Ajhar*, 130 Pa. Super. 149, 196 Atl. 876 (1938). Other cases illustrative of this general principle are: *Crocker v. Johnston*, 43 N.M. 469, 95 P.2d 214 (1939) (plaintiff not negligent as a matter of law for not looking to right after reaching the middle of intersection); *Richards v. Palace Laundry Co.*, 55 Utah 409, 186 Pac. 439 (1919) (defendant motorist, having looked ahead and seen a clear path, not negligent *per se* for not having kept constant lookout for bicyclist on the other side of street).

64. Compare the very similar rule once adopted in some states concerning conformity to trade usage or to certain types of statutes. See pp. 709-14 *infra*; *cf. James, Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 123 (1950).

65. 170 Mass. 596, 49 N.E. 1010 (1898).

66. 254 U.S. 415, 41 Sup. Ct. 162, 65 L. Ed. 335 (1920).

67. A rule of this kind, which as matter of law required a depression to exceed four inches in depth before it could be characterized as a defect, was recently overruled in New York. *Loughran v. City of New York*, 298 N.Y. 320, 83 N.E.2d 136 (1948), 15 BROOKLYN L. REV. 318 (1949), 13 ALBANY L.J. [No. 2] 104 (1949).

68. See, *e.g.*, *Jones v. Pennsylvania R.R.*, 5 Ter. (44 Del.) 486, 61 A.2d 691 (1948); *Noll v. Marian*, 347 Pa. 213, 32 A.2d 18 (1943), 18 TEMP. L.Q. 290 (1944). With the *Jones* case, contrast *Hendrickson v. Union Pac. R.R.*, 17 Wash.2d 548, 136 P.2d 438 (1943).

or profession. Habit is pretty much the same thing for an individual. Both custom and habit may be admissible in evidence for a wide variety of purposes. Here we are concerned with only one: their admissibility and effect for the purpose of showing what should have been done (*i.e.*, the standard of conduct) under the circumstances.

By the great weight of modern American authority a custom either to take or to omit a precaution is generally admissible as bearing on what is proper conduct under the circumstances, but is not conclusive.⁶⁹ Such evidence, coupled with testimony that the custom was observed, may be offered to show due care.⁷⁰ Or non-conformity to custom may be used to show negligence.⁷¹ Until recently, however, this rule was challenged by two minority views which assailed it from opposite directions. A very few courts altogether excluded evidence of custom offered for this purpose. Precautions, they reasoned, which the law was to require, "could not be tested" by what others did because forsooth these others might themselves "have been careless or prudent."⁷² On the other hand, a number of decisions went to the other extreme and virtually allowed industries and professions to set their own standards by holding that conformity to custom itself constituted due care and precluded a finding of negligence.⁷³ Both lines of cases seem clearly wrong on principle and have been largely abandoned.⁷⁴ The argument

69. *Denning Warehouse Co. v. Widener*, 172 P.2d 910 (10th Cir. 1949) (custom among broomcorn warehousemen not to hire watchmen); *Hellweg v. Chesapeake & Potomac Tel. Co.*, 110 F.2d 546 (D.C. Cir. 1940) (plaintiff struck in the ear by a bolt of electricity from telephone receiver, evidence that appliance and its installation were in accordance with customary methods); *Strong v. Chronicle Pub. Co.*, 34 Cal. App.2d 335, 93 P.2d 649 (1939) (plaintiff struck by revolving airplane propellor, testimony as to methods of warning at other airports of a similar class); *Cassanova v. Paramount-Richards Theatres*, 204 La. 813, 16 So.2d 444 (1943) (custom as to arrangement of steps in theatre); *Brunke v. Missouri & Kansas Tel. Co.*, 115 Mo. App. 36, 90 S.W. 753 (1905) (custom of handing tools up telephone pole to workmen on a rope rather than throwing them). For general treatments of the problem, see 2 WIGMORE, EVIDENCE § 461 (3d ed. 1940); *Morris, Custom and Negligence*, 42 Col. L. REV. 1147 (1942); *Notes*, 18 TULANE L. REV. 646 (1944), 172 A.L.R. 1141 (1948), 137 A.L.R. 611 (1942).

70. As in *Hellweg v. Chesapeake & Potomac Tel. Co.*, *supra* note 69; *Honea v. Coca Cola Bottling Co.*, 143 Tex. 272, 183 S.W.2d 968 (1944) (customary way of carrying bottles offered on issue of contributory negligence).

71. As in *Murphy v. American Barge Line Co.*, 76 F. Supp. 276 (W.D. Pa. 1948); *Levine v. Russell Blaine Co.*, 273 N.Y. 386, 7 N.E.2d 673 (1937) (error to exclude evidence of custom to equip dumbwaiter with smooth ropes in action for loss of arm through infection incurred from dirty bristly rope); *Silver Falls Timber Co. v. Eastern & W. Lumber Co.*, 149 Ore. 126, 40 P.2d 703 (1935) (evidence of custom to suspend use of high speed equipment in logging operations during periods of fire hazard admissible).

72. *Jenkins v. Hooper Irrigation Co.*, 13 Utah 100, 44 Pac. 829 (1896) (evidence that ditch was cleaned at same time and in same manner as other companies inadmissible). *Cf. Phoenix Assur. Co. v. Texas Holding Co.*, 81 Cal. App. 61, 252 Pac. 1082 (1927) (excluding evidence of defendant that other oil companies used tanks similarly constructed); *Burke v. South Boulder Cannon Ditch Co.*, 71 Colo. 58, 203 Pac. 1098 (1922) (admission of evidence of grade, depth and condition of other ditches in vicinity error); *Earl v. Cranch*, 16 N.Y. Supp. 770 (Sup. Ct. 1891) (evidence of how other lumber dealers customarily piled lumber incompetent).

73. Most of the decisions were in cases where the servant sued his master for injuries occurring in the course of his employment. *Shadford v. Ann Arbor St. Ry.*, 111 Mich.

against allowing custom to become the test is properly not an argument against admitting the evidence, for whatever help it may give the jury in setting a reasonable standard, but only against treating custom as prescribing the standard, and the prevailing rule accepts the argument only to that extent.⁷⁵

While the rule of admissibility is well nigh universal,⁷⁶ the basis for it merits examination. Wigmore finds its probative value in its bearing directly on what is reasonable average conduct—it reflects the reaction of many to a similar situation and so has a tendency to show a composite judgment as to

390, 69 N.W. 661 (1897); *Lehigh & W.B.C. Co. v. Hayes*, 128 Pa. 294, 18 Atl. 387 (1889). But the doctrine was not confined to such a situation. *Kilbride v. Carbon Dioxide & M. Co.*, 201 Pa. 552, 51 Atl. 347 (1902); *cf. McClaren v. G.S. Robins & Co.*, 349 Mo. 653, 162 S.W.2d 856 (1942); *Barnes v. Hotel O. Henry Corp.*, 229 N.C. 730, 51 S.E.2d 180 (1949).

74. "Other manufacturers . . . are not authorized to prescribe the standards of care by which the respective rights and liabilities of persons subject to the jurisdiction of Pennsylvania courts are determined." *Maize v. Atlantic Ref. Co.*, 352 Pa. 51, 41 A.2d 850, 853 (1945). See cases cited notes 69-71 *supra*, and also *Bimberg v. Northern Pac. Ry.*, 217 Minn. 187, 14 N.W.2d 410 (1944) (generality of its plan of construction for trestles cannot excuse a railroad for negligence in its construction); *Grant v. Graham Chero-Cola Bottling Co.*, 176 N.C. 256, 97 S.E. 27 (1918) (holding erroneous instruction that if defendant adhered to general usage in bottling soda he could not be held liable).

The chief exception is in malpractice cases. Morris seeks to explain the exception on the ground that the techniques and skills of the profession are esoteric. This might explain the requirement of expert testimony, but not the further rule that conformity to usage precludes negligence. The rules are connected: when expert evidence is not required the jury is not bound by professional practice. See, *e.g.*, *Ault v. Hall*, 119 Ohio St. 422, 164 N.E. 518 (1928) (custom of relying on sponge count nurse to determine whether all sponges were removed from incision). Yet they are separate: if experts are willing to characterize a customary procedure as negligent, juries are generally allowed to accept such opinions even where the subject matter is not commonly understood.

Of course in any given case a particular custom may so obviously represent all that can reasonably be required in the way of precautions that its observance should not be characterized as negligence. On the other hand a custom may be so clearly dangerous as to be entitled to no weight. See, *e.g.*, *Mayhew v. Sullivan Mining Co.*, 76 Me. 100, 112 (1884), rejecting an offer to prove a custom to leave mine ladder holes unguarded: "If the defendants had proved that in every mining establishment that has existed since the days of Tubal-Cain, it has been the practice to cut ladder-holes in their platforms . . . without guarding or lighting them . . . it would have no tendency to show that the act was consistent with ordinary prudence. . . . The gross carelessness of the act appears conclusively upon the recital." As Morris has pointed out, exclusion is tantamount to a ruling that the custom is negligent as a matter of law, *Morris, supra* note 69, at 1150.

75. "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 470, 23 Sup. Ct. 622, 47 L. Ed. 905 (1903). See also *Brigham Young University v. Lillywhite*, 118 F.2d 836 (10th Cir. 1941); *State, to Use of Henderson v. Clark*, 2 Ter. 138, 20 A.2d 127, 130 (Dev. 1941) ("Custom cannot change the quality of the act; it can only aid in determining what that quality is"); *Bimberg v. Northern Pac. Ry.*, 217 Minn. 187, 14 N.W.2d 410, 413 (1944) ("Local usage and general custom, either singly or in combination, will not justify or excuse negligence. They are merely fox holes in one of the battle-fields of law, providing shelter but not complete protection against charges of negligence.").

76. Some courts have excluded custom evidence where the subject matter is within the common experience of mankind. See *Simonds v. City of Baraboo*, 93 Wis. 40, 67 N.W. 40 (1896) (admission of evidence of the customary manner of loading and hauling wood error); *McNally v. Colwell*, 91 Mich. 527, 52 N.W. 70 (1892) (admission of evidence of fire appliances kept in other saw mills invades province of jury).

the risks of the situation and the precautions required to meet it.⁷⁷ Since this involves taking the judgment for its probative value without putting him who holds the judgment on the stand, it skirts the borderland of hearsay, though this difficulty usually passes unnoticed,⁷⁸ or is answered by confining hearsay to testimonial utterances (while here the judgment is evidenced circumstantially by behavior).⁷⁹ Morris points out another factor.⁸⁰ Evidence of custom may have great bearing on the reasonable feasibility of a precaution. If an actor's conduct conformed to custom, a holding that it is negligent will force change upon an entire industry and this is a material factor in weighing negligence.⁸¹ But where conduct is a departure from what others in a calling customarily do, the custom is a strong indication of a precaution within the actor's knowledge and one which may be taken without disturbing the fabric of a trade, and is therefore feasible.⁸²

An actor will not be allowed to show conformity with his own individual habits in order to prove due care.⁸³ Custom represents the judgment and experience and conduct of many and therein rests its probative force (which is lacking for an individual's habit). But where a party has habitually or frequently taken certain precautions on prior occasions which were omitted on the occasion in question, this fact should be received against him as an admission that he perceived the risk and deemed the precaution appropriate and feasible.⁸⁴ On such a basis company rules should be and are by many

77. See 2 WIGMORE, EVIDENCE § 461 (3d ed. 1940). See *Brunke v. Missouri & K. Tel. Co.*, 115 Mo. App. 36, 90 S.W. 753, 754 (1905) ("A method of doing a thing becomes a custom through its adoption by many prudent men, who, in selecting it as a rule of conduct, have necessarily found it to be a reasonably safe method. Their uniform conclusion, as exhibited by their actions, is not only persuasive evidence that their method is reasonably careful, but also that one not recognized by usage and less safe is not reasonably careful.").

78. See, however, *National Pressure Cooker Co. v. Stroeter*, 50 F.2d 642, 644 (7th Cir. 1931) ("The judgment of others as to the safety of a given device cannot be given to the jury in this indirect way and without the opportunity for cross-examining the one who has exercised the judgment").

79. 2 WIGMORE, EVIDENCE §§ 459, 461 (3d ed. 1940).

80. *Morris, Custom and Negligence*, 42 COL. L. REV. 1147, 1151 (1942). See *Chicago G.W. Ry. v. McDonough*, 161 Fed. 657 (8th Cir. 1908) (practice of other railroads in testing boilers some evidence of what defendant could have done); *Garvin v. Western Cooperage Co.*, 94 Ore. 487, 184 Pac. 555 (1919) (admitting evidence of safety devices used in other logging camps on this ground).

81. "Evidence of conformity warns that liability may have far reaching effects on the fabric of business institutions." *Morris, supra* note 80, at 1147. See, e.g., *Williams v. N.Y. Rapid Transit Corp.*, 272 N.Y. 366, 6 N.E.2d 58 (1936), where a holding that defendant railroad was negligent would have forced expensive reconstruction of railway platforms throughout the country.

82. *Chicago G.W. Ry. v. McDonough*, 161 Fed. 657 (8th Cir. 1908); *Garvin v. Western Cooperage Co.*, 94 Ore. 487, 184 Pac. 555 (1919); *Morris, supra* note 80.

83. This is to be distinguished from evidence of habit offered to show circumstantially that the habitual acts were done this time.

84. See, e.g., *Zinnel v. United States Shipping Bd. E.F. Corp.*, 10 F.2d 47 (2d Cir. 1925) (testimony that defendant had furnished ropes for safety of seamen held evidence of the proper standard of care for their safety); *Strong v. Chronicle Pub. Co.*, 34 Cal. App.2d 335, 93 P.2d 649 (1939) (failure to follow defendant's usual practice of using lights when plane landed at night).

courts admitted.⁸⁵ Other courts, however, exclude such rules on the uncritical ground that standards of conduct are to be fixed by the law, not by the company.⁸⁶ Similar arguments might be urged in favor of admitting evidence of precautions taken after the accident. Such evidence, however, is generally excluded.⁸⁷ In the first place, the admission, since it reflects hindsight rather than foresight, is far more equivocal.⁸⁸ But more than that, to admit the evidence would be a great deterrent against taking the precaution and the law wisely chooses to encourage the precaution.⁸⁹ Of course, evidence

85. "The regulations adopted by an employer for the conduct of a factory or a transportation system may be some evidence of his belief as to the standard of care required, and thus of the negligent nature of an act violating those rules." 2 WIGMORE, EVIDENCE § 461 (3d ed. 1940). *Accord*, *Phillips v. Montgomery Ward & Co.*, 125 F.2d 248 (5th Cir. 1942) (rule that store's aisles be kept clear of boxes admitted); *Montgomery v. Baltimore & O.R.R.*, 22 F.2d 359 (6th Cir. 1927) (rule as to signalling before moving engine); *Hurley v. Connecticut Co.*, 118 Conn. 276, 172 Atl. 86 (1934) (defendant's regulations for the conduct of motormen admissible); *Atlanta Consol. St. Ry. v. Bates*, 103 Ga. 333, 30 S.E. 41 (1898) (rule of defendant governing conduct of motormen at intersections admissible); *Stevens v. Boston Elevated Ry.*, 184 Mass. 476 69 N.E. 338, 339 (1904) (upholding admission of company rule on ringing of street car gong—"Against the proprietor of a business, the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety"); *Smith v. Boston & Maine R.R.*, 87 N.H. 246, 177 Atl. 729, 739 (1935) (rules as to precautions to be taken when railroad cars are pushed by engine—"In this instance the evidence has a tendency to show that the defendant had knowledge of a kind of protection suitable under certain circumstances").

86. *Louisville & N.R.R. v. Vaughan's Adm'r*, 183 Ky. 829, 210 S.W. 938 (1919) (rules as to speed of train admissible).

87. *Columbia & P.S.R.R. v. Hawthorne*, 144 U.S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405 (1892) (subsequent placing of safeguards on machinery); *Flint River Cotton Mills v. Colley*, 71 Ga. App. 288, 30 S.E.2d 426 (1944) (evidence that defendant covered open well after death of child inadmissible); *Engel v. United Traction Co.*, 203 N.Y. 321, 96 N.E. 731 (1911) (subsequent discharge of motorman); *Erickson's Dairy Products Co. v. Northwest Baker Ice Machine Co.*, 165 Ore. 553, 109 P.2d 53 (1941) (upholding trial court's withdrawal, on its own motion, of evidence that after fire welder used sheets of asbestos sheeting as shield). See 2 WIGMORE, EVIDENCE § 283, n.1 (3d ed. 1940).

88. "People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be . . . to hold that, because the world gets wiser as it gets older, therefore it was foolish before." *Bramwell, B.*, in *Hart v. Lancashire & Yorkshire Ry.*, 21 L.T. Rep. 261, 263 (Ex. 1869). See 2 WIGMORE, EVIDENCE § 283 (3d ed. 1940).

89. "[S]uch a rule . . . [would] virtually hold out an inducement for continued negligence." *Morse v. Minneapolis & St. L. R. Co.*, 30 Minn. 465, 16 N.W. 358, 359 (1883). "Policy has always been invoked to strengthen the case for exclusion. That argument is that the admission of such acts, even though theoretically not plainly improper, would be liable to overemphasis by the jury and that it would discourage all owners, even those who had genuinely been careful, from improving the place or thing that had caused the injury, because they would fear the evidential use of such acts to their disadvantage." 2 WIGMORE, EVIDENCE § 283 (3d ed. 1940). See *Gignoux v. St. Louis Public Service Co.*, 180 S.W.2d 784 (Mo. App. 1944) (holding inadmissible photographs of scene of accident showing subsequent repairs); *Brule v. Mayflower Apartments*, 113 S.W.2d 1058 (Mo. App. 1938) (moving post out of driveway after accident).

Very occasionally the exclusion of company rules has been justified on the same basis. "The effect of [admitting such rules] is that, the more cautious and careful a man is in the adoption of rules in the management of his business in order to protect others, the worse he is off, and the higher the degree of care he is bound to exercise." *Fonda v. St. Paul City Ry.*, 71 Minn. 438, 74 N.W. 166, 170 (1898). On the whole, however, the law has made the pragmatic judgment that the admission of such rules will not unduly deter businesses from adopting careful ones. After all the mere possibility of such use in hypothetical future cases is a vague threat, while the gain from an efficient system of accident prevention is very present and very significant.

of post-accident precautions may be allowed for other purposes, such as proving ownership or control of the place where the injury occurred,⁹⁰ contradicting a witness,⁹¹ or showing existing conditions at the time of the injury.⁹² If such evidence is admitted, the jury should be cautioned to limit their consideration of it to the proper purpose and, should the issue forming the basis of admissibility be taken out of the case, no legitimate function remains. The judge should then charge the jury not to consider the evidence at all.⁹³

OPINION BY LAY OR EXPERT WITNESSES

We have seen how in a very few situations expert opinion evidence is *required* as a basis for any judgment by the jury as to the proper standard of conduct. In many cases where it is not required, however, it will be *allowed*. The chief difficulties that beset its admissibility are those associated with the opinion rule. The core of valid policy within this rule is the forbidding of superfluous testimony—the thought that time should not be wasted in hearing witnesses draw conclusions and inferences (or for that matter, describe facts) which the tribunal is in just as good a position as the witness to draw or see for itself.⁹⁴ Thus, the witness who has observed the conduct or the condition causing the accident will be allowed to describe the details of what he observed, but will not be heard to state his conclusions or opinions on the matter unless this will add something useful to what is already before the tribunal.⁹⁵ In this context “opinion” often includes an express or implied statement of the proper standard of conduct such as statements that a platform was “not safe,” that the speed of a vehicle was “reasonable” or was “too fast,” that a driver “should have given a signal,” and the like. Since the sound basis for this rule of evidence is administrative convenience, it should be largely a matter for the trial court’s discretion and the admission of opinion (even where the appellate court would have ex-

90. *Kellems v. Schiele*, 297 Ill. App. 388, 17 N.E.2d 604 (1938).

91. *Garshon v. Asron*, 330 Ill. App. 540, 71 N.E.2d 799 (1947) (photographic evidence of reinforcement of railing after accident admissible to refute defendant’s testimony).

92. See generally *Shelton v. Southern Ry.*, 193 N.C. 670, 139 S.E. 232 (1927) (pointing out these and other evidential purposes for which subsequent precautions are admissible).

93. *Brule v. Mayflower Apartments*, 113 S.W.2d 1058 (Mo. App. 1938) (when ownership and control of apartment have been admitted the jury should be charged not to consider subsequent precautions admitted to evidence ownership).

94. 7 WIGMORE, EVIDENCE §§ 1917 *et seq.* (3d ed. 1940).

95. “Where . . . it is possible for the jury to take the same elements and constituent factors which guide a witness to his conclusions and from them alone make an equally intelligent judgment of their own, independently of the opinion of others, then undoubtedly it should be done.” *Barnes v. Thomas*, 72 Ga. App. 827, 35 S.E.2d 364, 370 (1945) (excluding opinion of lay witness as to whether doorway was dangerous). See also *Hardy v. Merrill*, 56 N.H. 227 (1875). See generally 7 WIGMORE, EVIDENCE §§ 1917 *et seq.* (3d ed. 1940).

cluded it) should rarely constitute reversible error. The tendency of modern authorities is towards just such a result,⁹⁶ but many jurisdictions still cling to a more mechanical application of the rule.

Where the witness has no special skill or knowledge of the matter he may state his conclusion from his observations wherever the details of the latter cannot be fully laid before the tribunal, as where they are so complex or so minute and evanescent as to elude complete perception or description.⁹⁷ This subsidiary rule is sound enough as a guide to discretion but appellate courts have fairly often sought to apply it themselves to the situations presented and to reverse when their application of the rule differed from the trial court's. The tendency to do this has been most marked where testimony is phrased in terms of conclusions which it is within the province of the tribunal itself to draw (such as those in the examples given above).⁹⁸ It has often been said that such testimony is an attempt to "usurp" the jury's function,⁹⁹ and though this is a fallacy which many have pointed out (since

96. "The only purpose for which we need any weapon of the sort is the potential need of saving the time that in some cases might be otherwise taken by marshaling an interminable multitude of opinions, and of preventing the consequent confusion of issues and the possibility of forcing a verdict by mere preponderance of numbers and influential names. But all this is mere possibility . . . and if it should be attempted, the ordinary judicial discretion to limit the number of witnesses, and the rule requiring personal knowledge would quite answer all practical purposes. For this reason there seems to be no objection against taking a radical step,—the *entire abolition of the rule* as such, leaving only in its place some specific discretion in the judge to meet the possibilities above mentioned." 7 WIGMORE, EVIDENCE 27 (3d ed. 1940). See *Dowling v. L.H. Shattuck, Inc.*, 91 N.H. 234, 17 A.2d 529 (1941) (admissibility of opinion evidence left to the "sound discretion" of the trial court); *Knaus Truck Lines, Inc. v. Commercial Freight Lines*, 238 Iowa 1356, 29 N.W.2d 204 (1947) (exclusion of expert opinion as to alternative course of conduct by driver confronted with blocked roadway within the discretion of the trial court). The opinion rule itself is not of ancient origin, being largely a product of nineteenth century judicial thought.

97. "[A]ll concede the admissibility of the opinions of non-professional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. There are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health; questions, also, concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention." *Hardy v. Merrill*, 56 N.H. 227, 241 (1875). "The same reason of absolute necessity has compelled the admission of opinion in certain cases where the poverty of human language makes it absolutely impossible to separate in words the minute and transient facts observed by the witness from the inference as to some other fact, irresistibly connected with the former in his own mind." *Mayor v. Pentz*, 24 Wend. 667, 674, 675 (N.Y. 1840). See, e.g., *Western & Southern Life Ins. Co. v. Danciu*, 217 Ind. 263, 26 N.E.2d 912 (1940) (opinion of lay witnesses as to health of deceased admissible); *Virginia Ry. & Power Co. v. Burr*, 145 Va. 338, 133 S.E. 776 (1926) (error to exclude impression of observing witness that deceased would have had time to run from place of danger).

98. See, e.g., *Eldridge v. McGeorge*, 99 F.2d 835 (8th Cir. 1938) (testimony as to who "controlled" truck causing injury held error in suit where one of issues was whether truck driver was independent contractor); *Keefe v. Armour & Co.*, 258 Ill. 28, 101 N.E. 252 (1913) (error to admit testimony that method used to test air pressure in tank car was not "reasonably safe").

99. "Opinions, belief, deductions from facts and such like, are matters which *belong to the jury*, and by which they arrive at their verdict; when the examination extends to these, and the judgment, belief, and inferences of a witness are inquired into as matters

the jury is perfectly free to reject the witness's conclusion),¹⁰⁰ it continues occasionally to recur in judicial rulings to this day.

The case of the skilled or expert witness stands somewhat differently, if the matter is one which the law recognizes as being a proper subject of expert testimony. Some of the older cases confined this field to inquiries "relating to some trade, profession, science, or art."¹⁰¹ The great weight of authority, however, inclines towards a broader view and receives opinions from witnesses qualified by skill or training upon any subject unless the question is one "which the average trier can resolve as satisfactorily as an expert."¹⁰² Once it is shown that a matter is a proper one for expert testimony and that the witness is a qualified expert, he will generally be allowed to give his opinion as to the proper standard of conduct,¹⁰³ (a) if he is an

proper for the consideration of a jury, their province is in a measure usurped: the judgment of witnesses is substituted for that of the jury." *Lincoln v. Saratoga & S.R.R.*, 23 Wend. 424, 431, 432 (N.Y. 1840); *Jackson Lumber Co. v. Butler*, 244 Ala. 348, 13 So.2d 294 (1942) ("invades the province of the jury").

100. "[T]he witness in expressing his opinion, is not attempting to 'usurp' the jury's functions; nor could if he desired. He is *not* attempting it, because . . . he *could not* usurp it if he would, because the jury may still reject his opinion and accept some other view, and no legal power, not even the judge's order, can compel them to accept the witness' opinion against their own." 7 WIGMORE, EVIDENCE 17 (3d ed. 1940). See also the language of Dunn, J., in *Chicago Union Traction Co. v. Roberts*, 229 Ill. 481, 82 N.E. 401, 402 (1907). See *Francis v. Southern Pac. Co.*, 162 F.2d 813 (10th Cir. 1947) (upholding admission of opinion of pathologist that train engineer would have responded "normally" to signal had he been mentally competent at the time, in the face of argument that the province of the jury had been invaded).

101. "[T]o warrant [the introduction of expert evidence], the subject of the inquiry must be one relating to some trade, profession, science or art in which persons instructed therein, by study or experience, may be supposed to have more skill and knowledge than jurors. . . ." Earl, J., in *Ferguson v. Hubbell*, 97 N.Y. 507, 513 (1884) (excluding testimony of witness having superior knowledge on subject of clearing land, on the ground that it was not a science, art, trade or occupation); *Hamilton v. Des Moines V.R.R.*, 36 Iowa 31 (1872) (excluding on similar ground testimony of brakeman as to the proper method of coupling railroad cars). See 7 WIGMORE, EVIDENCE § 1923 (3d ed. 1940).

102. *Kelly v. City of Waterbury*, 96 Conn. 494, 500, 114 Atl. 530, 532 (1921). See also *Taylor v. Town of Monroe*, 43 Conn. 36, 44 (1875) (opinion of roadbuilder admitted: "The true test of the admissibility of such testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the question at issue"). And see *State v. Killeen*, 79 N.H. 201, 107 Atl. 601 (1919) (test is whether witnesses' knowledge will aid trier in search for the truth); 7 WIGMORE, EVIDENCE § 1923 (3d ed. 1940).

103. In his interesting and provocative article on the subject, Morris points out, in effect, that part of the judgment upon the reasonableness of conduct may not fall within an expert's special competence but may involve "more than the technical knowledge of a particular discipline—a traffic technician may be able to estimate accurately the risk involved in driving on a particular type of road in a certain kind of weather, and yet have no special competence to judge whether the urgency of a mission justifies exposure to the risk." Morris, *Role of Expert Testimony in the Trial of Negligence Issues*, 26 TEXAS L. REV. 1, 10-11 (1947).

For cases where expert opinion as to the standard of conduct has been *allowed*, see *John V. Schaefer, Jr. & Co. v. Ely*, 84 Conn. 501, 80 Atl. 775 (1911) (admitting opinion of architect that construction of building was done in a "workmanlike manner"); *Augusta*

observer, on the basis of his observation of the conduct or condition in question, even where all the details of it are already before the tribunal;¹⁰⁴ (b) even if he has not been an observer, upon the basis of facts in evidence before the tribunal and stated to the witness as part of an hypothetical question.¹⁰⁵

The theory behind admissibility here is not that the opinion is valuable because all the detailed facts cannot be had, but rather that the witness's skill and training mean that the jury can get some help from his opinions even upon facts which have been fully laid before them.¹⁰⁶

If any particular court should frown on expert opinion evidence as to the standard of conduct to be observed or other matters directly in issue, the evidence may still be gotten in with hardly more than an obeisance to form. The method is simply to reframe the questions, substituting for what has been called "evaluating language"¹⁰⁷ a more factual type of language from which the forbidden conclusion inevitably follows. Thus, in *Bemis v. Central Vermont Ry.*,¹⁰⁸ though the judgment was reversed for the trial court's admission of an expert's opinion that it was not prudent to use a certain hoisting apparatus with less than three men, the appellate court approved other testimony by the expert as to the machine's structure, strength, method of use, number of men required and the danger in its use by a less number.

& *Summerville R.R. v. Dorsey*, 68 Ga. 228 (1881) (error to exclude opinion as to whether plaintiff's conduct was that of a prudent man); *Harrington v. Boston Elevated Ry.*, 229 Mass. 421, 118 N.E. 880 (1918) (that platform was not "reasonably proper construction"); *Beck v. Monmouth Lumber Co.*, 137 N.J.L. 268, 59 A.2d 400 (Ct. Err. & App. 1948) (opinion received that uninsulated electric wires created "dangerous condition"); *Stahlin v. Lehigh Valley R.R.*, 125 N.J.L. 211, 15 A.2d 344 (Sup. Ct. 1940) (admitting opinion that throwing bight of hawser was not "good seamanship"); *Koon v. Southern Ry.*, 69 S.C. 101, 48 S.E. 86 (1904) (opinion whether pile driver was "safe"); *Calhoun v. Fraser*, 23 Tenn. App. 54, 126 S.W.2d 381 (W.S. 1938) (that a surgeon exercising care and skill could sever a facial nerve). Compare, however, *Wilkerson v. City of El Monte*, 17 Cal. App.2d 615, 62 P.2d 790 (1936) (engineer's opinion that highway intersection was "dangerous"); *Cone v. Davis*, 66 Ga. App. 229, 17 S.E.2d 849 (1941) (opinion whether driving 45 m.p.h. on curve was negligent held inadmissible); *Keefe v. Armour & Co.*, 258 Ill. 28, 101 N.E. 252 (1913) (whether a mode of testing tank cars for air pressure was "reasonably safe"); *Jean v. Algonquin Hotel Co.*, 255 App. Div. 279, 7 N.Y.S.2d 412 (1st Dep't 1938) (reversal for admitting opinion as to whether use of a worn iron plate was "good practice"). See 7 WIGMORE, EVIDENCE § 1951 (3d ed. 1940).

104. A familiar example of this is expert testimony as to the genuineness of writings, and the like, which are in evidence before the jury. See, *e.g.*, *Brien v. Davidson*, 225 Iowa 595, 281 N.W. 150 (1938); *State v. Hauptmann*, 115 N.J.L. 412, 180 Atl. 809, 822 (Ct. Err. & App. 1935).

105. *Ver Bryck v. Luby*, 67 Cal. App.2d 842, 155 P.2d 706 (1945); 2 WIGMORE, EVIDENCE § 672 (3d ed. 1940).

106. Even in the field of expert testimony the inhibition against letting the witness give his conclusion upon the very issue which the tribunal must pass upon (thus, it is fallaciously assumed, "usurping" the jury's province) is occasionally to be found. But such rulings are rarer here than when a lay witness is involved.

107. *Morris, Role of Expert Testimony in the Trial of Negligence Issues*, 26 TEXAS L. REV. 1, 14 *et seq.* (1947).

108. 58 Vt. 636, 3 Atl. 531 (1886).

“Of course, the point had been as effectively decided by the expert as though the first question had been answered. The difference is largely one as to the form of the question.”¹⁰⁹ However, the fact remains that in some jurisdictions adhering to a strict view of the role of opinion evidence, these formal requirements must be propitiated.¹¹⁰

109. *Giraudi v. Electric Imp. Co.*, 107 Cal. 120, 40 Pac. 108, 110 (1895). *Cf.* *Wallace v. Speier*, 60 Cal. App.2d 387, 140 P.2d 900 (1943).

110. Morris in his article on expert testimony, *supra* note 107, at 14 *et seq.*, has cited many illustrative examples where the ingenious advocate has gotten in testimony by experts on the standard of conduct by the methods described.