LOSS APPORTIONMENT IN NEGLIGENCE CASES

PART II: SOME PROPOSALS FOR REFORM IN PENNSYLVANIA *

By Francis S. Philbrick †

It is known with a fair approximation to accuracy how many "accidents" involving personal injury happen yearly in this country. Something is known of their general nature, and of the place and manner in which they happen.146 No statistics are available, however, respecting the number of accidents in which there is involved the alleged negligence of a person other than the victim, nor of the nature of the injuries in these accidents—that is, aside from records kept under compensation acts, not involving negligence that is subjected to legal proof or disproof. There is little available information respecting the number which result in litigation; or of the number of litigated cases in which there is recovery; or of the amounts recovered for permanent or temporary injuries of various types; or of the time which elapses between the time of injury and the satisfaction of the judgment; or of the relation between the sum recovered and the burden thrown during the litigation and the incapacity of the victim—particularly if a wage-earner—upon his relatives and friends, physician, hospital, grocer and other creditors.

Thanks to the Columbia University Council for Research in the Social Sciences we do possess, in the report made to it in 1932 by its Committee to Study Compensation for Automobile Accidents, some information as regards such accidents, with respect to some of the points mentioned above.147 It is not likely that similar data gathered today would be substantially different in the general features.

† Professor of Law Emeritus, University of Pennsylvania.
146. From Accident Facts, published annually by the National Safety Council.
147. Report by the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences (1932), (This will hereafter be cited as Columbia Report). The information relates to studies in six cities and four rural districts of the country, and to 8849 cases. These consisted of 861 fatal and 7988 non-fatal injuries (the numbers studied do not represent the actual relative frequency of the two types—p. 255). "Half of all injured persons are pedestrians. In fatal cases more than two-thirds are pedestrians"—at 259. The occupational status of the victims in non-fatal cases was: in 52%—earners; 33%—children; 13%—housewives; 2%—others (at 260). The "earners" (4124) included 543 professional people or persons having their own business, 112 temporarily unemployed, and 3469 wage earners.

(766)
There are, of course, great differences between automobile accidents and other accidents. One of them is the peculiarly great difficulty of applying to the former with any assurance of accuracy the common law doctrines of negligence and contributory negligence; but though that, added to the magnitude of the social problem they present, has seemed to some to justify a demand that they be removed from the courts, no state has as yet taken that step. Two other differences are important. One is that the defendant's financial responsibility is, on the average, far greater in automobile cases, since in one state accident insurance is compulsory upon every owner of an automobile, in more than half of our states there are statutes designed to make certain his financial ability to meet claims against him, and in other states a varying percentage of the owners of motor vehicles voluntarily insure themselves. The other difference is one which can very safely be assumed to follow from the preceding. The number of claims—that is, substantial claims—for injuries in automobile accidents very greatly exceeds those which go to trial. It is obvious that this must be true in far larger measure of accidents not involving automobiles, since in these there is generally no guarantee whatever of a wrongdoer's financial responsibility.

148. "The very injury for which compensation is sought has often hindered or prevented the gathering of evidence. . . . The suddenness with which such accidents occur and the fact that the participants are usually unknown to each other and to all the bystanders [if any], make the plaintiff's task harder than in the case of many other accidents"—COLUMBIA REPORT, at 33. "In the days of poor roads and low speeds, the facts of an accident could be reconstructed in the courtroom with some degree of accuracy, and the problem of determining fault did not present unusual difficulties. But with high-powered cars and concrete highways, the probability that an accident—often the consequences of a fractional mistake in management—can and will be described accurately in court has become increasingly remote, especially where court congestion has delayed the time of trial"—Nixon, Changing Rules of Liability in Automobile Accident Litigation, 3 LAW & CONTEMP. PROBS. 476, at 477 (1936).

149. The Columbia Committee recommended a compensation plan administered under legal rules and procedure—see infra n. 161.

150. Massachusetts. This is discussed in the COLUMBIA REPORT, 111-31; by Elsbree and Roberts, Compulsory Insurance against Motor Vehicle Accidents, 76 U. of PA. L. Rev. 690 (1936); Blanchard, Compulsory Motor Vehicle Liability Insurance in Massachusetts, 3 LAW & CONTEMP. PROBS. 537 (1936); Carpenter, Compulsory Motor Vehicle Insurance and Court Congestion in Massachusetts, id. at 554.


152. The situation in 1927 and 1929 is shown in the COLUMBIA REPORT, 283-84.

153. COLUMBIA REPORT, 20 and n. 9; also at 28. The REPORT does not say "substantial," but the data cited plainly support that meaning.

154. It is said in the COLUMBIA REPORT that most states require common carriers to insure against liability for personal injuries, but that "The amount of insurance is limited and is often inadequate. Where a surety bond is permitted, a single bond in a moderate amount may be given to cover a whole fleet of taxicabs"—at 21 and n. 10.
The fate of the victim when the defendant is uninsured is shown in the facts that in nearly five thousand automobile accidents studied by the Columbia Committee the percentages of cases in which there was recovery of some compensation for temporary disabilities from defendants either insured or uninsured were 86 and 27, respectively; for permanent disabilities, 96 and 21; and for fatal cases, 88 and 17.\(^{155}\) In over three thousand cases of temporary disabilities, examined for the purpose of ascertaining whether the sums received covered complete losses, it was found that they did in 69% when defendant was insured and in only 11% when he was not.\(^{156}\) The corresponding figures in cases of permanent disability were 63 and 5%,\(^{157}\) and in fatal cases, 77 and 7%. In other words, "the inequality of payments is strikingly in favor of those who need the money least, that is the less seriously injured".\(^{158}\)

The Committee remarked on the above figures that they support two outstanding conclusions: "that a man injured by an uninsured motorist has little chance of receiving any compensation for his losses", and "that insurance companies pay in so large a proportion of the cases in which liability insurance is carried, that the principle of liability without fault seems almost to be recognized".\(^{159}\) It is perhaps applied rather than recognized. The practice in question is seemingly merely a working policy of friendly competitors—one losing today, the other tomorrow. But underlying that policy is surely distrust of the courts; those who are daily confronted with a choice between voluntary settlement and recourse to the courts choose the former.\(^{160}\)

The purpose of the preceding details is to emphasize the darkness that covers the operations of courts and other agencies in a single field, which has received particular attention, with respect to social conditions and interests. Most of the cases studied by the Columbia Committee were untried cases.\(^{161}\)

---

155. The number of cases studied was: 3,926 involving temporary disability, 499 involving permanent disability and 537 involving fatality, \(\text{id. at 73-5, 77, 81, 86.}\)  
156. \(\text{id. at 78. Cases studied, 3322. The percentages in which no payment was made were 14 and 74 (almost exactly the same as for the 4962 cases analyzed in the preceding note). The losses included loss of earnings, medical expenses, and (because the proportion of the payment made on account of it could not be accurately determined—\(\text{id. at 70}\) property damage.}\)  
157. \(\text{Cases of permanent disability covered, 250—id. at 83, 85; of fatal cases, 313—id. at 87-88, 90.}\)  
158. \(\text{id. at 75.}\)  
159. \(\text{id. at 203.}\)  
160. See the Committee's examples in the passages cited \(\text{supra note 153.}\) The cost to employers under the employers' liability acts of protecting themselves against claims (in hiring claim agents and attorneys, and otherwise) greatly exceeded the amounts paid to the injured—\(\text{Dodd, ADMINISTRATION OF WORKMEN'S COMPENSATION, 21 et seq. (1936).}\)  
161. \(\text{COLUMBIA REPORT at 62. The Committee was so impressed with the magnitude and complexity of the problem that it recommended a plan of non-judicial compensation, regardless of fault—\(\text{id. c. 8-10; also Lewis, The Merits of the Automo-}\)
Equally revealing of social conditions connected with accident litigation is the early history of employers' liability legislation."^62^ Under the common law system compensation for injury or death could be recovered from the employer only if he was negligent or if he violated contract duties respecting the place and conditions of employment; and he could oppose to an employe's claim the defenses of assumption of risk, the fellow servant doctrine, and contributory negligence. One might say of the fellow servant rule (and assumption of the ordinary risks incident to one's employment which originated in 1837 in *Priestley v. Fowler*),"^63^ as Mr. Bohlen said of contributory negligence, that they were an expression of "individualism"—imputed. More interesting and significant are the facts that both doctrines were radical innovations—the fellow servant rule as an exception to the general principle of *respondeat superior*; that both were judicial imputations of an individualism that was involuntary on the part of the plaintiff; that both appeared in a time of great industrial change; and that both served mightily the interests of the employer class. Both were promptly adopted from England by American courts."^64^ Before 1880 five states, beginning in 1855 with Georgia, had enacted statutes making railroad companies liable for injuries caused by the negligence of their employes to other employes, in the same degree as to strangers. Although the enactment in 1880 of the first employers' liability act in England aroused interest, legislation in this country made little progress until after passage in 1908 of the federal act. It then continued rapidly until more than half of the states had such enactments. They differed greatly as respected the persons protected and the employers upon whom liability was imposed, but it is significant that the latter were in most cases corporations, and far most

---

"^62^ The generalizations in this and the two following paragraphs are based upon *Dodd*, *op. cit. supra* note 160, at 11-26. Full citations will be found there.

"^63^ 3 M. & W. 1 (Ex. 1837).

"^64^ Farwell v. Boston and Worcester R. R. Co., 4 Metc. 49 (Mass. 1842) is the leading case on fellow servant and assumption of ordinary employment risks. On contributory negligence see *Malone, The Formative Era of Contributory Negligence*, 41 Ill. L. Rev. 151 (1946). Mr. Dodd has expressed the opinion that the explanation of the origin of the doctrines is "undoubtedly to be found, first, in the individualistic tendency of the common law, which took it for granted that an employee was free to contract and was not bound to risk life or limb in any particular employment; and second, in the desire of the judges to encourage large industrial undertakings by making the burdens on them as light as possible"—*Dodd, op. cit. supra* note 160 at 7. Underlying the contract theory was the assumption of the English classical economists of the time that labor could flow freely from place to place and that employers competed for it subject to that handicap."
generally railroad corporations. The federal act of 1908 dealt with common carriers engaged in interstate and foreign commerce. All these statutes left to the courts the settlement of claims for industrial injuries, and in view of the power of the employers affected by their provisions it is not surprising that abrogation of any of the three great common law defenses was rare, and that even restriction upon their operation was effected to but a limited degree. The fellow servant doctrine was more generally restricted, and to a greater degree, than the other two. Colorado was the first state that completely abrogated it in all fields of employment (1891). A few statutes narrowed the availability of the defense of contributory negligence, particularly where the action was grounded upon violation by the employer of a safety statute. More notable was the application to railroads in the statutes of nine states and in the federal act of the doctrine of comparative negligence, in allowing recovery despite a plaintiff's contributory negligence if less than that of the employer, but with a corresponding reduction of damages. One state applied this rule to all employments (Ohio), and three others applied it in special fields other than railroading. The courts, without the aid of statutes, very generally restricted the doctrine of assumption of risk by ruling that employes did not (in effect, could not) assume the risk of their employer's violating a statute passed for their protection. A few statutes also restricted the rule to risks inherent in the business—and again there was special attention to railroads.

By an act of Parliament of 1897 compensation irrespective of negligence displaced judicial processes in industrial accidents. Beginning in 1903 in Massachusetts, commissions were appointed by 1916 in over thirty states to investigate the operation of employers' liability statutes. The reports showed the same defects as indicated above in the field of motor vehicle accidents: "first, that a large proportion of industrial injuries went entirely uncompensated under the employer's liability acts; second, that in a large majority of cases in which a recovery was had, the amount secured was inadequate to make up for the wage loss incurred; and third, that the outcome of a personal injury suit was so uncertain that neither party to the suit nor his attorney could see whether liability could be avoided, or whether the amount of damages

would be great or small if liability were established.” 166 For example, in Allegheny County, Pennsylvania, in 25.1% of 235 cases of married men killed in industrial accidents nothing was received by their families, and in another 27.6% they bore virtually the whole loss since they received only $100 or less. 167 The result was an abandonment, in general, of the courts and their replacement by commissions administering compensation insurance, and fixing liability on employers despite the employee's fault.

The foregoing summation of findings in the fields of industrial and motor vehicle accidents present two matters decidedly pertinent to the subject of the present discussion, and it has seemed highly desirable to present them concretely. One is a fact: the statistical prominence and social significance of the uncompensated accident victim. The other is a question: to what extent was his loss of compensation at law due to the three technical common law defenses referred to—particularly that of contributory negligence?

It was the uncompensated accident, more than anything else, which stripped the courts of jurisdiction over industrial accidents. The problem of avoiding such accidents in the operation of motor vehicles supports the immense business of public liability insurance and is the motive for all our legislation requiring the insurance or financial responsibility of their owners. Once the social significance of that problem is fully investigated and pondered, the courts will either suffer other losses of jurisdiction or the law an unfriendly overhauling. There is, however, at present scarcely any definite knowledge of the subject. 168 The Columbia Committee expressed the opinion that more than 100,000 cases of permanent disability undoubtedly resulted annually from automobile accidents. 169 Its sampling indicated that even when “defendants” were insured (which may perhaps be taken as equivalent to being otherwise financially responsible) the compensation received covered losses up to the time of investigation in less than two thirds of such cases. 170 We do not know how often permanent disability results from other types of accidents. It cannot be said as respects either automobile or other accidents how generally negligence of another party is responsible for the disability. We do not know in what proportion of litigated cases recovery is defeated by contributory negligence.

168. For a general discussion by a highly competent authority—which, however, is not helpful on the presence of contributory negligence—see Corstvet, The Uncompensated Accident and its Consequences, 3 Law & Contemp. Prob. 466 (1936). Compare Sherman, supra note 161, at 604.
170. supra, p. 768.
Nothing is absolutely certain beyond the fact that there exists a problem of great complexity and of great social importance that calls for investigation. One permissible inference from the Columbia Committee’s data would seem to be this: that since in most cases of actual recovery the settlement was by insurance companies without litigation, and seemingly with little controversy over the parties’ respective faults, the percentage results in litigated cases, as respects the recovery of damages and as respects their coverage of losses sustained, would very probably be less favorable to those disabled than the results reported by the Committee. Another and very important inference seems to be probably safe; namely, that when recovery is in any way wholly defeated, or is inadequate to cover actual losses, some burden will be thrown upon the public. The few data gathered on this point by the Committee showed this to be definitely true of hospital service.\(^{172}\) Investigation would presumably show it to be true of public relief—and, in fatal cases, this would apply to the victim’s family.

It is not surprising that great resistance was made to the adoption of workmen’s compensation laws; it is surprising, rather, that they were so rapidly adopted. They ran counter to the conviction of an individualistic people, embodied in our law for centuries, that only he who causes another’s loss should make it good. That this conviction is still dominant in public opinion is evidenced by the fact that in the thirty-five years since it was first proposed to solve by a system of compensation insurance the problems of automobile accidents,\(^{173}\) the proposal has seemingly made no progress whatever. It is not entirely clear that we did accept the view that industrial accidents were inevitable, that the losses they caused should be treated as expenses of the business, and would be repaid by the public in the price of goods. What we did accept seems to have been, rather, proof that the courts were incapable of doing justice in dealing with such accidents; that the delay and expense of litigation were so great, and the allocation of loss under common law rules was so erratic and unjust, as to compel the creation of a legislative system. The doctrines of fellow servant and assumption of employment risks were destroyed because the multitude of industrial accidents spotlighted them as causes of social injustice. Today it is the vast number of automobile accidents that presents most sharply the problem of uncompensated victims. The injustice of the bar of contributory negligence, though statistically improvable, is as plain in those cases and in all other negligence cases as ever were its two companion doctrines

---

171. See supra, p. 768.
172. COLUMBIA REPORT, 59 and n. 4.
173. See for historical citations Braun, op. cit. supra note 151 at 505 and n. 1.
that are now gone. It is true that nothing as yet indicates a willingness to abandon judicial settlement of claims on the basis of individual responsibility. Not even automobile drivers as a class, much less the public generally, are disposed to assume payment of losses caused by reckless, unskilful, or unfortunate drivers. And, of course, no one has even dreamed that we should all insure ourselves mutually against accidents of all kinds. Yet the fact that in recent decades and within limited fields legislators have been willing to disregard individual fault in accidents, and substitute for litigation other methods of protecting both their and society's interests, is a warning not to be disregarded. Now is the time, therefore, to correct defects in the law, and, particularly, to do away with the bar of contributory negligence (and of course the plaintiff's burden in some states of alleging and proving its absence); though, of course, leaving it as a defense pleadable and to be proved by defendant in reduction of plaintiff's damages if the principle of comparative negligence be adopted.

A chief justice of the Supreme Court of Pennsylvania once declared that "It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there can be no recovery for any injury caused by the mutual neglect of both parties." Another has said of the bar against a plaintiff contributorily negligent in any degree: "This is a safe rule, easily understood,"—and also easy to charge—"and can not well be frittered away by the jury. . . . The rule itself is valuable and rests upon sound principles. We are not disposed to allow it to be undermined." But times change. Chief Justice Black's history was not beyond question, and perhaps he misread the future. Justice Paxson's value judgment of the rule carries no particular weight compared with some to the contrary.

Mr. Bohlen showed that there was no explanation of the bar of contributory negligence to be found in the rules of legal causation. There is no excuse for its manifest injustice unless one accepts as such

174. The bar of contributory negligence has already lost much ground in some fields—liability of railroad companies to passengers, of public utility companies to consumers of gas and electric power, of manufacturers of dangerous machines and gadgets. See Green, *Illinois Negligence Law*, 39 ILL. L. Rev. 123-24 (1944).

Evidence that the courts, in applying common law principles, have not developed satisfactory methods of awarding damages has not been confined to the field of torts. Dissatisfaction was earlier expressed in the field of commercial contracts, where arbitration (particularly in England) has to an increasing degree displaced judicial settlements. But in these the complaint was primarily against the law's delay, not so much against its doctrines.

175. *Railroad Co. v. Aspell*, 23 Pa. 147, 149 (1858) per Black, C. J. Elliott, *Degrees of Negligence*, 6 SO. CALIF. L. Rev. 91, 135 (1933) also refers to it as "dating from the early history of the law of negligence."


177. *Supra*, page 595.
the "individualism" forced by the rule upon its victim. Mr. Bohlen pointed out the unique illogicality of a rule which prevents one who is only secondarily at fault from recovering from another who is primarily responsible for the harm the former suffers. Obviously, the commonsense solution was to reduce the damages—as in the legal systems of continental Europe. We have seen that in some of the early cases in which a jury was instructed to apply the bar they ignored the charge and reduced damages, and that the judges allowed the verdicts to stand. This, of course, was a recognition of comparative negligences, with apportionment of plaintiff's loss. Some other illustrations of judicial hostility to the rule have incidentally appeared. No one has ever questioned the assumption that denial of the defense to a defendant guilty of reckless disregard of the plaintiff's safety was a deliberate limitation upon a rule admitted to be harsh. Recent years have witnessed the setting up by the courts in automobile accident cases of fixed standards of conduct in definite situations, violation of which was conclusive evidence of contributory negligence and enabled judges to take cases from the jury; and a few years have witnessed the breaking down of those rules—again by judicial action.

But the most striking of judicial limitations imposed upon the operation of the rule was the doctrine of last opportunity. One cannot, indeed, prove that this derived from dislike of the other rule, and was from the beginning developed to nullify that. It has been seen, however, that it appeared almost immediately after establishment of the bar of contributory negligence, and that it has operated from the beginning—to the limited extent of its availability—to invalidate the bar. Attempts were of course made to explain in the terminology of causation the plaintiff's right to recover, but it has been seen that it could not possibly be so explained; even Mr. Bohlen's suggestion of its origin would have explained only half of it at the time of its origin and no part of it later. The doctrine really embodies a judgment of comparative negligences; the defendant's is in fact the preponderant ethical fault, considering the principles which Mr. Bohlen formulated and the Restatement adopted; and nevertheless, by giving precedence over those principles to an artificial rule of legal causation, the Restatement

178. Ibid.
179. Ibid.
181. Supra p. 598.
182. Supra p. 596.
183. Supra p. 602.
184. Supra p. 603.
LOSS APPORTIONMENT IN NEGLIGENCE CASES

fails to solve ethically a case of last clear chance which the British Court of Appeal—by resting upon a reasonable evaluation of relative faults—solved ethically and consistently with the character of the doctrine.\textsuperscript{185}

To anyone who feels that the economic loss represented by plaintiff's harm should not rest on either party alone, but be apportioned between them, the doctrine is undeniably open to one grave objection: it merely shifts that loss from the plaintiff, with whom the bar of contributory negligence leaves it, to the defendant. Because of this fact Mr. Gregory, in an excellent book which advocates apportionment of the loss between the parties, has pronounced the doctrine "as objectionable as the strict common law defense of contributory negligence and for the same reason." \textsuperscript{186} It is impossible to accept this view, for several reasons. In the first place, there is certainly some ethical gain in shifting loss from the one who is usually (not necessarily) less to be blamed for the harm suffered to the one who is more to blame.\textsuperscript{187} In the second place, looking at the faults of the parties alone, the above judgment wholly ignores the fact that the defendant's fault is more potent (in fact alone potent in the situation of § 479 of the Restatement \textsuperscript{188}) at the moment of the accident; and also of a different type. The duty of self-protection is a moral duty; \textsuperscript{189} defendant's duty under specified conditions to avoid, if possible, harm to the plaintiff is enforced as law.

There has been considerable controversy in Canada over the question whether the last opportunity doctrine should be abolished when comparative negligence is made by statute the basis of loss apportionment—some statutes having been held to have abolished it and others

\textsuperscript{185} The Loach case, \textit{supra} n. 133 and text at 605-09.

\textsuperscript{186} \textsc{Gregory, Legislative Loss Distribution in Negligence Actions} 52 (1936). "One wonders if the cure is not as bad as the disease"—\textit{id.} at 126. Mr. Gregory nowhere recognizes in his references to the doctrine that it embodies judgments of comparative negligence. One might infer from some passages that this was because he accepted causal explanations of last clear chance; but more probably the reason is that he uses comparative negligence and loss apportionment as synonymous expressions.

\textsuperscript{187} Nobody knows why the defense of contributory negligence was introduced; all attempts to explain it are, as Mr. Bohlen said in suggesting two explanations himself, mere speculations to "account for a result already reached apparently unconsciously." As I think the medieval cases should be read (\textit{supra} at 586-87) liability was put on the defendant when, essentially, the harm seemed done by his "act"—that is, not necessarily wholly disregarding plaintiff's act as a contributing cause; and put on plaintiff if his act was clearly predominant. When industrial accidents became numerous and a burden on industry the defense of contributory negligence in any degree shifted loss to plaintiff. The doctrine of last opportunity, if on defendant's side, once more shifted loss to him.

\textsuperscript{188} \textit{Supra} at 609.

\textsuperscript{189} This is the reason why the defense of contributory negligence could not be explained by calling plaintiff joint tortfeasor with defendant. "He owes no legal duty to himself to take due care of himself or of his property, and as he has [in not so doing] violated no legal duty to defendant and done him no damage, he has committed no tort"—Schofield, \textit{Davies v. Mann: Theory of Contributory Negligence}, 3 Harv. L. Rev. 263, 268 (1890).
It seems clear that as a doctrine putting loss wholly on defendant it should necessarily be abolished, just as the bar of contributory negligence is necessarily abolished. But it is equally clear, as already remarked of the latter doctrine, that all fault on each side must be considered in loss apportionment on the basis of fault, and failure to utilize a last opportunity is so grievous a fault that it should continue to weigh heavily in apportionment.

Another line of judicial restriction upon the operation of the bar of contributory negligence is found in the doctrine of degrees of negligence. It is astonishing to note in this connection the bemuddling influence of Baron Rolfe's dictum that "there is no difference between negligence and gross negligence . . . [it is] the same thing with the addition of a vituperative epithet." As a general proposition this is misleading. Why should a definition of negligence for some legal purposes bar any more particular analysis of the meaning of the term for other purposes? When the conduct of a single actor in a single situation falls "below the standard established by law for the protection of others against unreasonable risk of harm", his imprudence can be properly characterized as great, moderate, slight, or otherwise. It is also manifest that the margin by which he falls short of the standard can be properly characterized by any of the above or other words of measurement. And, finally, it is equally plain that if circumstances should call

190. It is extremely difficult to know whether they do or do not repeal the doctrine. Mr. MacIntyre refers to the question, The Rationale of Last Clear Chance, 53 Harv. L. Rev. 1225, 1249, 1251 (1940); also Grauxy, supra note 186, at 126-33, compare 188-89; both favor abolition—in what sense? Morgan v. B. C. Elec. Ry. Co. [1930] 4 D.L.R. 30, [1930] 2 W.W.R. 776 is an extremely interesting case. On a dark and rainy night, in a poorly lighted district, plaintiff left his truck, unlighted and unattended, where it must be struck by a street railway car unless the motorman saw it in time to stop. Both the lower court and Court of Appeal regarded the case as proper for apportionment of damages; both recognized defendant's motorman as having failed to utilize a last opportunity; plaintiff wanted the complete value of a truck, the lower court gave him four-fifths (as the measure of defendant's culpability), the Court of Appeals gave him one-fifth. The case is commented on by Mr. Fairty—Note, 9 Can. B. Rev. 52-55 (1931); also by Mr. Weir—Davies v. Mann and Contributory Negligence Statutes, id. at 470 (1931). Both writers discuss solely the doctrine of last opportunity; both take the view, (1) that the apportionment statutes are applicable only when the two parties jointly cause the harm, (2) the British view that in the last opportunity situation the failure to use it is the sole cause; hence, (3) though the statutes do not exclude that situation they should. But should the statutes operate on the basis of legal causation? See also, on the question whether the British loss apportionment act of 1945 excludes the last clear chance, Williams, The Law Reform (Contributory Negligence) Act, 1945, 9 Mod. L. Rev. 105, at 105-32 (1946).

191. Wilson v. Bratt, 11 M. & W. 113, 115 (Ex. 1843). It has sometimes been argued that "since" care and negligence are correlative terms there cannot be degrees of the former if not of the latter. N. St. J. Green, The Three Degrees of Negligence, 8 Am. L. Rev. 649, 668; Union Traction Co. v. Berry, 188 Ind. 514, 520 (1919). But care and want of proper care are both matters of fact, and the law may choose to use degrees of either as convenience dictates. In states refusing to do this as respects negligence the contrary practice is often followed as respects care—for example, as respects liability in driving an automobile. The federal courts are committed to this distinction—infra note 226.
for the comparison of two parties' social faults, that is of negligence, it could be measured only by that margin, and could therefore be properly characterized by the same terms. In the last edition of his *Torts* Sir John Salmond wrote of negligence:

“The sole standard is the care that would be shown in the circumstances by a reasonably careful man, and the sole form of negligence is a failure to use this amount of care. It is true, indeed, that this amount [of care] will be different in different cases... But this is a different thing from recognizing different legal standards of care; the test of negligence is the same in all cases.”

Many judges and textwriters can be quoted to the same effect. It is evident, however, that they had in mind only the ordinary case of negligence and contributory negligence in an action between plaintiff and defendant, in which the practice conforms to the opinion they express.

Of course, if only one party is negligent, or if both are negligent but the plaintiff's negligence is contributory, there is no need for comparative terms—since negligence, simply, is all that is legally involved; but the employment of such terms in such cases—which Baron Rolfe had in mind—is at worst a solecism. In fact, negligent conduct may vary exceedingly in its departure from the legal standard in case of one person at different times or of different persons at one time and in one situation. It is simple fact, statistically proved, that "teen-age" drivers are far more negligent—are more lacking in care—than middle-aged drivers of automobiles. If, therefore, the law—or the casualty insurance business—permits of, or calls for, a comparison of faults, it is likely that the negligence of plaintiff and defendant will in many cases admit of such distinctions as the words gross, moderate, or slight indicate. And the courts in various states, observing these actual distinctions which were included within the definition of negligence but ignored in denying recovery to a negligent plaintiff, have at different times and in varying manners lessened the harshness of that rule by limiting its application to cases in which the negligences of the two parties were not shockingly unequal.

The Georgia law is particularly interesting. The Code contains one provision establishing apportionment of loss in railroad negligence

---

193. Mr. Bohlen insisted upon the great difference between assumption of risk and contributory negligence—Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233, 245 (1908); but much of the former is under the latter in the Restatement. In view of that, it is somewhat surprising that conduct recklessly disregardful of another's safety (often called gross negligence by the courts) is, by definition of negligence excluded therefrom (§ 282)—as also from intent; but it is dealt with in the Negligence volume, as a chapter of that subject.
cases: "If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributed to him." 194 This has by no means been restricted, in application, to railroad cases—195 no doubt because other provisions, which came before it in the original code of 1862 and are unlimited in terms, were regarded as controlling. Three other provisions define the circumstances in which plaintiff is or is not precluded from suing. One precludes suing for damage to himself or property "where the same is done by his consent or is caused by his own negligence"; 196—which is the same statement made since medieval times 197 and obviously means much more than merely a causal contribution to the harm, since it was originally in the same section with and immediately precedes the provision quoted just above. The other two provisions are in another Section: "If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. In other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained". 198 This Section has been applied, as its words warrant, in all types of negligence cases.

It is notable that all of these provisions appeared as early as in the original Code of 1862. 199 It will be noted that the Section last quoted applies to a plaintiff, as in England, the doctrine of last opportunity, and is a complete and perfect statement of the bar of contributory negligence as Baron Parke believed it should be, and had done his best to establish it, only a few years before. 200

In a case that was twice before the Supreme Court of the state shortly before the Code was prepared the doctrine of last opportunity

195. It has been extended to automobile accidents, mill workers, etc.
196. § 2781. Assumption of risk is specifically excluded in railroad accidents, § 2784; it is not excluded in other employments, § 3131; degrees of care and negligence are defined, §§ 3471-73.
197. Supra pp. 575 at note 12, 586-87.
198. § 2782. In § 4426 there is a general provision specifically denying recovery to one who has failed to utilize an opportunity to avoid harm by defendant's negligence.
was explicitly approved as applied to both parties. So also, in dictum, was the doctrine of mitigation of damages—not actually involved because only one party was found negligent; but that too was established before completion of the Code. The court which decided these cases was presided over by Judge Lumpkin, the elder, in the opinion of Mr. Wigmore and others one of the greatest of our state judges. Both opinions were written by him, and he manifestly drew his wisdom from a small group of English cases earlier cited and analyzed. The commissioners who framed the Code adopted the principles of these cases, new as they were, as "decisions of the Supreme Court", as they were authorized to do by the statute under which they were appointed. No doubt, too, the adoption was properly within their resolution "to add no principle or policy which had received the condemnation of the legislature", or was antagonistic to the settled decisions of [the courts] of the state. It was a remarkable example of what good codification can accomplish. It is also an interesting bit of legal history, showing how a few cases, which had until recently no permanent effect in England—presumably because the judges wished to minimize

201. A slave, driving a cart with a white woman (Mrs. W.) and four children in it, attempted to cross the track in front of a train, in disobedience of her orders and with full consciousness of its approach. The engineer of the train likewise had a full view of the cart. In The Macon & West. R.R. Co. v. Davis, 18 Ga. 679 (1855)—Davis suing as administrator of the owner of the deceased slave—the court held the charge below too strict in instructing the jury that if, from any cause originating in their management, a public crossing is approached with an uncontrollable engine and train, the negligence is gross, and the company are liable—compare supra p. 607 et seq. The defendant company, said the court, was bound to take "reasonable care," and whether it did should have been left to the jury; but the attempt "to be more definite and classify the degrees of diligence . . . has been abandoned as impracticable" (at 684). And also: "We . . . think that it ought to be left to the jury to say whether, notwithstanding the imprudence of the plaintiff's servant, the defendants could not, in the exercise of reasonable diligence, have prevented the collision," in which case they would be liable (at 686-87). It cited Lynch v. Nurdin, supra, note 180, as authority for modifying the strict bar of contributory negligence. In the second case the plaintiff below was a surviving child—The Macon & West. R.R. Co. v. Winn., 19 Ga. 440 (1856). A requested charge to the jury that if both parties were negligent, but plaintiff could by ordinary diligence have avoided harm through defendant's negligence, the latter would not be liable, was refused. On appeal the Supreme Court held this error. It cited various of the English cases cited supra, note 28 et seq. Note that the last opportunity rule is treated as outside the mitigation of damages provision.


203. Thomas R. R. Cobb, who was both reporter of the Supreme Court and one of the commissioners, framed the portion of the Code containing these articles—Clark, The History of the First Georgia Code, Ga. B. A. Rep. 138, 152-4 (1890).

204. Something on the Code's history is prefixed to its various revisions. The act providing for its preparation directed that it should, "as near as practicable, embrace, in a condensed form, the laws of Georgia, whether derived from the common law, the constitutions, the statutes of the state, the decisions of the supreme court, or the statutes of England in force in the state"—Ga. Acts, 1858, No. 94 at 95. "It changed or repealed existing laws, and it made new laws. . . . The commissioners made free use of the powers granted them. . . . The design of the Code was a bold one, and the execution was on the same line"—Clark, supra note 203, at 150.
obstacles to her progress in industrialization—found American judges wise enough to incorporate them into our more mutable systems.

They had a great influence, also, in two other states that introduced at almost the same moment as Georgia a far less direct and satisfactory system of comparative negligence than Georgia’s—namely, Illinois and Tennessee. The purpose of referring to their attempts to abrogate the bar of contributory negligence is not so much to laud them therefor as to emphasize the mistakes in method that nullified their efforts.

In Illinois that bar had been adopted in its harshest form, with the burden on plaintiff of proving its absence, in 1852, in the first common law negligence case in the reports of its Supreme Court. It then in rapid succession introduced the countervailing doctrine of last opportunity, began its entanglement with degrees of negligence in a railroad case involving the running down of livestock on the right of way and (more fatefully) a bailment case, and complicated its problems by the inevitable introduction of proximate causation. At that point Judge Breese, relying upon various of the early English cases that had weakened the defense of contributory negligence or even sought to replace it with a rule for mitigation of damages, enunciated this principle:

"the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover. . . . We say, then, that . . . the degrees of negligence must be measured and considered; and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."

This was obviously subject to two fatal weaknesses, both of which the Georgia court—resting on the same English cases but with far greater discernment—had avoided. Possibly Judge Breese intended only to

206. Moore v. Moss, 14 Ill. 106 (1852); Chic. & Miss. R.R. Co. v. Patchin, 16 Ill. 198 (1854); Skelley v. Kahn, 17 Ill. 170 (1855); Joliet & No. Indiana R.R. Co. v. Jones, 20 Ill. 221 (1858). The whole story through to its climax is told in four articles by Green—Illinois Negligence Law, 39 Ill. L. Rev. 36, 116, 197 (1944-45), 40 id. 1 (1945). Several of his conclusions are quoted hereafter. See also Mole & Wilson, A Study of Comparative Negligence, 17 Cornell L.Q. 333, 604 (1932), at 335, 634. This is an admirable article, of wide and accurate research, primarily expository but also critical, the earliest and still the best in the literature of the subject. My great indebtedness to it is evident in many citations. Another article embodying wide research, purely descriptive, and containing a very complete collection of citations to statutes and reports is Turk, Comparative Negligence on the March, 28 Chi-Kent Rev. 189 (1950). As it adds little if anything of substance to the Mole & Wilson essay, and appeared after most of my work was done, it is cited only here.
207. Including Raisin v. Mitchell, supra note 34; Pluckwell v. Wilson, supra note 28, and Lynch v. Nurdin, supra note 180; much the same cases as those relied upon by Judge Lumpkin in the cases cited supra, note 201.
contrast slight with great negligence, but he said "degrees", and that these must be "measured", and that was the rule the Court attempted for nearly thirty years to apply. Judge Lumpkin was far wiser in declaring that an application of any standard more definite than "reasonable care" was impracticable. But the second objection to Judge Breese's formula is much more important. The rule did not reject the defense of contributory negligence, but merely modified it. The evaluation of the parties' faults did not effect a final disposition of the case; the plaintiff, after passing that test, although causally negligent in some degree, could maintain his action and secure a full recovery. In this respect it was open to the same criticism as the doctrine of last opportunity when applicable to defendant. The immense advantage of the Georgia rule, under which suit is allowed despite contributory negligence but damages reduced by the jury and the case finally disposed of, is manifest. The English cases cited by Judge Breese went farther than his rule in not explicitly recognizing a bar when plaintiff's negligence was more than slight. The Georgia rule explicitly repudiated any such limitation; and, in addition, in place of requiring the jury to put a definite label on plaintiff's negligence left them free to appraise that sub silentio in giving their verdict. This was merely an outright adoption of what the English cases suggested. Judge Breese had lacked both boldness and discernment.

After an experience of nearly a quarter of a century in applying the Breese formula the Supreme Court repudiated it by a decision that the bar of contributory negligence had never been abrogated and that proof of the absence of such negligence must precede application of the formula. But, of course, if plaintiff first alleged and proved no contributory negligence resort to the rule could only harm him thereafter. Various causes entered into the failure of this attempted reform. The overrefinement of Judge Breese's rule—as it was actually, perhaps unnecessarily, developed—was an obstacle in trials. The unwillingness of the Supreme Court to let the trial court and jury settle the problem of negligence was a cause of constant reversals. A vast development

209. Supra note 201. This matter of degrees of negligence had been discussed for centuries in connection with its supposed derivation, in European legal systems, from the Roman law. As a matter of fact Thomasius (1655-1728) seems to have "demonstrated that the division of faults into three degrees . . . have not a signification sufficiently fixed and absolute for practical application; that gross negligence and fraud, slight negligence and accident or misfortune which could not have been foreseen, are often and easily confounded; that ordinary negligence and slight negligence do not offer differences sufficiently marked and characteristic to be discerned with accuracy"—N. St. J. Green, Proximate and Remote Cause, 8 Am. L. Rev. 651.

210. Calumet Iron & Steel Co. v. Martin, 115 Ill. 358 (1885). It was not until 1894 that the Court definitely declared comparative negligence to be no longer law in Illinois. City of Lanark v. Dougherty, 153 Ill. 163, 165 (1894).
of industry and increase of industrial accidents characterized the 1870s and '80s, and no doubt Mr. Green's suggestion is correct that the judges considered it undesirable to burden industry with the heavier liability which would have resulted from a displacement of employers' common law defenses by the principle of comparative negligence.\(^{211}\) The Illinois experiment attracted great attention and widespread criticism, most of which was concentrated upon the impracticalities of definite degrees of negligence, but it tended to cast discredit upon the general principle of comparative negligence.\(^{212}\)

In the same year as in Illinois, and with reliance upon the same English cases, the Supreme Court of Tennessee recognized comparative negligence,\(^{213}\) and though the doctrine was abandoned after a few years\(^{214}\) it deserves mention because it was given effect by a mitigation of damages.\(^{215}\) On the other hand, in Kansas degrees of negligence were utilized merely in decreasing the number of cases in which plaintiff was barred by contributory negligence.

\(^{211}\) Green, \textit{supra} note 206 at 51. "The common law doctrines of negligence burst full blown in Illinois in connection with railway traffic" in 1852. Mr. Green cites dozens of cases, the vast majority of which are railroad cases, of the period 1858-85.

Mr. Thompson, writing long after all the evidence was in, construed the Illinois doctrine to have meant: (1) that it predicated exercise by plaintiff of at least ordinary care—he was not to be barred for failing to use extraordinary care, that is, when his negligence was slight in fact; (2) he might then recover by showing that his negligence was slight in comparison with defendant's or the latter's gross—\(1 \text{T}\)hompson, \textit{Commentary on the Law of Negligence} §§ 269, 272, 273, 275 (2d ed. 1901).

\(^{212}\) Elliott, \textit{Degrees of Negligence}, 6 \textit{So. Calif. L. Rev.} 91-144, is an admirably full and accurate piece of research, containing a short discussion of comparative negligence, 135-41.

Collections of cases will be found in works on torts and negligence (old editions being cited advisedly): 2 Jaggard, \textit{A Handbook on the Law of Torts} § 275 (1895); Cooley, \textit{A Treatise on the Law of Torts} 675-79 (1879); Barrows, \textit{A Handbook on the Law of Negligence} 79 et seq. (1900). See especially 1 Thompson, \textit{supra} note 211, ch. 10 on \textit{Comparative Negligence}—§ 268, Georgia; §§ 269-84, Illinois; § 285 Kansas. In various states the doctrine of comparative negligence was supposedly not recognized but it was nevertheless held that plaintiff's "slight" negligence was not a bar—In general, "slight" could not be considered "remote" and inconsequential.

\(^{213}\) Whirley v. Whiteman, 1 Head 610 (Tenn. 1858). The court said: "the mere want of a \textit{superior} degree of care or diligence cannot be set up as a bar to the plaintiff's claim for redress; and that although the plaintiff may himself have been guilty of negligence, yet unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he will be entitled to recover" (at 619). This proposition assumes that neglect of a last opportunity was always the content of the \textit{bar} of contributory negligence—Baron Parke's position—text, \textit{supra} at note 200. In a later case the matter was accurately stated: "although guilty of negligence, yet if the party [plaintiff] cannot, by ordinary care, avoid the consequences of defendant's negligence, he will be entitled to recover."—East Tenn. R.R. Co. v. Pain, 12 Lea 35, 40 (Tenn. 1883) ; but note the next citation.


\(^{215}\) Dush v. Fitzhugh, 2 Lea 307, 309 (1879). But note that this does not apply when neglect of a last opportunity by defendant gave plaintiff recovery, \textit{supra} note 213.
One great difficulty arose in all these states from a confusion between the terminologies of fault and of causation. "Slight" was used as synonymous with "remote", and "gross" was used as a synonym of "proximate"—and in other special senses. The same confusion passed over into at least some treatises written to refute errors and guide the bar. The mere term "contributory negligence" implies a recognition of plaintiff's negligence as concurring in production of his injury. The Restatement's rules of causation are identical as respects defendant's negligence and plaintiff's contributory negligence, require that the wrongful act of each shall be a "legally contributing cause", and that each must be a "substantial" factor in producing the harm. But even before the Restatement it is impossible to see how any confusion could have arisen, in stating the defense of "contributory negligence," from adding to those words "in any degree, however slight." Mr. Thompson, however, objected to them as "cruel and wicked" (which the rule itself might indeed be called) in putting all loss on plaintiff even though his negligence "may have been slight or trivial". And he undertook to show it was not the law, (1) because plaintiff must have been guilty of a want of ordinary care; and this "... must have been a proximate cause of the injury"; and (2) because if plaintiff's negligence "was the remote or far-off cause of the catastrophe, and that of the defendant the proximate or near cause of it, the law permits the plaintiff to recover damages, and yet in such a case it cannot be said that [plaintiff] did not, in some degree, contribute to produce the ... injury".

These examples and those in the notes suffice to show how an undesirable temporal or spatial meaning was given to "remote" and "prox-

---

216. Thus, in the case last cited the court found it necessary to reject the idea that negligence of a plaintiff "that remotely contributed" to his injury would bar his recovery—ibid.

217. In the Whirley case, supra note 213, at 623, the court said: "he shall be considered the author of the mischief by whose first or more gross negligence it has been effected." In the Fain case, cited supra note 213, at 40, this became: "He is considered the author of the injury by whose first or more gross negligence, in the sense of proximate negligence, it has been effected." And in the Hull case, cited supra note 214, at 36, the court explained that in using "gross" in earlier cases it had meant "the prime, principal and proximate cause of the injury."

218. The first example in the preceding note is relatively unusual. Standard, of course, was the meaning of failure to take slight care. And both logical and common in jurisdictions and textbooks in which negligence was a proximate cause of a wrong only if a reasonable person should have foreseen that it would produce the effect it did produce, the negligence was "gross" if foreseeability of serious injury was reasonably probable, and "slight" if that was improbable—Thompson, op. cit. supra note 211, §§ 271, 50, 57.


220. 1 Thompson, op. cit. supra note 211, §§ 216, 267.

221. Id. § 170. In §§ 216, 230 he also uses "remote" as equivalent to "slight" in stating when one contributorily negligent may nevertheless recover.
imate" and how the difficulty inherent in the term "slight" ("or trivial" being an additional aberration)—which was a term of comparative fault—was compounded by making it synonymous with "remote", which was primarily a term of causation and which, in whatever sense it might be used, had for centuries had the almost invariable meaning of legal negligibility. And in Mr. Thompson's case this was somewhat curious, for he criticized Judge Breese's formula as allegedly based on this same confusion between fault and causation—though, in its original statement by him, it was not. The fact is that, assuming causation, he proposed to solve the problem on the basis of fault alone, doubtless because he thought it plain that a solution was neither logically nor justly given under existing rules of legal causation. It was an attempt to introduce a principle of fault into the common law by judicial construction of the negligence concept. His attempt to alter the administration of justice was perhaps too direct and transparent. The methods by which the courts had introduced as common law the defenses of contributory negligence and assumption of industrial employment risks (by imputed "individualism"), and particularly risks from the negligence of fellow servants (by an imputed contract of employment), were more technical and less obtrusive. But be that as it may, the defeat of the experiment was primarily due to the defects of the formula, coupled with the complexities which were introduced into its application by confusing terms of fault and causation that had wholly different meanings. This last reason for the abandonment of comparative negligence in Illinois and other states is a warning to be heeded in any future attempt to establish loss apportionment, by mitigation or damages or by any other formula, in negligence cases.

Degrees of care and of negligence have also had a long and widespread recognition in judicial decisions not involving restrictions upon the defense of contributory negligence. They have also been widely,
and usually loosely, employed in statutes. Mr. Elliott has described this usage as follows:

"Apart from the comparative negligence statutes . . . there are innumerable legal provisions wherein the degrees of negligence and of care are mentioned. In several states there has been a clear intention to codify the entire doctrine and thus give legislative sanction to its application. In statutes of those jurisdictions, isolated references to gross negligence and slight care, to ordinary care and ordinary negligence and to great care and slight negligence, safely may be assumed to have . . . some definite significance . . . But in a number of States, the term 'gross negligence' appears in contexts where one feels it to be more as an indication of legislative zeal and emphasis than as denoting a specific and distinct class of negligence." 228

The fact that these sporadic references to individual degrees of negligence have been especially numerous, as respects each, in particular fields—"gross" in penal statutes 229 and automobile guest acts,230 "gross" and "wilful" in workmen's compensation acts 231—tends of itself to suggest technical significance. To say "gross" is to imply at least one other degree—"less than gross". In other words all these scattered references to individual degrees of negligence intimate comparative negligence and must have done something in preparing the way for a doctrine of comparative negligence as a more just solution of negligence problems. In this connection it is interesting that Georgia's comparative negligence doctrine originated in a railroad accident 232 and that the temporary displacement of the bar of contributory negligence

227. "There are only six states evincing a definite legislative policy of recognition of degrees of negligence and of care, and in only three of them has the legislature furnished a complete definitional analysis for the aid of the courts in applying the provisions"—Elliott, supra note 175, at 134. The six states are Georgia, North Dakota, Oklahoma, California, Montana, South Dakota; to these should be added Louisiana. The three referred to are the first three of this list (California being another until 1873). Of these states Georgia alone applies the degrees, in practice, to negligence in personal injury actions, although her statute defines them in terms of property (bailments) only—GA. CODE ANN. §§ 3470-72 (1926). All cases of statutory recognition which Mr. Elliott could find are discussed by him at 127-35. On Louisiana see Hillyer, Comparative Negligence in Louisiana, 11 Tulane L. Rev. 112, 117.

228. Elliott, supra note 175, at 127.

229. For example, PA. STAT. ANN. tit. 18 §§ 254, 1311 (Purdon, 1936), repealed, Act of 1939, P. L. 375 § 201. See also Cody et al. v. Venzie, 263 Pa. 541, 542-45 (1919).

230. Mole & Wilson, supra note 206, at 625-33; Elliott, supra note 175, at 133-34.

231. Under the English Act of 1897 the workman was barred from a claim to compensation by his "serious and wilful misconduct." Jeremiah Smith commented on this act in his Sequel to Workmen's Compensation Acts, 27 Harv. L. Rev. 235, 344 (1913) at 240, 345. Various American acts generally followed this wording—Elliott, supra note 175, at 132.

232. Supra note 201.
by mitigation of damages proportionally to comparative negligence in Illinois originated in a case of injury to a railroad employee.\textsuperscript{233}

Forerunners of reform otherwise than through application of definite degrees of negligence were also on the statute books long before the resistance of industrial employers to modification of the common law defenses was broken by the flood of employers' liability laws and workmen's compensation acts early in this century. For example, Tennessee provided in 1856 that in case of non-observance by railroads of prescribed precautions at highway intersections the company "shall be responsible" to persons injured, and her courts interpreted this to mean that there should be no defense of contributory negligence and that damages should be mitigated.\textsuperscript{234} It has already been seen that in 1862 the Georgia Code applied to railroads a similar rule in both respects,\textsuperscript{235} with no mitigation of damages if the railroad company had violated a statute, and with a presumption of negligence on the part of the railroad.\textsuperscript{236}

Among the judicial antecedents of this statute, which was general in its wording, there had been an application of its principles to an action brought by an injured employee of a railroad.\textsuperscript{237} From 1871 onward Massachusetts, in a statute relating to railroad accidents, relieved plaintiffs of the defense of contributory negligence unless this was "gross or wilful" or a violation of law.\textsuperscript{238} In 1891 Florida adopted the Georgia provisions, extending them explicitly (as the Georgia courts originally did by interpretation only) to cover property damages, and also to hazardous occupations.\textsuperscript{239} No doubt other early instances of judicial and statutory modifications of the common law could be discovered if statutory compilations included more historical data. To some extent such modifications doubtless continued, after the beginning of general

\textsuperscript{233.} The Jacobs case, \textit{supra} note 208 and text.

\textsuperscript{234.} Tenn. Acts 1855-56, p. 92—§4 of Act of Feb. 28, 1856: "damages may be recovered" and the company "shall be responsible." \textit{Tenn. Code} §§1166, 1167 (Thompson & S. 1873) and note; East Tenn. & Ga. R.R. Co. v. St. John, 5 Sneed 524, 530 (Tenn. 1858); Louisville & Nash. R.R. Co. v. Burke, 6 Cold. 45, 51-2 (Tenn. 1868), in which it is said that the company was not to be held liable if plaintiff's fault was "wilful." Mole & Wilson, \textit{op. cit. supra} note 206 at 612-13, quote later cases in which it is said that mitigation was to be made when plaintiff's negligence was "remote" but not when "gross," even though defendant's be the "proximate cause"—see \textit{supra} notes 216-18.

\textsuperscript{235.} \textit{Supra} note 199.

\textsuperscript{236.} \textit{Ibid.}

\textsuperscript{237.} Augusta & Sav. R.R. Co. v. McElmurry, 24 Ga. 75 (1858).


\textsuperscript{239.} Fla. Acts 1891, c. 4071 (No. 62), §§1-3; \textit{Fla. Stat.} §§768.05-07 (rev. 1941). The language on loss apportionment, §768.06, is that of the Supreme Court quoted \textit{infra}, text at note 332.
legislation on employers' liability, in states relatively little industrialized.\textsuperscript{240}

It is only with reference to a few of their general characteristics that this discussion is concerned with the enormous mass of statutes that have modified or wholly displaced the common law of master and servant in the field of industrial accidents since English legislation in that field began in 1880. Aside from a Maryland Act of 1902, a Montana statute of 1909 and one of New York in 1910 all of which were declared unconstitutional, compensation laws began in 1911 when ten laws were passed. Before the end of 1913 there were twenty-one, six limited to occupations characterized as extra-hazardous (and were relatively near to absolute liability at common law for extra-hazardous use or conduct), the remainder of general application and wholly irreconcilable with its principles.\textsuperscript{241} And this movement has continued until, since the first of January, 1949,\textsuperscript{242} every state in the Union has such a law. In the meantime, with the enactment by Congress of the acts of 1906 (held unconstitutional) and 1908 to regulate employers' liability for injuries to employees of interstate railroads, a second class of statutes was begun. And "begun" seems to be a permissible expression, despite much sporadic and limited state legislation, earlier in date, which would be classified under the same heading; for the passage of the federal act of 1908 was promptly followed by that of more than a dozen state enactments which exactly or substantially reproduced it with reference to intrastate railroads, and more slowly by much similar legislation thereafter.

Individually and in comparison with each other these two groups of statutes give cause for reflection in connection with comparative negligence and corresponding apportionment of loss.

In all employers' liability acts the underlying assumption is an accident in which both parties are at fault, and the negligence of each is proved by ordinary common law procedures. However, the right to recover—under the federal acts and most of the state acts—is subject to no limitation based on the relative negligence of the two parties. The intent is to give some recovery for every injury due in part to the employer's negligence, and how much is determined (under the federal rule, generally followed) in a special manner that will be later discussed.

\textsuperscript{240} A Virginia provision on railroad crossing accidents seems to go no further back than 1919—\textit{Va. Code} §3959 (1919), \textit{Va. Code} §3959 (1942). It excludes the defense of contributory negligence but declares that it "may" (interpreted "must") be considered in mitigation of damages.

\textsuperscript{241} Smith, \textit{supra} note 231, at 342, 346-47 and n.12; and \textit{cf. supra} note 165.

\textsuperscript{242} When a Mississippi statute became effective. All save four states had such acts by 1932, all save one by 1941—\textsc{Schneider}, \textit{Workmen's Compensation Text} 24 (3d ed. 1941).
That is to say, the defense of contributory negligence is banned and damages mitigated in proportion to the plaintiff’s negligence. These two basic principles, after establishment in relation to railroad workers, were extended to other situations in various states.\(^\text{243}\) It was not true of all states, however, that the relative seriousness of the employee’s negligence was wholly disregarded—unless, indeed, no negligence appeared on the part of the employer, which was a case outside the acts. In various states a right to recover was recognized only when the employee’s negligence was “less” than that of the employer, or when their faults should respectively be found to be “slight” and “gross”. Perhaps the idea was that if the fault of the person injured was as great as that of the employer he had no moral right of action; or perhaps, less technically, that justice was served by leaving the loss as it had happened to fall—which, of course, if the employee’s negligence was greater than the employer’s, was not justice to the latter.

It is commonly said of the workmen’s compensation acts that in them fault is wholly disregarded. It is true that in general the presence or lack of fault on either the employer’s or employee’s part is irrelevant; and also true that their relative fault, if both have been negligent, is immaterial, and therefore outwardly “they are all . . . based upon a theory . . . which is utterly inconsistent with the fundamental principle of the modern common law of torts”.\(^\text{244}\) Since comparative negligence is not involved, the statutes are largely irrelevant to the subject of this paper; but since one of its purposes is to emphasize the element of fault in principles of civil liability, they are by no means entirely irrelevant. Before explaining why, attention may be directed to one aspect of the general theory of the acts that is of great significance. Mr. Witte long ago pointed out that

“Workmen’s compensation does not place the cost of accidents upon industry, but provides for a sharing of the resulting economic loss between employers and employees on a predetermined basis, without reference to fault, under a plan designed to insure prompt and certain recovery, at minimum expense. Its justification is . . . that workmen’s compensation reduces the economic loss resulting from industrial accidents to a minimum. This is the principle of ‘the least social cost’ . . . With reference to the cash indemnity, the principle of the least social cost does not demand that the entire economic loss due to accidents should be

\(^{243}\) Iowa, for example, extended the principles from railway cases to all actions—1 Iowa Code § 479.124 (1946) (old railroad provision), 2 id. 1843 (rule 97, Code Civ. Proc.). Oregon applies the principles in certain building and construction trades—3 Ore. Code §§49-705, 706 (1930) (see general index s.v. “Negligence—Contributory” for interpretation), but not in railroad—3 id. § 62-1702.

\(^{244}\) Smith, supra note 231, at 250, the qualification is the writer’s, not Professor Smith’s, and therefore explained below.
placed upon the employer. Rather, it suggests an equitable distribution of the costs between the employer and the employee, with benefits adjusted so that . . . there will be an incentive to the injured workman to return to work . . . " 245

This theory of the acts is recognized in at least some works prepared for practitioners in the field.246 So far as actually practiced it represents an apportionment of loss, based on social purposes rather than on the parties' individual faults; the sum given the plaintiff is adjusted to his harm rather than to his fault, and even the possibility of its future repetition seemingly plays no part in the adjustment.

There are, however, some distinct applications of fault in the application of the acts. One is to exclude from their benefits workmen whose injuries are due to their own "wilful or wanton" or "culpable" negligence. Virtually all the statutes have that provision. Similarly, a right to compensation is generally denied when the worker's injury is due to his failure to use safety appliances or to obey safety rules, or to his removal of safeguards.247 On the other hand, when an employer violates a safety statute the worker is, naturally enough, not directed to a common law action, but his damages are not diminished by contributory negligence.248 In this last case, there is a clear recognition of comparative fault in the application of the statutes.

The most striking characteristic of the compensation statutes is the abolishment of the three common law defenses. Many of the statutes, nevertheless, have subordinated the high purpose of extirpating those injustices to the end—seemingly regarded by them as higher—of hastening their own acceptance. By no means are all the statutes compulsory,249 and many of those which are elective penalize employers who do not elect to come under them and are sued at law for damages, by depriving them of the common law defenses.250

Except to the limited extend noted above the compensation acts do not bear at all upon the fault of negligence with which we are here concerned. The system does not deal with tort, breach of contract, or any other common law wrong at all,251 but for that reason the fact that in

246. SCHNEIDER, op. cit. supra note 242, § 3 at note 18; compare infra note 254.
249. SCHNEIDER, op. cit. supra note 242, ch. 3, §§ 77-78.
250. Id. c. 4, §§ 89-94.
251. They do not, and do not purport to, deal with torts. They are "founded on a theory inconsistent with the fundamental principles of the modern common law of torts," under which "there must be fault on the part of the defendant; either wrong intention or culpable inadvertence"—Jer. Smith, supra note 231, at 244, 239. Much less do they deal with torts by abandoning fault and going back to the ancient
fixing the limits of its province, and even slightly in applying its principles, fault in the sense that concerns us is recognized at all is the more significant of the latter's basic and inescapable character. In other respects the compensation system greatly concerns the purpose of this discussion. One is that the underlying, motivating objective of compensation and employers' liability legislation was to care for the uncompensated accident victim—uncompensated because common law procedures were incompetent to deal with it either with celerity, low cost, certainty, or with equity. The second is that it was apparent from the outset of the liability legislation that the defenses of assumption of risk and contributory negligence were doomed in one immense field of law, and such has been the result. The third is that the system early made

rule of liability for the consequences of an act, regardless of the actor's mental state, as Professor Bohlen spoke of them as doing—The Rule in Rylands v. Fletcher, 59 U. of P A. L. Rev. 423 (1911); compare n.136 at 445-46 and 452. Nor do they even remotely approach a theory of contractual liability, notwithstanding that many courts, unable to abandon the common law theory of contractual assumption of industrial risks, have sought to continue that theory by reading the compensation act into an imputed contract of employment—1 Schneider, op. cit. supra note 242, at § 17; Ann. Cas. 1916B, 158. They do not deal with a "wrong" of any kind so far as the common law is concerned—Devine's Case, 236 Mass. 588, 590 (1921). They create statutory law to deal with a "wrong" social condition. The employer is made mediatly responsible only as representing—ostensibly, the industry, but actually—the public, which assumes the loss in paying higher prices for the industry's products.

252. It has already been noted that in applying the negligence test of reasonable care the law disregards mental and psychological weaknesses (such as slow reactions); yet individuals with these qualities must labor, and their special qualities have likewise been ignored in interpreting laws that subject employers to the penalty of responsibility, in applications of the fellow servant rule, for employing "incompetent" workmen. The ignorance, stupidity, and slow reactions of such individuals—along with true incompetence due to inexperience—were responsible for a large portion of the accidents for which compensation was demanded. In 501 fatalities studied in the Pittsburgh Survey there were found 410 "indications of responsibility" (including duplications, and not all personal—on the part of employers 147, of victims 132, of fellow workmen 57, of foremen 49, and of none of the preceding 117. The last would be "unavoidable." But the 132 indications of victims' responsibility are convincingly analyzed by Miss Eastman, and only one-third were found ethically to deserve the attribution of responsibility; and of those, in less than half was the victim alone responsible—Eastman, Work-Accidents and the Law 86-95 (The Pittsburgh Survey, 1910). Schneider states that "statistics show"—without indicating sources, but presumably they are the findings of compensation commissions—that 40% of industrial accidents causing disability are due neither to the fault of the employer nor of the employee" and 30% due to the latter—1 Schneider, op. cit. supra note 242, at 2.

253. For delay and counsel costs where administration of a compensation act was left to courts see Devine et al., Three years under the New Jersey Workmen's Compensation Law, 5 Am. Lab. Leg. Rev. 31, 41-47 (1915).

254. As regards workmen, European compensation acts had all been based on payment of "a fixed and moderate proportion of the economic loss resulting from each injury," and that principle was adopted in American laws—Eastman, op. cit. supra note 252, at 209. The possibility of unexpectedly high verdicts forced employers to insure themselves at premiums so high because of the uncertainty, as to make safety in individual cases much more expensive than realized danger. See Bulletin No. 67 (1906) 781—U. S. Bureau of Labor, on cost of industrial insurance.

255. Burdick, The Law of Torts 126 (4th ed. 1926). The Federal Employers Liability Law of 1908 had embodied virtually all earlier limitations in state laws in assumption of risk (in both its forms) and contributory negligence. At least eleven states, in their employers' liability acts explicitly removed the bar
it evident that contributory negligence must ultimately be replaced to a great extent by apportionment of loss, that being the basis of relief in both the employers' liability laws and the compensation acts.

The primary purposes of all the preceding discussion have been also three. The first has been to trace the history of fault in the law of civil liability, to emphasize its fundamental importance, and the failure of theories of legal causation either to identify it accurately or give it proper attention. The second has been to emphasize the importance of the uncompensated accident victim, not merely in the industrial field where he has now ceased to exist but in all negligence litigation. The third has been to emphasize the facts that the defense of contributory negligence is very modern; that it was and is wholly unexplainable by theories of legal causation; that resistance to it began immediately following its first promulgation and has never ceased; that its rejection in the employers' liability and compensation acts was merely the culmination of resistance sporadically expressed in various states long before, judicially and in statutes; that it was originally judicial class legislation and only ceased to be so when swept away by other class legislation and that what was done for one class should now be done for all classes of litigants. When Professor Jeremiah Smith contemplated the first score of compensation acts he pointed out that the abrogation of the defense of contributory negligence put working men "in a better position than outsiders", but he gave no particular attention to the matter because of a belief "that the doctrine . . . (was) a decadent doctrine, which (would) ultimately disappear". He did, however, suggest that the question would later arise whether other persons should not be put "upon an equality with workmen". That should now be done, by abolishing the bar of contributory negligence and providing for loss apportionment in proportion to the relative negligence of the parties.

After more than a hundred years there is by no means complete agreement on the nature of the bar. Resistance to its application has caused its judicial treatment to remain "in a state of great confusion and uncertainty". The special difficulty of applying it in automobile accidents has been referred to. The following comments, written by the director of the study of such accidents which resulted in the Columbus

256. Smith, supra note 231, at 243, 236. He included the abolishment of assumption of risk in his reference, but as it was abolished only in relation to industrial risks, others than workers are not involved.

257. For example, supra pp. 581, 599.

258. 1 Thompson, op. cit. supra note 211, at § 231.

259. Supra p. 600.
bia Report, but with specific references to such accidents omitted, would unquestionably be applicable to vast numbers of industrial accidents and probably equally so to accidents in general:

"We have in many cases assumed that the 'care exercised by a reasonable man' really means an unrelaxing care of which no man is capable;'—that, perhaps, each juror, thinking of himself as the average man, may take care of—;"we have assumed that negligence and contributory negligence are always facts ascertainable by subsequent investigation and testimony; . . . The truth is that many accidents are caused by a momentary forgetfulness on the part of the motorist or of a pedestrian which happens to coincide with other conditions to cause a collision; that we apportion [assign] the entire burden of loss according to the supposed culpabilities of that moment." 261

The proposal is that a statute be adopted, general in its terms, abolishing the defense of contributing negligence and providing for an apportionment between the plaintiff and defendant of the loss caused by the injury. Before considering the manner by which the apportionment should be made; whether, if there should be more than one defendant, contribution should be made between them at the same time; and other questions of detail, brief reference may be made to the statutes, of the general nature indicated, which now exist in several of our states.

The earliest was that of Georgia, already repeatedly referred to. It is nearly a century old, based upon no forerunner, and in form still retains its original limited character as a law regulating railroads only. It makes the company presumptively negligent; refers in terms solely to personal injuries, not to property damage; gives no relief to the injured suitor who is shown to have had a last opportunity to save himself from harm; and provides, as to damages, merely that they "shall be diminished by the jury in proportion to the amount of default attributable to him".262 Substance aside, its phraseology is not wholly satisfactory. It cannot be regarded as a model. Its value is diminished by the fact that its draftsman was far ahead of his time. A statute drafted today, even in the same language, but with our experience in applying loss apportionment under employers' liability laws, could not meet with the hesitant and confused application that appears in the Georgia cases.263

260. See, for example, the analysis of cases by Eastman, op. cit. supra note 252, and to the description of cases under the New Jersey compensation act, supra note 253. There are many such lists available.
261. Lewis, supra note 161, at 588.
262. See supra p. 777-78; 79 S.E. 836.
263. Mole & Wilson discuss some cases with some quotations—supra note 206, at 609, 621, 635-37. Consider this remark of Lumpkin, J.: "As has been more than once noticed in opinions of this court, the words 'contributory negligence' are
Mississippi's statute, of 1910, was passed after various state statutes on employers' liability and the federal act were in uncontested operation, and was in terms applicable to all actions to recover damages for injuries to person or (since amendment in 1920) property. It declared in general terms that contributory negligence should not bar recovery; that damages should be reduced "in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control of the property" damaged; and that all questions of negligence should be determined by the jury.\textsuperscript{264} As respects the first provision, the supreme court has firmly resisted attempts to distinguish degrees of negligence. No amount of negligence bars a plaintiff from recovering. "This statute," it said, "is plain, unambiguous, and easily construed. . . . This statute does not deal with, and was not intended to introduce into our jurisprudence, degrees of contributory negligence, but it deals with contributory negligence proper of every character."\textsuperscript{265} The provision for mitigation of damages being mandatory, the court has not allowed verdicts to stand when that provision has manifestly been disregarded, but aside from that has heeded the other provision leaving questions of negligence to the jury. Various provisions of the Code of earlier date than the "comparative negligence" statute, all of them prescribing safety precautions in the operation of railroads, had wholly excluded the defense of contributory negligence in cases involving their violation. The question arose—and would arise in many states if a loss-apportionment law were enacted—whether the provision in the general statute for reduction of damages was intended to be applicable. It was held to be inapplicable.\textsuperscript{266}

Unlike the Mississippi statute, the laws of Nebraska (of 1913) and of Wisconsin (of 1931) resemble Georgia's in barring recovery by a plaintiff when his contributory negligence is of particular types. Georgia's provision is, however, the least objectionable. Plaintiff's sole negligence will of course bar recovery under all statutes, but assum-

\begin{footnotesize}
\textsuperscript{264} Miss. Laws 1910, c. 135; \textit{id.} 1920, c. 312; Miss. Code § 511-12 (1930). Mole & Wilson, \textit{supra} note 206, at 640-43, discuss some cases.

\textsuperscript{265} Yazoo & M. V. R. Co. v. Carroll, 103 Miss. 830, 835, 60 So. 1013, 1014 (1912).

\textsuperscript{266} See Miss. Code §§ 6118-21 (1930); Mole & Wilson, \textit{supra} note 206, at 617-18, for citations.
\end{footnotesize}
ing contributory negligence merely, a bar for failure to utilize a last opportunity to save himself from defendant's negligence is, ethically, not far removed from sole responsibility. The Nebraska act declares that recovery shall not be barred "when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison".\textsuperscript{267} This is manifestly objectionable in two respects; substantively, because it retains the bar of contributory negligence, and in terminology because it invites the horrors of attempted distinctions between degrees of negligence. And what does "in comparison" mean? Presumably, all that was desired was a \textit{direct} comparison of the faults of the two parties \textit{whose actual conduct is in evidence}, and a finding that defendant's was relatively more, or much more, serious. That is a simple matter. The other possibility is to take the circuitous route through cloudland, establishing the absolute degree of each party's negligence, one as "slight" and the other as "gross", relatively to the supposititious conduct of the law's reasonably prudent man, and then—though this is no longer necessary or a reality—compare them. At least in some cases the Nebraska court has yielded to every possible undesirable temptation in construing the law.\textsuperscript{268} The court exercises the right, if in its opinion the evidence reveals negligence on plaintiff's part that is more than slight (doubtless "in any degree") of entering a judgment of dismissal or directing a verdict for defendant.\textsuperscript{269}

Again, the Nebraska act provides that "the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of the contributory negligence attributable to the plaintiff".\textsuperscript{270} This, like the provision of the Mississippi law

\textsuperscript{267} NEB. COMP. STAT. § 8834 (1922), 2 NEB. REV. STAT. § 25-1151 (1943). Assumption of risk is abrogated in railroad cases by § 25-150 of 2 NEB. REV. STAT. (1943).

\textsuperscript{268} In Morrison v. Scotts Bluff County, 104 Neb. 254, 256, 177 N.W. 158 (1920) the court construed the statute as follows: "If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in \textit{any degree} that which \textit{under the circumstances} amounts to slight negligence, or if the negligence of the defendant falls in \textit{any degree} short of gross negligence \textit{under the circumstances}, then the contributory negligence of the plaintiff, however slight, will defeat a recovery" (italics added). The idea that "slight" and "gross" have meanings so definite that deviations from them "in any degree" are detectible speaks for itself.

\textsuperscript{269} Various Nebraska railroad cases hold, with respect to the drivers of wagons or automobiles, that breach of the "duty of self protection" (sometimes explicitly qualified as only an instinct) in failing to stop, look, and listen—or even dismount—is, to quote one of the cases,—negligence "more than slight, in comparison with that of the defendant, and will defeat a recovery, even though"—in violation of statute—"the whistle was not blown, and the bell not rung, or the speed may have been excessive"—Lewis v. Union Pac. R.R. Co., 118 Neb. 705, 711, 226 N.W. 318, 321 (1929).

\textsuperscript{270} See note 267 \textit{supra}. 
quoted above is substantially the language of the Federal Employers' Liability Act of 1908, and was construed as that was construed.

The Wisconsin act (of 1931), which is general in its application to actions for recovery of damages for negligence resulting in injuries to person or property, had been preceded by a statute relating to actions against railroads by their employees and which merely limited the right of recovery to cases in which the negligence of the company (or its officer, agent, employee) was "greater than" the negligence of the employee suing. This statute had been amended after passage of the federal employers' liability act of 1908 relating to interstate railroads, and the provision in that act for reduction of damages "in proportion to the amount of negligence attributable" to the injured employee was included in the Wisconsin railroad law as amended. The draftsman of the act of 1931 might better have framed it to apply to all other cases than those of railway fellow servants, adopting the provision for mitigation of damages and omitting the provision allowing recovery only when the injury was caused "in greater part" by defendant. Instead he made the law general at the expense of allowing recovery only if plaintiff's negligence "was not as great as the negligence of the person against whom recovery is sought". The question of the relation between the earlier and the later laws necessarily involved difficulties, but more objectionable is even a lessened bar of contributory negligence, and still more undesirable is the expression of the limitation on that bar in terms of degrees of negligence in a state where they have caused unusual difficulty.

272. "And even when the plaintiff has established his right to recover under this rule [as expounded supra note 268], it is the duty of the jury to deduct from the amount of damage sustained such amount as his contributory negligence, if any, bears to the whole amount of damage sustained"—Morrison case, supra note 268, at 256.
273. Wis. Laws 1907, c. 254, § 3.
274. Wis. Laws 1913, c. 644, § 3.
275. Wis. Laws 1931, c. 242—now Wis. STAT. § 331.045 (1943). The federal statute states its rules as relating to a plaintiff "guilty of contributory negligence." Curiously enough, Mr. Padway, Comparative Negligence, 16 MARQ. L. REV. 3, 7 (1931)—though stating that "under the Federal act no inquiry is made as to whose negligence is greater"—refers to this difference between it and the Wisconsin law as "not a difference in principle, but a difference in wording." That is, he (seemingly) takes the word "contributory" to mean that only one negligent in lesser degree may recover but with damages reduced—compare supra pp. 588-89. Yet he used the words "contributory negligence" in the law of 1931 (of which he was the draftsman) and required the inquiry.
276. Whelan, Note on Comparative Negligence Statute, 20 MARQ. L. REV. 189 (1935); also Comparative Negligence, 1938 WIS. L. REV. 465 at 472 et seq.
277. There is something on the Wisconsin classification in Campbell, Wisconsin's Comparative Negligence Law, 7 WIS. L. REV. 222, at 232-34; and in Whelan, Comparative Negligence, 1938 WIS. L. REV. 465, at 466-67, 479-80. Both articles discuss many other important matters.
In addition to the above statutes others are in force in the Canadian provinces: Ontario, British Columbia, Nova Scotia, Brunswick, Alberta, Prince Edward Island, and Manitoba. In addition, Great Britain has joined this group. The Eighth Report of the Law Revision Committee recommended (1939) "That in cases where damage has been caused by the fault of two or more persons the tribunal trying the case (whether that tribunal be a judge or jury) shall apportion the liability in the degree in which each party is found to be in fault." The Committee did not recommend "any change in the method of ascertaining whose the fault may be". This recommendation was acted upon in the Law Reform Act of 1945. Still more recently New Zealand has adopted a statute, and also West Australia.

Abortive efforts to secure the adoption of loss apportionment statutes have been made in several states. A bill which was virtually a copy

278. The Contributory Negligence Act, Ontario Stat. c. 32 (1924); substantially repeated, id. 1927, c. 103; reenacted in different form in Negligence Act, id. 1930, c. 27; amended id. 1931, c. 26; amended, id. 1935, c. 46; Ontario Rev. Stat. c. 115 (1937). The original bill of 1923 is in MacMurchy, Contributory Negligence—Should the Rule in Admiralty and the Civil Law Be Adopted?, 1 Can. B. Rev. 844 (1923). Gregory op. cit. supra note 115, at 69-70, prints the act as it stood before 1935. Mole & Wilson, supra note 206 at 652-53, and Note, 17 Temp. L. Q. 276, 285 (1943) print it as it was enacted in 1924. With one exception all the judges of the Supreme Court expressed themselves as "strongly in favor of the principle" of the bill before its introduction—MacMurchy, at 862. The Attorney General withdrew it (1923) for one year to allow of its study by the bar.

Revisions have introduced provisions for counter-claims, contribution between joint tortfeasors, guest passengers in automobiles (including a spouse of a negligent driver), addition of parties defendant, and possible division of costs; and a declaration that the "degrees" of fault of the respective parties "shall be a question" for the jury. The statute has affected legislation throughout the Commonwealth.

284. Manitoba Rev. Stat. c. 215 (1940). Canadian developments up to 1936 are discussed (and all statutes to that date printed) in Davie, Common Law and Statutory Amendment in Relation to Contributory Negligence in Canada (1936). The statutes of British Columbia, Nova Scotia, and New Brunswick are a uniform act drafted by the Commissioners on Uniform Legislation in Canada.

286. 8 & 9 Geo. 6, c. 28; Williams, The Law of Reform (Contributory Negligence) Act, 1945, 9 Mod. L. Rev. 105; Grunfeld, Firstfruits of the Contributory Negligence Act, 1945, 1 Annual L. Rev. 159 (1949); (Editorial), Negligence: Apportionment of Liability to Degrees of Fault, 21 N. Z. L.J. 169 (1945).

of the Mississippi statute was introduced in the New York legislature in 1930 but died in committee, and another bill failed of adoption in 1947. Other attempts have been made in Illinois, Michigan and Pennsylvania. It seems likely that no statute has as yet, in its drafting, received adequate study.

In this situation, it can certainly be said that a very great advance has been made since the beginning of this century in considering how negligence can most justly be dealt with. Resistance would undoubtedly be made by many lawyers to a proposal that such a statute as Mississippi's be introduced. It seems likely, however, that opposition to the general idea would yield if thought were given to the proposal. On the other hand consideration of the relation of such a statute to prior legislation, to counterclaims, to contribution among defendants who are joint tortfeasors, and other problems, would require much work by a drafting committee. In addition to these technical difficulties, there is really only one objection of a general nature that has ever been made to the proposal for loss apportionment in all negligence cases. Fifty years ago it would no doubt have been regarded by a great majority of lawyers as conclusive of the question on its merits—with which, in fact, it has no connection. It is hardly conceivable that any law teacher would today express the view that, "As there is no human method of properly apportioning the loss between plaintiff and defendant, either one or the other having to bear the whole loss, it will in many instances seem more satisfactory to leave the loss where it originally falls."

An apportionment, under such statutes as those above referred to, will doubtless in many cases not seem to be ideal. Certainly many made by juries or commissioners or judges under employers' liability or compensation acts or in admiralty are subject to the same remark.

288. It is quoted in Gregory, op. cit. supra note 115, at 59; discussed in Mole & Wilson, supra note 206 at 360, 643-55.


290. 30 Chicago B. Rec. 391, 394 (1949); Note, 17 Mich. S.B.J. 34 (1948); Note, 17 Temp. L.Q. 276 (1943). The proposed Pennsylvania act was based on the Mississippi Act (supra note 264) and the Ontario act (supra note 278), but on the latter as it stood in 1924. It is noteworthy that the bill declared the apportionment of loss "a matter entirely for the jury or in cases tried without a jury for the trial judge"—17 Temp. L.Q. 276, 277 (1943).

291. It is doubtless difficult to secure the opinions of judges on proposed changes—see Columbia Report, supra note 147, 40 n.13; compare supra note 278—the opinions were there given to the Attorney General, who drafted the bill.

292. Carpenter, supra note 37, at 233.

293. Compare note 260 supra.

294. "There may be occasions when the blame is not correctly apportioned . . . Even an approximate proportion is more welcome to the parties than a mere [equal] division of loss which is no approximation at all. The suggestion of blame at all is generally repelled with energy, but, when once blame is admitted or proved, the proportion fixed by the judges does not give rise to much criticism. The ship which was actually responsible for a quarter of the total damage is clearly better
But the imperfection in such settlements is obviously vastly preferable to the injustice of the bar of contributory negligence.\(^{295}\) It is quite feasible to do a better job than that done for a century past under the common law.

It has been done, literally for centuries, in the admiralty courts of many countries, where the loss has not been allowed to fall on one party, nor even equally borne by them, but is apportioned in accord with the fault of the respective parties—that is, "where the court finds both a rational and a moral difference in the amount of culpability".\(^{296}\) And this rule was adopted by Great Britain in 1911.\(^{297}\) The question here, however, is not what we should do in admiralty, but whether the rule of proportionate damages, as applied by many countries in that field, has worked satisfactorily. The evidence seems to be very strong that the rule is feasible and its operation highly satisfactory. We ourselves apply to all sailors under federal jurisdiction the rule of apportioned loss in actions for negligent injury.\(^{298}\) No difficulties have, seemingly, occurred in applying the rule to them, and there is strong evidence that the allocation of fault between two vessels in a collision is a simpler problem.\(^{299}\) As a matter of fact various cases of mutual fault of collision were settled in American courts on the rule of apportioned loss before the admiralty rule of equal division (following English practice) be-

---

\(^{295}\) Supra p. 595.

\(^{296}\) "Exactly the same investigation into the circumstances of a case must be made under the proportional rule as in England. . . . The facts, the responsibility and the damages must be ascertained under both rules. . . . [But] the French or Belgian judge goes on to decide whether there is a difference in the degree of negligence upon the two parties. . . . If he cannot distinguish between them to his own satisfaction he will divide the damage equally, or if the loss incurred by each interest is proportionally about the same, he will leave the loss where it falls and dismiss both claims. Where equal division of the loss fairly meets the facts of the case he applies the English rule, just as he applies the German rule, and admits no claim, where the justice of the case is best so met. But where the Court finds both a rational and a moral difference in the amount of culpability, it is entitled to give effect to that conviction"—Franck, \textit{supra} note 294, at 263, 264.

The whole subject is discussed with admirable completeness by Mole & Wilson, \textit{supra} note 206, at 339-59. Important articles, in addition to those just quoted, all cited by them, are Franck, \textit{A New Law for the Seas}, 42 L.Q. Rev. 25 (1926); Scott, \textit{Collision at Sea, Where Both Ships are at Fault}, 13 id. 17 (1897); Sprague, \textit{Divided Damages}, 6 N.Y.U.L. Rev. 15 (1928).

\(^{297}\) Great Britain having ratified the Brussels Maritime Convention and incorporated it in her Maritime Convention Act of 1911—1 & 2 Geo. V, c. 57, § 1. Equal division of loss is still made if both vessels are not clearly at fault.


\(^{299}\) Since it is said that, up to 1932, only three cases were to be found in the United States reports (the last of 1872) of "inscrutable fault"—that is, cases in which the court was satisfied that both parties were at fault but was unable to fix the specific faults of each—Mole & Wilson, \textit{supra} note 206, at 339 n.4.
came settled a century ago. It was with the latter rule, not with the earlier practice that doubts arose, leading to proposals by the American Bar Association that the "proportionate rule" be established. Professor Franck of Brussels (later President of the International Maritime Committee) stated after years of experience as an advocate: "I have never heard of any extraordinary difficulty being felt in the apportionment of the blame in this way. On the other hand I have often been told by judges that it is much easier to make such a comparison than to decide what was the operative cause of the collision, with a view to fixing one ship with the whole responsibility and holding the other blameless." It is easy to do this last under the defense of contributory negligence only because all question of true fault is eliminated. A committee of the American Bar Association reported in 1929 that the rule of proportional negligence, adopted in England in 1911, was "working with entire satisfaction" of the bar. To divide loss by halves is to admit that justice demands some division. "Either the principle of division is just, and then it should be complete, that is proportional;"—subject to the test of feasibility, which in practice it successfully meets—"or it is unjust, and there should be no division, by halves any more than by quarters".

Additional evidence of the practicality of a rule of proportional damages is given by the fact that it has long been applied in nearly all countries whose legal systems derive from or have been greatly affected by the law of Rome. It has existed as codified law in Prussia since 1794 and the lands of the German Empire since 1900, in France since 1804, in the lands of the old Austria since 1811, and in various countries of Europe and the Near and Far East. This is surely good evidence that the rule was regarded favorably both by lenders and borrowers. Nor is the age of a rule more than two thousand years old without significance—particularly when considering judicial creations of our own law that are only a little more or less than one century old. Of course the simplicity of codified provisions has also contributed

300. Id. at 346-347.
301. Id. at 346 et. seq.
302. Franck, supra note 294, at 264.
304. Franck, supra note 294 at 262.
305. Digest 50, 17, 203.
306. Some citations will be found in Mole, supra note 206, at 337-38; fuller lists in Hillyer, supra note 227, at 114, and Malone, Comparative Negligence—Louisiana's Forgotten Heritage, 6 La. L. Rev. 125 (1945). On Quebec see Nicholls, The Responsibility for Offences Under the Law of Quebec (1938); this whole discussion deals with "fault." See also, Walton, Delictual Responsibility in the Modern Civil Law . . . as Compared with the English Law of Torts, 49 L.Q. Rev. 70, 82-84 (1933).
mightily to their adoption. Curiously enough Louisiana—notwithstanding that her code recognizes three degrees of care and of negligence, contains the two sections of the Code Napoleon which are the basis of French law on the subject, and another provision which is said also to justify the proportional rule under the one-time Roman-Spanish law of the territory—has applied the English common law.

It may be said, of course, that the rule is applied in admiralty and under civil law systems by a judge, and that only for that reason could its application have been successful. It is not clear why a judge in Belgium, Chile, Siam, or Turkey should do a better job than can be done by an American judge and jury at common law, in cases so tried. But, at all events, the objection made is irrelevant to other evidence that may be next referred to.

More pertinent, possibly, then, than the foregoing considerations is the fact that many states of the Union have had experience in applying the doctrine of loss distribution under employers' liability laws or special acts or both. Some states have also had occasion to deal with the law of Quebec and other Canadian provinces. A few states, we have seen, have had experience through variant periods of time in applying the rule in all cases of negligent injuries to persons or property. The Federal Employers' Liability Act had been in operation a dozen years before its rule of apportioned loss was incorporated, unchanged, into the merchant marine act. This manifestly indicated satisfaction with the operation of the older act. If on the whole the application of the proportional rule has proved unsatisfactory under other statutes, it seems likely that the cause lay in particular provisions of the statutes—a number of which have been pointed out—that are wholly independent of that rule.

307. Compare the bulk of the Restatement's volume on Negligence with this provision (translating) of the Austrian code, § 1304: "If any fault on the part of a person injured is a contributory cause of the injury, the damage shall be shared proportionally by him and the one injuring him, and equally if their relative fault is indeterminable." See also the German Civil Code, § 254(1) (2)—THE GERMAN CIVIL CODE (Chung Hui Wang translation, 1907)—GREGORY, op. cit. supra note 115, at 175, credits Mr. Chung's translation to Professor Rheinstein; the comment on subsection (2) in the French government translation, 1 CODE CIVIL ALLEMAND 373 (Paris, 1904); comment by SCHESTER, THE PRINCIPLES OF GERMAN CIVIL LAW 154 (1907); THE FRENCH CIVIL CODE §§ 1150, 1382, 1383 (Wright translation, 1908).

In countries that have deliberately borrowed a foreign law, "The choice has always been for the Romanesque system. And the reason was always because that system was available for study and adoption in the form of concise codes"—Wigmore, remarks on the past and future of the common law, THE FUTURE OF THE COMMON LAW 59 (Harvard Conference, 1904).

308. Mole & Wilson, supra note 206, at 391; Note by Hillyer, supra note 227; article by Malone, ibid.

309. Compare discussion by Mole & Wilson, supra note 206, 646 et seq., of New York's experience.

310. As is pointed out id. at 366.
As respects the general character of an act embodying the proportional rule there seem to be three questions to consider that involve matters of general policy: whether fault should be the basis of the apportionment, what should be the rôle of causation, and what should be the powers of the jury. In addition to these there are various questions of a more technical nature, of which one is: how shall the apportioned losses be computed. Some opinions and suggestions will be ventured, for what they may be worth, on all of these.

It is submitted that fault should be that which should be considered by the jury, and comparative fault the basis for apportionment of loss. It is assumed that liability without fault is far removed—very far—from popular feeling and conviction, and was consented to in the field of industrial accidents only because of an opinion that the common law offered no alternative. Had comparative negligence and loss apportionment been moderately well established by 1900—had we begun our trial of employers' liability acts in 1880 as England did—it is very likely that it would have offered a more just solution than compensation. It has been pointed out that there is no trace of popular inclination to extend liability without fault even to motor vehicle accidents, notwithstanding the difficulty of proving specific faults therein. Under a loss apportionment statute the difficulties in those cases would be vastly diminished.

The Restatement is full of distinctions between faults. Negligence is defined by it as the exposure of one's self or another (without intent or wilful disregard in doing so) to the risk of unreasonable harm. The jury finds instinctively whether that fault is present. To add that the actor must foresee the likelihood that some harm will result from his conduct may aid the jury. To instruct them that the wrongfulness of the act depends "upon proximity of causation" is both meaningless and confusing. Negligent conduct is disregarded by the law unless it is a breach of the actor's duty to the plaintiff and unless it is a "substantial factor" in "bringing about" the injury in litigation. The latter is again found by the jury instinctively, though the Restatement gives useful suggestions to aid them. It is obviously a term of effectiveness, or causation; but it just as clearly represents an ethical measure

311. Supra text at note 173.
312. §§282, 463; see supra p. 598. Professor Dowling once wrote of "liability for a risk instead of liability for a fault"—2 American Labor Legislative Review 423 (1912). It is difficult to see how risk can be involved otherwise than suggested in the Restatement.
313. §§431, 465. One is under Causation, the other under Contributory Negligence; but it is really a matter of exclusion, of policy, not of true causation, and might have been covered by substituting the requirement for the words "legal cause" in §281 (c).
or test of faults—indicating those which alone should be considered. This is made even clearer by the statement of the draftsmen that "substantial" is used "to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense in which there always lurks the idea of responsibility." 314 It is also shown in tests which, in defining unreasonableness of conduct, make it dependent on the magnitude of the risk to others which the conduct creates and on the social utility of the conduct; 315 which recognize that whether conduct is negligent toward plaintiff may depend on the risk to a third person which any other possible conduct would have created; 316 which treat exceptionally conduct in an "emergency"; 317 and which recognize special negligence in the use of defective or inappropriate instrumentalities 318—except, to be sure, when this is ignored because of some rule of "causation". 319 On the other hand, as regards self-protection, when defendant's negligence makes plaintiff's exercise of a right impossible without exposing himself to risk of bodily harm, this risk to himself is again balanced against the social utility of this action and he is held guilty of contributory negligence and barred from recovering damages if he takes "unreasonable" risk in exercising his right. 320 If we have made self-protection a legal duty, as it seems from the Restatement that we have, the question still remains whether violation of that duty is as blameworthy as is violation of the duty not to harm others. 321 Juries are

314. Restatement, Comment a on § 431; (italics added).
315. §§ 291-94.
316. § 295.
317. § 296.
318. § 307.
319. Supra p. 608. In connection with that discussion of the Loach case note this remark of Professor Franck on collisions in admiralty: "For instance, by her sole negligence, A turns a position of security into one of danger. The danger having been created, A either continues in her fault or works matters still worse by committing another; but B, on her side, does not do all she might, in order to avoid the final collision. In such a case the creation of the direct danger by A will be considered, generally, as a reason for putting a heavier burden of damages upon her owners—it may be two-thirds or three-fourths; and I think this is an accurate and fair estimate of the case"—Franck, supra note 294, at 265; see infra note 322.
320. Restatement § 473; compare Comments under §§ 283, 464.
321. It will be seen from a reading of § 282 and Comment a under §§ 283 and 464 that we have done so solely to support the bar of contributory negligence. The idea would have appeared ridiculous to Americans of robuster times. Is it possible that we are so soon removed from frontier independence, so far advanced toward paternalism, that the law will not depart from the Restatement? See note 268 supra. The fact that plaintiff's duty was moral only was the reason why he and defendant were not joint tortfeasors, and so the bar of contributory negligence could not be in that way explained. "He owes no legal duty to himself to take due care of himself or of his property, and as he has [in failing to do that] violated no legal duty to the defendant and done him no damage, he has committed no tort"—Schofield, Davies v. Mann: Theory of Contributory Negligence, 3 Harv. L. Rev. 263, 268 (1890). Mr. Bohlen cited and agreed with this—Bohlen, Voluntary Assumption of Risk, 20 Harv. L. Rev. 14, 17 n.1 (1906).
hardly likely, in considering comparative negligence, to answer that question in conformity to the rule of contributory negligence. Among special problems of fault involved in, but not directly solved by, provisions of the Restatement is the distinction between lack of precaution against possible future dangers and lack of caution in the crisis when danger appears.\textsuperscript{322} The specific-situation standards, already referred to, established judicily or by statute to define the conduct of a reasonably prudent man,\textsuperscript{322} are other fault tests upon which a jury acts under instructions.

Many more examples might be given. The purpose in giving the above is two-fold. One is to emphasize what is really self-evident: that virtually all important matters with which a jury can deal in negligence actions are necessarily matters of negligence—that is to say, of fault. Indeed, in any ordinary case, once it is found as facts that both parties were negligent, and that the conduct of each has been “a substantial factor bringing about the harm”, there can be no problem left of true causation. Under a statute for apportionment of loss it would only remain to fix the damages accordingly. What is called causation, beyond ascertaintment of the facts stated, is merely fixation of liability for the entire loss on one party under rules of precedent or policy. But the primary purpose of putting examples of fault is to invite the reader, with those illustrations before him, to agree that when a jury is called upon to fix the relative fault of two parties—in other words, to say whether there is a reasonably clear difference in the blameworthiness of their conduct from the viewpoint of social interests—this involves no difficulties that are not involved every day in the work of every juror. The “blameworthiness” is judged instinctively; the “viewpoint of social interests” is necessarily involved in their judgments as average representatives of the community, chosen for the purpose of voicing its prevailing views. In Professor Franck’s words, already quoted, what is desired is the ascertainment of “a rational and a moral difference in the amount of culpability”—“a question not of algebra, but of common sense”.\textsuperscript{324} And, of course, every fault, of commission or omission, that is a substantial factor in an accident is to be considered, with no artificial exclusion of some as “antecedent”.\textsuperscript{325} That is to say, if a statute for loss apportionment be enacted it should certainly so provide.

\textsuperscript{322} Supra p. 606. Speaking of the last opportunity cases Mr. James says that the law has preferred “the person negligently unaware of danger to one who is negligent in the light of seen peril”—James, supra note 34, at 718.

\textsuperscript{323} Supra p. 596 and n.92. The same is true of the various safety statutes, relating to railroad operations and industrial plants.

\textsuperscript{324} Franck, supra note 294, at 264.

\textsuperscript{325} Supra p. 607 seq. and n.319.
Under such a statute questions of negligence and the proper adjustment of damages would be for the jury, as provided in the Mississippi act. The Mississippi court has held, no doubt correctly, that there must be a conflict of testimony or an actual issue concerning negligence before questions of negligence can go to the jury. That a jury is perfectly competent to deal with the apportionment problem is scarcely worth discussion. No matter by what formula it be solved it offers no question of great difficulty. The mere comparison of the relative fault of parties whose conduct is fully presented in evidence can rarely offer peculiar difficulties, and when it does (both parties being admittedly negligent) the loss can always be halved. As a matter of fact it is well known that even without an apportionment statute juries daily do apportion loss on their own theory of fault or justice. Every practitioner so avers.

Of course, a statute of loss apportionment, because it eliminates virtually all necessity of talk about legal causation once the jury finds that each party's conduct was a substantial factor in causing the harm, tends to give final power to the trial court and jury. When mitigation of damages has been sought through degrees of negligence—allowing the bar of contributory negligence unless plaintiff's negligence is "slight" and defendant's "gross", etc.—appellate courts have naturally been tempted to reverse the lower courts on disagreements respecting the meaning given to those words in instructions. This was one important cause of the failure of the Illinois experiment and to some extent it has given trouble in Wisconsin. There are everywhere reversals, in jurisdictions unplagued by degrees of negligence, for errors in administering rules of law. Mr. Padway, the draftsman of the Wisconsin Act of 1931, who had been active for many years in negligence practice, and also Justice Winslow in dissenting from a judgment of reversal under one of the earlier railroad statutes of Wisconsin, warned against the abuse of power by appellate courts. Justice Winslow's words are everywhere worthy of consideration:

"The question whether the negligence, if any, is the proximate cause of the injury complained of is also an inference of fact, which


327. McCollum v. Thrift, 156 Miss. 376, 125 So. 544 (1930); Natchez & S.R.R. v. Crawford, 99 Miss. 697, 55 So. 597 (1911).

328. "Almost invariably the weakness of a plaintiff's case is reflected in the size of the verdict awarded. Where verdicts are too large, trial judges exercise their power to suggest a remittitur instead of granting a new trial. Obviously this practice permits contributory negligence to be considered by juries as a mitigating factor in measuring a plaintiff's damages"—Green, supra note 206, at 124.

329. Green, supra note 206, at 47 et seq. and 127-30. These remarks on abuse in appellate practice, by one who for over twenty years has now been a special authority on the subject, are too long for quotation. The reader is urged to read them.
LOSS APPORTIONMENT IN NEGLIGENCE CASES

is under all ordinary circumstances properly an inference to be
drawn by the jury. . . . If the inferences of negligence and
proximate cause are peculiarly inferences to be submitted to the
jury, it seems to me to follow necessarily that the inferences as
to the *quantum* or extent of the negligence on each side and the
degree to which it proximately contributed to bring about the in-
jury must fall within the same rule. They cannot be properly
taken from the jury except in very clear cases where unprejudiced
and reasonable minds can come to but one conclusion.” 330

That such a declaration as that in the Mississippi act, but stronger, is
highly desirable is shown by the experience in several states. The
power of the trial judge to correct by *remittitur* excessive verdicts, or
verdicts in which the rule of apportionment is obviously not properly ap-
plied, should be sufficient safeguard.

By what method damages are adjusted to faults would seem to be
of secondary importance, although it has received much attention. The
provision in the Federal Employers' Liability Act, and in more than a
dozens states that exactly copied it, including Mississippi, is that "dam-
ages shall be diminished in proportion to the amount of negligence
attributable" to the person injured. This provision is subject to at least
four interpretations. 331 Of these by far the simplest, simply stated, is to
calculate the loss, rate the relative negligence contributions of the two
parties in causing it (for example as 1 to 2), and divide the loss between
them in the same proportion—one-third on plaintiff and two-thirds on
the defendant, who therefore pays two-thirds as damages to the plain-
tiff. Assuming that defendant or his property is also injured, the
counterclaim would be treated in the same manner, using the same
ratio of negligence contributions. If combined, the rule would be as
stated by the Supreme Court in construing the Federal Employer's
Liability Act: that the plaintiff, because of his contributory negligence,
"shall not recover full damages, but only a proportional amount bearing
the same relation to the full amount as the negligence attributable to
the [defendant] bears to the entire negligence attributable to both." 332

After all, quoting again Professor Franck, "the matter is not"—should
not be—"an attempt to convert a collision [injury] case into a mathe-

330. As quoted in Padway, *supra* note 275, at 13; the railroad act in question,
*supra* note 273; Justice Winslow's dissent, in Dohn v. Wisconsin Cent. Ry. Co., 144
Wis. 545, 555, 129 N.W. 252, 256 (1910).
16-19, discusses variante possibilities under the Wisconsin law; Mr. Campbell, *supra*
note 277, at 243-44, does the same; Mr. Gregory devotes a chapter to fundamental
considerations in apportioning loss—GREGORY, *op. cit.* *supra* note 115, at 72-79, and
another chapter to the mechanics of apportionment, *id.* at 88 et seq. See also the
abstracts of admirably cases given by Franck, *supra* note 294, at 264-70; and by
matical problem, where every act shall be given its numerical value. . . . It is a question not of algebra, but of common sense." 333 Since the provision of the federal act was copied into many state acts, the statement by the Supreme Court of its mode of application has naturally been common, and accumulated precedents of its approval encourage its repetition. But there have been reversals for misleading instructions, and the desirability seems clear of stating the principle in a statute in a manner that puts beyond doubt the mechanics of its application.

A statute should, of course, base apportionment of loss on the comparative faults of the parties. In every statute providing for mitigated damages, from Georgia's code of 1862 onward, their adjustment has been based on comparative negligence, with no reference to "cause" in the sense of technical legal rules of causation. Legal causation is an attempt to explain why liability is put on a particular party without mentioning the reasons of policy or history (except precedents) which in many cases are the true explanation. Legal causation frequently leads one away from, not to, the party actually more responsible, either in effective influence or ethically or both, for the injury in question. The requirements for the existence of "contributory" negligence, and the requirement that it be a "substantial factor" in "bringing about" the harm are, indeed, the same in the Restatement as those for defendant's negligence; but that has nothing to do with the existence or explanation of the defense of contributory negligence allowed to the defendant. Yet it is easy to find statements that plaintiff's contributory negligence is the "direct" cause or "proximate" cause of harm, although if those adjectives have any relation to reality the facts frequently contradict the statement, and contradict in almost all cases the "cause" if that means preponderant influence. All the judicial experiments with degrees of negligence, and all the early statutes antedating employers' liability acts and compensation acts—almost all relating to railroads—were designed to get rid of the policy rules (contributory negligence and the two types of assumption of risk in industry) which were concealed under talk of causation. They represent an insistence upon the respective faults of the parties. It is a basic intention in all loss apportionment statutes, once the fact of concurrent faults is found, to exclude the artificial rules of legal "causation" and attack the problem of loss directly in the mutual faults from which an injury proceeds. All the employers' liability acts had the same objective of loss apportionment on the basis of comparative fault. Yet so enthralled with "cause" are lawyers' minds that one writer, after collecting with admirable research many statutes of the types just mentioned, ended with a criticism of

333. Franck, supra note 294, at 264.
the federal employers' liability act that "the measure to be applied by the jury [in apportioning loss] is not the extent of the damage caused by the conduct of the plaintiff as compared with that caused by the defendant"; that, instead of such comparison, the statute calls for comparison of the quanta of negligence, total and contributive, "regardless of the relationship between conduct and extent of damage". 334 We find, also, another writer proposing a loss apportionment statute based on "proximate cause." 333 Little difficulty will be found in finding that one party's fault is greater or decidedly greater or very much greater, but who can say what is a "proximate cause"—or, rather, what is not? Unless loss apportionment statutes remain free—for they have been free in the past—of the utter vagueness, and frequent injustice of legal causation they would be useless. 336

The attachment of legal scholars of the British Commonwealth to legal causation is seemingly very much greater than our own. Our relative emancipation is attested by the Restatement. Their statutes abolish the bar of contributory negligence as a matter of justice, but they write of them as though reluctant to lose the certitude given by the doctrine of last opportunity, which—by a rule of wholly spurious causation 337—occasionally picked from cases of actually concurrent negligences one in which liability could be put upon a single wrongdoer. When contributory negligence is buried they are troubled with the question whether its ethical corrective, the doctrine of last opportunity—which is tainted with the same rule of last decisive impulse—is, or if not should be, buried with it. The question should be one of justice and utility, not of the rule of causation. We are faced with the dilemma of

334. Elliott, supra note 175, at 138; and compare his conclusion, (141 n.313) : that we omit "all reference to degrees or proportions of negligence in such enactments, making them statutes of comparative damages rather than of comparative negligence." See in Morrison, The Need for a Revision of the Louisiana Civil Code, 11 Tulane L. Rev. 213, at 218, a curious suggestion that "the moral idea of fault" be eliminated; compare infra n.360.

335. Smith, A Proposed Code Provision on Tort Liability, 10 La. L. Rev. 253. The Columbia Report, supra note 147, recommended in its compensation plan for automobile accidents that the statute "should use the word 'cause' allowing the administrative boards and the courts to apply accepted legal principles in the process of interpretation"—at 138-39. This combination of compensation plan with legal causation would presumably have created a most extraordinary product.

336. "The attempt which common law courts have made to resolve every major problem of legal liability in tort into terms of causal relation is the most glaring and persistent fallacy in tort law. . . . Of all the problems of tort law the problem of causal relation is the simplest, but it has become so enmeshed in meaningless terminology that there is little hope for its rationalization"—Green, Contributory Negligence and Proximate Cause, 6 N.C.L. Rev. 3. And of the rules of public policy concealed under terms of causation: "It would be thought that courts would be anxious to rest decisions . . . upon these considerations of policy"—id. 6; that is, instead of hiding them under talk of causation. But, of course, as regards the common law defenses of contributory negligence et cetera, they were not admitted to be policy rules.

choosing between Lord Sumner’s two statements in the Loach case—one, that to exclude the antecedent negligence respecting brakes would put defendant company “in a better position where they had supplied a bad brake but a good motorman than where the motorman was careless but the brake efficient”; 338 the other, that “the question is not one of desert or the lack of it, but of the cause legally responsible for the injury.” 339 The first statement is patently one that does refer to desert, exclusively. The dilemma has perturbed legal scholars from London to Wellington and Perth. 340 Mr. Bohlen, in a comment on the Loach case, ignored Lord Sumner’s second declaration 341 because he found no basis in modern legal causation supporting the doctrine of last opportunity. 342 The Restatement, so far as it recognizes the doctrine, does so clearly on a basis of fault in a situation presenting moral duty 343 However much of truth there may be in the Aristotelian view that true knowledge is attainable only through a study of causes, the road to true knowledge was blocked by misinterpreting Bacon’s proxima causa. To his contemporaries it meant what was undeniably and manifestly the cause;—science could not be founded on uncertainties. 344 To give it the meaning of nearness to the harm in time (or place) was absurdly illogical in a search for preponderant influence. In addition it wholly ignored the question of essential fault. A foremost problem in discussing apportionment statutes—in England, Canada, and Australia—has been the question whether cases of last opportunity fall within their provisions. Various cases have held that they do, and have made apportionment of loss between the parties. 345 Obviously, that is an abandonment of long-cherished English views of causation. Under them, the party neglecting a last opportunity is the sole cause of the ensuing harm, and there can therefore be, legally no contributory negligence of the other party. The statutes, by their very titles, assume the existence of contributory negligence; that is to say, of faults that concur in causing the harm. However, the Supreme Court of Canada held that cases of last opportunity were not outside the acts. 346 Then, too, after years of Canadian con-
troversy the British act was passed without reference to the matter. But controversy has continued and widened, and definite action seems likely to be taken. At any rate West Australia has declared it abolished, though strangely enough, only as respects plaintiffs; so that, theoretically, a defendant might be held to be outside the apportionment act and liable for all loss, but a plaintiff could never be.

There seem to be two alternatives. First, abolish the sole-cause doctrine of last opportunity, which would be unjust, since it always serves, when available, the ends of justice—either by justifying the bar of contributory negligence against a plaintiff who is guilty of it, or by making impossible the application of that bar against him when defendant is guilty of it. Or, second, abolish both the defense of contributory negligence and the sole-cause doctrine of last opportunity. Since all the statutes—those in this country and those elsewhere—which apply comparative negligence as the basis of loss apportionment have abolished the bar of contributory negligence, there is no longer any reason for the existence of any doctrine of last opportunity, through its establishment as a fault that has influence in producing the harm.

The English seem to be moving in this direction. Of course, we too long persisted in treating a “direct” cause, or a “last” cause, as necessarily the preponderant cause, but Mr. Bohlen long ago thought it virtually obsolete, surviving only in the last clear chance doctrine as he interpreted the latter. As that doctrine now appears in the Restatement, however, there is no reference to causation. It is also true that Georgia, not surprisingly in view of the time, excluded cases of last opportunity from the operation of its apportionment statute, and still follows that view. Tennessee did the same, too, without such a statute, when it was mitigating damages judicially under a doctrine of degrees of negligence. But today, with the one exception of Georgia, having explicitly abolished in our statutes the bar of contributory negligence, the sole-cause of last opportunity is equally regarded as abolished, sub silento. It is merely a fault to be weighed by the jury with other

the fault of each party ‘causes’ or ‘contributes to’ the damage. This reintroduces the old common law tests—Fairty, supra note 190, at 54. And Mr. Weir’s opinion was that “The weight of authority is to the effect that the Acts, in their ordinary form, have no application to cases in which the plaintiff would have been successful at common law without the assistance of the statute. The Acts were for the relief of plaintiffs—not for the amelioration of the condition of negligent defendants”—Weir, supra note 190, at 474. Compare supra note 201 on Georgia, and the action of West Australia mentioned below in the text.

347. See especially Fairty, supra note 190 at 54-55; Williams, supra note 190 at 114-19; Paton, supra note 285 at 380-84; Wright, supra note 340.

348. Supra p. 603.

349. Supra note 201.

350. Supra note 213.

351. In Wisconsin this fact has been judicially noted—Switzer v. Detroit Investm. Co., 188 Wis. 330, 206 N.W. 407 (1925).
faults in apportioning the loss of an accident. The term "proximate cause" is not to be found in the Restatement. It can be found in numberless cases, but it long ago lost its literal meaning.

Opinions have been expressed above on the form of statute that seems desirable as respects certain fundamental matters. There are others, some of equal importance but requiring no elaboration because of preceding discussion, others of varying importance but the treatment of which must depend upon special conditions in each state, to which mere reference may be made.

(1) It should be stated whether the act applies both to plaintiff's claim for damages and to defendant's counterclaims, if any. (2) The defense of contributory negligence will be abrogated, and the claim or claims to be adjusted indicated, by the usual provision that no contributory negligence of the plaintiff (or, if counterclaims are covered: of either party) in producing the harm of which he complains shall bar recovery. In jurisdictions in which there has been little or no recognition of degrees of negligence this usual provision would presumably be sufficient to exclude incontestably any argument that there should be no recovery unless plaintiff's fault was less than defendant's, or any instructions to the jury involving degrees of negligence. Stronger expressions—such as "no amount of contributory negligence", or "no contributory negligence however serious", avoiding "great" as suggesting "gross"—might be desirable in particular jurisdictions. (3) What should be done with assumption of risk is purely a local problem. Outside of industrial accidents, covered by other statutes, its role is ordinarily unobjectionable. (4) In almost all states the plaintiff no longer bears the burden of proving freedom from contributory negligence, and in such states no provision relieving him of it is necessary. (5) Under most of the Canadian statutes, like the British, the question whether the doctrine of last opportunity is abolished is one of interpretation. As already indicated, although there is no proper place for the doctrine (of putting sole liability on him who has the last opportunity to avoid harm) under loss apportionment statutes, there is great need to retain under them the fault of failing to utilize such a last opportunity, as certainly one of gravity.352

(6) Of extreme importance is the necessity of considering in advance questions which may arise concerning the relation of the new enactment to earlier statutes or established judicial doctrines of the jurisdiction. Examples of earlier statutes regarding railroads in Wisconsin

352. Note the variant opinions on this of the trial and appellate courts in the Canadian case stated supra note 190.
and Mississippi have been mentioned above. No special verdicts would seem to be called for under a loss apportionment statute if the right to recover is independent of the amount and nature of plaintiff's negligence, and if the last opportunity doctrine is properly disposed of by it. But in many states special rules relating to the violation of penal or other statues must be carefully considered in drafting a loss apportionment statute of the type in question. A proposal to make the statute retroactive might raise constitutional problems.

(7) In order to clear away in one proceeding all problems involved in an accident two other provisions are of unusual importance. The first—again involving technical local problems of procedure—is making possible the addition of parties, not already such, who are revealed as wholly or partially responsible for the accident. The other—certainly essential to an enactment designed to deal completely with the subject—is a provision for contribution between joint tortfeasors joined as defendants. On this there is available for the legislator Mr. Gregory's volume, written on that subject, which contains a suggested act, with careful consideration of all problems which it involves and abundant references to pertinent literature.

Various objections have been made to the adoption of loss apportionment statutes. All of them have been considered by various writers, some of them with much practical experience in the field, and it seems unnecessary to do more than briefly to mention them. A committee of the American Bar Association, in finally recommending against alteration of the American rule of equal division in equity, objected to the difficulty of apportioning damages. That, as regards admiralty, had been long before convincingly answered by authoritative writers already cited. Outside of admiralty, certainly experience under the many employer's liability acts shows that there is no basis for the objection. Nor is there anything in the objection of the same committee that the problem of apportionment would unduly burden judges. They cited no authority for the opinion. The trial judge has only to instruct, the statute being pleaded. The appellate judges might, indeed, assume burdens by encouraging appeals. This was the chief objection to the adoption in England of the continental rule. However, the same authorities on admiralty found appeals rare in European admiralty courts, there has been no increase in England since the apportionment

353. Supra text at notes 266, 276.
354. Supra note 229.
355. Supra note 230.
356. GREGORY, op. cit. supra note 115.
357. Franck, supra note 294, at 264. Scott, supra note 296, at 28.
358. Franck, supra note 294 at 270; Scott, supra note 296, at 29-31.
rule was adopted, and there seem to be few appeals on this head under the employer's liability acts and the federal Merchant Marine Act. There is nothing, apparently, in the idea that such statutes offer any special difficulties of an administrative nature. The committee of the American Bar Association, it has been noted, admitted that Great Britain was well satisfied after eighteen years of trial of the proportional rule.359 One looks vainly for evidence that there is any dissatisfaction with the rule as applied under the employers' liability acts.

Arguments that "minor faults" should not be considered (though this is not applied to plaintiff's contributory negligence, which is almost always minor), that the bar of contributory negligence discourages negligence (but confining attention to plaintiffs), and that there is no real need to change, are sufficiently answered when stated.360

359. Supra note 303.

360. The statutes actually in existence use the common law in ascertaining the existence of concurrent negligence, and then follow the civil law practice in apportioning damages solely on the basis of relative negligence of the parties. It is certainly well to borrow better law where we find it (as we do from state to state). Somewhere I have seen a foolish reference to "Romanizing" the law. Though the damages rule is Roman—supra note 305—the idea of liability based on fault is ancient. Germanic law. On the first page of a book on Fault and Liability the greatest of modern Germanists (their leader in combatting the excessive Roman elements in the early drafts of the German Civil Code) wrote (translating): "Of all the results of recent research in the field of Germanic legal history probably no other has had such far-reaching consequences as the discovery of the sharp distinction in our ancient law between fault and liability. . . . The conceptual distinction between them was first made by the Romanists. . . . But its potentialities for the solution of problems in legal history was first revealed by research in Germanic law. In the matured Roman law its existence could not be confirmed, for in the concept of an obligation, which we find fully developed in the Roman sources, fault and liability are completely fused. The obligation is a liability relation, as its name indicates, but the fault relation is so enveloped in it that the one man covered both," as in the "obligatio naturalis" in which legal liability is wholly lacking—Gierke, Schuld und Haftung 1 (1910). There is a considerable German literature on Fault and Liability. Mr. Isaacs, in his article on Fault and Liability, in Selected Essays on the Law of Torts 235 (1924) directs no attention to the problem. See supra note 334, referring to Mr. Morrison.