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Tort Liability for Negligence in Missouri

II Legal or Proximate Cause

It was stated at the beginning of the first article in this series¹ that in order to make out a *prima facie* case in an action based upon a negligent tort of the defendant, the plaintiff must allege and prove not only that the defendant was negligent, but also that the defendant's negligent misconduct was at least a part of the legal or proximate cause of the plaintiff's damage. In this article will be discussed the subjects of legal or proximate cause and contributing misconduct of the plaintiff.

SIGNIFICANCE OF "LEGAL CAUSE" AND "PROXIMATE CAUSE"

The word *legal* in the phrase *legal cause* seems to mean that the causal connection is sought to be traced to some person or persons upon whom legal liability is sought to be imposed. The phrase *legal cause* is thus used in contradistinction not to *illegal cause*² but to such phrases as physical cause, chemical cause and physiological cause.

It was one of Lord Bacon's maxims that "*in jure, non remota causa, sed proxima, spectatur.*" (The law regards the proximate, not the remote cause.) Bacon commented upon this as follows: "It were infinite for the law to judge the causes of causes and

1. Tort Liability for Negligence in Missouri.—I The Duty to Use Care, 7 Law Series, Missouri Bulletin, pp. 3-39.

2. It is believed that there is no case which has attempted to use the phrase *legal cause* in contrast to *illegal cause*; but there is a case in which the correlative term *legal consequence* has been construed to mean that a culpable defendant will not be liable for an illegal consequence, *i. e.*, a tort by a third person, tho the defendant intended it. In *Vicars v. Wilcocks* (1806) 8 East 1, the action was for slander; the plaintiff alleged and proved that the defendant had told

their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."³ The word *proximate* literally means nearest in time and place, and Bacon's maxim might be understood, and perhaps was understood at one time, as meaning that the law placed all antecedent causal agencies, both human and non-human, upon the same level and regarded the nearest as the sole cause. It is almost needless to say that such a narrow and mechanical conception proved to be wholly inadequate, and with the exception of one class of cases to be noted later, it has no longer any serious influence; but the term *proximate cause* has lost its literal meaning and has come to be used as a synonym for *legal cause*: in fact, its use in this technical sense is more common than the use of *legal cause*.

NEGLIGENCE AND LEGAL CAUSE MIXED QUESTIONS OF LAW AND FACT

The question of what the defendant's conduct was in a particular case is a pure question of fact: the question of how the defendant should have conducted himself is a pure question of law;⁴ but because the law has not undertaken to define exactly and specifically what a person should do in all possible circumstances that may arise but has contented itself with a rule suf-

one J. M. that the plaintiff had unlawfully cut the flocking cord of plaintiff's employer, J. O.; that defendant did this in order that J. O. would discharge the plaintiff; and that J. O. did so, believing the false charge. Lord Ellenborough said that "the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration; and here it was an illegal consequence, etc." For a deserved criticism of the case, see the opinion of Lord Wensleydale in *Lynch v. Knight* (1861) 9 H. L. C. 577.

3. Bacon, Maxims, Regula I. The language of the court in *Lightfoot & Son v. St. Louis & San Francisco R. R.* (1907) 126 Mo. App. 532, sounds somewhat like Bacon's rule, but the rule as such is not cited or laid down. See *post*, p. 28.

4. Or, to put it differently, whether a given or admitted state of facts amounts to due care or negligence is a question of law. Hence, if a plaintiff alleges certain misconduct of the defendant in his petition, the court will on demurrer decide whether those acts do or do not amount to negligence. *Tarwater v. Hannibal & St. Joseph R. R.* (1868) 42 Mo. 193. And if the parties should be able to agree on the facts, the question as to whether such agreed facts constituted negligence would be a question of law for the court. So, if the facts should be found specially by the jury or where the facts are undisputed.

ficiently indefinite and flexible to apply to all cases, the questions of what conduct amounts to due care in a particular case and whether the defendant's conduct does or does not equal such conduct, are usually not separated. The question of negligence is therefore a mixed question of law and fact. As to whether this mixed question should be decided by the court or jury is not everywhere settled, but the better view is that since the largest and most important ingredient is the question of fact, the jury is the more appropriate tribunal to decide the question, under instructions, of course, by the court.⁵ If the jury could reasonably find only one way, the court may decide it just as it may decide any other question of fact.⁶

Similarly the question of whether the plaintiff's damage was in any degree whatever caused by the defendant's conduct is a pure question of fact; the question, for what part of the

Fletcher v. Atlantic & Pacific R. R. (1877) 64 Mo. 484, 488; *Powell v. Missouri Pacific Ry. Co.* (1882) 76 Mo. 80; *Kelley v. Parker-Washington Co.* (1904) 107 Mo. App. 490, 496.

5. See *McPheeters v. Hannibal & St. Joseph R. R.* (1869) 45 Mo. 22, where the court said that "the question of negligence is peculiarly and exclusively for the jury to determine, and.....if there is any evidence to sustain the verdict we will not interfere." See also *Yarnall v. St. L., K. C. & Northern R. R.* (1882) 75 Mo. 575, 583, where it was held to be error to refer the question of negligence to the jury without instructions. The court said, "what constitutes negligence or care, as we all know, is a question of law for the court. Whether it exists in the given case is a question of fact for the jury. Usually and especially in a case like this, it is believed to be better practice for the court by appropriate instructions, applicable to the particular facts of the case in evidence and on trial, to tell the jury whether these facts, if they believe them to exist, do or do not amount to negligence or care."

6. *Norton v. Ittner* (1874) 56 Mo. 351; *Boland v. City of Kansas* (1888) 32 Mo. App. 8. It is usually said that where the court decides questions because sensible men could find only one way, it becomes a question of law, but this is a confusing terminology. Strictly speaking, law is a matter of rule or principle; and a question of fact does not become one of law merely because the court decides it. A better statement is that juries do not pass upon all questions of fact but only upon doubtful questions of issuable fact; where the question is not doubtful the court decides it because a verdict to the contrary would promptly be set aside as against evidence. While it is not uncommon for a trial court to decide that the defendant's conduct was clearly not negligent or that the plaintiff's conduct was clearly negligent it is quite uncommon for a court to decide that the defendant's conduct was clearly negligent or that the plaintiff's conduct was clearly not negligent, because the question of damages would necessar-

consequences⁷ the defendant shall be held legally liable is a pure question of law. But since the law has not attempted to define specifically the consequences for which a negligent defendant is liable, the question of legal cause is also a mixed question of law⁸ and fact. And like the question of negligence the question of legal cause is decided—if a doubtful one—by the jury under proper instructions by the court.⁹

DEFENDANT NOT LIABLE FOR REMOTE CONSEQUENCES

Theoretically, and as a matter of strict logic, a culpable defendant should be held liable for all the consequences of his misconduct; but our knowledge of causation is so imperfect that it is often a difficult matter of fact to determine whether the plaintiff's damage is a consequence of the defendant's conduct. In order to secure practical justice, therefore, it has long been settled that a defendant will not be held liable for such consequences as are so far removed in the chain of causation that the causal connection becomes merely conjectural.¹⁰ Such conse-

quently remain to be passed upon by the jury. Where the facts showing negligence of the defendant are undisputed, however, it would seem to be the proper practice for the court to leave to the jury only the question of the amount of damages. *Kelley v. Parker-Washington Co.* (1904) 107 Mo. App. 490, 496.

7. Bacon's maxim is stated in terms of cause: *i. e.*, assuming the plaintiff to have suffered loss, was the defendant's conduct the legal cause of this loss? The better and more widely current rules of legal cause, the probable consequence rule and the proximate consequence rule, are stated in terms of consequence: *i. e.*, assuming a culpable defendant, was the plaintiff's loss legally attributable to him? Since two or more culpable defendants may be legally responsible for the plaintiff's damage, it is obvious that it is more advantageous to state the rule in terms of consequence than in terms of cause.

8. *When legal cause is a part of the substantive law of torts.* Whenever special damage does not need to be proved in order to make out a cause of action, for example, in actions for breach of contract, trespass to land, conversion or libel, questions of legal cause are chiefly important in determining the amount of damages to which the plaintiff is entitled; such questions belong, therefore, to the law of damages. But where, as in actions based upon negligence, special damage is an essential element of the tort, the question as to whether the defendant's misconduct was the legal cause of the plaintiff's damage is a part of the substantive law of negligence.

9. *Feddeck v. St. Louis Car Co.* (1907) 125 Mo. App. 24, 32.

10. There is, however, a rule of legal cause occasionally laid down in early cases which, if followed literally, would hold a defendant liable

quences are called remote in contradistinction to near or proximate¹¹ consequences. While time and distance are always important elements in determining remoteness, they are by no means controlling. In *Poeppers v. Missouri Kansas & Texas Ry. Co.*,¹² some sparks from a locomotive of the defendant set

for remote or conjectural consequences. In *Gilman v. Noyes* (1876) 57 N. H. 627, the evidence tended to show that the defendant had left the plaintiff's bars down, whereby the plaintiff's sheep had escaped from the pasture and had been destroyed by bears. The trial court instructed the jury that if the defendant left the plaintiff's bars down, and the sheep escaped in consequence of the bars being left down by the defendant, and would not have been killed *but for* the act of the defendant he was liable for their value. The appellate court held that this instruction was erroneous. Ladd, J., saying, "The sheep would not have been killed, the jury say, but for that (the defendant's) act; does it follow that the damage was not too remote? Certainly, I think, it does not. That one event would not have happened but for the happening of some other, anterior in point of time, doubtless goes somewhat in the direction of establishing the relation of cause and effect between the two. But no rule of law as to remoteness can, as it seems to me, be based upon that one circumstance of relation alone, because the same thing may very likely be true with respect to many other antecedent events at the same time. The human powers are not sufficient to trace any event to all its causes, or to say that anything that happens would not have happened just as it did but for the happening of myriads of other things more or less remote and apparently independent."

To give a concrete illustration of the way in which the "but for" rule would work, suppose X drives his automobile so negligently in a crowded street as to attract the attention of passersby, one of whom, Y, is reminded thereby that he has agreed to meet his friend Z at a railway station; in his haste to get to the station in time Y runs over M. If it had not been for X's negligent driving Y would not have thought of his appointment in time to have gone to the station and therefore would not have run over M; yet it is obvious that no court would sanction a recovery by M against X.

The converse of the "but for" rule is generally true. 25 Harvard Law Review, 109. If the plaintiff's damage would have happened just the same regardless of the defendant's negligent conduct, the defendant's conduct is *not* the legal cause. *Meade v. Chicago, Rock Island & Pacific Ry. Co.* (1869) 68 Mo. App. 92, 101; *Beach v. St. Louis* (1900) 161 Mo. 433, 438.

11. While the phrase *proximate cause* has lost its literal meaning and has come to be used almost exclusively as a synonym for legal cause, the phrase *proximate consequence* seems to have retained its literal significance and is only rarely used in the sense of *legal consequence*, *i. e.* a consequence for which the defendant is legally responsible. See, however, *Hegberg v. St. Louis & San Francisco R. R.* (1912) 164 Mo. App. 517, 552, where "proximate consequence" apparently means legal consequence, if it means anything intelligible.

12. (1878) 67 Mo. 715.

fire to the prairie near the defendant's track about two o'clock in the afternoon of a certain day; the grass being very rank and dry and the wind being high, the fire extended about two and one half miles before night and continued to burn thru the night, tho slowly; but in the morning the wind rose again and blew hard, as was not unusual in that section, and carried the fire some five miles farther, till it reached the plaintiff's property and destroyed it. The court below instructed the jury that "altho they must, in finding a verdict, be governed by the maxim that every one is liable for the natural and proximate but not for the remote damages occasioned by his act, yet this maxim is not to be controlled by time or distance; that if there was but one continuous conflagration from the time the fire was set at or near the railroad track till, by its natural extension, it extended to and burned the plaintiff's property, in such a manner as to constitute but one event, one continuous burning, and that the damage complained of was under the surrounding circumstances the natural result of the escape of the fire from the engine of the defendant, thru the defendant's negligence, they should find for the plaintiff, if the said damage was not caused by any fault of the plaintiff." This instruction was held correct and the judgment for the plaintiff was affirmed.

In determining remoteness there is besides time and distance, a third element, viz., the intervention of other agencies, human or non-human, between defendant's culpable conduct and the plaintiff's damage. This will be discussed later in this article.¹³

THE PROBABLE CONSEQUENCE RULE

A culpable defendant is *prima facie* liable at least for such consequences as might have been foreseen by a prudent man in the position of the defendant;¹⁴ and a rule of legal cause which

13. See post, pp. 17-20, 21-23.

14. The New York and Pennsylvania doctrine that a defendant who negligently sets fire to one building which in turn sets fire to other buildings, is liable only for the loss of the first building, is obviously an exception; but the absurdity of such a holding has been thoroughly exposed and it seems never to have been followed in Missouri. See *Ryan v. New York Central R. R.* (1866) 35 N. Y. 210. For a criti-

is frequently laid down holds him only for such consequences. As this rule is usually expressed,¹⁵ a negligent defendant is liable only for the natural and probable consequences of his misconduct. The word *natural* may mean either in the actual course of nature or in the usual course of nature. If it means in the actual course of nature, then all consequences are natural; there can be no unnatural consequences. If it means in the usual course of nature, then it is difficult, if not impossible, to distinguish it from *probable*. If the rule means all consequences which are in the actual course of nature and also for all consequences which are probable, it would destroy the limitation implied in the word *probable*. It obviously means, therefore, such consequences as are both natural and probable.¹⁶ The word is redundant whether we take it to mean in the actual or in the usual course of nature, for "probable" is either synonymous with "usual" or is a less inclusive term. The rule will therefore be referred to in this article as the probable consequence rule.

Strictly applied, the probable consequence rule would exempt a defendant from liability for improbable as well as for remote¹⁷ consequences. Such a rule obviously makes the test

cism of the doctrine, see *Hoyt v. Jeffries* (1878) 30 Mich. 181, and *Fent v. Toledo, Peoria & Warsaw Ry. Co.* (1871) 59 Ill. 357-362.

It is well settled that a negligent defendant is not liable for the mere causing of mental pain or nervous shock and in some jurisdictions there can be no recovery even if bodily illness results therefrom. See 5 Law Series, Missouri Bulletin, p. 37. This also is an exception to the rule that a negligent defendant is liable for at least probable consequences; tho sought to be explained on various grounds, the real basis for such a holding is the apprehension felt by courts that nervous shock would be easily simulated.

It was the older law, and there are vestiges of it still remaining, that a culpable defendant is not liable where a third person has intervened after the beginning of defendant's misconduct and before the happening of the damage to the plaintiff and where the damage would not have occurred but for the intervention of such third person, even tho such intervention was foreseeable as a probable consequence of the defendant's misconduct. This, however, is fast disappearing except in the field of defamation. 25 Harvard Law Review 118 to 121.

15. *Feddeck v. St. Louis Car Co.* (1907) 125 Mo. App. 24, 32; *Aldrich v. St. Louis Transit Co.* (1903) 101 Mo. App. 77, 90.

16. See *Saxton v. Missouri Pacific Ry. Co.* (1903) 98 Mo. App. 494, 501, "consequences must be probable as well as natural."

17. Where the probable consequence rule is laid down it is not unusual to speak of improbable consequences as remote; where, however,

of legal cause and the test of negligence very similar, both being based upon the standard of the man of ordinary prudence. There is some confusion of the two ideas of negligence and of legal cause to be found in the cases; whether it is a cause or result of the probable consequence rule, it is difficult to say. A typical illustration is to be found in the opinion of POLLOCK, C. B., in *Greenland v. Chapin*¹⁸; the first sentence of the following excerpt states a question of legal cause, while the next sentence, purporting to be an answer to the first, states a test of negligence: "I entertain considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur."

DEFENDANT LIABLE FOR IMMEDIATE, THO IMPROBABLE
CONSEQUENCES

No matter how firmly the probable consequence rule is laid down, if the damage follows immediately, the fact that it was improbable does not exempt the defendant from liability. In *Hoepper v. Southern Hotel Co.*,¹⁹ the plaintiff, an employee of the defendant, was injured in the defendant's laundry. The trial court had instructed the jury that "the defendant can not be chargeable in this action unless the injury is of such a character in the manner of its occurrence as might have reasonably been foreseen or expected as the natural result by the defendant of its wringers running roughly and jerking. This was

the probable consequence rule is being contrasted with other rules of legal cause it is necessary to limit the use of the term remote as above indicated.

18. (1850) 5 Ex. 248.

19. (1897) 142 Mo. 379, 384, 388.

held to be erroneous, the court saying that "if the injury follows as a direct consequence of the negligent act or omission, it cannot be said that the actor is not responsible therefor because the particular injury could not have been anticipated."²⁰

One may have been negligent if some danger or harm to another was so likely that a prudent person would either have foregone acting, or have guarded against harmful consequences to the other. It is possible that a defendant ought to have foreseen one particular species of harm and that the plaintiff should actually suffer harm in an entirely different way. A good illustration of this is found in *Hill v. Windsor*,²¹ in which action was brought against the owners of a tug for personal injuries sustained by the plaintiff thru the alleged negligence of those in charge of the tug in causing her to strike violently against the fender of a bridge, on which the plaintiff was at work; the fender consisted of a row of piles driven perpendicularly into the bed of the stream and another row driven at an angle to the first; the plaintiff was standing on a plank fastened to the piles and had put a brace between one of the uprights and one of the inclined piles in order to keep them apart while he fitted them to be fastened together; the striking of the tug against the fender caused the brace between the piles to fall out, the piles came together, the plaintiff was caught between them and was severely injured. The trial

20. See also *Buckner v. Horse & Mule Co.* (1909) 221 Mo. 700, 710; *Dean v. K. C. etc. R. R.* (1906) 199 Mo. 386, 411, where the court said that one "may be liable for anything which, after the injury is complete, appears to have been a natural and probable consequence of his act or omission." Here the word "probable" is obviously misused, and "natural", if it means anything, means in the actual course of nature. Compare *Hill v. Windsor* (1875) 118 Mass. 251, 259, where the court said, "It is enough that it now appears to have been a natural and probable consequence." If probable means anything intelligible, it means foreseeable by a prudent or reasonable person standing in the shoes of the defendant *before* the occurrence. It is a contradiction in terms to say that an unforeseeable consequence becomes foreseeable because it actually occurs. See also *Harrison v. Kansas City Electric Light Co.* (1906) 195 Mo. 606, 629: "But in case the negligence is shown and the injurious consequences are immediate and flow directly from the negligent act, the person guilty of the act will not be excused for the reason that the particular consequences were unusual and could not ordinarily have been foreseen." See also *MacDonald v. Metropolitan Street Ry. Co.* (1908) 219 Mo. 468, 491.

21. (1875) 118 Mass. 251, 259.

court in charging the jury said, "The accident must be caused by the negligent act of the defendants; but it is not necessary that the consequences of the negligent act of the defendants should be foreseen by the defendants." The upper court held this to be correct, saying: "It cannot be said, as a matter of law, that the jury might not find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants running against it. This constituted negligence, and it is not necessary that the injury in the precise form in which it resulted should have been foreseen." Applying this to the facts of *Hill v. Windsor*, the jury would have been justified in finding that the plaintiff would probably fall into the water if the fender were struck by the defendants; that would make the defendants negligent, and the fact that the actual injury to the plaintiff in being thrown between the piles was unforeseeable should not prevent the defendants from being liable therefor.

LIABILITY FOR IMPROBABLE CONSEQUENCES NOT IMMEDIATELY FOLLOWING—THE PROXIMATE CONSEQUENCE RULE

Whether a negligent defendant is liable for improbable consequences which do not follow immediately but which are not so far removed in the chain of causation as to be considered remote or conjectural, it seems impossible to determine from the Missouri decisions. There seems to be no case squarely raising the question and there is so much confusion in the use of terms in the cases dealing with the question of legal cause that one can only guess what the attitude of the court would be. If recovery were allowed, as it certainly should be, it would mean the complete overthrow of the probable consequence rule and the adoption of the proximate²² consequence rule which seems to pre-

22. As this rule is usually stated, the defendant is liable for the "natural and proximate" consequences of his culpable conduct. The word *natural* seems to be redundant here just as it is in the phrase *natural and probable consequences*. See *ante*, p. 9. It certainly does not mean in the usual course of nature, because *usual* is practically synonymous with *probable* and the distinguishing characteristic of the rule is that it allows recovery for improbable consequences. Hence, if *natural* means anything it must mean in the actual course of nature; but this has no limiting effect, because all consequences are natural in

vail in England. Under this rule a negligent defendant is liable for all except remote consequences. The leading English case is *Smith v. London & Southwestern Railway Co.*,²³ which has been frequently cited in Missouri decisions.²⁴ In that case the defendant was sued for negligently burning the plaintiff's cottage. The defendant contended that he ought not to be held liable because no reasonable man could have foreseen that the fire would consume a hedge and pass across a stubble field and so get to the plaintiff's cottage at a distance of two hundred yards from the railway, crossing a road in its passage. The judgment for the plaintiff was affirmed, CHANNEL, B., saying, "When it has once been determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences whether he could have foreseen them or not." And BLACKBURN, J., said, "I also agree that what the defendants might reasonably anticipate is only material with reference to the question whether the defendants were guilty of negligence or not, and cannot alter their liability if they were guilty of negligence. . . . If the negligence were once established,²⁵ it would be no answer that it did much more damage than was expected."²⁶

this sense. The rule will therefore be referred to as the "proximate consequence rule".

23. (1800) L. R. 6 C. P. 14.

24. See, for example, *Hanson v. Kansas City Electric Light Co.* (1906) 195 Mo. 606.

25. It is often stated that the duty to use care must be owed to the plaintiff and this is true where the duty is a positive one based upon a specific relation such as that of a land occupier toward a business visitor; but it is at least doubtful whether it applies to active negligent misconduct any more than it does to intentional acts. See 7 Law Series, Missouri Bulletin, p. 7, note 17. And there seems to be no satisfactory reason why it should apply. If it does not so apply, it is obviously of increased importance whether the probable or proximate rule of legal cause is followed; because if the duty must always be owed to the plaintiff, the defendant can very often escape in a case like that of *Smith v. London & Southwestern Ry. Co.* by showing that while there may have been negligence toward the owners of property close to the railway, there was no negligence to the plaintiff because it was so unlikely that the fire would spread to his property. The point seems not to have been raised.

26. See the opinion of EARL, J., in *Ehrgott v. Mayor of New York* (1884) 96 N. Y. 280. "The true rule, broadly stated, is that a wrongdoer is liable for the damage which he causes by his misconduct. But this rule must be practicable and reasonable and hence has its

CONCURRENT HUMAN CAUSES

(A) *Negligence of Defendant Concurring with Culpable Act of a Third Person.*

The fact that the culpable act of a third person concurs with the negligent act of the defendant to produce damage to the plaintiff does not in any way excuse the defendant; each is *prima facie* liable to the plaintiff for the full amount of the damage, regardless of the relative amount of blame attributable to him; and altho each acts independently of the other, neither can set up the concurring culpable act of the other in defense, for the reason that one can not escape liability on the ground that his conduct was only a part of the legal cause.²⁷

The simplest illustration of concurrent human causes is that of an injury to a plaintiff due to the culpable active conduct of two defendants. In *Matthews v. London Street Tramways Co.*,²⁸ the plaintiff was injured in a collision between the omnibus upon which he was riding and a tram car driven by the defendant's servants. The trial court instructed the jury that to

limitations. A rule to be of practicable value in the law must be reasonably certain. It is impossible to trace any wrong to all its consequences. The best statement of the rule is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct; and what are such consequences must generally be left for the determination of the jury. We are, therefore, of the opinion, that the judge did not err in refusing to charge the jury that the defendant was liable 'only for such damages as might reasonably be supposed to have been in the contemplation of the plaintiff and defendant as the probable result of the accident.' "

In 25 *Harvard Law Review* 309, Professor Jeremiah Smith suggests the following rule: "Defendant's tort must have been a substantial factor in producing the damage complained of." Since in negligence cases the causing of some damage to some one is necessary to make a tort, it would be more accurate to say "defendant's tortious conduct." The suggested rule seems to be practically an equivalent of the proximate consequence rule, and has probably the advantage of being more intelligible to juries.

27. *Berry v. St. Louis, Memphis & Southeastern R. R. Co.* (1908) 214 Mo. 593, 598. The only exception to this statement seems to be that where statutes have imposed duties not recognized at common law, they have sometimes been construed as creating liability only in case the defendant's breach of the statutory duty has been the sole cause of the plaintiff's damage. See *Moore v. Abbot* (1850) 32 Maine 46; Bohlen, *Cases on Torts*, 226.

28. (1888) 60 *Law Times Reports* (N. S.) 47.

find a verdict for the plaintiff they must be satisfied that the injuries he sustained occurred solely through the negligence of the defendant's servants. The higher court held that the instruction was wrong because the defendant should be held liable even if his negligence was only a part of the cause; the court said that the following instruction should have been given: "Was there negligence on the part of the tram driver which caused the accident? If so, it is no answer to say that there was also negligence on the part of the omnibus driver."²⁹

Similarly, both are liable if the negligence of one consisted in creating a dangerous passive condition which concurs with active force brought to bear by the other. In *Newcomb v. New York Central & Hudson River R. R. Co.*,³⁰ the plaintiff had thru mistake boarded at Buffalo a West Shore train instead of a New York Central train; when he discovered the error, he jumped off the train while it was moving and stepped upon some grease which had been negligently left by the defendant on the station platform. The jury was charged that the defendant was not liable unless plaintiff's injury was caused solely by the negligence of the defendant. This was held to be erroneous, the court saying, "A defendant is liable if his negligence concurred with that of another, or with the act of God or with an inanimate cause, and became a part of the direct and proximate cause altho not the sole cause." The jury in this case might reasonably have found that the West Shore R. R. Co., was negligent in not stopping its train to let the plaintiff get off safely.³¹

Liability likewise rests upon both if the negligence of both consists in creating a dangerous passive condition which needs

29. *Obermeyer v. Logeman Chair Co.* (1910) 229 Mo. 97 seems to be a case of this type; the negligence of the defendant in the construction and operation of its elevators concurred with the negligence of a boy riding in the elevator in stepping on the plaintiff's toes thus causing him to step back and catch his heel between the floor of the ascending elevator and the projection of a foot beam at an unenclosed door.

30. (1902) 169 Mo. 409, 422.

31. In *Rice v. Chicago, Burlington & Quincy R. R. Co.* (1910) 153 Mo. App. 35, 52, the negligence of the defendant in permitting a decayed tree to remain adjacent to the road for many years concurred with the wrongful act of a third person in setting fire to the tree. The tree fell across the track and the plaintiff's eye was destroyed

only the non-culpable active conduct of the plaintiff to bring about harmful results. In *Asher v. Independence*,³² the defendant Lowe negligently built the fire escape of her hotel within eight or nine inches of the defendant city's electric light wire, without notifying the city to remove the wire and defendant city was negligent in not removing the wire after the erection of the fire escape. The plaintiff was injured by receiving a severe shock while using the fire escape; a judgment in his favor against the city was affirmed.³³

(B) *Negligence of Defendant Concurring with Non-culpable Act of Third Person or of Plaintiff.*

If the defendant's negligence concurs with the non-culpable conduct of a third person or of the plaintiff himself, the defendant is alone liable. In *Brennan v. St. Louis*,³⁴ a ditch had been cut across the street by running water; the plaintiff, a child of three, was with her thirteen year old sister, who was pushing a baby carriage with a baby in it; they were all on the sidewalk close to the ditch when another little girl came up, accidentally stumbled against the plaintiff and both fell into the ditch. A charge that the plaintiff should recover tho the stumbling of the girl in some degree contributed to the injury

by one of the branches of the tree shattering the glass of the car window adjacent to which the plaintiff was sitting. In *O'Gara v. St. Louis Transit Co.* (1907) 204 Mo. 724, the plaintiff was injured by the derailment of the defendant's car; the wrongful act of a boy in placing a brick on the track concurred with the negligence of the defendant in failing to discover the peril and stop the car. In *Berry v. St. Louis, Memphis & Southeastern R. R. Co.* (1908) 214 Mo. 593, the defendant's negligence in failing to guard or lock its turntable concurred with the apparently negligent act of children in revolving the turntable so as to injure the four year old plaintiff.

32. (1914) 177 Mo. App. 1.

33. In *Straub v. St. Louis* (1903) 175 Mo. 413, 416, the wrongful act of a shoemaker in placing and leaving an old counter on the sidewalk concurred with the negligence of the city in allowing it to remain; the plaintiff, a boy six years old, was injured by climbing on one edge of the counter thus pulling it over on himself and breaking his leg.

34. (1887) 92 Mo. 482.

was upheld.³⁵ In *Lore v. American Manufacturing Co.*,³⁶ recovery was allowed where the negligent failure of the defendant to guard its machinery concurred with the accidental slipping of the plaintiff upon the smooth floor.³⁷

INTERVENING HUMAN CAUSE

Where after a dangerous passive condition has been created by the defendant a third person comes into intelligent control³⁸ of the situation and negligently causes damage to the plaintiff, it is a case of intervention and not of concurrence; the third person thus comes between the defendant's conduct and the plaintiff's damage. Where the defendant's wrongful act has caused the intervening act of the third person, he ought

35. In *Harrison v. Kansas City Electric Light Co.* (1906) 195 Mo. 606, branches of a tree in the yard of plaintiff's intestate extended over defendant's arc light wire; the movement caused by the wind rubbed the insulation off the wire; while the current was not on, deceased's young son, who knew nothing of the dangers of electricity, wrapped a small copper wire around the arc light wire and fastened the copper wire to the tree in order to keep the arc light from burning the tree. Later the boy cut the copper wire loose from where he had fastened it; another part of the copper wire came into contact with a wire rope swing. Deceased, not knowing what had been done, touched the swing and was instantly killed. Defendant's negligence in not replacing the insulation thus concurred with the non-negligent conduct of the boy, and defendant was held liable.

In *Vogelgesang v. St. Louis* (1897) 139 Mo. 127, 136, steam from a locomotive suddenly blew off while plaintiff's wagon and mule team were on a bridge over the engine; the mules were frightened and ran the wagon into a ten inch excavation which the city had negligently permitted to remain at the edge of the bridge. In *Hordt v. Koenig* (1909) 137 Mo. App. 589, the defendant, landlord of property let to different tenants, maintained a defective fence close to a quarry in the rear of the property; the plaintiff, an invited guest of one of the tenants, leaned against the fence which gave way and he fell into the quarry. The defendant was held liable tho the quarry owner's negligence may have been a concurring cause. In *O'Hara v. Laclède Gas Light Co.* (1908) 131 Mo. App. 428, the defendant's negligence in leaving a gas pipe in the street concurred with the conduct of other children in starting the pipe rolling so that it ran over the plaintiff.

36. (1900) 160 Mo. 608, 626.

37. See also *Musick v. Dold Packing Co.* (1894) 58 Mo. App. 322, where the negligence of the defendant in leaving a tank of hot water uncovered concurred with the accidental slipping of the plaintiff on a piece of ice.

38. See the opinion of HOLMES, J., in *Clifford v. Atlantic Cotton Mills* (1888) 146 Mass. 47.

clearly to be held liable for the results of such intervening act;³⁹ but if he did not cause the intervening act he ought not to be liable for his conduct in such a situation becomes thereby a remote cause. As a practical matter, even tho the proximate consequence rule were to be followed, it would be difficult if not impossible to show that the defendant's culpable conduct caused the conduct of the intervening actor except by showing that the intervening act should have been foreseen. If the intervening actor is also culpable, of course he will be liable.

The importance of determining whether a cause is concurrent or intervening is obvious, for if the defendant's negligent conduct concurred with the conduct of another it is not necessary to show that the defendant should have foreseen the concurring cause;⁴⁰ as heretofore stated, the concurrent human causes may be and usually are independent actors.

In *Kiser v. Suppe*,⁴¹ the defendant was a mine owner; one Johnson, as an independent contractor, had undertaken to sink a shaft and the defendant had agreed to furnish a cable; the de-

39. Not only is causal connection not necessarily broken by the intervening wrongful act of a third person; it has also been held in a few cases that one must under some circumstances guard against the probable subsequent wrongful acts of others; or, to put it a little differently, negligence may consist solely in failing to anticipate and guard against such acts. Such holdings are, however, confined chiefly to the duty of carrier to passenger and to leaving dangerous weapons and explosives near children or others who are unable to appreciate their dangerous nature. Generally speaking, the probability that some third person will make use of a non-dangerous situation created by the defendant to injure the plaintiff is not enough to impose a duty of care upon the defendant. For a collection of cases on this point, see Bohlen, *Cases on Torts*, 200-213. There seems to be no Missouri case squarely raising the question. *O'Hara v. Laclede Gas Co.* (1908) 131 Mo. App. 428, where the defendant left a gas pipe in the street where children were in the habit of playing and some of the children started the gas pipe to roll so that it ran over the plaintiff, also a child, might have raised the question but it was probably negligence in the defendant to have the pipe there regardless of the action of the children.

40. That it is not necessary that a negligent defendant should have foreseen the operation of a concurrent cause, see *Buckner v. Horse & Mule Co.* (1909) 221 Mo. 700, 710; *Vogelgesang v. St. Louis* (1897) 139 Mo. 127, 136; *Booker v. Southwest Missouri R. R. Co.* (1910) 144 Mo. App. 273, 290; *Beach v. City of St. Louis* (1900) 161 Mo. 433, 438.

41. (1908) 133 Mo. App. 19, 30.

fendant negligently furnished a defective cable; Johnson kept on using it after knowing its condition and the plaintiff was injured by its breaking. It was held that the defendant's negligence was a remote and not a proximate cause. The plaintiff here could have recovered against the defendant only by showing that the defendant should have foreseen, because of his knowledge of Johnson's characteristics, that Johnson would likely be negligent in failing to repair the cable.⁴²

Where the third person has not come into intelligent control of the situation, the case is properly classified as one of concurrent and not of intervening cause, even tho the third person was negligent in not obtaining such intelligent control. In

42. While cases are comparatively rare where the defendant should have foreseen the neglect of duty of one who later comes into intelligent control of the situation, they are not unknown. In *Harrison v. Berkely* (1847) Strobhart's Reports Law (S. C.) 525, the defendant wrongfully sold liquor to the plaintiff's slave. The slave became intoxicated and was found dead the next morning from the intoxication and consequent exposure to the cool weather. It was held that the jury was justified in finding a verdict for the plaintiff; the slave's will being known by the defendant to be weak, the act of becoming intoxicated was such as the defendant should have foreseen. As the court pointed out, if the defendant had wrongfully sold the slave a rope but without suspicion that he intended to hang himself and the slave had hanged himself, the defendant would not have been held liable for such self destruction, because he could not truthfully be said to have caused it. In *Scott v. Shepherd* (1773) 2 Wm. Blackstone 892, which is generally known as the "squib case", the only question which was really decided was that if the plaintiff was entitled to bring any action at all, trespass was the proper form and not an action on the case. It is frequently cited, however, as deciding a question of substantial law. In that case the defendant threw a lighted squib or firecracker into a market house where there were a great many people; it fell upon the market stand of one Yates; one Willis in order to prevent injury to himself and the wares of Yates, took up the lighted squib and threw it across the market house, where it fell upon the market stand of one Ryal, who instantly and to save his own wares from being injured, took up the squib and threw it to another part of the market house where it struck the plaintiff in the face and, exploding, put out one of his eyes. Tho divided three to one upon the question as to whether trespass was the proper remedy, the four judges agreed in thinking that the defendant should be held liable. Tho Willis and Ryal in turn may have had intelligent control of the situation—the facts are not clear—their acts, whether done instinctively or rationally in self-defense were such as ought to have been foreseen by the defendant. If, however, the act of Ryal in striking the plaintiff had been negligent or intentional, it would be for the jury to say whether under the circumstances the defendant should

Strayer v. Quincy, Omaha & Kansas City R. R. Co.,⁴³ the defendant had furnished cars to the Rombauer Coal Co. for the purpose of loading coal for shipment. One of the cars thus furnished had a defective brake which gave way when the plaintiff, an employee of the coal company, attempted to use it, and the plaintiff was thereby injured. There was nothing to show that the coal company knew that the car was defective, but defendant contended that its own negligence was remote because the coal company was under a duty to inspect the car. The court, however, affirmed the judgment for the plaintiff, holding that causal connection was not thus cut off.

OPERATION OF ORDINARY NON-HUMAN FORCES

In regulating one's conduct so as to satisfy the legal requirement of due care one must take into consideration the ordinary and usual non-human forces by which he is surrounded; nor can he successfully contend that their operation in any way breaks the causal connection between his negligent conduct and the plaintiff's damage. In other words, such forces are always to be considered as concurrent and not as intervening causes. In *Peoppers v. Missouri, Kansas & Texas Ry. Co.*,⁴⁴ already stated,⁴⁵ altho the wind which spread the fire was a high one, it was not unusual in the region where the fire occurred and hence causal connection was not broken thereby. Not only is this true of ordinary inanimate forces; it is also true of the ordinary movements of animals. In *Bassett v. St. Joseph*,⁴⁶ the defendant city had negligently left a hole in one of its streets close to the sidewalk; the plaintiff was passing along the sidewalk when a mule kicked at her and in her effort to escape the mule

have foreseen such conduct. In *Nagel v. Missouri Pacific Ry. Co.* (1882) 75 Mo. 653, 661, the defendant was negligent in not fastening or otherwise guarding its turntable. The court apparently considered it as a case of intervening, not of concurrent cause, when it said, "If the defendant was negligent in not securing the turntable so that it could not be revolved by children, to their injury, the mere fact that it was revolved by other children who were playing upon it at the time the child was injured, will not excuse the defendant, if such act ought to have been foreseen or anticipated by it."

43. (1900) 170 Mo. App. 514, 524, 526.

44. (1878) 67 Mo. 715.

45. See *ante*, p. 7.

46. (1873) 53 Mo. 290.

the plaintiff fell into the excavation. The court held that the action of the mule did not in any way excuse the defendant.⁴⁷

Nor is causal connection broken by bodily diseases following an injury negligently inflicted by the defendant. In *Thomas v. St. Louis, Iron Mountain, & Southern Ry. Co.*,⁴⁸ the defendant's servant was negligent in assisting the plaintiff, a twelve year old girl, to alight from defendant's train; the plaintiff's ankle was sprained, tubercular germs attacked the spot thus weakened and produced permanent damage. It was held that the action of the disease germs did not make defendant's negligent a remote cause.⁴⁹

OPERATION OF EXTRAORDINARY NON-HUMAN FORCES

Where the defendant's conduct has consisted in creating a dangerous passive condition, causal connection is broken by

47. See also *Miller v. St. Louis, Iron Mountain & Southern R. R. Co.* (1886) 90 Mo. 393; the defendant had negligently set fire to the plaintiff's fences close to the railroad track; because of the destruction of the fence, stock came and destroyed the plaintiff's crops before the fence could be rebuilt. See also *Vogelgesang v. St. Louis* (1897) 139 Mo. 127, 137, where a mule team was frightened and ran away because of the sudden letting off of steam by a nearby locomotive.

48. (1914) 187 Mo. App. 420.

49. In *MacDonald v. Metropolitan Street Railway Co.* (1908) 219 Mo. 468, the plaintiff's husband was injured in the derailment of the defendant's cable car on which he was a passenger; after about a month he went in a crippled way to his office to attend to such duties as could not be postponed; some seven months later he died of *angina pectoris*. It was held that it was for the jury to determine whether *angina pectoris* was due to his injury. In *Seekinger v. Philibert & Johanning Manufacturing Co.* (1895) 129 Mo. 590, 603, the plaintiff was injured on the chest by a stick thrown from the defendant's machine and was later attacked by pulmonary tuberculosis; it was held that it was for the jury to determine whether the blow caused the disease. In *Poumeroule v. Postal Telegraph Cable Co.* (1912) 167 Mo. App. 533, the plaintiff after dark ran against one of the defendant's unsheathed guy wires which struck her breast; not realizing the injury was serious she did not consult a physician for some eleven months; it was then necessary to have nearly all of both breasts removed. It was held that the question of causation was properly submitted to the jury and the demurrer to the evidence was correctly overruled. Illustrations of other diseases are as follows: cancer, in *Arnold v. Maryville* (1904) 110 Mo. App. 254, 261; pneumonia, *Hanlon v. Missouri Pacific R. R. Co.* (1891) 104 Mo. 382; erysipelas, *Dickson v. Hollister* (1888) 123 Pa. St. 421; typhoid malaria, *Terre Haute & Indianapolis Railroad v. Buck* (1884) 96 Ind. 346.

the operation of an extraordinary natural force, usually called an "act of God", if the latter is of such magnitude that it would have produced the same damage even if the defendant had not been negligent. It is thus closely analogous to the unforeseeable act of a human being who comes into intelligent control of the situation. On the other hand, if the extraordinary force is not of such magnitude, causal connection is not broken, the extraordinary force or act of God being considered as a concurrent and not an intervening cause.⁵⁰ In *Beach v. St. Louis*,⁵¹ the defendant's premises had been damaged due to the bursting of a sewer; the defense was that the bursting of the sewer was caused by an act of God manifested in an unusual and unexpected rainfall and flow of water. The court said, "It is universally agreed that if the damage is caused by the concurring force of the defendant's negligence and some other force for which he is not responsible, including 'act of God', or superhuman force intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage. . . . If the negligence of the defendant concurs with the other causes of the injury in point of time and place, or otherwise so directly contributes to the plaintiff's damage, that it is reasonably certain that the other cause alone would not have produced it, the

50. In *Standley v. Atchison, Topeka & Santa Fe Ry. Co.* (1906) 121 Mo. App. 537, the plaintiff's evidence tended to show that the defendant company had so negligently constructed its bridge as to diminish the natural capacity of the stream over which it was built. An extraordinary flood came and the overflow upon the plaintiff's land was greater than it would have been if the bridge had been properly constructed. The lower court held that the plaintiff was entitled to recover for the excess damage thus caused and this judgment was affirmed. In *Baker v. Southwest Missouri R. R. Co.* (1910) 144 Mo. App. 273, 290, the defendant's negligence in maintaining and using an insufficient, weak and worn trolley wire concurred with an extraordinary sleet, the wires broke and a live wire struck the plaintiff on the face. The defendant was held liable. In *Benton v. St. Louis* (1912) 248 Mo. 98, 111, the defendant city's negligence in leaving a sink hole close to the sidewalk concurred with an extraordinary storm which filled the sink hole; the plaintiff's seven year old boy fell in and was drowned and the plaintiff recovered. In *Haney v. City of Kansas* (1887) 94 Mo. 334, the defendant's negligence in allowing its guttering, curbing, and sidewalk near the plaintiff's premises to remain out of repair concurred with an extraordinary rainfall.

51. (1900) 161 Mo. 433, 438.

defendant is liable, notwithstanding he may not have anticipated the interference of the superior force, which concurring with his own negligence produced the damage. But if the superior force would have produced the same damage whether the defendant had been negligent or not his negligence is not deemed the cause of the injury."⁵²

Where the defendant is a common carrier and its wrongful conduct has consisted merely in failing to perform its public service duty of due diligence in forwarding freight, and the plaintiff's shipment happens to be left in a place^d where it is injured by an extraordinary natural force, the defendant is not and should not be held liable. Strictly speaking, such conduct is not tort negligence^{e53} at all where it is mere delay with no foreseeable danger; and the position of the plaintiff's goods due to the delay is merely a non-dangerous condition and not a cause of the plaintiff's damage. If, however, the defendant after actual notice of an impending act of God could by the exercise of ordinary care avoid injury to the plaintiff but fails to do so, such conduct would be tort negligence and the defendant would be liable for damage caused by the cooperation of such negligence and the act of God.

In *Moffatt Commission Co. v. Pacific Ry. Co.*,⁵⁴ the defendant delayed the shipment of two cars of wheat so that they were destroyed in a great flood. Since the defendant had no notice of the storm in time to save the wheat, the judgment for the defendant was affirmed.⁵⁵ On the other hand, in *Wolf v. Amer-*

52. In *Baltimore & Ohio R. R. Co. v. Sulphur Springs School District* (1880) 96 Pa. 65, the defendant was negligent in not putting sufficient culverts thru a dam, but was held not liable for the sweeping away of the plaintiff's school house because the storm was so great that it would have produced the same damage tho the defendant had not been negligent.

53. Tho a common carrier may be sued either in tort or contract for a breach of its customary duty, its obligation is not really either contractual or delictual but based upon the peculiar undertaking of a public service.

54. (1910) 143 Mo. App. 441, 457.

55. In *Lightfoot & Son v. St. Louis & San Francisco R. R. Co.* (1907) 126 Mo. App. 532, a shipment of eggs to Chicago was delayed one day in Kansas City; an extraordinary flood appeared so suddenly that there was no opportunity to save the eggs. In *Werthheimer, Swartz*

ican Express Co.,⁵⁶ wine shipped by the plaintiff to St. Louis by defendant carrier arrived in East St. Louis in December. The weather was severely cold and it could not be forwarded across the river. The defendant placed it on a station platform where it was badly frozen. It was held that even if the cold was so extreme as to be properly called an "act of God", the defendant was not exempt from liability because the act of God merely co-operated with the defendant's negligence.⁵⁷

Shoe Co. v. Missouri Pacific R. R. Co. (1910) 147 Mo. App. 439, shipments of shoes in defendant's hands in Kansas City were destroyed by an extraordinary flood in 1903; plaintiff contended that the loss was partly due to the negligence of defendant in not removing the goods to a place of safety while the water was rising. It appeared that tho the river was rising for some hours, it rose very suddenly to an unprecedented height, without giving time to the defendant to act according to the changed conditions. It does not appear whether if the flood were normal any damage would have occurred. In *Merritt Creamery Co. v. Atchison, Topeka & Santa Fe Ry. Co.* (1909) 139 Mo. App. 149, the plaintiff's butter in the defendant's car was lost in Kansas City in an unprecedented flood; there was no time after notice of the flood to remove the butter to a place of safety and the judgment for the defendant was affirmed.

56. (1869) 43 Mo. 421.

57. In *Pruitt v. Hannibal & St. Joseph R. R.* (1876) 62 Mo. 527, failure of a common carrier to take proper care of hogs in very cold weather concurred with an extraordinary snow storm. In *Pinkerton v. Missouri Pacific Ry. Co.* (1906) 117 Mo. App. 288, 293, the plaintiff's household goods were lost by the defendant in an extraordinary flood; after the defendant's agent knew that the extraordinary flood was near at hand he directed the car which contained the plaintiff's goods to be taken into a place of even greater danger. In *Davis v. Wabash Ry. Co.* (1886) 89 Mo. 340, the evidence was conflicting as to whether after notice of the extraordinary flood the defendant had time to remove the plaintiff's goods out of danger.

III Contributory Misconduct of the Plaintiff

A. CONTRIBUTORY NEGLIGENCE

The General Rule.

The general rule as to contributory negligence is that even tho the defendant was negligent and his negligent conduct was part of the legal cause⁵⁸ of the plaintiff's damage, yet if the plaintiff himself did not use ordinary care for the safety of his person or property and if such lack of care was also a part of the legal cause of his damage, he is not entitled to recover. Such negligence on the part of the plaintiff is called contributory negligence.⁵⁹ The first recorded case in which the doctrine was explicitly laid down is *Butterfield v. Forester*,⁶⁰ in which action was brought for negligently obstructing a highway whereby the plaintiff, who was riding along the road, was thrown from his horse and injured. The trial court charged the jury that if

58. Even tho the plaintiff has not used due care with regard to the safety of his person or his property, it is not a bar to his recovery unless such conduct was a part of the legal cause of his damage. See *Sharon v. Parson* (1895) 17 Pa. 26, where the negligence of the plaintiff's husband in standing upon the steps of defendant's street car was not a part of the legal cause of his death because he was not jarred off by the motion of the car but was negligently put off by the defendant's conductor. Tho the court called the conduct of the defendant's husband contributory negligence it was probably a wrongful assumption of risk; but what is true here of a wrongful assumption of risk would be at least equally true of contributory negligence. See also, *Willmot v. Corrigan Consolidated Street Ry. Co.* (1891) 106 Mo. 535; *Buck v. Peoples' Street Ry. Co.* (1891) 46 Mo. App. 555, 566.

59. Occasionally the word "contributory" is used in speaking of two or more defendants whose negligent conduct has together caused the plaintiff's damage. *Standley v. Atchison, Topeka & Santa Fe Ry. Co.* (1906) 121 Mo. App. 537, 546. From an etymological viewpoint such usage is unassailable, but it is unfortunate because the common usage confines the term to mean contributing negligence of the plaintiff. In the case just mentioned the court should have used the term "concurrent".

60. (1809) 11 East 60.

a person riding with reasonable and ordinary care⁶¹ should have seen and avoided the obstruction, and if they were satisfied that the plaintiff was riding along the street extremely hard and without exercising ordinary care, they should find for the defendant; the higher court held this charge correct, Lord ELLENBOROUGH said, "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not use common and ordinary caution to be in the right. . . . One person being in fault will not dispense with another's using care for himself. Two things must concur to support this action: an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

The policy of the law behind the doctrine of contributory negligence is to place upon all members of society, prospective plaintiffs as well as prospective defendants, the duty to observe such care at all times as will tend to prevent damage. But instead of allowing contributory negligence to defeat recovery altogether, it would be more just to allow it to go only in reduction of damages, thus compelling the negligent defendant to bear a part of the loss and the negligent plaintiff a part. This is the rule in admiralty⁶² where there is no jury trial; but in cases where there is a right to trial by jury, such a solution has been thought unwise;⁶³ probably partly because of the traditional necessity or

61. The standard of care required of plaintiffs is similar to that required of defendants, viz., such care as a person of ordinary prudence would exercise under similar circumstances. *Myers v. Chicago, Rock Island & Pacific R. R. Co.* (1903) 103 Mo. App. 258, 276. Like the questions of the defendant's negligence and legal cause, it is a mixed question of law and fact and decided by the court only where the inference one way or the other is irresistible. *Barton v. St. Louis & Iron Mountain R. R. Co.* (1873) 52 Mo. 253. Tho it is common to say that the plaintiff is under a "duty" to use ordinary care for the safety of his person and property, the duty is of an imperfect and indirect sort, not being enforced by action but merely by refusing recovery in an action against others.

62. *The Max Morris* (1890) 137 U. S. 1. The part usually recovered is one half. In a collision where the defendant also suffered some damage, but less than that suffered by the plaintiff, the case is generally settled by adding the losses together, dividing the sum by two and giving the plaintiff judgment for the difference.

63. *Zumwalt v. Kansas City Suburban Belt R. R. Co.* (1903) 175 Mo. 288, 311.

at least desirability of keeping the issue before the jury simple, and partly because courts have felt that with the admiralty rule it would be difficult to retain the proper control over unreasonable verdicts.

Because of the harsh operation of the doctrine of contributory negligence upon plaintiffs, there has been a strong tendency to mitigate its severity by refusing to apply it in certain classes of cases, thus allowing the plaintiff full recovery in such cases. At one time in Illinois and perhaps in a few other states, it was held that if the negligence of the plaintiff was much less in degree than that of the defendant the plaintiff could recover; this was called the doctrine of comparative negligence. This doctrine has never obtained a foothold in Missouri, tho it has been contended for in several cases.⁶⁴

Exception to the general rule.

Tho very few, if any, jurisdictions have now the doctrine of comparative negligence as such, there is in all jurisdictions an exception to the rule of contributory negligence which amounts in substance to a specialized comparative negligence rule; i. e., in spite of the plaintiff's damage being caused partly by his own negligence, he is allowed to recover in certain specific classes of cases. This exception has been sought to be placed upon several different grounds, but the really fundamental explanation is that in these classes of cases the defendant is—to use an untechnical expression—"more to blame" than the plaintiff.⁶⁵

Tho it is well established in all jurisdictions that there is an exception to the rule of contributory negligence, there is both confusion and disagreement as to the exact limit of the exception. The leading case on the subject is that of *Davies v. Mann*.⁶⁶ In that case the plaintiff had fettered a donkey belonging to him and turned it into the highway to graze; the defendant's wagon, with a team of three horses, coming down a slight descent

64. *Holwerson v. St. Louis & Suburban Ry. Co.* (1900) 157 Mo. 216; *Davies v. Peoples' Ry. Co.* (1900) 159 Mo. 1; *Hurt v. St. Louis, Iron Mountain & Southern Ry. Co.* (1887) 94 Mo. 255.

65. If he is not in some way "more to blame", the law certainly should not shift the whole loss to his shoulders. See post, pp. 36, 38, 39.

66. (1842) 10 M. & W. 546.

ran against the donkey and killed it; the driver of the wagon was some distance behind the horses. The trial court told the jury that tho the act of the plaintiff in leaving the donkey on the highway so fettered as to prevent its getting out of the way of carriages traveling along it, might be illegal, still if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the wagon, the action was maintainable against the defendant. This charge was held correct, PARKE, B., saying, "Altho there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover."

The only reason suggested for the decision was that since the defendant's negligence was the immediate cause it was therefore the proximate cause, evidently meaning that the defendant's negligence was the sole proximate cause and that the plaintiff's negligence was no part whatever of the cause.⁶⁷ There is much of this sort of talk in modern cases on contributory negligence—the only place in our law where Lord Bacon's crude rule of immediate cause is now sought to be applied. If the donkey had been thrown over against X, a bystander, who was using the highway in the exercise of ordinary care, it could not be seriously contended that the negligence of the owner of the donkey was not a part of the legal cause of X's damage unless it were shown that the driver had intelligent control of the situation in time to have avoided the injury by due care and that his failure to so avoid should have been foreseen by the donkey owner.⁶⁸ And if the donkey owner's negligence is a part of the legal cause of X's damage it is unthinkable that it should not be a part of the legal cause of his own damage, unless we are to apply a different rule of legal cause to plaintiffs from

67. The same argument is made in *Magnitts v. Missouri Pacific Ry. Co.* (1914) 182 Mo. App. 694, 712: "The negligence of the party inflicting the injury and not that of the one first at fault is regarded in the law as the sole or proximate cause of the injury. In such cases, it is said the negligence of the defendant supersedes that of the plaintiff and becomes the proximate cause of, while that of the plaintiff is to be treated as remote to, the injury."

68. See *ante*, p. 17.

that which we apply to defendants, which would hardly be conducive to clear thinking. It does not clearly appear in *Davies v. Mann* whether the driver saw the danger or whether his negligence consisted in not seeing it, but the latter seems the fair inference since the driver was some distance behind the horses.

There are three—and it is believed only three—views as to the proper limit of exceptions to the rule of contributory negligence. For the purposes of this article these views will be called, respectively, (1) the conscious last chance⁶⁹ doctrine, (2) the unconscious last chance doctrine, (3) the humanitarian doctrine.

(1) *The conscious last chance doctrine.* According to the conscious last chance doctrine, recovery is allowed only where the defendant was conscious of the peril of the plaintiff's person or property in time to have avoided injury by the exercise of ordinary care, the plaintiff being unable to avoid the injury either because he was unconscious of the peril or because he could not by using ordinary care have extricated himself from the peril if he had known it. In many such cases the plaintiff might perhaps be able to recover on the ground that the defendant's negligence was the sole cause of the plaintiff's damage, the defendant having come into complete and intelligent control of the situation and his negligent conduct not being foreseeable by the plaintiff.⁷⁰ But cases where the defendant's conduct was foreseeable by the plaintiff are not explainable on the modern law

69. The terminology of the courts, "last chance" and "last clear chance," has been avoided because it is difficult, if not impossible, to affix any accurate meaning to these phrases. Conceivably the "last clear chance" might mean the "conscious last chance" and the "last chance" might mean the "unconscious last chance", but the phrases are used indiscriminately in the cases. For example, in *Union Biscuit Co. v. St. Louis Transit Co.* (19.4) 108 Mo. App. 297, 301, the phrase "last chance" was used where the defendant was conscious of the peril in time to avoid.

70. See *ante*, p. 18. The "perhaps" in the text is due to a doubt whether the rule as to an intervening human cause should apply to make a defendant liable where the plaintiff's own negligent conduct was the antecedent cause. Since it is the plaintiff's person or property that is injured and therefore must have been present when the damage was done, it is not so clear that causal connection should be held to be necessarily broken by the unforeseeable negligent conduct of another. If the rule as to unforeseeable intervening human cause

of legal cause, and to that extent at least the conscious last chance doctrine is an exception to the rule of contributory negligence.

It is suggested in some Missouri decisions that a defendant who is conscious of the plaintiff's peril is necessarily a wanton or reckless wrongdoer. In *Williams v. Metropolitan Street Ry. Co.*,⁷¹ the court said that "if the motorman saw the peril or could have seen it by looking in time to have avoided striking him, he was guilty of negligence. And such failure to exercise ordinary care on the part of the motorman eliminated the negligence of the deceased and is characterized as a wanton act." In *Cole v. Metropolitan Street Ry. Co.*,⁷² it was said that "the mere failure to observe ordinary care in situations of this character is of itself a wanton act."⁷³ While such statements may have done no

is not applicable here, then the entire conscious last chance doctrine is an exception to the rule of contributory negligence, except, of course, where the defendant acts wantonly or recklessly.

71. (1909) 141 Mo. App. 625, 630.

72. (1900) 121 Mo. App. 605, 612.

73. See also *Roberts v. Southern Pacific Co.* (1912) 166 Mo. App. 639, 644. In *Everett v. St. Louis & San Francisco R. R. Co.* (1908) 214 Mo. 54, 85, the court said, "The mere fact that the petition charges that the injury was wilfully and wantonly caused by the agents and servants in charge of the train will not prevent a recovery, provided the evidence shows that the injury was the result of their negligence and carelessness. The charge of wilfulness is sustained by proof of negligence." If there was nothing but a point of pleading involved, the last sentence just quoted is to be commended. If the defendant has reasonable notice of the acts with which he is charged, he ought not to be allowed to complain if the petition alleges that the act was wilful and the proof shows that it was only negligent, *provided that by the substantive law the defendant would be equally liable whether the conduct was negligent or wilful.* But when contributory negligence is relied on as a defense the rule as to the liability of a wilful wrongdoer is directly *contra* to the general rule as to the liability of a wrongdoer who is only negligent; it is well settled that contributory negligence is no defense to a wilful tort. Of the five cases cited by the court in support of its statement, in only one was the court speaking with reference to the defense of contributory negligence, namely, *Lange v. Missouri Pacific Ry. Co.* (1907) 208 Mo. 458, 476, and all that the court decided with reference to this point was that where a petition alleges wantonness and recklessness it is not error to give an instruction submitting the question of negligence to the jury.

Possibly some of the confusion just discussed may be due to the prevalence of the unfortunate maxim which is seen very frequently in criminal cases, viz., that "one intends the natural and probable consequence of his acts." If this were taken literally it is obvious that it would wipe out the sound and well settled distinction between intentional and negligent torts. The proper statement is that "one in-

harm in the particular cases in which they were used, the idea is unsound. Tho the difference between negligence on the one hand and recklessness or wantonness on the other may, like most other differences, be reduced to a difference of degree, the law properly treats them as different in kind; i. e., one who acts recklessly or wantonly is treated as a wilful and not merely as a negligent wrongdoer. Strictly speaking, a wilful or intentional wrongdoer is one who desires a particular result which is harmful to the plaintiff; a wanton or reckless wrongdoer is one who does not desire the harmful result but who is conscious of the peril and takes such long chances of injuring the plaintiff that he cannot be permitted to say that he did not intend the result. In other words, tho he stands between the strictly wilful wrongdoer on the one hand and the merely negligent wrongdoer on the other, the wanton or reckless wrongdoer's conduct is more nearly like that of the wilful wrongdoer and the law properly treats it as such.

But mere consciousness of the peril is not enough to make one a reckless or wanton actor. As said by the court in *Atchison, Topeka & Santa Fe Ry. Co. v. Baker*,⁷⁴ "The conduct of the employers in charge of an engine in failing to take measures for the protection of a person upon the track can be characterized as 'wanton' in the sense in which that word is used in this connection only when they actually know of his presence, or when the situation is substantially the same as tho they had such knowledge—when such knowledge may fairly be imputed to them. It is not enough for that purpose that the exercise of ordinary diligence would have advised them of the fact, for their omission of duty in that regard amounts only to negligence. Nor is it enough that they know some one might be in the place of danger; the probability must be so great—its obviousness to the employers so insistent—that they must be deemed to realize the likelihood that

tends the necessary consequences of his acts." This is a rule of common sense and experience: if A throws some water up in the air so that the force of gravity will necessarily bring it down upon the head of B whom A sees near him, A can not usually be heard to say that he did not intend that the water should strike B.

74. (1908) 79 Kan. 183.

a catastrophe is imminent and yet omit reasonable effort to prevent it because indifferent to the consequences. . . . One who is properly charged with recklessness or wantonness is not simply more careless than one who is only guilty of negligence; his conduct must be such as to put him in the class with the wilful doer of wrong."

The conscious last chance doctrine seems to prevail in California,⁷⁵ Montana,⁷⁶ Oregon,⁷⁷ Texas,⁷⁸ and in the Federal⁷⁹ courts. And probably all Anglo-American jurisdictions would go at least as far as the conscious last chance doctrine in allowing recovery.⁸⁰

(2) *The unconscious last chance doctrine.* The conscious last chance doctrine allows recovery only where the defendant was conscious of the plaintiff's peril in time to have avoided the injury by the exercise of due care. The unconscious last chance doctrine goes further and allows recovery where the defendant was unconscious of the peril but could by the exercise of due care have discovered the danger in time to have avoided the injury—the plaintiff, whether conscious of the peril or not, being helpless to avoid it. In *Radley v. London & Northwestern Ry. Co.*,⁸¹ the plaintiffs who owned a colliery near the defendant's railway, had left upon their sidewalk a car with a broken truck upon it, the combined height being about eleven feet. The defendant's servants, in pushing a long line of the plaintiff's empty cars on

75. *Waterman v. Wasalla Electric Ry. Co.* (Cal. App., 1913) 137 Pac. 1096; *Saver v. Eagle Brewing Co.* (1906) 3 Cal. App. 127, 84 Pac. 425.

76. *Dahmer v. Northern Pacific Ry. Co.* (Mont., 1913) 136 Pac. 1059.

77. *Stewart v. Portland Light & Power Co.* (1911) 58 Ora. 377, 114 Pac. 936.

78. *Morgan & Bros. v. Missouri, Kansas & Texas Ry. Co.* (1908) 50 Tex. Civ. App. 420; *Cardwell v. Gulf, Beaumont & Great Northern Ry. Co.* (1905) 40 Tex. Civ. App. 67, 88 S. W. 422.

79. *Iowa Central Ry. Co. v. Walker* (1913) 203 Fed. 685; *Hart v. Northern Pacific Ry. Co.* (1912) 196 Fed. 180.

80. In the following Missouri cases the defendant was actually conscious of the peril to the plaintiff tho such knowledge is not essential in Missouri to the defendant's liability. *Cole v. Metropolitan Street Ry. Co.* (1906) 121 Mo. App. 605, 611; *White v. St. Louis & Meramec River R. R. Co.* (1912) 241 Mo. 137, 153.

81. (1876) L. R. 1 App. Cas. 754.

to the siding, pushed the car with the broken truck upon it against a bridge of the plaintiff's and broke it, the car being too high to pass under. The court held that it was not sufficient to give the general rule of contributory negligence, saying, "But there is another proposition equally well established, and it is a qualification upon the first, namely, that tho the plaintiff may have been guilty of negligence and tho that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." In this case the defendant's servants did not see what the danger was; their negligence consisted in not investigating when the train was stopped by the bridge. The plaintiff on the other hand, not being present, was entirely unable to avoid the damage to his property. The defendant thus had the last chance to avoid injury, *i. e.*, later in point of time than the plaintiff's chance, tho the defendant was not conscious of that fact. It deserves to be emphasized that the court very properly did not attempt to reconcile its holding with the rule of contributory negligence, but stated explicitly that it was an exception to that rule. The defendant, not being in complete and intelligent control of the situation, could not be said to have been the sole cause of the plaintiff's damage.

The unconscious last chance doctrine probably represents English law.⁸² In this country it is very difficult without care-

82. The leading English case of *Davies v. Mann* seems also to have been a case of unconscious last chance, the plaintiff being unable to avoid because not present and the defendant probably not being conscious of the peril. Some interesting questions are likely to arise under this view, especially in cases where the plaintiff was present at the time of the injury. Of course, if as in *Rapp v. St. Louis Transit Co.* (1905) 190 Mo. 144, his wagon has stalled on the street car track and he is trying to extricate it, it is easy to see that the wagon is in helpless peril. But can it be properly said that a defendant, who is neither drunk nor asleep but is negligent in not seeing the plaintiff's peril, had the last chance to avoid in cases where the plaintiff was unconscious of the peril because of being either drunk or asleep? And if the defendant is considered as having the last chance in such cases, how can we distinguish the case where the plaintiff was neither drunk nor asleep but preoccupied and absent-minded as was the decedent in *Eppstein v. Missouri Pacific Ry. Co.* (1906) 197 Mo. 720?

ful study of the facts in the decisions to determine whether a particular jurisdiction is committed to this view or to the humanitarian doctrine, because in judicial statements little if any attention is usually paid to the ability of the plaintiff to avoid the injury. What seems to have happened is this: many courts took as a basis the conscious last chance doctrine in which it is properly held that it is not necessary that the plaintiff's person or property be in helpless peril in order for the plaintiff to recover, and feeling that it would be placing a premium upon ignorance to hold any less accountable a defendant whose lack of knowledge of plaintiff's peril was due to negligence, they merely inserted the additional clause "or should have known"⁸³ in the conscious last chance doctrine and thus made the usual statement of the humanitarian doctrine.

(3) *The humanitarian doctrine.* The humanitarian doctrine goes even further than the unconscious last chance doctrine and allows recovery tho the plaintiff was not in helpless peril; *i. e.*, recovery is allowed if the defendant knew, or if by the exercise of due care he could have known, of the plaintiff's peril in time to have avoided the injury tho the plaintiff himself may have been negligent in not discovering his peril in time to have avoided the injury.⁸⁴ It is thus not in any sense a last chance doctrine, because it is obvious that the defendant's chance of avoiding may be only equal to⁸⁵ and contemporaneous with

83. There may have been an intermediate step; the phrase "should have known" may at first have been used where the evidence of the defendant's knowledge, tho indirect and circumstantial, was so cogent that the conclusion was irresistible that he knew.

84. For a good statement of the humanitarian doctrine, see *Bechenwald v. Metropolitan Street Ry. Co.* (1906) 121 Mo. App. 595, 599: "Where the injury is produced by the concurrent negligence of both plaintiff and defendant, if the defendant before the injury discovered or by the exercise of ordinary care could or might have discovered the perilous situation in which the plaintiff was placed by the concurring negligence of both parties and neglected to use the means at his command to prevent the injury, then his plea of contributory negligence shall not avail him."

85. If the humanitarian doctrine as ordinarily laid down were literally followed, it would sometimes lead to rather curious results. Suppose A and B, while driving their automobiles in opposite directions, collide; neither one saw the danger in time to avoid the collision by the use of due care, but each could have seen the danger

that of the plaintiff.⁸⁶ According to the often repeated assertions⁸⁷ of the Missouri Supreme Court this is the settled law of Missouri, tho it is at least doubtful whether there are more than a very few cases whose facts absolutely required the laying down of such a broad rule.⁸⁸ In the great bulk of Missouri cases it is not clear whether the defendant really saw the danger in time to avoid, or whether he was negligent in not seeing it.⁸⁹

The humanitarian doctrine has been so called because of its real or supposed influence in preventing the destruction of human life, and it is usually spoken of as if it were limited to personal injuries or death caused by dangerous instrumentalities, especially railroad locomotives, street cars and automobiles. But these limits have not always been carefully observed. In *Borders v. Metropolitan Street Ry. Co.*,⁹⁰ in which the plaintiff recovered

in time to avoid if he had been properly watchful. If the collision happens to damage only A, A may recover from B; if it happens to damage only B, B may recover from A; and if both happen to be injured each may recover from the other! If this last case should arise the courts would probably hold that the doctrine does not apply to cases where both parties were engaged in using dangerous instrumentalities unless one was much more dangerous than the other.

86. See, for example, *Eppstein v. Missouri Pacific Ry. Co.* (1906) 197 Mo. 720, 735, where the negligent failure of both the plaintiff's husband and defendant's engineer to see the peril was probably due to the fact that they were both watching a train of another railroad.

87. See, for example, *Dutcher v. Wabash R. R. Co.* (1912) 241 Mo. 137, 159; *Murphy v. Wabash R. R. Co.* (1910) 228 Mo. 56, 79, where LAMM, J., said, "it has been a favorite doctrine of this court for two of three generations."

88. A careful search has revealed only the following case, tho there are probably more: *Eppstein v. Missouri Pacific Ry. Co.* (1900) 197 Mo. 720, 735. But in matters of procedure courts assume the rule to be well settled. For example, in *Felver v. Central Electric Ry. Co.* (1909) 216 Mo. 195, there was no evidence that the defendant's servants actually did see or that they did not see in time to avoid; there was evidence that they could have seen in time to avoid by the exercise of ordinary care, and the court held that this was sufficient evidence to submit to the jury under the humanitarian doctrine.

89. In *Dutcher v. Wabash R. R. Co.* (1912) 241 Mo. 137, 156, which is considered to be one of the most important cases on the subject, it is fairly clear that the defendant's servants saw the danger in time to avoid and therefore the defendant would have been liable even in jurisdictions which hold to the conscious last chance doctrine. And in *Murphy v. Wabash R. R. Co.* (1910) 228 Mo. 56, there was some testimony that the defendant's engineer saw the peril because he was looking in the direction of the deceased.

90. (1912) 168 Mo. App. 172, 176.

for damages to an electric coupe, the decision is based upon *Flack v. Metropolitan Street Ry. Co.*⁹¹ which in turn is placed by the court upon the humanitarian doctrine. And in *Dale v. Hill O'Meara Construction Co.*,⁹² in which a workman shoveling about a building recovered against a carpenter who sawed off the end of a rafter and let it fall upon him, the court laid down substantially the humanitarian doctrine in these words: "Plaintiff was entitled to recover, notwithstanding his own negligence, if the evidence showed that the carpenter knew or by the exercise of ordinary care, could have known of plaintiff's peril and negligently let the piece of timber fall on him." If a carpenter's saw and the sawed off end of a rafter are "dangerous instrumentalities," it is difficult to say what things are not.

If the humanitarian doctrine is to be applied to the protection not only of persons but also of property and to the uses of other than a few of the more dangerous instrumentalities, there seems nothing to justify it, either in logic or convenience. While the rule of contributory negligence is unjust in compelling the injured party to bear all his own loss, the humanitarian doctrine is even more objectionable because in compelling a defendant who may be no "more to blame" than the plaintiff to bear the whole loss, it involves the shifting of that loss from the place where it fell.

Either the conscious last chance doctrine or the unconscious last chance doctrine can be at least partially justified on the ground that the defendant having a later⁹³ chance to avoid should bear the loss rather than the plaintiff, if either one must

91. (1912) 162 Mo. App. 650. It should perhaps be added that in both cases the motorman apparently saw the danger in time to avoid and therefore the humanitarian doctrine was not necessary to either decision; but the same may be said of a large number of decisions laying down the doctrine. See *ante*, p. 35 and notes 88 and 89.

92. (1904) 108 Mo. App. 90, 97.

93. Throwing the loss upon the one who has the later chance to avoid is supposed to have the effect of tending to induce the continued use of due care on each party regardless of the negligence of the other. Instincts of self preservation and conscientiousness in the performance of duty, are, however, of far greater influence in bringing about the exercise of due care than are judicial decisions, no matter how just or severe.

bear it all. As already pointed out this ground does not exist in cases which require the humanitarian doctrine; hence, if that doctrine is to be supported at all it must be in its narrower application and upon the ground that it really does operate to conserve human life and safety from the perils which are necessarily attendant upon the use of swift and dangerous transportation devices. Does it actually conserve human life and safety? Is it really "humane"? WOODSON, J., has attempted to prove by statistics⁹⁴ that in perhaps the largest class of cases in which the rule has been laid down—namely, trespasses upon railroad tracks—the rule has worked badly in Missouri; and if the statistics have been fairly compiled it must be admitted that, whatever the cause, Missouri has an unenviable record in the number of persons killed or injured while thus trespassing. The gist of Judge WOODSON'S argument is that the humanitarian doctrine encourages the use of railroad tracks by trespassers and thereby produces disastrous results. To this argument, however, LAMM, J., has in the same case replied as follows: "In an eloquent and powerful argument at our bar and in a brief of point and force counsel deliver a set attack on the humanitarian doctrine. To feather one arrow aimed at it, it is argued in effect, that instead of being humane it faces the other way, for that it opens a new door to the destruction of life and limb by inviting or encouraging the use of railroad tracks by footmen. If the long and appalling inventory of injuries and deaths on railroad tracks is to be traced to bad doctrines formulated and announced by this bench, then indeed it has much to answer for. But learned counsel, we think, by inadvertence unsoundly argue in that behalf. It may well be doubted if a single person, within the memory of a man now alive, ever walked on a railroad track in Missouri, or refrained from walking there, solely because of any decision made by this or any court on any phase of the law of negligence. Hitherto it has been the generally accepted notion that to hold railroad companies to strict inquest and just

94. See his dissenting opinion in *Murphy v. Wabash R. R. Co.* (1910) 228 Mo. 56, 88, 109. And for the part quoted from LAMM, J.'S, opinion see p. 78 of the same case.

accountability when a child or adult is killed or maimed, conduces to care and caution in the management of death-dealing machines at places where people are permitted by the owners of such machines to be expected."

It is probably true that people who do or do not walk on railroad tracks are not influenced thereby by court decisions, while railroad companies, being comparatively few in number, may be thereby compelled to insist upon their servants' taking greater precaution because of the heavy liability placed upon the companies. But even tho it be not true that the long list of casualties is due to the humanitarian doctrine, it would be difficult to show that it has operated to make the number less than it otherwise would be; and even if it should be thus justified by results, it is at least questionable whether such a doctrine—which, like the doctrine of the turntable cases⁹⁵ must be considered anomalous—should not have been laid down by the legislature which could specify with more certainty the limits of the doctrine and thus probably save a large amount of expensive litigation.

If, as has been stated, the humanitarian doctrine is so well settled judicially that only a statute can overturn it, it should be treated as an anomaly, as the doctrine of the turntable cases is treated, and limited to those cases in which the holding of such doctrine might reasonably be said to have some influence in inducing a higher degree of care. This would include railroad companies and street car companies; it might also include companies using automobiles for transportation on a large scale, but individual drivers of automobiles and other vehicles are quite likely not to know of such a rule. In all other cases, either the conscious last chance doctrine or the unconscious last chance doctrine should be adopted. Until it becomes expedient to adopt the more just principle of dividing the damages in contributory negligence cases, the entire loss should not be shifted

95. See 7 Law Series, Missouri Bulletin, pp. 15-17. In the long run the burden of both that doctrine and of the humanitarian doctrine as applied to railroads is borne by the public in the form of increased rates. This is perhaps its strongest justification.

from the plaintiff to the defendant unless there is a sound and clearly understood reason therefor.

B. UNJUSTIFIABLE ASSUMPTION OF RISK

Another species of plaintiff's misconduct is that of unjustifiable assumption of risk. In contributory negligence the plaintiff is usually, if not always, unconscious that his person or property is in peril; if he fully realizes the peril and deliberately chooses to encounter it and such choice is not justified, his misconduct ceases to be merely negligent and partakes of the nature of consent. It is thus somewhat analogous to recklessness or wantonness in a defendant. The legal effect of unjustifiable assumption of risk is, however, substantially the same as that of contributory negligence; *viz.*, it enables the defendant to escape liability tho his negligence was a part of the legal cause of the plaintiff's damage, unless the defendant is held liable on some one of these doctrines just discussed.⁹⁶ Because the legal effect is similar, the distinction between contributory negligence and unjustifiable assumption of risk is frequently lost sight of.

As already pointed out,⁹⁷ one is justified in risking his bodily safety in an attempt to save human life and under certain circumstances, to save property from destruction. Much less justification is needed, of course, to risk one's property. In *Donovan v. Hannibal & St. Joseph R. R. Co.*,⁹⁸ an action was brought

96. Where a plaintiff is conscious of his peril just before the injury and has an equal chance with the defendant to avoid, he can not recover, whether his conduct be described as contributory negligence or unjustifiable assumption of risk. In *Watson v. Mound City Ry. Co.* (1895) 133 Mo. 246, the court said, "But to carry this doctrine to the length of saying that one who knowingly crossed the track of a railway in such close proximity to a moving train as to be struck thereby before he could cross would not be guilty of concurring negligence, would virtually abolish the law of contributory negligence altogether." See also *Moore v. Lindell Ry. Co.* (1903) 170 Mo. 528, 544. In *Holwerson v. St. Louis & Suburban Ry. Co.* (1900) 157 Mo. 216, 241, there is a dictum that if both defendant and plaintiff are wanton there can be no recovery; this would seem to be sound unless the plaintiff's recklessness has resulted in putting him in helpless peril.

97. 7 Law Series, Missouri Bulletin, pp. 8, 9. The subject of assumption of risk in cases of master and servant will be discussed in a later article.

98. (1886) 89 Mo. 147.

to recover double damages for injuries to cattle; the statute made it the duty of railroad companies to fence rights of way; the defendant company had failed to build a fence between its right of way and the plaintiff's pasture; plaintiff turned his cattle into this pasture after giving the defendant due warning, and some of them were killed by the defendant's trains. The court said, "There has been no negligence⁹⁹ in his pasturing his cattle upon his own premises; . . . he can not be deprived of the ordinary and proper use of his property by the failure of the railroad to perform its duty." To have held otherwise would have largely defeated the purpose of the statute.¹⁰⁰

A plaintiff is not bound to guard against the merely contingent negligence of others, such as the possible negligence of a railroad company in allowing sparks from its locomotives to set fire to dry grass which in the ordinary course of husbandry is left on the ground.¹⁰¹ In *Coates v. Missouri, Kansas & Texas Ry. Co.*,¹⁰² the court refused to apply this principle to shavings allowed to accumulate around a house in the course of erection. But the decision in this case has apparently been abrogated by a statute¹⁰³ making railroad corporations absolutely liable for loss occurring thru fire communicated by locomotives, and giving to such corporations an insurable interest in the property along their routes.

99. Notice the use of the phrase "no negligence"; it would have been more accurate to say that under the circumstances the plaintiff's assumption of the risk of losing his cattle was justifiable, because he obviously knew the peril. If he had not known the peril, then the expression "no negligence" would have been quite proper; as a matter of phraseology, a plaintiff is never justified in being negligent; if his conduct does not amount to an assumption of risk but is justifiable, it would be considered not negligent at all.

100. The decision has been followed in a case where apparently no statute was directly involved. *Gooch v. Bowyer* (1895) 62 Mo. App. 206. In that case the defendant was guilty of negligence in placing barbed wire along a division fence; the plaintiff, seeing the condition of the wire, nevertheless turned his stock out to graze and his horse was injured by the wire. The court said that "he had the right to pasture his own stock on his own premises, and he could not be deprived thereof by the defendant's neglect of duty."

101. *Fitch v. Pacific R. R. Co.* (1870) 45 Mo. 322.

102. (1875) 61 Mo. 38, 44.

103. Revised Statutes 1909, § 3151.

C. EFFECT OF PLAINTIFF'S VIOLATION OF STATUTES OR ORDINANCES

If a plaintiff at the time of his injury is engaged in the violation of a statute or ordinance he is in general barred from recovery against a negligent defendant if his own misconduct is a part of the legal cause of the damage. In determining the question of legal cause the most important element to be considered is the purpose of the statute or ordinance. In *Welsh v. Geneva*,¹⁰⁴ the plaintiff was moving a traction engine weighing six tons along the defendant's highway; coming to a bridge he concluded it was safe and attempted to cross it without spanning it with planks as required by statute in case of engines of that weight. It was held that it was proper to direct a verdict for the defendant since the use of the heavy engine contributed directly to the breaking of the bridge. In this case the purpose of the statute was to protect the bridge as well as the property of travelers. In *Berry v. Sugar Notch Borough*,¹⁰⁵ the defendant had negligently left a decayed tree standing in one of its streets, dangerous to travelers. The plaintiff, a motorman, while running a street car at the rate of fifteen miles an hour, was injured by the tree falling on the car. The ordinance made it illegal to run a street car more than eight miles an hour. It was held that this did not bar the plaintiff since it was not the cause of the accident. If the tree had fallen before the plaintiff reached it, and because of the high speed the plaintiff could not stop the car, he would probably have been barred, but on the ground of contributory negligence rather than that of being engaged in an illegal act. The purpose of the statute in this case was obviously to protect pedestrians and people in their vehicles from being run over by the street cars; it was not to protect the cars or people therein itself from being injured by falling trees.

In Missouri there seem to be only three cases on the point. In *Blackburn v. Southwest Missouri R. R. Co.*,¹⁰⁶ a city ordi-

104. (1901) 110 Mo. 388.

105. (1899) 191 Pa. 345.

106. (1914) 180 Mo. App. 548.

nance required house movers to obtain a permit from the city before they could lawfully move houses along the streets; while the plaintiff was moving a house without having obtained such permit he found it necessary to lift some wires for the house to pass under; he thought the wires were all telephone wires because they were uninsulated, but some of them were defendant's electric light wires and plaintiff's hands were seriously burned. It was held that plaintiff's violation of the ordinance was no bar to his recovery. The purpose of the ordinance was obviously to regulate street traffic and not to prevent house movers from being injured by electric wires. In *Chicago & Alton R. R. Co. v. Kansas City Suburban Belt R. R. Co.*,¹⁰⁷ the defendant negligently left on the plaintiff's track some cars with which the plaintiff's passenger train collided; the defense set up was that the plaintiff was at the time engaged in violating the speed ordinance, but this was held to be no bar to recovery. The purpose of the statute here was to protect pedestrians and drivers of vehicles at public crossings, not to prevent collisions with the property of another transportation company. In *Reed v. Missouri, Pacific Ry. Co.*,¹⁰⁸ the plaintiff alleged that the defendant negligently permitted fire to escape from its engines and burn the plaintiff's rick of hay. The defense set up was that the rick of hay had been placed within one hundred yards of the defendant's right of way, in violation of a statute, but this was held not to be a bar to recovery. The decision is to be supported, if at all, upon the ground that altho the purpose of the statute was to prevent the destruction of hay ricks, the facts in the particular case were such that the hay would just as certainly have burned if it had been beyond the one hundred yard limit. This is probably what the court had in mind when it said that "it is not shown that had the plaintiff not stacked his hay within the prohibited one hundred yards of the defendant's right of way it would not have been burned." The court seems to be wrong, however, in

107. (1898) 78 Mo. App. 245.

108. (1892) 50 Mo. App. 504.

thus assuming that the burden of proving legal cause was upon the defendant.¹⁰⁹

To sum up, if the purpose of the statute or ordinance is to prevent the sort of injury of which the plaintiff complains, his violation of the statute or ordinance should bar him unless the injury would have happened just the same regardless of such violation; where the purpose was not to prevent such injuries, the plaintiff's violation is of no legal consequence.

The subject of pleading and proof in negligence cases and the subject of imputed negligence will be dealt with in a subsequent article.

GEORGE L. CLARK¹¹⁰

109. The doctrine of *res ipsa loquitur* applies only to the proof of the defendant's negligence, not to the proof of causation. *Benedick v. Potts* (1898) 88 Md. 52.

110. In the preparation of this article valuable assistance has been rendered by Sidna P. Dalton, Esq., of the class of 1918.