Scope of Duty in Negligence Cases

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If a man has failed to meet the standard of conduct required by law, his conduct may be called negligent, and in most accident cases the principal questions as to liability turn upon whether the parties have met this standard. But breach of the standard by a defendant is not always attended by liability. There are several ways in which the law limits liability for negligence. (1) It often bars recovery because of the plaintiff’s conduct (e.g., by contributory negligence); (2) it allows recovery only for items of damage which it considers as not too remote; (3) it allows recovery only where there was an antecedent duty to use care with respect to the interest invaded. The two limitations last mentioned are often used in a confused and overlapping way. We shall try, however, to examine them separately, giving attention here to the scope of the duty to take care.

Probably any system of liability for accidental injuries, whether designed primarily to punish or deter wrongdoers or to compensate victims and distribute their loss according to principles of insurance, would have to devise limits to the kinds and the items of injury for which there could be recovery. Workmen’s compensation systems certainly do this. The attempt, however, to effect part of this

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1. Attempts have been made elsewhere to treat these questions. James, Nature of Negligence, 4 Utah L. Rev. ... (1953); James, Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1 (1951); James and Sigerson, Particularizing Standards of Conduct in Negligence Trials, 5 Vand. L. Rev. 697 (1952); James, Statutory Standards and Negligence in Accident Cases, 11 La. L. Rev. 95 (1950); James, Proof of the Breach in Negligence Cases, 37 Va. L. Rev. 129 (1951). Cf. James and Dickinson, Accident Proneness and Accident Law, 63 Harv. L. Rev. 769 (1950).

2. An attempt has been made to treat the problem of proximate cause elsewhere. James and Perry, Legal Cause, 60 Yale L. J. 761 (1951).

3. Workmen’s compensation statutes typically provide that compensation will be paid for accidental injuries arising out of and in the course of employment. For discussions of the limitations which this language has been held to impose, see, e.g., Riesenfeld, Forty Years of American Workmen’s Compensation, 35 Minn. L. Rev. 524, 532 et seq. (1951); Horovitz, Injury and Death Under Workmen’s Compensation Laws Part II (1944); Riesenfeld and Maxwell, Modern Social Legislation 234 et seq. (1950).

Similar limitations have been suggested for proposed automobile compensation schemes. See Columbia University Research Council, Report by Committee to Study Compensation for Automobile Accidents 245 (1932); French, The Automobile Compensation Plan 53 et seq. (1933); cf. Grad, Recent Developments in Automobile Accident Compensation, 50 Col. L. Rev. 300, 320-325 (1950).

A distinction should be noted between systems which seek to allocate to an industry or an enterprise (and its beneficiaries) the costs of casualties attributable to its peculiar hazards, and a system of comprehensive social insurance against all vicissitudes of the body (including accident, sickness, old age, etc.). Under the latter many existing types of limitation would become unimportant. It would not matter, for example, what caused an injury or a disease (though its genuineness, its incapacitating effect and the expense of treating it, etc., would still matter). Provocative treatments of the differences between the two types of systems are found
limitation through a limitation on the antecedent duty to use care seems to be a peculiar product of the development of Anglo-American law.  

It has often been pointed out that the concept of negligence as a tort is of fairly recent origin. Early English law did not concern itself primarily with broad theories of liability, but rather with procedural remedies (the forms of action). The law of negligence started from the notion that negligence was one way to fail in the performance of a determinable legal duty, so that the courts came quite naturally to look on negligence as the correlative of a duty not to harm plaintiff in the manner of which he was complaining. This duty might arise from the public nature of defendant's calling, from his holding of a public office, from bailment, from prescription or custom, or from his control of a dangerous thing. It might also arise from private contract. It appeared "as a sort of parasitic obligation in connection with an actual contract or obligation." Later the common-law concept of negligence was extended to make a man liable for damages from the negligent performance of his own projects and undertakings, quite apart from calling, office, contract, or the like. And in time negligence came to be thought of as an independent ground of liability. But the habit of thought which more or less unconsciously made negligence correlative to an antecedent duty to use care persisted, though it was a long while before our present ideas were thought out on broad comprehensive lines. Perhaps the first attempt to do so was made by Brett, M. R., in Heaven v. Pender:

"Whenever one person is placed by circumstances in such a position in regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person


6. See Winfield, supra note 4, at 44. As the authorities cited in note 5 supra point out, the germ of liability for negligence lay in the misperformance of these obligations. Liability, if any there was, for mere non-performance was worked out along different lines. Ames, The History of Assumpsit, 2 Harv. L. Rev. 1 (1888); Holdsworth, op. cit. supra note 5, at 428-454.

7. 1 Street, Foundations of Legal Liability 188 (1906).
or property of the other, a duty arises to use ordinary care and skill to avoid such danger.\textsuperscript{78}

The majority of the Court of Appeal decided the case on a narrower ground and did not accept the broad rule, and a decade later Brett himself limited it thus:

"If one man is near another or his property, a duty lies on him not to do that which may cause a personal injury to that other or may injure his property."\textsuperscript{79}

As Bohlen has pointed out in a leading article on the subject, the test proposed by Brett was a fairly accurate one as applied to a man's affirmative conduct in situations where the victim has come into contact with that conduct either involuntarily (on his part) or in the exercise of some legal right.\textsuperscript{10} The situations in which the application of the test has been denied, on the other hand, are those in which (1) the negligence complained of is a failure to take affirmative precaution—a non-feasance of a duty of care, and (2) the plaintiff has voluntarily placed himself within reach of the effects of the defendant's failure to take precautions.\textsuperscript{11}

There are several other types of situations also where, as we shall presently see, the duty to use care is limited—sometimes arbitrarily—more drastically than Brett's test would indicate.

**The Interests Protected and the Risks Protected Against**

Where defendant's affirmative conduct has injured a plaintiff who has come within reach of it either involuntarily or in the exercise of some legal right, there is usually no occasion to discuss the question of duty because plaintiff is obviously within the scope of any test that is likely to be adopted. A common case is a collision on the highway where nearly everyone has a right to be and each traveler owes other travelers the duty of reasonable caution.\textsuperscript{12} But even in cases where such a duty clearly exists, at least two views are possible as to the extent of that duty. Under one view it would be owed to all the world with respect to any injury that might in fact be caused by a breach of the duty.\textsuperscript{13} Under the other view inquiry is made into *why* the particular act or omission

\begin{itemize}
\item \textsuperscript{78} Heaven v. Pender, 11 Q.B.D. 503, 509 (1883).
\item \textsuperscript{79} Le Lievre v. Gould 1 Q.B. 491, 497 (1893) (italics added).
\item \textsuperscript{81} Id. at 22, Studies at 36.
\item \textsuperscript{82} 12. The duty in these cases is so clear that there was no need to plead it in the common-law action on the case, and there is no such need under modern rules. See, e.g., CLARK, CODE PLEADING 298 (2d ed. 1947).
\item \textsuperscript{83} 13. See Andrews, J., dissenting in Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (1928). Compare liability for injury caused by the violation of statute or ordinance under what may be called the "outlaw" theory. James, *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 104 (1950).}
\end{itemize}
complained of was negligent. This will be because the offending conduct foreseeably involved unreasonably great risk of harm to the interests of someone other than the actor. This view would limit the scope of the duty accordingly: the obligation to refrain from that particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails.14

The latter is the prevailing view.15 It means that in each case plaintiff must bring himself within the class of persons threatened by defendant's conduct. "Proof of negligence in the air, so to speak, will not do."16 The leading case on this point is Palsgraf v. Long Island R. R. Co.17 There plaintiff, a passenger standing on a station platform, was hurt by some scales which fell down on her as the result of an explosion some distance away. The explosion was caused by fireworks dropped by another passenger because an employee of defendant pushed him to help him board a crowded train. Nothing about the appearance of the package indicated its contents. The only negligence complained of was this action by the employee in pushing the unknown passenger. The Court of Appeals held that the defendant was not liable. "The conduct of the defendant's guard," explained Chief Judge Cardozo,

"if a wrong in relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her, it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. . . . If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong . . . with reference to someone else. . . . What the plaintiff must show is a wrong to herself."18

Under this rule it will be seen that the inquiry into the scope of duty is concerned with exactly the same factors as is the inquiry into whether conduct is unreasonably dangerous (i.e., negligent).

15. 38 Am. JUR., Negligence §§ 14, 18, 23, 24; 65 C. J.S. 339, 340; Restatement, Torts §281 (1934).
18. 248 N.Y. at 341-3, 162 N.E. at 99-100
Both seek to find what consequences of the challenged conduct should have been foreseen by the actor who engaged in it. Neither inquiry stops with what might be called the physical range of foreseeable harm, or with mere proximity in time or space. In both we look to see what natural forces and what human conduct should have appeared likely to come upon the scene, and we weigh the dangerous consequences likely to flow from the challenged conduct in the light of these interventions.\(^{19}\) And in this inquiry foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful man would take account of it in guiding practical conduct.\(^{20}\) Just as this broadening of the quest adds to the risks which may make conduct unreasonably dangerous, just so does it add to the range of duty. Dynamite caps carelessly left accessible to children may be long hidden or taken many miles before there is an explosion. An automobile made defectively in Detroit may be sold in Seattle or Miami before it brings harm. The victim of the explosion\(^{21}\) or the defect\(^{22}\) is none the less within the class to which the duty is owed. Moreover, the victim’s own conduct may bring him within the range of a danger which would not hurt him if he stayed where he was, and if that conduct is foreseeable a duty to the victim may be found. Thus there may be a duty to children to guard or secure objects which are dangerous to children only because of the likelihood of their own intermeddling.\(^{23}\) And the duty not to create a situation of apparent danger may be owed to the rescuer who voluntarily leaves a place of safety to encounter the peril.\(^{24}\) Under the principle presently being discussed, a duty of care would extend to the children or

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\(^{19}\) See, e.g., Mize v. Rocky Mtn. Bell Tel. Co., 38 Mont. 521, 100 Pac. 971 (1909), and Silver Falls Timber Co. v. Eastern & Western Lumber Co., 149 Ore. 126, 40 P.2d 703 (1935), both of which involve intervening inanimate forces; and cases cited notes 21-24 infra, which involve human interventions. I have recently tried to deal with these problems from the point of view of evaluating conduct (as unreasonably dangerous, or the opposite). James, Nature of Negligence, 4 Utah L. Rev. ... (1953). The same problems are often (unnecessarily, I think) treated as part of the proximate cause issue. Cf. authorities cited note 14 supra; James and Perry, Legal Cause, 60 Yale L. J. 761, 792 et seq. (1951).


\(^{22}\) See, e.g., General Motors Corp. v. Johnson, 137 F.2d 320 (4th Cir. 1943); MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

\(^{23}\) See, e.g., Lynch v. Nurdin, 1 A. & E. N.S. 29 (Q.B. 1841); Terranella v. Union Bldg. & C. Co. 3 N.J. 443, 70 A.2d 753 (1950). This, of course, is the basis of duty in attractive nuisance and playground rule cases.

the rescuer whenever their intervention is reasonably to be anticipated. Liability may however be defeated by a more restrictive test of duty. And a plaintiff may, of course, be barred from recovery by other principles if the manner and time of his intervention be foolhardy or stupid, even though there has been a breach of duty towards him.

The *Palsgraf* case also contains a suggestion that the duty, even if it is owed to the plaintiff, may be owed only with respect to the interest which is foreseeably jeopardized by the negligent conduct, and not to other interests even of the same plaintiff which may in fact happen to be injured. An act may occasionally, for instance, be negligent because it threatens property damage without involving any unreasonable threat of personal injury. Thus, in *Rasmussen v. Benson*, a defendant through carelessness furnished poisoned feed for plaintiff's stock and plaintiff became ill and died from worry over loss of the stock and damage to his dairy business. Adoption of the restriction suggested would mean that no duty was owed to plaintiff or his decedent with respect to his interest in bodily security. Very few cases have turned on such a point (as distinguished from the one next discussed) but potentially it may involve very difficult questions. In the *Rasmussen* case recovery for all items of damage was allowed. And the difficulty is avoided in

25. In cases where both the rescuer and the rescued are trespassers or licensees on defendant's land, for example, the latter may not owe the duty to exercise reasonable care towards plaintiff.


27. 248 N.Y. at 347, 162 N.E. at 101.


29. Unless, at least, the emotional disturbance and physical injury resulting therefrom are regarded as foreseeable here, and this seems a little tenuous.

30. *Scale v. G. C. & S. F. Ry. Co.*, 65 Tex. 274 (1886) (railroad negligently starting fire on right of way responsible for property of abutting owner, but not for death of owner's daughter from fighting fire), discussed in *Green, Proximate Cause in Texas Negligence Law*, 28 Tex. L. Rev. 621, 626 (1950); *Texas & Pacific Ry. v. Bigham*, 90 Tex. 223, 38 S. W. 162 (1896) (railroad which permitted defective stock pen gate fastening to remain in use liable for damage to cattle but not to shipper injured when cattle, alarmed by passing train, stampeded through defective gate). Both cases reason in terms of proximate cause.

Restatement, Torts § 81(b), comment g, (1934), adopts the limitation suggested by Cardozo. For specific criticisms, see Goodhart, *Restatement of the Law of Torts*, 33 U. of Pa. L. Rev. 968, 979 et seq. (1935); *Green, The Torts Restatement, 29 Ill. L. Rev. 582, 601 (1935).*

31. "If the courts once adopt such a distinction, then we are faced with the terrifying prospect of a whole new series of cases in which it will be necessary to consider whether or not a person has the same interest in his foot and his eye, in his two adjoining houses, in his ship and the cargo which it carries. Obviously a single distinction between bodily security on the one hand and property security on the other would be too broad." Goodhart, *Unforeseeable Consequences of a Negligent Act*, 39 Yale L.J. 449, 467 (1930). It is to be hoped that if courts follow Cardozo's suggestion at all they will not make too many refinements.

32. *Cf* however, the dissent of Carter J.: "... a breach of duty with respect to one's property cannot support an action for injury to the owner, no matter how
the rescue cases where a threat to person or property is seen to involve a threat also to the rescuer.33

There is another limitation which is widely placed on the duty to use care. In a concrete situation an act or omission is negligent because it carries an undue threat of harm from some more or less specific kind of risk. It is negligent, for instance, to entrust a loaded revolver to a twelve year old boy because the dangers of accidental discharge are unreasonably great. It is true that he may also throw it through a window or drop it on somebody's foot, but the gun is no more likely to cause harm in such ways than another object of similar size and weight, and presumably these perils are not so unreasonably great that it would be negligent to give the boy such other object.34 It could be contended, therefore, that the duty to refrain from this negligent act is owed only to protect against the kinds of hazards which were so foreseeably great as to make the act negligent, and that liability for a breach of this duty is correspondingly limited.35 Such a result would be very much like that which limits civil liability for a statutory violation to harms which are produced through the evil which the statute is aimed at.36 This limitation and the one actually imposed in the Palsgraf case are sanctioned by most modern American writers and by most courts, although in judicial decisions the result is often reached through reasoning in terms of proximate cause.38 Indeed, a professional generation ago the "cause" reasoning was used almost exclusively. But the problem is not one of cause in any meaningful sense and the scope of risk analysis has been gaining favor in recent years with both courts and commentators.89 It is doubtful whether this trend

intimate the causal connection between the act done and the bodily injury sustained, unless it be accompanied by a breach of duty with respect to the person of the owner." 135 Neb. at 251, 280 N.W. at 898.

33. Compare note 24 supra. See also Illinois Cent. R. Co. v. Siler, 229 Ill. 390, 82 N.E. 362 (1907); Liming v. Illinois Cent. R. Co., 81 Iowa 246, 47 N.W. 66 (1890) (both involving rescue of property).

34. See Carpenter, Workable Rules for Determining Proximate Cause, 20 Calif. L. Rev. 229, 231 (1932); RESTATEMENT, TORTS §281, illustration 2 (1934).

35. Even though, be it noted, both the foot and the window were exposed to the danger of being shot and so would be within the class of interests to which a duty was owed to refrain from this particular negligent act.


39. Sinram v. Pennsylvania R. Co., 61 F.2d 767 (2d Cir. 1932); Ross v. Hartman,
has made any material change in substantive results, but it has made a tremendous contribution in promoting clarity of thought.

The question whether the range of duty should be limited by the rules described heretofore in this article is an important one in theory. In favor of the limitations it may be urged that since the basis of liability for negligence is the foreseeability of unreasonable harm, the liability should be limited by the scope of the reasonable foresight. As Holdsworth has put it:

“If we are basing liability upon a negligent act, and if negligence consists in a failure to foresee results which ought reasonably to have been foreseen, it would seem that the negligent person ought only to be made liable to the extent to which he ought to have foreseen those results.”

The law has not always carried this reasoning to its logical conclusion; for instance, wherever defendant’s negligence involves a breach of duty to plaintiff, there may be liability for entirely unforeseeable consequences. That, however, does not dispose of the argument; it remains a logical though not a necessary corollary of the concept of negligence, as we have developed it, to limit the scope of duty by the very considerations that make the challenged conduct constitute a breach of duty. On the other hand, if we confine our reasoning to the framework of fault, perhaps the strongest argument for rejecting the limitation is presented: viz., that defendant’s “... act has the quality of wrongfulness, and that where one of two persons must lose, it is the wrongdoer who ought to suffer.”

From the viewpoint of those who are more concerned with the compensation of accident victims than with working out logical corollaries of the fault principle, the problem takes on a different aspect though the line defining liability is not necessarily to be drawn differently. As we have seen, if there were ever complete social insurance for bodily injury or disability, however caused, the only questions would be those as to the genuineness, or the extent of the injury, and the like. But under any less comprehensive scheme other lines will have to be drawn. If a system of compensation for motor vehicle accidents were adopted, for instance, it might very


40. It has been suggested that the analysis in terms of duty rather than proximate cause tends to restrict the jury’s sphere, but even this is doubtful. See p. 814 et seq. infra.

41. Holdsworth, op. cit. supra note 5, at 463.

42. James and Ferry, Legal Cause, 60 Yale L.J. 761, 790 et seq. (1951).

well extend only to accidents which were the foreseeable results of the hazards of motoring.\textsuperscript{44} And while this line is drawn in terms of statutory coverage rather than common-law duty, it might approximate the location of the present line.\textsuperscript{45} While the concept of duty is a limitation on the scope of liability, the limitation need not be severe. As may be seen elsewhere\textsuperscript{46} in negligence, the concept of foreseeability is elastic, and as knowledge increases and the pressure towards social insurance grows, the limitation will probably be pushed further and further back. Moreover, despite broad uncritical statements, there is no compelling reason why the leavening influence of the jury should not be employed upon this issue.\textsuperscript{47}

The question whether duty shall be limited by foreseeability in the manner just discussed is one side of the problem. On the other side is the question whether the duty to use care shall extend to cover the whole range of foreseeability. We have seen that this question troubled the Court of Appeal in \textit{Heaven v. Pender}, and that it is most acute when the inquiry relates to possible affirmative obligations or to the duty towards those who have voluntarily chosen to come in contact with defendant's conduct or his property. But it is not confined to those situations. There are other limitations which stop inquiry short of the bounds of that which is foreseeable, and these will be examined first.

There are some interests to which the law simply has not extended protection from injury through negligence even where such injury may be readily foreseen. Thus, until quite recently no action could be maintained on behalf of a child who was born deformed or maimed because of prenatal injuries brought about through defendant's negligence, nor on account of the death of such child similarly produced, whether the death occurred before or after birth.\textsuperscript{48} Under such a rule the law refuses, in effect, to protect from

\textsuperscript{44} Compare note 3 supra.

\textsuperscript{45} Ehrenzweig suggests a substitution of the risks that are typical of an enterprise or activity, for the risks which are to be foreseen as unreasonably likely results of the specific act or omission challenged as negligent. \textit{Ehrenzweig, Negligence Without Fault 52 et seq.} (1951). See Note, 63 HARV. L. REV. 671 (1950).

\textsuperscript{46} Harper, \textit{The Foreseeability Factor in the Law of Torts, 7 Notre Dame Law. 468} (1932); James and Perry, \textit{Legal Cause, 60 Yale L.J. 761, 785 et seq.} (1951); James, \textit{Nature of Negligence, 4 Utah L. Rev. ...} (1953).

\textsuperscript{47} See p. 815 infra.

\textsuperscript{48} The first decision in England or America seems to be Dietrich v. Northampton, 138 Mass. 14 (1884). This was widely followed. \textit{E.g., Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900); Stemmer v. Kline, 128 N.J.L. 455, 26 A.2d 489 (1942); Drobner v. Peters, 232 N.Y. 220, 135 N.E. 567 (1921); Berlin v. J. C. Penney Co., 339 Pa. 547, 16 A.2d 28 (1940); Magnolia Coca Cola B. Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935). See also Walker v. Mt. No. Ry. Co. of Ireland, 28 L.R. Ir. 69 (Q.B. Div. 1890); Frey, \textit{Injuries to Infants En Venta Sa Mere, 12 St. Louis L. Rev. 85} (1927); Muse and Spinella, \textit{Right of Infant to Recover for Prenatal Injury, 36 Va. L. Rev. 611} (1950); RESTATEMENT, Torts §69 (1939). "Prior to 1949 no American court of last resort had permitted recovery,
negligent invasion the interest of an unborn child in freedom from bodily harm or death. It also refuses to protect the interests of the after-born child from the risk of prenatal injury. A good many states still adhere to this restrictive rule.\textsuperscript{49} It is rested on considerations of administrative convenience and the fear of fraudulent claims, and also on the conceptual difficulty of finding a “person” to whom the duty of care is owed.\textsuperscript{50} None of these reasons justifies the full extent of the rule and it has been yielding ground in recent years.\textsuperscript{51}

The difficulty of proof and the concomitant opportunity for the too-easy fabrication of false claims have played an important part in justifying the denial of relief. As one court has put it “a rule of right may well be founded upon the inherent and inevitable difficulty or impossibility of proof.”\textsuperscript{52} Ordinarily the mere difficulty of proving something is no valid reason for forbidding all attempts to prove it. The rules of evidence and the requirements as to sufficiency of evidence (both of which are administered by the court) are generally thought sufficient safeguards against the danger that juries will find facts without legally adequate proof.\textsuperscript{53} A categorical prohibition of attempts at proof must here be justified upon an assumption that false but legally sufficient evidence will be not only offered but also accepted by the tribunal, in cases of this kind, more often than true evidence will be. Such an assumption not only shows a cynical lack of faith in the ability of our courts and juries to sift the true from the false, but it is a highly questionable one in fact. Small wonder then that a growing number of courts feel it is an

\footnotesize{in the absence of statute.” Note, 50 Mich. L. Rev. 166, 167 (1951). Several of the decisions cited above, however, reversed lower court opinions (e.g., the Stemmer and the Drobnar cases), and some were made over strong dissent (e.g., the Allaire case in which the dissent by Boggs, J., has been a rallying point for the more liberal point of view, and the Stemmer case wherein five judges dissented).


inadequate basis for denying all remedy in cases where there is a serious and genuine injury.\textsuperscript{54}

The lack of a "person" in being to whom the duty of care may be owed has often troubled courts, though it should not in cases where the child is later born alive and suffers after birth the results of the injury. For one thing, the law has not hesitated to find a child in its mother's womb to be already a person for many other purposes, whenever that is necessary to prevent injustice.\textsuperscript{55} There is no purely logical obstacle in the way of using the same reasoning here, if it is needed. But in truth there is no such need. Perhaps the root of the trouble has been a pseudo-practical consideration. A Texas court has said that the reasonable man "reckons life from the time of birth. His conscious care and solicitude are for the expectant mother and not for the unborn child apart from her."\textsuperscript{56} If this amazing statement means that present traumatic injury to a pregnant woman cannot reasonably be seen to endanger the foetus or the after-born child, it flies in the face of medical knowledge which is widely shared (in its rough outlines) by laymen.\textsuperscript{57} If it is meant in any narrower sense, it misses the point. If I negligently run into a bakery truck, my "conscious care and solicitude" may be only for the solitary driver, the truck, and the pies. Yet if the back of the truck is filled with children, I am liable to them too if they are hurt. And the improper canning of baby food today is negligence to a child born next week or next year, who consumes it to his injury. The limitation of the Palsgraf case contains no requirement that the interests within the range of peril be known or identified in the actor's mind, or even be in existence at the time of the negligence.\textsuperscript{58}

If the foregoing analysis were to be followed, there would be no impediment to recovery by a child (or by his estate if he dies after

\textsuperscript{54} See cases note 51 supra. In Woods v. Lancaster, the New York court said: "The questions of causation, reasonable certainty, etc., which will arise in these cases are not different, in kind, from the ones which have arisen in thousands of other negligence cases decided in this State, in the past." 303 N.Y. at 356, 102 N.E.2d at 693.

\textsuperscript{55} See Thellusson v. Woodford, 4 Ves. 227, 322 (Ch. 1798, 1799). To a contention that a child en ventre sa mere was a non-entity, Butler, J., said "Let us see what this non-entity can do. He may be vouched in a recovery, though it is for the purpose of making him answer over in value. He may be an executor. He may take under the Statute of Distributions. He may take by devise. He may be entitled under a charge for raising portions. He may have an injunction; and he may have a guardian."

\textsuperscript{56} Magnolia Coca Cola B. Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944, 949 (1935).

\textsuperscript{57} See authorities cited note 51 supra; Maloy, Legal Anatomy and Surgery 685 (1930).

\textsuperscript{58} Cf. Kine v. Zackerman, 4 D. & C. 227, 230 (Phila. Pa. C.P. 1924); Note, 63 Harv. L. Rev. 173 (1949). Seavey has pointed out that while liability for negligence extends only to those likely to be affected by the negligent conduct, yet "... these may be unknown or unknowable persons..." Seavey, Book Review, 45 Harv. L. Rev. 209, 210 (1931). This point is apparently overlooked in Note, 51 Mich. L. Rev. 315 (1952).
birth) for damages suffered after birth as a proven consequence of prenatal injury. The recent cases relaxing the rule have not however gone this far. Most of them have stressed the fact that plaintiff was a viable child at the time of injury, though they have not involved a denial of recovery where injury occurred before the child was viable. It is to be hoped that no such requirement will emerge. Its only purpose would be to show that plaintiff was in existence when the negligence occurred and this is a purpose that need not be fulfilled. Further, any such rule would involve the courts in serious and controversial questions that should be encountered only if there is real need for it.

What has been said leaves untouched the case where prenatal injury results in death of the child before birth. Here, of course, the mother may recover for her injury including the miscarriage, and the only question is whether the estate of the unborn child may have a separate recovery. To allow it would recognize an interest in being born alive. And however great the spiritual and moral value of such an interest, its claim to pecuniary compensation is far more tenuous and doubtful than that of the child who lives to bear the seal of defendant's negligence with all the conscious suffering and economic loss it may entail. Few cases have allowed separate recovery where the child is not born alive, and perhaps this is the fairest and most practical place to draw the line. It, too, would make arbitrary distinctions—as between the child killed just before delivery and one who dies just after—but this sort of thing will be encountered wherever there must be a borderline. Perhaps also there should be a qualification that the child be viable at the time of birth.

Another interest that has received incomplete protection from negligent invasion is that in freedom from disagreeable emotional disturbance. If such disturbance neither results from nor leads to some kind of bodily injury or sickness there may generally be no

60. A child is viable when it can live apart from its mother.
61. In all the cases cited in note 51 supra, the child was viable when injured, and a number of the opinions stress that point as significant. See also Lipps v. Milwaukee E. Ry. & L. Co., 164 Wis. 272, 159 N.W. 916 (1916); Note, 10 A.L.R.2d 1059 (1950).
62. See Note, 35 Cornell L.Q. 648 (1950); authorities cited note 59 supra.
63. Snow v. Allen, 227 Ala. 615, 151 So. 468 (1933). This was also recognized by the court in the Allaire and Dietrich cases, cited note 48 supra. Cf. Prescott v. Robinson, 74 N.H. 460, 69 Atl. 522 (1908) (mother may not recover for deformity of child either before or after birth caused by prenatal injury).
On the other hand, the mother is not allowed to recover for the loss of the child, as such, or its society or prospective earnings. Sullivan v. Old Colony St. R. Co., 197 Mass. 512, 83 N.E. 1091 (1908); Tunnieleiffe v. Bay Cities Consol. R. Co., 102 Mich. 624, 61 N.E. 11 (1894).
recovery for it against a defendant who has been merely negligent. 64 Fright, humiliation, indignation, or anger standing alone, will not constitute the kind of legal damage needed to support an action for negligence in causing them. This is true even though defendant's conduct threatened plaintiff with serious bodily harm (and so, constituted a clear breach of duty towards him), and though the emotional reaction was altogether foreseeable. Liability is denied because the injury is thought too trivial to warrant imposing the burden of liability upon the merely negligent actor, or the burden of administering such claims upon society. 65

Where, however, defendant's negligence has brought about bodily injury through physical trauma or impact, the law freely allows recovery for many kinds of emotional disturbance that result from the injury. Such damages have aptly been called "parasitic". 66 They may include fright, mental anguish, and the like, 67 and also suffering and disability caused by traumatic neurosis. 68


Exceptions to this general rule are recognized occasionally, where there has been negligent misdelivery or non-delivery of a death message by a telegraph company, and where there has been negligent interference with burial right in a corpse. See Harper, Law of Torts §67 (1933); Prosser, Torts 216 (1941); Note, 17 A.L.R.2d 770 (1951); McNeice, Psychic Injury and Tort Liability in New York, 24 St. John's L. Rev. 1, 33 (1949). Cf. Owens v. Liverpool Corp., [1939] 1 K.B. 394. The interest in freedom from disagreeable emotional disturbance is, of course, often protected against invasion by intentional or willful and wanton misconduct. Smith, supra at 229.

Since the Smith article contains the most exhaustive collection of cases there is on this whole problem, frequent references will be made to it to avoid compounded citation here. In addition to the articles already cited in this note, the general subject discussed in the text is treated in Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact, Studies in the Law of Torts 252 (1926), reprinted from 41 Am. L. Reg. (N.S.) 141 (1902); Throckmorton, Damages for Fright, 34 Harv. L. Rev. 260 (1921); Goodrich, Emotional Disturbance as Legal Damage, 20 Mich. L. Rev. 497 (1922); Wilson, The New York Rule as to Nervous Shock, 11 Corn. L.Q. 512 (1926); Bohlen and Polikoff, Liability in New York for the Physical Consequences of Emotional Disturbance, 32 Col. L. Rev. 409 (1932); Green, Fright Cases, 27 Ill. L. Rev. 761 (1933); Hallen, Damages for Physical Injuries Resulting from Fright or Shock, 19 Va. L. Rev. 253 (1933); Hallen, Hill v. Kimball—A Milepost in the Law, 12 Tex. L. Rev. 1 (1933); Campbell, Injury Without Impact, [1951] Ins. L.J. 654.

65. McNeice, supra note 64, at 26; Smith, supra note 64, at 208 n. 34, 228.

66. 1 Street, Foundations of Legal Liability 461 (1906). It will be noted here that an ambiguity lurks in the term "damage." Mere fright, etc., is not the type of legal damage that is a necessary element of a right of action for negligence; but if that element is otherwise supplied (as by traumatic physical injury), the emotional disturbance may be considered in assessing damages. See Harper, Law of Torts §67 (1933).

67. This is conceded on all hands. See, e.g., 15 Am. Jur. 593; 25 C.J.S. 549.

68. This too is now well settled, both in tort and workmen's compensation cases. See, e.g., Shulman and James, Cases and Materials on Torts 472 et seq. (2d ed. 1952). An exceedingly valuable and thorough collection of tort cases appears in Appendix B to Smith and Solomon, Traumatic Neuroses in Court, 30 Va. L. Rev. 87, 164 (1943). Appendix A to the same article collects cases of "Neurosis
Where there was no physical trauma or impact, but bodily injury or sickness was brought about by emotional disturbance (fright, or the like) Anglo-American courts originally tended to deny liability.\textsuperscript{69} Some said such injuries were not proximately caused by the negligence;\textsuperscript{70} most found the difficulties of proof too great and the dangers of manifold fictitious claims not readily capable of disproof,\textsuperscript{71} and looked upon impact as a "guaranty of merit to counterbalance risks of fraud."\textsuperscript{72} Fear that even genuine claims of this kind would impose an impossibly high standard of conduct and make the burden of liability too great, also lurked in the background.\textsuperscript{73} In many cases all this meant that, on grounds of extrinsic policy, defendant's duty was not extended to some risks which were altogether natural and probable.

The more recent trend, in the British Empire as well as America, has been away from this mechanical requirement of impact. Where defendant's conduct is intentional, or wilful and wanton, or constitutes a technical trespass or other legal wrong (which is complete without a showing of damage), recovery has often been allowed for emotional disturbance and its consequences.\textsuperscript{74} This has been so for a long time, but there has been an extension of liability along this line in recent years.\textsuperscript{75} Further, the impact rule has not been applied to require that the force proceed directly from defendant to plaintiff; emotional disturbance may be a link in the chain of cause that produces the physical trauma. Thus, if defendant's negligent conduct causes plaintiff to jump for his life,\textsuperscript{76} or to faint and fall,\textsuperscript{77} the impact rule does not preclude recovery for injury sustained from the jump or the fall (even where that injury comes from a wrenching

Following a Trivial Impact or Psychic Stimulus." Appendix C collects workmen's compensation cases involving traumatic neuroses.


\textsuperscript{70} See, \textit{e.g.}, Mitchell v. Rochester Ry. Co., supra note 69. In the \textit{Spade} case, supra note 69, Justice Allen conceded that proximate cause could often be shown in these cases.

\textsuperscript{71} This argument is stressed, for example, in all the cases cited in note 69 supra. An able statement of it occurs in Kalen v. Terre Haute & I.R. Co., 18 Ind. App, 202, 213, 47 N.E. 694, 697-8 (1897).

\textsuperscript{72} Smith, supra note 64 at 207.

\textsuperscript{73} See, \textit{e.g.}, Spade v. Lynn & B. R. Co., note 69 supra.

\textsuperscript{74} See note 64 supra. The oldest example of this was a case decided in 1348.


An exhaustive collection of cases may be found in Appendix A to Smith, supra note 64, at 306.


of the body rather than from external contact). Moreover, the rule has been found satisfied by the most trivial of impacts. Altogether it has come to lack substance and invite easy circumvention by the very litigants whose fraud it was designed to guard against. Little wonder then that many Anglo-American jurisdictions have come to repudiate the requirement of impact, so that it is distinctly the minority rule today.

The repudiation of the impact rule, however, has not solved all problems nor ended all limitations. Many of the problems it was aimed at were real enough. In addition to the danger of false claims, the fact looms large that in many of these cases there would be no substantial injury to the vast majority of men. Plaintiff suffers (even if honestly) because of his peculiar vulnerability or idiosyncrasy by way of pre-existing neurotic impairment. Now the impact rule, just as it fails to weed out false claims, also fails to discriminate between stimuli which would induce serious psychic consequences in normally constituted people and those which would do so only in people already peculiarly vulnerable. It seems fairly clear that the significant distinction for this purpose turns on the severity of the stimulus, without regard to whether trauma is physical or psychic. Some of these problems are currently solved by resort to prevailing tort principles, but some mechanical limitations linger. It remains to examine and appraise the current rules. (1) Generally defendant's standard of conduct is measured by the reactions to be expected of normal persons. Ordinarily he does not have the duty to be careful not to shock or frighten people. Activity may be geared to a workaday world rather than to the hypersensitive. It may


80. In an article describing and criticizing the impact rule in New York, McNiece concludes, "The only one who is defeated is the honest litigant who will not falsify, and who, if he does not come squarely within an exception, will not obtain redress for an injury which everyone agrees was foreseeable and culpably caused by another." McNiece, supra note 64, at 80-81.


82. On the basis of a study of 301 reported cases of this type, Smith concluded that in a substantial majority (175) of them, "The described stimulus was medically inadequate to produce injurious psychic reactions in an average person." Smith, supra note 64, at 281, 282.

83. Smith and Solomon, supra note 68.

84. See the valuable discussion of this point in the opinion of Lord Wright in Hay v. Bourhill v. Young, [1943] A.C. 92, 109, 110. Compare Braun v. Craven, 175 Ill. 401, 51 N.E. 657 (1898); Haas v. Metz, 78 Ill. App. 46 (1898). Conduct
be otherwise, however, if defendant has knowledge or notice of the presence of idiosyncracy in any given case. This, of course, is the application of a pervading principle of tort law. (2) Defendant's conduct must involve foreseeable risk of harm to a class of people which includes plaintiff. This principle is one of the primary subjects of the present article. In the present context, it may come into play in two kinds of situations. Defendant's conduct may threaten unreasonable harm to plaintiff through impact (though in the event, impact is barely missed). Such cases raise no serious question on the present score. In other cases, however, plaintiff is outside the zone of physical risk (or there is no risk of physical impact at all), but bodily injury or sickness is brought on by emotional disturbance which in turn is caused by defendant's conduct. Under general principles recovery should be had in such a case if defendant should foresee fright or shock severe enough to cause substantial injury in a person normally constituted. Plaintiff would then be within the zone of risk in very much the same way as are plaintiffs to whom danger is extended by acts of third persons or forces of nature or their own responses (where these things are foreseeable). If on the other hand injury comes to plaintiff because of

is not negligent merely because it foreseeably threatens to frighten people "unless reasonable anticipation would have shown that the fright was likely to have such [serious] consequences as to call for its avoidance." Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 337, 150 Atl. 540, 544 (1930). This reasoning may account for such cases as Herrick v. Evening Pub. Co., 120 Me. 138, 113 Atl. 16 (1921) (negligent insertion of false death notice).


If defendant's conduct will foreseeably expose a large and undetermine number of the public to danger, he may well be held to foresee the likelihood of some peculiarly vulnerable people. Compare Gerkin v. Brown & Scheler Co., 177 Mich. 45, 143 N.W. 48 (1913); Note, 49 Mich. L. Rev. 253 (1950) (duty of care in allergy cases). See discussions in the Chiuchiolo case; in the dissenting opinion of Evatt, J., in Chester v. Waverley Corporation, 62 Com. L. R. 1, 25, 26 (High Ct. Australia, 1939); and in Smith, supra note 64, at 261 et seq.

86. E.g., Orlo v. Connecticut Co., 128 Conn. 231, 21 A.2d 402 (1941); Purcell v. St. Paul City Ry. Co., 48 Minn. 134, 50 N.W. 1034 (1892). The statement in the text is not meant to suggest that there should always be recovery in these cases, but simply that they do not raise a serious question as to whether plaintiff is within the class of those to whom the duty of care is owed with respect to the act or omission that threatens the impact. Compare notes 98-101 infra.


89. As in the rescuer cases. See discussion, pp. 802-05 infra. Lord Wright draws on this analogy in his opinion in Hay or Bourhill v. Young, [1943] A.C. 92, 108. See also Note, 26 Temple L.Q. 210 (1952). Recovery was allowed on some such basis in the Urban and Rasmussen cases, supra note 88. Cf., e.g., Kirby v. Jules Chain Store Corp., 210 N.C. 508, 188 S.E. 625 (1936); Stockwell v. Gee, 121 Okla. 207, 249 Pac. 389 (1926); Gadbury v. Bleitz, 133 Wash. 134, 233 Pac. 299 (1925). All involved some basis of liability other than negligence, but not the threat of physical harm to plaintiff. See Note, 15 A.L.R.2d 108 (1951).
his peculiar susceptibility from a stimulus which would not evoke that response in a normal person, then plaintiff is not within the zone of risk.\textsuperscript{90} There is good reason to believe that this rational test would be hard enough to meet according to currently accepted medical notions,\textsuperscript{91} but the law has not everywhere been content to embrace it and the retreat from the "impact rule" has been marked by rear-guard actions in which other mechanical rules have cut off duty short of the full range of the reasonably foreseeable. Thus some courts flatly refuse to extend duty here to any plaintiff outside the zone of physical peril;\textsuperscript{92} many flatly deny liability to those who did not witness first hand the original tragedy;\textsuperscript{93} several have required that the emotional disturbance be fear for oneself (rather than fear for another, etc.).\textsuperscript{94} These rules again spring largely

\begin{footnotesize}
\textsuperscript{90} Hay or Bourhill v. Young, [1943] A.C. 92 (see particularly opinion of Lord Wright at 106 et seq.); Cook v. Village of Mohawk, 207 N.Y. 311, 100 N.E. 815 (1913); Denison, B., & N.O.R. Co. v. Barry, 98 Tex. 248, 83 S.W. 5 (1904). Plaintiff in the Hay case was a bystander in no danger from a traffic collision between people who were strangers to her. In the \textit{Cook} and \textit{Barry} cases defendants negligently flooded plaintiff's home but caused no appreciable threat of drowning or the like. Two of the plaintiffs were pregnant women (no doubt also predisposed to neurosis), the third plaintiff (also a woman) had a fibroid tumor that made her excessively nervous.

\textsuperscript{91} See Smith and Solomon, \textit{supra} note 68; Smith, \textit{supra} note 64. Compare Note, 15 U or Chi. L. Rev. 188 (1947) ("The inescapable conclusion from medical evidence is that fright is not a cause of abortion.") Note, however, that most of these cases involve miscarriage rather than abortion, the difference being in the degree to which pregnancy has advanced.

\textsuperscript{92} Resavage v. Davies, 86 A.2d 879 (Md. 1952) (mother witnessed both daughters killed by defendant's negligence); Wauhe v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935) (\textit{seemle}). \textit{Compare} Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950). In Hambrook v. Stokes Bros., [1925] 1 K.B. 141, recovery was allowed on account of injury suffered by a mother from shock at seeing her child run down, though the mother was apparently in no personal danger. \textit{Cf.} Frazee v. Western Dairy Products, 182 Wash. 578, 47 P.2d 1037 (1935).

Where plaintiff is out of the zone of physical peril and the victims in the accident are not related to him, injury to him through shock would rarely be foreseeable (so as to bring plaintiff within the scope of the duty). Hay or Bourhill v. Young, [1943] A.C. 92 (bystander); Blanchard v. Reliable Transfer Co., 71 Ga. App. 843, 32 S.E.2d 420 (1944). \textit{But compare} Rasmussen v. Benson, note 88 \textit{supra}.

\textsuperscript{93} Chester v. Waverley Corporation, 62 Com. L. R. 1 (High Ct., Australia, 1939) (plaintiff's son drowned in negligently exposed ditch; plaintiff suffered injuries from shock at seeing body of son recovered after harrowing search); Cote v. Litawa, 96 N.H. 174, 71 A.2d 792 (1950) (mother's injury from shock at learning of injury to daughter immediately after its occurrence). In Hambrook v. Stokes Bros., [1925] 1 K.B. 141, 152, the decision was expressly \textit{not} based on the circumstance that the mother later saw her child at the hospital. See, however, dissenting opinion of Evatt, J., in the \textit{Chester} case, 62 Com. L. R. 14, and of Markell and Delaplane, J.J., in Resavage v. Davies, 86 A.2d 879 (Md. 1952). Lord Wright thought "The dissenting judgment of Evatt J. will demand the consideration of any judge who is called on to consider these questions." Hay or Bourhill v. Young, [1943] A.C. 92, 110. \textit{Cf. Comment, An Australian Shock Case, 55 L. Q. Rev. 493 (1939)}.

\textsuperscript{94} This limitation was suggested by Kennedy, J., in Dulieu v. White & Sons, [1901] 2 K.B. 669, 675-76. It has been suggested in American cases where it was not needed to defeat liability, as in Cleveland, C.C. & St. L. R. Co. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900) (adoption of impact rules cut off \textit{all} damages from fright alone). It has been occasionally applied. Southern R. Co. v. Jackson, 146 Ga. 243, 91 S.E. 28 (1916); Sanderson v. Northern P. R. Co., 88 Minn. 162, 92
from worry over the matter of proof and such matters should presumably be handled by rules directly addressed to proof (e.g., requirement of expert witnesses, insistence that proof be clear and convincing). (8) Even where plaintiff is within the physical zone of risk, the duty to refrain from specific conduct is owed to him only with respect to the type of risk or hazard the foreseeability of which made that conduct negligent. And conduct which foreseeably threatens physical harm from bodily impact does not necessarily threaten physical harm from emotional disturbance without bodily impact. Common sense and medical science both tell us that there must be a "psychic stimul[us] of a very harrowing variety" before there is such a threat to people of average sensibilities. Thus, ordinary negligence in driving an automobile exposes people to unreasonable risk of physical trauma, but it does not under ordi-


The requirement of plaintiff's fear for self often leads to the same result as the insistence that plaintiff be within the zone of physical risk. But the notions are analytically different and need not yield the same results in all cases. Maryland, for instance, rejects the former but embraces the latter. Compare Bowman v. Williams, 164 Md. 397, 165 Atl. 182 (1933), with Resavage v. Davies, 86 A.2d 879 (Md. 1952).

See Restatement, Torts §313 (1934).

95. See discussion in Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935) (court felt the problem could not be solved by logic, nor is it clear that it can be entirely disposed of by a consideration of what the defendant ought reasonably to have anticipated); compare Urban v. Hartford Gas Co., supra note 88. Smith, supra note 66, at 274-277; Chester v. Waverly Corporation, supra note 93, at 33.


97. Cf. Clark v. Diefendorf, 109 Conn. 507, 514, 147 Atl. 33, 35 (1929) (claim against decedent's estate); Susquehanna S.S. Co. v. A. O. Anderson & Co., 239 N.Y. 285, 146 N.E. 381 (1925) (claim of mutual mistake). Perhaps the mechanical rules noted in the text spring from fear that dishonest or irresponsible medical testimony would too often be available to contradict what the court assumes to be the true medical theory (and that the court would then be bound to submit the conflict among experts to the jury). Such an assumption, however, is risky unless it represents a demonstrable or universally accepted proposition. If it does, the court may well feel sure enough to invoke judicial notice. Cf. Smith, supra note 68, at 283, 284. Generalizations, or rules of thumb, might be consciously evolved from such a process. If so, they would correspond more closely to scientific notions than do the present arbitrary rules.

98. See p. 789 supra. This conclusion is in flat contradiction to that in Restatement, Torts §436(2) (1934), which chooses to apply here the concept of proximate cause and the notion that the unusual manner in which harm is brought about does not break the chain of proximate cause. Cf. James and Perry, Legal Cause, 60 Yale L. J. 761, 797 et seq. (1951). In order to accommodate the difficulties here discussed, resort is then had to mechanical limitations (see comment c) and a caveat mentioning possible "unreliability of testimony," and need for further restrictions "as a matter of administrative policy."

The position taken here, it is submitted, has the advantage of making the needed limitation fit in better with both legal and medical theory. Cf. Smith and Solomon, supra note 68; Smith, supra note 64; Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930).

99. See Smith, supra note 64, at 121.
nary circumstances involve unreasonable likelihood of bodily injury through psychic trauma to those who are not actually hit.\(^\text{100}\) Most of us have survived (without harm) many a close shave in traffic. Greater likelihood of this kind might exist, however, as to the mother who witnesses her child killed before her eyes by the very same negligent driving (whether the mother is herself within the zone of physical peril or not). And in other situations, conduct which creates foreseeable risk of a great catastrophe (e.g., a railroad wreck) might well be foreseen to create a wider risk of injury through psychic trauma.\(^\text{101}\)

It is submitted that these questions will be solved most justly by applying general principles of duty and negligence,\(^\text{102}\) and that mechanical rules of thumb which are at variance with these principles do more harm than good.

Another line of restrictive cases involved a defendant who has negligently misperformed his contract with \(X\) in such a way as to endanger the life and limb of a wide circle of people (as by making an automobile with defective brakes, or installing a defective passenger elevator). For years the contractor's duty of care was limited to parties to the contract. The progenitor of this line of cases, \(\text{Winterbottom v. Wright,}^\text{103}\) was decided in 1842 before clear recognition of negligence as an independent basis of liability and of the distinction between tort and contract. The declaration (which was in \textit{case}) averred that defendant had contracted with the Postmaster General to furnish and keep in repair a mail coach but had negligently failed to keep it in good condition. Plaintiff, coachman for another contractor with the Postmaster General (to carry the mail), was hurt when the coach broke down because of its defective condition. The duty to use care towards this plaintiff could not be supported as an incident to the contract, nor did it arise from

\(^{100}\) Whether one who is actually hit may recover for, \(e.g.,\) traumatic neurosis which results from the injury only because of his idiosyncratic condition, is a question of extent of damages rather than duty. \textit{Cf.} note 68 \textit{supra.}

\(^{101}\) So that, \(e.g.,\) a participant in such a wreck whose injuries resulted entirely from psychic trauma might well be allowed to recover, where the narrowly missed pedestrian might not. See, as suggestive merely, Denver \& R.G.R. Co. v. Roller, 100 Fed. 738 (9th Cir. 1900) (plaintiff injured in wreck allowed to recover for results of shock induced by all the horrid circumstances of wreck).

\(^{102}\) While this would involve a repudiation of the kind of mechanical limitation dealt with at notes 92-94 \textit{supra,} it would also involve a rejection of some of the decisions favoring recovery such as Owens \& Liverpool Corp., \(1939\) 1 K.B. 394. See opinion of Lord Wright in Hay or Bourhill v. Young, \(1943\) A.C. 92, 110. Compare also note 98 \textit{supra.}

Another interest that has received incomplete protection from negligent invasion is that in contract relations. Harper, \textit{Interference with Contract Relations,} p. 873 \textit{infra.}

\(^{103}\) \(10\) M. \& W. 109 (Ex. 1842).
status, public calling or the like; no broader basis had yet been worked out.\textsuperscript{104} so no duty was found.\textsuperscript{105}

Lord Abinger and Baron Alderson were appalled at the breadth of liability opened up by plaintiff's argument. "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."\textsuperscript{106} Their strong dicta\textsuperscript{107} set the pattern for English and American decisions for over half a century. Additional reasons were found for the restrictive rule. Often the contractor had parted with control over the subject of the contract, and it was felt that his responsibility should end with his control.\textsuperscript{108} Often, too, the other party to the contract had negligently omitted to inspect or remedy the defect and some courts felt that this negligence—intervening between the contractor's fault and the injury to the third party—insulated the contractor from liability.\textsuperscript{109}

\textsuperscript{104} The case was however argued for plaintiff along modern lines. \textit{Id.} at 112.


\textsuperscript{106} 10 M. & W. 114. Apparently Lord Abinger thought that possible recovery by passengers or bystanders injured by the defective coach would be among such absurd and outrageous consequences. \textit{Id.} at 114. Baron Alderson said "The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason why we should not go fifty." \textit{Id.} at 115.

\textsuperscript{107} These expressions were a good deal broader than anything the decision called for. The case came up on demurrer (to the plea, but this "searched the record" and the decision turned on the sufficiency of the declaration) and the plaintiff alleged no misfeasance or affirmative negligence, but simply negligent failure to perform the contract. While the distinction between nonfeasance and misfeasance may be illusory and often hard to justify, yet it is frequently made and would account for the decision in this case under many modern cases. See, e.g., Moch v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928); Hanson v. Blackwell Motor Co., 143 Wash. 547, 255 Pac. 939 (1927). See analysis in Bohlen, \textit{Liability of Manufacturers to Persons other than their Immediate Vendees}, 45 \textit{L.Q. Rev.} 343, n. 1 (1929). Compare p. 807 infra.

\textsuperscript{108} Lebourdais v. Vitrified Wheel Co., 194 Mass. 341, 80 N.E. 482 (1907); Albany v. Cunliff, 2 N.Y. 165 (1849); Berg v. Otis Elevator Co., 64 Utah 518, 231 Pac. 832 (1924). See discussion of this point in Note, 22 \textit{Minn. L. Rev.} 709 (1938). Where it can be shown that defendant was negligently responsible for the defect that caused the injury (and that he could then have foreseen probability of injury to plaintiff) it should not matter that he was not in control of the injuring instrumentality at the time of the injury. Cf. James, \textit{Proof of the Breach in Negligence Cases}, 37 \textit{Va. L. Rev.} 179, 204 et seq. (1951).

\textsuperscript{109} See, e.g., Huset v. J. I. Case Threshing Machine Co., 120 Fed. 865 (8th Cir. 1903); Howard v. Redden, 93 Conn. 604, 107 Atl. 509 (1919); Note, 13 \textit{A.L.R.} 2d 191, 207 (1950). This will be recognized as an aspect of the last wrongdoing limitation which is generally repudiated. As a rule the negligent failure of a third person to take precaution which would have saved plaintiff from the consequences of defendant's wrong does not insulate defendant from liability. Gilbert v. New Mexico Constr. Co., 39 N.M. 216, 44 P.2d 489 (1935); James and Perry, \textit{Legal Cause}, 60 Yale L. J. 761, 796 (1951); \textit{Restatement}, \textit{Torts} §452 (1934). And it should not do so in these cases. Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949). Compare, however, note 128 infra.
The restrictive rule was applied to manufacturers with respect to defects in their products\(^{110}\) as well as to builders and other contractors.\(^{111}\) But even as the rule was spreading and broadening, “requirements of justice in particular cases impelled the courts to make exceptions to it.”\(^{112}\) A case decided in 1903\(^{113}\) sought to sum up those that had then developed. In doing so, however, the court failed to grasp the living principle that was striving for expression, and formulated the exceptions in sterile and mechanical terms which unfortunately exerted wide influence and had a stifling effect on the further development of the law for some time to come. The first exception was an act of negligence which is “imminently dangerous to the life or health of mankind and which is committed in the preparation or sale of an article intended to preserve, destroy or affect human life.”\(^{114}\) The second involved defendant’s invitation to plaintiff to use the defective appliance.\(^{115}\) The third exception applied to “one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities”—he is liable to any one who might foreseeably be hurt by the danger.\(^{116}\) Another exception was recognized in other cases where defendant created a nuisance.\(^{117}\)

The third exception proved most capable of growth. In 1916 the leading case of *MaePherson v. Buick Motor Co.*,\(^{118}\) marked the beginning of the present phase of development. Here at last Judge Cardozo recognized probability of harm as the broad basis of duty in these cases (as it is in negligence law generally). The case itself involved personal injury to a subvendee of an automobile having a latent defect and the actual decision was carefully

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111. Cases are collected in a series of Notes, 41 A.L.R. 8 (1926); 123 A.L.R. 1197 (1939); 13 A.L.R.2d 191 (1950).


114. *Id.* at 870, 871. See the admirable analysis of this case in Bohlen, *supra* note 107, at 344 et seq. As that author points out this formulation of the first exception was taken to include chewing tobacco and carbonated drinks. “On the other hand, elevators, high-powered machinery, motor cars, boilers, threshing machines are neither edible nor potable, and therefore incapable of being classified as food and drink. Nor are they drugs, explosives or firearms. Thus, they are not intended, when perfect, ‘to preserve, destroy or affect human life,’ nor are they ‘inherently dangerous’ in their use when free from defects. Therefore, they may without fear of liability be carelessly made and sold without inspection.” Perhaps the leading example of this exception is Thomas v. Winchester, 6 N.Y. 397 (1852).

115. Heaven v. Pender, 11 Q. B. D. 503 (1883), is treated as an example of this exception.

116. The *Huset* case itself was brought under this exception. *Cf.* Berg v. Otis Elevator Co., 64 Utah 518, 231 Pac. 832 (1924).


118. 217 N.Y. 382, 111 N.E. 1050 (1916).
limited to the facts. But the requirement that defendant know the
defect had been satisfied where he simply should have known; and
"imminently dangerous" was being rendered in effect "unreason-
ably dangerous." 119 Limitations still persisted in many states.
Something more than mere negligence was often required. 120 There
was doubt whether the new principle embraced the bystander as
well as the subvenee. 121 Some thought the defect must still be
latent (so as to exclude intervening negligence of the other party
to the contract). 122 Some excluded from the "imminently dan-
gerous" those things which were dangerous "only if negligently
made, prepared, or used." 123 There was occasional limitation of
liability to cases where life and limb were threatened, rather
than property merely. 124 The seminal principle continued to grow,
however, and today the manufacturer's duty of care with respect
to his products extends just about as far as the prudent eye can
foresee unreasonable harm. 125 The citadel of "privity" has indeed
fallen.

Courts have perhaps been somewhat more reluctant to go so
far in the case of other contractors (e.g., in building and construc-
tion work). Here the general rule is still often said to be one of
nonliability for injuries caused after the owner has accepted the
building or other subject of the contract. 126 Some distinctions

119. "If the nature of the thing is such that it is reasonably certain to place life
and limb in peril when negligently made, it is then a thing of danger. . . . If to the
element of danger there is added knowledge that the thing will be used by
persons other than the purchaser, and used without new tests, then, irrespective
of contract, the manufacturer of this thing of danger is under a duty to make it
319 Mass. 103, 64 N.E.2d 700 (1946), the court said that general acceptance of
the MacPherson case "has brought all dangerous things into the same class as the
'inhently dangerous' things to which the principle . . . has always been applied."
See also Note, 164 A.L.R. 569, 588 et seq. (1946).

120. See, e.g., Berg v. Otis Elevator Co., 64 Utah 518, 231 Pac. 832 (1924).
Anderson v. Linton, 178 F.2d 304 (7th Cir. 1949).
122. See, e.g., Colbert v. Holland Furance Co., 333 Ill. 78, 164 N.E. 162 (1928).
123. An example of such holding is Smith v. Davidson Rubber Co., 306 Mass.
618, 51 N.E.2d 486 (1940).
(1921).
125. Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946), reviews the
earlier history of the restrictive rule and altogether repudiates it, applying to such
cases instead the broad principles of scope of duty expressed in the MacPherson
case and in RESTATEMENT, TORTS §§395-398 (1934). See cases collected in 164
A.L.R. 569 (1946); Anderson v. Linton, 178 F.2d 304 (7th Cir. 1949).
126. See, e.g., Ford v. Sturgis, 14 F.2d 253 (D.C. Cir. 1926), noted in 75 U &
Pa., L. Rev. 779 (1927); Berg v. Otis Elevator Co., 64 Utah 518, 231 Pac. 832
(1924); cases collected in A.L.R. notes cited in note 111 supra; Notes, 22 Minn.
L. Rev. 709 (1938); 62 Harv. L. Rev. 145 (1948). As these authorities indicate,
exceptions in these cases, similar to those in the manufacturer cases, are recognized.
The 'privity' case, for instance, was brought under an exception for an imminently
dangerous concealed condition.

Outside the field of accidental personal injury or property damage, the duty to
use care is often stopped short of persons who may foreseeably be injured by
have been pointed out between the cases. The manufacturer makes standard goods and develops standard processes. Defects are harder to find in the contractor's special jobs. Again, the owner usually gives more thorough inspection to a building or structure than a vendee gives to a chattel. And a longer time may elapse between construction and injury in the contractor's case with the consequently greater opportunity for intervening factors to play a part.¹²⁷ These considerations, however, go to the question of negligence and should be treated simply as problems of proof in individual cases.¹²⁸ They should not be erected into a rule of thumb. And the modern tendency has been to measure the scope of duty here by the same broad principles of negligence.¹²⁹

The Duty of Affirmative Action

By and large, then, men owe a duty to use care in connection with their affirmative conduct, and they owe it to all who may foreseeably be injured if that conduct is negligently carried out. But to what extent are men under a duty to act affirmatively in order to protect others from harm—to what extent does a mere omission to act constitute actionable negligence?

At the outset it should be noted that definitions of negligence commonly include both acts and omissions which involve unreasonable risk of harm,¹³⁰ and in many situations the distinction


¹²⁸ Thus the length of time between the asserted negligence and the injury may so weaken the probability that the former was a substantial cause of the latter as to defeat recovery on that basis. This is a possible explanation of, e.g., Howard v. Redden, 93 Conn. 604, 107 Atl. 509 (1919). Cf. Note, 164 A.L.R. 569, 599 (1946) (same notion applicable in manufacturer cases). But lapse of time should not defeat recovery as matter of law where the proof shows the original defect was in fact a substantial cause of the injury. Hale v. DePaoli, 33 Cal.2d 228, 201 P.2d 1 (1948) (lapse of 18 years); Foley v. Pittsburgh-Des Moines Co., 363 Pa. 1, 68 A.2d 517 (1949) (lapse of 13 months).

¹²⁹ E.g., Moran v. Pittsburgh-Des Moines Steel Co., 166 F.2d 908 (3d Cir. 1948); Hale v. DePaoli, supra note 128; Foley v. Pittsburgh-Des Moines Co., supra note 128. See also authorities cited notes 111 and 127 supra.

¹³⁰ See, e.g., the famous definitions of negligence in Blyth v. Birmingham Waterworks Co., 11 Ex. 781, 784 (1856), and in Osborne v. Montgomery, 203 Wis. 233, 234, 242, N.W. 372, 379 (1931). See also Winfield, History of Negligence
between the two is altogether without significance in the law. Often the same conduct could be described as either one or the other. Thus, the driving of an automobile through an intersection at unabated speed without blowing a horn could be called either negligent operation or the failure to slow down and sound a warning when conditions required it. And the operation of a machine which is dangerous because of a concealed defect could just as well be regarded as the failure to inspect and repair the machine. But in these cases defendant has undertaken an affirmative line of conduct, and where that is true he comes under the affirmative duty to take precautions reasonably needed to protect others from injury from that conduct (as well as the negative duty to refrain from doing anything unreasonably dangerous).

Another type of case which perhaps is no different from the one just described, is presented where defendant gratuitously undertakes to confer a benefit on plaintiff. Defendant comes under no legal obligation to confer the benefit and a duty is not created by merely starting to perform the undertaking. In the performance however, defendant must use care not to injure plaintiff in some way over and above the mere failure to confer the benefit. Thus, if a landlord assumes to make repairs where there is no obligation to do so, he will be liable if he does "a bungling job of it", and the tenant is injured because of the dangerous condition created. The repairs need not have worsened the actual physical condition; liability will be imposed for the creation of an appearance of improvement which injects new danger into the situation because the appearance is belied by the fact. A closer question

__ in Torts, 42 L.Q. Rev. 184, 200 (1926); Winfield, Duty in Tortious Negligence, 34 Col. L. Rev. 41, 60 (1934); Restatement, Torts §322, comment a (1934).__

131. Cf. similar analysis in Harper & Kime, Duty to Control the Conduct of Another, 43 Yale L.J. 886 (1934); McNiece & Thornton, Affirmative Duties in Tort, 58 Yale L.J. 1272 (1949). Cf. also Brooks v. Jacobs, 139 Me. 371, 31 A.2d 414 (1943) (discussion of misfeasance and nonfeasance with respect to teacher’s duty to assure that pupils’ place of work is safe).

131a. See Seavey, Reliance on Gratuitous Promises or Other Conduct, 64 Harv. L. Rev. 913, 918, 919 (1951) ("It may be suggested that a gratuitous promise should not acquire validity merely by partial performance"). But cf. Note, 45 Harv. L. Rev. 164, 166, 167 (1931).

132. Gill v. Middleton, 105 Mass. 477 (1870); Marks v. Nambil Realty Co., 245 N.Y. 256, 257, 157 N.E. 129 (1927). For full treatment see Bohlen, Landlord & Tenant, 35 Harv. L. Rev. 663 (1922), Studies in the Law of Torts 202 (1926). See also Restatement, Torts §362 (1934); Notes, 15 A.L.R. 971 (1921), and 43 A.L.R. 1300 (1926). Cf. Glanzer v. Shepard, 233 N.Y. 236, 239, 135 N.E. 275 (1922) ("It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.") The duty should not be confined to the tenant but should extend to all within the range of foreseeable harm. Bohlen, supra, at 665 et seq. Compare Gill v. Middleton, supra (member of the tenant’s family); Shaw v. Buttonworth, 327 Mo. 622, 38 S.W.2d 57 (1931) (same); Bloecher v. Duerbeck, 333 Mo. 359, 62 S.W.2d 553 (1933) (tenant’s guest); Olsen v. Mading, 45 Ariz. 423, 45 P.2d 23 (1935) (business visitor of tenant).

133. “The tenant does not have to prove that by the negligent making of the
is presented when there has been no performance but the promisee is injured as a result of his reliance on defendant’s gratuitous undertaking. A doctor for instance promises to visit a charity patient and negligently fails to do so before it is too late. The patient could and would have called another doctor if it had not been for the first one’s promise. There is certainly authority for denying liability here.¹³⁴ Yet where plaintiff’s reliance is both reasonable and foreseeable and where defendant should also foresee an unreasonable likelihood of harm to him as a result of it, if the undertaking is not carried out, general principles call for liability where plaintiff does rely and is harmed by defendant’s negligent failure to do what he said he would.¹³⁵

At the other end of the spectrum are cases where the peril to the plaintiff has come from a source in no way connected with defendant’s conduct or enterprises or undertakings, past or present, but where the defendant has it in his power by taking some reasonable precaution to remove the peril. Here the law has traditionally found no duty, however reprehensible and unreasonable the defendant’s failure to take the precaution may be. “No ordinary bystander,” says Winfield, “is under a duty to attempt the rescue of a child from drowning in what he knows

repairs what was wrong has been made worse. His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right. . . . the presence of the prop cloaked the defect, dulled the call to vigilance and so aggravated the danger.” Marks v. Nambil Realty Co., 245 N.Y. 256, 259, 157 N.E. 129, 130 (1927). And see Riley v. Lissner, 160 Mass. 330, 35 N.E. 1130 (1894); Bohlen, Landlord and Tenant, 35 HARV. L. Rev. 633, 651 (1922).

But cf. Therrien v. First National Stores, 63 R.I. 44, 6 A.2d 731, 734 (1939) (not a landlord and tenant case; no cause of action against store owner who, in sweeping snow from sidewalk, left uncleared patches on one of which plaintiff slipped, because plaintiff did not “show that the defendant negligently made the sidewalk more dangerous than it would have been if the defendant had done nothing at all.”)

¹³⁴ Thorne v. Deas, 4 Johns. 84 (N.Y. 1809).

¹³⁵ This would cover the case where defendant’s undertaking has led plaintiff reasonably to rely on its fulfillment so that he (plaintiff) has failed to take some effective precaution which he would otherwise have taken. Knight v. Sheffield Corp. [1942] 2 A.E. Rep. 411 (K.B. Div.), with which compare Fox v. Newcastle upon Tyne Corp., [1941] 2 K.B. 120 (Ct. App.); Erie R. Co. v. Stewart, 40 F.2d 855 (6th Cir. 1930); Whitacre v. City of Charlotte, 216 N.C. 687, 6 S.E.2d 558 (1940); Note, 59 HARV. L. Rev. 807 (1946): Restatement, Torts §325 (1934). See Long v. Patterson, 198 Miss. 554, 561, 22 So.2d 490, 492 (1945). Compare note 162 infra.

The courts seem to have been somewhat more willing to impose liability on this basis when there has been physical injury to persons or property than where the injury is to the interest in financial advantage. Bohlen, Fifty Years of Torts, 50 HARV. L. Rev. 1225, 1254-6 (1937); Seavey, Reliance upon GratUITous Promises or Other Conduct, 64 HARV. L. Rev. 913 (1951). Cf. Carr v. Maine Cent. R. R., 78 N.H. 502, 102 Atl. 532 (1917); Siegel v. Spear, 234 N.Y. 479, 138 N.E. 414 (1923). The Carr case however is now doubtful authority in New Hampshire for recovery on negligence principles. Buskey v. New England Tel. & Tel. Co., 91 N.H. 522, 23 A.2d 367 (1941), 41 Mich. L. Rev. 185.
to be shallow water."

136. There is no legal duty to be a Good Samaritan. Such a rule represents an attitude of rugged, perhaps heartless, individualism and the tendency of courts has been increasingly to restrict it to the very type of situation just described. This has not always been so. A number of courts have held that even where a plaintiff has been injured by defendant's conduct or by a dangerous condition created by him, defendant has no duty to take reasonable affirmative steps to rescue or give aid unless he was at fault in producing the original injury. And other cases have held that the employer owes no such duty to an employee injured otherwise than by the employer's fault. But these situations are not really parallel to the type described at the beginning of the paragraph where there is no antecedent relationship between the parties and defendant has done nothing

137. This individualistic philosophy—reinforced perhaps by the rise of capitalism—the weight of precedent, and predictions of difficulties attending the administration of a different rule, are largely responsible for the retention of the working principle that there is no liability for omissions. Note, Failure to Rescue: A Comparative Study, 52 Col. L. Rev. 631, 632 (1952). See also Hale, Prima Facie Torts, Combinations and Non-Feasance, 46 Col. L. Rev. 196, 214 (1946); Bohlen, The Moral Duty to Aid Others as a Basis of Tort Liability, 56 U. of Pa. L. Rev. 217, 289 (particularly at 335, n. 89) (1908); Minor, Moral Obligation as a Basis of Liability, 9 Va. L. Rev. 420 (1923).

The practical difficulties are those of (1) formulating a rule not too vague to be followed, 52 Col. L. Rev. at 642; and (2) determining whose is the duty where the potential rescuers are more than one, Prosser, Torts 193 (1941). As the analysis in the Columbia note shows, these difficulties could be surmounted if a duty should be thought desirable. Thus defendant might be held only where a reasonable man would have realized plaintiff's grave danger, and lack of danger to himself, and where reasonably effective means of rescue were easily accessible as defendant knew or should have known, etc. At the beginning of the century Ames favored imposing a limited duty of rescue along such lines. Ames, Law and Morals, 22 Harv. L. Rev. 97, 112, 113 (1908).

138. See notes 142-151 infra, and text.


to create the risk.\textsuperscript{141} As we have seen, there is a growing belief that the beneficiaries of an enterprise which creates risks should pay for the casualties it inflicts without regard to fault. It is a lesser burden, by far, to impose on the beneficiaries the milder duty of furnishing reasonable rescue or first aid. This is simply requiring a man to minimize the consequences of risks which society gives him a privilege to create. It is not surprising, therefore, to find a marked tendency for both courts and legislatures to impose such a duty. Thus, many states have statutes requiring motorists to stop and give first aid to those whom they have injured without regard to questions of fault,\textsuperscript{142} and a few courts have held a defendant liable for failure to furnish his victim reasonable help, though he was faultless in inflicting the original injury,\textsuperscript{143} or for failure to take protective steps to shield plaintiff from a danger that defendant has innocently created.\textsuperscript{144} Other inroads have also been made into the rule of non-liability. Thus, control of a dangerous instrumentality may call for care to stop its continuing operation which is seen to threaten plaintiff.\textsuperscript{145} Some courts have held liable a defendant who has volunteered to care for one injured (by no fault of defendant's) and has negligently made his lot worse.\textsuperscript{146} The principal exceptions, however, have been those arising out of special relationships between the

\textsuperscript{141} Cf. Green, The Duty Problem in Negligence Cases, 28 Col. L. Rev. 1014, 1027-28 (1928); Note, 8 Mo. L. Rev. 205, 211 (1943).

\textsuperscript{142} Summers v. Dominguez, 29 Cal. App.2d 308, 84 P.2d 237 (1938); Note, 6 Notre Dame Law. 372 (1931); Note, 8 Mo. L. Rev. 205, 210 (1943).

\textsuperscript{143} Compare Whitesides v. Southern R.R., 128 N.C. 229, 38 S.E. 878 (1901), with Northern Cent. R.R. v. State to use of Price, 29 Md. 420, 441 (1868). Compare also note 144 infra. See Bohlen, Moral Duty to Aid Others as a Tort, 56 U. of Pa. L. Rev. 217, 316, 333 (1908); Restatement, Torts §322 caveat (1934).

\textsuperscript{144} Simonsen v. Thorin, 120 Neb. 684, 234 N.W. 628 (1931) ("Whoever places an obstruction in a public highway, even by an involuntary act and without negligence, is under an obligation to remove . . . it or to use care to warn others of its presence"). Cf. Zickafoose v. Thompson, 347 Mo. 579, 148 S.W.2d 784 (1941), on retrial 237 Mo. App. 690, 157 S.W.2d 259 (1941), wherein defendant, whose train blocked a crossing, was held under the humanitarian rule for failure of a brakeman to shout a warning to an approaching motorist seen to be unaware of danger. There was evidence of failure to give proper crossing signals before the train occupied the crossing but the court's reasoning seems to minimize the importance of this "primary negligence." Compare Standard Oil Co. v. Cowl, 198 F.2d 580 (8th Cir. 1952), wherein the court seems to assume that under Missouri law there would be a duty to use care to warn in such a case even though defendant was not negligent in being where he was when plaintiff ran into him. See Restatement, Torts §§314 comment e, 321 (1934).

\textsuperscript{145} Castonguay v. Acme Knitting M. & N. Co., 83 N.H. 1, 136 Atl. 702 (1927) (trespasser); Connelly v. Kaufmann & Baer Co., 349 Pa. 261, 37 A.2d 125 (1944) (invitee). Defendant's conduct here skirts the borderland of misfeasance. Compare the reasoning in the Connelly case with that in L. S. Ayres & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 354 (1942), noted in 8 Mo. L. Rev. 205 (1943); and see Restatement, Torts §314, comment c (1934).

parties. Thus, a carrier has been required to take reasonable steps for the protection or aid of a passenger who has become helpless while in its charge.\textsuperscript{147} A similar duty has been put on an employer towards his employee.\textsuperscript{148} One who invites others upon his premises has been held bound to take reasonable steps to rescue them from perils which his negligence played no part in creating.\textsuperscript{149} No doubt other relationships such as that of parent and child, nurse and invalid, and the like, would be treated the same way.\textsuperscript{150} The growth of these exceptions has greatly restricted the earlier rule. It may not be long before some pioneering court will take the further step urged by Ames forty-five years ago.\textsuperscript{151} Plaintiff has been injured by defendant's inexcusable failure to act under circumstances wherein action would be effective, easy, and commanded by every social and moral consideration. The real basis of objection to liability is that the law should not try to enforce unselfishness or make one man serve his fellows. In a society whose values are still significantly individualistic, this objection deserves great weight. But, I submit, those values would be properly safeguarded under Ames's rule by its careful limitations and its coincidence with the universal moral judgment of our society.

In examining the extent of affirmative obligations in tort, special treatment should be given to the negligent non-performance of duties assumed by contract in cases where that non-performance involves an unreasonable risk of harm to others—harm over and above the mere withholding of the benefit contracted for. A company, for example, has undertaken with a city to furnish it with water, and because the company negligently fails to do so, plaintiff's house is consumed by fire. Or a landlord's negligent failure to fulfill a covenant to repair leased premises, results in injury to the tenant when the ceiling falls on his head.


\textsuperscript{149} L. S. Ayers & Co. v. Hicks, 220 Ind. 86, 40 N.E.2d 334 (1942), 8 Mo. L. Rev. 205 (1943); Cf. Depue v. Plateau, 100 Minn. 299, 111 N.W. 1 (1907); Weymire v. Wolfe, 52 Iowa 533, 3 N.W. 541 (1879).

\textsuperscript{150} See Ames, Law and Morals, 22 Harv. L. Rev. 97, 112 (1908); Note, 52 Col. L. Rev. 631, 632 (1932). McNiece and Thornton, Affirmative Duties in Tort, 58 Yale L.J. 1272 (1949), suggest that benefit to the defendant is the hallmark of those relationships which impose an affirmative duty of care, but this may be too narrow.

\textsuperscript{151} See note 137 supra.
The obligations of tort law are for the most part non-consensual and independent of contract. They are generally imposed on men by law simply as part of the price of living in society, or of engaging in conduct which is likely to affect the actor's fellow beings. Contract obligations on the other hand are for the most part based on manifested consent\textsuperscript{152} which indeed is needed to bring them into being. By and large, therefore, such obligations are limited by the terms of that consent, or at least by terms which it is fair to impose because of that consent. Contract obligations, for instance, are generally owed only to the parties with whom the agreement was made, and with respect only to consequences which the parties had in mind when they made their bargain.\textsuperscript{153} On the other hand a duty undertaken by agreement is often more stringent than a duty to exercise care to perform the undertaking—it may well be a duty to perform. Yet in any case there may be negligence in carrying out the contract or in failing to carry it out, and this negligent "misfeasance" or "non-feasance" may hurt someone, as we have just seen, in a way over and above the withholding of performance. Even where this involved clearly affirmative conduct (e.g., the creation of a defective machine or dangerous premises), we noted that for years courts were reluctant to extend liability beyond privity of contract.\textsuperscript{154} Now they recognize that the agreement has no tendency to limit the scope of harm to be foreseen from unreasonably dangerous conduct done by reason of the agreement, and this foresight of harm has been taken as the basis of a duty not based on the consent.\textsuperscript{155} But where defendant's negligence ends merely in non-performance of the contract and where defendant is not under any recognized duty to act apart from contract,\textsuperscript{156} the courts generally still see no duty

\textsuperscript{152} Winfield, Province of the Law of Torts (1931). In a provocative review of this work, Seavey points out that this conventional statement of the distinction fails to take fully into account the objective theory of "intent" in contract law. It is clear, of course, that a man may become bound by an "agreement" he never meant to make if his conduct (including language) leads another reasonably to think he did mean it. The object of contract law is to promote the keeping of promises—even apparent promises—and not to assure men that they will be liable only where they have consented to be. Seavey suggests that all this and other considerations tend to minimize the practical distinction between contract and tort liability. Seavey, Book Review, 48 Harv. L. Rev. 209 (1931). But cf., for instance, Note, 40 Col. L. Rev. 1071, 1076 (1940).

\textsuperscript{153} Anson, Contracts 346 (3d Am. ed. 1930); Hadley v. Baxendale, 9 Ex. 341 (1854); McCormick, Damages §138 (1935); Corbin, Contracts §1019 (1950).

As a reference to the last citation will show, the statement in the text is an over simplified and conventional statement of a highly controversial proposition. It will serve for present purposes well enough. Cf. note 158 infra.

\textsuperscript{154} See text at note 103 et seg. supra.

\textsuperscript{155} See note 125 supra.

\textsuperscript{156} Such a duty may arise from a relationship between the parties or from the nature of defendants calling. Thus a bailee has a duty to use care to protect the subject of the bailment because of his possession of it and his relationship to the
to act affirmatively except the duty based on—and limited by—defendant's consent. Thus, whether the action is viewed as one in contract or in tort, only parties to the contract (or intended beneficiaries) may complain,157 and their complaint will be confined to "the contract measure of damages."158 Outside those limits, this is often looked on as the case of the priest and the Levite. This should not, however, prevent the courts from applying here the full reasoning which they use to find "misfeasance" in the gratuitous undertaking cases. A duty of care should be recognized to avoid damage foreseeable resulting to anyone from reasonable reliance on the undertaking,159 or from a partial performance that increased the risk of damage.160

Perhaps, however, the answer ought not to turn—solely at least—on the tenuous distinction between misfeasance and non-feasance.161 None of these cases is that of simon-pure inaction owner, without regard to any contract stipulation. And this duty may well require the taking of reasonable affirmative precautionary steps. See Note, 90 U. of PA. L. Rev. 740 (1942). There are other relationships also which have been held to impose on one party to them a duty to take reasonable affirmative steps for the protection of other persons or property within the relationship. Cf. notes 147-150 supra. And where a defendant has entered into a common calling, this may impose affirmative obligations upon him apart from contract. See, e.g., Nevin v. Pullman Palace Car Co., 106 Ill. 222 (1883); Zabron v. Cunard S.S. Co., 151 Iowa 345, 131 N.W. 18 (1911) (common carriers of passengers).


158. To meet, for example, that plaintiff could recover only the reasonable cost of repairs in cases where a landlord had negligently failed to carry out his covenant to make them, and nothing for personal injuries caused by lack of repairs. Murrell v. Crawford, 102 Kan. 118, 169 Pac. 561 (1917); Korach v. Loeffel, 168 Mo. App. 414, 151 S.W. 790 (1912); Williams v. Fenster, 103 N.J.L. 566, 137 Atl. 406 (1926). Contra: Busick v. Home Owners Loan Corp., 91 N.H. 257, 18 A.2d 190 (1941) ("when personal safety is a purpose of the repairs promised, it may fairly be said that the promise contemplates that personal safety depends on its observance"). See also Corbin, CONTRACTS §1019 (1950). This represented the "great weight of authority" thirty years ago, Note, 8 A.L.R. 765 (1920). "However, there is now a pronounced trend towards the view that the landlord is liable for personal injuries under such circumstances." Note, 163 A.L.R. 300 (1946). Recovery, where allowed, is generally based on a broad negligence theory, and not on the contract. The latter is viewed simply as an incident of the relationship between the parties calling for a duty to use care. Dean v. Hershowitz, 119 Conn. 398, 177 Atl. 262 (1935); Barron v. Liedloff, 95 Minn. 474, 104 N.W. 289 (1905); Merchants' Cotton P & S Co. v. Miller, 135 Tenn. 187, 186 S.W. 87 (1916); Eldredge, Tort Liability of a Connecticut Landlord, 24 Conn. B. J. 49, 50 (1950). Cf. Emery v. Rochester Tel. Corp., 271 N.Y. 306, 3 N.E.2d 434 (1936), 46 Yale L.J. 167 (1936); Buskey v. New England Tel. & Tel. Co., 91 N.H. 522, 23 A.2d 367 (1941), 41 Mich. L. Rev. 185 (1942) (telephone company not liable for death or for fire loss when failure of service prevented summoning aid).

159. See note 135 supra.

160. See notes 132, 133 supra.

161. The tenuous nature of this distinction, which has been pointed out at several places in the present discussion [compare PROSSER, TORTS 208, 209 (1941)], led the New Hampshire court to deny a telephone company's liability for the results
like that of the priest and the Levite. In all of them defendant has entered into an undertaking. Sometimes it may be only the undertaking represented by the contract itself, but often this is part of a larger venture—the water business, the telegraph business, the landlord’s business, and so on.

In the latter cases, what may be viewed as negligent omission so far as the individual contract goes, may wear the color of active negligence if the whole venture or enterprise is thought of—in very much the same way as the omission to inspect and repair a machine is regarded as active negligence on the part of him who continues to operate the machine without taking the precautions. So wherever the problem comes up in this context, a duty of care to perform such a contract may be justified by projecting into this field the prevailing principles of negligence law, and applying Brett’s broad test in Heaven v. Pender. Such a duty would be owed to those foreseeably injured by the negligent non-performance in a way over and above the withholding of the benefit contracted for, without regard to any question of reliance in the specific case.

The ultimate question is whether such a duty should be imposed as a matter of policy. This in turn will depend on the balancing of several factors, viz., the burden it would put on defendant’s activity; the extent to which the risk is one normally incident to that activity; the risk and the burden to plaintiff; the respective availability and cost of insurance to the two parties; the prevalence of insurance in fact; the desirability and effectiveness of putting the pressure to insure on one rather than the other, and the like. A judicious regard for such realistic considerations might justify liability in some situations and not in others even where there is no basis in doctrine for such a distinction. Thus, the landlord’s liability for injury to tenants and others from condition of the premises is readily insurable at reasonable rates of cutting off plaintiff’s service by affirmative negligence. Buskey v. New England Tel. & Tel. Co., 91 N.H. 522, 23 A.2d 367 (1941).

162. Even here liability may be conventionally justified. Generally one must refrain from creating undue risks of injury to others. “As a modern corollary where one sets a force in motion which may, unless controlled, cause loss to another, he must use due care to prevent the injury. A promise may cause an undue risk that, if unperformed, one who has paid no consideration will be injured by reliance.” Note, 45 Harv. L. Rev. 164 (1931). Compare note 135 supra.

163. See text at note 8 supra.

164. Thus persons who enter leased premises as guests or business visitors of the tenant should be allowed to recover for injuries resulting from the landlord’s negligent failure to keep a covenant to repair, even though there is no showing that plaintiff was aware of the covenant or in any way altered his course of action in reliance on it. See RESTATEMENT, Torts §§587 (1934); Note, 163 A.L.R. 300, 313 (1946). Compare note 132 supra.

165. Which would include negligent non-repair where there had been a covenant to repair.
and a great deal of such insurance is held. Tenants and others can readily insure their risk too by personal accident insurance. Experience to date has shown, however, that adequate coverage of this kind is not widely held and that those who need it most are least apt to hold it.\footnote{166} Probably much the same thing is true in the field of products liability.\footnote{167} These considerations would tend to favor extending the duties of care on the part of landlords and manufacturers; though if social insurance for physical disability should find wider acceptance, they might be overbalanced.\footnote{168} In the water company cases, the situation is somewhat different. Liability for fire damage could become a crushing burden in case of conflagration,\footnote{169} while fire insurance is widely held by property owners and represents for society a much more economical way to administer fire losses than does the cumbersome device of legal liability (even where that is covered by insurance).\footnote{170}

In sum, then, liability for negligent non-performance of contract should be imposed where injury to plaintiff (over and above the mere witholding of performance) is foreseeable and (1) where there is foreseeable and reasonable reliance on the undertaking which has been a cause in fact of the injury, or (2) where the contract is an incident to an enterprise of the defendant and there are adequate reasons from policy for imposing a duty of care to avoid the risk thus encountered, as an incident to the enterprise.

The Duty to Control the Conduct of Others

The distinction between affirmative conduct and the mere omission to act comes into play in deciding whether an actor has the

\footnote{166} See James and Law, Compensation for Automobile Accident Victims: A Story of Too Little and Too Late, 26 CONN. B. J. 70, 74 (1952); COLUMBIA STUDY, op. cit. supra note 3, at 221; GAGLIARDO, AMERICAN SOCIAL INSURANCE 14 (1949).

\footnote{167} As a general proposition the manufacturer or contractor is in a better position to and is more likely to insure than is the victim of personal injury. This does not mean, of course, that the maker of a defective product is always a better risk distributor than the distributor or user of it. In the case of Foley v. Pittsburgh-Des Moines Co., supra note 128, for instance, the A. O. Smith Co. of Milwaukee filed a brief amicus curiae urging that makers of pressure tanks and vessels were on the whole smaller economic units than the large industrial users of such products, and that the liability of third persons injured by defects should therefore be limited to the user, even where the maker's original negligence contributed to the injury. The Pennsylvania court did not adopt this argument.


\footnote{169} This was stressed by Cardozo in the Moch case, supra note 157. Compare also Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931) (stressing possibly crushing extent of liability of accountant to those foreseeably jeopardized by his negligence); Note, 46 YALE L.J. 167 (1936) (similar considerations as to liability of telephone companies for negligence).

\footnote{170} See Morris, Hazardous Enterprises and Risk Bearing Capacity, 61 YALE L.J. 1172, 1178 (1952).
duty to control the conduct of others. It may be assumed that the master has the duty to control the conduct of his servant in performing the master's business.\textsuperscript{171} The present problem is not concerned with that kind of relationship. Further, as we have seen, wherever an actor is under a duty to use care, that duty extends to risks created by the foreseeable intervention of the acts or omissions of others.\textsuperscript{172} The present problem is not that problem. We are here inquiring whether the duty exists at all (under certain circumstances), not with the extent of an admitted duty, though of course the latter inquiry will be called for once the existence of the duty is found. The question here is whether an actor may sometimes come under an affirmative duty to use care to control the conduct of another person, when he has the physical ability to do so but when he has no other legal responsibility for the conduct of that other person, and when that other person's conduct is not itself responsive to the actor's own conduct. To put the question in its simplest form, suppose that A, a bystander, sees B, a motorist who is not looking at the road, about to run down C, a child who is playing there. Suppose also that by shouting A could easily call B's attention to his surroundings and avert the tragedy. Is A under a legal duty to shout? His omission to do so is fraught with unreasonable probability of harm and so could be brought under a broad formula for negligence. Yet, as in the case of the easy rescue of the infant drowning in a shallow pool, the bystander in the present case probably has no duty to act.

There are, however, situations in which "a previous course of action, not in itself creating risks to others, may have brought the actor into certain socially recognized relations with others which are of such a character as to require affirmative acts to protect them from risks which the person thus required to act had no part in creating."\textsuperscript{173} Where such a duty exists, it is only an obligation to use reasonable care, not an absolute one to control the other person's conduct at all events.\textsuperscript{174} A duty to control the conduct of others

\textsuperscript{171} Nothing in the present discussion turns on the question whether the principle of vicarious liability rests on the master's supposed right and duty to control the servant's conduct while in the scope of his employment. See, e.g., Smith, \textit{Frolic & Detour}, 23 \textit{Col. L. Rev.} 444 (1923); Baty, \textit{Vicarious Liability} (1916). It should be pointed out, however, that in respondent superior cases any supposed requirement of \textit{actual} control (at least) is purely fictitious. A master would not be helped, for instance, by showing that the servant suddenly and inadvertently deviated from instructions and that there was no chance whatever for the master to have guarded against or to have checked the deviation. It will be noted that control is used in a different and less fictitious sense in the cases that follow.

\textsuperscript{172} See note 19 \textit{supra}.

\textsuperscript{173} Harper & Kime, \textit{Duty to Control the Conduct of Another}, 43 \textit{Yale L.J.} 886, 887 (1934).

\textsuperscript{174} Dowler v. Johnson, 225 N.Y. 39, 121 N.E. 487 (1918) ("many circumstances would have to be weighed. Chief among them, perhaps, would be the
may be brought into play by a relationship between the actor and the person who causes the injury, or between the actor and the victim of the injury. We shall first treat relationships of the former type:

(1) It is pretty widely held that when the owner of a vehicle is riding in it but allows another to drive it, the owner remains under a duty to use care to control the operator’s conduct.\(^\text{175}\) Some of the decisions speak in terms of imputed negligence or vicarious liability,\(^\text{176}\) but where that is the case there is no need to resort to the present principle, which is quite distinct and involves different grounds for its application.\(^\text{177}\) Here the defendant must be shown to have had in fact a reasonable opportunity to control the driver.\(^\text{178}\)


176. Thus where there can be no vicarious liability, for one reason or another, liability may be predicated on the duty to control. Dowler v. Johnson, supra note 174 (defendant was fire marshal who would not be vicariously liable for acts of his subordinate drivers); Palmer v. Miller, 380 Ill. 256, 43 N.E.2d 973 (1942). Cf. Carroll v. Harrison, 49 F. Supp. 283 (W.D. Va. 1943).

177. See note 174 supra. A confusion of the two grounds of liability may, however, lead to imputing the driver’s negligence to the owner without requiring the showing described in the text. Wilson v. Mondy, 22 Tenn. App. 356, 123 S.W.2d 828 (1938); cf. Palmer v. Miller, supra note 177. This would be unobjectionable where vicarious liability is a sufficient alternative ground of decision. But where it is not, then logic would require an opportunity to control before liability will be imposed, else the court will be “beating the devil around the stump.” Whether such disregard of logic may nevertheless be defensible depends on whether the denial of vicarious liability in the circumstances is itself defensible. Where, for instance, courts have adopted the altogether unjustifiable rule that a minor cannot be held for the torts of his servant, it may be just as well that they sometimes treat the facts of the cases described by the circumvention described in this note, although the net result involves a capricious quirk in the law (for negligence will be imputed where the infant owner is present, but has no actual chance to control, though it will not be imputed where he is absent) and although it would be far better to repudiate the unjustifiable rule in its entirety. The cases cited at the
While virtually all of these cases involve the owner of a vehicle (usually a motor vehicle) there seems to be no good reason why the same duty to control would not be imposed in the case of any other chattel which has similar potentiality for harm.\(^{179}\) And the duty is not confined to the owner but extends to one who has charge of the vehicle at the time.\(^{180}\)

(2) Where a parent has reason to know of a propensity for a particular type of dangerous conduct on the part of his minor child he is bound to take reasonable steps (by discipline, training, or the like) to curb or guard against the propensity.\(^{181}\) The dangerous habit must be of a very specific kind, however. There is no "general responsibility for the rearing of incorrigible children."\(^{182}\)

(3) There are other cases where a defendant has special ability to exercise control over another. Thus a master may be bound to control acts of his servants which they do entirely on their own account but which are closely enough connected with the employment in time and space to give the master a special opportunity to control the servant's conduct.\(^{183}\) It must be shown, however, that the likelihood of such acts by the servant had been brought home to the master, e.g., by a showing that the acts had occurred so persistently that the master knew or should have known of them.\(^{184}\) Thus,

beginning of this note all involve attempts to hold an infant liable for the operation of a vehicle he had charge of. Cf. also Powers v. State, 178 Md. 23, 11 A.2d 909 (1940) (owner who was intoxicated and asleep on the back seat held liable on the control theory, two judges dissenting).

Where the control theory is used as a means of barring a plaintiff for contributory negligence, it would be most unfortunate to expand it to cases where there is a lack of actual control and a reasonable opportunity to exercise it. See Note, 45 Micr. L. Rev. 1061 (1947). While the owner must have had a chance to control the driver's actions on this occasion, the driver need not have been incompetent or negligent on any prior occasions; liability here is not based on defendant's negligence in letting the guest drive, though if there is such negligence that is also a separate ground of liability. Carroll v. Harrison, supra note 177.


180. E.g., Dowler v. Johnson, supra note 174 (defendant was fire commissioner in charge of department car); Palmer v. Miller, supra note 177 (minor child had charge of parent's car).


183. Fletcher v. Baltimore & P. R.R., 168 U.S. 135 (1897); Hogle v. Franklin Mfg. Co., 199 N.Y. 388, 92 N.E. 794 (1910); Palmer v. Keene Forestry Ass'n, 80 N.H. 68, 112 Atl. 798 (1921). Cf. In re Sabhatino & Co., 150 P.2d 101 (2d Cir. 1945); McCrink v. City of New York, 296 N.Y. 99, 71 N.E.2d 419 (1947). Restatement, Torts §317 (1933), confines such liability to situations where the servant is on the master's premises or using his chattel, but the essential basis of liability should be the practical opportunity for effective control arising from the general master-servant relationship and from the connection between the dangerous conduct and the employment.

where a nurseryman’s employees smoked constantly on the job, a
jury might hold him to the duty of taking steps to get them to re-
duce the fire hazard from smoking during a dry season.185 And the
proprietor of premises where other persons have habitually engaged
in conduct which is dangerous to others must make reasonable
efforts to stop or control that conduct.186 Thus, where a city per-
mitted a shooting range in its park and also acquiesced in promis-
cuous shooting there by persons not belonging to the club that
installed the range, it was liable for the death of a child killed on
private premises near the park by a wild shot.187 Other examples
of the principle under discussion are presented by the duty of the
skilled professional man in charge of an operation to control the
conduct of those who assist him (though there is no vicarious lia-
bility),188 and by the duty of persons in charge of persons with
dangerous propensities (e.g., criminals or the insane) to restrain
their charges.189

An affirmative obligation to use care to control the conduct of
others may also be raised by a special relationship between the
actor and the person injured. Thus where one stands in loco
parentis, or is put in charge of persons under circumstances that
deprive them of normal means of self-protection (e.g., prisoners),
he must use care to restrain the foreseeable dangerous conduct of
third persons which unreasonably threatens his wards.190 A carrier
must exercise similar care for the protection of its passengers.191

in 36 Mich. L. Rev. 505 (1938); Dincher v. Great A. & P. Tea Co., 356 Pa. 151,
51 A.2d 710 (1947).

185. Palmer v. Keene Forestry Ass’n, supra note 183.

186. Thus the proprietor of premises owes to his invitees the duty of using care
to protect them from the foreseeable dangerous conduct of other invitees, E.g.
Myers v. Kansas City Junior Orpheum, 228 Mo. App. 840, 73 S.W.2d 313 (1934),
noted 13 Texas L. Rev. 146 (1934) (duty to protect theatre patron from dangers
foreseeably incident to crowd of fellow-patrons); Schubart v. Hotel Astor, Inc.,
168 Misc. 431, 5 N.Y.S.2d 203 (1938), aff’d, 255 App. Div. 1012, 8 N.Y.S.2d 567
aff’d, 281 N.Y. 597, 22 N.E.2d 167 (1939), or even trespassers. E.g., Neering v.
(1940) (where no particular reason to anticipate thief’s action). And the pro-
prietary owes a similar duty to protect persons off the premises from foreseeable
and readily controllable conduct of persons on the premises. Hoge v. Franklin
Super. 5, 198 Atl. 655 (1938).

187. Stevens v. City of Pittsburgh, supra note 186.

188. See, e.g., Davis v. Potter, 51 Idaho 81, 2 P.2d 318 (1931); Ault v. Hall,
119 Ohio 422, 164 N.E. 518 (1928).

189. Jones Co. v. State, 122 Mo. 214, 119 Atl. 577 (1923); Scolavino v. State,
202, aff’d, 297 N.Y. 460, 74 N.E.2d 174 (1947). With latter case, compare

190. E.g., Logan v. United States, 144 U.S. 263 (1892); Cashen v. Riney, 239
Ky. 779, 40 S.W.2d 339 (1931); Scolavino v. State, supra note 189.

191. E.g., Nute v. Boston & M. R. Co., 214 Mass. 184, 100 N.E. 1099 (1913);
And the occupier of land who holds it open to business visitors must use care to protect these visitors from the foreseeably dangerous conduct of other visitors or even trespassers.\textsuperscript{192}

\textbf{Functions of Judge and Jury}

The jury usually decides what conduct reasonable care would call for in the case before them, and also what was the conduct of the parties.\textsuperscript{193} But it is often said that the court decides whether the defendant owed to plaintiff any duty to use due care at all,\textsuperscript{194} and in one sense this is true. The court decides whether a manufacturer's liability is to be limited by privity of contract or extended to the full range of what may be foreseen; or whether likelihood of trespassing raises a duty of care towards the trespasser; or whether the duty to take a specific precaution is circumscribed by the specific dangers that called for the precaution, or extends to unforeseeable hazards. Yet the general rule has too often been stated without enough critical appraisal. The duty issue, like any other, can be broken down into (a) rules and (b) the application of those rules to the concrete facts of a given case. Here as elsewhere the court lays down the rules. But the application of those rules to particular facts should be, and in fact usually is committed to the jury on the duty issue as upon any other.\textsuperscript{195}

The duty issue frequently poses questions of the kind usually

\textsuperscript{192} S.W.2d 299 (1951), noted in 6 Ark. L. Rev. 241 (1952), 20 Kan. City L. Rev. 186 (1952).

\textsuperscript{193} See cases at note 186 \textit{supra}. Other classes of cases where duty is curtailed below the scope of what is reasonably to be foreseen are those involving owners and occupiers of land, gratuitous suppliers of chattels, and the older cases of master and servant. No attempt to treat these problems is made here. See Harper, \textit{Law of Torts} §§88-104 (1933); Prosser, \textit{Torts} c.c. 14, 15 (1941); James, \textit{Assumption of Risk}, 61 Yale L.J. 141 (1952).


\textsuperscript{195} See, e.g., Green, \textit{Proximate Causes in Texas Negligence Law}, 28 Texas L. Rev. 755 (1950); Cowan, \textit{The Riddle of the Palsgraf Case}, 23 Minn. L. Rev. 46, 54 (1938); Green, \textit{Judge and Jury} 67, 68 (1939).

\textsuperscript{195} For examples of cases where it was left to the jury to decide whether the injury to plaintiff was within the foreseeable scope of the risk, see Scorpio v. American-Republican, 131 Conn. 42, 37 A.2d 802 (1944); Kingsland v. Erie County Agricultural Soc., 298 N.Y. 409, 84 N.E.2d 38 (1949); James and Perry, \textit{Legal Cause}, 60 Yale L.J. 761, 792 et seq. (1951); James, \textit{Nature of Negligence}, 4 Utah L. Rev. \ldots; at notes 60, 73 et seq. (1953). See also Note, 63 Harv. L. Rev. 671, 672 (1950) ("If anything, the risk theory ought to give greater, not less, leeway to the jury's judgments"); Smith, \textit{Relation of Emotions to Injury and Disease: Legal Liability for Psychic Stimuli}, 30 Va. L. Rev. 193, 273 (1944) (suggesting that appellate courts find it psychologically easier to reverse on questions of proximate cause than on those of negligence including duty). In truth either form of words may easily be manipulated either to restrict or expand the jury's sphere. This, perhaps, is not fully true of cases where negligence is predicated on a breach of statute, and the court follows the negligence \textit{per se} rule, since determination of the class to be protected and the evil aimed at by the statute involves questions of construction commonly passed on by the court.
given to the jury. Under the prevailing rule duty to use due care is bounded by the foreseeable range of danger. Reasonable foreseeability of harm is the very prototype of the question a jury must pass upon in particularizing the standard of conduct in the case before it. It is no harder and not very different to fix upon the foreseeable range of that harm, or to determine whether a given hazard was foreseeably great enough to make particular conduct negligent. If the case is very clear, of course, a jury verdict may be directed here as upon any other question (as was true in Mrs. Palsgraf's case). But here as elsewhere, "In doubtful situations a jury must say where the line is to be drawn." 197

In fact, many courts actually do leave just this question to the jury under the issue of proximate cause. 198 The objection to treating it as a question of cause (rather than of duty) is that it prevents clarity of thought and meaningful analysis. But the fact that as a mere matter of straight-thinking analysis it is more helpful to think about the foreseeable range and source of danger as limits upon duty rather than limits upon causal connection in no way shows that these questions therefore become more difficult or less appropriate for the jury.

Professor Green argues that it is impossible in the nature of things for the duty problem to be decided by the jury, for if the court sends the issue to the jury this "necessarily operates as a ruling that there is a duty or else he would never have submitted the case to the jury at all." 199 But that is not so. As in the case of any other issue, the judge will leave the question to the jury if it is a debatable one, but the jury may decide that (for example) plaintiff was beyond the apparent scope of danger from defendant's conduct, and so beyond the scope of the duty to perform it carefully, even where they are quite ready to find defendant's conduct clearly below the standard of reasonable care.

Another and a sounder objection to the duty analysis is that it is unnecessary and simply duplicates the inquiry into negli-

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196. See note 17 supra.
198. E.g., Illinois Cent. R.R. Co. v. Siler, 229 Ill. 390, 82 N.E. 362 (1907); Cases collected in James and Perry, supra note 195.
199. He continues: "The judge passes on the existence of duty any way he may rule. If he consciously says there is no duty he will direct a verdict for defendant. If he consciously holds there is a duty he will submit the case to the jury on the negligence and other issues if there is any evidence raising them. But even though he tries to pass the questions of duty to the jury he cannot do so. The very passing automatically means that he has adjudged a duty to have obtained, and nothing but the jury's concurrence as to its violation is required in order to place responsibility on defendant." Green, The Duty Problem in Negligence Cases, 28 Col. L. Rev. 1014, 1030 (1928), reprinted in Green, Judge and Jury 68 (1930). See also discussion in Green, Rationale of Proximate Cause 90-93 (1927).
This is true (wherever duty is measured by the risk to be foreseen) if the negligence question is framed in terms of foreseeability of the hazard that befell and of injury to this plaintiff. A jury charge so framed should not be erroneous for omitting specific reference to duty (for it puts the question in such a way as to make negligence and duty indivisible). But prevailing practice and habit of thought do divide the question and this has some practical justification: (1) as we have seen duty is not always measured by the scope of the foreseeable risk, so that keeping it distinct will prevent confusion (2) even where duty is co-terminous with foreseeable risk, dividing the question will often make it clearer for judge or jury, by pointing up the different things that have to be looked out for when the problem gets complex. In the Palsgraf case, for instance, the question whether the dropping of a package at the side of the train should be foreseen to threaten plaintiff is a different question from that as to whether the guard’s conduct was unreasonably likely to make the package fall, and the two inquiries would be telescoped—at the expense of clarity—by asking the single question whether the guard’s conduct was negligent to plaintiff.

201. This is notably true in the case of owners or occupiers of land. See also notes 49, 92-94, 126, 139, 157, 158, supra.
202. To the eye of those who would push duty to the full extent of foreseeable risk, such confusion on the part of appellate courts might appear benign (as a transitional stage), but it might be a pitfall for trial courts.