NATURE OF NEGLIGENCE

By FLEMING JAMES, JR.*

I. Conduct or State of Mind?

The Restatement of Torts defines negligence as “conduct . . . which falls below the standard established by law for the protection of others against unreasonable risk of harm.” This is the generally accepted view. There is, however, a competing view which has had some vigorous champions. According to it, negligence involves the state of mind of indifference or inadvertence:

“a form of mens rea, standing side by side with wrongful intention as a formal ground of responsibility.”

Both of these viewpoints, of course, agree that there must be conduct before there is actionable negligence. The proponents of the state of mind theory do not claim that liability should be attached to indifference unaccompanied by conduct. And the viewpoints agree also that at least some mental qualities are to be considered in determining whether a given act is negligence. Those who accept the conduct theory, for instance, would readily admit that the special knowledge of the actor may bear on the evaluation of his conduct.

“The motions involved in starting a car, reasonable in one who is reasonably ignorant of a defect in the car, may be negligent in one who knows of the defect.”

What the difference between these viewpoints comes down to is this: Under the prevailing theory, unreasonably dangerous conduct is negligence without any requirement that it be accompanied by any particular state of mind. Under the opposite theory, conduct is not negligent unless it is accompanied

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1 Restatement, Torts §282 (1934).

2 Terry, Negligence, 29 Harv. L. Rev. 40 (1915); Edgerton, Negligence, Inadverence and Indifference, 39 Harv. L. Rev. 849 (1926); Beven, Negligence 3 (4th ed. 1928); Holmes, The Common Law 110 (1881); Pollock, Torts 350 (14th ed. 1939).

3 Salmond, Jurisprudence 535 (9th ed. 1937); Wharton, Negligence §3 (2d ed. 1878); Street, Personal Injuries in Texas §34 (1911). See also Winfield, Law of Tort 436 (2d ed. 1943).

4 Salmond, Jurisprudence 538 (9th ed. 1937).

5 Edgerton, supra note 2, at 853.
by indifference or inadvertence. This could mean that “that anxious consideration of consequences which is called care” precludes negligence.\(^6\)

It has sometimes been suggested that the two theories would yield the same results in practice.\(^7\) But surely there are many situations where unreasonably dangerous conduct may be accompanied by anxious care, or at least not by indifference or inadvertence. Familiar examples are those where such conduct resulted from “ignorance, stupidity, bad judgment, timidity, excitability, or forgetfulness.”\(^8\) Further, recent studies into the human causes of accidents suggest that such situations may be commoner than was generally supposed. Thus, it has been found in some studies that a very significant number of accidents are due to such things as defects of vision (largely unknown to those affected), atmospheric conditions (temperature and humidity), lack of experience, age, and fatigue, rather than to a careless mental state.\(^9\) In situations such as these the two theories would lead to different procedural results in the following ways:

1. Under the conduct theory, evidence offered for the purpose of showing the actor’s state of mind (as indifferent, or anxiously careful) would be excluded. Under the state of mind theory, it would be received. Such evidence might consist of the actor’s own statements, or of circumstantial evidence (e.g., results of psychological tests which tended to show that the cause of the accident was a type of conduct entirely consistent with anxious care), or in expert opinion evidence (e.g., by an industrial psychologist who had examined the actor). Consistently with the conduct theory, such evidence is generally excluded on the ground that it is ir-

\(^6\) Edgerton, supra note 2, at 853, quoting Salmond. See SALMOND, TORTS 429 (10th ed. 1945).

The Conflict just discussed is sometimes referred to as one between objective and subjective theories of negligence. SALMOND, JURISPRUDENCE 550 (9th ed. 1937); Edgerton, supra note 2. It is not, however, the same question as whether the standard of conduct to be applied shall take into consideration the individual shortcomings of the actor (e.g., blindness, awkwardness, poor memory, slow reaction time). The latter problem is also often discussed in terms of “objective” or “subjective” standards. But it will remain as a separate problem even under a full acceptance of the theory that negligence is conduct (Edgerton, supra note 2, at 849). For a full treatment of the latter problem, see Seavey, Negligence, Subjective or Objective, 41 HARV. L. REV. 1 (1927); James, Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. REV. 1 (1951).

There is another point here—one which is not fully developed in Edgerton’s able analysis. What has been said in the text presupposes that it is the actor’s state of mind (of indifference, or its opposite, anxious care) that would be significant under the state of mind theory. A possible point of view, however, would be to disregard the actor’s state of mind in this respect and to rule that conduct is negligent only if it is such as would be accompanied by an indifferent state of mind in the reasonably prudent (standard) man. This does not seem to be what the proponents of the state of mind theory mean. Indeed it is really indistinguishable from the conduct theory since, concededly, the standard man acts with care and forethought for consequences.

\(^7\) “The ambiguity can scarcely lead to any confusion, for the two forms of negligence are necessarily coincident. Objective negligence is merely subjective negligence realized in conduct; and subjective negligence is of no account in the law until and unless it is manifested in act.” SALMOND, JURISPRUDENCE 535 (9th ed. 1937). See also, POLLOCK, TORTS 355 n.(h) (14th ed. 1939).

\(^8\) Listed by Edgerton, supra note 2, at 857.

\(^9\) The literature in this field is collected and treated in James and Dickinson, Accident Proneness and Accident Law, 63 HARV. L. REV. 769 (1950). See, e.g., MAIER, PSYCHOLOGY FOR BUSINESS AND INDUSTRY (1942); TIFFEN, INDUSTRIAL PSYCHOLOGY (1942).
relevant.\textsuperscript{10} In this connection it must be noted, however, that the actor’s manner in court, and the evidence of how the accident happened would often give the jury a very distinct impression as to whether the actor had been subjectively careful or careless.

2. Under the conduct theory the jury would be told to disregard the actor’s state of mind (as careful or careless). Under the state of mind theory they would be told they must find indifference or inadvertence before they could find negligence, or at least that anxious care precluded negligence.\textsuperscript{11} Under this head the rulings are not quite so unequivocal. There is little if any support for an instruction clearly telling the jury to consider the actor’s state of mind.\textsuperscript{12} Yet some of the language commonly used in jury charges might be taken in this sense by laymen, though it probably would not be by a majority of the profession. The most common example of this is the recurring reference to negligence as a “want of due care.”\textsuperscript{13}


The rulings to date have not concerned offers of psychological test or expert opinion. But the basis for them (irrelevancy) is broad enough to exclude any type of evidence offered for this purpose (i.e., to show anxious care or its opposite). They would not necessarily, however, lead to exclusion of evidence furnished by psychologists or their tests if offered for the different purpose of showing that the actor’s conduct sprang from a shortcoming which should be taken into account in fixing the standard of conduct. To be sure the rulings cited excluded the evidence for either purpose. But they were concerned with factors like judgment; and a ruling that the standard of conduct is objective with respect to such a factor does not require a ruling that it is objective with respect to an entirely different kind of factor (e.g., experience, vision, ratio between muscular and perceptual speed). See James and Dickinson, supra note 9, at 791 et seq.

Nothing in this note is meant to suggest that the kind of evidence mentioned would necessarily be admissible if relevant. It would often, of course, encounter other objections.

\textsuperscript{11} Perhaps the culpable state of mind could be presumed from the showing of unreasonably dangerous conduct, but if the requirement of indifference or inadvertence is a genuine one of the substantive law, such presumption would be rebuttable. So-called conclusive or irrebuttable presumptions are not really presumptions at all. They serve only to conceal by fiction a ruling that the thing “presumed” is not required by the substantive law.


\textsuperscript{12} On the contrary, wherever the courts have adverted to this problem, they have excluded from the jury’s consideration the actor’s mental state of care or carelessness. Vaughan v. Menlove, 3 Bing. N.C. 468 (C.P. 1837) (statement that standard was whether defendant “had acted bona fide to the best of his judgment” held properly omitted from charge); St. Louis & St. Paul Packet Co. v. Keokuk & H. Bridge Co., 31 Fed. 755 (S.D. Iowa 1887) (charge: “Negligence, in its legal sense is very different from its received signification in common language. In common speech, the word ‘negligence’ is used as synonymous with carelessness, but it has a much broader meaning in legal parlance. Thus the failure to exercise proper skill, where the law requires it, is negligence, though ever so much care be used.”); Bessemer Land & Imp. Co. v. Campbell, 121 Ala. 20, 25 So. 793 (1899) (following charge upheld: “Whether or not [he] did or did not do what seemed to him . . . best is not the issue in the case. The issue is whether what was done or left undone would have been left undone by an ordinarily prudent person. . . .”); Young v. Louisville & N.R.R., 153 Ala. 232, 45 So. 238 (1907) (“good faith and honest intention or belief . . . is not satisying to refute an imputation of negligence . . . it is the act itself and not the intent, that denominates acts or omissions as negligent”); Orr v. Bradley, 126 Mo. App. 146, 103 S.W. 1149 (1907) (requested charge which would direct jury to find for defendant if he was advised and believed condition safe, held properly refused. Jury “were to judge of his conduct as measured by that of an ordinarily prudent man in the same circumstances.”); Contrast Cope v. Davison, 30 Cal. 2d 195, 180 P.2d 873 (1947) (where wilful misconduct was involved).

\textsuperscript{13} Edgerton, supra note 2, at 861. Other common examples of ambiguous phrasing which might be taken by a jury to refer to the actor’s mental state are found in Wollaston v.
3. Occasionally the application of one of these theories would bring about a directed verdict in favor of one of the parties in a case which would go to the jury under the other theory, but such instances are too rare to be of much practical importance.\textsuperscript{14}

The prevailing theory that negligence is unreasonably dangerous conduct may be justified on two grounds. The first is administrative simplicity. It is certainly easier to prove conduct than a state of mind. The second is that "so far as any mental test leads to different results from the conduct test, the results are bad."\textsuperscript{15} Edgerton has urged that the mental test would be at the same time too great a deterrent to useful conduct (since it might burden any conduct accompanied by indifference or inadvertence), and too slight a deterrent to dangerous conduct.\textsuperscript{16} Attaching liability to abnormally dangerous conduct discourages such conduct only and thereby protects the general security with a minimum of interference with desirable activity. The state of mind theory, on the other hand,

"would leave the general security unprotected against that vast amount of dangerous conduct which results not from inadvertence or indifference but from deficiencies in knowledge, memory, observation, imagination, foresight, intelligence, judgment, quickness of reaction, deliberation, coolness, self-control, determination, courage, or the like."\textsuperscript{17}

What seems much more important from the point of view of civil liability\textsuperscript{18} is that the mental test as applied to defendants would throw the burden of "that vast amount of dangerous conduct" on the innocent victims of it rather than on those who engaged in or who benefited by the conduct (or on society as a whole).

\begin{footnotesize}
\textsuperscript{14} See Edgerton, supra note 2, at 859, 860. There are other more or less insignificant consequences of the choice of one theory rather than another. The notion that the phrase "wilful negligence" involves a contradiction in terms, for instance, reflects the state of mind theory. See, e.g., Kelly v. Malott, 135 Fed. 74, 76 (7th Cir. 1905) ("Negligence and willfulness are as immeasurable as oil and water."); Louisville N.A. & C. Ry. v. Bryan, 107 Ind. 51, 54, 7 N.E. 807, 809 (1886); Salmond, Jurisprudence 538 (9th ed. 1937) ("These are two contracted and mutually inconsistent mental attitudes."); Sorrell v. White, 103 Vt. 277, 283, 153 Atl. 359, 362 (1931). This notion has few if any practical consequences.

The same thing can be said of the language often found in decisions attempting to distinguish between negligence and wilful or wanton misconduct, wherein it is typically said that "the distinguishing characteristic of negligence [is] 'carelessness, thoughtlessness, inattention, inadvertence.'" Limes v. Keller, 365 Pa. 258, 261, 74 A.2d 131, 133 (1950) (interpreting Delaware law). The further question whether wantonness is conduct or a state of mind need not detain us here. Compare note 22 infra.

\textsuperscript{15} It is conduct, not a state of mind, that causes harm. . . . If one's conduct is abnormally dangerous and causes harm one does not escape liability by virtue of his good health and strong muscles; should he escape it by virtue of his close attention or his earnest contemporaneous regret?" Edgerton, supra note 2, at 865.

\textsuperscript{16} Id. at 868.

\textsuperscript{17} Id. at 867.

\textsuperscript{18} More important because it is doubtful that civil liability is well adapted to deter dangerous conduct, at least on the part of individuals. See, e.g., James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549 (1948); James & Dickinson, supra note 9.
\end{footnotesize}
On behalf of the state of mind theory, it may be urged that it tends to bring about a closer correspondence between legal liability and the moral culpability of the individual actor.\textsuperscript{19} Moreover, it might be supported on an entirely different basis. In practical result, it might well prove to be a rule that expands liability. This is because under the doctrines now current, negligence appears on both sides of the scale—that of the defendant as a possible basis of liability, that of the plaintiff as a possible bar to liability. And it is entirely likely that juries, with their propensity by and large to resolve doubts in favor of accident victims, would use the notion most often to exonerate conduct of plaintiffs which on the face of it they would regard as unreasonably dangerous.\textsuperscript{20} Actually this is probably what happens under the present rule, so that a formal change would merely open the door to a few more sources of formal proof, and somewhat different language in the charge. The practical effect of these changes would probably be so slight that the pressures toward fuller liability at work underneath our present system are not likely to affect continued acceptance of the conduct theory by appellate courts, until and unless the whole structure of fault is swept away.

II. Factors for Determining Whether Conduct is Negligent.

A. General Formula.

If, then, negligence is conduct, the question arises of defining the standard to which conduct ought to conform in order not to be negligent. What kind of conduct, in other words, does the duty to use care exact? Perhaps the most widely quoted statement is that given by Baron Alderson in Blyth v. Birmingham Waterworks Co.:\textsuperscript{21}

"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which the prudent and reasonable man would not do."

Another statement, made by an American judge, also deserves quotation.

"Every person is negligent when, without intending to do any wrong,\textsuperscript{22} he does such an act or omits to take such a precaution that under

\textsuperscript{19} It should be noted that Salmond, the leading exponent of the state of mind theory, believed that the object of tort liability was penal, not compensatory. "For these [negligence and willfulness] are the two mental attitudes which alone justify the discipline of penal justice." \textit{Salmond, Jurisprudence} 538 (9th ed. 1937). See also \textit{Austin, Jurisprudence}, Lecture XX.

\textsuperscript{20} Since, as we have seen, the difference between the two theories would seldom bring about a different result as a matter of law (i.e., in such a way as to call for a directed verdict, or the like), adoption of the mental test would in most cases simply open up additional factors for the jury to weigh in determining the issue of negligence.


\textsuperscript{22} This phrase, which is quite commonly found in instructions, savors of the state of mind theory of fault. Note, however, that it is not here used to describe negligence but some more grievous fault which is being distinguished from negligence. As to whether state of mind is a necessary element of such more grievous fault, see \textit{Cope v. Davison}, 30 Cal. 2d 193, 180 P.2d 873 (1947); \textit{Restatement, Torts} §500 (1934); \textit{Holmes, Collected Legal Papers} 117, 190 (1921).

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the circumstances present he, as an ordinarily prudent person, ought reasonably to foresee that he will thereby expose the interests of another to an unreasonable risk of harm." 23

The broad test, then, is what a reasonably prudent person would foresee and would do in the light of this foresight under the circumstances. On the whole this is an objective test and one to be applied by the jury in each case. This reasonable man is, of course, an abstraction. He has long been the subject of homely phrase and witty epigram. He is no man who has ever lived and is not to be identified with any of the parties24 nor with any member of the jury. Greer, L.J., has described him as,

"... ‘the man in the street,’ or ‘the man in the Clapham omnibus,’ or, as I recently read in an American author, ‘the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves.’" 25

Now this reasonably prudent man is not infallible or perfect. In foresight, caution, courage, judgment, self-control, altruism and the like he represents, and does not excel, the general average of the community. He is capable of making mistakes and errors of judgment, of being selfish, of being afraid—but only to the extent that any such shortcoming embodies the normal standard of community behavior. On the other hand, the general practice of the community, in any given particular, does not necessarily reflect what is careful. The practice itself may be negligent. "Neglect of duty does not cease by repetition to be neglect of duty." 26 Thus the standard represents the general level of moral judgment of the community, what it feels ought ordinarily to be done, and not necessarily what is ordinarily done, although in practice the two would generally come to the same thing.

B. The Unreasonableness of the Risk.

Elsewhere I have tried to examine in some detail the qualities with which a jury will be told to endow the reasonably prudent man, and the extent to which the personal equation of the actor is taken into account in the process.27 Here let us look at those considerations upon which the law supposes reasonable men will guide their conduct. Negligence is conduct involving an unreasonable risk of harm, and the test for determining whether a risk is unreasonable is supplied by the following formula. The amount of caution "demanded of a person by an occasion is the resultant of three

24 This should be qualified to the extent that subjective factors are taken into account in judging an actor's conduct. See James, Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1 (1951).
27 See James, supra note 24.
factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced against the interest which he must sacrifice to avoid the risk.”

In striking this balance — that is, in weighing the likelihood of harm, the seriousness of the injury and the value of the interest to be sacrificed — the law judges the actor's conduct in the light of the situation as it would have appeared to the reasonable man in his shoes at the time of the act or omission complained of. Not what actually happened, but what the reasonably prudent person would then have foreseen as likely to happen, is the key to the question of reasonableness. Judge Cardozo, in a case involving harm caused by the kneeling position of a workman making repairs on a store, observes:

“... Looking back at the mishap with the wisdom born of the event, we can see that the mechanic would have done better if he had given warning of the change of pose. Extraordinary prevision might have whispered to him at the moment that the warning would be helpful. What the law exacted of him, however, was only the ordinary prevision to be looked for in a busy world.”

The balance of this article will examine, first the three variable factors to be weighed in determining the amount of caution required, then the division of function between judge and jury in making this determination, and finally the special considerations injected into this weighing process where the actor faced an emergency or where the conduct of another person contributed to bring about the harm.

1. The Likelihood of Harm.

The amount of caution required tends to increase with the likelihood that the actor's conduct will injure others. The likelihood of injury here means the quantitative probability of some such injury as a foreseeable consequence of the act or omission challenged as negligent. Other things being equal, the amount of care required will vary directly with the degree of probability of injury. At one end of the scale this factor alone may preclude negligence. Almost any bodily motion or rest involves some possibility of causing harm; but if that chance is small enough the conduct that entails it will not be negligent even though the conduct is of minimal utility and the injury very great.

Thus it is not negligent to move a freight train forward during a rainstorm although in fact it is wrecked by a cyclone whose path is so narrow that a few minute's delay would avoid disaster. “If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be

28 L. Hand, J., in Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).
30 This question of the reasonableness of the risk is treated in Terry, Negligence, 29 Harv. L. Rev. 40 (1915); Harper, Law of Torts §72 (1933); Prosser, Torts §35 (1941); Restatement, Torts §§291-293 (1934). To all of these treatments, I am deeply indebted.
carried on at all.” 21 As the likelihood of some injury becomes greater there is more room for the interplay of the other variable factors. At the opposite end of the scale even the virtual certainty of inflicting harm may not, as we shall see, make conduct negligent if the threatened harm is very slight or the utility of the conduct very great.


The amount of caution required tends to increase with the seriousness of the injury if it happens. If the harm which may be foreseen is great, conduct which threatens it may be negligent even though the statistical probability of its happening is very slight indeed. Thus, if I shoot a gun without looking in a woods near a town, or go over a little used railroad crossing without taking any precautions at all, I may be negligent although the chance of injury on this occasion may be far less than one in a thousand. 22 On the other hand, the threatened harm may be so slight as to preclude negligence, though the conduct had no utility and involved a high probability of this trivial harm. Thus it may not be negligent to move so clumsily as to threaten a slight pedestrian collision 23 or the invasion of merely dignitary interest in property, or (abstractedly) to put table salt instead of sugar into your guest’s coffee. Even carelessness will not be negligence unless it entails unreasonable likelihood of unreasonable harm.


The notion that it may be unreasonable to threaten serious harm even though the chance of its occurrence is slight, is well illustrated by allergy cases, e.g., Gerkin v. Brown & Schler Co., 177 Mich. 145, 143 N.W. 48 (1913); cf. Note, 49 Mich. L. Rev. 253 (1950); and by cases of injury through psychic trauma to people of more than average susceptibility. Chiuchiolo v. New England Wholesale Tailors, 84 N.H. 329, 150 Atl. 540 (1930). Note, however, that if there is no reason to suspect the allergy, liability is withheld. See Bennett v. Pilot Products Co. and Gould v. Slater Woolen Co., supra note 31.

Whether I am negligent in the cases put in the text would seem to depend on what was to be gained by doing the act in each case without taking the precautions. If I shot in self defense or crossed the track to escape bandits, I might not be negligent. Cf. Morris v. Platt, 32 Conn. 75 (1864).

23 Geoghgan v. G. Fox & Co., 104 Conn. 129, 132 Atl. 408 (1926); cf. Greene v. Sibley, Lindsay & Ciyor Co., 257 N.Y. 190, 177 N.E. 416 (1931); Restatement, Torts §293, comment a (1934). Similarly, it is not negligent to threaten mere fright. See discussion in Chiuchiolo case, supra note 32.
The words "risk," "hazard," or "danger" usually mean a combination of these factors — i.e. probability of injury and seriousness of injury if it occurs. In this sense, it is often said, "The greater the danger, the greater the care required to meet it," and such language is not infrequently used in instructions to juries.\textsuperscript{24} Generally such language is a neat and apt enough summary of what has heretofore been said. Yet it is incomplete and so, in some cases, may be misleading. As we shall see there is a third variable factor which works in the opposite direction and may sometimes be entitled to enough weight to prevent conduct from being negligent even where it involves virtual certainty of very great harm.

3. Value of the Interest to be Sacrificed.

The interest which must be sacrificed to avoid the risk is balanced against the danger. At this point there is the greatest need for careful analysis so as to focus attention on the precise interest which would be sacrificed, and this in turn will depend on precisely what act or omission is challenged as negligent.

Many enterprises or activities involve a certainty — or a very high probability — of taking a toll of life and limb and property, over a given period of time. Faced with such a situation, society (through its legislatures or courts) may choose any one of several possible courses of action. The activity may be forbidden altogether, as is done where a nuisance is enjoined or an enterprise is made illegal by statute.\textsuperscript{25} Or society may choose to incur the danger of the enterprise generally, because of its utility, but forbid it to be carried on in a certain specified manner.\textsuperscript{26} In each of these cases society has decided to sacrifice whatever good might come to it from the whole

\textsuperscript{24}Ireland-Yorba Gold Quartz Min. Co. v. Pacific Gas & E. Co., 18 Cal. 2d 557, 116 P.2d 611 (1941) (high tension wires); Splinter v. City of Nampa, 70 Idaho 287, 215 P.2d 999 (1950) (storing explosive or inflammable matter); Well v. Kreutzer, 134 Ky. 563, 121 S.W. 471 (1909) ("Greater care was incumbent upon him by reason of the deadliness of the machine he was propelling along the highway."); Culpepper v. Leonard Truck Lines, 208 La. 1084, 24 So. 2d 148 (1945) (backing truck in dangerous place); Barlow v. Lowery, 143 Me. 214, 59 A.2d 702 (1948) (pedestrian walking at night on highway); Sullivan v. McIntain States P. Co., 139 Ore. 282, 9 P.2d 1038 (1932) (electricity); White v. Pinney, 99 Utah 484, 494, 108 P.2d 249, 253, 254 (1940) ("Where the danger is great the care exercised must be commensurate with it."). See Bohlen, Fifty Years of Torts, 50 HARV. L. REV. 725, 741 (1937). This does not mean that the standard of care varies; that is always reasonable care under the circumstances. What it means is that under circumstances of more apparent danger, reasonable care will require the taking of more precautions than will a situation of less apparent danger.

\textsuperscript{25}As to injunction against nuisance, see Kall v. Carruthers, 59 Cal. App. 555, 211 Pac. 43 (1922); Rindge v. Sargent, 64 N.H. 294, 9 Atl. 723 (1887); cf. Smith, Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor, 17 COL. L. REV. 383 (1917); Notes, 61 HARV. L. REV. 515, 520 (1948), Nuisance and Legislative Authorization, 52 COL. L. REV. 781 (1952).

Harper, The Law of Torts §189 (1933), treats the effect of statutes making an enterprise illegal.

\textsuperscript{26}Thus in Woywinkel v. N. Clark & Sons, 216 Cal. 156, 13 P.2d 733 (1932), defendant was restrained from using its furnaces and kilns "unless and until it shall erect between said ... furnaces and the property of the plaintiff a substantial fire proof wall or fence at least fifteen feet in height." Cf. Beecher v. Dull, 294 Pa. 17, 143 Atl. 498 (1928); DeBlois v. Bowers, 44 F.2d 621 (D. Mass. 1930).

In a way, any safety statute (e.g., rules of road, safety appliance statutes, etc.) may be said to forbid the carrying on of a certain activity in a certain manner. Here the line of demarcation between acts and activities, which is shadowy at best, becomes tenuous indeed.
activity, or from doing it in the specified manner, because of the danger such conduct involves. “Negligence” is easy to see in these cases. It consists in going into the outlawed activity or in carrying on a legal activity by a method which has been outlawed.\textsuperscript{37}

Society, however, often makes other choices. It may decide that a dangerous enterprise or activity is useful enough to be tolerated, or even encouraged, yet that it should pay its way without regard to the lawfulness or carefulness of its prosecution, so far as the injuries it inflicted are concerned. This solution has been found by the courts in those cases of private nuisance where the law will give damages, but not an injunction;\textsuperscript{38} in cases of the keeping of dangerous animals;\textsuperscript{39} in cases of extra-hazardous activities like blasting;\textsuperscript{40} in cases like \textit{Rylands v. Fletcher}\textsuperscript{41} and \textit{Vincent v. Lake Erie Transportation Co.};\textsuperscript{42} and so on. Workmen’s compensation acts and statutes making railroads absolutely liable for fires they set represent legislative choice of a similar solution. Here we are in the field of strict liability. In these cases there need not be the creation of any unreasonable risk by defendant.\textsuperscript{43} To be sure the activity involves some risk of harm but it is not an unreasonable risk, because the activity is useful enough to warrant it. Thus the act of engaging in the enterprise can scarcely be negligent, though it is the very basis of liability. Only confusion can result from importing the language and the reasoning of negligence into these cases.\textsuperscript{44}

Outside the fields of illegal enterprise and of strict liability, the interest whose sacrifice is in question on the issue of negligence is the \textit{value of the particular act or omission which is challenged as negligent}. Looked at another way, it is the burden of refraining from that particular act or of taking an effective precaution to cover that particular omission. It is not the value of the enterprise or activity as a whole, or the detriment that would flow from its abandonment. Liability for negligence is not based on engaging in dangerous but lawful activities though their dangerous character may call

\textsuperscript{37} Cf. James, \textit{Statutory Standards and Negligence in Accident Cases}, 11 La. L. Rev. 95 (1950).


\textsuperscript{39} Restatement, Torts §§506, 507 (1934).


\textsuperscript{41} 34 L.J. Ex. (n.s.) 177 (1865), L.R. 1 Ex. 265 (1866); L.R. 3 H.L. 330 (1868).

\textsuperscript{42} 109 Minn. 456, 124 N.W. 221 (1910).

\textsuperscript{43} In any given case there may be negligence because of the manner in which the activity is prosecuted. See discussion in Kall v. Carruthers, 59 Cal. App. 555, 211 P. 43 (1922); Smith, \textit{Tort and Absolute Liability — Suggested Changes in Classification}, 30 Harv. L. Rev. 409, 411 et seq. (1917). But in the absence of negligence in the manner of carrying out the activity, liability will still be imposed. Rylands v. Fletcher, 34 L.J. Ex. (n.s.) 177 (1865), L.R. 1 Ex. 265 (1866), L.R. 3 H.L. 330 (1868); Whitman Hotel Corp. v. Elliott & Watters Eng. Co., 137 Conn. 562, 79 A.2d 591 (1951); Wojewoda v. Rybarczyk, 246 Mich. 641, 225 N.W. 555 (1929); Boman v. Port Jervis Gas Light Co., 122 N.Y. 18, 25 N.E. 246 (1890); Sullivan v. Dunham, 161 N.Y. 290, 55 N.E. 923 (1900).

\textsuperscript{44} Some courts and commentators, however, insist on rationalizing the results in these cases in (fictitious) terms of negligence. See, e.g., Read v. J. Lyons & Co., Ltd., [1945] 1 All E.R. 106, 110 (C.A. 1944); Earl v. VanAlstine, 8 Barb. 630 (N.Y. 1850); \textit{Street, Foundations of Legal Liability} 52 (1906). An excellent analysis of the problem is to be found in \textit{Harper, Law of Torts} §203 (1933).
for greater precautions\textsuperscript{45} while on the other hand their value to society may call for less onerous precautions.\textsuperscript{46} The matter has been well put by the Nebraska court in a turntable case:

"The business of life is better carried forward by the use of dangerous machinery; hence the public good demands its use, although occasionally such a use results in the loss of life or limb. It does so because the danger is insignificant, when weighed against the benefits resulting from the use of such machinery, and for the same reason demands its reasonable, most effective and unrestricted use, up to the point where the benefits resulting from such use no longer outweigh the danger to be anticipated from it. At that point, the public good demands restrictions. For example, a turntable is a dangerous contrivance, which facilitates railroadin; in general benefits resulting from its use outweigh the occasional injuries inflicted by it; hence the public good demands its use. We may conceive of means whereby it might be rendered absolutely safe, but such means would so interfere with its beneficial use that the danger to be anticipated would not justify their adoption; therefore the public good demands its use without them. But the danger incident to its use may be lessened by the use of a lock which would prevent children, attracted to it, from moving it; the interference with the proper use of the turntable occasioned by the use of such locks is so slight that it is outweighed by the danger to be anticipated from an omission to use it; therefore the public good, we think, demands the use of the lock."

The act or omission challenged as negligent may have value to the actor or to another—it may be impelled by selfishness or by nobility. In either case the law will weigh the reasonableness of this value against the risk of injury. Thus it is not necessarily negligent to dash into the path of a train to save a child's life at the risk of one's own.\textsuperscript{48} Nor would it be to run over a child if the driver's only alternative were to drive over a precipice to self destruction.\textsuperscript{49} Although in both cases the actor's conduct involved a virtual certainty of very great harm, the value served by the conduct was great enough so that even such risk of harm was not unreasonable. In other less dramatic cases, dangerous conduct may still be reasonable if it is useful enough and effective precautions are disproportionately burdensome in terms of expense, inconvenience, or alternative risk. Thus a rapid transit company has been held not negligent in maintaining station platforms with only a six foot clearance between newstands and the edge of the platform, the court saying, "If this form of construction is negligent, then

\textsuperscript{45} Harper, Law of Torts §72 (1933); Prosser, Torts 256 (1941); cf. note 34 supra.
\textsuperscript{46} Restatement, Torts §§ 291, comment e, 292, comment a (1934).
\textsuperscript{48} Eckert v. Long Island R.R., 43 N.Y. 502 (1871); Carney v. Buyea, 271 App. Div. 338, 65 N.Y.S.2d 902 (1946). Cf. Burnett v. Connor, 299 Mass. 604, 13 N.E.2d 417 (1938). Cf. note 35 infra. It should be noted that the problem here dealt with is the evaluation of the rescuer's conduct as negligent or not. A different problem is whether the likelihood of rescue is a risk which may make negligent the conduct which creates the danger which calls for the rescue. See, eg., James, Assumption of Risk, 61 Yale L.J. 141, 143, 146 (1952).
\textsuperscript{49} Spooneman v. Ulri, 332 Mo. 821, 60 S.W.2d 9 (1933); Green v. Guynes, 361 Mo. 606, 235 S.W.2d 298 (1951). Cf. Morris v. Platt, 32 Conn. 75 (1864).
hundreds, perhaps thousands, of railway stations must be rebuilt.” 50 It is not always negligent to use a somewhat dangerous highway when there is a safer but longer route. 51 And an engineer may be justified in not bringing his train to an emergency stop so as to lessen the peril of a highway traveler if such a stop would increase the peril of his passengers. 52

In deciding the issue of negligence all these factors must be weighed, and they must be weighed in the scale of phophesy, or foresight of the reasonable man. It remains to consider when the court is to do this weighing, and when the jury; further, whether the law has worked out any crystallized rules to be applied in particular situations.

C. Functions of Judge and Jury.

Generally it is for a jury to say what the reasonable man would foresee. The reasonable man represents the general level of community intelligence and perception and the jury, being a cross-section of the community, should best be able to tell what that general level is.53 Moreover the factors to be evaluated in determining the reasonableness of the risk “are practically not susceptible of any quantitative estimate, and the second two [gravity of the threatened harm, and value of the interest which must be sacrificed to avoid

50 Williams v. N.Y. Rapid Tr. Co., 272 N.Y. 366, 369, 6 N.E.2d 58, 59 (1936). Cf. Cooper v. City of Dallas, 83 Tex. 239, 18 S.W. 562 (1892); Terry, supra note 30, at 96. The expense and feasibility of prompt snow and ice removal is to be considered in deciding whether a city has used reasonable care in keeping its highways reasonably safe. See discussions in Congdon v. City of Norwich, 37 Conn. 414 (1870); Williams v. City of New York, 214 N.Y. 259, 108 N.E. 448 (1915).

51 See for example Congdon v. City of Norwich, supra note 50; Williams v. City of New York, supra note 50. Cf. Materna v. Pennsylvania R.R., 358 Pa. 149, 56 A.2d 233 (1948) (railroad need not make minute and painstaking inspection of loaded cars received from other lines); White v. Pinney, 99 Utah 484, 108 P.2d 249 (1940). One line of cases in which courts have pretty consistently held the effective precaution too onerous is that wherein defendant's negligence poses a continuing threat (e.g., of flood or fire) to plaintiff's premises, and plaintiff's conduct involves a beneficial use of his own land which increases his exposure to risk of loss from defendant's negligence. Examples are the planting of crops where the flood may come or the putting up of combustible structures where the fire hazard exists. Such conduct is generally held not to be contributory negligence. To be sure, plaintiff has increased his risk of loss, but this is not unreasonable since the effective precaution is to forego an otherwise reasonable and proper use of his own land for a protracted period of time. If the law insisted on that precaution, it would in effect let defendant by his wrong condemn part of the beneficial use of plaintiff's land without compensation. It might well be negligent, on the other hand, to insist on piling hay at the edge of one's otherwise barren field at the very moment when a fire is visibly approaching it from defendant's land. On this general subject, see Leroy Fibre Co. v. Chicago, M. & St. P.R.R., 237 U.S. 340 (1914); Taubbee v. Campbell, 241 Ky. 410, 44 S.W.2d 275 (1931); North Bend L. Co. v. Seattle, 116 Wash. 500, 199 Pac. 988, noted in 19 A.L.R. 423 (1921); Kellogg v. Chicago & N.W.R.R., 26 Wis. 223 (1870). Cf. Willits v. Chicago B. & K.C. Ry., 88 Iowa 281, 55 N.W. 313 (1893); Emry v. Raleigh & G.R.R., 109 N.C. 589, 14 S.E. 352 (1891); Smith v. Ogden & N.W.R.R., 33 Utah 129, 93 Pac. 185 (1907).


53 Grand Trunk Ry. v. Ives, 144 U.S. 408, 417 (1892); Hone v. Mammoth Min. Co., 27 Utah 168, 75 Pac. 381 (1904).
it] are generally not so, even theoretically. For this reason a decision always involves some preference or choice between incommensurables, and it is consigned to a jury because their decision is thought most likely to accord with commonly accepted standards, real or fancied."

Here as elsewhere in the law, however, courts have put outer limitations on the jury's sphere and have themselves struck the balance among the variable factors we have been discussing by the adoption of some more or less crystallized rules. Thus the courts (or legislatures) have made the broad decisions as to which activities are to be subject to strict liability, and which ones to liability only for negligence. Within the field of negligence courts have also made value judgments for society as to what risks are reasonable in some of the cases cited as illustrations above — it is not unreasonable to save one life at the risk of another life or of injury to person or property; it is not unreasonable to carry on a lawful enterprise merely because of the virtual certainty that it will exact a toll of injury in the course of its projected existence. On a lesser scale, courts have made this value judgment whenever they have prescribed specific standards of conduct for recurring situations. Generally however courts have allowed wide latitude to the jury, restricting their sphere sparingly, on an ad hoc basis, where one conclusion only seems warranted by the facts. And even where the ultimate value judgment is prescribed by the court, there is often a question for the jury. While A may not be negligent in saving his life at the expense of B's, A may have negligently got himself into the position where he had to make the choice, or he may have been negligent in believing he faced the dilemma when there was a better way out for all concerned. If there are questions like these, the jury will solve them.

The question of what risks a reasonable man would foresee is also generally left to the jury subject to the usual limitation that the jury will not be allowed to make an altogether irrational judgment on the matter. And in this connection it should be noted that foreseeability is not a term of precision. As Bramwell, B., said of an extraordinary storm, "we call it extraordinary, but in truth it is not an extraordinary storm which happens once in a century, or in fifty or twenty years; on the contrary it would be extraordinary if it did not happen. There is a French saying 'that there is nothing so certain as that which is unexpected.' In like manner, there is nothing so certain as that something extraordinary will happen now and then." It

"L. Hand, J., in Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940).

See notes 48-52 supra. Some cases have taken the view that the rescue of property did not warrant the taking of risk to life or limb, but the tendency has been to reject any rule of thumb for an inquiry into reasonableness under all the circumstances. Compare Cool v. Johnston, 58 Mich. 437, 25 N.W. 388 (1889), and Eversole v. Wabash Ry., 249 Mo. 523, 155 S.W. 419 (1913), with Rushton v. Howle, 79 Ga. App. 360, 53 S.E.2d 768 (1949), noted 48 Mich. L. Rev. 370 (1950).

"Restatement, Torts §292, comment a (1934).


See notes 53, 54, 57 supra. See also James, Functions of Judge and Jury in Negligence Cases, 58 Yale L.J. 667 (1949).

Ruck v. Williams, 3 H. & N. 308, 318, 319 (Ex. 1858).
will be seen, therefore, that there is no logical necessity for the courts to hold the jury in tight rein on this issue. And here as elsewhere the tendency has been for the courts to apply this limitation sparingly.60

The subject matter of the foregoing discussion has received specialized application by the courts in two types of situations which deserve special treatment here: (1) the effect of an emergency on the reasonableness of conduct; (2) the effect of the probable conduct of others upon the reasonableness of what the actor does.

D. CONDUCT IN EMERGENCIES.

If a person is caught in a sudden emergency, that is part of the circumstances in the light of which his conduct at that time is to be judged.61 And if the situation is one which would perturb the judgment of the standard man, that fact is to be considered.62 The test is whether the actor took one of the courses of action which a standard man in that emergency might have taken, and such a course is not negligent even though it led to an injury which might have been prevented by adopting an alternative course of action.63 As Cardozo, J., has said:

"'Errors of judgment,' however, would not count against him, if they resulted 'from the excitement and confusion of the moment.' The reason that was exacted of him was not the reason of the morrow. It was reason fitted and proportioned to the time and the event." 64

This rule will be applied even where the actor has put himself in the emergency because of some prior negligence;65 but in this connection one

60 A dramatic illustration of this trend is Chase v. Washington Water P. Co., 62 Idaho 298, 111 P.2d 872 (1941). Here defendant maintained the customary clearance of 28" between its transmission line and an uninsulated guy wire. This gap was bridged by chicken hawks locked in aerial combat, causing the fire which consumed plaintiff's property. Such hawks abounded in the region and had caused disturbances in wires. The court said, "While, from an anticipatory point of view, the exact manner in which these hawks interfered with the wires upon this occasion may seem unusual or extraordinary, viewed in retrospect it cannot be said to have been unforeseeable." Plaintiff's judgment was upheld. Such liberality of result seems to be invited by the Restatement's formula about what appears "extraordinary" after the event (which was quoted in the Chase case). Cf. James and Perry, Legal Cause, 60 YALE L.J. 761, 800 (1951).

61 See also Note, 61 HARV. L. REV. 515, 518 (1948); James, Qualities of the Reasonable Man in Negligence Cases, 16 MO. L. REV. 1, 14 (1951); Ehrenzweig, NEGLIGENCE WITHOUT FAULT 19, 55, 63 (1951). Another example of expanding the foreseeability concept has been in the field of products liability. Injury to strangers to the contract from dangerous defects was once thought unforeseeable from the manufacturer's viewpoint. See Huset v. J. L. Case Threshing Mach. Co., 120 Fed. 865, 867 (8th Cir. 1903). This of, course, is no longer the case. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1915); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E.2d 693 (1946).


66 This is clearly shown in last clear chance cases. Under prevailing American doctrine, defendant will be held on this basis only if he could have avoided the injury by exercising
thing should be noted: The exercise of due care in an emergency will not
insulate an actor from liability for the consequences of the negligence that
helped to bring the emergency about. Thus even though a motorist driving
at excessive speed does everything that could be done to avoid striking the
child who darts out into his path, these precautions taken in the emergency
(while constituting due care) will not excuse the driver from liability for
the excessive speed.

Another thing should be noted here. Failure to make some provision
for possible emergencies may constitute negligence. In many activities the
occurrence of certain types of emergencies is likely enough to call for
reasonable steps to meet them. The owner of a theatre must take account
of the possibility of fire, the proprietor of a bathing beach cannot ignore the
likelihood of emergencies that threaten drowning, and (most common of
all) the driver on the highway must make some preparation to meet a host
of vicissitudes which include many that are not specifically foreseeable. To
an extent which varies tremendously with circumstances, we will all be
held to expect the unexpected. This fact may call for precautions to meet
emergencies, which may consist of mechanical equipment (like fire escapes,
life-preservers), or the employment of suitable personnel and even the training of them to meet certain kinds of unusual situations.

E. THE OBLIGATION TO TAKE INTO ACCOUNT THE CONDITIONS AND THE
CONDUCT OF OTHERS.

When men live together in society, even the most selfish of them must
regulate their lives to a very great extent on the basis of how they expect

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reasonable care in the crisis as things were presented to him at that time. Note, 2 Utah L. Rev. 60 (1950). Antecedent negligence in getting himself into the emergency does not deprive him of the right to have his conduct judged in the light of that emergency. Sponeck
man v. Uhri, 332 Mo. 821, 60 S.W.2d 9 (1933).

On Plaintiff's side, even though he has gotten into peril by negligence he is considered
unable to escape from it "by the exercise of ordinary care," if he then acts reasonably
(but unsuccessfully) even though another reasonable course of action might have averted
the injury. See, e.g., Harrington v. Los Angeles Ry., 140 Cal. 514, 74 Pac. 15 (1903);
Shaaf v. Coen, 131 Ohio 279, 2 N.E.2d 605 (1936); James, Last Clear Chance: A Transi
tional Doctrine, 47 Yale L.J. 704, 711 (1937); RESTATEMENT, TORTS $254, and comment
Utah 365, 172 P.2d 665 (1946) (although boy negligent in playing on street, his running in
wrong direction when companion shouted warning of approaching auto, not treated as fresh

This, I suggest, is the real significance of the qualification so often found in stating
the "emergency" rule, that the emergency must not be one created by the actor's own
negligence. See cases cited notes 61-63 supra. If the foregoing analysis in the text is correct
this language, while technically faulty, will yield a correct result except in the last clear
chance type of situation.

Cf. note 59 supra.

Strahl v. Miller, 97 Neb. 820, 151 N.W. 952, aff'd sub nom. Miller v. Strahl, 239

Cf. Larkin v. Saltair Beach Co., 30 Utah 86, 83 Pac. 686 (1905) (equipment to rescue
bathers).


Collins v. Riverside Amusement Park Co., 61 Ariz. 135, 145 P.2d 853 (1944); Pickett
v. Jacksonville, 155 Fla. 439, 20 So. 2d 484 (1945); Mullen v. Russworm, 169 Tenn. 650,
50 S.W.2d 530 (1932); Larkin v. Saltair Beach Co., 30 Utah 86, 83 Pac. 686 (1905).

other people to act. And naturally enough in determining whether any given conduct involves an unreasonable risk of harm, the reasonably foreseeable conduct of others which may affect the consequences of the actor's conduct should be considered. This is the general rule. It remains to examine some special applications of it and some vestigial limitations upon it in practice.

The case where the conduct of the other person (i.e., other than the actor whose conduct is being judged) is itself that of a normal, reasonably prudent adult, gives no trouble at all. Such conduct the actor is bound to take into account if under the circumstances of the case it is reasonably foreseeable. Thus the manufacturer of an automobile in order to be in the exercise of due care must foresee that it is likely to be driven along public highways without the detection and repair of a latent defect.

The obligation to regulate one's conduct with a view to other people's disabilities and their substandard conduct should stand no differently. People generally do take extra precautions when they drive past a crowd of young children playing by the roadside, or when they see an aged and infirm pedestrian crossing the street. They do realize that other drivers often pull out from the curb without looking for traffic, and that they sometimes fail to yield the right of way or keep on going after a traffic light has turned red against them, and they drive with a view to these hazards. They do lock houses and automobiles and secure valuables against the possibility of theft, and so on. There are several types of situations where this notion has been applied, and for mere convenience of treatment they may be divided as follows:

1. Where something specific about the situation gives notice of the likelihood of the other person's disability or his substandard conduct. The first two examples given in the last paragraph are of that kind. So also are those cases where the nature of the place (e.g., playgrounds), or signs, proclaim the probability that children or blind people, or the like, will be present. And of course the other person's conduct may often show his infirmity to one who has eyes to see.

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9. RESTATEMENT, TORTS §§290, 302 (1934). Thus one who creates a danger is held to realize that danger invites rescue. Wagner v. International Ry., 232 N.Y. 176, 133 N.E. 437 (1921). And the likelihood of peril to the rescuer is to be weighed in deciding whether the original conduct was unreasonably dangerous. Carney v. Buyea, 271 App. Div. 338, 65 N.Y.S.2d 902 (1946). There may be found in the rescue cases an example of the general trend to view with increasing liberality the question of what is foreseeable. In 1904 the Iowa court declared, in a leading case, that a man will not be held to anticipate that someone will come to his own rescue. Saylor v. Parsons, 122 Iowa 697, 98 N.W. 500 (1904). Contrast Brugh v. Bigelow, 310 Mich. 74, 16 N.W.2d 666 (1944), noted 43 Mich. L. Rev. 980 (1945); Carney v. Buyea, supra, noted 32 CORNELL L.Q. 605 (1947), 25 TEXAS L. REV. 688 (1947).

10. Whether he is bound to exercise reasonable care in any given case is a separate question, having to do with the scope of duty.


An excellent example of this kind of situation is to be found in Shafer v. Keeley Ice Cream Co., 65 Utah 46, 234 Pac. 300 (1925), where defendant's agents continued to throw free candy to the crowd from a float in a parade although this caused a scramble and rush among the younger spectators. Plaintiff, a bystander, was knocked down and hurt in one of these scrambles.

2. Where the actor’s conduct (including omissions and also such things as the maintenance of premises or highways) is likely to affect an indeterminate number of people, among whom there will in all probability be some children, some aged and infirm people, some pregnant women, some foreigners who do not know the language or the customs of the country, and the like. In such situations, if the imputation of negligence is to be avoided, some account must be taken of reasonably foreseeable deviations like those mentioned. But such general likelihood does not call for as much in the way of precautions as do the situations mentioned in the previous paragraph.

When the other person’s conduct involves negligence or a crime, there are certain notions which sometimes impede the full application of the foregoing rational principle. It is often said that an actor may assume that others will act lawfully and carefully. Rightly understood this is sound enough, and no more than a corollary of the general principle. As a broad generalization, people probably do obey the law, so that unlawful conduct is more or less deviational and unusual. In many situations, therefore, the assumption mentioned no more than reflects the real factual probabilities as to what another person’s conduct will be. If the assumption is made only in cases where it reflects the facts, it is useful and proper. But in this connection two things must be noted. The first is that such an assumption does not always correspond to the facts. It does not in situations where a law is generally disobeyed. It does not where the facts in a specific case would show to a reasonable man in the actor’s position that another person will probably

In the child trespasser cases where liability is imposed under the turntable doctrine or the playground rule, one of the bases for finding negligence is the likelihood of the presence of children at the place where injury occurred.

Whether the duty not to be negligent is owed, in any given case, is a question pertaining to the scope not the nature of the duty.

This follows from the difference in the degree of likelihood in the two cases. Compare, for instance, Shaefer v. Keeler Ice Cream Co., 65 Utah 46, 234 Pac. 300 (1925), with Charvot v. Salt Lake City, 42 Utah 435, 131 Pac. 901 (1913). The differences between these two cases are many. But in each of them the court stressed as one factor the likelihood of the injurious childish response to the condition created by defendant. In Shaefer there was specific reason to expect that response; in Charvot there was not, although course children are among those exposed to the perils of an open ditch along the side of the street.


Such a law is the Connecticut statute requiring a motorist to go around the imaginary center of the intersection in making a left turn. Except where there is a traffic circle, or the like, this statute is rarely obeyed. This fact may not legally excuse the disobedience. Cf. Murphy v. Way, 107 Conn. 633, 141 Atl. 858 (1928); Fallon v. Collier, 133 Conn. 370, 51 A.2d 591 (1948); James, Chief Justice Malbone and the Law of Negligence, 24 Conn. B. J. 61, 66 n.25 (1950); but it should have a bearing on what others may reasonably expect of a motorist in making a left turn. Cf. Langner v. Caviness, 238 Iowa 274, 28 N.W.2d 421 (1947); Payne v. Chicago & A.R.R., 129 Mo. 405, 420, 31 S.W. 885, 888 (1895) in which the court said, "A presumption that every one will obey the law rests upon the fact that dutiful citizens do obey it. The presumption is at once rebutted when it appears
disobey the law this time.\textsuperscript{61} And it does not wherever the actor's conduct exposes some interest to risk from a large and indeterminate group of people which will probably include some who will be negligent or commit crime, so that the likelihood of some negligence or some crime is considerable, though the number of those who will be responsible for it is relatively small.\textsuperscript{62} The second thing to be noted is that the assumption has often been applied rather mechanically, without any real regard to the factual probabilities of the situation.\textsuperscript{63} Perhaps the most significant trend that has taken place in this particular field, in recent years, has been the increasing liberalization in allowing the wrongs of other people to be regarded as foreseeable where the facts warrant that conclusion if they are looked at naturally and not through the lens of some artificial archaic notion.\textsuperscript{64}

Subject to the qualifications just mentioned, situations where the probable negligence or crime of another is to be taken into account in evaluating conduct, fall into classifications parallel to those mentioned above\textsuperscript{65} with respect to the infirmities of others:

3. Where something specific about the situation gives notice of the likelihood of the other person's probable negligence or crime.\textsuperscript{66}
4. Where the actor's conduct exposes some interest to risk from a large number of people which includes some danger from negligence and some from crime.  

So far we have been considering ways in which the condition or conduct of others may require more precautions or acts of care than would otherwise be reasonably necessary. Under some circumstances, however, the conduct or condition of others may justify the actor in omitting a precaution which would otherwise be reasonable. Thus in a recent case the conduct of a deckhand on a ferry boat in impliedly inviting a truck driver to proceed was held to warrant a finding that the driver was not negligent in doing so though the clearance was so close where the deckhand stood that it might otherwise have required the driver to wait.

In the past decades the accident problem in America has assumed alarming proportions, and with its growth has come a growing realization of the social importance of compensating accident victims. Outside the field of industrial injuries we still look to the law of negligence to solve that aspect of the problem. The courts have not, however, been insensitive to the pressure for wider compensation—which would minimize the importance of fault as a basis of liability. The foregoing analysis of the nature of negligence has been made without specific reference to this pressure and the conflict it entails. After all, we are here in the very heart of the citadel of fault. Yet even here may be seen strong tendencies to stretch the fabric of fault towards greater ease of recovery. The broad pervading principles of negligence have not yet been exploited by the courts to yield the last full measure of compensation attainable within their logical framework. In the years to come we may expect not only that, but also many results which do not fit the logic of fault at all and make sense only in terms of compensation. The wise lawyer will appraise all that has been said here with that in view.

\*\*\*See note 82 supra. A ready example is the case of the bailee who takes no precautions against theft of the subject of the bailment. The Neering case, supra note 86, is another example.

\*\*\*Johnson v. United States, 168 F.2d 886 (2d Cir. 1948).