Proof of Negligence

Fleming James Jr.
Proof of Negligence*

Clarence Morris†

The Objectives of Proof

The substantive law of negligence points the way to proof of negligence. Claimants’ lawyers offering proof try to lay predicates for detailed conclusions which inescapably add up to negligence in law. Negligence is a compound conclusion, based on prior sub-conclusions; it can be broken down and its parts so stated that they throw light on the kinds of evidence needed. When a claimant’s lawyer argues the defendant’s negligence to a trial judge or a jury he needs to have made proof which will back up these six assertions:

1. This (describing it) is what defendant did.
2. Such conduct is dangerous.
3. Either (a) defendant knew it was dangerous, or (b) a reasonable man in defendant’s circumstances would know of the danger.
4. The risk could feasibly have been reduced in such-and-such a way, at the slight cost of $...., and with only such-and-such inconvenience.
5. Defendant knew of (or had a reasonable opportunity to know of) the safer way of acting.
6. Defendant’s conduct falls short of the care required of him by law.

Proof which will justify these six statements varies in complexity. In some cases all the plaintiff needs is evidence picturing (in a common sense way) the scene of injury and the defendant’s conduct at the time of injury. Proof that a defendant threw a banana peel on a busy walkway would sustain a verdict of his negligence. Often, however, proof of what happened at the time of the accident is only a start and other evidence must be adduced bearing on the last five of the above six statements. This discussion is designed to indicate the kinds of evidence sometimes needed to back up each of the six statements.

*This article is, in substance, a chapter from a projected book on Torts in process of preparation by the writer. Much of the ground covered is a synthesis and simplification of more elaborate presentations. The reader who is interested in more documentation than appears in the footnotes of this article may consult one of the following articles by the author: Custom and Negligence, 42 Col. L. Rev. 1147 (1942); The Role of Expert Testimony in the Trial of Negligence Issues, 26 Texas L. Rev. 1 (1947); Proof of Safety History in Negligence Cases, 61 Harv. L. Rev. 205 (1948); Admissions and the Negligence Issue, 29 Texas L. Rev. 407 (1951). These four articles also appear in Morris, Studies in the Law of Torts (1952).

†Professor of Law, University of Texas Law School; currently Visiting Professor, University of Pennsylvania Law School.
Proof Describing Defendant's Conduct and the Scene of Injury

Automobile-collision witnesses are seldom asked the color of the defendant's suit or when he last bought gasoline. But if a driver's identity is in dispute, the color of his suit might be crucial; or if testimony on speed conflicts, a showing that he pulled out of a filling station just before the collision may be determinative. Each law suit has individuality; details unimportant in one may be decisive in another.

In a negligence suit the plaintiff has the burden of coming forward with a credible and fairly specific version of what the defendant did and of circumstances surrounding his conduct.\(^1\) The plaintiff usually proves what happened by calling eyewitnesses who testify to what they saw—the defendant drove through a red light, the defendant's circular saw was used without a guard, etc. Litigants themselves often take the stand and give this sort of testimony; occasionally they are called by their opponents.

Testimony about prior or subsequent events may throw light on what happened at the time of accident. Mr. Witness testifies, Mr. Merchant's stairway had no handrail shortly before or shortly after Mr. Customer fell down the stairs. If Witness' testimony stands uncontradicted, trial judge and jury may infer that there was no handrail when Customer fell—unless Merchant explains how it got there or what became of it.

Conduct may leave tracks which can be fruitfully examined. An automobile braked at high speeds makes skid marks which can be located, measured and interpreted. Proof of the placement of the mark establishes where the brake was applied; proof of its length may establish speed; proof the brake was applied tends to establish that the driver saw trouble ahead; etc.

Laymen cannot read some tracks left by events; only experts can decode their meaning. In *Clark v. Standard Sanitary Mfg. Co.*\(^2\) claimant had cut his hand on a sharp edge of a fracture in a porcelain faucet-handle which broke when he turned it. The defendant-manufacturer made the handle. An expert testified that he found the handle brittle—because it was overbaked.

Experts may also be used to draw meanings from the testimony of eyewitnesses. In *Kelly v. McKay*\(^3\) a homeowner testified that

---

1. Some common-sense assumptions will aid plaintiff unless defendant comes forward with disproof; if, for example, in a head-on collision case, plaintiff proves defendant drove on the wrong side of the road, he need not initially rebut possible excuses defendant may have had for doing so.

2. 8 N.J. Misc. 284, 149 Atl. 828 (1930).

3. 149 Tex. 343, 233 S.W. 2d 121 (1950).
a quarryman set off a blast which shook rocks next to his house, and stated the distance between quarry and rocks. Then an expert took the stand and testified that only a dynamite charge heavier than one hundred pounds could have such an effect.

Proof of Danger

Conduct that is not dangerous is not negligent—as a matter of substantive law, for, only when conduct is dangerous can resulting injury be foreseen. Injuries can be the upshot of reasonably safe conduct—a careful driver can run over a child who darts into his path. No proof is needed to establish the dangerous character of deeds commonly known to be hazardous. But many hazards not understood by ordinary judges and jurors lurk in our industrialized world. When one of these hazards takes a toll the injured man who charges negligence needs proof to show danger. In Wood v. Canadian Imperial Dry, Inc. 4 a workman newly employed in a carbonated-drink bottling plant was hurt when a bottle exploded. Had the workman proved only these facts jurors (who know little about bottling machinery) might have difficulty in deciding whether the explosion was (1) a sporadic accident unlikely to recur in bottling works, or (2) an instance of a tendency to cause harm inhering in the way the business was run.

Danger or safety may be investigated in two different ways:

1. An investigator (without bothering about the past history of a bottling machine) may apply general knowledge to the machine and adjudge it dangerous or safe. This general knowledge may be about bottling machines as a class, mechanics, tensile strength of commercial bottle glass, gas pressures, etc. Those who have such knowledge are usually experts.

2. An investigator may be able to adjudge a particular machine dangerous or safe by going into its past history. If bottles often have exploded in it, then its use is probably dangerous; if it has been used for a long time without mishaps both before and after a particular explosion it can be adjudged relatively safe. These conclusions are sometimes soundly reached by persons without special knowledge or training—the judgment is “practical” rather than “theoretical.”

Each of these methods has its weakness. If a bottling machine is adjudged dangerous or safe on theoretical grounds without looking into its history, some practical aspect of danger or safety may be overlooked. If it is judged only on its bad or good record, happenstance may make it seem more dangerous or safer than it is.

4. 296 Mass. 80, 5 N.E.2d 8 (1936).
Often, of course, theory is enough—pulling a strange mule's tail is dangerous. And practical experience can clearly warn of danger before the nature of a risk is fully understood—some swamps were known to be malarial before the role of mosquitoes in spreading the disease was discovered. Sometimes, however, only a combination of theory and experience is convincing.

A good example of educating a trial judge and a jury with expert testimony on danger is *Air Reduction Co. v. Philadelphia Storage Battery Co.*,\(^5\) a suit for fire-damage to a factory. The defendant had built a system for distributing oxygen in the factory. Oxygen entered the system through a manifold which exploded soon after the system was put in use. The fire ensued. The factory owner's experts testified: oxygen under high pressure is inflammable and will explode on contact with coal dust, waste, oil, or small steel clippings. When oxygen explodes in a copper or brass manifold the fire burns itself out harmlessly inside the chamber. In a steel chamber fire feeds on the walls, perforates them, and bursts out. This testimony, coupled with proof that the manifold was steel, made an impressive case of danger. Qualified experts can be used to give such testimony whenever ordinary jurors will not recognize danger without a specialist's help.

Even though an accident happens in an industrial setting danger may be understood by jurors without expert testimony. In *Missouri, K. T. R. v. Williams*,\(^6\) a mail crane hit a passing locomotive engineer on the head and killed him. The railroad contended: jurors cannot intelligently decide where mail cranes should be located unless they are guided by expert testimony, and since the plaintiff offered none he had not proved negligence. The court held: danger was patent and plaintiff needed no experts to prove it.

Laymen do not always know the limits of their knowledge and expert testimony may be used to warn jurors away from unsound assumptions on danger. In *Johnson v. Detroit & M. R.*,\(^7\) an action against a railroad for running over cattle, the stock owner's non-expert witnesses described the cattle guard over which the stock had passed onto the right-of-way. The railroad offered expert testimony on the capacity of this type of guard to check stock. The appellate court ruled this testimony admissible. Such proof may keep jurors from assuming serious danger where little or none exists.

Discussion now turns to proof of danger or safety by showing the past record of the site of accident—safety history evidence.

---

5. 14 F.2d 734 (3d Cir. 1926).
6. 103 Tex. 228, 125 S.W. 881 (1910).
Most courts admit safety history evidence, but some courts always exclude it on the ground that it opens up a “collateral inquiry.”

A factory inspector who had the job of deciding whether or not a bottling machine was safe would not ignore proof that it had already claimed fifteen eyes or proof that it had been constantly used for forty years without injuring anyone. But factory inspectors do not hear lawsuits and are not impeded by these three aspects of litigation:

1. Trial judges and jurors cannot recheck partisan proof by active inquiry. When safety history evidence is offered it can only be heard or kept out, and the court hears only that history which advocates choose to present. Partisan advocates are likely to prove only parts of the machine’s record, parts which favor their clients. Cross-examination to develop completeness may be clumsy and time-consuming. Often such proof has too little value to be worth the time it takes.

But sometimes safety history evidence sheds crucial light on a central dispute. Many courts are willing to put up with it with these cases in mind. The most flexible practice allows trial judges to decide whether or not safety history is likely to be worth hearing and rule accordingly. A few appellate courts expressly avow this flexible practice; others tacitly approve it by upholding virtually all trial rulings on admissibility.

2. Litigants need special protection against surprise. A factory inspector who finds novel evidence can work with it and test it until he understands it. A damage suit lawyer who unexpectedly has safety history evidence thrown at him in a trial is rarely able to cope with it properly. Safety history evidence may encompass events happening sporadically over months and years; opposing counsel may be unprepared to meet fraudulent, partial, or mistaken testimony about other accidents or long periods of safe use.

But if lawyers know that safety history evidence may be heard they have a chance to be prepared to meet it; in no case which I have read does an objector make a convincing showing of unreasonable surprise.

3. Jurors may be misled by safety history evidence. Jurors convinced of a defendant’s guilt of negligence on another occasion may find against him even though he mended his ways before the accident in suit; jurors impressed by a defendant’s good record may fail to see that he dropped his guard.

But courts receiving safety history evidence restrict proof to times when conditions were virtually the same as those surrounding plaintiff’s injury. The logic of valid use of safety history evidence is simple, practical logic which adult jurors should under-
stand. Trial judges can, and sometimes do, give enlightening jury instructions on value and use of the proof.

Mrs. Shopper falls while walking in Mr. Merchant's store. Eyewitness's description of the floor may be the only proof needed on danger—once described the floor may be obviously hazardous or clearly safe. Proof of other falls or of long periods of safe use should be excluded as a waste of time. But fully described walkways may still be arguably dangerous or safe; the scene of some falls cannot be described by unskilled witnesses so that a jury can do more than choose between conflicting dogmatic testimony. If Mrs. Shopper claims the floor provided poor traction her witnesses are likely to testify, "the floor was slippery," or "the slickest I've ever seen," or "gave me a feeling of insecurity" or some other subjective statement of low probative weight. Proof of other falls (or of extensive use without falls) cogently bears on the quality of traction. Most courts admit safety history evidence in such cases. An occupant's proof of safe use may be so convincing that it warrants a directed verdict. A faller's failure to prove other falls may be a glaring lack in an already doubtful case—a lack which some courts have stressed in granting a nonsuit. Proof of other falls may not only forestall a directed verdict for the occupant but may also convince some juror, otherwise inclined to believe a defense witness who testified that the floor afforded ordinary traction.

In these fall cases the scene of accident is described testimonially and safety history evidence is added to throw light on qualities of the premises which are hard to describe objectively. In another type of case safety history evidence is a desirable substitute for detailed testimonial description. Baker v. Hagey was a suit against a junk dealer who processed steel scrap for market. Modern cutting torches had not yet been invented and large pieces of steel were broken up in a log structure with explosives. A steel fragment hit and injured a neighbor. The neighbor was allowed to prove: the junkman's operations had long been scattering high speed missiles over the whole neighborhood. This evidence established that the junkman's conduct was freighted with danger. Had the neighbor tried to prove the seriousness of risk without showing this bad record he would have needed testimony describing the structure in detail and proof showing the sizes, force, and likely paths of fragments produced by the kind of blasts used. Safety history evidence was a simple substitute for complicated eyewitness and expert testimony.

When eyewitnesses' description shows a high order of danger,

8. 177 Pa. 128, 35 Atl. 705 (1896).
super-added proof of other accidents is usually a waste of time; but when eyewitnesses' description is a weak showing of danger, proof of a long period of safe use is valuable and should be received. In Field v. Davis a teamster proved this his mules backed his wagon out of a grain elevator and over the side of a railing-protected entrance ramp. The court held: the elevator owner was properly allowed to show that thousands of wagons had used the ramp and there had been no other accident. Proof of injury tends to dispose jurors to find danger. Jurors might have been able to visualize this ramp and discern its safety without proof of its good record. But they might not, and the elevator owner deserved the protective inference that could be drawn from his safety history evidence.

A good example of a combination of expert testimony and safety history evidence is found in Muller v. Kirschbaum, a case in which the plaintiff was scalded when a restaurant coffee urn burst. The plaintiff proved by an expert that the urn could not withstand pressures above twenty-five pounds per square inch, and that its valves would not protect the urn from pressures higher than twenty-five pounds. The plaintiff then proved the urn had burst three other times, showing that the expert knew what he was talking about. So safety history evidence may confirm the reliability of expert testimony.

Discussion turns to another type of proof of danger or safety—admissions. An admission is a party's out-of-court statement inconsistent with his position at trial; it may be oral, written, or implied by his conduct; it is hearsay but is received under an exception to the rule excluding hearsay. A plaintiff's admission of safety of the site of his injury is inconsistent with his claim that the site was not maintained with due care; it may be proved against him. A defendant's admission of danger at the site is, of course, also competent evidence.

Proof of an admission is not necessarily conclusive of the matter admitted; it is only entitled to the probative weight it happens to have. If Mr. Consumer is poisoned by eating Mr. Packer's product and if in a moment of magnanimity says he is sure Packer's plant is run with all possible care, proof of his admission may be far from fatal to his claim. Safety of food processing can be judged

9. 27 Kan. 400 (1882).
11. Proof of other accidents sometimes tends to show that defendant knew (or should have known) his conduct was dangerous—a topic that will be discussed shortly. But a showing of other accidents after plaintiff's injury has no bearing on defendant's knowledge at or before the plaintiff's injury. Some courts receive this proof of subsequent safety history for its bearing on danger; other courts exclude it and restrict safety history evidence to cases in which it bears on defendant's knowledge of danger. See, Morris, Studies in the Law of Torts 77, footnote (1952).
reliably only by experts or those who know safety history. Unless Consumer has either special experience with food packing or knows of Packer's plant's record his admission has little weight and is not likely to sway a jury confronted with better founded proof to the contrary.

When an admission involves danger readily discerned by ordinary men it may be virtually determinative. In Reid v. Owens12 a young motorist driving his father's car ran down a pedestrian. The pedestrian sued the father claiming that he negligently entrusted the car to the boy, knowing he was not competent to drive. The pedestrian proved that before the accident the father had said his son was a reckless driver. The court held this evidence was properly admitted to show that the boy was, in fact, incompetent, and established the danger of turning a car over to him.

Proof of Knowledge of Danger or Opportunity to Discern It

The topic of proof of danger, just discussed, is a significant part of a negligence case because the substantive law of negligence makes it so. The new topic—knowledge of danger—is, of course, equally rooted in substantive law. The law does not make all dangerous conduct negligent; one who acts dangerously nevertheless exercises due care when he is excusably ignorant of the danger. If a reasonably prudent man contemplating the same act in the same circumstances would not have discerned the likelihood of injury the actor is not negligent. The reasonably-prudent-man is not omniscient; he sometimes fails to recognize dangers which in fact exist. Of course a defendant with knowledge of danger cannot plead excusable ignorance of it. And some defendants who are ignorant of danger are not excusably ignorant; they should know better.

In simple cases the only evidence needed to establish that the defendant was not excusably ignorant of a risk is eyewitness description of his conduct. A normal adult would not be heard to say, "I didn't know it was dangerous to smoke while cleaning a rug with gasoline."

When novel operations in technological fields turn out to be unexpectedly dangerous something more than eyewitness description is usually needed to prove that the defendant should have anticipated the harm which resulted. Illustrations of both adequate and inadequate pre-searches for risk are found in Chapman Chemical Co. v. Taylor,13 a suit for damages to growing cotton resulting from the use of 2, 4-D (a new chemical killer of broad leaf plants)

12. 98 Utah 50, 93 P.2d 680 (1939).
13. 215 Ark. 630, 222 S.W.2d 820 (1949).
brought against a rice farmer and a chemical company. The manufacturing chemical company mixed 2, 4-D with talc and touted the mixture for dusting rice fields to kill weeds. The farmer, after getting assurances from the manufacturer and impartial experts that 2, 4-D dusting was unlikely to harm neighboring cotton fields, hired aero-dusters to treat his rice fields. Much dusting had been done with other chemicals; none had ever floated more than a hundred feet when applied properly. Unknown to either of the defendants (or anybody else, for that matter) the particles were tiny air foils and floated far enough to kill a cotton crop three-fourths of a mile away. The court held: (1) farmer was excusably ignorant of danger and not liable, but (2) manufacturer "was charged with knowledge which tests would have revealed."

Actual knowledge of danger (or lack of it) can be proved by several kinds of evidence. The defendant can take the stand (or be called to it by the plaintiff) and tell whether he had such knowledge. Eyewitnesses who saw him look at the source of danger, or make a bungling attempt to remedy it, or order an employee to take steps to reduce the risk can give damaging testimony. Express admissions of knowledge of danger are occasionally proved; in the case in which a pedestrian proved that a car-lending father admitted knowledge of his son's reckless driving, the admission was received to prove: (1) the son was not a competent driver (danger) and (2) the father knew of his recklessness (knowledge of danger).

Implied admissions of knowledge of danger are often proved. In Branson v. Northern Pac. R., a train hit a truck on a private grade crossing. No warning whistle was blown. Since the crossing was not public, crossing signal statutes were inapplicable. Some private crossings may be so little used and so relatively safe that warnings are not called for. The trucker was allowed to prove that before the accident the railroad had maintained a "whistle post" at this crossing. The court held: this evidence tended to show both danger and the railroad's knowledge of danger.

A plaintiff need not establish knowledge of danger when he establishes that the defendant had an adequate opportunity to discover it and therefore would have discovered it had he been reason-

---

14. The majority were willing to hold the manufacturer liable without proof of negligence, and approved an instruction visiting liability without fault on him—on a theory of "extra-hazardous activity." A dissenting judge thought the jury should have passed on whether or not manufacturer was excusably ignorant of soaring qualities of his chemical. Cf. Walton v. Sherwin-Williams, 191 F.2d 277 (8th Cir. 1951), in which a manufacturer put up 2, 4-D in oil and made tests which showed it would not injure neighboring broad leafed crops if properly applied. The Court said, "There is . . . solid foundation for the finding that 2, 4-D in an oil solution is not an inherently dangerous product." The court then analyzes the case as a negligence claim defeated by proof of the manufacturer's due care.

ably alert. In *Rosenthal v. Central Garage* a business guest slipped on a glob of grease on a stairway. He proved neither that his host knew it was there nor how long it had been there. He failed to carry his affirmative burden of establishing that a reasonably alert garage operator could have discovered the hazard, and he lost his case. But in *White v. Mugar* decided by the same court in the same year, proof that a shopper slipped on vegetable leaves after they had been on a market floor for an hour thwarted the market man's motion for a directed verdict.

Safety history evidence can be used to prove knowledge of danger. In *Dyas v. Southern Pac. R.R.* a workman was killed by a collapsing railroad derrick which fell because ties under the derrick car were rotten. The plaintiff was allowed to prove the railroad's knowledge of an earlier accident in which another derrick collapsed on these same tracks for the same reason. Proof of knowledge of the earlier accident established either knowledge of the rot or an adequate opportunity to discern it.

Does proof of prior accidents tend to establish the defendant's knowledge of danger when the plaintiff does not show the defendant's knowledge of the prior accidents? In *Long v. John Breuner Co.* a customer fell on an inclined concrete store entrance. The customer called a witness who was ready to testify to a harmless fall he had while using the entrance. The merchant objected because there was no showing of his knowledge of the witness' fall. The appellate court affirmed a ruling admitting this evidence, saying the testimony not only tended to show the dangerous character of the ramp, but also tended to bring home to the merchant knowledge of the danger. This theory seems wrong; storekeepers often do not hear of harmless slips on their premises; the probative weight of such proof of knowledge is slight indeed. But viewed from a procedural angle the ruling takes on different light. The court did not bar the storekeeper from testifying that he neither saw nor heard of the witness's tumble. The merchant could have protected himself from an inference of knowledge by testifying convincingly that he had none.

In *Bridger v. Asheville & S. R.R.*, a case in which a child was killed while playing on an unlocked railroad turntable, proof was offered to show serious injuries had been inflicted by the turntable on several other children before the tragic accident in suit. The court ruled this evidence incompetent unless coupled with proof

---

17. 280 Mass. 73, 181 N.E. 725 (1932).
18. 140 Cal. 296, 73 Pac. 972 (1903).
20. 27 S.C. 456, 3 S.E. 860 (1887).
specifically showing the railroad's knowledge of these earlier accidents. This ruling seems doubtful on three grounds: (1) The evidence tended to prove the unlocked turntable dangerous. (2) Such accidents seldom go unreported and the railroad probably knew they happened; proof of their happening is strong circumstantial evidence tending to show the railroad's knowledge of them. (3) The railroad can be properly protected against a false inference of knowledge by affording it an opportunity to show that earlier accidents were neither reported to it nor seen by its servants.

The likelihood that a proprietor will know about earlier accidents on his property varies with circumstances. If many people have been seriously injured the proprietor is almost sure to know about some of the accidents. If only a few have been slightly injured (or barely escaped injury) the proprietor may well not be aware of the minute blemishes on his premises' record.

A proprietor's proof of a long period of safe use coupled with descriptive testimony tending to show safety may conclusively establish lack of danger— and, of course, no one can have knowledge of hazards which do not exist. Favorable safety history does not, however, establish excusable ignorance of danger when a clear hazard should have been discerned even though it has happened to claim no victims. Between these extremes lies a group of cases in which a record of no accidents bears on acceptability of excuses for failure to discern danger.

In William Laurie Co. v. McCullough21 a customer fell on an oiled floor in a dry goods store. The court held: the merchant should have been allowed to prove he had used the same floor dressing for a number of years without accidents. The court said the evidence tended not only to show the floor safe but also to show no lack of diligence on the part of the merchant in failing to discern whatever danger may have resulted from use of the floor dressing.

Other courts have taken a less sensible view. In Park Circuit & Realty Co. v. Coulter22 a child was injured in an amusement park when his foot caught in a "fun house" slide. The slide was a slanted series of free-rotating cylinders; the child's foot caught between two of them because the lower one was rotating the wrong way. Experts demonstrated with models and gave testimony showing (1) reverse rotation caused the accident, and (2) reverse rotation could feasibly have been prevented by inexpensive and efficient rachets. The proprietor offered to prove use of the slide by 100,000 people a year without prior accidents. This evidence was excluded. The

22. 233 Ky. 1, 24 S.W.2d 942 (1930).
appellate court approved exclusion on the doubtful theory that jurors would assume there were no other accidents if none were proved, and therefore exclusion was harmless. This holding is unsound. The evidence tended to show experience which warranted a reasonable belief in the slide’s safety. As a matter of substantive law the proprietor was not negligent even though his slide was unnecessarily dangerous if he reasonably believed it safe. The evidence had an affirmative bearing on an important issue in the case.

Another kind of proof bearing on knowledge of risk is proof of warnings of danger. In *Curd v. Wing*, a case in which a wall collapsed on adjoining property, the owner of the damaged property was allowed to prove, for the purpose of showing the wall-owner knew of the risk, that the city engineer had told him his wall was likely to fall.

Defendants are also allowed to prove assurances which lull them into reasonably (but mistakenly) believing their property safe. In *Langdon-Creasy Co. v. Rouse* a storekeeper’s exploding gasoline lamp injured an employee. The court held: the storekeeper should have been allowed to prove he had investigated before buying the lamp and was told by a number of users that the brand of lamp was perfectly safe. The evidence, of course, bore on whether or not the employer was excusably ignorant of danger.

The proprietor of a dry goods store who may reasonably rely on advice of others in selecting a gasoline lamp must not be confused with the maker of gasoline lamps who is engaged in a calling for which only experts are qualified. In the oxygen manifold case,

24. 139 Ky. 647, 72 S.W. 1113 (1903).
25. The case of Service v. Shoneman, 196 Pa. 63, 46 Atl. 292 (1900), raises a similar problem. Steam from a boiler sprayed on a workman in a dry goods store. The trial judge allowed the merchant to prove: he knew little about boilers, and was assured by a number of boiler users before buying his that the kind of boiler he proposed to buy was a good one. The jury was not impressed and returned a verdict for the workman on which the trial court pronounced judgment. The appellate court reversed and rendered judgment for employer. Perhaps this case goes no further than the gasoline lamp case plus a holding that reasonable jurors could not find negligence on the facts proved. The opinion, however, all but formulates a new rule of substantive law to this effect: an inexpert buyer of a complicated mechanical appliance who in good faith seeks out and relies on advice of qualified safety experts cannot be found guilty of negligence. At least one court has so interpreted the holding, and then followed it. State Journal Printing Co. v. City of Madison, 148 Wis. 396, 134 N.W. 909 (1912). Such a rule must have at least two limitations: (1) A proprietor less competent to judge safety than experts on whom he relies may still know enough to make some intelligent investigations on his own; his failure to investigate may sometimes be unreasonable disregard for safety of others. (2) The off-hand opinion of an expert caught on the fly can be a flimsy submission of the problem to him; if submitter ought to know that expert has not considered his problem carefully he cannot prudently rely on expert’s opinion.
discussed earlier, 26 experts called by the owner of the fire-damaged factory testified on danger resulting from use of steel manifolds, and then testified that this danger had long been known to science and commercial suppliers of oxygen systems. As a matter of substantive law the defendant who furnished the steel manifold was not entitled to claim excusable ignorance of this danger. Such an enterprise is carried on properly only by those who know how. Even an uninformed beginner in such a trade is derelict unless he engages, as his servants for whose qualifications he is responsible, experts acquainted with dangers known to the craft and allied sciences.

Even careful experts are sometimes excusably ignorant of risks. In Grammer v. Mid-Continent Petroleum Corp., 27 an occupational disease case, an employer went to great length to show that in spite of elaborate investigation and precaution a risk of lung disease was not discerned until after the plaintiff-workman contracted it. The majority of the court held that the employer established excusable ignorance of danger and was entitled to a directed verdict. 28

Proof of Feasible Safer Alternatives

An alarm-answering driver of a fire truck who speeds through crowded streets knows he is doing something dangerous. Yet, as a matter of substantive law, he is not negligent. There is no other feasible way to perform his important service. It is practical for him to give warning by blowing a siren; normally he would not be excused for driving a fire truck which was not equipped with one. But he may drive dangerously fast and still use due care.

Sometimes this aspect of the substantive law of negligence calls for no special proof. If a factory operator fails to fence an elevator shaft, no evidence is needed to show that practical safeguards were available and that he should have known about their availability. If a father entrusts his car to his reckless son for a night on the town he will not be heard to say he had no feasible alternative. But in some cases the availability, practicality, and opportunity to know about safer alternatives is not so obvious and must be established by proof.

A defendant's knowledge of feasible safeguards can be proved by admissions. Businessmen are likely to guard their talk; they seldom admit (on or off the witness stand) that they neglected to use feasible safeguards of which they had knowledge. Some damn-

27. 71 F.2d 38 (10th Cir. 1934).
28. A dissenting judge was not convinced. Both opinions are illuminating.
ing admissions of this kind are occasionally elicited on cross-examination. A rare example of an out-of-court admission was proved in Jones v. Raney Chevrolet Co.,28 a suit against a second-hand car dealer for injuries resulting from inefficient brakes. The claimant was allowed to prove: dealer said to a witness that he had had trouble with the type of brake on the model sold and had replaced many of them with a better type of brake. The appellate court affirmed without commenting on the evidence's tendency to establish the dealer's knowledge of a feasible safer alternative.

Cases on implied admissions of known feasible precautions are more common. In Warburton v. N. B. Thayer Co.,30 a factory hand was injured when her dress caught in a revolving shaft under her work bench. She was allowed to show that skirt guards were used on similar benches in the plant. This evidence clearly tended to prove the employer's knowledge of a feasible safeguard. Practicality of better protecting the employee was in issue and the holding is authority for competence of proof of implied admissions establishing knowledge of a feasible way of reducing a risk.

Suppose the employer used no skirt guards before the accident but installed them afterwards. Proof of this fact would tend to show that the risk could feasibly have been reduced before the worker was hurt. But it would not tend to show that before the accident the employer discerned danger or was aware of a way of reducing the risk. Some accidents educate; they call attention to dangers and prompt search for safeguards.

Courts universally exclude proof of precautions taken after an accident when offered "to establish negligence." One of the judicial justifications for this exclusion is fear that jurors will not understand the limited value of the proof. But when a lawyer offering proof of precautions adopted after injury offers it solely for the purpose of showing safer ways would have been practical virtually all courts receive it. Courts have ruled the following evidence competent: proof that a railroad changed its roadbed to keep sand from washing on its track, offered to show that a derailment which killed an engineer could easily have been prevented;31 proof that a slaughter house glue vat was covered after an employe fell into it, offered to show that a cover would not have unduly interfered with the packer's business;32 proof that a railroad discontinued use of a dangerous cross-over track offered to show that its use was unnecessary when a trainman was injured.33

30. 75 N.H. 592, 2 Atl. 826 (1909).
32. Carstens Packing Co. v. Swinney, 186 Fed. 50 (9th Cir. 1911). An industrial accident statute was involved, but the principle seems to be the same.
33. Derrington v. Southern Ry., 328 Mo. 283, 40 S.W.2d 1069 (1931).
Exclusion of proof that some simple fence or rail was built after an accident would not be error—even if offered only to show the practicality of the safeguard. Jurors commonly know about feasibility of simple precautions. When, however, the setting of an injury is industrial, feasibility of safer alternatives is usually a technical question; it may be a central issue calling for proof. The claimant’s lawyer must draw this issue clearly; if he does so a defendant unwilling to admit frankly feasibility of a safeguard will be unable to keep out properly offered proof of his post-accident adoption of that safeguard. 34

One judicial justification given for exclusion of proof of post-accident precautions is this: If such proof were competent, defendants would postpone adoption of new safeguards until claims are disposed of. If this reasoning justifies exclusion when the evidence is offered “to show negligence,” it also justifies exclusion when the purpose of the offer is more limited. But the reasoning is based on a doubtful proposition of fact. Many claims are in the mill for a long time; threat of further harm is much more frightening to defendants and their insurers than a minor threat of strategic disadvantage in a lawsuit which will probably not be tried. Especially is this true since expert testimony may be used to prove that safer alternatives were open to the defendant. In the oxygen manifold case, discussed earlier, experts testified that copper and brass manifolds were safer than steel manifolds; that their safety had long been known to science and the trade; and that they were in general use. This proof established: (1) the defendant feasibly could have reduced risk, and (2) he should have known he could.

A defendant using experts to prove he took all practical precautions completes this proof only if his witnesses account for his rejection of alternatives which seem safer to jurors of common understanding. In Harris v. Central Power Co. 35 a car struck a guy wire which ran from a power pole to pavement in an alley. Power company experts testified the guy wire was an indispensable support and had to be in the pavement if the pole was in the pavement. They then said the pole could not be moved off the pavement because its cross arms would encroach on abutting property. But a non-expert can think of feasible safer alternatives. The power company’s witnesses had not testified that an arm extending only

34. Defendants in these cases are normally specialists who have obligations to discern dangers and seek out ways of reducing them. They seldom can claim, as a matter of substantive law, either excusable ignorance of existing danger or excusable unawareness of available practical safeguards. These, then, are cases in which practicality of safer alternatives is likely to be a central issue.

35. 109 Neb. 500, 191 N.W. 711 (1922).
on the alley side would be impractical, and the court was willing to allow a jury, in the absence of expert testimony to the contrary, to find such an alternative feasible. The opinion puts forth other suggestions of practical safer alternatives, such as condemnation of a wider right of way, and warnings on the guy wire.

Closely resembling both expert testimony and subsequently adopted precautions is proof of departure from custom. If restaurateurs customarily use safety valves to control steam pressure in coffee urns, their use is probably equally feasible for a particular restaurateur; if they are used widely he probably had an adequate opportunity to find out about them. Of course a particular restaurateur should be allowed to show in rebuttal unusual circumstances which make customary safeguards peculiarly unnecessary or especially onerous for him.36

Unusual conduct is not necessarily unsafe conduct; proof that a defendant is merely different from other members of his craft is a waste of time and may be misleading. In Cunningham v. Ft. Pitt Bridge Works,37 an industrial accident case, a heavy girder was moved by hand and dropped on a workman. He was allowed to prove the customary way of moving structural iron was by crane—without showing that crane-moving is safer than hand-moving. The trial judge told the jury: departure from ordinary methods is negligence. The appellate court held the instruction wrong and said, "The party charging negligence does not show it by showing that the machinery was not in common use. If it should be so held, the use of the newest and best machine if not yet generally adopted, could be adduced as evidence of negligence. . . . the evidence should not in the first instance be admitted on behalf of the plaintiff unless it tends to show that the method pursued was not only unusual but more dangerous in itself than the ordinary one."38 When evidence tends to show lack of a customary precaution it does tend to show a feasible, well-known alternative safer than the course followed.39

Courts also usually allow defendants charged with negligence to prove they used all customary safeguards. This proof does not necessarily show either that greater precaution was impractical or that defendant was excusably ignorant of feasible precautions not yet adopted by his craft. The whole craft may have inexcusably

36. Proof of departure from business safety custom has another (and unusual) bearing. It tends to show liability will not force widespread business change. Without it jurors might assume erroneously that departer's conduct is representative of business. Some jurors (though not many) might hesitate to impose a liability which would have widespread repercussions. Proof of departure divests the departer of undeserved prestige.
37. 197 Pa. 625, 47 Atl. 846 (1901).
38. Id. at 630, 846.
failed to use feasible and well-known safeguards. Nevertheless this proof does have two permissible uses:

(1) It tends to point up the onus of the plaintiff's burden of proof. Proof of a defendant's conformity to custom sharpens attention on whether or not plaintiff has established that defendant had practical safer alternatives. When jurors know the ways of the defendant's calling they are less likely to accept hastily suggestions that he could and should have acted differently. If none of his craft has adopted suggested alternatives, the plaintiff must show clearly that these alternatives are safer and feasible.

(2) Lack of opportunities to learn of safeguards from other members of his craft is one of the circumstances to be taken into account in judging whether or not defendant was excusably ignorant of a feasible safeguard. A defendant who proves he followed standard usages proves he could not learn greater precaution from fellow craftsmen. He still may be negligent; those who follow bad examples may be at fault even though their models are respectable and numerous. If he should have learned about safeguards some other way, proof that he could not find them in his competitors' shops is no defense.

A business usage may be so obviously hazardous that the negligence of those who follow it is clear. Then proof of conformity to custom is a waste of time. In Mayhew v. Sullivan Mining Co., an industrial accident case, a mine operator cut a ladder hole in a platform in a dark shaft and posted no guards and gave no warnings. A workman fell through, dropped thirty-five feet, and was seriously hurt. The trial judge rejected operator's offer to prove such openings were customarily left unguarded. Barrows, J., approved the exclusion and said, "If the defendants had proved that in every mining establishment that has existed since the days of Tubal-Cain, it had been the practice to cut ladder-holes in their platforms . . . without guarding or lighting them, and without notice to contractors or workmen, it would have no tendency to show that the act was consistent with ordinary prudence. . . . The gross carelessness of the act appears conclusively upon its recital." When a custom is outrageously dangerous, the need of greater precaution may be a matter of common knowledge.

Evidence of conformity to custom takes on added significance when coupled with proof that widespread usage has resulted in virtually no injuries; the combination has all of the usual force of proof of conformity and in addition all of the usual force of widespread favorable safety history. If, in a fall case, a grocer

40. 76 Me. 100 (1884).
41. Id. at 112.
shows that his floors were treated in the customary manner, and that customers have used the same kind of floor without injury in hundreds of grocery stores, this evidence tends to prove not only that the grocer would discover no better way in the examples set by other grocers, but also that his floor was, in fact, safe. Proof of conformity alone does not go so far; some usages persist even though they result in injuries.

Evidence to Establish Criteria of Due Care

Normally proof tends to establish "facts"—what happened, how it could or could not have been avoided, etc. On the negligence issue, the plaintiff has usually exhausted the possibilities of proof once he has shown: (1) what defendant did, (2) how dangerous it was, (3) defendant's opportunity to discern danger, (4) availability of safer alternatives, and (5) defendant's opportunity to know about safer alternatives. Similarly the defendant is usually all through when he offers all of his counter-proof on these five sub-issues. Sometimes, however, counsel are allowed to prove that, in some one's estimation the defendant's conduct was unreasonably hazardous or duly careful, and the jury is permitted to respect these opinions for what they are worth. These are instances of exceptions to the opinion rule, which normally requires exclusion of opinions amounting to legal characterizations of facts. Most of the following discussion will be concerned with exceptional cases in which such proof may be received.

One preliminary problem involves a kind of proof—clearly admissible—in which an implied opinion on reasonableness should be disregarded by the jury—viz., proof of business custom. The problem can be posed this way: should the jury be permitted to use business custom as a measure of what the reasonably prudent man does, as a test of due care?

Early in the Twentieth Century a few courts took the position that the reasonably prudent man is the average man, and therefore a craftsman who proves that he acted like other members of his craft establishes the fact of his due care. Even these courts, however, hesitated to exonerate conformers to obviously dangerous customs. These courts said, "Conformity is due care only when custom is not obviously unreasonable."

Most courts now hold the view that due care is what-ought-to-be-done rather than what-usually-is-done; proof of what men do is only a non-conclusive aid in determining what should be done. Nevertheless a contrary notion—that the reasonably prudent man is a composite of actual people—seems to have great hardihood. Its per-
sistence probably stems from use of the ambiguous phrase, "ordinary care" as a synonym for "due care."

An ordinary pin is a common pin, not easily distinguished from billions of others. An ordinary oil painting, though clearly different from other ordinary oil paintings, may be satisfactory although without special merit. Similarly "ordinary care" has two meanings: (1) a statistical meaning comparable to the pin example—that is, the care in fact taken by others acting in similar circumstances, or (2) a value-judgment meaning comparable to the oil painting example—that is, satisfactory care—the care average persons should exercise. In the first sense ordinary care can be defined only by reference to what people do. In the second sense ordinary care can be defined only by reference to norms of proper conduct—conduct neither unduly solicitous nor unconscionably self-centered. These two ideas are not unrelated. Average care is likely to be duly considerate, and due care is likely to be average—people usually act properly. But we can ill afford to let those whose self-interest may run counter to paying the bill for adequate safeguards escape liability when all of them are guilty of the same shortcomings. While many business usages are satisfactory some are not, and we dare not make conformity to custom (average care) a test of satisfactory care.

If a custom must be adjudged satisfactory before it is used as a legal standard the grounds of that judgment, rather than the custom itself, are the sources of the standard. Judging reasonableness of a custom is, after all, the same as judging reasonableness of behavior conforming to it. Custom used as a test of due care only after it has been found reasonable, is, in itself, no test of care at all.

Usually when evidence of custom is received jury instructions are bare of comment on this proof. Occasionally it is mentioned, and the jury told nothing more helpful than: custom is not a conclusive test. Jurors no more clearly instructed may be tempted to substitute the judgment of a craft for their own judgment; lawyers should make clear arguments to keep them from doing so to the prejudice of their clients; these arguments should stress other functions of the proof—its bearing on the practicality of unused safeguards and on the opportunity of defendant to know about them. Perhaps, in the future, courts will devise more trenchant instructions. A simple caution to use custom as a test of reasonableness only after the custom is itself adjudged reasonable will do the job.

Experts are used to testify on danger, feasibility of reducing danger, and availability of knowledge of danger and safeguards; this testimony is all "fact" testimony. May an expert go further and characterize conduct as "reasonably prudent" or "unreason-
ably imprudent?” Usually such characterization is not permitted. Courts say it “violates the opinion rule” or “invades the province of the jury,” or “goes beyond the qualifications of the expert.” Never-\th\textit{theless} there are some exceptions to this rule, none of which is so firmly established that it can be relied on as a matter of course.

Some facts are deeply imbedded in special techniques and cannot be exhumed for understanding of average jurors in the time available for trial law suits. In \textit{Zarnik v. Reiss Coal Co.}\textsuperscript{43} a dump-car hopper-door opened off schedule and discharged cargo on a laborer working under a trestle over which the car was traveling. The locking device was a complicated mechanism. Clarity of most of the opinion vouches for the judge’s writing ability, but careful study of description of the lock left me with only a muddled impression of its workings. Perhaps jurors understood better; they had raw testimony before them and they may have seen diagrams or exhibits not embalmed in the opinion. The claimant’s counsel apparently feared jurors would not understand the risk; he asked his expert witness whether or not the hopper door was reasonably safely locked under the circumstances. The expert was allowed to testify that it was not. The appellate court affirmed and said jurors could not do as good a job of judging safety as the expert could.

The court in the \textit{Zarnik} case impliedly approves of this proposition: when facts are too complicated to expect jurors to settle the negligence issue on “fact” evidence, an expert’s opinion on reasonableness of risk may be given to the jury. When such evidence is received, expert testimony functions as argument—the expert on the stand advises the jury that they ought (or ought not) find the defendant negligent. Of course such testimonial-argument may be fortified further by argument of counsel made at the usual time.

In spite of the good sense of the holding in the dump car case, many courts would not follow it; they would exclude the evidence as an incompetent “conclusion.” A canny plaintiff’s counsel will elicit such testimony and risk reversal only when he believes he is likely to lose at the trial without it.

Evaluational expert testimony was not needed and brought a claimant to grief in \textit{Demarais v. Johnson.}\textsuperscript{43} The plaintiff’s expert had testified that a truck wheel collapsed because of loose spokes. Then the trial judge allowed him to testify that reasonable inspection before the accident would have uncovered the defect. This ruling was held wrong. The court said: the witnesses could properly have described methods of inspection and testified on their effectiveness and cost, but he was no more competent than the jurors to

\textsuperscript{42} 133 Wis. 290, 113 N.W. 752 (1907).

\textsuperscript{43} 90 Mont. 366, 3 P.2d 283 (1931).
determine whether or not failure to inspect was unreasonable; the witness, therefore, was not qualified to give expert testimony on what a reasonably prudent man would do. Plaintiff's lawyer could have avoided this risk of reversal and adduced more effective proof had he simply asked the witness to tell how inspections were usually made, how well they worked, and what they cost.

On some subjects experts are not able to state articulately the factual basis of their knowledge. In Christiansen v. McClellan a teamster working at road building was ordered to drive down an incline. His wagon upset and he was hurt. His expert was allowed to testify that the grade was too steep to be driven down in reasonable safety. The ruling was upheld on the ground that special knowledge and experience were involved. The witness did not elaborate on his judgment in any way. The factual basis of his dogmatic conclusion probably was not susceptible of full statement. An experienced teamster, however, has roughly accurate special knowledge on risks entailed in driving down grades. That knowledge is a composite of learning on traction, horse behavior, likelihood of load shifting, wagon centers of gravity, etc., all intertwined beyond the possibility of unravelment. His testimony amounted to saying, "the contractor was wrong in ordering the teamster to drive down the grade"—a judgment for the jury to take or leave. Jurors unskilled in teamsters' art may be incompetent to judge such an issue solely on proof of the angle of slope, the condition of its surface, the type of wagon, the content of load, etc. Without expert characterization of the grade as unreasonably dangerous, the teamster's case might have been too weak to withstand a motion for nonsuit. Nevertheless the expert could have been questioned on a more "factual" level; he could have testified that driving down the incline was freighted with substantial risk of upset, and stopped there. Perhaps his statement (in its context) meant no more, and was not likely to be understood as an opinion on a controversial matter of social policy. Experienced plaintiffs' advocates usually caution experts not to use evaluative language, for many courts are less liberal than the one that decided the teamster case.

In some circumstances defendants' experts testifying on safety can hardly be expected to avoid evaluational language. In Stewert's Adm'r v. Louisville & N. R.R., an action for wrongful death of a trainman killed in a derailment, one fact in dispute was the place where the train left the tracks. The plaintiff's evidence did not touch on condition of tracks at the point where railroad proof

44. 74 Wash. 318, 133 Pac. 434 (1913).
45. See, e.g., Pointer v. Klamath Falls Land Co., 59 Ore. 438, 117 Pac. 605 (1911), a contra decision on almost the same facts.
46. 136 Ky. 717, 125 S.W. 154 (1910).
tended to locate the derailment. The railroad undertook to prove by experts that tracks were in good order at that point. They were allowed to testify the tracks were reasonably safe, and they had not discovered the cause of derailment. The appellate court approved without saying anything about evaluational language. Practically no other form of testimony is natural in this context. If the experts had tried to detail the factual basis of their judgment, they would have had to wander over the whole professional field of proper road bed building and care. Had the plaintiff attacked some aspect on cross-examination or by counter-proof—and so given focus to the inquiry—the expert's original testimony would have little value until supplemented by more specific testimony.

In contrast is the holding in Whitehead v. Wisconsin Central Ry.,47 a suit for injuries incurred by a trainman struck by a low bridge. The bridge was guarded by tell-tales, but its ropes were fouled on a sheltering platform built over the tell-tales. Other roads used no such platforms. The court excluded testimony in general terms about the adequacy of these tell-tales. Proof before the court had already converged on the conclusion that the platform was an inexcusable fouling hazard; if there was a technical justification for its use defendant's experts should have gotten down to brass tacks and told about it.

Sometimes experts are allowed to testify on composite judgment of their craft on safety matters. In Lewis v. Texas N. O. R.,48 in which a landowner claimed a railroad's abutments unreasonably blocked a water course spanned by a trestle, railroad experts were allowed to testify: the trestle was built in accordance with best engineering safety practices. This conclusion was supported by detailed testimony on engineering calculations and design. No objection was made; both parties and the court took the competence of this evidence for granted. A railroad that builds in conformity to best engineering standards is usually capitalizing on all of the reliable safety information available to it—and is therefore using due care. However technologists develop approved practices to serve ends other than safety; such practices are unsuitable for judging due care. In Norfolk & W. R. v. Gillespie,49 a derailment case, injured plaintiff claimed the bank of a curve in the tracks was too shallow. The plaintiff proved a standard engineering table which called for an outside rail elevation of 53/ths inches on such curves. An expert for the railroad testified: the figure in the table was the right elevation for comfortable riding, but safety required only an elevation of 4 1/2 to 5 inches. Plaintiff's counsel used bludgeoning

47. 103 Minn. 13, 114 N.W. 254 (1907).
49. 224 Fed. 316 (4th Cir. 1915).
cross-examination to get him to say, "The table sets out normal and correct elevations." The trial judge ruled: the jury could find the elevation negligently unsafe on the proof of variation from the table. Perhaps this ruling was justified—on direct examination the railroad's expert did a poor job of demonstrating that figures in the table were affected by considerations of comfort; he also admitted that construction conforming to the table would have been safer and gave no excuse for departure. But the appellate court's affirming opinion shows no glimmer of recognition of the possibility that objectives other than safety may have affected the table.

When craft judgment crystallizes on subjects well understood by laymen courts differ on the competence of proof of craft judgment. In Hommel v. Badger State Inv. Co., a case involving a fall down a five inch step located four inches from a swinging door in an office building lobby, claimant's expert was allowed to testify to a violation of "good architectural practice." Architects use no laboratory science to furnish guides to safe walkways; nevertheless architectural interest in safe walkways has developed into craft lore crystallized in standard rules and charts. An architect told me, "The rule interdicting close proximity of steps to doors is based on the commonly known fact that doors are opened with hands and attention is drawn away from feet." But many modern structures are built in disregard of the rule. Though the appellate court held the testimony on architectural practice was admissible in the office building case, some courts have excluded similar proof in other cases as non-expert opinion invading the jury's province.

In most cases in which experts testify to reasonableness (or unreasonableableness) of precautions used they could have been prepared to give useful and clearly admissible "factual" testimony. While laymen are often able without the help of specialists to discern risks and their seriousness, they often know little about the practicality of alternative courses of conduct and costs in money and inconvenience of adopting them. An advocate who thinks his problems through in advance can often devise examination of experts which will bring out all of their relevant ideas without risk of error in-

50. 166 Wis. 235, 165 N.W. 20 (1917).
51. After our conversation I noticed four violations of the rule during a five minute walk on a modern university campus between his office and mine.
52. See, e.g., Graham v. Pennsylvania R., 139 Pa. 149, 21 Atl. 151 (1890). Held: trial judge erred in permitting architect to testify that an unguarded nine-inch step between two levels of a railroad platform was unsafe. The court said every traveler who ever got out of a railroad car or used stairs was as capable of judging the alleged danger as the architect. Though this architect only gave his personal opinion, the court probably would have been no more favorably disposed to proof of violation of good architectural practice—the court wanted no expert judgment. Perhaps this view can be justified on the ground that architects try to protect the careless as well as the careful; architecture has no rule of contributory negligence and no doctrine of voluntary assumption of risk.
herent in eliciting their opinions on reasonableness. Of course, sometimes that risk of error may be worth running.

Discussion now turns to proof of a litigant's own characterization of his, or his opponent's conduct by admissions. Mr. Equestrian says, in hearing of witnesses, "A reasonably prudent man would not run a horse down hill." Next day he rents Mr. Stablekeeper's horse, runs it down hill and injures it. Stablekeeper sues, and offers proof of Equestrian's statement. Is this evidence competent? Of course people do not talk in such legalistic terms. Yet similar problems are constantly raised in everyday litigation.

A close approximation to the horse case is a damage suit arising out of a breach of a company's own rules. Typical is Lake Shore R. v. Ward.53 A passenger was about to board an approaching train. As it neared she stepped back a pace to be safely out of the way. Her backward step put her into the path of another train coming from the opposite direction. A company rule forbade engineers to pass passengers waiting for other trains. Proof of this rule was held competent as an admission that due care required the engineer of the second train to stop.

A well-known case supporting the contrary minority view is Fonda v. St. Paul City R.54 in which the court says: the law fixes the standard of care, and the law cannot be varied by private rules—if private rules state standards different from legal standards they are irrelevant; if they state the same standards they are unnecessary. Of course the jury often has the function of deciding whether described conduct is negligent. Ordinary witnesses are never (and expert witnesses are seldom) permitted to testify on what a reasonably prudent man would do. Why should a railroad's views on reasonable conduct be singled out and held competent?

When a railroad fails to live up to its own concrete safety rule, the rule and its breach should be recognized as facts of the case. The legal conception of reasonable prudence entails the very considerations that normally guide draftsmen of company rules. Reasonable prudence means: enough effort to discern risks and their seriousness, determination to reduce appreciable risks when feasible, diligent search for safer procedures, and so on. These considerations also prompt and guide drafting of safety rules. The promulgation of a safety rule is an implied admission that the railroad has discerned danger and knows of a feasible way to reduce it. Admissions of fact are normally competent evidence.

But a safety rule is something more than an admission of fact; it admits that a risk of harm ought to be reduced in a particular way.

53. 135 Ill. 511, 26 N.E. 520 (1891).
54. 71 Minn. 422, 74 N.W. 166 (1898).
This ought-judgment is grounded in fact and grows out of fact—it is not a disembodied abstract principle of ethics. Surely a railroad should not be heard to say that its own realistic, informed opinion, based on its own professional qualifications and experience, should not be taken into account. A company rule is not likely to suggest a standard too high for practical enterprise; if and when it does (I have never seen a case remotely suggesting this possibility) the trial judge should have discretion to keep it out. Violations of safety rules should not be negligence per se. Some organizations have ideals impossible of accomplishment which may affect drafting of their rules. A company should be permitted to show that a violated rule was intended as an unattainable goal counseling perfection. Such ideals are, however, not usually expressed in rules published as working instructions. "No Smoking" is not an ideal in an oil refinery; it is a condition of continued existence.

Sometimes company rules are designed to protect the careless. Courts should keep clearly in mind that a breach of such a rule does not deprive the company of whatever contributory negligence defenses it would have had were there no rule to violate.

Admissions of proper standards of care can be implied by conduct as well as expressed in announced rules. In a case discussed earlier\(^5\) an injured factory hand was allowed to prove that work benches in the plant other than hers had skirt guards. This evidence tended to show that her employer discerned danger and knew of a feasible way of reducing it. All of his benches, except the plaintiff’s, had skirt guards. The employer’s extensive use of skirt guards implied that, in his judgment, benches should have them. Of course the implication falls if special circumstances make the employer’s implied judgment inapplicable to the plaintiff’s bench.

Plans to take precautions also imply the planner’s judgment on what ought to be done. When execution of such a plan is unjustifiably delayed and meantime an injury occurs, the implied admission that the planner departed from his own standards is clear. In *P. J. Llewelling Const. Co. v. Longstreth*\(^6\) a quarry worker was hit by a rock which bounced out of a chute. Sides of the chute were about a foot high. The workman was allowed to prove that several days earlier his boss ordered a foreman to make the sides higher, but the order was not carried out. The proof showed discernment of danger and a feasible way to greater safety. It also tended to prove something more, viz., in the employer’s judgment, the chute should have been safer.

After accidents those involved may make admissions of fault or

---

6. 156 Ark. 236, 246 S.W. 19 (1922).
lack of it. The unelaborated statement, "I was in the wrong", is based on the speaker's unannounced version of facts and his unarticulated theories of responsibility. Witnesses on the stand are seldom allowed to testify in terms so general. Some courts have excluded proof of such admissions, as "mere conclusions of law"; most courts, however, receive such proof. These admissions, when viewed in isolation, purport to be based on declarant's theories of legal responsibility, but, when viewed in their setting, they may be admissions descriptive of fact. In Robbins v. Weed, 57 an action against a motorist who ran down a pedestrian, the parties' testimony on what happened was in utter conflict. The pedestrian's witnesses testified: he was crossing the street and approaching motorist, whose view was unobstructed, gave no warning, did not change his course, and plowed into him. The motorist testified: he saw pedestrian, altered his course, and gave pedestrian ample opportunity to pass in front of him, but pedestrian jumped backwards into the path of the car. The dispute involved only what happened; either party was probably willing to concede that if his opponent's version was correct his opponent was entitled to a verdict. Pedestrian was then allowed to prove that motorist said he was to blame for the accident. This admission could have only a factual function; it tended to show the falsity of motorist's version of the facts. It had no bearing on a standard of conduct to be applied to the facts, for the standard was not in dispute. Motorist contended the admission should have been excluded because it was a mere conclusion following from his conceptions of law. In this setting the contention made little sense; the obvious bearing of the admission is on facts and not on motorist's theory of law. The court held the evidence competent.

In other settings reference of a bare admission of fault is clearly legalistic and throws no light on facts. In Rudd v. Byrnes 58 members of a hunting party separated and took up positions at deer crossings on a stream. The plaintiff left his station and trailed a dog into brush across stream from defendant's station. Defendant saw brush move, fired, and (since he had more skill than judgment) hit the plaintiff. Shooting at an unidentified moving object was so clearly negligent that the trial judge directed a verdict against defendant on the negligence issue. Defendant had pleaded contributory negligence and offered to prove plaintiff's out of court statement that he, too, was at fault. This evidence was held competent, but the court said it had little probative weight. Evidence of this admission served no fact-proving office—other proof

57. 187 Iowa 64, 169 N.W. 773 (1919).
58. 156 Cal. 636, 105 Pac. 957 (1909).
clearly portrayed the facts and they were not in dispute. Plaintiff's post-accident qualms are worth little unless they show facts or are based on special competence or experience.

These two cases show the variability of worth of bare post-accident admissions of fault. When their reference is factual they may valuably help in settling disputes of fact. When their reference is only moralistic or legalistic they are worthless. But if judges must discriminate between these two kinds of admissions in mid-trial their rulings would often be wrong. Proof of admissions like the one in the hunting case is not calculated to do much harm; jurors aided by arguments of counsel should see their worthlessness. The wise solution is the one to which most courts are tending—receive proof of bare post-accident admissions of fault and trust to abilities of jurors and counsel to see that they are properly weighed.

Three common forms of implied post-accident admissions of fault are flight from the scene of accident, rendering financial aid to the injured, and discharge of a servant who inflicts injury. They will be discussed separately.

**Flight.** In several cases a claimant has offered proof of a motorist's flight after a traffic accident. In none of them has the motorist objected. Criminal courts have universally permitted proof of an accused's flight from the scene of a crime. Perhaps this analogy has so settled the law that objection would be futile. In most cases proof of flight tends to establish facts, rather than legalistic conclusions. In *Shaddy v. Daley*, a side-swipe collision case, dispute centered on whether or not the defendant (who was traveling toward the plaintiff) was on the wrong side of the road. Proof that defendant fled after the accident was received. The probative weakness of the evidence is that he may have fled in confusion, or to avoid involvement, etc.—explanations which, of course, he could prove in rebuttal. The likelihood that he fled because he held erroneous theories of substantive law is not high; surely he knew that driving on the left side of the road was improper.

**Financial aid.** Proof that a defendant rendered or promised a claimant financial aid is often excluded on these grounds: (1) it is irrelevant, and (2) if it were admitted charitable impulses would be stifled.

There are those who will not offer to pay medical bills unless they believe themselves legally responsible for injury. Therefore proof of an offer to pay medical bills does have some tendency to prove consciousness of fault—a fact which can be proved, of course, in many courts by express admissions. Later discussion of specific

---

59. 58 Idaho 536, 76 P.2d 279 (1938).
cases will show that this kind of evidence is not necessarily irrelevant.

The second reason has more in it. If evidence of proffers of financial aid were received those who might otherwise lend a helping hand may suppress their generosity. But the number of private citizens who volunteer financial assistance to those whom they injure without fault cannot be large, and the growing availability of aid from other sources (charitable and governmental) reduces the social importance of such sporadic bounty. Corporations (railroads, for example) ordering by rule their employees to come to the aid of all injured on their property will be protected by the terms of their own rule from making an admission of fault; if assistance must be given to all who are injured, an instance of assistance does not tend to show consciousness of guilt.

Nevertheless caution in receiving this kind of proof is supported by adequate reason. Since proof of financial assistance has some little probative weight it might turn the scale in a close case. It could be the undoing of a humanitarian; a warm-hearted individual could suffer liability because of his generosity. This is reason enough for restricting the use of this kind of evidence—even though its exclusion may occasionally favor those whose real concern is only for themselves.

Some offers to pay for harm done are far from unsullied charity; exclusion of proof of these offers would unwarrantedly prevent a claimant from proving a damning admission of fault. In Rosen v. Burnham60 a landlord was remodeling part of his building; plaster fell on stock of one of his tenants—a merchant occupying premises next to those worked on. The landlord was called in and said he would pay for the damage done. Proof of this offer was admitted without objection. Had the landlord objected his objection should have been overruled. The merchant-tenant was not the kind of person likely to excite sympathy, and the landlord probably was not prompted by generosity. Of course the landlord could show in rebuttal, if such were the case, either that he was trying to satisfy a good tenant whether or not he was liable, or that he acted on a mistaken theory of liability.

The rule emerging in the case law on admissibility of evidence showing proffers of financial aid is: exclusion unless circumstances tend to show affirmatively that the proffer was not prompted by humanitarian impulses. When such evidence is admitted it may bear on disputes of fact, but in some settings it will tend to show only the defendant’s legal characterization of his acts and be of little worth.

60. 272 Mass. 583, 172 N.E. 894 (1930).
Discharge of servant. Proof that shortly after an accident a master fired the servant who did the harm tends to establish the master's belief that his servant was in the wrong. If the servant was let out for some other reason, his discharge is, of course, irrelevant. But in absence of explanation discharge following an accident tends to prove discharge because of the accident. Courts have uniformly excluded proof of dismissal or discipline of a servant—on the ground that proof of a remedial measure taken after an accident is never competent.\(^6\) Firing a negligent truck driver is quite different from scrapping a flawed fly wheel. A fly wheel can become unsound and do harm without negligence of its owner or his servants; but a master is responsible for the negligence of his servant even though he has used every possible precaution. If a master expressly admits his servant's negligence, proof of that admission is competent. There seems to be no acceptable reason for treating an admission of servant's fault implied from dismissal any differently from an express admission to the same effect. But with the authorities in their present state, plaintiffs' lawyers should hesitate to use such proof when other evidence will do the job.

The Burden of Proving Negligence

In all civil litigation plaintiff starts the ball rolling; trial of issues of fact does not start until he offers proof. Some issues are "defenses" and plaintiff need offer no proof to negative them until and unless at a later stage of the trial defendant's evidence puts them in issue. Negligence, however, is a plaintiff's issue; he has the initial burden of coming forward with proof adequate to establish negligence; unless he carries this burden before he rests his case, defendant is entitled to a dismissal. Once plaintiff has carried his burden of going forward well enough to thwart a motion for a dismissal defendant offers whatever evidence he may have, including proof of due care.

One of the defense's major objectives is to keep the case from the jury. When plaintiff rests his case defendant nearly always tests its sufficiency by asking the judge to rule that plaintiff's case is too weak to go to the jury. If this request is denied and defendant has proof to offer, the defendant is likely to renew the request when all of the evidence is in. Both requests are often centered on the negligence issue—though of course they can center on other issues.

Theoretically plaintiff, too, can call upon the judge to settle the negligence issue in his favor. If a reasonable juror after consid-

---

\(^6\) The leading case is Gillet v. Shaw, 217 Mass. 59, 104 N.E. 719 (1914).
ering all of the evidence could come to no conclusion other than that defendant was negligent, plaintiff is entitled to a directed verdict on that issue—should he ask for it. Plaintiffs seldom avail themselves of this opportunity. If a plaintiff's proof of negligence is strong enough for a directed verdict he will not fear the jury, but he will fear that the appellate court may not see the strength of his proof; in allowing the issue to go to the jury he runs virtually no risk of adverse verdict, but in asking for a directed verdict he runs some risk of reversal.

Negligence issues properly submitted to and honestly decided by a jury are usually settled once and for all. In most states, however, trial judges may override unwise verdicts—even though they are supported by some evidence; when a verdict is "against the weight of the evidence" the trial judge may set it aside and order a new trial; he does not substitute his judgment for that of the jury; he merely cancels the verdict rendered and orders a new trial before another jury which he hopes will act more sensibly. Plaintiffs (as well as defendants) are likely to attack verdicts as against the weight of the evidence; when a jury has found against a plaintiff he has nothing to lose in asking for a new trial.

There are few procedural guides to help trial judges and jurors decide on the adequacy of proof of negligence. When a defendant asks a trial judge to keep the issue from the jury and rule on the issue in his favor, the judge can look only to the substantive law requirements and the proof offered and ask himself whether reasonable jurors properly instructed could possibly find for the plaintiff. If the answer is yes the case must be submitted; if it is no the request must be granted. His legal learning will bear on what evidence is worth considering, but rarely will it help him determine probative weight of competent evidence. It is often said that a plaintiff must establish negligence "by a preponderance of the evidence" and this phrase is used in jury charges. The phrase points in the direction of adequate proof and has enough meaning to indicate that a plaintiff need not prove negligence "beyond a reasonable doubt," but it gives little comfort to trial judges or jurors faced with close problems of adequacy of proof.

Substantive law points to what must be proved. If a pedestrian's evidence tends to show that he was run down by an iceman's unhitched delivery horse, and if—as a matter of substantive law—leaving the horse unhitched is negligence, trial judge and jurors need only ask themselves whether or not the evidence adequately

62. One possible exception: a few courts have held testimony on out-of-court admissions of negligence uncorroborated by any other kind of proof of negligence will not support a verdict. Most courts have repudiated this view. See Morris, Studies in the Law of Torts 57 et seq. (1952).
proves the horse was left unhitched. But if substantive law furnishes no test of negligence more exact than the reasonably prudent man standard, they will have to determine not only whether or not proof justifies finding the horse was left unhitched but also whether or not leaving the horse unhitched should be characterized as negligence.

Occasionally both parties to a damage suit are willing to go to trial without a jury. Perhaps waiver of jury trial is more common than it once was. When a jury trial is waived the trial judge determines the facts as well as the law. Waiver of jury trial, of course, has no theoretical effect on the burden of proof—though, in fact, judges are likely to be more demanding of plaintiffs than jurors. Usually a plaintiff’s counsel is willing to waive jury trial only when he fears that his client is likely to fall victim to jury prejudice or jury ineptness. Some judges are more likely to give adequate verdicts on large claims than jurors unused to thinking in terms of thousands of dollars, amortization, etc. Defense counsel almost invariably try to keep their cases from going to the jury in jury trials, but this does not mean that they are eager to waive jury trial whenever a claimant is willing to do so. Intricacies of jury trial multiply chances for error, and likelihood that jurors will be misled disposes appellate courts to hold errors harmful enough to require retrial.

Res Ipsi Loquitur

One pattern of proof of negligence has been singled out by courts for special emphasis and given an esoteric name. In a 19th century English case, Byrne v. Boadle,63 a pedestrian proved he was walking past a store and a barrel of flour fell from a second story window, hit him, and seriously injured him. The trial judge ruled that the pedestrian did not establish the storekeeper’s negligence and entered a nonsuit. This ruling was questioned before the full bench of the Court of Exchequer, and found to be wrong.

Did pedestrian prove negligence? A barrel can fall out of a window without negligence of the occupant of the building. It is possible, for example, for an undiscoverable defect in a restraining rope to let a barrel loose in an utterly unforeseeable way.

Pedestrian, however, may recover without proving negligence beyond a reasonable doubt; he needs only proof by a preponderance of the evidence. When a heavy object falls out of a window the likelihood of its custodian’s negligence is quite high. Chances are better than 50-50 that this storekeeper was negligent. Rea-

63. 2 H. & C. 722 (Ex. 1863).
sonable jurors could find him negligent by bringing their own knowledge about such events to bear on the proof made. Pedes-
trian's case was strong enough to escape a nonsuit; he gave cir-
cumstantial evidence tending to show that storekeeper was negli-
gent. Baron Pollock put it this way, "There are certain cases of
which it may be said res ipsa loquitur, [the thing speaks for it-
self] and this seems one of them. In some cases the Courts have
held that the mere fact of the accident having occurred is evi-
dence of negligence . . ." 64

In Plumb v. Richmond Light & R. Co. 65 a passenger was injured
when a street car collided with a truck. The court said, "If a pas-
senger in a street car is injured by reason of a collision with an-
other vehicle moving in the street, a presumption of negligence
arises against the carrier, although the same presumption does
not arise against the driver of the other vehicle." 66 This court
holds: if a passenger proves only a collision and his resulting in-
jury, the carrier is not entitled to a directed verdict. But it cannot
be said that a juror of common experience knows: when a carrier
collides with another vehicle the likelihood that the carrier was
negligent is greater than the likelihood that the carrier exercised
due care. The court's refusal to presume negligence of the truck
driver indicates the court did not believe proof of collision is strong
enough to show that the traction company's servants were negli-
gent in fact. The passenger was excused from coming forward
with proof of the motorman's negligence. The thing does not—in
fact—speak for itself; only by fiction or legalistic presumption has
passenger proved motorman's negligence by a preponderance of
the evidence.

This analysis is not necessarily an attack on the result reached.
The opinion in the barrel case includes a relevant remark; Bram-
well, B., said, "Looking at the matter in a reasonable way it comes
to this—an injury is done to the plaintiff, who has no means of
knowing whether it was the result of negligence; the defendant,
who knows how it was caused, does not think fit to tell the jury." 67
In many cases, defendants' evidence-gathering opportunities are
superior to plaintiffs'—particularly when defendants are in con-
trol of premises, vehicles, or instrumentalities involved. More or
less arbitrary convention usually allots to plaintiffs a burden of
coming forward with evidence of defendants' negligence, rather
than allotting to defendants the burden of coming forward with
evidence of their own care. (The arbitrary nature of this allot-

64. Id. at 725.
66. Id. at 289, 505.
ment becomes clear when it is compared with the defendants’ allotted burden of coming forward with evidence of: (a) truth in a libel suit, (b) self-defense in an assault and battery action, and (c) contributory negligence in a personal injury case.) No strong reason can be given against allotting the burden to the defendant in the street car case especially since he has superior access to proof.

The holding in the street car case does not make for tidy law—in virtually all other negligence cases the claimant has an initial burden of coming forward with proof of lack of due care. Modern practice provides increasingly effective pre-trial procedures for discovering facts known to opponents; a passenger represented by skillful and vigorous counsel seldom needs the advantage of having the traction company present its evidence on the negligence issue first. In jurisdictions not following the Plumb case passengers injured in collisions often sufficiently establish negligence of carriers. So the justification for special treatment is far from conclusive, and has not had widespread acceptance. In some jurisdictions it has been expressly repudiated.\(^{68}\) Nevertheless there is a widespread tendency to advert from time to time to the defendant’s superior access to proof in res ipsa loquitur cases—usually in the form of a threat of nonsuit when the plaintiff has easy access to more specific evidence but nevertheless tries to prove negligence only by showing an accident unlikely to happen in the absence of negligence. Some courts automatically rule out use of res ipsa loquitur circumstantial proof whenever a claimant mentions specific acts of negligence in his petition.

In *Judson v. Giant Powder Co.*\(^{69}\) plaintiff’s property was damaged by an explosion in defendant’s nearby “nitro-glycerine house”—part of a plant for making dynamite. Every one in the nitro-glycerine house was killed and no direct proof on cause of explosion was available to either party. If plaintiff rested after proving only these facts, would his evidence of negligence have been sufficient to thwart a motion for dismissal? The court said, “While the cases are not in entire accord in holding that a presumption of negligence arises from the fact of the explosion, still they largely preponderate upon that side, and we think but few well-considered cases can be found looking the other way.”\(^{70}\) Apparently this court would have held dismissal improper; however some convincing opinions do support a contrary view. Is it a matter of common knowledge that so instable an explosive as nitroglycerin can be carefully processed with little danger of explosion?

---

69. 107 Cal. 549, 40 Pac. 1020 (1895).
70. *Id.* at 555, 1021.
In the Giant Powder case plaintiff's counsel feared a no answer to this question. He adduced expert testimony to augment (or supplant) common knowledge; his experts testified that if the factory were properly run and the workmen were reasonably careful an explosion would not occur. This proof foreclosed the possibility of dismissal when plaintiff rested. In Stanolind Oil & Gas Co. v. Lambert71 a landowner, whose property was damaged by blasting in nearby geo-physical exploration for oil structures, did not offer expert testimony and did not fare so well. Norvell, J., says, "In a case such as this, the matter is one for proof and can not be supplied by common knowledge, as it is in some res ipsa loquitur cases. We do not judicially know the details of exploratory operations by use of a seismograph, so that we can say that damage . . . indicates a departure from the norm and raises an inference of negligence."72

Once a court has ruled that as a matter of common knowledge a kind of injury is one not likely to happen without negligence, the ruling becomes a precedent, which is some assurance that expert testimony is not needed in similar cases. In the bursting-carbonated-drink-bottle cases, for example, some courts have held that bottler is not entitled to a dismissal when consumer proves only the burst and his injuries. Though these holdings are bottomed on a doubtful proposition about common knowledge (bottles do not ordinarily burst unless the bottler has failed to use due care) they seem to have the usual hardihood of precedents.

In the barrel case defense counsel argued that no evidence connected the storekeeper or his servants with the runaway of the barrel. Pollock, B., answered: the presumption is that the storekeeper's servants were working with the barrel, and if they were not the storekeeper could prove that fact. Pedestrian's proof tended to show not only negligence, but misconduct in storekeeper's own organization.

A plaintiff's burden of proof is, of course, not satisfied by a showing that an anonymous somebody was negligent; he must bring this misconduct home to the defendant. This requirement is formalized in the literature of res ipsa loquitur; it is generally said the plaintiff must show that the instrumentality causing his injury was under control of the defendant at the time. When a runaway barrel escapes from custody of the defendant proof of the resulting injury is circumstantial proof of negligence of the custodian. But if the control requirement is pushed too far, some defendants may unjustifiably escape liability. In Kilgore v.

72. Id. at 127.
Shepard73 a shopper sat in a merchant’s chair while receiving needle work instructions. The chair collapsed. On the ground that customer, rather than merchant, had control of the chair the court held she could not rely on the doctrine of res ipsa loquitur. This is technicality gone wild. In Winfree v. Coca Cola Bottling Co.,74 a bursting bottle case, the bottler argued that since his wares had been delivered to a retailer and he no longer had control over the bottle when it exploded claimant could not use res ipsa loquitur proof of negligence. The court said: the doctrine of res ipsa loquitur is inapplicable to this case, but since proof tended to show bottler’s negligence he was not entitled to a dismissal. This court refused to use the Latin words but reached the proper result. In most jurisdictions this overly nice verbal discrimination is not made; when a plaintiff’s proof tends to show an accident not likely to happen without negligence on the part of the defendant the doctrine of res ipsa loquitur is applied even though defendant no longer had custody of the damaging instrumentality when it did harm.

Some courts have moved in the opposite direction and tend to apply the doctrine of res ipsa loquitur to cases in which proof does not bring negligence home to defendant. In Vogt v. Cincinnati, N. & C. R.75 the court held: a passenger suing a traction company does not make out a case merely by showing that the street car collided with another vehicle. However, the court went on to say that under Kentucky authorities if passenger joins as defendants both the driver of the other vehicle and the traction company then proof of the accident thwarts dismissal. Two vehicles seldom collide when drivers of both use due care. Proof of collision does tend to establish negligence of at least one driver. But the passenger is relieved from showing initially whether both or only one of the two drivers has acted negligently. Ordinarily a tort plaintiff suing several independent defendants has the burden of showing the fault of each defendant. (An assault and battery plaintiff who proves that only one of two identical-twin-defendants battered him would probably be nonsuited unless he identified the batterer.) But the Kentucky re-allotment of burdens is not necessarily unwise. When defendants may, by a conspiracy of silence, defeat a plaintiff who obviously has a good cause of action against one of their number, the burden of going forward with identifying evidence can justly be cast on each defendant. In Ybarra v. Spangard,76 a malpractice case, the patient proved only that while he was under

73. 52 R.I. 151, 158 Atl. 720 (1932).
74. 83 S.W.2d 903 (Tenn. App. 1935).
75. 312 Ky. 668, 229 S.W.2d 461 (1950).
an anaesthetic for an abdominal operation his neck was severely injured. Defendants were all of the attending doctors and nurses. They contended they were entitled to a nonsuit because the patient had not proved which of them was negligent. The court held: each defendant could escape liability only by adducing proof exonerating himself.

Thus far discussion has dealt with trials in which (a) a plaintiff rests his case after proving an accident, and (b) the defendant then questions the sufficiency of plaintiff's proof of negligence by asking for a dismissal. The doctrine of res ipsa loquitur may thwart the request and the trial must proceed. What happens then?

In a number of states the doctrine of res ipsa loquitur is regarded as approval of a form of circumstantial proof of negligence and nothing more. In these states proceedings after the refusal to dismiss are as follows:

1. Cases in which defendants offer no proof of due care. The trial judge's refusal to dismiss when plaintiff rests is a ruling that a reasonable juror could find plaintiff's proof of negligence adequate but it is not a ruling that no reasonable juror could find plaintiff's proof inadequate. Therefore should plaintiff request the judge to rule that he has established negligence an unsettled problem is posed. In theory plaintiff's circumstantial proof can be strong enough to entitle him to a directed verdict on the negligence issue. In practice he seldom asks for it because: (a) his proof is rarely, if ever, strong enough to merit it,77 and (b) even when it is the plaintiff does not wish to run the risk that an appellate court might find reversible error in the ruling. These cases, then, usually go to the jury.

2. Cases in which defendant gives proof tending to rebut plaintiff's circumstantial proof of negligence. When the defendant offers evidence tending to show he used due care the best the plaintiff can hope for is a jury finding in his favor. But defendant's proof of due care may be so compelling that defendant is entitled to a directed verdict, even though he was not entitled to one when the plaintiff rested. In Texas & N. O. R. v. Schreiber78 a homeowner proved a passing locomotive chuffed and sprayed oil on his house. Then a railroad's expert testified convincingly that engines often scatter oil without fault on the part of the railroad. The

---

77. "Where a plaintiff establishes prima facie by direct evidence that injury was caused by negligence of the defendant the court may seldom direct a verdict though the plaintiff's evidence is not contradicted or rebutted by the defendant. The practice should be the same where under the rule of res ipsa loquitur the plaintiff establishes prima facie by circumstantial evidence a right to recover," Lehman, C. J., in George Foltis, Inc. v. City of New York, 287 N.Y. 108, 38 N.E.2d 455 (1941).

court held that, on all of the evidence, the jury could not be allowed to find proof of negligence. In other cases defendants' proof is less devastating and yet has the effect of raising a dispute on negligence appropriately submitted to a jury for decision—a decision which sometimes goes for defendant.79

Jury charges in res ipsa loquitur cases are fertile breeders of trouble. If the only effect of the res ipsa loquitur doctrine is to give a technical Latin name to a special kind of circumstantial proof there is seldom any reason for mentioning the doctrine to the jury; its ability to confuse is a good reason for not mentioning it. In other kinds of negligence cases standard instructions tell jurors that the plaintiff has a burden of proving negligence by a preponderance of the evidence. If standard instructions are given in a res ipsa loquitur case claimant's counsel can then make legitimate argument on the weight and nature of his circumstantial proof. When trial judges attempt to explain res ipsa loquitur to the jury in terms of "presumption" or "inference" they almost always commit error; such instructions cannot be framed without risking a jury impression that the defendant has a burden of proving due care. If the jury should be given special guidance, instructions should be limited to telling them that the claimant's circumstantial evidence should be given the weight it actually has—instructions must not be capable of misleading jurors into believing that the defendant has burdens more onerous than those of defendants confronted with other types of proof of negligence.

The foregoing description of procedural pattern is applicable only in jurisdictions in which res ipsa loquitur is merely a technical name for a kind of circumstantial proof. In some jurisdictions courts have developed a doctrine of res ipsa loquitur which does shift burdens to the defendant—burdens that defendants ordinarily do not have. In the Plumb case (in which the street car passenger was injured when the car collided with a truck) the New York court intended to saddle the traction company with the burden of coming forward with evidence of its due care even though the passenger at the time he rested his case had not offered adequate proof of its negligence. In the Ybarra case (in which the patient came out of an anaesthetic with an injured neck) the California court intended to saddle each of the doctors and nurses with the burden of coming forward with proof of exoneration even though the patient at the time he rested his case had not offered proof tending to single out those personally guilty of negligence. These plaintiffs who did not prove particular defendants' negligence by evidence are held to have "proved" negligence by "legal

presumption.” In such cases if a defendant comes forward with unrebutted proof of due care so strong and credible that reasonable jurors could not find against him he deserves (and probably will get) the protection of a dismissal entered by the trial judge. If he offers no proof at all of due care or proof that falls short of conclusively establishing due care the plaintiff may be entitled to rulings and jury charges disfavoring the defendant. Just what these rulings should be is not made clear by the decisions. To be consistent they should probably reflect the view that the defendant has a burden, not only of coming forward with evidence of care, but of proving due care by a preponderance of the evidence. A half way point is possible. The defendant could be saddled with the burden of coming forward with sufficient proof to raise a dispute on which reasonable jurors could differ, and then the plaintiff could be saddled with the burden of convincing the jury that the defendant was guilty of negligence. Until precedents settle the procedure in such cases proper jury charges on allotment of burdens will be hard to frame. Unfortunately the fate of litigants may turn on such jury charges; laymen are skeptical about the value of circumstantial evidence, and instructions on who has the burden of conviction may prove crucial.