Contributory Negligence and the Landowner Cases

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WITH THE decision of the now famous dispute between Messrs. Butterfield and Forrester in 1809,¹ the doctrine of contributory negligence was insinuated into the common law. Since then it has become ingrafted securely into the legal system, and for more than a century judges have been solemnly repeating over and over that a plaintiff cannot recover for the negligence of the defendant if he was guilty of any fault that contributed to his own injury. The doctrine has persisted in almost universal usage despite frequently expressed misgivings on the part of legal writers, who have called it a "ruthless defense"² or a misapplication of the you-are-another epithet.

Although different explanations of the doctrine have been advanced,³ the currently accepted view is that contributory negligence is an affirmative defense which gives expression to the individualistic attitude of the common law. Accordingly, the plaintiff must

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¹(1809) 11 East, 60, 103 Eng. Reprints 926.
²Green, Judge and Jury (1930) 115.
³The doctrine has been explained as a corollary of the idea of proximate cause. Pollock, The Law of Torts (13 ed. 1929) 759. Compare 1 Street, The Foundations of Legal Liability (1906) c. 9.

Professor Schofield suggests that the doctrine expresses a policy of the law to so place responsibility that similar accidents can best be avoided in the future. Schofield, Davies v. Mann: Theory of Contributory Negligence (1890) 3 Harv. L. Rev. 263.

The suggestion has been advanced that so long as the plaintiff’s fault must be given some effect no fairer disposition of the situation can be made than to preclude recovery when the plaintiff is negligent. This is best described, perhaps, as a "choice of evils" theory. See Lowndes, Contributory Negligence (1934) 22 Geo. L. J. 674.
shoulder primarily the burden of caring for himself, and only when all reasonable efforts of self help have failed is he permitted to call upon the courts for assistance. Another explanation, which differs from the above only in shading, is that the plaintiff's personal fault disqualifies him from maintaining his action under notions akin to the "clean hands" doctrine of equity. The common factor underlying these views is that against a negligent plaintiff a personal bar is interposed which precludes him from recovering irrespective of the merit his case otherwise may possess. This is the analytical structure upon which the Restatement of Torts proceeds. It is supported by the text writers and by the statements of courts in the reported decisions.

Despite the almost universal acceptance which has been accorded the doctrine under this interpretation, the defense has found little support in the experience of everyday practice. No lawyer possessed of even an ordinary degree of trial intuition is likely to reject a case that otherwise bodes well for recovery merely because he is satisfied that his client was admittedly careless. The experienced attorney will anticipate that in such a case some indefinite effect may be given to the negligence of the plaintiff, that the court and jury will weigh it as one of the factors affecting recovery. He will even be prepared to argue vigorously on the contributory negligence issue in the court room, but his capacity to sense the more subtle factors that influence the passing of judgment prompts him to proceed in the face of the law in the law books, and his likely reward will be a favorable verdict which will be sustained by both the trial and appellate courts.

Contributory Negligence and the Jury

The observation has often been made that the average jurymen tends to pay little or no attention to the contributory negligence of the plaintiff if he feels that recovery is otherwise warranted. Although he by no means ignores the plaintiff's conduct as

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4 This explanation was first advanced by Professor Bohlen: Bohlen, Contributory Negligence (1908) 21 Harv. L. Rev. 233.
6 Restatement, Torts (1934) Secs. 281, 467.
7 "Unlike assumption of risk, the defense does not rest upon the idea that the defendant is relieved of any duty toward the plaintiff. Rather the plaintiff is denied recovery because his own conduct disentitles him to maintain the action. In the eyes of the law both parties are at fault." Prosser, Handbook of the Law of Torts (1941) 393.
8 James, Last Clear Chance: A Transitional Doctrine (1938) 47 Yale L. J. 704, 717; Lowndes, supra note 3. See also Gregory, Legislative Loss Distribution in Negligence Actions (1936) 3.
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a part of the composite fact picture on which he passes judgment, yet he is unwilling to accept the notion that recovery should be denied arbitrarily because of the plaintiff's carelessness. The defense simply does not fit in with his sense of fair play, so he refuses to recognize it or he takes the plaintiff's fault into consideration merely in determining the amount of recovery.

Jury action of this kind was usual in common law suits for injuries to laborers prior to the advent of workmen's compensation acts, and played an impressive part in leading to a revision of the law of industrial accidents. There is no reason to believe that the instinct of the jury to administer court-made rules so as to meet its own sense of right and wrong is confined to any one field of endeavor. Nor can such action by juries be dismissed as mere sporadic misconduct which is sometimes to be expected of those who are not learned in the law. It persists with such chronic regularity that it is acknowledged privately by many judges as a fairly dependable factor whose potential operation exerts a definite influence on court determinations. The judge who submits the carelessness of the plaintiff for the jury's consideration usually does so aware of the fact that the harsh doctrine of contributory negligence will become a dead letter in that controversy; and his deliberations are affected accordingly.9

Unfortunately no observation on jury reactions can be confirmed to the same degree of certainty as a rule of law. The motivation behind the jury verdicts is not recorded and preserved in buckram for scholarly attention. Since we are dealing with human behavior which reacts in covert disobedience of established authority the confirmation of such a proposition is made all the harder. The current use of general verdicts in which the response to all of several issues is merged into a single yea or nay precludes even the making of a dependable study as to whether or not the jury made any answer to the issue of contributory negligence, much less the nature of its response.

The only available confirmation of the proposition that juries ignore the contributory negligence issue is the observations of judges and lawyers who are in regular contact with the jury. This at best is only opinion evidence which must be accepted with

9"It is a current forensic commonplace that a very effective method of destroying in action an unjust or unpopular rule is to delegate its application to the jury." Morgan, Some Observations Concerning Presumptions (1931) 44 Harv. L. Rev. 906, 909.
caution. Even the most routine negligence cases call for the considera-
tion of several distinct issues, such as negligence, causation, contributory negligence and so on. Each of these issues focuses the jury's attention on a different facet of the controversy. Whether the jury placed any emphasis on the negligence of the plaintiff can never be known with certainty. No observer, however honest and careful he may be, can do more than submit his estimate as to how the jury analyzed the situation. That estimate is entirely personal to him and must depend largely on the emphasis that he himself assigns to the various issues of the controversy. The specialized training of the judge or lawyer serves only to make the accuracy of his observation more uncertain, for he may tend to assume that the jury has rationalized the situation into logical propositions with much the same professional technique that he himself would employ. This assumption is highly undependable. Furthermore, once it is conceded that an observer and the jury have emphasized the same factors, the value of the observer's opinion must depend upon the soundness of his appraisal of the case; for it is only against this appraisal that the reaction of the jury can be weighed.

In view of the constant invitation for disagreement among observers it would be expected that little harmony of opinion could be secured through the simple process of nose counting. By the same token, however, a substantial concurrence one way or the other would make all the more plausible whatever conclusion is indicated. Particularly would this be true if an impressive majority of observers were to conclude that juries largely ignore the contributory negligence issue. It is to be presumed that the jury is composed of law abiding men who attempt to apply the court's instructions on the law. Consequently a contrary conclusion is likely to represent an opinion arrived at in the face of the expected order of things and hence would be supported by persuasive evidence to overweigh the initial presumption of regularity.

The writer's interest in the subject of juries and contributory negligence was aroused by an observation in a casual little book entitled "A Judge Takes the Stand," by Joseph N. Ulman. Judge Ulman's remarks are supported by eight years of trial experience on the Supreme Bench of Baltimore City. After acquainting his reader with the formal law of contributory negligence, he continues: "don't let any lawyer tell you that the law of contributory negligence is what I have just said it is. At least, don't let him tell you that this is the law of contributory negligence as it really works in the court room, and as it will affect your rights or your
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liabilities in a real case. Probably he will not even think of telling you so because even trained lawyers have observed that juries have knocked this theoretical law of contributory negligence into a cocked hat. For many years, juries have been deciding cases just as though there was no such rule of law. And all the time judges have been going on saying gravely that there is. Anyone with open eyes directed either to the front or to the rear, can plainly see that, on this point at least, the living law is jury-made far more truly than it is judge-made."

He concludes that the plaintiff's carelessness has its effect only on the amount of the verdict.

I was struck by the fact that a trial judge of ample experience with personal injury cases should venture this sweeping generalization. It would be interesting to learn whether Judge Ulman's observation is even partially confirmed by the experience of other trial judges. Accordingly, I secured the names of fifty whose opinion would be backed by at least five years of active experience on the trial bench. Through selection and elimination a fair geographical distribution was assured, and every effort was made to acquire a representative cross section of both urban and rural experience. I neither sought nor avoided the "scholarly" type of judge. To those so listed I sent copies of Judge Ulman's statement and requested their reactions.

The replies were highly gratifying, both from the standpoint of the number received (thirty-five of the fifty inquiries were answered) and the interest taken by my correspondents. I believe that I have succeeded in making a fair classification of the answers, although sometimes re-inquiries were necessary and in four instances I was unable to classify the writer's estimate with sufficient accuracy to record his views.

Of the remaining thirty-one judges thirteen were willing to accept without qualification Judge Ulman's broad generalization that contributory negligence as a bar to recovery is a dead issue with juries. Three others took the position that the attitude described is generally characteristic of the jury, although these correspondents were unwilling to agree that it is entirely dependable. Five judges found what I may describe as a "marked tendency" to ignore the issue, which is manifest in the general run of their determinations. Considering this group of twenty-one collectively it can be taken with fair assurance that these judges at least believe it more likely than not that the jury will ignore the defense. Of the remaining

11Ulman, A Judge Takes the Stand (1933) 31.
ten, three would venture only that the jury action on contributory negligence is unpredictable, while only seven judges were in direct opposition to Judge Ulman on the matter. This data is subject to various interpretations and no inevitable conclusion therefrom is urged. Unless, however, the verdict of the decided minority, representing only twenty per cent of the observers, is to be preferred, we can safely assume that the contributory negligence issue has a very limited part to play in trials before juries, if, indeed, it has any meaning at all.

**Contributory Negligence and the Judge**

The importance of jury action in cases involving contributory negligence can hardly be overemphasized. The proposition that the negligence of the plaintiff is a proper matter for the sole determination of the jury except in rare instances is so universally accepted that no citation of authority is needed. If the above observation on the jury's attitude is sound, the doctrine of contributory negligence should be regarded as an active factor only in those instances where courts have held that the plaintiff's carelessness was so obvious that recovery should be precluded as a matter of law. Thus the doctrine is reduced in perspective to a jury control device, and the reasons that prompt judges to so employ it and the liberality with which it is used by them become the focal points of inquiry for all practical purposes.

The attitude of judges toward the doctrine is not necessarily similar to that of jurymen. Technical training and a professional attitude toward the law plus a feeling of personal responsibility for its proper administration are all factors which make for a greater fidelity to established rules on the part of the judge. This affords no assurance, however, that courts are kindly disposed toward the contributory negligence idea, or that they will go further than to make a sparing application of the doctrine according to the accepted technique of deciding cases. The writer noted with interest that the great majority of his judge correspondents volunteered approval of the tendency of the jury to consider contributory negligence only in mitigation of damages. Some cited the humanizing effect of such action as one of the most commendable features of the jury system. The doctrine of comparative negligence was in decided favor even with several who did not share Judge Ulman's observation with respect to the jury.

If this is at all representative of court attitudes, it is to be ex-
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pected that opposition to the doctrine from this quarter will have an
effect on the outcome of litigation. The influence of such an atti-
tude can operate along two separate lines: First, we would expect
to find a reluctance to interfere with jury verdicts except in ex-
reme instances. Second, in the case where the court has substi-
tuted its own judgment for that of the jury on the asserted ground
that the negligence of the plaintiff cannot be reasonably disputed,
it may be suspected that the situation did not otherwise warrant re-
cover and that the plaintiff's negligence was seized upon because
it afforded the most articulate vehicle to give expression to the
court's dissatisfaction with the manner in which the jury disposed
of the controversy.

There is no discernible reluctance by appellate courts to set
aside jury verdicts on the asserted ground that the negligence of
the plaintiff was too clear to admit of reasonable dispute. This can
be established with fair accuracy. The writer selected two hundred
cases which appeared to involve contributory negligence as a
prominent feature and in which the jury had resolved the issue
against the plaintiff's carelessness. These were the sole criteria for
selection, and the relative merits of the controversies were other-
wise ignored. In thirty-seven per cent of these cases the appellate
courts reversed the judgment below on the ground that the plain-
tiff was guilty of contributory negligence as a matter of law. This
is not conclusive for any purpose, however, unless the cases in
which the juries' verdicts are set aside represent situations where-
in recovery otherwise would be appropriate.

The use of contributory negligence as an affirmative personal
defense does not by any means exhaust the possible effects of a
plaintiff's carelessness on the course of litigation; and statements
by appellate courts that the plaintiff cannot recover because he
was guilty of contributory negligence as a matter of law are open
to further examination. Of course it should not be presumed that
when judges say one thing they really mean something else. But
neither can we overlook the fact that unusual conduct by any per-
son, other than the defendant, who participates at the scene of
action may properly have a profound effect upon the outcome of
the case. This effect is thoroughly susceptible of discussion in
terms of contributory negligence if the actor happens to be the
plaintiff. In recognizing this fact we merely enlarge upon the
possible meaning of the language used by the courts, and no con-
tradiction is involved. The underlying philosophy of contributory
negligence may, however, be profoundly altered according to the purpose for which the doctrine is used. What appears at first blush to be incompatible with prevailing notions of right and wrong may upon reflection prove to be thoroughly acceptable. There is no evidence that either juries or judges are reluctant to consider the plaintiff's carelessness as a factor which may affect recovery; it is the idea of contributory negligence as an arbitrary bar which they find objectionable.

The plaintiff's behavior is a highly important factor in arriving at a solution of both duty and negligence problems. Its effect upon the extent of the burden to be shouldered by the defendant has not escaped the attention of courts and writers. In Section 290 of the Restatement of Torts\(^1\) it is said that the defendant is assumed to know "the qualities and habits of human beings . . . in so far as they are matters of common knowledge at the time and in the community"; and the definition of a negligent act in Section 302 includes conduct that "creates a situation which involves an unreasonable risk to another because of the expectable action of the other. . . ." But it does not follow that the defendant is required to adjust himself to the plaintiff's expectable conduct in such manner as to reduce the risk of injury to an absolute minimum.\(^1\) To impose such a requirement would be to ignore the defendant's privilege to conduct his business or operations in such way as will produce the greatest benefit to himself and to society. The law of negligence is basically a law of compromise, and in many instances unusual conduct by the plaintiff can be met only by extraordinary precautions requiring an inordinate degree of diligence or an excessive outlay of time or money, or both. If the complex business of modern living is to be carried on with any degree of economy or efficiency, heavily trafficked streets cannot be made a haven for sleepwalkers, nor can public places be so constructed or attended as to be foolproof. There are practical limits to the burdens that the defendant can shoulder. Mutual adjustment by both him and plaintiff is required in order to minimize the risk unless the standard of reasonable conduct is to be abandoned. This is a far cry from any notion of contributory negligence. It is not a matter of importance that the plaintiff's conduct was legal or illegal, reasonable or unreasonable. There is

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\(^1\)Restatement, Torts (1934) Sec. 290.

\(^1\)"It would be difficult to so arrange every part of a station as to render it impossible for careless people to meet with injury." Ladd, J., in McNaughton v. Illinois Central R. R., (1907) 136 Iowa 177, 182, 113 N. W. 844, 846.
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only one inquiry: did the plaintiff's behavior create a situation which the defendant could meet only through an adjustment which the court or jury is unwilling to impose upon him?

The extent to which a defendant will be forced by law to temporize with the plaintiff's conduct cannot be defined in advance. The requirement he must meet will vary with the plaintiff's behavior and the defendant's ability to anticipate and meet the situation with the means which are or should be available to him. It will vary also with the extent of the duty normally owed by persons in the defendant's class to those so situated as plaintiff. Other factors of equal importance must be considered later. It is apparent that this type of problem is normally solved in terms of duty, negligence, and even through the language of proximate cause. But there is no one inevitable way in which the problem must be stated in order that a fair solution be reached. A single factor will likely appear and reappear in a decision in the garb of different rules of law; the same problem can be rationalized several times along successively different lines. Which rule will finally be chosen may depend largely on personal preference or on the desire to avoid entanglement with previous decisions or established trial procedures. The choice may even be determined by the simple comfort of expression which the chosen rule affords over its competitors. It follows that when the question is whether or not the plaintiff's behavior has unduly increased the defendant's obligation one court may choose contributory negligence as a vehicle of expression in preference to the language of duty, negligence or causation. Such a choice has at least one purely forensic advantage. It is easier for an appellate court to rule as a matter of law that the plaintiff was guilty of contributory negligence than it would be to contradict the jury's finding on the issue of the defendant's negligence. The former practice enables the court to maintain a false but reassuring semblance of a separation between the functions of judge and jury. This is facilitated by the fact that incidents of plaintiff misconduct fall into a comparatively few classifications which can be readily subtended under rules of law. The extent to which judges may employ contributory negligence as a substitute for other mediums of expression and the

purposes to be served by so doing is the burden of the following
pages.

It should not be expected that all, or even substantially all,
judges will react similarly toward the negligence of the plaintiff.
Some more than others will accept literally the requirement that
the careless plaintiff is not entitled to recover. The idea that he
deserved what he got is by no means without its claim to just recog-
nition in an appropriate case. Also, some judges will insist upon
a rigid analytical structure and allocate to the negligence issue all
considerations that bear upon the defendant's burden; others will
not.

Further consideration of the suggested uses of contributory
negligence can be had only through careful study of fact situa-
tions which have lent themselves to resolution under that doctrine.
Little is to be gained, however, by random sampling. Cases in-
volving traffic and transportation with their transitory perils, fail-
ures of split second timing, negligence based on statutory viola-
tions and complications arising from the last clear chance cannot
be compared with landowner cases wherein the defendant's al-
leged negligence consists in his failure to make advance prepara-
tion and in which the plaintiff's rights vary both with his status
as trespasser or invitee and with the particular place where the
injury occurred. Situations in which invitees are injured on busi-
ness premises have been selected for consideration herein despite
certain obvious shortcomings. It is believed that the reasons sup-
porting this choice outweigh the relative disadvantages involved.

The Contributory Negligence of Business Guests and Patrons

Since we are primarily concerned with the effect that the plain-
tiff's behavior may have upon the defendant's duty it is to our
advantage that we begin with situations where the defendant's
conduct can be laid out in perspective and its worth to society
evaluated with some assurance. This is a common characteristic
of cases involving the duty owed to invitees on business premises.
These cases usually revolve around the requirement of advance
preparation by the defendant, which is a more or less static state
of affairs depending in no small measure on economic expediency.
For this reason the values involved can be disentangled from their
respective fact situations without too much difficulty. Moreover
the alleged misconduct of the plaintiff and defendant seldom occur
simultaneously in these cases, and we are thus spared the difficult
task of coping with time reactions and emergency adjustments. A further advantage lies in the susceptibility of this group of cases to fairly comprehensive treatment. No attempt has been made to exhaust the decisions, but enough cases have been examined to furnish a reliable cross section of typical court action in this field.

There is no assurance, however, that the conclusions drawn from this class of situations can be indiscriminately extended to other fields. In several respects the decisions dealing with the liability of landowners represent a unique corner of the law of negligence. We need not be reminded that toward trespassers and licensees the duties owed by the occupier are spare indeed. These persons must constantly be on the alert for their own safety. On the other hand, the business guest or invitee, with whom we are concerned, is entitled to assume that affirmative precautions for his safety have been taken, and the requirement of vigilance on his part has been correspondingly relaxed. Hence the extent of self protection required of the business guest does not necessarily correspond to the degree of vigilance exacted of one who, for example, is exposed to the perils of traffic on a public thoroughfare. Other differences will doubtless occur to the reader. The opinion may be ventured, however, that differences between fact type situations may reflect differences of technique and differences in the reasons that prompt judges to resort to the contributory negligence doctrine, but that the attitude reflected will be substantially the same in all classifications.

One evening H. A. Rollestone, who was in a highly intoxicated condition, maneuvered himself into the barroom of T. Cassirer and Company in Atlanta for the purpose of buying another drink. But the bartender refused to serve him because of Georgia’s penal code which forbids the sale of liquor to anyone who is obviously intoxicated. While loitering around the premises Rollestone staggered, lost his footing and lunged against the massive mahogany

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16 Restatement, Torts (1934) Secs. 333, 342.
19 Id. at Sec. 343, particularly comment a; Prosser, op. cit. supra. note 7, at 642. See also the following cases: Adams v. Schneider, (1919) 71 Ind. App. 249, 124 N. E. 718; Lewis v. Sells-Floto Shows Co., (1916) 98 Kan. 145, 157 Pac. 397; Scott v. University of Michigan Athletic Ass’n, (1908) 152 Mich. 684, 116 N. W. 624.
17 Situations in which the carelessness of the plaintiff is successive in point of time to that of the defendant are sometimes regarded as resting on a basis different from that of the usual contributory negligence case. It has been said that the doctrine of contributory negligence in such instances is justifiable in terms of proximate cause. 1 Street, op. cit. supra note 3, at 127. This distinction, if indeed it exists at all, is only in terminology and should have little bearing on our problem.
bar counter. This counter, which had been installed several weeks before, was so designed that its outside hung over from the center of gravity, and no attempt had been made to affix it to the floor. It fell forward under the sudden impact of Rollestone's weight and crushed him to death.

To a mind unaffected by legal niceties there would be little doubt as to the propriety of a recovery by Rollestone's widow under the facts given above. This establishment catered to the custom of those who wanted liquor, and its patrons were drinking and drunken persons. No one can doubt that it owed these customers the duty of making its premises reasonably safe against the unstable conduct which would be characteristic of the place. Furthermore its shortcomings were obvious and the tragic occurrence could have been avoided without appreciable loss or inconvenience to the management. Any jury doubtless would have returned a substantial verdict, but the trial judge entered a nonsuit in favor of the defendant. The plaintiff appealed and the defendant renewed its argument that there was no legal basis for recovery.\(^\text{18}\)

It contended that since liquor could not be sold to Rollestone in violation of the criminal law the deceased was at best a licensee and could not demand the exercise of reasonable care by defendant with respect to the condition of the bar counter. The supreme court acceded to this argument, but it labeled the defectively designed and installed counter a "trap," and by so doing it neatly avoided the advantage that the defendant hoped to gain by reason of the deceased's lowly status.

The defendant emphasized the contributory negligence of Rollestone, who was voluntarily intoxicated and obliviously staggering around in a public place. However, the court managed to dismiss this contention. It announced that a drunken man is responsible for his conduct to the same extent that he would be if he were sober. Such a person, said the court, is charged with knowledge that he is intoxicated and that his physical facilities are correspondingly impaired. Following this line the court ingeniously concluded that due care by a drunken person for his own safety means only that he must prudently adjust himself to his surrounding situation in the light of his known shortcomings. The deceased's obligation, when thus adroitly phrased, becomes properly a matter for the jury's attention. The case was remanded

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for trial and there is little doubt as to what disposition was made of it thereafter. One might profitably conjecture whether the deplorable condition of the deceased would have been so tenderly disposed of if he had slipped on the wet floor of a theater lobby on a rainy day or had fallen in the darkened aisle of a movie house. In this case, as in many others we shall consider, the court's approach to the plaintiff's negligence is but the reflection of its attitude toward the defendant's conduct, which in the case of the bar proprietor was wholly inexcusable.¹⁹

The duty owed by the proprietor of a business establishment or place of amusement to his customers or patrons is commonly defined as the requirement to use reasonable care. This generality, however, no more adequately describes the technique through which this type of case is handled than the terms "good judgment" or "sound verdict" describe the operations of the court or jury. Reasonableness merely means that the situation will be individualized for treatment—that the plaintiff's obvious loss will be balanced against the defendant's claim to do what he was doing at the time in the way he was doing it. None of the factors that entered into the balance are even suggested by this broad standard. The defendant's alleged shortcomings may consist in the way he designed his premises or equipment, in the manner in which they were constructed, maintained, arranged, illuminated, or attended, or even in the personal supervision which he exercised for the plaintiff's safety while the latter was in his place of business.

The extent of these duties will vary sharply with the nature and location of the place, the kind of business being conducted there and the type of clientele to which the business caters. It will depend to some degree on the extent to which the premises are adaptable to standardized construction and maintenance, the habits and demands of the public, and the permanent or transient nature of the peril complained of. Sometimes the proprietor's duty and breach of duty will be obvious; more often both customer and management must make mutual adjustments; and the requirements which are imposed upon the one must supplement those with which the other is charged.

¹⁹Compare with the principal case Holle v. Delaware, Lackawanna & Western R. R. (1939) 122 N. J. Law 358, 5 A. (2d) 874, and Calloway, Trustee Central of Georgia Ry. v. Hart, 11 Neg. Cases 448 (C.C.A. 5th 1944). In each of these cases an intoxicated passenger ventured into the vestibule between the cars of a moving train on which the outer vestibule door was carelessly left open, and was precipitated from the train. Here again the defendant railroad's high duty is evident, and plaintiff's contributory negligence was dealt with lightly by the appellate court, which sustained the jury's finding for plaintiff in each instance.
The first of all preparations to be made by the proprietor for the reception of his patron or customer is the evolution of a design for his business premises. The arrangement of rooms and hallways, the establishment of floor levels and angles of ascent and descent and the spacing of entrances and exits are only a few of the problems that must be solved in advance of construction. A conflict of interests is immediately presented to the prospective operator since safety is seldom completely compatible with either business needs or economy of construction. Yet in matters of design safety is a consideration of paramount importance, and it will prevail unless its demands exceed all bounds of economic tolerance, which is not often the case. In laying out his establishment on paper the proprietor has ample time for a leisurely reckoning with all contingencies which may present themselves. Likewise there is available for his use the collected experience of those who have built similar structures before him. This information includes the standards and practices of architects and engineers and the provisions of building codes and related statutes. These formulae are usually drawn so as to allow a wide margin of safety, and provision is made for excessive uses as well as for those which are to be expected regularly. Actions for injuries occasioned by defective design are usually characterized by the testimony of experts and are decided along the line of conformity with professionally accepted standards. Recovery is normally to be expected if the injury was occasioned by a shortcoming in design which was a substantial cause of the accident.

Here, as elsewhere, the contributory negligence of the patron is frequently urged as a reason for refusing recovery. However, the defense has had little or no appeal for the courts, who are likely to feel that adequate design would have included preparation for the prospect of the plaintiff's carelessness. Consequently, contributory negligence in this type of case has with singular unanimity been left in the hands of the jury, with results which would be expected.\(^2\) The cases wherein the plaintiff was held to

\(^2\)\text{Long v. John Breuner Co., (1918) 30 Cal. App. 630, 172 Pac. 1132 (paved incline leading to defendant's store constructed on excessive grade); Madigan v. O. A. Hale & Co., (1928) 90 Cal. App. 151, 265 Pac. 574 (defective cleats on runways); Rhodius v. Johnson, (1900) 21 Ind. App. 401, 56 N. E. 942 (confusing room arrangement in saloon, lighting inadequate; plaintiff ventured into the darkness and fell); Cousineau v. Muskegon Traction & Lighting Co., (1906) 145 Mich. 314, 108 N. W. 720 (plaintiff crushed in crowd awaiting public conveyance; peril could have been minimized through installation of railings); Dilley v. Baltimore Transit Co., (Md.}
be guilty of contributory negligence as a matter of law clearly showed at most only spare evidence of carelessness on the part of the defendant with respect to the design of his premises. Similar considerations apply to the arrangement of movable objects which are to have a fairly stable location, such as scales, counters, and display stands.

Sometimes public habits and tastes or the demands of economy have so profound an effect upon the requirements of design that the safety factor is subordinated. An excellent illustration is afforded by the numerous cases in which a patron seated in the

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be guilty of contributory negligence as a matter of law clearly showed at most only spare evidence of carelessness on the part of the defendant with respect to the design of his premises. Similar considerations apply to the arrangement of movable objects which are to have a fairly stable location, such as scales, counters, and display stands.

Sometimes public habits and tastes or the demands of economy have so profound an effect upon the requirements of design that the safety factor is subordinated. An excellent illustration is afforded by the numerous cases in which a patron seated in the
bleachers of a baseball stadium is struck by a foul ball during either the course of the game or in practice. Almost without exception recovery is denied in this situation. The decisions are explained indiscriminately in terms of either contributory negligence or assumption of risk by the patron.23

Beyond question the results reached in the baseball cases is satisfactory, but resort to the plaintiff’s carelessness or self-exposure as an explanation is unnecessary and has given rise to considerable confusion and even to useless litigation. Neither does the choice between assumption of risk and contributory negligence materially affect the matter. It has been said that the doctrine of assumed risk is used indiscriminately to cover situations where the plaintiff has expressly or impliedly consented to the defendant’s misconduct as well as situations where he has imprudently exposed himself and is thus contributorily negligent.24 Under either view, the plaintiff is regarded as being disqualified from maintaining his action because of his own conduct in a case in which recovery may otherwise be appropriate. The two doctrines are used interchangeably by the courts in all the landowner cases and the same considerations seem to determine the use of both contributory negligence and assumed risk.

The traditional American baseball field is a standardized product of the development of the game and reflects the tastes of the baseball fan. The familiar design of an enclosed and protected grandstand and the exposed bleachers section is found in nearly every hamlet as well as the largest cities. Custom, as well as the needs of economy, has produced a uniform layout which satisfac-


24Prosser, op. cit. supra note 7, at Sec. 57. Professor Prosser regards the baseball cases as examples of the implied consent phenomenon (id. at 377).
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The evidence shows that the seats behind the screen are the ones that are customarily looked upon by the patrons with the least favor; seats usually being desired in the open portions of the stands, preferably along the first and third base lines. "With the results of the play so much dependent on chance, and especially so as regards the course to be taken by batted balls, the game of baseball could hardly be played without some small element of risk of injury to spectators. Almost every one attending a game desires to witness it from a vantage point as near the diamond as his good fortune and purse will permit, and yet the nearer one is to the diamond the greater is the risk of injury from balls coming into the stands. The entire stands might indeed be screened in and practically all chance of injury to spectators be removed, but the perils of the game are not so great as to require such an extreme precaution, and, furthermore, it is a matter of common knowledge that a large part of those who attend the games prefer to sit where there is no screen to obscure their view. And so it is that the management of the game finds itself in the dilemma where it must cater to the wishes of the great majority of its patrons who prefer their seats in the open, and yet it appreciates that it must nevertheless screen off that portion of its stands where the greater number of foul balls may be expected to go and the greater danger is to be encountered, out of all of which has undoubtedly grown the general practice of erecting a screen behind home plate, with the stands facing other portions of the field left open, unless it may be, as in defendant's park, that screens are sometimes erected at other places for the purpose of cutting down extra base hits so as to add to what is believed to be the interest in the game." Bennick, Comm' r, in Grimes v. American League Baseball Co., (Mo. App. 1935) 78 S. W. (2d) 520, 522, 523.

25 "The evidence shows that the seats behind the screen are the ones that are customarily looked upon by the patrons with the least favor; seats usually being desired in the open portions of the stands, particularly in the smaller places, and would outrage many devotees of baseball who like to watch the game without obstruction. Thus the cost of the residuum of danger which results from the use of the customary design should not be thrust upon the management, which cannot further reduce the risk without exorbitant outlay and inconvenience. Of course custom has dictated no arbitrary limit to the size of the area which must be screened, and marginal situations have arisen from time to time. These have been properly disposed of as a matter for the jury's consideration."

Ratcliff v. San Diego Baseball Club of the Pacific Coast League, (1938) 27 Cal. App. (2d) 733, 81 P. (2d) 625 (patron seated at edge of screened portion struck by bat; screen extended eighty feet); Wells v. Minneapolis Baseball & Athletic Ass'n, (1913) 122 Minn. 327, 142 N. W. 706 (screen covered only sixty-five feet of grandstand); Olds v. St. Louis Nat. Baseball Club, (Mo. App. 1937) 104 S. W. (2d) 746 (issue of whether defendant should screen passages leading from grandstand to nearest exit held for jury). Compare Curtis v. Portland Baseball Club, (1929) 130 Ore. 93, 379 Pac. 277, where one hundred fifty feet were protected and the court refused to submit to the jury an issue as to whether defendant should have extended wings of the screen back into the grandstand.

It would be interesting to know in these cases what matters the jury is supposed to consider in determining the issue of "implied consent." See note 24, supra.

In Edling v. Kansas City Baseball & Exhibition Co., (1914) 181 Mo. App. 327, 168 S. W. 908, plaintiff was struck by a ball which passed through a defective netting. In answer to defendant's contention that plaintiff assumed the risk the court replied: "If the Kansas City Blues had kept their
A straightforward disposition of these baseball cases could be made through the simple expedient of a directed verdict for the defendant on the negligence issue whenever it appears that the latter's alleged carelessness consisted merely in his failure to depart from the traditional design in his structure. The first of this line of cases, *Crane v. Kansas City Baseball and Exhibition Company*\(^2^7\) was decided largely on this ground, and the court need not have gone further.\(^2^8\) However, it chose to emphasize that the plaintiff assumed the risk of being struck by voluntarily choosing an unprotected seat, and added: "And if it could not be said that he assumed the risk, still he should not be allowed to recover, since his own contributory negligence is apparent and indisputable."\(^2^9\) Following the *Crane* decision the disposition of this type of case in terms of contributory negligence or assumption of risk became current coin.

However, the true considerations that underlie the baseball cases have never been departed from. Since absence of negligence is the reason for refusing recovery it is immaterial whether the plaintiff did or did not know of the risk. So long as the customary protected area is provided it makes no difference whether the patron chose the bleachers through choice or because the grandstands were filled. The courts have faithfully adhered to this position although distinctions based on lack of knowledge of the game and the crowded conditions of the grandstand have been persistently urged upon them. A frequent answer given is that by entering the unenclosed portion the patron is deemed to have assumed the risk as a matter of law.\(^3^0\) It is obvious that when a fact is thus conclusively presumed it has lost its evidentiary significance.\(^3^1\) Other courts have considered each situation upon its

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\(^2^7\) (1913) 168 Mo. App. 301, 153 S. W. 1076.
\(^2^8\) Most of the opinions contain clear denials that defendant was negligent. In Cates v. Cincinnati Exhibition Co., (1939) 215 N. C. 64, 1 S. E. (2d) 131, the decision is properly rested on this ground alone.
\(^2^9\) (1913) 168 Mo. App. at 305, 153 S. W. at 1078.
\(^3^1\) "It is now common learning that the common law judges have made extensive use of the device of presumptions for two purposes: to control the jury in its function of fact finding, and to change the accepted rules of the common law without the appearance of judicial legislation." Morgan, supra, note 9, at 909.
In interesting contrast to the baseball cases is the situation where a spectator at a hockey game is struck by a flying puck. The flying puck, like a foul ball, is a fairly frequent occurrence. However, the courts have quite properly held that the spectator sitting in an unprotected portion of the coliseum does not assume the risk of injury as a matter of law, and these cases are usually sub-

See the excellent and extended discussion in Hudson v. Kansas City Baseball Club, Inc., (1942) 349 Mo. 1215, 164 S. W. (2d) 318. In Keys v. Alamo City Baseball Co., (Tex. Civ. App. 1941) 150 S. W. (2d) 368, plaintiff was unfamiliar with the game and urged that the management should have instructed her as to the perils of sitting in the exposed bleachers. The court replied: "It would have been absurd, and no doubt would have been resented by many patrons, if the ticket seller, or other employees, had warned each person entering the park that he or she would be imperiled by vagrant balls in unscreened areas. And yet that would have been defendant's duty, if plaintiff's contention is sound. We overrule that contention." (150 S. W. (2d) at 371.) Quinn v. Recreation Park Ass'n, (Cal. App. 1934) 35 P. (2d) 602; Adorno v. Village of Mount Morris, (1939) 171 Misc. 383, 12 N. Y. S. (2d) 685.

Several variations of the usual picture which have been considered to reinforce the conclusion that the results reached in the baseball cases are not properly grounded upon assumption of risk or contributory negligence. In Cincinnati Baseball Club v. Eno, (1925) 112 Ohio St. 175, 147 N. E. 86, a patron seated in the bleachers during the practice preceding the game was struck in the face by a ball batted from a point outside the diamond and near the grandstand. The Supreme Court of Ohio held that assumption of risk by the plaintiff was a proper matter for the jury's consideration. Again in Grimes v. American League Baseball Co., (Mo. App. 1935) 78 S. W. (2d) 520, temporary stands for a forthcoming World Series game had been erected on either side of the catcher's box and protruded about fifteen feet into the field. A ball rebounded from this structure and struck the plaintiff who was seated outside the protected grandstand. A jury verdict in favor of the plaintiff was affirmed on appeal and the plea of contributory negligence was dismissed.

The explanation of both these cases is simple. Although the courts are not willing to require extraordinary protection in the way of design of the stadium, they are prepared to submit to the jury issues as to whether the management should exercise reasonable supervision over the conduct of the players or should encumber the field with temporary structures in advance of the need. Compare Brummerhoff v. St. Louis Nat. Baseball Club, (Mo. App. 1941) 149 S. W. (2d) 382 and Zeitz v. Cooperstown Baseball Centennial, Inc., (Sup. Ct. 1941) 29 N. Y. S. (2d) 56.

mitted to the jury with resulting verdicts for the plaintiff. The usual explanation, that the spectator at the more novel game of hockey is not presumed to know the perils, is not very convincing in view of the fact that ignorance of the dangers of baseball has not in practice been accorded recognition by the courts. The basis of the distinction between the two sports appears to rest on the matter of negligence by the management. Unlike the baseball stadium, the hockey coliseum does not have a standardized design so far as screening and other protections are concerned. Nor is the expense of adequate safeguards likely to be a serious burden on the proprietor. There is no spectator habit opposed to screening, which has already been installed without objection or undue expense in addition to other safeguards in more than one-fourth of the stadiums. Considerations similar to those that control the baseball and hockey cases appear to underlie many other decisions on injuries to spectators at sporting events.

**Accidents in Remote Parts of Business Premises**

A business guest is not entitled to assume that all parts of the premises have been prepared for his reception. It is commonly

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34 A study of nineteen coliseums reveals that the floor heights above the ice vary from level to forty-two inches. End screens vary from five to ten feet in height and from twenty-six feet to one hundred thirty feet in length. Side screens, when used, vary from one and a half to three feet in height. (All figures as of June, 1940.)

35 In each of the following cases the spectator's assumption of risk or contributory negligence was held properly for the jury, with the inevitable plaintiff verdict: Arnold v. State, (1914) 163 App. Div. 253, 148 N. Y. Supp. 479 (injury at race track when car driven by Barney Oldfield skidded due to a blowout; large crowds permitted to gather outside grandstand along curves); Zieman v. World Amusement Service Ass'n of South Dakota, Inc., (1929) 209 Iowa 1298, 288 N. W. 48 (facts similar; racing car left track due to negligently installed steering wheel); Ellingson v. World Amusement Service Ass'n, (1928) 175 Minn. 563, 222 N. W. 335 (facts similar; ropes provided to keep crowds away from track were allowed to be lowered); Thompson v. Lowell, L. and H. St. Ry., (1898) 170 Mass. 577, 49 N. E. 913 (piece of steel bullet ricocheted off defective butt and struck spectator in the eye).

For an interesting discussion of the risk of injury to spectators at a semiprofessional cricket game on an improvised temporary field see Hall v. Brooklands Auto Racing Club [C.A. 1933] 1 K. B. 205, 209. In Ingerson v. Shattuck School, (1931) 185 Minn. 16, 239 N. W. 667, noted in (1932) 30 Mich. L. Rev. 1121, a spectator was injured at a football game on the premises of a preparatory school where she was hit by a player tackled at the side line. Such games were infrequent and the admission charge was small. The alleged negligence consisted in a failure to provide a rope barricade or fence, although a small grandstand had been erected. In refusing recovery the Minnesota court found that defendant was not negligent. In view of this finding, the court's statement that it would not hold that plaintiff assumed the risk as a matter of law was unnecessary and must be accepted with caution.
said that when he enters places where he is not entitled to be or where his presence is merely tolerated he loses his status as business guest and is regarded as a bare licensee or even a trespasser. With this demotion he loses his right to assume that provisions have been made for his safety and must be on the alert for his own protection. This limitation merely reflects the need to consider the extent of the burden which can properly be thrust upon the occupier and in no way bears the imprint of a defense arising out of the plaintiff's personal fault.

This type of duty classification, depending upon the status of the plaintiff, can at best afford a mere approximation of justice. Business premises do not lend themselves to arbitrary division into areas where the customer's presence is or is not allowed. Places which are frequented regularly by large numbers of people will require more preparation and closer attendance than remote areas where fewer people are likely to be and which may be primarily dedicated to important purposes other than the reception of the public. Such an area need not be a place where the presence of customers is not tolerated, nor need it be so obscure that the plaintiff must be regarded as a licensee while he is there. What we find is a paring down of the requirements on the management as the presence of customers at a given locale becomes increasingly less frequent and more remote in its bearing on the public relationship features of the business.

As the burden on the proprietor is relaxed it is to be expected that the corresponding duty of vigilance on the part of the customer will be increased. There are many areas in most business establishments where limited preparation only is demanded, and where the remaining danger must be met by some degree of caution by the customer if he is to avoid injury. The apportionment of the obligation between the parties is a fine task of social engineering and requires careful court administration in the interest of fair play.

Recourse to a shifting of plaintiff's status from that of business guest to licensee or trespasser can be had only in situations at the extreme of the scale. The duty concept is therefore entirely lacking in flexibility from the above type situation. The most fluent vehicle for the administration of these cases is a resort to the contributory negligence of the customer or patron, and there are many

\[\text{Restatement, Torts (1934) Sec. 343, Comment b; Prosser, op. cit. supra note 7, at 640.}\]
cases in which courts have held contributorily negligent a business guest who was injured on some comparatively unfrequented part of the premises. Common among these are situations in which storage rooms are infrequently used for entrance ways by customers with the consent of the management, or injury is occasioned through the permitted use of an obscure doorway designed for entry of employees or for some special purpose. We can similarly account for cases in which customers are injured while availing themselves of some requested facility not ordinarily offered.

Although the advance preparation required of the defendant may be less exacting with respect to places which are not frequented by the public and are devoted to the activities of the proprietor and his employees, yet if permission to enter such an area is granted the business guest and the latter is accompanied by either the proprietor or his representative, or if an ample opportunity is presented for a personal warning of special dangers, the guest's alleged negligence is likely to be regarded by the court as a proper issue only for the jury. Of course, in many of these cases there is a special personal undertaking by the management for the safety of the guest, and it is not to be expected that the latter will, in fact, be guilty of contributory negligence when he is justifiably off his guard.

Injuries in Poorly Illuminated or Dark Areas

Under modern conditions there is no satisfactory justification for inadequate lighting in those parts of business premises which are frequented by the general public. Poor illumination deprives

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38Hammer v. Liberty Baking Co., (1935) 220 Iowa 229, 260 N. W. 720 (use of employees' entrance to bakery); Hendershott v. Modern Woodmen of America, (1911) 66 Wash. 155, 119 Pac. 2 (use of rear door to theater designed primarily as fire escape).

39In the following instances the guest was held to be guilty of contributory negligence: Foshee v. Grant, (1922) 152 La. 303, 93 So. 102 (room in rear of saloon used for storage, but customers were occasionally served there; plaintiff's buttocks were scalded when he sat on top of a keg saturated in lye solution); Clark v. Cleveland Drug Co., (1933) 204 N. C. 628, 169 S. E. 217 (customer fell into unlighted basement after using phone in prescription division in rear of drug store); King v. Thackers, Inc., (1935) 207 N. C. 869, 178 S. E. 95 (customer requested use of employee's toilet in rear of restaurant; slipped on cornmeal on kitchen floor).

the business guest of his opportunity to guard against hazards which could not otherwise be obviated by the proprietor. Therefore in cases in which poor illumination plays an important part there is an observable leniency on the part of the courts toward the plaintiff's alleged contributory negligence. Particularly is this true where defective design is also chargeable against the defendant. It should be borne in mind, however, that dimly lighted portions of the premises are often obviously out of bounds for the business guest and are dedicated only to occasional uses of a private nature. For this reason the considerations discussed in the preceding paragraphs may prevail despite the fact that remote areas can often be made safer for the expected occasional entry by the public through the use of adequate lighting without undue burden on the management.

When the business guest ventures into complete darkness the problem assumes a slightly different aspect. At first blush it would appear that the shortcomings of the proprietor are all the more obvious where he wholly neglects his obligation to provide lights, and one would expect that the negligence of the customer would be readily ignored in these situations. However, it has been often asserted that the obligation of the management with respect to dangerous premises can be met by an adequate warning as well as by removing the peril. It may be doubted that such a substitute will always be accepted by the courts, particularly with respect to places which are thrown open to the public at large and where the duty of self-protection may be unduly heavy.

41Morgan v. Saks, (1905) 143 Ala. 139, 38 So. 848; Kennedy v. Phillips, (1928) 319 Mo. 573, 5 S. W. (2d) 33. 42Hill Grocery Co. v. Hamesker, (1921) 18 Ala. App. 84, 89 So. 850; Rhodius v. Johnson, (1900) 21 Ind. App. 401, 56 N. E. 942; Kennedy v. Phillips, (1928) 319 Mo. 573, 5 S. W. (2d) 33. 43Bedell v. Berkey, (1889) 76 Mich. 435, 43 N. W. 308; Massey v. Selker, (1904) 45 Ore. 267, 77 Pac. 397. 44Restatement, Torts (1934) Sec. 343 c(ii). 45If the duty to warn were in all cases an adequate substitute for the duty to prepare, as set forth in the Restatement, all the so-called voluntary assumption of risk cases where the business guest encounters a known peril could be easily rationalized as instances where failure of the management to fulfill this substitute obligation to warn was not a cause in fact of the injury. However, it is submitted that the defendant cannot exonerate himself by warning where other safeguards are readily available and where the convenience of the customer would be seriously interfered with by a failure to remedy the dangerous condition. Therefore the courts are not willing to define once and for all the limits within which the giving of a warning would be an adequate discharge of the proprietor's obligations, and they prefer to snipe at the problem from ambush through the use of the evasive language of assumed risk or contributory negligence. See cases cited in notes 52, 53 and 55, infra.
however, seldom characterizes the area which is left in complete
darkness. Consequently the courts are confronted with the propo-
sition that darkness affords its own warning, and the guest who
ventures into a completely darkened room knows that here is no
place of safety. To term this an assumption of risk is merely to
emphasize again the inseparability between the concept of negli-
gence and the so-called personal defenses we are considering.

The fact that the duty of the proprietor can be discharged by
warning is perhaps an instance of the individualism of the common
law which is receding in the face of modern conditions. Conse-
quently an unevenness in the effect to be given the plaintiff's con-
tributory negligence in these situations is to be expected. However
there is a well marked tendency on the part of the courts to hold
that a plaintiff who suffers injury as a result of his voluntary en-
trance into a darkened room either assumes the risk or is guilty
of contributory negligence as a matter of law.40

One comparatively large group of cases dealing with injuries
in darkened places deserves special mention. These are the situa-
tions involving accidents in motion picture theaters. Such a place
necessarily operates in partial darkness; too much light interferes
with the patron's enjoyment of the picture. On the other hand,
absolute darkness would increase the already existing peril to in-
tolerable limits. Between these two extremes there is a wide range
both with respect to the extent of illumination to be provided and
the placing of such lights as are used. Furthermore, supplemental
means of minimizing the danger must be considered. The arrange-
ment of seats, the incline and surfacing of aisles, the presence of
obstructions or sudden changes in floor level, and the provision
of ushers or other attendants—all these are matters of importance.
Where is the line that marks ordinary care?

There is considerable diversity of opinion on the extent of
the burden to be imposed on the management of motion picture
theaters. Some considerations would seem to call for a very ex-
acting standard of care. Large numbers of the public are induced
to enter a dark place where the situation is necessarily dangerous,
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and where the conditions are within the almost exclusive control of the management. If the proprietor is to be allowed to utilize dim lighting for commercial profit, it may be that he should answer for any accident which is the natural outgrowth of the semi-darkened conditions. Some of the decisions emphasize these factors which call for extreme care and indicate that the duty of the proprietor is somewhat analogous to that of the common carrier. Other courts have been impressed by the dilemma of the proprietor, who is faced with a conflict between the demands of safety and those necessary for successful operation, and many of the opinions manifest a leniency toward the defendant. The motion picture, like baseball, is an entrenched American institution which must be made available at a modest cost to poor and rich alike in all sections of the country. The standardized plans and arrangements which have grown up reflect a compromise, and these should be given weight in determining whether or not the management should be responsible for a given misadventure.

This difference of opinion is necessarily reflected in the position taken with respect to the patron’s duty to protect himself, and we find a striking inconsistency of attitude in the cases where the contributory negligence of the plaintiff is in issue. There is a tendency—not too well defined—to hold that the patron assumes the risk or is contributorily negligent when nothing beyond the usual obscurity of movie houses is discoverable. Where, however, there are defects of design or failure by the management to utilize

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some available safety device, the courts usually accept the jury's finding that the patron was free from fault.50

Transitory Perils

With respect to the design and lighting of the premises the occupier has an ample opportunity for advance preparation and the exercise of deliberate judgment. For this reason we have seen that he is likely to be held strictly accountable for his errors, subject only to the limits of economic tolerance. The problem becomes more difficult, however, when the asserted shortcoming of the management is an improper adjustment of its conduct to the constantly shifting scene of daily operations. Transitory perils are a recurrent feature in every business establishment. They may arise from the conduct either of the proprietor or the patrons or they may be the result of conditions for which neither is responsible. Inadvertnce by the management is the mainspring of liability in this type of case.

Through what agency was the peril created? What opportunity and what means were available for its removal? To what extent did efficient conduct of the business demand a toleration of some temporary danger? Was the hazard enhanced by defective design or faulty illumination? These considerations, and more, must be reckoned with by the judge and jury in disposing of the transitory peril cases. Each situation is unique and demands some degree of cooperative vigilance by both management and customer if mishances are to be avoided.

The contributory negligence of the plaintiff or his assumption of the risk is frequently resorted to in actions arising out of transitory perils whenever the court feels that the jury in its enthusiasm to distribute the wealth has lost the proper perspective with reference to the defendant's predicament. A customer slips in a puddle of slush which the storekeeper either has not had the opportunity to remove or where the persistent recurrence of slush

50Branch v. Klatt, (1911) 165 Mich 666, 131 N. W. 107 (defectively designed entrance way; darkness here not necessary to conduct of theater); Nephler v. Woodward, (1906) 200 Mo. 179, 98 S. W. 488; Dondero v. Tenant Motion Picture Co., (1920) 94 N. J. Law 483, 110 Atl. 911 (spectator tripped on defective rug); Bennetts v. Silver Bow Amusement Co., (1922) 65 Mont. 340, 211 Pac. 336 (seats indiscriminately raised above aisle level); Emery v. Midwest Amusement & Realty Co., (1933) 125 Neb. 54, 248 N. W. 804 (theater equipped with hooded lights in aisles, which were off at time of accident; patron knew of existence of lights and depended on them); Magruder v. Columbia Amusement Co., (1927) 218 Ky. 761, 292 S. W. 341 (seats four or five inches above aisle level).
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accumulations overtaxes all reasonably available facilities. Where one court will resolve such a controversy in favor of the management in terms of absence of negligence, another court with equal ease will foreclose the matter by holding that the customer assumed the risk or was guilty of contributory negligence. Possibly Ossa may be heaped upon Pelion and both devices will be resorted to. It may be a matter of some concern to a literal observer that a customer assumes the risk of falling by reason of the presence on the floor of liquid from a broken bottle dropped by a stranger only immediately theretofore, while he does not assume a similar risk with reference to peanut hulls which had been on the floor for several hours preceding the accident.

If the management itself created the temporary condition of danger for some purpose of its own, the court must determine whether the game was worth the candle. Where the management of a drugstore elected to conduct its waxing operations during its busiest hours and over the entire floor area of its establishment simultaneously, a patron who saw the wax one inch deep in places but nevertheless encountered the slippery floor to her misfortune did not assume the risk as a matter of law. The court, in-holding that her conduct should be passed upon by the jury, drew the cryptic distinction between “ordinary” and “extraordinary” risks—the latter were not assumed except within the jury’s discretion. On the other hand, where the proprietor of a self-service grocery

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Bridgeford v. Stewart Dry Goods Co., (1921) 191 Ky. 557, 231 S. W. 22. Compare Correia v. Atlantic Amusement Co., (1938) 302 Mass. 81, 18 N. E. (2d) 435, where water and slush had accumulated in the lobby of a theater for an hour and a half to the knowledge of attendants, who had made no effort to remove it. The plaintiff who saw the condition and attempted to pass through it was held not to have assumed the risk. The same result was reached in Majestic Theater Co. v. Lutz, (1925) 210 Ky. 92, 275 S. W. 16, where the danger was aggravated by defective design.


However, in Bilger v. Great Atlantic & Pacific Tea Co., (1934) 316 Pa. 540, 175 Atl. 496, on facts similar to those in Markham v. Bell Stores Co., supra, the court held that the plaintiff was contributorily negligent as a matter of law. It appears that the management was clearly careless, and this case must be regarded as an instance where the plaintiff was barred because of personal fault. Cost v. Fidler, (1915) 119 Ark. 540, 178 S. W. 373 can be explained only on the same basis.
found it necessary temporarily to encumber the aisles between counters with boxes used to replenish his stock on display, a customer who, in hurriedly retreating on the left-hand side of the aisle, stumbled and fell was regarded as being guilty of contributory negligence as a matter of law.\textsuperscript{56} This kind of juristic manipulation characterizes the disposition of the cases involving transitory perils.

\textit{Extraordinary Conduct by the Business Guest}

In most of the cases heretofore considered, the carelessness with which the plaintiff was charged was his mere inadvertence or indifference to his own safety. Despite the broad statement that a business guest is entitled to assume that the premises are reasonably safe and may accordingly relax his vigilance,\textsuperscript{57} no such generalization is supported by the results reached in the cases. The extent to which the plaintiff must protect himself varies inversely with the ability of the defendant to minimize the risk. After the latter has done all that can reasonably be expected of him, the loss from such danger as remains must rest where it falls—with the plaintiff. This simple idea can be described from the defendant's viewpoint as absence of duty or absence of negligence; from the plaintiff's viewpoint it can with almost equal ease be termed contributory negligence or assumption of risk. The notion that the plaintiff will be barred from recovery because of his personal fault is not reflected in the outcome of the litigation in this class of cases.

Situations in which the business guest is guilty of unusual conduct by reason of which it is claimed that he is contributorily negligent present only another variation of the same theme. It has been previously observed that extraordinary conduct by the plaintiff can be met only by extraordinary precautions on the part of the

\textsuperscript{56}Williams v. Liberty Stores, Inc., (1921) 148 La. 450, 87 So. 233. Compare Ginns v. C. T. Sherrer Co., (1914) 219 Mass. 18, 106 N. E. 600 (customer tripped on box in aisle of millinery store; obstruction had been there for more than half an hour and management had given orders that boxes should not be left lying around; patron not guilty of contributory negligence as a matter of law). Did the difference in the requirements of the two businesses influence the outcome in these cases?

An interesting problem is raised in the case of Shields v. Van Kelton Amusement Corp., (1920) 228 N. Y. 396, 127 N. E. 261. The plaintiff was skating at an open air ice skating rink operated by defendant. As the midday sun melted the ice in spots, obstructions were arranged so as to exclude skaters from dangerous areas. All this was observed by plaintiff who continued within the area where skating was still permitted. She fell when her skates caught in a soft spot in the ice, and was held guilty of contributory negligence as a matter of law. See also Frye v. Omaha & Council Bluff's St. Ry., (1921) 106 Neb. 333, 183 N. W. 567.

\textsuperscript{57}See note 16, supra.
Whether or not the latter can be charged with the special duties thus required is not a question that can be readily answered. A store cannot be so designed that patrons can with safety walk backward through the aisles or meander through the premises with darkened glasses. In such situations the jury will likely find that the plaintiff was guilty of contributory negligence, or the court will make a similar finding as a matter of law. On the other hand, the presence of an attendant may be sufficient to impose the obligation to warn, in which case the issue of the plaintiff's carelessness will be resolved in his favor.

Some businesses are operated under conditions where unusual and even boisterous or extravagant conduct is to be expected, and the management must be prepared to meet the situation. This is typical of amusement parks, fun houses, swimming pools and similar places. Even here, however, there is a point of tolerance
which cannot be exceeded. The public expects for a moderate fee to buy excitement and the illusion of danger. If the defendant is to supply merchantable realistic thrills at reasonable prices, he is entitled to expect that the patron will make some adjustment to his situation. It follows that the obligation of the management is not to be defined solely in terms of foreseeable conduct, but likewise with reference to the economic possibility of reducing the risk. Important considerations in these cases are the type of clientele to which the establishment caters and the feasibility of supplementing unavoidable shortcomings in design or construction with personal supervision. The so-called "fun house" represents an extreme illustration of this type of case. The patrons of these places pay their fare in order to expose themselves deliberately to hilarious and dangerous situations. It is difficult for the management to give them what they want and at the same time to guarantee their safety. Consequently, the courts tend to apply liber-

the case of Rienzi v. Tilyou, (1929) 252 N. Y. 97, 169 N. E. 101. The plaintiffs, husband and wife and weighing 440 pounds in the aggregate, attempted to ride on a single mechanical racehorse. They were injured in a fall which resulted from a defective stirrup strap, and the issue of contributory negligence was held for the jury's consideration.

In the following cases the plaintiff was held guilty of contributory negligence: Rayfield v. Sans Souci Park, 147 Ill. App. 493 (1909) (children playing tag in mirror maze which was intended for use as a puzzle and was not constructed for playground purposes; plaintiff ran into a mirror, which broke); Bernier v. Woodstock Agricultural Society, (1914) 88 Conn. 558, 92 Atl. 169 (boy witnessing balloon ascension grabbed a rope on balloon to get "a little ride up" and was dropped from three hundred feet in the air); State, to use of Hamel v. Glen Echo Park Co., (1921) 137 Md. 529, 113 Atl. 85 (deceased stood up in car of scenic railway with obvious result); Mikulski v. Morgan, (1934) 268 Mich. 314, 356 N. W. 339 (misuse of ducking apparatus at swimming pool).

Arndt v. Riverview Park Co., 259 Ill. App. 210 (1930) (child attempted to ride on merry-go-round with fifty pound brother in her lap and fell when she released her grip to wave at her mother; verdict for plaintiff affirmed); Brown v. Columbia Amusement Co., (1932) 91 Mont. 174, 6 P. (2d) 874 (mother injured in attempting to leap onto moving merry-go-round to rescue child from danger; device was improperly attended; same result); Ainsworth v. Murphy, (Orl. App. 1926) 5 La. App. 103 (ten year old child attempted to change horses on moving merry-go-round; held barred by contributory negligence. Note the impracticability of defendant's guarding against this type of occurrence). With this case compare Harris v. Crawley, (1912) 170 Mich. 381, 136 N. W. 356 (child jumped off moving merry-go-round).

"It was for the thrill of bumping and of the escape from being bumped that plaintiff entered the contrivance and remained there after opportunity for exit had occurred. The chance of collision was that which gave zest to the game upon which plaintiff had entered." Case, J., in Gardner v. G. Howard Mitchell, Inc., (1931) 107 N. J. Law 311, 314, 153 Atl. 607, 609.

"The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation." Cardozo, J., in Murphy v. Steeplechase
ally the doctrine of assumption of risk and contributory negligence whenever they find that further efforts by the management to minimize the peril would be impossible or impracticable.\textsuperscript{68}

*Concerning the Traffic Cases*

Some readers will doubtless feel that the foregoing observations, while correctly reflecting the attitude of courts and juries toward contributory negligence in the landowner cases, have little application to injuries which flow from the operation of trains and motor vehicles. It can be properly pointed out that the doctrine of contributory negligence is largely a product of the transportation cases and that these represent the instances of its most frequent use. Certain points of difference between the transportation cases and the landowner cases have already been noted;\textsuperscript{69} others deserve brief mention here.

The type of misconduct most frequently charged against the business guest is mere passivity—a failure affirmatively to watch out for himself. This differs only in degree from assumed risk; and the close relationship between an assumption of risk and the absence of a duty to use due care has been observed many times.\textsuperscript{70} This observation, however, is something quite different from what the writer has attempted to point out in the preceding pages. It is one thing to state that where the plaintiff has manifested a willingness to take on a recognized danger this extinguishes any duty to use care which otherwise might exist. Such a position

Anusement Co., (1929) 250 N. Y. 479, 483, 166 N. E. 173, 174. In this case the plaintiff was injured on a device known as a \textquotedblleft flopper," consisting of a moving inclined belt with irregular sporadic motion which caused her to fall. A verdict for plaintiff was reversed on appeal.\textsuperscript{71}

\textsuperscript{68}Sullivan v. Ridgeway Constr. Co., (1920) 236 Mass. 75, 127 N. E. 543 (plaintiff who jumped from belt conveyor at foot of slide assumed the risk); Nicoletti v. Park Circuit & Realty Co., (Mo. App. 1926) 287 S. W. 661 (corpulent plaintiff lost her balance on slide because she disobeyed instructions to lean forward; the court was not impressed by her insistence that the accident was occasioned because an attendant gave her \textquotedblleft da beeg-a pooh\textquotedblright). Recovery was allowed in Dahna v. Fun House Co., (1927) 204 Iowa 922, 216 N. W. 262. Here plaintiff was injured by a concealed mechanism which suddenly raised the floor level. In view of the fact that the public asks for such surprises the problem of liability was very difficult. Compare Carlin v. Krout, (1923) 142 Md. 140, 120 Atl. 232 (plaintiff's arm caught in handrail on \textquotedblleft ocean wave\textquotedblright; case disposed of favorably to defendant without mention of contributory negligence or assumption of risk).

\textsuperscript{69}Page 71, supra.

\textsuperscript{70}Warren, Volenti Non Fit Injuria in Actions of Negligence (1895) 8 Harv. L. Rev. 457. Professor Bohlen has said: \textquoteleft\textquoteleft In a word, voluntary assumption of risk merely negatives the duty to take care to provide safe conditions and to prevent the failure to do so from being actionable negligence.	extquoteright\textquoteright Bohlen, supra note 4, at 247. The same point of view has been set forth in Prosser, op. cit. supra note 7, at 377, Sec. 51.
presupposes an otherwise existing duty which, if breached, would give rise to a valid cause of action, provided only that the plaintiff had not "sold out" by assuming the risk. The assumption by the plaintiff, under this view, still remains affirmative conduct, or is at least a manifestation of attitude, which transfers the risk from the shoulders of the defendant and bars the possibility of recovery, irrespective of all else. It is quite another thing to point out, as the writer has attempted to do, that both assumption of risk and contributory negligence are mere phrases of supererogation used by the courts to explain an absence of either duty or negligence on the part of the defendant. In other words, in such situations the case against the defendant is not meritorious because the exactions claimed of him are more than he can be required to meet. If this is correct and the terms assumption of risk and contributory negligence are devices of legal forensics, they are as adaptable for use in one type of negligence case as in another.

Furthermore, the group of cases considered in the last preceding section involved active participation by the plaintiff in the creation of the risk, and these situations do not materially differ from the transportation cases. Indeed, in all such instances the plaintiff's active participation must be regarded as an added circumstance calling for leniency in the attitude toward the defendant, and thus an even stronger case for the use of some mediating device is presented than in the situations where the plaintiff's conduct is merely passive indifference.

It is submitted that in the traffic cases there is more occasion for resort to contributory negligence for the purpose heretofore suggested than in any other class of litigation. In the first place, the issue of the defendant's negligence is likely to be determined on an entirely arbitrary basis. The violation of traffic statutes and ordinances is generally regarded as wholly conclusive on the negligence issue. Consequently all efforts to individualize the situation must operate through indirection. As a result the proximate cause issue is overburdened and the question of whether the plaintiff's negligence was a contributing factor is pressed to the breaking point. Second, the traffic cases, like other situations involving transitory peril, must often be solved in terms of adversity and reaction by the defendant. These human characteristics

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71 See the interesting collection of cases in Shulman and James, Cases and Materials on the Law of Torts (1942) 638 et seq.
72 See generally on this subject, Green, Contributory Negligence and Proximate Cause (1927) 6 N. C. L. Rev. 3.
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are almost impossible to evaluate with any assurance in a given situation, and the need for flexibility in disposing of these cases is prominent.

If the conduct of the plaintiff has magnified the hazard which the defendant must meet to such an extent that it becomes impolitic to cast the burden on his shoulders, what could be more expectable than a resort to contributory negligence as a bar to recovery? An ample variety of mediating devices thereby becomes available to the court, including that artful phrase, the last clear chance; and there is the further comfort of knowing that an escape is available when desired through the relegation of the contributory negligence issue to the jury with fair assurance as to the outcome. At least it seems proper to suggest that contributory negligence as employed in the traffic cases deserves a fair re-examination in terms of what is being done with the doctrine, rather than what is being said about it by the courts.

These include the rule that contributory negligence is not a defense against the wilful negligence of the defendant, as well as the possibility that the plaintiff's negligence did not materially contribute to the accident or that it was not a "proximate cause" thereof.

Compare James, supra note 8, at 704.