CONTRIBUTORY NEGLIGENCE TOWARDS A HAZARD OTHER THAN THAT CAUSING INJURY; RECOMMENDED CHANGES IN APPLICATION

Since about 1850 when negligence—that is, conduct objectively unreasonable in light of the foreseeable risk—joined strict liability and intentionally tortious conduct, there have been three grounds for imposing tort liability upon a defendant whose conduct has caused harm to another. Paralleling the development of negligence as a ground for liability, the doctrine grew that negligence of the plaintiff contributing to his injury barred his recovery. Perhaps the most stringent example of the latter bar is the so-called "outlaw rule," which prevented plaintiff's recovery if, at the time of the injury, he was violating a statute.[1] Gradually, however, limitations on the outlaw rule were imposed as part of a trend indicating general dissatisfaction with the absolute defense of contributory negligence.[2] The last clear chance doctrine, the rule that contributory negligence is a defense to neither actions based upon wilful and wanton recklessness nor to those grounded upon intentionally tortious conduct, that only advertent contributory negligence bars recovery in strict liability cases, the proliferation of workman's compensation statutes abolishing contributory negligence, and the enactment of comparative negligence legislation, are other manifestations of this discontent.[3]

One of the more interesting limitations to the contributory negligence defense is the rule that permits a negligent plaintiff to recover for the ordinary negligence of the defendant, provided that plaintiff was not negligent towards the hazard that injured him, but towards another hazard.[4] This note traces the development of the "double-hazard" rule by studying in detail those cases in which it was asserted to be applicable. For convenience, two aspects of the rule will be kept separated: (1) what criteria are used to determine whether there was more than one "hazard," i.e., what is meant by "hazard"?; (2) what standard is used to determine whether the plaintiff was negligent towards the hazard that actually injured him? No clear answer to

1. James, Statutory Standards & Negligence in Accident Cases, 11 La. L. Rev. 95, 104-05 (1950).

2. Ibid.

3. See generally Prosser, Torts §§ 51-53 (2d ed. 1955); Leflar, The Declining Defense of Contributory Negligence, 1 Ark L. Rev. 1 (1947); James, Contributory Negligence, 62 Yale L.J. 691 (1953).

4. Restatement, Torts § 468 (1934). See also Prosser, op. cit. supra note 3, at § 51; James, supra note 3, at 728-29.

the first question can be expected because the law is still developing. This note only attempts to disclose the current trend. Solving the second problem will be difficult because some courts allow a negligent plaintiff to recover by saying that his negligence was not a "proximate cause" of his injury,[5] while others say simply that the plaintiff was not negligent towards the hazard that injured him.[6] It must be determined whether this difference in treatment materially affects the outcome of the cases.

An understanding of the double-hazard rule depends upon a knowledge of the two landmark cases from which it was fashioned. In *Gray & Bell v. Scott,*[7] plaintiff's child played in defendant's passageway despite warnings that he might be injured by equipment moving through it. He was killed, however, when a coal car fell into the passageway from defendant's negligently maintained siding above. The defendant claimed that the child had been contributorily negligent by continuing to play in the passage after the warnings. The court rejected this argument and asserted the child had been killed by a risk "entirely different" from that about which he had been warned, adding that he had had no reason to "expect" danger from above.[8] In *Smithwick v. Hall & Upson Co.,*[9] the plaintiff disregarded warnings not to work on that part of a slippery platform which lacked a guard rail. He was injured, however, when a nearby wall collapsed and knocked him to the ground. Citing the *Scott* case, the court rejected defendant's contributory negligence plea and pointed out that plaintiff had been injured by a "source of danger entirely different" from that about which he had been warned and of which he had no "knowledge."[10]

Considering first the second problem mentioned above, both the *Scott* and the *Smithwick* cases seem to use foreseeability as the standard for determining whether the plaintiffs had been negligent. This is indicated by the courts' use of such words as "knowledge"[11] and "expect."[12] What criteria were used for determining that there were two "entirely different" hazards, however, is not so easy a question. The criterion indicated by the *Scott* case is the direction from which the object causing injury comes. If the passageway

5. See, e.g., cases cited in note 14 infra.
6. E.g., Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 Atl. 924 (1890); Gray & Bell v. Scott, 66 Pa. 345 (1870).
7. 66 Pa. 345 (1870).
8. Id. at 347.
9. 59 Conn. 261, 21 Atl. 924 (1890).
10. Id. at 268, 21 Atl. at 925.
11. Ibid.
12. 66 Pa. at 347.

had contained tracks, and the child had been warned about being struck by a coal car, the decision would probably have been the same. That is to say, it is hardly reasonable to assume the court was distinguishing between a coal car and some other type of moving equipment. A coal car falling from above, then, apparently constituted an "entirely different" risk than one moving down the passageway. Determining the criterion employed in the *Smithwick* case is even more perplexing. The injury in this case was caused by plaintiff's body falling to the ground. Was the "entirely different" hazard the *way in which* the fall was brought about (being knocked down instead of slipping) or the *object* precipitating it (the wall instead of the platform)? The phrase used by the court, "source of danger,"[13] is hardly illuminating.

Following these two landmark cases, the rule was next applied in a series which can be described generically as "platform cases."[14] The situation common to all of them was this: the plaintiff stood on the platform or running board of a moving vehicle which collided with another vehicle, one of the drivers being negligent. The courts uniformly held that although the plaintiff was negligent—his position plus the vehicle's motion created the hazard of falling—his negligence was unrelated to the hazard of injury from collision.[15] The courts' creation of two hazards—falling and collision—is logically unacceptable. It is clear that the injury in all of these cases was caused by falling from a moving vehicle.[16] Apparently the courts conceived the separate hazard as being the way in which the fall was precipitated. The platform cases are also interesting because, following a chance remark in the *Smithwick* case, they not only inquired whether the plaintiff had been negligent according to the foreseeability standard, but also questioned whether plaintiff's negligence was a "proximate cause" of his injury.[17] Why it was necessary to deal with proximate cause after determining that plaintiff was not negligent was not explained.

The overlapping of the negligence and proximate cause questions to the ultimate confusion of both is well illustrated in *Kinderavich*

13. 59 Conn. at 268, 21 Atl. at 925.

14. Montambault v. Waterbury & Mildale Tramway Co., 98 Conn. 584, 120 Atl. 145 (1923); Dewire v. Boston & Maine R.R., 148 Mass. 343, 19 N.E. 523 (1889); Guile v. Greenberg, 192 Minn. 548, 257 N.W. 649 (1934).

15. Ibid.

16. One is here reminded of the joke which has become a standard among the airborne infantry: "It's not the fall that hurts you—it's the sudden stop."

17. Montambault v. Waterbury & Mildale Tramway Co., 98 Conn. 584, 589-91, 120 Atl. 145, 147 (1923); Dewire v. Boston & Maine R.R., 148 Mass. 343, 347-48, 19 N.E. 523, 525 (1889); Guile v. Greenberg, 192 Minn. 548, 551-53, 257 N.W. 649, 650-51 (1934).

v. Palmer,[18] widely criticized for its application of the double-hazard rule.[19] Plaintiff negligently walked onto a railroad track where an eastbound train knocked him unconscious and tossed his body onto a parallel track. Twelve minutes later defendant's westbound train severed plaintiff's arm. The court held that even if plaintiff was negligent with respect to the first train, this negligence was not the proximate cause of his injuries.[20] But the court also said that plaintiff could not have been negligent towards the second train because, being unconscious, he was not on the track of his own volition.[21] Thus the court seemingly conceived of each train as a separate hazard. It hardly appears likely that the court would have found plaintiff negligent towards the one hazard of being struck by a train, but not negligent towards the second hazard of being struck by one train and propelled into the path of a second.

Finally, in the recent case *Furukawa v. Yoshia Ogawa*,[22] the concept of "hazard" was given another twist. The defendant owned a garbage pit enclosed on three sides by concrete retaining walls. The walls were covered with refuse. While emptying garbage into defendant's truck, which was parked in the pit, plaintiff slipped from the wall and fell into the pit, impaling himself on a hook that protruded upward from the rear fender of the truck. The trial court applied the double-hazard rule and held that plaintiff was negligent with respect to standing on the refuse-covered wall, but not with respect to the hook.[23] Plaintiff was permitted to recover damages suffered because of the hook. Affirming the trial court's judgment, the appellate court added that plaintiff was not negligent with respect to the hook because he did not appreciate the *amount of danger*.[24] The trial court here apparently viewed the wall and the hook as two separate hazards, while the appellate court viewed falling into the pit as one hazard and falling upon a hook as another. Both courts seemingly used the foreseeability test to determine whether the plaintiff had been negligent.

From the preceding discussion it is apparent that the concept of "hazard" is a vague one at best. No court has ever formulated criteria for determining whether there was more than one hazard in a given fact situation. Nor are any criteria clearly discernable from the facts of the cases applying the double-hazard rule. In

18. 127 Conn. 85, 15 A.2d 83 (1940).
19. E.g., Prosser, Torts § 51, at 286 n.28 (2d ed. 1955).
20. 127 Conn. at 98, 15 A.2d at 89-90.
21. Ibid.
22. 236 F.2d 272 (9th Cir. 1956).
23. Id. at 274 n.2.
24. Id. at 274.

some, the criterion would seem to be the direction from which the injuring object comes;[25] in some, it would seem to be the way in which the movement causing injury is precipitated;[26] in others, it would seem to be the existence of two objects, both capable of producing harm but only one of which does;[27] and in at least one case, the criterion would seem to be the amount of danger foreseeable by the plaintiff.[28] An inquiry into the goal sought to be achieved by the courts employing it is therefore indicated.

The features common to all of the double-hazard cases are easily enumerated: (1) plaintiff was negligent; (2) defendant was negligent; (3) plaintiff was injured during a course of events which, in some respects and to a greater or lesser degree, was extraordinary. The aim of the courts in the double-hazard cases also is clear: to limit the effect of the plaintiffs' negligence. The liability of a defendant for harm in fact caused by his negligent acts is limited by the doctrine of proximate cause.[29] One facet of the proximate cause doctrine is the rule that the defendant will not be held responsible for harm that was a sufficiently extraordinary result of his negligence.[30] The double-hazard rule appears to be an attempt to give plaintiffs the benefit of a similar rule since, theoretically at least, contributory negligence is an *absolute* bar to recovery[31] and, as was noted above, the sequence of events preceding the injury in all of the double-hazard cases was to some extent extraordinary.

It is submitted, however, that the method used by the courts to limit the legal effect of a plaintiff's negligence is both clumsy and confusing. First of all, it requires the court to find an "entirely different" risk. There has been no consistency about the criteria for determining what is a separate risk and the determination is, in any case, arbitrary. Secondly, the court must then determine that the plaintiff was not negligent with respect to this second risk. In order to find no negligence, the court must recite, with varying amounts of detail, the course of events leading up to the injury and ask whether this precise course was foreseeable. Two things should be noted about this procedure: (1) It is not the method ordinarily

25. Gray & Bell v. Scott, 66 Pa. 345 (1870); cf. Kinderavich v. Palmer, 127 Conn. 85, 15 A.2d 83 (1940).

26. "Platform cases," supra note 14. See also Smithwick v. Hall & Upson Co., 59 Conn. 261, 21 Atl. 924 (1890).

27. Furukawa v. Yoshia Ogawa, 236 F.2d 272 (9th Cir. 1956) (trial court); Kinderavich v. Palmer, 127 Conn. 85, 15 A.2d 83 (1940).

28. Furukawa v. Yoshia Ogawa, supra note 27 (appellate court).

29. See Restatement, Torts §§ 431, comment d, 435-53 (1934).

30. Id. at § 433(b). See also id. at § 435(2) (Supp. 1948).

31. Within the limitations stated in the text at note 3 supra.

used for determining whether a person was negligent—that is, instead of asking "Was the plaintiff acting like a reasonably prudent person in light of the foreseeable risk?" it substitutes the inquiry, "Could a reasonably prudent person have foreseen that by working upon a slippery platform in spite of warnings not to, a nearby wall would collapse and knock him to the ground?" (2) It is not the standard applied to determine whether the defendant in the same case was negligent; the jury thus has two standards of negligence. Finally, this approach to the problem confounds the questions of negligence and proximate cause,[32] an area in which there is sufficient confusion at present.

An example of the confusion that can result from the above process of limiting the effect of a plaintiff's negligence is *Cosgrove v. Shusterman*.[33] Here the plaintiff was riding on the running board of an automobile which collided with another at an intersection; the plaintiff was crushed between the two cars. After mentioning the double-hazard rule, the court said that the test of plaintiff's negligence was whether he ought reasonably to have foreseen the hazard from which his injury resulted; the rule applied no further than to answer this question.[34] However, the court then added that if this question was answered affirmatively, the remaining question would be, was plaintiff's negligence the proximate cause of his injury?[35] In explanation, the court said that plaintiff would not be barred for injuries which were an extraordinary result of his negligence.[36] It is difficult, if not impossible, to conceive of a case where a "hazard" which should have been foreseen could in any sense be extraordinary, but that is the apparent holding of the *Cosgrove* case.

In spite of this difficulty, however, the *Cosgrove* case does indicate a method of limiting the effect of a plaintiff's negligence while avoiding the objections previously noted to the double-hazard rule as traditionally employed. It is believed that a better method would be to determine whether the plaintiff was negligent in the same way that determination is made about the defendant, viz., in light of the

32. Implicit in this statement is an evaluative acceptance of the view usually taken by American courts and best exemplified by the dissenting opinion of Andrews, J., in Palsgraf v. Long Island R.R., 248 N.Y. 339, 347, 162 N.E. 99, 101 (1928). See also Prosser, Palsgraf Revisited, 52 Mich L. Rev. 1 (1953). To be contrasted is the view taken in Green, Rationale of Proximate Cause, passim (1927) and Green, Judge and Jury, passim (1930).

33. 129 Conn. 1, 26 A.2d 471 (1942). See also Kryger v. Panaszy, 123 Conn. 353, 196 Atl. 795 (1937).

34. 129 Conn. at 5, 26 A.2d at 473.

35. Ibid.

36. Id. at 7-10, 26 A.2d at 474-75.

foreseeable risk, was the plaintiff acting as a reasonably prudent man? If this question is answered negatively, as it would have been in all of the double-hazard cases, the court could inquire whether this negligence was the proximate cause of plaintiff's injuries. At this point, if the court thought the sequence of events connecting the plaintiff's negligence with his injury was sufficiently unusual, it could eliminate the legal effect of that negligence. The proposed method has two advantages over that requiring the creation of an "entirely different" risk: (1) the standard for determining negligence is applied consistently to both plaintiffs and defendants; (2) it permits the courts to limit a plaintiff's responsibility for his negligent acts in the same manner that they limit a defendant's responsibility. It should be noted that the proposed solution would not preclude the courts, in their continuing efforts to circumvent the contributory negligence defense, from applying different standards to plaintiffs and defendants in the determination of what is "extraordinary."