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Frederick J. Moreau

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Torts

by *Frederick J. Moreau**

New occasions teach new duties
Time makes ancient good uncouth
They must upwards still, and onward
Who would keep abreast with truth.

Lo, before us gleam her campfires
We ourselves, must pilgrims be
Launch our Mayflower and steer
Boldly through the desperate wintry sea.

James Russell Lowell—*The Present Crisis*

Constantly, the bounds of duty are
enlarged by knowledge of a prospective use.

Cardozo, *Glanzer v. Shepard*,
233 N.Y. 236, 135 N.E. 275, 23 A.L.R. 1425
(1922).

* Ph.B. 1922, University of Wisconsin, LL.B. 1925, University of Wisconsin Law School. LL.M. 1937, Columbia University. J.D. 1966, University of Wisconsin. Professor of Law, University of California, Hastings Col-

lege of the Law. Member, Wisconsin and Kansas State Bars.

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I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought certainty. I was oppressed and disheartened when I found that the quest for it was futile. * * * I have become reconciled to the uncertainty because I have grown to see it is not discovery, but creation; and the doubts and misgivings, the hopes and the fears, are part of the travail of mind, the pangs of death and the pangs of birth in which principles that have served their day expire, and new principles are born.

Cardozo, *Nature of the Judicial Process*, pp. 166–7.

Negligence

Duty

The field of negligence is undoubtedly the one that dominates litigation in these times in our complex economic structure. There is much interdependence of peoples which results from technology. For this reason we look at negligence at the outset. Basically, actionable negligence is simply a cause of action that consists of four elements: a duty or obligation recognized or imposed by law; a breach of that duty; a causal connection with resulting damage; and the damage itself. Many opinions on negligence begin with a statement to this effect,¹ and all texts on the subject follow the same routine.² And it must be true that all the complex problems that arise in connection with the subject must be related in some way to one or more of these four basic elements.

1. *White v. Schnoebelen*, 91 N.H. 273, 18 A.2d 185 (1941); *Raymond v. Paradise Unified School District*, 218 Cal. App.2d 1, 31 Cal. Rptr. 847 (1963); *Lysick v. Walcom*, 258 Cal. App.2d

136, 65 Cal. Rptr. 406 (1968). For further discussion of this case, see Seligson, *Insurance Law*, in this volume.

2. Prosser, *Law of Torts*, 3d. ed., p. 146; *Harper on Torts*, section 66.

This year has brought forth very significant changes in our law, in effect modifying some formerly accepted attitudes toward some of these elements. The court gives guidelines to the jury with reference to breaches of duty, causal connection, and damage, elements which are normally for the jury to decide under instructions. With reference to the existence of a duty,³ it is particularly for the court to determine because initially it must decide whether there is a case which must be submitted to the jury. If there is no existing duty, there can be no breach, no wrongful conduct, and therefore nothing further to decide. Yet there may be cases in which the court submits the duty questions to the jury; these are generally cases in which the facts are in dispute, in which event the jury resolves the facts and then applies the law according to the instructions of the court. The point is that the jury chooses from among conflicting facts in arriving at the existence or non-existence of a duty, but the court still has great influence because it advises the jury as to what findings of fact will give rise to a duty to exercise care.

The court often decides to whom a duty is owing as well as whether that duty exists. This is what was done in *Palsgraf v. Long Island R.R. Co.*,⁴ in which Justice Cardozo held that while conduct might have been tortious toward someone other than the plaintiff, it would not be tortious toward an *unforeseeable* plaintiff; that is, a person beyond the range of foreseeability, even if such person were injured directly by conduct careless with reference to others. As he expressed it, "The risk reasonably to be perceived defines the duty to be obeyed". With limitations to be noted later, the foreseeability of risk remains the basic consideration in finding the existence of a duty.

3. See *Matthias v. United Pacific Insurance Co.*, 260 Cal. App. 2d 752 at 753, 67 Cal. Rptr. 511 at 512 (1968) stating that: "An indispensable factor to liability founded upon negligence is the existence of a duty of care owed

by the alleged wrongdoer to the person injured, or to a class of which he is a member."

4. 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253 (1928).

With this preliminary foundation in mind, we proceed to examine the facts in *Dillon v. Legg*,⁵ decided in June, 1968. The complaint alleged that defendant Legg was negligently driving his automobile along a road in Sacramento County at the time that plaintiff's young daughter was lawfully crossing the road in front of him, and that Legg's automobile struck the child and caused injuries resulting in her death. The first cause of action was for the wrongful death of the child, which is routine. As a second cause of action, however, the plaintiff alleged that she, the mother of the child, was in proximity to the collision and witnessed the collision and the injury to her child, which caused her great emotional disturbance, shock, injury to her nervous system, and great physical and mental pain and suffering. After filing an answer, the defendant moved for judgment on the pleadings, contending that no cause of action was stated, as the plaintiff alleged only that she suffered emotional distress, shock, and fright induced by apprehension of negligently caused danger or injury to a *third person*. Defendant further contended that the plaintiff may not recover, even when the third person is a close relative, so long as the apprehension is not for plaintiff's own danger. Defendant, of course, made this motion relying on *Amaya v. Home Ice, Fuel and Supply Co.*⁶ Accordingly, a study or review of *Amaya* is essential to an understanding of this case, though we can note at once that in *Dillon* the supreme court reversed the trial court's ruling granting defendant's motion. The majority opinion in *Dillon* thinks in terms of distinguishing *Amaya*, but Traynor's dissent to *Dillon* rests on the theory that *Amaya* is controlling; so it must be his opinion that they are not distinguishable, both involving emotional disturbance and shock for viewing a third person about to be maimed or killed, and that it matters not that the third person is a child, sister, or spouse of the person put in apprehension. Yet both cases involved a close relative.

5. 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968).

6. 59 Cal. 2d 295, 29 Cal. Rptr. 33, 379 P.2d 513 (1963); Torts Restatement, § 313(2).

A brief examination of the *Amaya* decision will help us in our study of *Dillon*. It was a mother's suit for physical injuries resulting from emotional shock caused by fear for the safety of her minor child, who was hit by defendant's truck while it was being negligently operated. The opinion of the district court of appeal, by Justice Tobriner, then on that bench, went right to the duty problem and held that an automobile operator, as a reasonable man, should foresee that the class of persons who may suffer harm from his misconduct includes a parent whose emotional distress may come from the exposure of his child to injury, adding that "we cannot hold as a matter of law that the risk of such injury is not foreseeable in the context of present day conditions". He cites *Prosser*, who indicates that most people "feel" that such a parent should recover. He then traces historically the feudal rules wherein there was almost absolute liability,⁷ until the Industrial Revolution caused a breaking away from such strictness and caused the movement to fault as the basis required for a breach of duty.⁸ And duty simply means those considerations which lead society to conclude that the plaintiff's interests are entitled to protection.

Justice Tobriner points out that the problem of finding a duty is more difficult when the plaintiff is said to be unforeseeable and when the injury consists of emotional distress. He reminds us of the famous case, *Donoghue v. Stevenson*,⁹ in which Lord Atkin raised the nice question: "Who is my neighbor?" That is, who is the person to whom a duty is owed? The answer being—those persons who are so closely affected by my act that I ought reasonably to have them in contemplation when my acts affecting them are called in question. Obviously, Justice Tobriner felt that the mother was so closely and directly affected by the defendant's act that the defendant should be held to have had her in contemplation. The injury to the plaintiff is foreseeable if the defendant's con-

7. *Weaver v. Ward*, Hobart 134, 80 Eng. Rep. 284 (1616).

8. *Brown v. Kendall*, 6 Cush (60 Mass) 292 (1850).

9. A.C. 562 (1932). See Marsh's comment on this in 69 L.Q.R. at 182.

duct encompasses potential risk to a class of persons which includes the plaintiff. The court lists the grounds usually relied on for denying recovery: (a) the absence of impact; (b) the absence of the presence of the plaintiff in the zone of impact; (c) the absence of physical manifestations of emotional distress; (d) the absence of plaintiff's fear for his own safety; and finally (e) the danger of fraudulent claims. The justice then explains them all away and returns to the basic issue of foreseeability of risk—the key question—and refers to the objections above as “court-inspired theories to restrict the range of liability of a defendant to narrow areas”. Yet he recognizes that a boundary line should be drawn. *Prosser* is relied on for the suggestion that in order to avoid ridiculous cases we should require that: (a) the threatened injury must be serious enough to cause severe shock; (b) the shock must result in actual physical injury or harm; (c) the person threatened should be related in some way to the plaintiff, and (d) the shock must be fairly contemporaneous with the defendant's conduct.

When *Amaya* was appealed to the supreme court and reversed by a vote of 4 to 3, the whole problem was again reviewed. Justice Schauer wrote for the majority. The problem was again restated clearly. “May tort liability be predicated on fright or nervous shock (with consequent bodily illness) induced solely by the plaintiff's apprehension of negligently caused danger or injury to a third person?” He concedes that California has not yet required concurrent impact on the plaintiff to enable him to recover, but finds that the question raised here has been before the court three times and in each case the court refused to resolve it.

Schauer, in reversing, relied on the fact that 18 jurisdictions that had considered the matter held that the plaintiff had no cause of action; that the First Restatement, section 313, in dealing with the question, placed the issue in the form of a caveat, thus inviting action by the courts to resolve the matter. This was done in 1934. No court having taken the bait during the 29-year interim, the Reporter and his advisers, when drafting the Second Restatement in 1960, withdrew the

caveat and restated the rule in accord with what was the unanimous trend of the decisions. Justice Schauer emphasized that the problem must be approached from the standpoint of *duty* rather than from *causation*; that the mother must show a duty to herself not to be subjected to an unreasonable risk of fright or shock from seeing a third person (in this case, her daughter) in peril due to defendant's negligence. And even if it might be said that such fright might be foreseeable, that alone would not be sufficient to establish such a duty as a matter of law. There are other considerations involved, such as administrative factors and the threat of fraudulent claims. Intentional infliction of fright is one thing, but the mere negligent infliction of such fright is another matter.

There is the fear that "extravagant credulity leads to injustice", assuming that in all these cases the fear is extravagant. Then there is the socio-economic factor. This is the fear that such a liability would prove too far-reaching. In fact, the court here fastened on a statement or generalization to the effect that such a liability would be "unthinkable"; it would be beyond social utility. So the policy should be to refuse to create such duties. It confirms the thinking of Justice Wickhem in *Waube v. Warrington*,¹⁰ that such a liability "would be wholly out of proportion to the culpability of the negligent tortfeasor".

The thorough dissent to *Amaya* by Justice Peters, concurred in by Justices Gibson and Peek, is well worth careful study. He recognizes the unanimity of the decisions, but feels that this should not preclude critical analysis. The dissent is exhaustive; it disposes of all the usual arguments made: the requirement of impact; the presence of the plaintiff in the zone of impact; that though physical injury which follows mental disturbance cannot be the basis of recovery in some states, it is allowed in California; and that the rule that the plaintiff must fear for his own safety is not followed absolutely. Justice Peters concludes that in the light of modern times, a defendant who negligently endangers a child

10. 216 Wis. 603, 258 N.W. 497,
98 A.L.R. 394 (1935).

should foresee that the child's mother may be nearby, and seeing her child endangered, will suffer shock with resulting physical consequences. But he would limit recovery to cases where the endangered person is a close relative, the shock is severe, actual harm results, the plaintiff is present at the time, and where the shock is contemporaneous with the endangering.

In *Dillon v. Legg*, we must note at once that the majority opinion is written by Justice Tobriner, who wrote the opinion in *Amaya* rendered by the district court of appeal. Again he takes up all the objections to recovery, and disposes of them in about the same manner in which he did in *Amaya*. He seeks to distinguish *Amaya* in that it involves only a "third person," while here in *Dillon* we have the close relationship of mother and child and fear for the child. But to the extent that *Amaya* is contra to this decision, he overrules it. The impact rule has been rejected in California, and that automatically rejects the zone of danger rule because it was used only to insure impact, and if impact is not essential neither is the substitute for it. He attacks the limited concept of duty as favoring the property owner, and as a device designed to curtail the danger of large awards.¹¹ It was a way of limiting "untempered fairness". It was also feared that the courts would be flooded with trumped-up claims, fraudulent and indefinable. But in such a case as this, the mother seeing her child endangered will suffer real shock and physical injury therefrom—this will be no unreal situation.

The mere possibility that fraudulent claims may be made is no reason for denying the entire class of such claims. Many cases in California reveal that the mere danger of fraud is no ground for denying recovery in all cases. Interspousal recoveries support this thinking. And the fear for one's own

11. *Toomey v. London and Brighton Rly.*, 3 C.B. (ns) 146. Marsh explains how the court reacted in this case in which a poor illiterate passenger fell down a stairway in the defendant's station. The court held there was no evidence of negligence to go to the

jury, saying, "Every person who has any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result." See *Marsh, Invitees, Licensees and Trespassers*, 69 L.Q.Rev. at 185.

safety is sufficient basis for recovery without impact.¹² Proper guidelines can be set up to prevent any undue extension of liability. Basically, foreseeability of risk is the primary consideration for allowing recovery; this is the foundation for establishing the element of duty in the absence “of overriding policy considerations”.¹³ Defendant owes a duty only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous and therefore negligent.¹⁴

The guidelines set out above will prevent the rash of cases feared by old decisions, the majority opinion in *Amaya*, and the dissents in *Dillon*. These safeguards bear repeating, and include: (a) the third person must be a close relative; (b) the shock must be a serious one; (c) the physical injury must be substantial; (d) it must occur immediately after the fright or shock is experienced; and (e) the plaintiff must have witnessed the negligent conduct toward the relative. These requirements will prevent any fraudulent claims.

The reader should note what section 436 of the Restatement provides. While Restatement section 313 considers the problem from a standpoint of duty, section 436 deals with liability for physical harms resulting from emotional disturbance, in terms of proximate, or legal, cause. Subsection 1 states that negligent conduct in failing to act with care to avoid causing fright or emotional disturbance which the actor would recognize as likely to bring about bodily harm will leave the actor liable even if the harm results solely from the created fright or emotional disturbance. Subsection 2 provides that if the conduct was likely to create bodily harm *otherwise* than by subjecting a person to fright or shock, but the harm still results solely from the fright, the actor remains liable. Subsection 2 makes finding liability easier, of course, because the actor could foresee actual harm directly caused;

12. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal.2d 330, 240 P.2d 282 (1952). *Hergenrether v. East*, 61 Cal.2d 440, 39 Cal. Rptr. 4, 393 P.2d 164 (1964).

13. *Grafton v. Mollica*, 231 Cal. App.2d 860, 42 Cal. Rptr. 306 (1965); *McEvoy v. American Pool Corp.*, 32 Cal.2d 295, 195 P.2d 783 (1948); **14.** *Keeton, Legal Cause in the Law of Torts*, pp. 18-20; *Seavy, Mr. Cardozo and the Law of Torts*, 52 Harv.L.Rev. 372 (1939).

so he is liable even though the harm came through fright or shock instead of through physical contact. Formerly, damages for fright, shock, pain and suffering, mental as well as physical, could be tacked onto other damages which resulted from other torts such as assault, battery, and false imprisonment. Under subsection 2, the damages for bodily harm caused by fright and shock need not be tacked onto something else. Subsection 3, however, finds the causal connection to be effected if the harm to plaintiff referred to in subsection 2 results instead from fright or shock caused by the sight of harm or peril to a member of *plaintiff's immediate family*. Thus the very thing that *Waube* and *Amaya* held was not actionable, because there was no *duty* to guard against such dangers, is here held to be a *causal* result. Hence it was important to have *Dillon* establish a duty in such cases so as to make section 436(3) fully operative in California. With the existence of the duty, its breach, and the causal connection, a perfect cause of action is established.

Another great case making it easier to find a duty owing to a plaintiff is *Rowland v. Christian*.¹⁵ It presents the problem of finding a new basis for determining the duty owing by occupiers and owners of realty toward persons on the premises. For years, we teachers of torts simply taught that there was one principal question involved in such cases: what was the status of the person on the premises? He could be one of three, namely: business invitee, licensee, or trespasser. Once that was settled, the duty followed as a matter of course. A business invitee was entitled to ordinary care; a trespasser was owed no duty, save to not be intentionally injured; and the licensee fared little better than the trespasser. He took the premises as he found them, even though he was expected; he was entitled to be warned about traps which the owner knew were concealed on the premises.

Obviously, these rules evolved from the rights of land-owners to the exclusive possession of their properties; this was feudalism. As one moves around the Middle East and

¹⁵. 69 Cal.2d 108, 70 Cal. Rptr. 97, 443 P.2d 561 (1968). For further discussion of this case, see LAZEROW, REAL PROPERTY, in this volume.

other undeveloped regions and notes how private properties are surrounded by high walls, he sees how the right to exclusive possession was and still is a very essential right. This is a phase of tort law that was limited by property rights rather than by any thought of due care under the circumstances. The late Professor Bohlen was one of the first tort teachers to refer to this formula as having “a benumbing influence” on thinking about the legal relationships between owners or occupiers and persons on the premises.¹⁶ (These benumbing influences are always around.)

The facts in *Rowland* were as follows: defendant offered to drive the plaintiff to the airport where plaintiff was to board a plane. Defendant invited plaintiff to her apartment before they were to leave for the airport. While there, plaintiff requested to use the bathroom and was injured when the porcelain handle of a faucet broke in his hand. What was the duty owing by defendant toward the plaintiff under these circumstances? This is the issue.

On the basis that the plaintiff was “purely and simply a social guest,” but there was no business purpose involved, and that plaintiff was not paying anything to be driven to the airport, defendant moved for summary judgment. Plaintiff was a mere licensee under the common-law classification of persons on other peoples’ premises. In the absence of traps or active negligence a licensee takes the premises as he finds them. No liability attaches for mere defective premises. The trial court granted the defendant’s motion and the district court affirmed on the theory that there was no trap; there was nothing concealed. Yet it was true that the defendant knew of the condition of the faucet and did not warn the plaintiff. Under the Restatement Second, section 342,^{17, 18}

16. Bohlen, *Duties of Landowners*, 69 U. Pa. L. Rev. 142, 237, 340. Reprinted in Bohlen’s *Studies in the Law of Torts* at p. 160. This was written in 1921, and it was hailed as a stimulating comment by Marsh. See Marsh, 69 L.Q. Rev 182 (1953).

17, 18. § 342 of Restatement 2d provides: “A possessor of land is subject

to liability for physical harm caused to licensees by a condition on the land if, but only if,

(a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and

there is a provision for a warning of known dangerous conditions. But the California courts had held that section 342 was not the California rule.¹⁹

Another case not mentioned in the *Rowland* opinion that covers the whole question is *Ross v. DeMond*,²⁰ which stated that "it has been unequivocally stated that section 342 is not the law of this state". The court there recognized that the California rule, the old common law rule, has been severely criticized by writers as well as by a California court in *Fernandez v. Consolidated Fisheries Co.*¹ The writer has raised his own voice as to the soundness of this criticism.² The court in *Ross* states that since *Oettinger v. Stewart*,³ California recognizes that there is a duty to avoid *active* negligence toward a licensee and even toward a discovered trespasser, as distinguished from the *passive* negligence involved in cases of defective conditions. Here one finds an effort to apply section 1714 of the Civil Code,⁴ as was done in *Fernandez*, but the court concluded that the law of California was still "a Procrustean bed bounded by the concepts of 'invitee' at the head and 'licensee' at the foot".⁵

(b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and

(c) the licensees do not know or have reason to know of the condition and the risk involved."

19. *Hansen v. Richey*, 237 Cal. App. 2d 475, 46 Cal. Rptr. 909 (1965); *Saba v. Jacobs*, 130 Cal. App.2d 717, 279 P.2d 826 (1955); *Fisher v. General Petroleum Corp.*, 123 Cal. App.2d 770, 267 P.2d 841 (1954). See also *Ross v. DeMond*, 48 Cal. Rptr. 743 (1966), in which a hearing was granted but there was no supreme court ruling on the case.

20. *Ross v. DeMond*, 48 Cal. Rptr. at 749, in which a hearing was granted but there was no supreme court ruling on the case.

1. 98 Cal. App.2d 91, 219 P.2d 73 (1950).

2. Moreau, *Stone, Legal System and Lawyers' Reasonings* (Book Review), 17 Hastings L.J. 854 (1966).

3. 24 Cal.2d 133, 148 P.2d 19, 156 A.L.R. 1221 (1944).

4. Cal. Civil Code § 1714 states: "Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

5. As to Procrustean beds in the common law, see Pound, *An Introduction to the Philosophy of Law*, Chapter V, p. 145. "A systematist who would fit the living body of the law to his logical analytical scheme must proceed after the manner of Procrustes." Of course he then justifies dividing lines in order

This was the status of the law when the *Rowland* appeal came to the supreme court. The question had been considered just as thoroughly as the question in *Amaya* and *Dillon*. The motion for summary judgment had been granted and the district court of appeal affirmed, finding no basis for relief for this plaintiff. There was no trap, no concealed trap, no active negligence, and still no duty to warn under section 342 of the new Restatement.

The supreme court reversed by a vote of 5 to 2. The holding was that the summary judgment was not proper under what the facts *might* reveal. The facts *might* show that the defect was not obvious, and was probably concealed. The facts *might* also show that defendant was aware of the defect and did not warn, thereby violating a duty toward the plaintiff in neither warning of the danger, nor in eliminating it. Section 1714 of the Civil Code is resurrected again and used as it was in *Fernandez* to set forth a civil-law principle which has been embedded and ignored in California law since 1872. The broad principle of duty from *Heaven v. Pender*⁶ is also used. The court criticizes the basis of liability emanating from considerations of land ownership and the need for protecting landowners. It is a heritage from feudalism. The Supreme Court of the United States has pointed out, too, that these rules were rooted in the land cultures that followed the feudal system.⁷ Marsh, the English writer, showed how England had much difficulty in in getting away from the Procrustean bed. Justice Peters lists at least ten exceptions which were made to the traditional categories. Among the exceptions he lists are: (a) foreseeability of harm to the plaintiff, (b) the degree of certainty that injury would follow, (c) closeness of conduct and injury, (d) moral blame in defendant's conduct, (e) policy of preventing future harm, (f) con-

to make our experiences more intelligible.

6. 11 Q.B.D. 503 (1883). This case contains about the broadest principle from which to spell out a duty to act.

7. *Jones v. United States*, 362 U.S. 257, 4 L.Ed.2d 697, 80 S.Ct. 725, 78

A.L.R.2d 233 (1960); Harper and James, *The Law of Torts*, p. 1430; Prosser, 26 Minn. L. Rev. 573; Marsh, *The History and Comparative Law of Invitees, Licensees, and Trespassers*, 69 L.Q.Rev. 182 and 359.

sequences upon the community, (g) availability of insurance, (h) whether there was active negligence as distinguished from passive conduct. He refers to *Newman v. Fox West Coast Theaters*,⁸ a licensee case in which the court exacted a duty to warn.

The court relies heavily on section 1714 of the Civil Code and *Fernandez v. Consolidated Fisheries Co.*⁹ to find liability generally. And the common-law classifications do not constitute exceptions to the general rule. The court said, "We decline to follow and perpetuate such rigid classifications". The proper test is section 1714, Civil Code.¹⁰ Although the classes may be mentioned, they are no longer controlling. The big question is whether the defendant has acted as a reasonable man in view of the probable injuries to others. It is strange indeed that our court has now discovered section 1714, which has been in the books since 1872. In a sense we might speak of the passing of an old common-law landmark.

The California court seems to be the first to take this realistic step. The case has been sent back for a new trial, and, in fact, is being retried as this is being written. It will be interesting to note how the trial court will draw its instruction to the jury in conformity with the opinion. Emphasis no doubt will be placed on whether the defect in the handle was obvious or not; if it was not, there was a duty to warn the plaintiff. Perhaps possessors will have a duty to place guests and licensees in the same position as they themselves are. If they know of defects not obvious, a warning is due. The categories will still be mentioned for what they are worth.

In *Brockett v. Kitchen Boyd Motor Co.*¹¹ the defendant held a prolonged Christmas party on December 23, 1966. One Huff, 19 years of age, an employee of the defendant, was a guest at the party; he was served copious drinks of liquor and urged to indulge the beverage so that he became grossly in-

8. 86 Cal. App.2d 428, 194 P.2d 706 (1948).

9. 98 Cal. App.2d 91, 219 P.2d 73 (1950).

10. See *Oettinger v. Stewart*, 24 Cal. 2d 133, 148 P.2d 19, 156 A.L.R. 1221 (1944).

11. 264 Cal. App.2d 69, 70 Cal. Rptr. 136 (1968).

toxicated and unable to drive. The defendant employer, knowing Huff's condition, placed him in the Thunderbird automobile which Huff was driving and directed him to go ahead and drive into traffic. The plaintiffs were stopped at a traffic light when Huff's car crashed into the rear end of their car and caused serious injuries to plaintiffs. The trial court sustained demurrers to plaintiffs' complaint on the basis of decisions in California¹² holding that the mere sale or supplying of intoxicating beverages to a person who becomes intoxicated thereby does not make the supplier liable in tort to a third person who is injured by the intoxicated person. The rationale is that the consumption of the liquor rather than its sale is the proximate cause of the injury. This thinking was extended to a sale of gasoline to an intoxicated person in *Fuller v. Standard Stations, Inc.*,¹³ but the district court there indicated that it would have found liability if it did not feel that the liquor cases decided by the supreme court were imperative directives. But it indicated that the sale of the gasoline could very well be a proximate cause of the injuries. And if the use of the gasoline were foreseeable as likely to intervene, the original sale of liquor would remain a proximate cause because the intervening force (the sale of gasoline) would not also be a superseding cause, shifting the liability to the user solely. Section 447 of the Restatement support this theory. The district court felt bound by *Cole v. Rush* and *Fleckner v. Dionne*.¹⁴ Once we note that the *Fuller* case was finally decided on the theory of proximate cause, however, we must assume that there was a breach of duty since the question of causation cannot be reached without a prior finding of a breach of duty. On this issue, see *Ewart v. Southern California Gas Co.*¹⁵

So the *Brockett* court went ahead and found a real basis for the existence of a duty on the part of the company putting

12. *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); *Cole v. Rush*, 45 Cal.2d 345, 289 P.2d 450, 54 A.L.R.2d 1137 (1955).

13. 250 Cal. App.2d 687, 58 Cal. Rptr. 792 (1967).

14. *Fleckner v. Dionne*, 94 Cal. App. 2d 246, 210 P.2d 530 (1949); *Cole v. Rush*, 45 Cal.2d 345, 289 P.2d 450, 54 A.L.R.2d 1137 (1955).

15. 237 Cal. App.2d 163, 46 Cal. Rptr. 631 (1965).

on the Christmas party. It found that the special facts here rendered the liquor and gasoline cases inapplicable and not controlling. The distinction has its genesis in the *special relationship* existing between defendant company and Huff, its employee. Essentially, the basis of the cause of action is the undertaking to control the conduct of another, and he who undertakes to do an act must do so with care. It constitutes a misfeasance rather than a mere nonfeasance. Several of the cases cited by the court hardly hit the proposition involved, in that here there was neither a breach of a promise nor a misrepresentation. The relationship between these parties was such that defendant had assumed the responsibility for the well-being and conduct of the minor, not only for the protection of the minor, but also for members of the public. The minor was grossly incompetent to drive, and the incompetence was caused by the defendant. Furthermore, the most persuasive fact is that the defendant guided the minor to his automobile. It is the strong policy of the state that intoxicated persons must not drive. So Huff committed a crime, and the defendant aided and abetted him therein. Moreover, California has always held that a person who turns over the driving of an automobile to an intoxicated person is liable for the consequences.¹⁶ The same is true if one turns over his car to an incompetent.¹⁷

The *ratio decidendi* of the case is that "persons having a special relationship with a drunken minor employee, voluntarily inducing the improper operation of an automobile not owned by them, are liable for proximate consequences of such operation". In the other cases cited above, cars were owned by the defendant, but here the defendant, although he did not own the car, had *control* over its use because of other factors. Thus the basic fact here is the assumption of control under such circumstances as the facts indicate. It is interesting to con-

16. Caccamo v. Swanston, 94 Cal. App.2d 957, 212 P.2d 246 (1949); Schomaker v. Provoo, 96 Cal. App.2d 738, 216 P.2d 562 (1950).

17. Buelke v. Levenstadt, 190 Cal. 684, 214 P.42 (1923); Rocca v. Stein-

metz, 61 Cal. App. 102, 214 P. 257 (1923); McCalla v. Grosse, 42 Cal. App. 2d 546, 109 P.2d 358 (1941); Owens v. Carmichael U-Drive Autos Inc., 116 Cal. App. 348, 2 P.2d 580 (1931).

sider whether it would make a difference if Huff were 21 years old. Suppose he had been just a neighbor dropping in and imbibing too much?

In *Matthias v. United Pacific Insurance Co.*¹⁸ we have another duty problem indicating that human relationships can be surprisingly subtle. Premises, which were rented, were in a defective condition in that the front stairway risers were not uniform; nor was there a center railing facilitating the stairway's use. The owner insured himself with the defendant company against liability for risks which inhered in his relationships with his tenants, his tenant's guests, and the public. It was obviously a liability policy by which the insurer obligated itself to indemnify the owner, its insured, to the extent of satisfying such judgments as might be recovered against the owner. This suit aims to go right against the insurer on the theory that the company itself owed a duty to the injured person by having written the policy, knowing of the defects, thereby perhaps making the owner more careless since he could rely on the fact that he was insured. It calls to mind that on occasion when one cautions a driver about his driving he may facetiously or otherwise reply, "I am insured". This may indicate that the plaintiff's theory is not entirely groundless.

No judgment had been rendered against the insured, and so the question is whether there is a direct liability upon the part of the insurer. Did it owe a duty to the plaintiff? The court observed that the indispensable factor in all negligence actions "is the existence of a duty of care owed by the alleged wrongdoer to the person injured, or to a class of which he is a member".¹⁹ But the phrases "duty of care" and "unreasonable risk of harm" do not provide a test of universal application. The quest for such a formula out of the many decisions on the subject has been in vain. All scholars in the field

¹⁸. 260 Cal. App.2d 752, 67 Cal. Rptr. 511 (1968).

¹⁹. 260 Cal. App.2d at 753, 67 Cal. Rptr. at 512. See also *Routh v. Quinn*, 20 Cal.2d 488 at 491, 127 P.2d 1 at 3,

149 A.L.R. 215 at 218 (1942), and *Raymond v. Paradise Unified School District*, 218 Cal. App.2d 1, 6, 31 Cal. Rptr. 847, 850 (1963).

agree on this.²⁰ Generally, we can say the standard is one of reasonable conduct. See Restatement, sections 282 et seq. Guard against unreasonable risk of harm is the admonition.

What tests have been suggested? The court reviews factors in *Amaya*, among them the social utility of the activity out of which the injury arises, balanced against the risks and costs involved. (See Restatement, section 292, which mentions the social value of the interest to be advanced by the conduct, and the extent of the chance that these interests will be advanced by the conduct.) Here the activity is the writing of an insurance contract by which the assured is given the benefits of being reimbursed for what he might have to pay to people injured on his premises. Insurance spreads losses, and legislation recognizes the value of this activity. This attitude minimizes any thought that the contracts will encourage the creation and continuance of defective premises. Hence, allowing such recovery as is sought here would defeat the basic purpose of insurance. It would make insurance more expensive and less attractive to the assured. It would result in the writing of policies only when there is practically no possibility of loss through negligence. And even if foreseeability of harm were the criterion, the insurer here had no reason to foresee that the writing of the policy would encourage carelessness on the part of the assured. If it were so considered, it would get us into the problem of whether the negligence of the assured would then become a superseding force. If foreseeable, it would not be superseding, leaving both insured and insurer liable for the whole damage. But while the insurance company may have been negligent toward itself in insuring a poor risk, this does not spell out a duty toward the plaintiff.

As to the claim that the insurance company did not take any action to advise or direct the owner to remedy the de-

20. Prosser, *Law of Torts*, 3d ed, p. 334. "Various factors undoubtedly have been given conscious or unconscious weight, including convenience of administration, capacity of the parties to bear the loss, a policy of preventing

future injuries, the moral blame attached to the wrongdoer, and many others." See also Leon Green, *The Duty Problem in Negligence Cases*, 28 Col.L.Rev. 1014 and 29 Col.L.Rev. 255.

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fects, the court found that generally, in the absence of any special relationships, such as in *Brockett v. Kitchen Boyd Motor Co.*,¹ there is no duty to take action to protect others.² Section 316 of the Restatement states that there may be a duty on the part of a parent to control a child, and section 317, a duty on a master to control a servant. Sections 318, 319, and 320, respectively, refer to the duty of a possessor to control his licensee, duties of persons in charge of dangerous persons to control them, and the duty to guard a person under one's control to protect him against injuries from third persons. But there is no mention of any duty on the part of an insurer to control the assured. The absence of duty being clear, it is a matter of law for the court and not for the trier of fact.

Historically there has been opposition to the recognition of new duties for the protection of valued interests such as the right to privacy,³ the right to maintain tort actions for negligence by persons without privity of contract,⁴ the right not to be subjected to intentionally inflicted mental disturb-

1. 264 Cal. App.2d 69, 70 Cal. Rptr. 136 (1968).

2. The case of *Connor v. Great Western Savings & Loan Asso.*, 69 Cal.2d —, 73 Cal. Rptr. 369, 447 P.2d 609, decided December 12, 1968, is so definitely within our thinking here that it is felt that it should be mentioned even if it extends us beyond our given year. Purchasers of a home in a residential development in Ventura County suffered damage when the homes suffered serious damages from cracking caused by ill-designed foundations that could not withstand the expansion and contraction of adobe soil. The Valley Development Co., which built and sold the homes, negligently constructed them without regard to soil conditions. Plaintiffs joined the Great Western Savings and Loan Association on the basis that it had a real role in financing the development. Plaintiff claimed that the Association was liable either as a joint enterpriser with the developer or on a separate duty of care to the plain-

tiffs. Plaintiffs were nonsuited in the trial and appealed. The supreme court reversed by a vote of 4 to 3. The majority found a duty to be exercised by the Association even if there was no privity of contract, since the duty may be found on the basis of public policy. The duty was to protect plaintiffs from seriously defective construction, defective plans, and defective inspections. Negligence of the builders was not a superseding cause. The court again reviewed §§ 447 and 449 of the Restatement. The case will undergo considerable study and discussion, and financing organizations will have to be much more careful of their procedures. They will have to think not only about the safety of their investments, but also whether the rights of future owners are protected.

3. *Melvin v. Reid*, 112 Cal. App. 285, 297 P. 91 (1931).

4. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

ance, the right to be free from injuries created by negligently inflicted mental disturbance,⁶ and the right to recover for mental shock with resulting physical injury from viewing a close relative negligently subjected to serious danger and injury.⁷ The opposing argument is that recognition of such rights would open a veritable Pandora's box from which would flow fraudulent, fictitious, faked, intangible, untrustworthy, illusory, speculative, and extravagant claims. There would be floods of litigation, the argument goes, in which damages could not be proved even with much perjured testimony. Experience with these cases shows that such fears have not been justified. They have been proved unfounded, for the judicial process has been able to separate the genuine from the fraudulent. Yet these arguments are being made regularly by our pessimists who can still feel the stomachache in the apple blossoms.

Products Liability or Strict Liability

As is to be expected, a number of cases have arisen in which plaintiffs have sought the advantages of this type of liability in which contributory negligence is not a defense, and in which negligence need not be proved save by showing that the products were defective when they left the factory and have not been substantially changed since then. The most thorough analysis of this cause of action during the year appears in *Barth v. B.F. Goodrich Tire Co.*⁸ A Goodrich tire blew out and the damages were substantial. The judgment for Barth was for \$207,375 and the guests in the car were awarded a total of \$6,000. The case was tried vigorously, with able counsel on both sides. Anyone reading this opinion will profit greatly in finding what procedures he should follow with reference to the care to be taken with his tires; overloading and abnormal speeds do have a bearing on the per-

5. *State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal.2d 330, 240 P.2d 282 (1952).

6. *Espinosa v. Beverly Hospital*, 114 Cal. App.2d 232, 249 P.2d 843 (1952).

7. *Dillon v. Legg*, 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912 (1968).

8. 265 Cal. App.2d —, 71 Cal. Rptr. 306 (1968). For further discussion of this case, see York, REMEDIES, in this volume.

formance of tires. Of course, here the company was held liable largely because it had not warned users as to these matters. Probably competition prevents reference to the limitations that might induce buyers to buy elsewhere. Perhaps the rare recovery because of tire failures justifies the policy not to emphasize these limitations. How many of us keep our speeds down because of the possibility of a blowout? This opinion, with all the expert testimony, is enlightening. Do we accelerate sharply on a curve when to do so increases danger greatly? Overloading and excessive speeds could very well have prevented the plaintiff from winning this case if it had been a straight negligence case; but in a strict liability case, only use with actual knowledge of defects operates to defeat the plaintiff's case.

Thus we can say that the big hurdle for the attorneys for Goodrich was the fact that their client failed to warn of dangers for overloading and excessive speeds. The failure to warn was the defect. The facts were unclear whether there were actual defects in the tire though there was some evidence that such defects might have existed. Mrs. Barth was driving a 1961 Chevrolet station wagon equipped with Goodrich tires when the left rear tire blew out, causing the car to go out of control and over an embankment. Mrs. Barth was killed and her four passengers injured. Mr. Barth, for himself and their two children, sued for the wrongful death of Mrs. Barth, and the injured passengers joined in the suit. The car was a company car, which Mrs. Barth was authorized to drive. In November, 1961, the owner arranged to have two new Silver-town tires placed on the car by Perry and Whitlow, wholesale and retail distributors for Goodrich in San Francisco; the tires were guaranteed against blowouts for 24 months. The accident occurred in April, 1962, after the tires had been in use for some five months. Two additional tires had been placed on the car in December, 1961. Accordingly, all tires were new. The suits were brought against Goodrich, manufacturer, and Perry and Whitlow, distributors and installers. The car had been used in business, and with a trailer attached. There was much evidence that the tires were overloaded at times, and that Goodrich knew that such tires were subject to over-

loading but never advised the public or particular customers to that effect. There was much expert testimony on overloading to show that the tire was *not used as intended*.

The jury returned a verdict against Goodrich in favor of all plaintiffs, but in favor of the distributor-installer. Goodrich appealed, and the plaintiffs appealed the judgment for the installer. Goodrich made these arguments on appeal: (a) The issue of strict liability should not have been submitted because the evidence showed that the use of the tire was not as intended in that there was excessive speed, and that there had been overloading. The court's position was that the tires had been checked regularly and the public had never been advised of the danger of overloading, nor of the fact that speeds enhance tire dangers. (b) The court erred in not giving Goodrich's requested instruction on burden of proof to the effect that if the jury found that it was just as probable that the accident was proximately caused by some misuse or abuse of the tires as by the defect in the tire, the verdict should be for the defendant. The court stated that such instruction was held erroneous in *Alvarez v. Felker Manufacturing Co.*⁹ (c) Goodrich claimed it was error to instruct that contributory negligence was not a defense. But Restatement, section 402A, comment (n) and the cases hold that it definitely is not a defense unless it amounts to assumption of risk, which would mean that the plaintiff used the product with knowledge of the defect. This is the rule in *Seely v. White Motor Co.*¹⁰ and *Canifax v. Hercules*.^{10.1} There was no evidence that the Barths knew of any defects, and there was no evidence of any use not sanctioned, so there could have been no contributory negligence. But it was proper, said the court, to tell the jury of the defects, as there was evidence of experts on both sides that there were defects. And the word "defect" includes not only clear defects, but also the

9. 230 Cal. App.2d 987, 41 Cal. Rptr. 514 (1964).

10. 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P.2d 145 (1965).

10.1. 237 Cal. App.2d 44, 46 Cal. Rptr. 552 (1965). See also Vander-

mark v. Ford Motor Co., 61 Cal.2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964), and Prosser, *Strict Liability to the Consumer in California*, 18 *Hast. L.J.* 9 (1966).

failure to urge care to do certain things or warn not to do other things which will cause danger. *The failure to warn is a defect.* *Ghera v. Ford Motor Co.*¹¹ Section 402A, comment (j) of the Restatement is in accord that the product is deemed defective if placed on the market without adequate warnings. (d) Goodrich also claimed that the fact that the tires were sold by the trade name of Silvertown prevents liability for implied warranties. But here the trade name was used only for identification purposes, so that plaintiff still could rely on the warranty.¹² (e) Goodrich claimed that Barth's guests, the Clarks, could not take advantage of the warranties because there was no privity of contract. But products liability is liability in tort and so privity is no longer necessary.¹³ See also *Vandemark v. Ford Motor Co.*,¹⁴ where a sister of the owner recovered; *Gutierrez v. Superior Court*,¹⁵ where the guest of an inn recovered; *Peterson v. Lamb Rubber Co.*,¹⁶ and *Alvarez*.¹⁷ (f) Goodrich also claimed that the court erred in not telling the jury that a speed of more than 65 miles per hour would constitute a rebuttable presumption of negligence. As a matter of fact, the instruction told the jury that such a speed violation would be negligence as a matter of law, so the given instruction was more favorable to Goodrich than the one requested; so it could not have been prejudicial.

On the Barth and Clark appeals from the judgment in favor of the distributor, the latter's role in the distributive process must be examined. The owner of the Chevrolet advised

11. 246 Cal. App.2d 639, 55 Cal. Rptr. 94 (1966).

12. See *Odell v. Freuh*, 146 Cal. App. 2d 504, 304 P.2d 45, 76 A.L.R.2d 345 (1956).

13. Of course the leading case on the elimination of the old requirement is *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

14. 61 Cal.2d 256, 37 Cal. Rptr. 896, 391 P.2d 168 (1964).

15. 243 Cal. App.2d 710, 52 Cal. Rptr. 592 (1966).

16. 54 Cal.2d 339, 5 Cal. Rptr. 863, 353 P.2d 575 (1960). Here the court held that an employee using a defectively made tool could be held in privity with the vendor manufacturer so as to have the benefit of implied warranties. This was pre-Greenman, which was decided in 1963. If privity was needed, then the court would find it.

17. 230 Cal. App.2d 987, 41 Cal. Rptr. 514 (1964).

Barth, its employee, that two Silvertown tires for the Chevrolet had been ordered through a Goodrich distributor in the Midwest similar to Perry and Whitlow. Perry and Whitlow sent the invoice to Goodrich and received a service charge for handling the matter and \$40.00 credit for the tires removed from their stock; they also received \$4.13 for the mounting of the tires. The court had instructed that unless Perry and Whitlow had *sold* the tires they could not be held liable. The jury accordingly held for the distributors on the theory that they had not been sellers. That is, the selling was necessary to ground strict liability. But the appellate court held that the definition of sale under the old terminology was inaccurate for the applicability of tort liability. Under *Greenman v. Yuba Power Products, Inc.*,¹⁸ and section 402A of the Restatement, one who sells any product in a defective condition to the user or consumer is liable to such user or consumer if the seller is engaged in the business of selling such product and it reaches the receiver in the same condition. The rule applies although the seller has exercised all possible care in the preparation and sale, and it also applies although the user has not brought the product from or entered into any contractual relation with the seller. The comment (f) to section 402A explains that those liable include manufacturers, wholesalers, retail dealers, or distributors; the important thing is that all parties who are integral parts of the overall producing or marketing process, or enterprise, are included. Of course Perry argues that his firm was a mere conduit between the plaintiff and the manufacturer. But the firm was clearly more than that, as indicated by the fact that the tires came from their stock, that they received credit therefor, and also that they mounted the tires and were paid for so doing. They were distributors and so fell within the rule of the Restatement and the cases.

A second case, also involving an alleged defect in an automobile, is *Waters v. American Motors Corporation*.¹⁹ A car again went out of control and resulted in the death of the

18. 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1963).

19. 263 Cal. App.2d —, 69 Cal. Rptr. 799 (1968) hearing granted August 28, 1968.

driver. A Rambler was purchased new by Mrs. Elmore in March, 1962, and the accident happened six weeks after the purchase and after the car had been driven less than 3,000 miles. Mrs. Elmore thought the car shimmied, but her husband was not certain about it. But if it shimmied, it was after the speed was over 65 miles per hour. On the day of the accident, Mrs. Elmore was driving on a three-lane road and while passing another car and while going 60 to 65 miles per hour, her car suddenly fishtailed and went over the center lane and crashed into the Waters car, killing Mr. Waters and injuring Mrs. Waters, who sued her for her injuries and the wrongful death of her husband; Mrs. Elmore sought damages for her injuries.

Thus the claims of Mrs. Elmore were by a user, but those of the Waters family were as bystanders or non-users. If a defect in the car was established we would then have had a case on the rights of bystanders to recover under the doctrine of strict liability. The trial court heard the evidence and entered a nonsuit which the district court of appeal affirmed. In order to make a cause of action it was up to the plaintiff to show that the car was defective when it was sold and that the defect caused the injuries and death involved.

Motorists following the Rambler testified that some metal seemed to be dragging beneath the car, and sparks were emanating from under it as the car was fishtailing across the highway. It seemed as if the drive-shaft had become disconnected at one end, and the marks on the highway showed that something had dug into the paving. In addition to the alleged dropping of a part of the mechanism of the car, there was also a claim of the shimmying of the car and of foreign particles in the gear box. The court concluded that the shimmying was not proved as the cause of the wreck because Mrs. Elmore was not driving at the speed required for the shimmying; so if there had been shimmying, it was not relevant. As to particles in the gear box, that was not proved. The question narrows down, then, to the alleged defect of parts of the car becoming dislodged and causing the wreck. The court states that the part was neither pro-

duced nor identified. So the whole case rests on what inferences can be made from what evidence is produced. Several cases are cited to the effect that when a defect is not specifically proved, the plaintiff cannot have the benefit of the inference unless all other possible causes of the accident are negated. No manufacturing flaw or inadequate design was presented; hence the need of negating other possible causes. The court relies on *Henningsen v. Bloomfield Motors*,²⁰ and *Jakubowski v. Minnesota Mining & Manufacturing*,¹ both New Jersey cases.

The importance of *Waters* lies in what it says about proving a case of this kind; i.e., it does not prove itself. Inferences are to be made, but not lightly. Plaintiff must show (a) that there was a defect in the car when it left the dealer, (b) proper use, and (c) that the injury is traceable to the defect, i.e. it must be causal. It was the court's decision that these requirements were not met. Readers should examine *Ghera*,² in this connection. It will be recalled that in *Ghera*, a fire developed almost spontaneously in a two-month-old Thunderbird when the owner had driven it to his job and had walked away from it about 100 feet. All that was left to infer was that a new automobile does "not suddenly develop a fire in the engine compartment without someone's negligence". The court concluded that the plaintiff's cause could be sustained as negligence proved with the doctrine of *res ipsa loquitur*, or on strict liability by inference, or on breach of warranty. But is it not equally true that parts do not drop off of new cars without someone's negligence? Of course as the Thunderbird in *Ghera* was not being driven, other causes of the accident would not have to be negated. The driving of the Thunderbird was not involved, but that of Mrs. Elmore's Rambler was.^{2,1}

20. 32 N.J. 358, 161 A.2d 69, 75 A.L.R.2d 1 (1960).

1. 42 N.J. 177, 199 A.2d 826 (1964).

2. 246 Cal. App.2d 639, 55 Cal. Rptr. 94 (1966).

2.1. Since the discussion of *Waters* was written, the Supreme Court, 70

A.C. 615, 75 Cal. Rptr. 652, 451 P.2d 84, March 1968, reversed the Court of Appeal on two major phases of the case: (1) a car with a falling drive shaft is a defective car forming a basis for liability under the doctrine of strict liability and (2) a third person, a mere by-

The applicability of products and strict liability to real estate transactions is considered in *Conolley v. Bull*.³ Defendant Bull, was a real estate developer and speculator in residential property, and he obtained a permit to build a home on his sloping lot in Contra Costa County, then hired a contractor to build the house. Defendant testified that he was not present when the foundation was put in but that he knew the piers went down 12 feet. No soil tests were made before construction; a neighbor talked to defendant and asked if he knew there was a slide condition in the lot, and defendant said not to worry about it. The neighbor wrote him a letter telling him that if any damage to his property resulted because of the construction he would look to defendant for damages. Defendant Bull sold the property to Conolley, who raised questions about a culvert which emptied onto the place. But upon being assured that the house was built safely, he bought it. Plaintiff took possession in October or November, 1961, though the escrow was not to be closed until February 16, 1962. On that date, while it was raining, a landslide occurred. On February 19, plaintiffs served notice of rescission on defendants but later asked for damages in the alternative. A soil specialist testified for plaintiffs that he found 2½ feet of fill on the place, and that fill is prone to slide; he and another expert testified that in such a situation a soil test should be made, and that it was customary to do so in Contra Costa County. At the trial, the court stated to counsel that there was evidence of negligence and evidence that might call for the application of the rule of strict liability in tort as declared in *Greenman v. Yuba Power Products*.⁴ The cause of action was originally for rescission but it was amended to allege negligence and strict liability. The trial court found that: (a) defendant was negligent in building without providing adequate soil drainage; (b) as a real estate developer he failed to arrange for

stander, is entitled to recover for damages resulting from such defect.

3. 258 Cal. App.2d 183, 65 Cal. Rptr. 689 (1968).

4. 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1963).

suitable drainage; and (c) he was “absolutely liable” to plaintiffs for such failure, in the sum of \$9,925.00. The amendments were proper as it was simply a change of legal theory on the facts proved. So there was no prejudice from the variance in pleading.⁵ Experts had testified that the failure to have proper drainage caused the slide, so there was no surprise as to the facts, and the cause for negligence was sustained.

Our special interest here, however, is to note whether the doctrine of strict liability is applicable to such a case as this. The status of the law on the matter is covered concisely on pages 842 to 847 of Prosser and Smith, *Cases on Torts*, fourth edition. The New Jersey case—*Schipper v. Levitt & Sons, Inc.*⁶ applies the doctrine in a case where the defendant was developing real estate. As Prosser states, “To date of publication, this New Jersey case stands alone imposing strict liability, without privity upon the builder-vendor. It has not been followed nor rejected. Will it be followed?” The case has been cited many times in the past two years, with no clear holding in accord. The district court of appeal in *Conolley* refused to apply the strict liability rule to the facts of the case. It pointed out that in *Halliday v. Green*,⁷ the court expressly refused to hold the builder of an apartment house liable on the products liability doctrine where tenants were injured from a fall in a defectively built staircase. The same ruling is made in *Sabella v. Wisler*,⁸ as to liability for construction on a loose fill, and in *Dow v. Holly*,⁹ as to liability for installing a defective gas heater. In each of the latter cases the contractor’s liability was rested on proof of negligence. The *Halliday* case notes the differences between strict products liability for manufacturing a product and for construction of real estate as follows: (a) The builder is seldom in a position

5. In *Read v. Safeway Stores Inc.*, 264 Cal. App.2d —, 70 Cal. Rptr. 454 (1968), the plaintiff had initially proceeded on a theory of negligence. The trial court’s refusal to allow plaintiff to change the theory of his case to strict liability was held to be error.

6. 44 N.J. 70, 207 A.2d 314 (1965).

7. 244 Cal. App.2d 482, 53 Cal. Rptr. 267 (1966).

8. 59 Cal.2d 21, 27 Cal. Rptr. 689, 377 P.2d 889 (1963).

9. 49 Cal.2d 720, 321 P.2d 736 (1958).

to limit his liabilities by express warranties and disclaimers and thereby defeat recovery by an occupant in a defectively constructed building. (b) It is much less difficult for the occupant to trace the defect in a building than to trace the fault in a complex manufactured product, so the need for such a rigid rule is less pronounced. (c) The buyer of a building can always make a very careful check—a meaningful inspection. The *Halliday* case points out that if strict liability were available, the plaintiff would profit in two ways: (a) It would relieve him of showing the privity of tenants with the builder; (b) All we would need to show is a defective condition—not that it was negligently constructed. And *Dow* points out the similarity to *MacPherson v. Buick*.¹⁰ “There is . . . a close analogy between a supplier of chattels and a general contractor for the construction of a building.” Although *Dow* flirts with the *MacPherson* reasoning, the basis of its decision is on negligence. Prosser sees no real distinction between suppliers of chattels and suppliers of homes.¹¹ As we go to press the second division of the district court of appeal (San Francisco) has held, in *Kriegler v. Eichler Homes, Inc.*,¹² that a supplier of homes is liable in strict liability. The court cites Prosser and *Schipper*.

A brief look at *Harris v. Belton* and similar cases¹³ seems justified. *Harris* involves the sale of cosmetics. Plaintiff used a widely advertised “Skin Tone Cream” which she claimed burned, irritated, scarred, and darkened her skin. She sued the manufacturer and the retailer for breach of express warranty, on the basis of the advertising, and of implied warranty on the basis that the product was not merchantable. The court gave consideration to possible liability on the strict theory of *Greenman* and similar cases. The evidence showed that the product affected two percent of users

10. 217 N.Y. 382, 111 N.E. 1050 (1916).

11. Prosser, *Law of Torts*, 3d ed., p. 693.

12. 269 Cal. App.2d —, 74 Cal. Rptr. 749 (1969).

13. 258 Cal. App.2d 595, 65 Cal. Rptr. 808 (1968). See also *Cochran v. Brooke*, 243 Ore. 89, 409 P.2d 904 (1966); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App.2d 689, 60 Cal. Rptr. 398 (1967); and *Lewis v. Baker*, 243 Ore. 317, 413 P.2d 400 (1966).

adversely, such people probably being allergic to some of the ingredients in the product. But each bottle contained due warning of this danger. The judgment for the defendant was affirmed. Thus the decision follows the pattern usually applied in such cases. See comments (i) and (j) of section 402A of the Torts Restatement.

Res Ipsa Loquitur

Res Ipsa Loquitur—in Rear-end Collisions. In *McHale v. Hall*,¹⁴ we have a clear rear-end collision that brings into play three basic principles of the law of negligence: (a) statutory violation, (b) imminent peril, and (c) *res ipsa loquitur*. The first two deal with liability, the third with proof. Mrs. McHale was driving the family Volkswagen with her three children. She was going east, intending to make a left turn some short distance from the crest of a gradually sloping downward hill. She stated she was driving 15 to 20 miles per hour and gradually slowed down on approaching the intersection. When very near the intersection, the car was rear-ended by the Hall car. Mrs. McHale gave no hand signal indicating a turn, and the left directional blinker on the Volkswagen was out of order, as was the brake light. At the top of the crest, Hall had been driving 45 to 50 miles per hour, a lawful speed. Seeing the McHale car 200 feet from the intersection, he reduced his speed. When 125 feet from the Volkswagen, he first realized she intended a turn. He applied his brakes vigorously but was unable to stop in time.

The McHales sued for damage to their Volkswagen and on behalf of their injured child. The jury brought in a verdict for defendant. The court instructed that the doctrine of *res ipsa loquitur* applied to rear-end cases, but that the doctrine of imminent peril applied in defendant's favor since he suddenly saw plaintiff was going to stop. So *res ipsa loquitur* was against him, but imminent peril was in his favor. The negligence of the defendant being in issue, the jury must resolve

14. 257 Cal. App.2d 342, 64 Cal. Rptr. 694 (1967).

the conflicting facts and presumptions. Likewise Mrs. McHale's failure to give the signal was a statutory violation, giving rise to a presumption of contributory negligence on her part, so the jury could find that this failure was the sole cause of the accident. Rarely does one find three such fundamental principles interacting in a simple lawsuit.¹⁵

Res Ipsa Loquitur and Medical Practice. In *Belshaw v. Feinstein*,¹⁶ a patient who later died was afflicted with Parkinson's disease, and Dr. Feinstein performed stereotaxic surgery, a procedure with a calculated risk of mortality of one percent. The surgeon's technique is fully described in the court's opinion. There were questions of why and how the plaintiff's brain was cut and damaged during the operation, whether it was a negligently used trephining instrument or just a pulling away of the dura from the bone. But the doctor stated it was a "possibility" that it had been cut. The doctor did not inform the patient's wife of this possibility; on the contrary he told her the patient suffered a stroke or complications. Only twice out of 900 of such cases had doctors cut the brain, so the result was a rarity. The trial court gave a conditional *res ipsa loquitur* instruction, indicating that the jury could find that the injury was due to negligence if, in the light of past experience, it probably was due to negligence and that the defendant was probably the person responsible.¹⁷ In determining whether such a probability exists, courts normally have relied on facts being of common knowledge or the testimony of expert witnesses.

The mere fact of rarity or low incidence of the occurrence alone is not sufficient to produce an inference of negligence. Because it is often difficult to get medical men to testify against the interests of the profession, the California courts

15. The use of *res ipsa loquitur* in rear-ending cases is well analyzed in *Davis v. Ewen*, 148 Cal. App.2d 410, 306 P.2d 908 (1957), and the significance of a brake failure in such a case is stated by the supreme court in *Clark v. Dziabas*, 69 Cal.2d 449, 71 Cal. Rptr. 901, 445 P.2d 517 (1968). See also

Maloney v. Rath, 69 Cal.2d 442, 71 Cal. Rptr. 897, 445 P.2d 513 (1968).

16. 258 Cal. App.2d 711, 65 Cal. Rptr. 788 (1968).

17. *Siverson v. Weber*, 57 Cal.2d 834, 22 Cal. Rptr. 337, 372 P.2d 97 (1962).

have treated the fact of low incidence as one element which may be combined with *other* evidence of negligence, so that the likelihood of a negligent cause may be sufficiently great that the jury may conclude that the accident was more probably than not the result of someone's negligence.¹⁸

The doctrine, then, permits the jury to draw an inference of negligence in this case. This was obviously a situation in which common knowledge could not apply. Also, according to the testimony of the experts, all that happened was quite expectable and calculated. So neither common knowledge nor expert testimony was available. True, there was low incidence. Was there specific evidence of negligence to go with the fact of low incidence to satisfy the requirements of *Quintal v. Laurel Grove Hospital*,¹⁹ and *Clark v. Gibbons*?²⁰ The court found such evidence in defendant's uncertainty as to whether he cut the dura or whether it just tore away, and in the fact that the adjustment of the trephine was possibly inaccurate. Also, defendant told the patient's family that he had suffered a stroke, which was untrue. The judgment for \$155,000 for the plaintiff was affirmed.

A more recent medical case is *Rawlings v. Harris*.¹ The facts are less complex, involving just a pan-hysterectomy in which defendant surgeon sutured the patient's ureter, causing the uncontrolled flowage of urine. The trial court refused to give the conditional *res ipsa loquitur* instruction, and the defendant won a verdict. The appellate court ruled that the instruction should have been given and therefore ordered a new trial. This case seems to be clear, for the experts were not in agreement here; they differed sharply. In the previous case there was full agreement, and so some other justification for the use of the doctrine had to be found. *Clark v. Gibbons*² and *Tomei v. Henning*³ are relied on. As the court explains, it is not for the court, but for the jury

18. *Clark v. Gibbons*, 66 Cal.2d 399, 58 Cal. Rptr. 125, 426 P.2d 525 (1967).

19. 62 Cal.2d 154, 41 Cal. Rptr. 577, 397 P.2d 161 (1965).

20. 66 Cal.2d 399, 58 Cal. Rptr. 125, 426 P.2d 525 (1967).

1. 265 Cal. App.2d —, 71 Cal. Rptr. 288 (1968).

2. 66 Cal.2d 399, 58 Cal. Rptr. 125, 426 P.2d 525 (1967).

3. 67 Cal.2d 319, 62 Cal. Rptr. 9, 431 P.2d 633 (1967).

to determine the existence of facts justifying the application of the doctrine. This is why it is called a conditional instruction. Here the plaintiff's expert had testified that the injury involved is always caused by negligence. This was more definite than the situation in *Clark v. Gibbons*,⁴ in which the expert witness for the defendant was induced to make admissions by a careful cross-examination by plaintiff's counsel.

Res Ipsa Loquitur and Strict Liability. *Casetta v. United States Rubber Co.*⁵ involves a suit by a tire repairman who was injured by an explosion which occurred while he was putting a new tire on a rim. Suit was against the manufacturer and distributor, and plaintiff had a verdict against both for \$58,500. The court, however, gave judgment for the defendants notwithstanding the verdict. The theories of the suit included negligence of defendants, breach of implied warranty of fitness of the tires, and strict liability in tort. The evidence in this case is detailed and complicated; the procedure for mounting tires is thoroughly examined for possible failure to proceed properly and for contributory negligence. But we are concerned here with the relation of *res ipsa loquitur* to strict liability of manufacturers, retailers, and distributors. We have already noted, in our discussion of *Barth v. Goodrich Tire Co.*,⁶ that the distributor was held equally liable with the manufacturer if he was involved in the marketing and had a definite part in the whole transaction. The *Casetta* opinion contains a complete citation of strict liability cases beginning with *Greenman*.⁷ It restates the usual three requirements for the application of the *res ipsa loquitur* doctrine: (a) the accident must be one that does not ordinarily occur without negligence on the part of someone; (b) the instrumentality must be under the defendant's exclusive control; and (c) the plaintiff must not have contributed to the accident. If tires are properly manufactured they do not explode when being mounted. The defendants still had control in the absence of a showing that the condition of the tire had been

4. 66 Cal.2d 399, 58 Cal. Rptr. 125, 426 P.2d 525 (1967).

5. 260 Cal. App.2d 792, 67 Cal. Rptr. 645 (1968).

6. 265 Cal. App.2d —, 71 Cal. Rptr. 306 (1968).

7. 59 Cal.2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 13 A.L.R.3d 1049 (1963).

changed since leaving the defendant's plant. As to the plaintiff's participation or contribution, the parties were in a definite clash. And in such case the jury decides, under proper instructions, whether the inference of negligence can be made.

On the basis of the thorough testimony of defendant's experts, the court determined that there was no basis for a finding that the explosion was due to a defect in the tire when it left the manufacturing plant, and therefore the court properly rendered judgment for the defendants notwithstanding the verdict on plaintiff's theory that there was a defect in the tire.

The finding, however, that there was a failure to warn the plaintiff of the dangers inherent in the mounting of tires gives a basis for holding the manufacturer liable for failure to give adequate warning of any dangerous usages which it knows or should have known would result in the type of accident that occurred. It cites *Ghera*,⁸ as well as others, and Restatement section 402A. Some warnings were actually given and posted, but the manufacturers also knew that these warnings and suggested precautions were more honored by their breach than by their observance; therefore special warnings should have been given, especially when safety rims were used. The extent to which the warnings were communicated was in dispute. The plaintiff had offered several instructions on failure to warn as a basis for finding the product defective.⁹ The court therefore ordered a new trial covering the warnings given and communicated and also their relation to the issues of the defective product. A product without adequate warning is defective. Certainly *Ghera* clearly establishes that *res ipsa loquitur* is available for proving the negligence of a manufacturer, and the jury may find strict liability by drawing the inference from the circumstances, which is what is done in *res ipsa* cases. The trial court only decides whether plaintiff has produced sufficient evidence to permit the jury to draw the inference, in either case.

8. 246 Cal. App.2d 639, 55 Cal. Rptr. 94 (1967).

9. *Canifax v. Hercules Powder Co.*, 237 Cal. App.2d 44, 46 Cal. Rptr. 552 (1965).

In *McCurter v. Norton Co.*,¹⁰ plaintiff was injured by an abrasive wheel on a machine. The court held that *res ipsa loquitur* could not apply because the wheel was not in the same condition as it was when it left the defendant's plant. But the court issued a further caveat on its use. The basic fact in strict liability cases is that the manufacturer placed a product on the market in a defective condition. A defect must be shown. Can such a defect be shown by the doctrine of *res ipsa loquitur*? The court here denies that this can be done. It says specifically that "when a party relies on the rule of strict liability the requirement of showing a defect cannot be satisfied by reliance on the doctrine of *res ipsa loquitur*." The fact is, however, that the plaintiff fails here because the defendant has an affirmative defense, to wit, the product has been changed over the time that has passed since the wheel came from the manufacturer. Too much time had passed, and the product had been used a great deal. The manufacturer had lost control, but there are many cases in which the product has passed into the hands of others and the doctrine is still applicable.¹¹ Of course, it can be said that the doctrine of *res ipsa loquitur* will not prevail over affirmative defenses such as assumption of risk, which means using the product with knowledge that it is defective, and in such case the use would be improper and abnormal. It can be said that strict liability can be gotten by inference from circumstances which may be different from the requirements for the doctrine of *res ipsa loquitur*.

The doctrine of *res ipsa loquitur* is probably given more liberal treatment in its use in California than in any other state. Certainly this is true since *Ybarra v. Spangard*,¹² which allowed the jury to draw the inference even against the testimony of all persons who were in the operating room with the injured patient. The idea is that we should make the people who were on hand explain what happened. This was also true in

¹⁰. 263 Cal. App.2d 402, 69 Cal. Rptr. 493 (1968).

U.S. Rubber Co., 260 Cal. App.2d 792, 67 Cal. Rptr. 645 (1968).

¹¹. See, for example, *Ghera v. Ford Motor Co.*, 246 Cal. App.2d 639, 55 Cal. Rptr. 94 (1967) and *Casetta v.*

¹². 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258 (1944).

Summers v. Tice.¹³ *Res ipsa* is simply a method of proving a general allegation of negligence, and it will also support allegations of specific negligence if the petition contains a general allegation as well as specific allegations.¹⁴ The dangers of its over-use prompt many jurists to call for a halt in its liberal extension. This has been especially true in medical cases. The medical profession would favor the theory of the calculated risk. It is a problem of finding suitable grounds for indulging the inference of negligence. Requiring facts of common knowledge or expert testimony as to professional matters would surely be adequate bases for the inference, but rarity and low incidence should be coupled with something fairly substantial. The cases examined here indicate a further liberalization in the use of *res ipsa loquitur*.

Last Clear Chance—Looking and Not Seeing

The last clear chance doctrine makes interesting study in California because the doctrine is designed to allow a plaintiff to recover notwithstanding contributory negligence, and California is a state in which contributory negligence is still recognized as a strong defense.¹⁵ Moreover, Civil Code section 1714 provides that a plaintiff can recover for injuries occasioned by another "except so far as the latter (the plaintiff) has wilfully or by want of ordinary care, brought the injury upon himself." So the code strengthens the judicial rule. Last clear chance abrogates the defense of contributory negligence. When is the doctrine applicable? In fitting it into tort theory it has been said that defendant's conduct is *the* proximate cause of plaintiff's injury. It also can appear as almost an infliction of intentional injury if the act is done with actual knowledge of plaintiff's predicament. Putting it in terms of proximate cause relates it to an element of the cause of action for negligence. But as Prosser points out, it

13. 33 Cal.2d 80, 199 P.2d 1, 5 A.L.R.2d 91 (1948).

14. *Atkinson v. United Railroads of San Francisco*, 71 Cal. App. 82, 234 P. 863 (1925).

15. *Myers v. Carini* 262 Cal. App.2d 614, 68 Cal. Rptr 800 (1968).

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is difficult to find any uniformity of thinking in application of the doctrine.¹⁶

Basically four types of last clear chance have evolved as follows: (a) Defendant discovers the plaintiff in physical peril from which he cannot extricate himself. (b) Defendant discovers plaintiff clearly oblivious of his peril but able to extricate himself if he knew his predicament (in California this is called inattentiveness). (c) Plaintiff is in physical peril and unable to extricate himself, and defendant does not discover him in that situation; and (d) Plaintiff is in peril because he is inattentive, or oblivious, or unaware, and again the defendant does not discover him. The last type is what is known as the humanitarian rule applied in Missouri. But the writer still has not found a Missouri lawyer who would claim that if a railroad engineer failed to discover a drunk sleeping on a track in the middle of a great wheat field, the company would be liable. The usual Missouri cases where there is a duty to discover are intersection cases. The progression of theories of last clear chance from (a) to (d) leads to a situation where a defendant has the duty to discover a plaintiff, who is innocently or negligently inattentive, and take care of him. You are now your brother's keeper. Often the word "unconscious" is substituted for the word "undiscovered" in describing defendant's state of mind as to plaintiff's position of danger.

Our problem is to try to ascertain just where California draws the line: under what conditions is the doctrine applicable? Just when is the defense of contributory negligence abrogated? In *Brandelius v. City & County of San Francisco*,¹⁷ the Supreme Court of California undertook to draw this line. A passenger alighting from a cable car was fatally struck by another cable car going in the opposite direction, and suit was for his wrongful death. The case is clouded because the carrier-passenger relation would place added duties on the carrier, but the jury was to determine if that relation

16. Prosser, *Law of Torts*, 3d ed p. 438.

17. 47 Cal.2d 729, 306 P.2d 432 (1957). See also *Girdner v. Union Oil Co.*, 216 Cal. 197, 13 P.2d 915 (1932).

has ended. So the doctrine must be considered on the basis that the carrier-passenger relation had terminated. The formula announced by the court is:

(1) That plaintiff has been negligent and as a result thereof he is in a position of danger from which he cannot extricate himself or escape by the exercise of ordinary care, and this includes the situation where his danger is due to his inattentiveness.

(2) The defendant has knowledge that the plaintiff is in a position of danger and knows, or in the exercise of ordinary care *should know*, that plaintiff cannot escape. It should be noted that it is sufficient that defendant *should know* that plaintiff cannot escape; actual knowledge of this fact is not necessary.

(3) Defendant has the last clear chance to avoid the accident by the exercise of ordinary care, fails to do so, and the proximate result is that plaintiff is injured.¹⁸

Hence, the doctrine takes effect when defendant has actual knowledge of plaintiff's *position of danger* and actual or constructive knowledge of his inability to escape from the danger. It will be appreciated, of course, that the liberal doctrine begins when a duty to find out about plaintiff's danger is required. If defendant *knows* of plaintiff's predicament, it is not much to ask him to prevent injury.¹⁹ This can be illustrated by a case where plaintiff is walking down a railroad track and the engineer sees him. He has actual knowledge of plaintiff being in a position of danger—but he has no duty to stop his train until he knows, or should know, by the exercise of ordinary care, that plaintiff is not going to escape, either because he is caught in a trap or is totally unaware that a train is coming.

In California the defendant must have actual knowledge of plaintiff's position of danger, but constructive knowledge of his inability to escape is sufficient. Once the danger is known, it is reasonable to assume that defendant must observe the

18. *Doran v. City and County of San Francisco*, 44 Cal.2d 477, 283 P.2d 1 (1955).

19. *Daniels v. City and County of San Francisco*, 40 Cal.2d 614, 255 P.2d 785 (1953).

plaintiff to see if he is going to save himself. And when a reasonable person in defendant's position would realize that the plaintiff was not going to act to save himself, then a duty arises for the defendant to take over. If the defendant has enough time available, and a clear chance to prevent injury, and fails to do so, the injury is the proximate result of such failure. With this analysis it would seem clear that the rule is far from the Missouri humanitarian doctrine, which places a duty to discover or know the plaintiff's position of danger at intersections and other places where plaintiff may be expected.

The California rule seems to be more liberal when one can be charged with having seen what he would have seen had he looked. And if there is a duty to look, and there is such a duty to look at intersections, the defendant is charged with knowledge of what a look would have revealed. There is also the rule that one must act with due care under the circumstances. The looking and not seeing rule is well accepted.

Now let us look at a few recent cases.

In *Philo v. Lancia*,²⁰ plaintiff was travelling south between 40 and 45 miles per hour while defendant was driving west with his truck loaded with three tons of rock. It is an intersection case, usually a difficult matter to resolve. There were no obstructions to the drivers' views, no traffic signals, the weather was dry and both roads were paved. Plaintiff approached the intersection and noted defendant's truck some distance away. Defendant was not slowing down, so plaintiff sounded his horn when about 100 feet from the intersection, applied his brakes, and slid into the intersection. Defendant testified that when he first saw plaintiff's vehicle it was clear that plaintiff could not stop before entering the intersection, but he nevertheless put his foot on the accelerator in order to clear the intersection first. But on entering the intersection he applied his brakes and skidded into plaintiff's vehicle, leaving marks about 18 feet long. Plaintiff's tire marks were

²⁰ 256 Cal. App.2d 475, 63 Cal. Rptr. 900 (1967).

over 100 feet long. The evidence was in sharp conflict as to which vehicle entered the intersection first. But the facts show that the defendant's truck would have stopped in time if he had had brakeage for another 3 to 5 feet. Under those facts the court instructed according to the last clear chance doctrine, and the giving of the instruction was set up as error. The district court of appeal affirmed. It indicated that when defendant testified that he looked both to the right and left and did not see plaintiff until the plaintiff sounded his horn, he disclosed that he was negligently inattentive as a matter of law. "Failure to keep a lookout to see that which can readily be seen if the driver is looking is negligence as a matter of law." The trial court gave the instruction on "looking and not seeing"¹ and under the facts, this was not error. Defendant claimed he was entitled to an instruction on his being confronted with an "imminent peril" situation and that the fact that he did not do what he might have done is not necessarily negligence. The court indicated that his conduct was properly held to have been negligent even without any such instruction. This case seems to hold that the last clear chance doctrine was applicable because defendant failed to observe and failed to exercise care to discover plaintiff in a position of danger, and not because he failed to discover if he could escape. At least by holding him to have knowledge of what he would have seen had he looked, the court liberalized the application of the doctrine. The defendant claimed he did not discover plaintiff until he sounded his horn. He may not have known plaintiff was there, but he was liable as if he had known. We are thus approaching "humanitarianism" by "looking and not seeing".

In *Lopez v. Ormonde*,² two boys were riding a bicycle across an intersection after having pushed a traffic button giving them the "go" sign. Defendant's truck was making a right turn at the intersection and collided with the boys in the intersection, and one of the boys was killed under the dual wheels of the truck. As it was claimed that the boys

1. See BAJI § 140.

2. 258 Cal. App.2d 176, 65 Cal. Rptr. 513 (1968).

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 were guilty of contributory negligence, it was error not to give the last clear chance instruction to destroy the possible defense. The last clear chance instruction requested is what is known as BAJI No. 205 (Revised). This is substantially the same instruction as that developed in *Brandelius*.³ Yet defendant testified that he at no time observed the decedent prior to his death. But a passenger in the truck had seen the boys and warned the driver. The boys were in clear view of any reasonably observant person. The facts show adequate knowledge despite the denial of knowledge. So here again we see an effort to liberalize the doctrine so far as requiring actual knowledge is concerned.

In *Lauder v. Jobe*,⁴ which involved a chain of rear-end collisions, a truck was stopped on a freeway in the second lane from the center strip, and the driver was picking up something that had fallen off his truck. Lauder struck the rear of the truck. Jobe was following Lauder and struck Lauder's car. Both cars were damaged, and both parties were injured. Cross actions were brought, one by Lauder and the other by Jobe. So far as last clear chance is concerned, it seems clear that Lauder had negligently placed himself in a position of danger when he hit the truck and could not escape from that position, and that Jobe saw the Lauder car up against the truck and not movable. So the issue here is whether Jobe saw the situation in time to do anything about it. Lauder testified that he was going 60 miles per hour so in six seconds he moved 540 feet. There was a strip of adequate width on the left to enable Jobe to avoid hitting Lauder. Also the evidence showed that Jobe saw the position of Lauder for a distance of 700 feet. So the evidence showed that there was a last clear chance for Jobe to avoid injuring Lauder. Thus, the thinking of the court in *Brandelius* is applied in this case.

In *Gillingham v. Greyhound Corporation*,⁵ we have a good summary by Justice Bray restating the *Brandelius* formula

3. 47 Cal. 2d 729, 306 P.2d 432 (1957). See also *People v. Walker*, 266 Cal. App.2d —, 72 Cal. Rptr. 224 (1968) and *Fry v. Young*, 267 Cal. App.2d —, 73 Cal. Rptr. 62 (1968).

4. 261 Cal. App.2d 539, 68 Cal. Rptr. 63 (1968).

5. 263 Cal. App.2d 564, 69 Cal. Rptr. 728 (1968).

and concluding quite properly that the doctrine was not applicable to the facts. The Greyhound bus driver was following a car at a distance of about 100 feet at night when he saw something in the highway which turned out to be the body of the plaintiff who had been struck by the car immediately ahead of the bus. The driver, without a chance to stop, straddled and may have hit the body, which was not more than 30 feet ahead of him when he saw it. The court considered *Lauder v. Jobe*,⁶ but the facts were different. There was no evidence upon which the jury could find that the driver had any chance to avoid straddling and possibly hitting the body. The doctrine could not be held applicable. There was no chance, let alone a clear one.

In conclusion we can assert that while the California courts emphasize that the plaintiff's position of danger must be discovered, the application of the doctrine approaches the humanitarian rule because the requirement of discovery is tempered by the duty to look for possible plaintiffs and by holding the defendant to have seen what he would have seen had he looked. This expands actual discovery to include a duty to discover.

Shifting of Liability

Indemnity Cases

Indemnity is a broad term in law. It can mean restitution, complying with a guaranty, or reimbursement; it can mean subrogation on the theory that a benefit has been conferred which should be paid back. We speak of indemnity actions which aim to obtain a full reimbursement. In tort it means that where each of two persons is made responsible by law for damages suffered by an injured person, the one who is only passively negligent, on paying the damages, has a right of indemnity by which he shifts the entire burden of the loss to the party who is actively negligent. This is a right of implied indemnification which may arise from contract or

⁶ 261 Cal. App.2d 539, 68 Cal. Rptr. 63 (1968).

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from equitable considerations. The Supreme Court of California in 1958 gave full recognition to this right in *City and County of San Francisco v. Ho Sing*.⁷ Ho Sing had made changes in the sidewalk adjoining his premises, and as a result someone was injured. The injured party recovered a \$10,000 judgment against both the city and Ho Sing. The city paid half of the judgment and then sued for indemnity, thus placing full liability on Ho Sing. The court distinguishes indemnity from contribution (the latter also being allowed in this state since the enactment of Code of Civil Procedure, Section 875 in 1957) where plaintiff gets a joint judgment against both tortfeasors. Here there was a joint judgment, but the city was entitled to full restitution rather than mere contribution. It is a difference between primary and secondary liability as well as active and passive conduct, between the character and kind of wrong. The ultimate conclusion as to whether the right exists in a particular case rests on facts to be decided by the trier of facts.

Considerations pointing to a decision include the nature and scope of the relationship, the obligations owed by one to the other, the extent of the participation by the plaintiff seeking indemnity in the affirmative acts of negligence, the physical connection of the plaintiff with the acts of the actor, the plaintiff's knowledge or acquiescence in what is done, and the failure of plaintiff to perform what he was called on to perform by their agreement. It is a question of fact. *Herrero v. Atkinson*.⁸ If the active person is an independent contractor, the right to indemnity should generally prevail.⁹

In *Muth v. Urricelqui*,¹⁰ the question was raised whether the owner's right to supervise the active contractor's work was enough participation to disentitle him to indemnity. The court held not, on the theory that the right to act did not raise a duty to act. Muth was both owner and the general con-

7. 51 Cal.2d 127, 330 P.2d 802 Co., 202 Cal. App.2d 99, 20 Cal. Rptr. 820 (1962).

8. 227 Cal. App.2d 69, 38 Cal. Rptr. 490, 8 A.L.R.3d 629 (1964).

10. 251 Cal. App.2d 901, 60 Cal. Rptr. 166 (1967).

9. *Safeway Stores v. Mass Bonding*

tractor who contracted with Urricelqui to do grading which was improperly done. The purchasers of the house recovered damages from the owner and general contractor, who sought indemnity from the actor. The reserved right to supervise was not participation, so recovery was allowed. But actual supervision might make a difference.

In the recent case of *O'Melia v. California Production Service Inc.*,¹¹ defendant, an independent oil field repair contractor, was employed by plaintiff to repair an oil well. During the work an employee of defendant was injured and obtained a settlement of \$50,000 from the plaintiff, who sought indemnity. The injury was caused by the absence of certain safety latches in plaintiff's equipment. Plaintiff owned the machinery, which had no latches, and was on hand helping. He participated as he was connected physically with the operation. One instruction stated that plaintiff's right to indemnity would not be lost if he were inactive, unless he knew or should have foreseen, as a prudent person, that if the machinery were operated without the latches or some other safety device, someone might be hurt. Moreover, the court also instructed at defendant's request that because the work was done on plaintiff's property, it was a "place of employment" within the meaning of sections 6302 and 6304 of the Labor Code. He had the duty of providing a safe "place of employment" and of using safety devices, so he was not entitled to recover. A good recent case is *Hoke v. Jordan*.¹²

Shifting by Finding that a Superseding Cause Came into Play

This phase of shifting liability is prompted by some of the cases on shifting appearing in Prosser's *Cases on Torts*, fourth edition, pages 404 to 414. There is of course a change of liability when a true superseding cause is held to be the sole proximate cause of plaintiff's damages. It is a different shift from that noted in the indemnity cases. In the indemnity cases the liability of the indemnitee is founded on the rule

¹¹. 261 Cal. App.2d 618, 68 Cal. Rptr. 125 (1968).

¹². 266 Cal. App.2d —, 72 Cal. Rptr. 631 (1968).

that the principal is entitled to indemnity from losses caused by the active negligence of his agent. In the causation cases, the liability of the original wrongdoer was real and primary, but it disappears when the new actor comes on the scene and neutralizes the causal effect of the first actor's conduct. The first actor is relieved of his liability even if his negligence is a substantial factor in bringing it about—Restatement section 440. The new cause prevents the actor from being liable. Section 442 lists six considerations which are important in making the determination whether a cause is superseding. (a) Does the intervention bring on damage of a different kind from what would result from the first actor's conduct? (b) Does what happens appear extraordinary rather than normal? (c) Is the intervening force a normal result of the original act? (d) Is it a positive act or just a failure to act? (e) Is the new force the result of a wrongful act of a third person? (f) What was the degree of culpability of the wrongful act?

The writer always recalls in this connection a case which arose in Lawrence, Kansas, in which a garageman was putting a set of new gas tanks under the ground. He had a moving contractor do the work and when the old tanks had been loaded on huge trucks to be carried away, the garage owner noticed that residual liquid in the old tanks was running down the street which sloped gradually. He worried about fire and called the fire chief to take care of the danger. The chief came with one of his men, and the chief said, "Let's see if the stuff will burn," and his man applied a match. Immediately there was a fire six blocks long following the curb where several cars were parked. Several burned before their owners could be found.¹³ Was the application of the match a superseding force? Were the garage owner and the contractor still liable? The chief? The city? The car owners sued the garageman, Standard Oil Co., the contractor, and the fire chief. The court held the parties removing the tanks liable, saying, "the setting of the fire was not so unrelated to

13. *Trapp v. Standard Oil Co.*, 176 Kan. 39, 269 P.2d 469 (1954).

the situation as to constitute the sole proximate cause". Another match throwing case is *Stone v. Boston and Albany Rly. Co.*¹⁴ in which the throwing of the match just negligently was held to be a superseding cause. Of course that was seventy years ago, but even then the great Chief Justice Knowlton dissented.

Where does California stand on this? *Gibson v. Garcia*¹⁵ is a starting place. A negligently driven car struck the defendant's rotten utility pole, causing the pole to strike a user of the adjoining highway. The collision of the car with the pole was not a superseding cause. Certainly the Supreme Court of California has accepted the guidelines of sections 442 to 453 of the Restatement to determine whether causes are superseding.¹⁶ These cases rely on Restatement of Torts, section 447, for the conclusion that the fact that an intervening act of a third person is done negligently does not make it an intervening cause if: (a) a reasonable man knowing the situation existing when the intervening act is done would not regard it as highly extraordinary that the third person so acted; or (b) that the act is a normal response to the situation created by defendant's negligent act and the manner in which the intervening act is done is not extraordinarily negligent. This statement is, of course, the language of section 447. Would the act of the fire chief who applied the match to gasoline be considered as superseding under this section?

In *Fuller v. Standard Stations Inc.*,¹⁷ involving the sale of gasoline to an obviously inebriated driver, the court considered the conduct of the driver as an intervening cause. It simplified the question by simply saying that "the intervention of causal forces does not relieve earlier wrongdoers if those forces were foreseeable." This goes back to the brief formula of the late Professor Beale,¹⁸ who reduced the matter to

14. 171 Mass. 536, 51 N.E. 1 (1898). 213, 157 P.2d 372 158 A.L.R. 872

15. 96 Cal. App.2d 681, 216 P.2d (1945).
119 (1950).

16. *Stewart v. Cox*, 55 Cal.2d 857, 13 Cal. Rptr. 521, 362 P.2d 345 (1961);
McEvoy v. American Pool Corp., 32 Cal.2d 295, 195 P.2d 783 (1948);
Mosley v. Arden Farms Co., 26 Cal.2d

17. 250 Cal. App.2d 687, 58 Cal. Rptr. 792 (1967).

18. Beale, *The Proximate Consequences of an Act*, 33 Harvard L.Rev. 633 (1920).

continued liability if the injury was directly, or indirectly caused by (a) another force which was caused by the original force, or (b) by a new force which was foreseeable as likely to come into existence and unite with the situation created by the first force to cause the damage.

The *Mosely* case,¹⁹ in which crates were negligently left on a sidewalk and moved by an unknown agent, to the injury of the plaintiff, presented the same problem. Liability was sustained, but the concurring opinion by Justice Traynor showing the relation of duty and causation is most valuable. He concluded that liability must be imposed because "the possibility that third persons would move the crates was not so remote that it could not be regarded as part of the risk. Defendant's negligence consisted in failing to protect plaintiff against that risk." Thus he handled the question as one of duty.

The court having stated definitely that sections 442 to 453 of the Restatement control the matter of determining what constitutes a superseding cause, it still remains to decide how a trial court should instruct the jury. The BAJI instructions 104C to 104C-D are based on California decisions which make the foreseeability of the intervening cause the issue for the jury.²⁰ Thus we must ask how the Restatement sections, which now are deemed controlling, should be worked into the instructions. Should the actual provisions of the Restatement be used? Trial courts are faced with a real problem. What if the jury returns to ask the court what the Restatement means?

The trial court endeavored to clarify the issue in *Ewart v. Southern California Gas Co.*¹ by telling the jury that when it found an intervening cause it must then decide whether such

19. *Mosley v. Arden Farms Co.*, 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872 (1945).

20. *Jones v. City of South San Francisco*, 96 Cal. App.2d 427, 216 P.2d 25 (1950) (Opinion by Justice Peters). *Richardson v. Ham*, 44 Cal.2d 772, 285

P.2d 269 (1955) (Opinion by Justice Traynor). That intermeddlers would start a bulldozer was foreseeable as an intervening force that would not supersede the original negligence.

1. 237 Cal. App.2d 163, 46 Cal. Rptr. 631 (1965).

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plaintiff had shown that “defendants more probably than not could foresee the new cause.” The court was here trying to implement the applicable sections of the Restatement. The district court held this was an erroneous interpretation for all that was required was that the defendant should have considered whether a reasonable man in defendant’s position would regard it as highly extraordinary that a third person would have so acted. Thus would section 447 of the Restatement find its way into the structure of our law. *Ewart* did not go up to the supreme court. We must await future cases.

The Guest Statute

The guest statute is unique in that it is designed to limit liability, whereas most statutes regulating conduct are designed to increase liability or at least facilitate its proof. Current judicial decisions also tend to increase liability as we indicated in the first section of this study. Accordingly, it is not surprising that the guest statute’s limitation on liability is strictly construed by the courts since it not only is in derogation of the common law, but also flies against the trend of the times. The statute limits the rule that a person must act with ordinary care, but the courts permit this limitation to operate only within the narrow confines of the statute.

The California statute (Vehicle Code section 17158) provides that a guest who accepts a ride in any vehicle upon a highway without having given compensation for such ride cannot recover damages unless intoxication or willful misconduct of the driver is established. A 1961 amendment to the Code further provides that the owner of an automobile is similarly barred if he is injured in his own vehicle while it is being driven by another. This amendment was designed to remove the uncertainty in the law which had developed when attempts were made to apply the statute to owners who were not driving when an accident occurred. It had seemed impossible to say that a person was a guest in his own car, yet it could be that in furnishing the car, he was giving compensation for his ride. The amendment, therefore, was designed to resolve these inconsistencies by giving the owner

the status of a guest if he was riding with someone in his car who was driving at the owner's request.

Who Is a Guest?

*Whitehill v. Strickland*² is a case from the district court of appeal which involves the amendment to the statute mentioned above. A woman was traveling in her husband's automobile from the San Francisco bay area to Southern California. The defendant, who was the husband's stepfather, accompanied her and was to share the driving chores. The defendant was driving when the car crossed over the center line and collided with another car. The woman, the owner's wife, was killed, and her husband, who was not present in the car, brought a wrongful death action. The defendant tried to hide behind the guest statute, but he did not succeed. He argued first, that as an owner, the plaintiff may not recover because the statute prohibits him from doing so. Second, he argued that the wife was a guest in the car when the accident occurred, and that since, as a guest, she would have been barred from recovery, her husband, in a wrongful death action, would also be barred.

The statute, said the court, bars an owner from recovering only for his *own* injuries, and since he obviously was not injured, he was not barred in an action for his wife's wrongful death unless the wife's status in the car the moment she was killed was that of a guest. Was she, then, a guest? She certainly was not an owner, since the automobile was not community property. Was she her husband's guest? No, she was her husband's bailee, which made her the *host*, not the *guest*. But did the shifting of the stepfather to the driver's seat change the relationship? Not at all; the driver retained the guest status that he had always had. He had no relationship to the car; he did not own it; he did not rent it; he did not borrow it; and he did not have charge of it. Therefore, the defendant not the decedent was the guest.

2. 256 Cal. App.2d 837, 64 Cal. Rptr. 584 (1967).

The owner, therefore, could hold the defendant to a standard of ordinary care because the statute did not apply to these facts. The statute does not bar an owner from recovering for someone else's injuries, and the person who was injured was neither an owner nor a guest. It is interesting to consider how this case would have turned out if the car had been community property. The wife would then have been an owner, and she would have fallen within the limitation of the statute. If she could not have recovered for her injuries, had she lived, the question would have been whether the co-owner, the husband, would fare any better. The general rule seems to be that if the decedent is barred from recovery for injuries, if still alive, there can be no recovery on behalf of any beneficiary in a wrongful death action.³

*Elisalda v. Welch's Sand & Gravel*⁴ is another example of strict construction. The district court was quick to find that the guest status, if it ever existed, had terminated.⁵ The parties were delivering cement from one site to another in a new subdivision. The plaintiff's foot was crushed by the wheel of the cement truck. The court held that if there ever had been a guest relationship, it had ended when the plaintiff's foot touched the ground as he got off the truck. Furthermore, the plaintiff had been sitting on the truck's fender, and since the statute says "in" a vehicle, not "on" a vehicle, the statute did not apply. And since the entire affair was in connection with a mutual business venture, it was easy for the court to find compensation; so the plaintiff was never a guest in the first place.

*Lubeck v. Lopes*⁶ considers the statutory requirement of compensation. The defendant was driving the plaintiff to the defendant's attorney's office so that the plaintiff could obtain advice concerning her own personal affairs. An accident ensued, and the plaintiff was injured. The plaintiff was barred from recovery by the statute unless she could show

3. *Buckley v. Chadwick*, 45 Cal.2d 183, 288 P.2d 12, 289 P.2d 242 (1955).

4. 260 Cal. App.2d 46, 67 Cal. Rptr. 57 (1968).

5. *Trigg v. Smith*, 246 Cal. App.2d 510, 54 Cal. Rptr. 858 (1966).

6. 254 Cal. App.2d 63, 62 Cal. Rptr. 36 (1967).

that she gave the defendant compensation for the ride. The plaintiff argued that the defendant received compensation, claiming that by providing the transportation to the attorney's office, the defendant was furthering her own business relationship with the attorney. The court would not accept this reasoning. It is true that compensation need not be in cash, and that "such compensation may consist of any tangible benefit given to the driver, where such benefit is the motivating influence for supplying transportation to the rider. However, where an inference of tangible benefit conferred by the rider rests wholly in conjecture, such inference is insufficient to constitute compensation".

*What Conduct by the Guest Will Bar His Recovery?
Contributory Negligence under the Guest Statute*

Is contributory negligence a defense to an action based on the guest statute where the defendant is guilty of willful misconduct? No, said the supreme court in *Williams v. Carr*,⁷ although "contributory willful misconduct" is a defense. First, there is no support in the statute for the argument that contributory negligence should be a defense. Second, it is generally agreed that contributory negligence is not a defense to other non-statutory actions based on willful misconduct. Therefore, there is no basis for holding that contributory negligence should be a defense to any guest statute action.

The problem, now, is to determine whether the plaintiff's conduct in *Williams* was ordinary contributory negligence or contributory willful misconduct. The answer is easy if the plaintiff exhibits a reckless disregard for his own safety, for such conduct is an assumption of risk, and such a plaintiff should not recover. In *Williams*, although the plaintiff and the defendant had been drinking together, willful misconduct was the issue, not intoxication. The defendant's misconduct consisted of continuing to drive the car in which he and the plaintiff were traveling after the defendant had realized that the beer he had consumed, plus the long hours he had spent

7. 68 Cal.2d 579, 68 Cal. Rptr. 305, 440 P.2d 505 (1968).

without sleep, had made him too drowsy to safely operate the vehicle. Since plaintiff was sound asleep at the time the defendant discovered his own sleepiness, there was no way plaintiff could have been aware of the defendant's misconduct. She was injured in the accident which ultimately occurred due to the defendant's driving while half-awake. Her contributory negligence in getting in the car with him after both had had several beers was not enough; the issue was not intoxication. She must, in some way, either actively or passively, have assented to the misconduct. Since she had not assented, she was not barred from recovering.

Collateral Source Payments and Their Effect on Damages

In many cases involving serious injuries sustained from accidents caused by the faults of others, the victims often receive substantial sums from insurance companies, Medicare, Blue Cross and Blue Shield, and from employers under workmen's compensation. Should such payments be deducted from judgments recovered against persons at fault? Professor Fleming has written an exhaustive study of the problem.⁸

The basic principle is that any sums received by plaintiff from parties at fault, other than the defendant, in causing the plaintiff's injuries are deductible from a judgment rendered against the defendant. This deduction insures that the plaintiff can only have one full satisfaction for his injuries. Presumably the judgment rendered is to cover all the injuries sustained. On the other hand, when the payments to plaintiff are made by parties who are not at fault, such amounts are *not* deductible. Frequently, an employer or his insurance carrier makes a payment by way of settlement. If the employer was not at fault, the amount paid is not deductible. This situation was clearly presented in the recent case of *De Cruz v. Reid*.⁹

8. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 Cal. L.Rev. 1178 (1966). See also *City of Salinas v. Souza & McCue Construction Co.*, 66 Cal.2d 217, 57 Cal. Rptr. 337, 424 P.2d 921 (1967).

9. 69 Cal.2d 217, 70 Cal. Rptr. 550, 444 P.2d 342 (1968), following the supreme court decision in *Witt v. Jackson*, 57 Cal. 2d 57, 17 Cal. Rptr. 369, 366 P.2d 641 (1961).

De Cruz died in an accident while employed on a ranch. Defendant Reid was delivering fertilizer to the ranch in a large truck, and De Cruz was riding on the truck and assisting with the unloading, when he was killed. The employer was not negligent. De Cruz's family settled with the employer for \$18,000, under the workmen's compensation law, then brought suit against Reid, the negligent driver of the truck. A verdict was rendered for \$40,000, and the sole question was whether the workmen's compensation settlement should be deducted from the amount of the verdict. The supreme court held that the \$18,000 should not be deducted from the \$40,000. If the employer himself had actually been negligent, then workmen's compensation payments would be deductible from a judgment against the third person defendant under the principle that the wronged person is entitled to only one satisfaction. But since the employer was not negligent, this principle did not apply, and the workmen's compensation recovery was not deducted from the amount of the verdict in the negligence action. On the surface this seems to give the wronged person a greater recovery if he is wronged once than if he is wronged more than once. But that seems to be the law.

Defamation

The year we are reviewing yielded a number of defamation cases, and a complete survey of all of them on all issues would require the writing of a treatise on the subject. At the outset we have two cases¹⁰ setting at rest the question of how the undertaking called for by section 830 of the Code of Civil Procedure must be made. The section calls for two competent and sufficient sureties. The cases hold that either a cash deposit of \$500 or the filing of a bond by a recognized surety company is a satisfactory compliance with the specific requirements of section 830. Section 1056 of the Code of Civil

10. *Rogers v. County Bank of Santa Clara County*, 67 Cal.2d 437, 254 Cal. App.2d 224, 61 Cal. 62 Cal. Rptr. 429, 432 P.2d 31 (1967). Cash security deposit The corporate bond complies with the approved. *Brandt v. Superior Court of* statutory requirements.

Procedure gives full recognition to the adequacy of such security. It is said that this security has the dual effect of (a) giving the defendant security for his costs and expenses, and (b) discouraging hastily filed defamation actions by impressing on litigants the need for mature consideration as to the propriety of going forward with process.

In *Washburn v. Wright*,¹¹ an unincorporated association, which may sue in California, and another similar association were described in an advertisement, as "extremist organizations founded by John Birch Society members." The court referred to various definitions of the word "extremist" and concluded that in the mental climate of 1964 in California it was not defamatory *per se* to call anyone an extremist or a member of the John Birch Society. In such cases it is the function of the court to construe alleged defamatory language in a sense that is natural and obvious, and in a way in which the persons to whom it is communicated would be likely to understand it. Of course alleged membership in the Communist party, or communist affiliation, or sympathy for Communism is defamatory *per se*. So it is logical to conclude that alleged membership in the John Birch Society, which opposes Communism, will not subject a person to hatred, contempt, and ridicule and cause him to be shunned or avoided.

*Stoneking v. Briggs*¹² arose out of the troubles of a local labor union. Plaintiff had been president of the local, and some members reported to the international organization that things were going out of control; as a result the management of the local was put under the trusteeship of the parent organization. Defendant Briggs, a member of the local, reported to various newspapers that President Stoneking and Secretary Baum had been relieved of their positions. As a result of Briggs' statements, five articles appeared in bay area newspapers concerning the trusteeship, the removal of Stoneking, and statements attributed to Briggs to the effect that Stoneking and Baum had been removed for internal reasons, that the

11. 261 Cal. App.2d 789, 68 Cal. Rptr. 224 (1968).

12. 254 Cal. App.2d 563, 62 Cal. Rptr. 249 (1967).

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objective was to put the direction of the local in the hands of new leadership to bring order out of chaos, that there had been violations of federal and union laws, and that Stoneking had been under observation for some time. Briggs made similar statements to several reporters.

The court instructed that the statements could have two meanings, one harmless, the other defamatory, and left it to the jury to make the finding. It also instructed that the jury could consider the *insinuations* that could be made from the words used, such as that officers Stoneking and Baum were the cause of the abuses, and that their elimination from office had been *crucial to the solution* of the difficulties. These matters were to be judged by the jury "by the natural and probable effect upon the mind of the average reader." The sting of the accusation was that Stoneking had failed to act for the best interests of the union and was grossly incompetent in his capacity as president. So the charge was clearly related to prohibitions under section 46(3) of the Civil Code. The code definitions of slander are very broad and have been held to include almost any language which on its face has a natural tendency to injure a person's reputation either generally or with respect to his occupation. What is said is construed from the expressions and from the whole scope and apparent object of the writer. See *MacLeod v. Tribune Publishing Co.*¹³

Some of the matters alleged in *Stoneking* were in fact true and admitted by the plaintiff. There were internal troubles in the local's affairs, and the trusteeship had followed the removal of the plaintiff from his position. But there were inaccuracies which could not be termed minor, and the insinuations were the result of the inaccuracies. The jury could appraise the entire situation and conclude that average persons of ordinary intelligence would attribute defamatory insinuations to defendant's statements, and that such insinuations were not true. And the record supports this conclusion. Thus

¹³. 52 Cal.2d 536, 343 P.2d 36 (1959).

we see that true statements may lead to liability because of the insinuations that follow therefrom.

Defendant raised the issue of privilege. He recognized that the privilege is conditional on its use for proper purposes, and on the absence of malice. The defendant pointed out that since the jury did not assess any punitive damages, it did not find any malice. The court found the claim to be a nonsequitur. The fact that the jury did not award punitive damages does not necessarily negate the finding of malice. And there was no finding as a matter of law that there was no malice for if that had been the case, the evidence of the wealth of the parties would not have been admissible. It is not clear from the opinion whether the matter of excessive publication was presented to the jury. On that basis alone it would seem that the conditional privilege was lost. How could such publication to several newspapers be considered otherwise than excessive? Words said to members of the union would be clearly privileged. This is implied by the court when it points out that Briggs ought to have anticipated republication of statements made to inquiring reporters. And of course the greatest source of damage to plaintiff was this wide republication. Its only purpose could be to hurt the plaintiff. It was an abuse of a conditional privilege. Restatement of Torts, sections 593 and 599.

The subject of damages is well-reviewed. The jury allowed compensatory damages in the sum of \$22,000, a substantial sum. A motion for a new trial was made on the basis that the amount allowed showed passion and prejudice. The trial court considered the matter very carefully and denied the motion, pointing out that: (a) there is no accurate standard in such cases; (b) the award was within the area of discretion; (c) no change should be made unless the allowance is grossly excessive and obviously due to passion and prejudice. The facts showed the life history of the plaintiff, his long-time membership of the local and his membership in a number of civic organizations. He was shunned by friends of long standing, was the object of unfriendly remarks, and found it more difficult to obtain jobs in his trade as a carpenter.

We should note, too, that the supreme court denied a hearing in the case, but that Justice Traynor was in favor of granting the rehearing.

In *di Giorgio Corporation v. Valley Labor Citizen*,¹⁴ an article written by defendant Jeff Boehm was published in the *Union Gazette* of the Olympic Press and circulated in Santa Clara County. A chap by the name of Galarza, an employee of labor organizations, had furnished materials to Boehm. Boehm's article falsely charged the plaintiff and a congressman with faking a congressional hearing report and using this report against union organization of farm workers. Thus, this was all prepared by a labor man on behalf of labor. When the article appeared in the *Union Gazette*, Galarza sent a copy to the defendant *Valley Labor Citizen*, and it was republished. Boehm had nothing to do with this republication, unlike the situation in the previous case in which Briggs made his statements to reporters and so obviously intended the republications for which he was held liable. Briggs not only foresaw republication, but intended and caused it. So in this case the question was whether a joint judgment against Boehm and the *Valley Labor Citizen* could stand. Of course anyone republishing a defamatory statement is liable for so doing even if he states the source of his information. But whether the originator should be liable for the republication is a different question. Of course, if the originator intends, or perhaps if he clearly foresees, the republication, he may be held liable.¹⁵ But here there was no claim that Boehm was in any way tied up with *Valley*. Galarza was the moving force all along, and Boehm was merely his tool. The court thus held that the joint judgment could not stand. Moreover, Boehm's newspaper was not asked to retract, so only special damages could be recovered against him.

It must be noted that *Valley* was asked to retract, but it refused after consultation with Boehm and *Union Gazette*. This retraction had no effect on Boehm's liability as this must

14. 260 Cal. App.2d 268, 67 Cal. 611, 213 P. 954 (1923); see also *Curley v. Vick*, 211 Cal. App.2d 670, 27 Cal. Rptr. 82 (1968).

15. See *Siemon v. Finkle*, 190 Cal. Rptr. 501 (1963).

be determined by what happened before the publication. The retraction only affects the damages. If it is refused, more damages are recoverable. If plaintiff pleads and proves a demand for a retraction which is refused, he may recover general and punitive damages in addition to special damages. To recover punitive damages, he must still prove actual malice.

The court concludes that a writer in the position of Boehm could not be held for general and punitive damages unless his newspaper was given a chance to retract and then refused. Here the *Union Gazette*, for which Boehm worked, had not been asked to retract; hence Boehm could not be held to the verdict rendered. To do so would circumvent the retraction statute, Civil Code, section 48a. The court then held that the verdict for plaintiff against *Valley* could not be separated from that against Boehm, and therefore the whole case must be reversed. It was a single verdict, and there was no way for deciding the respective responsibilities.

Envisaging a new trial against the *Valley Labor Citizen*, the court called attention to the possibility of a further limitation on the liability of newspapers and radio stations by virtue of the recent decisions of the Supreme Court of the United States, notably *New York Times Co. v. Sullivan*,¹⁶ denying liability unless plaintiff proves actual malice, evidenced by knowledge of falsity or reckless disregard of the truth. *Curtis Publishing Co. v. Butts*¹⁷ extended this concept to public figures so that there can be no recovery unless there is a showing of "highly unreasonable conduct constituting an extreme departure from the standards of investigating and reporting ordinarily adhered to by responsible publishers." *Valley Labor Citizen* should be prepared to assert the constitutional privilege granted by these recent decisions. This is an affirmative defense which must be pleaded and proved.¹⁸ One plaintiff is a congressman, making him a government figure, giving the defendant the special privilege granted under the First and

16. 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964).

17. 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967).

18. *Pavlovsky v. Board of Trade*, 171 Cal. App.2d 110, 340 P.2d 63 (1959).

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Fourteenth Amendments to the United States Constitution. And so the Amendments to the United States Constitution and the United States decisions are introduced as “higher law” which will henceforth be of controlling force in California libel law when government officials and public figures are plaintiffs.

Privilege

The subject of privilege is a very common one in tort law. We find it in self-defense, defense of property, necessity and in all forms of self-help. Whenever we find it, we are confronted with the making of a compromise. All privilege is based on compromise. We have to make a choice from two desirable ends. The less desirable end yields to the more desirable. We act like Brutus—not that he loved Caesar less, but that he loved Rome more.¹⁹ So when granting great privileges we must find the reason for granting them. The retraction laws of California in effect extend the privilege to publish without fear of large general damages, recovery being limited to special damages listed in the statute.

It is well to note that the Constitution of California, Article I, section 9, on liberty of speech and of the press provides that “[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the *abuse* of that right; and *no law shall be passed* to restrain or abridge the liberty of speech or of the press.” (Emphasis added.) The First Amendment to the United States Constitution tells us that Congress *shall pass no law* abridging the freedom of speech and of the press. And the Fourteenth Amendment is a similar limitation of the states’ power to pass laws abridging the privileges of the citizens of the United States. These two amendments form the foundation of Justice Black’s theory that the press should be free to publish even when motivated by malice. Should such extreme privileges be granted? We naturally look for the purpose of such an absolute right to injure citizens. Such an invasion of rights must be justified.

19. Shakespeare, *Julius Caesar*, Act III, scene 2.

What is the most desirable end? In *New York Times Co. v. Sullivan*,²⁰ Justice Brennan refers to “our profound commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” In *Butts*¹ the court stated that even as to public figures “our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of ‘public officials.’” The people of any country, but especially of a democracy, must be thoroughly informed on all issues. Justices Black and Douglas insist that our forefathers saw this and accordingly placed in the Constitution these absolute privileges to criticize and comment and even to publish false facts, known to be false.

Our forefathers knew from experience how governments encroached on peoples’ rights. Even in Shakespeare’s day, there was no bill of rights. In fact a contemporary of his, Sir Edward Coke, was the leader in the movement to make kings observe the laws. He fought for the Petition of Rights in 1628, but the Petition itself did not get recognition until 1689. About the same time, 1688, Pufendorf in Vienna was publishing his monumental work on natural law in which he states that to make a king subject to law is to deny his kingship. So the Bill of Rights was in effect a dike to prevent the overflow of autocratic power. Hungary, Czechoslovakia, East Germany, Poland, and the new edicts of Franco tell us about the great need of checking autocratic power today. The people must be informed. Justice Black is probably right. Our forefathers must have meant it when they said that “no laws should be passed.”

The writer has special interest in *New York Times* because the court relied on an opinion written by a great Kansas jurist in the year 1908.² Justice Burch of Kansas was a most

²⁰. 376 U.S. 254, 11 L.Ed.2d. 686, 84 S.Ct. 710, 95 A.L.R.2d 1412 (1964). ². *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281 (1908).

¹. 388 U.S. 130, 18 L.Ed.2d 1094, 87 S.Ct. 1975 (1967).

scholarly jurist. ^{Morgan: Torts} His opinion in *Coleman* is long and thorough. It is a treatise on libel. It was a case of misstatement of a fact by a newspaper about a candidate for state office. Justice Burch held that there was no cause of action unless actual malice was proved. Justice Brennan in *New York Times* quotes him at length. Professor Llewellyn in his last work, *The Common Law Tradition*, refers to Burch as one of the great jurists of the country. In the early thirties the American Law Institute was writing what are sections 598 and 606 of the Restatement of Torts, and Justice Burch was a member of the committee working with the Reporter, who at that time was Professor Bohlen of Pennsylvania. Justice Burch suggested to this writer that he would appreciate any help possible in getting the *Coleman* case approved as the acceptable principle for the Restatement. This writer demurred for two reasons. First, he preferred the majority rule which is now section 598; and, second, it would have meant opposing the advocate of the accepted rule, the late Learned Hand, distinguished federal judge. It is sad that *New York Times* did not come about before Burch's death. It was Burch's position that the public official cases are governed by the fundamental principle that anyone with an interest to protect should be privileged to misstate facts honestly to another person with the same interest. A church member can speak falsely about a member to another member as long as he is not motivated by malice. So a citizen should be likewise privileged to speak to another citizen about a third person who aspires to perform public functions. One quote from Burch—"In measuring the extent of a candidate's profert of character, it should always be remembered that the people have good authority for believing that grapes do not grow on thorns, nor figs on thistles." It is fun to ask a law class if that means anything. A logician can make observations. Burch's opinion was prophetic. The case should be returned to the casebooks.

The applicability of the great privilege was again before the Supreme Court of the United States in *St. Amant v. Thomp-*

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son.³ St. Amant was a candidate for office in Louisiana, and

in the course of a campaign speech he read a series of questions that he had put to a member of the Teamsters' Union and the answers given. The answers implicated Thompson, a deputy sheriff from Baton Rouge. Thompson immediately brought suit, claiming that the publication imputed "gross misconduct and inferred conduct of a most nefarious nature." Thompson recovered judgment for \$5,000; the intermediate Louisiana court of appeal reversed because the record did not show that St. Amant had acted with actual malice, as required by *New York Times*. The highest court of Louisiana reversed again on the theory that there was an adequate showing of reckless activity to satisfy the *New York Times* rule.

The Supreme Court of the United States held that the privilege prevented recovery as there was no adequate showing of malice; Justice Fortas wrote a vigorous dissent, as he did in *Time, Inc. v. Hill*,⁴ a case involving the right to privacy, insisting that there were still remnants of individual rights which were entitled to recognition.

We are now ready to glance at the one California case involving these principles. *Cepeda v. Cowles Magazines*⁵ was a suit brought by the well-known baseball star, formerly with the San Francisco Giants and the St. Louis Cardinals. He sued Cowles Publishing Co. for saying in its magazine, *Look*, that Cepeda was in "doghouse status" with his bosses, was not a team man and blamed everybody but himself when things went wrong. The federal trial judge in San Francisco had ruled for the defendant, entering summary judgment. Plaintiff appealed and the U. S. Court of Appeals reversed, stating that what was written was not comment but factual statements which were actionable *per se* if not privileged. Hence no allegation or proof of special damages was necessary. This was not comment or criticism which would have been more easily privileged. The case was sent back for trial.

3. 390 U.S. 727, 20 L.Ed.2d 262, 88 S.Ct. 1323 (1968).

4. 385 U.S. 374, 17 L.Ed.2d 456, 87 S.Ct. 534 (1967).

5. 392 F.2d 417 (9th Cir. [1968]).

The jury ^{Moreau: Torts} found for the defendant, and the case went up for a second appeal.

Since the matter involved stating facts about Cepeda, the only question was whether there was a privilege to state false facts about a prominent baseball player. There was such a privilege under *Butts*, but recovery could be made if plaintiff could show actual malice. Cepeda was a public figure and *Butts*, in between the two trials, extended the same privilege to publication with respect to public figures as to public officials. So the *Butts* decision cast real hurdles for Cepeda to overcome. He was not able to establish that the defendant had acted with actual malice or that he had knowledge of falsity or reckless disregard for whether the statement was true or false. In *Butts* a slightly less rigid showing needed to be made than in *New York Times*, for it was sufficient for the plaintiff to win if he showed that the defendant had been guilty of “highly unreasonable conduct constituting an extreme departure from standards of investigating and reporting ordinarily adhered to by responsible publishers.” At any rate when the case came up for trial, *Butts* had been decided so the “higher law” had come into the picture.

Because *Butts* had just been decided, in the second trial Cepeda now had to show facts meeting the *Butts* standards recited above. The jury found for the defendant and on appeal to the circuit court, the judgment was affirmed. Judge Madden, who wrote the opinion, gave a concise and thorough resume of the situation. He noted how Justice Frankfurter had indicated only 12 years before that the federal amendments had no bearing on libel cases, but that now, under the cases reviewed, the burden was on the plaintiff to prove actual malice or extreme departure from standards of investigation and reporting on the part of the defendant, and that the evidence supported the jury’s finding that plaintiff had failed to establish his case. His summary as to how the Supreme Court divided on the issue is concise. The Chief Justice would use only the test given in *Times v. Sullivan*; Justices Black and Douglas would make the privilege absolute. Madden refers to the *Butts* test as relatively liberal in the direction of recovery. He points out that the instruction based on Justice Harlan’s

language in *Butts* should not have been given since Harlan's proposed test had been rejected by the majority of the Supreme Court. So we now have new privileges for the press.

In *Hayward v. Watonsville Register-Pajaronian and Sun*,⁶ we have an illustration of the privilege of a newspaper to make "a fair and true report in a public journal" of a judicial proceeding. This is the language of part of section 47 of the Civil Code, which lists the publications that are privileged. Here the newspaper published a report on Hayward based on police and FBI reports, revealing that: (1) Hayward was arrested on a warrant, issued by the police department, charging grand theft of \$3300 worth of furniture; (2) police found \$3300 worth of furniture that had not been charged to him; (3) the store of which Hayward was manager had moved to repossess some furniture which he had charged; and (4) police records show that Hayward previously served a term in a Kansas prison on a check charge. Hayward brought suit for libel, alleging that not one of these statements was true.

There are two questions involved. First, was this a report of a judicial proceeding and, second, was it a "fair and true" report? The courts take a broad view of the meaning of "judicial proceeding."⁷ In *Hayward*, the court cites cases where the oral statements of district attorneys, sheriffs, and police officers were held to be qualifiedly privileged under Civil Code, section 47; therefore crime reports of a police department and FBI identification records should also be privileged under the code.

The FBI report showed:

<i>Name and Number</i>	<i>Arrested or Received</i>	<i>Charge</i>	<i>Disposition</i>
Leslie Hayward	7-5-39	Forgery	1 to 10 years in the K.S.I.R. paroled.

6. 265 Cal. App.2d —, 71 Cal. Rptr. 295 (1968).

7. *Albertson v. Raboff*, 46 Cal.2d 375, 295 P.2d 405 (1956); *Kurata v. Los Angeles News Publishing Co.*, 4

Cal. App.2d 224, 40 P.2d 520 (1935). "A defendant need not justify every word of the alleged defamatory matter; it is sufficient if the substance, the gist, and sting of the charge is justified."

Actually the ^{Morreau: Torts} facts were: Hayward pleaded guilty to a charge of forgery in the second degree; he was sentenced to a term of not less than ten years at hard labor in the Kansas State Industrial Reformatory; he was placed in the custody of the sheriff of Rice County until he could be taken to the reformatory; and later that same day he applied for a parole or probation which was granted to take effect on July 24. There was no showing that he spent any part of the eleven-day period following the trial in the Kansas State Industrial Reformatory.

The court found that what the defendant said about the plaintiff based on this FBI record was a "fair and true report of a judicial proceeding" within the meaning of Civil Code section 47.

It should be noted that for each item, the defendant indicated the *source* of the information. This is very important. The court emphasized such words as "police said" and "police records show." Instead of the word "forgery" the defendant used the words "check charge." This is a distinction without a difference. But certainly it is important to indicate the source in each case.

Additional phases of tort law that might have been examined would include contributory negligence and assumption of risk, fraud, right to privacy, conversion, and false imprisonment. Some of these have been touched upon in connection with problems to which they were related. They can be given more emphasis in future articles.

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