

ACCIDENT PRONENESS AND ACCIDENT LAW

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TORT law is obviously much concerned with human conduct that produces accidents. For the past thirty years men working in fields such as industrial psychology have been making studies and finding things out about this conduct. To date no one has tried to point out in any systematic and detailed way what implications these studies and findings may have for tort law in accident cases.

I. STUDIES ON ACCIDENT PRONENESS

For more than a quarter century there has been in the psychological literature a concept that some individuals are more likely to have accidents than are people at large.¹ Their greater liability to accidents has been called "accident proneness," which "may be regarded as a combination of human abilities which make a person highly proficient in bringing about accidents."² The implications of this concept may best be brought out by casting its treatment into three sections:³ (A) Are there accident-prone individuals? (B) What causes accident proneness? (C) What can be done to decrease the number of accidents due to accident proneness?

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¹ In dealing with the psychological material that follows the authors are simply trying to describe the studies and findings of a group of men working along the line suggested by the text. There are of course diverse schools of thought among psychologists. We shall not try to resolve conflicts which fall within their peculiar field of competence. We believe the existence of these conflicts does not impair the conclusions drawn here.

² N. MAIER, *PSYCHOLOGY IN INDUSTRY* 350 (1946).

Note that the word "liability" as used in the psychological literature has an entirely different meaning from its usual one in legal literature. But both meanings are familiar enough, and with a little attentive care the reader will readily be able to keep the strands of definition separate. For the trouble it takes to do this, we apologize; but the trouble does not seem nearly so great as the burden of learning a new and entirely unfamiliar vocabulary.

³ Cf. Rawson, *Accident Proneness*, 6 *PSYCHOSOMATIC MED.* 88 (1944).

A. *Are There Accident-Prone Individuals?*

The distribution of accidents among the population is not according to chance. Bristol estimated that ten per cent of the working population may be responsible for seventy-five per cent of the accidents.⁴ Blain found that four per cent of all drivers accounted for one third of automobile accidents.⁵ These and many other studies point to one uncontrovertible fact: A small portion of the population sustains a large proportion of the accidents.

The earliest attempt to explain the distribution of accidents was made by Greenwood and Woods in 1919. They tested three hypotheses as to the distribution of accidents among a homogeneous group of women factory workers: (1) that accidents are distributed according to chance; (2) that all workers start with an equal accident propensity but an individual who suffers one accident by chance may in consequence have her liability to accident increased or decreased; (3) that some workers are from the beginning more likely to suffer accidents than others.

After ruling out chance distribution by statistical analysis,⁶ and then comparing the accident distribution of the group for two successive periods, they found that the most tenable explanation was the third theory, that of unequal propensities. This does not mean, of course, that accidents never happen by chance or that having an accident may not make for a predisposition to have more accidents, but merely that some people start with a greater liability to accident than others.⁷ Later research has verified this conclusion.⁸

Other studies make it clear that contrary to widespread popular impression mechanical defects play an insignificant part in causing automobile accidents.⁹ Thus, only 3.5 per cent of all cars

⁴ Bristol, *Medical Aspects of Accident Control*, 107 A.M.A.J. 653, 654 (1936).

⁵ Blain, *The Automobile Accident—A Medical Problem*, 3 J. CRIM. PSYCHOPATHOLOGY 37 (1941); cf. H.R. DOC. NO. 462, PART 6, 75TH CONG., 3D SESS. 1 (1938); Johnson, *Born to Crash*, Collier's, July 25, 1936, p. 28, 60.

⁶ It was found that of 648 women 26 had three to five accidents. On a chance basis only eight women would be expected to have three to five accidents. GREENWOOD AND WOODS, *THE INCIDENCE OF INDUSTRIAL ACCIDENTS UPON INDIVIDUALS WITH SPECIAL REFERENCE TO MULTIPLE ACCIDENTS* (1919).

⁷ H. VERNON, *ACCIDENTS AND THEIR PREVENTION* 28-29 (1936).

⁸ NEWBOLD, *A CONTRIBUTION TO THE STUDY OF THE HUMAN FACTOR IN THE CAUSATION OF ACCIDENTS* (1926).

⁹ Canning, *Motor Vehicle Inspection Records Show that Mechanical Defects Play Small Part in Highway Accidents*, 74 AUTOMOTIVE INDUSTRIES 336 (1936).

involved in accidents have been shown to have mechanical defects, and in only 0.25 per cent of cars involved in accidents can it be shown that the defect played a part in causing the accident. And mechanical inspection of vehicles has yielded disappointing results in promoting safety.¹⁰

In any accident situation there are two variables: the accident potential of the situation and the reaction of the individual to that potential.¹¹ The early experimental work was done on homogeneous groups of workers to rule out as much as possible the working of the first factor. Later studies, however, tried to determine just how much weight should be given to the accident potential of the situation, particularly in traffic accidents which occur under conditions so varied in point of danger. This research showed that, while high accident potential increases the likelihood of accidents for all drivers, the differential between the rates of the accident-free and the accident-prone groups remains.¹² A high accident potential and an accident-prone driver make for a high accident expectancy. A high accident potential and a normal driver make for an accident possibility.

A warning should be noted here: accident proneness means a predisposition to have an undue number of accidents, but the high-accident group may contain some individuals who are not accident-prone.¹³ The problem has been to see whether there are any traits, or groups of them, which are often enough asso-

¹⁰ See Cardall, *Psychological Factors in Accident Prevention*, 26 PERSONNEL J. 288 (1948) ("It is not the machine which should be regarded as hazardous so much as the individual who is operating that machine"); cf. FARMER AND CHAMBERS, A STUDY OF ACCIDENT PRONENESS AMONG MOTOR DRIVERS (1939); U.S. BUR. MINES REP. No. 6367, 3 (1930); Bingham, *Psychology and Highway Safety*, 31 SCIENTIFIC MONTHLY 552, 553 (1930) (three fourths to nine tenths of all automobile accidents are caused by human failure); Miles, *The Psychology of Accidents*, 5 J. NAT. INST. IND'L PSYCH. 183 (1930); Myers, *Human Factor in Accidents*, 8 HUMAN FACTOR 266 (1934).

¹¹ See Farmer, *Accident Proneness and Accident Liability*, 14 OCCUPATIONAL PSYCH. 121 (1940).

¹² See Forbes and Kraft, *A New Theory of Traffic Accident Incidence*, 38 PSYCH. BULL. 531 (1941) (complete dissimilarity of the accident-exposure curve and the accident curve shows that exposure to accident had little to do with who had the accidents). But see Williams, *Accidents on the Roads*, 19 PUBLIC ROADS 77, 78-79 (1938) (four out of five accidents occur on dry roads in clear weather and while the car is traveling straight ahead).

¹³ See, e.g., FARMER AND CHAMBERS, A PSYCHOLOGICAL STUDY OF INDIVIDUAL DIFFERENCES IN ACCIDENT RATES 3 (1926). And, conversely, an occasional accident-prone person may escape actually having accidents during any period studied.

ciated with high accident frequency to furnish a reliable indication of the existence of the predisposition.

B. *What Causes Accident Proneness?*

Tests for detecting accident proneness follow a general pattern. Individuals are selected who have accident rates appreciably higher than the mean for the population studied. The whole sample population is then given a test to measure some specific characteristic or ability, and a correlation is made between the test scores and the accident records of the two groups. If there is a significant difference in performance on the test between the two groups the characteristic or ability measured is probably connected with accident proneness. Such factors fall conveniently under five headings: (1) habits and skills, (2) physical characteristics, (3) psychomotor characteristics, (4) mental characteristics and attitudes, and (5) age and experience.¹⁴

Habits and Skills.—Defective operating habits of motor vehicle drivers may easily render them accident-prone. A simple example will suffice.¹⁵ During his service a bus driver had had eighteen accidents which the company after investigation had charged to the fault of the other driver. An analysis of the accidents, however, showed them all to be of the same kind — another driver had run into the left rear fender of the bus. Observation disclosed that this operator drove his bus close to the curb until he came to a parked car. He would then signal in the prescribed manner and swing the bus out into traffic. The driver of the car behind would miss the signal and hit the left rear fender of the bus as it swung in front of him. When the driver was trained to ease out into traffic rather than swing out, accidents charged to the “carelessness” of others ceased.

Physical Characteristics.—After a thorough analysis one investigator found a significant correlation between accident proneness and the results of comprehensive visual tests.¹⁶ With

¹⁴ Miles, *supra* note 10, at 186, would classify accident-prone automobile drivers under the headings of physical factors, mental factors, and operating defects (habits and skills). Ogilvie, *Abstract of Discussion on Accident Proneness*, 107 A.M.A.J. 655 (1936), would classify accident-prone industrial workmen under the headings of physical defects, job misplacement, and the uneducable.

¹⁵ Bingham, *The Accident-Prone Driver*, 6 HUMAN FACTOR 158 (1932).

¹⁶ Stump, *A Statistical Study of Visual Functions and Industrial Safety*, 29 J. APPLIED PSYCH. 467 (1945); see J. TIFFIN, *INDUSTRIAL PSYCHOLOGY* 293 (1942) (use of four critical vision tests would reduce the lost-time accident rate by at least 25%).

the exception of vision, however, most of the studies show little correlation between physical characteristics and accident rate.¹⁷

Psychomotor Characteristics.—Most testing of accident proneness has involved stimulus-response measurements.¹⁸ Significant positive correlations have been found, but these correlations have been small in most cases. The reason for this may be that isolated characteristics have generally been tested, while the cause of accident proneness is a complex of relationships which is more than the mere sum of the individual factors.¹⁹ Thus, sensori-motor skills show a correlation with the accident rates of skilled but not of unskilled industrial workers.²⁰ And poor co-ordination may be associated with accident rate only when a time limit is put on the test.²¹ Perhaps the most significant experiment along this line revealed only a slight correlation between scores on perception tests and accident rate, and between scores on tests of co-ordination and accident rate. The difference between the scores on the two tests, however, showed a high correlation with accident rate. In other words, "the person who reacts quicker than he can perceive is more likely to have accidents than the person who can perceive quicker than he can react."²²

Mental Characteristics and Attitudes.—In a study made in the

¹⁷ Adler, *The Psychology of Repeated Accidents in Industry*, 98 AM. J. PSYCHIATRY 99 (1941) (organic disease); Johnson and Lauer, *A Study of the Effect of Induced Manual Handicaps on Automotive Performance in Relation to Reaction Time*, 21 J. APPLIED PSYCH. 85 (1937) (manual disability).

¹⁸ Farmer, *The Study of Personal Differences in Accident Liability*, 3 J. NAT. INST. IND'L PSYCH. 432, 433-34 (1927). Tests for accident proneness are legion. They range from Brintnall, *A Study of Some Driving Habits of Commercial Drivers*, 14 J. Soc. PSYCH. 159 (1941) (automobile acceleration rates) to Kroeber-Keneth, *Unfallneigung und Handschrift*, 14 ZEITSCHRIFT FÜR MENSCHENKUNDE 17 (1938) (handwriting analysis). There are psychophysical tests for reaction time, resistance to distraction, vigilance, visual co-ordination, vision, judgment of relative size of near and distant objects, judgment of speeds. See Johnson, *Detection and Treatment of Accident-Prone Drivers*, 43 PSYCH. BULL. 489 (1946); Miles and Vincent, *The Institute's Test for Motor Drivers*, 8 HUMAN FACTOR 245 (1934).

¹⁹ Predictions of accident frequency may be based on the composite scores on a number of tests, or on an analysis of the accident records, or preferably on a combination of the two. However, the most that has actually been done to date is to divide the tested population into classes with different accident propensities. Johnson, *supra* note 18, at 520-21.

²⁰ Chambers, *A Preliminary Inquiry into the Part Played by Character and Temperament in Accident Causation*, 85 J. MENTAL SCIENCE 115 (1939).

²¹ Lahy and Korngold, *Recherches expérimentales sur la psychologie des sujets qui se blessent fréquemment au travail*, 34 JOURNAL DE PSYCHOLOGIE 291 (1937).

²² Drake, *Accident Proneness: A Hypothesis*, 8 CHARACTER AND PERSONALITY 335, 339-46 (1939).

Thirties in connection with the development of psychosomatic medicine, hospital patients were separated into different classifications according to the disease for which they were admitted. Those with fractures were examined to see whether they differed appreciably in mental characteristics from the general patient population.²³ The findings of this study and others²⁴ show that the personality traits of the accident victim conformed to a pattern not observed among patients admitted for other causes. As a group the fracture patients had a low illness record, high previous accident rate, small families, and a high percentage of childless marriages. A relatively large number had long-established anxiety hysteria, having had agoraphobia and claustrophobia and particularly fear of falling. The members of the group were restless and given to feverish activity under emotional stress. Normal in appearance and with few neurotic traits, they were casual about feelings and personal problems. There was less interest in intellectual values and greater inclination to make snap judgments.

One of the outstanding characteristics of the fracture group was the high resistance to authority which resulted in suicide tendencies or the need for self-punishment, either of which were fulfilled by having accidents. When the pressure from authority or aggressive hostility had reached an intolerable point, members of the group were more apt to engage in violent activity than to try to solve the problem on a rational basis. This suggests that many accidents are symptomatic behavior; in fact, "one is struck by the number of cases in which apparent accidents are not accidents at all."²⁵

In all people there are cycles of exhilaration and depression. Although the period of depression usually lasts for not more than

²³ Dunbar, Wolfe, and Rioch, *Psychic Component in Fracture*, 93 *AM. J. PSYCHIATRY* 649 (1936), 95 *id.* 1319 (1937).

By using "mental" as an element in causation of accident proneness the authors do not wish to imply that they subscribe to a mind-body separation. The word is merely one of convenience under which will be classed such factors as intelligence and emotional causes.

²⁴ H. DUNBAR, *PSYCHOSOMATIC DIAGNOSIS* 245-47 (1943); Bingham, *Individual Differences in Industrial Personnel*, 15 *EUGENICAL NEWS* 19, 21 (1930); Miles, *supra* note 10, at 184-85.

²⁵ Dunbar, Wolfe, and Rioch, *Psychic Component in Fracture*, 93 *AM. J. PSYCHIATRY* 649, 676 (1936). The initial reaction of the accident victim was a feeling of guilt, but this was quickly repressed, and the victim disclaimed all responsibility. This has an obvious bearing on the reliability of spontaneous statements made by a participant at the scene of an accident.

twenty per cent of the time, one investigator found that fifty per cent of industrial accidents happened while the workers were depressed.²⁶ In addition, industrial output was 6.8 per cent higher when the workers were not in the depressed phase.²⁷

According to the accepted view, a certain minimum of intelligence is necessary if the worker is to be accident-free; but, above this minimum, intelligence has little or nothing to do with accident proneness.²⁸

Age and Experience.—Automobile drivers under twenty-five have a disproportionate number of accidents.²⁹ This is due to attitudes toward driving as well as to lack of skill; natural exuberance and the wish to test one's ability are not conducive to safety. But, since these are attitudes shared by most of us and are usually tempered by time, they belong on the periphery of the concept of accident proneness. The inexperienced also have more than their share of accidents,³⁰ but inexperience like youth is common to many and is temporary. Moreover, among beginners the same division is to be found between those who are relatively accident-prone and those who are relatively accident-free.³¹

Significant for their absence from the causes of accident proneness are "carelessness" or "fault." "Recent medical research has shown that 'accident proneness' may be an innate characteristic of some individuals and a personal phenomenon independent of any question of responsibility, conscious action or blameworthiness."³²

²⁶ Hersey, *Emotional Factors in Accidents*, 15 PERSONNEL J. 59, 60 (1936).

²⁷ Hersey, *Rate of Production and Emotional State*, 10 PERSONNEL J. 355, 357 (1932).

²⁸ Chambers, *supra* note 20, at 118. *Contra*: Henig, *Some Psychological Aspects of Industrial Accident Prevention*, 64 SAFETY ENGINEERING 61 (1932).

²⁹ H.R. Doc. No. 462, PART 6, 75th Cong., 3d Sess. 2 (1938); Johnson, *Biographical Methods of Detecting Accident-Prone Drivers*, 35 PSYCH. BULL. 511, 512 (1938); Raphael, Labine, Flinn, and Hoffman, *One Hundred Traffic Offenders*, 13 MENTAL HYGIENE 809, 811 (1929); Forbes, *Age Performance Relationships among Accident-Repeater Automobile Drivers*, 2 J. CONSULTING PSYCH. 143 (1938).

³⁰ See HERBERT MOORE, *PSYCHOLOGY FOR BUSINESS AND INDUSTRY* 359 (2d ed. 1942); J. TIEFFIN, *INDUSTRIAL PSYCHOLOGY* 294-97 (1942).

³¹ FARMER AND CHAMBERS, *A STUDY OF ACCIDENT PRONENESS AMONG MOTOR DRIVERS* 9 (1939).

³² Bristol, *Medical Aspects of Accident Control*, 107 A.M.A.J. 653, 654 (1936). We do not take those with such "innate characteristics" to be the equivalent of untrainables.

C. *What Can Be Done to Decrease the Number of Accidents Due to Accident Proneness?*

The hypothesis of accident proneness has met the pragmatic test — action based on the analysis of tests and past accident records has consistently led to decrease in the future accident rate.³³ This action may follow one of several lines: therapeutic work with accident-prone employees may be undertaken; they may be shifted to jobs of low accident potential; or the accident-prone may be excluded in the hiring and firing of employees. The drastic method of exclusion runs into serious collateral difficulties, since all of those who are accident-prone — about four per cent of the total population — can scarcely be kept out of work and off the roads.

The first two methods, however, have often been used effectively³⁴ alone or in combination. A trucking concern, for example, which employed many drivers and covered several million miles a year, analyzed the accident records of all its drivers to determine which were accident-prone. The accident-prone drivers were then shifted to departments with low accident potential and their places filled by new drivers whose records were kept under similar scrutiny. At the end of seven years, the company found that upon shifting one eighth of the drivers it had decreased its accidents by 78 per cent while the total mileage had increased slightly.³⁵ In this connection it should be pointed out that the concept of classes of unequal liability is especially useful to in-

³³ Various batteries of tests have been put into operation and have been found reliable enough to justify commercial use. See, e.g., FARMER, CHAMBERS, AND KIRK, TESTS FOR ACCIDENT PRONENESS 28 (1933); Miles and Vincent, *The Institute's Test for Motor Drivers*, 8 HUMAN FACTOR 245, 246 (1934); cf. Laby and Korngold, *Recherche expérimentale sur les causes psychologiques des accidents du travail*, COMPTES RENDUS DE VIII^e CONFÉRENCE INT'L DE PSYCHOTECHNIQUE 140-47 (1935). But see Slocombe, *The Psychology of Safety*, 20 PERSONNEL J. 42, 105 (1941).

³⁴ The efficacy of the first method was reported by Myers, *The Human Factor in Accidents*, 8 HUMAN FACTOR 266, 269-70 (1934) (restaurant breakage reduced 53% by retraining). See also Bingham, *Individual Differences in Industrial Personnel*, 15 EUGENICAL NEWS 19, 23 (1930) (individual attention to high-accident employees cut accident rate 41% in two years); Drake, *The Prediction and Control of Accidents*, 51 SCIENTIFIC MONTHLY 74, 76 (1940) (workers hired on basis of estheto-kinetic co-ordination scores had 70% less accidents than others); Miles, *The Psychology of Accidents*, 5 J. NAT. INST. IND'L PSYCH. 183, 186 (1930) (accidents cut 42.7% in one industry by retraining).

³⁵ Johnson, *Born to Crash*, Collier's, July 25, 1936, p. 28. The generalized character of accident proneness was illustrated by the fact that the accident rates rose in the departments to which the accident-prone drivers were shifted.

insurance companies, large employers, and others who have the opportunity to work on an actuarial basis.³⁶

II. ACCIDENT PRONENESS AND ABSOLUTE LIABILITY

How do the results of these studies bear on the desirability of retaining fault as the cardinal principle of civil liability in accident cases? Accidents and their consequences today pose a serious social problem.³⁷ Its solution calls for two things: (1) measures which will cut down accidents; (2) measures which will minimize the bad effects of those accidents which do happen.³⁸ These measures must not, however, cost society too much in other directions; they must not, for example, unduly inhibit valuable but dangerous activity.³⁹ Moreover, they must on the whole satisfy the ethical or moral sense of the community, its feeling of what is fair and just.⁴⁰

Let us now examine the implications of the recent studies for the fault principle in the light of the possible objectives which that principle should serve.

The Moral Objective.—The fault principle is sought to be justified in part by the inherent fairness of imposing liability on him who has been guilty of some personal moral shortcoming (here generally negligence) and of shielding from liability the man who has been free from blame.⁴¹ Of course, the legal standard

³⁶ See Cardall, *Psychological Factors in Accident Prevention*, 26 PERSONNEL J. 288, 293 (1948) ("in modern industrial operation, ignorance of methods so readily and cheaply available is no excuse for accidents attributable to psychological and physiological deficiencies").

³⁷ During 1948 approximately 98,000 people were killed and 10,300,000 injured in the United States by accident. The direct economic loss has been estimated at \$7,400,000,000 (including \$715,000,000 loss by fire). NATIONAL SAFETY COUNCIL, ACCIDENT FACTS 10 (1949 ed.).

³⁸ See HULVEY AND WANDEL, WORKMEN'S COMPENSATION AND AUTOMOBILE LIABILITY INSURANCE IN VIRGINIA I (1931); cf. COLUMBIA UNIV. COUNCIL FOR RESEARCH IN SOCIAL SCIENCES, REP. COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS [hereinafter COLUMBIA REPORT] 55, 66, 219, 222 (1932); Corstvet, *The Uncompensated Accident and Its Consequences*, 3 LAW & CONTEMP. PROB. 466 (1936).

³⁹ See SALMOND, TORTS 439 (10th ed. 1945); cf. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 57-58 (1928); GREEN, JUDGE AND JURY 76-77 (1930).

⁴⁰ The possible objective of inflicting punishment does not play an important part in this field of tort law. See PROSSER, TORTS 28 (1941); cf. SALMOND, TORTS 18.

⁴¹ See Ames, *Law and Morals*, 22 HARV. L. REV. 97, 100 (1908) ("the ethical quality of the defendant's act has become the measure of his liability instead of the mere physical act regardless of the motive or fault of the actor"); SALMOND, TORTS 18 *et seq.*; Smith, *Tort and Absolute Liability—Suggested Changes in*

of conduct is largely external and does not take into account the actor's personal equation with the result that legal fault does not entirely coincide with moral fault. But apologists of the present system justify it on the ground that by and large the two do coincide.⁴² The tendency of the recent studies, however, has been to cut down the importance of personal moral shortcoming as a factor in causing accidents and to do so in many cases where the "layman's common sense" would find something to blame.⁴³ To be sure, personal fault is not entirely ruled out,⁴⁴ but the scope of personal blameworthiness has been very drastically narrowed. If, then, the fault principle is carried to its logical conclusion — so that liability is imposed only where there is personal blame — liability will become more and more restricted.

The Securing of Compensation to Accident Victims. — The present system recognizes this too as one of its objectives and awards compensatory damages whenever that may be done without offending its premises as to morality, as by making a blameless man pay damages, or to expediency, as by unduly inhibiting desirable conduct.⁴⁵ But we have just seen how the recent studies have narrowed the sphere of culpability and how this would cause a great restriction of liability if many accident-prone but morally blameless people are not to be held liable. This would mean, in turn, that a greatly increased number of victims would go uncompensated. The recent studies thus emphasize sharply the essential conflict between refining the fault principle and compensating accident victims.⁴⁶ Of course, as we shall see, the existing rules are now and could continue to be administered so as to *conceal* this dilemma, *e.g.*, by the use of an external standard

Classification, 30 HARV. L. REV. 241, 259 (1917). *But cf.* Seavey, *Speculations as to "Respondeat Superior"* in HARV. LEGAL ESSAYS, 433, 437 *et seq.* (1934).

⁴² See POLLOCK, TORTS 8 (14th ed. 1939); Smith, *supra* note 41, at 254-55, 262.

⁴³ This is the tenor of most of the studies listed in Part I, *supra*; note, *e.g.*, the kinds of factors listed as causing accident proneness. See also N. MAIER, PSYCHOLOGY IN INDUSTRY 354 (1946); Myers, *Human Factor in Accidents*, 8 HUMAN FACTOR 266, 279 (1934).

⁴⁴ An occasional student finds more room for "fault" than do most. See, *e.g.*, Henig, *supra* note 28.

⁴⁵ GREEN, JUDGE AND JURY 76-77, 142 (1930); POLLOCK, TORTS 47 (Excursus A, by Landon).

⁴⁶ Quite independently of the recent studies there is a very strong case indeed for the social importance of compensating accident victims. See materials cited in note 38 *supra*; Ballantine, *A Compensation Plan for Railway Accident Claims*, 29 HARV. L. REV. 705 (1916); Marx, *Compulsory Compensation Insurance*, 25 COL. L. REV. 164 (1925).

of conduct for defendants; but this goes a long way towards an abandonment of the moral justification of the fault principle.⁴⁷

That does not, of course, end the matter, for even if personal culpability should be disregarded altogether, the present system could perhaps be justified on the ground of expediency. The claims of the injured innocent are meritorious and will be satisfied where the injury is caused by *unreasonably dangerous* conduct, for such conduct, by hypothesis, involves danger out of proportion to its social worth.⁴⁸ But the exaction of compensation from one whose conduct is *not unreasonably dangerous* would impose an undue burden on desirable, affirmative activity which would be out of proportion to the benefit conferred on victims. The line which separates these two kinds of conduct, then, is the expedient one to draw between liability and nonliability for injury, since it combines a considerable incentive towards safety and a minimum of interference with desirable enterprise. In view of this possible contention,⁴⁹ let us see what implications the recent studies have for the argument from expediency.

The Deterrence of Conduct which Causes Accidents.—The results of the recent studies will themselves tend to promote safety and reduce accidents under *any* system of liability. But we believe this tendency would be stronger under a system of absolute liability than under a continuation of the fault principle. In the

⁴⁷ Just as the dilemma could be concealed by the increasing use of fictions, *i.e.*, the continued use of the *vocabulary* of ethics to denote concepts which become increasingly amoral, so also could the withdrawal and abandonment be concealed. But none of this could alter the underlying fact that

Words strain,
Crack and sometimes break, under the burden,
Under the tension, slip, slide, perish,
Decay with imprecision, will not stay in place,
Will not stay still.

T. S. Eliot, *Burnt Norton*

in COLLECTED POEMS 1909-1935, 211, 219 (1947).

While we do not believe that accident law should abandon a moral objective, we do feel that the present system largely lacks the moral justification claimed for it. Cf. Seavey, *Speculations as to "Respondeat Superior"* in HARV. LEGAL ESSAYS 433, 442 (1934). Our conclusion from this, however, is *not* that the "fault" basis should be perpetuated without regard to morals, but that there should be a shift in the direction of emphasizing social as against individual morality. Cf. PROSSER, TORTS 21 (1941); Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 233 (1914). But see Pound, *The Involuntary Good Samaritan*, Fortune, Nov., 1949, p. 171.

⁴⁸ RESTATEMENT, TORTS § 291, comment *a* (1934); Seavey, *Negligence — Subjective or Objective?*, 41 HARV. L. REV. 1, 7 (1927); Terry, *Negligence*, 29 HARV. L. REV. 40, 42 (1915).

⁴⁹ HOLMES, THE COMMON LAW 94-96 (1881); SALMOND, TORTS 436.

first place, the recent studies emphasize the extent to which large units, such as transportation companies, government, and insurance companies, are in a strategic position to reduce accidents. Conversely, they emphasize the relatively insignificant part which the individual's conscious free choice plays in causing or preventing accidents.

Secondly, a system of absolute liability tends to increase the pressure towards accident prevention on large groups and enterprises, where we have seen it will do the most good, rather than on the individual, where it will do relatively little good. This is so for three reasons: (1) large units are involved in many accidents and appear often as defendants, rarely as claimants; (2) even where the accident is caused by an individual while acting for himself, in his aspect as potential defendant he is increasingly becoming covered by liability insurance, so that the pressure of increased liability is put in the first instance on the insurance company;⁵⁰ (3) the abolition of the defense of contributory negligence — which usually accompanies a shift to absolute liability — clearly adds a further incentive to safety on the part of perennial defendants, and if there is a corresponding loss of incentive (which is not at all clear) it is on the part of the individuals who are potential accident victims.

Since the large business or governmental unit is in a far better position to reduce accidents than is the isolated individual, and since absolute liability puts added pressure to reduce accidents on the large unit, it follows that absolute liability will be a greater spur to safety than a system of less strict liability. "If the law requires a perfect score in result, the actor is more likely to strive for that than if the law requires only the ordinary precautions to be taken" ⁵¹ Available facts substantiate theory rather dramatically. Not only were the recent studies themselves undertaken by large units, but they were in the main undertaken because of the increased liability put upon such units by workmen's compensation acts.⁵² Moreover, the drop in the industrial fa-

⁵⁰ Cf. James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948). The uninsured driver seldom pays. See COLUMBIA REPORT 28-29 (1932).

⁵¹ Seavey, *Speculations as to "Respondeat Superior"* in HARV. LEGAL ESSAYS 433, 447 (1934); cf. *Arizona Employers' Liability Cases*, 250 U.S. 400, 432-33 (1919) (Holmes, J., concurring).

⁵² Moore, *op. cit. supra* note 30, at 378, says of workmen's compensation statutes, "The result has been an increased interest in safety rules and in discovering

tality rate since the passage of those acts has been truly remarkable — it was cut in half between the two wars.⁵³

The Encouragement or Discouragement of Enterprise. — Perhaps the heaviest artillery which the proponents of the fault principle can muster is the contention that any stricter rule of liability will discourage affirmative activity and unduly fetter desirable enterprise. If this were true, it would constitute a pragmatic objection to a scheme of absolute liability which would certainly deserve serious consideration. But like so many appeals to practical common sense this one probably rests on no solid foundation of fact but simply on a bald assertion of plausible error. If a system of absolute liability involves fixed limitations on the amount to be recovered, as in the case of workmen's compensation, it may actually cost little or no more than a system where liability is for negligence as determined by a jury without limitation on the amount.⁵⁴ In any event there is small reason to claim that the advent of workmen's compensation has had any effect in checking the phenomenal advances in applied science and industry which have taken place since that time. On the con-

those who are accident prone." See also N. MAIER, *PSYCHOLOGY IN INDUSTRY* 320 (1946). As early as 1929 the Cleveland Railway Company and the Metropolitan Insurance Company were doing work on accident proneness. See METROPOLITAN LIFE INS. CO., *THE ACCIDENT-PRONE EMPLOYEE* (1929).

⁵³ Hall, *Everybody's Job*, 47 *Best's Ins. News* (Fire & Cas. Ed.), March, 1947, p. 85, 96; cf. *America's Loss through Fatal Accidents*, 39 *id.* 769 (1939).

⁵⁴ The comprehensive schemes that have been put forward provide for some such limitation. See, e.g., COLUMBIA REPORT 140-42, 213 (1932); MARX, *The Course of the Personal Suit and a Remedy*, 10 *A.B.A.J.* 493 (1924). But even where stricter liability has not been coupled with any corresponding limitation upon recovery, the additional burden it imposes apparently will not have a material effect in stifling enterprise. Canals in England were early subjected by statute to rigorously strict liability for damage from escaping water, Peak Forest Canal Act, 1794, 34 *GEO.* 3, c. 26, § 15, yet the development of canals went further in England than here. Compare BOWDEN, KARPOVICH, AND USHER, *AN ECONOMIC HISTORY OF EUROPE SINCE 1750*, 115 (1937) with BINING, *THE RISE OF AMERICAN ECONOMIC LIFE* 211-16 (1943). In some states absolute liability was imposed for damage from blasting even though caused by concussion, see SMITH, *Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future*, 33 *HARV. L. REV.* 542, 544 (1920), but there is no indication that the negligence rule elsewhere applied has discouraged building and construction less than strict liability has. Absolute liability obviously has not prevented development in the most familiar fields where it has been tried — aircraft and railroads. See, e.g., MASS. GEN. LAWS c. 160, § 234 (1932) (absolute liability for fires set by railroad engines); UNIFORM AERONAUTICS ACT §§ 5, 11 (1922). These instances also suggest that absolute liability does not unduly retard or clog development; at least they furnish no comfort to those who would assert the contrary.

trary, there is good reason to believe that any pressure which the stricter liability has exerted has spurred the business man's ingenuity to find new devices and new ways of doing things which have at the same time cut down accidents and also increased productive efficiency. The coupling of these results will not be merely sporadic and accidental. Aside from any question of civil liability, accidents are costly to employers and disrupt production, and on the whole the cost of devices and techniques for avoiding them will be more than offset by the elimination of this waste and disruption. The recent studies show that the type of behavior which produces accidents is often inefficient behavior from the point of view of production, even where it does not actually succeed in bringing about an accident; and they illustrate how effective efforts towards safety may serve the end of productivity as well.⁵⁵ More broadly they illustrate how the fear of greater accident liability tends not to discourage but actually to foster the most useful kind of productive activity.

III. ACCIDENT PRONENESS AND THE FAULT PRINCIPLE

For the present, however, liability generally is imposed only when there is some kind of fault; and for the most part contributory fault is a bar to recovery. At least a formal adherence to this system is likely to continue for some little time. So it is worth while to see what implications the recent studies have for the administration of the fault principle even if they point most clearly to its abandonment altogether.

Standard of Conduct of Participants. — Is a person's accident proneness or its opposite to be considered in determining what for him is reasonable conduct? Or is a man to be held to the average of behavior of the community without making any allowance for, let us say, his slow reaction time, or his poor coordination, or his emotionally upset state? This, of course, is an old question in a slightly new form. Is an external standard of care to be taken, or is the individual's behavior to be judged in the light of his own personal equation? On the whole, the law has

⁵⁵ Increased production in nearly every industry is accompanied by a decrease in the accident rate. AMERICAN ENGINEERING COUNCIL, *SAFETY AND PRODUCTION* 76-80 (1928). As we have just seen, the industrial accident rate has dropped sharply during the past decades. During the same period the increase in productivity has been just as striking, Bowden, *Wages, Hours, and Productivity of Industrial Labor, 1909 to 1939*, 51 MONTHLY LABOR REV. 517, 530 (1940).

chosen an objective standard,⁵⁶ but that is not universally so, and there has been a good deal of disagreement lately as to whether greater allowance should be made for the individual's shortcomings.⁵⁷ So the matter will bear re-examination in the light of the recent studies.

The case for the subjective standard rests largely on the assumption that legal fault, as a basis of civil liability, should correspond as closely as possible with personal moral shortcoming. It is an attempt to refine the fault principle.⁵⁸ It is unfair, so runs the argument, to require the blind to see,⁵⁹ the deaf to hear,⁶⁰ or the young child to have the judgment or experience of the adult.⁶¹

The case for the objective standard is more complex. The arguments that have traditionally been given for it are either unconvincing or incomplete. One that is almost always advanced is the practical impossibility of administering any standard which would call for measuring the infinite and imponderable differences among men.⁶² But this argument from convenience — if not from necessity — may perfectly well be coupled with a concession that an individualized standard would be preferable if there were some feasible way to apply it.⁶³ Some have found support for the external standard in the need for uniformity.⁶⁴

Another argument for the objective standard stresses the interests of the injured person. The awkward man's "slips are

⁵⁶ The social insurance concept first appeared in the field of workmen's compensation. See *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 296, 94 N.E. 431, 440 (1911). Recently great strides have been made towards social insurance in some fields where it had formerly been thought out of the question. But as to accidents little further progress has been made. This may be for two reasons: (1) Possibly the law in the accident field is resilient enough to achieve some of the practical effect of social insurance without specifying absolute liability. (2) There have been no pressure groups championing absolute liability.

⁵⁷ See *Charbonneau v. MacRury*, 84 N.H. 501, 153 Atl. 457 (1931); RESTATEMENT, TORTS § 283, comment *e* (1934); Seavey, *Negligence — Subjective or Objective?*, 41 HARV. L. REV. 1, 27 (1927).

⁵⁸ See HOLMES, THE COMMON LAW 112 ("It is the coarseness, not the nature, of the external standard which is objected to."); Ames, *Law and Morals*, 22 HARV. L. REV. 97, 100 (1908).

⁵⁹ *Hefferon v. Reeves*, 140 Minn. 505, 167 N.W. 423 (1918).

⁶⁰ *Furtado v. Bird*, 26 Cal. App. 152, 146 Pac. 58 (1914).

⁶¹ *Johnson v. St. Paul City Ry.*, 67 Minn. 260, 69 N.W. 900 (1897); RESTATEMENT, TORTS § 283, comment *e* (1934).

⁶² HOLMES, THE COMMON LAW 108.

⁶³ See, e.g., *Charbonneau v. MacRury*, *supra* note 57, at 512, 153 Atl. at 463; cf. GREEN, JUDGE AND JURY 161.

⁶⁴ See PROSSER, TORTS 225.

no less troublesome to his neighbors than if they sprang from guilty neglect.”⁶⁵ To the extent that we are concerned with a *defendant's* conduct the clue to the strongest case for an external standard is to be found in the last argument. This case proceeds from the premise that in accident law today the object of compensating accident victims is more important than that of refining the fault principle, so that where the two objectives conflict, compensation should prevail. Since the subjective test by and large relaxes the standard,⁶⁶ its application to defendants to secure a refinement of fault would reduce the chance of compensation and would therefore be bad.

How then do the recent studies bear on these arguments? In the first place, as we have seen, the studies cast grave doubt on the feasibility and the desirability of retaining the fault principle at all. They cast the same doubt on any step to bring about a closer correspondence between legal fault and the moral quality of the actor's conduct, since they show that the bulk of conduct which is unreasonably dangerous from an objective point of view is not attended by personal blameworthiness. It follows that further refinement of the fault principle deserves less weight as an objective of tort law than the objective of compensating accident victims, and as we have just seen, this proposition tends to support the case for an objective standard for defendants.

On the other hand, the recent studies perhaps diminish the force of one contention traditionally urged in favor of the objective standard, namely, the impossibility of measuring the differences among men. Already they furnish a reasonable basis for measuring some differences and further progress will come with time. But even if this progress pushes back the realm of what it is impossible to show, there would still be practical difficulties. The trial of a negligence case would become in part a psychological examination of the participants and a battleground of tests and of experts and their theories. Moreover, even if the measurements can be made — at the cost of considerable trial time and effort, and confusion of the jury — the question still remains whether it is worthwhile to make them in determining civil liability.

⁶⁵ HOLMES, *THE COMMON LAW* 108.

⁶⁶ Theoretically, of course, the subjective test will take account of the defendant's *superior* skills, etc., and thus open up additional avenues of recovery. *Louis Pizitz Dry Goods Co. v. Waldrop*, 237 Ala. 208, 186 So. 151 (1939); *RESTATEMENT, TORTS* § 299, comment *f* (1934). But in practice this comes to little. In the majority of cases the test is invoked to “temper the wind to the shorn lamb.”

One more broad consideration should be noted. The recent studies indicate that a great deal of the accident-producing behavior, on the part of all the immediate participants in an accident, involves accident proneness. A determination, therefore, that it should be considered in fixing the legal standard of conduct will at least theoretically affect a very large number of accident cases.

So much for general considerations. Let us next examine the problem more concretely, in the light of them. First should come the more or less analogous legal precedents. The jury will generally be told to take into account the physical characteristics of the actor in judging what is reasonable conduct.⁶⁷ This is true not only of such palpable characteristics as blindness and one-leggedness, but also of poor vision and defective bones.⁶⁸ As we have seen, some factors contributing to accident proneness are of this kind, so that existing precedents cover them or are tolerably close.⁶⁹ The immaturity of childhood is widely thought entitled to consideration,⁷⁰ but probably the inexperience of the novice is not.⁷¹ Allowance is generally *not* made for more complex psychological factors, such as mental characteristics and attitudes.⁷² Psychomotor characteristics, such as reaction time, could be assimilated to either line of precedents, so far as legal doctrine goes.⁷³

Two aspects of the cases that have arisen deserve special attention. One has already been mentioned—the tendency of a

⁶⁷ RESTATEMENT, TORTS § 289, comment *h* (1934); see Weisiger, *Negligence of the Physically Infirm*, 24 N.C.L. REV. 187 (1946).

⁶⁸ *Wray v. Fairfield Amusement Co.*, 126 Conn. 221, 10 A.2d 600 (1940); see Weisiger, *supra* note 67.

⁶⁹ *E.g.*, tunnel vision, poor co-ordination, slow reaction time.

⁷⁰ At least when the child is a plaintiff. RESTATEMENT, TORTS § 283, comment *e* (1934); *cf. id.* § 289, comment *h*; see Shulman, *The Standard of Care Required of Children*, 37 YALE L.J. 618 (1928).

⁷¹ *Hughey v. Lennox*, 142 Ark. 593, 219 S.W. 323 (1920); *Goff v. Hubbard*, 217 Ky. 729, 290 S.W. 696 (1927) (driving under dealer's tutelage); *Holland v. Pitocchelli*, 299 Mass. 554, 13 N.E.2d 390 (1938) (picking isolated spot in the country to learn to drive). But see RESTATEMENT, TORTS § 290, comment *b* (1934). *Cleary v. Eckart*, 191 Wis. 114, 210 N.W. 267 (1926), has been cited for the proposition that a beginner is held only to a "reasonably prudent beginner" standard. *Morris, Role of Expert Testimony in the Trial of Negligence Issues*, 26 TEX. L. REV. 1, 18 (1947). But in the *Cleary* case the inexperienced defendant was held not liable to his guest for injuries on the ground that plaintiff had assumed the risk of defendant's known inexperience.

⁷² See, *e.g.*, HARPER, TORTS § 144 (1933); PROSSER, TORTS § 108.

⁷³ See Seavey, *Negligence—Subjective or Objective?*, 41 HARV. L. REV. 1, 15-16 (1927).

subjective test in practice to relax the required standard. This means that any step towards further individualization of the test will help accident victims get compensation when it is applied to the issue of contributory negligence, but it will cut down their chances for compensation when used to determine the liability of a defendant. The second noteworthy thing about these cases is that of those which do apply a relaxed individualized standard the overwhelming majority relax the standard on the issue of contributory negligence, *in favor of the accident victim*.⁷⁴

From the foregoing analysis two questions emerge: (1) Should an explicit double standard be adopted so that a plaintiff's conduct is judged in the light of his handicaps, including accident proneness, while a defendant's conduct is viewed objectively? (2) If an explicit double standard is not adopted, is an implicit double standard likely to prevail in practice? We believe that the answers to both questions should be in the affirmative.

It has been generally assumed, with virtually no examination, that the same standard of conduct should be applied to defendant and plaintiff alike.⁷⁵ The prevailing position could be justified by an argument for a kind of consistency. But true consistency does not demand like treatment for unlike problems. And only a servile and mechanical consistency calls for like treatment of concepts which have a superficial likeness without probing more deeply into the problems and policies which underlie the concepts. So here, the word "negligence" is used on both sides of the scale; but it does not follow that negligence and contributory negligence are equally important to the objectives of tort law today or deserve equality of treatment.

Contributory negligence was a child of court-made common law. The philosophy of *laissez faire* which regarded the employers and employees as bargaining equals would quite naturally decline to extend the aid of the courts to victims who had not used proper

⁷⁴ A large number of cases have dealt with a child as plaintiff, yet *Charbonneau v. MacRury*, *supra* note 57, was said to bring to three the total number of cases in which the question of a child-defendant's conduct had come up. 79 U. OF PA. L. REV. 1153, 1154 (1931). In England the *Charbonneau* point "seems never to have been decided." SALMOND, TORTS 61. Cases dealing with the physical characteristics of defendants are scanty and confined almost exclusively to situations where the defendant has lost control of a vehicle through temporary illness or unconsciousness.

⁷⁵ RESTATEMENT, TORTS § 289, comment a (1934); see *Charbonneau v. MacRury*, *supra* note 57, at 508, 153 Atl. at 461; see PROSSER, TORTS 395.

care to prevent accidents.⁷⁶ It was quite natural, too, that the stark individualism of the early 19th century would impose equally rigid standards of conduct on plaintiff and defendant in an accident case; in that context, consistency of treatment for negligence and contributory negligence made sense. However, in the century and half since contributory negligence was born there have been tremendous changes. Not only has the accident problem itself assumed much greater proportions, but there has been a major shift in economic and social philosophy. Even conservatives accept a large measure of the social insurance that has been adopted in great areas of our economy. In the field we are discussing the important segment representing industrial accidents has been almost wholly covered by workmen's compensation laws.

The forces which underlie this trend would rule out personal fault altogether as either a basis of or defense to accident liability. They would emphasize the objectives of compensation for the victim and a wide distribution of his loss. Short of this, they call loudly for expanding the concept of negligence as a basis for liability, because such an expansion serves both the moral objective (in a climate of opinion which sees an increasing responsibility for the welfare of our fellow men) and the objective of compensating accident victims. But the same forces call out as loudly for restricting a defense which would serve only the morals of a bygone individualism and would be a distinct disservice to the need to compensate victims. So the vital policies behind negligence and those behind contributory negligence are today diametrically opposed and any notion that "consistency" demands the same treatment for each is fatuous indeed. The defense of contributory negligence has often been justified as a healthy deterrent against careless conduct on a plaintiff's part, just as the law of negligence is justified as a deterrent against a defendant's carelessness.⁷⁷ But, as we have seen, this is putting the pressure towards safety on the wrong person and relieving the pressure in the quarter where it will do the least good.

What has just been said has had a profound, if often unperceived, influence on accident law, and this influence has reached the defense of contributory negligence, which "has been looked

⁷⁶ See Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 235, 254 (1908).

⁷⁷ SALMOND, *TORTS 18 et seq.* (Stallybrass throws some doubt on the present-day correctness of this position); Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674 (1934); cf. GREEN, *JUDGE AND JURY* 77, III.

upon with increasing disfavor by the courts"⁷⁸ and legislatures.⁷⁹ The evidences of this disfavor are many: (a) The 19th century common law of several of the older states put on plaintiff the burden of pleading and proving his own due care. Today most of those jurisdictions have by statute or judicial opinion⁸⁰ put on the defendant the burden of pleading and proving contributory negligence. (b) A number of statutes have restricted the defense of contributory negligence or have substituted a rule of comparative negligence for it.⁸¹ (c) The courts have declined to extend the defense of contributory negligence to cases where liability is predicated on wanton or wilful misconduct,⁸² or on acts done by defendant at his peril.⁸³ (d) The courts have not extended the defense broadly to actions for nuisance.⁸⁴ (e) The courts have made serious inroads on the defense by creating the "last clear chance" doctrine under which a different and more restricted concept of proximate cause is applied to contributory negligence than to negligence.⁸⁵ (f) The courts have often refused to extend the defense to actions based on the violation of a statute intended to protect the plaintiff from some of the weaknesses of his position (e.g., child labor laws).⁸⁶ (g) The law has shown a tendency to restrict or to abandon rules imputing contributory negligence

⁷⁸ PROSSER, TORTS 394.

⁷⁹ See Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 342 (1914) ("the defense itself is crumbling at many points under attacks both legislative and judicial"); Smith, *Sequel to Workmen's Compensation Acts I*, 27 HARV. L. REV. 235, 243 (1914) ("a decadent doctrine, which will ultimately disappear from the law"); Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1 (1946).

⁸⁰ CLARK, CODE PLEADING 303-07 (2d ed. 1947); PROSSER, TORTS 288.

⁸¹ See Howard, *Torts—The Theory and Operation of Comparative Negligence*, 22 SO. CALIF. L. REV. 276, 278 n.8 (1949); Campbell, *Ten Years of Comparative Negligence*, [1941] WIS. L. REV. 289, 304.

⁸² *Kasanovich v. George*, 348 Pa. 199, 34 A.2d 523 (1943); RESTATEMENT, TORTS § 482 (1934); cf. *Potter v. Gilmore*, 282 Mass. 49, 184 N.E. 373 (1933) (operation of unregistered vehicle no bar to suit based on wanton and reckless conduct).

⁸³ HARPER, TORTS § 152; PROSSER, TORTS 462.

⁸⁴ See HARPER, TORTS § 193. There is, to be sure, authority that the defense is available where the ground of the nuisance is negligence. *McFarlane v. Niagara Falls*, 247 N.Y. 340, 160 N.E. 391 (1928). But cf. *Beckwith v. Town of Stratford*, 129 Conn. 506, 29 A.2d 775 (1942) ("absolute nuisance").

⁸⁵ See James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938); MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940).

⁸⁶ See Leflar, *supra* note 79, at 6.

to a plaintiff, while at the same time the vicarious liability of defendants has been constantly expanded.⁸⁷

There is, therefore, a sound basis both in reason and on authority for treating contributory negligence as a disfavored defense in a system wherein liability for negligence is ever expanding. Surely it is an entirely appropriate and logical part of this treatment to adopt a double standard of conduct — that is, one which applies a relaxed subjective test to the plaintiff and a more rigid and objective test to the defendant. There is already some authority for this position. All states, for instance, allow the child-plaintiff the benefit of his immaturity. Of the very few states which have faced the question of a child-defendant's liability, some hold him to an adult standard of care.⁸⁸

If the courts do not adopt an explicit double standard, however, they are nevertheless likely to adopt rules which will allow the operation of a tacit double standard in practice.⁸⁹ They may do this, for example, by admitting evidence of accident proneness and inviting the jury to consider it as bearing on the standard of conduct of any party as to whom it is offered, without requiring the jury as a matter of law to find a verdict one way or another on the basis of it. Though theoretically such a rule would apply to plaintiffs and defendants evenhandedly, it would in practice generally be used to excuse an accident victim from the charge of contributory negligence.⁹⁰

⁸⁷ See, e.g., N.Y. DOM. REL. LAW § 73; PROSSER, TORTS 500 ("family purpose" doctrine); SHULMAN AND JAMES, CASES ON TORTS 407, 681-87 (1942); Seavey, *Speculations as to "Respondeat Superior"* in HARV. LEGAL ESSAYS 433, 451-56 (1934).

⁸⁸ *Neal v. Gillett*, 23 Conn. 437 (1855); see *Roberts v. Ring*, 143 Minn. 151, 153, 173 N.W. 437, 438 (1919). Apparently in the ordinary automobile cases parties and courts usually proceed in practice on the assumption that infant defendants will be held to the ordinary standard of care. See, e.g., Transcript of Record, p. 94, *Rozell v. Rozell*, 281 N.Y. 106, 22 N.E.2d 254 (1939) (charge to the jury). A special note to the RESTATEMENT, TORTS § 167, comment e (Tent. Draft No. 4, 1929), stated: "There may be some doubt as to whether it is correct to regard contributory negligence and negligence [of a child] as sufficiently analogous to make one a safe basis for statements in regard to the other." The final draft made full surrender to the argument from formal consistency.

⁸⁹ Cf. *Smith, Sequel to Workmen's Compensation Acts II*, 27 HARV. L. REV. 344, 367 (1914).

⁹⁰ This would be so for these reasons: (a) Such exculpatory evidence would generally be offered for plaintiffs. See note 74 *supra*. (b) Juries tend to resolve doubts in favor of liability so that they would be more likely to accept the invitation to relax the standard for the accident victim. See James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 687 (1949). (c) Where the

We expect to see the courts increasingly admit evidence of accident proneness where fairly accurate tests have been developed. But the nature of the judicial process and the habits of professional thought are such, that the double standard may well continue to operate largely in practice only, its explicit adoption being reserved for bolder courts.

The recent studies may have further significance: an accident-prone person may be required to take that failing into account in engaging in dangerous activity like driving a car, at least where he knows or has reason to know of his failing.⁹¹ Some shortcomings are so serious that a man who has them would not be reasonable in engaging in certain activities at all. But on the whole the courts have been reluctant, except in very clear cases, to forbid the ordinary activities of life to the handicapped person.⁹² If the handicapped are to be forbidden pursuits of normal living, it will be by the legislature; and this is as it should be, for so drastic a step should be taken, if at all, through the democratic process. Short of this, reasonable care may well require the handicapped to do what they can to compensate for their knowable shortcomings, so that, for instance, the man with slow reaction time should drive more slowly than his fellows.⁹³ And an increasing general knowledge of such things as accident proneness may well enlarge the individual's duty to find out about himself.

Standard of Conduct of Nonparticipants. — The recent studies have a possible bearing also on the standard of conduct that may be required of people who stand in certain relationships to one of the participants in an accident. With advances in knowledge about accident proneness and in techniques for its detection, employers may be held to an increasing obligation to use that knowl-

defendant is not the driver but a third person, such as the driver's employer, any relaxation of the standard of conduct prescribed for the driver personally is most unlikely to be of any help to such third person even in the realm of legal theory, as we shall presently see.

⁹¹ See, e.g., *Diamond State Tel. Co. v. Hunter*, 2 Terry 336, 21 A.2d 286 (Del. Super. 1941).

⁹² Thus the lame, the halt, the blind, and the very young may use the highways, at least on foot, though in doing so they may both cause and encounter greater risks than others. Statute apart, one-legged men and one-eyed men may drive cars without necessarily being negligent in doing so. *Madison v. Berry*, 145 So. 694 (La. App. 1933). So may children fifteen years old, *Black v. Hunt*, 96 Conn. 663, 115 Atl. 429 (1921), although they have an accident record several times as bad as that of older men.

⁹³ Cf. *Hughey v. Lennox*, 142 Ark. 593, 598-99, 219 S.W. 323, 325 (1920) (inexperience); see Weisiger, *supra* note 67.

edge and those techniques for selecting accident-free employees for jobs such as driving buses or trucks, or operating dangerous machinery. Even if such a duty is recognized, however, it might not affect the employer's liability in cases where *respondeat superior* applies. If the servant's conduct is tested by an objective standard the master is fully liable vicariously wherever that standard is not met, quite apart from any possible negligence in hiring an accident-prone driver. And if the servant on the occasion in question fully meets the test of reasonable, normal conduct, any negligence in engaging him to drive can scarcely be a proximate cause of the injury.⁹⁴ If, however, the servant himself is given the benefit of his accident proneness in any judgment of his conduct (which the writers think unlikely, at least when servant and master are defendants), the further question arises whether in determining the master's vicarious liability he is to be credited with the same benefit.⁹⁵ If he is, the benefit might well be wiped out by the added possibility of negligence in hiring a subnormal employee.

The recent studies will open up new possibilities of negligence on the part of employers, bailors, and others who are not vicariously liable for the injuries caused by the accident-prone driver. For example, many employers allow their salesmen or drivers to use company-owned cars after hours for their own purposes.⁹⁶ In such cases the master's negligence in entrusting an automobile to one whom he knew or should have known to be accident-prone may provide the basis of liability that *respondeat superior* will not,⁹⁷ and evidence of the employee's accident proneness — whether this consists of the results of tests or of past accident record — should be allowed for this purpose.⁹⁸

Evidentiary Aspects. — To the extent the objective standard remains intact, there is also a question whether evidence of a

⁹⁴ *Denver City Tramway Co. v. Cowan*, 51 Colo. 64, 116 Pac. 136 (1911); *Black v. Hunt*, 96 Conn. 663, 115 Atl. 429 (1921). This does not mean that the servant's accident proneness may not, perhaps, be admissible in evidence to show the servant's negligence and hence the master's vicarious liability.

⁹⁵ He was not so credited in *Hill Transp. Co. v. Everett*, 145 F.2d 746 (1st Cir. 1944).

⁹⁶ See, e.g., *Baldwin v. Singer Sewing Mach. Co.*, 49 Idaho 231, 287 Pac. 944 (1930).

⁹⁷ See, e.g., *Rocca v. Steinmetz*, 61 Cal. App. 102, 214 Pac. 257 (1923).

⁹⁸ *Bock v. Sellers*, 66 S.D. 450, 285 N.W. 437 (1939); *Clark v. Stewart*, 126 Ohio St. 263, 185 N.E. 71 (1933). *But cf. Tannis v. Eding*, 280 Mich. 440, 273 N.W. 761 (1937).

person's accident proneness is to be admitted to show what he probably did on this occasion. The difficulties spring chiefly from the rule limiting the use of character to show conduct on a specific occasion⁹⁹ and the inhibitions against the use of prior specific instances¹⁰⁰ to throw light on what was done in the case at bar.

In civil cases the general rule is that evidence of a party's character is not admissible to show what his conduct was on a particular occasion, but that evidence of his habit or custom of doing or omitting a particular thing may be received for this purpose.¹⁰¹ The general propensity to be negligent or careful has usually been assimilated to character, and evidence of it excluded, though on no very satisfactory ground.¹⁰² It could scarcely be urged that propensity is totally without probative value, though perhaps its rational probative effect is too slight to warrant the risks of an unduly long excursion into collateral matters and a too facile overpersuasion of uncritical minds.¹⁰³ Such reasoning would obviously exclude evidence offered to show that a party was accident-prone for the purpose of proving that he was negligent at the time of the accident. And this would be true however the accident proneness was sought to be evidenced — whether by the opinion of experts, by tests, by a showing of past accidents, or otherwise.¹⁰⁴

⁹⁹ 1 JONES, EVIDENCE IN CIVIL CASES [hereinafter JONES] §§ 148, 163a (4th ed. 1938); 1 WIGMORE, EVIDENCE [hereinafter WIGMORE] § 64 (3d ed. 1940).

¹⁰⁰ 3 WIGMORE § 987 lists the following reasons for this rule: (1) undue prejudice, (2) unfair surprise, (3) confusion of issues, and (4) lack of strong probative value.

¹⁰¹ 1 JONES § 163a; 1 WIGMORE § 92 *et seq.*

¹⁰² One reason advanced for excluding evidence of character is that inquiry into it is irrelevant, because for the most part courts in civil cases are not concerned with the moral quality of an act. See 1 WIGMORE § 64. But that reason applies to moral character and not to such personality traits as skill, competence, or accident proneness.

¹⁰³ See 1 JONES § 148: "In the eyes of the law, the inferences which might be drawn from evidence of character or reputation of the parties are too vague, uncertain and unreliable to be worthy of consideration in determining the merits, however just and reasonable such inferences may seem to the lay mind."

¹⁰⁴ Of course, some of the data which would bear on accident proneness might be admitted in an appropriate case on a narrower basis. Evidence of a man's slow reaction time, for example, ought to be received to show that he did not stop his vehicle within an improbably short distance. And the past accident record of a driver might disclose a habit pattern of sufficient regularity to be admitted on familiar principles. See, for instance, the description of the bus driver with eighteen accidents mentioned on p. 772 *supra*.

It may be urged with considerable force that the recent studies invite reconsideration of the rule stated in the last paragraph, since they afford a scientific basis for attributing more probative value to accident proneness, when properly shown, than loose conclusions about propensity toward negligence deserve. Moreover, the general rule has not commanded universal acceptance. Some courts, for example, admit evidence of a person's general disposition to be careful in order to show care at the time of the accident, where there are no eyewitnesses to his conduct at that time;¹⁰⁵ and very occasionally courts have admitted this kind of evidence for such a purpose in cases beyond the scope of this exception.¹⁰⁶ Under such rulings, proper evidence of accident proneness should be admitted to show carelessness.

Where it is proper to show accident proneness for this or any other purpose, there is a question of how it may be proven. The results of specific tests of the individual in question should be admissible if introduced through the testimony of a qualified expert who can show that the tests are scientifically approved ones, that they were properly administered in this case, and what the significance of the result is.¹⁰⁷ The last might well be in the form of an expert opinion whether the individual was accident-prone.

As we have seen, a conclusion as to accident proneness may also be based on, or contributed to by, a clinical interview and observation or a past accident record. The former should be admissible in evidence as an admission against a party to the action if a qualified expert will testify as to its meaning. Where, however, the conduct of a nonparty is in issue (as where an employer is sued for his employee's negligence), the subject's narrative as to his case history will run afoul of the hearsay rule if offered through the observer.¹⁰⁸ This difficulty could be obviated by

¹⁰⁵ See 1 JONES § 163a; 1 WIGMORE § 65.

¹⁰⁶ *Poe v. Lawrence*, 60 Cal. App.2d 125, 140 P.2d 136 (1943) (defendant's inexperience and limited license entitled to some consideration by trial court in determining whether defendant tried to beat another car through the intersection).

¹⁰⁷ See Note, *Scientific Gadgets in the Law of Evidence*, 53 HARV. L. REV. 285 (1939); 3 WIGMORE § 875; Cowan, *The Relations of Law to Experimental Social Science*, 96 U. OF PA. L. REV. 484 (1948). See cases collected in MORGAN AND MAGUIRE, *CASES ON EVIDENCE* 576 n.8 (2d ed. 1942).

He should indicate how the history tends to show the fact of accident proneness. Of course the narrative may have contained statements which are damaging to the party's present position quite aside from the theory of accident proneness, and in such cases expert testimony is unnecessary to show the statement's relevance.

¹⁰⁸ 6 WIGMORE §§ 1720, 1722.

eliciting the narrative, on the stand, from the subject himself and calling the expert simply to interpret it.

The admissibility of past accident records presents more difficulty in view of the traditional reluctance of the law of evidence to receive individual instances for the purpose of showing propensity, character, or the like. Exclusion has been based in part on a supposed lack of strong probative value and on fear of encountering too many collateral issues.¹⁰⁹ The recent studies should reduce the force of both objections. They tend to indicate that accident records have substantial bearing on the actor's conduct at the time of accident. And they show that collateral inquiry into the particular circumstances surrounding the other accidents is largely unnecessary since the crucial fact is the mere repetition itself of involvement in accident.

IV. CONCLUSION

The findings of the industrial psychologists who have studied accident proneness show, we believe, that there is little correspondence between dangerous conduct and moral fault, such as carelessness or recklessness. They show, too, that defendants as a class are far better able than victims to prevent accidents, that employers were spurred on to make these very studies by the imposition of absolute liability for industrial accidents. Moreover, they strongly suggest that effective precautionary measures yield more in terms of increased productivity than they entail in the way of expense. They point up the emptiness of the arguments, both from morals and from expediency, which are currently used to support the fault principle of liability. They represent, in short, a strong further argument for comprehensive social insurance for accidents.

While the fault principle remains, defendants should not be allowed to escape liability by showing accident proneness as an excuse for conduct which would be negligent by ordinary standards. To let them do so would bring legal fault a little closer to the moral fault of the individual, but at far too great a cost. It would exclude from compensation persons injured by the most dangerous (so far as causing accidents goes) class of the population. And where the objective of conforming law to an individualistic morality comes into head-on collision with the objective of

¹⁰⁹ See note 100 *supra*.

compensating accident victims, the latter should prevail. The standard for contributory negligence, on the other hand, *should* be subjective and take the victim's accident proneness into account, for a subjective standard for plaintiffs would both refine the fault principle and compensate more victims.