NEGLIGENCE, CONTRIBUTORY NEGLIGENCE
AND THE MAN WHO DOES NOT RIDE THE
BUS TO CLAPHAH

By Ross Parsons*

The common law workshop is pretty much of a Heath Robinson affair. Precedent insists that we must make do for the most part with the conceptual machinery of generations gone by. It would be nice if we could, every so often, throw out the old machinery to the scrap metal dealer and retool with machines designed to produce solutions to our new problems. But if this is denied us, at least we ought to see to it that we do the best possible job with the machinery that we have. The adapting of the concept of negligence so that it will serve both to select occasions of loss distribution and to select occasions of individual responsibility is probably the most important job our judges have been called on to do in the last hundred years. Maybe they haven't made much of a fist of it. They are entitled to remind us that a concept, like man, cannot be the slave of two masters. But until statutory compensation schemes take over the function of loss distribution, our judges must do their best with the resources of doctrine available to see that they render unto each master the things that are his. Recently in Staveley Iron & Chemical Co. Ltd. v. Jones the House of Lords indulged in some solemn pronouncements about negligence and contributory negligence which cast shadow on much that one would have thought was valuable doctrine. The object of this article is to attempt to restore some light to the area of shadow.

The plaintiff was engaged in the lifting by crane of a pan of heavy cores on to a railway waggon. One of his functions was to see that the main hook was directly centred over the pan before the crane took the load away. He failed to signal to a fellow-employee, the crane

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1 Code systems may involve similar limitations. French judges have made do, in insuring fashion, with the conceptual apparatus furnished by articles 1382-1386 of the Code Civil in furthering loss-distribution. See Parsons: 'Death and Injury on the Roads', (1955) 3 University of Western Australia Annual Law Review, 201, 206-209.

2 For some assessment of their achievement ibid., 202-206 and the writer's article 'Individual Responsibility versus Enterprise Liability' (1956) 29 Australian Law Journal, 714. They prefer to operate in twilight created by the rule of evidence that the fact of insurance must never be mentioned in court. Perhaps there is wisdom in the rule, if only the courts will go ahead in certain types of situation and treat the defendant as if he is the focus of a loss-distribution system, for if he isn't, he should see to it that he is. This is the approach taken by French lawyers: (1955) 3 University of Western Australia Annual Law Review, 201, 250-251.

3 Any test of 'liability' will involve some limitations on loss-distribution. The purpose of loss-distribution leads eventually to the abolishment of common law liability and the substitution of a statutory scheme of loss insurance: Parsons, op. cit. (n. 1), 271-274.


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driver, that the hook was not in fact centred. The crane driver, a woman, hauled on the load without first taking the strain, as she should have done, to see if all four chains attached to the main hook and to the pan were equally taut. In consequence the pan swung towards the plaintiff and his hand was trapped between the waggon and the pan. The plaintiff brought an action for personal injuries against the employer, alleging failure to provide a safe system and vicarious liability for the negligence of the crane driver. The trial judge, Sellers J., found there was no evidence of failure to provide a safe system. In dealing with the claim founded on vicarious liability, he first addressed himself to the plaintiff's behaviour and called on the doctrine approved in *Caswell v. Powell Duffryn Associated Collieries Ltd.* to appropriate to judging the question of contributory negligence of an employee. Lord Wright in that case said: 'What is all-important is to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his preoccupation in what he is actually doing at the cost perhaps of some inattention to his own safety.' Applying a standard so adapted Sellers J. found there had been no contributory negligence by the plaintiff. He then felt impelled by what some would call logical consistency to find that there was no negligence by the crane driver and thus no vicarious liability on the employer. The crane driver worked under the same conditions as the plaintiff, and taking count of this, Sellers J. thought that the quality of her act was no different from the quality of the plaintiff's act.

The Court of Appeal reversed the decision of the trial judge, unanimously deciding that there was negligence for which the employer was vicariously liable and agreeing that there was no contributory negligence by the plaintiff. Denning L.J. rejected the what-is-sauce-for-the-goose-is-sauce-for-the-gander argument because this would involve, he thought, the restoration of the abolished doctrine of common employment. He insisted that there was a distinction between negligence and contributory negligence which warranted our asking more of a defendant than we ask of a plaintiff, and he repeated that doctrinal merger of employer's liability for his own negligence and employer's vicarious liability which he first

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5 [1940] A.C. 152.  
6 Ibid., 178.  
8 Ibid., 840. See the discussion *infra*, p. 173.  
9 The distinction is sound but the explanation offered by Denning L.J., by the other members of the Court of Appeal, and by House of Lords, involves an unreal insulation of what is asserted to be the legally relevant situation from the actual situation. The explanation offered is that negligence involves duty to others while contributory negligence involves duty only to oneself. See the discussion *infra*, p. 172.
expounded in *Jones v. Manchester Corporation.* By this merger he is able to avoid the dilemma which a vicarious liability situation otherwise presents for the court. The immediate thought to treat the situation as one of loss-distribution is countered by a second thought that the employee is also liable and bound to indemnify his employer so that the loss which it is sought to distribute may finally be shifted to an individual. The merger makes it doctrinally possible to fix the employer with liability without paying the price of exposing the employee.

Hodson L.J. announced that he could not 'agree that the act or omission of the employer's servant ought', as the trial judge had thought, 'to be looked at exactly in the same way as the act or omission of the plaintiff.' He argued that the doctrine approved in *Caswell's* case applied only to contributory negligence and did not extend to negligence. He then proceeded to avoid the dilemma of the vicarious liability situation by an assumption expressed with convenient vagueness that the plaintiff's action was properly founded on breach of the employer's own non-delegable duty to his employee.

Romer L.J. agreed with Denning L.J. and Hodson L.J. that *Caswell's* case must be confined to contributory negligence. He then proceeded to use words which come very near to expounding Lord Justice Denning's merger of employer's liability for his own negligence and employer's vicarious liability. He said: 'The question here, however, is not as to the crane driver's rights but as to her employers' liability... If an employer employs a crane driver to operate a crane, it is the employer himself who, in the eye of the law, is operating it, though he is doing so through the person of the employee. From this it follows that, if the crane driver's wrongful handling of the crane results in injury to a third party, it is no defence to the employer to say that the workman's act or omission would have amounted to something less than contributory negligence if it had resulted in injury to the workman himself. It is the standard of care which the crane driver (as the defendant's servant) owed to the plaintiff which is material to the present case, not the standard of care which she owed to herself.'

An appeal to the House of Lords was dismissed. The Lords took the opportunity to contradict or question some of the doctrine expounded in the courts below. They unanimously rejected Lord Justice Denning's merger of the personal and vicarious liabilities of the employer. This case, they insisted, was one of vicarious liability.

10 [1952] 2 Q.B. 852, 867-872.
12 [1955] 1 Q.B. 474, 482.
and 'wholly distinct from cases where an employer is under a personal liability to carry out a duty imposed upon him as an employer by common law or statute.'\textsuperscript{16} They agreed with the Court of Appeal in rejecting the standard adopted by Sellers J. in judging the crane driver's actions, insisting that no inference could be drawn from what might be the standard appropriate in judging contributory negligence. 'The crane driver was bound', said Lord Morton, 'in accordance with well-established principles, to use that degree of care which an ordinary prudent crane driver would have used in the circumstances.'\textsuperscript{17} They refused to decide that it was proper to apply the \textit{Caswell} standard in judging contributory negligence in a common law action against an employer. \textit{Caswell}'s case had been concerned with an action for breach of a statutory duty.\textsuperscript{18} On their appraisal of the facts they were able, without calling on \textit{Caswell}, to find that there had been no contributory negligence by the plaintiff.

Lord Justice Denning's merger of the personal and vicarious liabilities of the employer was no doubt a heresy but it might in time have mellowed into useful doctrine. One cannot help feeling that the Lords' anxiety to scotch the heresy may have been heightened by a conviction that Denning L.J. is something of a trouble-maker who ought to be disciplined. It is significant that all the Lords ascribe the heresy exclusively to Denning L.J. and exonerate Hodson and Romer L.JJ. Neither Hodson L.J. nor Romer L.J. openly confessed his faith in the heresy. Yet both came near to a confession, no doubt moved by a misgiving that their rejection of the trial judge's assessment of the crane driver's conduct might expose the crane driver to loss-shifting. In the writer's submission judicial thinking went astray in \textit{Jones v. Staveley} when Sellers J. refused to find that the employer was in breach of his duty to provide a safe system. What are excusable errors of judgment on the \textit{Caswell} test if we are judging the individual responsibility of the employee are just those contingencies against which the employer ought to provide in fulfilling his duty to establish a safe system, and for which the enterprise should pay when a fellow-employee is injured. It will be submitted hereafter that despite the rejection by the Court of Appeal and House of Lords, the standard Sellers J. applied to the crane driver's behaviour is not unsound when it is a matter of judging the individual responsibility of the crane driver, whether in an action by the injured employee or in an indemnity claim brought by the employer on the authority of \textit{Romford}.

\textsuperscript{16}[1956] A.C. 627, 639, \textit{per} Lord Morton of Heneryton.\textsuperscript{17} \textit{Ibid.}, 405.

\textsuperscript{18} It is true that \textit{Caswell}'s case was concerned with an action for breach of statutory duty but Lord Atkin said: 'I cannot . . . accept the view that the action for injuries caused by breach of statutory duty differs from an action for injuries caused by any other wrong'. [1940] A.C. 152, 166. Lords Macmillan and Porter took the same view. Only Lord Wright thought that actions for breach of statutory duty are in a special category.
v. Lister. And it will be submitted that the application of the Caswell test was appropriate in judging the plaintiff's behaviour. The result is not quite the same as Lord Justice Denning's merger of personal and vicarious liabilities; it is rather a matter of taking much of what might have been regarded as vicarious liability and assigning it to the category of employer's personal liability. Thus the dilemma is solved, while Lord Justice Denning's merger may only obscure it.

The shadows cast by Jones v. Staveley are the questioning of the authority of the Caswell test in the determination of contributory negligence in common law actions, and the rejection of the Caswell test in the determination of negligence. There will be those who will direct us to take comfort in knowing that the House of Lords, whatever doctrine it adopted in fact, saw to the compensation of the victim, and, so far as we are aware, no claim for an indemnity from the crane driver was made by Staveley's liability insurer. Loss-distribution was achieved. But it is little comfort that these results have depended on some benign fact-finding and the charity of an insurance company. Doctrine should, so far as we can make it, provide at least a framework within which sound decisions may be worked out. One is tempted to say that these decisions should be expressed in rules articulating the policy decisions, which may then be available for future decisions. Perhaps this is asking too much of the judicial process, and maybe articulate rules are too difficult to change. But doctrine which must be overcome by fictitious fact-finding, if sound decisions are to be reached, can be satisfying only to those who would mock the law. Just what damage the House of Lords has done to the framework of doctrine will depend on the academic and professional reception the Lords' pronouncements receive and the room for counter-attack which stare decisis may allow. It is in the hope of influencing the academic and professional reception which may be afforded to Jones v. Staveley that the writer proposes examination of the general question raised by the issue of the relevance of the Caswell test: what scope does doctrine afford for taking count of qualities peculiar to the actor in judging negligence and contributory negligence? An attempt will be made to assess this scope in terms of the problem of rendering service both to loss distribution and individual responsibility.

Apportionment statutes are a relatively new phenomenon and their full potential is yet to be known. While the selection of apportionment situations is left to the common law the power to apportion may set at nought much of the learning on negligence and contributory negligence. Thus a finding of negligence is hollow indeed if damages are apportioned wholly in favour of the defendant. Some

consideration will be given in the concluding part of this article to what might be done under the statutes. For the time being it is enough to note that there is a prospect of differing answers to the question of the scope for taking count of the individual qualities of the actor depending on the stage of judging that has been reached; though function may have failed to find responsive doctrine in the selection of apportionment situations, it may find it in the apportionment process.

THE RELEVANCE OF INDIVIDUAL QUALITIES OF THE ACTOR IN THE INITIAL DETERMINATION OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE

Every student knows that the standards of negligence and contributory negligence are 'objective' and this no doubt will be offered as a talisman affording a ready answer to our question. In fact the insistence that the standards are 'objective' carries us no further than excluding the personal standard of the actor whose conduct is in question and the personal standard of the judge who tries the case. These no doubt are 'subjective' standards. But a standard does not become 'subjective' because it takes count of some of the qualities of the actor whose conduct is judged. We are not surrendering to the blind actor's own standard if we judge him by a standard which is tailored to accommodate the fact that he is blind. Whether the standard does accommodate blindness is yet to be considered. The present submission is that we do not exclude such accommodation simply by proclaiming that the standard is 'objective'. Closely allied to the fallacy which would exclude individualization as a surrender of the 'objective' test, is another which insists that the standard is a 'legal' and not a 'moral' standard and that it would be to apply morals and not law to take count of some of the qualities of the actor. The law's standards may or may not accord with the standards which the community as large adopts in judging behaviour. No doubt there are times when the law cuts with a chopper, but the scalpel is not pre-

20 *Infra*, pp. 182 ff.
21 If such were included the law would be doing what some argue our rules of private international law do in referring a question to the whole of the foreign law. The actor would be heard to say: 'I did my best according to my lights'. And the court would be bound to listen to the actor's exposition of his standards of behaviour. 'Judgment . . . would be as variable as the length of the foot of each individual': *Vaughan v. Menlove* (1837) 3 Bing. N.C. 468, 475.
22 No doubt the judge's personal equation cannot be entirely excluded. See Lord Macmillan in *Glasgow Corporation v. Muir* [1943] A.C. 448, 457.
23 The writer does not wish to make of this a verbal quarrel. If it is thought useful to say that a standard becomes more 'subjective' as it takes count of more qualities of the individual actor there is no reason for complaint. No harm is done until an argument is raised founded on the talisman of objectivity. Seavey's use of 'subjective' thus gives no cause for complaint: (1927) 42 *Harvard Law Review*, 1.
scribed by saying that the judge's standard is a legal standard. At this stage those who seek a single stroke of doctrine which will in all circumstances exclude reference to the individual qualities of the actor will be ready to parade 'the man-on-the-Clapham-omnibus'; 'the reasonable man'; 'the ordinary prudent man.' It will be said that it is by reference only to the way in which this man would have behaved that the law determines negligence and contributory negligence. If the actor happens to have some of the qualities of this idealized man the standard will be fortuitously individualized. But the law is not concerned even to enquire what are in fact the qualities of the actor whose conduct is in question. The law does not have a standard for the man who rides the bus to Putney. Put in another way, it will be said that the law practises a severe economy: it knows only one standard of care. To take count of qualities of the actor would give rise to a multiplicity of standards and the law's economy forbids this. There are sound reasons in terms of efficiency of the judicial process why we should avoid spawning an embarrassing brood of standards. But a doctrinal economy which demands a kind of monism in conceptual apparatus belongs in Fering's heaven and not in the humble world of men. In any event, the monism in the formulation of the 'reasonable man' standard is only a shell. The weasel words 'under the circumstances', without which the formulation is incomplete, suck

There is a suggestion of both these fallacies in Glanville Williams' study 'The Aims of the Law of Tort.' He says: 'Lawyers were once accustomed to debate whether the standard of care in negligence was subjective or objective, and the issue was eventually settled in favour of the objective standard of the reasonable man. Such a standard cannot be justified as an expression of moral principle, but it is sometimes supposed that a subjective standard is conceivable that would be a moral one. This is not so, for in truth there is no such thing as a wholly subjective standard. A standard may be more or less subjective, in the sense that it may take account of more or less of the particular factors affecting the individual; but once bring into the standard all the factors affecting the individual and the standard disappears'... 'To put the matter in a nutshell, an objective standard of care is not an ethical one, and a subjective standard is a contradiction in terms.' (1951) 4 Current Legal Problems, 137, 139-160. If a standard becomes 'subjective' if it takes count of qualities peculiar to the actor then the classical 'Man-on-the-Clapham omnibus' standard is a subjective standard in that it takes count of the fact that the actor is a man and not one of the other animals whose behaviour may be of legal significance. And is it true that a standard 'disappears' if it takes count of all the factors affecting the individual? It would undoubtedly make the task of judging impossibly complicated, but a standard of judgment will only disappear if we abandon the philosophical position which any standard of judgment assumes, and adopt a purely mechanistic explanation of human behaviour. In this event we can have no standards of judgment at all; we can have only standards of comparison.

Monism may of course be expounded on occasions by some whose motives are far from those of the enthusiast for conceptual economy. Monism has been used in recent years by the functionally minded jurist to throw the law of occupier's liability back into the melting pot. It is thus a technique for reassessing particular standards and valuable in this role. A moment's reflection on the law with regard to occupier's liability and employer's liability will convince that, apart from the argument in the text which is concerned with variations in standard depending on the qualities of the actor, our law has in fact a multiplicity of standards. The assigning of the plaintiff to the category of invitee and not to the category of employee in the recent case of O'Reilly v. Imperial Chemical Industries Ltd. [1955] 1 W.L.R. 1155, with consequences as to the standard of care owed by the defendant, did not depend on inferences drawn
its substance. Exploring the significance of these words, in so far as they direct that we must judge the defendant’s behaviour by asking what the man on the Clapham bus would have done if he had been placed in the defendant’s situation, takes up a substantial part of our tort law learning. Thus the gravity of the risk of injury, the practicability of measures that would be necessary to eliminate the risk and the social value of the end to be achieved are all circumstances which will affect the behaviour of our friend on the Clapham bus. The writer’s present concern might be explained as an examination of how far qualities peculiar to the actor may be regarded as circumstances with reference to which we must judge the Clapham gentleman’s behaviour and the significance of such circumstances. But this would be to indulge the sophistries which belong to the art of statutory interpretation and are not called for here. And there would be a nice line to draw between ‘man’ and his ‘circumstances’. Are blind eyes part of our idea of ‘man’ or are they some of the circumstances in which he acts? It is best to leave this to people who delight in such conundrums. It is enough to have demonstrated that there is no commanding doctrine which uncompromisingly excludes taking count of qualities peculiar to the actor in judging negligence and contributory negligence. It is now proposed to look rather at what we may be seeking to achieve by taking count or refusing to take count of such qualities and what doctrine may be available to support our purposes.

At the outset of this article the contemporary function of our law of negligence and contributory negligence was described in terms of selecting occasions of loss-distribution and occasions of individual responsibility. The law is in effect asked to further concurrently two distinct and in some measure conflicting orders of morality. It is a socialist morality that directs the selection of occasions of loss-distribution; it is an individualist morality that directs the selection of occasions of individual responsibility. It will be obvious that there ought to be important differences in our criteria of selection depending upon what kind of occasions we are seeking. Socialist morality is not concerned to be indulgent or to be stern in measuring the behaviour of the individual actor. It is not concerned to say: ‘You did the best that could be expected of you’ or ‘One such as you ought to have known better’. These however may be assessments of vital concern to an individualist morality. A satisfactory pattern of doctrine would determine the domains of these two orders of morality and elaborate distinct principles of selection for each domain. So long,

from the behaviour of the man who rides to Clapham. Incidentally, this is not to say that the writer approves the reasoning of the Court of Appeal in O'Reilly v. Imperial Chemical Industries Ltd. The court determined a vital policy question of standard of duty by reference to the rules in Mersey Docks v. Coggins [1947] A.C. 1, rules which had only a verbal relevance.
however, as our courts avoid articulate recognition of the law's service to loss-distribution,27 we must do the best we can with the existing resources of doctrine. Perhaps it is time for a warning: 'Those who have no stomach for sophistries had best go ashore'. Each of the principles examined below seems to work well enough for a time but then begins to labour. Some of the art that the court is called upon to show involves choosing the right moment to shift from one principle to another. Let it be admitted that we are forcing doctrine to do things it was never designed to do; that we are adapting old machinery to new purposes. When loss-distribution is achieved by statutory schemes the common law machinery will be spared many a rattle and squeak and will need to work only limited shifts.

When the defendant is but the focus of loss-distribution we need doctrinal approval for pushing liability to the uttermost. We need approval for excluding consideration of his individual qualities wherever there is danger that such consideration may mislead us into excusing him. When we seek to allot individual responsibility to defendant or plaintiff we need approval for taking such count of the individual qualities of the actor as individualist morality requires. The writer confidently assumes that individualist morality requires us to judge the actor by reference to his individual qualities wherever he has not held out to others that he has superior qualities.

The Determination of Negligence

The resources of doctrine available in the determination of negligence and relevant to our question are these:

(1) There is a principle which asserts that there is a difference between negligence and contributory negligence which will warrant our asking more of the actor where negligence is in issue than we ask of him when contributory negligence is in issue.28 The difference is commonly explained by the dogma that negligence involves duty to others while contributory negligence involves duty only to oneself. The dogma is but a device29 to justify a difference which has a functional significance. Negligence most often involves selection of an occasion of loss-distribution. Contributory negligence involves selec-

27 Denning L.J. has been ready at times to grant articulate recognition, Jones v. Staveley [1955] 1 Q.B. 474, 480.
29 The device requires a nice distinction between the actual and the legally relevant situation. Just how unreal it is becomes apparent when it is used to justify differing assessments of the same behaviour. See the judgment of Lord Tucker in Staveley Iron & Chemical Co. Ltd. v. Jones [1956] A.C. 627, 645.
tion of an occasion of individual responsibility. Thus if the explanation is unreal, the principle is valuable in founding a general rule which asserts that the individual qualities of the actor are irrelevant in judging negligence save where these qualities are superior to the qualities of the man on the Clapham bus.

(2) The general principle serves very well most of the time as a means of pushing liability as far as the common law machinery can manage, but it may run into functional difficulty in the few cases where loss-distribution is not available. It will at times be clear that the defendant is not in a position to distribute, whether through the cost of the goods and services that he sells or through an insurance pool of which he should be asked to avail himself. Should this defendant's qualities be inferior to those of the man on the Clapham bus and he has not held himself out as competent, individualist morality requires that we individualize the standard so as to take count of these qualities. The defendant may find some relief from the general principle in the rule variously expressed as assumption of risk, *volenti non fit injuria* or release from duty. Where the plaintiff has of his own choice entered or remained in some continuing relationship with a defendant of inferior qualities, that defendant will be released from duty to the extent that he will be held only to a standard of care appropriate to his inferior qualities. Valuable as a corrective, the medicine should be used wisely. Indeed doctrine has been busy since *Smith v. Baker* determining the indications and appropriate dosage. The doctrine is cast in the language of the Latin tags *sciens* and *volens*. But the inarticulate premiss is that a rule appropriate enough in the selection of occasions of individual responsibility ought not to be allowed to defeat loss-distribution. This premiss affords the explanation of recent Canadian authority which has refused to follow *Insurance Commissioner v. Joyce*. By holding that the passenger who rides with a drunken driver does not release the driver, though the passenger's behaviour may amount to contributory negligence, the Canadian courts achieved the distribution

30 The writer assumes throughout this article that contributory negligence always involves selection of occasions of individual responsibility. It is conceded however that this assumption requires qualification. Some cases simply involve competition between two loss-distribution systems, e.g., in a motor vehicle property damage action where the plaintiff carries comprehensive insurance and the defendant carries liability insurance. Insurance carriers have pretty well taken such cases out of the courts by 'knock-for-knock' agreements. Where the action is for personal injuries and the plaintiff carries accident insurance, there is no subrogation. The pay-out by the accident insurer to the plaintiff is in one aspect a windfall. It is not entirely unreal then to regard the issue of contributory negligence as involving the selection of an occasion of individual responsibility. For a discussion of some of the problems arising in situations involving competition between loss-distribution systems see the writer's article (1955) 28 Australian Law Journal, 563.


33 (1948) 77 C.L.R. 39.
of at least part of the loss. Of course, as the law stood in Queensland at the time of Insurance Commissioner v. Joyce a holding of contributory negligence had the same result as a holding of release from duty and there was thus no room for the inarticulate premiss.

It is submitted that Sellers J. correctly used the medicine in Jones v. Staveley to find that there was no negligence on the part of the crane driver for which the employer was vicariously liable. No doubt this submission attracts the accusation that it will revive the doctrine of common employment despite legislative abolition. But has not Romford v. Lister\(^24\) come very near to reviving the doctrine anyway? The employee who sues alleging vicarious liability may bankrupt his fellow-employee if the employer’s insurer chooses to take advantage of Romford. The furthering of loss-distribution will not be soundly achieved \textit{via} the vicarious liability technique until the employer is required to cover his employee against third party risks.\(^35\) He may be so required either by statutory provision or, as Denning L.J. was prepared to do in Romford, by implying a term promising such cover in the contract of service. The sound action meanwhile is to continue with the well-tried technique of raising the employer’s personal duty. The muddled thinking in Stapley v. Gypsum Mines,\(^36\) Jones v. Staveley, and Romford v. Lister may reflect a developing judicial conviction that worker’s compensation has adequately taken over the function of loss-distribution in the area of employment relations; that we can decommission the adapted common law machinery in this area.\(^37\)

It is true that Stapley v. Gypsum Mines\(^38\) and Jones v. Staveley reject the release rule in judging the fellow-employee’s behaviour, but in neither case was the fellow-employee joined as a defendant and, so far as we are aware, in neither case was any claim for indemnity or contribution made against the fellow-employee. One has the feeling that some of the judges were keeping their fingers crossed that plaintiff and defendant would not avail themselves of proceedings open to them. The writer is not at all impressed with doctrine whose sound functioning rests on judicial gambling.

(3) The release rule will not be available as a corrective in all situations where a corrective is needed. The rule requires that the plaintiff shall have voluntarily entered or remained in some relation-

\(^24\) For a discussion of the implications of the Romford decision see the writer’s article (1956) 29 \textit{Australian Law Journal}, 714.

\(^35\) The writer believes that it is uncommon for the employer’s liability policy to cover the employee.

\(^36\) [1953] A.C. 663.

\(^37\) Should we decommission, there will be difficult problems in unscrambling the continuing loss-distribution function of the machinery in cases where the person who suffers loss is outside the employment relation. Were it not for the problems of unscrambling, the common law machinery might have been decommissioned long ago.

\(^38\) [1953] A.C. 663.
ship with the defendant knowing of the defendant’s inferior qualities. It is thus unlikely to be available where an employee’s acts have resulted in loss to some person who is not in any employment relation with him. Perhaps function will one day break surface and fashion doctrine especially for these situations. The sympathetic evaluation by the House of Lords of the school teacher’s conduct in *Carmarthenshire County Council v. Lewis* comes near to creating such special doctrine. Despite the fact that in the courts below the case had been argued and decided entirely on the question of the alleged negligence of the teacher, the Lords now found that the school authority had been negligent but the teacher had not. Where a lower court feels the fetters of doctrine, most often the only recourse is the Houdini antic of appropriate fact-finding. It will be seen in the following part of this article that there is sometimes a second chance for the defendant who is not the focus of a loss-distribution scheme, in the power of the court to apportion. It will be submitted that in making the apportionment the court may properly apply an individualized standard to the defendant. But the court’s power is conditioned on findings of negligence and contributory negligence. There is thus a continuing need for the Houdini act. It is more than a little incongruous that a frank individualizing of the standard applied to the defendant must wait upon a finding of contributory negligence in the plaintiff. But unless and until we retool with new machinery we must learn to be tolerant.

(4) It is explicit in the general principle that where the qualities of the defendant are superior to the qualities of the man on the Clapham bus he will be judged by a standard which takes count of these superior qualities. Both loss-distribution and individualist morality are thus served. Socialist morality is content to ride along on a rule which pushes liability so much further. So too socialist morality will ride along on the rule which insists that where a man holds himself out as having special skill and others rely on his hold-

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40 They did just what, in the writer’s submission, should have been done in *Jones v. Staveley*, supra pp. 166-167, 175.

41 Lord Oaksey dissented on the ground that it was not open to the House to find the school authority negligent since ‘none of the judges who ha[d] heard the case ha[d] based his judgment on an obligation on the appellants to keep the gate locked and the matter [was] not relied upon in any of the reasons to the respondent’s printed case’ [1955] A.C. 549, 553. Lord Oaksey’s pleading point was taken up by the House of Lords recently in *Esso Petroleum Co. v. Southport Corporation* [1956] A.C. 218; [1955] 3 All E.R. 864.

42 Some of the significance of *Benmax v. Austin Motor Co. Ltd.* [1955] A.C. 370 is in the increased opportunity it has given to appellate courts to make new functional appraisals by way of the Houdini act.

ing out he will be held to a standard which requires him to display this special skill. While socialist morality obviously will ride as far as possible, individualist morality counsels some restraint. The law of professional negligence is the most important area of application of this reliance rule. While professional men may commonly enough take out liability insurance a judgment against a professional man may involve him in substantial moral and monetary loss which he is not able to distribute. Denning L.J. has recently allowed function to break surface in urging restraint. In the foreword to a recent book he writes:

'The courts have no hesitation in holding that mistakes made by car drivers or employers are visited by damages: but they make allowances for the mistakes of professional men. They realize that a finding of negligence against a professional man is a serious matter for him. It is not so much the money, because he is often insured against it. It is the injury to his reputation which a finding of negligence involves.'

There is an important application of the reliance rule in the rule that an employer is held to a specially high standard of care in favour of workmen who have submitted themselves to his protection.

Lifting the employer's duty by way of the reliance rule has very real value in situations such as arose in Jones v. Staveley. It has already been submitted that the sound answer to the problems there raised was to allow recovery for the employer's failure to provide a safe system, while holding that no action lay against the fellow-employee because, in co-operating in common submission to their employer, each employee must be taken to have released the other from duty in respect of acts which are the inevitable errors arising from the fatigue and monotony of the work.

The Determination of Contributory Negligence

The resources of doctrine available in the determination of contributory negligence and relevant to our question are these:

1. The general principle which asserts a difference between negligence and contributory negligence justifies, in the writer's submission, the importing of a leavening of individualist morality in judging contributory negligence. Thus the standard should take count of the

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46 The doubts expressed by the New Zealand Court of Appeal in C. E. Daniell Ltd. v. Velekou [1955] N.Z.L.R. 645 as to whether it was proper to describe the employer's duty as a 'high' duty stemmed from a fascination with a purist monism which, it was thought, denied the possibility of differing standards.
individual qualities of the actor save where the actor has held himself out as having superior qualities. It must be admitted, however, that judicial and academic *dicta* do not agree. With limited exceptions it is claimed that the standard must be determined by reference to the qualities of the man on the Clapham bus. The prime inspiration of these *dicta* is that doctrinal monism which cannot tolerate a multiplicity of standards and a certain sense of elegance which cannot tolerate an affront to symmetry. No doubt, the writer's submission is hard pressed by these niceties. It may be well then to be ready to stand by, where we can, with other resources.

(2) The release rule, we have seen, is a loyal servant of individualist morality. Where the defendant has freely entered into a continuing relationship with the plaintiff knowing that the plaintiff's qualities are inferior in some respects to those of the man on the Clapham bus, the release rule justifies adjusting the standard asked of the plaintiff so as to take count of his special qualities. There is a subtle doctrinal difficulty which appears to stand in the way. We are told again that negligence involves duty to others, while contributory negligence involves duty to oneself, and it is said that while orientation of the duty in negligence is proper there is no scope for orientation of the duty in contributory negligence. There is no one who can release the plaintiff for we cannot allow him to release himself. To go along with this reasoning is to allow the dogmatic explanation of a principle to defeat the very purpose the principle was intended to further. Dixon J. (as he then was) in *Davies v. Adelaide Chemical Co. Ltd.* did not succumb to the dogma. He said: 'The plaintiff who for very many years had acted as the defendant's greaser, regularly lubricated the rollers of the conveyor belts while they were in motion. It was his common practice to do so and everyone about the plant was aware of it. . . . At all events, I think that in following such a practice at the time of the accident the plaintiff was not guilty of such negligence as to disentitle him to recover, because he was not acting contrary to any rule, instruction, advice or practice made, given or established by the defendant as his employer or in his own interest or for his own convenience but, on the contrary, was performing his duties according to his habitual and long standing practice for which he had the apparent, and, as I think, actual approval of the factory management who treated it as part of his ordinary work'.

*74* The writer draws some support from the judgment of Jordan C.J. in *Cotton v. Commissioner for Road Transport* (1943) 43 S.R. (N.S.W.) 67, 69: 'It is conceived that contributory negligence in the sense in which it is now being considered occurs only when a person fails to take all such reasonable care as he is in fact capable of. I am not aware of any case in which a person has been held to be guilty of contributory negligence through the application of some arbitrary general standard, notwithstanding that he had been as careful as he could.'

*48* (1949) 74 C.L.R. 541, 551—writer's italics. Prosser rather sacrifices the plaintiff-release rule by asking whether we are 'to be so ingenious as to say that the plaintiff is
We have seen that the dogmatic explanation provoked some questioning of Caswell’s case by the House of Lords in Jones v. Staveley. Yet there are hopes of salvage operations offered by these words in Lord Reid’s opinion: ‘It may be that a servant can say to his employer, “You cannot complain of my lapse because you put me in a situation where a careful and prudent man might well have a lapse like mine”’. And Lord Tucker’s opinion leaves room for distinguishing Staveley. He said: ‘My Lords, let me say at once that, while accepting without question [the dicta in Caswell’s case] and other dicta to a similar effect which have been used in this House in relation to cases under the Factories Acts and other statutes imposing absolute obligations on employers or occupiers of premises, I doubt very much whether they were ever intended or could properly be applied to a simple case of common law negligence such as the present where there was no evidence of work-people performing repetitive work under strain or for long hours at dangerous machines’. Might we not then explain the refusal to follow Caswell as having turned simply on the absence of evidence as to the general nature of the plaintiff’s work from which the court could have inferred a release?

Raising the defendant’s duty because of his knowledge of the plaintiff’s deficiencies does not, as it might be suggested, dispense with the release rule. The plaintiff’s task in establishing negligence is made easier, but he is given no help in rebutting a defence of contributory negligence. In Yachuk v. Oliver Blais Co. Ltd. the defendant’s knowledge that the plaintiff was a child ignorant of the inflammable nature of gasoline not only lifted the defendant’s duty, but, it was conceded, was relevant in judging the issue of the child’s contributory negligence under an obligation to protect the defendant against liability for the consequences of his own negligence’. Prosser: Handbook of the Law of Torts (2nd ed., 1955) 285. On the other hand Leon Green’s article ‘A Study in Proximate Cause’ (1930) 39 Yale Law Journal, 532 assumes a plaintiff-release rule. He was seeking a more satisfactory technique than was afforded by last-opportunity for choosing between plaintiff and defendant where there was apparently negligence and contributory negligence. He argued for a determination of what might be called the ‘dominant duty’, which then is made to prevail by way of what may be real, but often will be fictional release of the other party. The need to push the release-rule as far as fictional release has largely disappeared with the enactment of apportionment statutes, and the writer would not take it so far. Release will pretty much be confined to cases where there is a special continuing relation between the parties as in the employment situation. The speeches in the House of Lords in Staveley v. Jones are disposed to explain Caswell’s case as involving a statutory release. But the fact that the release may be achieved by statute does not mean that it cannot also be achieved by common law doctrine.

(3) The availability of the reliance rule in judging contributory negligence is theoretically hampered by the same doctrinal subtleties as affect the release rule. Yet no one doubts that we judge the contributory negligence of the driver of a motor vehicle by reference to a special standard of skill. The reliance rule, in judging contributory negligence, serves only to select occasions of individual responsibility. There is need to exercise restraint at all times lest the rule should push liability too far. Thus it should not be held that a blind man or an old man using the streets holds himself out as a competent pedestrian.

The Classification of Qualities

Warren Seavey has suggested a classification of human qualities under the headings physical, mental and moral. He does not pretend that the classification is ‘scientific’ and for the most part does not attempt to found any doctrine upon it. The classification has however within it the seeds of a futile search for what might be called the ‘essential’ as distinct from the ‘accidental’ qualities of our friend on the Clapham bus. The essential qualities, we may be told, have to do with the personality while the accidental qualities have to do with the flesh. The man on the Clapham bus borrows his accidental qualities from the particular actor whose conduct is in question, much like Danny Kaye desporting himself in the many roles in ‘The Secret Life of Walter Mitty’. The accidental qualities, in the language of

failed. In each case the defendant’s acquiescence in the manner of work adopted by the plaintiff was regarded as critical. In Carroll v. Chicken Palace [1955] 3 D.L.R. 681, the Ontario Court of Appeal held that the defendant had discharged the increased duty imposed on him due to his knowledge of the plaintiff’s blindness. The court did not therefore have to decide whether the plaintiff had been guilty of contributory negligence. There are, however, some unfortunate dicta which suggest that the court would have held the plaintiff to the standard of care of a person with full sight.

54 Cork v. Kirby MacLean Ltd. [1952] 2 All E.R. 402, involves a holding that an epileptic who offered himself as a painter held himself out as fit to work at heights. He fell due to a sudden attack of epilepsy and in an action against his employer was held guilty of contributory negligence. It is submitted that if he had disclosed his epilepsy and, because of a shortage of labour, had nonetheless been employed, this would both have lifted his employer’s duty and precluded the finding of contributory negligence. The reliance rule precluded the plaintiff in S.A. Ambulance v. Wahlheim (1948) 77 C.L.R. 215 from pleading his defective hearing as an excuse. It was found that there had been no contributory negligence but members of the High Court were at pains to point out reasons why a man of normal hearing would not have heard the siren.

55 Daly v. Liverpool Corporation [1939] 2 All E.R. 143, 143: The plaintiff in this case was an elderly woman. She was trying to cross the road, and I think she was doing her best. For one of that age, I do not think that it was at all a bad best, but it was not good enough. Although her inability to see the bus and to think as quickly as younger people could have done, and to take the necessary action, would not occur in younger men and women, what she actually did was the best she could. I cannot believe that the law is quite so absurd as to say that, if a pedestrian happens to be old and slow and a little stupid, and does not possess the skill of the hypothetical pedestrian, he or she can only walk about his or her native country at his or her own risk. One must take people as one finds them. There is no hypothetical standard of care. We must all do our reasonable best when we are walking about.

accepted writ, are some of the 'circumstances' in which our Clapham friend acts. It is from such language, it seems to the writer, that Seavey draws the conclusion that the physical qualities of the actor are always relevant in judging his behaviour. We are told that we must judge a blind man by asking how the Clapham gentleman would behave if he were blind. Indeed Seavey is prepared to go further and include in 'circumstances' some qualities of the actor which on any showing are more than physical. Thus he suggests that the actor's abnormally slow reaction time, provided he is not conscious of it, is to be regarded no differently from a latent defect in the steering of the car that he is driving. But he stops short of suggesting that we should judge the moron by asking how the Clapham gentleman would behave if he were a moron.

It is submitted that there is only one significant general classification of qualities of the actor, and this stems from the limitations on practicable judicial enquiry. Some qualities of the actor may be assessed by the court with an approach to a true understanding while others may be assessed only by the psychologists and the Almighty. The court will be unready to push enquiry too deeply into the recesses of the actor's mental and emotional equipment. Thus it may be that a litigant who has satisfied doctrine and so shown the court that it may properly take count of individual qualities, may yet have difficulty in inducing the court to go all the distance he may seek to lead it on an investigation of those qualities. The court will be ready enough, where doctrine allows, to take count of the fact that a man is blind or deaf or crippled. But it will be timid when it is asked to carry an investigation of the qualities of the actor beyond patent physical disabilities. Certainly it will boggle at a general investigation of the will-power and intelligence of the actor save where the abnormality is of an order which we would call insanity, or where the age of the actor provides a ready-reckoner. And it will not relish an investigation into the nature and degree of the skill which the actor in fact possessed. The court will not be anxious to get involved in an investigation which may require a battery of psychological tests and, if it is a matter of professional skill, a new submission of the actor to university examination. There is an academic lawyer's problem of how to judge a doctor who lends first aid in an emergency, not as a

58 Seavey, op. cit., 2, 15, 24.
59 Pollock no doubt expressed himself a little too strongly when he wrote: 'It is by no means suggested that theories of psychology, normal or abnormal, should be made propositions of law. The errors of common sense are more tolerable, on the whole, than those of speculation; at all events they are more easily corrected.' Pollock on Torts (15th ed., 1951), 48.
61 Infra, pp. 181-182.
doctor but as a bystander. The doctor does as much for the injured person as you or I could do, but neglects to apply some treatment which his medical training should have reminded him was called for. The court's answer to the academic problem is likely to be: if you had held yourself out as a doctor we would insist that you be skilful, whatever your competence in fact. But we are not prepared to undertake an investigation of how well you have heeded your master's teachings.

Where doctrine allows, the court will attempt to assess the actor's knowledge of the circumstances in which he acted. But, save where he is insane or the ready-reckoner of age is available, there will be a point beyond which the court will refuse to argue with him and will impute a minimum of knowledge. The actor's mistaken belief poses no more difficulty of assessment than does the actor's knowledge. But the application of doctrine in determining the relevance of the actor's mistaken belief tends to pose some difficulties. The writer well remembers an argument with one of his law teachers involving this question: is it enough in a situation where rescue is not in fact called for to show that the rescuer believed rescue was necessary, or must one also show that the Clapham gentleman would have so believed? It is submitted that it is enough, in judging contributory negligence, to show the would-be rescuer's belief. On the other hand the defendant who holds a mistaken belief peculiar to himself may not be able to rely on that belief for excuse save within the limits of the release rule. Assume that the call for heavy lifting equipment in Watt v. Hertfordshire County Council had been made by a practical joker and a gullible officer in charge had been too easily deceived. The Council would have been forced to rely on the principle of release and might have foundered on the Smith v. Baker limitations on that principle. One member of the Court of Appeal in Watt v. Hertfordshire County Council brought in the release rule to reinforce his conclusion that the Council was not liable. He may thereby have started a controversy. Is motivation provoked by the circumstances one of the qualities by reference to which we determine what the Clapham gentleman would have done? Putting it another way, does it matter what end the Clapham gentleman would have thought he was serving if that end was not in fact furthered by what was done? It may be that

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62 The relevance of what the Clapham man would have believed, at the earlier stage of showing a duty on the defendant, is not denied.

63 In a recent case tried in Perth, X a schizophrenic driving a stolen car, knocked down the plaintiff on a cross-walk. X believed that he was being chased by men who proposed to kill him. The defendant in the action, under statutory provisions, was the Motor Vehicle Insurance Trust. Judgment which has not been given at the time of writing, will be looked to with some interest.


65 Ibid., per Singleton L.J.
mistaken belief is only relevant where doctrine allows taking count of the special qualities of the actor. 66

Youth, senility and insanity are obvious circumstances which may affect the qualities of the actor and they have been the subject of some special academic and judicial consideration. But these circumstances do not call for any distinct doctrine. They are of significance only because they may induce an otherwise shy court to make an assessment of the intellectual and emotional equipment of the actor. The writer will be content with these summary comments:

(1) In judging contributory negligence in a child actor the court will usually be content with a ready-reckoner. Having ascertained his age the court will impute to him a set of qualities which it has scheduled for a child of his age. Thus the court avoids an expedition which may take it beyond the limits of practicable judicial enquiry. 67

(2) Text-book writers—there is no English or Australian decision 68—are disposed to reason from cases involving a child's contributory negligence to the conclusion that the special qualities of a child are always relevant in judging negligence. 69 The reasoning is unsound but perhaps the conclusion is sound. It will be remembered that, in the absence of release, doctrine has yet no machinery to handle the situation where a defendant is not in a position to distribute and where, therefore, an individualist moral judgment of his behaviour is called for. The writer has suggested that we need some new doctrine to handle this situation. Perhaps a special rule for child-defendants is a contribution to such doctrine. It would of course be more satisfying if the rule were framed in terms of its function, but loss-distribution must, it seems, make-do with Heath Robinson contrivances. In the rare situations where the child is in a position to distribute, the reliance-rule may come to the plaintiff's aid.

(3) In Daly v. Liverpool Corporation 70 Stable J. relied on the plaintiff's advanced years to excuse what would otherwise have been contributory negligence. The case is a useful one for pedestrian plain-

66 Assume, in addition to the practical joke and the gullibility of the officer, that the jack had fallen from the vehicle and injured a pedestrian. Would the Council then have been entitled to rely on motivation so as to excuse the defective mooring of the jack? Daborn v. Bath Tramways [1946] 2 All E.R. 333, which in any event involved contributory negligence, does not help, for the ambulance driver's motivation in that case accorded with the external situation.

67 The schedule system becomes grotesque at times. In a recent Western Australian case involving a child aged six injured in a running-down, the judge relied on the fact that children of six are taught at school that they must look both ways before crossing and found the child guilty of contributory negligence. He did not consider it was relevant that this particular child had not yet started school.


70 [1939] 2 All E.R. 142.
tiffs though difficulties in setting up a ready-reckoner for the aged may deter more timid judges.

(4) The disposition of some American authorities to reason from contributory negligence cases to the conclusion that age is always relevant in judging negligence is unsound both in reasoning and conclusion.

(5) The disposition to consider insanity a defence in negligence reflects the fundamentally make-shift character of the law of tort as an instrument of loss-distribution. A wholly rational system of loss-distribution would not be predicated on liability at all. So long as courts must operate within a liability frame-work they are likely to balk at finding negligent a man whose insanity is of such an order that he does not know what he is doing.

THE RELEVANCE OF INDIVIDUAL QUALITIES OF THE ACTOR IN DETERMINING AN APPORTIONMENT

A detailed study of the potential of apportionment statutes and the complexities which may arise in exploiting that potential is beyond the compass of this article. No more is here intended than an indication of the bearing of this potential on the special question raised. Perhaps, however, for the temptation is great, there will be room for some gratuitous advice to the courts on a wider front.

The critical words of the English Act are:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

'Fault' means negligence breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

These words are followed in the Queensland, Victorian and Tasmanian Acts. The Western Australian Act, however, strikes out on its own:

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73 See the writer's article (1955) 3 *University of Western Australia Annual Law Review*, 201, 271-274.

74 Law Reform (Contributory Negligence) Act, 1945, ss. 1(1), 4.

75 Law Reform (Tortfeasors Contribution Contributory Negligence, and Division of Chattels) Act, 1952, ss. 10(1), 4.

76 Wrongs (Contributory Negligence) Act, 1951, ss. 3 (1), 2.

Whenever in any claim for damages founded on an allegation of negligence the court is satisfied that the defendant was guilty of an act of negligence conducing to the happening of the event which caused the damage then notwithstanding that the plaintiff had the last opportunity of avoiding or could by the exercise of reasonable care, have avoided the consequences of the defendant's act or might otherwise be held guilty of contributory negligence, the defendant shall not for that reason be entitled to judgment, but the court shall reduce the damages which would be recoverable by the plaintiff if the happening of the event which caused the damage had been solely due to the negligence of the defendant to such extent as the court thinks just in accordance with the degree of negligence attributable to the plaintiff.

'Negligence' includes breach of statutory duty.\(^78\)

What might be the special virtues of the original drafting of the Western Australian Act will be noted in a moment. Immediately the writer would draw attention to the abundance of words and dearth of consistent meaning which have marked the judicial interpretation of the words of the English Act. Granted that the Act is in play, there is a number of distinguishable views on the mathematics of apportionment:

(1) It is said that apportionment must be determined by reference to the extent to which each of the wrongs has caused the loss.\(^79\) Some vague suspicion that this involves philosophical nonsense has probably prompted judges to alloy the causation test with another which insists that the apportionment must be determined by reference to 'blame-worthiness', or 'culpability'.\(^80\) Variations on this 'culpability' test give rise to all the formulae which follow.

(2) It is said that apportionment must be determined by comparing the culpabilities of the parties. We add the quantum of the plaintiff's culpability to the quantum of the defendant's culpability and scale down the plaintiff's recovery by the fraction which his culpability is

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\(^78\) Law Reform (Contributory Negligence and Tortfeasors Contribution) Act, 1947, ss. 4(1), 3.

\(^79\) Charlesworth, Negligence (2nd ed., 1947) 495; Pollock on Torts (15th ed., 1951) 352.

\(^80\) Lord Reid said in National Coal Board v. England [1954] A.C. 403, 427: 'I think that firing the shot without making certain that all in the vicinity had taken shelter was much more culpable and more directly connected with the accident than anything which the respondent did, and I would hold that Williams' share in the responsibility for the damage was three times as great as the respondent's share.' Lord Reid elaborated his test in Stapley v. Gypsum Mines [1953] A.C. 663, 682: 'A Court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but "the claimant's share in the responsibility for the damage" cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness.' In Davies v. Swan Motor Co., [1949] 2 K.B. 291, 326 Denning L.J. said: 'Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the Court to be "just and equitable" having regard to the claimant's "share in the responsibility" for the damage. This involves a consideration not only of the causative potency of a particular factor, but also of its blameworthiness.'
of the total culpability. This view has a number of variants depending on what we mean by culpability:

(a) In one variant culpability refers to the quantum of departure from the standard set by the law.\(^8\)

(b) In another variant culpability refers to the quantum of departure from the standards directly set by individualist morality, which may or may not coincide with the standard set by the law.\(^8\)

(c) In a third variant culpability refers, in judging the defendant’s behaviour to the quantum of departure from the law’s standard and, in judging the plaintiff’s behaviour, to the quantum of departure from the standard directly set by individualist morality.\(^8\)

(3) It is said that apportionment must be determined by reference only to the plaintiff’s culpability. We must scale down the plaintiff’s recovery by the fraction which his culpability is of the total culpability of which he could possibly have been guilty in the particular situation. This view has two variants depending on what we mean by culpability.

(a) In one variant culpability refers to the quantum of departure from the standard set by the law.

(b) In the other variant culpability refers to the quantum of departure from the standard set directly by individualist morality.\(^8\)

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\(^8\) Prosser seems to support this view though he equivocates by using the word ‘fault’. Prosser, ‘Comparative Negligence’, Selected Topics on the Law of Torts, 26, and the model statute, 68-69. The High Court in Pennington v. Norris (1956) 30 Australian Law Journal, 242, 244, formally adopts this view but, it will be seen, applied some individualist morality in judging the plaintiff’s behaviour.

\(^8\) Prosser does not exclude this view, Handbook of the Law of Torts (2nd ed., 1955), 296; see the references in n. 81 above. Denning J. (as he then was) seems to have operated on this view in Lavender v. Diamints Ltd. [1948] 2 All E.R. 249 though he used the causation language. Defendant was in breach of a statutory duty, but not guilty of common law negligence. Plaintiff, it was found, was guilty of contributory negligence. Denning J. apportioned 100 per cent against the plaintiff, arguing that the defendant’s ‘share of responsibility’ must be nil. The Court of Appeal ([1949] 1 All E.R. 532) rejected the finding of contributory negligence and gave judgment for the plaintiff. Singleton L.J. alone commented on the apportionment made by Denning J. He said: ‘I find myself unable to agree with this, in view of the fact that the judge had found the defendants to have failed in their statutory duty in a way which must at least have had some bearing on the accident to the plaintiff’ ([1949] 1 All E.R. 532, 538). Singleton L.J. thus appears to prefer testing culpability by reference to the standard set by the law. And see Beal v. E. Gomme Ltd. (1949) 65 T.L.R. 543.

\(^8\) The High Court’s judgment in Pennington v. Norris (1956) 30 Australian Law Journal, 242, seems to add up to this view. After formally adopting comparison by reference to legal standards and insisting that contributory negligence involves duty only to oneself, the judgment goes on to assert that the risk which the plaintiff’s conduct created for others was a relevant consideration. See infra, p. ?

\(^8\) Payne (1955) 18 Modern Law Review, 344 argues for one or other of these variants. The article was referred to by the High Court in Pennington v. Norris but no comment was made. The absence of comment is strange since the High Court impliedly rejected Payne’s view by adopting comparison of culpabilities. Which of the variants is the one Payne favours is hard to say. He writes at one stage: ‘The responsibility of the defendant is the ordinary legal responsibility which arises from the fact that a tort has been committed, while the responsibility of the plaintiff is both legal and moral,
The distinction drawn in the above arrangement between the law's standard and a standard set directly by individualist morality is of course not the distinction drawn in the preceding part of this article. There we were concerned to determine how far the law's standard is leavened by individualist morality. A direct recourse to individualist morality involves a simple rejection of the law's standard, however leavened or unleavened. To the extent of such direct recourse the courts are remaking the law of tort. Findings of negligence and contributory negligence become simply the constitutional conditions of the court's law-making power.

It would be, no doubt, a challenging exercise in the handling of authorities to take the dicta which the writer has relegated to footnotes and attempt to determine which of these views is the law. But the exercise is better left undone. The present resources of doctrine offer a variety of techniques for doing the variety of tasks which apportionment situations involve. So far as the words of the English Act are concerned no one view can be shown to be certainly right. The words 'just and equitable' offer a continuing authority to melt down and re-work any view which is proving inconvenient. And even if the words 'share of responsibility' do direct the philosophically impossible search for Lord Justice Denning's 'causative potency', the courts are only directed to 'have regard' to such potency. Fortunately for them, Western Australian judges are relieved of any need to argue with the philosophers. The corresponding words of the Western Australian Act are 'in accordance with the degree of negligence attributable to the plaintiff'.

The writer is tempted indeed to add another view to the list already detailed. Why should we assume that the reduction of the plaintiff's damages must be determined as a fraction of the total damages? Is there not room in loss-distribution situations for a view which will involve assessing a fine to be inflicted on the plaintiff by deducting it from his damages? Perhaps such a view raises too starkly the question of just what the judges and the law are about. The idea of apportioning the loss extends the twilight. Apportionment involves a refinement of individualist moral ideas. It has won support however,

since the legal effects of contributory negligence follow only from morally culpable conduct' (p. 347). But at another stage he argues that the 80* per cent reduction in Stapley is to be attributed 'to the extent of the departure of S from the norm of the reasonable man' (p. 354).

Nonetheless Virtue J. seems to think that philosophy can help. Thus in McNaı́r v. Wilson (1952) 54 W.A.L.R. 66, 79 he said: 'The amount of the reduction is of course dependent under the section on the degree of negligence attributable to the plaintiff. Upon consideration of all the circumstances I am in agreement with the judgment of Walker J. that the accident should be attributable 50* per cent to the negligence of the plaintiff and 50* per cent to the negligence of the defendant' (writer's italics). Similar thinking determined his judgment in Downey v. Great Western Consolidated Gold Mines N.L. (not yet reported). See infra, pp. 190-192.
not as such a refinement, but as a modification of the old machinery which will in Heath Robinson fashion enable us to produce a little more loss-distribution than we did before. The mechanic will tell you that you can never be sure what will happen when you go tinkering with an old machine. Perhaps the gain to loss-distribution in some areas has been at the expense of gains already achieved. 87

The need is for a classification of tasks and an assigning of appropriate techniques which will assist the courts to do their best, with the machinery available, to further both loss-distribution and individual responsibility.

Where the defendant is merely the focus of loss-distribution, the finding of negligence is simply an acknowledgment that the occasion is within the distribution system. Just such a simple acknowledgment is involved in a finding of negligence against an employer, against an occupier, against a manufacturer and, since the days of compulsory third party insurance, against a motor vehicle driver. After the acknowledgment the finding of negligence should be defunct, and we should look now only to the plaintiff’s culpability. 88 The assessment of the quantum of the plaintiff’s culpability must in the last analysis be an intuitive stab. The exact determination of the dimensions of culpability is an exercise in medieval scholarship and beyond the equipment of our courts. But if it is a stab, it ought not to be a blind stab. It is true that blind stabs will eventually form themselves into a pattern at least for the judge who makes them and possibly for his brethren. The Supreme Court judges in Western Australia have established some sort of a pattern in motor vehicle accident cases. 89 And there is virtue in having a pattern whatever its origin. 90

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87 See the writer’s article, ‘Death and Injury on the Roads’ (1955) 3 University of Western Australia Annual Law Review, 201, 230-242, as to Western Australian experience in the area of motor vehicle accidents.

88 Comparison of culpabilities in loss-distribution situations can lead to some grotesque results at least when culpability is taken to refer directly to individualist morality. The judgment of Denning J. in Lavender v. Diamints Ltd. [1948] 2 All E.R. 249 (subra n. 82) shows an otherwise ‘progressive’ judge very much off the beam. Contrast this judgment with the express statutory intention in the Federal Employers’ Liability Act (U.S.) noted infra, n. 93. Lord Justice Denning’s more recent language of ‘causative potency’ is an attempt to get back on the beam though, in the writer’s submission, it is a beam that will guide him nowhere.

89 Perhaps it would be more correct to say that each judge has established a distinct pattern. Synnot v. Ronzio (1955) 57 W.A.L.R. 77 was a simple case of a pedestrian, walking with traffic on the edge of a bitumen road, hit on a clear night by a car approaching from behind with lights on high beam. The trial judge apportioned 1/3rd against the pedestrian. On appeal Jackson J. alone agreed with the trial judge’s apportionment. Beyond disagreeing with counsel’s submission as to how apportionment should be determined, he was content to say that ‘the matter should be approached in “a broad commonsense manner.” ’ Dwyer C.J., while feeling that he was compelled by the traffic regulations to find there was some negligence by the plaintiff, thought that ‘the utmost that should be weighed in the balance against the plaintiff should be about half the amount which has been suggested’ (1955) 57 W.A.L.R. 77, 81. Virtue J. said that he would ‘have been inclined to attribute a somewhat greater degree of negligence to the plaintiff than that proposed’ but would not dissent because ‘a proper percentage under the section seem[ed] hardly able to be arrived at otherwise than by
The submissions now made are made in the cause of finding a rational rather than a caballistic origin for a pattern. The plaintiff's conduct must be judged by a standard leavened by individualist morality to the extent that so long as he has not held himself out as having superior qualities the standard must take count of his individual qualities. This submission made at this level is an insurance against the failure of the same submission at the level of the initial determination of contributory negligence. There are fetters of precedent and juristic authority at the earlier level. But those fetters have been removed by the words of the apportionment statutes. How much further need there is to call on individualist morality beyond this leavening raises questions which are beyond the compass of this article. But some excursion is beyond resisting. After generations of interests-conflicts explanation of the law of negligence by sociological jurists, it is, to say the least, surprising to find doctrine strongly asserting that contributory negligence involves duty only to oneself. For is not the risk to which the plaintiff's conduct has exposed others, judged with reference to the value of the interest he was seeking to further, a vital consideration? The High Court in *Pennington v. Norris* thought risk to others was at least relevant: 'We think ... that in this case the very fact that his conduct did not endanger the defendant or anybody else is a material consideration.'

91 So far as resort to this consideration is not warranted by the law's standard there will be a direct resort to individualist morality under the power conferred by the apportionment statutes. This is not to say that the plaintiff's failure to take care for himself is a consideration which may be neglected. Whether judging a man by reference to such failure

\[\text{an intuitive process rather than by a process of precise logical reasoning'}\] (1953) 57 W.A.L.R. 77, 81. Some revision of these patterns will be required if the judges are to respond to the High Court's opinion in *Pennington v. Norris*.

92 The existence of a pattern favours predictability of judicial decision and a consequent atmosphere which makes for settlements. During debate on the Bill which became the Western Australian Act one member asked: 'You are sure the title to the Bill should not be "Fees for Lawyers"?' (1947) 119 Parliamentary Debates (W.A.) 1210.

93 (1956) 30 Australian Law Journal, 242, 244. Whether they thought it was relevant on the law's standard or on some moral standard is beyond knowing. The words preceding the passage quoted in the text are: 'By "culpability" we do not mean moral blameworthiness but degree of departure from the standard of care of the reasonable man. To institute a comparison in respect of blameworthiness in such a case as the present seems more or less impracticable, because while the defendant's negligence is a breach of a duty owed to other persons and therefore blameworthy, the plaintiff's "contributory" negligence is not a breach of any duty at all, and it is difficult to impute "moral" blame to one who is careless merely of his own safety. Here, in our opinion, the negligence of the defendant was in a high degree more culpable, more gross, than that of the plaintiff. The plaintiff's conduct was *ex hypothesi* careless and unreasonable, but, after all, it was the sort of thing that is very commonly done: he simply did not look when a reasonably careful man would have looked.' The writer has already rejected comparison in the class of case to which *Pennington v. Norris* belongs, but the obscurity in the passage quoted supports the submission hereafter made in the text that no comparison is possible save in terms of risks to others: that one cannot divide apples by oranges.
is or is not a 'moral' judgment in the meaning, whatever it may have been, which the High Court gave to this word in *Pennington v. Norris* need not concern us. There is at least a social morality to be served in preserving our human and material resources by insisting that people take care for themselves. It is true that it may be doubted whether depriving a man of some or all of his damages because of contributory negligence is of any value as a deterrent in some areas of human activity, and this may justify a less concern with this aspect of the plaintiff's conduct in some cases than in others.

On the basis of these submissions an apportionment against a plaintiff of damages which would otherwise be distributed, if expressed as a fraction, will rarely be a large fraction. Indeed fractional thinking is inappropriate in this context. One should rather ask what is a proper fine to impose on the plaintiff. It is true that the ceiling of the fine is set by the damages the plaintiff has in fact suffered, but beyond this the amount of the damages should be irrelevant. This really is elementary common sense, though it must be admitted the law of tort is obsessed with a primitive morality which judges conduct by consequences, and the law of crime is not without some infection. Perhaps then the writer is asking for more than the inertia of the past will permit. But if our thinking must be in terms of a fraction then let us agree that the fraction will never exceed one half and will normally be substantially less.

Where the finding of negligence is not a mere acknowledgment that the plaintiff's loss is within a loss-distribution system, but is the authority to shift a loss in whole or in part from one individual to another, the court should look immediately to the comparative culpability of the parties. We saw that in determining negligence in the area of loss-shifting it is to some extent beyond the apparent capacity of existing principle to bring in a leavening of individualist morality. If the leavening cannot be imported at that stage, there is power in the statutory mandate to import it in determining an apportionment.

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92 For an expression of doubt as to the value of the device in motor vehicle accident cases see the writer's article (1955) 3 *University of Western Australia Annual Law Review*, 201, 283-287.

93 The English and Western Australian Acts require the jury, where a case is tried with a jury, to determine the total damages and the extent to which those damages are to be reduced. The words do not demand the naming of a fraction. Jury trial has pretty well disappeared in Western Australia. Prosser reports a tendency in America for juries to ignore the direction to apportion and argues that the special verdict required by the English and Western Australian Acts is desirable. But perhaps there is wisdom in these American jury verdicts in loss-distribution situations where the plaintiff's culpability is slight. And see the provision in the Federal Employers' Liability Act, 1908 (U.S.): 'Provided that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'

94 Thus the fraction (20 per cent) determined upon in *Pennington v. Norris* is sound, though the ostensible manner of calculating it—a comparison of culpabilities—is unsound.
Thus, what could not be done at the first level, may be done at this second level. Where then the actor has not held himself out as having superior qualities the law's standard will be individualized to take count of his individual qualities. To this extent there may be a direct resort to individualist morality. The process of comparison of culpabilities will be primarily concerned with the risks each party has created for others. Here the language of sociological jurisprudence is eminently appropriate; it is a matter of determining a point of adjustment in a conflict of interests. Defendant's and plaintiff's behaviours are weighed against one another in terms of an evaluation of the interests each was seeking to further and the hazards involved for others. So far as the law's standard in contributory negligence is preoccupied with a myopic regard only for the risks the plaintiff's behaviour has created for himself, there will need to be a further direct importing of individualist morality. When a point of adjustment is determined on and a tentative apportionment fixed, it is time enough to have regard to the plaintiff's failure to take care for himself. Comparison again becomes inappropriate. Indeed one would have thought it was a kindergarten axiom that one cannot divide two apples by three oranges. The modification of the tentative apportionment so as to discipline the plaintiff for failing to take care for himself should be determined, in the manner already outlined, by asking what is a proper fine to impose on the plaintiff.\textsuperscript{95}

There remains to consider a technical objection to the submission just made. The Court of Appeal was disturbed in \textit{Davies v. Swan Motor Co.}\textsuperscript{96} at the idea that a method of apportionment might be adopted which would have the result, in a multiple-defendant situation, that the amount of the plaintiff's judgment against one defendant might differ from the amount of his judgment against another,

\textsuperscript{95} In his note on \textit{Stapley v. Gypsum Mines} ([1952] 1 Q.B. 575; [1953] A.C. 663) in (1954) 17 Modern Law Review, 66, 70, Glanville Williams supports the House of Lords in its rejection of the 'single cause' thinking the Court of Appeal had used. He then proceeds to question the apportionment made by the House of Lords and in doing so makes use of a degrees-of-causation thinking which is just as untenable philosophically as the 'single cause' thinking used by the Court of Appeal. Glanville Williams supposes that both miners had been killed and their estates had brought cross-actions. He comments: 'The logic of apportionment is such that if in the first action Stapley is held 80 per cent to blame he must also be held 80 per cent to blame in the second action in which his estate is defendant, the circumstances in each case being the same.' If this is the logic of apportionment, then no doubt the present writer is illogical. It certainly is contemplated that on the technique of apportionment offered in the text each estate as plaintiff might recover only 20 per cent. Glanville Williams' logic leads him to some strange propositions. Thus he says: 'To allow recovery at all leads logically to the conclusion that the recovery should be of 50 per cent. Suppose there had been not two but ten servants involved in the default, and that Stapley alone had suffered damage: then it might seem to follow that he should, by parity of reasoning, have recovered 90 per cent of his damages from the employers, who would be vicariously liable for the sum total of the one-tenth shares of each servant.' Glanville Williams' logic has recently been rejected by Lynskey J. in \textit{Williams v. Port of Liverpool Stevedoring} [1956] 1 W.L.R. 551.

\textsuperscript{96} [1949] 2 K.B. 291.
with attendant arithmetical complications in determining contribution between the tortfeasors. Yet it must be obvious that so far as we compare culpability the plaintiff’s judgment will vary with the particular defendant against whom judgment is given. And where successive actions are brought against tortfeasors the court may reach differing assessments of damages and differing apportionments in each action. Perhaps the concern felt by the Court of Appeal will be useful in bolstering the suggestion that comparison of culpabilities is inappropriate wherever the defendant is merely the focus of loss-distribution. But it cannot be used as an independent argument.

The determination of contribution between tortfeasors is a process closely similar to the determination of apportionment. The considerations the writer has urged as appropriate on apportionment are equally appropriate on contribution. Thus where tortfeasor A is the focus of a loss-distribution system and tortfeasor B is not, only B’s conduct need be looked to on contribution. It is a matter of determining a fine to be imposed on B and this fine will ordinarily be substantially less than the ceiling fixed by the amount of the judgment given against B. In assessing this fine B’s individual qualities will be relevant. Where neither A nor B is the focus of a loss-distribution scheme, it is a matter of balancing culpabilities and in this process the individual qualities of both A and B will be relevant. Where, as it might be, the issue is simply between A’s loss-distribution system and B’s loss-distribution system, it will be well enough to divide the loss equally between the two systems. In some circumstances both contribution and apportionment are called for. The arithmetic becomes more complicated but, it is submitted, sound function can only be achieved by following the considerations urged in this article. Causation thinking seems to have a special appeal in cases where both contribution and apportionment are called for, but the fogging of judicial minds and the defeat of any intelligible function are greater than ever. In a recent Western Australian case,

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97 The critical words of the Law Reform (Married Women and Tortfeasors) Act 1935, (Eng.) s. 6 are: 'shall be such as may be found by the Court to be just and equitable, having regard to the extent of that person's responsibility for the damage'. The words of the English Act are copied by the Law Reform (Miscellaneous Provisions) Act 1946 (N.S.W.), s. 5, the Wrongs (Tortfeasors) Act 1949 (Vic.), s. 2, the Law Reform (Tortfeasors Contribution, Contributory Negligence, and Division of Chattels) Act 1952 (Qld.), s. 6, the Wrongs Act 1935-51 (S.A.), s. 26, and the Tortfeasors and Contributory Negligence Act 1954 (Tas.), s. 3. The Law Reform (Contributory Negligence and Tortfeasors Contribution) Act 1947 (W.A.), indulges original drafting in being content with the words 'shall be such as may be found by the Court to be just and equitable.'

98 While the writer would quarrel with the fractions chosen by the County Court, the approach offered in the text is not inconsistent with the success of the defence of res judicata in Bell v. Holmes [1956] 3 All E.R. 449.

99 Downey v. Great Western Consolidated Gold Mines N.L. (not yet reported—Supreme Court judgment, 23rd September 1955; High Court judgment, 10th December 1956).
Virtue J. endeavoured to determine apportionment and contribution by a simple dissection of the orange of causation. He dissected 35 per cent to the plaintiff, 15 per cent to the defendant employee and 50 per cent to the defendant employer, and entered judgment for the plaintiff for 15 per cent of his damages against the defendant employee and 65 per cent of his damages against the defendant employer. Dissecting the orange of causation is Glanville Williams' idea. It has the intriguing consequence from the plaintiff's point of view, that 'the more the merrier'. Thus it was argued in a recent English case that if 10 workmen are engaged in the same careless act and one of them is injured, apportionment against him will be 10 per cent. Where 5 workmen are so engaged apportionment against the injured workman will be 20 per cent. In effect Virtue J. gave a joint judgment against the employer and defendant employee as to 15 per cent and a several judgment against the employer as to 50 per cent. Whatever may have been the position prior to contribution statutes, there can be no doubt that the court may now make several judgments. It is submitted however that the power ought not to be used so as to deprive the plaintiff of a financially responsible quarry. It is some comfort that the several judgment went against the employer. An appeal was taken to the High Court by the defendant employer only. The High Court found that there had been no personal negligence on the part of the employer, but on the basis of vicarious liability proceeded to apportion the damages between the plaintiff and the employer in the proportion 35/15. The court observed that the plaintiff had not asked for any alteration in the amount of the judgment entered against the defendant employee and left judgment against him as determined by Virtue J. The writer confesses himself fascinated by the arithmetic but completely bewildered as to the function of the calculations. The determination of contribution can and should remain a distinct issue, just as the determination of apportionment on a claim raises an issue distinct from the determination of apportionment on a counter-claim arising on the same facts. Where cars driven by A and B are involved in a collision it may properly be ordered that A recover 80 per cent of his damages

2 Williams v. Port of Liverpool Stevedoring [1956] 1 W.L.R. 551, supra n. 95.
3 The neat disposal of both issues in one process with liabilities disappearing in set-off of judgments, favoured by Glanville Williams (Joint Torts and Contributory Negligence (1951), chs. 7, 19) and Prosser (Selected Topics on the Law of Torts (1953), 61), may satisfy the tidy mind, but the law's service to loss-distribution may be severely limited. The insurer's control of the defence of an action will not normally extend to the raising of a counter-claim and in this there is some comfort. Where set-off of judgments does occur it may be open to a defendant to enforce distribution by insisting that he has paid some of his 'liability' by way of surrender of a chose in action against the person to whom the liability is owed, and that the insurer must indemnify him against this loss.
from B and that B recover 70 per cent of his damages from A. If a push cyclist, C, has been injured in the collision it may properly be ordered that C recover 90 per cent of his damages from A and B jointly. The apportionment against C will not vary for both A and B are backed by loss-distribution systems. On contribution it may properly be ordered that A and B each pay 45 per cent. If B had been another push cyclist it would have been quite proper to order that C recover a several judgment for 30 per cent against A and an additional judgment for 60 per cent against A and B jointly. On contribution between A and B it would have been proper to order that A pay 80 per cent and B 10 per cent. If this approach calls for more arithmetic, the reward, in the writer's submission, is sound function.

Some years ago Fleming James raised an argument with Charles Gregory on the virtue of contribution statutes. James' argument was that contribution statutes tend to take loss out of the 'channels of distribution' and shift it to individuals. If the submissions the writer has urged are followed this consequence will be prevented save to the extent that discipline of an individual is called for. And contribution statutes will, in the language of the argument, be 'pragmatically' justified in full. We will have held our achievements in the adapting of the old common law machine, and be equipped to go on through apportionment and contribution, to new achievements.