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NEGLIGENCE OF THE PHYSICALLY INFIRM

G. B. WEISIGER*

Tort liability as related to physical defects has been a subject of litigation in a considerable number of cases. Most of the situations involve negligence and the formulas used by the courts with reference to the standard of conduct. The opinions disclose a certain amount of disagreement if not confusion as to the test to be applied in instructing juries or in drawing the inference of negligence as a matter of law. Serious physical incapacity in the form of blindness, deafness, lack of limbs and in other respects exists to such an extent as to make it appear desirable to give some consideration to the rules of negligence related to this condition. It is proposed to discuss this subject with reference to contributory fault of persons physically defective and to the standard of conduct required of such persons as it affects the interests of others.

One difficulty that underlies the whole matter is the failure to agree on what negligence *is*. Salmond's¹ view emphasizes the *mens rea* and suggests a subjective approach. On the other hand, writers² and courts generally deal with the situation largely from the objective point of view. Alderson³ defined negligence as consisting of an act or failure to act, in other words in terms of conduct. But the conduct if it is not to be negligent must be that of the reasonable man. To identify the reasonable man, the standard man, there must be agreement on his qualities, mental, physical and moral. In comparing the actor's conduct with that of the reasonable man, the judge or jury assumes the actor's qualities must be identical with the reasonable man's whether they are or not. This would seem to be a method as objective as Alderson's definition would permit. This procedure depends on an external test of the actor's behavior and is objective with reference to his actual qualities. If, however, some attribute of the actor is considered to account for a variance between his conduct and the external standard, to that extent the approach is subjective.

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¹ SALMOND, JURISPRUDENCE (9th ed. 1937) §140.

² Terry, *Negligence* (1915) 29 HARV. L. REV. 40. See especially, Edgerton, *Negligence, Inadvertence and Indifference; The Relation of Mental States to Negligence* (1926) 39 HARV. L. REV. 849.

³ *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781 (1856). "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

Under the objective standard conduct speaks for itself. If what the actor does or appears to do seems unreasonably dangerous as viewed externally, there is negligence. If a car on a crowded street swerves from one side to the other surely the driver must be negligent according to this test. Yet, if some unexpected ailment seized the driver resulting in loss of his consciousness, he is not liable for the death of a pedestrian in the path of his car.⁴ Likewise, if a driver of a car suddenly and unexpectedly loses muscular control, no liability attaches for harm arising from his conduct.⁵ In both these situations an entirely objective consideration would result in liability. By taking account of the physical incapacity, a subjective factor, the result is different.

The method of ignoring the actor's qualities and proceeding objectively to determine liability has the merit of simplicity and convenience.⁶ However, the attempt to maintain one standard and at the same time make allowance for attributes of the actor in which he varies from the normal man, has succeeded in confusing juries and, it may be suspected, the courts as well.

When the concept of negligence gained recognition in the law it is not strange that the standard sought was largely objective. With reference to infinite varieties of factual situations a formula of measurement had to be adopted. In the early law of absolute liability nothing more was required to make the defendant liable than that his act resulted in plaintiff's damage. "For what he did unwittingly he repented wittingly." Under this principle there was no thought of such notions as negligence, objective or subjective, negligence as a term of relation or the so-called rules of proximate cause. The standard of liability required only a causal connection between act and harm and afforded little difficulty in application. When the fault requirement was first admitted courts were not at all certain as to how far it should invade the older doctrine. Such expressions as "utterly without fault" and "unavoidable accident" and "that he could not have acted in any other way" to be found in this period of transition suggest standards differing little from acting at peril. When Alderson's definition was announced the courts through experience were inclined to apply it objectively. The court or jury as identified with the reasonable man was to determine whether the actor's conduct, without reference to any unusual quality of the actor, presented the appearance of unreasonable risk. In *Vaughan v. Men-*

⁴ *Slattery v. Haley*, 3 Dominion L. R. 156, 25 Ont. L. R. 95 (1923).

⁵ *Cohen v. Petty*, 65 Fed. (2d) 820 (1933).

⁶ *Charbonneau v. MacRury*, 84 N. H. 501, 511, 153 Atl. 457, 463, 73 A. L. R. 1266, 1275 (1931). "The understanding of this court that the general standard of care governing the conduct of adults namely, reasonable care under all the circumstances applies as well to minors as adults and that infancy and want of experience of the latter are merely evidential factors to be weighed with the other circumstances, is made plain in *Goodall v. York*, 74 N. H. 454. . . ."

love,⁷ the court held it immaterial that the defendant acted bona fide and according to his best judgment. In *The Germanic*⁸ it was held that if the defendant acted as his judgment approved, even though he were an expert, this was not sufficient to avoid liability. It may be admitted that these two decisions are correct and that the judgment factor should be measured externally. However, the language of both is so comprehensive toward objectivity that in many decisions, the courts attempt to apply the same external standard to all the qualities which according to that standard are presumed to be found in the normal person. While in some cases the actor is subjectively considered as to such a quality as physical incapacity, the tendency is to so relate these differences from the norm to the objective test that the overall appearance of his behavior must meet the external standard as applied to the normal man. Such a fondness for one method of deciding cases and the endeavor to equate similar and dissimilar situations has led to misunderstanding. The transition from absolute liability to a basis of fault was not accomplished in a day or by the decision of one case. Or rather it may be said the concept of fault changes with the accumulation of experience, progress made in the methods of proof, and a better understanding of those characteristics of an individual that relate to fault. As the law of crimes has evolved with greater emphasis on the individual capacity of the accused, so in negligence a greater variation from the requirement of one external standard of conduct may be expected with more consideration for the personal equation of the actor than is found in the earlier cases.

The Restatement of Torts after defining negligence in terms of conduct⁹ particularizes in Section 289 as follows:

"The actor should recognize that his conduct involves a risk of causing an invasion of another's interest, if a person,

- (a) possessing such perception of the surrounding circumstances as a reasonable man would have, or such superior perception as the actor himself has, and
- (b) possessing such knowledge of other pertinent matters as a

⁷ 3 Bing. N. C. 468 (1837) in which Tindal, C. J., says: "Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."

⁸ 196 U. S. 589, 596, 25 Sup. Ct. 317 (1904). Holmes, J., says: "The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned."

⁹ RESTATEMENT, TORTS §282: "Negligence is any conduct except conduct recklessly disregarding of the interests of others which falls below the standard established by law for the protection of others against unreasonable risk of harm."

reasonable man would have, or such superior knowledge as the actor himself has, and

- (c) correlating such perception and knowledge with reasonable intelligence and judgment would infer that the act creates an appreciable chance of causing such invasion."

It is to be observed in this statement that the actor's qualities of perception and knowledge must be at least equal to those of the reasonable man, and that he must use the intelligence of the reasonable man and more if he has it¹⁰ with reasonable judgment.¹¹ In only the judgment factor is the standard entirely objective. In comment e¹² on this section with reference to perception it is stated:

"The qualities which a reasonable man possesses and which therefore the actor must exercise to obtain a perception of the surrounding circumstances are:

- "1. Physical capacity to obtain sense impressions."

In comment h¹³ it is explained:

"Children and abnormal persons: Insofar as concerns the physical capacity to perceive the circumstances surrounding the actor, allowance is made for physical infirmities if they are substantial and capable of reasonably certain proof and, like blindness and deafness, deprive the actor of his physical capacity to perceive facts readily perceptible to the normal man. If the actor knows that he is physically inferior in any particular, he is required to use his remaining faculties with greater diligence. Children of tender years are judged by a different standard of perception, knowledge

¹⁰ RESTATEMENT, TORTS §289, comment o.: "Unless the actor is a child of tender years or possibly unless he is insane, as to which see sec. 283, comment e and caveat, no such allowance is made for his inferiority of intelligence as is made for a substantial and clearly provable physical inferiority which prevents him from obtaining a normal perception of his surroundings. He must exercise, at the least, the intelligence of a reasonable man and must also exercise such superior intelligence as he may possess. As in all cases where the reasonable man is the standard to which the actor's personality must conform, the minimum of intelligence which he must possess and exercise is that which is customarily regarded as requisite for the protection of himself and others, rather than that which the average man customarily exercises, although in the majority of cases the two are identical (see comment g)."

¹¹ RESTATEMENT, TORTS §291, comment c.: "In determining whether the actor should realize the unreasonable character of a known or recognizable risk, the judgment of the actor, unless he be a child or insane person, must conform to the standard of a reasonable man, neither more nor less. He is not excused because he is peculiarly inconsiderate of others or reckless of his own safety nor is he negligent if his moral or social conscience is so sensitive that he regards as improper, conduct which a reasonable man would regard as proper. In this respect the problem differs somewhat from that of determining whether the actor should recognize the risk which his conduct involves and the magnitude thereof, in which allowance is made for certain physical infirmities and in which the actor is required to utilize such superior qualities as he may possess."

¹² RESTATEMENT, TORTS §289, comment e.

¹³ RESTATEMENT, TORTS §289, comment h.

and intelligent correlation from that of the reasonable man (as to insane persons see caveat e thereto). With these exceptions, the actor must exercise such attention, intelligence, and memory as are customarily regarded at the time and in the community as requisite for the protection of the interests of the actor and others. But this is merely the minimum requirement. If the actor possesses superior powers of perception of the circumstances surrounding him, he is required to have a more perfect realization of the risk which his conduct involves."

In comment e it is said that the actor must have the same physical capacity to obtain sense impressions as the reasonable man. In comment h allowance is made for substantial physical infirmities and, if the actors knows of them, he must use his remaining faculties with greater diligence. This could mean that the same external standard is to be applied to the physically defective as to the normal man if, for example, what is lacking in sight must be made up in hearing. Conceivably, if the hearing of a blind man is so acutely developed as to more than compensate for loss of sight he could be held to a standard higher than is objectively used for the normal man. That a different standard is not contemplated for the adult with physical incapacity is implied from the language which follows as to children: "Children of tender years are judged by a *different standard of perception*,¹⁴ knowledge and intelligent correlation from that of the reasonable man." An illustration that follows this comment suggests that a blind man is not required to meet the objective standard:

"A, a blind man is walking down a sidewalk in which there is a depression coated with ice. A normal man would see the depression and avoid it. A, being blind, is not negligent in walking into it."¹⁵

From this illustration it is clear that the standard is subjective with reference to the blindness. However attentive the actor may have been in the use of the other senses and capacities they could not under these circumstances compensate for the lack of sight. Objectively, then, as this illustration indicates, a blind man's act is measured by a standard *different* from that used for the normal man.

Professor Seavey observes:¹⁶

"Some cases in dealing with defective persons have said that they must use 'a greater amount of care' to make up for this defect.

¹⁴ Italics supplied.

¹⁵ RESTATEMENT, TORTS §289, Illustration 5.

¹⁶ Seavey, *Negligence—Subjective or Objective* (1927) 41 HARV. L. REV. at p. 14, note 14.

Whether or not this is true, it is clear that a blind man is not required to act as does one who can see, but is expected to act as blind persons act, so that conduct which would be negligent in one who can see may not be negligent in a blind man and *vice versa*."

Prosser, discussing physical attributes makes this comment:¹⁷

"It is sometimes said that a blind man must use a greater degree of care than one who can see, but this means nothing more than that he must take the precautions the ordinary reasonable man would take if he were blind. In theory the standard remains the same, but it is sufficiently flexible to take his physical defects into account."

If this means the standard for normal men remains the same when applied to blind men it seems to conflict with the preceding statement which would require the care of reasonable blind men. It may be that under certain circumstances the conduct, objectively considered, that is required of a blind man might be the same as that required of the normal man due to the greater use of the blind man's other faculties which it is reasonable to expect, or due to the blind man's particular undertaking, but this would be a coincidence. In theory, it appears, the standards are distinctly different.

It is generally admitted that the standard for adults is not the standard for children.¹⁸ Obviously children cannot be expected to have the knowledge, intelligence or judgment of adults. The courts usually use the formula of like age, intelligence and experience. If children act as children of like age, intelligence and experience are reasonably expected to act, nothing more is required. The age factor places children in a separate class not because age is important in itself but because it has a bearing on the other qualities, mental and physical, that are essential in the reasonable adult. The child's age gives some indication as to what can be expected in physical ability, knowledge and judgment. These qualities are considered objectively and also subjectively as to what intelligence and experience the child in question possesses. A child of fourteen might be shown to have such attributes as reasonably to require of him the conduct of the reasonable adult. However, he is entitled to be dealt with subjectively as to the ability he has and then objectively as to the class of children to which he belongs by virtue of his individual qualities. In other words, his conduct must be reasonable for one of his class, a child of like age, intelligence and experience.

Whereas the age of a child differentiates him from the adult by re-

¹⁷ PROSSER, TORTS §36.

¹⁸ Cf. *Charbonneau v. MacRury*, 84 N. H. 501, 153 Atl. 457 (1931).

quiring a subjective consideration of those qualities deemed essential in normal conduct, the proof of a physical defect of an adult at once places him in a separate class as to one of these qualities such as perception. It may be assumed the blind man should have ordinary knowledge, intelligence and judgment, and, in some situations, due to lack of perception with reference to sight, greater than normal ability in other perceptive qualities. Whether this greater use of the other capacities should compensate for the lack of visual perception, depends on the nature of the surrounding circumstances. If it should make up for the defect, then the external standard for normal adults would be applicable. But in some cases compensating for the defect is impossible and cannot reasonably be expected. To say that allowance should be made for a physical defect and other capacities used more diligently suggests the standard for normal men must be met or possibly something more. At any rate, the statement is ambiguous and has been confusing.¹⁹ To deal with the physically defective as a class avoids this difficulty. To require the conduct that can be reasonably expected under the circumstances of a person so incapacitated can be applied in all situations. If the surroundings are such that greater diligence compensates for the defect and the standard for normal men is met, that is coincidental. If the surroundings require something less, as is frequently the case, then the infirm adult is excused when he acts as a reasonable man of his class. If the child cannot be expected to act as an adult, neither can the physically defective adult be expected to act as a normal adult. The blind man is no more responsible for his blindness than the child for his age.

TESTS APPLIED TO CONTRIBUTORY FAULT

The standard of conduct for the physically defective has been considered by the courts most frequently on the issue of contributory negligence. On appeal two types of questions are usually considered: error in the trial court's instructions and whether on the evidence the finding by the jury can be supported. Evidence of the plaintiff's incapacity may come in on either side. At times judges have seemed perplexed that a plaintiff would rely on his defective condition, implying that if any such condition exists, the plaintiff would do better to conceal it. According to this view, the plaintiff starts out with two strikes against him in the proof of contributory fault. In *Kaiser v. Hahn Bros.*²⁰ the plaintiff, due to defective vision from recent illness, wore colored glasses as she walked along the sidewalk. She stumbled over two skids that extended about five inches high across the walk. An instruction on contributory

¹⁹ See Notes, 14 L. R. A. (N.S.) 648 and 41 L. R. A. (N.S.) 193.

²⁰ 126 Iowa 561, 102 N. W. 504 (1905).

negligence called attention to the weakness of the plaintiff's eyes, the effect the glasses might have had and "all facts and circumstances which the evidence tended to prove." Judgment for plaintiff was reversed, the court saying:

"It is true that the jury was fully instructed that it was the duty of the plaintiff to act as an ordinary prudent person would act under the circumstances but in view of the apparent reliance²¹ placed by plaintiff on the defective condition of her eyes and the wearing of colored glasses as an excuse for not observing the obstruction in the walk, we think defendants were entitled to an instruction such as that asked to the effect that, under such circumstances, plaintiff was bound to use greater care and caution."²²

What standard the court expected the plaintiff to meet is not clear. When it speaks of "The apparent reliance placed by the plaintiff on the defective condition of her eyes," it appears that the court demands the conduct of a person with normal vision or possibly something more. If the court meant to use the standard for normal persons it seems pertinent to inquire why any evidence of the condition of the eyes should be considered. If the result is the same irrespective of this subjective factor, it would seem to have no bearing on the issue involved. If the standard for normal persons is to be used, why all this difficulty in trying to balance the defect against the greater prudence and caution? The expression *apparent reliance* leads one to suspect that the court might exact a higher external standard of the person with bad eyes than one with normal vision. Such an attempt to work the subjective element into a rule applicable to all adults is misleading, and under the circumstances of this case it appears to be unwarranted.

In *T. P. & W. Ry. Co. v. Hammett*,²³ plaintiff, a man 82 years of age, afflicted with deafness, was struck by defendant's train which was being backed over a crossing. The trial court refused to give defendant's requested instruction to the jury, as follows:

". . . By due care for his own safety is meant that the law required him to exercise the degree of care that a reasonably prudent person in possession of the ordinary senses and capacities would have exercised under the facts and circumstances in evidence. If

²¹ See *Candee v. K. C. & I. R. R.*, 130 Mo. 142, 31 S. W. 1029 (1895).

²² *Kaiser v. Hahn Bros.*, 126 Iowa at 564 says: "The instruction asked was not open to the objection that it required more than ordinary care of the plaintiff under the circumstances. It correctly stated the rule recognized in *Hill v. Glenwood*, *supra*, that although the degree of care required of a person with defective eyesight is the same as required of other persons, that is, ordinary care under the circumstances—yet ordinary care on the part of a person with defective eyesight involves greater prudence and caution than is required to constitute ordinary care on the part of a person having full possession of his faculties."

²³ 220 Ill. 9, 77 N. E. 72 (1906).

you believe he was old and hard of hearing yet that did not excuse him from the duty to exercise the full degree of care as required above, and the law is that any defect in hearing not only did not excuse him from the exercise of care, but it required of him the greater use of his other senses to discover whether a car was approaching."

Instead the trial court gave this instruction:

"You are instructed that if you believe the plaintiff was old or his hearing defective, yet that would not excuse him from the obligation to exercise due care. He was bound to exercise that degree of care that an ordinary prudent person whose hearing was so defective should have exercised under the circumstances shown in evidence."²⁴

On appeal, judgment for plaintiff was reversed on the ground that the charge requested was right and the charge given was erroneous. The court said the evidence was close, the issues sharply drawn and the instruction given was likely to mislead the jury and justify it in concluding that a deaf person is not required to hear, because that is impossible, and that to the extent of deafness, the degree of care required of such person is lessened.

The Supreme Court of Illinois thus distinctly refused to recognize the deaf plaintiff as a member of a class separate from normal persons and it required of the deaf man compliance with the objective standard as applied to normal persons. However, the trial judge's charge seems to be entirely correct as it conforms to the prevalent assumption that persons are not required to lock themselves in and avoid all the risks of existence merely because of physical incapacity. This assumption is expressed by the Iowa court²⁵ as follows:

"Sidewalks are made for the use of the lame, the halt, and the blind, as well as for persons in the full possession of their faculties. The standard of care owing to them is not, ordinarily, increased by reason of defects of sight or of hearing, but these defects do not of themselves prevent one possessed thereof from going onto the public street."

²⁴ *Id.* at 22, the court said: "The degree or kind of care required to be used must be the same in the case of all adult persons in possession of their natural faculties—that is, that it shall be reasonable and ordinary care. It cannot rest on a sliding scale depending upon the acuteness of or defects in the senses of sight, hearing or feeling. When one places himself in a position requiring the exercise of care for his own safety, and is conscious that one of his senses designed by nature for his protection is dulled by age, disease or from some other cause, he must be more vigilant in the use of the remaining senses to supply the defect and protect himself."

²⁵ *Yeager v. Inc. Town of Spirit Lake*, 115 Iowa 593, 597, 88 N. W. 1095 (1902).

In accord with the view that a blind man should be required to act only as would a reasonable man so afflicted, is the case of *Sleeper v. Sandown*.²⁶ Here the plaintiff, a man totally blind, fell off a bridge due to the neglect of the defendant town to replace a railing at the side of the bridge. It was admitted that defendant was negligent in not replacing the railing. The trial court refused the defendant's request for a charge to the jury that the plaintiff was negligent as a matter of law since it would clearly be negligent for persons in general, possessing the sense of vision, to walk off such a bridge in the daytime. On appeal, judgment for plaintiff was affirmed, the court saying:

"Although blindness in itself is not negligence, still in judging of the conduct of a blind man, his unfortunate disability must be considered, and he must doubtless be held to govern his conduct with a reasonable regard to his situation in that respect."

In *Neff v. Wellesley*²⁷ plaintiff, blind and lame, was struck by a team of horses as he tried to cross a street. Defendant, driver of the horses, did not know that plaintiff was blind. On appeal, the court in affirming judgment for plaintiff, approved an instruction which read in part:

"A blind man has a right to walk the streets, walk anywhere where a person with full sight has a right to walk. A person who cannot hear has the same right to walk anywhere. A lame person has a right to walk anywhere. But in view of the incapacities for taking care of himself which a blind man has, and of which he must be conscious, the exercise of ordinary prudence and caution would require him to conduct his care with reference to his inability to see. And if there was an inability to hear, so that a man could not take warning by the hearing of what was about him, or likely to put him in jeopardy, his wariness in view of his infirmity of hearing *would be nothing more than the ordinary prudence and caution of a man who cannot take care of himself by listening*."²⁸

In *Weinstein v. Wheeler*²⁹ the plaintiff, a blind boy, in attempting to cross a street was struck by defendant's car. Defendant drove on the left side of the street trying to pass behind the plaintiff who, on hearing the car, became confused and reversed his direction. The charge to the jury was equivalent to a directed verdict for the defendant. On appeal, the court in reversing a judgment for the defendant, said:

"The blind and the halt may use the streets without being

²⁶ 52 N. H. 244 (1872).

²⁷ 148 Mass. 487, 491, 20 N. E. 111, 2 L. R. A. 500 (1889).

²⁸ Italics supplied.

²⁹ 127 Ore. 406, 257 Pac. 20 (1928); S. C. 135 Ore. 518, 295 Pac. 1096.

guilty of negligence if, in so doing, they exercise that degree of care which an ordinarily prudent person *similarly afflicted*⁸⁰ would exercise under the same circumstances. The true test to be applied to this case is: what would an ordinarily prudent person, who was blind and of the age and experience of the plaintiff, do to avoid injury upon hearing the sound of an approaching automobile when crossing the street?"

These illustrations, from the numerous cases in which contributory fault of adults with physical disability has been determined, indicate that the courts are not in accord as to the test to be employed. Some courts hold the adult with physical disability to the same external standard of conduct as required of normal persons. Others deal with the physically defective as they do with young children by placing them in a class separate from normal persons. This method as it has been applied to children has been generally followed and approved. It is easily understood by juries. The chief difficulty is to determine within what ages the rule applies. But this difficulty does not exist with reference to the disabled adult. The proof shows an essential factor is lacking. Whatever ground exists for the rule as to children exists equally for adults with physical disability. The frequent reversals⁸¹ of judgments in cases where juries have found for physically defective persons on the issue of contributory negligence, suggests that courts adhering too closely to the objective standard may be too far out of step with popular reaction. Doubtless on the facts in some cases reversals are proper irrespective of the formula used. Nevertheless, there is room for the suspicion that the divergence between the views of the court and jury is too great if the courts are to reflect the *mores* of the people.

THE INFIRM ADULT AS DEFENDANT

In the foregoing discussion, the decisions considered had reference to contributory fault. The formula suggested, partly objective and partly subjective, that an adult with physical disability should be judged by what can reasonably be expected of an adult with such disability seems correct as it relates to contributory fault. However, the question arises whether society exacts a higher standard of conduct when the act of the disabled adult endangers the interests of others. In other words, should the same standard used for the physically defective adult as a plaintiff be used when he is a defendant? Should negligence and contributory negligence be determined by the same test?

The Restatement of Torts, Section 289, comment a (with reference

⁸⁰ Italics supplied.

⁸¹ See Note, 41 L. R. A. (N.S.) 193.

to the subject in general, and not as to persons with physical disability) says:

"The rules which determine the contributory negligence of a plaintiff are, with the exception stated in §463, comment a, the same as those which determine the negligence of the defendant."

Section 464, comment b, says:³²

"The rule stated in Section 289 is important in determining whether the plaintiff should recognize the existence of a risk to which it would be contributory negligence to expose himself. As to the allowance to be made for such physical inferiorities as are substantial and susceptible of reasonably certain proof, see comment g on Section 289."

These comments indicate the same standard for negligence of the adult of physical inferiority whether he be plaintiff or defendant. In the Tentative Draft of the Restatement there is a special note³³ as to children:

"Special Note: There are so few cases which involve the liability of a child defendant that it has been necessary to state the standard of behavior required of a child as it is indicated by the analogy of contributory negligence on the part of young children. There may be some doubt as to whether it is correct to regard contributory negligence and negligence as sufficiently analogous to make one a safe basis for statements in regard to the other. It may be that children should not be required to conform to a particular standard in order to relieve an admittedly negligent defendant from liability to them. It does not necessarily follow that a child should not be required to conform to a higher standard of behavior where it is necessary for the protection of innocent members of the public."

The question of applying different standards to children for negligence and contributory negligence has arisen in very few cases. There is authority for using the same standard for both³⁴ and apparently some support for requiring a higher standard when the child is a defendant.³⁵ Whatever basis there is for requiring a higher standard for children

³² RESTATEMENT, TORTS §463 comment a. refers to §464. The reference in §464 to §289 comment g. probably is intended for §289, comment h. as to which see note 13 *supra*.

³³ RESTATEMENT, TORTS (Tent. Draft, Part IV) §167.

³⁴ Charbonneau v. MacRury, 84 N. H. 501, 153 Atl. 457, 73 A. L. R. 1266 (1931). See 79 U. OF PA. L. REV. 1153-54; Briese v. McArtle, 146 Wis. 89, 130 N. W. 893, 35 L. R. A. (N.S.) 574 (1911).

³⁵ Neal v. Gillett, 23 Conn. 437 (1855); Roberts v. Ring, 143 Minn. 151, 173 N. W. 437 (1919); Terry, *Negligence*, 29 HARV. L. REV. 40.

as defendants than as plaintiffs might seem to apply with more force to adults with physical incapacity. The adult conscious of his physical defect is assumed to have normal knowledge, intelligence and judgment. He might be held to take the risk in entering upon certain activities that his conduct as a defendant must equal that of normal men. For example, if a man is so color blind that he cannot distinguish traffic signals, or a man subject to epilepsy (a disease characterized by sudden loss of consciousness) undertakes to drive in traffic, it might seem reasonable to hold that he should desist from such activity unless his conduct, externally measured, is that of normal persons.³⁶ If his conduct does come up to this standard, he is not negligent merely because of his incapacity.³⁷ In such activities the conduct reasonably to be expected of the man with a physical defect is the same as that exacted of the normal person. A child may not have the knowledge and judgment to appreciate the danger in such activities, while the adult with knowledge of his incapacity should know better. However, in activities less dangerous, it would seem that the physically defective defendant's conduct could not be expected to equal the normal man's conduct. Suppose a blind man in walking on a sidewalk runs over a small child. Though under the circumstances this might clearly be negligence in a person who could see, yet the test should be what the reasonable blind man would do.

With respect to normal persons it is generally assumed that the standard of conduct for negligence is the same as for contributory negligence.³⁸ There is authority for the same rule as to young children. There is little authority on this point with respect to adults who are handicapped by some physical incapacity. It seems reasonable, however, to apply the same standard to the physically disabled person whether he is plaintiff or defendant. In any situation it is the conduct that can reasonably be expected of a person with such defect under the external circumstances of the case. In an undertaking which involves great danger to others, the adult with a physical defect acting reason-

³⁶ *Roberts v. Ring*, 143 Minn. 151, 173 N. W. 437 (1919). In this case defendant, 77 years old and defective in sight and hearing drove an automobile over a boy on a public street. The court held it was an error to charge the jury to take into consideration the defendant's age or condition of sight or hearing in determining his negligence. The court said: "Such infirmities to the extent that they were proper to be considered at all, presented only a reason why defendant should refrain from operating an automobile on a crowded street where care was required to avoid injuring other travelers. When one by his acts or omissions causes injury to others, his negligence is to be judged on the standard of care usually exercised by the ordinarily prudent normal man."

³⁷ *Madison v. Berry* (La. 1933) 145 So. 694.

³⁸ *RESTATEMENT, TORTS* §289, comment a.; *BOHLEN, STUDIES IN TORTS*, p. 527.

ably with reference to such defect will refrain from the activity or be held liable for harm unless his conduct is that of the normal man. The reasonableness in this instance is whether he should undertake certain activities. If it is reasonable for an infirm adult to engage in an activity, there is no requirement that his conduct and the normal man's should be identical.