Abrogation of the Contributory Negligence Bar in Cases of Disparate Risks

Marie Roach Yeates
values sought to be protected by the drafters. Any lessening of the present requirements will only serve to undermine fourth amendment guarantees in the name of administrative efficiency. At the least, the instant case should serve as a minimum standard by which any further balancing is to be measured.

Rebecca L. Hudsmith

ABROGATION OF THE CONTRIBUTORY NEGLIGENCE BAR IN CASES OF DISPARATE RISKS

Justifications of the doctrine of contributory negligence rely upon various theories — causation, assumption of risk, deterrence, apportionability of damages, and equity. Of all the rationales articulated to justify the doctrine of contributory negligence, the most fundamental is derived from public policy—the law will not protect a person who does not protect himself. That is to say, the duty of care for others manifestly should be no higher than the duty of self-protection. Despite the apparent soundness of this proposition, its result is sometimes a windfall of nonliability for a negligent defendant.

1. Under the doctrine of contributory negligence, a plaintiff is denied recovery when his own unreasonable conduct, combined with that of the defendant, culminated in the injury. Bohlen, Contributory Negligence, 21 HARV. L. REV. 233, 233 (1908). The doctrine was first articulated in Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809), in which the plaintiff ran into a pole which the defendant had negligently laid across the road. Had the plaintiff not been "riding violently," he could have avoided the injury. The court refused to grant recovery saying: "One person being in fault will not dispense with another's using ordinary care for himself." Id. at 927.

2. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.2 (1956); W. PROSSER, LAW OF TORTS § 65 (1971); Bohlen, supra note 1, at 233; Lowndes, Contributory Negligence, 22 GEO. L.J. 674, 674-85 (1934).

3. Lowndes, supra note 2, at 681. The author describes this explanation as "the archaic assumption of the individualism of the common-law, which required of every tub that it stand upon its own bottom." Id.

4. Bohlen, supra note 1, at 254. "To hold otherwise would . . . rob of self-reliance, and . . . enervate and emasculate [plaintiffs] . . . by removing from them all responsibility for their own safety." Id. at 254-55.

5. Green, Contributory Negligence and Proximate Cause, 6 N.C.L. REV. 3, 4 (1927). Green comments that much can be said against the harshness of the contributory negligence bar, "because it throws the whole risk on the plaintiff, while it lets the defendant, also a wrongdoer, go free." Id. at 5.
The traditional contributory negligence doctrine not only fails to consider the proportional fault attributable to each of the parties, but also does not properly take into account the allocation of risks between the plaintiff and the defendant. Although any negligent conduct may create a risk of harm to someone, it is the divergence in the degree and nature of the respective risks to which the plaintiff and the defendant are exposed which characterizes a disparate risk situation. In the disparate risk situation the defendant is engaged in an activity which by its very nature creates a risk of injury to the plaintiff far greater than the risk imposed on the defendant by the same activity. While the plaintiff's negligence endangers only himself, the defendant's negligence endangers all those around him. As the allocation of risk becomes more disparate, the inequity produced by the contributory negligence bar assumes particularly harsh proportions. It is submitted that the Louisiana courts have seized upon such instances of disparity and have utilized duty/risk analysis to remove selectively the contributory negligence bar.

Illustrative of this selective abrogation of the contributory negligence defense are decisions rendered in two recent cases. In Boyer v. Johnson, the defendant employer hired a minor to drive a delivery truck in violation of the applicable child labor statutes. Five days after the illegal employment began, the minor was killed when he lost control of the vehicle while making deliveries. The court developed the defendant employer's ambit of duty by deriving a standard of care from the child labor statutes. As a result, the contributory negligence of the minor was held to be immaterial to the determination of liability. Similarly, in Baumgartner v. State

6. This has been termed a lack of mutuality of risks. See Comment, The Last Clear Chance Doctrine in Louisiana—An Analysis and Critique, 27 LA. L. Rev. 269, 275 (1967).

7. 360 So. 2d 1164 (La. 1978).

8. LA. R.S. 23:161(10) (Supp. 1976) prohibits the employment of a minor "as driver of any motor vehicle used for commercial or industrial purposes." LA. R.S. 23:163 (1950) prohibits the employment of a minor under 16 years of age to work in connection with power-driven machinery.
Farm Mutual Automobile Insurance Co.,\textsuperscript{9} the doctrine of contributory negligence was held to be unavailable to the negligent motorist who struck the plaintiff pedestrian as he crossed the street within the boundaries of a crosswalk. Although both the motorist and the pedestrian were negligently inattentive, the court found the duty to anticipate and protect against the negligence of the pedestrian to be within the standard of care of the motorist. Consequently, the defense of contributory negligence was abrogated in motorist/pedestrian cases.

For jurisprudential perspective, the traditional treatment of issues of delictual liability arising in child labor and motorist/pedestrian cases will be examined. These treatments will then be compared with the court's newly evolving approach to the contributory negligence doctrine.

Minors Employed in Violation of Child Labor Laws and the Contributory Negligence Bar

A penal statute prohibiting child labor may be utilized by the court to impose an analogous civil duty upon the employer.\textsuperscript{10} Liability is incurred when a risk within the ambit of the statutorily-derived duty materializes to cause injury to a member of the class that the statute was designed to protect. Distinct from his statutory standard of care, the employer has a nonstatutory duty, the ambit of which includes a separate set of risks.

In Alexander v. Standard Oil of Louisiana,\textsuperscript{11} the supreme court directed its attention to a formulation of the statutory duty imposed on an employer who hired a minor in violation of a statute which made it unlawful to employ any child under fourteen years of age in certain occupations.\textsuperscript{12} The plaintiff, illegally employed as a rivet heater, was injured when he fell from his employer's scaffold to the ground. The court concluded that the statute created a duty designed to prevent

\textsuperscript{9} 356 So. 2d 400 (La. 1978).
\textsuperscript{11} 140 La. 54, 72 So. 806 (1916).
\textsuperscript{12} 1908 La. Acts, No. 301.
injury to minors of certain ages. Moreover, the employer's violation of the statute was held to be the legal cause of the minor's injury.

Although the minor in Alexander was not contributorily negligent, dictum in the opinion indicates that the court was willing to include within the employer's standard of care the duty to protect the minor from his own negligent behavior. The court stated: "The reason children are forbidden to be employed in dangerous occupations being that they are presumed to be incapable of taking care of themselves, it would seem to be illogical to hold them responsible for their negligence." However, the lack of negligence of the Alexander minor made this an improper case in which to rule on the availability of the contributory negligence defense to relieve an employer who had breached his statutory duty.

The supreme court defined the ambit of the nonstatutory duty of employers in Flores v. Steeg Printing and Publishing Co. This nonstatutory duty exists in the absence of, or in supplement to, an employer's statutory duty towards a minor employee. The Flores minor employee was not within the statutorily prohibited age group and consequently was not a member of the class protected by the child labor statute. The nonstatutory duty required only that the employer instruct and inform the minor concerning the dangers inherent in his employment which the minor could not be presumed to appreciate or comprehend. The court held that contributory negligence would be a valid defense to liability based on a breach of the nonstatutory duty.

13. 140 La. at 68, 72 So. at 811. See Malone, supra note 10, at 367.
14. 142 La. 1068, 78 So. 119 (1918).
15. Flores involved Act 301 of 1908, which prohibited the employment of minors under 14 years of age and required the employer to obtain a certificate of age prior to employing a minor between the ages of 14 and 16. The minor in Flores was over 14 years of age, thus his employment was not prohibited. Though the employer neglected to obtain the certificate of age, the purpose of that requisite was obviously only to ascertain that the prospective employee was over 14. Thus, the Flores case represents the nonstatutory duty of the employer. Act 301 of 1908 is the predecessor of the modern child labor provision, La. R.S. 23:163 (1950). The latter provision was violated by the defendant in the instant case of Boyer v. Johnson, 360 So. 2d 1164 (La. 1978).
16. In Flores the court relied on the lack of legislative intent to remove the contributory negligence bar as a defense to a breach of the nonstatutory duty of the employer. The court stated: "It may be presumed that the legislature felt that children
Misinterpreting the *Flores* decision and ignoring *Alexander*, the First Circuit in *Jones v. Insurance Co. of North America* applied the *Flores* nonstatutory duty to an employer who violated the applicable child labor statute. The minor in *Jones* was injured while driving the employer's tractor in the scope of his employment. Since he was under sixteen years of age, his employment in connection with power-driven machinery was proscribed by statute. The *Jones* court, incorrectly utilizing the *Flores* nonstatutory standard of care, found no breach of the employer's duty since the minor had been properly instructed and was cognizant of the inherent dangers of his employment. The court clearly erred in applying the "inform and instruct" nonstatutory duty to the employer in *Jones*; it should have derived a broader ambit of duty because of the statutory violation. The contributory negligence issue was not reached, because the court found that the defendant had not breached his duty towards the employee.

*Boyer v. Johnson* presented the court with an opportunity to delineate clearly the scope of the duty of an employer whose violation of a child labor statute results in injury to a minor employee. Influenced by the dictum in *Alexander*, the *Boyer* court held that the employer's plea of contributory negligence over 14 were capable of taking care of themselves. . . . The act does not provide directly or by implication that contributory negligence of a child over 14 years of age cannot be pleaded or shown." 142 La. at 1073, 78 So. at 121. Following the *Flores* court's reasoning, an a contrario argument may be made that the same legislation did implicitly make the contributory negligence defense unavailable when the prohibition against the employment of minors under 14 years of age was violated. The *Flores* court relied in part upon *Darsam v. Kohlmann*, 123 La. 164, 48 So. 781 (1909). However, the court did so improperly since the *Darsam* case dealt with the statutory duty of an employer to a minor employee. Additionally, the *Darsam* court did not reach the contributory negligence issue since there had been no breach of the employer's statutory duty. See note 49, infra, and accompanying text.

17. 303 So. 2d 902 (La. App. 1st Cir. 1974).
18. *La. R.S. 23:163(2) (1960)* states: "No minor under the age of sixteen shall be employed, permitted or suffered to work . . . [i]n, about, or in connection with power-driven machinery."
19. 360 So. 2d 1164 (La. 1978).
20. The defendant employer hired young Boyer to drive a delivery truck, although such employment was a violation of *La. R.S. 23:161(10) (Supp. 1976)*, which prohibits the employment of a minor "[a]s a driver of any motor vehicle used for commercial or industrial purposes." On the fifth day of the illegal employment, Boyer was killed when he lost control of the vehicle while making deliveries. The court assumed that the accident was caused by the minor's inability to handle the vehicle.
as a defense had to be rejected because the statutory duty was designed to protect against the youth, inexperience, and relative lack of judgment of the minor.\textsuperscript{21} The Boyer court thus defined the ambit of the statutory duty of the employer in such a way as to remove the contributory negligence bar in cases of violations of child labor statutes which result in injury to a minor employee.

In Boyer, the Louisiana Supreme Court adopted the position already accepted in a majority of other states, that the contributory negligence of the minor is not a defense to a violation of child labor statutes.\textsuperscript{22} Moreover, Boyer is consistent with the holding in Flores and the dictum in Alexander concerning the contributory negligence bar: the contributory negligence defense is permitted in the context of the employer’s nonstatutory duty; but it is impermissible when the statutory duty is involved.

The Motorist/Pedestrian Accident and the Contributory Negligence Bar

While uncertainty had surrounded the availability of the contributory negligence bar in child labor injury cases before Boyer, the contributory negligence of the pedestrian, until recently, had been widely acknowledged as a valid defense.\textsuperscript{23}

\textsuperscript{21} 360 So. 2d at 1169.

\textsuperscript{22} See, e.g., Terry Dairy Co. v. Nalley, 146 Ark. 448, 225 S.W. 887 (1920); Boyles v. Hamilton, 235 Cal. App. 2d 492, 45 Cal. Rptr. 399 (1965); Dusha v. Va. & Rainy Lake Co., 145 Minn. 171, 176 N.W. 482 (1920); Karpeles v. Heine, 227 N.Y. 74, 124 N.E. 101 (1919); Lenahan v. Pittston Coal Mining Co., 218 Pa. 311, 67 A. 642 (1907); Pinoza v. N. Chair Co., 152 Wis. 473, 140 N.W. 84 (1913); W. Malone, LOUISIANA WORKMEN’S COMPENSATION LAW AND PRACTICE 10 (1951); W. Prosser, supra note 2, at 425-26; 2 RESTATEMENT (SECOND) OF AGENCY § 526, Comment (b) (1958).

\textsuperscript{23} Biagi v. New Amsterdam Cas. Co., 151 La. 925, 92 So. 387 (1922) (plaintiff’s contributory negligence barred recovery); Ortego v. State Farm Mut. Auto. Ins. Co., 295 So. 2d 593 (La. App. 3d Cir.), cert. denied, 299 So. 2d 800 (La. 1974) (pedestrian contributorily negligent, no recovery); Glatt v. Hinton, 206 So. 2d 91 (La. App. 4th Cir. 1967) (pedestrian contributorily negligent, last clear chance doctrine inapplicable); Ingram v. McCorkle, 121 So. 2d 303 (La. App. 1st Cir. 1960) (pedestrian contributorily negligent, but defendant had the last clear chance); Breaux v. Barichivich, 49 So. 2d 651 (La. App. 1st Cir. 1950) (pedestrian contributorily negligent, but defendant had the last clear chance). Even cases which recognized a “higher duty” of care to the motorist also pointed out that the pedestrian’s contributory negligence was still relevant. Accord Mequet v. Algier MFG. Co., 147 La. 364, 84 So. 904 (1920). The Mequet court made it clear that the pedestrian was not “to be excused for failing to use his
However, the pedestrian had often recovered in spite of his negligence under the doctrine of last clear chance. That doctrine allows the contributorily negligent plaintiff to recover if it appears that the defendant might have avoided the injury to the plaintiff notwithstanding the plaintiff's negligence.

The last clear chance doctrine is primarily applied to cases in which the plaintiff assumes a position of helplessness. In instances of "discovered peril" the defendant who recognizes the helpless position of the plaintiff in time to avoid the injury is considered to have the last clear chance.

The defendant is also considered to have the last clear chance in situations of "apparent peril." In these cases the defendant's last clear chance is based on the assumption that, had the defendant exercised reasonable care, he would have recognized the helplessness of the plaintiff in time to avoid the injury.

In the motorist/pedestrian cases, however, the most often encountered situation is one in which the pedestrian's peril is caused by his inattention rather than his helplessness. If the motorist was cognizant of the inattention of the pedestrian in time to avoid the injury, it is still possible to say that the motorist had the last clear chance and, hence, that the

---

24. Cases in which the pedestrian was contributorily negligent and the motorist had the last clear chance are: Jackson v. Cook, 189 La. 860, 181 So. 195 (1938); Taylor v. Kendall, 162 So. 2d 156 (La. App. 3d Cir. 1964); Ingram v. McCorkle, 121 So. 2d 303 (La. App. 1st Cir. 1960); Deck v. Page, 77 So. 2d 209 (La. App. Orl. Cir. 1955); Prine v. Continental S. Lines, 71 So. 2d 716 (La. App. 2d Cir 1954); Moore v. NOLA Cabs, Inc., 70 So. 2d 404 (La. App. Orl. Cir. 1954); Breaux v. Barichnivich, 49 So. 2d 651 (La. App. 1st Cir. 1950).

25. See Comment, supra note 6, at 273, in which the author indicates the near exclusive application of the last clear chance doctrine to traffic and transportation cases. See generally F. Harper & F. James, supra note 2, at 2214; James, Last Clear Chance: A Transitional Doctrine, 47 Yale L.J. 704 (1938); MacIntyre, The Rationale of Last Clear Chance, 53 Harv. L. Rev. 1225 (1940).

26. See Restatement (Second) of Torts § 479 (1964).


negligent plaintiff may recover. 29

On the other hand, when both motorist and pedestrian are inattentive and the motorist is unaware of the pedestrian's peril, most courts refuse to apply the last clear chance doctrine. 30 These courts reason that either party, had he been attentive, could have avoided the injury; thus, the defendant cannot be held to have had the last clear chance. 31

In order to allow the inattentive pedestrian to recover despite his contributorily negligent conduct, one approach taken by Louisiana courts is to extend the apparent peril doctrine of last clear chance to cases in which the pedestrian's peril results from inattention rather than helplessness. Thus, where both parties are inattentive, the court may find that the defendant motorist had the last clear chance to avoid the injury since, had he been attentive, he would have discovered the pedestrian's peril (inattention) in time to avoid the injury. 32 The court simply refuses to consider that the pedestrian might have had the

29. The Restatement (Second) of Torts § 480 (1964). The Restatement allows the use of the last clear chance doctrine to aid the inattentive plaintiff only in the “discovered peril” situation. That is, the defendant must have recognized the plaintiff's inattention in time for the defendant to have acted to prevent the harm.

30. See, e.g., Dyerson v. Union Pac. R.R., 74 Kan. 528, 87 Pac. 680 (1906); Glatt v. Hinton, 205 So. 2d 91 (La. App. 4th Cir. 1967); Donohue v. Rolando, 16 Utah 2d 294, 400 P.2d 12 (1965); Hester v. Watson, 74 Wash. 2d 924, 448 P.2d 320 (1968). Harper and James in their treatise on torts indicate that a large majority of courts have refused to apply the last clear chance doctrine where both parties are negligently inattentive but the defendant would have discovered plaintiff's peril had the defendant exercised reasonable care. F. Harper & F. James, supra note 2, at § 22.13 n.4. Louisiana courts appear to fall in this category. But see text at notes 32-33, infra.

31. However, the Missouri humanitarian doctrine, an extension of the last clear chance doctrine, allows the inattentive plaintiff to recover in this situation. Perkins v. Terminal R.R. Ass'n of St. Louis, 340 Mo. 868, 102 S.W. 2d 915 (1937); Burke v. Pappus, 316 Mo. 1238, 293 S.W. 142 (1927); Bechtenwald v. Metropolitan St. Ry., 121 Mo. App. 595, 97 S.W. 557 (1906). Coulson, Last Clear Chance — Humanitarian Doctrine in Missouri, 6 Kan. City L. Rev. 235 (1938). The author comments that: “The cases in Missouri allow the plaintiff to recover in spite of his continuing, concurrent, contributory negligence, when that negligence is exactly equivalent to the defendant’s negligence—i.e., failure to keep a proper lookout.” Id. at 245. See generally Gaines, The Humanitarian Doctrine in Missouri, 20 St. Louis L. Rev. 113 (1934); Otis, The Humanitarian Doctrine, 46 Am. L. Rev. 381 (1912); McCleary, The Basis of the Humanitarian Doctrine Reexamined, 5 Mo. L. Rev. 56 (1940).

last clear chance. This application of the last clear chance doctrine, which allows the contributorily negligent pedestrian to recover when in fact either party might have had the last clear chance, led one writer to question whether the court had "placed the contributory negligence of the pedestrian on the shelf" in pedestrian injury cases.33

In several instances, however, the Louisiana courts have in fact considered whether the inattentive plaintiff had the last clear chance, contravening the intent of the last clear chance doctrine by allowing it to be used as a "two-edged sword" which defendant as well as plaintiff may wield. This approach to the last clear chance doctrine has been utilized in several motorist/pedestrian cases.34 Thus, the inattentive pedestrian is denied recovery as a result of a finding that it was the plaintiff who had the last clear chance to avoid his own injury. This involves an incorrect application of the last clear chance doctrine which developed as a plaintiff's tool, a means by which the plaintiff could avoid the harsh contributory negligence bar.35

The supreme court was presented with the inattentive motorist/inattentive pedestrian situation in Baumgartner v. State Farm Mutual.36 The Fourth Circuit, applying the doc-

---

33. Malone, The Work of the Louisiana Supreme Court for the 1957-1958 Term — Torts and Workmen's Compensation, 19 LA. L. Rev. 334, 340 (1959). The case referred to is Belshe v. Gant, 235 La. 17, 102 So. 2d 477 (1958), in which an inattentive pedestrian was struck by an inattentive motorist. Through the application of the "apparent peril" doctrine of Jackson v. Cook, 189 La. 860, 181 So. 195 (1938), to the inattentive pedestrian plaintiff, the contributory negligence of the pedestrian became irrelevant. A similar interpretation of the doctrine of Jackson was made in Law v. Osterland, 3 So. 2d 674 (La. App. 2d Cir. 1941), and commented upon in Malone, The Work of the Louisiana Supreme Court for the 1940-1941 Term—Torts and Workmen's Compensation, 4 LA. L. Rev. 209, 211 (1942). See Comment, supra note 6, at 283 n.57, in which it is indicated that "if the full import of Jackson were accepted, that decision would dissolve the defense of contributory negligence in these cases."


35. Although the use of the last clear chance doctrine as a defendant's doctrine is conceptually incorrect, the practical effect to the plaintiff is identical to that created when the last clear chance doctrine is not applied at all. That is, the plaintiff's recovery is barred by his contributory negligence.

36. 356 So. 2d 400 (La. 1978). Although there were indications that the pedestrian might have been somewhat intoxicated, the court found that the pedestrian was
trine of last clear chance as a "two-edged sword," had found that the pedestrian had the last clear chance and was therefore barred from recovering by his contributory negligence. Rather than attempt to untangle the twisted intricacies of the use (or misuse) of the last clear chance doctrine, the Louisiana Supreme Court held that contributory negligence is unavailable as a defense to a negligent motorist; and hence, the doctrine of last clear chance no longer applies to motorist/pedestrian cases. The court stated:

Accordingly, we hold that the doctrine of "last clear chance" has no application in absolving a motorist from liability when he negligently strikes a pedestrian. In the city a motorist is obligated to maintain a lookout for pedestrians at crosswalks at all times. If he fails to see a pedestrian in a position of peril when he should have, the motorist is at fault and is responsible. ... The motorist cannot escape liability by proving that the pedestrian, admittedly in peril because of his own negligence, could have avoided injury more quickly than the motorist.

The court indicated its express disapproval of the "two-edged sword" application of the last clear chance doctrine. Particularly where there is a lack of mutuality of risks, the court pointed out that the last clear chance doctrine should not be used as a weapon in the hands of of the defendant. Focusing on the disparity of risks to the parties, the court charged the motorist with a higher standard of care towards the pedestrian than that which had previously been imposed in motorist/pedestrian cases.
**The Redefinition of the Defendant’s Duty**

Although the *Baumgartner* court relied on a statute as a collateral source of the motorist’s duty, the defendant’s duty was primarily not statutorily derived. In *Boyer*, on the other hand, the employer’s duty was drawn wholly by analogy to the child labor statute. Regardless of the source of the defendant’s duty, the approach taken in defining the ambit of that duty was identical. In both *Boyer* and *Baumgartner* the court removed the contributory negligence bar to recovery by expanding the ambit of defendant’s duty. This expanded duty requires the defendant to anticipate the possibility of plaintiff’s negligence and to exercise due care to avoid injury even to a negligent plaintiff.

The *Boyer* court worked this expansion of duty by analogizing to statutes which prohibit the employment of minors in certain occupations. A defendant employer’s duty is to anticipate that minors are likely to be injured in the course of such employments due to their own negligence. By the act of

---

43. 356 So. 2d at 404 n.3. LA. R.S. 32:212(A) (1950) provides that, in the absence of operative traffic control signals, motorists must yield to pedestrians crossing the roadway within a crosswalk when “the pedestrian is upon the half of the roadway upon which the vehicle is travelling or when the pedestrian is approaching closely from the opposite half of the roadway [so] as to be in danger.”


45. Justice Tate, deriving the defendant employer’s duty from the applicable child labor statutes, indicated what that duty encompasses. “In enacting the child labor statutes, the legislature imposed on employers certain duties, in order to protect the child laborer from the dangers incident to his employment with an employer who is not an employer of record.” 360 So. 2d at 1166. “[The defendant in this case, who violated laws which sought specifically to protect Johnny from his own youth and inexperience and from other risks of employment,” 360 So. 2d at 1166. “The defendant in this case, who violated laws which sought to protect Johnny from his own youth, inexperience, and relative lack of judgment, cannot be heard to assert that these very defects in Johnny’s character caused the accident.” 360 So. 2d at 1169. See W. PROSSER, *supra* note 2, at § 65, indicating that child labor statutes have often been construed to place the responsibility on the employer to protect the class of plaintiffs against their own negligence. See notes 21-22, *supra*, and accompanying text.
ploying a minor to perform the proscribed activity, the defendant's breach of the duty is consummated and the threshold of liability exceeded. Since the employer's breach of duty is completed by initially employing the minor, proof of the employer's exercise of reasonable care once employment commenced is no defense.\footnote{46}

In a significant footnote, Justice Tate gave some indication that the expanded duty of the employer of a minor may even include certain risks to the employee which occur outside of the scope of employment.\footnote{47} In \textit{Darsam v. Kohlmann}\footnote{48} the court had denied recovery to the minor based on a finding that the minor employee had removed himself from the scope of employment at the time of the injury.\footnote{49} Justice Tate, commenting on the \textit{Darsam} holding, stated: “We might disagree with the \textit{Darsam} court that the additional risk was not within the statutory protection . . . .”\footnote{50} Thus, the \textit{Boyer} court indicated a willingness to expand an employer’s duty to include risks incurred by a minor employee when he steps outside of the scope of employment. However, the extent to which the duty of the employer encompasses these outside-of-employment risks has not yet been delineated by the court.

The ambit of the defendant motorist’s duty in \textit{Baumgartner} was also drawn so as to encompass risks created in part by the negligence of pedestrian plaintiff.\footnote{51} A motorist
is charged with "the constant duty to watch out for the possible negligent acts of the pedestrians and avoid injuring them." Moreover, a motorist "should not be able to escape responsibility for injury to the pedestrian by pleading the latter's negligence." Thus, the Baumgartner court applied to the motorist/pedestrian case a technique similar to that used in the Boyer decision. An enlargement of the defendant's duty so as to remove the contributory negligence defense resulted in the imposition of liability on the defendant upon a one-step determination that defendant was negligent.

The Rationale Supporting the Redefinition of Duty

The Baumgartner court saw the defendant's higher duty of care as resulting from the disparity of risks borne by the motorist and the pedestrian. The motorist's utilization of the higher standard of care than that required of pedestrians is imposed upon the motorist..." 356 So. 2d at 406. Without going to the extent of removing the contributory negligence bar, prior Louisiana courts have expressed a similar "higher duty" of the motorist. See Duffy v. Hickey, 151 La. 274, 91 So. 733 (1922); Mequet v. Algiers Mfg. Co., 147 La. 364, 84 So. 904 (1920); Woodard v. Burke, 135 So. 2d 333 (La. App. 1st Cir. 1961); Prine v. Continental S. Lines, 71 So. 2d 716 (La. App. 2d Cir. 1954); Norwood v. Bahm, 129 So. 183 (La. App. 1st Cir. 1930).

The lack of mutuality of risks to the motorist and the pedestrian respectively, "while not outwardly recognized by the judiciary, explains why extreme care in the operation of dangerous instrumentalities is demanded.” Comment, supra note 6, at 275. Leon Green describes the motorist/pedestrian relationship as follows:

It is [the motorist] who is enjoying the ride or making the profit from the operation of such machines as make the highway perilous. While his activity is lawful ..., yet he is not on equal footing with the plaintiff he hurts; he enjoys every advantage. He runs little risk of hurt from plaintiff's negligence, either physically or financially; plaintiff has an excess of both risks." Green, supra note
automobile creates a risk of collision in which great harm would befall the pedestrian, while little financial or physical harm would be likely to occur to the motorist. Moreover, the pedestrian's activity only endangers himself, while the motorist's action of driving the automobile creates a risk of harm to all pedestrians around him.

An employer in a Boyer situation creates a similar disparity of risks by employing a minor to work in a proscribed occupation. Again, the defendant, furthering his own enterprise, places the plaintiff in a position of great peril without incurring any real risk to himself. While the minor poses little threat of injury to the employer, the employer exposes the minor to risks of great bodily harm.

The disparity of risks concept, which is also termed a lack of mutuality of risks, has been present in the law of negligence since the interjection into society of motorized instrumentalities in the nineteenth century. Before the advent of the train, the trolley, and the automobile, the law of negligence was applied in the standard situation in which two persons were by their activity mutually exposing each other to risks of accidents. However, the initial introduction of the dangerous instrumentality—the train—altered the allocation of risks to the parties. Moreover, juries, responding to the inequitable dis-

5, at 32. "The motorist has chosen to make the streets unsafe. . . . [H]e imposes the risk, why should he not bear the loss when it comes? Justice is at her best here.


56. Since the motorist is the beneficiary of the risk-creating activity of driving, a type of enterprise theory of liability may be suggested. The motorist, if he desires to drive and thus make the streets unsafe for pedestrians, must "pay his own way." Harper and James, in their treatise on tort law, indicate that there is a "growing tendency to accept the idea of social insurance, that where losses can be traced to a given form of activity their cost should be distributed among those who benefit by that activity." F. HARPER & F. JAMES, supra note 2, at § 22.14.

57. See note 55, supra.

58. See note 56, supra, for the enterprise theory of liability applied to the motorist defendant. When the risk of harm created by the activity of driving materializes, those engaged in the lawful activity of driving are liable. A fortiori, one engaged in an activity proscribed by law in furtherance of his own enterprise, i.e., the employment of minors in certain occupations, should be required to repair the injuries resulting from risks created by that activity.

tribution of the risks, demanded "reparation of the intruding railway which created dangers but was not exposed to the perils of its own making." The contributory negligence bar allowed the courts to protect the "infant" industry from the wrath of juries whose damage awards could have taxed the new activity out of existence. The court made the policy judgment that the activity which the defendant pursued was useful to society and hence must be fostered in its growth. The determinative factors in employing the contributory negligence bar were the utility of the defendant's activity and the inability of that activity to bear the cost of the risk. Thus, the disparity of risks and policy considerations created the need for the courts to utilize the contributory negligence bar as a tool to protect the new transportation industries.

In Boyer and Baumgartner, the court balanced the same policy considerations, considered the same disparity of risks, but concluded that the contributory negligence tool must now be abandoned in order to protect the plaintiff. The unarticulated policy judgment of the court recognizes that the defendant's risk-creating activity is now in a better position to bear the risk of harm which it creates. The automobile is no less useful to society, but the phenomenon of insurance makes it possible for the court to demand that automobile drivers bear the risk which their activity creates. The automobile driver who can pass the liability on to his insurance company absorbs the loss more easily than the pedestrian. In the same way, the

60. Id.
62. Id. at 137-38.
63. Green, supra note 55, at 278. According to Green, the motorist:
can protect himself from financial hurt by a pittance, and as against the pedestrian at least, he runs little risk of suffering hurt either to his person or property. His ability to afford the advantages of a motor implies a like ability to supply protection against its hurts. In short, he imposes the risk, why should he not bear the loss when it comes. The same economy is involved in compensating the hurt individual who either supports a family or is supported by someone who does as is involved in the employer-employee cases. Insurance is the best available protection we have against the inevitable. The hurts and injuries of a motorized society are largely of that type. Morality, economy, and justice all require the person who creates hazards on a large scale to avail himself of the protection insurance gives in behalf of his victims.

Id. at 278.
employer who chooses to employ the minor in proscribed occupations must bear the risk which that employment creates. Again, the enterprise is quite able to bear the risk as a cost of doing business, while the individual employee cannot easily absorb the accident cost. Thus, the court imposed liability on the party who was better able to bear the risk.

The prophylactic element of the court's decision in the instant cases is related to the disparity of abilities of the parties to prevent the harm. The Boyer court interpreted the child labor statute as a legislative determination that minors in certain situations are incapable of protecting themselves. The employer who exercises due care by refusing to employ the minor in proscribed activities is in a better position to prevent the harm than the minor, who may find it difficult to protect himself once the employment begins. Thus, there is a disparity in the abilities of the parties to avert the harm. To achieve

64. The same justification lies behind the modern workmen's compensation statutes. W. Malone, supra note 22, at 33-34. The author discusses the cost of industrial accidents in this way: "It is futile to dismiss this question with the observation that the victim must shoulder his own accident costs. Seldom does the average worker have accumulated savings sufficient to tide him over anything more than the most trivial mishap." Id. at 33. Society has slowly come to realize that "industry should be required in some way or another to bear at least a part of the risk it has created." Id. at 34. Interestingly enough, initial statutory reforms which paved the way for modern workmen's compensation legislation, involved a removal of the absolute contributory negligence bar as one of the employer's defenses. Thus, these reforms shifted the cost of industrial accidents to the employers by allowing the employee a tort recovery. See id. at 28-31.

65. See note 45, supra.

66. Disparity of abilities may also be seen as the basis of the last clear chance doctrine. Where both plaintiff and defendant are negligent, the doctrine of last clear chance allows plaintiff to recover due to the defendant's superior ability to avert the harm. See note 25, supra. Assuming that the minor, once he is employed, will negligently injure himself, the employer, by the exercise of reasonable care, should recognize the minor's peril. Thus, one might say that the employer had the last clear chance to avoid the injury all the way up to the point of its occurrence. The employer's last clear chance would be based on his superior ability to avoid the injury by terminating the minor's employment. However, duty/risk analysis may be used to articulate the same notions. The end result is identical whether the contributory negligence bar is removed through the use of the last clear chance doctrine or by utilizing duty/risk analysis. Under the duty/risk approach, the defendant's duty includes the duty to anticipate and protect the minor from his own negligent acts. For a good illustration of the manner in which duty/risk analysis and the last clear chance doctrine can each be used to make the contributory negligence of the plaintiff irrelevant, see Pence v. Ketchum, 326 So. 2d 831 (La. 1976) (Dixon, J., concurring); Note, 37 LA. L. Rev. 617 (1977).
the prophylactic effect and prevent the recurrence of the injury, the court imposed liability on the party who was best able to reduce the risk of harm.

In the motorist/pedestrian situation the disparity in abilities is less apparent than that evident in the employment of minors in dangerous occupations. However, the party in control of the instrumentality can fairly be charged with a greater capacity to prevent the harm. In comparing the parties’ relative abilities to avoid a motorist/pedestrian accident, it is evident that the motorist can change the speed and direction of his vehicle with more quickness than the pedestrian can muster to escape the oncoming car.

Thus, the following factors combined to bring about the abrogation of the contributory negligence bar in the instant cases:

(1) The defendant’s conduct created the disparity of risks and abilities between plaintiff and defendant.
(2) The defendant was better able to bear and distribute the risk.
(3) Imposition of liability upon the defendant was more likely to achieve the desired prophylactic effect and to mitigate the likelihood of the recurrence of the injury.
Whether this set of factors is sufficient to justify the abolition of the contributory negligence bar is open to dispute. There will be those who agree with Chief Justice Sanders' dissenting view in *Baumgartner* that such a "major revision of the law . . . should be based upon a careful study of the entire field of delictual responsibility followed by legislative action."  

Until the legislature acts to apportion recovery according to proportionate fault, one can expect the court to continue to regard the contributory negligence bar to recovery as being too harsh to countenance in individual cases encountered in the future. As such cases arise, the notions of risk disparity, risk distribution, and relative ability to prevent the harm may well prove helpful in analyzing the results reached by the court.

Marie Roach Yeates

defendant driver. The logical conclusion of this development could entail the enactment of no-fault legislation which has already found acceptance in other jurisdictions.

68. 356 So.2d 400, 407 (1978).

69. *See, e.g., Outlaw v. Bituminous Ins. Co.*, 357 So. 2d 1350 (La. App. 4th Cir. 1978), in which a nine-year-old golfer was blinded by the defendant's golf ball. The mature golfer apparently was aware that the boy was crouched behind his own golf bag, slightly to the left of the defendant's drive line. The court indicated that the defendant's duty included the duty to "anticipate that the nine-year-old might . . . leave the protected cover . . . and place himself into the path of a possible bad shot . . . ."

*Id.* at 1352. Although the boy was contributorily negligent, "his negligence cannot be both the foreseen risk which imposes the duty on the mature golfer not to hit the ball and at the same time a defense to an action for damages for breach of the mature golfer's duty. The youngster's leaving a place of safety cannot both impose a duty and excuse its breach." *Id.* at 1353. Thus, the Fourth Circuit avoided the harsh result of the contributory negligence bar by expanding the defendant's ambit of duty to include anticipating and guarding against the plaintiff's possible negligence. The activity of driving a golf ball is a dangerous activity because it imposes a great risk of bodily harm to others on the golf course. The disparity in the risks as between the driver of the ball and the bystander is evident.