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Comparative Negligence and Mitigation of Damages: Two Sister-Doctrines in Search of Reunion

Yehuda Adar*

"It is, indeed, a high-sounding phrase which announces that no man shall be permitted to base his recovery upon his own fault… Yet, … there is a growing feeling that injustice is being worked and that there are situations in which the plaintiff should not be denied a recovery merely because his own fault has to some appreciable degree contributed to his harm."[1]

ABSTRACT

This article addresses a neglected problem in Anglo-American tort law, namely, the apparent inconsistency between comparative negligence and mitigation of damages. Notwithstanding the now unquestionable victory of comparative negligence over the old all-or-nothing doctrine of contributory negligence, the doctrine of mitigation (or avoidable consequences) seems to retain its doctrinal integrity. Under comparative negligence, any loss that the victim could have avoided is apportioned between the victim and the tortfeasor. In contrast, under the doctrine of mitigation, a tort victim can never recover for any element of loss that could have been avoided. The apparent tension between these two loss allocation mechanisms was identified by the drafters of the Third Restatement of Torts on Apportionment of Damages, which proposed abolishing mitigation altogether and subsuming it under comparative negligence. Surprisingly, this revolutionary proposition was not preceded nor followed by any academic discussion. This is the first article ever to present a full-fledged account of the interrelation between comparative negligence and mitigation in tort law. That interrelation is addressed from three different perspectives. First, on the level of positive analysis, the article revisits the entrenched dichotomy between the doctrines, reveals their often overlooked similarities, and at the same time sharpens the distinctions between them. Second, the article exposes the theoretical tension seemingly generated by the coexistence of comparative negligence and mitigation in the modern law of tort. It offers an integrative thesis under which this tension may be relaxed, at least to some extent. Finally, on the normative level, this article challenges the widespread belief that the mitigation doctrine is morally sound and economically efficient. This is accomplished by exposing the limits of the aforementioned integrative thesis and by illustrating the unfairness and inefficiency to which a blind application of the mitigation principle may lead. To solve these hardships, and to relax the theoretical tension between the doctrines, the article calls for a reform of this area of law, along the lines of the Third Restatement's overlooked proposal.

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* Assistant Professor, University of Haifa, Faculty of Law. For their good advice and encouragement I am grateful to Rabeea Assy, Omri Ben-Shahar, Jeffrey Berryman, Bruce Chapman, Orit Gan, Sirko Harder, Michael Krauss, Andrew Kull, Douglas Laycock, Jason Nayers, Ronen Perry, Ariel Porat, Doug Rendleman, Pietro Sirena, and Eyal Zamir. Valuable feedback was provided by the participants of the Seventh Remedies Discussion Forum, which took place at the University of Aix-Marseille III (June, 2011), and the weekly seminar of the Civil Law Department of the University of Pompeu Fabra School of Law, Barcelona (January, 2012). This article is dedicated to Dan Dobbs, our remedies giant, from whom so many of us have learned so much.

[1] A. Chalmers Mole & Lyman P. Wilson, *A Study of Comparative Negligence*, 17 CORNELL L. Q. 604, 633 (1932) (calling to abandon the 'all-or-nothing' common law rule of contributory negligence in favor of a doctrine of comparative negligence).

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I. Introduction

This article addresses a neglected problem in Anglo-American tort law. Notwithstanding the now unquestionable victory of comparative negligence (or comparative fault) over the old common law doctrine of contributory negligence, the doctrine of mitigation (or avoidable consequences) remains intact.[2] The core of the mitigation doctrine is the rule according to which a tort victim may not recover for any loss that could have been avoided had the "duty to mitigate" been fulfilled. In contrast, comparative negligence is a defense aimed at reducing a tort victim's recovery by a percentage that reflects her comparative fault in causing the injury for

[2] The expressions mitigation and avoidable consequences are here used interchangeably, as are the terms comparative negligence and comparative fault. For the sake of consistency, however, for the most part I will use the terms "mitigation" and "comparative negligence."

which she is seeking compensation. Although they have developed as separate doctrines, these two rules carry substantial similarities, if only in their effect: both enable a court or jury to reduce the damage award based on some kind of default on the plaintiff's part.

At the same time, these two doctrines employ fundamentally different methods when dealing with the victim's avoidable loss. While comparative negligence apportions this loss between the parties, the doctrine of mitigation allocates the loss in its entirety to only one of them: either the victim (if found guilty of failing to mitigate) or the tortfeasor (if the victim is not so found). Thus, the mitigation doctrine seems to preserve the rigid and now much discredited all-or-nothing loss allocation system employed under the common law defense of contributory negligence. However, unlike contributory negligence, which has been abolished in most Western jurisdictions, the doctrine of mitigation is still good law. How can we explain the persistence of this all-or-nothing doctrine in the age of comparative responsibility?

My decision to look into this question and explore the relationship between the doctrines of comparative negligence and mitigation was driven by three basic intuitions. First, the two doctrines are more similar than is usually assumed and perform an essentially similar function. Second, the coexistence of these two doctrines in modern tort law generates a theoretical tension deserving careful scrutiny. Finally, the strict all-or-nothing approach administered under the mitigation doctrine must be attenuated, to prevent injustice to either victims or injurers. The article follows these three basic intuitions and integrates them into a full-fledged account of the interrelationship between comparative negligence and mitigation of damages.

The theoretical tension between comparative negligence and the doctrine of mitigation seems to have been identified by the drafters of the Third American Restatement of Torts.[3] Under a somewhat vague rule declaring that "special ameliorative doctrines for defining plaintiff's negligence" are abolished, the Reporters have proposed total abolition of the mitigation doctrine. Under the Restatement's approach, the failure to mitigate (i.e., to prevent) a certain avoidable loss should merely reduce the scope of a tortfeasor's liability with respect to that loss, rather than eliminate it altogether.[4] Surprisingly enough, this revolutionary proposition has escaped the attention of the Anglo-American legal community. It has barely been mentioned by American courts and has not yet been discussed in the academic literature. The article therefore presents a timely attempt to assess the theoretical validity and the normative appeal of the Restatement's somewhat overlooked reform proposal.

The discussion proceeds in three stages. First, in part II, I undertake a positive inquiry into the interrelationship between the two doctrines. The aim is to expose the close affinity of the doctrines of comparative negligence and mitigation of damages and at the same time to sharpen the fundamental distinction between them. To a common lawyer, this kind of comparative exercise may seem odd. Mitigation and comparative negligence have had a separate history in the common law and have developed as distinct and autonomous legal concepts. This doctrinal dichotomy is still very much ingrained in the Anglo-American legal thinking. The present article challenges this tradition, asking the reader to acknowledge the similar role played by the two doctrines, and the need to look more carefully into their complex interrelationship.

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[3] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (2000) [hereinafter RESTATEMENT THIRD or THIRD RESTATEMENT] § 3.

[4] *See infra* note 26 & preceding text.

Second, in part III, the article raises an interesting theoretical question that has not yet been addressed, namely: Given their clear resemblance, on the one hand, and their utterly different methods of allocating avoidable loss, on the other hand, do these doctrines reflect a conflicting set of values? Is a theoretical reconciliation between these two established institutions nonetheless feasible? As a first step towards answering these questions, I argue that the mitigation doctrine has arisen out of an individualistic ideology, which put strong emphasis on the need of each individual to care for his own good. This philosophy seems to clash with the communitarian values of solidarity and mutual consideration, which I believe can best account for the rise of comparative negligence. In light of this ideological divergence, the ongoing coexistence of the mitigation and comparative negligence doctrines under the same regime of liability presents a puzzle that deserves an answer. A major contribution of this article is the effort to answer this puzzle by constructing a *prima facie* case to enable the theoretical integration of the mitigation doctrine into the communitarian theory which supports and explains comparative negligence. The argument highlights the normative significance of the distinct time phase within which each of the doctrines operates. During the pre-tort stage, in which comparative negligence dominates, the risk of violation (and injury) has not yet materialized. A victim's unreasonable failure to avoid injury at this point, though deserving of censure, may often be excusable. She can legitimately rely, at least to a certain degree, on other people performing their private law duties toward her. However, the failure to take precautionary steps *after* having suffered an actual violation (usually accompanied by a perceived injury) is arguably much less excusable. Thus, a victim's negligent "failure to mitigate" in the post-tort stage must entail a qualitatively different legal sanction. That sanction consists of the law's complete refusal to regard the defendant's negligence as a legal cause of the victim's avoidable loss.

Finally, in part IV, the normative aspects of the problem are addressed. The aim is to examine the normative appeal of the integration thesis which was offered in part II, and by so doing to assess the normative strength of the doctrine of mitigation itself.[5] This is done in two stages. First, I expose in very general terms the apparent weaknesses of the mitigation doctrine from the perspectives of fairness, efficiency, and coherence with established principles of causation. Then, I illustrate these general concerns by taking a closer look at a few typical factual categories in which these concerns are most evident. The main drawback of the doctrine of mitigation is that it prohibits courts and juries from taking into account any factor other than the reasonability of the plaintiff's conduct. This weakness is most evident in cases where even after the commission of the tort, the defendant has some control over the causal process leading to the plaintiff's further loss. However, the same weakness is also present in cases where following the tort, only the party who is able to mitigate the loss is the victim. I argue that even in these cases, which may well be the vast majority, the defendant should not automatically be discharged from any liability with respect to that loss. Such a discharge may well be justified where the victim's failure to mitigate represents a reckless disregard of the duty to mitigate (especially in the tort was not intentional). However, where the victim's failure to mitigate is merely an

[5] The article will not assess the role of either mitigation or comparative negligence within the law of contract. Nevertheless, its insights may become relevant to contract law, if comparative negligence is adopted as a general contract doctrine. This, however, is not presently the case in most Anglo-American jurisdictions. For a recent analysis of the problem *see* Ariel Porat, *A Comparative Fault Defense in Contract Law*, *in* FAULT IN AMERICAN CONTRACT LAW 237, 249-254 (Omri Ben-Shahar & Ariel Porat eds., 2010).

innocent mistake, the tortfeasor should share with the victim some portion of the avoidable loss occasioned by the wrongdoing. This is so, for one of the direct and foreseeable consequences of any tort is the creation of a problematic and irregular state of affairs, with which the victim of the tort is now forced to cope. Reacting properly to such a situation requires the victim to make a choice, which is not always obvious. When the victim fails in this complex assignment, and this failure does not represent a reckless disregard of the duty to mitigate, it is morally justifiable to hold a tortfeasor responsible not only for the direct impact of tort, but also (partially) for the indirect losses which resulted from the victim's erroneous decision. Such an approach will force potential injurers to internalize the foreseeable risk of error which they wrongfully impose on their victims, thereby enhancing the efficient deterrence of potential tortfeasors.

This article therefore concludes, that in cases where the failure to mitigate represents an innocent misjudgment, courts and juries should be allowed to apportion responsibility for the avoidable loss between the parties on the basis of their comparative fault in bringing about that loss. This solution is preferable to finding the plaintiff not negligent in order to escape the harsh effects of the mitigation rule. The availability of this judicial option will not only prevent injustice to victims, but also to tortfeasors. Finally, reforming the mitigation doctrine so as to avoid these normative concerns will relax the theoretical tension currently produced by the coexistence of comparative negligence and mitigation of damages under a single regime of tort liability. In turn, such reform is expected to strengthen the internal coherence and moral force of Anglo-American tort law.

II. Revisiting the Traditional Dichotomy: A Critical Positive Analysis

A. The Traditional Dichotomy between Mitigation and Contributory (or Comparative) Negligence

1. Contributory and Comparative Negligence

Under the common law doctrine of contributory negligence, a guilty tortfeasor could have been entirely exempt from liability towards the tort victim, if it can be shown that the loss suffered by the latter could have been avoided but for the victim's own careless conduct.[6] Recognizing the harsh results to which the application of the rule might lead in many cases, the English courts were quick to graft a number of exceptions onto the basic rule. First, they declined to apply the defense to cases of intentional[7] or reckless[8] wrongdoing. Second, the defense did not apply if,

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[6] The doctrine's origins are usually traced back to Butterfield v. Forrester [1809] 103 Eng. Rep. 926 (K.B.). The first American case to apply the doctrine of contributory negligence is probably Smith v. Smith, 19 Mass. (2 pick.) 662 (1824). For a detailed history of the doctrine and a useful survey of the old cases from which it emerged *see* Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189 & 304 (1950) (in two parts).

[7] WILLIAM L. PROSSER, JOHN W. WADE & VICTOR E. SCHWARTZ, TORTS: CASES AND MATERIALS 569 (8th ed., 1988) ("It is standard hornbook law that contributory negligence is not a defense to an intentional tort").

[8] RESTATEMENT OF TORTS (SECOND), §§ 481, 482. HENRY WOODS & BETH DEERE, COMPARATIVE FAULT 10 (3rd ed., 1996), citing Walldren Express & Van Co. v. Krug, 126 N.E 97 (Ill. 1920), where a negligent truck driver who hit a boy playing ball in the street was not allowed to raise the defense of contributory negligence due to his "wanton" disregard of the possibility that children would play in the streets. For a detailed discussion of this exception to the rule before and after the introduction of comparative negligence regimes in the United States *see* VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE, 7, 119-122, 122-130, 132-139 (5th ed., 2010).

notwithstanding the plaintiff's prior inadvertence, the defendant had a "last clear chance" to prevent the injury.[9] Third, contributory negligence was no defense where the defendant had violated a standard fixed by statute, if the statute intended to provide special protection to persons like the victim against their own mistakes.[10] Finally, where rejecting the plaintiff's claim seemed too harsh a result, some courts simply held that the plaintiff's default was not sufficiently serious to be regarded as contributory negligence.[11]

The common denominator of all these exceptions was that they led to the imposition of full liability on the defendant for the plaintiff's avoidable loss. Under the doctrine of contributory negligence it had to be either the defendant or the plaintiff – but never both – who was charged with full responsibility for the plaintiff's avoidable loss.[12] Wide discontent with this all-or-nothing approach led the vast majority of Anglo-American jurisdictions, throughout the 20th century, to abandon contributory negligence in its original strict form. Typically through legislative intervention, and in some cases through the initiative of the courts, a more flexible defense – comparative negligence – was gradually introduced into Anglo-American tort law.[13]

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9 RESTATEMENT OF TORTS (SECOND), §§ 479-480. The doctrine (knows also as the "last opportunity" rule or the "discovered peril" rule) is ascribed to the English case of Davis v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (Exch. 1842). In that case, which in a sense mirrors Butterfield v. Forrester, *supra* note 6, the defendant ran over the plaintiff's ass, which had been left with fettered forefeet in the road, eating grass. The Court refused to bar the plaintiff's claim, reasoning that notwithstanding the latter's negligence in leaving the ass unattended in the road, the defendant was the one who had the 'last chance' of preventing the accident. Thus, the defendant was liable for the entire loss. The expression was first mentioned in Bridge v. The Grand Junction Railway 3 M. & W. 244 (1838). For discussions of the 'last clear chance' (or 'discovered peril') doctrine, it rational and its relevance under contemporary regimes of comparative negligence see: SCHWARTZ, *supra* note 8, at 163-177; DAN B. DOBBS, TORTS AND COMPENSATION 265-268 (2nd ed., 1993) [hereinafter DOBBS, COMPENSATION]; SALMOND & HEUSTON ON THE LAW OF TORTS 486-488 (21st ed., Heuston & Buckley eds., 1996). For an illuminating and thorough analysis of the early cases employing the doctrine, *see*, Malcolm M. MacIntyre, *Rationale of the Last Clear Chance*, 53 HARV. L. REV. 1225 (1940) (claiming that the true rationale of Davis v. Mann – and the clear chance doctrine – was not causation but rather the slightness of plaintiff's negligence compared to that of defendant).

10 RESTATEMENT OF TORTS (SECOND) § 483. PROSSER ET AL., *supra* note 7, at 569-570. *See generally* William L. Prosser, *Contributory Negligence as Defense to Violation of Statute,* 32 MINN. L. REV. 105 (1948).

11 WOODS & DEERE, *supra* note 8, at 9. Towards the end of the 19th century a clear trend of some courts was to allow the jury wide discretion regarding the question of whether a plaintiff had been contributory negligent. *Id*. For the role of the jury in softening the hardship of the contributory negligence defense, *see also* SCHWARTZ, *supra* note 8, at 8-9.

12 "Under the rule of contributory negligence you could make the injured plaintiff accountable for his own misbehavior… or you could find a way to duck the bar of contributory negligence… But you never held both parties accountable. The plaintiff recovered all damages, in spite of his fault, or the defendant escaped all liability in spite of *his* fault." Dan B. Dobbs, *Accountability and Comparative Fault*, 47 LA. L. REV. 939, 943 (1987) [hereinafter Dobbs, *Accountability*].

13 The first Federal law to incorporate a rule of comparative negligence was the Federal Employers Liability Act, 45 U.S.C §51 et seq. (1908). The first state to adopt such a legislative reform was Mississippi, in 1910. Miss. Code Ann. § 11-7-15. The developments are well documented in the literature. *See, e.g.,* Dobbs, *Accountability*, *supra* note 12; DAN D. DOBBS, THE LAW OF TORTS, 503-504 (2000) [hereinafter DOBBS, TORTS]; O.C. Twyner, *A Survey and Analysis of Comparative Fault in Mississippi*, 52 MISS. L.J. 563 (1982). However, a vast majority of states have been much slower to adopt comparative negligence, and had not done so until the seventies. A detailed discussion of the early development of comparative negligence in American law is provided by Mole & Wilson, *supra* note 1. For a more recent report *See* John W. Wade, *A Uniform Comparative Fault Act – What Should It Provide?* 10 U. MICH. J. L. REFORM 220, 220-

Under the modern doctrine of 'comparative negligence,' which outside the United States still retains the label 'contributory negligence,'[14] a plaintiff's contributory negligence would not routinely exempt a negligent defendant from all liability. Rather, such negligence merely grants the Court or jury the authority to apportion the plaintiff's avoidable loss between the parties.[15] Such apportionment is carried out by determining an equitable proportion (usually a percentage) which reflects the relative responsibility of each of the parties for causing the relevant loss. That relative responsibility is, in turn, determined by the combined weight of two factors: First, the relative ('comparative') *degree of fault* manifested by the misconduct of each of the parties (i.e., extent of the deviation from the norm of reasonableness); and Second, the relative (comparative) *causal impact* that that misconduct had on the plaintiff's loss and on its extent.[16]

As of today, only four American states (Alabama, Maryland, North Carolina, Virginia) and the District of Columbia still adhere to the original common law version of contributory negligence.[17] The other forty-six states have adopted some form of comparative negligence. Of these states, twelve have embraced a "pure" regime,

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222 (1977); John W. Wade, *Comparative Negligence – Its Development in the United States and Its Present Status in Louisiana?* 40 LA. L. REV. 299 (1979-1980). An example of a bold judicial decision substituting comparative negligence for contributory negligence is the Michigan Supreme Court's decision in Kirby v. Larson, 256 N.W.2d 400 (Mich. 1977).

14 The terminological gap has a fairly simple explanation. In England, which most commonwealth countries naturally followed, the transformation from the old common law doctrine to the new legislative rule was abrupt and general in its scope. This enabled the legal community to keep using the old expression with no substantial risk of confounding the new doctrine with the old one. However, in the United States the process of abolishing the old common law was gradual, lengthy, and is still not complete. This necessitated a clear terminological distinction. On this point *See* W.V. Horton Rogers, *Contributory Negligence under English Law*, *in* UNIFICATION OF TORT LAW: CONTRIBUTORY NEGLIGENCE 57, 57, fn. 3 (U. Magnus & M. Martin-Casals eds., 2004).

15 RESTATEMENT THIRD, § 5. *Cf.* Uniform Comparative Fault Act, § 1(a) (1977) [hereinafter UCFA] under which a claimant's contributory fault "diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's fault, but does not bar recovery." (*available at*: http://www.law.upenn.edu/bll/archives/ulc/fnact99/1970s/ucfa79.pdf). A similar formulation was adopted by the English Law Reform (Contributory Negligence) Act, 1945, § 1(1), which sets forth that the "[w]here 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." The terms 'comparative negligence' and 'comparative fault' are often used interchangeably (see, e.g., the UCFA, which throughout the Act uses the latter term to denote comparative negligence). However, some courts and legislators have offered a distinction under which comparative negligence apportions responsibility between a wrongdoer and her victim, whereas comparative fault apportions responsibility for the plaintiff's loss among a plurality of wrongdoers (in the context of contribution between tortfeasors). *See, e.g.*: Schneider National Inc. v. Holland Hitch Co., 843 P.2d 561, 566 n. 4 (Wyo. 1992), citing WYO. STAT. ANN. § 1-1-109(a)-(d) (1977).

16 "In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." UCFA, § 2(b). This formulation was adopted by some states. *See e.g.* § Iowa Code 668.3(3). Indeed, the term comparative negligence (or comparative fault) has been criticized for its failure to capture the causal factor in the apportionment carried out under the doctrine. Prosser, *Comparative Negligence*, *supra* note 84, at 1, fn. 2.

17 John R. Grier, *Rethinking the Treatment of Mitigation of Damages Under the Iowa Comparative Fault Act in Light of Tanberg v. Ackerman Inv. Co.*, 77 IOWA L. REV. 1913, 1918 (1992) (citing judicial references at n. 57); SCHWARTZ, *supra* note 8, at 4.

under which a flexible division of responsibility is always allowed.[18] Thirty-three states employ intermediate or "modified" regimes, which allow apportionment depending on the victim's level of culpability.[19]

2. Mitigation of Damages

The doctrine of mitigation, known also as the "avoidable consequences" doctrine, is an established principle in the common law of damages. The doctrine is comprised of three different rules. The first rule states that a defendant is not liable towards a plaintiff for any loss resulting from the defendant's wrong (be it a tort or a breach of contract) if the plaintiff could and should have avoided that loss.[20] The second rule, which is a corollary to the first, recognizes a plaintiff's right to demand reimbursement for any reasonable cost incurred while attempting to mitigate (whether or not such attempt was successful).[21] Under the third rule, if the plaintiff succeeds in mitigating a certain loss, then the damages should be reduced accordingly.[22] This article focuses exclusively on the first rule, which is universally perceived as the most fundamental of the three.[23]

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18 The "pure comparative negligence" states are Alaska, California, Florida, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New Mexico, New York, Rhode Island, and Washington. SCHWARTZ, *supra* note 8, at 32, 62-64. The first to adopt this regime was Mississippi. MISS. LAWS 1910, ch. 135. See, today: MISS. CODE ANN., § 11-7-15 (1972). Pure comparative negligence is also embodied in various Federal laws, the best known of which is the Federal Employers' Liability Act of 1908 (covering injuries to employees in the interstate railroad industry). 45 U.S.C. § 53. A "pure" regime was adopted since 1945 by all common law jurisdictions outside the United States, including England (and Scotland), Northern Ireland Australia and New-Zealand, as well as all Canadian provinces.

19 Under this model, which is known as "modified comparative negligence", a flexible apportionment of loss based on the comparative fault of the parties becomes possible only if the defendant's contributory fault outweighs or at least equals that of the plaintiff. If, however, the plaintiff's fault equals or outweighs the defendant's, the latter escapes liability and no apportionment is allowed. The "forty-nine percent" rule is today the law in 12 States: Arizona, Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Tennessee, Utah, and West Virginia. The "fifty percent" rule is the most popular regime. It was first introduced by New-Hampshire in 1969, and was followed by Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Massachusetts, Minnesota, Montana, Nevada, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, and Wyoming, to which Wisconsin joined in 1971 (altogether 20 states). A somewhat different modified system applied in South Dakota, under which comparative negligence applies only if the plaintiff's negligence was slight compared to that of the defendant. SCHWARTZ, *supra* note 8, at 33-34.

20 RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (St. Paul, 1979); RESTATEMENT OF TORTS (SECOND) § 918(1). JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS 563 (4th ed. 1998): "the law does not permit the wronged party to recover those damages that could have [been] avoided without undue risk, burden, or humiliation". The *locus classicus* of the doctrine is a contracts case, British Westinghouse Co. v. Underground Ry. [1912] A.C. 673 (H.L.).

21 Put differently, these costs are regarded by the law as a foreseeable and thus a compensable consequence of the defendant's wrong. *See* 1 DAN B. DOBBS, LAW OF REMEDIES: DAMAGE-EQUITY-RESTITUTION 383 (2nd ed. 1993, unabridged edition) [hereinafter DOBBS, UNABRIDGED REMEDIES].

22 For this threefold taxonomy see, e.g., HARVEY MCGREGOR, MCGREGOR ON DAMAGES 235-236 (18th ed., 2009); 1 CHITTY ON CONTRACTS, 1478-1479 (Hugh G. Beale Gen. ed., 29th ed. 2004). Dan Dobbs accepts this tripartite classification, but offers an additional (fourth) rule, under which if damages are reduced due to a failure to mitigate, the plaintiff should be allowed credit for the hypothetical costs she would have incurred had she executed her duty to mitigate. DOBBS, UNABRIDGED, *supra* note 21, at 381.

23 *See, e.g.,* Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 967, fn. 2 (1983) ("The doctrine of avoidable consequences, which precludes an injured party from recovering damages for losses which he

In contrast to contributory negligence, the mitigation doctrine was originally developed in the context of actions for breach of contract. It occupies a central position within the law of contract damages.[24] However, the principle was soon absorbed into the law of torts as well, where it is frequently relied upon by defendants in their efforts to curtail the scope of their liability in damages towards injured plaintiffs.[25]

A striking development in the history of the doctrine took place in the year 2000. Under a somewhat vague rule declaring that "special ameliorative doctrines for defining plaintiff's negligence" are abolished, the Third Restatement on the Apportionment of Liability proposed to abolish the mitigation of damages doctrine from the face of tort law. According to the Reporters, under a regime of tort liability in which comparative negligence plays such a pivotal role, the avoidable consequences doctrine, which provides an all-or-nothing rule, is both superfluous and problematic. The doctrine should therefore be absorbed into the doctrine of comparative negligence.[26] Notwithstanding its revolutionary nature, this proposal has

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reasonably could have avoided, is the centerpiece of the mitigation principle"). The centrality of the first rule may be best explained by reference to its theoretical independence relative to the second and third rules. The two latter rules derive naturally from the basic principle that compensation is aimed at fulfilling the plaintiff's expectation interest – but no more. In contrast, the rule denying compensation for avoidable consequences is generally perceived as a *limitation* on the expectation interest. For a critique of this common understanding and an interesting attempt to reconcile the mitigation rule with the expectation principle *See* Michael B. Kelly, *Living without the Avoidable Consequences Rule in Contract Remedies,* 33 SAN DIEGO L. REV. 175 (1996).

24 Authoritative discussions of the current status of the doctrine in American contract law include: 3 DOBBS, UNABRIDGED REMEDIES, *supra* note 21, at 127-153; Allan E. Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1183-1199 (1970); ALLAN E. FARNSWORTH, FARNSWORTH ON CONTRACTS 806-821 (3rd ed., 1999); 5 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS, 241-255 (1964); 11 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS, 311-322 (revised ed., Joseph M. Perillo ed., 2005). For an English perspective *See* ANDREW BURROWS, REMEDIES FOR TORTS AND BREACH OF CONTRACT 122-128 (3rd ed. 2004); CHITTY, *supra* note 22, at 1478-1488; MCGREGOR, *supra* note 22, at 235-284 (covering both contract and tort).

25 "In earlier days cases of mitigation involving tort appeared only from time to time. Today they are quite common and cover a wide field." MCGREGOR, *supra* note 22, at 266. "Most of the authorities on the 'duty' to mitigate relate to breach of contract, but the broad principles are equally applicable to tort." W.V. HORTON ROGERS, WINFIELD & JOLOWICZ ON TORT 955 (16th ed. 2002) [hereinafter WINFIELD & JOLOWICZ]: "While the doctrine of mitigation of damages developed in the law of contracts, the courts had little difficulty in extending its application to the law of torts as well." John C. Everett, *Mitigation of Damages - Effect of Plaintiff Choosing among Reasonable Alternatives*, 23 ARK. L. REV. 132, 133 (1969). Treatments of the role of mitigation in tort law have usually been relatively concise compared to parallel discussions in the contractual context. *See e.g.* W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 458-459 (5th ed., 1984) [hereinafter PROSSER & KEETON]; 4 FLOWER V. HARPER ET AL., THE LAW OF TORTS, 344-347, 311-316 (1986); 22 AM. JUR. 2D *Damages* §§ 334-347 (2003). For an English perspective see, e.g., HALSBURY'S LAWS OF ENGLAND 12(1) (reissue) §§ 859, 1041 (available at LexisNexis); CLERK & LINDSELL ON TORTS 1885-1887 (Michael A. Jones Gen. Ed., 20th ed. 2010); MCGREGOR, *supra* note 22, at 266-272.

26 *Id.* § 3. *See also* cmt. b & illus. 4 & 5. Especially illuminating is the Reporter's Note to comment b, id. at 40-41, which states that "Under comparative responsibility, it no longer makes sense to have a plaintiff's [post-accident] negligence constitute an absolute bar to recovery, even for the portion of the plaintiff's injuries caused by that conduct. … A plaintiff's failure to mitigate damages should no longer constitute a bar to recovering those damages. … [it] is a factor to consider when assigning percentages of responsibility. … Interestingly, unlike other Sections of the RESTATEMENT (SECOND) OF TORTS (1965) [hereinafter RESTATEMENT OF TORTS (SECOND)] which have been superseded, § 918 ("avoidable consequences") had not been explicitly replaced

hitherto been completely ignored by the legal community.[27] It has not been considered in the academic literature, and the Courts continue to recognize and apply the doctrine routinely.

3. Mitigation of Damages versus Comparative Negligence: An Under-Researched Dichotomy

Anyone looking into the vast body of literature and case law relating to the doctrines in question will immediately discover that Anglo-American law treats mitigation and comparative negligence (or contributory negligence, where is still applies) as two utterly distinct legal institutions. Notwithstanding the stark similarity between them, Anglo-American lawyers seem to perceive comparative or contributory negligence on the one hand and mitigation of damages on the other as two legal phenomena which have little or nothing to do with each other. Consequently, the interrelation between the two doctrines is rarely investigated. Furthermore, courts and commentators have rarely questioned the justification for maintaining the traditional distinction between these two legal concepts. Several factors seem to be involved here.

First, as an historical fact, contributory negligence and mitigation of damages were developed by the common law courts as independent legal rules. As such, they were given different names. To a large extent this may be explainable by the fact that whereas contributory negligence has always been considered a tort doctrine, mitigation developed and is studied mainly within the context of contract law. Moreover, the distinct terminology used to describe each of the doctrines carries different semantic content, and thus sends different normative messages. For example, the mitigation principle is often perceived as imposing a *duty to mitigate* on the plaintiff. In contrast, in the context of contributory (or comparative) negligence no explicit reference is made to any kind of "duty" or obligation of the plaintiff towards the defendant. Then again, the language of *fault or negligence*, which is so deeply ingrained in the concept of comparative negligence (or comparative fault, as it is often called), is absent from the jargon used in the context of mitigation. Finally, under mitigation the plaintiff's default is usually described as a *failure to act*, that is, a nonfeasance. Comparative negligence, on the other hand, is more susceptible to being understood as implying some kind of *active conduct* on the part of the plaintiff.[28]

The dichotomy between the principles of mitigation and comparative or contributory negligence is not, however, merely terminological. These doctrines are actually understood as playing radically different roles within the law of tort. Contributory negligence – and its modern successor comparative negligence – are often portrayed as legal defenses to an action in tort. Conversely, mitigation of damages is traditionally perceived as a rule of damages, affecting only the size of the remedy to be awarded once the question of liability has been settled.[29] This functional distinction, which made sense when contributory negligence was a total defense,

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by the THIRD RESTATEMENT. It is therefore officially still in force, and is frequently relied upon by American courts. However, reading the text of the new Restatement, there is no doubt that that Section was in fact repealed.

27 The sole exception of which I am aware is DAN B. DOBBS & PAUL T. HAYDEN, TORTS AND COMPENSATION 267-268 (4th ed., 2001), where the authors point out the over-strictness of the mitigation rule, making explicit reference to Section 3 of the THIRD RESTATEMENT.

28 *See e.g.,* GUENTER H. TREITEL, THE LAW OF CONTRACT 982 (11th ed., 2005) (distinguishing the faulty failing to mitigate from actually helping to bring about the loss, which under tort law is called contributory negligence).

29 For the critique of this presumption *see* below, text to notes

seems to continue even today, after the advent of comparative negligence. It is strongly reflected in the methodology of many torts textbooks. In these texts, analyses of contributory or comparative negligence are most often included in chapters dealing with general defenses to tort liability. Mitigation, in contrast, is typically discussed under separate headings which deal with damages.[30] This method of classification is so entrenched that it sometimes leads remedies experts to exclude any treatment of comparative negligence from their textsbooks, presumably on the basis of the assumption that the doctrine involves issues of liability rather than remedial questions.[31]

The terminological variance and "geographical" separation which characterize the traditional treatment of these doctrines may not have had such an impact on the mindset of common lawyers, had sufficient effort been invested in the study of their interrelation. Such efforts, however, have been rare, and have not attracted much attention. In this case, as in others, the semantic and methodological tradition of separation left this borderland under-researched.

To illustrate the point, the two major American monographs on comparative negligence barely mention the mitigation of damages doctrine. In one of these sources, the doctrine is mentioned only once.[32] In the other, the possible convergence of mitigation with comparative negligence under some comparative fault statutes was summarily pointed out, but was not followed by any critical analysis.[33] Likewise, in two well known general texts on the law of torts, the doctrines are discussed separately, with no mention of their close affinity.[34] Finally, in the numerous articles and essays which have examined them, very rarely have comparative negligence and mitigation of damages been discussed in tandem.[35] Among the hundreds of articles which have studied the doctrines of comparative (or contributory) negligence and their role in tort law, systematic examinations of the interrelationship between these doctrines and the doctrine of mitigation have been extremely rare.[36]

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30 *See, e.g.,* RICHARD EPSTEIN, CASES & MATERIALS ON TORTS (8th ed. 2004) (comparative negligence discussed under "plaintiff's conduct"; avoidable consequences treated under "recoverable elements of damages"); DOBBS, COMPENSATION, *supra* note 9 (comparative negligence dealt with under "defenses"; avoidable consequences under "adjustments in damages"); Harry STREET & MARGARET BRAZIER, THE LAW OF TORTS (10th ed. 1999) (contributory negligence treated under "defenses"; mitigation under "remedies").

31 *See e.g.* DOUG RENDLEMAN & CAPRICE L. ROBERTS, CASES & MATERIALS ON REMEDIES (8th ed., 2010) (no treatment of contributory or comparative negligence; avoidable consequences dealt with under "limitations on damages"); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS (4th ed. 2010) (same).

32 SCHWARTZ, *supra* note 8, at 113, mentions it when referring to a plaintiff's negligence which increased his initial injury;

33 WOODS & DEERE, *supra* note 8, at 94-95.

34 WINFIELD & JOLOWICZ, *supra* note 25, at 318-336, 954-955 (no mention of mitigation while discussing contributory negligence and vice versa); EPSTEIN, *supra* note 30, at 288-318, 790-791 (same).

35 A representative example is a lengthy and widely cited article on comparative negligence, in which the author examines, *inter alia*, the effect of the doctrine on other tort doctrines such as assumption of risk, remoteness, joint and several liability, etc. Mitigation of damages was not discussed nor mentioned throughout the article. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199 (1990).

36 As far as I am aware, the only two journal articles which include a critique of the presumed analytical distinctions between mitigation and contributory negligence are Kelly, *supra* note 23, at 263-278 and Jerry J. Phillips, *The Case for Judicial Adoption of Comparative Fault in South Carolina*, 32 S. C. L. REV. 295, 309-315 (1980). Mitigation and comparative negligence are often mentioned in tandem in cases and articles dealing with what are known as "seatbelt cases". However, these are not true mitigation cases but rather contributory or comparative negligence

Admittedly, occasionally a text writer may acknowledge – explicitly or implicitly – that the two doctrines are largely similar.[37] However, these recognitions are seldom accompanied by a careful examination of the source of this resemblance, of its degree, or of the normative questions it might raise.[38]

B. The Traditional Dichotomy Revisited

As we have just seen, contributory and comparative negligence are perceived in Anglo-American tort law as two clearly separate doctrines. However, we have also seen that several scholars have acknowledged the strong resemblance between these doctrines. Is this resemblance only external and superficial or does it reflect important substantive similarities? Are these doctrines more similar or more distinct? To what extent does the answer depend on whether mitigation is compared to contributory negligence as opposed to comparative negligence? I seek to provide an answer by comparing the various features of the doctrines in question. As we shall later see, this positive analysis is necessary if one wishes to understand and evaluate the normative questions which the coexistence of mitigation and comparative negligence entail.

1. Contributory Negligence and Mitigation of Damages: A Distinction without a Difference?

Notwithstanding the different terminology used to describe these two common law doctrines and despite the scholarly and judicial inclination to regard them as two independent doctrines, this article claims that contributory negligence and mitigation of damages are essentially identical doctrines. Understanding this claim is a crucial step in for the critical assessment of the relationship between mitigation and comparative negligence.

At first, we must remove a fundamental and yet very common mistake regarding the presumably distinct role played by each of the doctrines within tort law. As mentioned earlier, whereas the contributory negligence is treated as a complete

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cases, for they involve pre-accident rather than post-accident negligent conduct. Notwithstanding, before the advent of comparative negligence some court were willing to treat this kind of contributory negligence as a failure to mitigate, to avoid the harsh results of finding the plaintiff to have been contributorily negligent (one of the first cases to use this technique was Spier v. Barker, 323 N.E.2d 164 (N.Y. 1974)). However, along with the gradual abolishment of contributory negligence in most jurisdictions, courts (in both "pure" and "modified" jurisdictions) have become less inclined to embrace the mitigation approach, finding it either analytically or normatively unappealing. For useful introduction to the complex issues arising in these cases see, e.g., David F. Guldenschuh, *Note, The Seat Belt Defense: A Comprehensive Guide for the Trial Lawyer and Suggested Approach for the Courts*, 56 NOTRE DAME LAWYER, 272 (1980).

[37] For explicit acknowledgement *see, e.g.*, Laycock, *supra* note 31, who does not deal with contributory or comparative negligence, but observes that these doctrines are "closely related" to mitigation of damages; and compare PROSSER ET AL, *supra* note 7, at 563, where the authors mention the apparent resemblance and state that the doctrines should be distinguished on the basis of the different time phase in which each of them applies. By considering the avoidable consequences doctrine under a sub-heading in a chapter on contributory negligence HARPER ET AL., *supra* note 25, at 344-345, seem to have implicitly acknowledged the close affinity between the doctrines under discussion. *See also* 3 STUART M. SPEISER, CHARLES F. KRAUSE, ALFRED W. GANS, THE AMERICAN LAW OF TORTS, 294-298 (2008) who express the view that the mitigation doctrine is "closely related to but clearly distinguishable from contributory negligence". Interestingly, more than a hundred years ago Theodore Sedgwick commented that "[t]he application of the doctrine of contributory negligence and of that of avoidable consequences *often produce results that closely resemble each other*". In his view, the doctrines differ, however, in that the first "defeats the action itself" while the second only limits the scope of the plaintiff's recovery. THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES 300 (8th ed., 1891).

[38] I discuss the very few exceptions below.

defense to liability in tort, mitigation is considered a remedial rule, which affects merely the scope of the plaintiff's recovery.[39] At first sight, this description may seem perfectly sound. However, a more careful examination reveals that it is misleading. It is misleading, because by emphasizing only the diverse end-results of their application, this traditional account conceals the substantive similarity between the two doctrines. Thus, it is prone to create the impression that since the effect of their application in most cases is radically different (i.e., defeat of the action, versus reduction of the damages), then the nature of the rules themselves must also be fundamentally different. However, this is not the case.

In fact, both contributory negligence and mitigation of damages apply the same basic rule: *Defendant is not liable for any damage caused by his wrongful conduct, if the plaintiff could and should have avoided suffering that damage*.

If this assertion were correct, then why does contributory negligence preclude liability, whereas mitigation of damages merely reduces its scope? The answer to this question is fairly simple, if one recalls that under common law contributory negligence and mitigation of damages each apply in a different time-phase. As mentioned earlier, mitigation denies recovery for any loss resulting from the defendant's wrong.[40] It is universally accepted that the "duty to mitigate" arises only *after* the completion of a legal wrong against the plaintiff, that is, in the context of a tort action, only once the tort is complete.[41] In contrast, to be considered contributory negligence, a plaintiff's relevant conduct must *precede* the completion of the tort, or at least coincide with it.[42] This temporal borderline between contributory negligence and mitigation of damages has been recognized and applied by the judiciary on numerous occasions.[43]

In the context of a tort action in negligence, in which contributory (as well as comparative) negligence is most frequently referred to, the cause of action is complete only once the plaintiff has sustained some recoverable loss. This flows inevitably

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39 See, e.g., RESTATEMENT (SECOND) OF TORTS, § 918, cmt. a: "[C]ontributory negligence either precludes recovery or is no defense at all to a claim for compensatory damages. On the other hand, the rule stated in this Section [i.e., avoidable consequences] applies only to the diminution of damages and not to the existence of a cause of action." This is an entrenched distinction. See, for example: SEDGWICK, *supra* note 37, at 300; CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 127 (1935).

40 *See supra*, note 20 and accompanying text.

41 PROSSER ET AL., *supra* note 7, at 525: "This rule denies recovery for any damages which could have been avoided by reasonable conduct on the part of the plaintiff *after a legal wrong* has been committed by defendant."

42 MCGREGOR, *supra* note 22, at 87: "[G]enerally speaking, contributory negligence arises at the time of or before the defendant's wrong"; DOBBS & HAYDEN, *supra* note 27, at 795 ("Courts and writers have often emphasized that avoidable consequences rules come into play after the plaintiff's injury"); PROSSER & KEETON, *supra* note 25, at 458 (same); 22 AM. JUR. 2D *Damages* § 497 (Revised ed. 1988) ("Contributory negligence occurs either before or at the time of the wrongful act or omission of the defendant. On the other hand, the avoidable consequences generally arise after the wrongful act of the defendant). *See also* Eugene Kontorovich, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491, 497 (2001) ("Mitigation deals only with the plaintiff's conduct *after* his cause of action accrues…").

43 "The avoidable consequences doctrine… limits consideration of a plaintiff's fault to the time period that begins *after a defendant's wrongful conduct.*" Del Tufo v. Twp. of Old Bridge 685 A.2d 1267 (N.J. 1995); "Contributory negligence, however, comes into action when either the injured party's carelessness occurs *before* defendant's wrong has been committed or *concurrently* with it." Ostrowski v. Azzara, 545 A.2d 148, 152 (N.J. 1988). *See also*, to the same extent: Yazoo & M.V.R. Co. v. Fields, 195 So. 489 (Miss. 1940); Munn v. Southern Health Plan, 719 F. Supp. 525, 527 (N.D. Miss. 1989).

from the fact that causation of recoverable loss is an indispensable element of the cause of action in negligence. This means that the doctrine of mitigation may apply – and bar the recovery of avoidable loss – only with respect to any further losses sustained by the plaintiff after she had suffered an initial recoverable loss, i.e., only after the tort of negligence has been established.[44] On the other hand, contributory negligence occurs prior to the culmination of the defendant's breach of duty in an initial loss to the plaintiff. Therefore, in a negligence claim, contributory negligence will not only preclude the plaintiff's right to recover damages for her initial loss, but will exempt the defendant entirely from liability.

Take, for example, the common situation where P, a pedestrian, crosses the street inattentively and, failing to notice D's careless driving, is injured by D's car. Assume further, that P's neglect to see a doctor soon after the accident results in a serious aggravation of his initial injury. Applying the mitigation principle to P's post-accident negligence will preclude P's right to damages for any loss that could have been avoided had P visited a doctor sooner. However, P's post-tort neglect will not affect P's right to claim compensation for her initial injury, since her neglect did not in any way affect that injury.[45] If, however, we apply contributory negligence to P's pre-accident self-negligence (i.e., the failure to notice D's car), this will, *by the very same working principle*, bar P's right to damages for the initial injury caused by the accident (since that injury would not have occurred but for P's contributory negligence). As a corollary, P will lose her cause of action in negligence against D, and will be denied recovery not only for the initial loss but for any consequential loss she may have suffered as a result of the accident.

This practical difference in outcome, however, is not a result of any substantive difference in method or in approach to the problem of allocating loss between a faulty defendant and a careless plaintiff. Both doctrines implement the same substantive norm to this problem, namely, that no one should be compensated for loss he could and should have avoided. The different outcome of their application is merely a reflection of the temporal borderline which the common law of torts had drawn between the doctrines in question.

The misleading nature of the conventional distinction here discussed is clearly revealed if one considers tort actions in which liability is *not* dependent upon the causation of any actual injury to the plaintiff. In torts actionable *per se* (*e.g.*, defamation, conversion, trespass, etc.),[46] applying contributory negligence to a plaintiff's *pre-tort* lack of care will prevent her from claiming compensation for any loss she could have avoided, but will *not defeat the cause of action* itself. Therefore, the plaintiff may be entitled to other remedies (e.g., an injunction, nominal damages, or even disgorgement and punitive damages in appropriate cases). On the other hand, applying the mitigation principle to a plaintiff's *post-tort* conduct will, in certain cases, not only affect the scope of the damages awarded the plaintiff, but might defeat the entire cause of action.[47]

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44 PROSSER ET AL., *supra* note 7, at 563: "[in negligence?] The avoidable-consequences rule becomes material after plaintiff has been injured."; HARRY STREET & MARGARET BRAZIER, THE LAW OF TORTS 530 (10th ed. 1999): "[C]ontributory negligence is concerned with negligence of the plaintiff before the cause of action has matured by the occurrence of some damages; after damages has occurred… he has a duty to take care to mitigate his loss."

45 In other words, there is no causal link between P's neglect and his initial injury.

46 As well as actions for breach of contract, which is a wrong actionable *per se*.

47 This seems to have been acknowledged in Ostrowski v. Azzara, 545 A.2d 148, 450 (N.J. 1988): "There can be cases of mitigation or avoidance… where the plaintiff will have no recovery or almost no recovery."

To conclude, contrary to its widespread image as a rule that merely *reduces* recovery for avoidable losses, mitigation in fact *eliminates* altogether the right of a plaintiff to recover for any such losses, even when they are factually linked to the defendant's wrongful conduct. In this very important respect, the mitigation doctrine is identical to the doctrine of contributory negligence: both have the effect of completely barring the plaintiff from recovering any damages whatsoever, if those damages could have been avoided by the exercise of due care. Put differently, contributory negligence and mitigation of damages are two parallel but identical doctrines of tort law: they lay down the same substantive principle, but apply it in different stages of a torts case.[48]

At first blush this conclusion may seem surprising or even odd to a common lawyer accustomed to thinking of contributory negligence and mitigation of damages as two independent legal phenomena. However, the same conclusion is further reinforced, if one considers the other characteristic features of the two doctrines.

To begin with, compare the nature of the conduct triggering the defense of contributory negligence, with the conduct giving rise to the avoidable consequence doctrine. The close affinity here is threefold: First, under both doctrines, the relevant conduct can be either an act or an omission, by which the plaintiff in some way participates in the *causation of harm to herself*.[49]

Second, under both doctrines, the plaintiff's conduct must be considered *unreasonable* under the circumstances, that is, *faulty and unacceptable*, from a social point of view.[50] This often under-emphasized resemblance was acknowledged in the clearest manner by the Supreme Court of Michigan:

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48 Interestingly, academic acknowledgement of this striking similarity between the doctrines of contributory negligence and mitigation of damages is extremely rare. The most powerful critique of the functional distinction between these doctrines appears in Kelly, *supra* note 23, at 266-267. Kelly criticizes the "mechanical habit of treating contributory negligence as a bar to the action" as being of "superficial nature", given that mitigation also denies recovery for any avoidable element of loss. *See also* Phillips, *supra* note 36, at 309-311, who criticized the proposed distinctions between the doctrines and claimed that most, if not all them disappear on closer analysis. In his view, the doctrines "cannot be distinguished in logic or in policy". *Id.*, at 311. The failure to notice the striking resemblance between the doctrines was noted by the Supreme Court of Florida which opined that "This chronological distinction sometimes makes it difficult to *see* the similarities in the doctrines and their essential *purpose and effect*." Ridley v. Safety Kleen Corp. 693 So. 2d 934, 942 (Fla. 1997). The Court referred to comparative negligence, but the statement seems even more relevant to contributory negligence.

49 Admittedly, a failure to mitigate will often take the form of a nonfeasance (e.g., failure to follow medical advice following an accident, failure to repair damaged property, etc.). However, it can also manifest itself through an active deed of imprudence (e.g., a negligent attempt to treat a wound or to stop a fire, leading to augmentation of the initial injury). This has long been recognized in the literature. *See e.g.* MCCORMICK, *supra* note 39, at 127, describing mitigation as a rule aiming to discourage people from both "*passively suffering* economic loss" and "*actively increasing* such loss". Examples falling into the last category are compiled id., at 131-131 fts. 15-21. Needless to say, contributory negligence can take the form of a nonfeasance (e.g., a failure to use a safety device meant to provide protection against personal injury).

50 The Restatement defines contributory negligence as conduct involving an *undue* risk of harm to oneself. RESTATEMENT (SECOND) OF TORTS § 463 cmt. b. Similar language is used by the RESTATEMENT (SECOND) OF CONTRACTS § 350(1), to describe the failure to mitigate: "[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation." Compare RESTATEMENT (SECOND) OF TORTS § 463 cmt. c ("it is only when he [the plaintiff] is *unreasonable* in refusing or failing to take action to prevent further loss that his damages are curtailed."). *See also* Prosser ET AL., *supra* note 7, at 525: "…defendant must prove that plaintiff's *unreasonable conduct* prevented the diminution of his injuries."; Kelly, *supra* note

> The concept of avoidable consequences operates as well as a type of comparative negligence… it requires the jury to first make *a judgment that plaintiff was negligent*…[51]

Third, the standard of conduct in light of which the plaintiff's conduct is to be assessed seems to be identical. This is the objective standard of the reasonable man, situated in the same set of circumstances.[52] To be sure, applying this standard to the causation of risk to oneself would typically give rise to more lenient demands than those which could be expected from people whose carelessness might harm others. This difference, however, is taken into account under both doctrines in much the same way, namely, by giving some allowance to the subjective preferences or the peculiar traits of the specific plaintiff at hand when deciding whether or not he or she is guilty of self-negligence.[53]

Then again, notwithstanding the different terminology surrounding each of the doctrines, most of their characteristics seem to be identical. They both provide *a complete defense* against the imposition of liability for losses that could have been avoided had the plaintiff not been self-negligent. The procedural corollary of this classification is that the defendant, rather than the plaintiff, is charged with the burden of pleading and proving both contributory negligence and mitigation of damages.[54]

Another consequence of characterizing both doctrines as legal defenses is that neither of them imposes a duty or an obligation, in the strict Hohfeldian sense, on the plaintiff. If such a duty existed, the defendant would be entitled to a legal remedy for the violation of his correlative right by the plaintiff. This, however, is clearly not the case: The victim of a tort can never be held liable towards the defendant (or anyone

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23, at 263 ("The avoidable consequences doctrine imports negligence principles by limiting damages only when the plaintiff *unreasonably* failed to minimize the loss.").

51 Kirby v. Larson, *supra* note 13, at 624. *See also* Coker v. Abell-Howe Co., 491 N.W.2d 143, 148 (Iowa 1992) ("Like contributory negligence, avoidable consequences is the review of the reasonableness of the plaintiff's conduct… Both doctrines examine the plaintiff's duty to care for his own interests…").

52 "[T]he standard of conduct to which he [the actor] must conform for his own protection is that of a reasonable man under like circumstances." RESTATEMENT OF TORTS (SECOND) § 464.

53 *See e.g.,* Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1732 (1995), noting "the courts' greater willingness to individualize the "objective text of negligence for victims than for injurers". *See also* Ellerman Lines, Ltd. v. The Steamship President Harding, 288 F.2d 288 (2nd Cir. 1961) ("The standard of what reason requires of the injured party is lower than in other branches of the law"). *See also* SCHWARTZ, *supra* note 8, at 8. With respect to mitigation *see e.g.* Mark Gergen, *A Theory of Self Help Remedies in Contract* 89 B.U. L. REV. 1397, 1403 (2008) ("the duty to mitigate is unlike the duty of care in negligence. … whether an action is proper is determined by a subjective standard: taking an actor with all of his or her peculiar preferences"). Interestingly, the Third Restatement had adopted the position that the applicable standard for judging negligent conduct is the same under comparative negligence as it is under an ordinary examination of negligence. RESTATEMENT THIRD, § 3. However, the comments to this Section make it clear that conduct creating risk to oneself is examined under a different, and more lenient standard than the one applying to conduct creating risk to others (whether the conduct be of the defendant or of the plaintiff). *Id.*, cmt. a.

54 RESTATEMENT OF TORTS § 477 ("The burden of establishing the plaintiff's contributory negligence rests upon the defendant."). To the same extent *See* RESTATEMENT THIRD § 4. However, this has not always been a universally accepted rule. Certain jurisdictions used to impose the burden of proving freedom from contributory negligence on the plaintiff. HARPER ET AL., *supra* note 25, at 347-352. As regards mitigation, *see* Sedgwick, *supra* note 37, at 336: "It has been repeatedly held that the burden of proof is always on the defendant to prove that the plaintiff might have reduced damages." However, a question may arise as to who carries the burden of establishing the extent of the avoidable loss. On this problem *See* A. J. Kerr, *Mitigation of Loss: Problems Concerning the Onus of Proof*, 98 S. AFRICAN L.J. 306 (1981).

else) for merely contributing to her own loss or for failing to mitigate that loss.[55] Indeed, it is widely accepted that, entrenched as it may be in legal discourse, the phrase "duty to mitigate" is a misleading expression.[56]

Yet, in a different and wider sense, both contributory negligence and mitigation do indeed seem to impose a legal duty, i.e., the duty to take reasonable measures to avoid causing self-harm. To be sure, that duty does not create a correlative right to enforce the performance of the duty. Nonetheless, it is a public legal duty, the violation of which subjects the plaintiff to a legal sanction. The sanction is the "disability" to recover compensation for any loss sustained as a result of failing to perform the duty to avoid self-harm.[57] In Hohfeldian terms, the defendant is granted a right of immunity as against the plaintiff.[58] In this very specific sense, both contributory negligence and mitigation of damages impose a true legal duty on potential tort victims.[59]

To conclude, contrary to a widely entrenched view, not only are mitigation of damages and contributory negligence similar, but they are in essence truly identical doctrines.[60]

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55 To be sure, an act of self-negligence might well amount to a violation of the injurer's right in the strict sense, as where the plaintiff's negligence also harmed the injurer or a third party. However, this is not a precondition for the application of either the doctrine of mitigation or that of contributory negligence.

56 "Generations of legal commentators have observed that the term "duty" is misleading… the failure to mitigate merely "disables" the injured party from recovering avoidable losses.", Goetz & Scott, *supra* note 23, at 967; JOHN EDWARD MURRAY, MURRAY ON CONTRACTS 799 (7th ed., 2001); Jeffrey K. Riffer & Elizabeth Barrowman, *Recent Misinterpretations of the Avoidable Consequences Rule: The "Duty" To Mitigate Damages and Other Fictions*, 16 HARV. J.L. & PUB. POL'Y 411 (1993); Michael G. Bridge, *Mitigation of Damages in Contract and the Meaning of Avoidable Loss* 105 L.Q.REV. 398, 399 (1989). But *see* Saúl Litvinoff, *Damages, Mitigation, and Good Faith* 73 TUL. L. REV. 1161, 1163-1164 (1999) (claiming that under Louisiana civil law a duty to mitigate does exist, creating a correlative right in the defendant, and deriving from the duty to perform obligations in good faith).

57 "…the "duty", if it can be so called, is not one for which a right of action is given against the person who violates it. The penalty is merely the disallowance of damages for losses… the person wronged [the plaintiff] should not be spoken of as under a "duty" to avoid damage, but rather under a "disability" to recover for avoidable loss." MCCORMICK, *supra* note 39, at 128, citing Rock v. Vandine 189 P. 157 (Kan. 1920). *See also* PROSSER ET AL., *supra* note 7, at 525: "The so-called duty to mitigate damages in tort law actually is merely an inability to recover for those damages."

58 Wesley N. Hohfeld, *Some Fundamental Legal Conceptions As Applied in Judicial Reasoning*, 23 YALE L.J. 19, 55-58 (1913-1914) ("[I]mmunity is the correlative of disability ("no-power"), and the opposite, or negation, of liability").

59 The interpretation offered here finds support in the dissenting opinion of Holohan J. in Law v. Superior Court 755 P.2d 1135, 1159 (Ariz. 1988), where criticizing the Majority opinion he said: "Despite the court's claim that nonuse of a seat belt is not a question of duty… this decision imposes upon all motorists and passengers of this state the duty to wear seat belts, and *it fixes the penalty for nonuse as reduction of the amount of damages to be recovered* by an injured motorist or passenger. It is pure sophistry to declare that the decision today does not impose a specific duty on all to make use of seat belts." A powerful statement of the argument made in the text is provided by Kelly, *supra* note 23, at 263-265. Kelly even goes a step further, and defines the breach of the 'duty to mitigate' (as well as contributory negligence) as a "wrong" against the defendant. *Id*., at 265.

60 Interestingly, accessions to the thesis advanced in this section were made by preeminent tort scholars. SALMOND & HEUSTON, *supra* note 9, at 525, expressed the view that "[t]he duty to mitigate damage *is really an application of the broad principle* of contributory negligence". Similarly, PROSSER & KEETON, *supra* note 25, at 459, conclude their brief treatment of the subject stating that "the doctrines of contributory negligence and avoidable consequences *are in reality the same*." The most detailed analysis of the interrelation between contributory negligence and

2. The Fundamental Difference between Comparative Negligence and Mitigation

Interesting as it may be, the study of the interrelation between contributory negligence and mitigation is not the main goal of this article, which is rather to explore and assess the interrelations between mitigation and comparative negligence. Nevertheless, the preceding discussion is a crucial step in our effort to achieve that goal. This is so, for the only significant distinction between contributory negligence and comparative negligence lies in the different method they apply for the allocation of avoidable loss between plaintiffs and defendants: Contributory negligence applies an all-or-nothing approach and allocates the loss either to the injured plaintiff or to the defendant in its entirety, whereas comparative negligence allows courts and juries to apportion the loss suffered by the plaintiff between the parties, based on their relative responsibility for causing the harm suffered by the plaintiff. In all other relevant respects contributory negligence and comparative negligence seem to be identical: being an outgrowth of its common law predecessor, the latter is triggered by the same kind of conduct which used to trigger the former (i.e., plaintiff's faulty causation of self-harm). Another important corollary of the outgrowth of comparative negligence from contributory negligence is that like its predecessor, comparative negligence applies to pre-tort rather than to post-tort self-negligence.[61]

If comparative negligence and contributory negligence differ mainly in their approach to the allocation of avoidable loss between a negligent defendant and a negligent plaintiff, and if, as argued above, contributory negligence and mitigation of damages are in essence identical doctrines which employ the same loss allocation mechanism (at different time phases), then the inevitable result must be that comparative negligence and mitigation of damages apply distinct methods of loss allocation. Indeed, this is exactly the case. Contrary to what is often assumed by both commentators and courts, mitigation of damages is much more akin to contributory negligence than it is to comparative negligence. True, these doctrines resemble each other in that their application (at least in a negligence case) will not ordinarily lead to the defeat of the plaintiff's cause of action, but will typically only affect the scope of recovery.[62] This resemblance has misled both courts and commentators into believing that mitigation of damages is a form of comparative negligence, which allows for an apportionment of a victim's losses between a tortfeasor and the victim of the tort.[63]

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mitigation is not doubt that of Glanville Williams. In his magisterial work on concurrent causes he discusses the presumed differences and concludes that the only clear distinction is the temporal one, which in turn he criticizes as being very difficult to justify: Glanville L. Williams, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE 281-291 (1951).

61 *See supra* notes 42-43.

62 This, however, is only partially true in jurisdictions which adopted a "modified" regime of comparative negligence. In these systems, if the contributory negligence of the plaintiff is found to be greater (or even equal) to that of the defendant, it will bar the entire action. *See supra* note 19.

63 Such was the conclusion reached by Phillips, *supra* note 36, at 314-315, who argued that mitigation of damages is a form of comparative negligence, and as such creates a contradiction (under South Carolina tort law) with the doctrine of contributory negligence: "South Carolina… already has a limited rule of comparative fault in its avoidable consequences doctrine… The only question is whether the courts will acknowledge this fact and take appropriate steps to extend the *avoidable consequences principle of comparative fault* and to eliminate the defense of contributory negligence." *See also* F. Patrick Hubbard & Robert L. Felix, *Comparative Negligence in South Carolina: Implementing Nelson v. Concrete Supply Co.* 43 S. C. L. REV. 273, 294 (1992), characterizing the avoidable consequences under the mitigation doctrine as "injuries proximately caused by the plaintiff's conduct and therefore barred in whole *or in part*…". The same misconception is sometimes shared by the judiciary. *See e.g.* Kirby v. Larson, *supra* note 13

However, this resemblance between the doctrines is only external and superficial, for it does not emanate from any substantive similarity. The opposite is true: Just as it differs radically from contributory negligence in its approach to the allocation of avoidable loss between injurer and victim, so does comparative negligence differ radically from mitigation of damages in this respect. The reason why both comparative negligence and mitigation only reduce rather than preclude the defendant's liability is the same reason why contributory negligence and mitigation differ in this respect, namely: the simple fact that they operate in different time phases of a torts case.

Thus, while both contributory negligence and mitigation of damages employ the same mechanism for allocating avoidable losses between injurers and their victim, both of them differ in this respect from comparative negligence. More concretely, whereas contributory negligence and mitigation employ an all-or-nothing test, which allocates the plaintiff's avoidable loss in its entirety to either the defendant or the injured plaintiff, comparative negligence allows for a flexible apportionment of the plaintiff's avoidable loss between the parties.

This fundamental difference can be elucidated by reference to two theories or two concepts of legal causation.[64] Contributory negligence and mitigation of damages employ what may be called a method of 'hard causation'. Under such a concept, a separate element of loss for the causation of which two or more persons are legally responsible, cannot be further divided between these persons on any basis other than strict factual causation. Therefore, if two (or more) wrongdoers are legally responsible for causing a certain loss to a third party, and if there is no reasonable causal basis for further dividing that loss into separate identifiable units which can be attributed to only one of the wrongdoers, than each of them is liable for the full extent of the loss they have jointly caused. Under such a rigid theory of causation, no apportionment will be allowed between the wrongdoers in a suit brought by the third party, since each of them is liable with respect to the whole loss suffered by the latter.[65] Likewise, if the only two causes of the loss are a defendant and a self-negligent plaintiff, hard causation would not allow any apportionment of the loss between the parties since, *ex hypothesis*, that loss is (causally) indivisible. The whole loss would then have to fall on either the defendant or the plaintiff.[66]

, at 624: "The concept of *avoidable consequences operates as well as a type of comparative negligence*… the jury ascertains the proportion to which plaintiff's fault contributed to the injury… In this way, *the same type of judgment and machinery* which operate under comparative negligence already operate in our state to a limited extent."

64 For a fascinating discussion of the various ways to deal with the problem of allocating a single element of loss to a number of contributory causes *see* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 225-235 (2d ed. 1985).

65 This is basically the common law doctrine of joint and several liability. A different question is whether to allow contribution (on a separate trial) between the wrongdoers. Under a theory of hard causation the answer must be no, since there is no objective way of further dividing the loss between the parties. To be sure, such a division is today allowed in most jurisdictions, under the doctrine of contribution between wrongdoers. However, it is based on a concept of soft rather than hard or strict causation.

66 In theory, both the plaintiff and the defendant should have both been found jointly (and severally) liable for plaintiff's entire loss. This, however, will result in a logical contradiction, for how can the defendant be liable towards the plaintiff for the whole loss, if the plaintiff herself is (also) liable (responsible) for that entire loss (and *vice versa*)? The common solution of this seemingly inevitable contradiction is to define only of the parties as the creator of the loss, thus exempting the other from any legal responsibility. This is exactly the way the doctrines of contributory negligence and mitigation of damages operate.

In tort law, the doctrines which fulfill the role of deciding who of these two is to be held responsible for the entire loss are contributory negligence and mitigation of damages. As we have already seen, both of them – each in a different time phase – employ a very similar test under which any negligence on the part of the plaintiff results in total exemption from liability to the defendant. The single most important difference between those doctrines is that whereas under contributory negligence this basic rule is subject to a number of exceptions, under the doctrine of mitigation it is applied with practically no exceptions.[67] That is to say, as far as mitigation of damages is concerned, any self-negligence which is causally linked to the plaintiff's loss (hereinafter: contributory self-negligence) will inevitably result in the denial of the plaintiff's right to be compensated for that loss.[68]

In comparative negligence, on the contrary, the method for allocating responsibility for a causally indivisible element of loss to which both the victim and a wrongdoer have factually contributed, is that of dividing responsibility (and thus also liability) for the loss between both parties. This method is based on a more fluid concept of causation, which may be named 'soft causation'. The theory deserves the title 'soft', for three reasons. First, because it allows courts and juries to perform an assessment of the relative causal contribution of each party based on a rough assessment of the degree of risk created by the conduct of each party, even when there seems to be no scientific way of verifying the precision of such an assessment; and second, because the apportionment is not purely causal, but is based also on an assessment of the relative (comparative) degree of fault manifested in the faulty conduct of each of the parties. Finally, under comparative negligence, the plaintiff's self negligence is not necessarily regarded as breaking the causal link between the defendant's wrongful conduct and the plaintiff's avoidable loss.[69] Conversely, under a mitigation of damages analysis, any finding of contributory self-negligence is equivalent to a determination that the causal link between the defendant's actions and the plaintiff's loss has been broken. Consequently, the defendant always escapes liability, even when under a conventional proximate cause analysis he would have been found responsible for the plaintiff's loss, had the latter not been self-negligent.

Dan Dobbs eloquently summarizes the fundamental distinction between comparative negligence and mitigation of damages in his legendary treatise:

> The two doctrines are functionally different because they use radically different schemes for apportioning responsibility and for measuring that apportionment. … Although fault in some sense is involved in both cases, the response to that fault is quite different.[70] … Comparative negligence rules reduce damages in proportion to the plaintiff's fault. Avoidable consequences rules

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67 The two exceptions which have been proposed in the literature are discussed *infra*, IV.B.1-2.

68 MCGREGOR, *supra* note 22, at 236. CORBIN, *supra* note 24, at 241: "…the plaintiff is *never* given judgment for damages for losses that he could have avoided by reasonable effort without risk of other substantial loss or injury".

69 *See e.g.* Caffagi, *supra* note 91, at 243: "Comparative negligence is typically depicted as conduct that concurs to the breach, without breaking the causal link." *See also* DOBBS & HAYDEN, *supra* note 27, at 799.

70 Dan B. Dobbs, LAW OF REMEDIES: DAMAGE-EQUITY-RESTITUTION 275 (2nd ed., 1993, one volume abridged edition) [hereinafter DOBBS, REMEDIES].

> reduce damages for discrete identifiable items of loss caused by the plaintiff's fault."[71]

Thus, the ultimate answer to the question posed at the beginning of this chapter is that in many respects comparative negligence and mitigation of damages are largely similar doctrines. The single most important distinction between them lies in their fundamentally different approach to the allocation of avoidable self-harm. While comparative negligence divides the responsibility for any such harm between both of its creators according to a combined test of comparative fault and comparative causal contribution, mitigation always allocates the harm exclusively to the plaintiff.

III. Theoretical Analysis: Can The Two Sisters Live Together?

A. The Mitigation Puzzle

1. Defining the Puzzle

Mitigation has for centuries been considered by both courts and commentators as a universally accepted and a highly regarded doctrine of the common law, reflecting both good moral sense and sound economic policy.[72] Despite the fact that it was apparently abolished the Third Restatement,[73] the doctrine seems alive and well in virtually all common law jurisdictions. Within the United States, it has shown remarkable endurance in the face of comparative fault statutes which, following the UCFA,[74] have literally subsumed it under a wide definition of fault which explicitly covers *"unreasonable failure to avoid an injury or to mitigate damages."*[75] For a number of reasons, however, this formal convergence has not been very influential. First, it should be noted that the number of states which have incorporated the all-encompassing definition of the UCFA is relatively small.[76] Second, even those states, have not always followed the literal formulation, and some have explicitly refused to apply the statute to post-tort self-negligence.[77] Finally, even in these states, the alleged absorption into comparative negligence of the mitigation doctrine was almost always proclaimed as *obiter dicta* in cases which had nothing to do with post-accident misconduct.[78] Indeed, the Third Restatement's fails to cite any concrete reference,

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71 DOBBS, COMPENSATION, *supra* note 9, at 806-807. To the same extent *see* PROSSER & KEETON, *supra* note 25, at 468.

72 *See e.g.* Shiffer v. Board of Education 224 N.W.2d (Mich. 1974) (describing the "principle of mitigation" as a "thread permeating the entire jurisprudence"); Kontorovich, *supra* note 42, at 499 ("The important economic function of the mitigation doctrine explains its *complete acceptance* by courts and uniformly favorable treatment by scholars. It is the "*universal* common law rule" in torts…). To the same extent *See* Roger D. Colton & Doug Smith, *The Duty of a Public Utility To Mitigate "Damages" from Nonpayment through the Offer of Conservation Programs,* 3 B.U. PUB. INT. L.J. 239, 248-249 (1993) ("There are few principles in the law of remedies as well established as that of a claimant's duty of mitigation").

73 *Supra* note 3.

74 *Supra* note 15.

75 UCFA § 1 (b).

76 *See e.g.* ALASKA STAT. § 09.17.900 (2012); BURNS IND. CODE ANN. § 34-6-2-45(a)(1) (2012); IOWA CODE § 668.1 (2011); MINN. STAT. § 604.01 (2011); REV. CODE WASH. § 4.22.015 (2012); Louisiana adopted the UCFA's definition of "fault" by judicial decision. Watson v. State Farm Fire & Casualty Ins. Co., 469 So. 2d 967 (La. 1985).

77 For example, in Indiana, after a period of uncertainty, the Supreme Court ruled that "The phrase "unreasonable failure to avoid an injury or to mitigate damages" ... applies only to a plaintiff's conduct *before* an accident or initial injury… a plaintiff's post-accident conduct… is not to be considered in the assessment of fault." Kocher v. Getz 824 N.E.2d 671, 674-675 (Ind. 2005).

78 For example, in Florida, the cases which proffered that mitigation was subsumed into comparative fault were all concerned with allegedly negligent pre-tort conduct (usually a failure to use a safety

either judicial or academic, in support of its radical proposal to altogether abolish the doctrine of mitigation. All in all, therefore, there is still a universal consensus among courts and commentators that under American tort law mitigation of damages and comparative (or contributory) negligence are still two clearly distinguishable concepts that should not be confused with each other.[79]

To me, this state of affairs presents a puzzle: If, as argued above, mitigation and comparative negligence reflect different approaches to an identical problem, and if comparative negligence has had the upper hand over contributory negligence (as it clearly has, in most jurisdictions), then how is one to understand the endurance within tort law of the all-or-nothing rule of mitigation, which in almost every respect is identical to contributory negligence? Are these entrenched institutions of tort law in any way compatible with each other? Can the flexible machinery which is offered to courts and juries in the pre-tort stage be reconciled with the sharp 'all-or-nothing' mitigation rule which governs their decisions in the post-tort phase? To me, the *prima facie* answer to this question seems to be "no". My basic intuition is that this fundamental divergence of approach must mirror a deeper theoretical gap between conflicting philosophies. I believe that understanding the historical and ideological background which inspired and helped shape both doctrines can support my claim that the coexistence of the two doctrines is indeed a puzzle, and does indeed create a theoretical tension that must be resolved.

2. The Individualistic Foundation of Mitigation

In the previous section I demonstrated that contributory negligence and mitigation of damages are in essence identical doctrines. I believe that such a strong substantive similarity is not merely coincidental. It reflects a shared set of values, originating in the same underlying ideology. This is the individualistic philosophy which gave rise to the development of many common law doctrines during the eighteen and nineteen centuries.

Both contributory negligence and mitigation of damages impose a moral duty to take reasonable steps to protect one's own welfare, even when the source of the risk

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device), i.e., cases in which the application of the mitigation doctrine has always been questionable. In Parker v. Montgomery, 529 So. 2d 1145 (Fla. 1st DCA), review denied, 531 So. 2d 1354 (Fla. 1988), a seatbelt defense case, the Florida Court of Appeal rejected the defendant's suggestion that the failure of a parent to use a child's safety device could be conceptualized as a failure to mitigate damages, where the introduction of such evidence was statutorily inadmissible to base comparative negligence. The court reasoned that "[T]he application of the concept of mitigation of damages for the purpose of reducing a plaintiff's damages resulting from his or her failure to use a seat belt is now subsumed within that of comparative negligence." Id., at 1148. This view was later accepted by the Florida Supreme Court in Ridley v. Safety Kleen Corp. 693 So. 2d 934 (Fla. 1997), another seatbelt defense case. In Jacobs v. Westgate, 766 So. 2d 1175, 1181 (Fla. Dist. Ct. App. 3d Dist. 2000) a case involving the unlawful eviction of a tenant's property resulting in its destruction, the trial court instructed the jury to consider separately both the plaintiff's alleged comparative fault and his failure to mitigate the loss. Overruling, the Court of Appeal observed, based on *Parker* and *Ridley*, that under Florida law the two doctrines were subsumed and that the doctrine of avoidable consequences "was abolished with the adoption of comparative negligence". In Minnesota, a pure comparative fault State, the Court of Appeal stated, in *obiter dicta*, that "as to items of consequential damage, the unreasonable failure to mitigate damages is "fault" which can be apportioned under the comparative fault statute." Mike's Fixtures, Inc. v. Bonbard's Access Floor Systems, Inc. 354 N.W.2d 837, 840 (Minn. Ct. App. 1984). *See also*, to the same extent, Lesmeister v. Dilly, 330 N.W.2d 95, 103 (Minn. 1983).

[79] The orthodoxy is maintained even by courts that have recognized the close affinity between the doctrines. *See e.g.* Ostrowski v. Azzara, 545 A.2d 148, 151 (N.J. 1988): "Related *in effect, but not in theory*, to the doctrine of contributory negligence is the doctrine of avoidable consequences."

is the unlawful or unreasonable conduct of another person. In order to encourage people to abide by this perceived moral duty, the common law attached a severe legal sanction, namely, the rule denying plaintiffs any right to demand compensation for harm which they could have and should have avoided had they followed the imperative of self-protection or self-preservation. As tort scholars have noted, the moral justification for this demanding approach towards potential victims is far from obvious.[80] There seems to be a consensus that the best explanation is provided by two interconnected moral ideas stemming from the individualistic philosophy which dominated legal thought throughout most of the nineteenth century.[81]

First, in a rapidly developing industrial and urbanized society, individuals are not to be perceived as "their brothers' keeper" and therefore should concern themselves with promoting their own good, while not overly relying on the help of others.[82] Second, a legal system willing to encourage individuals and enterprises to engage in risky but nonetheless productive activities, must be careful not to overburden itself with a flood of litigation arising out of unfortunate accidents which careful and reasonable people could have avoided.[83] Such accidents – and such litigation – are socially wasteful and therefore should be brought under control by stern legal rules, such as the avoidable consequences doctrine and the defense of contributory negligence. As Dean Prosser put it:

> Probably the true explanation [for contributory negligence] lies merely in the highly individualistic attitude of the common law of the early nineteenth century. … there is reason to think that the courts found in this defense, along with the concepts of duty and proximate cause, a convenient instrument of control over the jury, by which the liabilities of rapidly growing industry were curbed and kept within bounds.[84]

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80 In the contractual context it has been argued that mitigation reflects a deviation of the common law of contracts from the morality of promising. Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 724-726 (2007). *See also* Caprice Roberts, *Restitutionary Disgorgement for Opportunistic Breach of Contract and Mitigation of Damages*, 42 LOY. L. A. L. REV. 131, 164 (2008) where the author speculates briefly about the possible moral idea behind the mitigation doctrine and concludes that "[t]he clearest rationale supporting mitigation stems from economic considerations."

81 See, generally, Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981).

82 In the famous case of *Butterfield v. Forrester*, *supra* note 6, to which the origins of contributory negligence are traced, the court recognized the defendant's negligence but nonetheless found the defendant not liable, given the plaintiff's negligence in failing to notice the danger and avoid injury. The Court reasoned: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. … One person being in fault will not dispense with another's using ordinary care for himself." *Id.* at 927. *See also* Francis H. Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233, 253, 255 (1908) ("Contributory negligence … throws on the individual the primary burden of *protecting his own interest*. … This conception is part of the very atmosphere of English legal thought… the plaintiff can ask from others *no higher respect for his rights than he himself pays to them*.").

83 The "gatekeeper" function of common law doctrines such as contributory negligence and assumption of risk is mentioned by Richard A. Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1736-37 (1982).

84 William L. Prosser, *Comparative Negligence,* 51 MICH. L. REV. 465, 468-469 (1953) [hereinafter Prosser, *Comparative Negligence*].

While these explanations have more often been discussed in the context of contributory negligence, they seem equally applicable to the doctrine of mitigation, which has often been rationalized by reference to its important moral and economic role in discouraging socially wasteful behavior.[85] Indeed, such reasoning is apparent in the early nineteenth century cases which applied the doctrine. Thus, in contracts case decided in 1830, the Supreme Court of Maine stated:

> If the party… can protect himself from a loss arising from breach, at a trifling expense or with reasonable exertions, *he fails in social duty* if he omits to do so. … he who has it in his power to prevent an injury to his neighbor, and does not exercise it, *is often in a moral, if not in a legal point of view, accountable for it*. The law will not permit him to throw a loss, resulting from a damage to himself, upon another..."[86]

3. The Communitarian Foundation of Comparative Negligence

Given the central role of comparative negligence in American tort law and the wide interest of commentators in its various aspects, it is quite surprising that the question of its underlying moral theory has not been thoroughly pursued in tort scholarship. What seems particularly lacking is an exploration of the philosophy or the moral theory underlying the doctrine, and its relationship to the moral theory underlying contributory negligence, its historical predecessor.[87]

Without engaging in a full-blown inquiry into this question, I would like to suggest that the fundamental distinction between those moral theories is not so much in the content of their particular moral demands; rather, it is the moral perspective from which those demands emanate which mark the true theoretical gap between contributory and comparative negligence. More concretely, while it is the individualistic approach of the common law courts which nourished and shaped the all-or-nothing rule of contributory negligence throughout most of the eighteenth and nineteenth centuries, it was the rise of communitarian political thought during the twentieth century, which best explains the rise of comparative negligence.[88]

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85 The economic foundations of the mitigation principle have usually been examined in the contractual context rather than in the context of tort law. *See*, *e.g*: Goetz & Scott, *supra* note 23; Donald Wittman, *Optimal Pricing of Sequential Inputs: Last Clear Chance, Mitigation of Damages, and Related Doctrines in the Law*, 10 J. LEGAL STUD. 65 (1981); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 118–120 (7th ed. 2007); DONALD HARRIS, DAVID CAMPBELL & ROGER HALSON, REMEDIES IN CONTRACT & TORT 210–216 (2nd ed. 2002); Mary Kelly & Anne E. Kleffner, *Optimal Loss, Mitigation and Contract Design*, 70 J. RISK & INS. 53 (2003).

86 Miller, Warden of the State Prison v. The Tr. Of the Mariner's Church, 7 Me. 51, 55 (1830). For an old torts case with a similar reasoning *See* Loker v. Damon, 34 Mass. 284 (1835) (trespass to land). For a survey of the early cases in which the doctrine developed throughout the 19th century *see* SEDGWICK, *supra* note 37, at 295-337; MCCORMICK, *supra* note 39, at 127-158.

87 An exception is Simons, *supra* note 53, who noted (id., at 1694) that "[s]urprisingly, the noneconomic literature on contributory fault is sparse". Notably, Simons does not distinguish contributory from comparative negligence, nor does he distinguish between pre-accident and post-accident self-negligence.

88 For general studies of communitarianism and its relationship with liberalism see, *e.g.* D. BELL, COMMUNITARIANISM AND ITS CRITICS (1993); A. Gutmann, *Communitarian Critics of Liberalism, in* COMMUNITARIANISM AND INDIVIDUALISM (Avineri & De-Shalit Eds. 1992); H.C. TRIANDIS, INDIVIDUALISM AND COLLECTIVISM (1995); W. KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989); R. L. KETCHMAN, INDIVIDUALISM AND PUBLIC LIFE: A MODERN DILEMMA (1987).

Generally speaking, unlike individualist theories, communitarian theories perceive humans not as atomistic creatures, but rather as social beings that can fully fulfill their goals only within a community. Hence the communitarian emphasis on social values such as cooperation, solidarity and mutual consideration. I believe that the notion of comparative responsibility, which stands at the heart of the doctrine of comparative negligence, can easily be rationalized and justified in light of these terms. Under comparative negligence, rather than holding any one of the parties responsible for the victim's entire loss depending on which of them had the "last chance" to avoid it, (or, for that matter, any other predetermined criterion), the responsibility for the victim's avoidable loss is shared by both. The apportionment of liability is carried out according to the community's judgment of each of the parties' degree of responsibility (measured by both fault and causation) for the victim's loss. Furthermore, instead of founding the potential victim's duty to act exclusively on her duty of self-protection, a communitarianist approach will base that duty on the victim's social obligation towards her potential injurer. That duty dictates the taking of reasonable precautions not only to safeguard oneself from one's own mistakes, but also to protect one's fellow citizen from becoming a tortfeasor and thus being exposed to both social condemnation and legal sanction. Therefore, under the communitarian theory of comparative responsibility, the law's sanctioning of self-negligence is not merely a reflection of a general social duty. It is *relational obligation* which society imposes on each and every one of its members towards all other members, to refrain from acting in a manner which might expose another citizen to future legal liability with respect to a loss that could have been avoided without any great hardship.[89]

Yet, as injurers are also members of the community, they too must abide by the norms of cooperation and solidarity. It is for this reason that, while an injurer should be allowed to voice a complaint against a tort victim for her irresponsible conduct, such conduct does not exonerate the injurer from responsibility for his own unlawful behavior. Under the communitarian interpretation offered here, the imperative of cooperation and solidarity is twofold: It obliges people to exercise due care *ex ante* for their own safety and the safety of others, and it requires them to accept *some* responsibility *ex post* for the losses which by acting carelessly or unlawfully they have imposed on others or on themselves.

The communitarian account of comparative negligence presented here gains some support from a recent article, written by a comparatist, which examined the divergent approaches of the civil law and the common law to the problem of loss allocation in contract cases.[90] The author emphasizes the divergence between the American approach, which perceives contract law mainly as an efficient risk allocation device, and the civilian approach, which regards the principle of good faith as the cornerstone of contract law and private law more generally. Under the principle of good faith, debtors and creditors – not only within contract law, but more generally under the law of obligations – are expected to cooperate and to take into account the interests of each other. This duty of solidarity is expected from the obligor and the obligee *even in the face of non performance* (i.e, wrongdoing) by one of the parties.

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[89] Simons, *supra* note 53, at 1737-1744, illuminatingly distinguishes between two possible understandings of the law's sanctioning of self-negligence. Under the first interpretation, a victim's duty to take self-precaution is directed towards society only. Under the alternative approach, the victim's duty is directed towards the injurer, in which case it can be conceptualized as a "duty to rescue" the injurer, i.e., a private moral obligation.

[90] Fabrizzio Caffagi, *Creditor's Fault: in Search of A Comparative Frame*, *in* FAULT IN AMERICAN CONTRACT LAW 237 (Omri Ben-Shahar & Ariel Porat eds., 2010).

According to the author, this explains the wide recognition, in continental legal systems, of comparative negligence as a general defense not only in tort law, but in contract law as well.[91]

To conclude, rather than reflecting a mere change of technique, the shift from contributory negligence to comparative negligence within the Anglo-American world seems to reflect a much deeper social process. It reflects a general movement from a strongly individualistic to a much more communitarian regime of tort liability.[92]

If the analysis offered here is correct, then how is one to resolve the mitigation puzzle? How is one to explain the fact that, all in all, the two quite contradictory doctrines continue to coexist as two independent legal doctrines, without any apparent conflict? How does mitigation, with its all-or-nothing blade, retain its legitimacy and its doctrinal integrity, in the face of the comparative fault revolution? One possible answer is that changes in a legal culture are slow to arrive and that the abolition of mitigation is only a matter of time. Along the same line of thought, one can speculate that courts and lawyers are simply conservative and that the legal community has not yet recognized the theoretical tension which the coexistence of the doctrines creates within the system. This, in large part, may be a result of our mistaken habit of looking at comparative negligence and mitigation as two independent doctrines which have practically nothing to do with each other.

Yet, a completely different answer may be that contrary to what I have just proposed, there is actually no theoretical tension between the doctrines of mitigation and comparative negligence. What if the premise that they are based on contradictory ideological viewpoints is simply mistaken? Is it really not possible to integrate mitigation of damages and comparative negligence into a single theoretical framework, which explains their distinct loss allocation mechanisms by reference to a

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91 Id., at 249-254. To this the author adds the traditional reluctance of the civil law tradition to give efficiency considerations any prominence over non-instrumental values such as justice or fairness. Simon Whittaker's analysis of the different approaches of the French and English law to the right to terminate a contract seems to support Cafaggi's general claim, that the fundamental ideological approach of a legal system and its moral values have a direct impact on the details of legal doctrine. Whittaker claims that in English law termination is conceived of as a legitimate self help remedy for serious breach, and that this might explain the readiness of courts to balance this burden of the defendant with a correlative burden of mitigation on the promisee, who is expected to act diligently in searching for a substitute. In contrast, under French law, termination is considered a 'last resort' judicial remedy, as it conflicts with the promisor's right to perform the contract, as well as with the idea that contracts are to be performed *(pacta sunt servanda*). This approach fosters, in turn, a judicial reluctance to view the failure to look for substitute performance as a "*faute de la victime*" (the French parallel to contributory negligence). Thus, the understanding of the duties of parties to a contract in the face of breach (independent recourse to the market versus an obligation of ongoing cooperation) influences a legal system's readiness (or reluctance) to recognize a social duty (with legal consequences) to mitigate, as well as the scope and content of such duty. Simon Whittaker, *Contributory Fault and Mitigation, Rights and Reasonableness: Comparisons between English and French Law*, *in* CAUSATION IN LAW 149, 160-168 (Luboš Tichý ed., 2007).

92 The influence of the communitarian ideology on legal developments in private law has been noted by important scholars. *See e.g.* Daniel Friedman, *The Transformation of 'Good Faith' in Insurance Law*, *in* GOOD FAITH IN CONTRACT 311, 312 (Brownsword Ed. 1999): "Broadly speaking, modern law is moving from an individualistic approach to a more communitarian approach. … The process of curbing the individualistic approach has profound effects in many fields, and is in fact reshaping the whole area of private law." For a general communitarian perspective on tort law, see, *e.g.* Robert M. Ackerman, *Tort Law and Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 681 (1995) (mentioning comparative negligence only briefly).

single principle? In the remainder of the section I explore the plausibility of this latter suggestion.

B. The Integration Thesis: Defending Mitigation under A Theory of Comparative Responsibility

The following subsection reconstructs a *prima facie* case for the integration of the doctrine of mitigation into the general principle of comparative responsibility, which has not yet been considered in the literature:[93] Much of the apparent theoretical tension between comparative responsibility and mitigation dissolves, if one pays sufficient attention to the normative significance of the distinct time phase in which each of the doctrines operates.

As mentioned earlier, this borderline is crossed the moment that a tort is committed against the victim. More precisely, it is the moment in which the victim becomes aware of his becoming a victim of a tort, which marks the boundary between comparative negligence and a failure to mitigate.[94] In negligence cases, this is the moment in which the injured party (hereinafter: the victim), first learned that she had been injured by the defendant's breach of duty. From that moment on, the mitigation doctrine imposes on the victim a duty to avert further avoidable loss that might flow from this initial injury.[95]

This moment is normatively significant because it captures a transformation in the mental state of the injured party. It is at this very moment that the plaintiff becomes aware of the fact that the victim's rights have been violated and (where the tort of negligence is concerned) that *the risk latent in such a violation has actually materialized*. Unlike a potential victim who has not yet been injured, or who is not yet aware that the injury was caused by another person's fault, the fully aware victim cannot claim that in failing to mitigate he or she was legitimately relying on the defendant's performance of his legal duties of care towards the victim.[96]

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93 One explanation for this absence might be that the doctrine of mitigation, since its very inception, was founded not so much on any moral theory but rather on what seemed a sound economic policy of discouraging self-reliance and preventing social waste (*see supra* note 80). If this be true, an attempt to reconcile that doctrine with comparative negligence, which is clearly supported by a strong moral sentiment, might seem doomed from the start. In my view, this explanation is only partially convincing since, as we have seen, the principle of mitigation is supported by the individualistic morality of the eighteenth and nineteenth centuries. A simpler explanation may be that the moral tension between the doctrines was efficiently masked by the entrenched traditional dichotomy between them.

94 This distinction between the tort and the victim's knowledge of it is rarely emphasized in the literature, but courts and writers seem to implicitly assume that in tort cases these events often converge. Glanville Williams argued that in practice the distinction does not matter so much, since if the plaintiff is unaware of the tort, his failure to mitigate will most probably be considered reasonable. Williams, *supra* note 60, at 282. In the sources dealing with contractual mitigation, the point is often explicitly acknowledged. *See e.g.* Kelly, *supra* note 23, at 265: "the avoidable consequences doctrine generally operates only after the plaintiff knows about the defendant's wrongful conduct".

95 *See supra*, text to notes 57-59.

96 In the contractual context, such an argument serves to justify the distinction between pre-breach and post-breach failures on the part of the promi*see* to take steps to avoid loss from breach. The While at the pre-breach time phase the latter is allowed to rely on performance by the promisor without fear of legal sanction, his failure to mitigate in the post-breach time phase will result in his losing his right to compensation. *See e.g.* Ariel Porat, *Contributory Negligence in Contract Law: Towards A Principled Approach* 28 U. BRIT. COLUM. L. REV. 141, 159 (1994).

The distinct nature of society's increased expectations from a potential victim in the post-tort stage was acknowledged in the case law. Thus, distinguishing between the different phases in a negligence case, the Supreme Court of Kansas noted:

> While as a general rule one must use reasonable diligence to mitigate one's damages *once the risk is known ... one is not required to anticipate negligence* and guard against damages which might ensue if such negligence should occur.[97]

Indeed, it may be argued, and this seems to me an intuitively strong claim, that a tort victim who in the face of a clear understanding that he or she has been wronged fails to take such reasonable prophylactic steps to minimize the negative consequences of the wrong, is *not merely careless, but also reckless.* Such recklessness – which for the reason mentioned above cannot as easily be presumed in the pre-tort stage – warrants a qualitatively different legal response. That response is tort law's outright rejection of the victim's claim for compensation. In refusing to allow any apportionment of the avoidable loss between the wrongdoer and the victim, and by allocating it exclusively to the latter, the law signals that the victim's conduct is unacceptable and inexcusable. Most importantly, that conduct is inexcusable not only under from an individualistic perspective which regards no person as the keeper of his brother, but from a communitarian perspective as well. This is so, for by failing to act in a reasonable manner in the face of a known violation of his rights, the victim of the tort signals her disrespect for the core values of cooperation, solidarity and mutual consideration. As a corollary, the symbolic reaction of the legal system is to deprive the plaintiff of his moral right to share part of his avoidable losses with his blameworthy injurer. Formulated differently, in failing to mitigate a perceived injury, the injured party should be regarded as 100% contributorily negligent.

If this integration thesis is convincing, I believe it can provide at least a *prima facie* rejoinder to the mitigation puzzle. The answer is that tort law's transition from comparative negligence to mitigation in the post-tort time phase is not arbitrary nor does it reflect a shift from a communitarian set of values to a strictly individualistic or utilitarian. Rather, the shift from a flexible to a strict loss allocation apparatus merely reflects the dynamic *nature and extent* of society's expectations from potential victims at different temporal stages. Because in the pre-tort phase those expectations are much less demanding, sharing responsibility is the appropriate solution. Such a partition of responsibility is not available, however, after a tort has already been committed. At this stage, the victim must either act reasonably to avert any further loss (in which case he will be compensated for any loss he did not succeed in avoiding), or bear full responsibility for his avoidable losses.

IV. Normative Analysis: The Limits of the Integration Thesis and the Hardships of Mitigation

The previous part of the article suggested that notwithstanding their radically different approaches to the allocation of avoidable loss, and despite their opposing ideological sources, comparative negligence and mitigation of damages may be theoretically reconciled, if the temporal borderline between the doctrines is given

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[97] Hampton v. State Highway Comm'n, 498 P.2d 236, 249 (Kan. 1972). In a seminal article on contributory negligence the view was expressed that "[t]he decided cases recognize, though they do not expressly formulate, a difference between pre-caution and caution, - taking care in advance to provide against *merely probable dangers*, and careful action *in the face of known peril* to oneself or others." Bohlen, *supra* note 82, at 257.

sufficient normative weight. In so doing, the integrative thesis has provided not only a theoretical framework for integrating that doctrine into a general regime of comparative responsibility, but also a prima facie normative defense of the mitigation doctrine.

This part seeks to assess the normative strength of this defense. First, in Section A, I discuss some general concerns with the mitigation doctrine, which cast some initial doubts as to the normative strength of the integrative thesis. Then, in Section B, these difficulties are illustrated on a variety of typical categories in which to apportion liability between the parties seems superior to allocating it to only one of them.

A. The Limits of the Integration Thesis: Initial Doubts

1. Fairness Concerns

Since the turn of the twentieth century, a remarkable amount of scholarly energy was invested in demonstrating the many deficiencies of the common law doctrine of contributory negligence. Leaving aside the modern law and economics literature,[98] it seems that the overwhelming majority of writers, who addressed the issue, supported the move from contributory to comparative negligence, mainly for reasons of fairness towards injured victims.[99] The main fairness argument supporting this majority view is that the all-or-nothing rule employed under contributory negligence fails to express the moral responsibility of both plaintiff and defendant for causing the avoidable harm. By allocating the entire loss to the latter under the rule, or to the former under its exceptions, the common law doctrine conveys a wrong normative message, that negligence of either party is a moral excuse for the other party's default. Furthermore, such an all-or-nothing approach results in injustice toward tort victims which may remain uncompensated for wrongful harms they have would not have suffered but for their injurers' unlawful conduct.

This basic moral objection to contributory negligence seems to me perfectly applicable to the doctrine of mitigation. True, an unreasonable failure to avoid a loss will generally be less understandable at the post-tort stage, than it would be in the pre-

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98 *See infra* notes 102-103.

99 Academic criticism of the common law doctrine of contributory negligence gained momentum at the turn of the 20th century and seems to have reached a certain peak towards its midst. Among the most influential articles which exposed the normative weaknesses of the old doctrine one must include: Bohlen, *supra* note 82; Mole & Wilson, *supra* note 1; Charles L.B. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674 (1933-34) (the rule of contributory negligence, as well as its exceptions are unjust and illogical); Turk, *supra* note 6, at 202: "Why should the mutilated victim have to suffer the sorrows of pain, tears, and sleepless nights while his opponent, perhaps guilty of fault to a higher degree, is free to leave a court of justice bearing a certificate that he is not to be deemed a tort-feasor? To call such a result "harsh" is to use a mild expression, to say the least!"; Prosser, *Comparative Negligence*, *supra* note 84; Fleming James, *Contributory Negligence*, 62 YALE L.J. 691, 732 (1953) (concluding that comparative negligence would be a far more rational solution to the problem presented by self-negligence); Frank E. Maloney, From *Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 152–54 (1958) (surveying and supporting the movement towards comparative negligence); Thomas F. Lambert, *The Common Law is Never Finished (Comparative Negligence on the March)*, 32 A.T.L.J. 741 (1968) (same). For more recent support of comparative negligence, *inter alia* on fairness grounds *see, e.g.* John W. Wade, *A Uniform Comparative Fault Act – What Should It Provide?* 10 U. MICH. J. L. REFORM 220 (1977); John W. Wade, *Comparative Negligence – Its Development in the United States and Its Present Status in Louisiana* 40 LA. L. REV. 299 (1979-1980); Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal* 87 YALE L.J. 697 (1978); Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which is the Optimal Negligence Rule?* 24 N. ILL. UN. L. REV. 41, 47-51 (2003)

tort stage. However, this does not necessarily mean that faulty conduct is necessarily inexcusable to a degree that would justify a complete denial of compensation. One should recall that a failure to mitigate is rarely intentional, that is, it rarely occurs with the explicit intention of incurring further harm. Thus, the social and moral price of a total rejection of the plaintiff's claim may be disproportionate to the moral cost of allowing the wrongdoer to wholly escape liability for a loss which would not have occurred had the latter acted lawfully in the first place.

This is definitely a powerful argument in cases where following the tort the tortfeasor still has some effective control over the causal process leading to the plaintiff's further loss.[100] However, as the following section will demonstrate, even when this is not the case, it is not at all obvious that the tortfeasor should be relieved from any responsibility. When the plaintiff's default is both socially excusable and foreseeable from the standpoint of a reasonable tortfeasor, the communitarian values of solidarity, cooperation and mutual consideration are not harmed – but rather advanced – by a rule that allows a flexible apportionment of the avoidable loss between the parties.[101]

To conclude, the mitigation doctrine can be integrated into a communitarian theory of comparative responsibility only in those cases where the plaintiff's failure to mitigate is so unforeseeable or so inexcusable, that the values of solidarity and mutual consideration will not be offended by granting the tortfeasor a complete release from liability. In other cases, however, the integrative thesis fails to provide a satisfactory moral explanation for the mitigation doctrine.

2. Efficiency Concerns

The law and economic literature is divided on whether an all-or-nothing rule of contributory negligence or a flexible doctrine of comparative negligence is overall more efficient in minimizing the costs of accidents. For quite a while the economic case for contributory negligence seemed to be firmly established.[102] More recent analyses, however, have endorsed a more favorable view of comparative negligence, and some works have concluded that it the preferable regime.[103]

To a large extent, this debate has almost entirely neglected the parallel question of whether and to what extent a flexible apportioning device of comparative negligence may be economically superior to the all-or-nothing rule of mitigation in the post-tort phase. This lack of consideration may be explained by the common assumption that once a tort (or a breach of contract, for that matter) has been

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100 These cases are discussed *infra*, IV.B.2-3.

101 This argument is further pursued *infra*, IV.B.4.

102 *See e.g.* John Prather Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323 (1973); George L. Priest, *Modern Tort Law and its Reform*, 24 VAL. U. L. REV. 1, 11 (1987) (claiming that comparative negligence reduced overall deterrence); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 175, fn. 5 (6th ed. 2003) (citing three empirical works in support of contributory negligence).

103 *See e.g.* Robert D. Cooter & Thomas S. Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067 (1986); Robinette & Sherland, *supra* note 99, at 51-54 (surveying the literature and arguing that no consensus has been reached). Schwartz, *supra* note 99, at 703-721, 726 (claiming that psychological considerations indicate that the contributory negligence is likely to be counterproductive as a means of incentivizing careful conduct). *See also* D. Haddock & C. Curran, *An Economic Theory of Comparative Negligence*, 14 J. LEGAL STUD. 49 (1985); D. Orr, *The Superiority of Comparative Negligence: Another Vote*, 20 J. LEGAL STUD. 119 (1991). For a comprehensive survey of the development of the debate *See* Mireia Artigot I Golobardes & Fernando Gómez Pomar, *Contributory and Comparative Negligence in the Law and Economics Literature*, *in* TORT LAW AND ECONOMICS 46 (Michael Faure ed. 2009).

committed, the "least cost avoider" – if not the only one – is the victim. Having completed the tort, the tortfeasor ordinarily is out of the picture, with no effective means of preventing an aggravation of the victim's situation.[104] It is therefore more effective (and less costly) to incentivize the victim of the tort to mitigate the loss, than to try to encourage the tortfeasor to do the same. The mitigation doctrine is thought to achieve this goal by making it clear to potential tort victims that they will not recover for any loss they can avoid with a relatively small effort or expense (for which they are in any case entitled to recompense). This contrasts with a pre-tort situation, in which no general presumption can be made as to which of the parties (i.e., the potential victim or the potential injurer) can prevent the accident, and hence the loss, at a minimum cost.

This conventional rationale can meet with two serious objections. The first objection questions the assumption that after a tort has been committed, the victim alone is capable of preventing further losses from occurring. As demonstrated in the next section, cases will arise where the tortfeasor may well have an equal opportunity to avert the victim's consequential loss.[105] In those cases, it is far from clear that the plaintiff is necessarily the "least-cost avoider." It is therefore also unclear whether, on grounds of efficiency, the victim alone should be incentivized to take preventive action to avert the plaintiff's avoidable loss. A comparative negligence rule thus becomes a prima facie attractive alternative to mitigation, even in the post-tort time phase.[106]

A second objection is more general, as it applies even to cases in which the tortfeasor has no effective control over the plaintiff's situation, and thus is unable to mitigate the loss. In my view, even in such cases, a case can be made for burdening the tortfeasor with a portion of the victim's avoidable loss. Such a case is based on the assumption that deciding whether and how a certain loss should be mitigated is often a very complex decision. In such cases, the plaintiff's failure to mitigate will most often represent not only an innocent mistake, but also a foreseeable one, from the point of view of a reasonable tortfeasor. Under that assumption, is seems economically inefficient to absolve the tortfeasor from the duty to compensate the victim for what are the foreseeable consequences of the wrong. In order to make potential injurers fully internalize the cost of their unlawful conduct (which includes the risk of the victim's erring in the mitigation decision he is bound to take), it is necessary to assign some of the avoidable loss to the tortfeasor. The extent of that liability should reflect the relative responsibility of the tortfeasor compared to that of the victim, as determined by a competent court or jury.

3. Coherence Concerns

In American jurisprudence the sanction imposed on careless plaintiffs under the doctrine of mitigation is rarely conceptualized in terms of causation.[107] However,

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[104] *See e.g.* Porat, *supra* note 96, at 159, stating that mitigation "encourages action on the part of the aggrieved party, who is usually in the best position to mitigate damages". For similar reasoning *see* David Campbell & Roger Halson, REMEDIES IN CONTRACT AND TORT 307 (2nd ed., 2002) (C [claimant] is usually better placed than D to reduce his loss…").

[105] *See infra,* IV.B.

[106] In the contractual context, an influential article has claimed that the mitigation principle is too rigid and thus to bring into consideration the variety of factors influencing the optimal allocation of the burden of performance or of mitigation between the parties. Goetz & Scott, *supra* note 23.

[107] See, e.g., Farnsworth, *supra* note 24, at 757. The Second Restatement has bluntly acknowledged that the rationale of the avoidable consequences rule has nothing to do with causation, but rather only with a public policy of discouraging socially inefficient conduct: "[I]t is not true that… the

the English courts developing the doctrine during the eighteenth and nineteenth centuries frequently resorted to concepts of causation to explain the doctrine.[108] According to this theory, in failing to respond reasonably to a known violation of his rights, the self-negligent plaintiff becomes an intervening or a superseding cause, which 'breaks the chain of causation' between the defendant's tort (or breach of contract) and the plaintiff's loss.[109]

Whether or not causation reasoning is used in formal justifications of the mitigation principle, there is no doubt that the effect of applying the rule to a certain element of avoidable loss is of exactly the same effect as a legal rule providing that under no circumstances is a tortfeasor considered a legal cause of any loss could have been mitigated by the victim.[110]

In my view, such a rule is inconsistent with entrenched principles of the law of causation. One of these principles is that when two subsequent wrongful acts combine to cause a single injury, the first wrongdoer is not automatically absolved from liability just because his act was followed by another wrongful act.[111] The opposite is true: both wrongful acts will be considered legal causes of the loss, unless the second in time was so extraordinary and unexpected, that it deserves to be considered a superseding cause.[112]

The doctrine of mitigation seems to present a clear deviation from this principle. In holding the negligent victim to be the only cause of the avoidable loss, the doctrine in effect regards the victim as an intervening cause, which breaks the causal link between the tort and the victim's loss. However, a failure to act reasonably in order to reduce or avoid the risks arising out of a completed tort is neither an extraordinary nor an unforeseeable event. It is a widespread phenomenon, and one which is often neither fully voluntary nor wholly unacceptable. It is therefore very difficult to see how why the failure to mitigate, which is not even a wrong in the formal sense, should be treated by the law of tort as equivalent to an intervening cause.[113]

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conduct of the tortfeasor ceases to be a legal cause of the ultimate harm; but recovery for the harm is denied because it is in part the result of the injured person's lack of care, and public policy requires that persons should be discouraged from wasting their resources…". RESTATEMENT (SECOND) OF TORTS § 918, cmt a., cited with approval in Ostrowski v. Azzara, 545 A.2d 148, 438 (N.J. 1988).

108 Intervening causes was also used by the courts to justify the doctrine of contributory negligence. *See* Phillips, *supra* note 36, at 311.

109 *See e.g.* Bridge, *supra* note 56, at 400-401 (citing cases which based the doctrine on notions of causation). Compare PETER CANE, THE ANATOMY OF TORT LAW 179 (1997) ("The doctrine of mitigation, coupled with the doctrine of intervening causation, express the plaintiff's responsibility for losses resulting from P's reactions to the tort, whether acts of omissions.").

110 DOBBS, REMEDIES, *supra* note 70, at 275-276 ("Avoidable consequences rules work the same way as a decision that says "the plaintiff's fault was the sole proximate cause" of some particular item of harm or loss."). *See also* BURROWS, *supra* note 24, at 75, 105-106 ("both the duty to mitigate and intervening cause *can* be regarded as denying damages for exactly the same reason").

111 *See e.g.* Penzell v. New York, 466 N.Y.S.2d 562, 566 (Ct. Cl. 1983) ("Where the wrongful acts of two parties were not precisely concurrent in point of time, liability may nevertheless be imposed on each where… several acts of neglect concurred to produce the injury.").

112 *See* RESTATEMENT OF TORTS (SECOND) § 442. Mickle v. Blackmon, 166 S.E.2d 173, 181 (S.C. 1969): "The rule is firmly established that the intervening negligence of a third person will not relieve the original wrongdoer of responsibility if such intervention should have been foreseen… the original negligence still remains active, and a contributing cause of the injury."

113 *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 212 (1959) (arguing that the mitigation principle cannot always be justified on ordinary causal principles). Compare, in the contractual context Paul J. Bates, *Mitigation of Damages: A Matter of Commercial Common*

To conclude, the mitigation doctrine seems to have adopted a rule which starkly contradicts established principles of causation. These principles are not merely technical or formal rules, but are based on considerations of moral and other policy considerations.[114] If those consideration do not ordinarily justify allowing a tortfeasor to escape liability only because a subsequent tortfeasor later contributed to the same injury, it is difficult to see how they can justify such a result when the subsequent contributing factor is the unreasonable act of the innocent victim. This looks like a clearly unjustifiable discrimination of the victim by the tort system. As such, it is bound to generate a considerable amount of incoherence in the law of tort liability.[115]

B. The Hardships of Mitigation: A Closer Look

This part of the article examines the preliminary doubts raised in the last section. It illustrates the weakness of the all-or-nothing rule endorsed by the mitigation doctrine in a few specific contexts (subsections 1-3) and finally in a more general context (subsection 4). The goal is to point out the typical types of case in which the advantages of the avoidable consequences doctrine in terms of encouraging solidarity between tortfeasors and victims and discouraging wasteful conduct may not justify an all-or-nothing solution. At the same time, this section highlights the potential benefits of applying a more flexible division of responsibility for avoidable consequences in these typical cases. This will help us define the defendable borders within which mitigation can play a legitimate role under a general regime of comparative negligence.

1. Intentional Wrongdoing

Intentional wrongdoing is a category in which an unrestricted application of the mitigation doctrine clearly leads to socially undesirable and morally unfair, results. For the sake of our discussion, intentional wrongdoing can be defined as the tortious conduct of a defendant, carried out with the awareness of its being wrongful towards the plaintiff and with no moral justification. This includes not only intentional torts (such as battery, fraud, etc.), but also acts of negligence which reflect a conscious disregard of the defendant's duty of care. Intentional wrongdoing, as it is here defined, will usually manifest a substantial departure from acceptable standards of decency and social solidarity. Therefore, whether a tortfeasor has acted with a reckless disregard of the rights of the victim seems highly relevant to any

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Sense, 13 ADVOCATES' QUARTERLY 273, 294 (1992), arguing that "To escape responsibility for losses on causation grounds, the defendant must show that they would have occurred at the same time and to the same extent, even in the absence of the breach of contract. This is difficult to do."

114 Prominent tort theorists have argued that the principles of legal causation represent the moral ideal of corrective justice. *See* generally Richard A. Epstein, *Causation in Context: An Afterward*, 63 CHIC.-KENT L. REV. 653 (1987); Richard W. Wright, *Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts,* 73 IOWA L. REV. 1001, 1018-1019 (1988). Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHIC.-KENT L. REV. 407 (1989).

115 It is worth noting that the RESTATEMENT OF TORTS (SECOND) § 465(2) explicitly states that "The rules which determine the causal relation between the plaintiff's negligent conduct and the harm resulting to him *are the same* as those determining the causal relation between the defendant's negligent conduct and resulting harm to others." The mitigation doctrine seems to contradict this rule. Mitigation's deviation from the general theory of causation might even raise issues of equal protection under the United States Constitution. Such a thesis was advanced in support of abolishing contributory negligence in favor of comparative negligence, on grounds other than causation theory, by Phillips, *supra* note 36.

apportionment made under a general regime which recognizes the principle of comparative responsibility.

Indeed, as we have seen, the traditional approach of the common law has been to completely exclude the application of contributory negligence in cases of intentional wrongdoing.[116] However, this has not been the case regarding mitigation of damages. Unlike its pre-tort parallel, the avoidable consequences doctrine was never accompanied by a clear exception which limited its scope of application to non-intentional torts (or breaches of contract). This was acknowledged by a commentator who investigated this question in great detail:

> Very seldom has a court clearly and expressly recognized that the rule of avoidable consequences affords any less protection to the willful or reckless defendant than to the merely negligent defendant.[117]

Nonetheless, a court of justice sensing the need to express moral reprobation towards the intentional tortfeasor may be less inclined to regard the victim's failure to mitigate as sufficient reason to wholly exempt the former from liability. The typical way of achieving this goal was to regard the defendant's intentional conduct as a factor affecting the reasonability of the victim's conduct. Since reasonability is the only factor which is determines whether a plaintiff has or has not failed to mitigate his loss, the only way to bypass the rule was to define the victim's failure to mitigate as reasonable, or at least as not clearly unreasonable. Indeed, in a revealing research published in 1943, Ralph Bauer demonstrated that in cases of intentional wrongdoing courts were often reluctant to infer that the victim acted unreasonably, at least if the latter's negligence did not seem very extreme.[118]

However, in cases where the self-negligence of the victim is obvious, this kind of a determination may seem quite artificial and thus problematic to carry out in a coherent manner. Perhaps in order to cope with this difficulty, the Restatement explicitly incorporated an intentional wrongdoing exception into its basic rule of mitigation in torts. Section 918(2) provides that the rule denying compensation for avoidable consequences will not apply to intentional torts unless the victim "intentionally or heedlessly" failed to protect the victim's self-interests.[119]

Prima facie this seems to be a fairly sensible approach. Focusing exclusively on the victim's misjudgment and ignoring the role of the defendant in creating the risk that the victim will ultimately err in her reaction to the tort is neither fair nor

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116 *Supra* text to notes 7-8.

117 Ralph S. Bauer, *The Administration of the Rule of Avoidable Consequences as Affected by the Degree of Blameworthiness of the Defendant,* 27 MINN. L. REV. 483, 485 (1943).

118 Bauer, *id*. Bauer mentions the Michigan courts as being especially activists in this regard. The view that the defendants' intentionality might be taken into account, if only covertly, was expressed a few years earlier by CHARLES MCCORMICK, *supra* note 39, at 134-135. The author did not offer to exclude the usual effect of the rule in such cases (*id*., at 139), but admitted that "Undoubtedly also the deliberate and intentional, rather than merely inadvertent or negligent, character of most continuing torts naturally arouses a feeling of indignation in the victim, and properly enters into the consideration of how far the victim may be required to undergo trouble and expense to avoid future injury which the defendant could himself avoid by ceasing his wrongful conduct." *Id*., at 139. It is submitted that although continuing wrongdoing may quite often overlap with intentional doing, these categories raise different policy considerations and therefore should be treated separately. I discuss continuous wrongs in the next subsection.

119 RESTATEMENT OF TORTS (SECOND) § 918(2), illus. 4-7. The same rule was already present in the first Restatement.

efficient.[120] The difficulty is exacerbated when the tort is committed with full knowledge of its wrongfulness. Under a regime of comparative responsibility, which aims to divide responsibility taking into account the communitarian values of solidarity and mutual consideration, it is highly problematic to ignore the nature and character of the defendant's wrongful conduct when determining the victim's relative responsibility for the avoidable losses. However, it is equally problematic to wholly ignore the victim's negligence, especially when it is extreme, since such conduct also represents a disregard of the same values. It seems that the Second Restatement endeavored to strike a sensible balance between the need to deter intentional wrongdoing on the one hand, and the necessity to discourage extreme manifestations of self-negligence on the other.

Yet, the Restatement's rule is still an all-or-nothing rule, as it limits the intentional wrongdoing exception to cases where the victim's negligence was not "heedless", whatever that term may exactly mean.[121] This rigidity prevents the court from apportioning liability in a flexible way that will be attuned to the relative importance of the contradicting policy considerations at stake. A superior solution in these cases would allow courts and juries to apply the principle of comparative responsibility at the post-tort stage. This would mean that the plaintiff's avoidable loss would be divided between the intentional wrongdoer and the victim according to their comparative responsibility in bringing about the victim's loss. Such apportionment should be allowed even when the latter's conduct seemed "heedless" or even reckless.[122]

2. A Tortfeasor's Equal Opportunity to Mitigate

A common implicit assumption is that once a tort is committed, only the plaintiff is in control of any ensuing risk to his or her welfare. However, this is not always true.

Where a continuing tort is concerned (e.g. an ongoing nuisance or trespass), the defendant still has control over the causal process resulting in the plaintiff's loss even after the accrual of the cause of action. In such cases, the tortfeasor is no less capable than the victim of preventing further loss from occurring. It is thus clear that as long as the tort continues, both the victim and the tortfeasor should be held morally accountable for any further loss that each of them could have taken reasonable measures to avoid.[123] Apportionment on the basis of comparative negligence (when the harm is indivisible) seems much fairer than imposing the burden of preventing the further loss only upon the victim. The solution is also more efficient, since it

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120 This idea is further developed *infra,* IV.B.4.

121 The use of this vague term was criticized by WILLIAMS, *supra* note 60, at 285.

122 The idea that under a regime of comparative negligence intentional wrongdoing should not automatically preclude apportionment was voiced by William J. McNichols, *Should Comparative Responsibility Ever Apply to Intentional Torts?* 37 OKLA. L. REV. 641 (1984). *See also* Gail D. Hollister, *Using Comparative Fault to Replace the All-or-Nothing Lottery Imposed in Intentional Torts Suits in Which Both Plaintiff and Defendant Are at Fault* 46 VAND. L. REV. 121 (1993) (supporting an intermediate approach which will allow flexible apportionment in some cases of intentional wrongdoing). The Third Restatement, *supra* note 3, is not clear on this issue. While its general approach supports apportionment of any indivisible loss flexibly under comparative responsibility principles, in this specific context the drafters preferred not to take a firm stand, leaving the issue to be resolved under "substantive law" rather on principles of apportionment. *See* Reporter's Note to § 1, cmt. c (final paragraph).

123 This weakness of the mitigation doctrine is acknowledged by DOBBS, REMEDIES, *supra* note 70, at 275.

incentivizes both parties (and not only the plaintiff) to make an effort to avoid the loss.[124]

Furthermore, even where the tort was not in itself a continuing one, for example, when the defendant committed a single act of negligence causing an accident, the tortfeasor may still be in a position to prevent the victim from incurring additional loss. In these cases, it seems utterly unjust, as well as inefficient, to exempt the tortfeasor from all liability.[125]

Assume, for example, that following a certain accident which was caused by John's negligence, Dana is seriously injured, but for some reason refuses to recognize the gravity of the situation and to call an ambulance. Under the doctrine of mitigation, if Dana's conduct is negligent, then she cannot recover damages for any aggravation she suffers as a result (e.g., death resulting from loss of blood). However, this completely ignores the responsibility of the defendant for causing the accident in the first place, and for failing to minimize its harmful consequences *ex post*.

Consider another example. Tim is a highly esteemed businessman and was nominated as a director in a very profitable company. Assume that Tim is defamed by a certain newspaper and is required by the company's board of directors to refute the allegations against him. From emotions of self-respect, Tim refuses to do so, but asks the newspaper to double-check its sources and to issue an immediate apology. The newspaper is slow to do so and Tim's nomination is revoked by the company, causing him a substantial economic loss of profit. While Tim may well be censured for failing to actively refute the allegations against him, the newspaper might have had an equal opportunity to prevent the consequential loss suffered by Tim.

In these situations, the values of solidarity and cooperation underlying comparative responsibility require the negligent defendant to share responsibility with the victim for any further loss that both could have avoided. Thus, in the first illustration, John should be expected to call an ambulance if for some reason the plaintiff fails to do so. In the second example, the newspaper should be expected to double check its information following Tim's complaint, and to make a correction. However, under the mitigation doctrine, the newspaper is not required to prove that it took reasonable steps to mitigate Tim's reputational loss. Its only concern is to prove that Tim could have mitigated the loss by himself.

In my view, this is a serious deficiency. Instead of treating the parties as complete strangers, the law should recognize tortfeasors' responsibility towards their victims even in the post-tort stage. A tortfeasor causing an initial injury or loss should be expected to offer the victim any reasonable assistance (including financial aid) in order to prevent a further deterioration in the victim's situation. If the tortfeasor negligently fails to do so – and especially if he fails to do so at the victim's request (as in the second example) – his default should be taken into account just as the victim's failure to mitigate.[126]

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124 *See* also *supra*, text following note 106.

125 The unjustness applying mitigation to these cases was recognized by Dan Dobbs: "If… the defendant had an equal and continuing opportunity to minimize damages he has caused, and at a cost no greater than would be required of the plaintiff, the grounds for reducing his liability seem doubtful." DOBBS, REMEDIES, *supra* note 70, at 274.

126 This is evidently so in cases where the defendant's costs of mitigation are lower than or equal to those of the plaintiff. However, under a regime of comparative negligence, the question who the least-cost avoider is, is not conclusive. A regime of comparative responsibility is based on the assumption that it is more just to encourage both parties to take due care than to ask them to assess which of them is the cheapest cost avoider.

However, this has not been the traditional approach of the common law. Courts facing this kind of argument have either rejected it altogether or, as was often done in cases of intentional wrongdoing, regarded the defendant's equal opportunity to mitigate as negating the unreasonableness of the victim's conduct. The latter approach was adopted by some courts in contracts cases.[127] It has, however, been criticized for having the effect of eliminating any incentive on the part of aggrieved promisees to mitigate their damages.[128]

Admittedly, equal opportunity cases may be rarer in tort cases than in contracts cases.[129] However, whenever they come about, both parties – rather than the plaintiff alone – should be encouraged to take reasonable steps to prevent further avoidable losses from occurring. When both parties fail to do so, apportioning the loss between them according to their comparative fault seems to be a much more sensible solution than to let the loss lie where it falls. Among other factors, the Court or jury should give considerable weight to the relative ease with which each of the parties could have mitigated the victim's further loss.

3. Negligent Reliance on a Tortfeasor's Poor Advice

Where the plaintiff's failing to mitigate can be attributed, at least partially, to an over-reliance on the defendant's negligent promise or advice, the application of the mitigation doctrine may lead to odd results. Assume, for example, that in a products liability case, a consumer realizes that an electrical device he purchased has ceased to function properly. He informs the manufacturer (or the supplier, for that matter) of the problem. Instead of replacing the device immediately as it should have, the latter gives the consumer instructions for solving the problem. Operating the device in a negligent manner (i.e., in deviation from the instructions given) the consumer is electrocuted and suffers severe personal injury. Is the consumer entitled to any compensation at all for this consequential loss?

Assuming that in discovering the defect the consumer has become aware both of his cause of action (in negligence, or breach of warranty) and of his initial property loss, his subsequent negligent use of the device constitutes a failure to mitigate. His personal injury would therefore be considered an avoidable consequence for which he is solely to blame. However, in this case, as well as in many other cases of products liability, this result seems both unfair and undesirable.

To be sure, to solve the difficulty a court of jury may decide to regard the consumer as acting reasonably under the circumstances. However, this kind of solution is also problematic, as it fails to give sufficient weight to the victim's role in bringing about his personal injury. The better view, which squares much better with

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127 In contracts, the equal opportunity exception is usually traced to the famous case of S.J. Groves & Sons v. Warner Co. 576 F.2d 524, 530 (3d Cir. 1978), where it was said that "Where both the plaintiff and the defendant have had equal opportunity to reduce the damages by the same act… The duty to mitigate damages is not applicable where the party whose duty it is primarily to perform a contract has equal opportunity for performance…". However, even in contract law the exception is rarely considered *stare decisis*. *See* Michael B. Kelly, *Defendant's Responsibility To Minimize Plaintiff's Loss: A Curious Exception to the Avoidable Consequences Doctrine*, 47 S.C. L. Rev. 391, 401 & n.38 (1996): "Courts that recite the equal opportunity exception often have alternative justifications available, usually finding that the plaintiff in fact acted reasonably." *See also* DOBBS, REMEDIES, *supra* note 70, at 22.

128 Kelly, *Id.*, at 395. The author expressed the fear that if taken seriously, "The equal opportunity exception could supplant the avoidable consequences doctrine in almost every contract case. The defendant could prevent all damages to the plaintiff simply by performing the contract."

129 Arguably, an analogy can be drawn between breach of contract cases and continuing torts such as nuisance or trespass.

the principles of cooperation and solidarity, as well as those of efficient deterrence, would be to allow the court to apportion this indivisible loss between the parties responsible for causing it.

4. Excusable and Foreseeable Self-Negligence

Subsections 2 and 3 considered situations in which the even after the commission of the tort, the defendant still has some kind of *control over the victim's avoidable loss*. The present category is different. Here, I would like to discuss a much wider concern, which is always relevant in mitigation cases, regardless of whether or not the defendant has any ability to prevent the plaintiff from suffering any further loss. To use economic analysis jargon, the problem is not that the tortfeasor may be the "least-cost avoider" of the victim's avoidable loss. Rather, the claim is that *even when this is clearly not the case,* the rule of mitigation is not always defensible on moral or economic grounds.

The problem is this: A tort is an unlawful act of one person that violates the protected interests of another person. After a tort is committed, there is an obvious need to limit its detrimental consequences. The mitigation doctrine strives to fulfill this purpose by encouraging victims to take reasonable steps to avert further loss, lest they be denied compensation for such losses. However, the doctrine does not tell potential victims in advance what a reasonable step is. Hence, following the commission of a tort, the victim needs to decide what to do in the face of the tort and its initial impact. This, in turn, requires the plaintiff to undertake a series of complicated and risky decisions.

First, the victim is required to *reasonably* assess the nature and the extent of the risks latent in the wrong or the injury already suffered. Second, the victim must examine *reasonable* ways to minimize these risks and to *reasonably* elect one of them. Finally, after having decided on a specific means of mitigation, the victim needs to *reasonably* determine how much to invest (in terms of money, time, and effort) on preventive measures. These are not very easy decisions. They all involve the weighing and balancing of numerous factors.[130] Anyone, including a law and economics professor or a remedies expert, may err in the process of making such evaluations. The problem with mitigation is not that it requires victims to make those evaluations, however. Nor is the problem that the doctrine sanctions victims for having made the wrong choices. Sanctioning self-negligence is necessary if the law is to promote solidarity and mutual consideration between members of society, and if it is to discourage unnecessary social waste. What then is the problem?

I believe that the main problem with mitigation is that it gives insufficient weight to the fact that the very need to face these complex decisions is *a direct and foreseeable consequence of an unlawful act* perpetrated by the tortfeasor against the victim of the tort. As we have seen, under the doctrine a plaintiff's failure to mitigate is treated as if it were the sole legal cause of the avoidable loss suffered by the victim. This result is not only incoherent with general principles of liability,[131] but is also

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[130] The complexity involved in a mitigation decision was recognized by the Restatement: "Whether or not he [the victim] is unreasonable… depends upon the amount of harm that may result, …the chance that the harm will result if nothing is done, the amount of money or effort required…, his ability to provide it and the likelihood that the measures will be successful." RESTATEMENT OF TORTS (SECOND) § 918 cmt. e. Compare, in the contractual context, Bates, *supra* note 113, at 277: "[T]he plaintiff must estimate the total amount of the projected losses, then calculate the total cost of all potential mitigatory measures. … This rough formula is complicated in practice by the uncertainties of the business world."

[131] *See supra*, IV.A.3.

morally problematic in terms of the communitarian values underlying a regime of liability which recognizes, in principle, the possibility to apportion responsibility on the basis of comparative fault.

It is true that the doctrine of mitigation goes a long way towards the victim. The standard of negligence to which a victim must live up in order to comply with the duty to mitigate is relatively lenient.[132] Moreover, the courts will not in any way sanction a victim for the fact that her reasonable efforts to minimize the loss have eventually failed.[133] However, often a jury or a Court may have no doubt that the plaintiff has indeed failed to take reasonable steps in mitigation (or that clearly unreasonable steps were taken which aggravated the loss). At this stage, no weight is given to the fact that the victim's mistake would not have taken place but for the defendant's wrong. In my view, this is a serious deficiency. A tortfeasor's responsibility should not automatically cease with every mistaken decision of his victim. Indeed, it was the tort which obliged the plaintiff to face the risk of making the erroneous mitigation decision in the first place. Why should the tortfeasor not be held liable for the clearly foreseeable consequences of his wrongdoing, just as would be the case if the "intervening cause" had been the wrongful act of another tortfeasor?

To be sure, cases will arise in which the plaintiff's failure to mitigate reflects an obvious disregard for the legitimate interests of the tortfeasor in minimizing liability, *e.g.,* where the plaintiff refrains from calling the fire department to put out a fire on his property negligently caused by the defendant.[134] Very frequently, however, it will be obvious to the jury that the failure to mitigate was the result of an innocent (yet negligent) misjudgment. Such a failure to mitigate may not only be foreseeable, from the perspective of a reasonable man in the shoes of the potential tortfeasor, buy may often be considered excusable. It is not clear why in such cases, which seem to be the vast majority, the same strict mechanism should always apply.

A few illustrations may be helpful to understand the problem. Imagine, for example, a case where a victim, while still recovering from a personal tort injury, inadvertently slips and falls down a staircase, thus worsening her medical situation and causing herself additional (or separate) personal loss.[135] Alternatively, imagine a case where a patient is given the wrong medication by a negligent pharmacist, but fails to see a doctor promptly upon realizing that something is wrong with it, a delay which in turn leads to a drastic aggravation of the victim's medical situation.[136] In light of the fact that the defendant wronged the victim in the first place, is it so obvious that the victim should be denied any compensation for the additional loss which could have been avoided had she been more careful?[137]

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132 *See supra* note 53 and accompanying text.

133 This rule applies even when the plaintiff's failed efforts increased, rather than decreased, the plaintiff's loss. *See supra*, text to note 21.

134 This is known as the moral hazard problem, which is often emphasized in sources dealing with mitigation in contract law. The problem is less acute in the realm of personal injuries, where potential victims have a strong incentive to refrain avoid injury. *See* Posner, *supra* note 102, at 172-173. For the moral hazard problem *See* generally, Steven Shavell, *On Moral Hazard and Insurance*, 93 Q.J. ECON. 541 (1979).

135 The example is based on the facts of McKew v. Holland & Hannen & Cubitts (Scotland) Ltd. [1969] 3 All E.R. 1621 (H.L.).

136 *See,* Walter v. Wal-Mart Stores, Inc. 748 A.2d 961 (Me. 2000).

137 Indeed, in McKew, *supra* note 135, the English House of Lords explicitly admitted that: "[I]t is not at all unlikely or unforeseeable that an active man who has suffered such a disablilty will take some quite unreasonable risk…". Notwithstanding, the house went on to rule that "..but if he does, he cannot hold the defendant liable for the consequences." *Id*., at p. 1623 (per Lord Reid).

Closely analogous are the archetypical cases where an injured victim neglects to receive medical treatment or refuses to undergo a recommended operation, neglect which then aggravates her medical situation.[138] Unlike some continental jurisdictions which sharply refuse to apply the mitigation principle in these cases,[139] American courts have approached the issue on a case-by-case basis. Consequently, while some courts have denied compensation in cases where such refusal was deemed clearly foolish or unreasonable, others have awarded full compensation when this seemed too harsh a result.[140]

In my view, this approach is problematic, as it forces courts into a very difficult "black or white" choice. The court must either decide that the plaintiff behaved irresponsibly, and then deny any compensation for the aggravation; or – in order to avoid this result – determine that such conduct is not unreasonable.[141] However, such a determination, in turn, creates two problems which unfortunately do not cancel each other out. First, such an artificial conclusion may also be unjust and unfair towards the defendant, who will be required to account not only for his own misdeeds, but also for the plaintiff's self-negligence. Second, instead of exposing the victim's error, such a decision will conceal it, thus sending the wrong message to future potential victims. Indeed, this was exactly the criticism which eminent writers raised in the past against the 'last clear chance' doctrine, which under contributory negligence could shift the entire loss from the negligent plaintiff to the negligent defendant. The words of Dean Prosser are here as relevant as they were in 1954, when he criticized that doctrine:

> [T]he real objection to the last clear chance is that it seeks to alleviate the hardships of contributory negligence by shifting the entire loss due to the fault of both parties from the plaintiff to the defendant. It is still no more reasonable to charge the defendant with the plaintiff's share of the consequences of his fault than to charge the plaintiff with the defendant's; and it is no better policy to relieve the negligent plaintiff of all responsibility for his injury than it is to relive the negligent defendant.[142]

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138 Most famous are the "Jehovah's witnesses" or "Christian Scientists" cases, where patients who refused to receive a blood transfusion following a negligently performed operation died as a result. Suites brought for wrongful death following such tragic event were sometimes rejected, but in other cases courts have refused to define patients' refusal as a failure to mitigate. The contradicting views are reflected in the majority and the dissenting opinions rendered in Wilcut v. Innovativ Warehousing, 247 S.W.3d 1 (Mo. Ct. App. 2008). Note, *Medical Care, Freedom of Religion and Mitigation of Damages*, 87 YALE L.J. 1466 (1978). Jennifer Parobek, *God v. the Mitigation of Damages Doctrine: Why Religion Should Be Considered a Pre-Existing Condition*, 20 J. L. & HEALTH 107 (2007).

139 Whittaker, *supra* note 91, at 154-160; Solène Le Pautremat, *Mitigation of Damage: A French Perspective*, 55 INT'L. & COMP. L.Q. 205 (2006).

140 Illustrative cases are Small v. Combustion Engineering 681 P.2d 1081 (Mont. 1984) (refusal to undergo a knee surgery with 92% success rate, leading to a permanent disability not found to amount to a failure to mitigate); Badeux v. State 690 So. 2d 203 (La. Ct. App. 1997) (failure to stop obsessive consumption of food not a failure to mitigate); but compare Tanberg v. Ackerman Inv. Co. 473 N.W.2d 193 (Iowa 1991) (post-accident failure to lose weight was legitimately assessed by the jury as "fault").

141 In the context of contributory negligence it was said that "[c]ourts have become more reluctant to rule that the plaintiff's conduct is negligent as a matter of law, and juries are notoriously inclined to find that there has been no such negligence." PROSSER & KEETON, *supra* note 25, at 469. I believe that to a great extent this hold true with respect to mitigation of damages decisions.

142 Prosser, *Comparative Negligence*, *supra* note 84, at 14-15.

Interestingly, this dilemma has actually disturbed courts and juries in cases where they were presented with clear evidence of self-negligence which nonetheless did not seem to justify a complete denial of the victim's claim. Thus, in a case brought in 1888 before the Supreme Court of Texas, albeit the fact that the plaintiff's neglect aggravated his personal injury, the Court affirmed the jury's decision to regard his self-negligence as excusable, thus permitting him to recover for his entire consequential loss.[143]

In my view, in all of these cases, when the black-or-white solution seems unjust, instead of either denying recovery or allowing it in full, courts and juries must be allowed to apportion the loss between the parties. This apportionment should be carried out in the same way as in the pre-tort stage, i.e., by comparing the contributory fault of the victim in the post-tort stage, with the contributory fault of the defendant, as reflected in his overall conduct both before and after the completion of the tort.[144]

V. Conclusion

The conclusions from the positive, theoretical and normative analysis of the dichotomy between comparative negligence and mitigation of damages can be summarized as follows. First, on the positive level, contrary to the conventional understanding, these doctrines are in fact very similar. Both are designed to resolve a single problem, namely, the allocation of avoidable loss between a blameworthy defendant and a negligent plaintiff. And yet, mitigation is not a form of comparative negligence. Just like contributory negligence in the past – and contrary to comparative negligence – mitigation of damages employs an all-or-nothing mechanism which denies court and juries any discretion to apportion responsibility between the parties.

Second, on the purely theoretical level, this article has argued that given their very distinct approaches to the allocation of avoidable loss, as well as the rival philosophies which seem to support each of them, the coexistence of these two doctrines under the same branch of law could have been expected to create a serious

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143 Gulf, Co. & S. F. Ry Co. v. McMannewitz, 8 S.W. 66 (Tex. 1888), mentioned by 1 SEDGWICK, *supra* note 37, at 331. *See also* British Columbia Elec. Ry. v. Loach, [1916] 1 A.C. 719 (P.C. 1915) (appeal taken from B.C.), where the Court, relying on the last clear chance doctrine, preferred to impose liability on the defendant for operating a train with defective brakes, to releasing it entirely from liability towards the clearly negligent plaintiff (who drove his car on the railway tracks only to be struck by the defective train).

144 The single judicial decision of which I am aware, that actually implemented comparative negligence mechanism to a consequential loss which at the post-tort stage only the victim could have avoided, is an English case of first instance: Carlsholm (Owners) v. Calliope (Owners), The Calliope [1970] P. 172; [1970] 1 All ER 624. The case involved a first collision between two ships in the River Seine, which was caused by the defendant's negligence, and which caused an initial property loss to the plaintiff's ship. Then, a few hours later, while changing the original plan and seeking refuge in a certain harbor, the captain of the plaintiff's ship unsuccessfully performed a difficult and apparently negligent maneuver which caused a further separate property loss to the ship. The dilemma facing the Court was phrased in the clearest terms by justice Brandon (at p. 178): "Is the necessary result, as a matter of law, that A's claim in respect of the consequential damage fails altogether, on the ground that his further negligence breaks the chain of causation between it and the casualty, and makes it therefore too remote? Or can the Court find, if it thinks it right on the facts, that the *consequential damage was caused partly by the original casualty, the effect of which was continuing*, and partly by the further negligence of A, and, on the basis of such finding, make a further apportionment, or sub-apportionment, of liability for the consequential damage?" While acknowledging that apportioning consequential loss in such a situation may be rarely justified, the judge nevertheless went on to divide the second loss between the owners of the two ships. Though formulated in terms of legal causation, this decision seems to deal with essentially the same problems which arise in any mitigation case.

theoretical tension within tort law. The fact that this tension has not led to a serious conflict between the doctrines, and that mitigation retains its doctrinal independence, is a puzzle. The integrative thesis I offered was an attempt to answer this puzzle by emphasizing the normative significance, under a theory of comparative responsibility, of the temporal distinction between pre-tort and post-tort self-negligence.

Finally, on the normative level, the article examined the question of whether and to what extent the integration thesis can provide a fully satisfactory normative support to the mitigation doctrine as it stands today. It concluded that the thesis ultimately fails to provide a sufficiently robust justification for the distinction between pre-tort and post-tort self-negligence. Denying a tort victim any compensation for a loss which would not have occurred but for the defendant's wrongdoing can be justified only when the tort was not intentional, and when the plaintiff's was so extreme as to signal disrespect for the values of solidarity and mutual consideration. However, when the tort was intentional or when the plaintiff's self-negligence was neither inexcusable nor unforeseeable, a blind rule which without exception allocates the entire avoidable loss to the victim cannot be justified.

The proposed solution to the shortcomings of the mitigation doctrine in terms of fairness, efficiency and coherence with the general theory of causation should be evident by now. Instead of allocating the avoidable loss emanating from a completed tort either to the tortfeasor or to the victim, courts and juries should be allowed to divide responsibility for such a loss, just as they are permitted to do so when the plaintiff's negligence preceded the tort. Courts have consistently refused to view the subsequent fault of a second wrongdoer as breaking the chain of causation between a plaintiff's loss and the fault of a preceding wrongdoer. If so, they clearly should not commit themselves to such an approach when the subsequent fault is that of an innocent victim.

I therefore conclude that the solution professed by the Third Restatement, namely, to abolish the doctrine of mitigation so as to subsume it under a general regime of comparative responsibility, is clearly warranted. Mitigation must be abandoned, or at least restricted in the scope of its application, so as to allow courts and juries to take into account all relevant factors which may tip the scales of justice as well as affect the goal of promoting efficient deterrence of potential tortfeasors and potential victims. The main factors are the degree of culpability manifested by each party's contributory fault, the ability of each of the parties to eliminate the risk posed by the tort, and the extent to which the plaintiff was aware of the kind and magnitude of the risk to which the tort exposed her. These factors should be weighed and balanced against each other not only when deciding whether the plaintiff behaved unreasonably (as they indeed are under current doctrine), but also once an affirmative answer is given to that question. Courts are capable of taking these conflicting considerations into account and balancing them in the service of both justice and social expediency.[145]

Does the reform proposed by the Third Restatement require a legislative intervention? I believe that it does not. In most states it can be carried out by adopting a liberal (and often literal) interpretation of the terms "fault" or "negligence" as they

[145] Exercising judicial discretion in this context must presume the "capability of the judicial system… to appraise such a claim. Also at work is an appraisal of the role of tort law in compensating injured parties, involving as that role does, not only reason, but also fairness, predictability, and even deterrence of future wrongful acts. . . . [T]he ultimate decision is a policy choice summoning the most sensitive and careful judgment." Procanik v. Cillo, 478 A. 2d 755, 763 (N.J. 1984) (per Pollock J.).

appear in the comparative fault legislation, which will allow these term to cover both pre-tort and post-tort self-negligence.[146]

A final caveat is in place. The duty to mitigate is a legal duty of extreme social importance. As such, it must be backed up with an appropriate legal sanction. The aim of this article has not been to question the validity of this assumption, but merely to emphasize the need for a sensible match-up between that sanction and the gravity of the plaintiff's default. Indeed, the fact that a victim has acted carelessly even after having become aware of her cause of action, may often militate against allowing the victim to ask for an apportionment. The timing of the plaintiff's negligence should definitely be given considerable weight, but should not always be considered a conclusive factor.[147]

Many established legal principles have undergone considerable evolution, while others have not. The doctrine of contributory negligence has evolved over time and has transformed into comparative negligence. Its sister, the mitigation of damages doctrine, has not. It is time for the two sisters to reunite under a harmonized concept of comparative responsibility. It is the imperative of tort law in our age to make this happen.

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[146] As mentioned above, in the few states which adopted the UCFA's approach, a failure to mitigate damages is explicitly included in the definition of "fault". Interestingly, in England two important writers offered to adopt such a wide interpretation to the term "fault" in the Contributory Negligence Act (1945). *See* WILLIAMS, *supra* note 60, at 292-294; BURROWS, *supra* note 24, at 132.

[147] *See* Reporter's note to cmt. b., sec. 3: "This Section abolishes doctrines that give all-or-nothing effect to certain types of plaintiff's negligence based on the timing of the plaintiff's and defendant's negligence. Instead, the timing of the plaintiff's and defendant's negligence are factors for assigning percentages of responsibility."