

and one for whose benefit that duty is imposed is injured by failure to perform it, the authorities are clear that *prima facie*, and if there be nothing to the contrary, a right of action arises.

But that *prima facie* right disappears when a finding of contributory negligence is properly reached. If there was any evidence to warrant the conclusion at which the jury arrived in regard to the negligence of the plaintiff's late husband, I should, I think, in the present state of the law, be obliged to dismiss the action notwithstanding the negligence of the defendants in not covering the dangerous winze or "glory hole," and in failing to supply Pressick with a proper wrench. But there is, in my opinion, no evidence whatever, to support the particular and only finding of the jury that Pressick was negligent in not using with more care the defective wrench given him by the defendants with knowledge that he would have to use it in a place dangerous because of their neglect. The tightening and loosening of the swing nut required the exercise of great force. The nut had to be unscrewed every time the drill was set for a new hole. The machine might have been more safely placed for the loosening of the nut if the valve had not been on the side on which it was at the time of the accident. This was the contributory negligence which the defendants sought to prove Pressick guilty of. By their verdict the jury shew that they rejected this contention and accepted the evidence that the drill was properly placed. If it had been turned into the position suggested by defendants as the only proper one, the peril resulting from a slip in tightening the nut would have been the same as would have existed in loosening the nut with the drill in the position it actually occupied. The jury found none of the grounds of contributory negligence sought to be established by the defendants, but evoked by some obscure process of reasoning a ground which is in my opinion unsupported by any evidence. Entertaining this opinion, I reject their finding and direct that judgment be entered for the plaintiff for the damages found by the jury, \$1,750.

There was, I may add, evidence to warrant a verdict for a much larger sum. The plaintiff is also entitled to her costs. Stay of thirty days.