defendant was guilty of the last negligence, but only whether he had an opportunity to avoid the accident by the use of due care. If he had, and the plaintiff had not, which was the fact in *Davies* v. *Mann*, he is liable.

Before proceeding to examine more closely the application of the rule in *Davies* v. *Mann* to different conditions of fact, a matter by no means free from difficulty, two other points of a general nature must be noticed.

1. To compel the defendant in *Davies* v. *Mann* to pay the whole damage, when the plaintiff is also at fault, may be said to operate as a punishment upon the defendant. So it may also be said that to deprive the plaintiff of all compensation in other cases of contributory negligence, where the rule in *Davies* v. *Mann* does not apply, and where the negligence of the plaintiff may be only a small element in the accident, operates as a punishment upon him. It may be conceded that there is a punitive element in each of those cases; and if the law of contributory negligence is founded upon considerations of policy, the punitive element can be readily explained and understood.

2. But it may be asked, if the idea of punishment is involved in *Davies* v. *Mann* at all, why does not that admit the doctrine of comparative negligence which prevails in Illinois and several other States? By that rule, "the degrees of negligence must be measured and considered; and wherever it shall appear that the plaintiff's negligence is comparatively slight, and that of the defendant gross, he shall not be deprived of his action."* It is perfectly plain that there is no logical connection between the rule in *Davies* v. *Mann* and the doctrine in the passage quoted, which is from the case where comparative negligence first appeared. No comparison of the negligence of the plaintiff and of the defendant is made in *Davies* v. *Mann*. The question is, Can the defendant avoid the consequences of the plaintiff's negligence? If he can, then, although his negligence may be slight in comparison with that of the plaintiff, he is obliged to pay the whole damage.

It remains to apply the rule in *Davies* v. *Mann* to cases with different facts.

1. Suppose the defendant, or the driver, in *Davies* v. *Mann*, instead of being a short distance behind his horses, had stopped by the way in a public house, and allowed the horses to go on ahead, and that when the accident occurred he was a mile behind them, and they were not in sight. What rule is to be applied? Neither plaintiff nor defendant is on the ground at the time of the accident, and the negligence of the defendant consists in allowing the horses to go on alone. His negligence is equally remote from the accident with that of the plaintiff, and although it may be more blameworthy to allow a team of three horses to go alone upon the highway than to leave a donkey fettered there, that cannot affect the result. The rule in *Davies* v. *Mann* requires the defendant to use due care to avoid the consequences of the plaintiff's negligence, but in this case he could not, after the peril was imminent, do anything to avoid the accident. The principle of *Davies* v. *Mann* has therefore no application, and the case falls under the

* *Galena & Chicago Union R. R. Co.* v. *Jacobs*, 20 Ill. 478, 497, per Breese, J. (1858).