

## VICARIOUS RESPONSIBILITY AND CONTRIBUTORY NEGLIGENCE

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THE vicarious responsibility imposed when a plaintiff recovers damages from some one other than the actual wrongdoer has never been quite satisfactorily explained.<sup>1</sup> Nevertheless, the courts have applied the conventional categories of vicarious liability to cases in which the defendant pleads the contributory negligence of a third party. Consequently, such pleas are generally confined to situations where the plaintiff, had he been defending instead of suing, would have been responsible in damages for the conduct of the person whose contributory negligence is alleged. In short, vicarious responsibility must work both ways if it works at all.<sup>2</sup>

Aside from the conventional employment and agency situations, there are four recurring types of cases involving the plea of contributory conduct of some one other than the plaintiff. (1) The defendant pleads the conduct of a child-plaintiff's parents. (2) Defendant pleads the conduct of a vehicle passenger-plaintiff's driver. (3) Defendant pleads the conduct of a bailor-plaintiff's bailee. (4) Defendant pleads the conduct of a husband- or parent-plaintiff's wife or child in an action for loss of services. These type cases will be subsequently referred to by number.

In case 1 a child whose extreme youth precludes its own conduct from being pleaded as a defense, is carelessly allowed by its parents to become exposed to danger and is injured by the defendant. Courts generally deny the plea of the parent's conduct in the child's action for damages, observing that the child cannot be made to accept the risk of its parents' conduct because a conventional relationship of vicarious responsibility does not exist between them.<sup>3</sup>

In case 2, plaintiff riding in a vehicle driven by another is injured in a collision with the vehicle driven by defendant. Unless the driver of plaintiff's car is his servant or is engaged

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<sup>1</sup> See Douglas, *Vicarious Liability and Administration of Risk I* (1929) 38 YALE L. J. 584; Legis. (1931) 45 HARV. L. REV. 171.

<sup>2</sup> *Little v. Hackett*, 116 U. S. 366, 371, 6 Sup. Ct. 391 (1886); *New York, L. E. & W. R. R. v. New Jersey E. Ry.*, 60 N. J. L. 338, 38 Atl. 828 (1897). For brevity, this will be termed the "both ways" test.

<sup>3</sup> *Warren v. Manchester St. Ry.*, 70 N. H. 352, 47 Atl. 735 (1900).

in a "joint enterprise"<sup>4</sup> with him, so that the plaintiff would be responsible for his driver's conduct to any third person, the defendant's plea of the driver's conduct is denied.<sup>5</sup> The "both ways" test spelled the over-ruling of many older cases in which occupants of a vehicle were simply identified with the driver and were made to bear the risk of his driving.

Case 3 is an action by a bailor against one whose conduct, combined with that of the bailee, caused damage to the chattel bailed. Although the bailor was not responsible in damages to any third person injured by the bailee's carelessness of the bailment,<sup>6</sup> courts until about 1900 allowed the bailee's conduct to be pleaded as a defense to the bailor's action for damages.<sup>7</sup> But the general approval of the "both ways" test has established the contrary view.<sup>8</sup> The issue in type case 3 is present in an action by the owner or mortgagee of real property damaged by the concurrent negligence of his lessee, life tenant or mortgagor and defendant.<sup>9</sup> A more striking analogy is an action by a conditional vendor<sup>10</sup> or chattel mortgagee whose security is damaged by the negligence of defendant and the vendee or mortgagor.

<sup>4</sup> See Comment (1929) 38 YALE L. J. 810.

<sup>5</sup> Little v. Hackett, *supra* note 2.

<sup>6</sup> Herlihy v. Smith, 116 Mass. 265 (1874); *cf.* Nash v. Lang, 268 Mass. 407, 167 N. E. 762 (1929); Mosby v. Kimball, 178 N. E. 66 (Ill. 1931).

<sup>7</sup> Bethea v. Taylor, 3 Stew. 482 (Ala. 1831); Welty v. Indianapolis, & V. Ry., 105 Ind. 55, 4 N. E. 410 (1886); Smith v. Smith, 2 Pick. 621 (Mass. 1825); Illinois Central R. R. v. Sims, 77 Miss. 325, 27 So. 527 (1899); Johnson v. Atchison, T. & S. F. Ry., 117 Mo. App. 308, 93 S. W. 866 (1906); Forks Township v. King, 84 Pa. 230 (1877); Winner v. Oakland Township, 158 Pa. 405, 410, 27 Atl. 1110, 1111 (1893); T. & P. Ry. v. Tankersley, 63 Tex. 57 (1885); Munster v. Hexter, 295 S. W. 245 (Tex. Civ. App. 1927).

<sup>8</sup> This view obtains in Alabama, Arkansas, Connecticut, Delaware, Illinois, Indiana, Kansas, Louisiana, Maine, Massachusetts, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Tennessee, Virginia, Washington, Wisconsin, in the federal courts and in England. A few typical decisions are Nash v. Lang, *supra* note 6; New York, L. E. & W. R. R. v. New Jersey E. Ry., *supra* note 2; Gibson v. Bessemer & L. E. R. R., 226 Pa. 198, 75 Atl. 194 (1910); Sea Ins. Co. v. Vicksburg, S. & P. Ry., 150 Fed. 676 (C. C. A. 5th, 1908); and Wellwood v. King [1921] 2 Ir. R. 274 (K. B. Div. 1920), *rev'd* at 290 (C. A. 1921).

<sup>9</sup> Higgins v. Los Angeles G. & E. Co., 159 Cal. 651, 115 Pac. 313 (1911); Boehm v. Bethlehem, 4 Pa. Super. Ct. 385 (1897); *cf.* Consolidated Gas Co. v. Getty, 96 Md. 683, 54 Atl. 660 (1903). *Contra:* Bartlett v. Boston G. L. Co., 117 Mass. 533 (1875). A tenant is not barred by the landlord's contributory negligence. Contos v. Jamison, 81 S. C. 488, 62 S. E. 867 (1908); Missouri Pac. Ry. v. Pfrang, 7 Kan. App. 1 (1897). A present owner is not barred by the contributory negligence of his vendor. Richmond v. Gallego Mills Co., 102 Va. 165, 45 S. E. 877 (1903).

<sup>10</sup> Commercial Credit Corp. v. Satterthwaite, 150 Atl. 235 (N. J. 1930), commented upon in (1930) 40 YALE L. J. 135. See Lacey v. Great Northern Ry., 70 Mont. 346, 354, 225 Pac. 808, 811 (1924), 38 A. L. R. 1331, 1337 (1925); United Motor Finance Co. v. Quaker City Cab Co., 82 Pa. Super. Ct.

Case 4 presents a situation analogous to the three type cases mentioned inasmuch as the injury to the plaintiff is caused by the concurrent conduct of the defendant and another who is not an agent or servant of the plaintiff or engaged in a joint enterprise with him. The defendant negligently injures a minor child or the wife of plaintiff, who sues to recover for medical expenditures and loss of services. Courts universally grant the defendant's plea of the child's or wife's conduct, but they rationalize this view in a variety of ways.<sup>11</sup>

In all except the fourth of these type cases, the issue becomes a quibble concerning the existence of one of the categorical relationships of vicarious responsibility between the plaintiff and the one whose conduct is pleaded as a defense. Little attempt is made to decide these cases in accordance with the foreseeable chance of injury taken by the plaintiffs. Courts seem unaware that the policies involved in granting or denying the defensive plea may be different from those controlling the responsibility in damages of a master for the conduct of his servant, and that the latter are probably concerned simply with providing a financially responsible defendant.

Some courts in handling case 4 have conceived elaborate and artificial rationalizations to reconcile their decisions with the disposition of cases 1, 2, and 3. Similar rationalizations are suggested in some of the bailment cases decided by courts not conforming to the general view of type case 3. The first part of this article is a discussion and criticism of these decisions and rationalizations. The second part attempts a critical study of the social value of common-law rules governing vicarious contributory negligence in order to demonstrate the possibilities

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272 (1923); *General Motors Acceptance Corp. v. Baltimore & Ohio R. R.*, 97 Pa. Super. Ct. 93 (1929).

<sup>11</sup> *Chicago B. & Q. Ry. v. Honey*, 63 Fed. 39 (C. C. A. 8th., 1894); *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 206 N. W. 198 (1925). These two cases are typical and the most important. Cases in which the same result was reached without statement of reason or theory, or by simply basing it on "imputed negligence" are as follows: *Pratt v. Brawley*, 83 Ala. 371, 3 So. 555 (1887); *Wueppesahl v. Connecticut Co.*, 87 Conn. 710, 89 Atl. 166 (1913); *Raden v. Georgia R. R.*, 78 Ga. 47 (1886); *Kennard v. Burton*, 25 Me. 39 (1845); *Dietrich v. Baltimore & H. S. Ry.*, 58 Md. 347 (1882); *Vorrath v. Burke*, 63 N. J. L. 188, 42 Atl. 838 (1899); *Gilligan v. New York & H. R. R.*, 1 E. D. Smith 453 (N. Y. C. P. 1852); *Burke v. Broadway & S. A. R. R.*, 49 Barb. 529 (N. Y. Sup. Ct. 1867); *Cleveland, C. & C. R. R. v. Terry*, 8 Ohio St. 571 (1858); *Winner v. Oakland Township*, *supra* note 7; *Knowlton v. Hydro-Electric P. C.*, 58 Ont. L. Rep. 80 (1925); *McKittrick v. Byers*, 58 Ont. L. Rep. 158 (App. Div. 1925).

For a good note discussing this type of case critically see Note (1926) 42 A. L. R. 717. See also Comment (1922) 31 YALE L. J. 639; (1926) 24 MICH. L. REV. 592; Gilmore, *Imputed Negligence* (1921) 1 WIS. L. REV. 193, 206-215.

of their more satisfactory administration by the adoption of methods in vogue in some of the more liberal jurisdictions.

## I

The rule that a bailee may recover against third parties for the entire damage to the bailment is the point of departure in the analysis of type case 3. Why he originally had an action for injury to the bailor's interest as well as to his own is a matter of speculation.<sup>12</sup> But it is now generally accepted that as against third persons the bailee's possession entitles him to full recovery.<sup>13</sup> The bailor has no reason to complain for he may control recovery for his interest if he acts before the bailee receives judgment;<sup>14</sup> and if he does not, it is assumed that as he entrusted the chattel to his bailee, he likewise entrusts the recovery of damages for injury to his interest in the chattel.

The defendant is protected from a subsequent action by the bailor when the bailee has recovered full damages.<sup>15</sup> This is based neither on *res judicata*<sup>16</sup> nor on a theory that the bailor has already sued by his agent,<sup>17</sup> the bailee; it is rather because the courts will not make a defendant pay twice for the same default.<sup>18</sup> The bailee holds the damages "in trust" for the bailor.<sup>19</sup> Although many cases indicate that complete *recovery* is a defense to the bailor's later action, and at least one court has held that a settlement has the same effect,<sup>20</sup> there is apparently no decision that a judgment *against* the bailee would pre-

<sup>12</sup> HOLMES, THE COMMON LAW, Lecture V, *The Bailee at Common Law* (1881) 164 *et seq.*; Bordwell, *Property in Chattels* III (1916) 29 HARV. L. REV. 731-751.

<sup>13</sup> The Winkfield [1902] P. D. 42; The Beaconsfield, 158 U. S. 303, 15 Sup. Ct. 860 (1895); Herries v. Bell, 220 Mass. 243, 107 N. E. 944 (1915).

It is said there is a tendency to confine bailee's recovery to his own limited interest unless he is duly authorized by his bailor to recover full damages. DOBIE, BAILMENTS AND CARRIERS (1914) 64, 87, 134; Note (1912) 25 HARV. L. REV. 655. This tendency seems to have been arrested in England. BEVEN, NEGLIGENCE (4th ed. 1928) 909.

<sup>14</sup> Smith v. Willoughby, 24 N. D. 1, 138 N. W. 7 (1912); Missouri, K. & T. Ry. v. Hunter, 216 S. W. 1107 (Tex. Civ. App. 1919).

<sup>15</sup> DOBIE, *op. cit. supra* note 13, at 64.

<sup>16</sup> But see Eaton v. Schild, 149 Atl. 637 (N. J. 1930).

<sup>17</sup> But see Missouri K. & T. Ry. v. Hunter, *supra* note 14.

<sup>18</sup> FREEMAN, JUDGMENTS (5th ed. 1925) § 482 and cases cited in note 12; see Lord, Stone & Co. v. Buchanan, 69 Vt. 320, 37 Atl. 1048 (1897); Hasbrouck v. Lounsbury, 26 N. Y. 598 (1863).

<sup>19</sup> Industrial Inv. Co. v. King, 132 So. 333 (Miss. 1931); cases cited in FREEMAN, *loc. cit. supra* note 18. See also Woodman v. Nottingham, 49 N. H. 387 (1870); Littlefield v. Biddeford 29 Me. 310 (1849); Walsh v. United States T. & A. Co., 153 Ill. App. 229 (1910).

<sup>20</sup> Harris v. Seaboard A. Ry., 190 N. C. 480, 130 S. E. 319 (1925).

clude the bailor's subsequent action.<sup>21</sup> Even recovery by bailee for injury to his limited interest only is no defense.<sup>22</sup>

These conclusions have an important bearing on type case 3. Suppose in the bailee's action for negligent injury to the chattel, the defendant successfully pleads the bailee's contributory negligence. Would the bailor's subsequent action be barred? In *Wellwood v. King*<sup>23</sup> the Irish King's Bench, allowing the defendant to plead the bailee's conduct in an action by the bailor for damage to his automobile, rested its decision on the assumption that if the bailee had sued first and had been defeated because of his contributory negligence, a subsequent action by the bailor would have been barred as a matter of course. The court thought it was anomalous and unjust that recovery "for the same injury to the same chattel in damages enuring for the benefit of the same person were to depend upon the quiddity whether the bailor or bailee was the first litigant." Consequently it decided to admit the plea of bailee's conduct whether he or bailor sued first. The court's view that "the action by the bailee is an action on behalf of the bailor," the outcome of which should determine the rights of the bailor, would probably be rationalized as *res judicata* or "a cause of action already adjudicated." The validity of this rationale depends upon the meaning and accepted application of these concepts.

An action to be *res judicata* must be between the same parties to the prior judgment.<sup>24</sup> Successive actions by the bailee and

<sup>21</sup> FREEMAN, *op. cit. supra* note 18, § 482; *Tarleton v. Johnson*, 25 Ala. 300 (1854); *Ladany v. Assad*, 91 Conn. 316, 99 Atl. 762 (1917). In each of these cases the bailor was bound by judgment against bailee in which former action bailor was represented informally by counsel.

The only decision found by the writer that judgment against bailee is conclusive upon bailor is *Byrne v. Crooks*, 2 City Court Rep. 148 (N. Y. City Ct. 1885). This decision is on the theory that a bailee is his bailor's agent. *Cf.* also headnote in *Yrisarri v. Clifford*, 32 N. M. 1, 249 Pac. 1011 (1926) and *Eaton v. Schild*, *supra* note 16.

On the other hand, there are several decisions that a judgment against bailee is not binding upon the bailor. *Peck v. Merchant's T. & S. Co.*, 35 Kan. 126, 116 Pac. 365 (1911); *Standard Foundry Co. v. Schloss*, 43 Mo. App. 304 (1891); see also *Farmers' U. W. Co. v. Barnett*, 214 Ala. 202, 107 So. 46 (1925); *Hasbrouck v. Lounsbury*, *supra* note 18; *Pierce Oil Corp. v. Taylor*, 147 Ark. 100, 227 S. W. 420 (1921).

<sup>22</sup> *Rogers v. Roberts*, 58 Md. 519 (1882); *cf. Pico v. Webster*, 12 Calif. 140 (1859); *McLaughlin v. Raleigh, C. & S. Ry.*, 174 N. C. 182, 93 S. E. 748 (1917); see also STORY, *BAILMENTS* (9th ed. 1878) § 352.

<sup>23</sup> *Supra* note 8. Although the King's Bench Division readily admitted that the bailor could not be held in damages for the bailee's negligent injury to another, it thought the bailor's action for damages should nevertheless be barred by the bailee's contributory negligence. The Court of Appeal reversed this decision.

<sup>24</sup> FREEMAN, *op. cit. supra* note 18, § 671; Comment (1926) 35 YALE L. J. 607; von Moschzisker, *Res Judicata* (1929) 38 YALE L. J. 299, 302 *et seq.*

bailor against the same defendant with respect to the same fact situation for the same damages are actions between different parties; and the view that adverse judgment suffered by an agent or assignor is a defense to a later action by the principal or assignee is distinguishable.

The defense of *res judicata* is to protect a defendant from unnecessary litigation with respect to the same cause of action.<sup>25</sup> If an agent sues on a cause of action belonging to his principal, the latter is himself acting vicariously. Without the authority his name implies, the agent has nothing to present the court for decision; with such authority he presents on behalf of his principal the only claim existing against the defendant. The assignment case is similar. Only one claim exists, and whether assignor or assignee sues on it first, the other by substitution is concluded by the outcome. Only one party may bring an action in either of these two situations, for allowing the other a trial on the merits after the cause of action had once been adjudicated is vexatious to the defendant.

The parties to a bailment, however, may bring two separate actions for injury to their several interests. With no authority from his bailor, the bailee may ask for damages to the interests of both. On the other hand, he may simply ask for damages to his limited interest. In either case, the bailee is suing on his own cause of action,<sup>26</sup> for as against everyone but his bailor he is the owner of the damaged property. He is not, like the agent or assignee, suing in behalf of another on the only cause of action existing, for the bailor's cause of action is entirely distinct.

This division of interests in a bailment suggests the contrasting situation of splitting a cause of action, a typical case for the application of *res judicata*. If *B* injures *A*'s person and property in the same act, *A* must recover both elements of

<sup>25</sup> FREEMAN, *op. cit. supra* note 18, § 626; von Moschzisker, *op. cit. supra* note 24, at 299 *et seq.* The accuracy of this proposition depends upon the meaning of "cause of action". If *X* by the same negligent acts simultaneously harms *A*'s person and automobile, has *A* one cause of action or has he two, one for personal injuries and another for property damage? The view here taken is that there is but a single cause of action consisting of two claims, the cause of action being either the fact transaction giving rise to a claim and remedy to one person or the claim or right itself to recover. See CLARK, CODE PLEADING (1928) 319-324 and cases cited. For a practical point of view on this question see a comment by Professor E. W. Hinton in (1927) 21 ILL. L. REV. 506, in which the policies behind the proper application of the concept *res judicata* and their relevance or irrelevance to the term cause of action is analytically discussed. See a comprehensive discussion of the relation of *res judicata* to the concept of cause of action in (1931) 16 CORN. L. Q. 590.

<sup>26</sup> Missouri, *K. & T. Ry. v. Hunter*, *supra* note 14; *Pierce Oil Corp. v. Taylor*, *supra* note 21.

damage if at all in one action. A judgment in his claim for injury to property is a bar to a later action for personal injuries.<sup>27</sup> If his assignee for property damage recovers judgment, A's subsequent action for personal injuries is barred.<sup>28</sup> According to legal theory, there is only one cause of action in these cases and B should be sued only once. If the claims are litigated separately, judgment in the first spells the limit of B's liability. It was not necessary to split the cause of action<sup>29</sup> and in doing so A has made B liable to needless and vexatious litigation. If the combined right to recover for injuries to the bailor's and bailee's interests in a damaged chattel were the cause of action, consisting of two claims for injury to two separate interests, which cause of action the bailee may litigate in his own right, his action for damage to his limited interest alone ought to justify a plea of *res judicata* in the bailor's subsequent action, on the ground that litigation of part of a split cause of action finally adjudicates the whole cause of action. That this argument has been attempted without success indicates that favorable or adverse judgment in bailee's suit is not *res judicata* on his bailor's subsequent action.<sup>30</sup>

Adjudication of the bailee's action for complete damages should not justify a plea of *res judicata* in his bailor's later suit on the theory that since the bailor should know his bailee may sue for and recover full damages, he has impliedly appointed his bailee agent or assignee for the purpose of suing. Far from implying an agency between them, the contract of bailment seems to emphasize an exclusion and separation of interests. It does not "identify" bailor and bailee any more than a contract of marriage identifies husband and wife.

This discussion of *res judicata* in type case 3 seems equally applicable to the analogous situations of leases of and life estates in real property,<sup>31</sup> and conditional sales<sup>32</sup> and mortgages of

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<sup>27</sup> Comment (1927) 21 ILL. L. REV. 506, *supra* note 25.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* Professor Hinton observes that in some cases it is necessary to separate the claims for personal injuries and property damage to A. As examples, he cites the cases where A must assign his claim for property damage to an insurance company as a condition precedent to collecting property insurance, and where A's trustee in bankruptcy takes his claim for property damage as an asset of the estate, although he may not take A's claim for personal injuries. In such cases, it seems, it is better to recognize after the assignment two causes of action accruing to two different parties than to regard it as a single cause of action split into two claims, litigation of either one of which would create a defense under the plea of *res judicata* to the other action.

<sup>30</sup> *Pierce Oil Corporation v. Taylor*, *supra* note 21.

<sup>31</sup> FREEMAN, *op. cit. supra* note 18, § 483; *Wood v. Griffin*, 46 N. H. 230 (1865); *California Dry-Dock Co. v. Armstrong*, 17 Fed. 216 (C. C. D. Calif. 1883); and *Bedingfield v. Onslow*, 3 Lev. 209 (1685) (life tenant, though

both real and personal property. It should not be inferred, however, that after the bailee, conditional vendee, lessee or mortgagor is defeated owing to his contributory negligence, the bailor, vendor, lessor or mortgagee may then recover for complete damages, simply because he is not barred from suing by a plea of *res judicata*. For if such contributory negligence is established in the later action, the plaintiff may recover only for damage to his own interest.<sup>33</sup>

A discussion of *res judicata* involves the concepts of "one cause of action" and "derivative action". In the rationales of type case 4 which are expressed in terms of "one cause of action" and "derivative action", the concept of *res judicata* is noticeably absent. On the same concepts employed in the discussion of bailment cases an entirely different theory of decision is built.

The plaintiff in *Honey v. Chicago, B. & Q. Ry.*<sup>34</sup> sued for loss of services of his wife and for medical expenses. The district court denied the plea of the wife's contributory negligence, but was reversed on this issue. The appellate court thought that since plaintiff had a right to control his wife's movements but permitted her to come and go as she wished, he should bear the risk of her carelessness in failing to protect her ability to serve him. There was also an intimation of the theory denied by Judge Shiras, of the district court, that plaintiff's right of action was derived from his wife's and that he could exercise no greater claim as an "assignee" of her right of action than she could. If

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responsible to remainderman for waste, cannot hold third party for damage to remainder unless he himself had first reimbursed remainderman). But see *Willey v. Laraway*, 64 Vt. 559, 25 Atl. 436 (1892); *Rockwood v. Robinson*, 159 Mass. 406, 34 N. E. 521 (1893); *Anthony v. New York, P. & B. R. R.*, 162 Mass. 60, 37 N. E. 780 (1894); *Moeckel v. Cross & Co.*, 190 Mass. 280, 76 N. E. 447 (1906).

The most authoritative recent case is *Rogers v. Atlantic, G. & P. Co.*, 213 N. Y. 246, 107 N. E. 661 (1915), where the court held defendant liable to life tenant for complete damages by analogy to the bailment cases, recognizing that life tenant was not liable over to the remainderman. This recovery, the court said, would bar the remainderman's later action, not on any theory of *res judicata*, but rather because courts will not make defendant pay twice for the same tort.

<sup>32</sup> *Carolina, C. & O. R. R. v. Unaka S. L. Co.*, 130 Tenn. 354, 170 S. W. 591 (1914); *Stotts v. Puget Sound T. L. & P. Co.*, 94 Wash. 339, 162 Pac. 519 (1917). In the latter case the court said, comparing the instant case to a bailment case: "We think the analogy is complete." It then said that the vendor's later action was barred either by vendee's recovery or by estoppel, since vendor testified in vendee's action. In view of the bailment analogy, the latter reason would seem questionable. See also *Smith v. Gufford*, 36 Fla. 481, 18 So. 717 (1895).

<sup>33</sup> *General Motors Acceptance Corp. v. Baltimore & Ohio R. R.*, *supra* note 10.

<sup>34</sup> *Honey v. Chicago, B. & Q. Ry.*, 59 Fed. 423 (S. D. Iowa 1893); *Chicago B. & Q. Ry. v. Honey*, *supra* note 11.



his right of action really were derivative, it must have belonged to his wife originally. But she could not have recovered for loss of services even if she were free from contributory negligence; nor could she under any circumstances release or assign such a claim.

The Wisconsin Supreme Court in *Callies v. Reliance Laundry Company*,<sup>35</sup> developed the theory denied by Judge Shiras in the *Honey* case to its logical conclusion.<sup>36</sup> The plaintiff's action was for loss of her son's services and for incidental expenditures. The court allowed defendant to plead her son's contributory negligence. The Wisconsin court would not justify its decision by "imputing" the child's negligence to its parent, since he was not her servant. They preferred to say that the whole right of recovery for personal injuries and for loss of services accrued to the child, the latter portion of which "the law" assigned to the parent in return for her duty of care and support. "In return for the performance of such obligation the law gives to the parent the right to a part of the child's cause of action in case he is negligently injured by another." But the parent is in no better position than any assignee of a claim subject to a defense against the assignor. "If the minor is guilty of contributory negligence neither minor nor parent can recover, for their rights spring out of the same transaction—the same cause of action."<sup>37</sup>

Young Callies had previously sued the laundry company for personal injuries and had lost because of his contributory negligence.<sup>38</sup> If the Wisconsin court really thought that there was but one cause of action involved, it could more simply have dismissed Mrs. Callies' action as *res judicata*. This easy way out was closed, however, by a previous decision in *Selleck v. Janesville*.<sup>39</sup> There a husband, suing for loss of his wife's services, tried to establish the defendant's negligence by his wife's recovery in her prior and separate action for personal injuries. The court held, in accordance with the general view, that two distinct causes of action were involved and that judgment in the wife's separate action was not *res judicata* on the husband's. "A judgment is conclusive only between parties and privies. The husband was, of course, not a party. His wife sued alone. Nor is there any privity between him and his wife as to his now asserted demand. The cause of action is not one which once belonged to her and has been transferred or transmitted to him."<sup>40</sup>

<sup>35</sup> *Supra* note 11.

<sup>36</sup> For an interesting discussion of this question, antedating the Callies case, see Gilmore, *loc cit. supra* note 11.

<sup>37</sup> *Callies v. Reliance Laundry Co.*, *supra* note 11.

<sup>38</sup> *Callies v. Reliance Laundry Co.*, 182 Wis. 53, 195 N. W. 975 (1923).

<sup>39</sup> 104 Wis. 570, 80 N. W. 944 (1899).

<sup>40</sup> *Ibid.* 573, 80 N. W. at 945. Compare *Craley v. La Crosse C. Ry.*, 106

This is not much like the court's later language in the *Callies* case. The *Selleck* case represents an established view and the issue is the same whether the action is for loss of a wife's or a child's services.<sup>41</sup>

It is apparent that "cause of action" means something different to the Wisconsin court in the *Selleck* and *Callies* cases. The liberal interpretation of this concept in the latter case relieves the court of an embarrassing discussion of *res judicata*. It offers no precedent, however, to support its interpretation. The most liberal interpretation of this concept is expressed by Dean Clark with respect to the code cause of action.<sup>42</sup> He describes it as the aggregate of facts giving rise to a remedy at law, the extent of the cause of action being limited by trial convenience. He would say of the *Callies* case that since the remedies of the child and parent arose out of substantially the same fact transaction, requiring the same witnesses and trial of the same issues, they *may* sue together stating a single cause of action. Thus where *X* collides with *A*'s car, injuring *A* and his guest, *B*, *A* and *B* may sue together stating a single cause of action. But in neither case would he say that the plaintiffs *must* join and state a single cause of action as a condition to complete recovery.<sup>43</sup> If they bring separate actions or allege separate causes of action as joint plaintiffs, they have done nothing to which he would object. Judgment in *A*'s action will not bar *B*'s action, since the defense of *res judicata* is proper only between parties to the prior action or their privies. Dean Clark simply contends that under the codes *A* and *B* should be *permitted* to recover as joint plaintiffs stating a single cause of action and should not be penalized for doing so unless their separate claims arose out of substantially different fact transactions. This conception of "cause of action" affords no support to the decision in the *Callies* case, where the plaintiff was penalized simply because her claim arose out of substantially the same fact transaction giving rise to the claim of another person.

The Wisconsin court's view of a "cause of action" is without precedent or support. It is wholly at variance with its own

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Wis. 239, 82 N. W. 197 (1898), where the court denies the applicability of *res judicata* and employs *stare decisis*.

<sup>41</sup> *Laskowski v. People's Ice Co.*, 203 Mich. 186, 168 N. W. 940 (1918); *Womach v. St. Joseph*, 201 Mo. 467, 100 S. W. 443 (1907); see Note (1930) 5 WIS. L. REV. 368, especially the principal case there discussed, *Priestor v. Southern Ry.*, 151 S. C. 433, 149 S. E. 226 (1928).

<sup>42</sup> CLARK, CODE PLEADING (1928) 75-87.

<sup>43</sup> *Ibid.* 324, which reads, in part: "The rule of joinder of parties and of splitting is not inconsistent, however, for, under all rules of *res judicata* and of another action pending, not only must the *cause* be the same, but the *parties* must be the same". See *Pierce Oil Corp. v. Taylor*, *supra* note 21, a bailment case.

meaning of the phrase as expressed in the prior case of *Selleck v. Janesville*. Both this and the *Callies* case were actions for loss of services, and in both cases the phrase "cause of action" was given contradictory meanings to serve different purposes. It is believed that the term "cause of action" should not have an absolute meaning but rather that it should receive the practical interpretation and application suited to the most convenient trial of lawsuits. But its artificial and assumed interpretation as a means of reconciling decisions "on principle" is objectionable. It is unfortunate that the court, inasmuch as it wrote an opinion, did not frankly declare its motive for allowing the defense in this particular type of case.

## II

Whether the defendant's plea in these situations should be allowed or denied as a matter of social policy ought to be discussed with respect to the defense of contributory negligence in general, first, as this defense is administered under the traditional views of the common law, and second, as it is administered under a modern and more liberal view. This discussion of policy raises questions of value judgments to which there can be no correct and final answer. Nevertheless it is conducted on this plane with the hope that the most feasible suggestions will be the most persuasive.

The policies of allowing or denying the plea in type cases 1 (child-plaintiff) and 2 (passenger-plaintiff) have been ably treated elsewhere.<sup>44</sup> It may be added that under the traditional administration of contributory negligence the circumstances seem insufficient to justify defendant's complete immunity from paying damages in these two type cases. The conclusion is not so obvious in type case 3 (bailor-plaintiff). This is not, strictly speaking, a type case, although it is usually so regarded. The term "bailment" has a fairly definite meaning when used to describe the property interests of two people in a single chattel; but it is a mistake to give it a fixed meaning for the purpose of allocating risks of loss in negligence cases. Renting out an automobile for normal use, leaving it for repair or storing it are bailments accompanied by the usual division of interests and rights as between bailor and bailee and third persons interfering with the bailment. But the expectability of harm to the chattel bailed, due to the contributory conduct of the bailee in dealing with the chattel according to the terms of the bailment, grows progressively less in these three cases.

The courts, however, do not seem to regard the risk of prob-

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<sup>44</sup> See, for example, Gilmore, *op. cit. supra* note 11, at 193, 257.

able injury taken by the bailor as controlling in case 3.<sup>46</sup> The basis of decision is rather that the bailor is not responsible in damages to third persons injured by the bailee's careless use of the chattel, or, as often expressed, the bailee is not his bailor's servant or agent. But exceptions to this basic assumption have accompanied the widespread use of automobiles. Several states have enacted statutes making the bailor of an automobile responsible for the careless driving of his bailee.<sup>46</sup> Another exception is the "family automobile doctrine",<sup>47</sup> under which the head of a family who permits his wife or child to drive his car must answer in damages for their careless driving. This doctrine reflects in a particular class of bailments the social policy found in the statutes just mentioned and, indeed, it has been adopted by legislation.<sup>48</sup> This vicarious responsibility is rationalized by calling the wife or child a servant or agent; but its real justification is stated as the risk properly attached to entrusting to another an instrumentality so likely to cause harm.<sup>49</sup> Indeed, a

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<sup>45</sup> It is probable, however, that this was the explanation for the original view that a bailor could not recover because of his bailee's contributory negligence. See cases cited *supra* note 7.

<sup>46</sup> CAL. CIV. CODE (Deering, 1931) § 1714¼ (by consent); CONN. GEN. STAT. (1930) § 1627 (renting or leasing); IOWA CODE (1931) § 5026 (by consent); ME. REV. STAT. (1930) c. 29, §§ 35, 99 (by consent to minors and leasing to others); MICH. COMP. LAWS (1929) § 4648 and annotation (by consent); N. Y. Laws 1929 c. 54, § 59 (former Highway Law § 282-o) (by consent); R. I. Acts and Resolves 1927, c. 1040, § 3 (consent, driver "deemed to be agent of the owner," etc.); S. C., CIV. CODE (1922) § 5706 (claim against the owner's or bailor's automobile by lien of attachment except when driver steals car under certain circumstances). And see ARIZ. CODE (Struckmeyer, 1928) § 1671 (bailment or furnishing to minor under 18); Del. Laws 1929, c. 10, § 72 (same as Arizona); Idaho Laws 1929, c. 274, § 1 (bailing, giving or furnishing to minor under 16); PA. STAT. ANN. (Purdon, 1930) tit. 75, § 211 (same as Idaho). See also Mass. Acts, 1928, c. 317, § 1 (driver *prima facie* agent of owner under any circumstances) and Bruce v. Hanks, 178 N. E. 728 (Mass. 1931), interpreting it.

As to leases of railroad property see Mo. REV. STAT. (1929) § 4689 and Shaffer v. Rock I. & P. Ry., 300 Mo. 477, 254 S. W. 257 (1923); and as to bailments of airplanes, section 5 of the Uniform Aeronautics Acts. These statutes have been liberally construed. See Legis. (1931) 45 HARV. L. REV. 171, and cases and excellent note in (1929) 61 A. L. R. 866.

In Hodge Drive-it-yourself Co. v. Cincinnati, 52 Sup. Ct. 144 (U. S. 1932), the Supreme Court upheld an ordinance which, although it does not make a bailor liable for the negligence of his bailee, requires bailor to insure or put up bond against the negligent driving of bailees for hire.

<sup>47</sup> Lattin, *Vicarious Liability and the Family Automobile* (1928) 26 MICH. L. REV. 846; Green, *The Duty Problem in Negligence Cases II* (1929) 29 COL. L. REV. 255, 277-279, n. 67; and (1923) 7 MINN. L. REV. 353.

<sup>48</sup> MICH. COMP. LAWS (1929) § 4648. This statute requires consent to the bailment, but provides that consent shall be presumed if the driver is a member of owner's immediate family. This statute was held constitutional in Bowerman v. Sheehan, 242 Mich. 95, 219 N. W. 69 (1928).

<sup>49</sup> Lattin, *op. cit. supra* note 47, at 865-868.

third exceptional case, in which a corporation was held responsible in damages for the negligent driving of its automobile by an employee acting outside the scope of his employment, emphasized this factor as the proper basis of liability.<sup>50</sup>

Vicarious responsibility is attached in these exceptional cases only to bailment of an automobile for normal use and then obviously to provide a financially responsible bearer of the hazard created by putting an automobile on the highway. In jurisdictions imposing statutory liability courts have allowed the defendant, in an action by the bailor for damages to his car, to plead the bailee's contributory conduct as a defense.<sup>51</sup> Courts approving the second and third instances of exceptional liability just noted, will probably adopt a similar view. This view is simply a mechanical application of the "both ways" test, and aside from any question of its desirability it unfortunately strengthens the conviction that the defense is permissible only where the bailor would be liable in damages for an injury to a third person due to the bailee's negligent use of the car.

It is believed that allowing or denying the defense of the bailee's contributory negligence in case 3 should not depend simply upon the bailor's liability for or immunity from damages to a third person injured by the bailee's negligence. It is a wholly independent problem.<sup>52</sup> Aside from the cases in which courts have taken this view,<sup>53</sup> a few examples should indicate that entirely different risks are involved in the two situations. A conditional vendor is not liable under statutes making the owner of an automobile responsible in damages for the consequences of its negligent use by one driving it with his consent.<sup>54</sup> Any other result would seem shocking, unless the sale itself, under the cir-

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<sup>50</sup> *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920). See Lattin, *op. cit. supra* note 47, at 865-868.

<sup>51</sup> *Secured Finance Co. v. Chicago, R. I. & P. Ry.*, 207 Iowa 1105, 224 N. W. 88 (1929); *Swartout v. Van Auken*, 132 Misc. 89, 228 N. Y. Supp. 671 (Sup. Ct. 1928); *Shuler v. Whitmore*, 138 Misc. 814, 246 N. Y. Supp. 528 (Sup. Ct. 1930). But see *Gochee v. Wagner*, 232 App. Div. 401, 250 N. Y. Supp. 102 (4th Dep't 1931), *rev'd*, on a theory of control by plaintiff owner's presence, 257 N. Y. 344, 178 N. E. 553 (1931). See (1931) 17 CORN. L. Q. 153.

<sup>52</sup> See (1931) 17 CORN. L. Q. 158.

<sup>53</sup> See cases *supra* note 7.

<sup>54</sup> *Lennon v. L. A. W. Acceptance Corp.*, 48 R. I. 363, 133 Atl. 215 (1927); *Thompson v. Morgan*, 224 App. Div. 691, 228 N. Y. Supp. 670 (4th Dep't 1928). The court deciding this New York case was construing section 282-e of the New York Highway Law which has since been replaced by N. Y. Laws 1929, c. 54, § 59, which provides that a conditional vendor or his assignee is not an owner within section 282-e. For a liberal interpretation of this new provision, see *Arcara v. Moresse*, 258 N. Y. 211, 179 N. E. 389 (1932). Similar provisions occur in CAL. CIV. CODE (Deering, 1931) § 1714½; ME. REV. STAT. (1930) c. 29, § 99. But see (1930) 40 YALE L. J. 135.

cumstances, was negligent. The conditional vendor simply retains title as security for the price of the car. The chances of injury to their respective interests taken by the bailor and a conditional vendor of automobiles, however, are identical. Foreseeability of the same hazards of traffic and of the same probability of the driver's carelessness in dealing with these hazards are present in each case. Suppose the bailment is for carriage. It is inconceivable that the bailor should be liable in damages for an injury to another caused by the negligent carrying of the chattel. Yet some of our courts have allowed the defense of the carrier's contributory negligence in actions by the bailor against third party defendants.<sup>55</sup> It is true that these decisions were rationalized by calling the carrier the bailor's "agent"; but they are defensible on the ground that the bailor assumed the risk of obvious traffic hazards when he entrusted the goods to the carrier. The same argument applies, less pointedly perhaps, to the bailment of any harmless chattel. The probability of damage to it through the carelessness of the bailee is apparent; the likelihood of injury to a third person through carelessness in the bailment is insignificant.

With respect to the chances of damage taken by an owner of a chattel who puts it under the control of another, there is no difference between an ordinary bailment and entrusting possession to an employee. That a master has more control over his servant than a bailor has over his bailee is irrelevant, since it is unlikely that either has any actual control when the accident occurs. The bailor, however, stands in a much better position to recover against a third party, for his bailee's contributory negligence is no defense. Suppose the chattel is an automobile which the owner hands over for normal use. The master must bear the risk of his servant's careless driving, whether he is sued for damages or is trying to recover for harm to the car. The bailor bears the risk in neither case, unless a statute places on him liability in damages to third persons injured by the bailee's careless driving. Such divergent consequences of almost identical situations is surprising. But it is doubtful whether the situation would be improved by deciding that any owner of an interest in a chattel who entrusts it to another's care should bear the risk of the possessor's carelessness. As long as contributory negligence means complete immunity for the defendant, courts will probably not place the risk of the possessor's conduct on the owner in these cases unless the owner, were he defendant, would be liable in damages to a third person injured by the possessor's

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<sup>55</sup> *Arctic Fire Ins. Co. v. Austin*, 69 N. Y. 470 (1877). This decision and its language was approved in *Spelman v. Delano*, 177 Mo. App. 28, 163 S. W. 300 (1914), but was deplored in *Bower v. Union Pac. R. R.*, 106 Kans. 404, 188 Pac. 420 (1920).

careless use of the chattel.<sup>56</sup>

In type case 4, an action by a husband or parent for loss of his wife's or child's services, the contributory conduct of the latter is a defense, although no master-servant relation exists. The Circuit Court of Appeals in *Chicago B. & Q. Ry. v. Honey* considered the issues in this case and the bailment situation identical. At that time the defense of bailee's conduct was generally allowed and the court could "conceive no greater reason" for allowing the defense offered than that the plaintiff, were he suing for damage to a horse and carriage he had let her drive, would be precluded from recovering by her contributory negligence. This view was further explained by the observation that the husband has permitted his wife and the bailor his bailee to control their own movements, in each case with the plaintiff's interest in their power. The Wisconsin court in *Callies v. Reliance Laundry Company* refused to endorse this reasoning.

Another possible explanation for the general view in these cases is a reluctance to protect the particular interest of the plaintiff. It is not as objective as the interest in the bailment cases but it has been recognized for centuries and is, indeed, often referred to as "property."<sup>57</sup> Married women's statutes may have affected the husband's interest in his wife's services,<sup>58</sup> but these would be equally effective where the wife is free from contributory negligence. In any event, such legislation does not affect a parent's interest in his child's services.

Whether the defense is allowed or denied in type case 3 and 4 and in analogous situations, the result is not satisfactory under the traditional principles of contributory negligence. Two common-law prejudices hamper their most effective disposition: a reluctance to grant contribution between joint and concurrent tortfeasors; and a tradition of placing the entire loss on plaintiff or defendant, instead of allocating it in proportion to their respective faults.

A rule which denies an accounting between highwaymen<sup>59</sup> or contribution from an accomplice to a cheat who has been made to pay damages for defrauding the plaintiff has no place in negligence cases. On the other hand, contribution between jointly

<sup>56</sup> The "both ways" test, referred to in note 2, *supra*.

<sup>57</sup> *Frazier v. Georgia R. R.*, 101 Ga. 70, 75, 28 S. E. 684. (1897); *Tidd v. Skinner*, 225 N. Y. 422, 433, 122 N. E. 247 (1919). See (1912) 26 HARV. L. REV. 74; (1926) 24 MICH. L. REV. 592. But see *Wilson v. Grace*, 273 Mass. 146, 173 N. E. 524 (1930); *Bruce v. Hanks*, *supra* note 46.

<sup>58</sup> *Feneff v. New York C. & H. R. R.*, 203 Mass. 278, 89 N. E. 436 (1909); *Bolger v. Boston El. Ry.*, 205 Mass. 420, 91 N. E. 389 (1910); see also *Marri v. Stamford St. R. R.*, 84 Conn. 9, 78 Atl. 582 (1911).

<sup>59</sup> *Everet v. Williams* (The Highwayman's Case, *circa* 1725) of which no official report exists. It is fully reported in (1893) 9 L. Q. REV. 197 and in LINDLEY, PARTNERSHIP (9th ed. 1924) 124, n. a.

responsible defendants would achieve a fairer distribution of the loss occasioned by their negligence. Although several jurisdictions allow contribution in negligence cases either by common law<sup>60</sup> or by statute,<sup>61</sup> it is more generally denied.<sup>62</sup> And in many of the states permitting contribution at all, it is carefully restricted not only to liability for negligence but to cases in which the quality of the paying defendant's negligence is thought to be milder than that of the contributing defendant.<sup>63</sup>

Where contribution is permitted, however, it is not always effected. Some jurisdictions permit the defendant against whom alone the plaintiff brought suit and recovered, to bring a separate action for contribution, raising for the first time the issue of such defendant's negligence to the original plaintiff.<sup>64</sup> But other jurisdictions require the common liability to be reduced to a joint judgment before the paying defendant may have contribution.<sup>65</sup> If the plaintiff elects to sue only one of the avail-

<sup>60</sup> *Ellis v. Chicago & N. Ry.*, 167 Wis. 392, 167 N. W. 1048 (1918); *Wait v. Pierce*, 191 Wis. 202, 209 N. W. 475, 210 N. W. 822 (1926); *Goldman v. Mitchell-Fletcher Co.*, 292 Pa. 354, 141 Atl. 231 (1928); see *Reath, Contribution between Persons jointly charged for Negligence—Merryweather v. Nixan* (1898) 12 HARV. L. REV. 176; Note (1911) 11 COL. L. REV. 665. For the most recent and an authoritative discussion see Note (1931) 45 HARV. L. REV. 349.

<sup>61</sup> GA. CODE (1926) § 4513 (among joint "trespassers" and against whom plaintiff secured judgment); KY. STAT. (Carroll's, 1930) § 484a (negligence cases involving no moral turpitude); MD. ANN. CODE (Bagby, 1924) art. 101, § 58 (employee injured by employer and a third person jointly; see *Bethlehem Steel Co. v. Variety I. & S. Co.*, 139 Md. 313, 115 Atl. 59 (1921)); MD. ANN. CODE (Bagby Supp. 1929) art. 50, § 12A (in action *ex delicto* among judgment debtors of plaintiff); MICH. COMP. LAWS (1929) §§ 14497, 14475 (among parties to non-malicious joint libel); MO. REV. STAT. (1929) § 3268 (among defendants to judgment in all tort cases); N. Y. C. P. A. 1931 § 211-a (among all joint tortfeasors who suffer joint judgment for injury to person and property); N. M. Stat. 1929, 76-101 (among defendants to judgment in all tort cases); N. C. CODE ANN. (Michie, 1931) § 618 (all tort cases, with some interesting provisions for enforcement); TEX. ANN. REV. CIV. STAT. (Vernon, 1925) c. 9, art. 2212 (among judgment debtors in all tort cases); VA. CODE (1930) § 5779 (negligence cases involving no "moral turpitude"); W. VA. CODE (1931) c. 55 art. 7, § 13 (among parties to joint judgment in action *ex delicto*); ONT. STAT. 20 GEO. V. c. 27, § 3 (1930), quoted in note 76, *infra*. See generally on statutory attempts to enact such contribution, *Legis.* (1931) 45 HARV. L. REV. 369.

<sup>62</sup> *Royal Indemnity Co. v. Becker*, 122 Ohio St. 582, 173 N. E. 194 (1930); *National Surety Co. v. Massachusetts Bonding Co.*, 19 F. (2d) 448 (C. C. A. 2d, 1927); *Portland v. Citizens Tel. Co.*, 206 Mich. 632, 173 N. W. 382 (1919). But see (1921) 5 MINN. L. REV. 370.

<sup>63</sup> See Note (1931) 45 HARV. L. REV. 349.

<sup>64</sup> See statutes cited *supra* note 61, and *Duluth M. & N. Ry. v. McCarthy*, 236 N. W. 766 (Minn. 1931).

<sup>65</sup> N. Y. statute, *supra* note 61; *Grant v. Asmuth*, 195 Wis. 458, 218 N. W. 834 (1928); *Michel v. McKenna*, 199 Wis. 608, 227 N. W. 396 (1929); *Zutter v. O'Connell*, 200 Wis. 601, 229 N. W. 74 (1930).



able tortfeasors, this defendant may be unable to secure contribution. In several states requiring joint liability to the plaintiff, before contribution is allowed,<sup>66</sup> the sole defendant may join the other tortfeasor as a co-defendant, making him a party to the joint judgment and, in some cases, securing an adjudication of contribution in the same action.<sup>67</sup> But in jurisdictions making contribution conditional on common liability or joint judgment the most liberal devices fail when some domestic relationship between them prevents the co-defendant's tort liability to the plaintiff.<sup>68</sup>

Contribution between co-defendants generally results in an arbitrary and equal division of loss, regardless of the comparative seriousness of their respective carelessness. It has no application, moreover, where the concurrently negligent tortfeasors are plaintiff and defendant. In such a case the common law places the entire loss on one party or the other instead of distributing it equally or in proportion to the seriousness of their respective defaults. The admiralty view has always been different,<sup>69</sup> the loss being equally shared.<sup>70</sup> Most courts, however, refuse to compare "negligences",<sup>71</sup> preferring to leave the loss where it occurs whenever the plaintiff has contributed to it. In many jurisdictions, however, the plaintiff may recover full damages if he is only "negligent" and defendant is "grossly negli-

<sup>66</sup> WIS. STAT. (1929) § 260.19, and *Ellis v. Chicago & N. W. Ry.*, *supra* note 60; *Wait v. Pierce*, *supra* note 60; *Mitchell v. Raymond*, 181 Wis. 591, 195 N. W. 855 (1923), and *Scharine v. Heubsch*, 203 Wis. 261, 234 N. W. 358 (1931). For other provisions of this kind, see MD. ANN. CODE (Bagby, 1924) art. 16, § 196 and (Bagby Supp. 1929) art 50, § 12A; MICH. COMP. LAWS (1929) § 14475; N. Y. C. P. A. 1931, § 193 sub. 2, and *Haines v. Bero E. C. Corp.*, 230 App. Div. 332, 243 N. Y. Supp. 657 (4th Dep't 1930); N. C. CODE (Michie, 1931) § 618; *Lottman v. Cuilla*, 288 S. W. 123 (Tex. Comm. App. 1926), discussed in (1928) 6 TEX. L. REV. 554. On the subject generally see (1923) 1 TEX. L. REV. 454; ONT. STAT. 20 GEO. V, c. 27 § 6 (1930). Compare CAL. CIV. CODE (Deering, 1931) § 1714½ *sub. nom.* Subrogation. The New York provision was recently held inapplicable. *Fox v. Western N. Y. M. L., Inc.*, 257 N. Y. 305, 178 N. E. 289 (1931). As to the New York statutes see (1931) 16 CORN. L. Q. 246, 400, 598.

<sup>67</sup> For the most liberal case of this kind, see *Scharine v. Heubsch*, *supra* note 66.

<sup>68</sup> *Ackerson v. Kibler*, 138 Misc. 695, 246 N. Y. Supp. 530 (Sup. Ct. 1931). *Contra*: *Wait v. Pierce*, *supra* note 60. *Cf. Zutter v. O'Connell*, *supra* note 65.

<sup>69</sup> SALMOND, TORTS (7th ed. 1928) 55. See *Cayzer, Irvine & Co. v. Carron Co.*, 9 App. Cas. 873, 881 (H. L. 1884), and *The Cairnbahn* [1914] P. D. 25.

<sup>70</sup> Huger, *The Proportional Damage Rule in Collisions at Sea* (1928) 13 CORN. L. Q. 531; and *Robinson, Legal Adjustments of Personal Injury in the Maritime Industry* (1930) 44 HARV. L. REV. 223.

<sup>71</sup> Compare *Galena & C. U. R. R. v. Jacobs*, 20 Ill. 473, 496 (1858), with *Lanark v. Dougherty*, 153 Ill. 163, 165, 38 N. E. 892 (1894). See 20 R. C. L. Negligence, § 119.

gent."<sup>72</sup> Some courts, believing that this terminology implies a comparison of negligences, prefer to label defendant's conduct "recklessness" or "wilful indifference", a sort of constructive intent.<sup>73</sup> Courts employing the various refinements of the "last clear chance doctrine"<sup>74</sup> carefully instruct the jury under what particular circumstances an admittedly negligent plaintiff may recover against a negligent defendant. One of these refinements, the so-called "humanitarian doctrine,"<sup>75</sup> virtually instructs the jury to do the right thing by the plaintiff. These devices are all intended to relieve a careless plaintiff from the usual effect of contributory negligence. They are, in practical effect, categories of comparative negligence, without the equitable feature of sharing the loss.

It is strange that the difference between the complete liability and the complete immunity of a defendant should depend on the niceties employed in administering these devices before a jury. A general verdict for plaintiff does not indicate that the jury

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<sup>72</sup> The term "gross negligence" is not generally favored. In *Wilson v. Brett*, 11 M. & W. 113, 115 (Exch. 1843) Rolfe, B., observed that he "could see no difference between *negligence* and *gross negligence*—that it was the same thing, with the addition of a vituperative epithet." Many American jurisdictions, however, still employ this device to allow a plaintiff to evade the defense of contributory negligence. *Birmingham R. & E. Co. v. Bowers*, 110 Ala. 328, 20 So. 345 (1895); *Alger v. Duluth-Superior T. Co.*, 93 Minn. 314, 101 N. W. 298 (1904); *Astin v. Chicago, M. & St. P. Ry.*, 143 Wis. 477, 128 N. W. 265 (1910). Compare *Davis v. McCree*, 299 Fed. 142 (C. C. A. 6th, 1924), with *Dierickx v. Davis*, 80 Ind. App. 71 (1922), two cases arising out of the same accident but taking opposite views.

<sup>73</sup> In *Atchison, T. & S. F. Ry. v. Baker*, 79 Kan. 183, 98 Pac. 804 (1908), the court disapproved the use of the terms "gross negligence" and "wanton negligence" but was perfectly willing to permit the conduct referred to in evidence for the purpose of letting plaintiff evade the defense of contributory negligence by showing "wilfulness" or "implied intent," to which contributory negligence is no defense. *Steinmetz v. Kelly*, 72 Ind. 442 (1880). See (1929) 5 WIS. L. REV. 184.

<sup>74</sup> For a complete discussion of this doctrine see a note by Professor Bohlen in (1917) 66 U. OF PA. L. REV. 73, and *STUDIES IN TORTS* (1926) 536.

<sup>75</sup> *Barrie v. St. Louis Transit Co.*, 102 Mo. App. 87, 76 S. W. 706 (1903); *Murphy v. Wabash R. R.*, 228 Mo. 56, 128 S. W. 481 (1910); *Memphis St. Ry. v. Haynes*, 112 Tenn. 712, 81 S. W. 374 (1904). In the *Barrie* cases it is amusing to see the court saying that "there is, in this state, no such thing as comparative negligence." There is some question whether or not the last clear chance or ultimate negligence doctrine should be retained under modern contributory negligence statutes apportioning negligence and responsibility therefor. See *Weir, Davies v. Mann and Contributory Negligence Statutes* (1931) 9 CAN. BAR REV. 470, where it is urged that these acts do not apply where the defendant had the "last clear chance" to avoid the catastrophe, despite plaintiff's contributory negligence, since the last clear chance rule deals with causation and not with comparative negligence. The view taken by the British Columbia Appeal Court in *Morgan F. Co. v. British C. E. Ry.*, 42 B. C. R. 382, 4 D. L. R. 30 (1930), that the statute obviates the necessity of retaining this doctrine, seems better.

followed or even understood the necessarily refined and elaborate instructions. Moreover, the verdict must inevitably be one sided, throwing the entire burden of loss on one party or the other. A special verdict estimating as accurately as possible the respective delinquency of each party would be more helpful. In this way the defendant can be made to answer in proportion to his share of the fault. Where this is practicably impossible, the fault could be arbitrarily apportioned half to each. This practice has been adopted by statute in several jurisdictions<sup>70</sup> and

<sup>70</sup> Ark. Gen. Acts of 1919, Act No. 156, Crawford and Moses Dig. § 8575 (personal injury and death actions against railroad where plaintiff's negligence "of lesser degree" than defendant's); FLA. COMP. LAWS (1927) § 7052 (plaintiff injured by fault of self and railroad); GA. CODE (1926) § 2781 (plaintiff injured by fault of self and railroad); NEB. COMP. STAT. (1929) § 20-1151 (where plaintiff's negligence slight and defendant's gross); Wis. Laws 1931, c. 242 (where plaintiff's negligence is "not as great" as defendant's); B. C. STAT. 1925, c. 8 (all cases of mutual fault); N. B. REV. STAT. 1927 c. 143, at 1758 (all cases of mutual fault); N. S. STAT. 1926 c. 3, at 5 (all cases of mutual fault); ONT. REV. STAT. (1927) c. 103, as amended in ONT. STAT. 20 GEO. V c. 27 (1930) (all cases of mutual fault).

The present Ontario Statute, the most complete of any the writer has found, applies to all negligence cases. The most important sections of this statute are as follows: "3. In any action founded upon the fault or negligence of two or more persons the court shall determine the degree in which each of such persons is at fault or negligent, and where two or more persons are found liable they shall be jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each shall be liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

4. In any action for damages which is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

5. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed to be equally at fault or negligent.

6. Whenever it appears that any person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant upon such terms as may be deemed just.

7. In any action tried with a jury, the degree of fault or negligence of the respective parties shall be a question of fact for the jury."

See *Knowlton v. Hydro-Electric P. C.*, 53 Ont. L. R. 80 (1925).

Those statutes which apply only where plaintiff's negligence is less than defendant's, are disappointing. If loss is going to be apportioned according to fault at all, why shouldn't it be done whenever defendant has contributed, especially since it may be found practicable in most cases to say that the parties were equally careless.

The citations in this note do not include the statutes for the benefit of employees such as that in 45 U.S.C.A. (1928), Fed. Emp. Liab. Act § 53, where contributory negligence is said to be no defense but reduces the damages payable in proportion to the amount of fault attributable to the employee. Statu-

its fairness and simplicity recommend its widespread sanction.

The combined contribution and apportionment devices are ideally suited to a fair decision of the issues in type cases 3 and 4.<sup>77</sup> In case 3 the contribution device as employed in Wisconsin would place the burden of loss equally on the two whose conduct had occasioned the injury to the bailor and would prevent him from throwing the entire burden on either bailee or defendant alone as he may do under the usual practice. The apportioning device would allocate to each defendant that share of the ultimate loss for which he was responsible. Both of these devices are combined by legislation in the Ontario statute<sup>78</sup> and in contemporary English admiralty practice.<sup>79</sup> And under these statutes if it is practicably impossible to apportion the negligence of the two parties, the burden is shared equally.

This scheme, however, places no risk of loss in type case 3 on the bailor of an automobile for normal use. He may still recover complete damages from either the third party defendant or the bailee. If he obtains a joint judgment against both and executes it against the third party defendant, the latter is compelled to bear the risk of the bailee's insolvency in contribution proceedings. On the other hand, the owner of an automobile harmed by the concurrent negligence of his servant and defendant, bears the risk of his servant's contributory negligence, whether it means no recovery or partial recovery from the defendant. The decisions of the bailment and employment cases are surprisingly divergent depending on the mere chance of the driver's being a bailee or a servant. The same probability of harm to the owner's interest in the hands of another is present in each case. There seems to be sound policy for treating the bailor and master alike in these cases, and it is not at all the same policy for making the bailor or master responsible in damages to third persons injured by such conduct.

The suggested device of apportioning negligence would apply as well to the employment and agency as to the bailment cases. The master under such practice could recover judgment from the defendant for his fair share of the loss, getting the balance from his servant if he could. This suggests the risk to place on the bailor in these cases. Instead of permitting the bailor to recover a joint and several judgment for the entire loss against bailee and his co-defendant, with the option of executing it

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tory provisions of this type are found in ARIZ. REV. CODE (Struckmeyer, 1928) § 1388; ARK. STAT. 1916 §§ 5484, 8152; FLA. COMP. LAWS (1927) § 7060; IOWA CODE (1931) § 8158; KAN. REV. STAT. (1923) § 66-238; N. C. CODE (1931) § 3467; S. D. COMP. LAWS (1929) § 9709.

<sup>77</sup> But see Legis. (1931) 45 HARV. L. REV. 369, 374-5.

<sup>78</sup> Statute cited and quoted in part in note 76, *supra*.

<sup>79</sup> 1 & 2 GEO. V. c. 57, §§ 1, 3, as applied in the Cairnbahn case, *supra* note 69.

entirely against the third party defendant, leaving him a worthless right of contribution against the bailee, it would seem highly expedient to place the risk of his bailee's insolvency on the bailor, as his share of the risk assumed when he entrusted his property to the care of the bailee. The bailor would obtain judgment against the third party defendant for that proportion of the total damage which this defendant's share of the negligence causing the damage bears to the aggregate of his and the bailee's negligence. He would receive judgment for the balance against his bailee, execution depending on the bailee's solvency. If it is practicably impossible in a given case to apportion the shares of negligence between bailee and his co-defendant, there is authority for an arbitrary rule of equal responsibility.

This scheme is equally adaptable to conditional sales, chattel mortgages and, for that matter, life estates in and mortgages of real property. It might be stated generally as suitable in all cases where the ownership of an interest is in one person and the possession is in another, regardless of the owner's liability for or immunity from damages to third persons injured by the custodian's or possessor's careless use of the interest. This general statement covers many situations not involving serious hazards to the property involved. But in such cases the owner's risk of loss is correspondingly slight.

It is more doubtful whether type cases 1, 2, and 4 could be successfully disposed of in this manner. In case 1 it is hard to see any justification for placing on an infant too young to be capable of negligence, any risk of his parent's carelessness. It is unfortunate that the defendant cannot compel the negligent parent to contribute; but where the existing devices for contribution between tortfeasors require joint liability in favor of plaintiff against both defendants, a child's inability to hold his parent in tort renders this impossible.<sup>50</sup> Case 4 is not open to the same objection, since the risk of his wife's or child's negligence might with some reason be placed on the plaintiff. Allocation of this risk is not as imperative as it is in case 3, however, for the plaintiff in case 4 has less "control" over his interest. The owner of a chattel, on the other hand, exercises his absolute control when he voluntarily entrusts it to another. If it is thought unwise to place this risk on the plaintiff in case 4 and the defendant suffers adverse judgment, his right of contribution will usually depend on the plaintiff's ability to recover a judgment in tort against his wife or child. Type case 2 is more like the bailment situation. The plaintiff voluntarily entrusts his person to the driver for the purpose of carriage. It is not obvious, however, that the plaintiff in this situation should

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<sup>50</sup> Zutter v. O'Connell, *supra* note 65.

assume the risk of the driver's carelessness. Whether he is compelled to do so or not, the third party defendant may at least have contribution from the driver.

It is not the purpose of this article, however, to state what risks should accompany any given circumstances or conduct. That should be left to experts in social problems. But the common law rules of contributory negligence are obviously archaic and the suggestions here offered may prove useful in determining a method of administration more suited to the social needs of the present day.