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THE CONTRIBUTORY NEGLIGENCE OF PLAINTIFF'S WIFE OR CHILD IN AN ACTION FOR LOSS OF SERVICES, ETC.

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THE PROBLEM

OF LATE years American courts have fairly well agreed that the contributory negligence of another than the plaintiff in an action should not be imputed to him so as to bar his recovery unless such other is in the relationship of agent or servant to the plaintiff.¹ More accurately stated, they will not permit the defense to be pleaded unless the relationship between the two is such that the plaintiff, if he were being sued as defendant for the negligence of the other, would be held vicariously liable in damages.^{1a} This view, that vicarious or imputed liability has to work both ways or not at all, is responsible for the overruling, in practically all states, of the imputation of a parent's or guardian's contributory negligence to a very young plaintiff, of a vehicle driver's to his injured passengers, and of a bailee's to his bailor in an action by the latter for damage to the chattel bailed.²

It is consequently surprising to learn that American courts persist in denying recovery by a parent or husband for loss of services and/or consortium and/or for medical expenses, incident to injuries sustained by his child or wife as a result of the defendant's negligence and the child's or wife's contributory negligence.³ This situation would seem to fall within

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¹ *Little v. Hackett*, 116 U.S. 366, 371, 6 Sup. Ct. 391, 29 L.Ed. 652 (1886); *New York, L.E. & W. R.R. v. New Jersey E. Ry.*, 60 N.J.L. 338, 38 Atl. 828 (1897).

^{1a} For brevity, this will be referred to as the "both ways" test.

² For cases and discussion see Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 Yale L. J. 831-834 (1932).

³ *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). Cf. *Kerr v. Forgue*, 54 Ill. 482 (1870); *Chicago & G.E. Ry. v. Harney*, 28 Ind. 28 (1867); *Benton v. C.R.I. & P. R.R.*, 55

the now generally recognized rule stated above. The plaintiff is suing for negligent injury to an interest belonging exclusively to him, and the defendant pleads as a defense to his action the contributory negligence of another person, the relationship of whom to the plaintiff falls within no conventional category of vicarious liability. Thus if the plaintiff were sued for damage caused by the negligence of such other person, the relationship of parent or husband to such person would not render him liable.

The thesis of this article is that no court has satisfactorily explained why the plea is allowed in the type case under discussion and that the apparent inconsistency, referred to in the preceding paragraph, consequently is not disproved.

THE BAILMENT ANALOGY

(a) *Factual similarity and apparent inconsistency.*

Of the situations generally recognized as falling within the principle stated above, the bailment cases are the most similar to the type case under discussion and hence furnish the best analogy for the purposes of this article. Indeed, the court in a leading case treated these two situations as identical at a time when the bailor was generally subject to the plea of his bailee's contributory negligence.⁴ This comparison is occasionally of peculiar value, inasmuch as the plaintiff may sue in the capacities both of bailor and husband or parent, such as when he has lent his wife or child his automobile.⁵

As long as courts allowed the plea in the bailment cases, they found it helpful to recognize the analogy and to employ the reasoning in one line of cases to support their decisions in the other. Thus when it seemed potent to argue that inasmuch as the bailor voluntarily delegated the control of his chattel to the bailee he assumed the risk of the latter's con-

Iowa 496, 8 N.W. 330 (1881); Kennard v. Burton, 25 Me. 39 (1845); Dietrich v. Baltimore & H.S. Ry., 58 Md. 347 (1882); Thibeault v. Poole, 283 Mass. 480, 186 N.E. 632 (1933); Vorrath v. Burke, 63 N.J.L. 188, 42 Atl. 838 (1899); Burke v. Broadway & S.A. R.R., 49 Barb. (N.Y. Sup. Ct. 529) (1867); Cleveland, C. & C.R. R.R. v. Terry, 8 Ohio St. 571 (1858); Winner v. Oakland, 158 Pa. 405, 410, 27 Atl. 1110, 1111 (1893); Holmes v. Fond du Lac, 42 Wis. 282 (1877); Cawley v. La Crosse C. Ry., 106 Wis. 239, 82 N.W. 197 (1900); Callies v. Reliance Laundry Co., 188 Wis. 376, 206 N.W. 198 (1925); Honey v. Chicago, B. & Q. Ry., 59 Fed. 423 (S. D. Iowa 1893); Chicago, B. & Q. Ry. v. Honey, 63 Fed. 39 (C.C.A. 8th 1894); Knowlton v. Hydro-Electric P.C., [1926] 1 D.L.R. 217; McKittrick v. Byers, [1926] 1 D.L.R. 342; Dority v. Ottawa R.C.S.S.T., [1930] 3 D.L.R. 633. *Contra*: Wasney v. Jurazsky, [1933] 1 D.L.R. 616.

⁴ Chicago B. & Q. Ry. v. Honey, 63 Fed. 39 (C.C.A. 8th 1894).

⁵ E.g., Thibeault v. Poole, 283 Mass. 480, 186 N.E. 632 (1933).

tributory negligence, it likewise seemed appropriate to say that if a husband or parent did not use his "control" over his wife or child to keep them out of harm's way he undertook the risk of their contributory negligence in actions for loss of services, etc.⁶ Denial of the plea in the bailment cases, however, seems to have robbed the analogy of its force and to have minimized the importance of the "control" argument in the actions for loss of services, etc.⁷

The force of the bailment analogy may also be thought to depend on a similarity between the plaintiff's interests involved in the two type situations. This feature seems not to have been stressed in decided cases, although the difference between the interests is apparent. To say that one interest is tangible and separate from the personality of the party contributorily negligent while the other is not, however, seems a crude way to distinguish these situations. The important thing in common is that in each case an economic interest of advantage belonging to the plaintiff has been harmed. This is clearly recognized in actions by a husband or parent where his wife or child is free from negligence. Occasionally, indeed, courts have referred to this interest as "property" in such cases,⁸ and they recognize fully as serious an injury to the plaintiff, when his wife or child is free from contributory negligence, as they ever do to the tangible subject of an ordinary bailment.

The apparently intimate connection and closeness of the plaintiff's interest in services and consortium to the party contributorily negligent is probably no more pronounced, at least for the practical purposes of suit, than is that of an automobile or tuxedo, a necklace, wig or glass-eye loaned for normal use. The only difference perceivable is that the latter items are the subjects of bailment, and he who is entitled to the beneficial interest in them, i.e., who "owns" them, comes under a different category of artificial relationship to them, that of bailor. Indeed, the bailor seems to exercise more voluntary choice in trusting his interest to the care of the bailee, and thereby supplying some reason for accepting the risk of contributory negligence, than does the husband or father in the type case under discussion.

When the plaintiff asks only to be compensated for medical expenditures because the jurisdiction in question no longer recognizes his claim

⁶ *Chicago B. & Q. Ry. v. Honey*, 63 Fed. 39 (C.C.A. 8th 1894).

⁷ *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 206 N.W. 198 (1925).

⁸ *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 also 26 Harv. L. Rev. 74 (1912); 24 Mich. L. Rev. 592 (1926).

for loss of services or consortium,⁹ it may be difficult at first to see how an "interest" of his has been harmed.¹⁰ It is apparent, however, that because of his legal obligation to care for his wife, her injuries caused by her own and the defendant's negligence have cost the plaintiff the amount in suit. Is this any less an injury to the plaintiff's "interests," simply because it is just so much money out of his pocket, than payment to a garage for repairs on his car would be? The important thing seems to be that in each case the plaintiff suffers a definite loss. This conclusion seems justified inasmuch as courts conventionally regard this type of damage to a husband or father as actionable in the absence of the wife's or child's contributory negligence; and even when such contributory negligence is present they regard this type of damage as similar to injuries to the right to services and consortium, which are admittedly "interests" of the plaintiff capable of injury.

(b) *The policies behind the defense of contributory negligence in general.*

There seems to be nothing in the alleged policies behind contributory negligence which would lead to a denial of the plea in the bailment situation, and yet permit it in the case under discussion. These policies are variously described¹¹ as: (1) the impossibility of apportioning damage between the two tortfeasors; (2) that the plaintiff's act breaks the chain of causation; (3) that it bars recovery in order to insure prudence and care; and (4) "that one who invites injury may not make it the basis of a recovery." Since, in light of these policies, the bailor is not barred by the bailee's negligence, it is difficult to see why the husband or parent should be barred in the type of case under discussion. He has not been careless, he has taken no part in the conduct leading to the action; yet he has suffered pecuniary damage and/or the loss of a valuable interest for which the courts grant him compensation only if a certain person other than himself (but not his agent or servant) was free from contributory negligence.

As a matter of fact, it is doubtful whether anyone really understands the policies behind this defense. Judging from some of the innovations of recent years, it looks as if the defense as a common-law institution were undergoing considerable discredit.¹² But whatever the reasons may be for

⁹ See *Feneff v. New York C. & H. R.R.*, 203 Mass. 278, 89 N.E. 436 (1909); *Bolger v. Boston E. Ry.*, 205 Mass. 420, 91 N.E. 389 (1910); and *Marri v. Stamford St. R.R.*, 84 Conn. 9, 78 Atl. 582 (1911); cf. *Dennis v. Clark*, 56 Mass. 347 (1848).

¹⁰ See *Thibeault v. Poole*, 283 Mass. 480, 186 N.E. 632 (1933).

¹¹ In 78 Univ. Pa. L. Rev. 1014 (1930).

¹² See Gregory, *supra* note 2, 841 *et seq.* See also Ulman, *A Judge Takes the Stand* (1933), 30-34.

maintaining this defense, they clearly do not require its vicarious application any more in the loss of service cases than in the bailment situation.

(c) *Policies behind the vicarious aspect of imputed contributory negligence.*

In the opening paragraph of this article it was stated that the so-called "both ways" test¹³ was responsible for the overruling of the older cases permitting the plea of the bailee's contributory negligence in the bailor's action. The courts now say that since the bailor is not vicariously responsible in damages to a third party injured by his bailee's carelessness in handling the chattel, it is erroneous to suppose that he should be responsible for the bailee's contributory negligence in the sense that he is subject to it as a defense in his action for damage to the chattel. This, apparently, is the only reason given for the conclusion.

The reader should consider what has happened here. A court is asked to decide whether or not the contributory negligence of a bailee might be pleaded in an action by the bailor. The court restates this question into the general inquiry as to whether or not the "negligence" of the bailee should be "imputed" to the bailor. It then turns to the decision of a case which is not that before it, the case of master and servant, or principal and agent, the conventional instance of "imputed negligence." In this situation negligence of the servant or agent is imputed to the master or principal not only to prevent the latter's recovery for damage to the chattel arising out of the servant's and the defendant's concurring negligence, but also to make him liable to a third person injured by the servant's careless use of the chattel. Now, the court observes, everyone knows that a bailor is not responsible in damages to a third person injured by the bailee's careless use of the chattel.¹⁴ Therefore the bailor cannot be saddled with responsibility for the bailee's contributory negligence when the former is suing for damages to the chattel, because, in an entirely different fact situation (the master-servant case) the master is answerable for his servant's negligence both ways and here it is settled that the bailor is not answerable one of these ways. Therefore, he is not answerable in the other way, which is the issue before the court.

Note that the court has apparently assumed that the policies behind the holding of the master answerable for his servant's negligence for both purposes are identical. Furthermore it has not disclosed what those policies are. If the court is correct in its assumption, there may be some

¹³ So called simply for brevity.

¹⁴ *Herlihy v. Smith*, 116 Mass. 265 (1874), the entire *per curiam* opinion being as follows: "The ruling at the trial was correct. The case is too plain for discussion."

reason to suppose by simply using the rough analogy of the master-servant situation, that if these policies do not call for responsibility of the bailor in damage to a third person for the negligence of this bailee, they should not require him to be subject to the plea of his bailee's contributory negligence. But if we question the court's assumption respecting these policies in the master-servant cases, we may discover that vicarious responsibility for damages to a third party rests on considerations of policy entirely different from those supporting vicarious responsibility for the contributory negligence of another as a defense. This is speculation, since nobody knows what the policies of vicarious responsibility for either purpose are.¹⁵ But under such circumstances it would seem permissible to suppose as a working hypothesis what they might most reasonably be.

There is much reason to believe that a master is responsible in damages to a third person for the negligence of his servant because (1) he has enabled his financially irresponsible servant to control a social situation which might, and did, result in damage to another, and (2) the servant was acting for the benefit and in place of the master, presumably, according to a not too broad fiction, as the master himself would have acted had he been personally in charge. There is some reason here to believe that the master should be deemed to have delegated his control of the situation to the servant, although this does not mean much.

But these causes for vicarious liability do not reasonably support the rendering of the master answerable for his servant's contributory negligence when he is a plaintiff, if the emphasis on the master's liability in damages is furnishing a source of financial responsibility after he put the servant in a position to act for his benefit and at his request. No consideration of this sort arises when the plea of the servant's contributory negligence is urged against the plaintiff master. The cause for permitting this plea is more likely to be that had the master himself been on the spot and acted as the servant had, he could not have recovered; and since he had entrusted the care of his interests to his servant for reasons of his own, it is not unfair to conclude that he should abide by and be governed by the standard of conduct employed by the servant in protecting his interests. Again it might be said that the master had "delegated the control" of his interests to the servant, but this does not mean very much.

This analysis finds support in the decisions arising out of several recent statutes imposing vicarious liability on the bailors of automobiles for

¹⁵ See Douglas, *Vicarious Liability and Administration of Risk I*, 38 *Yale L. J.* 584 (1929); note, 45 *Harv. L. Rev.* 171 (1931).

damages to third parties injured by the driving of negligent bailees.¹⁶ The obvious purpose of these statutes is to provide a financially responsible defendant, the assumption apparently being that people too poor to own cars cannot compensate for damage they cause while driving hired or borrowed ones. Since the bailor enables his impecunious bailee to bring about the damage, there is obviously much reason in holding him responsible. But it is absurd to suppose the legislature meant, therefore, to subject bailors to the plea of their bailee's contributory negligence in actions for damages to their cars. Although the supreme court in one state permitted the plea in such a case under one of these statutes,¹⁷ it has been denied elsewhere;¹⁸ and one writer has ably exposed the fallacy of applying the "both ways" test here to achieve something the legislature never had in mind or mentioned and with which the obvious policies behind the statutes had nothing whatever to do.¹⁹

We may reasonably conclude that just because a bailor is not conventionally responsible in damages to a third party injured by his bailee's negligent use of the chattel, the corollary that the bailor plaintiff is therefore not subject to the plea of his bailee's contributory negligence does not follow. But if this conclusion is true the reasons given by the courts for overruling the older decisions imputing the contributory negligence of the bailee to the bailor are inadequate. We may then reasonably suppose that since the bailor entrusted his interest to the bailee to be used normally and be brought into relationship with the hazards customary to such use, he should be subject to the plea of the bailee's conduct just as the plaintiff master is subject to the plea of his servant's conduct. This seems especially true since the bailor would be prevented from recovering if it had been his own and not his bailee's carelessness in handling the chattel and since in the analogous master-servant situation the master's "control," at the time of such an accident causing the damage at least, is actually no greater than the bailor's over the one in possession of the chattel.

¹⁶ Many of these are cited in Gregory, *supra* note 2, 842, n. 46. A typical statute is Mich. Comp. Laws (1929) § 4648.

¹⁷ Secured Finance Co. v. Chicago, R.I. & P. Ry., 207 Iowa 1105, 224 N.W. 88 (1929).

¹⁸ Gochee v. Wagner, 232 App. Div. 401, 250 N.Y. Supp. 102 (4th Dept. 1931), reversed on a theory of control because of the plaintiff owner's presence, 257 N.Y. 344, 178 N.E. 553 (1931). Cf. Kernan v. Webb, 50 R.I. 394, 148 Atl. 186 (1929) where the court said, in referring to its statute: "The operator is not thereby made the agent of the owner with all the incidents of the law of principal and agent."

¹⁹ See 17 Corn. L. Quar. 158 (1931).

According to this analysis, if the plea is appropriate in the master-servant cases it is equally appropriate in the bailment cases for the same reasons, which, of course, have nothing to do with the policies behind the master's liability in damages for his servant's negligence or the bailor's immunity from damages for his bailee's negligence.²⁰ But most of our courts have decided, whether wisely or unwisely, to bar the plea by mechanical application of the "both ways" test not only in the bailment cases but in two other type cases mentioned at the beginning of this article, in all of which situations many of our courts formerly permitted it.

Now the whole point of this section is to air out what is behind the general principles of vicarious contributory negligence, and to show that pursuant to a fairly reasonable articulation of underlying policies, although the courts have justification for permitting the plea against the husband or parent in an action for loss of services, etc., they have no social justification for distinguishing between this situation and the other three types of vicarious contributory negligence not involving a master-servant relationship. If consistency were worth nothing in our legal system, this argument would be greatly weakened. But it is obvious that in any rational system, such as our common law, based on principles and reasoning by analogy, consistency is indispensable. Furthermore, if the courts are right in the other three type cases mentioned, of which the bailment case is typical, what possible reasons can there be for allowing the plea in the fourth type case, the one under discussion? It is submitted that there is no adequate social justification as long as courts are considered to be acting wisely in denying the plea in these other cases. The reasons or rationalizations which the courts give in the most recent cases allowing the plea in this fourth type situation will now be discussed and analyzed.

THE NEW RATIONALE

(a) *Introductory—the principal decisions.*

The court in the leading case of *Chicago, B. and Q. R. Co. v. Honey*²¹ rested its decision largely on the analogy of the bailment cases in which, at that time, the plea of the bailee's contributory negligence was allowed. In *Callies v. Reliance Laundry Co.*,²² the next case of outstanding importance, however, the Wisconsin court, permitting the plea of the son's contributory negligence in a parent's action for loss of services and medical expenditures, was hard put to it to rationalize its decision, for it had come

²⁰ A similar analysis with a slightly different purpose in view appears in Gregory, *supra* note 2, 843 *et seq.*

²¹ 63 Fed. 39 (C.C.A. 8th 1894).

²² 188 Wis. 376, 206 N.W. 198 (1925).

over to the modern view of denying the plea in the other type cases of so-called imputed contributory negligence.²³ It did not use the "control" theory²⁴ which played an important part in the *Honey* case but which was greatly weakened by the almost universal adoption of the modern view in the other type cases. It did not mention the bailment cases but did say that its decision could not rest on any doctrine of imputed negligence. It therefore did what might be expected—it invented a theory with which to justify its decision.

The previous paragraph no doubt indicates the writer's conviction that the Wisconsin court had made up its mind how to decide the case and then rationalized its decision. As a judicial technique this is probably not unusual; but it is unsatisfactory because nobody knows why the court reached its decision. In this particular case, especially since the court in question has always been quite frank in overruling precedents it no longer likes, it is doubtful if the court itself knew, except that it preferred the precedents and trusted to an intuition that this case was somehow different from the other type cases mentioned. The opinion is ingenious to a degree and is a model of an apology in the real sense of that word. But the court has "done well" by its assumed premises, although making these assumptions was practically the decision of the case.

The next important case involving this problem,²⁵ recently decided by the Massachusetts supreme court, rests chiefly on the Wisconsin court's decision. Chief Justice Rugg, writing the opinion, says of the alleged general principle "governing" the decision of this type of case: "The principle is supported by a finely reasoned opinion in *Callies v. Reliance Laundry Co.*"²⁶ The Massachusetts court furthermore declares that "There is nothing inconsistent with this in"²⁷ the present general rule governing the decision of the bailment cases.

²³ *Gulessarian v. Madison Rys.*, 172 Wis. 400, 179 N.W. 573 (1920), the infant plaintiff case; *Reiter v. Grober*, 173 Wis. 493, 181 N.W. 739 (1921), the passenger-vehicle driver case; *Calumet Auto Co. v. Diny*, 190 Wis. 84, 208 N.W. 927 (1926), a bailment case, which was not decided until a few months after the *Callies* case. For an excellent discussion of the situation in Wisconsin prior to the *Callies* case, and for a good analysis of the problems here involved in general see *Gilmore, Imputed Negligence*, 1 Wis. L. Rev. 193, 257 (1921).

²⁴ See *supra* pp. 174-175.

²⁵ *Thibeault v. Poole*, 283 Mass. 480, 186 N.E. 632 (1933).

²⁶ *Ibid.*, 635.

²⁷ *Ibid.*, 635, citing *Nash v. Lang*, 268 Mass. 407, 167 N.E. 762 (1929). The plaintiff husband in this action was allowed to retain his judgment for damages to his car in spite of, but lost his judgment granting recovery for medical expenses due to his wife's injuries because of, the failure of the trial court to allow the plea of his wife's contributory negligence as a defense to his action.

(b) *Derivative causes of action and contributory negligence.*

The background for the new rationale is uncertain but it might have had its origin with the first use of the term "derivative" to define the husband's or parent's action for loss of services, etc. Beach in his text on Contributory Negligence stated that to impute the contributory negligence of third persons, other than servants or agents, to a plaintiff

"... there must be a *pro tanto* identification of the third person with the plaintiff, and that such an identity will be found to exist . . . in two classes of cases . . . , and the second, where the cause of action is derived from the third person."²⁸

But there is no explanation whatsoever in the text concerning the meaning of this statement. Another section of Beach's text contains the following reference to derivative actions:

"In actions by a parent, the child's contributory negligence will defeat the claim, because when a plaintiff derives his cause of action from an injury done to a third person, such plaintiff is justly chargeable with the contributory negligence of the third person."²⁹

Here Beach cites indiscriminately actions for loss of services and medical expenses and also for death damages under statutes. None of the opinions in the former type of case cited contains any reference to "derivative" causes of action and it seems unfortunate and highly inaccurate to confuse with this type of case the issue in actions for death damages by a designated beneficiary or the deceased's representative under a statute denying recovery unless the deceased, had he lived, were able to recover. Under these statutes the legislature is creating a liability which never existed at common law and is defining its limits to coincide with the fiction that, as far as the defendant may be held liable, it is *as if* the child had survived.³⁰

The first case of the type under discussion found, containing a mention of the derivative cause of action, is *Pratt Coal and Iron Co. v. Brawley*.³¹ The principal on which this decision rests was briefly stated in the opinion as follows:

"Wherever plaintiff derives his cause of action from an injury to a third person, the contributory negligence of such third person is imputable to him, so as to charge him with the consequences."³²

²⁸ Beach, *Contributory Negligence* (1st ed. 1885), 106 § 33; (3d ed. 1899), 146, § 103.

²⁹ The quotation is from the third edition, 189, § 132. The corresponding passage in the first edition is substantially similar and is found in § 44, at p. 138.

³⁰ See analysis of this question with reference to Wisconsin, *infra* pp. 184-185.

³¹ 83 Ala. 371, 3 So. 555 (1888).

³² *Ibid.*, 374.

The court did not reveal the source of this rule or attempt to give any authority for it. Nor did it attempt to tell what it meant by the words "derives his cause of action." It is significant, however, that the court cited the second reference to Beach mentioned above and the inference that it simply borrowed from this text is natural.³³

Apparently these authorities were urged on the district court in *Honey v. Chicago, B. and Q. R. Co.*,³⁴ for that court, approving a charge to the jury that the contributory negligence of the plaintiff's wife should not bar his recovery for loss of her services, hotly denied that the plaintiff's cause of action was derived from his wife. Referring to the first passage from Beach quoted above, the judge said, in part:

"It cannot be successfully maintained that the right of action in behalf of the husband is derived from the wife, so as to bring the case within the second class named in the foregoing citation."³⁵

He devoted considerable space in attempting to prove that this was so. Nevertheless, the circuit court of appeals, reversing him,³⁶ calmly continued to refer to the husband's action for loss of services as "derived" from his wife, although it made no attempt to explain the meaning of the word in this connection.

Only Shiras, the district judge denying the plea in the lower court disposition of the *Honey* case, intimates what "derived" means, and since he was reversed, one concludes that he was mistaken. He assumed it was used in the sense in which it is used in assignment cases or in actions by administrators of decedents' estates or by stockholders. In these situations the cause or right of action was originally in another who was the proper party to sue upon it, and this was the very distinction which Shiras claimed existed between causes of action properly derivative and the cause of action asserted by the husband- or parent-plaintiff in the type case under discussion. Apparently a subtler shade of meaning was attributed to the term "derivative" by Beach and these earlier courts employing it in these cases. Certainly they used it in the sense of "acquiring from." The cause of action does intimately relate to the wife or child since it is for a loss with respect to such person. But an action for damage to a horse is intimately related to the horse; yet nobody would say that the action was derived from the horse. If the action were for loss of money

³³ Only the first edition of Beach was then available. The court's reference was to p. 137 whereon commenced the section referred to, containing the passage in question, which appears on p. 138.

³⁴ 59 Fed. 423 (S.D. Iowa 1893).

³⁵ *Ibid.*, 426.

³⁶ *Chicago, B. & Q. Ry. v. Honey*, 63 Fed. 39 (C.C.A. 8th 1894).

suffered because of having to hire another horse or for inability to rent it out, this analogy would seem quite appropriate.

The appellate court in the *Honey* case said that ". . . the husband's right to sue for loss of society and services grows out of the marital relation, . . . is incident to the rights thereby acquired . . . , and cannot exist without it."³⁷ The court clearly implies that the husband derives his action from his wife, for her action is contrasted to his in that hers is ". . . in no wise dependent upon the marital relation."³⁸ The court adds: "She does not derive her right to sue from that relation, but brings suit like any other person for an injury sustained through the fault of another."³⁹ Naturally when a man sues for loss of services of his wife he must prove a wife. Accordingly it might be said that his action is "incident" to the marriage relationship. But this means no more than to say that one who sues for damage to a horse must prove some relationship of interest toward the horse and that the action is incidental to this relationship. But it would be absurd to say that the action is derived from this relationship of interest toward the horse. The authorities discussed so far, however, do not advance beyond this in explaining what the alleged derivation is and how it plays any part in permitting the defense in question.

(c) *Derivative causes of action and the assignment analogy.*

The assignee of a cause of action is subject to the defenses existing against the assignor at the time of the assignment. Consequently the plea of contributory negligence of the assignor of a cause of action in tort based on negligence is appropriate against an assignee plaintiff. This simple rule was used with a vengeance in developing the new rationale of the type case under discussion in *Callies v. Reliance Laundry Company*.⁴⁰ In that case, a suit by a parent for loss of services and medical expenses arising out of negligent injuries to her minor son, in which the court permitted the plea of the latter's contributory negligence, the court's whole line of reasoning is based on the original assumption that when the child was injured only one "cause of action" came into existence with respect to the child's and his parent's rights of recovery. The court assumed this to be true without any discussion. This and the next steps in the reasoning are illustrated by the following quotations which are given rather fully so that the points the court makes will not lose force by being paraphrased.

"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."⁴¹

³⁷ *Ibid.*, 42. ³⁸ *Ibid.* ³⁹ *Ibid.* ⁴⁰ 188 Wis. 376, 206 N.W. 198 (1925). ⁴¹ *Ibid.*, 380.

"The parent is by law required to support and care for his child. 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. So also, since the husband is required to support his wife, the law likewise gives him a part of the wife's cause of action in case she is negligently injured by another. This splitting up of the cause of action, resulting in some of the damages being given the child and some to the parent, or some to the wife and some to the husband, is due solely to the parental and marital relations existing between the parties. . . ."⁴²

"The parent takes by operation of law a part of the child's cause of action and he must take it as the child leaves it . . . the law assigns to the parent a part of the cause of action, and he takes it subject to any defenses that could be urged against the child, in whom the whole cause of action, but for the law, would vest. . . ."⁴³

"It is therefore not a case of imputed negligence, but a case where by operation of law a part of a cause of action is assigned from the child to the parent, and the part of the cause of action so assigned can have no better standing in court than the part not so assigned. It is a familiar principle of law that an assignee of a cause of action stands in the shoes of the assignor."⁴⁴

Granting that the plaintiff in this type of case sues as an assignee or partial assignee, i.e., by derivation of a cause of action originally belonging to his child or wife, any defense good against the latter should also be good against him. But this rationale seems quite manufactured in this case and its use is without precedent, its source apparently being the references to "derived" causes of action appearing in *Beach* and the older cases mentioned above. What seemed to *Beach* adequate to describe roughly the action for compensation for loss of what one had coming to him from another person, e.g., loss of services, is apparently seized upon, given a meaning which the term already has in an entirely different connection and which *Beach* and the earlier courts undoubtedly did not have in mind, and thus arbitrarily becomes the basis of an entirely new rationalization. The Wisconsin court adopts the very interpretation of the term "derived" which Judge Shiras had so confidently stressed in his opinion in the *Honey* case⁴⁵ as disproving the inaccuracy and impropriety of using this term when describing the plaintiff's action in the type case under discussion.

(d) *The "cause of action" in the type case and in similar situations.*

(1) The Wisconsin court's rationale depends on its assumption that the sole "cause of action" for recovery of anything against the defendant accrued solely to the wife or child in the type case involved. This and other courts, however, continuously decide, for a different purpose, that out of an identical fact situation entirely separate causes of action accrue to the

⁴² *Ibid.*, 380.

⁴⁴ *Ibid.*, 381.

⁴³ *Ibid.*, 381.

⁴⁵ *Honey v. Chicago, B. & Q. Ry.*, 59 Fed. 423 (S.D. Iowa 1893).

husband or parent on the one hand and to the wife or child on the other. Thus, when a wife loses her action for personal damages because of her contributory negligence, the finding of this defense in her action is not binding on her husband in his separate action for loss of services, etc., the courts declaring that this finding is *res inter alios acta* and that the husband's cause of action is entirely separate from his wife's.⁴⁶ The same is true of parent and child.⁴⁷ The plaintiff husband or parent is entitled to a separate trial before a separate jury of the issue of his wife's or child's contributory negligence and it is perfectly possible for a wife to recover nothing because a jury found her contributorily negligent and for her husband to recover for loss of her services because his jury found her free from contributory negligence.

Although the husband or parent is entitled to this separate action in spite of the findings in his wife's or child's action, it is implicit in the cases in which this issue appears that the plea of the latter's contributory negligence is appropriate in the husband's or parent's action. It is possible to have both issues raised in a single action. Suppose a husband sues for loss of his wife's services after she has failed to recover for personal injuries because of her contributory negligence and judgment is given for the defendant because the issue of the wife's contributory negligence was already decided adversely to the plaintiff. If the plaintiff appeals on the two grounds that the wife's action was *res inter alios acta* and that the plea is inappropriate in his action anyway, the Wisconsin court, remanding the case, would apparently say for the edification of the trial court that the finding against the wife was not binding on the husband because their causes of action were entirely separate, whereas the plea was appropriate because their alleged causes of action were not separate but merely parts of the same cause of action.

Such a position may seem hopelessly inconsistent but curiously enough it is not; the court is simply implying that different constructions of the phrase "cause of action" are applicable for different purposes. However unsatisfactory this refinement may be, it seems an insufficient reason to undermine the court's rationale in the *Callies* case. For though the two claims may be sufficiently distinct to obviate application of the defense of *res judicata*, they might reasonably be considered sufficiently united, at least in their source, to justify the plea good against one claim in an

⁴⁶ *Selleck v. Janesville*, 104 Wis. 570, 80 N.W. 944 (1899); *Laskowski v. Peoples' Ice Co.*, 203 Mich. 186, 168 N.W. 940 (1918); *Womach v. St. Joseph*, 201 Mo. 467, 100 S.W. 443 (1907). See 1 Freeman, *Judgments* (5th ed. 1925), 1033-40, §§ 470-480.

⁴⁷ See 1 Freeman, *supra* note 45, 1040-3, § 481.

action on the other. And if it is convenient to do so, it might be reasonable to justify both these conclusions in terms of causes of action.

(2) But there are other aspects of this rationale open to criticism. The Wisconsin court said in the *Callies* case that the sole cause of action arising out of the "transaction" accrued to the child, that it was "split" and a "part" "assigned" by "the law" to the parent. This is somewhat analogous to a situation involving a factual set-up of considerable difference. Many courts hold that one whose person and property are injured by the same tort and who assigns the claim for property injury to another, cannot recover for personal injuries if the assignee has already sued his claim to judgment, since there was but one "cause of action" which was split and is now adjudicated.⁴⁸ Although the Wisconsin court has not decided this issue squarely, it has indicated a preference for this view.⁴⁹ Among the courts taking this view there is a sharp conflict, however, concerning the subsequent action for personal injuries by one whose claim for property damage arising from the same tort was assigned to the insurance company paying property insurance and sued to judgment by such assignee.⁵⁰ The preferable view seems to be that where the partial assignment is thus necessary or, as when a trustee in bankruptcy seizes and has adjudicated the claim for property damage as an asset, by operation of law,⁵¹ the action for personal injuries should not be barred.⁵² If the Wisconsin court refuses to adopt this alleged preferable view, however, an inconsistency may arise with respect to the action for loss of a child's or wife's services, etc. For since in Wisconsin "the law" splits an injured child's cause of action, "assigning" part of it to his parent, if the child sues his claim to judgment, whether he recovers or not for whatever reasons, before his parent sues as "assignee," the latter's action should be barred as *res judicata*. But there is small likelihood that the Wisconsin court would ever press its view of the split cause of action as set forth in the *Callies* case to this extent. Again it would not be unreasonable to justify an apparent inconsistency in the use of a concept in two distinct situations by showing that it was used for different purposes each time.

Consideration of the ordinary case involving the split cause of action betrays one surprising feature of the rationale under discussion. In such a case the person in whom the whole cause of action originally vested could control it completely. He could sue on it as a whole, he could assign it in whole or in part and he could release the defendant or covenant not

⁴⁸ See a comment by Hinton, 21 Ill. L. Rev. 506 (1927).

⁴⁹ Cf. *Booth v. Frankenstein*, 209 Wis. 362, 245 N.W. 191 (1932).

⁵⁰ *Loc. cit. supra* note 47.

⁵¹ *Ibid.*, for source of example.

⁵² *Ibid.*

to sue him, thus giving the defendant immunity from having to pay damages. The wife or child under the rationale in question, however, could do none of these things; the whole cause of action supposed to arise in such person and then be partially assigned by law to the husband or parent is *never* under the control of and may *never* be affected as such by the wife or child. In the only other instances⁵³ of assignment of part of a cause of action "by law," the "assignor" had ample power to affect the entire cause of action at some time or other. Until the assignment is deemed to have taken place it is his completely; but in the rationale under discussion this is never true. It is hard to believe, therefore, that the notion of the complete cause of action arising in the wife or child followed by a partial assignment "by law" is anything but the sheerest of inventions prompted by the somewhat peculiar needs of a particular situation.

(3) Another situation suggests the weakness of the rationale in the *Callies* case. In a fairly recent Massachusetts case⁵⁴ it appeared that the plaintiff's son, a minor, had elected to take compensation under a statute for injuries received during employment. The plaintiff sued at common law for loss of her son's services and the issue before the court was whether or not her action was barred by the statute. The statute in question declares that unless an employee elects at the time of being hired to remain under the common law he shall be deemed to have waived his common-law rights and shall be subject to the compensation act, which of course, does not provide for the cause of action asserted by the plaintiff. Here, then, no cause of action at common law ever accrued to the son. Nevertheless the court allowed the plaintiff's action, saying in part:

"The parent's right of action was not in any just sense consequential upon that of the son. It was independent of his right, and was based upon her personal loss. It is true that the right of action in each case rested upon the same foundation, that is, the fact that he had been injured by the negligence of the defendant. Under the provisions of the Act, . . . he had waived his right of action; but he had not waived, by his own mere act he could not waive, his parent's independent right."⁵⁵

Such a conclusion could obviously not follow from the reasoning set forth in the *Callies* case.

(4) The most serious inconsistency of the Wisconsin court's rationale is perhaps the most obvious one. It is orthodox to grant recovery to a spouse or parent for the seduction⁵⁶ of, or for the debilitation induced by

⁵³ The bankruptcy situation referred to in Professor Hinton's comment, *supra* note 48.

⁵⁴ *King v. Viscoloid Co.*, 219 Mass. 420, 106 N.E. 988 (1914).

⁵⁵ *Ibid.*, 422.

⁵⁶ See Madden, *Domestic Relations* (1931), 431-6, 175-8.

providing drugs⁵⁷ to, the plaintiff's spouse or minor child, the nature of the recovery being for loss of services, loss of companionship and for medical expenses. And this is true even when the spouse or child cannot recover because of consent or participation.⁵⁸ Furthermore there is ample authority that a parent may recover for negligent injury to his minor child, in spite of the latter's contributory negligence, when the child is *employed* by the defendant without his parent's consent, or if general consent was given, when it was lacking with respect to particular dangerous work.⁵⁹ The gist of the tort in these child employment cases is the "intentional" invasion of the parent's rights by deliberately exposing the child employee to certain risks without his parent's consent. The child's action for personal injuries, however, rests on his employer's negligence to which the contributory negligence is a defense.

Since the plaintiff's actions in these cases are for injury to the identical interests involved in the type case under discussion and since the damages are equally similar, the plaintiff's causes of action or claims would seem to be as "derivative" here as in the general type case exemplified by the *Callies* and *Honey* cases. And if these particular causes of action are so derivative, why may the plaintiffs in these cases recover when the seduced female or the debilitated or injured spouse or child may not recover because of consent or participation or contributory negligence? Granting that conduct falling within the "intent" category of liability is regarded more harshly than that falling within the negligence category, still from the point of view of the "cause of action" and "derivative action" theories there is no apparent difference between them. But it is hardly credible that a court capable of conceiving the rationale of the *Callies* case could not rationalize such a difference!

(5) The Wisconsin court in the *Callies* case bases its decision in part on the universal rule permitting the plea in the type case under discussion but cites as the most persuasive analogy the rule in effect under their death damage statute.⁶⁰ To avoid the risk of misstating the court's use of this analogy by a synoptic paraphrase, the following quotation from its opinion is included.

⁵⁷ See collection of cases in 3 A.L.R. 1145, 1152 and particularly the principal case reported, *Tidd v. Skinner*, 225 N.Y. 422, 122 N.E. 247 (1919).

⁵⁸ *Cowden v. Wright*, 24 Wend. (N.Y. Sup. Ct.), 429, 430 (1840) where the court observed: "There [in seduction cases] the only remedy for the injury is the action by the parent; the daughter is without redress, however aggravated the seduction." See also *Dennis v. Clark*, 56 Mass. 347 (1848).

⁵⁹ *Marbury Lumber Co. v. Westbrook*, 121 Ala. 179, 25 So. 914 (1898); *T. & P. Ry. v. Brick*, 83 Tex. 526, 18 N.W. 947 (1892). See 42 A.L.R. at 724 (1926).

⁶⁰ *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 206 N.W. 198 (1925).

"Such is also the legislative policy of our state. Section 331.03 of the Statutes of 1925, in operation since 1857, provides for the survival of a cause of action in case of the death of a person caused by the wrongful act of another, and for a recovery by the personal representative *only in case where the party injured, had he lived, would have been entitled to recover*. This legislative declaration is an adoption of the common-law rule that in case of the splitting up of the cause of action each part stands upon the same basis and is subject to the same defenses. It can make no difference, so far as the contributory negligence of the minor is concerned, whether the whole cause of action, as in the case of death, is given the parent by statute, or in case of an injury not resulting in death only a part of the cause of action is given it by the common law. In both cases the parent is free from contributory negligence, and in both cases he has suffered damage at the hands of the defendant, and in both cases he is given a cause of action by law. In one case the whole cause of action passes from the minor to the parent by operation of law and in the other only a part of the cause of action so passes. We see no reason why both should not be subject to the same defenses."

"... Why should it [contributory negligence] not equally be a defense to the whole cause of action when the law splits it up? The law by giving the parent a part of the cause of action does not change the nature of the part transferred, but merely passes it from one to the other. When the [death damage] statute passes a whole cause of action from a deceased person to another, it passes it upon equitable principles in the condition in which the deceased left it, that is, subject to the same defenses. . . . Neither the whole nor a part of the cause of action can be purged from contributory negligence where that exists by merely a legal transfer or assignment."⁶¹

The statute referred to reads as follows: "Whenever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then . . . the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured; . . ."⁶²

The court intimates that the real reason why the action for death damages is subject to the plea of the decedent's contributory negligence is that the cause of action therefor is derived from the decedent by assignment "by law" and that the plaintiff assignee takes it as the decedent left it—tainted with contributory negligence. This conclusion does not bear analysis and is furthermore inconsistent with a decision⁶³ and opinion of the court handed down a few months after the *Callies* case appeared. In this subsequent case the deceased lived a week after the original injury, from the results of which she then died. The administrator, her husband, brought suit for pain and suffering during her life and for pecuniary loss

⁶¹ *Ibid.*, 381-2.

⁶² Wis. Stats. (1925), § 331.03, now Wis. Stats. (1931), § 331.03.

⁶³ *Koehler v. Waukesha Milk Co.*, 190 Wis. 52, 208 N.W. 901 (1926).

suffered by himself through her death. The jury found the husband negligent in caring for the deceased but the deceased free from contributory negligence. The supreme court held that the plaintiff might recover for pain and suffering but not for pecuniary loss to himself through the death, because of his own negligence. Regarding the claim for pain and suffering the court said:

"The right to maintain such cause of action vests in the representative of the estate of said deceased, and the proceeds when collected are treated as personal property assets of the estate . . . and to be distributed according to law. Such cause of action is a separate and distinct one from the cause of action purely statutory, given by Section 4255, now Section 331.03 [the death damage statute]. . . ."

"The two actions, however, are separate and distinct—the one for the pain and suffering, present and enforceable from the moment of injury; the one for the benefit of the survivors by reason of the death inchoate, so to speak, from the time of the injury to the consequent death, but ripening then and upon that event into the second and separate cause of action . . . the one is for the wrong to the injured person, the other to the beneficiaries or survivors for their pecuniary loss; one begins where the other ends. It is not a double recovery, but a recovery for a double wrong. The two separate causes may be joined in one complaint, as was done here."⁶⁴

It seems apparent from the court's language in this second case that the cause of action for death damages is not derived from the deceased, whereas the cause of action for pain and suffering was. It is true that if the deceased alone were contributorily negligent recovery would be denied on both causes of action but for entirely different reasons. The cause of action for pain and suffering arose independently of statute and survives the decedent's death by virtue of a general survivorship statute,⁶⁵ whereas the cause of action for death damages, non-existent at common law, was *created* by statute. It is apparent, therefore, that the cause of action for pain and suffering *is* tainted with the deceased's contributory negligence and that this result may be rationalized on simple principles of assignment. But if the cause of action for death damages was never in existence during the deceased's lifetime and does not, moreover, belong to the estate, how can it be said that it is "assigned by law" from the deceased to the statutory beneficiaries?

The true explanation of the plea of the deceased's contributory negligence to the action for death damages is found in the statute creating the cause of action.⁶⁶ If this is not in itself apparent, reference to the two Wisconsin cases under discussion should leave no doubt. In the *Koehler* case the court intimates that the statute is self-limiting in its extent and in the *Callies* case the court openly speaks of the "legislative policy" and

⁶⁴ *Ibid.*, p. 56.

⁶⁵ Wis. Stats. (1925), § 331.01.

⁶⁶ Wis. Stats. (1925), § 331.03.

"legislative declaration" which permits recovery of death damages "*only in case where the party injured, had he lived, would have been entitled to recover.*"⁶⁷ The court's basic error in this part of its analysis appears in its assertion that the death damage statute ". . . provides for the *survival* of a cause of action . . .," implying that it originally accrued to the deceased, whereas in truth the statute *creates* the cause of action only after it is impossible for one to have accrued to the deceased.

CONCLUSION

The preceding part of this article is a good example of fighting the devil with fire. Such an analysis is difficult to evolve and it seems like a waste of time because it is concerned almost entirely with juggling artificial concepts. It seldom achieves a satisfactory solution of the problem involved, but it occasionally proves to be the most efficient method of undermining an unsound argument put forward as a compelling solution.

The rationale of the *Callies* case is unsound chiefly because it rests on a false conception of "cause of action" and exacts too much from this mistaken notion. It will be recalled that the Wisconsin court in one part of its opinion declared that the parent is unable to recover because of the child's contributory negligence, ". . . for their rights spring out of the same transaction—the same cause of action."⁶⁸ This statement contains a clue to the court's mistaken conception. Most of the time the court undoubtedly has reference to a "claim" or "right of action" when it says "cause of action." Thus the part just quoted might well read ". . . for their [causes of action] spring out of the same transaction—the same cause of action." This leaves the phrase "cause of action" at the end of this quotation to be accounted for. Its use in this sense, to mean the fact situation giving rise to a claim or various claims for recovery, has some currency and reputable support. But such usage is concerned with problems of trial convenience and with the principles of *res judicata*, in which connections the concept has acquired a fairly conventional meaning. This meaning, however, has nothing to do with derivative actions and assignments, whether "by law" or otherwise. Its proper concern is with the expedition of litigation and with protecting a defendant from the vexation of more than one law suit arising out of the claims accruing to one person as a consequence of a single fact transaction, and even then its true function seems to be more descriptive than fundamental. It was well said by a leading authority in connection with a current legal problem where

⁶⁷ See quotation from this case *supra* p. 191.

⁶⁸ See quotation from this case *supra* p. 191.

several courts have attempted a solution by the application of some definition of a cause of action, or an analysis of the elements making up a cause of action: "In the main our law has not been evolved on any such basis."⁶⁹

It is probably a matter of indifference to academic lawyers how the type case under discussion is decided and if they had convictions, such would probably be a matter of indifference to others. In no way are they fitted to say that better results will follow denying the plea of the wife's or child's contributory negligence than granting it. It is clearly a matter for our only appropriate social agencies, the courts or the legislatures. But we may all criticize the way in which courts deduce their results from the doctrines and principles of the common law. For whatever one thinks of law simply as a body of doctrine and principles, he cannot deny that that is what we have. In such a system of jurisprudence principles and rules should be made to mean something and not be susceptible to sterilization by the use of artificial counter doctrine in any fact situations wherein their application would produce decisions which courts do not like. If there is some sound social policy against following the principle, the court should state it as the basis for its distinction. Otherwise, we had best recognize that a jurisprudence of concepts and principles is not worth while.

Consistency in administering a "common law of principles," however, seems important enough to justify considerable excitement in its defense. This article indicates that there may be and probably are just as good reasons and policies behind permitting the plea in the bailment cases as in the type case under discussion and in certain master-servant cases. But courts having agreed on the result in the bailment cases, consistency in the type case under discussion seems advisable on their part unless they satisfactorily distinguish it from the bailment situation. What is distasteful in the American cases on the problem involved is either the lack of reasoning or, what is worse, the absurdity of it. And the only compensation for the recent approval given to the modern rationale of these cases by the Massachusetts court⁷⁰ is the almost simultaneous decision by a Canadian court,⁷¹ apparently the first of its kind, denying the plea in a parent's action.

⁶⁹ Professor Hinton in 21 Ill. L. Rev. 506, 507 (1927).

⁷⁰ *Thibeault v. Poole*, 186 N.E. 632 (Mass. 1933).

⁷¹ *Wasney v. Jurazsky*, [1933] 1 D.L.R. 616.