not the case.[17] Since a more obvious danger would be more likely to be appreciated and remedied by one who knew of the facts which constituted it, the test of foreseeability as applied to cases of subsequent knowledge produces a queer result; the defendant is protected in cases of his more serious negligence and not in cases where others would be more likely to overlook the danger.

It might at first seem harsh to hold the manufacturer of an instrumentality responsible for all reasonably foreseeable consequences actually resulting from his original negligence in releasing a defective product from his control, in spite of subsequent precautions which were rendered ineffective through the carelessness of others, where the person injured is not himself at fault. It might seem absurd in a case where a manufacturer had gone to extreme lengths to remedy the defect, as for instance, by sending a high executive out to plead with the then owner, who still proved stubborn. Yet it must be remembered that the liability of the manufacturer is basically an enterprise liability; for instance, it must always be based on the negligence of an employee who is generally unknown and whose specific conduct is not in evidence.[18] Yet courts at times do not even mention the point and at times find no difficulty in applying res ipsa loquitur.[19] The fact is that it is practically impossible to manufacture articles without some defects creeping in and that this is a necessary incident of mass production. If dangers are to be released on consumers as a necessary result of our system of production it seems only fair that the enterprise should bear the losses resulting from them since it is best able to spread the cost among all consumers, rather than that the loss should be left on the innocent individual who had little reason to anticipate it. The requirement of foreseeability then remains, not so much for the reason that the enterprise might avoid the dangers in the first place, although that is still of some significance, but for the reason that by foreseeing inevitable harm to someone the enterprise is able to insure against it; and the concept of foreseeability becomes that of statistical foreseeability.[20]

Workmen's Compensation—Evidence—Settlement between Third-Party and Employee as Evidence of Negligence in Collateral Suit.—[Illinois].—An employee of the plaintiff construction company was killed while working on a railroad bridge repair project. The deceased's widow brought an action against

[17] "More and more the actual probability is becoming the controlling factor, and less and less attention is paid to what ought as distinguished from what is likely to be done." Bohlen, Liability of Manufacturers to Persons Other Than Their Immediate Vendees, 45 L.Q. Rev. 343, 365 (1929).

[18] The evidence of negligence offered in the instant case was merely that the hood catch was defective and that the defendant company had taken precautions to remedy it. Ford Motor Co. v. Wagoner, 192 S.W. 2d 840, 841 (Tenn., 1946).

[19] For the extent to which this doctrine is applied see Prosser, Torts § 43 (1941).

[20] For an excellent discussion of the relationship between enterprise liability and proximate cause, see Loss-Shifting and Quasi-Negligence: A New Interpretation of the Palsgraf Case, 8 Univ. Chi. L. Rev. 729 (1941).

the railroad, which was not under the Illinois Workmen's Compensation Act, claiming that her husband was an employee of the railroad and had been killed through the negligence of the railroad's agents and servants. To the railroad company's motion to dismiss was attached an affidavit by the plaintiff company stating that the decedent was an employee of the plaintiff and not of the railroad. Subsequently this action was dismissed, the widow receiving a $4,000 settlement from the railroad. Prior to the settlement the widow made an application for compensation from plaintiff under the Illinois Workmen's Compensation Act, and was awarded $4,895 by the Industrial Commission after the settlement had been made. The Commission refused to grant the plaintiff's demand for a $4,000 credit under Section 29[1] of the Act. The circuit court confirmed the decision of the Industrial Commission. On appeal to the Illinois Supreme Court, *held*, the plaintiff was not entitled to have the amount of the settlement credited against its payment to the widow, since the railroad company was not even remotely connected with the accident and hence was not legally liable and since the death was shown to have been caused by the negligence of an employee of the plaintiff. Judgment affirmed. *F. K. Ketler Co. v. Industrial Com'n.*[2]

When an accident has been caused under circumstances creating a legal liability in a third party not under the Act, the Illinois Workmen's Compensation Act, like that in many states, allows an innocent employer who has paid or is liable to pay compensation to the injured employee or his representative, to have his own liability reduced by the amount the injured employee has recovered from the third party, either by way of judgment or settlement. In the event the employee does not pursue his available remedy against the third party, the innocent employer can proceed against the third party and is permitted to indemnify himself out of any moneys recovered for any expense incurred and compensation which has been or will be paid to the injured employee, any excess to be paid over to the employee.[3]

Thus there are two conditions which must be met before the credit feature of the Act is operative; the employer and his employees must be free from negligence and there must be legal liability in a third person not under the Act.[4] The result in the instant case can be supported on the failure of the first condition. The court's treatment of the settlement, however, indicates that, even if the employer had not been negligent, a credit would not have been allowed. How the existence of legal liability in the third party is to be established after a settlement has been made is the troublesome problem presented by this decision.

[1] Ill. Rev. Stat. (1945) c. 48, § 166.

[2] 65 N.E. 2d 359 (Ill., 1946).

[3] Ill. Rev. Stat. (1945) c. 48, § 166.

[4] If the third party is also under the Act, the employee has only one remedy and cannot maintain an action against the third party. The employer, however, can seek indemnification from the third party. Ill. Rev. Stat. (1945) c. 48, § 166.

The problem, never considered directly by the Illinois courts, has typically arisen in two ways in other jurisdictions. (1) The employer, not bound by a settlement to which he has not consented, may bring suit against the third party after paying compensation to his employee; (2) the employer may demand a credit or set-off when the injured employee seeks compensation after making a settlement with the third party.[5]

The majority view in the former situation holds that the employer is required to establish the third party's liability and cannot use the fact of the third party's settlement as either a presumption or evidence of guilt.[6] The rationale is that amicable settlements should be encouraged and should not operate to the disadvantage of the third party. The third party may nevertheless be required to pay damages to the employer despite the settlement if the employer can sustain the burden.[7] It is the third party's failure to obtain the employer's consent to the settlement which brings about this result.[8]

In a few jurisdictions the third party who makes an unauthorized settlement will be liable to the employer up to the amount of the settlement solely upon the showing by the employer that such settlement has been made.[9] If, however, the employer desires to recover an additional sum, which will be the case when the settlement is less than the compensation liability, he must then prove the third party's legal liability.[10] The rationale of this position is that any settlement is for the benefit of the employer who is entitled to indemnification to the extent of his own liability for compensation; both the employee who has received the settlement and the third party who made the settlement must answer to the employer for that amount. This minority position is patently inconsistent. If the employer seeks to recover more than the amount of the settlement, he must prove a legal liability which has already been presumed in order

[5] If the employee made a settlement after receiving compensation, the employer can proceed against the employee or his estate for reimbursement. This was permitted in an Illinois case where the employer's non-negligence and the third party's negligence were tacitly presumed. In re Estate of Shields, 320 Ill. App. 522, 51 N.E. 2d 816 (1943).

[6] Whitney v. Louisville & N.R. Co., 296 Ky. 381, 177 S.W. 2d 139 (1944); U.S. Fidelity & Guaranty Co. v. New York, N.H. & H.R. Co., 101 Conn. 200, 125 Atl. 875 (1924); Broderick v. Great Lakes Casualty Co., 152 Pa. Super. Ct. 449, 33 A. 2d 653 (1943); Southern Surety Co. of New York v. Chicago, R.I. & P.R. Co., 215 Iowa 525, 245 N.W. 864 (1932); Lloyd Adams, Inc. v. Liberty Mutual Ins. Co., 190 Ga. 633, 10 S.E. 2d 46 (1940).

[7] On the question of the amount of damages which can be recovered see 19 A.L.R. 790 (1922).

[8] Under the typical statute, a settlement does not bind the employer unless he has consented to it. Ill. Rev. Stat. (1945) c. 48, § 166.

[9] Traders & Gen. Ins. Co. v. West Texas Utilities Co., 140 Tex. 57, 165 S.W. 2d 713 (1942); Texas Employers' Ins. Ass'n v. Fort Worth & D.C. R. Co., 181 S.W. 2d 828 (Tex. Civ. App., 1944); Western Md. R. Co. v. Employer's Liability Assur. Corp., 163 Md. 97, 161 Atl. 5 (1932).

[10] Texas Employers' Ins. Ass'n v. Fort Worth & D.C. R. Co., 181 S.W. 2d 828 (Tex. Civ. App., 1944); Western Md. R. Co. v. Employers' Liability Assur. Corp., 163 Md. 97, 161 Atl. 5 (1932).

that he might obtain at least the amount of the settlement. The absurd result of this position was recognized by a Texas court in a recent decision, which held, nevertheless, that recovery up to the amount of the settlement was statutory, despite the fact that the Texas act also requires legal liability in the third party.[11] However, if this result is held to be required by statute, there is some question whether such a statute is constitutional. The Georgia Workmen's Compensation Act, which had the usual requirement that there be legal liability in the third party before a credit would be allowed, was amended so that the employer could recover by merely showing that a payment had been made. This amendment was held a deprivation of the third party's property without due process of law.[12]

In the second situation in which the problem of the effect of a settlement arises—the employer's claim for a credit in the employee's action for compensation after a settlement—two views can be found in the decisions. One view, consistent with the majority view in the former situation, holds that the employer must prove the third party's liability before he will be allowed the credit, and that the settlement is not evidence of liability.[13] The other position holds that the employee is precluded from denying the liability of the third party from whom he has accepted a settlement, on the theory that the employee's release to the third party presumes liability.[14] This latter rationale is clearly inconsistent with the majority position in the action between the employer and the third party, yet two states which hold that in that situation the settlement will not even be evidence of liability here hold that the settlement is conclusive evidence of liability.[15] The encouragement of amicable settlements which motivated the courts when the action was between the employer and the third party requires the same result when the action is between the employer and the employee. An employee might make a smaller settlement to avoid what might be a longer but more compensatory litigation had he pursued his action to judgment,

[11] Texas Employers' Ins. Ass'n v. Fort Worth & D.C. R. Co., 181 S.W. 2d 828, 830 (Tex. Civ. App., 1944). "We therefore have a case wherein the insurance carrier is entitled to no cake at all by reason of any alleged negligent act on the part of the railway company, yet is being presented with a portion of the cake because the railway company saw fit to buy its peace from the employee." Ibid., at 831.

[12] Lloyd Adams, Inc. v. Liberty Mutual Ins. Co., 190 Ga. 633, 10 S.E. 2d 46 (1940). This result was noted with approval in Broderick v. Great Lakes Casualty Co., 152 Pa. Super. Ct. 449, 33 A. 2d 653 (1943).

[13] Renner v. Model Laundry, Cleaning & Dyeing Co., 191 Iowa 1288, 184 N.W. 611 (1921); Disbrow v. Deering Implement Co., 233 Iowa 380, 9 N.W. 2d 378 (1943).

[14] Rosenbaum v. Hartford News Co., 92 Conn. 398, 103 Atl. 120 (1918); Whitney Transfer Co. v. McFarland, 283 Ky. 200, 138 S.W. 2d 972 (1940); Tews v. Hanks Coal Co., 267 Mich. 466, 255 N.W. 227 (1934).

[15] Connecticut and Kentucky. Cf. Rosenbaum v. Hartford News Co., 92 Conn. 398, 103 Atl. 120 (1918), and U.S. Fidelity & Guaranty Co. v. New York, N.H. & H.R. Co., 101 Conn. 200, 125 Atl. 875 (1924); Whitney Transfer Co. v. McFarland, 283 Ky. 200, 138 S.W. 2d 972 (1940), and Whitney v. Louisville & N.R. Co., 296 Ky. 381, 177 S.W. 2d 139 (1944).

for the same reasons that a third party might make a relatively costly settlement to avoid a similarly lengthy but less expensive litigation had he resisted the employee's claim.

There is, indeed, a valid reason for treating the effect of the settlement differently depending on whether the employer seeks a credit from his employee or recovery from a third party, but that reason is not given by any of the courts. The successful maintenance of a suit by the employer against the third party would require double payment by the third party, and, although this will and should be allowed when the third party has been negligent, it would be unreasonable to hold the fact of one payment as evidence in establishing the necessity of another payment. Although the third party has been careless in not obtaining the employer's consent to the settlement, the third party should not bear a burden beyond being subject to an action by the employer. When the employee resists the employer's demand for a credit, however, the employee is seeking something like double recovery. It is not unreasonable to require the employee to prove that the settlement is really a donation or an act of charity before he shall be permitted to have both the settlement and the compensation. It is unfair, however, to deny to the employee the opportunity of proof, as has been done by the courts which hold that the acceptance of a settlement by the employee assumes the third party's liability. Treating the settlement as a rebuttable presumption of liability in the third party[16] when the employer seeks a credit in the employee's action for compensation is desirable for many reasons. It does not distort the plain language of the statute; it recognizes the desirability in encouraging settlements; and it promotes the policy which is opposed to double recovery[17] by shifting a difficult burden of proof from the employer—which the instant case implies he must bear[18]—to the employee. It permits the employee to gain the advantage of a donation, but short of that he must indemnify his employer from whom he is claiming or has claimed compensation.

[16] This approach has been suggested in an analogous situation in a recent Virginia case. Stone v. Helme, 37 S.E. 2d 70 (Va., 1946). Virginia, like a number of states, gives the employee an election when there is liability in the third party. He can either get compensation or proceed against the third party. The plaintiff contended that the third party was not liable, and hence the plaintiff did not give up his compensation remedy by accepting a settlement from a nonnegligent third party. The settlement was held to be prima facie evidence of the third party's negligence, and it was held that the employee would have to sustain the burden of proving that the third party from whom he had received a settlement was nonnegligent. But cf. Renner v. Model Laundry, Cleaning & Dyeing Co., 191 Iowa 1288, 184 N.W. 611 (1921), where this approach was explicitly rejected.

[17] The court in the instant case indicated that this was one of the purposes of Sec. 29 of the Illinois Workmen's Compensation Act, F. K. Ketler v. Industrial Com'n, 65 N.E. 2d 359, 362 (Ill., 1946).

[18] It is not clear from the report of the instant case how the issue of the third party's nonnegligence was established. At the hearing before the arbitrator the employer introduced a copy of the widow's complaint in her action against the railroad and a letter from her attorney to the employer notifying him that she was claiming compensation and was also proceeding against the railroad, but would drop the compensation claim if the railroad suit was successful.