

## REPLICATION

THE issue between Mr. Gregory and me is after all a surprisingly narrow one. Both of us believe that a comprehensive scheme of social insurance for accidents is a better ultimate solution of the problem of civil liability than the principle that recovery must be based on fault. We divide only on the question of what to do in the meanwhile. Mr. Gregory would perfect the fault principle and refine its implications even though that might take us farther away from our ultimate goal, while I should evaluate a rule of law, existing or proposed, partly in the light of its tendency to take us nearer to or farther from our goal, and I should think this consideration weightier than questions of fault. That leads into an inquiry which seems sordid, perhaps even unethical, to Mr. Gregory; but I do not view it in that light. I must look behind the trappings of verbiage and rationalization to see how the rule is really working out, how it affects litigants singly and in the mass, where its incidence truly is.<sup>1</sup> And then, perhaps, I must seek to justify a rule in terms of premises that do not find open acceptance in our jurisprudence, so that, if my position prevails, a moderately good rule will be perpetuated by the courts for *expressed* reasons which are demonstrably bad.

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<sup>1</sup> The strategy used in the cases considered in the former article was described without praise or condemnation. It is only fair to say, however, that there was certainly no indication of unethical conduct in any of them. A clear distinction exists between procuring a witness to testify in a certain manner, on the one hand, and on the other merely avoiding a course of conduct which will unnecessarily antagonize him.

If one is to gauge wisely the implications and practical effects of what he is doing, he can afford to ignore neither the actual behavior of people in the situation he is treating, nor the consequence of that behavior. And this, I think, is just as true in the field of law reform as of professional practice. A different attitude—an abhorrence to the jockeying which takes place in lawsuits—may perhaps be understood. But even if it is accepted it scarcely furnishes a reason for taking the opportunities to jockey away from one side and giving them to the other.

Our difference in attitude has many a precedent. Both of us would welcome a wholesale change in the fault principle. Mr. Gregory must have it all or none, and prefers the more complete negation of it to any half-way measures. I, too, would like to have it all, but find no quarrel with a process which very great men have thought peculiarly characteristic of legal growth. “. . . As the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content; and at last a new form, from the grounds to which they have been transplanted.”<sup>2</sup>

I do not question Mr. Gregory's account of the origins of the rule forbidding contribution. Surely, as he says, there can be no claim that the considerations I urge had anything at all to do with its birth or early growth. But how does that matter? The rule of vicarious liability may owe its origin to the law of noxal surrender and the slaveowner's privilege to redeem an offending slave by making good the loss.<sup>3</sup> Would Mr. Gregory have us shape the rule today with a view to carrying out more perfectly this initial function? Should we decide whether to keep or discard it on any such basis as that? Presumably not; and yet the parallel is tolerably close.

Besides this principal difference between us, several matters in Mr. Gregory's response deserve brief mention.

“Social irresponsibility” may exist at present, but contribution would not check it. The rule as it is affords no protection to the impecunious driver when his conduct alone is the cause of an injury, or when the other possible defendants are not insured. If these risks give him no sense of responsibility, his social conscience will hardly be quickened by the slight additional risk that contribution would entail for him.

A memorandum opposing contribution, prepared by the Association of Casualty and Surety Executives, substantiates my view

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<sup>2</sup> HOLMES, *THE COMMON LAW* (1881) 36. See also *id.* at 5.

<sup>3</sup> HOLMES, *THE COMMON LAW* (1881) 9 *et seq.* Any competing explanation for the germs of vicarious liability will serve my argument just as well.

that improper collusion is no serious problem under present law.<sup>4</sup> The pertinent parts of this memorandum — which is marked by insight and breadth of view — are set forth below.<sup>5</sup>

Mr. Gregory has, I think, revealed a flaw in my treatment of third party practice. I failed to draw enough distinctions. Where one defendant has been allowed to bring another into the suit, courts have taken at least three different attitudes toward the relationship between the plaintiff and the new party: the new defendant may be dropped if the plaintiff chooses not to seek a judgment against him; <sup>6</sup> the plaintiff may be compelled to take a judgment against the new party if the jury finds the latter liable to

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<sup>4</sup> ASSOCIATION OF CASUALTY AND SURETY EXECUTIVES, MEMORANDUM IN OPPOSITION TO PROPOSED UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939). The views heretofore expressed grew out of my own experience in tort practice which was all on the side of a corporate defendant. My attention was first called to this document by Mr. Gregory's response to my article. See *supra* p. 1177, n.12.

<sup>5</sup> "As to the argument that even though a plaintiff may make all alleged tortfeasors parties defendant he may settle with one or more for nominal sums leaving the remaining defendant or defendants liable for the greater part of the damages with no remedy against those released, . . . those having practical experience in the handling of negligence cases know that there is no such problem of collusive settlements. Rarely will a plaintiff prior to his consummating a settlement with all parties release one or more financially responsible defendants for a nominal sum and take the chance of proceeding to trial against the remaining defendant. Here again he runs the risk of having the jury exonerate the defendant he sought to hold for the greater part of the damages. There are, of course, instances where one of the parties defendant is so clearly not liable under the law or the facts that a plaintiff will be willing to release him for a nominal sum and such party is willing to pay it to 'buy his peace.' This frequently happens and we can see nothing wrong in it. Certainly there is nothing collusive about it. Where a plaintiff might settle for a nominal sum against a financially irresponsible defendant, the responsible defendant is no worse off than he would be had said party not been made a defendant in the first instance. In neither case would his right of contribution be of any substantial value.

. . . If deals are going to be made to get testimony they will be made just as easily under this proposed bill as they are under existing law. Indeed, we believe the incentive under this bill to make a deal with an irresponsible defendant would be just as strong because such a defendant could not in any way get out of the case, and with the possibility of his having a judgment rendered against him for all or part of the damages he would be more susceptible than ever to help the plaintiff with his testimony and try to throw the entire blame on the other defendant or defendants." ASSOCIATION OF CASUALTY AND SURETY EXECUTIVES, MEMORANDUM IN OPPOSITION TO PROPOSED UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939) 2.

<sup>6</sup> *Bargeon v. Seashore Transportation Co.*, 196 N. C. 776, 147 S. E. 299 (1929); *cf. Vivian v. Seashore Transportation Co.*, 196 N. C. 774, 147 S. E. 298 (1929).

him;<sup>7</sup> or the plaintiff may be given a choice whether to seek judgment against the new defendant, but the latter will be retained in the suit in any event so that the original defendant's possible contribution claim against him will be safeguarded. Although Mr. Gregory's answer blurs the distinction between the first and third patterns, he has convinced me that I failed to note one consequence of the distinction between the second and the third. Under the third solution the plaintiff cannot be forced to take the chance of getting an uncollectible judgment if he wishes to avoid that chance by refusing to seek relief against the impecunious new defendant. This, however, changes the picture very little. It simply shows that if care is used, effective procedure for contribution may be had at the price of one less disadvantage. But a rule which thwarts existing trends in our law toward wide distribution of losses is dearly bought though it costs nothing in the way of collateral harm. And the proposed rule may not be exonerated even to this extent. Surely the third procedure noted above is considerably less favorable to plaintiffs than the first. So there still remains the dilemma between procedural inefficiency and disadvantage to accident victims even though it is a little less acute than I had thought.

Mr. Gregory has made an unfortunate quotation from the former article, viz.: ". . . the imposition of liability without fault puts a burden on affirmative activity which works against the general good." The words he has quoted correctly, but I was merely voicing an objection to my major premise which seemed to me invalid.

The insurance companies, it is true, apparently oppose contribu-

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<sup>7</sup> This attitude has been more common than Mr. Gregory suggests. It was the one adopted by the New York courts before the *Fox* case was decided by the Court of Appeals. *Schenck v. Bradshaw*, 233 App. Div. 171, 251 N. Y. Supp. 316 (3d Dep't 1931); *Davis v. Hauk & Schmidt, Inc.*, 252 App. Div. 556, 250 N. Y. Supp. 537 (1st Dep't 1931); *Fox v. Western Motor Lines, Inc.*, 232 App. Div. 308, 249 N. Y. Supp. 623 (4th Dep't 1931). In the two first cited cases the new defendant was cited in over the plaintiff's objection. The *Fox* case was reversed in 257 N. Y. 305, 178 N. E. 289 (1931). As to Pennsylvania, while "The Act of 1929 did not permit a defendant to bring in a third party alleged to be solely liable to the plaintiff . . . this defect was cured by amendment in 1931." 1 MOORE, FEDERAL PRACTICE (1938) 762. And, "prior to 1939 . . . the jury could find in favor of the plaintiff directly against the added defendant jointly or severally even though the plaintiff never had made any claim against him." Letter of Robert M. Bernstein, Esq., of Philadelphia [Mr. Bernstein represented the plaintiff in *Majewski v. Lempka*, 321 Pa. 369, 183 Atl. 777 (1936)]. But what Mr. Gregory says of Pennsylvania practice has again been true since 1939.

tion, but their reasons for doing so do not run counter to any contention made in the former article — indeed, they furnish strong support for much of it. In its memorandum<sup>8</sup> the Association of Casualty and Surety Executives took the position that the tentative Uniform Contribution among Tortfeasors Act would afford an empty remedy and would restrain, hinder, and delay the settlement of cases.<sup>9</sup> The former would be true, it was thought, because contribution claims would exist chiefly against impecunious wrongdoers whom the plaintiff did not bother to sue, so that insurance companies could expect to get very little from them.<sup>10</sup> Fears that compromise would be impeded were based on considerations similar to those I have urged.<sup>11</sup>

If my alignment with the insurance companies amuses Mr. Gregory, it also puts him in a strange predicament. His proposal will take society one step further away from comprehensive insurance; it cannot, surely, help plaintiffs; it can only hurt impecunious defendants. If, in addition, responsible defendants see more harm than good in contribution,<sup>12</sup> its advocates are made to look

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<sup>8</sup> See note 5 *supra*.

<sup>9</sup> Increased litigation was also feared. There seems to be no reason for declining to take these reasons at their face value. It is hard to conceive of ulterior motives. And progressive insurance companies are anxious to dispose of claims by reasonable compromise wherever possible.

<sup>10</sup> This is, incidentally, strong support for the prophecy that contribution will have no appreciable effect on insurance rates.

<sup>11</sup> This language seems pertinent: "In the consideration of similar bills before the New York Legislature for the past several years, it was practically conceded that such legislation would stand in the way of a separate settlement by one person, for a moderate consideration in a case where others were involved, and indeed this was even urged as an argument in favor of it. This seems strange since it would appear to be a fair proposition that any person threatened with the expense and uncertainty of a law suit ought to have the right to settle at a price which it seems to him to be in his best interest to pay." ASSOCIATION OF CASUALTY AND SURETY EXECUTIVES, MEMORANDUM IN OPPOSITION TO PROPOSED UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT (1939) 3.

<sup>12</sup> The Association of Casualty and Surety Executives leave no doubt on this point: "In conclusion we would like to make this pertinent observation — this legislation which is presumably for the benefit of responsible defendants and insurance companies is opposed so far as we know by all such interests. Certainly it cannot benefit injured persons. At none of the hearings held on the bill before the Legislature in New York State over the past several years has any one representing plaintiffs, insurance companies or corporations who frequently are defendants in negligence actions, ever appeared in favor of the bill. As far as we know, everyone who has a real and practical interest in the handling of negligence suits is op-

very much like men who propose to sacrifice good sense to a syllogism — and an outworn syllogism at that. Was Don Quixote ever more quixotic?

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posed to this legislation. To foster it over the opposition of those it is supposed to help and who in their judgment and experience believe it to be unwise merely to relieve a theoretical hardship would in our opinion be most unfortunate." *Id.* at 4.