CONTRIBUTORY NEGLIGENCE IN ROAD ACCIDENTS

From time immemorial roads have been made to enable pedestrian and vehicular traffic. Also from time immemorial, it is well known that collisions and accidents resulting in loss of life, personal injuries and damage to property occur on the highways.

In case of accident, problems of a legal nature arise which in many instances find their way before a court of law. It is therefore important to examine how the various questions are determined by the courts.

TRESPASS OR NEGLIGENCE ?

Two courses of action have traditionally been open to the plaintiff. He had to sue either in trespass or in negligence. Each of these actions offered certain advantages and also had some drawbacks.

The action in trespass is the older of the two. It is therefore plain that originally in all cases of unintentional injury or damage caused to the person or chattels in running-down accidents, an action in trespass was always brought[1] The gist of the action is the allegation of the plaintiff that the defendant has with lawful excuse caused direct injury to his person or property. The burden of proof surprisingly light. There is no need to prove any damage or any duty not to ca injury because the infringement itself of the personal or proprietary rights of t plaintiff will ground an action. All that the plaintiff has to show is the injury an it is then for the defendant to justify or excuse his conduct, otherwise judgment for the plaintiff will inevitably follow.

In *Leame* v. *Bray* [2] the defendant inadvertently drove his carriage against that of the plaintiff. The court held that the proper remedy was trespass because the

1. The modern action in trespass is directly related to the writ of trespass which became commonly used as from about the middle of the thirteenth century. It covered injuries to land, to goods and to the person. These actions are now distinct. While trespass to land consists in an unjustifiable interference with the possession of land, and trespass to goods in a similar interference with the possession of chattels, trespass to the person crystallized in the torts of assault, battery and false imprisonment in addition to a few torts which have no special names and which are covered by the overall term of trespass to the person. The action in trespass brought in cases of road accidents was thus that of trespass to the person and / or trespass to goods.
2. (1803) 3 East. 593; 102 E.R. 724.

injury was immediate from the act done. Lord Ellenborough C.J. said in the course of his decision :

> If the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass vi et armis by all the cases both ancient and modern. [3]

In *Hopper* v. *Reeve* [4] the defendant drove a gig against a carriage causing injury to the plaintiff's wife who was travelling therein. The court held that an action in trespass was properly brought.

Again in *Hall* v. *Fearnley* [5] the plaintiff, a pedestrian, was thrown down and injured by the defendant's cart. The plaintiff succeeded in trespass. The court held that the defendant would not be allowed to show that he was not negligent, although had he been able to prove inevitable accident that would have afforded a defence. [6]

The application of an action in negligence [7] to running-down cases is of relatively recent origin. Since the late eighteenth and the beginning of the nineteenth century, counsel have repeatedly attempted to sue in case in preference to trespass but it was only after many years of indecision and anxiety that the courts upheld their contention. In *Williams* v. *Holland*, [8] which was preceded by *Moreton* v. *Hardern*, [9] Tindal C.J. held that where an injury is occasioned by the carelessness and negligence of the defendant, the plaintiff may make the negligence of the defendant

3. Ibid., 599; 726.
4. (1817) 7 Taunt. 698; 129 E.R. 278.
5. (1842) 3 Q.B. 919; 114 E.R. 761.
6. A practically identical view was taken in *M'Laughlin* v. *Pryor* (1842) 4 Man. & G.48; 134 E.R. 21.
7. Negligence can be defined as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do", Alderson B. in *Blyth* v. *Birmingham Waterworks Co.* (1856) 11 Ex. 781, 784; 156 E.R. 1047, 1049. If therefore a person fails to act in accordance with this standard, he is guilty of negligence. Thus many torts may be committed negligently, e.g. trespass or nuisance. Yet in order to be actionable as a specific independent tort, the plaintiff must prove the existence of a legal duty on the part of the defendant owed to him to exercise care, and actual damage suffered by him as a result of some act or omission on the part of the defendant.
8. (1833) 10 Bing. 112; 131 E.R. 848.
9. (1825) 4 B. & C. 223; 107 E.R. 1042.

he ground of his action and bring an action on the case notwithstanding the act is mmediate so long as it is not a wilful act. [10]

Since then both avenues lay open to the plaintiff and he was free to take the one of his choice. As wilfulness was not to be easily suspected in collision cases, an action in negligence was the safe course to take.

In negligence the burden of proof rests heavily on the plaintiff. He must satisfy the court as to the existence of a legal duty to take care, breach of that duty by the defendant, and a consequential damage to himself. In view of the much heavier burden of proof it is easy to guess that there were compelling reasons which made the plaintiff undertake this burden. The reason for suing in negligence was to avoid a serious procedural drawback of the action in trespass, namely, the proof that the injury suffered by the plaintiff was direct, for if it turned out to be consequential, an action in trespass would not lie. Also, if the injury was inflicted due to negligence of the defendant's servant who was in charge of the vehicle, it was impossible to show that it was the immediate or direct act of the defendant. [11] Furthermore, where the maxim res ipsa loquitur [12] applied in an action for negligence, the plaintiff would have gained nothing by suing in trespass as to sue in negligence afforded an even advantage. In addition, an action framed in negligence favoured the plaintiff with respect to costs. As Lord Kenyon C.J. has said in *Savignac* v. *Roome* : [13]

> If in an action of trespass the plaintiff recover less than 40s., he is entitled to no more costs than damages; whereas a verdict with nominal damages only in an action on the case carries all the costs.

On the whole, the advantages of an action in negligence were too great to be

10. The facts of the case were that the plaintiff's son and daughter were passengers in the plaintiff's cart which at the time of the accident was standing at the side of a public road with the near wheel on the footpath when the defendant so carelessly drove his gig and horse that it ran and struck against the plaintiff's cart causing injuries to the passengers and damage to the cart.

11. *Quarman* v. *Burnett* (1840) 6 M. & W. 499; 151 E.R. 509.

12. The maxim is well explained by the Court of Exchequer Chamber in *Scott* v. *London and St. Katherine Docks Co.* (1865) 3 H. & C. 596, 601; 159 E.R. 665, 667: "[W]here the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

13. (1794) 6 T.R. 125, 129 - 130; 101 E.R. 470, 472 - 473.

neglected and the previously frequent course of bringing an action in trespass in road accident cases fell into disuse. As from the second half of the nineteenth century the position shifted squarely in favour of negligence and the courts themselves would insist that the cause of action be so framed. The plaintiff had to sue in negligence but should he nonetheless rely on trespass he had to prove that the trespass was done negligently. [14]

The justification of this rule rests on the broad ground of practical feasibility, convenience and common sense. It has two branches.

One deals with cattle which being driven upon the highway strays on to neighbouring land. It is plain that if the adjoining land is not fenced, it is practically impossible to prevent the cattle from straying off the road. The rule therefore established itself that if cattle which is lawfully upon the highway strays on to neighbouring land, there is no liability for trespass so long as there is no negligence on the part of the person in charge.. [15]

The other branch is concerned with highway traffic in general and is founded on the view of Lord Blackburn [16] that traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill occasioning the accident. [17]

14. McCardie J. in *Gayler & Pope, Ltd.* v. *Davies & Son, Ltd.* [1924] 2 K.B. 75, 82 - 84. See also *Fowler* v. *Lanning* [1959] 1 Q.B. 426.

15. The law is expounded in *Goodwin* v. *Cheveley* (1859) 28 L.J. Ex. 298, 300 - 301, (sub. nom. *Goodwyn* v. *Cheveley* 4 H. & N. 631; 157 E.R. 989) and in *Tillet* v. *Ward* (1882) 10 Q.B.D. 17. In the first case Bramwell B. said: "The law is this: (a person) has a right to take his cattle along the highway; and certainly if they do go along the highway, and there are no fences in the adjoining land, it is certain that they will stray; therefore the plaintiff cannot prevent it; and as that is a necessary consequence of the enjoyment of the right of using the highway, why it is a necessary evil, I suppose, which those whose lands border on the highway must sustain."

16. *Fletcher* v. *Rylands* (1866) L.R. 1 Ex. 265, 286 - 287.

17. Lord Blackburn further developed the doctrine of assumption of risk in *River Wear Commissioners* v. *Adamson* (1877) L.R. 2 App. Cas. 743, 767, where his Lordship

Close to the end of the nineteenth century the issue was further complicated y the appearance of motor vehicles. Soon the courts of law were called upon to ıdicate how claims arising from accidents involving such vehicles were to be treated. .t first, attempts by counsel were made to equate motor vehicles to wild beasts [18] ut the judicial opinion on this aspect of the law was not clear cut. [19] A few years ıter, however, hand in hand with the much improved technical qualities of motor ehicles the conclusion was reached that, if properly managed, they were not more angerous to mankind than mild cattle. [20] Consequently, in order to succeed in a

17. (cont.) said: "Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railing or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good. And he does not establish this against a person merely by showing that he is the owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner." Two years earlier Bramwell B. expressed the same opinion in *Holmes* v. *Mather* (1875) L.R. 10 Ex. 261, 267 when his Lordship said: "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid."

18. This contention received some support in *Isaac Walton & Co.* v. *Vanguard Motorbus Co. Ltd.* (1908) 25 T.L.R. 13.

The law makes an important distinction between animals mild by nature *(mansuetae naturae)*, and naturally mischievous animals *(ferae naturae)*. There is principally no liability for injuries and damage done by animals *mansuetae naturae*, like cows and horses, unless they have displayed some vice or ferocity which is contrary to the nature of the species and there is actual or imputed knowledge of it. Animals *ferae naturae*, like tigers, lions, bears, etc., on the other hand, are presumed to be ferocious by nature and their owners are liable for any mischief they may cause if out of control. Consequently, to class motor vehicles in the latter category would have made their owners strictly liable for injuries and damage caused by their operation.

19. *Wing* v. *London General Omnibus Co.* [1909] 2 K.B. 652.

20. In *Phillips* v. *Britannia Hygenic Laundry Co. Ltd.* [1923] 1 K.B. 539, 552 - 553, McCardie J. said: "It seems clear that a person who drives or rides a horse upon a highway cannot be deemed to undertake in favour of strangers that the horse is free from vice. There is no quasi warranty of the fitness of a horse in favour of the public. Knowledge of defect in the horse, or some negligent act or omission, must be proved .... In my view it is reasonably clear on principle that just as no absolute duty at common law exists as against owners of horses, so no absolute duty exists with

running-down claim, the plaintiff had to prove negligence irrespective of whether the vehicle was horse drawn or motor propelled. [21] This view received strong support in the decision of the Judicial Committee of the Privy Council in *Winnipeg Electric Co* v. *Geel*, [22] and the principle enunciated by Lord Blackburn that negligence must be proved in a running-down case is now firmly anchored in law.

It is conceivable, of course, that a road accident may occur without anybody being negligent, [23] yet in the vast majority of cases accidents take place as a result of lack of proper care. As to the parties involved, it happens from time to time that there is only one party to blame, e.g. a car hits a tree, but as a general rule at least two parties are actively involved in road accidents. If so, only one may be responsible for the happening of the accident but more usually both parties share in the production of the disastrous result.

If one party is entirely and exclusively to blame for the accident, there is no

20. (cont.) respect to motor cars.... I think that the general existing practice at Nisi Prius, o requiring some prima facie evidence of misconduct or negligence against a defendant is correct, is sound in principle, and consistent with the 'main body of authority.'

21. *Phillips* v. *Britannia Hygenic Laundry Co. Ltd ; Gayler and Pope, Ltd.* v. *B. Davies and Son, Ltd.* [1924] 2 K.B. 75.

22. [1932] A.C. 690, 695, where the Judicial Committee took the view that a plaintif claiming damages for personal injuries in a running-down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss and damage.

23. In *Holmes* v. *Mather* (1875) L.R.10 Ex. 261, the defendant's horses, while being driven by the defendant's servant in a public highway, ran away, and became so un manageable that the driver was unable to stop them, but could, to some extent guide them. While unsuccessfully trying to turn a corner safely, the driver guided them so that, without his intending it, they knocked down and injured the plaintiff, who was in the highway. The jury found that there was no negligence in any one. Bramwell B in the course of his decision said (at p. 267): "The driver is absolutely free from all blame in the matter; not only does he not do anything wrong, but he endeavours to do what is best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away .... Now, i the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course o driving, was thrown upon her dress or got into her eye and so injured it. It seems manifest that, under such circumstances, she could not maintain an action."

See also *The Virgil* (1843) 2 W. Rob. 201; 166 E.R. 730, and *Manzoni* v. *Douglas* (1880) 6 Q.B.D. 145.

problem. If he is injured the one not in fault recovers. [24] Unfortunately, only very few cases are that simple. In most cases both parties materially contributed to the result. In this event a case of contributory negligence takes shape. The basic feature of contributory negligence is that both parties were negligent and that the negligence of each of them was a contributory cause of the accident.

Contributory negligence is invariably used as a defence. To succeed, the defendant has to prove [25] lack of reasonable care on the part of the plaintiff for his own safety or that of his property. [26] The matter thus reflects on the duty imposed on road users by law. The test is that of reasonable care. [27] As Lord Atkin put it in *Hambrook* v. *Stokes Brothers* [28] the duty of the driver of a motor-car on a highway is not a duty to refrain from inflicting a particular kind of injury upon

24. There are two eventualities : 1. where A without fault of his own is injured (or suffers damage) by the negligence of B, B is liable to A; and 2. where A by his own fault is injured (or suffers damage) by B without fault on B's part, B is not liable to A. *The Bernina (2)* (1887) 12 P.D. 58, 89; *Nance* v. *British Columbia Electric Ry. Co. Ltd.* [1951] A.C. 601, 611, J.C., per Viscount Simon.

25. *S.S. Heranger (Owners)* v. *S.S. Diamond (Owners)* [1939] A.C. 94, 104.

26. *Davies* v. *Swan Motor Co. (Swansea), Ltd.* [1949] 2 K.B. 291; *Vance* v. *British Columbia Electric Ry. Co. Ltd.* [1951] A.C. 601, 611 per Viscount Simon.

27. In *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878) 3 App. Cas. 1155, 1206 Lord Blackburn said : "I think that there is in this case no room for doubt as to what the controversy at the trial was. It was a case of collision, and in such cases the principles of law have, as far as I know, always uniformly been agreed upon, though there often has been a great difference of opinion as to the application of those principles to the particular case. Those who go personally or bring property where they know that they or it may come in collision with the persons or property of others, have by law a duty cast upon them to use reasonable care and skill to avoid such a collision. ... In cases of collision, the principle is, I think, what I have above stated. And the duty in such cases is reciprocal. With two carriages or two ships of equal weight, the risk of damage if they come into collision with each other, is about equal, and the reciprocity of duty is obvious. Where a light gig comes in collision with a heavy waggon, the damage is likely to fall principally on the light gig, and if a man comes negligently in collision with an express train, he will almost certainly be dashed to pieces, whilst those in the express train will very likely be unconscious that any accident has happened. There is a natural feeling in juries in favour of the light gig or the man, who will suffer the chief damage; but the duty cast by law on the light gig or man is the same as that cast on the heavy vehicle, viz., to use reasonable care and skill to avoid the collision."

28. [1925] 1 K.B. 141, 156 - 157.

those who are on the highway. If so, he would be an insurer. It is a duty to use reasonable care to avoid injuring those using the highway. It is thus a duty owed to all wayfarers, whether they are injured or not; though damage by reason of the breach of duty is essential before any wayfarer can sue. [29]

A user of the highway is not entitled to assume that other users of the road will be careful, nor does he need to anticipate that they will be negligent and avoid the effects of that negligence. He is, however, expected to be aware of the risk which is inherent in highway traffic and to keep in mind the teachings of experience. [30] The position is clearly stated by Lord Uthwatt in *London Passenger Transport Board* v. *Upson* [31] where his Lordship said:

> I desire only to register my dissent from the view . . . that drivers are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, will behave with reasonable care. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.

What therefore matters is the standard of care displayed by the parties. And

29. A quarter of a century later in *Nance* v. *British Columbia Electric Railway Co. Ltd.* [1951] A.C. 601, 611, Viscount Simon delivering the judgment of the Privy Council made an identical statement. His Lordship said: "Generally speaking, when two parties are so moving in relationship to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. ... When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care .... " And in *Dawrant* v. *Nutt* [1961] 1 W.L.R. 253, Stable J. held that all users of the highway, whether drivers or passengers, cyclists or pedestrians, owe a duty of care to all other users of the highway to take reasonable care for their own safety.

30. In *Grant* v. *Sun Shipping Co. Ltd.* [1948] A.C. 549, 567, Lord du Parcq said in this connection: "I am far from saying that everyone is entitled to assume, in all circumstances, that other persons will be careful. On the contrary, a prudent man will guard against the possible negligence of others when experience shows such negligence to be common." And see also *Grayson Ltd.* v. *Ellerman Line Ltd.* [1920] A.C. 466, and *Compania Mexicana de Petroles "El Aguila"* v. *Essex Transport and Trading Co.* (1929) 141 L.T. 106, 115.

31. [1949] A.C. 155, 173.

it is a question of fact in each particular case whether their conduct fails to meet the test and amounts to negligence. [32]

THE SEARCH FOR A RULE

If the defendant in a running-down case was able to show that the plaintiff failed to take reasonable care of himself, and that the harm which he suffered was due partly to his own negligence, the plaintiff did not succeed. This was so because the principle *In pari delicto potior est conditio defendentis* applied. [33] So in *Wakelin* v. *London and South Western Railway Co.* [34] where it appeared that the plaintiff's husband was killed by a train at a level crossing, Lord Halsbury L.C. said:

> [I]t is manifest that the plaintiff, who gives evidence of a state of facts which is equally consistent with the wrong of which she complains having been caused by – in this sense that it could not have occurred without – her husband's own negligence as by the negligence of the defendants, does not prove that it was caused by the defendant's negligence. She may indeed establish that the event has occurred through the joint negligence of both, but if that is the state of the evidence the plaintiff fails, because in pari delicto potior est conditio defendentis.

This test was, however, not entirely satisfactory and another test, that of causation, [35] which is also perceivable in his Lordship's statement, was increas-

32. Contributory negligence is thus also a question of fact; *Tidy* v. *Battman* [1934] 1 K.B. 319; *Morris* v. *Luton Corporation* [1946] K.B. 114.

33. The principle is based on the view that if both parties are guilty of breach of some rule of law, it would be inconceivable to allow one to succeed against the other for both should be punished. This brings the principle within the ambit of the penal theory. It was applied to prevent the plaintiff from recovering when he himself was not free of negligence.

34. (1886) 12 App. Cas. 41, 45.

35. Legal proximity of causation may be defined as that conception of cause and effect which has been adopted by the courts as the test by which to asertain whether a particular harm is to be ascribed to a particular act or omission as its consequence as a prerequisite to the imposition of legal responsibility therefor; Francis H. Bohlen, "Contributory Negligence" (1908) 21 Harv.L.R. 233, 234. The doctrine is founded on the view that the plaintiff cannot recover if his own negligence were the decisive cause of the harm which he suffered.

ingly applied. For it has become apparent that in many cases in which the defendant succeeded in contributory negligence, he should also have succeeded had he himself brought the action in the first place. For although he was not entirely free of blame it was the other party who actually caused the accident. And as it was obviously opposed to justice that anyone should be required to answer for a harm unless he had actually caused it, it was of vital importance to establish that the plaintiff's harm was caused by the defendant's misconduct. [36]

The relevant rule was laid down by Lord Blackburn in *Cayzer* v. *Carron Co.* [37] where his Lordship identified the several eventualities and referred to the discrepancy in the rules of Common Law and Admiralty.

If therefore the defendant caused the accident, i.e. if notwithstanding the plaintiff's negligence, the defendant with reasonable care could have avoided injuring the plaintiff, the plaintiff recovered in spite of his own negligence. [38]

If the plaintiff caused the accident, i.e. if notwithstanding the defendant's negligence, the plaintiff with reasonable care could have avoided the injury, the plaintiff could not recover. [39]

36. Bohlen, loc. cit., 234. See also *Caswell* v. *Powell Duffryn Associated Colleries Ltd.* [1940] A.C. 152, 164 per Lord Atkin.

37. (1884) 9 App. Cas. 873, 880-881. Lord Blackburn said: "... I think there is no difference between the rules of Law and the rules of Admiralty to this extent, that where any one transgresses a navigation rule, whether it is a statutory rule, or whether it is a rule that is imposed by common sense, what may be called the common law, and thereby an accident happens of which that transgression is the cause, he is to blame, and those who are injured by the accident, if they themselves are not parties causing the accident, may recover both in Law and in Admiralty. If the accident is a purely inevitable accident not occasioned by the fault of either party, then Common Law and Admiralty equally say the loss shall lie where it falls, each party shall bear his own loss. Where the cause of the accident is the fault of one party and the one party only, Admiralty and Common Law both agree in saying that that one party who is to blame shall bear the whole damage of the other. When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rule of Admiralty and the rule of Common Law. The rule of Common Law says, as each occasioned the accident neither shall recover at all, and it shall be just like an inevitable accident; the loss shall lie where it falls. Admiralty says, on the contrary, if both contributed to the loss it shall be brought into hotchpotch and divided between the two."

38. *The Bernina (2)* (1887) 12 P.D. 58, 89 per Lindley L.J.

39. Idem.

If both plaintiff and defendant caused the accident, i.e. if there was as much want of reasonable care on the part of the plaintiff as well as on that of the defendant, or in other words, if the proximate cause of the injury was the want of reasonable care on both sides, the plaintiff could not sue. In such a case the plaintiff could not with truth say that he was injured by the defendant's negligence, he could only with truth say that he was injured by his own carelessness and the defendant's negligence, and the two combined gave no cause of action at common law. 40

The first rule is illustrated by *Davies* v. *Mann*, 41 the celebrated donkey running down case. Parke B. said in the course of his decision that the mere fact of negligence on the part of the plaintiff in leaving his donkey on the public highway, was no answer to the action, unless the donkey's being there was the immediate cause of the injury; and that, if the accident was caused by the fault of the defendant's servant in driving too fast, the mere fact of putting the ass upon the road would not bar the plaintiff of his action. For although the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify driving over the goods left on a public highway, or even over a man lying asleep there, or purposely running against a carriage on the wrong side of the road. 42

The scope of operation of the second rule – if the plaintiff caused the accident he could not recover notwithstanding the defendant's negligence – appears from *Butterfield* v. *Forrester*. 43 The defendant, for the purpose of making repairs to his

40. Idem.

41. (1842) 10 M. & W. 546; 152 E.R. 588. The plaintiff, having fettered the fore feet of a donkey belonging to him, turned it into a public highway where the donkey was grazing on the off side of a road about eight yards wide, when the defendant's waggon, coming down a slight descent, ran against the donkey, knocked it down, and killed it. Erskine J. told the jury, that though the act of the plaintiff, in leaving the donkey on the highway so fettered as to prevent his getting out of the way of carriages travelling along it, might well be illegal, still, if the proximate cause of the injury was attributable to the want of proper conduct on the part of the driver of the waggon, the action was maintainable against the defendant; and his Lordship directed the jury to find for the plaintiff if they thought that the accident might have been avoided by the exercise of ordinary care on the part of the driver. On a motion for a new trial it was held that the jury were properly directed and that the plaintiff was entitled to succeed.

42. Similar decisions were given in *Tuff* v. *Warman* (1858) 5 C.B. (N.S.) 573; 141 E.R. 231, in *Radley* v. *London and North Western Ry. Co.* (1876) 1 A.C. 754, and in *McLean* v. *Bell* (1932) 147 L.T. 262.

43. (1809) 11 East. 60; 103 E.R. 926.

house which was close by the road, had put up a pole across the road obstructing i in part, free passage being left by another branch or street in the same direction. The plaintiff riding fast on the road at dusk did not observe the obstruction, rode agains it, fell with his horse and was injured. There was enough light to discern the obstruct ion from a distance of one hundred yards. Judgment was given for the defendant. Lor Ellenborough C. J. said :

> One person being in fault will not dispense with another's usin ordinary care for himself. Two things must concur to support thi action, an obstruction in the road by the fault of the defendant, an no want of ordinary care to avoid it on the part of the plaintiff. [44]

The gist of the third rule can be traced in all the afore-mentioned cases bu innumerable further references may be made. So in *Vennal* v. *Garner*, [45] a case fo running down a ship, Bailey B. said :

> I quite agree, that if the mischief be the result of the combined neg ligence of the two, they must both remain in statu quo, and neithe party can recover against the other. [46]

Again in *Cayzer* v. *Carron Co.*, [47] Lord Blackburn observed :

> The rule of Common Law says, as each occasioned the accident neithe shall recover at all, and it shall be just like an inevitable accident the loss shall lie where it falls.

Swadling v. *Cooper* [48] provides another illustration. [49]

44. Ibid., 61; 927. Bayley J. said in the course of his decision: "The plaintiff wa proved to be riding as fast as his horse could go, and this was through the streets o Derby. If he had used ordinary care he must have seen the obstruction; so that th accident appeared to happen entirely from his fault" (idem.). The rule may further b illustrated by *Dowell* v. *General Steam Navigation Co.* (1855) 5 El. & Bl. 195; 11 E.R. 454.

45. (1832) 1 C. & M. 21; 149 E.R. 298.

46. Ibid., 22; 298. A similar decision was given in *Pluckwell* v. *Wilson* (1832) 5 Car. & P. 375; 172 E.R. 1016.

47. (1884) 9 App. Cas. 873, 881.

48. [1931] A.C.1. The defendant, whilst driving his motor-car at about thirty miles a hour along a main road, approached a point in the road where it was crossed by a sid road, when a man riding a motor-cycle came into the road from the side road witho warning and a collision occurred in which the motor-cyclist was killed. The distanc from the position of the defendant's car when he first became aware of the presenc of the deceased to the spot of the collision was not more than eleven yards. Th

In many cases in which the injury was substantially caused by the combined negligence of both parties and in which the courts were bound to hold for the defendant, as no party was entitled to damages, judges and especially juries felt sympathy for the plaintiff when it was apparent that his share in the final outcome was of a much more limited extent than that of the defendant, and it is quite natural that ways were sought to mitigate the harshness of the rule in order to enable the plaintiff to recover. In this way the doctrine of "last clear chance" came into being. The proposition put forward was that the party was to blame for all the damage who had the last opportunity of avoiding it, or who would have had the last clear chance of avoiding it but for his own negligence.

To support the proposition which can be traced in *Davies* v. *Mann*, and such cases as *Tuff* v. *Warman, Radley* v. *London and North Western Ry. Co., British Columbia Electric Ry. Co. Ltd.* v. *Loach*,[50] the doctrine in *Davies* v. *Mann* was often put forward in a way as to confuse the issue and to obscure the true meaning of these cases. Fresh light was, however, thrown on the matter in *Boy Andrew (Owners)* v. *St. Rongvald (Owners)* [51] by the House of Lords. Lord Simon said in the course of his decision that the principle of *Davies* v. *Mann* has often been explained as amounting to a rule that when both parties were careless, the party which had the last opportunity of avoiding the results of the other's carelessness was alone liable. This suggested test of "last opportunity" seemed to be inaptly phrased and was likely in some cases to lead to error, as indeed the United Kingdom Law Revision Committee said in their 1939 report:

48. (cont.) defendant applied his brakes but failed to avoid the collision. In an action brought by the plaintiff, the widow of the deceased against the defendant under Lord Campbell's Act for damages for the loss of her husband, Humphreys J. directed the jury that if they found that the defendant was negligent in such a way as to cause the accident, but that the deceased man was guilty of contributory negligence so that both parties were substantially to blame for the accident, they should find a verdict for the defendant, and that the question was, whose negligence was it that substantially caused the accident. The jury found for the defendant and judgment was entered accordingly. The House of Lords, reversing the decision of the Court of Appeal held that, it being clear from the facts that from the moment when the parties became aware of their respective positions there could have been no time for the defendant to do anything to avoid the impact, the judge had sufficiently explained to the jury the law applicable to the facts and that the direction given to the jury was sound.

49. See also *Admiralty Commissioners* v. *S.S. Volute (Owners)* [1922] 1 A.C. 129.

50. [1916] 1 A.C. 719.

51. [1948] A.C. 140, 148 - 149.

> In truth, there is no such rule – the question, as in all questions of liability for a tortious act, is, not who had the last opportunity of avoiding the mischief, but whose act caused the wrong? [52]

THE LAW REVISION AND THE PRESENTLY APPLICABLE LAW

With more and more running-down cases coming before the courts in which the courts felt that no adequate justice to the claims of the parties was being done, legislative action became necessary to cope with the situation. [53] In 1939, the United Kingdom Law Revision Committee recommended [54] the extension of the principle applied in the Maritime Conventions Act 1911 [55] to contributory negligence in general. [56]

As a result, the Law Reform (Contributory Negligence) Act 1945 [57] was enacted. It provides in s. 1(1) that

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in

52. Cmd. 6032 (1939), 16. Lord du Parcq expressed an identical view in *Grant* v. *Sun Shipping Co. Ltd.* [1948] A.C. 549, 563. See also *Davies* v. *Swan Motor Co.* [1949] 2 K.B. 291, 318 per Evershed L.J., and 321-322 per Denning L.J.

53. Cases which caused the greatest concern were those in which a pedestrian or a cyclist was involved. As he had not taken out a policy of insurance, he was in a much worse position than the driver of a motor car who was invariably so protected. Consequently, the common law principle that where both parties are to blame for the accident, neither can recover did not operate evenly as between the parties for if the plaintiff lost his claim because of his own contributory negligence, he had no insurance policy to look to.

54. Cmd. 6032 of 1939.

55. 1 & 2 Geo. 5, c. 57; in New Zealand see Shipping and Seamen Act 1952, s. 468.

56. Section 1 (1) of the Maritime Conventions Act 1911 reads: "Where by the fault of two or more vessels, damage or loss is caused to one or more of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

Provided that (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; ... ".

57. 8 & 9 Geo. 6, c.28

> respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: ....

Under "damage" the Act refers to loss of life and personal injury although there is no doubt that injury to property is also included, and "fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from the Act, give rise to the defence of contributory negligence (s. 4). [58]

Since this enactment, if the court finds that both parties are to blame, it is empowered to go on with the case and to apportion damages. The Act thus addresses itself to the question of recoverability of damages in cases where both parties are guilty of negligence. [59]

In *Davies* v. *Swan Motor Co.*, [60] Denning L.J. gave an exposition of the presently applicable law. His Lordship said that if the plaintiff's negligence was one of the causes of his damage, he was no longer defeated altogether but would get reduced damages. The practical effect of the Act was, however, wider than its legal effect. Previously, to mitigate the harshness of the doctrine of contributory negligence, the courts in practice sought to select from a number of competing causes, which was the cause – the effective or predominant cause – of the damage and to reject the rest. Now the courts had regard to all the causes and apportioned damages accordingly. This was not a change in the law as to what constituted contributory negligence – the search, in theory, was always for all causes – but it was a change in the practical application of it. [61]

In arriving at a decision under the Act the court has to consider how much the parties contributed to the cause of the accident, and how much each of them is

58. In New Zealand, the Contributory Negligence Act 1947, ss.2,3 contain similar provisions.

59. The concept of contributory negligence in the presently applicable law was defined by Lord Wright as follows: "The concept of contributory negligence is that two parties are in fault in a legal sense, and each, accordingly, is liable to contribute to the damage in proportion to the part he played in the causation of or responsibility for the damage"; "Contributory Negligence" (1950) 13 M.L.R. 2, 7.

60. [1949] 2 K.B. 291, 322-324.

61. Denning L.J. went on to illustrate his proposition by considering how the cases of *Butterfield* v. *Forrester* and *Davies* v. *Mann* would be decided today, and came to the conclusion that both of them might well be held to be cases for a reduction in damages because the plaintiff's own fault was one of the causes of the damage.

is to be blamed for the final result, and to give a decision which is just and equitable as between the parties. [62]

The share of responsibility as determined by the court may range from full responsibility down to blamelessness. So the defendant may be responsible for the whole loss and the plaintiff blameless or vice versa, or they may share responsibility equally, or in virtually any other proportion. The 1945 Act is applied only, of course, when the parties share in the responsibility. The usually recurring percentages are 50 – 50, 66⅔ – 33⅓, 75 – 25, and 80 – 20. [63]

Marvin Sigurdson v. *British Columbia Electric Ry.* [64] illustrates the position

62. In *Davies* v. *Swan Motor Co.* [1949] 2 K.B. 291, 326, Denning L.J. said in this connection: "Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the court to be 'just and equitable,' having regard to the claimant's 'share in the responsibility' for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness." And in *Stapley* v. *Gypsum Mines Ltd.* [1953] A.C. 663, 682, Lord Reid remarked: "A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but 'the claimant's share in the responsibility for the damage' cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness." See also *Clyke* v. *Blenkhorn* [1958] 13 D.L.R. (2d) 293.

63. But other proportions may be arrived at: e.g.

60 – 40: *Thos. A. Barlow Ltd.* v. *Manchester Corporation*, Manchester Assizes, March 4, 1947 (Singleton J.);
Young v. *Otto* [1948] 1 D.L.R. 285.

65 – 35: *Messenger* v. *Sears and Murray Knowles, Ltd.* [1960] 23 D.L.R. (2d) 297.

70 – 30: *De Wolfe Hardware Co. Ltd.* v. *Hamilton* [1955] 5 D.L.R. 471;
Kleinhans v. *African Guarantee and Indemnity Co. Ltd.* 1959 (2) S.A. 619 (E.C.);
Lindfors v. *Cameron* [1962] 31 D.L.R. (2d) 58 (N.S.S.C.)

85 – 15: *Marasek* v. *Condie* [1958] 12 D.L.R. (2d) 252.

90 – 10: *White* v. *Tip Top Ice Cream Co. (Wellington) Ltd.* [1950] N.Z.L.R. 406.

64. [1953] A.C. 291. The plaintiff was driving his motor-car on a wide street. He decided to get some petrol at a garage situated at the opposite side of the road. As there was some oncoming traffic, after giving the appropriate signal, he stopped in the centre of the road on a street car track which ran down the centre portion of the road. A street car was approaching in his direction. It was about 200 – 250 feet away

of full responsibility. As to equally shared responsibility, *Harvey* v. *Road Haulage Executive* [65] may be referred to. Many examples of one third – two thirds split responsibility may be cited. [66] *Gardiner* v. *Motor Vehicle Insurance Trust* [67] is a

64. (cont.) with an unobstructed view. It did not slow down and was approaching fast. The plaintiff could not cross the road because of the traffic, he attempted to back off the track, but before he could do so the street car struck him a violent blow demolishing the car. On his claim for damages, the jury found that the accident was caused solely by the negligence of the motorman in failing to keep a proper lookout and that the plaintiff was not guilty of contributory negligence. Judgment was entered accordingly and the decision was upheld by the Judicial Committee of the Privy Council.
See also *France* v. *Parkinson* [1954] 1 W.L.R. 581; *Ng Siew Eng* v. *Loh Tuan Woon* (1955) 21 M.L.J. 89; *Woo Peng Chong* v. *Malayan Tobacco Distributors Ltd.* (1955) 21 M.L.J. 178; *Kain & Shelton Ltd.* v. *Virgo* (1956) 97 C.L.R. 230; *Drennan* v. *Greer* (1957) 23 M.L.J. 77; *Olson* v. *Lange* [1958] 13 D.L.R. (2d) 46; *MacLeod* v. *Kuhlmann* [1959] 20 D.L.R. (2d) 614; *Frodsham* v. *Aetna Insurance Co.* 1959 (2) S.A. 271 (A.D.).

65. [1952] 1 K.B. 120. The defendant left his lorry pointing obliquely across a 30 ft. wide road. It was a foggy morning and visibility extended only some eleven or twelve yards. After the lorry had been in the position for about five minutes, the plaintiff riding a motor-cycle at eighteen to twenty miles an hour, ran into the back of it and was injured. The Court of Appeal held that the parties were equally to blame, the case was one for contribution and the plaintiff could only recover one half of his damages. See also *Smith* v. *W.H. Smith and Sons Ltd.* [1952] 1 All E.R. 528; *Baker* v. *Market Harborough Industrial Co-operative Society Ltd.* and *Wallace* v. *Richards (Leicester) Ltd.* [1953] 1 W.L.R. 1472; *Holloway* v. *McFeeters* (1956) 94 C.L.R. 470; *Taylor* v. *South African Railways and Harbours* 1958 (1) S.A. 139 (D. & C.L.D.); *Basson* v. *Pietersen* 1960 (1) S.A. 837 (C.P.D.).

66. In *Lang* v. *London Transport Executive* [1959]1 W.L.R. 1168 a collision occurred at a road junction between a city bus and a motor-cycle. The bus was travelling along a major road at a speed of not more than twenty miles an hour approaching a junction with a minor road. The motor-cyclist did not slow down at a 'Slow, Major Road Ahead' sign and rode straight out into the main road and the collision occurred at the crossing. The Court of Queens Bench, Havers J., held that the possibility of danger was reasonably apparent to the driver of the bus, who was therefore under a duty to take reasonable precautions. Although he was on a major road, driving at a moderate speed, and the motor-cyclist was far more to blame, the bus driver had failed to take reasonable care for the safety of the other traffic on the road and was therefore negligent; in the circumstances the motor-cyclist was two thirds and the bus driver one third to blame for the accident. See also *Wellington City Corp.* v. *Palliser* [1949] N.Z.L.R. 1054; *Earl* v. *Morris* [1950] N.Z.L.R. 33; *Hill-Venning* v. *Beszant* [1950] 2 All E.R. 1151; *McCarthy* v. *Raylton Productions Ltd.* [1951] W.N. 376; *Hibberds Foundry Ltd.* v. *Hardy* [1953] N.Z.L.R. 14; *Crothers* v. *Northern Taxi Ltd.* [1957]

case of one fourth – three fourths share in responsibility, and *Laskewitz* v. *Holland* [68] provides an example of one fifth – four fifths responsibility.

NOTE ON THIRD PARTY CLAIMS

All the above outlined cases proceed on the premise that both parties were guilty of negligence. A quite different situation, however, arises when a blameless person e.g. a passenger is injured in consequence of a collision between two or more

66. (cont.) 10 D.L.R. (2d) 87; *Gaynor* v. *Allen* [1959] 2 Q.B. 403; *Lindsay-Dickson* v. *Southern Insurance Assoc. Ltd.* 1959 (1) S.A. 528 (D. & C.L.D.); *Stolp* v. *Du Plessis* 1960 (2) S.A. 661 (T); *Gage* v. *King* [1961] 1 Q.B. 188.

67. (1955) 95 C.L.R. 120. The plaintiff, while driving a motor-car at night had his right arm resting on the bottom of the window opening, with his elbow projecting from the car. A vehicle travelling in the opposite direction grazed the side of the plaintiff's car in passing, and struck and severely injured the plaintiff's projecting elbow. The damage to the plaintiff's car was merely superficial, and it is quite possible that the driver of the other vehicle never knew that any damage had been caused. He was never found and the plaintiff brought his action under s.7(3) of the Motor Vehicle (Third Party Insurance) Act 1943 – 1951 (W.A.). The Supreme Court of Western Australia (Dwyer C.J.) found that the plaintiff was himself one quarter to blame for the accident and deducted twenty-five per cent from the damages assessed on account of plaintiff's contributory negligence. The High Court of Australia (Fullagar, Kitto and Taylor J J.) upheld the finding. See also *Howitt* v. *W. Alexander & Sons Ltd.* 1948 S.C. 154 (Ct. of Sess.); *Mallett* v. *Dunn* [1949] 2 K.B. 180; *Roberts* v. *Jones* (1949) 304 Policy Holder J.L.S. 1430 (Byrne J.); *Clyke* v. *Blenkhorn* [1958] 13 D.L.R. (2d) 293; *Clyne* v. *Yardley* [1959] N.Z.L.R. 617; *Walton* v. *Nearing* [1960] 22 D.L.R. (2d) 145; *Celliers* v. *South African Railways & Harbours* 1961 (2) S.A. 131 (T); *Stein* v. *Lehnert* [1962] 31 D.L.R. (2d) 673 (M.C.A.).

68. [1955] N.Z.L.R. 298. The plaintiff was riding a motor-cycle along a road. At the same time, a truck driven by the defendants' driver was proceeding in the opposite direction on the same road and a collision occurred. There was considerable contradictory evidence as to the distances apart the respective drivers were when they first saw each other and as to the initial positions of the truck and the motor-cycle. Each driver alleged that the other was originally on his wrong side of the road, and both drivers denied such allegations. On the facts of the case, the Supreme Court of New Zealand (McGregor J.) found that both were negligent and the jury limited the degree of fault attributable to the plaintiff to 20 per centum charging the defendants with the remaining 80 per centum. See also *Davies* v. *Swan Motor Co.* [1949] 2 K.B. 291; *Pennington* v. *Norris* (1956) 96 C.L.R. 10; *Panickar* v. *Chwee May Kwong* (1958) 24 M.L.J. 136; *Di Paolo* v. *Kila* [1960] 23 D.L.R. (2d) 362; *Bhyat's Store* v. *Van Rooyen* 1961 (4) S.A. 59 (T).

vehicles. In that case, it can be said that the negligence of two or more persons contributed to the damage. In this event, although the drivers are not joint tortfeasors, the injury is caused by their concurrent negligence and the plaintiff can sue them all and may recover judgment against them. Section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 (U.K.) [69] and s.17 of the equivalent Law Reform Act 1936 (N.Z.) become relevant, and the defendant can recover an appropriate contribution, so that in fact damages are apportioned as between the defendants. [70]

If, however, one of the defendants is for some reason not liable to the plaintiff, the other defendant or defendants cannot claim contribution from him and has or have to make good the whole loss. This is so especially when one of the co-defendants is the spouse of the plaintiff. As one spouse cannot at common law sue the other in negligence for personal injuries, the spouse cannot be said to be a tortfeasor who is, or would if sued have been, liable in respect of the same damage. The Law Reform (Contributory Negligence) Act 1945 would not provide a remedy as the loss thus suffered by the other defendant or defendants cannot be characterised as damage within the meaning of s.1 (1) of the Act. But the difficulty may be and has been overcome by legislation in both the United Kingdom [71] and New Zealand. [72, 73]

69. 25 & 26 Geo. 5, c. 30. It provides in subs. (1): "Where damage is suffered by any person as a result of a tort (whether a crime or not) – . . .

(c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as joint tort-feasor or otherwise . . ."; subs. (2): "In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity".

70. *Croston* v. *Vaugham* [1938] 1 K.B. 540.

71. Law Reform (Husband and Wife) Act 1962 which, with two exceptions in the discretion of the court, abolishes the spouses' disability in tort.

72. Matrimonial Property Act 1963, s.4, which follows the United Kingdom statute.

73. See also the Wrongs Act 1958 (Victoria, Australia). Section 24 (1) provides: "Where damage is suffered by any person as a result of a tort (whether a crime or not) – (d) where any tortfeasor liable in respect of that damage is unable to recover contribution under this section from any other person because such other person is the husband or wife of the person by whom the damage was suffered, such tortfeasor may recover contribution from such other person under this section to the same extent as he could

Should the plaintiff, e.g. a passenger, be negligent, he may still claim damages on the strength of the Law Reform (Contributory Negligence) Act 1945. He will recover reduced damages but as between the several co-defendants the action will proceed as aforesaid. [74]

Should by any chance the judgment remain unsatisfied because the defendant was not insured against third party risks, the plaintiff's claim may still be satisfied from another source, if an adequate provision is made for this contingency. So in Great Britain, an agreement between the Minister of Transport and the Motor Insurers' Bureau, an incorporated corporation, was made on June 17, 1946 by virtue of which the Bureau agreed to satisfy any sum payable or remaining to be payable including taxed costs to any person in whose favour judgment was given in respect of any liability which is required to be covered by a policy of insurance under Part II of the Road Traffic Act 1930 whether or not it was in fact so covered and the judgment is not satisfied in full within seven days from the date upon which the person or persons in whose favour the judgment was given became entitled to enforce it. Also legislative action may be taken. [75]

If in an action for contribution under s.6 of the Law Reform (Married Women and Tortfeasors) Act 1935 or similar legislation, judgment given against the defendant is not satisfied in full or in part because the defendant was not insured against third party risks, there seems to be no reason why the plaintiff could not seek satisfaction of his claim from the appropriate agency, if there is one in existence.

73. (cont.) have recovered contribution thereunder if the person by whom the damage was suffered were not the wife or husband of such other person".

74. *Davies* v. *Swan Motor Co.*

75. So e.g. in Victoria (Australia), the Motor Car Act 1958, s. 50 (1) provides: "Where (a) judgment against the owner or driver of an uninsured motor car has been entered in respect of the death of or bodily injury to any person caused by or arising out of the use of that motor car; (b) such death or bodily injury is one against liability in respect of which the judgment debtor, had there been in force a contract of insurance under this Division relating to such motor car, would have been insured; and (c) the judgment debtor does not satisfy the judgment in full within one month after it has been entered – the judgment creditor may obtain judgment against a nominal defendant to be named by the Minister for a sum equivalent to the amount (including costs) unpaid in respect of the first-mentioned judgment or the amount to which the liability of an authorised insurer might have been limited had there been in force a contract of insurance under this Division relating to such motor car, whichever is the smaller amount".

If the owner or driver of the motor vehicle which caused the injury cannot be traced, there is no provision in the above mentioned agreement between the Minister of Transport and the Motor Insurers' Bureau which would enable the victim to obtain satisfaction from the Bureau. It is, however, the policy of the Bureau to give adequate consideration to the matter and to make an ex gratia payment to the victim or his dependants in appropriate cases. Such provision may be made by legislative action. [76]

76. So e.g. in Victoria (Australia), the Motor Car Act 1958, No. 6325, s. 48 provides for the case where the driver or owner of the motor car out of the use of which death or bodily injury arose is insured against that liability, but cannot be found. In such a case, any person who could have obtained a judgment in respect of such death or bodily injury against such owner or driver if he could be found may recover against the insurer. If in the same circumstances even the identity of the motor car cannot be established, the victim may obtain judgment against a nominal defendant to be named by the Minister (s.49). Similarly, where the owner or driver of an uninsured motor car cannot be found, any person who could have obtained a judgment against such owner or driver if he could be found may obtain judgment against a nominal defendant appointed by the Minister (s.51).
See also the Agreement between His Majesty the King and Insurance Companies regarding claims in respect of death or bodily injury caused by the use of motor vehicles that cannot be identified, 1931, New Zealand Gazette, p. 3023; Road Traffic Act 1934 (South Australia); Transport Act 1962 (N.Z.); Motor Vehicles (Third Party Insurance) Act 1949 (N.S.W.); Motor Vehicle (Third Party Insurance) Act 1943 (W.A.).
See *Australian National Airways Pty. Ltd.* v. *Vines* [1950] V.L.R. 510; *Chadwick* v. *Bridge* (1951) 25 A.L.J. 50; *Luxton* v. *Vines* (1952) 85 C.L.R. 352; *Grima* v. *Sykes* (1952) 70 W.N. (N.S.W.) 6; *Curtis* v. *Nominal Defendant* (1953) 71 W.N. (N.S.W.) 34; *Vines* v. *Djordjevitch* (1955) 91 C.L.R. 512; *Gardiner* v. *Motor Vehicle Insurance Trust* (1955) 95 C.L.R. 120; *Scott* v. *Nominal Defendant* (1956) 73 W.N. (N.S.W.) 643; *Holloway* v. *McFeeters* (1956) 94 C.L.R. 470; *Zuk* v. *Miller* [1957] S.A.S.R. 41; *Martin* v. *Nominal Defendant* (1954) 74 W.N. (N.S.W.) 121; *Ussher* v. *Nominal Defendant* (1957) 74 W.N. (N.S.W.) 370; *Sophron* v. *Nominal Defendant* (1957) 96 C.L.R. 469; *Brown* v. *Nominal Defendant* (1958) 58 S.R. (N.S.W.) 369; *Gillam* v. *Incorporated Nominal Defendant* [1958] V.R. 280; *Bakaj* v. *Incorporated Nominal Defendant* [1958] V.R. 612; *Cavanagh* v. *Nominal Defendant* (1959) 59 S.R. (N.S.W.) 62; *Boyle* v. *Nominal Defendant* (1958) 59 S.R. (N.S.W.) 413; *Kinnear* v. *Miller* [1959] S.A.S.R. 41; *Howell* v. *Nominal Defendant* (1962) 62 S.R. (N.S.W.) 40.

CONCLUSIO

CONCLUSION

Looking back at the evolution of the law of contributory negligence one can notice a continuous search for a rule which would enable a just and equitable solution of the problem. It is quite plain that the use of an action on the case in place of that in trespass in running-down cases was a considerable improvement of the position. Also the emergence and the evolution of the several sub-rules within the law of negligence was prompted by the desire of bench and bar to make the law more workable and more adequate to deal with the involved cases which presented themselves. And when finally the law as it stood was unable to cope with the situation by its own means, it was the legal profession which urged the legislature to take the necessary action.

There is no need to stress that the results in this branch of the law are encouraging. The courts are now well equipped to deal with the problem which haunted the profession for many long years. The law, of course, does not cease to develop and new problems will arise but the solid foundations which have been laid give the assurance of favourable future development.

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