of the instrumenality by a known reckless bailee, it would appear that the test applied by the minority opinion is a better approach. Neither test will lead to an automatic solution in proximate cause but it seems undesirable that the solution be automatic. The test applied by the minority appears to be more flexible and to permit the determining agency to place more emphasis on the relative wrongfulness of the defendant's conduct. Thus, where the defendant's conduct is more blameworthy, the extent of liability could be made greater. It is true that the same result could be reached under the majority test, but it would be more difficult to reach that result from a logical, or at least legalistic, point of view.

The value of defining exactly the relationship between a particular defendant and a particular plaintiff seems to be more than offset by the need for flexibility in an area of the law where each set of facts varies to a considerable extent from any other set of facts.

DAVID G. LUPO

TORTS—NORTH DAKOTA ESPOUSES SIMPLE TOOL DOCTRINE—STEPLADDER HELD WITHIN RULE. Plaintiff Olsen brought suit against Ken Temple, Ancient Arabic Order of the Mystic Shrine, to which he belonged.[1] In connection with a visit of the Imperial Potentate to Kem Temple, a dance was scheduled at the State Fairgrounds. The dance pavilion was to be decorated by passing streamers over a wire which ran down the center of the pavilion, about sixteen feet above the floor.[2] The ends of the streamers were to be secured on either side to simulate a canopy. In order to reach the wire, a stepladder had been brought the preceding evening from the temple cloakroom to the fairgrounds. This stepladder was about fourteen feet tall.[3] Plaintiff (a member of the decoration committee) set up the stepladder, making a cursory examination as to its condition by shaking it. He climbed until the wire was at his shoulder, and began passing the streamers over the wire while two helpers below secured the ends to the sides of the pavilion. This work continued for about

1. Olsen v. Kem Temple, Ancient Arabic Order of the Mystic Shrine, 43 N.W.2d 385, *rehearing denied* (N.D. 1950).
2. The actual height of wire and ladder are in doubt. The figures given in this article are averages derived from trial testimony.
3. See note 2 *supra*.

an hour. It became necessary for the plaintiff to mount one more step, the wire becoming higher toward the center of the pavilion. When the plaintiff placed his weight upon the next step, it tilted under his foot. Plaintiff fell to the floor, sustaining serious injuries.

Testimony showed that the ladder had been in the possession of the Temple for sixteen years, was renailed or otherwise tightened up on occasion, and was described as "rickety," "wobbly," and "unsafe" by members of the Divan (officers of the defendant organization).[4] By a 3-2 decision with four opinions filed, the action of the trial court in setting aside a verdict for plaintiff was affirmed.[5]

The first question before the court was the relationship between the plaintiff and defendant. Was the plaintiff a mere volunteer, to whom the defendant owed only slight care, or was plaintiff an employee?[6] The justices were unanimous in deciding that plaintiff was a gratuitous employee.[7] Thus, as employee, albeit gratuitous, the apparently controlling statute read:

> An employer, in all cases, shall indemnify his employee for losses caused by the former's want of ordinary care.[8]

However, the case actually had as its controlling factor the "Simple Tool Doctrine," which the court holds an exception to the employer's duty to use ordinary care in the furnishing of tools to his employees:[9]

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4. 43 N.W.2d 385, 397 (N.D. 1950).
5. *Id.* at 385.
6. It is difficult to define the relationship of defendant and plaintiff in terms other than that of employer and gratuitous employee. The plaintiff was not a mere volunteer since the work was performed either at defendant's request or with consent.

The shrine was a "benevolent and beneficial association" as regards the purely social function from which the case arises, and not such a "charitable institution" as could claim immunity to tort actions. 38 AM. JUR., *Mutual Benefit Societies*, § 188 (1936).

7. N.D. REV. CODE § 34-0204 (1943) attempts to define the gratuitous employee as "one who undertakes to do a service for another without consideration . . ." This definition is useless here in that it fails to specify any request by the employer that the employee undertake the work.

Although the court held that Olsen was a gratuitous employee, it did not apply the provisions of the state's Workmen's Compensation statute (N.D. Rev. Code, Title 65), thus holding plaintiff to be no employee at all for the purposes of that law. It is submitted that this view is correct, since Olsen did not work under any "appointment, contract of hire, or apprenticeship" as specified by § 65-0102, sub. (5).

8. N.D. REV. CODE § 34-0203 (1943).
9. The employer was also required, at common law, to use reasonable care in providing his servants a safe place to work, to warn them of hidden

> . . . where a tool or appliance is simple in construction, and a defect therein is discernible without special skill or knowledge, and the employee is as well qualified as the employer to detect the defect and appraise the danger resulting therefrom, the employee may not recover damages from his employer for an injury due to such a defect that is unknown to the employer.[10]

The court held, as a matter of law, that the Shrine stepladder was a simple tool and was, therefore, subject to the inspection of plaintiff. Defendant is relieved of all duty concerning such tools and, as a result, of all liability to anyone injured by their use, regardless of the age or condition of the tools. As to the simple tool doctrine, Morris, J., calls it a "widely recognized exception" to employee's duty of ordinary care.[11] Although several states recognize this doctrine,[12] others reject it,[13] and the silence of the majority of states indicate that they will present the question of care to the jury without distinctions drawn between simple and complex tools. Labatt finds the doctrine to be of doubtful validity.[14] The Supreme Court, reviewing a case arising under the Federal Employers' Liability Act,[15] stated:

> The simple tool doctrine, used by the courts below to bolster their belief that the evidence was insufficient, does not affect our conclusion. In the first place, the contrariety of opinion as to the reasons for and the scope of the simple tool doctrine, and the uncertainty of its application, suggest that it should not apply to cases arising under legislation, such as the Jones Act,[16] designed to enlarge in some measure the rights and remedies of injured employees.[17]

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dangers, to provide an adequate number of competent fellow servants, and to make reasonable rules for the conduct of the work. PROSSER, TORTS 505 (1941).

10. 43 N.W.2d 385, 386 (N.D. 1950). When the court adds "unknown to the employer" it means that the actual defect must not be in the actual knowledge of the employer, as evidenced by the fact that the court gives a decision adverse to the plaintiff even though a defendant admitted that the ladder was "unsafe." *Id.* at 397.

11. 43 N.W.2d 385, 387 (N.D. 1950).

12. Kelley v. Brown, 262 Mich. 356, 247 N.W. 900 (1903); Mozey v. Erickson, 182 Minn. 419, 234 N.W. 687 (1931); Roper v. Ware Shoals Mfg. Co., 139 S.C. 48, 137 S.E. 210 (1927).

13. Neely v. Chicago and Great Western R. Co. *et al.*, 14 S.W.2d 972 (Mo. App. 1928); Buchanan and Gilder v. Blanchard, 127 S.W. 1153 (Texas 1910).

14. 3 LABATT, MASTER AND SERVANT § 924a (2d ed. 1913).

15. 45 U.S.C.A. § 51.

16. 46 U.S.C.A. § 688.

17. Jacob v. City of New York, 315 U.S. 752 (1942). Plaintiff fell and

By the simple tool doctrine, once it has been shown that the tool is "simple," the employer is *ipso facto* relieved of liability even if the defect be so latent that a reasonable inspection would not have disclosed it, and even if the employer knew of the defect! *Caveat servitor!*

By the terms of the North Dakota Statute previously quoted, an employer, *in all cases,* owes ordinary care. Yet the court states that the simple tool doctrine:

> . . . constitutes an exception to the general rule that an employer is bound to use ordinary care to furnish his employees with reasonably safe and proper tools and appliances with which to work.[18]

Broderick, J., dissenting, wished to apply the simple tool doctrine, but would make an exception in any case where the employee did not know of the danger while the employer did.[19] This exception is made in several states.[20] In the case at bar, testimony by members of the Divan proved that they knew the ladder to be "rickety," "wobbly," and "unsafe" which would bring the case under the exception. If the simple tool doctrine must be applied, it is but elementary justice to make this exception.

The final question in the case is whether or not a stepladder is a simple tool. There is a split of opinion in those states accepting the doctrine.[21] Another view is that a stepladder is not even a tool.[22]

Does not the extraordinary height of the ladder from which plaintiff fell remove it from the domain of simple tools? According to the principal case, the height is immaterial because

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was injured when a wrench slipped owing to wear in its jaws. The district court applied the simple tool doctrine, and took the case from the jury. This action was affirmed by the United States Court of Appeals, but reversed on appeal to the Supreme Court.

18. 43 N.W.2d 385, 386 (N.D. 1950).

19. *Id.* at 399.

20. Fishburne v. Int. Harvester Co., 157 Kan. 43, 138 P.2d 471 (1943); Nichols v. Bush, 291 Mich. 473, 289 N.W. 219 (1939); Person v. Oakes, 244 Minn. 541, 29 N.W.2d 360 (1947); Phillip Casey Roofing and Mfg. Co. v. Black, 129 Tenn. 30, 164 S.W. 1183 (1914) (dictum); Randall v. Gerrick, 104 Wash. 422, 176 Pac. 675 (1918); Stork v. Stolper Cooperage Co., 127 Wis. 318, 106 N.W. 841 (1906).

21. Dessecker v. Phoenix, 98 Minn. 439, 108 N.W. 516 (1906) (12 foot stepladder simple tool); Laurel Mills v. Ward, 124 Miss. 447, 99 So. 11 (1924) (8 foot stepladder held not simple tool); Etel v. Grubb, 157 Wash. 311, 288 Pac. 931 (1930) (10 foot stepladder held not simple tool).

22. Puza v. C. Hennecke Co., 158 Wis. 482, 149 N.W. 223 (1914).

plaintiff was not using the full length of the stepladder. Simple calculation shows that plaintiff was standing about eleven feet from the floor in order to work shoulder-high on a wire sixteen feet from the floor. A stepladder of the size required for Olsen's work could only be clumsy and require some skill in its use. The court has rather strained the concept of simple tools[23] by forcing it to include a stepladder of fourteen feet.

The *Olsen* case is the first application of the simple tool doctrine in North Dakota.[24] It is perhaps unfortunate that the case arises on the peculiar facts of a lodge and its member. The opinion of Nuessle, C. J., hints that the court may have found the facts of the case more persuasive than the doctrine used to reach the desired result. Application of the simple tool doctrine in its pristine form to future cases involving *bona fide* employees injured by the use of defective simple tools could well give results unintended by the court in this case.

It is a judicial anachronism for the court to apply the simple tool doctrine. The days of protecting employers at the expense of workingmen are past. As pointed out in the able dissent of Christianson, J., the question of the employer's negligence and the worker's contributory negligence should go to the jury without artificial distinctions drawn between simple and complex tools. A plaintiff injured while using a simple tool infected with a latent defect should not be precluded from recovery.

J. W. PARKS

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23. The concept of simple tools is vague. Hammers and jacks are commonly held simple tools, but beyond that it is impossible to predict. One finds conflicting opinions on almost every tool. As stated in Sheltrown v. Michigan Cent. Railway Co., 245 Mich. 58, 222 N.W. 163 (1928), whether a tool is simple or not "depends much on the use to which it is to be put by the employee. His age, his incapacity to appreciate danger, the nature of the employment, his familiarity with the work to be done [may be considered, as well as] whether the tool is subjected to any other stress than the muscular effort of the person using it." Thus, a tool may be simple or complex depending on several variables. Lack of predictability is obviously another objection to the doctrine.

24. 43 N.W.2d 385, 396 (N.D. 1950).