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NOTES

THE DOCTRINE OF IMPUTED CONTRIBUTORY NEGLIGENCE AS APPLIED TO THE OCCUPANT OF A VEHICLE.

One of the most interesting doctrines in the whole body of law is that of contributory negligence. It is certainly one of the most fundamental traits of human nature to excuse one's own fault by alleging the equal fault of the person one has injured. The foundation of this doctrine can be observed in any accident between two motorists. The air is immediately rent with vociferous accusations as to each other's share of the blame for the occurrence. In all probability, two chariot-

eers crashing together in the narrow streets of ancient Ninevah used much the same language and presented much the same excuses to the elders sitting at the gates. "It was his own fault" has been the excuse of the ages, and the law of contributory negligence has become fixed in all systems. If the injured party was also careless and contributed to his own injuries he could not recover. That much is clear even to the variest tyro in the law.

How far can the doctrine be extended? The important question discussed by this article is: does it include third persons injured by the concurrent negligence of two others? In some cases, the matter is clear. The negligence of a servant in line of duty is imputed to his master; that of a parent is imputed to his infant child; the negligence of a joint agent is that of his fellows. About these there is no question.

But today imputed negligence presents a problem of interest to the lawyer and layman alike. Is the contributory negligence of the driver of a vehicle to be imputed to his passenger? One calls a taxi to take him to a train, or a passing friend offers one a ride home, or the weary hiker along the highway gets a "lift" from the kindly passer-by. Suddenly our peace and bones are shattered by a wreck, and it develops that our driver, as we are suavely told when we seek monetary balm for our wounded feelings and bodies, was also careless and guilty of contributory negligence, and we can recover nothing.

What do the courts say to this? Their opinions are divided, and it is the purpose of this article to indicate to some extent this conflict of opinion and note some of the reasons given by the various courts for their opinions. Today the

majority of Courts hold, with some qualifications, that the negligence of the driver of a vehicle cannot be imputed to his passenger, but a minority dissent vigorously from this.

Since the earliest of important decisions in modern times on this was an English one, it will be proper to view briefly the English position. The case which first applied the doctrine that the negligence of the driver is imputable to his passenger, and which is the starting point of most discussions, whether for or against the doctrine is *Thorogood v. Bryan*¹ decided in 1849. In this case a passenger alighting from a public omnibus before it had drawn up to the curb or stopped and he was struck and killed by another public bus. It was decided that the driver of the first bus was guilty of contributory negligence in permitting his passenger to alight while it was in motion. The court held without dissent that the defendant could not be charged, the driver's negligence being imputed to the passenger so as to bar his recovery, on the grounds of contributory negligence. The Court based its decision on the ground that by selecting this particular conveyance the passenger became identified with the driver whose actions became his, and who, so far as third parties were concerned, was his servant. *Eutterfield v. Forrester*² and *Bridge v. Grand Junction Railway Co.*³ were cited as authorities. The first, that of a man riding carelessly into an obstruction, was a simple case of contributory negligence and added nothing to the subject. The second, that of a passenger injured on a railroad train, altho a question of procedure is the real issue, indicates this doctrine of identification. * Neither case really

1. 8 C. B. 115.

2. 11 East. 60.

3. M & W 243.

raises the issue of constructive contribution to the injury.

The next real discussion of the question was in the Admiralty case of *The Milan*.⁴ *Thorogood v. Bryan* was expressly overruled as being decided on very doubtful grounds. A conflict between various cases followed, with the case of *Armstrong v. Lancashire & Yorkshire Railway Co.*⁵ following *Thorogood v. Bryan*. The Court approved the leading case and doubted Lishington's refusal to follow it in *The Milan*, saying that by his use of the admiralty rule of divided damages he had in effect really approved it. The ruling case which finally settled the question in English law was *Mills et al. v. Armstrong et al.*, better known as "*The Bernina*",⁶ a ruling in the House of Lords on an Appeal from the Court of Appeal.

This case arose from injuries to passengers and non-navigating officers in a collision caused by the negligent operation of two ships. The defense was largely based on *Thorogood v. Bryan*, and the final decision is largely a discussion of that case. In his decision Lord Herschell said, "With the utmost respect for these eminent judges, I must say I am unable to comprehend this doctrine of identification. In what sense is a passenger by a public stage-coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with driver that the negligence of the latter would render the former liable to third persons injured by it"....."In short, so far as I can

4. Lush. 388.

5. L. R. 10 Ex. 47.

6. 13 App. Cases 1.

see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured." He says further, speaking of the theory that the driver was the servant of the passenger, "What kind of control has the passenger over the driver which would make it reasonable to hold the former for the negligence of the latter." Lord Watson presented much the same reasoning. The decision of the House, altho Lord Bramwell presented a strongly dissenting opinion, was to the effect that the negligence of a person operating any vehicle could not be imputed to a passenger exercising no control over the operation.

This case has settled the law of England on this subject, and has exercised a profound influence on American opinion.

Turning to the United States, a direct conflict of authority on this doctrine is found. A minority opinion follows the rule of *Thorogood v. Bryan*, but the prevailing general rule overrides it on much the same grounds as those expressed in the "Bernina." The general American rule may be stated thus: When an accident occurs to a vehicle in which the plaintiff was riding, thru the concurring negligence of the driver of a vehicle and third parties, the negligence of the driver cannot be imputed to the passenger, unless he was exercising some control over the actions of the driver, either actual or presumed by law, and he may recover from the third party despite the contributory negligence of his driver.

Hundreds of cases could be cited in support of this rule, but it will be sufficient to discuss only a few showing the extent of the rule and the situations to which it has been applied.

In the celebrated case of *Little v. Hackett*⁷ the Supreme Court of the United States in 1885 expressly overruled *Thoroughgood v. Bryan* and held that the hirer of a public hack, giving directions as to the route he wishes to cover, but exercising no other control, does not assume the relation of master and servant with the driver and can recover for his injuries despite his driver's negligence. This fixes Federal law on this point, never having been overruled by the Court, and also indicates the extent of control to which the passenger may go without assuming the relation of master.

Turning to the various State courts many decisions are to be found indicating their approval of the American rule, and the struggles some of them had to reach it. An early case is found in New York. In *Masterson v. New York Central Railroad Co.*⁸ that State held in 1888 that one riding by invitation in the wagon of another was not debarred from recovery against a railroad failing to maintain in good condition a public crossing even tho the driver was negligent in not observing the condition of the crossing, provided that the driver was sober and competent so far as the plaintiff's knowledge went. There is no decision overruling this, altho it has been qualified as will be explained later. As an indication of the trouble of some of the States in getting to this ground, Pennsylvania can be taken as an example. The question arose in 1886, and caused the Court some trouble. In the earlier case of *Lockhart v. Lickenthaler*⁹ the Court had followed *Thoroughgood v. Bryan* by ruling that a passenger on a common carrier injured thru the concurrent negligence of his carrier was

7. 116 U. S. 366.

8. 84 N. Y. 247.

9. 46 Pa. 151.

barred from recovery against third parties, and must look to his carrier alone for relief. *Borough of Carlisle v. Brisbane*¹⁰ had dodged the issue by making a distinction between common carriers and private conveyances. In *Dean v. Penns. RR Co.*¹¹ the Court had expressed its disapproval of the whole doctrine in a dictum, and finally in 1891 in *Bunting v. Hogsett*¹² swept away all traces of the doctrine of imputed negligence and permitted the passenger even on a common carrier to recover fully. Iowa, too, had trouble with the doctrine and had barred recover in several cases,¹³ but the Supreme Court of that State in *Nesbit v. Town of Garner*¹⁴ considered these cases carefully and came to the conclusion that they came within the qualifications of the rule and that the negligence of a driver could not bar an invited guest in the vehicle from recovery against the town.

In Missouri there was little difficulty maintaining the general rule as against the doctrine. The leading case in the State upon this point was *Beck v. Missouri Pacific Railway Co.*¹⁵ decided in 1890, in which it was held unequivocally that the negligence of the driver of a public stage coach in carelessly driving upon a railroad crossing in the dark without looking could not be imputed to a passenger in the stage-coach. The Court quoted from "The Bernina" with approval, and, having the question before it for the first time for judic-

10. 113 Pa 514.

11. 129 Pa 526.

12. 12 L. R. A. 268.

13. 39 Iowa 523.

57 Ia. 748.

60 Ia. 429.

71 Ia. 209.

14. 75 Ia. 314.

15. 102 Mo. 544.

ial determination approved the doctrine of that case, and brought Missouri into line with the general rule. The next Missouri case was that of *Sluder v. St. Louis Transit Co.*¹⁶ in 1905 in which it was held that no relation of master and servant is created between the hirer of a livery carriage and its driver so as to impute the driver's negligence to the passenger. Recent Missouri cases decided as late as 1925,¹⁷ while directly deciding cases which do impute the negligence of the driver to the occupant uphold the main rule, and decide these cases as exceptions to it.

Having noted the extent of the rule against this doctrine of imputed negligence, it might be interesting to discover some of the reasons for it. In nearly all cases where this defense is set up, an attempt is made to create the relation of master and servant between the passenger and driver and then apply the well-known rule of imputing the servant's negligence to his master. The cases already discussed have indicated some of the objections to this, and others are more specific. In the Indiana case of *The Town of Knightsbridge v. Musgrove*¹⁸ the Court held that an invited passenger did not assume the relation of master to the driver since he was merely a passive guest, and exercised no control over the driver. In discussing a theory that the possession of the vehicle by the passenger made the driver his servant, the Court in the North Carolina case of *Duval v. Atlantic Coast Line Railway Co.*¹⁹ said:—
“the possession of the passenger must be such as to supersede

16. 189 Mo. 107.

17. 266 S. W. 1015.

267 S. W. 12.

18. 116 Ind. 121.

19. 34 N. C. 331.

for the time being the possession of the owner to the extent of making the driver the temporary servant of the passenger." In accordance with this, it was held that a girl of fourteen riding with her father had not taken possession of the vehicle to such an extent as to make him her actual temporary servant. Turning to Nebraska, a good discussion of the creation of the relation is had in *Loso v. Lancaster County*,²⁰ where it is held that in the case of a common carrier the operator is the servant of the carrier and not of the passenger and neither is the servant of the passenger. In the case of an invited guest in a private conveyance, the Court said: "The owner and driver of the team is not controlled by and is not in any sense the servant of the invited guest, and to hold him responsible for the negligence of the former, by whose permission alone he rides is unauthorized by law and repugnant to reason."

Having established the general rule the courts are reluctant to allow immaterial qualifications of and exceptions to it. One exception that is frequently urged is that of the age of the injured occupant was such as to place him under the care of the driver, and lack of care for the infant by the driver was a reason for imputing his negligence to the infant. But in *Kowalski v. Chicago Great Western Ry. Co.*²¹ the United States Circuit Court of Appeals held that an infant child was not charged with the negligence of his father. New York held that an infant child held in its mother's lap and thrown from thence by the negligence of its father who was driving could not be held responsible for its father's negligence in *Lewin*

20. 109 N. W. 752.

21. 34 C. C. A. 1.

*v. Lehigh Valley Railroad Co.*²² Other states have held that a minor, thirteen years old and riding with his father was free from any imputed negligence,²³ that the negligence of the driver could not be imputed to his sixteen year old daughter;²⁴ nor could the negligence of the plaintiff's employee who was driving be imputed to the minor son of the plaintiff, who was riding with him.²⁵ In the latest Missouri case²⁶ decided in the past six month, an infant child riding in its father's arms was held not chargeable with the father's negligence.

The cases just cited show that not only has the age of the injured person nothing to do with the case, but neither does the relationship of parent and child make the negligence of a parent, driving, imputable to his child who is the occupant. This doctrine has been extended further to hold that the status of husband and wife will not affect the matter. Altho some early cases hold differently the general present ruling is expressed in two cases. In Indiana in the *N. Y. C., & St. L. Ry. Co. v. Robbins*²⁷ the Court held that the existence of the marriage relation alone does not charge the wife with her husband's negligence, who at the time had the sole management of the vehicle. And in Georgia the case of *City of Cedartown v. Brooks*²⁸ held that a wife could not be charged with her husband's knowledge of dangerous defects in a bridge. However, the Federal courts hold differently on this subject in

22. 165 N. Y. 667.

23. 43 Ohio State 91.

24. 127 Mo. App. 577.

25. 175 Ia. 498.

26. 267 S. W. 382.

27. 38 Ind. App. 172.

28. 2 Ga. App. 583.

the case of husband and wife²⁹ as do the Delaware courts where there is any family relation.³⁰

The defendant in these cases where contributory negligence of the driver is set up as a defense has attempted to plead the negligence of a fellow-servant where two servants of a common master, one the driver and the other the passenger have been injured. The courts have uniformly ruled against them where recovery was sought against a third person and not against the common master.³¹

While the Courts have been reluctant to allow exceptions to the general rule, yet there are certain well understood and universally applied qualifications of it. The most common of these arises under the master and servant rule where such a relation actually exists. In the New York case of *Smith v. N. Y. C. & H. R. RR. Co.*³² it was held that when the master surrendered complete control of the vehicle to his servant, the negligence of the servant was imputable to his master. The Missouri case of *Markowitz v. Metropolitan Street Railway Co.*³³ in which the mistress was riding in the vehicle and directing the driver supported this.

While this principle is generally acknowledged it is sometimes difficult to decide when the relation has been created. A South Dakota case, *Van Horn v. Simpson*³⁴ held that two

29. 26 Fed. 22.

30. 14 Atl. 922.

31. 6 C. C. A. 281.

122 N. Y. 646.

83' Tex. 410.

198 Ill. 288.

110 Ill. 366.

212 Ill. 366.

32. 39 N. Y. Sup. 1119.

33. 186 Mo. 350.

34. 35 S. D. 640.

partners engaged in partnership business, the one driving was acting as the servant of the other. Two recent Missouri cases establish the relation, one in *Walker v. Mississippi Bridge & Terminal Co.*³⁵ declaring that the negligence of the plaintiff's hired chauffeur is the negligence of the plaintiff, and the other in *Rose v. Wells*³⁶ holding that a wife acting as her husband's chauffeur on his business trips was his agent.

Another important qualification is that persons engaged in a common enterprise, altho not standing in the relation of master and servant to each other, yet are so identified with each other as to have the negligence of one imputed to the other. This is illustrated by the case of *Yanold v. Bower*³⁷ where two parties had engaged a row boat for a joint enterprise, and the one acting as passenger was injured through the contributory negligence of the one rowing. It was held that he could not recover. The leading cases supporting this principle are *Koplitz v. City of St. Paul*,³⁸ *Anthony v. Kiefner*,³⁹ and *Christopherson v. Milwaukee, St. Paul & Saulte Ste. Marie Railway Co.*, although none of them decide the point directly but lay it down as dicta.

Perhaps the most important of these qualifications is the rule that the passenger must not supinely trust the driver when he knows of the danger but must exercise some degree of care for his own safety. Accurately speaking, this is not a real qualification of imputed negligence, but rests directly on the actual contributory negligence of the passenger him-

35. 267 S. W. 12.

36. 266 S. W. 1015.

37. 186 Mass. 396.

38. 58 L. R. A. 74.

39. L. R. A. 1915F 876.

self. In *Frickell v. N. Y. C. & H. R. Railroad Co.*⁴¹ it was said that where the occupant of the vehicle had the same opportunity to discover the danger as the driver the rule against imputed negligence would not apply. In *the City of Vincennes v. Thuis*⁴² it was held that a passenger who knowingly permitted himself to be driven at a reckless and dangerous rate was participating in the contributory negligence and could not recover. Likewise in *Warth v. Jackson County Court*⁴³ and occupant who with full knowledge of the dangers of the road made no protest against being driven over it was not permitted to recover. Lest this principle be carried too far, however, it was stated by the United States Circuit Court of Appeals in *Pyle v. Clark*⁴⁴ that the passenger is not required to use the same degree of care as driver. In other words, while the primary duty to exercise due care rests upon the driver and his failure to do so is not imputable to the occupant, yet the latter must, when both have an equal opportunity to see and avoid the danger, warn the driver and if not able to prevent his recklessness must at least protest it or he also will be held guilty of contributory negligence.

Thus the rule has been established in both England and America that the negligence of a driver cannot be imputed to his passenger, subject to these three qualifications. The overwhelming majority of the United States support the rule, but we find three of them until recently flat-footedly against the rule and in favor of the doctrine so far as it applies to

40. L. R. A. 1915A 761.

41. 120 N. Y. 290.

42. 28 Ind. App. 543.

43. 71 W. Va. 184.

44. 25 C. C. A. 190.

private conveyance. These three are Michigan, Wisconsin, and Montana. Since Michigan established the leading case in support of the doctrine and was followed by Wisconsin and Montana, although the later two have recently abrogated it, it seems to be only proper to give her the doubtful honor of designating the doctrine as the "Michigan rule."

The Michigan case cited as the leading authority on this point is *Lake Shore & Michigan Southern Railroad Co. v. Miller*⁴⁵ decided in 1875. The Court seems to have held incidentally without any direct reference that if the driver in this case was negligent the plaintiff was negligent. In fact, it seems to have taken that for granted without any raising of or discussion of the point. A study of the facts in the case would seem to bring it rather under the third qualification than really contrary to the rule. The plaintiff was in the employ of one Eldridge and riding with him in a wagon. They approached a railroad crossing, partly obstructed in view. Eldridge was deaf and could not hear the noise of the train, although he could have heard it whistle, which was proven not to have been blown. Neither he nor the plaintiff paid any particular attention to the track, believing that no train was due. Eldridge drove onto the track and the wagon was struck, killing Eldridge and wounding the plaintiff. Does not the fact that the plaintiff could have seen the danger if she had tried, and knowing Eldridge was somewhat deaf, under a duty to exercise an extra degree of care have some bearing on the real reason for this decision? The next case in point and the one which by upholding *Railroad v. Miller* definitely established the Michigan rule was *Muller v. City*

45. Mich. 274.

46. 100 Mich. 143.

of *Ouasso*.⁴⁶ This definitely asserts that when a person arrives at the age of discretion and voluntarily enters a private conveyance the negligence of the driver is to be imputed to the occupant, and cites *Railroad v. Miller* supra as settling the question. It is admitted that the doctrine is not to be applied to children not of the age of discretion as there is implied compulsion on their actions. Four judges concurred in this decision. A strong dissenting opinion, however, was filed by Judge Hooker who pointed out that by this time (1894) *Thorogood v. Bryan* was thoroughly discredited. He also points out a distinction, which is the third qualification of the majority rule, in which he admits that because one person happens to be driving a vehicle does not relieve the other from taking care for his own safety and insist the *Railroad v. Miller* was decided on this ground. In 1904 the Court in *Hempel v. Detroit, Grand Rapids & Western Railroad*⁴⁷ rejected the doctrine as applied to infants but said that there was no question of the authority of *Railroad v. Miller* in the case of adults. Later cases uphold the doctrine likewise, but a recent case, *Robertson v. United Fuel & Supply Co.*⁴⁸ has started to mitigate the severity of the rule by adopting a qualification which holds that a servant riding in a vehicle, in line of duty, driven by his master is not chargeable with his master's negligence. Evidently proceeding on the same theory of compulsion which relaxed the doctrine in favor of minor children.

For a long time Wisconsin followed Michigan taking *Prieux v. City of Mineral Point*⁴⁹ in 1878 as the authority on

47. 138 Mich. 1.

48. 187 N. W. 300.

49. 43 Wis. 514.

the doctrine. This held that one riding in a private vehicle makes the driver his agent, for he has the election of going or not going and he voluntarily submits to the other making himself an agent. The case admits a distinction with a common carrier, holding that in this age, there is no question of a voluntary submission since one must ride on a common carrier if compelled to go some place and has no private vehicle. *Otis v. Town of Janesville*⁵⁰ and *Lightfoot v. Winnebago Traction Co.*⁵¹ uphold this doctrine, but the recent case of *Reiter v. Grober et al.*⁵² decided in 1921 expressly overrules *Prideux v. City of Mineral Point* and brings Wisconsin into line with the general rule.

The question was decided in Montana by the Michigan rule in 1894 in *Whittaker v. City of Helena*⁵³ which held that one voluntarily entrusting himself to the care of another in driving a vehicle made the latter his agent by implication. However recently Montana came into line in *Sherris v. Northern Pacific Railway Co.*⁵⁴ which concedes the doctrine of imputed negligence to be unsound, although only as dicta, for the case is decided on another point. This leaves only Michigan upholding the Michigan rule, and that State is weakening on it, so one may confidently predict that within a short time it will be overruled there by decision or statute and all American jurisdiction will declare that there is no such thing as imputed negligence as applied to the occupant of a vehicle.

WARREN TURNER, '27.

50. 47 Wis. 422.

51. 123 Wis. 479.

52. 181 N. W. 739.

53. 14 Mont. 124.

54. 175 Pac. 269.