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THE PROPOSED DISCARD OF THE DOCTRINE OF IMPUTED CONTRIBUTORY NEGLIGENCE

DAVID R. LESSLER†

THE IMPOSITION OF NEGLIGENCE WITH A BAR TO RECOVERY BY AN INNOCENT PERSON WHERE ACCIDENT WAS CAUSED BY CONCURRING NEGLIGENCE OF TWO OR MORE PERSONS.

The term "imputed negligence" may well be considered as *sui generis*. It is a contraction of "imputed contributory negligence" because in using the term what is actually meant is "imputed contributory negligence." Although the full terminology "imputed contributory negligence" is used on occasion,1 "imputed negligence" is more generally employed,2 and will, therefore, be used in this article.

The question of "imputed negligence" only arises in those cases where the concurring negligence of two or more persons is claimed to have been the proximate cause of an accident and where the injured person, seeking a recovery against one of the tort-feasors, occupies a certain status or relationship to the other tort-feasor, such as husband and wife, parent and child, master and servant, principal and agent, employer and employee or other persons in a similar category. Surprising as it may seem, in any accident caused by the concurring negligence of two persons, it was the well settled law in the early days of jurisprudence, both in England and in the United States, that where the party injured came within the status or relationship of husband and wife, principal and agent, or any of the others just mentioned, the injured person was barred from the right to recover damages against the guilty tort-feasor upon the ground that the fault of the husband, parent, guardian, agent or employee to whom the injured person was related or occupied such a status was chargeable to the injured person by reason of that status or relationship. The fact that the injured person (wife, child, ward, principal or employer etc.) seeking a recovery was not responsible for the accident, that is, was innocent of any negligence, was held to be immaterial; and the fact that the person against whom a recovery was sought was a tort-feasor whose negligence actually contributed to the accident was likewise held immaterial. Even more surprising, however, is the existence today of this principle in the jurisprudence of every state, in instances

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2. Beach, Contributory Negligence § 100 (2d ed. 1892); 1 Shearman and Redfield, Negligence § 65a (6th ed. 1913); 3 Cooley, Torts § 492 (4th ed. 1932); 4 Blashfield, Cyclopedia of Automobile Law and Practice § 2491 (1946).
involving principal and agent, employer and employee and master and servant.

**Origin of Doctrine of “Identification” With Its Theory of “Imputed Negligence.”**

The doctrine of “imputed negligence” is said to have arisen in 1849 in England before the English Courts of Common Law in the case of *Thorogood v. Bryan*. This case involved an action upon the case brought by a wife, as administratrix, against the owner of an omnibus for damages sustained by reason of the death of her husband resulting from the negligence of the driver of defendant's omnibus. The deceased had been riding in an omnibus and the driver thereof negligently permitted him to alight on the public highway while the vehicle was in motion instead of at the curb. As a result another omnibus, negligently driven by the defendant's servant, struck and so seriously injured him that he died shortly thereafter. The defendant owner of the omnibus pleaded “not guilty” to the declaration and as a defense claimed—and the court so instructed the jury—that, “if they were of the opinion that want of care on the part of the driver of Barber’s omnibus [from which the deceased had alighted] in not drawing up to the kerb to put the deceased down . . . had been conducive to the injury . . . notwithstanding the defendant (by her servant) had been guilty of negligence, their verdict must be for the defendant. . . .” The jury, under these instructions, returned a verdict for the defendant. The administratrix thereafter obtained a *redecem nisi* for a new trial on the grounds of misdirection.

The appellate court, after considering the arguments in both that case and *Cattlin v. Hills* sustained the instructions of the court and enunciated the principle of “imputed negligence.” It was based upon a theory referred to as “identification,” that is, a passenger in a vehicle. “having

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4. Id. at 116, 137 Eng. Rep. at 453. The case of Thorogood v. Bryan was argued at great length before the appellate court. The court, however, before it rendered a decision required argument by counsel in another case involving the identical principle concerned, although this time relating to the rights of a passenger upon one steamboat to recover damages against another steamboat for personal injuries suffered in a collision between the two vessels where it was claimed that the negligence of the crew of both vessels caused the accident and the negligence of the crew of the vessel in which the plaintiff was a passenger was attributable and chargeable to the plaintiff and barred him from a recovery. The jury had given a verdict for the plaintiff-passenger in that case but the appellate court never decided it due to the fact that the parties had compromised the case in the interim although the court stated it would have ordered judgment “discharging the rule” (i.e., setting aside the verdict) if this had not been done. *Cattlin v. Hills et al.*, 8 Man. G. & S. 123, 137 Eng. Rep. 455 (1849).
trusted the party by selecting the particular conveyance . . . so far identified himself with the owner and her servants, that, if any injury results from their negligence, he is to be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care on the part of the driver will be a defense of the driver of the carriage which directly caused the injury.\textsuperscript{96}

Maule, J. stated, and his associates concurred, that:

"... the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased. If the deceased himself had been driving, the case would have been quite free from doubt. So, there could have been no doubt, had the driver been employed to drive him, and no one else. On the part of the plaintiff, it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He selects the conveyance. He enters into a contract with the owner, who, by his servant the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it. . . . If there is negligence on the part of those who have contracted to carry the passengers, those who are injured have a clear and undoubted remedy against them. But it seems strange to say, that, although the defendant would not, under the circumstances, be liable to the owner of the other omnibus for any damage done to his carriage, he still would be responsible for an injury to a passenger. The passenger is not without remedy. But, as regards the present defendant, he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default of the driver whom he thought fit to trust . . . ."\textsuperscript{7}

Cresswell, J. stated: "If the driver of the omnibus the deceased was in had, by his negligence, or want of due care and skill, contributed to any injury from a collision, his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him, stands in any better position. For these reasons . . . the plaintiff in this case was not entitled to recover.\textsuperscript{98}

Adoption of Doctrine of "Identification" in England and United States.

The doctrine of "imputed negligence" based upon the theory of "identification" remained the law in England until 1888 when it was overruled in the \textit{Bernina} case\textsuperscript{9} which was decided by the House of Lords. During the intervening period of these years, however, this doctrine was adopted in various jurisdictions in the United States by courts that specifically cited it as the basis of their decisions.\textsuperscript{10}

\begin{itemize}
  \item \textsuperscript{6} Id. at 129, 137 Eng. Rep. at 458.
  \item \textsuperscript{7} Id. at 131, 137 Eng. Rep. at 458.
  \item \textsuperscript{8} Id. at 133, 137 Eng. Rep. at 459.
  \item \textsuperscript{9} 13 App. Cas. 1 (1888).
  \item \textsuperscript{10} Brown v. N.Y. Cent. R.R., 31 Barb. 385 (N.Y. 1860); Lockart \textit{et al.} v. Lichten-thaler \textit{et al.}, 46 Pa. 151 (1865); Prideaux v Mineral Point, 43 Wis. 512 (1878).\end{itemize}
There appears a statement in one jurisdiction in 1922 that the decision of *Thorogood v. Bryan* was "first adopted in the United States in 1878 by the State of Wisconsin. . ." However, as far as the writer has been able to ascertain, this dubious honor apparently belongs to New York, whose courts, referring to *Thorogood v. Bryan*, adopted the doctrine of "identification" in 1860 in the case of *Brown v. New York Central R. R.* This doctrine was followed in Michigan in *Lake Shore & Michigan Southern R. R. v. Miller*, and in perhaps a few other jurisdictions without specific mention of *Thorogood v. Bryan* by the courts. The doctrine of "identification," however, at all times was disapproved in most of the states.

**Statement That Doctrine of "Identification" Originated in Roman Law as Without Foundation.**

It has been unquestioned until the present time, as far as this writer has been able to ascertain, that "in the famous cause of *Thorogood v. Bryan*, an English court invented a new application of the old Roman Doctrine of Identification and held that a passenger in a public vehicle, though having no control over the driver, must be held so identified with the vehicle as to be chargeable with any negligence on the part of its manager which contributed to an injury inflicted upon such passenger by the negligence of a stranger." The only text that this writer has been able to discover in which the statement appears is the text just cited and subsequent editions of the same work. It seems, however, that this statement and its author was quoted verbatim by the court in *Duval v. Atlantic Coast Line R. R.* A further statement was found in the discussion of this problem by another court which stated in 1922: "The doctrine of imputed negligence as found in the jurisprudence of the states of the United States, as taken from the British courts, is viewed by text-writers as being no more than an application of the old Roman doctrine of 'identification.' . ." However, an examination of the

12. 31 Barb. 385 (N.Y. 1860). In all fairness to New York it should be noted that there seems to have been a contrary holding in one of the New York courts in 1859: Chapman v. New Haven R.R., 19 N.Y. 341 (1859).
14. 1 Shearman and Redfield, Negligence § 66 (6th ed. 1913); Beach, Contributory Negligence § 100 (2d ed. 1892); 3 Thompson, Commentaries on Negligence § 3067 (1902); 3 Cooley, Torts § 492 (4th ed. 1932); 4 Blashfield, op. cit. supra note 2, § 2491.
15. 1 Shearman and Redfield, Negligence § 66 (4th ed. 1888) (emphasis added).
16. 134 N.C. 331, 46 S.E. 750 (1904). This case is also quoted in another text, under notes, for this Roman origin. 65 C.J.S. 797 (1950).
jurisprudence of England and the United States as well as that of the Roman law has disclosed that such a statement has no foundation in fact.

A study of English jurisprudence reveals that not one author has made the statement that the doctrine of "identification" is attributable to Roman law. A study of American jurisprudence likewise reveals a dearth of authority for this claim. Texts both old and new disclose no such statement by their respective authors in discussing the principles of "imputed negligence." An examination of the case of Thorogood v. Bryan, where the doctrine of "identification" was promulgated, as well as the Bernina case where it was specifically overruled, reveals that those courts made no statement that the doctrine of "imputed negligence" was an application of, or emanated from, any principle of Roman law such as "identification." It would appear reasonably probable that if this doctrine originated in Roman law some work on Roman law would have been cited. The absence of such a reference can be attributed to the fact that no basis ever existed for such a claim. In addition, the fact that no mention was ever made that the doctrine of "identification" arose from Roman law either in Thorogood v. Bryan, or in the Bernina case or in any subsequent English case involving "imputed negligence" tends further to establish the falsity of that contention.

If there were any vestige of doubt as to the inaccuracy of the statement, an examination of the Roman law itself would remove it. Such an examination establishes incontrovertible proof that the doctrine of "identification" did not and could not exist because no principle of contributory negligence ever existed in Roman jurisprudence. "The Romans had not exactly a law of contributory negligence, i.e., they did not think of the matter quite in that way. It is true that modern writers have invented and attributed to the Romans a theory of what they call 'culpa compensation,' into which they have attempted to force the Roman texts. It is an unsuitable name in any case, since it suggests setoff (compensatio), a quantitative estimate of the negligence on each side, or, at best, our Admiralty rule rather than the common law rule. And it completely falsifies the Roman view. They seem to have applied here a theory of causation, no doubt a theory of causation which is not satisfactory, but that is not exceptional in theories of causation. The Roman view was that the negligent or intending person was liable for

18. 1 BEVEN, NEGLIGENCE IN LAW 165 (4th ed. 1928); 7 AMERICAN AND ENGLISH ENCYCLOPEDIA OF LAW 445 (2d ed. 1898).

19 BEACH, CONTRIBUTORY NEGLIGENCE § 100 (2d ed 1892); 29 CYCLOPEDIA OF LAW AND PROCEDURE 542 (1908); 1 LABATT, MASTER AND SERVANT § 55 (1913); 3 COOLEY, TORTS § 492 (4th ed. 1932); HARPER, TORTS § 146 (1933); 4 BLASHFIELD, op. cit. supra note 2, § 2491.
the harm if he caused it but not if some intervening agency prevented his act from producing its effect.\textsuperscript{220} An examination of other well-known and authoritative texts and treatises on Roman law at the Yale Law Library, which has a copy of all the known works and treatises on the subject, fails to reveal the existence of a doctrine of "identification" in Roman law.\textsuperscript{21}

The only conclusion the writer can reach is that the authors who originally made the statement mistakenly and arbitrarily assumed that certain principles which emanated from Roman law were applicable, when actually they were principles adopted by the English law, though generally used in their Latin phraseology, which merely referred to the relationship between master and servant and the liability of the master to a third party; e.g., the phrases "respondeat superior" and "qui facit per alium facit per se."\textsuperscript{222} The truth is, therefore, as borne out by research and an examination of \textit{Thorogood v. Bryan} and the \textit{Bernina} case, that the principle of "identification" was a product of the English court's own reasoning and was not an application of any Roman law doctrine of "identification."

**DISCARD OF DOCTRINE OF "IDENTIFICATION" IN ENGLAND.**

The question of the soundness of the doctrine of \textit{Thorogood v. Bryan} with its imputation of negligence to a passenger upon the basis of his "identification" with the driver came before the English courts in \textit{Mills et al. v. Armstrong},\textsuperscript{23} commonly known as the \textit{Bernina} case as it involved a vessel by that name. The case involved three suits by the respective estates of a passenger and two members of the crew of the Bushure who were killed as the result of a collision with the Bernina. The defendant maintained that there could be no recovery because the contributory

\ \textsuperscript{20.} Bucckland and McNab, \textit{Roman Law and Common Law} 288-9 (1936). Shearman and Redfield, the originators of this statement, in an earlier edition of their work make no reference to this doctrine as an emanation from Roman law. \textit{Shearman and Redfield, Negligence} § 46 (3d ed. 1874).

\ \textsuperscript{21.} See Hunter, \textit{A Systematic and Historical Exposition of Roman Law} (3d ed. 1897); Stephenson, \textit{A History of Roman Law} (1912); Buckland, \textit{A Manual of Roman Private Law} (2d ed. 1939); Rader, \textit{Handbook of Roman Law} (1927); Shearman, \textit{Roman Law in the Modern World} (3d ed. 1937); Jolowicz, \textit{Historical Introduction to the Study of Roman Law} (1932). In order to make doubly certain of this fact, the writer communicated with the Yale Law Library whose reference librarian, Mr. John S. Gum-mere, after an exhaustive research wrote: "I have not been able to verify [the existence] of [any] Roman doctrine of identification in any of our works on Roman Law. It is mentioned in \textit{Shearman and Redfield, Negligence} § 66 (4th & 5th editions) but no further clue is given." Letter to writer, July 20, 1950.

\ \textsuperscript{22.} 1 Beven, \textit{op. cit. supra} note 18, at 715-6.

\ \textsuperscript{23.} 13 App. Cas. 1 (1888).
negligence of the crew of the Bushure must be imputed to the claimants on the “identification” doctrine of Thorogood v. Bryan. The lower court denied recovery on that ground but the Court of Appeals reversed the decision. The case then went before the House of Lords which adopted the written presentations of Lord Herschell and Lord Watson, which favored overruling Thorogood v. Bryan, and sustained the decision of the Court of Appeals.

Lord Herschell observed that “the very question that had to be determined was, whether the contributory negligence of the driver of the vehicle was a defense as against the passenger when suing another wrongdoer. To say it is a defense because the passenger is indentified with the driver, appears . . . to beg the question, when it is not suggested that this identification results from any recognized principles of law, or has any other effect than to furnish that defense, the validity of which was the very point in issue.”24 It was pointed out that “the relation between the passenger in a public vehicle, and the driver of it, certainly is not such . . . [that] the act of one man is treated in law as the act of another.”25 In criticizing the statement made in Thorogood v. Bryan that a party had a right to choose his own conveyance and, having selected it, must take the consequences of any default of the driver with whom he saw fit to entrust his safety, the House of Lords further adopted the statement of Lord Herschell that the reasoning is not “well founded either in law or in fact. What kind of control had the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance, that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers travelling in steamships or on railways, the unreasonableness of such a doctrine is even more glaring.”26 The House of Lords also criticized the reasoning of Thorogood v. Bryan that if the driver of the vehicle, in which a person is a passenger, is negligent, the driver's master may not recover and therefore since the passenger who employs the driver should stand in no better position he likewise may not recover.

“Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that if his driver's negligence alone had caused the collision, he would have been liable to an action for

24. *Id.* at 7.
25. *Id.* at 8.
the injury resulting from it to third parties. The learned judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver.27

After the decision in the *Bernina* case there could be no question that the doctrine of "identification" with its imputation of negligence to a passenger of a vehicle was disownenanced and discarded throughout the jurisprudence of England.28

**DISCARD OF DOCTRINE OF "IDENTIFICATION" IN THE UNITED STATES.**

The doctrine of "identification" had been adopted in a minority of the states. However, after the decision of the *Bernina* case, the courts in virtually every one of these states reversed their stand until today practically none of the courts, except perhaps in Connecticut, follows the rule of *Thorogood v. Bryan*. Previously the Supreme Court of the United States, in a scholarly and exhaustive opinion in *Little v. Hackett*29 had rejected the doctrine as a false and fictional legal anachronism. This decision was cited by the House of Lords in the *Bernina* case as establishing the disapproval of the doctrine by an overwhelming majority of the courts in the United States.

The Court stated in *Little v. Hackett*:

"Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration.

"The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world."30

27. *Ibid.* Lord Watson's opinion points out the anomaly of holding that a passenger, so unconnected with the driver as to be exempt from liability to third persons for the driver's negligence, is nevertheless barred from recovery against wrongdoers by the driver's contributory negligence. *Id.* at 16.


30. *Id.* at 374-5.
A New Jersey court, cited with approval by other authorities, has stated:

"If the law were otherwise, not only the hirer of the coach, but also all the passengers in it, would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach-stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried."31

The overwhelming weight of modern authority is to the effect that the negligence of an operator is not to be imputed to a passenger. There are special relationships in which the doctrine of imputed negligence has been applied. However, these instances, as will be now pointed out, in no way modify or otherwise limit the practically universal rule just stated.

"IMPUTED NEGLIGENCE" IN SPECIAL RELATIONSHIPS.

There are special relationships involving husband and wife, parent and child, bailor and bailee, master and servant, principal and agent and others in which the contributory negligence of one person has been held applicable, in certain instances, to the other by reason of the particular relationship. These special relationship cases actually do not involve the "imputed negligence" theory, referred to under the "identification" doctrine, but have reference to the right to impute the negligence (actually, the contributory negligence) of one person to another by reason of the circumstances of that particular relationship with the consequent bar to a recovery of damages against a third person for his concurring negligence.

The principle of imputed negligence involved in the special relationship of parent and child, insofar as it ever existed, or still exists today, is based upon the theory that the child and its conduct are under the parent’s control.32 "An infant is not sui juris. He belongs to another to whom discretion in the case has been exclusively confided. That person is keeper and agent for this purpose; and in respect to third persons, his act must be deemed the act of the infant; his neglect, the infant’s

32. Shearman and Redfield, NEGLIGENCE § 46 (3d ed. 1874); 1 Beven, op. cit. supra note 18, at 178 et seq.
neglect.\textsuperscript{33} "This principle of law arises out of the family. It recognizes the parent in a sense as the repository of a trust to nurture and protect his offspring.\textsuperscript{34} In the case of husband and wife, the imputed negligence principle is based upon the theory that the wife herself under common law had no right to bring an action for personal injuries without her husband so that "the contributory negligence of the husband barred the wife of the right to recovery as effectually as it did him."\textsuperscript{35} There was also the theory that the wife was under the husband’s care or that he controlled her personal conduct.\textsuperscript{36} In earlier days, certain courts stated that the wife was under the care of her husband who had custody of her person and was responsible for her safety so that "any want of ordinary care on his part is attributable to her in the same degree as if she were wholly acting for herself."\textsuperscript{37} The theory was that "the person to whom the negligence of another is imputed, owing to the relationship between them ought to be responsible for the conduct of such other to the cause of the injury."\textsuperscript{38}

Imputation of negligence in the master and servant and principal and agent relationships was founded upon the fact that the principal or master was either in absolute control or had the absolute right to control so that the negligence of the agent or servant was, in effect, the negligence of the principal or master.\textsuperscript{39} The reason was also given that "[t]he negligence of the servant is imputed to the master, because the master employes and can discharge the servant and direct his actions."\textsuperscript{40} Likewise, in the bailor and bailee cases the theory was originally that the bailor was responsible for the bailee’s negligence on the ground that he had a right to control even though he did not exercise it, and therefore, was chargeable with the bailee’s negligence.\textsuperscript{41} The bailee was considered the bailor’s agent and therefore the negligence of the bailee was attributable to the bailor.\textsuperscript{42}

The authorities today no longer impute the negligence of the parent

\textsuperscript{33} Hartfield v. Roper, 21 Wend. 615, 619 (N.Y. 1839). See also Pastore v. Livingston, 72 Misc. 555, 331 N.Y. Supp. 971 (1911).
\textsuperscript{34} Gallagher v. Johnson, 237 Mass. 455, 458, 130 N.E. 174, 175 (1921).
\textsuperscript{35} 1 Shearman and Redfield, Negligence § 67 (6th ed. 1913).
\textsuperscript{36} Shearman and Redfield, Negligence § 46 (3d ed. 1874).
\textsuperscript{37} Carlisle v. Sheldon, 27 Vt. 438, 446 (1856). See also Joliet v. Seward, 86 Ill. 402 (1877).
\textsuperscript{38} 1 Shearman and Redfield, Negligence § 65a (6th ed. 1913). See also 1 Beven, op. cit. supra note 18, at 179; 3 Cooley, Torts § 492 (4th ed. 1932).
\textsuperscript{39} Lassock v. Bileski, 94 Pa. Super. 299 (1928).
\textsuperscript{40} Virginia Ry. & Power Co. v. Gorsuch, 120 Va. 655, 658, 91 S.E. 632, 637 (1917).
\textsuperscript{41} Smith v. Smith, 2 Pick. 621 (Mass. 1824); Forks Township v. King, 84 Pa. 230 (1875); Puterbaugh v. Relesor, 9 Ohio St. 484 (1859).
\textsuperscript{42} Toledo v. Wabash R.R., 25 Ind. 185 (1865).
to the child so as to bar a recovery by the child against a third party whose negligence concurs with that of the parent.43 In parent and child cases, "it is now thoroughly established that the parent's negligence does not insulate the defendant's culpability, and the child may recover. The child is not precluded from obtaining redress from one who has committed a wrong against it because its parent has also contributed to the harm. The parent or guardian is not the child's agent or servant, and it is obviously unjust to hold it responsible for its guardian's misconduct. To 'impute' the parent's negligence to the child would . . . be tantamount to holding the child responsible, not for its own, but its parent's discretion." There are, however, a minority of states that hold the contrary.45

The authorities today in cases involving the relationship of husband and wife have almost unanimously declared that the marital relationship, of itself, is not sufficient to impute the contributory negligence of the husband to the wife or vice versa so as to bar a recovery against a third party whose negligence concurred with the other spouse.46 There are, as appears in the citations set forth in the notes, jurisdictions to the contrary. A change has been made by statute in practically every state so that now married women have a right to recover damages for their own separate use and the fault of a husband, while in company with his wife, is not chargeable to her.47 The courts have laid down the general principle, in contract actions, equally applicable here that: "The marital relations per se bestowed no authority upon the husband to act as agent for the wife. . . ."48

Connecticut is sometimes cited as a jurisdiction which still imputes the negligence of one spouse to the other upon the basis of the doctrine of "identification" or upon the basis of the relationship between them.49

43. 3 Cooley, Torts § 493 (4th ed. 1932).
44. Harper, Torts § 149 (1933). N.Y. DOM. REL. LAW § 73: "In an action brought by an infant to recover damages for personal injury the contributory negligence of the infant's parent or other custodian shall not be imputed to the infant." See also 4 Blashfield, Cyclopedia of Automobile Law and Practice § 2496 (1946); 65 C. J. S. 801 (1950); Daley v. Norwich & W.R.R., 26 Conn. 590 (1858).
45. 65 C. J. S. 801 (1950); Harper, Torts § 149 (1933).
46. 4 Blashfield, op. cit. supra note 44, § 2497; 3 Cooley, Torts § 492 (3rd ed. 1932); Restatement, Torts § 487 (1934); 65 C. J. S. 800 (1950); Rodgers et al. v. Saxton, 305 Pa. 479, 158 Atl. 166 (1931); Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W. 2d 406 (1943).
47. 1 Shearman and Redfield, Negligence § 67 (6th ed. 1913); Peskowltz et al. v. Kramer, Inc. et al., 105 N. J. L. 415, 144 Atl. 604 (1929).
48. Cyclone Fence Co. v. McAviney et al., 121 Conn. 656, 659, 186 Atl. 635, 636 (1930).
49. 3 Bouvier, Law Dictionary 2521; Beach, Contributory Negligence § 109 (2d ed. 1892); 1 Shearman and Redfield, Negligence § 67 (6th ed. 1913); 35 Yale L. J. 766 (1926).
The basis for this statement is found in certain dicta appearing in Peck v. New York, N. H. & H. R. R. and in subsequent cases. A study of the law of Connecticut, however, discloses that this doctrine, if it ever did exist in that state, has been overruled. There are a few jurisdictions—although in the distinct minority—which hold that the very relationship of husband and wife creates an agency of one for the other, so that the contributory negligence of one must be imputed to and bar a recovery by, the other. Such states as Washington, California and Iowa, where the doctrine of imputed negligence still exists, have community property laws upon which the doctrine is founded rather than upon the particular relationship of husband and wife.

50. 50 Conn. 379 (1882).

51. There are dicta in Connecticut cases which indicate that the negligence of one spouse would be imputed to the other. See, Morgan v. Marchessault et al., 117 Conn. 607, 609, 619 Atl. 609, 610 (1933); Stiles v. Countermarsh, 118 Conn. 691, 692, 171 Atl. 509, 510 (1934); Bradley v. Niemann, 137 Conn. 81, 83, 74 A.2d 876, 877 (1950). The question was never specifically raised except in the latter case and was not determined. Peck v. New York, N. H. & H. R.R., supra note 50, was specifically overruled in the later case of Bartram et ux. v. Town of Sharon, 71 Conn. 686, 43 Atl. 143 (1899). Further, in subsequent cases, Connecticut has consistently rejected the doctrine of imputed negligence. Bartram et ux. v. Town of Sharon, supra; Wing v. Eginton, 92 Conn. 336, 102 Atl. 655 (1918); Weidlich v. New York, N. H. & H. R.R., 93 Conn. 438, 106 Atl. 323 (1919); Chodes v. Clark Seed Co., 95 Conn. 263, 111 Atl. 58 (1920); Sullivan v. Krivitsky, 100 Conn. 508, 123 Atl. 847 (1924); Bacon v. Rocky Hill, 126 Conn. 402, 11 A.2d 399 (1940). In 1877 married women were given the right to sue in Connecticut in their own name for personal injuries. Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925). It appears, therefore, with this change of statute and in view of the cases just cited, that if the question is squarely presented, the courts in Connecticut will finally reject the doctrine of imputed negligence between husband and wife.


53. "The community of husband and wife is, under our laws, a legal entity in which the individuality of both spouses is merged, insofar as ownership of property acquired by either after marriage is concerned. . . . The husband has the management and control of the community personal property. . . . This control goes to the extent that the wife cannot sue, except by joining her husband as plaintiff, to recover damages for personal injuries suffered by her alone . . . [the husband's] contributory negligence being the contributory negligence of the community; and his contributory negligence being established . . . we are unable to see how the conclusion could be avoided that the community's recovery would hereby be defeated." Ostheller v. Spokane & I. E. R.R., 104 Wash. 678, 686, 182 Pac. 630, 633 (1919). See also Pacific Const. Co. v. Cochran et al., 29 Ariz. 554, 243 Pac. 405 (1926); Kline v. Barkett et al., 158 P.2d 51 (Cal. 1945); Kalleg v. Fassio et al., 125 Cal. App. 96, 13 P.2d 763 (1932); Denbar v. San Francisco Ry. et al., 54 Cal. App. 15, 201 Pac. 330 (1921); Bostwick et al. v. Texas & P. Ry., 81 S.W.2d 216 (Tex. Civ. App. 1935). Missouri Pac. Ry. v. White, 80 Tex. 202, 15 S.W. 808 (1891).
The authorities today have also declared that if an owner lends a vehicle to another, the resulting relationship of itself is insufficient to impute to the owner as bailor the contributory negligence of the driver and bar the owner from a recovery against a negligent third party. Statements to this effect also appear in many authorities cited under the master and servant and principal and agent cases.

Modern authorities, in cases involving master and servant and similar relationships, declare that the relationship of master and servant or principal and agent, of itself, is sufficient to impute the contributory negligence of the driver as servant or agent to the owner as master or principal so as to bar a recovery by the owner. This had been the rule in early days and is still, apparently, the existing doctrine in the United States. It is the claim of this writer, that every jurisdiction should modify or otherwise change this rule for the reasons later stated so that a recovery should not be denied even to a principal or master by imputation of his agent's or servant's contributory negligence.

Discussion of the further question of the right of a parent or child to recover for injuries to a child, loss of service, wages, medical disbursements and similar items, as dependent both upon whether the parent or the child sues therefor and the form of the action, may be found elsewhere. Likewise, the similar problem of the right of a husband to recover for injuries to his wife has been discussed by various authorities. Closely akin to this problem is the right of beneficiaries, within a certain degree of kinship to a deceased as provided by statute, to recover where a claim is made that the contributory negligence of the beneficiary barred his right to recover damages for the death of the decedent. The answer to this question is dependent upon the particular provisions of the statutes involved. Suffice to say, the writer, in order to keep this article within reasonable bounds, has not discussed these problems but has merely pointed to them as allied to the issue of "imputed negligence."

55. Shearman and Redfield, Negligence § 46 (3d ed 1974); 7 American and English Encyclopaedia of Law 445 (2d ed. 1898); 3 Thompson, Commentaries on Negligence § 3068 (1902); Beach, Contributory Negligence § 103 (2d ed. 1892); 29 Cyclopedia of Law and Procedure § 542 (1908); 1 Labatt, Master and Servant § 55 (2d ed. 1913); 1 Shearman and Redfield, Negligence § 65a (6th ed. 1913); 1 Beven, Negligence in Law 715 (4th ed. 1928).
56. 3 Cooley, Torts § 492 (4th ed. 1932); Harper, Torts § 149 (1933); 65 C.J.S. 804 (1950); Sampson v. Wilson, 89 Conn. 707, 96 Atl. 163 (1915).
57. Harper, Torts § 149 (1933); 1 Shearman and Redfield, Negligence § 71 (6th ed. 1913); 46 C.J. 1301 (1928).
59. 3 Cooley, Torts § 492 (4th ed. 1932); 4 Blashfield, op. cit. supra note 44, § 2491.
From time to time the question has arisen in various jurisdictions under the so-called "family car statutes" whether the owner, be he a passenger in the car or not, is barred from recovering damages for injuries sustained where the car is driven by a spouse, relative or other person in any category defined in the statute, who is contributarily negligent upon the ground that the statute makes the driver the agent of the owner. For the sake of brevity, the phrase "family car statute" will be used to designate any statute imputing agency to the driver and will not be limited to statutes referring to husband and wife and similar relationships. This problem is sometimes confused by courts with the question of "imputed negligence" as based upon the "identification" doctrine. However, it does not involve that doctrine. Imputation of the negligence of the driver to the owner under these family car statutes depends upon the particular wording of the statute. It further depends upon the view of the particular jurisdiction as to whether the purpose of the statute was to affix or to limit liability.

Where the question of the imposition of agency upon the basis of the relationship between the driver of the car and the owner under the family car statutes has arisen, the courts have, except in a few instances, held, in the absence of a contrary intent specifically set forth in the statute, that the family car statute is only applicable where it is sought to be applied to impose rather than to escape liability. Thus, in Christensen v. Hennepin Transportation Co., the leading case holding the negligence of the husband driver not imputable to the wife under a family car statute, a wife was injured while riding in a car owned by her husband which collided with defendant's car. The court, in answer to the claim that the statute barred a recovery, stated, in an extended and learned discourse, that the statute's purpose was to establish the financial responsibility of an owner of a motor vehicle for personal injuries and to make such owner liable to those injured upon the highways where no such liability would otherwise exist. The court pointed out that the statute was silent with respect to the rights of an owner where he sues a third person to recover damages sustained by him as a result of the ownership or operation of a motor vehicle and that the language of the statute did not make the operator the agent of the owner with all the incidents of the law of agency. In stating that the statute was remedial and should be construed as such the court said:

60. See Note, 11 A.L.R.2d 1437 (1950).
61. 215 Minn. 394, 10 N.W.2d 406 (1943).
"The duty to construe a remedial statute liberally simply means that the court should so apply it as to suppress the mischief sought to be avoided by affording the remedy intended. It stops short of extending a statute to purposes and objects not mentioned therein. In its remedial aspect the statute imposes financial liability on an owner consenting to operation of his automobile for the driver's negligence. To that extent it should be liberally construed. . . . The subject of imputing a driver's contributory negligence to the owner is not mentioned in the statute. It is not the mischief at which the statute aims. It is entirely foreign to the purpose of the statute. The express provisions set limits which exclude the entire subject of imputed contributory negligence. . . .

"The doctrine of contributory negligence does not effectuate the purpose of the statute of establishing financial responsibility for negligence. On the contrary, by barring plaintiffs it operates to defeat such responsibility by enabling negligent defendants to escape liability." 62

Where third parties sought to use the statute and its consequent imputation of agency in an attempt to impute the negligence of the driver to the owner, other courts have tersely said: "The statutory implication is not applied to contributory negligence which is governed by the rules which pre-existed the statute." 63 "The statute does not change the common law rule respecting the owner's right to recover from third persons under the circumstances disclosed by this record. Nor may it be involved for the purpose of imputing the operator's negligence to the owner. It is applicable for that group only in actions brought by third persons against the owner." 64

Existing Doctrine.

The general doctrine prevailing today can be gleaned from a study of the following quotations: " . . . the negligence of the operator is not to be imputed to a passenger therein . . . unless his relation to the driver is such that he has the right to exercise control over the operator of the vehicle." 65 "[T]he driver's negligence is to be imputed to the passenger, wherever the latter controls or has the right to control or participate in controlling the operations or movements of the vehicle." 66 "[T]he general rule is that negligence in the conduct of another will not be imputable to the person injured if he neither authorized such conduct nor participated therein nor had the right or power to control the conduct of such

62. Id. at 411-2, 10 N.W.2d at 416.
65. 3 COOLEY, TORTS § 2493 (4th ed. 1932).
66. 4 BLASHFIELD, op. cit. supra note 44, § 2493.
The injured person in these instances "is barred from recovery against a negligent defendant by the contributing negligence of a third person only when the relationship between the plaintiff and the third person is such as to make the plaintiff vicariously responsible to anyone harmed by such third person's negligence." A number of minority jurisdictions have held that the mere presence of the owner in a car presupposes the concomitant control or right to control upon his part. The driver is considered a servant or agent whose control and negligence is attributable to the owner to bar a recovery from a third party for injuries sustained by the owner through the concurring negligence of the driver and the third party. Thus, in cases involving the relationship of husband and wife, recovery has been denied on the ground that:

"The owner of an automobile has the right to control and direct its operation. So when the owner is an occupant of an automobile being operated by another with his permission or at his request, nothing else appearing, the negligence of the driver is imputable to the owner. . . .

"Strictly speaking, the person operating with the permission or at the request of the owner-occupant is not an agent or employee of the owner, but the relationship is such that the law of agency is applied." "It was [the injured person's] car, he was present and had the legal right to control its operation, and the negligent conduct of the driver was imputable to him. The mere fact that he chose to sit on the rear seat and refrained from directing its operation did not change his rights or limit his liability." And in similar cases where the spouse who was the owner was a passenger, the court has said that the owner was "traveling in her own car. . . . As owner, she had full power to control her husband's conduct while she was present. Consequently his negligence was chargeable to her." This theory has even been applied where the spouse charged with imputed negligence was an invalid. The rule has likewise been applied in parent and child relationships.

67. 65 C. J. S. 797 (1950).
68. HARPER, TORTS § 146 (1933).
The majority authorities have criticised this view as "a purely fictitious one. No occupant riding in a vehicle driven by another has actual control over the operating details of the car. Where several are riding, such group authority would obviously prove disastrous." The minority view has been discredited by the decision in the leading case of Rodgers v. Saxton\textsuperscript{75} in which the court stated: "Nor is the husband-driver necessarily the agent or servant of his wife-passenger, even in those cases where the wife herself has purchased the car with her own funds and has registered her ownership. The husband is still the head of the family, and when he is at the wheel of that car, even with his wife present, the presumption is that he is in control of the car, and, in the absence of evidence to the contrary, he is solely responsible for its operation. Ownership of a car does not necessarily mean control of that car, any more than ownership of any other property necessarily means control of it."\textsuperscript{76} And, "... even though the fact should be established in a given case that the driver and passenger of a vehicle were engaged in an admittedly joint enterprise at the time the driver was negligent, that fact alone would not tend to prove that the passenger had a right to share in the vehicle's control."\textsuperscript{77}

**Doctrine of "Imputed Negligence" a Legal Anachronism.**

The universal rule today in this country apparently is that negligence can be imputed in master and servant and similar relationships upon the basis of an agency created by reason of (a) the actual control and/or (b) the right to control.\textsuperscript{78} However, use of the latter factor to create an agency under which the negligence of one person is attributed to another in relationships such as parent and child, husband and wife and bailor and bailee has been almost universally discarded as anachronistic and contrary to justice and the requirements of modern civilization. For the same reason use of this factor should be discarded as a basis for the creation of an agency in master and servant and similar relationships in order to impute the negligence of a servant to a master in a suit by a master against a third person. The negligence of an owner or his con-

\textsuperscript{74} Harper, Torts § 148 (1933). See also 3 Cooley, Torts § 492 (4th ed. 1932); 4 Blashfield, *Cyclopedia of Automobile Law and Practice* §§ 2493, 2497 (1946); Restatement, Torts § 490 (1934); 3 Cooley, Torts § 492 (4th ed. 1932).

\textsuperscript{75} 305 Pa. 479, 158 Atl. 166 (1931).

\textsuperscript{76} Id. at 485, 158 Atl. at 168. See also Christensen v. Hennepin Trans. Co., 215 Minn. 394, 10 N.W. 2d 406 (1943); Virginia Ry. & Power Co. v. Gorsuch, 120 Va. 655, 91 S.E. 632 (1917).


\textsuperscript{78} 3 Cooley, Torts § 492 (4th ed. 1932); Sampson v. Wilson, 89 Conn. 707, 96 Atl. 163 (1915).
tributory negligence should be determined solely by the fact of actual control, i.e., actual participation in the movements of a car. "If the owner of a car, while he occupies it, allows another to drive it, but retains control of it and the manner in which it is driven, he is liable for the driver's negligence in the operation."90

The use of "the right to control" factor in determining whether or not to impute the negligence of a driver to a passenger in such instances has been severely criticised by some on the ground that it was "a purely fictional one."96 One court stated that "the highway would be the wrong place to make the assertion of a partial right to control. In the nature of things a vehicle is controlled only by one person at one time, and rights flowing from joint ownership must be divisible in point of time. Certainly assertion of such rights in the course of operation is not timely, nor in the interest of public safety."91 For the same reason, the right of an owner to control a car driven by his servant or agent should not, ipso facto, permit the imputation of the negligence of the servant or agent to the owner and bar a recovery against a negligent third party.

The fact of ownership in the ordinary cases and in the relationship of master and servant, just as in other special relationships, should be considered only as a circumstance in determining the owner's "peculiar ability to control the manner in which the driver operates the car, and [which] therefore, may bar his recovery against the negligent defendant."95 However, such negligence would be personal negligence and not imputed negligence. The right to control is, therefore, only important in determining whether a person is personally guilty of contributory negligence. A plaintiff should be "barred from recovery if the negligence of a third person is a legally contributing cause of his harm, and the plaintiff (a) has the ability to control the conduct of the third person, and (b) knows or has reason to know that he has such ability, and (c) knows or should know (1) that it is necessary to exercise this control, and (2) that he has an opportunity to do so, and (d) fails to utilize such opportunity with reasonable care."93 "... the same rule of reasonable care under all the circumstances is applicable to the case of a passenger which is applicable in other cases..."94 The relationship of the owner to the driver or the presence of the owner is material

82. Restatement, Torts § 491, comment h. (1934).
83. Id. § 495.
only as it may be considered circumstantially in determining the passenger’s negligence. A passenger should not be held responsible for the contributory negligence of a driver and be barred from a recovery against a third party whose negligence concurred with his driver “unless he has an opportunity to observe the existence of danger, and time and opportunity to warn the driver thereof. In such event his failure to do so would rather be his own direct negligence than a mere ground for imputing to him that of the driver.”\footnote{85} It is a person’s own contributory negligence that bars him from a recovery where he “shut[s] his eyes to danger in blind reliance upon the unaided care of another . . . [or] needlessly entrusts himself to the control of another he knows to be incompetent. . . .”\footnote{86}

In early jurisprudence, a misconception of the maxims “respondeat superior” and “qui facit per alium facit per se,” which were borrowed from Roman law,\footnote{87} led to their use as part of the theory of “contributory negligence” to impute the contributory negligence of a servant to a master in an action by the latter against a third person. Actually there was no such doctrine of contributory negligence in Roman law.\footnote{88} The law of contributory negligence arose in England in 1809 in the case of \textit{Butterfield v. Forrester},\footnote{89} and has been seriously criticised as not resting upon a satisfactory basis.\footnote{90} The utter absurdity of this prevailing doctrine is revealed when we consider the fact that, under well established law, a servant is personally responsible to a master for injuries suffered by reason of the servant’s negligence.\footnote{91} It appears to this writer unreasonable and illogical to hold that, although a servant is personally liable to a master for negligence while operating a car for his master, the very same negligence which contributes to the master’s injury must be imputed to the master in an action against a third party. Our modern economic system and public policy require that the doctrine of imputed negligence, based solely upon the relationship of the occupants of the vehicle, be discarded as no longer applicable in actions where contributory negligence is urged as a defense. The early jurisprudence of

\footnote{85. 3. \textsc{Cooley}, \textsc{Torts} § 492 (4th ed. 1932). See also 1 \textsc{Shearman and Redfield}, \textsc{Negligence} § 66a (6th ed. 1913).
86. 1 \textsc{Shearman and Redfield}, \textsc{Negligence} § 66a (6th ed. 1913).
87. 1 \textsc{Beven}, \textsc{Negligence in Law} 715-6 (4th ed. 1928).
88. \textsc{Buckland and McNair}, \textsc{Roman Law and Common Law} 288 (1936) and authorities previously cited.
89. 11 East 60 (1809).
91. 18 R. C.L. 502 (1929); Shaker v. Shaker \textit{et al.}, 129 Conn. 518, 29 A. 2d 765 (1942); Donohue v. Jette, 106 Conn. 231, 137 Atl. 724 (1927); Smith v. Foran, 43 Conn. 244 (1875).}
England and the United States overlooked the fact that the maxims "respondeat superior" and "qui facit per alium facit per se" were adopted under the Roman law to affix liability upon the master for the torts of his servant and not to remove the liability of a third party for injury the master suffered as a result of that third party's negligence because of the fact that it concurred with that of the servant to cause the injury to the master. These Roman maxims, like the provisions of our family car statutes of today, should not have been interpreted to absolve a third party from liability to a master merely because of the concurring negligence of a servant. The error in the interpretation of these maxims by the courts does not justify its continued existence. Stare decisis does not require a court to perpetuate a wrong for which it was responsible.

The jurisprudence of our country took one step in that direction by discarding the theory of imputing the negligence of a driver to an ordinary passenger under the "identification" doctrine of Thorogood v. Bryan. A further step in that direction has been taken by a majority of the courts in this country in rejecting the doctrine of imputing the negligence of a driver to an owner, where the latter's so-called "right to control" stemmed merely from the particular relationship of husband and wife, parent and child, or bailor and bailee. The doctrine of imputed negligence in actions involving master and servant, principal and agent and similar relationships should likewise be discarded. In the words of Judge Cardozo: "Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel today. The principle... does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be."

The rule to be desired is that each person be held responsible for his own negligence; and such personal negligence alone should determine whether the injured person is entitled to recover damages. The relationship or status of the driver of a car should be considered merely as one of the circumstances in determining the personal contributory negligence, if any, of a passenger. No negligence of a driver should be imputed to a passenger in an action by the latter against a third party solely because of the status or relationship between the two. The right of a third party to bar a recovery by such a passenger should depend solely upon the conduct of the passenger in the actual control of the car or his failure to exercise that control or take such other action as was reasonably required and warranted by the circumstances. In other words, the question of the passenger's right to recover should be made dependent upon the presence or absence of his own personal contributory negligence.