DEPARTMENT OF TORTS.

EDITOR-IN-CHIEF,
MELVILLE M. BIGELOW, ESQ.
Assisted by
BENJAMIN H. LOWRY, ALEX. DURBIN LAUER.

CIRCUIT COURT OF APPEALS. EIGHTH CIRCUIT.
UNION PACIFIC RY. CO. *v.* LAPSLEY.[1]

Where a person accepts the gratuitous invitation of the owner and driver of a vehicle to ride with him, and exercises no control over such driver, the latter's negligence cannot be imputed to his guest so as to defeat his recovery against a third person for injuries resulting from the concurring negligence of the driver and such third person.

STATEMENT OF THE CASE.

Action by James J. Lapsley, as administrator of the estate of Eliza J. Lapsley, against the Union Pacific Ry. Co. to recover damages for causing the death of his intestate.

Verdict and judgment for plaintiff in the sum of $1000. The evidence disclosed that decedent was 48 years of age. The plaintiff was her brother, and lived in the same neighborhood. A member of the family living at a distance was ill, and decedent accepted an invitation of her brother to go with him in his wagon to visit the sick relative. On the return from the visit the accident happened by the train of defendant company running into the wagon. No whistle or other signal was heard, and just as the team was on the track an approaching train was seen, which struck the wagon and so seriously injured the decedent, who was sitting on a back seat, that she died in a few minutes. Both the plaintiff and his sister knew the surroundings of the crossing, and they came down in the wagon without stopping to look or listen.

The Court below[2] charged the jury that, if defendant

[1] 51 Fed. Rep., 174.
[2] 50 Fed. Rep., 172.

was negligent in operating its railway, and that negligence was the proximate cause of the injury, the plaintiff was entitled to recover unless they found that decedent was herself negligent, or controlled the driver, and he was negligent as a result of that control, and such negligence contributed to the injury.

To that portion of the charge exception was taken, and a writ of error brought.

Judgment affirmed.

IMPUTATION OF NEGLIGENCE TO PASSENGER; HOW AFFECTING HIS RIGHT OF ACTION AGAINST JOINT WRONG-DOERS.

In cases of injury by negligence the usual course of inquiry is:

Is there any negligence by defendant personally?

Is there any negligence by defendant's servants?

Has that negligence, if any, been wholly or partly a direct cause of the accident?

Has plaintiff personally been guilty of any negligence?

Has plaintiff, by his servants, been guilty of any negligence?

Has that negligence, if any, been either wholly or partly a direct cause of the injury?

These questions are the necessary forerunners of the vital principle—which is the general law on the subject—that a party who sustains an injury from the carelessness or negligence of another may maintain an action, unless he or his servants have been guilty of such negligence or want of due care as contributed to the injury.

The common law applicable to cases where a plaintiff has been injured by negligence, and in the course of which transaction there have been negligent acts or omissions by more than one person, is stated thus by ESHER, M. R. in "The Bernina" (L. R. 12 Prob. Div., 61), afterward affirmed in the House of Lords *sub. nom.*, Mills *v.* Armstrong, 13 App. CAS. 1.

(1) If no fault can be attributed to the plaintiff, and there is negligence by defendant and also by another independent person, both negligences in part directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either defendant or wrong-doer.

(2) If, in the same case, the negligence is partly that of the defendant personally, and partly that of his servants, plaintiff can maintain an action either against defendant or his servants.

(3) If, in the same case, the negligence is that of defendant's servants, though there be no personal negligence by defendant, plaintiff can maintain an action either against defendant or his servants.

(4) If, in the same case, the negligence, though not that of the defendant personally, or of a servant of defendant, consists in an act or omission by another, done or omitted to be done by the order or direction or authority of defendant, plaintiff can maintain an action either against defendant personally or against the person guilty of the negligence.

(5) If, although plaintiff has

himself or by his servants been guilty of negligence, such negligence did not directly partly cause the accident, and the alleged wrong-doer might by reasonable care have avoided the accident, plaintiff can have an action against defendant.

The remaining points in this sub-division are expressed in the general rule on the subject of contributory negligence laid down above. It is essential to state these principles in order to have a groundwork for the understanding of the development of the law in the case of concurrent negligence, and the imputation of such negligence, by various and intricate interpretations of the courts of law to an ordinarily disinterested plaintiff.

The case which first touched the fundamental principles above set forth, and gave rise to a variety of conflicting decisions, was that of Thorogood *v.* Bryan (8 C. B., 115) (1849), in which the startling doctrine was announced that a passenger upon the vehicle of a common carrier, who sustains an injury which is the result of the concurrent negligence of those in charge of such vehicle and third persons, is so identified with the former as to be chargeable with their negligence in an action against the latter, and therefore entitled only to recover damages from his carrier. The facts of the case were the simple ones of a collision between passing omnibuses, in one of which the plaintiff was riding. Whatever question there might have been as to the plaintiff's own personal negligence was early eliminated from the case, and it was decided solely on the ground of the concurrent negligence of the servants of the owners of the omnibus.

In plain truth, the judgment of the Court in that case amounts to this: That the plaintiff passenger made the driver of the vehicle his agent to the extent of being liable for the driver's acts; that by selecting that particular vehicle to transport him the plaintiff identified himself with the driver as to be associated with him for the purpose of barring any action against wrong-doers on the ground of contributory negligence.

By "identified" POLLOCK, B., understood, not that plaintiff had made the driver his agent, but that he must be taken to be in the same position as the owner of the conveyance or his driver for the purposes of the action. With this variation, the decision was approved: Armstronge, R. R. (L. R., 10, Exch., 47) 1875.

"Identified with the driver," "in the same position with the driver," are useless and entertaining fictions invented only to escape the inevitable conclusions resulting from the principles of master and servant. It makes the driver a servant and yet not a servant at the same time. The plaintiff must be associated with the driver to incur the penalties of negligence, and then disassociated when he should wish to maintain an action against the driver or the owner of the vehicle. In other words, the injured party, when suing one of the wrong-doers, is barred by the contributory negligence of his "for-the-time-being" servant, and can then sue his own servant alone.

"If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it," said MAULE, J., in Thorogood *v.* Bryan, to sustain his doctrine that by the very selection a relationship was created. But surely

public policy must overrule this reason when the helpless citizen is obliged to take the only means at hand for his transportation, and if especially by so doing he assumes to himself, along with a vehicle full of other passengers, the responsibility of the driver's negligence.

In a case in 1825 (Lavgher *v.* Pointer, 5 B. & C., 547), the relationship arising from a hiring was discussed in full. The defendant, the owner of a carriage, hired a pair of horses and a driver for one day of a stable-keeper. The man got no wages for his service, but a gratuity dependent on the caprice of the hirer. It was held the latter was not liable for the driver's negligence, on the ground that no relation of master and servant existed.

Persons hiring job-horses, said the Court, for a short time, cannot be supposed to have any knowledge of the driver or any control over him, and the public would, undoubtedly, suffer if the liability were transferred to the hirer, probably unknown, from the owner of the horse.

So with the application of the same reasoning to the plaintiff in Thorogood *v.* Bryan, he would be responsible to third parties for injuries occasioned through the negligence of the driver.

A distinction might be made between the two cases cited above, in that the passenger in the omnibus had no control over the driver at all, whereas in the hackney-coach he could order the driver to go where he pleased, and had more than a qualified use of the vehicle. This distinction is put with more force in the later American decisions in a complete separation of the rule as respects public and private carriers.

More strictly speaking, the driver cannot be the servant of two people. His relationship to passenger and owner of the vehicle must be fixed once for all, and not vary with the circumstances of each case. Carrying the rule in Thorogood *v.* Bryan to its absurd but logical conclusion, a multiplicity of actions would lawfully arise depending on the different degrees of negligence of each passenger with the driver, as between passenger and passenger, and third party injured and passenger.

Movable property must, of necessity, be sent out into the world by the owner to be conducted and cared for by other persons, and to prolong and multiply a relation so arising between owner and servant to chance strangers, wholly uninterested in the general scope of the employment, would be to delay and harass the most common transactions of life.

"Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in relation of *master* to the wrong-doer. He who had selected him as his servant from the knowledge of, or belief in, his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey." Quarman *v.* Burnett, 6 M. & W., 499 (1840).

Here was a concise statement of the legal relations, and the liability arising through that relation must cease to exist when the relations in real, physical earnest, ceased to exist. No other person than the master of such servant is liable, on the simple ground that the servant is the servant of another; consequently, a

third person, entering into a contract with the master, which contract does not raise the relation of master and servant at all, is not thereby rendered liable, and to make such person liable recourse must be had to a different and more extended principle, namely, that a person is liable not only for the acts of his own servant, but for any injury which arises by the act of another person, in carrying into execution that which that other person has contracted to do for his benefit.

The basis of the theory of master and servant having fallen to the ground in a series of decisions, it was attempted to sustain the identification of the passenger with the driver in the more recent cases.

In Childs *v.* Hearn, L. R., 9 Exch., 176 (1874), the Court went so far as to "identify" the plaintiff with the conveyance in which he was riding, for the purpose of the suit. If it was meant that the carriage was under his control, it was surely a mistake, as an imputation of negligence cannot arise through an inanimate object.

The doctrine of Thorogood *v.* Bryan, with its companion case of Cantlin *v.* Hills, was never adopted in Scotland, nor by the English Admiralty Court, and was never at rest until it was overruled by the Court of Appeals, without a dissenting voice, in the case of "The Bernina" (*supra*).

It is rapidly fading out, and in the United States, while a few State courts yet make distinctions to the broad rule, the best judicial decision is against it.

Courts of Admiralty, in cases of collision when the injury has happened from negligence on both sides, have adopted from the maritime law the principle that the loss shall be sustained equally by both.

While Dr. Lushington, in the case of "The Milan," Lush., 388 (1861), declined to be bound by Thorogood *v.* Bryan, he gave plaintiff but half his loss against the defendant upon this peculiar principle of admiralty. But though this may more nearly approximate justice in many cases, it yet fails to apportion the loss according to the degree of negligence in each, and the principle has never been adopted by the common law, which looks upon parties guilty of negligence in such cases as wrong-doers; and upon the ground, as it would seem, that no man shall take advantage of his own wrong, refuses to enforce contribution among joint wrong-doers, and will not apportion the damages, although one defendant is more culpable than another.

"Herein lies the difficulty," was said in R. R. *v.* Miller, 25 Mich., 274 (1872), where an apportionment was attempted to be made, "which is inherent in the nature of the subject, and the infirmity necessarily incident to all human administration of justice—the impossibility of ascertaining what portion of the injury was produced by the negligence of the one, and what by that of the other, and apportioning to each his just share of liability." Where the injury is the result of two concurring causes, one party in fault is not exempted from liability for it, although another party may be equally liable, states the law on the subject: Ricker *v.* Freeman, 50 N. H., 420 (1884); and the injured party may sue both or either: Tompkins *v.* Clay Street Ry. Co., 66 Cal., 163 (1884).

In the United States there is no court which still broadly adopts the rule in Thorogood *v.* Bryan, yet there remain some States which have made interesting variations upon it. Those States are Wisconsin, Michigan and Iowa.

All of them have wavered in their decisions, notably New York and Pennsylvania; and the most steadfast has been New Jersey. The space permitted this article will not allow an adequate history of the development of the law in the different State courts, yet in all of their decisions there runs the one clear distinction of a positive disaffirmance of the rule as concerns passengers in public conveyances, and a variation of it (to be now explained) in respect to private vehicles.

In Pennsylvania the rule has met with many vicissitudes. The earliest case, Lockhart *v.* Lichtenthaler, 46 Pa. St., 151 (1863), was that of a passenger on the vehicle of a common carrier injured by the concurrent negligence of the carrier and a third party. The Court, while approving Thorogood *v.* Bryan, did not go as far in reasoning out their decision to the effect that only the carrier could be sued. It expressly repudiated the "identity" theory, and based its decision on grounds of public policy, holding the carrier thus to greater care and diligence.

"The third party is not compensated, and should not be held to any responsibility," said THOMPSON, J. "This rule, it cannot be doubted, will be more likely to increase diligence than its opposite, which would enable a negligent and faithless party to escape the consequences of his want of care by swearing it on to another, which he would assuredly do if the temptation and opportunity offered." To these novel moral grounds were added the reasons that the carrier was liable to his employer at all events, and to make his associate in misconduct answerable for all the consequences of it would make one wrong-doer respond in place of another for an injury which both had committed. The justice of the decision rested on the equitable ground that the carrier should answer for his employer rather than one in whom the employer reposed no confidence.

In the analysis of the case, the Court does not use the word "servant," but "employee."

It should be stated in connection with this case and Simpson *v.* Hand, 6 Whart., 311 (1841), that the difference sought to be made between a carrier of passengers and of goods was one only of the degree of responsibility, imputing greater care to the former.

In imputing negligence to the plaintiff the Court held there was at least privity of contract between him and the carrier of his goods when he committed them to the care of the latter, giving him authority to assume a control over them equal, to some extent, to that of an agent.

Later cases in Pennsylvania expressly disapprove Thorogood *v.* Bryan, yet the Court assumes to itself the power of imputing to the plaintiff personal negligence in the fact that while riding with a companion driver he did not stop, look and listen, as was his duty under the law: Dean *v.* Penna. R. R. Co., 129 Pa. St., 514 (1889); Crescent City *v.* Anderson, 114 Pa. St., 643 (1886).

Where plaintiff had accepted an

invitation to ride and was thrown out owing to the wheel striking against a stone in the highway, it was held that if she exercised reasonable care in the selection of a driver, knowing the road as well as he, his negligence could not be imputed to her: Noyes *v.* Town of Boscawen, 64 N. H., 361 (1887).

So, in Plimmer *v.* Ossipee, 59 N. H., 55, the husband was driving and the wife was injured. The question of the character of the husband as a driver in the past being raised, it was held that evidence as to his safe driving was relevant, and the element of identity or control did not enter into it.

There cannot be said to be control in the following cases:

A vessel chartered for a day's excursion: Cuddy *v.* Horn, 46 Mich., 596 (1881).

A railway train: Chapman *v.* New Haven R. R., 19 N. Y., 341.

A street car: Bennett *v.* N. J. R. R., 36 N. J. L., 225.

A stage coach: Turnpike Co. *v.* Stewart, 2 Metc. (Ky.), 119.

The Iowa rule may be stated thus: When several parties are engaged in a common enterprise and one is injured by the joint negligence of one of his associates and another, the negligence of his associate will be imputed to him and will defeat all right of recovery against the other party, and when a person is injured through the common negligence of one who, from their relation, is bound to care for and protect him and another, the negligence of the former will be imputed to him, and will defeat a recovery against the other party.

But in Nisbet *v.* the Town of Garner, 75 Ia., 514 (1888), the Court refused to declare that, when one rides in the vehicle of another, the driver, as a matter of law, becomes his agent or servant in such sense that his negligence, contributing to an injury, will be imputed to him regardless of the real relation of the parties. The relation of principal and agent must exist in fact, and the law will not create the relation from the mere fact that the plaintiff accepted an invitation of another to ride in his carriage. If he is but the guest of the other, and neither has nor assumes the right to direct or control the conduct of the driver, neither he nor the owner can be regarded as his servant.

The negligence of the husband was, nevertheless, imputed to the wife, on the ground of the relation, and the fact that she was under the care of her husband: Yahn *v.* Ottumwa, 60 Ia., 429 (1883). "When paterfamilias drives his wife and child in his own vehicle, he is surely their agent in driving them to charge them with his own negligence," is another shade of the rule: Prideaux *v.* Mineral Point, 43 Wis., 513 (1878), in which State no case affecting public conveyances seems to have arisen, and no distinction was made between the two in that cited.

Where the passenger is seated away from the driver, or is separated from him by an enclosure, and is without opportunity to discover danger and to inform the driver of it, no negligence can be imputed to him: Brickell *v.* R. R., 120 N. Y., 290 (1890).

But in a private conveyance, irrespective of any domestic or fiduciary relation, the plaintiff is bound to exercise ordinary care: Dean *v.* R. R., 129 Pa. St., 514; R. R. Co. *v.* Kutac, 11 S. W. Repr. (Tex.), 127.

Yet in Indiana the extent of imputable negligence is limited again by the following principle: "Before the concurrent negligence of a third person can be interposed to shield another whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, as that, in contemplation of the law, the negligent act of the third person was, upon the principles of agency, or co-operation in a common or joint enterprise, the act of the person injured." In a case where this rule was stated, the husband was the driver and the wife was injured. In giving her judgment the Court said she was a mere passive guest, with as much authority to control his movements as to answer for his sins: Louisville N. A. & C. Ry. Co. *v.* Creek, 29 N. E. R., 481 (1892).

It did not appear how plaintiff and driver came to be riding together, and the Court said that if the plaintiff failed to use the care which prudence required, relying upon the vigilance of his companion, he must prove that the driver was in the exercise of due care: Allyn *v.* R. R., 105 Mass., 79 (1870).

In Randolph *v.* O'Riorden, 29 N. E. R., 584 Mass. (1892), the trial judge charged that the jury could find one or both defendants liable in a joint action, and that only the personal negligence of the plaintiff could defeat the action.

In a case in Ohio the plaintiff was 16 years old, *sui juris*, and was with her father, driving, when the accident occurred. It was held that his negligence could not be imputed to her, there being no evidence that she had not acted with reasonable care, and no control being shown other than the mere fact of relationship. It was considered, but not decided, whether the father would not have been jointly liable with the defendant wrong-doer: St. Clair St. Ry. Co. *v.* Eadie, 43 Ohio St., 91 (1885).

It makes no difference whether the defendant's act was a positive act of negligence or whether he only contributed to it by an act of omission, throwing the greater degree on the driver: Dyer *v.* Erie Ry. Co., 71 N. Y., 228 (1877).

There being no reason why a person should not have taken a ride, knowing the driver to be a reasonably prudent man—no relation of master and servant existing, no control being exercised, no joint enterprise on foot, no willful act of wrong-doing on the part of the driver—negligence will not be imputed, and, in the absence of his own, a plaintiff can recover: Masterson *v.* N. Y. C. & H. R. R. Co., 84 N. Y., 247 (1881); Bennett *v.* R. R., 36 N. J. L., 225 (1873); Brannen *v.* Kokomo Co., 17 N. E. R., 202 (1888), Ind.; Little *v.* Hackett, 116 U. S., 366 (1886); State *v.* B. & M. R. R. Co., 80 Me., 430 (1888).

ALEXANDER DURBIN LAUER.