

## THE CONTRIBUTORY NEGLIGENCE OF AUTOMOBILE PASSENGERS

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In the field of personal injury litigation centering about the use and operation of automobiles, the contributory negligence of passengers and the circumstances under which the contributory negligence of the driver will be imputed to them are frequently-recurring problems.<sup>1</sup> Like many other negligence problems, they are determinable only upon a careful inquiry into the facts, which are usually too complex to permit of solution by rule of thumb methods. Unfortunately, however, the courts have not always undertaken a full consideration of all the material facts, nor have they been entirely consistent in the application of well-settled principles, with the consequent result that there has developed an uncertainty as to the true grounds of decision where these problems are presented. It is hoped that the ensuing discussion may be of some assistance in clearing up this uncertainty and defining more thoroughly the principles involved in the solution of these cases.

### PERSONAL CONTRIBUTORY NEGLIGENCE

Contributory negligence is said to be that failure on the part of a plaintiff to exercise ordinary care (*i. e.*, to conduct himself reasonably) for his own safety, which, in order to bar recovery, can be regarded as one of the causes of the injury complained of. It may consist in acting when he should have refrained from so acting, or in refraining when he should have acted, but in either case his conduct must be unreasonable under the circumstances in order to constitute that negligence which will bar a recovery. What is reasonable conduct for an automobile passenger, particularly a gratuitous one, with respect to his own safety?

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<sup>1</sup>The scope of this article will be found somewhat more comprehensive than the title indicates. It is intended as an analysis of the principles upon which guest passengers are denied a recovery for injuries suffered in automobile accidents, either because of personal contributory negligence or the imputed contributory negligence of the driver.

Obviously the answer to this inquiry depends upon the circumstances—the kind of hazard and the situation in which it is encountered—and on casual inspection this fact may seem to preclude any very concrete analysis of the problem. Nevertheless a substantial bit of generalization is possible. Fortunately, the majority of cases in which the problem has come up can be classified as to factual situation with a fair degree of standardization.

It is a rather well-settled rule that where a person chooses to ride with a driver known to be a dangerous or incompetent operator he is guilty of negligence with regard to his own safety unless the situation be one of extreme emergency, and even in that situation he may be held to have assumed the risk of injury from the driver's incompetencies.<sup>2</sup>

The same rule applies where the way to be traversed is unsafe, or the car is not in a roadworthy condition, or the weather makes travel dangerous, provided the passenger is, or ought to be, aware of these facts.<sup>3</sup> These are all situations in which one's conduct in becoming a passenger is very likely to be regarded as unreasonable except in the face of rather grave emergencies. There seems to be adequate justification for this view. The passenger is in a neutral position when he forms his decision; he may enter the car or not, as he will; and, except in the case of an emergency, he has ample time and opportunity for a full consideration of the facts. His present situation is one of comparative safety from which he is not justified in emerging for an adventure of dangerous proportions unless impelled by exceedingly grave considerations. In all these cases the prospective passenger may, by relying solely upon his own powers, ordinarily avoid the risk of injury involved in becoming a passenger under such circumstances.

There is, however, a class of cases—and it is by far the largest—where the question of the passenger's contributory negligence requires a more exhaustive analysis of the situation out of

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<sup>2</sup> *McGeever v. O'Byrne*, 203 Ala. 266, 82 So. 508 (1919); *Lynn v. Goodwin*, 170 Cal. 112, 148 Pac. 927 (1915); *Besserman v. Hines*, 219 Ill. App. 606 (1920); *Shifflett's Adm'x v. Virginia Ry. & Power Co.*, 136 Va. 72, 116 S. E. 500 (1923).

<sup>3</sup> *Rebillard v. Minneapolis, St. P. & S. S. M. Ry.*, 216 Fed. 503 (C. C. A. 8th, 1914); *Hurley v. Spokane*, 126 Wash. 213, 217 Pac. 1004 (1923); *Somerfield v. Flury*, 223 N. W. 408 (Wis. 1929).

which the injury may be supposed to have arisen. These are the cases in which the contributory negligence of the passenger is alleged to consist in an act or omission (usually the latter) with respect to the operation of the car. In such cases there is no negligence on the part of the passenger anterior to the time when the car is set in motion. The negligence asserted is ordinarily a failure to do something for the purpose of controlling or affecting in some manner the driver's operation of the car. Common examples are the failure of passengers to protest against unlawful speeding or other violations of traffic regulations; failure to protest against obvious incompetencies in the management and operation of the car; and failure to warn the driver of impending dangers, or to keep a lookout for them. A good many others might be mentioned, but these are sufficient to serve as an illustration of the type of situation which will be involved in the present discussion.

While there is considerable variation in the judicial treatment of such cases, a review of the decisions and a survey of the practices of trial courts leads to the conclusion that the question of the passenger's contributory negligence is frequently submitted to a jury with the implication that if the passenger knew or should have known of the danger, could have protested or warned and did not, and such failure can now be regarded as a cause of the injury complained of, he is guilty of contributory negligence and cannot recover. In other words, the jury is led to infer that the passenger was under an obligation to act in the face of a danger which was known or should have been known, provided the jury can now say that such action would likely have been of any assistance in preventing the injury of which the passenger is complaining. In some jurisdictions the decisions seem to have defined the proper manner of conduct for the passenger so exactly that there remains very little for the trial court to do but determine the actual facts and then apply the legal measuring stick that has been evolved as a concrete test of negligence.

Thus, in the recent Maryland case of *State v. Phillinger*<sup>4</sup> an

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<sup>4</sup> 142 Md. 365, 120 Atl. 878 (1923).

instruction, charging the jury that the passenger was contributorily negligent in riding in the car of another at an "excessive speed" if he did not object or protest, was approved with the comment that a failure to do anything in such cases is clearly unreasonable. In *Atwood v. Utah Light & Railway Co.*,<sup>5</sup> the Supreme Court of Utah said:

" . . . he (the passenger) may not sit silently by and permit the driver of the vehicle to encounter or enter into open danger without protest or remonstrance and take the chances, and, if injured, seek to recover damages from the driver of the vehicle or from the one whose negligence concurred with that of the drivers, or from both."

The instruction approved by the Oregon court in *Elling v. Blake-McFall Co.*<sup>6</sup> specifically required the jury to find that the passenger was contributorily negligent if he failed to warn, protest, caution, or direct the driver with respect to foreseen dangers; while in the Kansas case of *Cooper v. Chicago, R. I. & P. Ry.*<sup>7</sup> it was held that passengers must maintain a lookout, observe obvious dangers, warn the driver and protest against encountering them, and demand to leave the car if not heeded. Cases from many other jurisdictions approve similar rules.<sup>8</sup>

The principle deducible from these decisions is that the hypothetical reasonable man, upon whose shoulders falls the responsibility of setting a standard of conduct for all kinds of situations, would, when riding as a passenger in an automobile, maintain a lookout of some kind for dangers to himself both from without and from within, and would, when such danger was apprehended, do something for the purpose of minimizing it. Thus it is a principle of action in the face of danger, calling for affirma-

<sup>5</sup> 44 Utah 366, 374, 140 Pac. 137, 140 (1914).

<sup>6</sup> 85 Ore. 91, 166 Pac. 57 (1917).

<sup>7</sup> 117 Kan. 703, 232 Pac. 1024 (1925).

<sup>8</sup> *Tracey v. Welch*, 145 Atl. 662 (Conn. 1929); *Dale v. Jaeger*, 44 Idaho 576, 258 Pac. 1081 (1927); *Ferguson v. Lang*, 126 Kan. 273, 268 Pac. 117 (1928); *Stephenson's Adm'x v. Sharps Ex'rs*, 222 Ky. 496, 1 S. W. (2d) 957 (1927); *Howe v. Corey*, 172 Wis. 537, 179 N. W. 791 (1920); *Krause v. Hall*, 195 Wis. 565, 217 N. W. 290 (1928); *Morningstar v. North East Penna. R. R.*, 290 Pa. 14, 137 Atl. 800 (1927). For convenience these will hereafter be referred to as the *strict rule* cases.

tive conduct for the purpose of controlling the operation of the car in accordance with what the passenger may conceive to be reasonable care; and it definitely fixes that conduct as including watchfulness, protesting, warning, advising, and demanding that the car be stopped, these apparently being regarded as constituting appropriate action for most situations of danger. In announcing this principle the courts are not merely determining that there is a duty upon the passenger to exercise ordinary care for his self-protection; that duty, which is the foundation upon which the doctrine of contributory negligence has been erected, is tacitly assumed.<sup>9</sup> The rule laid down in these cases includes not only a determination of duty, which is logically a question of law, and of standard of care, which is also a matter of law; but it includes to some extent a determination of amount and kind of care necessary to conform to the standard, which is ordinarily an inquiry of fact for the jury on all the evidence. It is, in effect, an assertion that the courts will not countenance passive inaction upon the part of passengers where their own safety is concerned, and that such conduct will be judicially regarded as unreasonable if danger should have been apprehended.

Dissenting somewhat from this view, there is a line of decisions in which, it is submitted, the courts have adhered to a more satisfactory procedure in testing the conduct of automobile passengers for contributory negligence—a procedure somewhat more consistent with fundamental principles of the law of negligence. A striking illustration is found in the case of *Carlson v. Millisack*.<sup>10</sup> There the plaintiff's intestate went riding with defendant, and in returning to the former's home after dark they were traveling on an unfamiliar road. The lights on the defendant's car were very poor. He drove at the rate of thirty-seven miles per hour, in violation of a statute, came upon an unexpected turn, and swerved the car so sharply that it upset, causing the death of plaintiff's intestate. It further appeared that the speedometer was

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<sup>9</sup> The term "duty" is used here for the sake of convenience. It has frequently been pointed out that there is no duty of care in the usual sense of the word. A failure to observe the duty merely results in a legal disability which may bar a recovery by the plaintiff.

<sup>10</sup> 82 Colo. 491, 261 Pac. 657 (1927).

located on the dashboard, directly before the seat of the deceased; that but a few seconds before the accident she had told the defendant, in answer to his inquiry, that they were traveling thirty-seven miles per hour; that the deceased knew that the road was unfamiliar to the defendant; that she had previously expressed a desire to hurry home; and that at no time did she remonstrate with the defendant about the operation of the car. In an action for damages, contributory negligence on the part of deceased was interposed as a defense, and a verdict was directed for the defendant on the ground that the deceased was contributorily negligent in failing to warn or protest against such driving. Reversing the judgment of the trial court on that point, the court said:

“Counsel claim that it was the duty of Elsie to protest against the driving of the car at the speed at which it was being driven, and they call attention to the fact that the speedometer was not on the driver’s side of the car, but directly in front of Elsie. In the circumstances of this case no such duty devolved upon her. In *Hedges v. Mitchell*, 69 Colo. 285, 194 Pac. 620, the plaintiff was injured while riding as a guest in the defendant’s automobile. The collision was proximately caused by the defendant’s driving to the left on the roadway circling the Thatcher monument in the city park in Denver, in violation of an ordinance providing: ‘A vehicle passing around a circular roadway shall keep to the right from the entrance or exit.’ It was contended that the plaintiff was guilty of contributory negligence, in that he failed to warn or guide the defendant as to his route of travel and his speed. Delivering the opinion of the court, Mr. Justice Burke said: ‘But a duty to give such advice implies a duty to heed it, and the rear seat driver is responsible for enough accidents as the score stands without the aid of judicial precedent. The place for a passenger who knows better than the driver of a car when, where and how it should be operated is at the wheel.’”<sup>11</sup>

If the court intended to hold that the deceased owed no duty to exercise care for her own safety while riding with the defendant, then the case must be regarded as doubtful authority. That passengers are required to exercise ordinary care for their own

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<sup>11</sup> *Ibid.* 495, 261 Pac. at 659.

safety is a principle too well settled to admit of argument, and, if the deceased did not exercise such care by conducting herself reasonably under the circumstances, she should not be permitted to recover. But a careful reading of the opinion would seem to indicate that the court intended to hold that she *may have exercised ordinary care under the circumstances by doing nothing*. The court's declaration of policy on the question of "back-seat driving" merely comes to this—that the conduct of an ordinary reasonable man might consist in forbearance from "back-seat driving" although confronted with dangers which would, under other conditions, ordinarily call for some action as a means of minimizing them.

Such a principle is not necessarily one of inaction, and therefore is not the antithesis of the view taken in *State v. Phillinger*<sup>12</sup> and similar cases. Upon retrial of *Carlson v. Millisack* the jury will be permitted to pass upon the question of the deceased's negligence, and they may find that she was unreasonable in her failure to act for her safety. On the other hand, they may find that inaction and silence was a reasonable course of conduct under the circumstances. Thus the rule laid down in that case will require the passenger to act if that is the only reasonable course of conduct open to him. In the language of the California court in *Curran v. Earle C. Anthony, Inc.*:<sup>13</sup>

"The duty of a passenger to remonstrate against excessive speed or to withdraw from the vehicle, a reasonable opportunity therefor being afforded, is not absolute, the question whether by failing to do either he is wanting in ordinary care being dependent upon the circumstances of the particular case."

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<sup>12</sup> *Supra* note 4.

<sup>13</sup> 77 Cal. App. 462, 471, 247 Pac. 236, 239 (1926). *Accord*: *Shields v. King*, 277 Pac. 1043 (Cal. 1929); *Hermann v. Rhode Island Co.*, 36 R. I. 447, 90 Atl. 813 (1914); *Leclair v. Boudreau*, 143 Atl. 401 (Vt. 1928).

Very few cases have referred directly to the matter under discussion. In most of the decisions in which it is mentioned, the courts have disposed of it by saying that the question of the passenger's contributory negligence is for the jury. Such a disposition, however, avoids the real problem, which is not *whether* the question shall be submitted to the jury, but *how* it shall be handed over to them. The objection to the *strict rule* cases is that they narrow too greatly the scope of the jury's inquiry by holding as a matter of law that it is contributory negligence for a passenger to remain inactive and silent in the face of danger.

The considerations that have induced this method of handling the problem of a passenger's contributory negligence are readily discernible. No involved process of reasoning is necessary to show how one may reasonably remain passive in the face of threatened dangers encountered while riding as the passenger of another. The strongest argument is perhaps the most simple one. It rests upon the very obvious proposition that the passenger may frequently be justified in believing that any attempt at interference with the operation of the car will tend to increase the danger rather than lessen it. Some affirmative conduct on the part of the passenger is so clearly unreasonable, in that it almost always tends to increase the danger, that it has been uniformly condemned. For instance, with the car actually in operation it would seldom be regarded as reasonable for a passenger to interfere directly with its mechanical operation, or to attempt to quit the car while in motion, although there, as elsewhere, exceptional circumstances might alter the conclusion.<sup>14</sup>

Verbal protests or warnings to the driver in the face of apprehended danger would, no doubt, be approved by many persons as reasonable conduct. Does it necessarily and logically follow that a failure to protest or warn is unreasonable conduct? It is at this point that the problem becomes fundamental. The *strict rule* cases are apparently committed to the view that if a particular kind of conduct is reasonable all other conduct is unreasonable under the same circumstances. At least, they have declared that where it is reasonable for a passenger to warn or protest or otherwise direct the driver it is unreasonable for him to remain passive. But that process of reasoning inevitably leads to the conclusion that there can be no such thing as an alternative between different kinds of reasonable conduct. It is submitted that such a doctrine interprets too literally the hypothesis of the reasonable man. It presupposes that, although he is but a theoretical abstraction, he is nevertheless a particularized one, and that when his conduct under the circumstances has been determined it is *the* reasonable conduct by which the fault of the litigants is to be measured.

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<sup>14</sup> *Southern Pacific Co. v. Wright*, 248 Fed. 261 (C. C. A. 9th, 1918); *Clark v. Connecticut Co.*, 83 Conn. 219, 76 Atl. 523 (1910).

It is believed that this is not a satisfactory conception of the standard of care by which negligence is to be determined. The true standard of care is reasonable conduct—conduct which an ordinary reasonable man *might* observe under those circumstances. For the automobile passenger confronted by dangers, it is ordinary prudence that the law requires, and that, in many cases, may include more than one kind of conduct. It may demand action or inaction, or it may offer a choice between them, just as it may permit an alternative between different kinds of action where some action is the only reasonable conduct.

With due recognition to the psychological phenomena involved, there are certainly a great many persons who would not regard forbearance to interfere with the conduct of the driver in the operation of the car as unreasonable and negligent omission. Two reasons may be advanced in support of this view. It is a matter of common knowledge that there are certain social customs which are generally observed even at the risk of personal loss; or, to put it another way, many persons regard it as reasonable to run the risk of personal loss in the observance of customs, if the risk is not too great. These customs function as inhibitions upon the natural tendency of normal individuals to act for the purpose of minimizing a known or suspected danger, and they are important factors in determining the course of human conduct. Of such a nature is the custom which deters the guest from advising or criticizing the host, and this applies in the car as well as in the home. The average guest will, no doubt, feel constrained to run some risk of loss or damage rather than the risk of offending the host by interfering or expressing dissatisfaction with his conduct. Of course, there is a point where the line must be drawn, but under modern social standards it seems safe to say that this is a factor which cannot be entirely disregarded if reasonable conduct is to mean anything more than mere conjecture in the realm of the unknown. It is no objection to the consideration of this factor to say that the social standards should be altered or that the guest should disregard them in the face of personal danger, for it is the proper function of the law of negligence to recognize a standard

of conduct that is in harmony with existing social conditions, which means that all social factors must be weighed in finding that standard. If this custom or inhibition is a factor in ordering the conduct of society, then its value should not be overlooked in determining what is reasonable conduct for persons coming under its influence.<sup>15</sup>

A slightly different line of argument leads in the same direction. Assuming that the guest will always disregard social customs and the feelings of his host and look to his own safety, it is nevertheless true that upon some occasions it will appear more conducive to safety to refrain from interfering with the driver, rather than run the risk of confusing him by directions or warnings. With the passenger now in a position where he is unable directly to avert threatened injury, but must rely upon a more or less uncertain agency, and usually with but a very short space of time in which to decide upon a course of conduct, inaction can hardly be regarded as conclusive of the issue of negligence. Particularly is this so in cases of emergency where interference with the physical and mental processes of the driver will frequently increase the risk of injury. In *Hermann v. Rhode Island Co.*<sup>16</sup> the court saw the problem clearly. They said:

“It cannot be said as a matter of law that such guest or passenger is guilty of negligence because he has done nothing. In many such cases the highest degree of caution may consist of inaction. In situations of great and sudden peril, meddlesome interference with those having control, either by physical act or by disturbing suggestions and needless warnings may be exceedingly disastrous in its results. While it is true that it is the duty of such guest or passenger not to

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<sup>15</sup> Both Judge Cardozo and Professor Green have recently called attention to the fact that the law of negligence is not a law of safety, but a law of reasonable conduct. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* (1928) 57, 59; Green, *The Duty Problem in Negligence Cases* (1928) 28 *COL. L. REV.* 1011, 1032. To be unreasonable it is not enough that one's conduct risks injury. It must always be such a risk that “the game is not worth the candle”, and in determining this it is disregarding the facts to say that social customs are not to be considered.

<sup>16</sup> *Supra* note 13, approved in *Ohio Electric Co. v. Evans*, 77 *Ind. App.* 669, 134 *N. E.* 519 (1922).

submit himself and his safety solely to the prudence of the driver of the vehicle, and that he must himself use reasonable care for his own safety, nevertheless he should not, in every case, be held guilty of contributory negligence merely because he has done nothing." <sup>17</sup>

On the other hand, it must be conceded that in many situations, perhaps in the majority, the failure of the passenger to act for his own safety by warning, protesting, or taking similar precautions, is strong evidence of negligence; and yet, in view of what has here been said, a general ruling that as a matter of law such omissions are contributory negligence seems to go too far. Literally applied, it would frequently have the practical effect of imputing the negligence of the driver to the passenger where the latter had refrained from indulging in the obnoxious and frequently dangerous practice of "back-seat driving". Therefore, if the results reached in most of the *strict rule* cases are acceptable, it is in spite of the rule and not because of it, for, as the California court has recently declared:

"A guest passenger, traveling by automobile, is bound to exercise ordinary care for his own safety; but whether or not he has exercised such care is a question of fact, which, unless the evidence is all one way, must be submitted to a jury, and their determination thereof is conclusive." <sup>18</sup>

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<sup>17</sup> *Ibid.* 450, 90 Atl. at 814.

<sup>18</sup> *Benjamin v. Noonan*, 277 Pac. 1045, 1046 (Cal. 1929). Where the action is by a guest passenger against a third person not in the same vehicle, it is interesting to note that some of the *strict rule* jurisdictions show less tendency to hold that inaction and silence on the part of the passenger is contributory negligence as a matter of law. *Chiswell v. Nichols*, 137 Md. 291, 112 Atl. 363 (1920); *Wappler v. Schenck*, 178 Wis. 632, 190 N. W. 555 (1922). The reason for this is not very clear. Logically there should be no difference simply because the defendant is a third person. The duty of the passenger to care for his safety is the same no matter who is defendant, and that omission on the part of the plaintiff which is branded as contributory negligence in the one case should also be so regarded in the other. A probable explanation of this anomaly exists in the widespread belief that it is unfair to hold one in the position of host liable to a guest passenger for the consequences of ordinary negligence in the operation of the conveyance. So strong has this feeling become that in some jurisdictions statutes have given the host a liberal immunity from liability to the guest. *Silver v. Silver*, 108 Conn. 371, 143 Atl. 240 (1928); *Puckett v. Pailthorpe*, 223 N. W. 254 (Iowa 1929). But to give effect to this attitude without the aid of statute, by means of a legal principle that not only condones but also encourages "back-seat driving", is an objectionable procedure.

## IMPUTED CONTRIBUTORY NEGLIGENCE

Closely related to the problem of a passenger's personal contributory negligence is that of determining under what circumstances the contributory negligence of the driver will be imputed to him. With the advent of the automobile this much-discussed problem has acquired a new vitality. The legion of modern cases in which it has been considered bears witness to its practical importance.

Except in Michigan,<sup>19</sup> the following propositions of law have definitely been established by both the English and American courts:

1. The contributory negligence of the driver ordinarily will not be imputed to a passenger.<sup>20</sup>

2. If a passenger controls, or has the right to control, the driver in the operation of the vehicle, the contributory negligence of the driver will be imputed to the passenger.<sup>21</sup>

3. If the passenger and the driver are engaged in the prosecution of a joint enterprise or adventure at the time of the accident, the contributory negligence of the driver will be imputed to the passenger.<sup>22</sup>

In England it was originally decided, in the famous case of *Thorogood v. Bryan*,<sup>23</sup> that the contributory negligence of the driver would be imputed to passengers. Founded upon an unsound theory of identity, the rule was subsequently rejected in *The*

<sup>19</sup> For an analysis of the law in Michigan, see (1926) 35 YALE L. J. 766.

<sup>20</sup> *Nichols v. Pacific El. Ry.*, 178 Cal. 630, 174 Pac. 319 (1918); *Weidlich v. New York, N. H. & H. R. R.*, 93 Conn. 438, 106 Atl. 323 (1919); *Opp v. Pryor*, 294 Ill. 538, 128 N. E. 580 (1920); *Fernald v. French*, 121 Me. 4, 115 Atl. 420 (1921); *Fahy v. Director General*, 235 Mass. 510, 126 N. E. 784 (1920); *Terwilliger v. Long Island R. R.*, 152 App. Div. 168, 136 N. Y. Supp. 733 (1912), *aff'd*, 209 N. Y. 522, 102 N. E. 1114; *Robinson v. Oregon-Wash. R. & N. Co.*, 90 Ore. 490, 176 Pac. 594 (1919); *Wolf v. Sweeney*, 270 Pa. 97, 112 Atl. 869 (1921); *Reiter v. Grober*, 173 Wis. 493, 181 N. W. 739 (1921); see *Beard v. Klusmeier*, 158 Ky. 153, 158, 164 S. W. 319, 321 (1914); BERRY, *THE LAW OF AUTOMOBILES* (4th ed. 1924) 485.

<sup>21</sup> *Bullard v. Boston El. Ry.*, 226 Mass. 262, 115 N. E. 294 (1917); *Dauber v. Josephson*, 209 Mo. App. 531, 237 S. W. 149 (1922); *Schofield v. Director General*, 276 Pa. 508, 120 Atl. 449 (1923).

<sup>22</sup> *Myers v. Southern Pacific Co.*, 63 Cal. App. 164, 218 Pac. 284 (1923); *Dunlap v. Philadelphia R. T. Co.*, 248 Pa. 130, 93 Atl. 873 (1915); see *Cotton v. Willmar, etc., Ry.*, 99 Minn. 366, 373, 109 N. W. 835, 839 (1906).

<sup>23</sup> 8 C. B. 115 (1849).

*Bernina*,<sup>24</sup> and the contrary view was adopted. A few American jurisdictions blindly followed *Thorogood v. Bryan*, but in the majority it was never recognized as law; and, of the former, all except Michigan finally abandoned the insidious doctrine, although in Iowa, Montana, Nebraska, Wisconsin, and Vermont it was so well founded in precedent that some serious difficulties were encountered in disposing of it.<sup>25</sup>

The second proposition is a logical corollary of the first, and is founded upon the principle of vicarious responsibility. When the passenger controls, or has the right to control, the driver in the operation of the vehicle, the latter must ordinarily be regarded as his servant or agent, for whose negligence, within the scope of his authority, the passenger is responsible at common law. It is the element of the right to control the conduct of another that distinguishes the relationship to which the principle of vicarious responsibility is applicable. Unless one is prepared to advocate the entire abandonment of that principle, the soundness of this proposition must be admitted. A Massachusetts court expressed the thought in these words:

“Disregarding the passenger’s own due care, the test whether the negligence of the driver is to be imputed to the one riding depends upon the latter’s control or right of control of the actions of the driver, so as to constitute in fact the relation of principal and agent or master and servant, or his voluntary, unconstrained, non-contractual surrender of all care for himself to the caution of the driver.”<sup>26</sup>

The third proposition is of comparatively recent origin, and, while the courts are generally agreed upon it as a doctrine of law, some difference of opinion has developed in its application. Two conceptions of joint enterprise appear in the cases dealing with the subject. One of these regards the joint enterprise as an association of passenger and driver in the use of the car for the accom-

<sup>24</sup> 56 L. T. R. 450 (1886).

<sup>25</sup> On this proposition see Gilmore, *Imputed Negligence* (1921) 1 WIS. L. REV. 193.

<sup>26</sup> *Shultz v. Old Colony Street Ry.*, 193 Mass. 309, 323, 79 N. E. 873, 877 (1907); see (1907) 8 L. R. A. (N. S.) 597. Although the expression “imputed negligence” does not adequately describe the true situation, it seems doubtful that the courts will abandon it.

plishment of common or individual objects, irrespective of the element of control or right of control of the conduct of the driver in its operation. The criterion of joint enterprise is found in the joint use of the vehicle as a means of accomplishing a purpose in which they have a common interest, or, it seems, to facilitate individual projects. According to this conception it is immaterial that the passenger has in fact no right of control over the driver and that legally he could not require the driver to observe his commands. Upon this basis it has been held that, when the passenger contributes to defray the expense of operating the vehicle which is being used to common advantage, it is permissible to treat him as a joint adventurer although the facts fail to show any relationship upon which a right of control over its operation may be predicated; and a similar result has been reached where the trip is made in furtherance of some business or social purpose in which the driver and passenger have a joint interest.

In *Jensen v. Chicago, M. & St. P. Ry.*<sup>27</sup> the plaintiff and one Sonnabend were riding to a prize fight in the latter's car, and Sonnabend was driving. The plaintiff paid a share of the operating expenses of the car. The court permitted the jury to find that the parties were engaged in a joint enterprise, denying that the element of control and authority was necessary, and imputed the contributory negligence of Sonnabend to the plaintiff.

The case of *Lawrence v. Denver & R. G. R. R.*<sup>28</sup> turned partly on the question of joint enterprise, and the court held that where the plaintiff was riding to town with a piano salesman in the latter's car, for the purpose of inspecting a piano as a prospective purchaser, there was a joint enterprise and the contributory negligence of the driver was imputable to the plaintiff. In the course of its opinion the court observed that "the trip was a business matter, and in no sense a social affair".

However, in *Wentworth v. Town of Waterbury*<sup>29</sup> the ride

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<sup>27</sup> 133 Wash. 208, 233 Pac. 635 (1925).

<sup>28</sup> 52 Utah 414, 174 Pac. 817 (1918).

<sup>29</sup> 90 Vt. 60, 96 Atl. 334 (1916); cf. *Beaucage v. Mercer*, 206 Mass. 492, 92 N. E. 774 (1910); *Hanser v. Youngs*, 212 Mich. 508, 180 N. W. 409 (1920); *Washington & O. D. Ry. v. Zell's Adm'r*, 118 Va. 755, 88 S. E. 309 (1915); *Coleman v. Bent*, 100 Conn. 527, 124 Atl. 224 (1924).

was purely a social affair, the plaintiff and one Gibson having decided to take the former's wife and a friend of Gibson on a sight-seeing trip in a car procured by Gibson and exclusively under his control. The court held that "the plaintiff and Mr. Gibson were engaged in carrying out a common purpose" and that the latter's negligence was to be imputed to the plaintiff.

The other conception of joint enterprise, which is recognized in the majority of cases, proceeds upon an entirely different theory. An essential element of joint enterprise according to this theory is a relationship between passenger and driver in which each is mutually principal for, and agent of, the other in some undertaking within the scope of which falls the trip in question. The criterion here is the right of the passenger to control the driver in the operation of the car. In fact the doctrine of joint enterprise is here regarded merely as an extension of the second proposition, rather than as an independent principle. This theory was stated by a Minnesota court, as follows:

"Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movement and conduct of each other with respect thereto."<sup>30</sup>

It is submitted that this is the preferable view of joint enterprise, and that the cases in which the element of control is disregarded proceed upon a misconception of the general principles of imputed negligence. As explained in *Nonn v. Chicago City Ry.*:<sup>31</sup>

"There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of

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<sup>30</sup> *Cunningham v. Thief River Falls*, 84 Minn. 21, 27, 86 N. W. 763, 765 (1901). *Accord*: *Fisher v. Johnson*, 238 Ill. App. 25 (1925); *Wagner v. Kolster*, 188 Iowa 174, 175 N. W. 840 (1920); *Director General v. Pence's Adm'x*, 135 Va. 329, 116 S. E. 351 (1923); *cf. Barry v. Harding*, 244 Mass. 588, 139 N. E. 298 (1923); *Scheer v. Melville*, 279 Pa. 401, 123 Atl. 853 (1924); see also BERRY, *op. cit. supra* note 20, at 501, and cases cited therein.

In some jurisdictions the courts have inconsistently recognized both conceptions in different kinds of cases. Compare, for example, *Jensen v. Chicago, M. & St. P. Ry.*, *supra* note 27, with *Neagle v. City of Tacoma*, 127 Wash. 528, 221 Pac. 588 (1923).

<sup>31</sup> 232 Ill. 378, 381, 83 N. E. 924, 925. (1908).

master and servant or principal and agent. In order that the negligence of one person may be properly imputed to another, they must stand in such relation of privity that the maxim 'qui facit per alium facit per se' directly applies."

It seems doubtful that the plaintiffs in *Jensen v. Chicago, M. & St. P. Ry.*,<sup>32</sup> *Lawrence v. Denver & R. G. R. R.*,<sup>33</sup> and *Wentworth v. Town of Waterbury*<sup>34</sup> were principals for the drivers in regard to the operation of the car or that they had any right of control in that respect. The test applied to them appears quite inadequate, and the results reached must be regarded as unsound unless in fact there existed a right of control, express or implied. There is more room for implying a mutual agency where the passenger agrees to defray a part of the expenses or where the purpose of the trip is the transaction of business in which he and the driver are jointly interested, than where the purpose is pleasure and social recreation. The existence of such facts, however, is at most only evidentiary of mutual agency and right of control, and should never be accepted as *per se* decisive of joint enterprise.

In rounding out this brief discussion of the doctrine of joint enterprise, attention is called to the fact that it is never applied when the action is by the passenger against the driver of the car in which he is riding. The reasons for this are concisely stated in *O'Brien v. Woldson*:<sup>35</sup>

"When the action is against a third person, each member of the joint enterprise is a representative of the other, and the acts of one are the acts of all if they be within the scope of the enterprise. When the action is brought by one member of the enterprise against another, there is no place to apply the doctrine of imputed negligence. To do so would be to permit one guilty of negligence to take refuge behind his own wrong. The situation where the action is brought by one member of the enterprise against the other is entirely different from that where recovery is sought against a third person."

<sup>32</sup> *Supra* note 27.

<sup>33</sup> *Supra* note 28.

<sup>34</sup> *Supra* note 29.

<sup>35</sup> 149 Wash. 192, 194, 270 Pac. 304, 305 (1928). *Accord*: *Collins v. Anderson*, 37 Wyo. 275, 260 Pac. 1089 (1927).

Consequently, practically all of the cases in which the doctrine is applied are actions by the passenger against third persons, usually the driver of another vehicle whose negligence has combined with that of the plaintiff's driver to cause the injury. There is, however, a third type of case to which it has been applied on at least one occasion. In *Lucey v. John Hope Co.*<sup>36</sup> the plaintiff sued both the driver and the passenger of an automobile that had collided with one in which the plaintiff was riding. It was held that there could be a recovery against the passenger as well as against the driver, on the theory of joint enterprise, but the problem was, of course, one of liability rather than disability, and does not fall within the scope of this article.

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<sup>36</sup> 45 R. I. 103, 120 Atl. 62 (1923).