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# Imputed Contributory Negligence

Fleming James, Jr.\*

Our system of liability based on fault is part of an economic and social philosophy of individualism. Quite naturally then an individual is generally held only for his own fault and not for the fault of another. Innocent *A* is not usually liable for injuries caused by guilty *B*. It is a commonplace, however, that he sometimes is. That is where there is a relationship between *A* and *B* to which the law attaches the consequences of vicarious liability. Such relationships are those between master and servant, and persons engaged in a partnership or a joint enterprise. Where the servant, for instance, acting within the scope of his employment negligently injured *C*, the innocent master, *A*, is liable to *C* for that injury. This result is usually described by identifying master and servant. *Qui facit per alium facit per se*. This means that the servant's negligence is *imputed* to the master.<sup>1</sup>

The case put does not involve contributory negligence. *C* has been the innocent victim of *B*'s fault (else he would be barred of recovery by his own negligence). But let us shift the case slightly. Suppose that *C* has negligently run into and destroyed *A*'s truck, and that *A*'s driver, *B*, was also negligent but *A* was in all respects free from fault. *A* now sues *C* for the damage to his truck. By hypothesis he cannot be barred from recovery by his own negligence, for there was none. And under general principles the innocent victim has the choice of suing either or both of two persons whose wrongs contributed to his injury. The question here is whether *A* is to be barred for the negligence of his employee, *B*. The law today says he is. Here again the result is described by identifying master and servant and *imputing* the latter's negli-

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1. The problems of vicarious liability, collaterally involved here, are treated in, e.g., Douglas, Vicarious Liability and Administration of Risk, 38 Yale L.J. 584 (1929); Holmes, Agency, 4 Harv. L. Rev. 345 (1891), 5 Harv. L. Rev. 1 (1891); Laski, The Basis of Vicarious Liability, 26 Yale L.J. 105 (1916); Seavey, Speculations as to "Respondeat Superior," Harv. Leg. Essays 433 (1934); Y. B. Smith, Frolic and Detour, 23 Col. L. Rev. 474, 716 (1923); Wigmore, Responsibility for Tortious Acts, 7 Harv. L. Rev. 315, 383, 441 (1894); Baty, Vicarious Liability (1916). Cf. Steffen, Independent Contractor and the Good Life, 2 U. of Chi. L. Rev. 501 (1935); Restatement, Agency §§ 219 et seq. (1933).

gence to the innocent master. The same result is reached where *B* is a partner or a joint entrepreneur of *A*, and *B*'s negligence occurs within the scope of such relationship. This result is generally called imputed contributory negligence.<sup>2</sup>

So far we have been dealing with relationships wherein *B*'s negligence will be imputed to *A* whether *A* is plaintiff or defendant. The rule of imputation here works both ways, so that it meets what has been called the "both-ways test."<sup>3</sup> Formerly, however, there were many relationships in which the law imputed *B*'s negligence to *A* if *A* was plaintiff but not if *A* was defendant. Rules of this kind have been largely repudiated. First we shall examine these rules and the development which led to the wide current acceptance of the both-ways test with its appealing formal consistency. But that is only part of the story. In recent years there has been both judicial and legislative expansion of vicarious liability—particularly in the automobile accident field.<sup>4</sup> This poses the further question whether the both-ways test should be applied so as to expand likewise the defense of contributory negligence (by imputing it in relationships where the pre-existing law did not)—a result which would expand an impediment to liability *pari passu* with the expansion of liability itself. This in turn will call for a re-evaluation of the both-ways test to see whether its formal symmetry may not conceal an equal treatment for policies that are diametrically opposed to each other, so that it tends to be self-defeating.<sup>5</sup> If that is the case, still further questions arise: Should the both-ways test be abandoned? Is it likely to be progressively abandoned? If it is, what factors should be considered in determining whether and when contributory negligence should be imputed? And finally,

2. See in general Gilmore, *Imputed Negligence*, 1 *Wis. L. Rev.* 193, 257 (1921); Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, etc.*, 2 *U. of Chi. L. Rev.* 173 (1935); Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 *Yale L.J.* 831 (1932); Keeton, *Imputed Contributory Negligence*, 13 *Texas L. Rev.* 161 (1935); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 *Ford. L. Rev.* 156 (1951); Notes, 17 *Corn. L.Q.* 158 (1931); 24 *Mich. L. Rev.* 592 (1926); 80 *U. of Pa. L. Rev.* 1123 (1932); 33 *B.U.L. Rev.* 90 (1953); 32 *Am. L. Reg.* 763 (1893); 11 *A.L.R.* 2d 1437 (1950).

3. This apt phrase is used by Gregory in his articles cited in note 2 *supra*. See also Note, 32 *Am. L. Reg.* 763, 765 (1893) ("It is a poor rule that won't work both ways.").

4. See discussion in *Jacobsen v. Dailey*, 228 *Minn.* 201, 36 *N.W.2d* 711 (1949); authorities cited note 2 *supra*.

5. See, e.g., Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, etc.*, 2 *U. of Chi. L. Rev.* 173, 177, 178 (1935).

should the doctrine of imputed contributory negligence be retained at all?<sup>6</sup>

*Distinctions to Be Made*

As a preliminary matter, certain distinctions should be made. Plaintiff may himself have been guilty of a negligent act or omission which contributed to the injury. Such negligence may consist in:

- (a) An actual exercise of control over another person (e.g., the driver of a vehicle) as by urging him to speed.<sup>7</sup>
- (b) A negligent failure to exercise control over another when there is actual chance for such control and the failure to exercise it is fraught with unreasonable harm to plaintiff.<sup>8</sup> Thus an automobile passenger may be negligent in taking no step to prevent his driver from running into an obvious obstruction.<sup>9</sup>
- (c) The negligent entrusting of one's self or one's property to another whom the plaintiff ought to have known to be incompetent.<sup>10</sup>

In any such case, plaintiff will be barred by his own negligence even though the situation is not one where the other person's negligence will be imputed to him. It is where no ground of plaintiff's personal negligence appears that the question of imputed negligence becomes important.

There are other situations where an innocent plaintiff's recovery may be affected by the negligence of another person through doctrines technically distinct from the imputation of negligence. These are involved in actions for loss of services of

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6. Most of the authorities cited in note 2 *supra* discuss this point. See particularly Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, etc.*, 2 U. of Chi. L. Rev. 173 (1935); Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 Yale L.J. 831 (1932); Lessler, *Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 Ford. L. Rev. 156 (1951); Note, 17 Corn. L.Q. 158 (1931).

7. See discussion in *Quarman v. Burnett*, 6 M. & W. 499, 507 (Ex. 1840); *Little v. Hackett*, 116 U.S. 366, 372 (1886). Cf. note 22 *infra*.

8. In general, see Harper and Kime, *The Duty to Control the Conduct of Another*, 43 Yale L.J. 886 (1934); James, *Scope of Duty in Negligence Cases*, 47 N.W. L. Rev. 778, 809 (1953). But cf. *Painter v. Lingon*, 193 Va. 840, 71 S.E.2d 355 (1952); note 28 *infra*.

9. E.g., *Boscarello v. New York, N.H. & H. R.R.*, 112 Conn. 279, 152 Atl. 61 (1930); *Glick v. Baer*, 186 Wis. 268, 201 N.W. 752 (1925).

10. E.g., *Wilson v. Hill*, 103 Colo. 409, 86 P.2d 1084 (1939); *Garrity v. Mangan*, 232 Iowa 1188, 6 N.W.2d 292 (1942). In these cases contributory negligence and assumption of risk often overlap. See James, *Assumption of Risk*, 61 Yale L.J. 141, 149 et seq. (1952).

another (wife, child, etc.); for expenses incurred on behalf of another; or for the wrongful death of another.

#### *Driver and Passenger*

In *Thorogood v. Bryan*<sup>11</sup> an English court imputed the negligence of the driver of a public omnibus to his passenger, so as to bar an action for the passenger's death brought against the owner of another omnibus which negligently contributed to the accident. A similar rule would no doubt have been applied to the passenger on a railroad train,<sup>12</sup> or a vessel,<sup>13</sup> or a private conveyance.<sup>14</sup> The rule came to have some following in this country,<sup>15</sup> though other courts rejected it from the first.<sup>16</sup> The judges who decided the *Thorogood* case thought that the passenger should be "identified" with the driver because (1) he had selected, and entrusted himself to the driver and to this mode of conveyance (thus taking upon himself the driver's faults);<sup>17</sup> (2) he had a measure of control since he had "employed" the owner to drive him and "If he is dissatisfied with the mode of conveyance, he is not obliged to avail himself of it";<sup>18</sup> (3) it would be "strange" to impose upon the defendant greater liability to the passenger than to the owner of the very same conveyance.<sup>19</sup> These reasons were for the most part repeated in the American cases following the rule.<sup>20</sup> They did not, however, long prevail. *Thorogood v. Bryan* was over-

11. 8 C.B. (Man. G. & S.) 114 (C.P. 1849).

12. See *Bridge v. Grand Junction Ry.*, 3 M. & W. 244 (Ex. 1838) (and treatment of this decision in *Thorogood v. Bryan*, 8 C.B. [Man. G. & S.] 114 [C.P. 1849]); *Armstrong v. Lancashire & Y. R. Co.*, L.R. 10 Ex. 47 (1875); *Lockhart v. Lichtenthaler*, 46 Pa. 151 (1863).

13. *Cattlin v. Hills*, 8 C.B. (Man. G. & S.) 123 (argued with the *Thorogood* case) (C.P. 1849).

14. *L.S. & M.S. R. Co. v. Miller*, 25 Mich. 274 (1872); *Carlisle v. Town of Sheldon*, 38 Vt. 440 (1866); *Prideaux v. City of Mineral Point*, 43 Wis. 513 (1878).

15. *Brown v. New York Cent. R.R.*, 31 Barb. 385 (N.Y. 1860) (passenger in stagecoach); *Lockhart v. Lichtenthaler*, 46 Pa. 151 (1863) (passenger in train); cases cited note 14 supra. Wisconsin limited its rule to passengers in a *private* conveyance.

16. *Little v. Hackett*, 116 U.S. 366 (1885); *Danville, L. & N.T. R.R. v. Stewart*, 59 Ky. 119 (1859); *Bennett v. New Jersey R. & T. Co.*, 36 N.J.L. 225 (1873); *Chapman v. New Haven R.R.*, 19 N.Y. 341 (1859); *Transfer Co. v. Kelly*, 36 Ohio 86 (1880). Contrast the *Chapman* case with *Brown v. New York Cent. R.R.*, 31 Barb. 385 (N.Y. 1860).

17. *Thorogood v. Bryan*, 8 C.B. (Man. G. & S.) 114, 130, 131, 132 (C.P. 1849).

18. *Id.* at 132.

19. *Id.* at 132, 133.

20. See cases noted 14, 15, supra. In *Lockhart v. Lichtenthaler*, 46 Pa. 151 (1863), however, the Pennsylvania court expressed dissatisfaction with the reasoning in *Thorogood* and found a better basis for the rule in holding the carrier alone responsible "as an incentive to care and diligence." *Id.* at 164.

ruled in England and widely repudiated in this country, even in states which originally followed it.<sup>21</sup>

The reasoning involved in this repudiation was as follows: (1) there was no real control or chance to control by the passenger in these cases generally;<sup>22</sup> (2) the passenger should not be penalized for the perfectly lawful and reasonable act of selecting this mode of conveyance or this driver;<sup>23</sup> (3) since the negligence of the driver would not be imputed to the passenger in a suit by an injured third person against the passenger, or in a suit by the passenger against the driver's master, there was no general principle of law that would support the imputation in all cases and therefore it would be "against all legal rules" to impute it to him in this situation.<sup>24</sup> It will be seen that this reasoning includes an application of the both-ways test.

While *Thorogood v. Bryan* is dead today, its spirit has had a partial and unhappy reincarnation in the modern doctrine of joint enterprise.<sup>25</sup> In theory this doctrine is one of general application, involves ordinary notions of agency, and meets the both-ways test.<sup>26</sup> There has been, however, a modern extension of it which

21. *Mills v. Armstrong*, "The Bernina," 13 App. Cas. 1 (H.L. 1888); cases cited note 16 supra; cases collected in Note, 90 A.L.R. 630 (1934); *Gordon v. Hartwick*, 325 Mich. 534, 39 N.W.2d 61 (1949); *Bunting v. Hogsett*, 139 Pa. 363, 21 Atl. 31 (1891); *Reiter v. Grober*, 173 Wis. 493, 181 N.W. 739 (1921).

A collection of older cases is found in Note, 32 Am. L. Reg. 763 (1893).

22. It was conceded, of course, that if the passenger actually exercised control in a specific case, and did so negligently, that this might bar his recovery. *Little v. Hackett*, 116 U.S. 366, 372 (1886); *New York, L.E. & W. R.R. v. Steinbrenner*, 47 N.J.L. 161, 170 (1885). The latter opinion graphically portrays the impracticability and undesirability of control by passengers in a public vehicle.

See also Note, 32 Am. L. Reg. 763, 764 (1893).

23. *Mills v. Armstrong*, "The Bernina," 13 App. Cas. 1, 8 (H.L. 1888); *Little v. Hackett*, 116 U.S. 366, 379 (1886). Compare note 47 infra.

In any given case, denial of liability could be predicated on the passenger's own negligence in selecting a driver known to be, or observably, incompetent, if the facts warranted it. None of the cases here involved any such showing. But cf. *Louisville Taxicab & Transfer Co. v. Barr*, 307 Ky. 28, 209 S.W.2d 719 (1948) (where such negligence on the part of the passenger was found).

24. *Little v. Hackett*, 116 U.S. 366, 375-377 (1886).

25. See, e.g., *Weintraub*, *The Joint Enterprise Doctrine in Automobile Law*, 16 Corn. L.Q. 320 (1931); *Rollison*, *The "Joint Enterprise" in the Law of Imputed Negligence*, 6 Notre Dame Law. 172 (1931); Notes, 48 Mich. L. Rev. 372 (1950); 1 *Baylor L. Rev.* 492 (1949); 48 A.L.R. 1055 (1927); 63 A.L.R. 909 (1929); 80 A.L.R. 312 (1932); 95 A.L.R. 857 (1935); *Prosser*, *Handbook of the Law of Torts* § 65 (1941); *Restatement, Torts* § 491 (1934); authorities cited note 2 supra.

Compare *Mechem*, *The Law of Joint Adventure*, 15 Minn. L. Rev. 644 (1931) (not dealing with accident cases).

26. *Crescent Motor Co. v. Stone*, 211 Ala. 516, 101 So. 49 (1924); *Straffus v. Barclay*, 147 Tex. 600, 219 S.W.2d 65 (1949); *Keeton*, *Imputed Contributory Negligence*, 13 Texas L. Rev. 161, 163 (1935); Note, 1 *Baylor L. Rev.* 492 (1949); *Restatement, Torts* § 491 (1934).

is in fact concerned almost exclusively with automobile cases;<sup>27</sup> which is often used in situations more closely akin to the friendly co-operation between neighbors or members of a family for mutual benefit, than to typical agency or employment situations;<sup>28</sup>

27. See, e.g., Rollison, *The "Joint Enterprise" in the Law of Imputed Negligence*, 6 *Notre Dame Law*: 172, 174 (1931); *Notes*, 33 *B.U.L. Rev.* 90, 99 (1953); 48 *Mich. L. Rev.* 372 (1950); *Restatement, Torts* § 491, *Comment C* (1934). Cf. 4 *Blashfield, Cyclopaedia of Automobile Law and Practice* §§ 2372, 2494 (Perm. ed. 1946); 38 *Am. Jur., Negligence* § 249.

28. The requirements for joint enterprise are often said to be a mutual interest in the purposes of the venture and a "right of control over other members in directing that venture." See, e.g., Weintraub, *The Joint Enterprise Doctrine in Automobile Law*, 16 *Corn. L.Q.* 320, 325 (1931); *Note*, 48 *Mich. L. Rev.* 372, 373 (1950); 4 *Blashfield, Cyclopaedia of Automobile Law and Practice* § 2494 (Perm. ed. 1946). Some courts make the control requirement fairly narrow and find a right of control only where plaintiff owns the automobile himself, or has joint ownership or possession of it with the driver; or where the right of control can be pretty clearly spelled out along lines which have become familiar in conventional agency or partnership situations. E.g., *Bryant v. Pacific Electric Ry.*, 174 *Cal.* 737, 164 *Pac.* 385 (1917) (with which compare *Howard v. Alta Chevrolet Co.*, 243 *P.2d* 804 [*Cal. App.* 1952]); *Coleman v. Bent*, 100 *Conn.* 527, 124 *Atl.* 224 (1924); *Weller v. Fish Transport Co.*, 123 *Conn.* 49, 192 *Atl.* 317 (1937); *Fuller v. Mills*, 36 *Ga. App.* 357, 136 *S.E.* 807 (1927); *Greenwood v. Bridgeways, Inc.*, 243 *S.W.2d* 111 (*Mo. App.* 1951); *Bowley v. Duca*, 80 *N.H.* 548, 120 *Atl.* 74 (1923); *Painter v. Lington*, 193 *Va.* 840, 71 *S.E.2d* 355 (1952); *Brubaker v. Iowa County*, 174 *Wis.* 574, 183 *N.W.* 690 (1921). Other courts, however, have gone pretty far along the lines suggested in the text. E.g., *Caliendo v. Huck*, 84 *F. Supp.* 598 (*N.D. Fla.* 1949), noted in 48 *Mich. L. Rev.* 372 (1950); *Wentworth v. Waterbury*, 90 *Vt.* 60, 96 *Atl.* 334 (1916). Cf. *Washington & O.D. Ry. v. Zell's Adm'r*, 118 *Va.* 755, 88 *S.E.* 309 (1916), overruled by *Painter v. Lington* supra. The weight of authority favors the former view. See authorities note 25 supra.

Circumstances may impose a duty to use care to control the conduct of another. If there is a real chance to exercise control, failure to do so may then be personal negligence as we have seen. Note 9 supra. Cf. Weintraub, *The Joint Enterprise Doctrine in Automobile Law*, 16 *Corn. L.Q.* 320, 329 (1931); Keeton, *Imputed Contributory Negligence*, 13 *Texas L. Rev.* 161, 168 (1935). Beyond this, the "right of control" is a familiar test of an employment or agency relationship. But it is not a satisfactory justification for vicarious liability, which is imposed not on this basis, but rather on grounds of public policy "in favor of burdening one who acts through another in pursuit of his own ends with the injuries incidental to his servant's activities." Weintraub, supra at 335; authorities cited note 1 supra. "Right of control" in this sense is no better justification for imputing negligence to a plaintiff. And the very grounds of policy which justify vicarious liability of defendants point away from defeating liability through the defense of contributory negligence. It is not surprising, therefore, that some recent cases have refused to find a right of control even in some of the situations mentioned in the first part of this note. Thus the fact that an automobile was registered in a wife's name was held an insufficient basis for finding that she might control the husband-driver's conduct while they were together on an errand for mutual pleasure. *Rodgers v. Saxton*, 305 *Pa.* 479, 158 *Atl.* 166 (1931). Cf. *Painter v. Lington*, supra. See also *Christensen v. Hennepin Transp. Co.*, 215 *Minn.* 394, 10 *N.W.2d* 406 (1943); *Fox v. Kaminsky*, 239 *Wis.* 559, 2 *N.W.2d* 199 (1942) (in both of which the errand was the husband's and the wife-owner went along for company). A like result has been reached where husband and wife were joint owners and they were "traveling together to Florida," the husband driving. *Jenks v. Veeder Contracting Co.*, 177 *Misc.* 240, 30 *N.Y.S.2d* 278 (*Sup. Ct., Albany County* 1941), aff'd on this point 264 *App. Div.* 979, 37 *N.Y.S.2d* 230 (1942); 290 *N.Y.* 810, 50 *N.E.2d* 231 (1943). The trial court remarked pithily, "the highway would be the wrong place to

and which is scarcely ever used as a basis for vicarious liability, but nearly always as a ground for cutting off (by imputed negligence) the claim of an innocent automobile guest against a negligent third person.<sup>29</sup> The doctrine is no better than its unlamented deceased forerunner, except, perhaps, in situations closely resembling an *ad hoc* partnership for a business purpose.<sup>30</sup>

### *Parent and Minor Child*

In 1839 a New York court imputed the negligence of the father to his two year old son in an action brought on behalf of the child against a third person whose alleged negligence resulted in the running down of the child by a sleigh.<sup>31</sup> This was not a suit for the father's own damage, but he was plaintiff as next friend of the child. The father's negligence lay in allowing so young a child on the road unattended. The court gave three reasons for its ruling: (1) Since the child was too young to be negligent, "the law must make him responsible, through others, if the doctrine of mutual care between the parties using the road is to be enforced at all in his case."<sup>32</sup> (2) The care of helpless children is confided to a guardian who "is keeper and agent for this purpose," so that the guardian's act must be deemed the child's as to third persons.<sup>33</sup> (3) It is much more fit that the infant should look to his negligent guardian than that a guardian should "harass [third persons] in courts of justice, recovering heavy verdicts for his own misconduct."<sup>34</sup>

Most courts repudiate this position. The child is not, of course, liable to third persons for his parent's custodial negligence,

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make the assertion of a partial right of control." *Contra*: *Archer v. Chicago, M., St. P. & P. R.R.*, 215 Wis. 509, 255 N.W. 67 (1935). Compare *Mustin v. West*, 46 So.2d 136 (La. App. 1950) (husband-owner barred by negligence of wife driver where husband present in car); *Waguespack v. Savarese*, 13 So.2d 726 (La. App. 1943).

29. Weintraub, *Joint Enterprise Doctrine in Automobile Law*, 16 *Corn. L.Q.* 320, 323 (1931); Note, 1 *Baylor L. Rev.* 492 (1949); Prosser, *Torts* 492 (1941).

30. An example is *Zajic v. Johnson*, 126 Neb. 191, 253 N.W. 77 (1934), where the seven members of an orchestra bought a car together and were driving home from an engagement when the accident occurred. Compare Weintraub, *The Joint Enterprise Doctrine in Automobile Law*, 16 *Corn. L.Q.* 320, 334-338 (1931); Note, 48 *Mich. L. Rev.* 372 (1950); Prosser, *Torts* 497, 498 (1941); Note, 48 *A.L.R.* 1055 (1927). It is not suggested that imputed negligence is justified in such a case, simply that it is less unjustified than in other cases of joint enterprise.

31. *Hartfield v. Roper*, 21 *Wend.* 615 (N.Y. 1839).

32. *Id.* at 619.

33. *Ibid.*

34. *Id.* at 620.



so there is no agency under generally applicable notions;<sup>35</sup> and the rule has been generally condemned as harsh and unjustifiable.<sup>36</sup> The third reason—that the negligent father is the real beneficiary of the action—has some merit.<sup>37</sup> Most courts, however, invoke this reasoning only to bar the parent's own action (for loss of services, expenses, etc.), and not in the suit for the child's injury.<sup>38</sup> Few if any jurisdictions still follow the rule in *Hartfield v. Roper*;<sup>39</sup> it was changed in New York by statute in 1935.<sup>40</sup>

### *Husband and Wife*

At common law the husband was a necessary plaintiff in a suit for injuries to the wife and had the right to any proceeds of judgment.<sup>41</sup> As a natural corollary of this rule the husband's negligence barred his recovery.<sup>42</sup> This situation is changed by statute, however, and the great weight of modern authority finds no basis for imputing the negligence of one spouse to another merely because of the marital relationship itself.<sup>43</sup> In some states,

35. That is, even if the child could appoint an agent, so as to be held vicariously liable for the agent's acts. On grounds that are tenable neither in logic nor in policy this has sometimes been denied. See, e.g., *Palmer v. Miller*, 380 Ill. 256, 43 N.E.2d 973 (1942); *Covault v. Nevitt*, 157 Wis. 113, 146 N.W. 1115 (1914); Note, 103 A.L.R. 487 (1936). But cf. *Carroll v. Harrison*, 49 F. Supp. 283 (W.D. Va. 1943), aff'd 139 F.2d 427 (4th Cir. 1943); *Gregory, Infant's Responsibility for his Agent's Tort*, 5 Wis. L. Rev. 453, 458 et seq. (1930). The reasoning that rejects the infant's vicarious liability may also be used to prevent negligence from being imputed to him as plaintiff because of a relationship of agency or joint enterprise. See, e.g., *Potter v. Florida Motor Lines*, 57 F.2d 313 (S.D. Fla. 1932); *Howe v. Central Vermont Ry.*, 91 Vt. 485, 101 Atl. 45 (1917). This is another instance of the way in which two wrong rules may, capriciously, make a right result in law. Here, as elsewhere, the sounder solution is to get rid of both rules and avoid the caprice.

36. *Warren v. Manchester St. Ry.*, 70 N.H. 352, 47 Atl. 735 (1900); *Gulesarian v. Madison Rys. Co.*, 172 Wis. 400, 179 N.W. 573 (1920); *Gregory, Vicarious Responsibility and Contributory Negligence*, 41 Yale L.J. 831 (1932); *Lessler, The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 Ford. L. Rev. 156, 165 (1951); Note, 33 B.U.L. Rev. 90, 100 (1953).

37. In the eyes of those who do not want to see contributory negligence pared away. See *Gilmore, Imputed Negligence*, 1 Wis. L. Rev. 193, 201 (1921).

38. *Id.* at 258, 259.

39. See cases collected in Note, 15 A.L.R. 414 (1921). This lists Delaware, Maine, Maryland, Massachusetts, and New York as following the minority view. But cf. *Brown v. Schendelman*, 4 W.W. Harr. 50, 143 Atl. 42 (Del. 1928); *Messick v. Delaware Electric Power Co.*, 175 Atl. 772 (Del. Super. 1934) (limiting rule); note 40 infra.

40. New York Domestic Relations Law § 73; Massachusetts changed her rule by statute in 1945. Mass. Gen. L. c. 352, § 85D. See *Gill v. Jakstas*, 325 Mass. 309, 90 N.E.2d 527 (1950).

41. *Pennsylvania R.R. v. Goodenough*, 55 N.J.L. 577, 28 Atl. 3 (1893). Cf. *Spiller v. Close*, 110 Me. 302, 86 Atl. 173 (1913) (applying similar principle in action to recover gambling losses).

42. *Pennsylvania R.R. v. Goodenough*, 55 N.J.L. 577, 28 Atl. 3 (1893).

43. *McCord v. Benford*, 48 Ga. App. 738, 173 S.E. 208 (1934); *Louisville N.A. & C. Ry. v. Creek*, 130 Ind. 139, 29 N.E. 481 (1892); *Vitale v. Checker*

a right to damages acquired by the wife during marriage must be sued for by both husband and wife and becomes community property. Under such a rule the husband's negligence will bar recovery.<sup>44</sup>

### *Bailor and Bailee*

There was a good deal of nineteenth century authority for imputing the negligence of the bailee to the bailor, so as to defeat the bailor's recovery against a third person for his negligence in injuring the subject of the bailment. In some of the earlier cases the point was assumed, or decided without discussion.<sup>45</sup> In others it was reasoned: (1) that the bailor had entrusted the goods to a bailee of his own selection so that against strangers the bailee's possession was that of his bailor<sup>46</sup> (a kind of assumption of risk); (2) since either the bailor or the bailee might sue the third person, the latter's plight should be the same in either suit—" . . . the bailor and bailee must recover, if at all, on the same facts and under the same circumstances."<sup>47</sup> But these reasons are not convincing. As to the first it may be answered (as it was in the passenger cases) that the fault principle does not generally put on a man (make him "assume") the risks of another's negligence where his own conduct has been reasonable and lawful, and that there is no reason for excepting the case of conduct which consists in entrusting one's self or one's goods to another for a legitimate purpose.<sup>48</sup> To the second reason, it may be said

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Cab Co., 166 La. 527, 117 So. 579 (1928); Notes, 59 A.L.R. 153 (1929); 110 A.L.R. 1099 (1937).

For the Connecticut rule, see Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 Ford. L. Rev. 156, 167, n. 51 (1951).

44. *McFadden v. Santa Ana, O. & T. St. Ry.*, 87 Cal. 464, 25 Pac. 681 (1891); *Basler v. Sacramento Gas and Electric Co.*, 158 Cal. 514, 111 Pac. 530 (1910); *Isaacs v. San Francisco*, 73 Cal. App.2d 621, 167 P.2d 221 (1946); *Ostheller v. Spokane & Inland Empire R.R.*, 107 Wash. 678, 182 Pac. 630 (1919).

But the rule does not make one spouse liable for injuries negligently caused by the other. *Cox v. Kaufman*, 77 Cal. App.2d 449, 175 P.2d 260 (1946); *Pacific Tel. & Tel. Co. v. Wellman*, 98 Cal. App. 2d 151, 219 P.2d 506 (1950).

45. E.g., in *Smith v. Smith*, 2 Pick. 621 (Mass. 1824); *Forks Township v. King*, 84 Pa. 230 (1877), it was assumed. In *Texas & P. Ry. v. Tankersley*, 63 Tex. 57 (1885), it was decided as a point beyond question, without discussion.

46. *Puterbaugh v. Reasor*, 9 Ohio St. 484 (1859). Cf. *Illinois Cent. R. Co. v. Sims*, 77 Miss. 325, 27 So. 527 (1900); *Wellwood v. King* [1921] 2 Ir. R. 274 (K.B. Div.), rev'd 290 (C.A.).

47. *Illinois Cent. R. Co. v. Sims*, 77 Miss. 325, 327, 27 So. 527, 528 (1900). Cf. *Wellwood v. King* [1921] 2 Ir. R. 274, 278 (K.B. Div.); *Anheuser-Busch, Inc. v. Starley*, 28 Cal.2d 347, 170 P.2d 448 (1946), noted in 34 Calif. L. Rev. 769 (1946); Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 Yale L.J. 831, 834 et seq. (1932). See also *Motorlease Corp. v. Mulroony*, 9 N.J. 82, 86 A.2d 765, 767 (1952).

48. Of course, a bailor's negligence may attach to the act of entrusting,

that the bailor and bailee have each a separate and independent interest in the property;<sup>49</sup> moreover, in the typical case, the only real injury is to the bailor's interest, and his suit ought not to be embarrassed by the fact that, for more or less technical reasons, the bailee may also sue (and account to his bailor for the proceeds).<sup>50</sup>

Without extensive consideration of either of these reasons the majority of courts saw in the bailment of goods cases an analogy to passenger cases and followed the both-ways reasoning and the authority of *The Bernina*<sup>51</sup> and *Little v. Hackett*<sup>52</sup> to deny the imputation.<sup>53</sup> This rule is applied without distinction to all sorts of situations which the law classifies as bailments,<sup>54</sup> including cases of chattel mortgage and conditional sales.<sup>55</sup>

From what has been said it can be seen that the doctrine of imputation was once used most effectively to implement and even extend the defense of contributory negligence. As the defense itself came increasingly to be thought harsh, however, it came to be felt that imputation could not be generally justified.

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as where the bailee is observably not a fit custodian for goods; but that is a case where the entruster's own conduct is not reasonable. For discussions, see *Mills v. Armstrong*, "The Bernina," 13 App. Cas. 1, 8 (H.L. 1888); *Little v. Hackett*, 116 U.S. 366, 379 (1886).

49. See *Anheuser-Busch, Inc. v. Starley*, 28 Cal.2d 347, 351, 170 P.2d 448, 450 (1946); *Motorlease Corp. v. Mulroony*, 9 N.J. 82, 90, 86 A.2d 765, 770 (1952) (dissenting opinion of Vanderbilt, C.J.).

50. 6 Am. Jur., Bailments §§ 302-310 (1950); 8 C.J.S., Bailments § 56 (1938).

If the situation is one in which the bailee has a separable and recognizable interest (so that he will actually obtain part of the fruits of the action), there is no compelling reason why his contributory negligence might not be allowed as a defense *pro tanto*. See *Anheuser-Busch, Inc. v. Starley*, 28 Cal.2d 347, 170 P.2d 448 (1946) (where carrier-bailee has paid bailor in full, contributory negligence recognized as defense to bailor's action); *Morris Plan Co. v. Hillcrest Farms Dairy*, 323 Mass. 452, 82 N.E.2d 889 (1948) (suggesting that conditional vendor's recovery might be limited to unpaid balance on a conditional sale agreement.)

For the suggestion that both mortgagee and mortgagor of personal property should join as plaintiffs where each has an interest, see *Jolly v. Thornton*, 40 Cal. App.2d 819, 102 P.2d 467 (1940); Note, 47 Harv. L. Rev. 523 (1934).

51. 13 App. Cas. 1 (H.L. 1888).

52. 116 U.S. 366 (1886).

53. E.g., *Wellwood v. King* [1921] 2 Ir. R. 290 (C.A.) (auto left with garage for repairs); *Currie v. Consolidated Ry.*, 81 Conn. 383, 71 Atl. 356 (1908) (rented vehicle); *Cain v. Wickens*, 81 N.H. 99, 122 Atl. 800 (1923) (loaned automobile); *New York, L.E. & W. R. Co. v. New Jersey Electric Ry.*, 60 N.J.L. 338, 38 Atl. 828 (1897) (rented vehicle).

See cases collected in Notes, 6 A.L.R. 316 (1920); 30 A.L.R. 1248 (1924).

54. Note the diverse types mentioned in notes 49-52 supra. The rule would also apply where the goods are in a carrier's or warehouseman's possession.

55. *Morris Plan Co. v. Hillcrest Farms Dairy, Inc.*, 323 Mass. 452, 82 N.E.2d 889 (1948); *Lacey v. Great No. R. Co.*, 70 Mont. 346, 225 Pac. 808 (1924); *Commercial Credit Corp. v. Satterthwaite*, 107 N.J.L. 17, 150 Atl. 235 (1930), *aff'd* 108 N.J.L. 188, 154 Atl. 769 (1931). Cf. Note, 47 Harv. L. Rev. 523 (1934).

So it waned, except where negligence was imputed by rules of general and well accepted application—that is, where there was vicarious liability. In this development, and as long as there were vestiges of the older, harsher rules, the both-ways test was the vehicle for humane law reform. It had in addition the strong psychological appeal of all rules cast in the form of balanced and logical symmetry—witness the recurrence of the “mutuality” concept in our law.<sup>56</sup> Small wonder then that its acceptance was almost universal two decades ago when it became ensconced in the Restatement.<sup>57</sup> There were those, however, who pointed out that “Courts seem unaware that the policies involved in granting or denying the defensive plea may be different from those controlling the responsibility in damages of a master for the conduct of his servant, and that the latter are probably concerned simply with providing a financially responsible defendant.”<sup>58</sup>

Even as the last traces of the older imputation of contributory negligence (*beyond* the scope of vicarious liability) were vanishing, the seriousness and growth of the automobile accident problem and the plight of uncompensated accident victims<sup>59</sup> led to increasing pressure for providing financially responsible defendants. One response to this pressure was the extension of vicarious liability by the court-made “family purpose” doctrine and by statutes having similar (or broader) effect. Some of the latter, for example, imposed vicarious liability on automobile owners for the negligence of anyone operating the car with the owner’s consent. This represented a departure from the fault principle so as to impose liability on innocent parties for reasons similar to those leading to workmen’s compensation—the owners were

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56. See, e.g., Stone, The “Mutuality” Rule in New York, 16 Col. L. Rev. 443 (1916) (mutuality of remedy in specific performance); Cox, Res Adjudicata: Who Entitled to Plead, 9 Va. L. Reg.(N.S.) 241 (1923) (mutuality of estoppel of judgment).

57. Restatement, Torts § 485 (1934). See also Note, 17 Corn. L.Q. 158 (1931).

58. Gregory, Vicarious Responsibility and Contributory Negligence, 41 Yale L.J. 831, 833 (1932). See also Gregory, The Contributory Negligence of Plaintiff’s Wife or Child in an Action for Loss of Services, etc., 2 U. of Chi. L. Rev. 173 (1935).

59. Report by the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Sciences (1932); Corstvet, The Uncompensated Accident and Its Consequences, 3 Law & Contemp. Prob. 466 (1936); Grad, Recent Developments in Automobile Accident Compensation, 50 Col. L. Rev. 300 (1950); McNiece and Thornton, Automobile Accident Prevention and Compensation, 27 N.Y.U. L. Rev. 585 (1952).

better distributors of the risks which their lawful activities created than were their victims.<sup>60</sup>

Under these statutory and judicial rules expanding vicarious liability beyond the scope of the older law, the question soon arose whether negligence should be imputed to a *plaintiff* on the same new wider basis. Should the bailee's negligence be imputed to his bailor, or the son's to the father, when the bailor or father sues a negligent third person for damage to the automobile? The formal logic of the both-ways test would give an affirmative answer, and some courts<sup>61</sup> and one legislature<sup>62</sup> have imputed the negligence on this basis. But this leads to the paradox that a rule which departed from the common law in response to an urge towards wider liability is being used to curtail liability by expanding the scope of a defense to it. Courts that have perceived this difficulty have re-evaluated the both-ways test. Some of them have found that it lacks validity in this context wherein it would serve as a vehicle of reaction rather than reform.<sup>63</sup> As the Minnesota court has said, "The very reason for holding the consenting owner liable for negligence of the operator of his automobile, that of furnishing financial responsibility to an injured party, is completely absent in the owner's action to recover for damages" done to his car by a negligent third party.<sup>64</sup> Another purpose of

60. See *Jacobsen v. Dailey*, 228 Minn. 201, 36 N.W.2d 711, 11 A.L.R.2d 1429 (and note at 1437) (1949); Note, 17 Corn. L.Q. 158 (1931).

61. *National Trucking & Storage Co. v. Driscoll*, 64 A.2d 304 (D.C. Mun. Ct. App. 1949); *Secured Finance Co. v. Chicago, R.I. & P. Ry.*, 207 Iowa 1105, 224 N.W. 88 (1929); *Dileo v. Dumontier*, 195 So. 74 (La. App. 1940).

62. California. See note 71 *infra*.

63. *Jacobsen v. Dailey*, 228 Minn. 201, 36 N.W.2d 711, 11 A.L.R.2d 1429 (1949); *Nannes v. Ideal Garage*, 150 Misc. 522, 269 N.Y. Supp. 777 (1934); *Mills v. Gabriel*, 284 N.Y. 755, 31 N.E.2d 512 (1940).

64. *Christensen v. Hennepin Transportation Co.*, 215 Minn. 394, 413, 10 N.W.2d 406, 417 (1943); *Jacobsen v. Dailey*, 228 Minn. 201, 205, 36 N.W.2d 711, 714 (1949).

An excellent note has put it: "Although [the owner's] negligence has been no greater than that of an employer under the Workman's Compensation Acts, the same economic considerations apply [to make him liable]. But no such considerations are present when the borrower and the third person have both been negligent, and it is the owner who is suing." 17 Corn. L.Q. 158, 164 (1931).

See also the admirable analysis in Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, etc.*, 2 U. of Chi. L. Rev. 173 (1935).

The *Jacobsen* case involved the collision of two cars, each driven by the owner's son. Plaintiff sued for damage to his car and defendant counter-claimed for his damage. The court upheld an instruction that if both sons were negligent, both fathers could recover. Cf. *Bandyach v. Ross*, 26 N.Y.S.2d 830 (City Ct. Utica 1941); Note, 17 Corn. L.Q. 158 (1931). The court also upheld a refusal to instruct that if both sons were negligent the verdict should be for the one suffering the greater damage and for only the difference between the amounts of damage suffered. It is submitted that this

such statutes is to induce care by car owners in selecting persons to whom they entrust the car. But probably the liability which the statute imposes on the owner is the strongest incentive to that end, and little will be added to it by cutting the innocent owner off from recovery for his own property damage.<sup>65</sup>

The rejection of the both-ways test under owner's consent statutes raises the question whether it has any validity at all. The whole doctrine of vicarious liability stems from considerations other than the defendant's personal fault, for it assumes his innocence. Indeed, the most widely accepted justification today rests all vicarious liability on bases essentially like those which underlie its recent extension in the consent statutes.<sup>66</sup> And these considerations furnish no fairer basis for cutting off an innocent plaintiff's recovery here than they do in the case of bailments. If the principle of liability or disability for individualized fault is taken as the norm, and vicarious liability or disability is regarded as an exceptional solution (to be justified only for reasons of policy sufficient in each case to warrant the exception) then there would be little justification indeed for imputing negligence to an innocent plaintiff in most cases.

A possible justification may be suggested where the risk of loss to property is a recurring and calculable one in the owner's business. The owner of a fleet of trucks or buses, or of automobiles for rent, or of automobiles on conditional sale, would furnish examples. In such a case the owner typically makes provision for distributing this property loss—by insurance or otherwise—whether it is caused by the servant's or the bailee's negligence or not. Where that is the case the loss is at once put into channels for its wide distribution without resort to the relatively inefficient method of tort liability; and society may well lose rather than gain from any step which would encourage the

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refusal was eminently sound. If the fathers were covered by liability insurance, the rejected instruction would allow the insurance companies to credit the personal loss of the insureds against their liability as insurers. Compare James, *Contributory Negligence*, 62 *Yale L.J.* 691, 734 (1953). If they were not so covered, there is no need for the refused instruction.

In the case put, this possibility may be avoided by suits against the sons (bailees) rather than the fathers. If the insurance policies are in the usual form, they will cover the sons' liabilities as well as those of the insured owners.

65. Except possibly in the case of an individual owner who has liability but not collision insurance.

66. See, e.g., Laski, *The Basis of Vicarious Liability*, 26 *Yale L.J.* 105 (1916); Smith, Frolic and Detour, 23 *Col. L. Rev.* 444, 716 (1923); Douglas, *Vicarious Liability and Administration of Risk*, 38 *Yale L.J.* 584, 720 (1929); James, *Vicarious Liability* (to be published in 28 *Tulane L. Rev.* ... [1954]).

cumbersome attempts to pursue the matter further in the hope of getting a nicer adjustment to an illusory concept of fault. That pursuit puts additional burdens on our already overworked judicial machinery; and it often lets good loss distributors throw some of their losses on individuals who cannot distribute them at all.<sup>67</sup> A rule of imputed negligence would deter professional bailors (or their insurers) from making this quest (so costly to society) and would effectively encourage the practice of insurance to cover the property loss incident to these transactions. Such considerations might lead to adopting Gregory's suggestion that bailments should not all be treated alike for this purpose. In distinguishing between classes of bailments, he would make controlling "the risk of probable injury taken by the bailor."<sup>68</sup> It is submitted that a better basis for distinction would be the likelihood that bailors of a certain class would insure or otherwise make regular provision for the loss, and the desirability of putting upon them pressure for making such provision.<sup>69</sup> Similar considerations might justify the imputation of negligence to employers of labor (as the present rule does).

It should be noted that the foregoing reasoning would not justify the both-ways test. Rather it would lead to *denying* imputation in some situations where there is vicarious liability (as with the individual lender of an automobile under the owners' consent statutes); and imputing negligence in other cases where there was not vicarious liability (as in the case of professional bailors). Perhaps it is unlikely that the waning defense of contributory negligence<sup>70</sup> will enjoy much belated expansion, even for reasons like these.<sup>71</sup> On the other hand it should be noted

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67. Compare James, Contribution Among Tortfeasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156 (1941); James, Social Insurance and Tort Liability: The Problem of Alternative Remedies, 27 N.Y.U. L. Rev. 537, 559 (1952).

68. Gregory, Vicarious Responsibility and Contributory Negligence, 41 Yale L.J. 831, 841-2 (1932). Cf. Gregory, The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, etc., 2 U. of Chi. L. Rev. 173 (1935).

69. See Ehrenzweig, Assurance Oblige—A Comparative Study, 15 Law & Contemp. Prob. 445 (1950).

70. See Leflar, The Declining Defense of Contributory Negligence, 1 Ark. L. Rev. 1 (1946).

71. In this connection, however, two recent statutes should be noted. The California owner's consent statute expressly provides for imputed negligence. Deering's Cal. Vehicle Code Ann. § 402 (1935, 1937, 1943, 1949, 1951). *Milgate v. Wraith*, 19 Cal.2d 297, 121 P.2d 10 (1942); *Spendlove v. Pacific Electric Ry.*, 30 Cal.2d 632, 184 P.2d 873 (1947). And a 1939 New Jersey statute provides for imputed negligence in all cases of bailment (expressly including conditional sales). 46 N.J. Stat. Ann. c. 36, § 1; *Motorlease Corp. v. Mulroony*, 9 N.J. 82, 86 A.2d 765 (1952). Is it more than a coincidence that

that most of the claims that are barred by imputed contributory negligence today are property damage claims by parties who employ labor and are likely to provide for property damage claims in the way described. Such losses do not pose the social problem or build up the same pressures for redress that personal injuries and death have. So it is not unlikely that the imputed negligence may remain where it is now entrenched, save possibly in the field of "joint enterprise."

All of the situations we have been considering have involved a claim against someone who is an outsider to the relationship which gives rise to the imputation of negligence. The great weight of authority confines the doctrine of imputed negligence to such situations, and refuses to impute the defendant's negligence to the plaintiff when the action is, for example, by master against servant, or by one joint entrepreneur against another.<sup>72</sup> There is no shadow of excuse for the minority rule, and it is probably nothing more than a judicial faux pas.

There is another situation which is similar (but not identical) in operation and result to the imputation of another's negligence to the plaintiff, but which is analyzed differently under the legal reasoning currently in vogue. Where a wife or minor child is injured a right of action accrues to the husband or parent for loss of services, and expenses, and sometimes other items, while the wife or child has a right of action for pain, suffering, disfigurement, and so on, arising out of the same injury. Under the prevailing rule in this country, the negligence of the wife or child will bar the husband's or the parent's action (for the items above enumerated), even under circumstances where the injured person's negligence will not be imputed to the husband- or parent-plaintiff.<sup>73</sup> If, for example, a son has borrowed his father's dress clothes and car to go to a dance and negligently collides with

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New Jersey, which was one of the first states to reject the imputation of negligence from bailee to bailor, was apparently content with the prevailing rule until a few years after it was applied to the conditional vendor of an automobile?

72. *Whidden v. Malone*, 220 Ala. 220, 124 So. 516 (1929); *Bushnell v. Bushnell*, 103 Conn. 583, 131 Atl. 432 (1925); *Bostrom v. Jennings*, 326 Mich. 146, 40 N.W.2d 97 (1949) (disapproving former holdings to the contrary and indicating they were ill-considered); *Johnson v. Hetrick*, 300 Pa. 225, 150 Atl. 477 (1930); *Campbell v. Campbell*, 104 Vt. 468, 162 Atl. 379 (1932); *O'Brien v. Woldson*, 149 Wash. 192, 270 Pac. 304 (1928); cases collected in Notes, 62 A.L.R. 440, 442 (1929); 85 A.L.R. 630, 632 (1933). Cf. *Kimbrow v. Holladay*, 154 So. 368 (La. App. 1934), where no joint enterprise was found, but the present point apparently went unnoticed.

73. *Chicago, B. & Q. Ry. v. Honey*, 12 C.C.A. 190, 27 U.S. App. 196, 63 Fed. 39 (1894), reversing judgment 59 Fed. 423, 7 Am. Neg. Cas. 556 (1893).



another negligently driven car, the son's negligence will not affect the father's action for damage to the clothes or the car (at least if it is not a "family car") but it will bar the father's action for loss of services and expenses incurred because of his son's personal injury.<sup>74</sup> These discrepant results suggest inconsistency. It remains to consider: (1) what legal doctrine is used to justify the distinction between them; (2) whether the justification is sufficient as a matter of either logic or policy, and (3) if not, which rule should prevail.

It is generally said today that the husband's or parent's claim for services, etc., is a "derivative" one, and stands no better than it would in the hands of the injured person from whom it was derived.<sup>75</sup> Now there are situations in our law where a claim originally was in one party, who had a right to sue upon it, but then passed to another, by operation of law or voluntary transfer. Suits by assignees or representatives of decedents' estates, and derivative stockholders' actions, are examples. In these situations plaintiff's case generally does have all the infirmities it had while in the hands of the original owner. And one of the leading modern cases espousing the rule now in question invokes the assignment analogy.<sup>76</sup> But it is a weak one. The claim for loss of services never did belong to the injured party, any more than did the claims for damage to the clothes or the car<sup>77</sup> in the case put above. The law gives the husband or parent an independent claim from the very moment of the injury which the wife or the child never could sue on, or destroy by settlement or judgment, or assign.

The claim for services, then, is not a derivative one in the ordinary sense. Nor has it been treated as derivative for other purposes. Thus, as Gregory points out, a woman's consent to her seduction or her debilitation by drugs will bar her own action for injuries sustained, but not the action of her husband for loss of services and companionship and for medical expenses.<sup>78</sup> In terms

74. If the case were one of imputed negligence (e.g., agency), the son's negligence would bar the father's action for any and all items of damage.

75. *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 206 N.W. 198, 42 A.L.R. 712 (and note at 717) (1925); Harper, *A Treatise on the Law of Torts* § 149 (1933).

76. *Callies v. Reliance Laundry Co.*, 188 Wis. 376, 206 N.W. 198, 42 A.L.R. 712 (1925).

77. Indeed even less, since the bailee's interest in the subject of the bailment will support an action on his part for the whole damage. *Armstrong v. Kubo & Co.*, 83 Cal. App. 331, 263 Pac. 365 (1928); *Central R.R. v. Bayway Refining Co.*, 81 N.J.L. 456, 79 Atl. 292 (1911).

78. Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, etc.*, 2 U. of Chi. L. Rev. 173, 188, 189 (1935).

of logic the assignment analogy does not seem as close as the analogy of bailment.<sup>79</sup> If one insists on thinking conceptually, he may conceive of the wife or child as carrying around with him the husband's or parent's pecuniary interest (in potential services and freedom from medical expense) as though it were a jacket, or a necklace, or a wig. On a more realistic level is the owner's relatively greater practical chance for control and selection in the case of bailees than of families. In the case put, for instance, the father presumably had less control over who or what his son would be than he had over the matter of lending him his clothes and his car on this occasion. One possible ground for imputing a bailee's negligence is therefore even weaker where the parent's or husband's independent claim for loss of services is involved. Altogether there seems to be no warrant in either doctrine or policy for treating the two cases differently—at least to the disadvantages of the claim for loss of services, etc. Nor does there seem to be any adequate basis for barring the innocent owner of this claim (which the law gives as correlative to duties it imposes) for the negligence of another than the plaintiff, whether the process is called imputation or something else.

If the husband- or parent-plaintiff has himself been negligent, that fact will of course affect his recovery for loss of services, etc.<sup>80</sup> Moreover, questions may arise as to whether the negligence of a third person (e.g., a custodian of his child) will be imputed to him. Such questions are parallel to those involving imputation of negligence to the beneficiary under a wrongful death statute, and will be treated below.<sup>81</sup>

It is a commonplace, of course, that under Anglo-American common law of the early nineteenth century a right of action for personal injury did not survive the victim's death, and no civil action accrued to anyone on account of his death.<sup>82</sup> This situation

79. Indeed, in an earlier day when the bailee's negligence was imputed to the bailor, this analogy was used in a leading case to *support* the defense of the wife's contributory negligence to the husband's claim. *Chicago, B. & Q. R. Co. v. Honey*, 12 C.C.A. 190, 27 U.S. App. 196, 63 Fed. 39 (1894), reversing judgment 59 Fed. 423, 7 Am. Neg. Cas. 556 (1893).

The analogy is surely no less apt now that the rule in bailments is reversed.

80. *Pratt Iron & Coal Co. v. Brawley*, 83 Ala. 371, 3 So. 555 (1888); *Kokesh v. Price*, 136 Minn. 304, 161 N.W. 715 (1917); *Conway v. Monidah Trust*, 52 Mont. 244, 157 Pac. 178 (1916).

81. See p. 358 et seq. *infra*.

82. *Baker v. Bolton*, 1 Campb. 493 (N.P. 1808); Schumacher, *Rights of Action under Death and Survival Statutes*, 23 Mich. L. Rev. 114 (1924); Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 Tulane L. Rev. 386 (1942); Voss, *The*

has everywhere been remedied, in one way or another, by statute.<sup>83</sup> Some of the statutes, following the original English model of Lord Campbell's Act,<sup>84</sup> create a new cause of action for the benefit of those suffering pecuniary damage from the wrongful death.<sup>85</sup> Others provide that the right of action of the party injured shall survive.<sup>86</sup> Some of these survival statutes provide for the recovery of damages resulting from the death, as well as for damages on account of pain, suffering and economic loss, if any, suffered by the decedent before death.<sup>87</sup> Other jurisdictions have both a wrongful death statute (covering the loss to beneficiaries from the death) and a survival statute (covering damage suffered by decedent before death).<sup>88</sup>

Under all of these types of statutes the contributory negligence of the deceased is a bar to an action for negligently causing his death or injury. Where the statute provides for the survival of his action, the surviving action is derivative in the fullest sense of the term, and the result of the cases comes as near to being demanded by inexorable logic as anything does.<sup>89</sup> Where a new right of action is created, the statute often provides for recov-

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Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana, 6 Tulane L. Rev. 201, 203-212 (1932); Tiffany, Death by Wrongful Act c. 1 (2d ed. 1913).

83. Tiffany, Death by Wrongful Act xix-lxxi, c. 3 (2d ed. 1913), contains a comparative analytical table and a summary of the principal statutes.

84. 9 and 10 Vict. c. 93 (1846).

85. Tiffany, Death by Wrongful Act § 24 (2d ed. 1913), lists 34 states and the District of Columbia as having a statute of this type. Examples are Art. 2315, La. Civil Code of 1870; New York Decedent Estates Law § 130. The Louisiana statute originally provided only for the survival of the deceased's own action. Earhart v. New Orleans & Carrollton R. Co., 17 La. Ann. 243 (1865). The wrongful death provision was added in 1884. See Voss, The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana, 6 Tulane L. Rev. 201 (1932).

86. Schumacher, Rights of Action under Death and Survival Statutes, 23 Mich. L. Rev. 114, 116 (1924); Tiffany, Death by Wrongful Act § 25 (2d ed. 1913). An example is to be found in 41 Iowa Code Ann. §§ 611.20-611.22 (1950). See Jones, Civil Liability for Wrongful Death in Iowa, 10 Iowa L. Bull. 169 (1925); 11 Iowa L. Rev. 23 (1925).

87. Tiffany, Death by Wrongful Act § 26 (2d ed. 1913). See Chase v. Fitzgerald, 132 Conn. 461, 45 A.2d 789 (1946); Jones, Civil Liability for Wrongful Death in Iowa, 10 Iowa L. Bull. 169 (1925); 11 Iowa L. Rev. 23 (1925).

88. St. Louis & Iron Mtn. Ry. v. Craft, 237 U.S. 648 (1915) (FELA); Farrington v. Stoddard, 115 F.2d 96 (1st Cir. 1940) (Maine statutes); Eichorn v. New Orleans & C.R. Light & Power Co., 112 La. 236, 36 So. 335 (1904); Voss, The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana, 6 Tulane L. Rev. 201, 223-226 (1932).

An extensive review of the American statutes may be found in Coliseum Motor Co. v. Hester, 43 Wyo. 298, 3 P.2d 105 (1931).

89. Quinn v. New York, N.H. & H. R. Co., 56 Conn. 44, 12 Atl. 97 (1887); Lane v. Central Iowa Ry., 69 Iowa 443, 29 N.W. 419 (1886); Vitale v. Checker Cab Co., 7 La. App. 653 (1927); 166 La. 527, 117 So. 579 (1928); Oppenheim, The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal, 16 Tulane L. Rev. 386, 417 (1942).

ery on the express condition that deceased could have maintained an action for the wrong "if death had not ensued," and such a statute, too, seems to demand the result of the cases.<sup>90</sup> Other wrongful death statutes have been interpreted as though they contained such a provision, though in fact they do not.<sup>91</sup> These last decisions might well have gone the other way, since the action is not truly a derivative one and there is no basis for imputing the deceased's negligence to his defendants.<sup>92</sup> It is unlikely, however, that the decisions will be reversed at this late date.

Wherever the negligence of a third person would have been imputed to the deceased (if he had sued for his own injuries), that imputed negligence will be imputed to the deceased in an action for his death. The discussion in the earlier part of this article is therefore applicable to such a situation.<sup>93</sup>

A question is also presented where a beneficiary has been negligent. Under survival statutes this is generally held to be immaterial.<sup>94</sup> Under wrongful death statutes, however, the negligence of a sole beneficiary in many states bars his recovery for the wrongful death of another (even where deceased could have maintained an action for his injuries if death had not ensued).<sup>95</sup>

90. Lord Campbell's Act itself contains such a provision. See also, e.g., New York Decedent Estates Law § 130.

91. This is the case in Louisiana. See *Vitale v. Checker Cab Co.*, 7 La. App. 653 (1927); 166 La. 527, 117 So. 579 (1928). See also Prosser, *Torts* 423 (1941).

92. The court of appeal in the *Vitale* case made the distinction suggested in the text, and the Supreme Court was troubled by the apparent inconsistency between awarding the widow damages for her personal injury and withholding damages in her action arising out of her husband's death, but decided to follow the prevailing rule. See comments in Oppenheim, *The Survival of Tort Actions and the Action for Wrongful Death—A Survey and a Proposal*, 16 *Tulane L. Rev.* 386, 417 (1942).

93. Thus the parent's or custodian's negligence will not be imputed to a child who has been killed as a result of it. *Atlanta & C. Air-Line Ry. v. Gravitt*, 93 Ga. 369, 20 S.E. 550 (1894); *Bamberger v. Citizens' St. R. Co.*, 95 Tenn. 18, 31 S.W. 163 (1895). The rule was otherwise in New York and other states following *Hartfield v. Roper*, 21 Wend. 615 (N.Y. 1839). *Carr v. Merchants' Ice Co.*, 91 App. Div. 162, 86 N.Y. Supp. 368 (1904). But now that *Hartfield* has been superseded by statute (New York Domestic Relations Law § 73), the custodian's negligence will no longer be imputed to the deceased child. *Meyer v. Inguaggiato*, 258 App. Div. 331, 16 N.Y.S.2d 672 (1940).

94. *Wilmot v. McPadden*, 78 Conn. 276, 61 Atl. 1069 (1905); *Wymore v. Mahaska County*, 78 Iowa 396, 43 N.W. 264 (1889); *Westerfield v. Levis*, 43 La. Ann. 63, 9 So. 52 (1891) (distinguishing damages for wrongful death from those on account of the deceased's own suffering, etc., in this respect). *Warren v. Manchester St. Ry.*, 70 N.H. 352, 47 Atl. 735 (1900). But see *Niemi v. Boston & M. R.R.*, 87 N.H. 1, 9, 173 Atl. 361, 175 Atl. 245 (1934) (overruling *Warren v. Manchester*); *Crevelli v. Chicago, M. & St. P. R. Co.*, 98 Wash. 42, 167 Pac. 66 (1917).

95. *Peoples v. Seamon*, 249 Ala. 284, 31 So.2d 88 (1947); *Burton v. Spurlock*, 294 Ky. 336, 171 S.W.2d 1012 (1943); *Wise v. Eubanks*, 159 So. 161 (La. App. 1935); cases collected in Note, 2 A.L.R.2d 785, 788 et seq. (1948). A contrary

Moreover, if there are more beneficiaries than one, some of these states will reduce any recovery by the amount of the negligent beneficiary's share.<sup>96</sup> Where the negligence of a beneficiary becomes material under such a rule, questions arise as to when the negligence of another will be imputed to him. These questions are, as we have noted, parallel to those involving the possible imputation of a third person's negligence to a husband- or parent-plaintiff in his action for loss of services, etc., of his wife or child. For the most part, such questions are solved along lines described earlier in this article. Some especially severe rules have crept in, however, where the negligence is that of the custodian of a child who has been killed or injured. Where the custodian is acting in the scope of his employment by a parent, the case falls within well defined concepts.<sup>97</sup> But even where there is no vicarious responsibility under general principles, some decisions have imputed the custodian's negligence to one<sup>98</sup> or both parents<sup>99</sup> or the negligence of one parent (who was acting as custodian) to the

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result is reached in New York. *McKay v. Syracuse Rapid Transit Co.*, 208 N.Y. 359, 101 N.E. 885 (1913); *Zinman v. Newman*, 51 N.Y.S.2d 132 (1942).

Where the statute requires the action to be brought by the personal representative, the question of his negligence is immaterial, under any rule, unless he is also the beneficiary. It is the beneficiary's negligence that is significant. *Peoples v. Seamon*, supra; *Burton v. Spurlock*, supra; Note, 2 A.L.R.2d 785, 791 et seq. (1948).

96. There are three rules. Some courts will bar *all* beneficiaries if *any* of them is negligent. *Hazel v. Hoopston-Danville Motor Bus Co.*, 310 Ill. 38, 141 N.E. 392 (1923). Other courts refuse to bar *any* beneficiary unless *all* are negligent. *Herrell v. St. Louis-S.F. R. Co.*, 324 Mo. 38, 23 S.W.2d 102 (1929). The majority of states will bar recovery on behalf of any beneficiary who has been negligent. *Phillips v. Denver City T. Co.*, 53 Colo. 458, 128 Pac. 460 (1912); *Kokesh v. Price*, 136 Minn. 304, 161 N.W. 715 (1917); cases collected in Note, 2 A.L.R.2d 785, 799 et seq. (1948).

97. This may account for such rulings as *Schlenk's Adm'r v. Central Pass. Ry.*, 15 Ky. L. Rep. 409, 23 S.W. 589 (1893) (custodian was 12 year old girl employed by parents as nurse); *Niemi v. Boston & M. R. Co.*, 87 N.H. 1, 9, 173 Atl. 361, 175 Atl. 245 (1934) (wife-owner of car being driven by husband); *Richmond F. & P. R. Co. v. Martin's Adm'r*, 102 Va. 201, 45 S.E. 894 (1903) (father put 11 year old son in charge of wagon to drive mother and daughters to city).

98. *Pratt Coal & Iron Co. v. Brawley*, 83 Ala. 371, 3 So. 555 (1888) (grandmother's negligence imputed to father); *Atlanta & C. Air-Line Ry. v. Gravitt*, 93 Ga. 369, 20 S.E. 550 (1894) (child in uncle's custody; uncle's negligence bars father who has legal custody, but not mother); *Conway v. Monidah Trust*, 52 Mont. 244, 157 Pac. 178 (1916) (custodian's negligence bars father's action for services, but not child's own action); *Bamberger v. Citizens' St. R. Co.*, 95 Tenn. 18, 31 S.W. 163 (1895) (child left with grandmother who temporarily put custody in her daughter; latter's negligence imputed to parent). Cf. *Richmond, F. & P. R. Co. v. Martin's Adm'r*, 102 Va. 201, 45 S.E. 894 (1903).

99. *Gress v. Philadelphia & R. Ry.*, 228 Pa. 482, 77 Atl. 810 (1910) (6 year old boy and older sister on way home from school; sister's negligence imputed to parents); *Nettles v. Southern Ry.*, 211 S.C. 187, 44 S.E.2d 321 (1947) (young child and 8 year old cousin sent to store; cousin's negligence imputed to parents).

other parent.<sup>100</sup> Such rulings stand on as shaky a footing as *Thorogood v. Bryan* and *Hartfield v. Roper*: they are altogether indefensible, and are being increasingly rejected.<sup>101</sup>

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100. *Keena v. United Railroads of San Francisco*, 57 Cal. App. 124, 207 Pac. 35 (1922) (but see note 101 infra); *Toner's Adm'r v. South Covington & C. St. R. Co.*, 109 Ky. 41, 58 S.W. 439 (1900); *Emerine v. Ford*, 254 S.W.2d 938 (Ky. 1953); *Niemi v. Boston & M. R. Co.*, 87 N.H. 1, 173 Atl. 261, 175 Atl. 245 (1934); *Darbrinsky v. Pennsylvania Co.*, 248 Pa. 503, 94 Atl. 269 (1915); *Smith v. Philadelphia Transp. Co.*, 173 F.2d 721 (3d Cir. 1949) (applying Pennsylvania law); *Nichols v. Nashville H.A.*, 187 Tenn. 683, 216 S.W.2d 694 (1949); *Crevelli v. Chicago, M. & St. P. Ry.*, 98 Wash. 42, 167 Pac. 66 (1917). Cf. *Milliken v. Weybosset Pure Food Mkt.*, 71 R.I. 312, 44 A.2d 723 (1945).

101. *Flores v. Brown*, 233 P.2d 168 (Cal. App. 1951), 39 Cal.2d 622, 248 P.2d 922 (1952); *Phillips v. Denver City Tramway Co.*, 53 Colo. 458, 128 Pac. 460 (1912); *Illingworth v. Madden*, 135 Me. 159, 192 Atl. 273 (1937); *Love v. Detroit, J. & C. R. Co.*, 170 Mich. 1, 135 N.W. 963 (1912); *Reynolds v. Thompson*, 215 S.W.2d 452 (Mo. 1948); *Macdonald v. O'Reilly*, 45 Ore. 589, 78 Pac. 753 (1904).

The *Flores* case overrules the oft-cited *Keena* case, so that one spouse is no longer regarded as the agent of the other to care for the child. If both parents are living together, however, any recovery for the wrongful death of their child is community property, so that the negligence of either will bar recovery. *Flores v. Brown*, 39 Cal.2d 622, 630, 631, 248 P.2d 922, 926 (1952). That notion was inapplicable to *Flores*, however, since the negligent parent was also killed in the accident.