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TORTS — IMPUTED NEGLIGENCE — PASSENGER IN PRIVATE CARRIER FOR HIRE — The plaintiff hired Hilton, a private carrier, to drive her from Detroit to Ann Arbor. Hilton's car collided with a car driven by the defendant, both Hilton and the defendant being negligent. *Held*, that the plaintiff could recover, as the negligence of a private carrier for hire will not be imputed to a passenger riding in his conveyance. Three judges dissented; the four concurring judges refused to join Justice McDonald in his opinion expressly overruling the whole doctrine of *Thorogood v. Bryan*. *Lachow v. Kimmich*, 263 Mich. 1, 248 N. W. 531 (1933).

In return for transporting him and others to work the plaintiff paid *B*, a fellow workman, a fixed sum to defray the cost of his gas and oil. The plaintiff was injured in a collision due to the negligence of *B* and that of the defendant, driving another automobile. *Held*, that the plaintiff could recover as *B* was a private carrier for hire and there was no joint venture. *Johnson v. Mack*, 263 Mich. 10, 248 N. W. 534 (1933).

C, a drain commissioner, received 10c per mile for driving his car to meetings of the commission. The plaintiff, another drain commissioner, while riding with *C* to such a meeting, was injured because of the concurrent negligence of *C* and the defendant. *Held*, that *C* was not a private carrier for hire, his negligence was imputed to the plaintiff, and so the plaintiff could not recover from the defendant. *Caswell v. N. Y. C. R. R.*, 263 Mich. 18, 248 N. W. 641 (1933).

These three cases show clearly Michigan's stand on the well-worn doctrine of *Thorogood v. Bryan*,[1] imputing the contributory negligence of the driver of a conveyance to his guest or passenger when the latter seeks to recover for injuries sustained due to the negligence of a third party. The *Lachow* case indicates the court's opposition to the general policy of the doctrine and its refusal to extend its application beyond the facts of actually decided cases. In the *Johnson* case this is carried even further, the court refusing to impute negligence, though other courts might easily have found a joint venture.[2] Yet in spite of the strong opin-

[1] 8 C. B. 115, 134 Eng. Repr. 452 (1849).

[2] See also Wojewoda v. City of Detroit, 264 Mich. 277, 249 N. W. 850 (1933).

ion written by Justice McDonald in the *Lachow* case advocating that Michigan's long line of cases following *Thorogood v. Bryan* be overruled, the *Caswell* case shows that the court's dislike of judicial legislation is strong enough to compel it to adhere to part of this doctrine. Michigan is now the only State which applies this rule to a mere guest.[3] Although *Thorogood v. Bryan* was for a time followed in several other States, the earlier decisions have been overruled in these States as well as in England itself.[4] In most jurisdictions negligence is now only imputed if there is actual agency, a master-servant relation, or a "joint venture." [5] Even Michigan has so qualified the original doctrine that negligence is not imputed to a passenger in a common carrier,[6] to a fellow servant,[7] to a servant riding with his master,[8] to a minor,[9] or to a passenger of a private carrier for hire.[10] Generally speaking, negligence is imputed on one of three grounds:

Cf. O'Brien v. Woldson, 149 Wash. 192, 270 Pac. 304 (1928) and Frisorger v. Shepse, 251 Mich. 121, 230 N. W. 926 (1930), establishing a joint venture on quite similar facts.

[3] The Michigan rule dates from Lake Shore & Mich. R. R. v. Miller, 25 Mich. 274 (1872). See also Mullen v. Owosso, 100 Mich. 103, 58 N. W. 663 (1894); Holsaple v. Menominee Superintendents of Poor, 232 Mich. 603, 206 N. W. 529 (1925) and cases therein cited.

The federal court sitting in Michigan has refused to follow the Michigan rule. Commercial Electric Supply Co. v. Greschner, (C. C. A. 6th, 1932) 59 F. (2d) 512.

[4] As examples of the earlier decisions see Prideaux v. Mineral Point, 43 Wis. 513 (1878); Lockhart v. Lichtenthaler, 46 Pa. 151 (1863); Whittaker v. Helena, 14 Mont. 124, 35 Pac. 904 (1894); Yarnold v. Bowers, 186 Mass. 396, 71 N. E. 799 (1904).

For cases repudiating the doctrine see Bennett v. Nebel, 199 Wis. 334, 226 N. W. 395 (1929); Carlisle v. Brisbane, 113 Pa. 544 (1886); Laird v. Berthelote, 63 Mont. 122, 206 Pac. 445 (1922); Shultz v. Old Colony St. Ry., 193 Mass. 309, 79 N. E. 873 (1907); Yost v. Nelson, 124 Neb. 33, 245 N. W. 9 (1932); Kuhn v. Kjose, (Iowa 1933) 248 N. W. 230; Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391 (1886); The Bernina, 13 App. Cas. 1 (1888).

In general see Mechem, "The Contributory Negligence of Automobile Passengers," 78 UNIV. PA. L. REV. 736 (1930); Gilmore, "Imputed Negligence," 1 WIS. L. REV. 193 (1921); 80 UNIV. PA. L. REV. 1123 (1932); 8 L. R. A. (N. S.) 597 (1907); L. R. A. 1915A 761; L. R. A. 1915B 953.

[5] See note 4, supra. For criticism of the modern joint venture doctrine as in effect a revival of Thorogood v. Bryan see J. Weintraub, "The Joint Enterprise Doctrine in Automobile Law," 16 CORN. L. Q. 320 (1931). In defense of this doctrine is Falknor, "The Doctrine of Joint Adventure in Automobile Law," 1 WASH. L. REV. 113 (1925). See also Rollison, "The 'Joint Enterprise' in the Law of Imputed Negligence," 6 NOTRE DAME LAWY. 172 (1930).

[6] Galloway v. Detroit United Ry., 168 Mich. 343, 134 N. W. 10 (1912).

[7] McKernan v. Detroit Citizens' St. Ry., 138 Mich. 519, 101 N. W. 812 (1904).

[8] Robertson v. United Fuel & Supply Co., 218 Mich. 271, 187 N. W. 300 (1922).

[9] Donlin v. Detroit United Ry., 198 Mich. 327, 164 N. W. 447 (1917). The plaintiff was over 16 years of age.

[10] Besides the principal decisions Rogers v. Weber, 235 Mich. 180, 209 N. W. 165 (1926), by a 4 to 4 division had affirmed the decision of the lower court refusing to apply the rule to such cases.

agency,[11] "assumption of risk," [12] or a public policy seeking to prevent one who was contributorily negligent from indirectly profiting by the plaintiff's recovery.[13] All three have been given as the reason for imputing negligence to a guest in an automobile. That in the guest case any agency is fictional is obvious from the fact that the guest is not liable to a third party injured.[14] The phrase "assumption of risk" is also used only to rationalize the desired result. If it were used in its technical sense the host would be under no duty to his guest.[15] Of course in the ordinary case we find such a duty.[16] Even if there are additional facts showing genuine assumption of risk as between the guest and the host the situation can be more easily handled on the basis of the guest's actual contributory negligence, when he is suing a *third* party. The third reason is equally inapplicable here as the negligent driver usually benefits little by the recovery of his guest.[17] As pointed out by the dissenting judges in the *Lachow* case, if a plaintiff who hires a private carrier has no control over such carrier certainly a gratuitous passenger would have no control over his host. Furthermore, there would be no harmful results if the court reversed itself on this point, as no defendant could claim that he had negligently injured a guest in another's car in reliance on the peculiar Michigan doctrine of imputed negligence. It would appear, from these recent cases, that if the rule imputing the negligence of a driver to a mere guest is to be changed in Michigan in the near future it must be done by the legislature.

C. S. R.

[11] This is the basis for the "joint venture" and "control" tests. It is also frequently the explanation of "identification."

[12] "Further, the private carrier . . . is presumably accepted knowingly and discreetly by the occupant of the vehicle, or if such transportation is accepted at random and indiscriminately the passenger should assume the risk of thus acting without the exercise of ordinary care. . . . " Lachow v. Kimmich, 263 Mich. 1 at 8, 248 N. W. 531 at 533 (1933).

Similar to assumption of risk is the old Massachusetts doctrine of the "voluntary surrender of all care to the caution of the driver." On this see Israelite, "The Guest of the Careless Driver," 6 BOSTON U. L. REV. 234 (1926).

[13] There is certainly something to be said for refusing recovery to a plaintiff, the negligence of whose husband or father contributed to the injury. See also Lockhart v. Lichtenthaler, 46 Pa. 151 (1863).

[14] Reiter v. Grober, 173 Wis. 493, 181 N. W. 739 (1921).

[15] It seems to be assumption of risk as between *host* and guest to which the courts are referring. If it were assumption of risk as between the guest and the third party, there would, of course, be no point in speaking of negligence or contributory negligence at all.

[16] Roy v. Kirn, 208 Mich. 571, 175 N. W. 475 (1919).

[17] There is always some benefit from the fact that recovery from the third party will bar recovery from the host.