STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Vehicle Code Section 17150 and Related Sections

October 1966

CALIFORNIA LAW REVISION COMMISSION
School of Law
Stanford University
Stanford, California

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NOTE

This pamphlet begins on page 501. The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 8 of the Commission's REPORTS, RECOMMENDATIONS, AND STUDIES.

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted. They are cast in this form because their primary purpose is to undertake to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

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October 4, 1966

To HIS EXCELLENCY, EDMUND G. BROWN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The California Law Revision Commission was authorized by Resolution Chapter 130 of the Statutes of 1965 to make a study to determine whether Vehicle Code Section 17150 and related statutes should be revised. The Commission submits herewith its recommendation relating to this subject and the study prepared by its research consultant, Professor Jack H. Friedenthal of the Stanford School of Law. Only the recommendation (as distinguished from the study) is expressive of Commission intent.

Respectfully submitted,
RICHARD H. KEATINGE
Chairman

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

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Vehicle Code Section 17150 and Related Sections

BACKGROUND

In 1957, the Legislature directed the Law Revision Commission to make a study to determine whether damages awarded to a married person for personal injuries should be separate or community property. The underlying reason for the study was that under the then existing law an injured married person could not recover damages from a negligent tortfeasor when the negligence of his spouse was a contributing cause of the injury because any damage award would be community property. Therefore, to allow recovery would permit the negligent spouse, in effect, to recover for his own negligent act.

At the same session at which it directed the Commission to study this topic, the Legislature enacted Section 163.5 of the Civil Code providing that damages awarded to a married person for personal injuries are the separate property of the injured spouse, thereby removing the reason—based on the community property nature of the award—for the imputation of the contributory negligence of one spouse to the other. Section 163.5 has created other problems, however, which required the Commission to proceed with the study directed by the Legislature. See *Recommendation and Study Relating to Whether Damages for Personal Injury to a Married Person Should be Separate or Community Property,* 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 401 (1967).

During the course of its study, the Commission realized that any recommendation it might make concerning the nature of the property interests in a personal injury damage award to a married person would not solve the problem that existed, for many if not most actions for damages in which the contributory negligence of a spouse is a factor arise out of vehicle accidents. Under Vehicle Code Section 17150, the contributory negligence of a person operating a vehicle with the permission of the owner is imputed to the owner, with the result that the nature of the property interests in the vehicle involved in an accident causing personal injuries can be determinative on the issue of imputed contributory negligence between spouses regardless of their interests in any damages awarded. Therefore, the Commission sought and was granted authority in 1962 to study whether Vehicle Code Section 17150 should be revised or repealed insofar as it imputes the contributory negligence of the operator of a vehicle to its owner.

The Commission's study of imputed negligence under Vehicle Code Section 17150 revealed other sections involving the same problem. Moreover, the study revealed important defects in these and other sections involving related problems, for consideration of the policies underlying imputed contributory negligence necessarily involved consideration of the extent to which a vehicle owner should be responsible for damages resulting from the operation of the vehicle by another.

In 1965, therefore, at the Commission's request, the Legislature extended the Commission's authority to consider all relevant aspects of Vehicle Code Section 17150 and related sections.

RECOMMENDATIONS

Vicarious Liability of Vehicle Owners, Bailees, and Estate Representatives

Vehicle Code Section 17150 provides that a vehicle owner is liable for the damages caused by the "negligence" of a person operating his vehicle with his permission. Vehicle bailees and estate representatives are subjected to similar liability by Sections 17154 and 17159. These sections were enacted to provide the public with protection against the "growing menace of death and injury in the operation of motor vehicles" by the "financially irresponsible." See *Bayless v. Mull,* 50 Cal. App.2d 66, 69-71, 122 P.2d 608, 610–611 (1942). They were based on the view that an automobile is "a dangerous instrumentality . . . in the hands of an incompetent or irresponsible driver." 50 Cal. App.2d at 70, 122 P.2d at 611.

Since the sections impose liability only when the operator is negligent, however, they do not apply in cases where the reason that gave rise to their enactment is of greatest force. Under existing law, the sections are inapplicable when the operator is guilty of willful misconduct or drives while intoxicated. *Weber v. Pinyan,* 9 Cal.2d 226, 70 P.2d 183 (1937) (intoxication and willful misconduct in attempting to embrace passenger); *Jones v. Ayers,* 212 Cal. App.2d 646, 28 Cal. Rptr. 223 (1963) (willful misconduct in disregarding boulevard stop sign and entering intersection at high speed); *Stober v. Halsey,* 88 Cal. App.2d 660, 199 P.2d 318 (1948) (intoxication and willful misconduct in driving at high speed and removing hands from steering wheel). In rare cases, a person injured as a result of the operator's willful misconduct or intoxication can recover from the owner on the theory that the owner negligently entrusted the operator with the vehicle. *Benton v. Sloss,* 38 Cal.2d 399, 240 P.2d 575 (1952). But in the absence of such proof, the owner is immune from liability for injuries caused by the willful misconduct or intoxication of the operator.

Thus, the more irresponsible the operator, the more difficult it is to impose liability on the person who provided the operator with the vehicle and the less financial protection the public has against injuries caused by the operator.

The courts have reached these conclusions by construing the word "negligence" narrowly to exclude willful misconduct. *Weber v. Pinyan,* 9 Cal.2d 226, 70 P.2d 183 (1937). The term "willful misconduct" is not used in Section 17150; it is used in Section 17158 to describe the kind of conduct for which an operator is liable to his guest. Nevertheless, the courts have held that the terms are mutually exclusive and that an owner cannot be held liable under Section 17150 for an operator's conduct that constitutes "willful misconduct" under Section 17158. *Benton v. Sloss,* 38 Cal.2d 399, 240 P.2d 575 (1952); *Weber v. Pinyan,* 9 Cal.2d 226, 70 P.2d 183 (1937); *Jones v. Ayers,* 212 Cal. App.2d 646, 28 Cal. Rptr. 223 (1963); *Stober v. Halsey,* 88 Cal. App.2d 660, 199 P.2d 318 (1948).

To treat the terms as mutually exclusive is to disregard the diverse purposes underlying the two sections. Section 17158 is designed to prevent collusive or fraudulent suits. *Emery v. Emery,* 45 Cal.2d 421, 289 P.2d 218 (1955); *Ahlgren v. Ahlgren,* 185 Cal. App.2d 216, 8 Cal. Rptr. 218 (1960). Section 17150 is designed to protect third persons against the improper use of automobiles by financially irresponsible persons. *Bayless v. Mull,* 50 Cal. App.2d 66, 122 P.2d 608 (1942). To shield himself from liability, the owner must either make sure that the operator is financially responsible or obtain insurance against his own potential liability. The exclusion of "willful misconduct" from Section 17150 tends to defeat the purpose for which the section was enacted, for the injured third person in a "willful misconduct" case cannot look to the owner for relief, and it may be that the operator's conduct cannot be covered by insurance because of the restrictions of Insurance Code Section 533. See *Escobedo v. Travelers Ins. Co.,* 227 Cal. App.2d 353, 38 Cal. Rptr. 645 (1964); *Escobedo v. Travelers Ins. Co.,* 197 Cal. App.2d 118, 17 Cal. Rptr. 219 (1961). Thus, Section 17150 provides no protection against financial loss in the very cases where danger of death or injury is greatest.

Recent cases have interpreted "willful misconduct" under Section 17158 in such a way that the problem will be accentuated if there continues to be an immunity from liability for such conduct under Section 17150. These cases have construed the term "willful misconduct" to include conduct virtually indistinguishable from negligence. For example, in *Reuther v. Viall,* 62 Cal.2d 470, 42 Cal. Rptr. 456, 398 P.2d 792 (1965), the conduct described hereafter was held to be "willful misconduct": The Reuthers and the Vialls were neighbors and friends. After a joint outing, the Viall automobile was being used to return the Reuther's baby sitter to her home. Two small children of the Reuthers and the defendant's small daughter were in the car. The heat element of the cigarette lighter fell to the floor of the automobile, and Mrs. Viall, the driver, took her eyes off the road for a brief time and bent down to pick up the lighter. The car crossed the center line and collided with another automobile.

Of course, Mrs. Viall's action was misconduct—she should not have taken her eyes off the road. And, of course, her misconduct was willful. But if this is willful misconduct, much of what has been considered negligence can be characterized as willful misconduct. Negligence frequently involves the willful doing of some act when a reasonable person should be able to foresee that some harm will result therefrom. The operator of a vehicle may willfully drive too fast, roll through a stop sign, or look away from the road for a moment. Under the *Reuther* case, such misconduct may well subject the operator to liability to a guest. The courts seem to have a propensity for construing the guest statute as being inapplicable whenever possible in order that a guest injured by the misconduct of another might be compensated. But to carry over such an interpretation of "willful misconduct" to Section 17150 and deny an owner's vicarious liability when the driver's conduct is of a similar character would virtually nullify the section.

Sections 17707 and 17708 of the Vehicle Code make certain persons (parents and signatories to drivers license applications) liable for damages caused by minors in the operation of vehicles. As originally

enacted, these sections created vicarious liability only for negligence. *Gimenez v. Rissen,* 12 Cal. App.2d 152, 55 P.2d 292 (1936). When it became apparent that the sections provided no vicarious responsibility for the kinds of irresponsible driving that minors are apt to engage in, the sections were amended to provide for vicarious liability for willful misconduct as well as negligence. See *Gimenez v. Rissen, supra.*

The Commission recommends a similar revision of Sections 17150, 17154, and 17159 of the Vehicle Code.

Imputed Contributory Negligence

Vehicle Code Section 17150 provides that the owner of a vehicle who permits it to be operated by another is liable for any injury caused by the negligence of the operator. Moreover, the negligence of the operator is imputed to the owner for all purposes of civil damages, thus barring the owner from recovering damages from a negligent third person if the operator was also negligent. Similar imputation provisions appear in Sections 17154, 17159, and 17708 of the Vehicle Code.

The provision of Vehicle Code Section 17150 that imputes the contributory negligence of a driver to the owner of the vehicle was enacted in 1937. Cal. Stats. 1937, Ch. 840, § 1, p. 2353. From that time until Vehicle Code Section 17158 [1] (the guest statute) was amended in 1961, this provision merely prohibited the owner from recovering from the negligent third person; it did not affect his remedy against the negligent operator. Thus, in effect, it forced an owner who was injured by the concurring negligence of the operator and a third person to obtain his relief in damages from the operator alone. At a time when contribution between tortfeasors was unknown to the law, the choice thus forced upon an owner of a vehicle was not an unreasonable one. If the owner were not forced to recover his damages from the operator whom he selected, he probably would look only to the third person for relief regardless of the relative fault of the parties. By barring the remedy against the third person, the law prevented the owner from showing such favoritism. Since he selected the operator, he was required to bear the risk of the operator's negligence and ability to respond in damages.

An amendment to the guest statute in 1961, however, deprived an owner of his right to recover from the operator damages for personal injuries caused while the owner is riding as a guest in his own car. The policy underlying the guest statute—to prevent collusive suits—is undoubtedly as applicable to owners riding as guests as it is to other guests; but the amendment has deprived the innocent owner of his only remedy for personal injuries caused by the concurring negligence of the operator and a third person.

[1] Section 17158 provides:

> 17158. No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or wilful misconduct of the driver.

Repeal of the provision of Section 17150 that imputes the contributory negligence of the operator to the owner would restore the owner's right to recover from the negligent third person. This, however, would force the third person to bear the whole loss that his negligence caused only in part.

Within recent years California has abandoned the traditional common law view that there is no contribution between tortfeasors. The contribution principle seems to be fairer than requiring one tortfeasor to bear the entire loss caused only partially by his fault. Applied to the case where an owner is injured by the concurring negligence of the operator and a third person, the principle of contribution offers a means for providing the owner with relief, preventing collusive suits between owners and operators, and requiring both the negligent third person and the operator to share the burden of liability arising from their concurrent wrongful actions.

Accordingly, the Commission recommends the repeal of the provisions of the Vehicle Code that permit a third party tortfeasor to escape liability to an innocent owner because of the contributory negligence of the operator of the vehicle. Instead, the third party tortfeasor, when sued by the owner, should have the right to join the operator as a party to the litigation; and, if both are found guilty of misconduct contributing to the injury, the third party should have a right to contribution from the operator in accordance with the existing statute providing for contribution between tortfeasors. See CODE CIV. PROC. §§ 875–880.

It is recommended that an operator be required to contribute when he is guilty of any negligent or wrongful act or omission in the operation of the vehicle. The third party tortfeasor, however, as under the existing contribution statute, should not be permitted to obtain contribution if he intentionally caused the injury or damage.

PROPOSED LEGISLATION

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to amend Sections 17150, 17151, 17152, 17153, 17154, 17155, 17156, 17159, 17707, 17708, 17709, 17710, and 17714 of the Vehicle Code, and to add a chapter heading immediately preceding Section 875, in Title 11 of Part 2, of, and to add Chapter 2 (commencing with Section 900) to Title 11 of Part 2 of, the Code of Civil Procedure, relating to liability arising out of the operation of vehicles.

The people of the State of California do enact as follows:

VEHICLE CODE

§ 17150 (amended)

SECTION 1. Section 17150 of the Vehicle Code is amended to read:

17150. Every owner of a motor vehicle is liable and responsible for ~~the~~ death ~~of~~ or injury to person or property resulting from ~~negligence~~ *a negligent or wrongful act or omission* in the

operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner~~, and the negligence of such person shall be imputed to the owner for all purposes of civil damages~~.

Comment. Under the prior language of Section 17150, a vehicle owner was not liable for injuries caused by the willful misconduct or intoxication of the operator. *Weber v. Pinyan,* 9 Cal.2d 226, 70 P.2d 183 (1937); *Jones v. Ayers,* 212 Cal. App.2d 646, 28 Cal. Rptr. 223 (1963); *Stober v. Halsey,* 88 Cal. App.2d 660, 199 P.2d 318 (1948). Under Section 17150 as amended, a vehicle owner will be liable for the damages caused by the willful misconduct or intoxication of an operator using the vehicle with the owner's permission. Of course, liability based solely on vehicle ownership and not arising out of a master-servant relationship is only a secondary liability that is expressly limited in dollar amount. See Vehicle Code Sections 17151-17153.

The last clause of Section 17150 has been deleted because it, together with Section 17158, prevented an innocent vehicle owner from recovering any damages for a personal injury caused by the concurring negligence of his driver and a third person. Instead of barring an owner's cause of action in such a case, Section 17150 as amended permits him to recover his damages from the negligent third person who, in turn, can obtain contribution from the negligent operator under Sections 900-910 of the Code of Civil Procedure.

§ 17151 (amended)

SEC. 2. Section 17151 of the Vehicle Code is amended to read:

17151. The liability of an owner, bailee of an owner, or personal representative of a decedent ~~for imputed negligence~~ imposed by this chapter and not arising through the relationship of principal and agent or master and servant is limited ~~to~~ the amount of ten thousand dollars ($10,000) for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of twenty thousand dollars ($20,000) for the death of or injury to more than one person in any one accident and is limited to the amount of five thousand dollars ($5,000) for damage to property of others in any one accident.

Comment. This amendment merely conforms the section to Section 17150 as amended.

§ 17152 (amended)

SEC. 3. Section 17152 of the Vehicle Code is amended to read:

17152. In any action against an owner, bailee of an owner, or personal representative of a decedent on account of ~~imputed negligence as~~ *liability* imposed by Sections 17150, 17154, or

17159 *for the negligent or wrongful act or omission of* the operator of ~~the~~ *a* vehicle ~~whose negligence is imputed to the owner, bailee of an owner, or personal representative of a decedent~~, *the operator* shall be made a party defendant if ~~personal~~ service of process can be ~~had upon the operator within this State~~ *made in a manner sufficient to secure personal jurisdiction over the operator*. Upon recovery of judgment, recourse shall first be had against the property of the operator so served.

Comment. This amendment conforms the section to Section 17150 as amended. It also requires that the operator be made a party if personal jurisdiction over him can be obtained in any manner. Code of Civil Procedure Section 417 and Vehicle Code Sections 17450–17463 prescribe various ways in which personal jurisdiction can be secured other than by personal service within the state.

§ 17153 (amended)

SEC. 4. Section 17153 of the Vehicle Code is amended to read:

17153. If there is recovery under this chapter against an owner, bailee of an owner, or personal representative of a decedent ~~based on imputed negligence~~, the owner, bailee of an owner, or personal representative of a decedent is subrogated to all the rights of the person injured or whose property has been injured and may recover from the operator the total amount of any judgment and costs recovered against the owner, bailee of an owner, or personal representative of a decedent.

Comment. This amendment merely conforms the section to Section 17150 as amended.

§ 17154 (amended)

SEC. 5. Section 17154 of the Vehicle Code is amended to read:

17154. If the bailee of an owner with the permission, express or implied, of the owner permits another to operate the motor vehicle of the owner, then the bailee and the driver shall both be deemed operators of the vehicle of the owner within the meaning of Sections 17152 and 17153.

Every bailee of a motor vehicle is liable and responsible for ~~the~~ death ~~of~~ or injury to person or property resulting from ~~negligence~~ *a negligent or wrongful act or omission* in the operation of the motor vehicle, in the business of the bailee or otherwise, by any person using or operating the same with the permission, express or implied, of the bailee ~~, and the negligence of such person shall be imputed to the bailee for all purposes of civil damages~~.

Comment. This amendment to Section 17154 is in substance the same as the amendment to Section 17150. See the Comment to Section 17150.

§ 17155 (amended)

SEC. 6. Section 17155 of the Vehicle Code is amended to read:

17155. Where two or more persons are injured or killed in one accident, the owner, bailee of an owner, or personal representative of a decedent may settle and pay any bona fide claims for damages arising out of personal injuries or death, whether reduced to judgment or not, and the payments shall diminish to the extent thereof such person's total liability on account of the accident. Payments aggregating the full sum of twenty thousand dollars ($20,000) shall extinguish all liability of the owner, bailee of an owner, or personal representative of a decedent for death or personal injury arising out of the accident which exists ~~by reason of imputed negligence,~~ pursuant to this chapter, and did not arise through the ~~negligence~~ *negligent or wrongful act or omission* of the owner, bailee of an owner, or personal representative of a decedent nor through the relationship of principal and agent or master and servant.

Comment. This amendment merely conforms the section to Section 17150 as amended.

§ 17156 (amended)

SEC. 7. Section 17156 of the Vehicle Code is amended to read:

17156. If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this chapter ~~relating to imputed negligence~~, but the vendee or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of the motor vehicle. A chattel mortgagee of a motor vehicle out of possession is not an owner within the provisions of this chapter ~~relating to imputed negligence~~.

Comment. This amendment merely conforms the section to Section 17150 as amended.

§ 17159 (amended)

SEC. 8. Section 17159 of the Vehicle Code is amended to read:

17159. Every person who is a personal representative of a decedent who has control or possession of a motor vehicle subject to administration for the purpose of administration of an estate is, during the period of such administration, or until the vehicle has been distributed under order of the court or he has complied with the requirements of subdivision (a) or (b) of Section 5602, liable and responsible for ~~the~~ death ~~of~~ or injury to person or property resulting from ~~negligence~~ *a negligent or wrongful act or omission* in the operation of the motor vehicle by any person using or operating the same with

the permission, express or implied, of the personal representative; ~~and the negligence of such person shall be imputed to the personal representative for all purposes of civil damages~~.

Comment. This amendment to Section 17159 is in substance the same as the amendment to Section 17150. See the Comment to Section 17150.

§ 17707 (amended)

SEC. 9. Section 17707 of the Vehicle Code is amended to read:

17707. Any civil liability of a minor arising out of his driving a motor vehicle upon a highway during his minority is hereby imposed upon the person who signed and verified the application of the minor for a license and the person shall be jointly and severally liable with the minor for any damages proximately resulting from the ~~negligence or wilful misconduct~~ *negligent or wrongful act or omission* of the minor in driving a motor vehicle, except that an employer signing the application shall be subject to the provisions of this section only if an unrestricted driver's license has been issued to the minor pursuant to the employer's written authorization.

Comment. This amendment to Section 17707 merely substitutes the term that has been used in Vehicle Code Section 17001 and in Sections 17150–17159 for that which appeared in Section 17707. The substitution has been made in order to make it clear that the same meaning is intended. No substantive change is made by the revision.

§ 17708 (amended)

SEC. 10. Section 17708 of the Vehicle Code is amended to read:

17708. Any *civil liability* ~~negligence or wilful misconduct~~ of a minor, whether licensed or not under this code, ~~in~~ *arising out of his* driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor ~~shall be imputed to~~ *is hereby imposed upon* the parents, person, or guardian ~~for all purposes of civil damages~~ and the parents, person, or guardian shall be jointly and severally liable with the minor for any damages proximately resulting from the ~~negligence or wilful misconduct~~ *negligent or wrongful act or omission of the minor in driving a motor vehicle*.

Comment. The same reasons which justify the deletion of the provisions for imputed contributory negligence from Section 17150 justify the removal of the similar provisions from Section 17708. The language of the section has been revised to conform to that used in Section 17707.

§ 17709 (amended)

SEC. 11. Section 17709 of the Vehicle Code is amended to read:

17709. No person, or group of persons collectively, ~~to whom negligence or willful misconduct is imputed~~ shall incur liability

for a minor's negligent or wrongful act or omission under Sections 17707 and 17708 in any amount exceeding ten thousand dollars ($10,000) for injury to or death of one person as a result of any one accident or, subject to the limit as to one person, exceeding twenty thousand dollars ($20,000) for injury to or death of all persons as a result of any one accident or exceeding five thousand dollars ($5,000) for damage to property of others as a result of any one accident.

Comment. This amendment merely conforms the section to Sections 17707 and 17708 as amended.

§ 17710 (amended)

SEC. 12. Section 17710 of the Vehicle Code is amended to read:

17710. ~~Negligence or wilful misconduct shall not be imputed to~~ The person signing a minor's application for a license *is not liable under this chapter for a negligent or wrongful act or omission of the minor committed* when the minor is acting as the agent or servant of any person.

Comment. This amendment merely conforms the section to Section 17707 as amended.

§ 17714 (amended)

SEC. 13. Section 17714 of the Vehicle Code is amended to read:

17714. In the event, in one or more actions, judgment is rendered against a defendant under this chapter based upon the negligent *or wrongful act or omission of a minor in the* operation of a vehicle ~~by a minor~~, and also by reason of such *act or omission* ~~negligence~~ rendered against such defendant under Article 2 (commencing with Section 17150) of Chapter 1 of Division 9, then such judgment or judgments shall not be cumulative but recovery shall be limited to the amount specified in Section 17709.

Comment. This amendment merely conforms the section to Sections 17707 and 17708 as amended.

CODE OF CIVIL PROCEDURE

SEC. 14. A chapter heading is added immediately preceding Section 875 of the Code of Civil Procedure, in Title 11 of Part 2, to read:

CHAPTER 1. CONTRIBUTION AMONG JOINT JUDGMENT TORTFEASORS

SEC. 15. Chapter 2 (commencing with Section 900) is added to Title 11 of Part 2 of the Code of Civil Procedure, to read:

CHAPTER 2. CONTRIBUTION IN PARTICULAR CASES

§ 900 (new)

900. As used in this chapter:

(a) "Plaintiff" means a person who recovers or seeks to recover a money judgment in a tort action for death or injury to person or property.

(b) "Defendant" means a person against whom a money judgment is rendered or sought in a tort action for death or injury to person or property.

(c) "Contribution cross-defendant" means a person against whom a defendant has filed a cross-complaint for contribution in accordance with this chapter.

Comment. The definitions in Section 900 are designed to simplify reference in the remainder of the chapter. The definition of "plaintiff" includes a cross-complainant if the cross-complainant recovers or seeks tort damages upon his cross-complaint. Similarly, the defined term "defendant" includes a cross-defendant against whom a tort judgment has been rendered or is sought. The "defendant" may actually be the party who initiated the action. "Contribution cross-defendant" means anyone from whom contribution is sought by means of a cross-complaint under this chapter. The contribution cross-defendant may, but need not, be a new party to the action.

§ 902 (new)

902. If a money judgment is rendered against a defendant in a tort action for death or injury to person or property arising out of the operation of a motor vehicle, a contribution cross-defendant, whether or not liable to the plaintiff, shall be deemed to be a joint tortfeasor judgment debtor and liable to make contribution in accordance with Title 11 (commencing with Section 875) of Part 2 of the Code of Civil Procedure where:

(a) The contribution cross-defendant was the operator of the vehicle;

(b) The plaintiff is a person who is liable for the negligent or wrongful act or omission of the contribution cross-defendant under Section 17150, 17154, 17159, 17707, or 17708 of the Vehicle Code; and

(c) A negligent or wrongful act or omission of the contribution cross-defendant in the operation of the motor vehicle is adjudged to have been a proximate cause of the death or injury.

Comment. Sections 900-910 permit a defendant who is held liable to an owner of a vehicle, or to some other person who is made statutorily liable for the conduct of the vehicle's operator, to obtain contribution from the operator if he can establish that the injury was caused by the operator's concurring negligence or wrongdoing.

Until 1961, the provision of Vehicle Code Section 17150 that imputes an operator's negligence to the vehicle owner limited the remedies available to an owner who was injured by the concurring negligence of a

third party and the vehicle operator to damages from the operator alone. The imputed contributory negligence of the operator barred the owner's remedy against the negligent third party. In 1961, Vehicle Code Section 17158 (the guest statute) was amended to deprive the owner of his remedy against the operator, leaving him with no remedy for his tortiously inflicted personal injuries.

A fairer way to achieve the guest statute's purpose of guarding against fraudulent claims while still providing the innocent owner with a remedy for his injuries is to require contribution between the joint tortfeasors. Sections 900–910 provide a means for doing so.

Section 902 establishes the right of the third party tortfeasor to obtain contribution from the operator whose misconduct contributed to the plaintiff's loss. Under Section 902, a right of contribution can arise only if the third party tortfeasor is held to be liable to the plaintiff. In those instances where the contributory negligence or contributory wrongdoing of the operator is imputed to the plaintiff—as in master-servant situations—the third party is not liable to the plaintiff and, hence, no question of contribution can arise. Thus, Section 902 can apply only where the relationship of master-servant did not exist between the plaintiff and the operator insofar as the operator's acts were concerned.

Under Section 902, if the defendant (the third party tortfeasor) is held liable, he is entitled to contribution from the operator in the event that the operator's negligence or misconduct is adjudged to have been a proximate cause of the injury involved in the case. To obtain an adjudication that is personally binding on the operator, the defendant must proceed against the operator by cross-complaint and see that he is properly served. See Section 905 and the Comment thereto. Usually the fault of the defendant and the fault of the operator will be determined at the same time and by the same judgment. If, however, the defendant's cross-action against the operator is severed from the plaintiff's action and tried separately, the contribution cross-defendant will be adjudged to be a joint tortfeasor within the meaning of Section 902 if the judgment against the defendant and the concurring fault of the contribution cross-defendant are shown. Section 902 does not permit a contest of the merits of the judgment against the defendant in the trial of the cross-action.

After the defendant has obtained a judgment establishing that the operator is a joint tortfeasor, his right to contribution is governed by Code of Civil Procedure Sections 875–880 relating to contribution among joint tortfeasors. Thus, for example, the right of contribution may be enforced only after the tortfeasor has discharged the judgment or has paid more than his pro rata share. The pro rata share is determined by dividing the amount of the judgment among the total number of tortfeasors; but where more than one person is liable solely for the tort of one of them—as in master-servant situations—they contribute one pro rata share. Consideration received for a release given to one joint tortfeasor reduces the amount the remaining tortfeasors have to contribute. The enforcement procedure specified in Code of Civil Procedure Section 878 is applicable.

Under Section 902, the defendant may be entitled to contribution from the operator even though the operator might not be independently

liable to the plaintiff. For example, if the operator has a good defense based on Vehicle Code Section 17158 (the guest statute) as against the owner, he may still be held liable for contribution under Section 902. The policy underlying Vehicle Code Section 17158 is to prevent collusive suits between the owner and the operator to defraud an insurance company. The reasons justifying Section 17158 are inapplicable when the operator's negligence is sought to be established by a third party who would be liable for all of the damage if the operator's concurring negligence or misconduct were not established. The third party and the operator are true adversaries and there is little possibility of collusion between them.

§ 903 (new)

903. If a money judgment is rendered against a defendant in a tort action for death or injury to person or property arising out of the operation of a motor vehicle by the defendant, a contribution cross-defendant (whether or not liable to the plaintiff) shall be deemed to be a joint tortfeasor judgment debtor and liable to make contribution in accordance with Title 11 (commencing with Section 875) of Part 2 of the Code of Civil Procedure where:

(a) The plaintiff is a person who is liable for the negligent or wrongful act or omission of the defendant in the operation of the motor vehicle under Section 17150, 17154, 17159, 17707, or 17708 of the Vehicle Code; and

(b) A negligent or wrongful act or omission of the contribution cross-defendant is adjudged to have been a proximate cause of the death or injury.

Comment. Section 902 establishes the right of a judgment tortfeasor to obtain contribution from a vehicle operator whose concurring negligence or wrongdoing was a proximate cause of the damage or injury and the plaintiff is a person who is made liable by the Vehicle Code for the conduct of the vehicle operator. Section 903 is designed to give an operator an equivalent right of contribution from a third party tortfeasor in those cases where, despite the guest statute (Vehicle Code Section 17158), the operator may be held liable to a person who by statute is made vicariously liable for his misconduct. *But see* Section 910.

§ 905 (new)

905. A defendant's right to contribution under this chapter must be claimed, if at all, by cross-complaint in the action brought by the plaintiff. The defendant may file a cross-complaint for contribution at the same time as his answer or within 100 days after the service of the plaintiff's complaint upon the defendant, whichever is later. The defendant may file a cross-complaint thereafter by permission of the court.

Comment. Section 905 provides that the right to contribution created by this chapter must be asserted by cross-complaint. If the person claiming contribution began the litigation as a plaintiff and seeks contribution for damages claimed by cross-complaint, Section 905 authorizes him to use a cross-complaint for contribution in response to the cross-complaint for damages.

The California courts previously have permitted the cross-complaint to be used as the pleading device for securing contribution. *City of Sacramento v. Superior Court*, 205 Cal. App.2d 398, 23 Cal. Rptr. 43 (1962). Section 905 requires the use of the cross-complaint so that all of the issues may be settled at the same time if it is possible to do so. If for some reason a joint trial would unduly delay the plaintiff's action—as, for example, if service could not be made on the contribution cross-defendant in time to permit a joint trial—or if for some other reason a joint trial would not be in the interest of justice, the court may order the actions severed. CODE CIV. PROC. § 1048. See *Roylance v. Doelger*, 57 Cal.2d 255, 261–262, 19 Cal. Rptr. 7, 11, 368 P.2d 535, 539 (1962).

Under Code of Civil Procedure Section 442, a cross-complaint must be filed with the answer unless the court grants permission to file the cross-complaint subsequently. Under Section 905, however, a cross-complaint for contribution may be filed as a matter of right within 100 days after the service of the plaintiff's complaint on the defendant even though an answer was previously filed. This additional time is provided because it may not become apparent to a defendant within the brief period for filing an answer (10–30 days) that the case is one where a claim for contribution may be asserted. Section 905 also permits a cross-complaint for contribution to be filed after the time when it can be filed as a matter of right if the court permits.

Inasmuch as no right to contribution accrues until the liability of the defendant has been adjudicated and he has paid more than his pro rata share of the judgment, there is no time limit on the right to file a cross-complaint for contribution other than the limitation prescribed in Section 905. Thus, a plaintiff's failure to file his complaint for damages until just prior to the expiration of the applicable statute of limitations will have no effect on the defendant's right to file a cross-complaint for contribution within the time limits prescribed here.

§ 906 (new)

906. For the purpose of service under Section 417 of a cross-complaint for contribution under this chapter, the cause of action against the contribution cross-defendant is deemed to have arisen at the same time that the plaintiff's cause of action arose.

Comment. Section 417 of the Code of Civil Procedure permits a personal judgment to be rendered against a person who is personally served outside the state if he was a resident of the state at the time of service, at the time of the commencement of the action, or at the

time the cause of action arose. Section 906 has been included in this chapter to eliminate any uncertainty concerning the time a cause of action for contribution arises for purposes of service under Section 417. Section 906 will permit personal service of the cross-complaint outside the state if the cross-defendant was a resident at the time the plaintiff's cause of action arose.

§ 907 (new)

907. Each party to the cross-action for contribution under this chapter has a right to a jury trial on the question whether a negligent or wrongful act or omission of the contribution cross-defendant was a proximate cause of the injury or damage to the plaintiff.

Comment. If the contribution cross-defendant were a codefendant in the principal action, he would be entitled to a jury trial on the issue of his fault. Section 907 preserves his right to a jury trial on the issue of his fault where he is brought into the action by cross-complaint for contribution. After an adjudication that that contribution cross-defendant is a joint tortfeasor with the defendant, neither joint tortfeasor is entitled to a jury trial on the issue of contribution. Judgment for contribution is made upon motion after entry of the judgment determining that the parties are joint tortfeasors and after payment by one tortfeasor of more than his pro rata share of that judgment. CODE CIV. PROC. §§ 875(c), 878. The court is required to administer the right to contribution "in accordance with the principles of equity." CODE CIV. PROC. § 875(b). Since the issues presented by a motion for a contribution judgment are equitable issues, there is no right to a jury trial on those issues.

§ 908 (new)

908. Failure of a defendant to claim contribution in accordance with this chapter does not impair any right to contribution that may otherwise exist.

Comment. Section 908 is included to make it clear that a person named as a defendant does not forfeit his right to contribution under Code of Civil Procedure Sections 875–880 if a joint tortfeasor is named as a codefendant in the original action and he fails to cross-complain against his codefendant pursuant to this chapter.

§ 909 (new)

909. Subdivision (b) of Section 877 of the Code of Civil Procedure does not apply to the right to obtain contribution under this chapter.

Comment. Section 877(b) of the Code of Civil Procedure provides that a release, dismissal, or covenant not to sue or not to enforce a judgment discharges the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors. The policy underlying this provision of the Code of Civil Procedure is to permit settle-

ments to be made without the necessity for the concurrence of all of the tortfeasors. Without such a provision, a plaintiff's settlement with one tortfeasor would provide that tortfeasor with no assurance that another tortfeasor would not seek contribution at a later time. Here, however, the close relationship of the parties involved would encourage plaintiffs to give releases from liability, not for the purpose of bona fide settlement of a claim, but merely for the purpose of exacting full compensation from the third party tortfeasor and defeating his right of contribution. Since this would frustrate the purpose underlying this law, the provisions of Code of Civil Procedure Section 877(b) are made inapplicable to contribution sought under this chapter.

§ 910 (new)

910. There is no right to contribution under this chapter in favor of any person who intentionally injured the person killed or injured or intentionally damaged the property that was damaged.

Comment. Section 910 may not be necessary. Section 875(d) provides: "There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person." Section 910, however, is included to make it clear that this substantive provision in the chapter relating to joint judgment tortfeasors applies to the right of contribution under this chapter. Moreover, Section 910 applies to intentionally caused property damage, whereas Section 875(d) appears to apply only to intentionally caused personal injuries.

SAVINGS CLAUSE

SEC. 16. This act does not confer or impair any right or defense arising out of any death or injury to person or property occurring prior to the effective date of this act.

Comment. This act creates new liabilities and abolishes old defenses. In order to avoid making any change in rights that may have become vested under the prior law, the act is made inapplicable to the rights and defenses arising out of events occurring prior to the effective date of the act.

DOUBLE JOINTING CLAUSE

SEC. 17. If Senate Bill No. ___ is also enacted by the Legislature at its 1967 Regular Session, the chapter heading added by Section 5 of that bill immediately preceding Section 875 of the Code of Civil Procedure, in Title 11 of Part 2, the heading of Chapter 2 (commencing with Section 900) added to Title 11 of Part 2 of the Code of Civil Procedure by Section 6 of that bill, and the Sections 900, 905, 906, 907, 908, 909, and 910 of the Code of Civil Procedure included in that Chapter 2 by Section 6 of that bill are hereby repealed.

Comment. The Senate Bill referred to in Section 17 is the bill introduced to effectuate the Commission's *Recommendation Relating to Whether Damages for Personal Injury to a Married Person Should be Separate or Community Property,* 8 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 401 (1967). Since that bill contains duplicate chapter headings and sections of the Code of Civil Procedure which are identical with Sections 900, 905, 906, 907, 908, 909, and 910 of the Code of Civil Procedure contained in the legislative measure herein recommended, Section 17 has been inserted in this bill to make the duplicate provisions of the other bill inoperative if both bills are enacted.

A STUDY RELATING TO IMPUTED CONTRIBUTORY NEGLIGENCE: THE ANOMALY IN CALIFORNIA VEHICLE CODE SECTION 17150*

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Imputed Contributory Negligence: The Anomaly in California Vehicle Code Section 17150*

JACK H. FRIEDENTHAL†

I. INTRODUCTION

The doctrine of imputed contributory negligence has recently been subjected to sharp attack both by courts[1] and legal commentators[2] throughout the country. In particular, adverse criticism has been leveled at the classic notion that a person who would be vicariously liable to innocent third persons for the negligent acts of another should be barred by such negligence from recovery from negligent third persons. A recent tentative draft of the *Restatement of Torts* contains a recommendation to eliminate approval of imputed contributory negligence except in a few specified situations.[3]

An excellent example of the problems caused by such imputation occurs in connection with section 17150 of the California Vehicle Code.[4] Originally that section provided only that an owner of an automobile was liable to innocent third persons for injuries and damages caused by the negligence of the owner's permittee driver, that is, another person driving the owner's car with the latter's express or implied permission. This still is a primary purpose of the section. In 1937, however, the fol-

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* This Article is based on a research study prepared by the author for the California Law Revision Commission. The opinions, conclusions, and recommendations contained in this Article are entirely those of the author and do not necessarily represent or reflect the opinions, conclusions, and recommendations of the California Law Revision Commission.

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1. See, *e.g.*, Johnson v. Los Angeles-Seattle Motor Express, Inc., 222 Ore. 377, 352 P.2d 1091 (1960); Wilcox v. Herbst, 75 Wyo. 289, 295 P.2d 755 (1956).

2. See, *e.g.*, 2 HARPER & JAMES, TORTS §§ 23.5–.6 (1956); PROSSER, TORTS § 73, at 501–02 (3d ed. 1964).

3. RESTATEMENT (SECOND), TORTS § 485, comment *c* (Tent. Draft No. 9, 1963), reads: "*c.* With these exceptions [irrelevant here], the common law no longer imputes the negligence of a third person to the plaintiff to bar his recovery for the harm he has suffered, even in situations where he would be liable for that negligence as a defendant in an action brought by a third person."

4. The full text of the section as amended is as follows: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." CAL. VEHICLE CODE § 17150.

The section was first enacted in 1929 as § 1714¼ of the Civil Code. See Cal. Stat. 1929, ch. 261, § 1 at 566. In 1935 it was redesignated § 402 of the Vehicle Code. See Cal. Stat. 1935, ch. 27, at 153. It received its current title in the Vehicle Code codification of 1959. See Cal. Stat. 1959, ch. 3, at 1654.

lowing new clause was added to the end of the section: "and the negligence of such person [the permittee] shall be imputed to the owner for all purposes of civil damages."[5] Initially it was argued that this amendment, which will be referred to hereafter as the imputation clause, was intended merely to demonstrate clearly the liability of the owner to third persons.[6] The California Supreme Court was quick to point out, however, that the statute as it originally stood, was sufficient for that purpose; hence the amendment could have but one objective: to bar the owner from suing negligent third persons when the owner's permittee has also been negligent.[7] The amendment has not been interpreted as strictly as it might have been to bar all recovery by the owner. It has been held that the section does not prohibit recovery by the owner from the negligent permittee.[8]

In 1961 section 17154 of the Vehicle Code was amended[9] and section 17159[10] was added to provide, respectively, that any bailee of a motor vehicle or any personal representative of a decedent in charge of the decedent's motor vehicle would be liable as an owner to innocent third persons who were injured due to the negligence of a person operating the vehicle with the express or implied consent of the bailee or personal representative. Both sections contain an additional provision, identical to the imputation clause in section 17150, to bar the bailee or personal representative from recovering from negligent third persons.

Any discussion of the imputation clause in section 17150 necessarily affects the analogous provisions in sections 17154 and 17159. In order to avoid confusion, however, the discussion herein will refer only to section 17150 and will employ the term "owner" to include "bailee" and "personal representative" unless there is a material distinction which requires separate consideration of each statute.

The purpose of this study is to analyze the arguments that the imputation clause should be changed or eliminated. A strong case can be made for outright repeal; a survey of the law in other jurisdictions[11] shows that California's position has been adopted by only a small minority of courts and that the trend is in the opposite direction.

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5. Cal. Stat. 1937, ch. 840, § 1, at 2353.

6. See Milgate v. Wraith, 19 Cal. 2d 297, 121 P.2d 10 (1942).

7. *Ibid.*; *accord*, Cooke v. Tsipouroglou, 59 Cal. 2d 660, 31 Cal. Rep. 60, 381 P.2d 940 (1963); Spendlove v. Pacific Elec. Ry., 30 Cal. 2d 632, 184 P.2d 873 (1947) (dictum); Mooren v. King, 182 Cal. App. 2d 546, 6 Cal. Rep. 362 (4th Dist. 1960).

8. Mason v. Russell, 158 Cal. App. 2d 391, 322 P.2d 486 (3d Dist. 1958). In 1961 the California guest statute, CAL. VEHICLE CODE § 17158, was amended, Cal. Stat. 1961, ch. 1600, § 1, at 3429, so as to include any owner riding as a passenger in his own car. See Patton v. La Bree, 60 Cal. 2d 606, 35 Cal. Rep. 622, 387 P.2d 398 (1963). To this limited extent, then, the owner is now unable to recover from the negligent permittee.

9. Cal. Stat. 1961, ch. 1734, § 4, at 3743.

10. Cal. Stat. 1961, ch. 1734, § 6, at 3743.

11. See text accompanying notes 39–58 *infra*.

Even if it is decided to retain imputed contributory negligence, it may be desirable to amend the current provision in several ways. The first would be to alter section 17150 clearly to impute to the owner the permittee's willful misconduct as well as his negligence.[12] At present the statute apparently entitles the owner to collect from a negligent third party if it can be shown that the owner's permittee was guilty of willful misconduct rather than ordinary negligence.

A second possible amendment would be designed to eliminate a current problem involving the meaning of "ownership" and "permission to drive" when the injured person and the driver are husband and wife.[13] As the law now stands, the right of an injured spouse to collect from a negligent third party despite the negligence of the driver spouse depends upon the way in which title to the vehicle is held—*i.e.*, as community property, joint ownership, or separate property—and in whose name the vehicle is registered with the Department of Motor Vehicles. It seems undesirable to base the right to relief on such criteria, since the use of family automobiles is rarely governed by the way in which title is held. Very recently the California Supreme Court, in a case involving the imputation clause of section 17150, recognized that many families may not even be aware of the various legal presumptions which determine ownership of a family vehicle and stated that further legislation was needed to clarify the ownership problem.[14]

At this point it is important to note that this study deals only with the situation in which imputation of contributory negligence is sought to be justified solely on the basis of ownership of a motor vehicle plus permission to use it. It does not cover those cases where a person, whether or not a vehicle owner, has imputed to him the contributory negligence of a vehicle driver who is his partner, joint venturer, or agent. Rules regarding these latter relationships have developed exclusively at common law[15] and would be unaffected by the alteration or repeal of the imputation clause of section 17150.

II. The Case for Repeal of Imputed Contributory Negligence

In analyzing the propriety of imputing contributory negligence under section 17150, it is necessary to review certain fundamental assump-

12. See text accompanying notes 65–67 *infra*.

13. See text accompanying notes 68–78 *infra*. It should be noted that some such problems may arise whenever a vehicle is owned by two or more parties, whether or not husband and wife.

14. Cooke v. Tsipouroglou, 59 Cal. 2d 660, 667–68, 31 Cal. Rep. 60, 64, 381 P.2d 940, 944 (1963), 51 Calif. L. Rev. 799.

15. See 2 Witkin, Summary of California Law *Torts* § 338, at 1540–41 (7th ed. 1960); 20 Calif. L. Rev. 458 (1932).

tions concerning tort liability. There are two limitations to the basic principle that one who, due to the negligence of another, suffers injury to his person or property may normally recover damages from the tortfeasor. First, if the injured party negligently contributed to his own injuries or by his acts assumed the risk of those injuries, recovery is prohibited. This is not, of course, an exculpation of the other party's wrongful act, but merely a limitation on recovery under the policy that one who is responsible for his own injuries, even in part, is not worthy of compensation. Secondly, even if the injured person is an innocent victim, relief may be refused if there exists an overriding reason why recovery would be socially undesirable.

It follows, then, that the imputation of a permittee's negligence to bar an owner's recovery from a negligent third party must be based either on a finding of "unworthiness" or on a determination that there is an overriding social policy reason against recovery.

A. *Arguments That the Owner Is "Unworthy"*

1. *The nature of the owner's "fault."*

The problems of imputation arise only when the owner has not been negligent. Thus, if the owner entrusted his car to a permittee who did not know how to drive, and as a result an accident occurred, the owner's own negligence would be an absolute defense in his suit against a negligent third party.[16]

When the owner is not negligent, however, it is difficult to find an element of "fault" in his conduct. His sole act is that of entrusting his automobile to another—an act which, standing alone, is not improper and does not bar the owner from recovering damages when an accident occurs. If lending one's vehicle nonnegligently constitutes a "wrong," then the owner should be barred from collecting damages from a negligent third party even when his permittee is not at fault. If the loan is not "wrong" at the time it is made, it cannot become "wrong" by subsequent acts of the permittee which are not within the owner's power to control.[17] If such subsequent activity of the permittee is somehow attributable to the owner, then the current law is inconsistent in permitting the owner to recover from the permittee. If the owner is at fault, he

16. *Cf.* McCalla v. Grosse, 42 Cal. App. 2d 546, 109 P.2d 358 (2d Dist. 1941); 2 WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 305, at 1502 (7th ed. 1960).

17. In some cases, such as when the owner is a passenger in his own vehicle, he may have a duty to use care to control the operator's conduct. See Grover v. Sharp & Fellows Contracting Co., 66 Cal. App. 2d 736, 153 P.2d 83 (4th Dist. 1944) (alternative holding); 2 HARPER & JAMES, TORTS § 18.7, at 1055 & n.5 (1956).

should be penalized by not being allowed to recover at all. It should be noted here that the 1961 alteration of section 17158,[18] the California "guest statute," to bar an owner who is a passenger in his own vehicle from collecting from his own negligent driver does not eliminate the inconsistency. An owner who was not a passenger may still collect for personal injuries and property damage from his negligent permittee, even though he would be barred by section 17150 from collecting from a negligent third party.

It has been argued that the same "wrong" which makes the owner liable to innocent third persons for the negligence of the permittee driver justifies the imputation of such negligence to bar the owner's recovery.[19] The fallacy of this position is that provisions making the owner liable to innocent third persons are not based on a notion that the owner has committed a wrong.[20] This is particularly true under California law where the owner is not even primarily liable to third parties. He is merely a guarantor of the financial responsibility of the permittee and it is the latter who must ultimately bear the cost of his negligent acts.[21] Furthermore, the owner's liability, even as a guarantor, is strictly limited in dollar amount.[22] These liability provisions merely assure innocent third parties that their injuries will not go completely uncompensated. Thus the owner, the only person who can assure a financially responsible permittee, will be liable if he fails to exercise his control and lends his car to an insolvent driver. It is clear, however, that the liability provisions are in no way based on a recognition of "fault" on the part of the owner; otherwise the limitations on the owner's liability would make no sense at all.

2. *Assumption of the risk of loss by the owner.*

Attempts to justify the imputation of contributory negligence under section 17150 may be based on the theory that the owner, by loaning his vehicle, has assumed the risk of loss that might result from an accident

18. Cal. Stat. 1961, ch. 1600, § 1, at 3429; see Patton v. La Bree, 60 Cal. 2d 606, 35 Cal. Rep. 622, 387 P.2d 398 (1963).

19. See Milgate v. Wraith, 19 Cal. 2d 297, 301–02, 121 P.2d 10, 11–12 (1942) (quoting from Renza v. Brennan, 165 Misc. 96, 97, 300 N.Y. Supp. 221, 223 (Westchester County Ct. 1937)).

20. See Christensen v. Hennepin Transp. Co., 215 Minn. 394, 411–13, 10 N.W.2d 406, 416–17 (1943); Johnson v. Los Angeles–Seattle Motor Express, Inc., 222 Ore. 377, 387, 352 P.2d 1091, 1094 (1960); 17 CORNELL L.Q. 158 (1931) (discussing New York law).

21. CAL. VEHICLE CODE §§ 17152–53.

22. CAL. VEHICLE CODE § 17151, as amended, Cal. Stat. 1961, ch. 1734, § 1; Cal. Stat. 1963, ch. 403, § 1, provides: "The liability of an owner . . . for imputed negligence imposed by this chapter . . . is limited to the amount of ten thousand dollars . . . for the death of or injury to one person in any one accident and . . . to the amount of twenty thousand dollars . . . for the death or injury to more than one person in any one accident and is limited to the amount of five thousand dollars . . . for damage to property of others in any one accident."

due to the concurrent negligence of the permittee and the third party. This is unsound. First, if the owner is held to have assumed the risk, certainly the one person from whom he should not be entitled to collect is the negligent permittee, yet section 17150 has been specifically interpreted not to bar such recovery.[23] Secondly, and more importantly, it makes no sense whatever to say that the owner should be held to assume the risk of the third person's negligence.[24] No automobile operator or owner, merely by driving or allowing his vehicle to be driven, should be held to assume the risk of the negligence of all other drivers. The awareness of danger is the general peril that another driver may fail to exercise proper care. If this constitutes an assumption of risk, then automobile accident liability would have terminated long ago. Situations involving the California guest statute[25] provide an interesting comparison. Although the statute prohibits recovery by an injured guest from his negligent host, it does not impute to the guest the host's negligence so as to prevent the guest from collecting from a negligent third party.[26]

3. *Expectations of the third party.*

A further argument favoring imputation is that a negligent third party is entitled to expect that he will not be held liable for damages caused in part by the negligence of another driver. Were the negligent permittee the owner of the vehicle, he would be barred from recovery. It would thus be unfair, the argument continues, to permit the liability of the third party to turn on what is to him the fortuitous circumstance of who owns the other vehicle.

Such an argument is absurd. In the first place it is unrealistic to believe that such an expectation exists or that it in any way affects the manner in which a person drives. Even under the current law the contributory negligence of another driver is no defense against an action for damages brought by a nonnegligent passenger in the other car[27] or, indeed, by the owner of the other car if the driver had no permission from the owner or had exceeded the scope of permission granted.[28] Yet, as far as the negligent third party is concerned, it is fortuitous whether

23. Mason v. Russell, 158 Cal. App. 2d 391, 322 P.2d 486 (3d Dist. 1958).

24. 2 HARPER & JAMES, TORTS § 23.5, at 1272 (1956).

25. CAL. VEHICLE CODE § 17158.

26. Reynolds v. Filomeo, 38 Cal. 2d 5, 236 P.2d 801 (1951); Dorsa v. MacNeil, 112 Cal. App. 2d 807, 247 P.2d 577 (1st Dist. 1952) (dictum). See also Cary v. Wentzel, 39 Cal. 2d 491, 247 P.2d 341 (1952).

27. Cases cited note 26 *supra*.

28. The California Supreme Court has held clearly that the owner is not liable under § 17150 for the negligence of a driver who has exceeded the scope of the permission granted to him by the owner. Engstrom v. Auburn Auto. Sales Corp., 11 Cal. 2d 64, 77 P.2d 1059 (1938); Henrietta v. Evans, 10 Cal. 2d 526, 75 P.2d 1051 (1938). It necessarily follows that § 17150 would not be held to impute such negligence to the owner to bar his recovery from a negligent third person.

there are innocent passengers in the other vehicle, or whether the driver has permission from the owner.

Moreover, the negligent third party should not be entitled to anticipate or rely upon the other driver's negligence to avoid liability. If the latter is barred, it is only because he has contributed to his own injury and therefore is deemed to be unworthy of recovery. This should not adversely affect the right of any other injured person to obtain redress.

B. *Possible Existence of an Overriding Social Reason Favoring Imputation*

1. *Additional safety to the public.*

Conceivably imputation of contributory negligence could be based on the notion that it will promote extreme care by the owner in selecting permittee drivers.[29] Even if, as a matter solely between a nonnegligent owner and a negligent third party, the latter should bear the owner's loss, arguably the added increment of safety to the public justifies the imputation clause which places the loss on the owner.

At the outset, it should be noted that this argument rests on the highly dubious assumption that automobile owners are aware of the current law and its implications and govern their conduct accordingly. But assuming the owners do know the law, it is impossible to see how the imputation clause induces any *extra* care on their part. There are many other incentives to insure maximum caution. First, the owner is liable to innocent third persons for the negligence of a permittee who is not financially responsible. Secondly, if the owner is in fact negligent in choosing the permittee, he is not only primarily liable to third persons but he is barred from recovering his own damages. Thirdly, if, as is often the case, the owner who entrusts his vehicle to another remains in the vehicle as a passenger, there is as strong an incentive as possible to select a safe operator.

Thus the only situation in which the owner might be induced by the imputation clause to use extra caution would be when the owner has an insurance policy covering his liability to third parties but not covering collision damages to his own vehicle, and when the owner is not a passenger. Even in this situation, however, it is absurd to think that the likelihood of imputation will influence the owner's choice of a driver. If the owner is concerned about the safety of his vehicle, he will pick a safe driver who will, hopefully, avoid *all* accidents. An owner cannot

29. *Cf.* National Trucking & Storage Co. v. Driscoll, 64 A.2d 304, 308 (D.C. Munic. Ct. App. 1949) (added safety to public one ground for justifying imputation); York v. Day's Inc., 153 Me. 441, 448, 140 A.2d 730, 734 (1958) (suggestion that imputation could lead to extra care by owner).

anticipate that an accident will involve a third party and, even if it does, that the third party will be negligent. Imputation is irrelevant unless such a negligent third party is involved.

2. *Absurd results in isolated cases.*

Another argument made in favor of the imputation clause is that its absence leads to absurd results when a collision occurs between two negligent permittees.[30] If there is no imputation clause in the owner financial responsibility law, each owner may obtain a judgment for damages against the other owner as well as against the other owner's permittee driver. Thus, the owners may end up paying each other for their respective losses. In several such cases in New York, which has no imputation clause, trial judges have argued for a change in the law.[31]

But as pointed out by several well-reasoned authorities,[32] these criticisms are not justifiable. Surely it is proper to permit each of the innocent owners to collect damages from the negligent driver of the other owner's vehicle. As previously shown, a negligent person has no right to expect to be free from all liability simply because the damages he caused were also a result of someone else's negligence. The situation in guest cases is again closely parallel. If two negligent drivers, each accompanied by a guest, have a collision, the drivers, although not liable to each other, are each liable to the guest who was riding in the other vehicle.[33] Recovery by two innocent owners is certainly as logical as recovery by two innocent guests.

The possibility that one (or both) of the owners may ultimately have to pay for his permittee's negligence has no logical connection with the owner's right to recover because of someone else's negligence. If an owner in California wishes to avoid all vicarious liability and to ensure that all damages to third parties will be borne by the person who should bear them, his negligent permittee, he can easily do so by choosing a financially responsible permittee. Perhaps the statements of the New York trial judges, although still subject to the foregoing criticism, can be explained by the fact that, unlike a California owner who is only secondarily liable for a limited sum, a New York owner is primarily and fully responsible to innocent third parties for the negligence of his permittee.[34]

30. Milgate v. Wraith, 19 Cal. 2d 297, 302, 121 P.2d 10, 12 (1942); Gelb v. McCabe, 220 N.Y.S.2d 738 (New Rochelle City Ct. 1961).

31. Gelb v. McCabe, *supra* note 30; Bandych v. Ross, 26 N.Y.S.2d 830, 834 (Utica City Ct. 1941).

32. *E.g.*, Christensen v. Hennepin Transp. Co., 215 Minn. 394, 412–15, 10 N.W.2d 406, 417–18 (1943); 17 CORNELL L.Q. 158, 165 (1931).

33. Cases cited note 26 *supra*.

34. *Compare* N.Y. VEHICLE & TRAFFIC LAW § 388 *with* CAL. VEHICLE CODE §§ 17151–53.

3. *Likelihood that in certain cases the negligent driver will benefit from his own wrong.*

The strongest argument in favor of imputation is available in cases where the owner of the vehicle and the permittee are members of the same household. Arguably, recovery will benefit the entire family; hence the negligent permittee will benefit in spite of his own wrong.

This position lacks force in cases where the owner sues for personal injuries. The only conceivable benefit to the permittee stems from the fact that the owner's recovery may relieve other financial resources of the family. In order to remedy this, the negligence of one family member would always have to be imputed to the rest of the family. The California Legislature has unequivocally adopted a contrary policy. The enactment in 1957 of Civil Code section 163.5, making recovery for personal injuries by a married person his or her separate property, was for the express purpose of eliminating as a defense the negligence of the injured person's spouse.[35] Under prior law recovery was community property.[36] If the other spouse was contributorily negligent, relief was denied to prevent that spouse from benefiting from his or her own wrong.[37] In enacting section 163.5 the legislature took the position that the benefit of permitting recovery by the injured spouse far outweighed any detriment resulting from possible benefit to the negligent spouse. Surely this policy should also apply to the cases now arising under section 17150 in which an owner suffers personal injuries.[38]

The situation as to damages to the vehicle is not quite so clear. If the owner actually controls the vehicle's use, recovery poses little problem. But sometimes the person having legal title to a vehicle turns it over to, and treats it as belonging to, another member of the family. If, despite the negligence of such a user, the legal owner can collect damages from a negligent third party and apply them to repair the vehicle, the user may be said to have benefited from his own wrong if the repaired vehicle is returned to him.

It is hardly justifiable, of course, to retain section 17150 in its present form simply because there is a single narrow area where relief seems improper. If necessary, a special section could be enacted to bar relief when it could be shown that the negligent permittee exercised ownership powers over the vehicle. Even this would seem undesirable, since the ultimate control of the vehicle is always with the legal title holder,

35. See 32 CAL. S.B.J. 507–08 (1957).
36. Zaragosa v. Craven, 33 Cal. 2d 315, 202 P.2d 73 (1949).
37. *Ibid.*
38. This would be accomplished by adoption of the new provision approved at the recent California State Bar Convention. See text accompanying note 74 *infra*.

who may withdraw his permission at will. Under the current law the permittee may receive a similar benefit if the vehicle is returned to him after it is repaired at the owner's expense. In either case the return of the vehicle is a gift which can be revoked at any time. Arguably, the possibility that the vehicle will be repaired and returned to the user will be increased if the owner is able to collect from the third party. This is counterbalanced, however, by the possibility that the owner may be negligent should he reentrust the vehicle to the permittee after the latter's demonstration of carelessness. Furthermore, the owner's costs of prosecuting his action against the third party will tend to offset his recovery and make him wary of returning the vehicle to the same permittee.

C. *The Law in Other Jurisdictions*

In only a handful of jurisdictions outside of California is the negligence of a permittee driver imputed to a vehicle owner to preclude recovery against a negligent third party.[39] In two states, New Jersey[40] and Texas,[41] such imputation occurs because of a general doctrine, consistently discredited elsewhere,[42] which imputes the contributory negligence of any bailee to the bailor, regardless of the nature of the property. The only jurisdiction which has clearly held such imputation to apply solely because of the owner-permittee relationship is the District of Columbia. There the municipal court of appeals took the position that the statute making an owner vicariously liable to innocent third persons for the negligence of his permittee should be interpreted also to bar the owner from recovery.[43] The court stated that one of the major purposes of the statute was to increase public safety and that this would be better accomplished if the owner could not collect. As we have already seen, however, such a position is totally unjustified.[44] The only decision cited by the court was a ruling by the Supreme Court of Iowa which

39. The rules in New Jersey, Texas, Rhode Island, and the District of Columbia are discussed in text accompanying notes 40–43 *infra*. In two other states, Louisiana and Georgia, there are cases which flatly state, without discussion, that the negligence of a permittee driver will be imputed to the owner to bar the latter's recovery. Taylor v. Hynes, 147 So. 2d 432 (La. App. 1962) (owner was father of permittee); Rogers v. Johnson, 94 Ga. App. 666, 96 S.E.2d 285 (1956) (dictum). There are, however, other cases in those jurisdictions which indicate that such imputation is not automatic and depends upon some relationship other than mere owner-permittee. See Mustin v. West, 46 So. 2d 136 (La. App. 1950); Meyer v. Rein, 18 So. 2d 69, 72 (La. App. 1944) (dictum); Archer v. Aristocrat Ice Cream Co., 87 Ga. App. 567, 74 S.E.2d 470 (1953).

For a more detailed discussion of the law in states which now impute, or in the past have imputed, contributory negligence to a vehicle owner, see Annot., 11 A.L.R.2d 1437 (1950).

40. The New Jersey rule is established by statute. N.J. STAT. ANN. § 2A:53A–6 (Supp. 1963). See Motorlease Corp. v. Mulroony, 9 N.J. 82, 86 A.2d 765 (1952).

41. See Weir v. Petty, 355 S.W.2d 192 (Tex. Civ. App. 1962). The Texas law was adversely criticized in 6 TEXAS L. REV. 111 (1927).

42. See PROSSER, TORTS § 73, at 504–05 (3d ed. 1964), citing Texas law as the one modern exception. *Id.* at 505 n.7. See also Price v. Miller, 165 Md. 578, 169 Atl. 800 (1934); 6 TEXAS L. REV. 111 (1927).

43. National Trucking & Storage Co. v. Driscoll, 64 A.2d 304 (D.C. Munic. Ct. App. 1949).

44. See text accompanying note 29 *supra*.

reached a like result on the basis of a similar statute.[45] Subsequently, however, the Iowa decision was overruled, and imputation of contributory negligence on the basis of the owner-permittee relation has been eliminated in that state.[46]

In one other jurisdiction, Rhode Island, imputation exists, but only to a limited extent. A Rhode Island statute[47] provides that in the event a *permittee* has not filed proof of his financial responsibility prior to an accident, the permittee will be deemed to be the owner's agent. Such a statute obviously was designed only to assure recovery by innocent third persons. However, the Supreme Court of Rhode Island,[48] over a vigorous dissent, held that the "principal-agent" relationship set up by the statute also exists in cases where the owner brings suit against negligent third persons; since contributory negligence of an agent is imputed to his principal, recovery by the owner is barred. This, of course, is not the same type of absolute imputation clause that exists in California. Any Rhode Island vehicle owner can collect from a negligent third party in spite of the negligence of the permittee if the permittee has properly filed with the state proof of his financial responsibility. The Rhode Island provision has been weakened by a more recent decision holding the statute inapplicable when the driver is a "bailee."[49] Just who qualifies as a "bailee" is unclear, but apparently the term includes anyone who operates the vehicle under any type of contractual relationship with the owner, including a mechanic hired by the owner to repair the vehicle.[50]

Over the years there have been many cases in other jurisdictions where the issue of imputation of contributory negligence based solely on the owner-permittee relationship has been raised and rejected.[51] Many of

45. Secured Fin. Co. v. Chicago R.I. & P. Ry., 207 Iowa 1105, 224 N.W. 88 (1929). This case was also relied on by the California Supreme Court in its attempt to justify the California statute. See Milgate v. Wraith, 19 Cal. 2d 297, 303, 121 P.2d 10, 12 (1942).

46. Stuart v. Pilgrim, 247 Iowa 709, 74 N.W.2d 212 (1956). See also Phillips v. Foster, 252 Iowa 1075, 109 N.W.2d 604 (1961).

47. R.I. GEN. LAWS ANN. § 31-33-6 (Supp. 1963).

48. Davis Pontiac Co. v. Sirois, 82 R.I. 32, 105 A.2d 792 (1954).

49. Goulet v. Coca-Cola Bottling Co., 83 R.I. 310, 116 A.2d 178 (1955).

50. See *ibid.*

51. See Morgan County v. Payne, 207 Ala. 674, 93 So. 628 (1922); Reddell v. Norton, 225 Ark. 643, 285 S.W.2d 328 (1955); Roach v. Parker, 48 Del. 519, 107 A.2d 798 (Super. Ct. 1954); Gilman v. Lee, 23 Ill. App. 2d 61, 161 N.E.2d 586 (2d Dist. 1959); Lee v. Layton, 95 Ind. App. 663, 167 N.E. 540 (1929); York v. Day's Inc., 153 Me. 441, 140 A.2d 730 (1958); Price v. Miller, 165 Md. 578, 169 Atl. 800 (1934); Sherman v. Korff, 353 Mich. 387, 91 N.W.2d 485 (1958); Knutson v. Nielsen, 256 Minn. 506, 99 N.W.2d 215 (1959); Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406 (1943); McCloud v. Saling, 259 S.W.2d 699 (Mo. Ct. App. 1953); Lacey v. Great No. Ry., 70 Mont. 346, 225 Pac. 808 (1924); Davis v. Spindler, 156 Neb. 276, 56 N.W.2d 107 (1952); Lusty v. Ostlie, 71 N.W.2d 753 (N.D. 1955); Ross v. Burgan, 163 Ohio St. 211, 126 N.E.2d 592 (1955); Johnson v. Los Angeles-Seattle Motor Express, Inc., 222 Ore. 377, 352 P.2d 1091 (1960); Howle v. McDaniel, 232 S.C. 125, 101 S.E.2d 255 (1957); Young v. Lamson, 121 Vt. 474, 160 A.2d 873 (1960); Painter v. Lingon, 193 Va. 840, 71 S.E.2d 355 (1952); Lloyd v. Northern Pac. Ry., 107 Wash. 57, 181 Pac. 29 (1919); Schweidler v. Caruso, 269 Wis. 438, 69 N.W.2d 611 (1955); Porter v. Wilson, 357 P.2d 309 (Wyo. 1960); Wilcox v. Herbst, 75 Wyo. 289, 295 P.2d 755 (1956); Boothby v. Prescott, 97 N.H. 504, 92 A.2d 661 (1952) (dictum); Axelrod v. Krupinski, 302 N.Y. 367, 98 N.E.2d 561 (1951) (dictum).

these decisions contain excellent discussions of the problem,[52] pointing out the undesirability of such imputation and criticizing states, including California,[53] which have adopted it. For example, in 1960 the Supreme Court of Oregon, in refusing to allow the defense, reasoned as follows:

> We are asked to deny recovery because of imputed contributory negligence based on mere ownership alone . . . .
>
> Numerous jurisdictions now hold owners liable in damages for the negligence of others in the operation of the motor vehicle because ownership carries with it the right of control over the operation, even though actual control is absent. . . . . But the right of control as a convenient ground for imposing liability on an innocent owner is not equally cogent when employed to deprive an innocent owner of a remedy against a third party tort-feasor merely because such a rule has the structural balance of reciprocity. . . .
>
> The defendants say that Oregon should follow the . . . [so-called two-way] rule which makes the convenient concept of vicarious fault a two-edged sword.
>
> As pointed out by defendants, vicarious contributory negligence is a bar to recovery in several jurisdictions. But a number of well-reasoned decisions have been cited by the plaintiff as indicating a trend toward a rule more consistent with the facts of life today. In each of . . . [these latter] cases, the courts analyzed the factual relationship of the occupants of the auto, and found that actual control over the driver was absent. There being no other ground to deny recovery except by reaching for vicarious liability, these courts have refused to do so, and have allowed recovery. . . .
>
> The only virtue in the doctrine of contributory negligence is that it prevents one tort-feasor from profiting by the wrong of another. In many cases the doctrine results in hardship. . . . If contributory negligence is a doctrine of dubious virtue, then there is no good reason for inventing fictitious fault where there is no real negligence, to bar an . . . owner, [who] might . . . be liable as a matter of public policy for injuries to others under certain circumstances.[54]

It is important to note that almost all, if not all, jurisdictions impute contributory negligence in cases where the injured party and the driver are partners, joint venturers, or principal and agent.[55] This is true, of course, whether or not the person to whom the negligence is imputed is the owner of the vehicle.[56] The only effect of ownership itself is that in some states when an owner is also a passenger in his vehicle, and only then, the driver is presumed to be either a joint venturer with or the

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52. See, *e.g.*, Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406 (1943); Johnson v. Los Angeles–Seattle Motor Express, Inc., 222 Ore. 377, 352 P.2d 1091 (1960); Wilcox v. Herbst, 75 Wyo. 289, 295 P.2d 755 (1956).

53. See Christensen v. Hennepin Transp. Co., *supra* note 52, at 409–15, 10 N.W.2d at 415–18.

54. Johnson v. Los Angeles–Seattle Motor Express, Inc., 222 Ore. 377, 384–87, 353 P.2d 1091, 1094–95 (1960).

55. For a general discussion of the California rules see 2 WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 338, at 1540–41 (7th ed. 1960).

56. See *ibid.*

agent of the owner.[57] Such a presumption may always be rebutted by a showing of evidence to the contrary.[58] These latter rules in no way support the arbitrary provision for imputation of contributory negligence as adopted in California. Indeed, they demonstrate that such an arbitrary statutory provision would be considered unsound.

D. *Limitations on the Amount of Recovery by the Owner if the Imputation Clause Is Repealed*

If the imputation clause is repealed, there may be some question whether recovery against the third party should be qualified or limited by statute to reflect the permittee's concurrent negligence.

One possibility would be to require the owner to join the permittee as a defendant in any action against the third party. This would at least guarantee that if both were negligent, the third party would be entitled to contribution from the permittee under the California contribution statute.[59] This would prohibit the owner from suing only the third party either because the permittee is the owner's relative or friend, or because the owner hopes that the permittee will testify on his behalf as to the negligence of the third party. There is no right to contribution in California unless the plaintiff obtains a joint judgment against the joint tortfeasors.[60] Hence the right to contribution depends solely on the whim of the plaintiff. Although this rule is subject to adverse criticism,[61] the policy underlying it—to ensure that the plaintiff need not litigate with unwanted defendants[62]—applies to all joint-tortfeasor cases including the owner-permittee situation. Thus the answer, if one is needed, is to change the contribution statute, not to create a special exception.

A second possible limitation on recovery in the event of repeal of the imputation clause would be to allow the owner to collect only a proportionate share of his damages, *e.g.*, fifty per cent, from a negligent third party when the permittee was also negligent. This would put the onus directly on the owner to sue the permittee in order to collect full damages. Such a provision could not be justified. If the owner is entitled to recover at all, he should be able to get full redress from a negligent tort-

57. *E.g.*, Moore v. Skiles, 130 Colo. 191, 274 P.2d 311 (1954); Tuttle v. McGeeney, 344 Mass. 200, 181 N.E.2d 655 (1962); Rocky Mountain Produce Trucking Co. v. Johnson, 78 Nev. 44, 369 P.2d 198 (1962); Eason v. Grimsley, 255 N.C. 494, 121 S.E.2d 885 (1961); Ross v. Burgan, 163 Ohio St. 211, 126 N.E.2d 592 (1955); Beam v. Pittsburgh Ry., 366 Pa. 360, 77 A.2d 634 (1951); Angel v. McLean, 173 Tenn. 191, 116 S.W.2d 1005 (1938). For a complete discussion, including lists of jurisdictions that do and do not utilize such a presumption, see Annot., 50 A.L.R.2d 1281 (1956).

58. See cases cited note 57 *supra*.

59. CAL. CODE CIV. PROC. § 875.

60. *Ibid.*

61. See Comment, 9 HASTINGS L.J. 180, 186–87, 190 (1958).

62. See James, *Contribution Among Joint Tortfeasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156, 1160–65 (1954).

feasor. Even under the current law an owner who sues his negligent permittee for damages is entitled to full redress despite the concurrent negligence of a third party.[63]

Surely an arbitrary rule permitting an owner to collect only a portion of his damages from the negligent third party would be unjust if it applied to those cases where the owner is barred by the guest statute[64] from suing the negligent permittee. The owner, like an ordinary guest who cannot sue his host, should be able to get complete relief from the third-party tortfeasor.

Here again the solution, if one is required, is simple. If it is felt that one tortfeasor who was not made a defendant should be required to share the burden with joint tortfeasors who were sued, the law as to contribution should be altered to ensure such a result.

III. Desirability of Alteration of the Current Provision if It Is Not Repealed

A. *Inclusion of "Willful Misconduct"*

Section 17150 refers only to "negligence" of the permittee driver and says nothing about willful misconduct. This is true of the clauses dealing with the owner's liability to innocent third persons as well as of the imputation clause. The Supreme Court of California has held that insofar as the owner's liability is concerned, the statute does not cover intoxication or willful misconduct.[65] It would seem to follow that the imputation clause, which is not even a separate sentence in section 17150 also does not extend beyond ordinary negligence. Thus, an owner might obtain relief from a third party by proving that his permittee was guilty of willful misconduct as opposed to ordinary negligence. This result makes little sense and is out of harmony with the legislature's solution of an analogous problem in section 17708.[66] Section 17708 imputes to a parent the willful misconduct as well as the negligence of a child whom the parent has given permission to drive. Surely, if the imputation clause of section 17150 is to be retained, it should be amended to cover willful misconduct. Whatever justification is found for the clause, it allows no distinction between negligence and willful misconduct of the permittee.[67]

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63. There is no statutory basis for any limitation on recovery. *Cf.* Mason v. Russell, 158 Cal. App. 2d 391, 322 P.2d 486 (3d Dist. 1958).

64. Cal. Vehicle Code § 17158.

65. Benton v. Sloss, 38 Cal. 2d 399, 240 P.2d 575 (1952); Weber v. Pinyan, 9 Cal. 2d 226, 70 P.2d 183 (1937). See also Jones v. Ayers, 212 Cal. App. 2d 646, 654, 28 Cal. Rep. 223, 229 (2d Dist. 1963).

66. Cal. Vehicle Code § 17708.

67. 2 Witkin, Summary of California Law *Torts* § 321 (7th ed. 1960); 26 Calif. L. Rev. 276 (1938).

B. *Special Problems of Dual Ownership by Husband and Wife*

A special problem arises when a husband and wife have some form of joint ownership of the vehicle and one spouse is injured while the other is driving. The difficulty exists because the courts have interpreted section 17150 to make the right of the injured spouse to collect from a negligent third party depend upon which form of ownership is used and in whose name the vehicle is registered with the State Department of Motor Vehicles.

In situations where one spouse owns the vehicle or where it belongs to both spouses in joint tenancy or tenancy-in-common, the results are predictable. If the injured spouse is sole or part owner, the negligence of the other spouse will be imputed to bar recovery.[68] If the injured spouse does not have a proprietary interest, recovery will not be barred.

The situation is more complex when the vehicle is community property. If it was purchased with community funds other than the segregated earnings of the wife, control of the vehicle is deemed by section 172 of the Civil Code to be exclusively in the husband. Therefore, although the wife is an owner, she has no power over the use of the vehicle and cannot give anyone permission to drive. Therefore, when the wife is injured because of the concurrent negligence of her husband and a third party, she may collect damages from the third party.[69] Her husband cannot be her permittee and therefore section 17150 does not apply. On the other hand, if the wife was driving negligently and the husband was injured, he will be barred.[70] If the vehicle was purchased with the wife's earnings, however, the situations in which recovery would be allowed are probably reversed. Civil Code section 171c gives a wife control over her "money" earnings and, presumably, over property she purchases with such earnings, until mingled with other community property.

Although the above rules are logical, at least in terms of technical ownership and control, the supreme court may have created an unjustifiable exception in *Dorsey v. Barba*.[71] In that case an injured third party brought suit under section 17150 against a wife, alleging that his injuries resulted from the husband's negligent driving. The automobile was community property but had been registered solely in the wife's name.

68. Cooke v. Tsipouroglou, 59 Cal. 2d 660, 31 Cal. Rep. 60, 381 P.2d 940 (1963); Zabunoff v. Walker, 192 Cal. App. 2d 8, 13 Cal. Rep. 463 (1st Dist. 1961); Mooren v. King, 182 Cal. App. 2d 546, 6 Cal. Rep. 362 (4th Dist. 1960).

69. Cooke v. Tsipouroglou, 59 Cal. 2d 660, 663, 31 Cal. Rep. 60, 61, 381 P.2d 940, 941 (1963) (dictum); Lawson v. Lester, 191 Cal. App. 2d 34, 12 Cal. Rep. 368 (3d Dist. 1961) (alternative holding); Carroll v. Beavers, 126 Cal. App. 2d 828, 273 P.2d 56 (3d Dist. 1954) (dictum); *cf.* Shepardson v. McLellan, 59 Cal. 2d 83, 27 Cal. Rep. 884, 378 P.2d 108 (1963).

70. See Cooke v. Tsipouroglou, 59 Cal. 2d 660, 663, 31 Cal. Rep. 60, 61–62, 381 P.2d 940, 941–42 (1963) (dictum) (by implication); *cf.* Rody v. Winn, 162 Cal. App. 2d 35, 327 P.2d 579 (2d Dist. 1958).

71. 38 Cal. 2d 350, 240 P.2d 604 (1952).

There was no evidence that the automobile had been purchased with the wife's earnings. The wife defended on the ground that Civil Code section 172 gave her husband complete control of the use of the vehicle; therefore she could not have granted him permission to drive and section 17150 was inapplicable. The supreme court held that under these circumstances the wife, who in fact assented to her husband's driving the car, should be held responsible. The court stated that the legislature intended the statute to apply the term "owner" broadly, to include many who did not have the title, such as conditional buyers, and even some who did not have full incidents of ownership. Thus the legislature must have intended the sole registered owner of the vehicle to come within the provisions of the section. The fallacy in this reasoning is that the statute requires "permission" as well as ownership, and the wife in such a case is legally incapable of giving such permission.[72]

It logically follows from this decision that if a community automobile is registered solely in the name of the wife, section 17150 will be interpreted to impute to the wife the negligence of her husband and thus bar her recovery from negligent third persons. Whether in such a case the negligent driving of a wife will be imputed to her husband is debatable; since legally it is he who possesses full control over the vehicle, logic would dictate that he be bound. On the other hand, having recognized that the wife can give permission despite her legal disability to do so, the court might adopt a practical approach, which treats a community vehicle registered in the wife's name as if it belonged to her alone.

These rules produce a jumble of results so arbitrary that they could not possibly be in line with the legislative purpose of the imputation clause. Of course, the legislature in 1937 did not have to consider the most serious problems of imputation between husband and wife because prior to the enactment of Civil Code section 163.5 in 1957 the negligence of one spouse would always bar the other in any personal injury action.[73] The question before us now is whether there is any remedy for the situation as it exists. Of course, the simplest, most effective remedy would be to do away with the doctrine of imputed contributory negligence altogether. But we are assuming here, arguendo, that some justification exists for retaining it.

Short of outright repeal of the imputation clause there are several possible solutions to the problems in the husband-wife cases. One would be to adopt a new statute exempting all such cases from the scope of imputed contributory negligence. In September 1963 the Conference of

72. See 25 So. CAL. L. REV. 468, 470 (1952).
73. Zaragosa v. Craven, 33 Cal. 2d 315, 202 P.2d 73 (1949).

State Bar Delegates approved a resolution to sponsor such legislation.[74] A second possible solution might be to amend the current imputation clause to exempt "nominal" owners who do not in fact control the use of a vehicle and include all "active" owners who do exercise such control.

1. *The state bar recommendation.*

The provision approved by the Conference of State Bar Delegates reads as follows:

> Section 17150.1 LIABILITY NOT IMPUTED TO SPOUSE. In an accident involving a motor vehicle the negligence of one spouse, if any, while operating said motor vehicle shall not be imputed to the other spouse, by reason of ownership, in any action brought by the latter for any personal injuries arising out of said accident.

This proposal can certainly be looked upon as a step in the right direction, particularly by those who favor outright repeal of the imputation clause. Such a provision would eliminate all of the arbitrary distinctions governing recovery in the various joint-ownership cases. The section goes much further, however, because it does not merely distinguish between cases in which contributory negligence should be imputed and those in which it should not; instead, it exempts all husband-wife cases, even including those where there is no joint ownership. This makes sense only if there is no legitimate basis for imputation of contributory negligence in any case; but if that is so, the new section simply does not go far enough. On the other hand, if there is a sound basis for imputing contributory negligence, the proposal would lead to many unjustifiable results. Consider, for example, the case in which a husband, who is the sole owner of an automobile used exclusively by him in connection with his business, makes a one-time exception to a company rule by lending the vehicle to his wife for a day of shopping. She agrees to drive him to his club on her way to town. En route an accident occurs which is due to the concurrent negligence of the wife and the driver of the other vehicle. The husband suffers severe physical injuries and his car is badly damaged. Under the proposed statute the husband would be able to collect for his physical injuries from the other driver. He could not, however, collect for the damage to his automobile. In such a case there is no rational basis for a distinction between personal injury and property damage. Similarly, assume that the facts were exactly the same except that the husband had loaned the car to his parent or child, or to his business partner, or to a friend. In any of the latter cases the husband would be barred from all recovery. Certainly there is nothing in the

74. See Los Angeles Daily Journal, Sept. 30, 1963, p. 14, col. 8 (Resolution No. 65).

marriage relationship which would justify the difference in outcome in these situations.

If the proposed section were adopted, similar provisions would have to be enacted with respect to the imputation clauses in sections 17154[75] and 17159;[76] otherwise there would be another type of inconsistency among the cases. If, for example, in the original hypothetical case (where the wife is the permittee) the husband did not own the car but had been given the use of it for several months by his business partner who was on vacation, the husband would be barred from all recovery, despite the fact that the case is logically indistinguishable from one in which the husband is the vehicle owner.

2. *Alternative recommendations based on actual control as well as ownership.*

It seems clear that the legislature intended the imputation of negligence in motor vehicle cases to turn on control as well as ownership of the vehicle. This explains why section 17150 operates only when "permission" has been given, and why the term "owner" in that section has been specifically defined in section 17156 to cover the vendee but not the vendor of a vehicle which is subject to a conditional sales contract or a chattel mortgage. It further explains the existence of section 17154, which treats a bailee of a motor vehicle in the same manner as section 17150 treats an owner.

The inconsistent results among cases in which the owner and permittee are husband and wife occur only when the spouses are joint owners and only then because the requirement of "permission," which normally assures that the party to whom negligence is to be imputed had control, is obliterated by technicalities. These inconsistencies could be eliminated, and the cases made compatible with the notion that there is justification for the imputation of contributory negligence, merely by enacting a provision which makes actual control a prerequisite to such imputation. Consider, for example, the case where a husband and wife own a vehicle in joint tenancy but the wife does not drive and takes no part in controlling the general use or maintenance of the vehicle. Under the current law, since she is an owner and since her husband drives the vehicle with her "implied" if not her express permission, the negligence of her husband will be imputed to her to bar her recovery from a negligent third person.[77] Under a provision which imputes contributory neg-

75. CAL. VEHICLE CODE § 17154, as amended, Cal. Stat. 1961, ch. 1734, § 4, imputes the negligence of a bailee's permittee to the bailee for all purposes of civil damages.

76. CAL. VEHICLE CODE § 17159, as amended, Cal. Stat. 1961, ch. 1734, § 6; Cal. Stat. 1963, ch. 145, § 1, imputes the negligence of a permittee to the personal representative of a decedent's estate who consents to operation by the permittee for all purposes of civil damages.

77. See Cooke v. Tsipouroglou, 59 Cal. 2d 660, 31 Cal. Rep. 60, 381 P.2d 940 (1963).

ligence only to those part owners exercising actual general control over the vehicle, the wife would be able to recover for her personal injuries. Thus the case would be dealt with realistically, as if the husband were the sole owner. The wife should not be able to collect for damage to the vehicle in such a case, however, since recovery necessarily would benefit the tortfeasor husband.

A new provision based on "actual control" would not only permit "nominal" owners to recover, it would also prohibit recovery, to the extent now allowed, by those owners who actually do control the use of the vehicle. Take, for example, a case where a community-owned vehicle, purchased with the husband's earnings and registered in his name, is treated generally as belonging to the wife. One day the husband requests and is granted permission to use the vehicle. In backing out of the driveway he collides with another vehicle, the accident being due to the negligence of both drivers. The wife, standing nearby, is injured by flying debris. Under the law prior to 1961, and probably today, the wife is entitled to recover from the negligent third party because she is legally incapable of giving permission to anyone to drive the vehicle. The only doubt as to the current state of the law is due to the 1961 addition to section 17154 of the Vehicle Code providing that a bailee of an automobile is to be treated in the same manner as is an owner under section 17150. If the wife can be considered a bailee in such a case, then she could be held to have given "permission" under section 17154, though she could not have done so as an owner under section 17150. It seems unlikely, however, that the wife, as a bailee, can be said to have given "permission" to her husband when he is the bailor and, as between the spouses, the one who has sole power to control the vehicle. In any event, a new provision based on actual control would ignore these technicalities and make it clear that the wife could not recover.

A rule based upon actual dominion over a vehicle would, of course, present difficult problems of proof and would offer an incentive for collusion and perjury among family members. But a similar incentive often exists under the current law,[78] and the results under such a new provision would at least be consistent with one another.

Unjustifiable claims of lack of control could be prevented to some extent by placing the burden of showing lack of control on the owner who seeks to avoid imputation. This is also consistent with the principle that it is the party who has access to the means of proof who should carry the burden.

78. For example, in response to a claim of imputed contributory negligence it is to the advantage of the injured passenger spouse, and, as a practical matter, to the negligent driver spouse, to testify that the motor vehicle driven by the latter is the separate property of the driver spouse or is community property which is under the control of the driver spouse.

IV. Conclusions

A. *General Recommendations*

1. The clauses in sections 17150, 17154, and 17159 providing for the imputation of contributory negligence should be repealed.

2. No statutory limitations should be placed on the recovery against a negligent third person by an innocent owner, bailee, or personal representative of a deceased owner of a motor vehicle who has permitted another person to drive.

B. *Special Recommendations in the Event That the Imputation Clauses Are Not Repealed*

1. The imputation clauses of sections 17150, 17154, and 17159 should be amended to impute to the owner, bailee, or personal representative of a deceased owner the willful misconduct as well as the negligence of a permittee driver.

2. One of the following two new provisions should be adopted with regard to cases where the injured person and the permittee driver are husband and wife:

(a) In an accident involving a motor vehicle the negligence of one spouse, if any, while operating said motor vehicle shall not be imputed to the other spouse, by reason of any provision of section 17150, 17154, or 17159, in any action brought by the latter for any personal injuries arising out of said accident. Nor shall the negligence of the spouse operating said vehicle be imputed to the other spouse, by reason of any provision of section 17150, 17154, or 17159, in any action brought by the latter for damage to property except when the spouse operating the vehicle has a community, joint, or concurrent interest in said property.

(b)(1) In an accident involving a motor vehicle in which the operator or the vehicle and another person have a joint, concurrent, or community interest, the negligence of the operator shall not be imputed to the other person by reason of any provision of section 17150, 17154, or 17159, in any action brought by the latter for personal injuries arising out of said accident, if, but only if, the latter did not make general use of or exercise control over the use of the vehicle. Nor in such case shall the negligence of the operator of the vehicle be imputed to such other person, by reason of any provision of section 17150, 17154, or 17159, in any action brought by the latter for damage to property except when the operator of the vehicle has a community, joint, or concurrent interest in said property.

(2) Notwithstanding the provisions of Civil Code sections 171c and 172, any spouse who in fact makes general use of or exercises control over the use of a motor vehicle in which he (or she) has a community property interest, and who brings suit to recover for personal injuries or damage to property arising out of an accident involving said motor ve-

hicle, shall be deemed capable of giving to the other spouse "permission" as that term is used in sections 17150, 17154, and 17159 of the Vehicle Code.

(3) For the purposes of sections (1) and (2) any person who seeks to avoid the imputation of contributory negligence under section 17150, 17154, or 17159 shall have the burden of proving that he (or she) did not make general use of or exercise control over the use of the motor vehicle.

C. *Comments on Special Recommendation 2*

1. The choice between Recommendation 2(a) and 2(b) should depend solely on the legislature's view as to the validity of imputed contributory negligence. If it is believed that there is no justification for it, but that outright repeal is not politically feasible at this time, then 2(a) is more appropriate. If, on the other hand, it is felt that there is a sound basis for such imputation, 2(b) is the only logical provision that can be adopted.

2. As can be seen, 2(a) is similar to the provision recommended by the Conference of State Bar Delegates. Section 2(a) differs in that it covers cases falling within sections 17154 and 17159 as well as within section 17150, and also in that it includes a provision permitting recovery for damage to property except when the tortfeasor spouse would necessarily benefit if such recovery were allowed. In spite of these differences, however, the results in cases covered by such a provision still would be logically inconsistent with the results in many cases which are not covered.

3. Both 2(a) and 2(b) contain provisions designed to prevent a spouse from recovering for damage to property in which the tortfeasor spouse has an interest. It could be argued that in such a case the plaintiff spouse should not be completely barred, but should be permitted to recover for that share of the property owned by the plaintiff spouse. However, this would require a major change in the policy which led the legislature to limit section 163.5 to actions for personal injuries.

4. The most difficult problem with respect to 2(b) relates to the amount of control required in both 2(b)(1) and 2(b)(2). These sections turn on whether a person makes general use of or exercises the right to control the use of the vehicle.

The purpose of 2(b)(1) is to permit a "nominal" owner to recover as if not an owner at all. The provision would seem too rigid if it were interpreted to permit defense lawyers to defeat the action merely by showing that the plaintiff used the vehicle once. The courts should have some flexibility to permit recovery despite the fact that the injured person may have used the vehicle on rare occasions. On the other hand, it should be

made clear that all owners can, at the same time, be held to have made general use of or exercised control over the use of the vehicle and that the statute should not be read to require "primary" control or even "substantial" control.

An argument may be made for the alteration of 2(b)(2) to require "substantial" or "primary" control to limit the effect of the section in barring recovery in cases where it is now permitted. Such changes would, however, retain in part the current inconsistencies in husband-wife cases which exist due to different types of dual ownership. It is these very inconsistencies which the section is designed to eliminate.

5. Finally, it is important to note that Recommendation 2(b) is not limited to the case where there is dual ownership by spouses, but would also cover any other case of dual ownership in which one or more of the owners did not exercise control over the vehicle. This is necessary if all results under sections 17150, 17154, and 17159 are to be consistent with one another.

V. Further Problems for Study

Although an analysis of section 17708 of the California Vehicle Code is beyond the authorized scope of this study, it is important to note that that section contains provisions quite analogous to sections 17150 and 17154. Section 17708 makes a parent or guardian secondarily liable to innocent third persons for the negligence of a minor child whom the parent permits to drive and imputes that negligence to the parents to bar their recovery from negligent third persons.

The considerations as to the propriety of imputation of contributory negligence under sections 17150 and 17154 apply, at least in part, to the imputation provisions of section 17708 and the legislature should be aware that if the former are to be altered, so perhaps should the latter.

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