

# Feminist Legal History

*Essays on Women and Law*

EDITED BY

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## Women behind the Wheel

*Gender and Transportation Law, 1860–1930*

MARGO SCHLANGER

Gender difference is only infrequently mentioned in recent negligence cases. To contemporary (mostly non-essentialist) eyes, gender difference seems to appear only mildly relevant to tort law's area of concern: care and harm to others and self. But in the early days of modern tort law, when gender differences loomed larger in the consciousness of American jurists, and unabashedly so, judicial opinions more frequently grappled with how negligence doctrine ought to take account of female difference. This chapter explores opinions published between approximately 1860 and 1930 that illuminate this issue in cases involving women drivers and passengers of cars and wagons.<sup>1</sup> The focus on transportation-related injuries reflects early tort law's similar preoccupation.

Many feminist scholars have argued that tort law historically subordinated women by simply omitting them from the developing objective standard of care. They point out that even as texts such as Holmes's *The Common Law*<sup>2</sup> or the famous British case of *Vaughn v. Menlove*<sup>3</sup> canonized the "reasonable man" standard, and simultaneously settled the way in which tort doctrine would deal with differences relating to intelligence, physical disability, mental disability, age, and other factors, women were simply left out. The claim is that tort law used to measure caretaking by a "reasonable man" standard which was not just linguistically but truly a masculine one—and that the construction was the once-unnoticed emblem of the legal system's substantive oppression and exclusion of women.<sup>4</sup> Recent feminist scholarship, however, rebuts charges of erasure. Barbara Welke, for example, writes of accident law from 1865 to 1920 that "taking the gender out of the law was something like taking the bounce out of a rabbit: unnatural, impossible, undesirable. . . . Men's and women's accidents were patterned by gender, generating legal rules which in effect were shaped by and directed toward women and men, but not both."<sup>5</sup> This chapter's examination of old accident

cases likewise undermines the accusation that pre-feminist tort law consistently excluded both the category of gender and women themselves. Its contribution is to flesh out and complicate the account of just *how* gender and women were included.

As many other chapters in this collection note, the gender ideology in America ascendant in the mid-nineteenth century and still dominant, albeit with increasing ambivalence, well into the early twentieth century, was that of "separate spheres."<sup>6</sup> The division of the world into public and private, male and female worlds attached tension to women using any means of transportation, because transportation took place in a public, male space.<sup>7</sup> But ideology bent to convenience: women frequently, if less frequently than men, rode trains, streetcars, wagons, and cars, even if their use of these means of transportation ran counter to the separate spheres concept.<sup>8</sup> The cases in this chapter deal with women injured in wagons or cars, the most "private" and therefore the most acceptable conveyances for women. In the first set of cases, the injury victims were women drivers of wagons. Some nineteenth-century court decisions in this category acknowledged and treated a perceived gender difference—that women were inferior drivers to men. Others acknowledged but rejected that difference. Both types of opinions examined numerous doctrinal possibilities for the role gender should play but settled on none of them, showing that a particular shared understanding about gender could not answer the question of *how* gender should bear on the injured female tort plaintiff's right to recover.

In the second set of cases, women were injured as passengers in cars and wagons, usually when their husbands were driving. The opinions establish that judges' views of the gendered relationship of wife to husband were of central analytic importance to their legal assessments of a woman's right to recover against a third party who caused an accident. Although the cases display a relatively unchanging construction and presentation of the marital relationship—assigning the wife, at least in the public space of the roads, to a role subordinate to her husband's—between 1860 and 1930 the legal consequence of this assignment underwent a complete inversion. In the early part of the period, courts concluded from women's subordinate position in marriage that a female passenger could not recover against a third party if her husband's driving had negligently contributed to the accident. Around 1900, however, the results shifted, and courts concluded from the same subordination that a female passenger *could* recover in the same circumstances.

The most important point demonstrated here is that even a shared vision of actual and appropriate gender roles and abilities does not dictate case out-

comes. Although the cases do evince judges' shared understanding that wives had less authority than husbands and, nearly as consistently, that women lacked competence in the public sphere of transportation, this chapter's presentation of the interplay of tort doctrine and ideas about gender demonstrates that judges varied enormously in their views of the difference gender should make for tort law.

### *Women Drivers*

Late-nineteenth and early-twentieth-century women were more likely to ride in cars than to drive them. Nonetheless, there were female drivers, and they were sometimes injured in accidents. In the late nineteenth century resulting court opinions occasionally discussed gender, expressing a shared sense that women were not as capable drivers as men. A range of doctrinal options existed for a court confronting an accident involving a female driver and a claim that gender difference was relevant: women might be bound to take more care to compensate for their lack of skill; women might be held to commit contributory negligence simply by driving; women might be held to a standard of care that referenced only other women drivers (in practice, then, their perceived lesser skill could excuse what otherwise might be contributory negligence) or to a male standard of care or to a bi-gender standard of care; and defendants might be required to take more care to accommodate women's needs as drivers. There are opinions weighing each of these options, but no one approach appears to have prevailed. These cases demonstrate that even when courts share a view that women's abilities are not as developed as men's, gender politics can intertwine with doctrine in complex ways that produce varied approaches.

An 1860 Connecticut case provides an early example of the assumption that women were bad drivers, and how that assumption could operate within a personal injury case. In *Fox v. Town of Glastenbury*, the estate of Harriet Fox sued the town, arguing that the accident in which she died was caused by the town's failure to maintain a railing along the sides of a causeway. The jury had rendered a plaintiff's verdict, but the state supreme court vacated and remanded for a new trial, holding that although the town's failure to maintain a railing along the causeway was indeed negligence, Fox's attempt to pass across the causeway was contributory negligence. The court stated that "we think no person of ordinary discretion in their circumstances, and exercising ordinary prudence and discretion, would have made such attempt." This is a linguistically gender-neutral standard of care. But the court continued:

We are not unmindful of the fact urged upon our attention by the plaintiff's counsel, that these travelers were females. And in that fact, and in the timidity, inexperience, and want of skill which it implies, we can find an explanation of their injudicious and fatal attempt to turn around in the water, but no reason or excuse for the recklessness of their conduct in driving into it.

The court concluded: "if men of ordinary prudence and discretion would regard the ability of the party inadequate for the purpose without hazard or danger, the risk should not be assumed."<sup>9</sup>

It seems that in *Fox* the reviewing court merged two questions together: What would a reasonable person do, and what would a reasonable man expect the plaintiff to do? The opinion's "men of ordinary prudence and discretion" function not as models setting the standard for accident-avoidance, but as jury/blame-assessors. Thus members of the all-male jury are excused from deciding whether they themselves would have crossed the causeway. They are told, instead, to recall that women are bad drivers and to decide whether a woman driver should have crossed. To *neglect* to consider gender as a factor counting against the plaintiff is deemed inappropriate.

Other courts, however, took a more moderate approach. In *Daniels v. Clegg*, in 1873, as in *Fox*, the court believed that female sex equated to lack of driving skill but announced that femaleness could excuse lack of skill. Richard Clegg sued Calvin Daniels to recover the damage to his horse and buggy when Daniels collided with Clegg's daughter, who was driving. She was twenty years old and was driving quite fast, downhill, "being in great haste to find her father on account of the dangerous illness of a sister." After a jury verdict for Clegg, Daniels appealed, contesting several of the charges to the jury. The court had charged the jury that:

In deciding whether the plaintiff's daughter exercised ordinary care in driving the horse, or was guilty of [contributory] negligence, the jury should consider the age of the daughter, and the fact that she was a woman. . . . [S]he would not be guilty of negligence if she used that degree of care that a person of her age and sex would ordinarily use.

The Michigan Supreme Court approved the charge as ultimately given, commenting:

No one would ordinarily expect, and the defendant had no right to expect, from a young woman thus situated, the same amount of knowledge, skill,

dexterity, steadiness of nerve, or coolness of judgment, in short the same degree of competency, which he would expect of ordinary men under like circumstances; nor, consequently, would it be just to hold her to the same high degree of care and skill. The incompetency indicated by her age or sex—without evidence (of which there is none) of any unusual skill or experience on her part—was less in degree, it is true, than in the case of a mere child; but the difference is in degree only, and not in principle.<sup>10</sup>

Again, the injured female, at age twenty, a legal minor, is like a child; but this time she wins her suit rather than loses by that fact.

Tort law could have responded to perceptions of feminine incompetence with an onerous doctrinal rule that women committed contributory negligence as a matter of law simply by driving. This would have been enforcement of separate spheres ideology with a vengeance. But only one case was found that even urged such an approach, and the 1837 Maine Supreme Judicial Court there rejected the defendant's argument, holding, "There is no doubt but a woman may be permitted to drive a well broken horse, without any violation of common prudence."<sup>11</sup> Indeed, most opinions refused to ratify any notion that women and men made up different communities of drivers, whose conduct tort law should acknowledge as categorically different. In *Tucker v. Henniker*, the New Hampshire Supreme Court insisted that women were part of a bi-gender community of drivers by reference to which the ordinary standard of care was set. The plaintiff, injured while driving a horse and carriage, sued the town, arguing that defects in the repair of the road caused her accident. The town, in turn, accused her of contributory negligence. In the trial court, the jury had been instructed that the plaintiff was "bound to exercise ordinary care, skill and prudence in managing [her] horse, such care, skill and prudence as ordinary persons like herself were accustomed to exercise in managing their horses."

The New Hampshire Supreme Court reversed the plaintiff's verdict and remanded for a new trial, holding that the jury might have been misled into thinking that the phrase "ordinary persons like herself" meant that the plaintiff was to be held to a standard of care set by comparison to women, rather than the entire community. The court explained:

In a country where women are accustomed, as among us, to drive horses and carriages, there can be no doubt that the degree of care, skill and prudence required of a woman in managing her horse would be precisely that degree of care, skill and prudence which persons of common prudence, or

mankind in general, usually exercise . . . in the management of the horses driven by them. Now the language of the charge in the court below might be construed as making the average care, skill and prudence of women in managing horses, instead of the average care, skill and prudence of mankind generally, including all those accustomed to manage horses, whether men or women, boys or girls, the standard. . . . As it may be doubtful whether this average would be higher or lower than that of mankind in general, and as it is not the precise standard prescribed by the law, and the jury may possibly have been misled by it, the instructions must be held to have been erroneous on this point.<sup>12</sup>

Although the opinions just discussed offered these varied analyses of gender's impact in women drivers cases, judges in such cases did not invariably address gender at all. This was probably not because late-nineteenth-century courts failed to consider the possibility of discussing gender in these circumstances. The cases discussed above were well known and frequently listed in treatises under gendered headings,<sup>13</sup> so the gender issues they raised were familiar to contemporaries. However, the cases' analyses of gender were rarely cited in other opinions. Moreover, as the twentieth century progressed, judges deciding woman-driver cases ceased addressing gender, whether the woman was driving a car or a horse-drawn vehicle. Again, and for the same reasons, it likely was not a case of unconscious erasure of gender but rather a considered decision not to include it expressly in the analysis. Perhaps the gendered analysis was unattractive because it was so inconclusive. Or perhaps the assumption of lesser feminine competence faded somewhat as horse-drawn vehicles were replaced by motorized ones.<sup>14</sup> Or perhaps the factual predicate of the cases became less frequent because many fewer women drove the early cars, which were difficult and dirty to start, than had driven horse-drawn vehicles.

Where courts *did* choose to address gender, the range of approaches taken in the women drivers cases shows that to know that courts considered gender important in a certain context—even when the reason gender was at issue was somewhat disrespectful of women's equality such as the assumption that women are bad drivers—is to know very little. When women were injured while they were driving, the category of cases was small enough, and the doctrinal possibilities wide enough, that the opinions do not yield a definitive approach. Rather, the cases highlight the pressure points of tort doctrine's interaction with gender, and reveal that those pressure points are not modern inventions.

## *Husband Drivers, Women Passengers*

When the driver of a car involved in an accident was the passenger's husband, the issue frequently arose whether the husband's alleged contributory negligence should be "imputed" to his wife. As this section describes, before 1890 or 1900 the contributory negligence of a husband-driver typically was imputed to his wife-passenger, because she was subject to his control. Beginning about the turn of the century, however, the same ideas about marital hierarchy led to the precisely opposite results. Courts began to apply the non-marital law of agency and to hold that because a wife did not have the right to control her husband, she was not responsible for his contributory negligence.

The doctrine of "imputed negligence" originated in the 1849 British case of *Thorogood v. Bryan*, a tort action seeking damages for the death of a man who had just gotten off one omnibus and was run over by another. The defendant was the owner of the second omnibus, who argued that the operator of the first omnibus should not have let off passengers at the point where it stopped and that his negligence in doing so should bar the action. The Court of Common Pleas agreed, attributing the contributory negligence of the first omnibus operator to the decedent passenger and reversing the plaintiff's jury verdict.<sup>15</sup> In its original application, assigning a common carrier's negligence to its passenger, most American courts were not receptive to the *Thorogood* imputed negligence rule.<sup>16</sup>

But while American courts became reluctant to uphold a fictitious identification of the passenger with the driver or conductor of a common carrier, for some years they were more willing to merge the identities of a wife-passenger and her husband-driver. Courts found support in the authoritative *Shearman and Redfield on Negligence*, which stated in its first edition, in 1869, that although "a passenger in a public conveyance . . . is not precluded from recovering" because of the contributory negligence of the driver of that conveyance, the rule was the reverse "where a wife suffers an injury while under the immediate care of her husband."<sup>17</sup> The treatise offered no explanation and ignored the fact that in the only case it cited, *Carlisle v. Town of Sheldon*,<sup>18</sup> the Vermont Supreme Court had expressly stated that there was "nothing in the marital relation" contributing to its analysis; the same result would obtain, said the court, for any passenger and any driver.

Nonetheless, a number of other courts agreed with *Shearman and Redfield* that a wife driven by her husband differed somehow from a passenger in other circumstances. In a few cases, courts analyzed this not as a question of imputed negligence at all but rather as a concomitant of coverture, which had

"for centuries [given] husbands rights in their wives' property and earnings, and prohibited wives from contracting, filing suit, drafting wills, or holding property in their own names."<sup>19</sup> The husband's contributory negligence barred *his* action for personal injury to his wife; under coverture, she herself had no right to sue. Usually, however, courts in husband-driver/wife-passenger cases did not explicitly rely on the common law of coverture. Indeed, they could not, because most of the cases discussing the issue were decided *after* the passage of marital status reform statutes allowing women to hold separate property and bring their own lawsuits.<sup>20</sup> More typical was the analysis in an 1877 Illinois case, in which the court commented that because "plaintiff placed herself in the care of her husband, and submitted her personal safety to his keeping," any negligence on his part would be imputed to her.<sup>21</sup>

This "placing in the care" language does not, facially, explain why wives and husbands have any different relation for tort purposes than do passengers and common carriers. After all, the passenger on a train relies on the care of the conductor. Yet these decisions imputing the contributory negligence of a husband-driver to his wife-passenger were, generally, rendered despite the courts' simultaneous rejection of the *Thorogood* rule. The question is why. The exploration of the topic of imputed negligence found in a jury charge in an 1891 federal case provides some insight. The case concerned two adult siblings, driving together, who were in an accident; the sister-passenger was killed, and the question was whether the contributory negligence of the brother-driver would be imputed to her. The judge explained to the jury that no such imputed negligence would be allowed, and he contrasted the situation, in dicta, to the imputation of the contributory negligence of a husband to his wife, and other like circumstances:

Now, there are certain circumstances, gentlemen, in which as a matter of law the negligence of a driver of a carriage . . . may be imputed to another person who occupies the vehicle with him; as, for instance, a father is driving, and has a child in the carriage, or a husband is driving, and has his wife there with him, or a guardian is driving with a ward that he has under his care. . . . [B]ecause . . . the one controls the other, and where ordinarily . . . we recognize the fact that the one trusts the other, and relies upon the other for protection; that is, a husband exercises protection, and the wife looks to the husband for protection.<sup>22</sup>

The charge indicates that when some courts said that a woman had "placed herself in the care of her husband," they meant far more than that she had

trusted him to drive her safely, the meaning of the phrase for *Thorogood*. The phrase appears, instead, to have encapsulated the same theory of marriage that underlay the superseded common law doctrine of coverture. Indeed, Blackstone's 1765 explanation of coverture used language quite similar to this federal jury charge: "The husband and wife are one person in law [and] the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover, she performs everything."<sup>23</sup>

In sum, in the earliest cases involving the contributory negligence of a husband-driver and his wife-passenger, the husband's negligence was frequently imputed to his wife, for the stated reason that she was subject to his control. The most persuasive explanation of the doctrine is that, although the rule was announced, technically, after the end of coverture, it drew on the common law understanding of marital status which subsumed wives' identities in the identities of their husbands.

But this early majority rule was quickly reversed, beginning in the 1890s.<sup>24</sup> Two historical developments are relevant to this reversal. The first was the growing impact of the Married Women's Property Acts enacted earlier. Both contemporary and modern observers have commented on the gradual expanding effect of coverture's end.<sup>25</sup> As Clare Dalton has commented, the logic of the Acts, if not precisely their language, undermined "the 'marital unity' ideology, endowing women with legal personality and capacity, and thereby recognizing their individuality."<sup>26</sup> Simultaneous non-doctrinal changes reinforced the point, as women undertook a variety of political campaigns for women's welfare,<sup>27</sup> and most pertinently for suffrage, emphasizing that their interests were not adequately represented by their husband's vote.<sup>28</sup> It seems likely that over time judges grew to understand and apply that logic to accident cases involving husband-drivers and wife-passengers. Indeed, one 1894 Georgia case acknowledged as much. The court cited the abundant authority for imputing a husband-driver's negligence to his wife-passenger but rejected the rule, commenting that, under Georgia law, she had a right to recover damages, which became her "separate and individual property, not subject to any debt or liability of the husband." The court called "indefensible" the "doctrine . . . that . . . would seek to charge a wife with the negligence of her husband simply because of the marital relation existing between the two," and emphasized that "the wife has distinct, individual legal rights."<sup>29</sup>

Growing juridical separation of husbands and wives created a kind of doctrinal vacuum in areas where decision rules had previously been based on marital merger. In the area considered here, a "control test" lifted from other

areas of tort law promptly filled that vacuum. In the nineteenth century the rule of *respondeat superior* dictated that a "master" (i.e., employer) would be held responsible in tort for the negligent act committed by its "servant" (i.e., employee). Hirers of independent contractors, however, were not responsible for negligent acts committed by the contractors. The common law test that evolved to distinguish employees from independent contractors focused on whether the alleged employer had the right to control the alleged employee. Use of a "control test" to distinguish "servants" from "contractors" was announced in both the United States and Britain by 1850, but the test gained wide currency only in the following decades.<sup>30</sup> In the same time frame the right to control also became dispositive of liability under the law of the "joint enterprise," under which persons with joint rights of control over an instrumentality of harm are jointly liable for any harm caused by either of them.<sup>31</sup>

These doctrinal developments—by which one party answered for a second party's negligence only if the first party had a right to control the second's actions—took place in industrial contexts, with little similarity to the cases discussed here. In those settings the person or entity that was potentially vicariously liable was generally a defendant, not a plaintiff. Accordingly, the boundary on vicarious liability imposed by these rules generally worked to *limit* compensation to accident victims. But as the rules became dogmas of tort law rather than novel doctrines with limited application, courts began following their logic in nonindustrial settings as well, and the outcomes in the wife-passenger cases began to shift in favor of the female accident victims. As early as the 1890s,<sup>32</sup> and overwhelmingly in the first decades of the twentieth century,<sup>33</sup> courts found it no longer sufficient for defendants to argue that the negligence of the husband should be imputed to the wife by reason of the marital relation. Using either doctrinal label—*respondeat superior* or joint enterprise—the crucial issue for assessing liability was whether the injured passenger had the right to control the driver. If she did, then any contributory negligence of the driver would be imputed to her. Thus defendants accused of negligently causing injury to a wife-passenger, and seeking to avoid liability by accusing her of contributory negligence, now had to contradict contemporary gender norms and argue that the wife was the "master" of the "servant" husband or that they were engaged in a joint enterprise. As summarized in one court: "The negligence of the husband is not to be imputed to the wife unless he is her agent in the matter in hand, or they are jointly engaged in the prosecution of a common enterprise."<sup>34</sup> Another court emphasized the role of control: "Negligence on the part of a husband in driving an automobile, therefore, cannot be imputed to his wife who is

riding with him, unless the parties are engaged in an enterprise giving the wife the power and duty to direct or to assist in the operation and management of the car.”<sup>35</sup>

Doctrinally, then, the consequence of an unchanging understanding of the marital relationship was thus inverted. Where earlier the rationale for imputing a husband’s negligence to his wife had been the wife’s lack of control, now that very lack of control allowed her to win her case.

Courts implementing these doctrinal changes described very different types of moral intuitions than the courts that had held women to their husbands’ care. In the very earliest case that refused to impute a husband’s negligence to his wife, the court commented: “In our opinion, there would be no more reason or justice in a rule that would, in cases of this character, inflict upon a wife the consequences of her husband’s negligence, solely and alone because of that relationship, than to hold her accountable at the bar of eternal justice for his sins because she was his wife.”<sup>36</sup>

Success for defendants under the new doctrinal categories appears to have been rare, because it took unusual circumstances to create a joint enterprise. In a 1921 Wisconsin case, for example, the court stated: “In one sense husbands and wives in their journey through life are always engaged in joint enterprises, sometimes successful, sometimes disastrous. But the mere fact that they travel in the same car . . . does not constitute a joint enterprise within the meaning of the rule under decision.”<sup>37</sup> But even though they had grown to recognize women’s individuality, courts did not alter their views of women’s limited authority. Judges simply were reluctant to entertain the idea that a wife controlled her husband, or at least his driving. The ideological component of such reluctance was brought out in an 1897 Kansas case:

Say what we may in advocacy of the civil and political equality of the sexes, there are conditions of inequality between the same in other respects which the law recognizes, and out of which grow differing rights and liabilities. . . . By the universal sense of mankind, a privilege of management, a superiority of control, a right of mastery . . . is accorded to the husband, which forbids the idea of a co-ordinate authority, much less a supremacy of command in the wife. His physical strength and dexterity are greater; his knowledge, judgment, and discretion assumed to be greater; all sentiments and instincts of manhood and chivalry impose upon him the obligation to care for and protect his weaker and confiding companion; and all these justify the assumption by him of the labors and responsibilities of the journey, with their accompanying rights of direction and control.<sup>38</sup>

Even without this kind of express substantive theory of the proper relationship between husband and wife, the courts sometimes simply acted on their perception of social reality. For example, the Kansas Supreme Court said, in 1913:

Common sense would dictate that when a wife goes riding with her children in a rig driven by her husband, she rightfully relies on him not to drive so as to imperil those in his charge. The law does not depart from common sense by requiring her under the circumstances shown here to impugn her husband’s ability to drive and assume the prerogative to dictate to him the manner of driving. With one child on her lap, and another sitting next to look after, she might with human and legal fairness and propriety leave the driving in the exclusive care of the husband and father. . . . She frankly testified that she was “scrooched down,” holding her baby, and “gawking around at things.”<sup>39</sup>

Courts, then, refused to punish women passengers for acting as gender norms dictated, and leaving the responsibility for safe driving to their husbands.

Cases involving accidents that occurred where a wife was driving a car owned by her husband-passenger underscore the gendered nature of this analysis. A husband’s car ownership, unlike a wife’s,<sup>40</sup> seems invariably to have ensured that any contributory negligence his wife committed would be imputed to him. That the wife had direct control over the wheel simply did not suffice to outweigh the ideological imperative of male control. Thus, in 1923, the Arkansas Supreme Court held that the plaintiff’s wife’s negligence in driving his car would be imputed to him, because he “owned the automobile, and was in no sense a guest of his wife, so he had control, along with his wife, over the movements of the car.”<sup>41</sup> The Kentucky Court of Appeals agreed, in a case in which the plaintiff, “who had been an invalid for some time, was riding in his automobile with his wife who was operating the machine.” The court held that her contributory negligence was imputable to him, because she was “his agent in the operation of his automobile at the time of the collision.”<sup>42</sup> Indeed, the same rule applied against a husband-owner when he was not even in the car, so long as he had authorized its use by his wife.<sup>43</sup>

Although the contributory negligence of a husband-driver was not generally imputable to his wife-passenger by 1890–1900, the issue of contributory negligence remained present. In cases involving husbands and wives, and other female passengers and male drivers, juries were asked to evaluate the passenger’s actions to see if she had exercised ordinary care. This judgment, too, was imbued with gender-specific realities and assumptions. In order to recover, an



injured woman had to negotiate a tricky rhetorical path. First she had to claim that she was not in control of the car, because that might suggest a joint enterprise or agency relationship and accordingly defeat recovery. At the same time, if she asserted too vehemently her own lack of control, she risked being judged to have trusted so completely to the care of the man driving as to constitute contributory negligence. The idea that a woman-passenger could be found guilty of contributory negligence for relying on her husband to take care acted as a check on the new recognition of wives' agency. In effect, a wife could forfeit her new legal claim to individuality by a complete failure to guard her own safety.<sup>44</sup>

More often, however, courts in female-passenger cases featured the rule that "the same degree of care is not required of a passenger riding in an automobile as is required of the driver of the car."<sup>45</sup> Occasionally courts made explicit the precise role that gender played in such cases. In an 1897 federal case involving a female passenger in a hack, the trial court, later affirmed on appeal, charged the jury:

I am inclined to think that, if this plaintiff were a man suing for a recovery, I should be constrained to advise you that he could be no more relieved from the duty of looking out for the train than the driver of the wagon; but this plaintiff being a woman, a person who is not accustomed, or very much accustomed, to such places, and to going in this fashion from one depot to another, I think it is a matter fairly for your consideration whether she used the care and diligence which should be expected of a person in her situation, in going across this road.<sup>46</sup>

This case makes explicit the judicial expectation of women's cession of public spaces to men, and how such expectation influenced the analysis of contributory negligence.<sup>47</sup> Such cases etched the gendered ideology of separate spheres and the masculinization of public spaces into the law of personal injury in a way that benefited the actual female accident victims, making their compensation more likely.

### Conclusion

This chapter has examined, in some detail, reported court opinions between 1860 and 1930 involving women injured in car and wagon accidents. The opinions show that common law courts, far from naively erasing gender by subsuming women into the male category of "reasonable men" or a purportedly neutral, but no less male, category of "reasonable persons," actually

treated gender as an important factor in assessing appropriate standards of care, when perceived gender difference was highlighted. Ideas about women's autonomy and authority suffused judicial analyses of women's right to recover in tort. The opinions also establish the variety of responses available and taken even by jurists who shared a view of women's lesser authority and competence in the realm of marriage and transportation. The role of gender in these cases was not only unhidden, it was complex and mediated by other tort doctrines.

Moving from the descriptive and historical to the normative, it is tempting—but unfair—to give these cases a failing feminist grade, concluding that they implemented an anti-female ideology of women's subordinate position in marriage and, more generally, in society. True, to acknowledge women's lesser authority or capability and embody that acknowledgment in, for example, a jury instruction could be seen as reinforcing a coercive and subordinating hierarchy by rewarding an accident victim's compliance with it. The accusation has particular force for the opinions that exhibited their authors' particular relish in women's subordinate role. But a more appropriate evaluation emphasizes that judicial refusal to recognize the social and ideological reality of women's lesser authority or skill would have imposed an unduly high standard of self-care on women—a standard that would have required them to rebel against the gender role strictures of society. Rather than coercing compliance with gender norms, the recognition of women's subordinate role simply avoided punishing individual accident victims for such compliance.

### NOTES

1. This chapter is based on the much longer treatment in Margo Schlanger, *Injured Women before Common Law Courts, 1860–1930*, 21 Harv. Women's L.J. 79 (1998), which includes a third category of opinions involving cases of women injured while getting on and off trains.

2. Oliver Wendell Holmes Jr., *The Common Law* 86–89 (1881) (1963).

3. 132 Eng. Rep. 490 (C.P. 1837) (Tindal, C.J.).

4. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Educ. 3, 22 (1988); see also, e.g., Robin L. West, *Relativism, Objectivity, and Law*, 99 Yale L.J. 1473, 1491 (1990).

5. Barbara Young Welke, *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920*, at 96 (2001). I have argued with Welke's specific interpretation of opinions involving women injured getting on and off trains, in Schlanger, *Injured Women before Common Law Courts*, *supra*.

6. See, e.g., Mary Ryan, *Womanhood in America: From Colonial Times to the Present* 113–19, 252 (3d ed. 1983); Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. Am. Hist. 9 (1988).

7. See, e.g., Virginia Scharff, *Taking the Wheel: Women and the Coming of the Motor Age* 1–7 (1991).

8. See Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 U. Pa. L. Rev. 705, 711 (1995); Patricia Cline Cohen, *Safety and Danger: Women on American Public Transport, 1750–1850*, in *Gendered Domains: Rethinking Public and Private in Women's History* 109 (Dorothy O. Helly & Susan M. Reverby eds. 1992).

9. 29 Conn. 204, 208–9 (1860).

10. 28 Mich. 32, 42 (1873).

11. 14 Me. 198, 199, 200 (1837).

12. 41 N.H. 317, 321–22 (1860).

13. See, e.g., Charles Fisk Beach Jr., A Treatise on the Law of Contributory Negligence § 260, 391 (John J. Crawford ed., 3d ed. 1899); Seymour D. Thompson, 1 Commentaries on the Law of Negligence in All Relations §§ 319–320, 339 (2d ed. 1901).

14. Michael Berger, *Women Drivers: The Emergence of Folklore and Stereotypic Opinion Concerning Feminine Automotive Behavior*, 9 Women's Stud. Int'l Forum 257, 258 (1986).

15. 8 C.B. 115 (1848), overruled by *Mills v. Armstrong* (*The Bernina*), 12 P.D. 58, 13 App. Cas. 1. (1888).

16. See *Chapman v. New Haven R.R.*, 19 N.Y. 341, 344 (1859); *Little v. Hackett*, 116 U.S. 366, 375 (1886). There were, however, scattered exceptions, chief among them Wisconsin and Montana (for a time), and Michigan (in non-common-carrier cases involving adults). For detailed discussions, see *Schultz v. Old Colony St. Ry.*, 79 N.E. 873 (Mass. 1907); *Cuddy v. Horn*, 10 N.W. 32 (Mich. 1881); *Mullen v. City of Owosso*, 58 N.W. 663 (Mich. 1894); and *Sherris v. Northern Pac. Ry.*, 175 P. 269 (Mont. 1918).

17. Thomas G. Shearman & Amasa Redfield, A Treatise on the Law of Negligence §46, 48–50 (1st ed. 1869).

18. 38 Vt. 440 (1866).

19. Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 Geo. L.J. 2127, 2127 (1994).

20. See, e.g., Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 Geo. L.J. 1359 (1983).

21. *City of Joliet v. Seward*, 86 Ill. 402, 402–3 (1877); see also, e.g., *Yahn v. City of Ottumwa*, 15 N.W. 257 (Iowa 1883); *Nisbet v. Town of Garner*, 39 N.W. 516, 517 (Iowa 1890); *Gulf C. & S. F. Ry. v. Greenlee*, 62 Tex. 344 (1884); *Prideaux v. City of Mineral Point*, 43 Wis. 513 (1878).

22. *Lapsley v. Union Pac. R.R.*, 50 F. 172, 181 (C.C.N.D. Iowa 1891).

23. 1 William Blackstone, Commentaries on the Laws of England 442 (1765).

24. There was, however, no reversal in many community property states, where injured wife-passengers continued to be denied recovery for many years. See, e.g., sources cited in Fleming James Jr., *Imputed Contributory Negligence*, 14 La. L. Rev. 340, 348 n.44 (1954).

25. The contemporary observation I have in mind is Letter from Elizabeth Cady Stanton to Gerrit Smith (Jan. 3, 1856), in *Elizabeth Cady Stanton: As Revealed in Her Letters, Diary, and Reminiscences* v. 2, 63 (Theodore Stanton and Harriot Stanton Blatch eds., 1969) (1922). I was alerted to this letter by Jacob Katz Cogan, Note, *The Look Within: Property, Capacity, and Suffrage in Nineteenth-Century America*, 107 Yale L.J. 473, 487 (1997). For examples of modern commentary, see, e.g., Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117, 2142 (1996); Siegel, *Marital Status Law*, 2149–57; *Bartrom v. Adjustment Bureau, Inc.*, 618 N.E.2d 1, 4 (Ind.

1993) (“[R]everberations from the lifting of coverture slowly resounded through the common law.”).

26. Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 New Eng. L. Rev. 319, 327 (1997).

27. I thank an anonymous peer reviewer for emphasizing this point. See, e.g., Kathryn Kish Sklar, *Florence Kelley and the Nation's Work: The Rise of Women's Political Culture, 1830–1900* (1995).

28. See Eleanor Flexner and Ellen Fitzpatrick, *Century of Struggle: The Woman's Rights Movement in the United States* (1996).

29. *Atlanta & C. Air-Line Ry. v. Gravitt*, 20 S.E. 550, 556 (Ga. 1894).

30. See *Shearman & Redfield*, §§ 73–74, 76–79, 82–84, 85–92; Gerald M. Stevens, *The Test of the Employment Relation*, 38 Mich. L. Rev. 188, 189–94 (1939); *Standard Oil Co. v. Anderson*, 212 U.S. 215 (1909).

31. See Fleming James Jr., *Vicarious Liability*, 28 Tul. L. Rev. 161, 210–12 (1954), and sources there cited; Joseph Weintraub, *The Joint Enterprise Doctrine in Automobile Law*, 16 Cornell L.Q. 320 (1931); Gilbert K. Howard, Note, *Negligence—Driver's Negligence Imputed to Passenger in Suit by Third Party*, 1 Baylor L. Rev. 492 (1948–49).

32. *Louisville, N. A. & C. Ry. v. Creek*, 29 N.E. 481 (Ind. 1892); *Reading Township v. Telfer*, 48 P. 134 (Kan. 1897); *Finley v. Chicago, M. & St. P. Ry.*, 74 N.W. 174, 174 (Minn. 1898).

33. As late as 1933 the issue was sufficiently live for the Supreme Court to treat the rule as open to question. See *Miller v. Union Pac. R.R.*, 290 U.S. 227, 232 (1933).

34. *Phillips v. Denver City Tramway Co.*, 128 P. 460, 464 (Colo. 1912).

35. *Stevens v. Luther*, 180 N.W. 87, 87 (Neb. 1920).

36. *Louisville, N.A. & C. Ry. v. Creek*, 29 N.E. 481, 482 (Ind. 1892).

37. *Brubaker v. Iowa County*, 183 N.W. 690, 692 (Wis. 1921).

38. *Reading Township v. Telfer*, 48 P. 134, 136 (Kan. 1897).

39. *Williams v. Withington*, 129 P. 1148, 1149–50 (Kan. 1913).

40. See, e.g., *Lucey v. Allen*, 117 A. 539 (R.I. 1922); *Southern Ry. v. Priestester*, 289 F. 945 (4th Cir. 1923); *Virginia Ry. & Power v. Gorsuch*, 91 S.E. 632, 633, 634 (Va. 1917).

41. *Wisconsin & Arkansas Lumber v. Brady*, 248 S.W. 278, 280 (Ark. 1923).

42. *Standard Oil Co. of Kentucky v. Thompson*, 226 S.W. 368, 369, 379 (Ky. 1920); see also *Gochee v. Wagner*, 178 N.E. 553 (N.Y. 1931).

43. *Stickney v. Epstein*, 123 A. 1, 4 (Conn. 1923).

44. See, e.g., *Fogg v. New York, N. H. & H. R.R.*, 111 N.E. 960, 962 (Mass. 1916); *Whitman v. Fisher*, 57 A. 895 (Me. 1904).

45. *Waring v. Dubuque Elec.*, 186 N.W. 42, 43 (Iowa 1922) (per curiam).

46. *Denver & R. G. R.R. v. Lorentzen*, 79 F. 291, 292–93 (8th Cir. 1897).

47. See also, e.g., *Corn v. Kansas City C. C. & St. J. Ry.*, 228 S.W. 78, 82 (Mo. 1920); *Denton v. Missouri, K. & T. Ry.*, 155 P. 812, 813 (Kan. 1916).