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Imputed Contributory Negligence - Master Servant Relation - Not a Bar to Master's Recovery in Automobile Cases

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at the same time enable a defendant to properly defend himself against the claim being made.

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IMPUTED CONTRIBUTORY NEGLIGENCE—MASTER SERVANT RELATION—NOT A BAR TO MASTER'S RECOVERY IN AUTOMOBILE CASES—The plaintiff was riding as a passenger in his own truck which was being driven by his employee. The truck collided with another truck owned by the defendant corporation and operated by its employee. Plaintiff brought suit against the corporation to recover for his own personal injuries and damage to his truck, alleging negligence on the part of the defendant's driver. The defendant denied any negligence and alleged the contributory negligence of the plaintiff's driver which when imputed to the plaintiff would bar recovery. The trial court instructed the jury that, if they found the plaintiff's driver to be contributorily negligent, then as a matter of law the contributory negligence would be imputed to the plaintiff. The jury's verdict was in favor of the defendant and judgment was rendered accordingly. The plaintiff appealed to the Minnesota Supreme Court and argued that the doctrine of imputed contributory negligence was unjust and ought to be abandoned. The Supreme Court *held* that, although the master may have been vicariouslly liable for any injuries suffered by the third party as a result of his servants negligence, the master can not be barred from recovery for his own injuries and damages caused by the negligent third party, even though the servant was contributorily negligent.

In reversing the lower court and granting a new trial, the supreme court expressly limited its abandonment of the doctrine of imputed contributory negligence to automobile negligence cases.[1] *Weber v. Stokely-Van Camp, Inc.*, 274 Minn. 482, 144 N.W.2d 540 (1966).

The doctrine of imputed contributory negligence is the device whereby the plaintiff is denied recovery against the defendant when the negligence of another is "imputed" to the plaintiff because of

1. There was a second issue decided by the Minnesota Supreme Court, that of whether or not the procurring of affidavits from a juror after the trial, relating to the conduct or discussions during deliberations, may be used to impeach a verdict. The trial court's conclusion, based on affidavits and counter-affidavits, that the alleged misconduct was not sufficient to warrant a new trial, was affirmed. This issue will not be discussed within this article.

the existence of some relationship with the latter, usually agency or employment.[2]

Under the common law, liability for negligence is based upon fault.[3] However, the courts have permitted, where a certain relationship exists between the parties, such as master and servant,[4] a fiction to be created so as to impose liability upon the master though he may not have personally participated in or had knowledge of the servant's act.[5] Such imposed liability is termed "vicarious liability".[6] It is the theoretic right to control the conduct of the servant which is the fiction and the foundation of the doctrine of imputed negligence.[7]

There are many reasons for imputing the negligence of a servant to his master in a suit by an injured third party,[8] but probably the most popular is to provide the injured person with a financially responsible defendant.[9] One author phrased it as providing a "Deep Pocket" into which the injured plaintiff may reach for compensation.[10]

During the latter part of the 19th century the doctrine of imputed contributory negligence had its inception.[11] In 1849 an "unfortunate" English decision imputed the negligence of the driver of an omnibus to his passenger, who was injured through the negligent operation of another vehicle. The passenger's right of recovery for injuries suffered was precluded on the theory that since the passenger had selected that particular means of conveyance he in fact became "identified" with its driver and a party to the negligent act.[12]

In 1886, the United States Supreme Court, in deciding whether the negligence of a public hack-driver would be imputed to his

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2. Henniss, *Imputed Contributory Negligence,* 26 TENN. L. REV. 531 (1959):
"As the doctrine assumes the plaintiff's innocence of actual negligence, imputed negligence is the best understood as *transferred* negligence; *See generally*: Gregory, *Vicarious Responsibility and Contributory Ngligence.* 41 YALE L. J. 831 (1932); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence.* 20 FORDHAM L. REV. VEF (1951); 2 HARPER & JAMES, THE LAW OF TORTS § 21.1 (1956) (referred to as HARPER & JAMES, hereinafter); PROSSER, TORTS § 73 (3rd ed. 1964) (referred to as PROSSER, hereinafter).
3. *See* HARPER & JAMES § 14.1; PROSSER § 74.
4. For the purposes of this article the term master will be synonomous with employer; also, servant with employee.
5. *See* HARPER & JAMES § 26.1; PROSSER § 68.
6. *Supra* note 5.
7. Little v. Hackett, 116 U.S. 366 (1886).
8. *Supra* note 5.
9. Weber v. Stokely-Van-Camp, Inc., 274 Minn. 482, 144 N.W.2d 540 (1966) (dictum).
10. PROSSER § 68 n. 7.
11. Weber v. Stokely-Van Camp, Inc., *supra* note 9, at 541 (dictum); PROSSER § 73.
12. Thorougood v. Bryan, 8 C.B. 115, 137 Eng. Rep. 452 (1849). This decision was overruled by England's House of Lord's, within forty years, in Mills v. Armstrong (The Bernia), 12 P.D. 58, 13 A.C. 1 (1888). But in the interim, various courts in the United States specifically referred to the English decision as the basis for adopting the same doctrine: Brown v. N.Y. Cent. R.R., 31 Barb. 385 (N.Y. 1860); Lockhart et al. v. Lichtenthaler et al., 46 Pa. 151 (1865); Prideaux v. Mineral Point, 43 Wis. 513 (1878); *See* PROSSER § 73 for the comment that Thorogood v. Bryan was an "unfortunate" decision.

passenger so as to bar recovery against a negligent third party, expressly repudiated the English doctrine based upon its theory of "identification".[13] The Supreme Court refused to impute the driver's negligence and declared that:

> The passenger has no control over the driver or agent in charge of the vehicle. And it is this right to control of the agent which is the foundation of the doctrine that the master is to be affected by the acts of his servant.[14]
>
> In the absence of this relation, the imputation of [the driver's] negligence to the passenger, where no fault . . . is chargeable to him, is against all legal rules.[15]

The rule has evolved that where a vicarious relationship exists, the negligence of the one, for example the servant, is imputed to the master barring the latter's right of recovery even though he is actually innocent of any fault.[16] The test which is used to determine the existence of such a relationship is the so-called "Both-Way test":[17] if the master is vicariously liable to a third party due to the servants negligence he is also barred from recovery for any losses suffered as a result of his servant's contributory negligence.[18]

In the present case the plaintiff did not dispute the doctrine of imputed negligence or vicarious liability itself, but rather, the application of the "both-way" rule to the doctrine, which resulted in the "universally accepted"[19] companion doctrine of imputed contributory negligence. The Minnesota Supreme Court analyzed the logic of applying the both-ways rule to the doctrine of imputed

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13. Little v. Hackett, *supra* note 7; *See also* PROSSER § 73 "The American cases which accepted (the English doctrine) now have been overruled everywhere." Reiter v. Grober, 173 Wis. 493, 181 N.W. 739 (1921); Bunting v. Hagsett, 139 Pa. 363, 21 A. 31 (1890). Michigan was the last state to abandon the idea: Bricker v. Green, 313 Mich. 218, 21 N.W.2d 105 (1946).

14. Little v. Hackett, *supra* note 7, at 376.

15. Little v. Hackett, *supra* note 7, at 375.

16. Weber v. Stokely-Van Camp, Inc., *supra* note 9, at 542 (dictum).

17. Weber v. Stokely-Van Camp, Inc., *supra* note 9, at 542 n.3, "The term was probably coined by Gregory, *Vicarious Responsibility and Contributory Negigence*. 41 YALE L. J. 831 (1932)".

18. Weber v. Stokey-Van Camp, Inc., *supra* note 9 (dictum); Frankle v. Twedt, 234 Minn. 42, 45, 47 N.W.2d 482, 486 (1951). The Minnesota court made it quite clear when it said: "On the basis of an agency relationship, the negligence of an agent is imputed to his principal as a bar to the latter's right of recovery, in an action which he brings against a third party, *only* when the nature of the agency relationship is such that the principal would be subject to a vicarious liability as a defendant to another who may have been injured by the agent's negligence." RESTATEMENT OF TORTS § 486 (1934) specifically adopted the both-way rule, where a master-servant relationship exists, and it was incorporated into the RESTATEMENT (SECOND) OF TORTS § 486 (1965).

19. Weber v. Stokely-Van Camp, Inc., *supra* note 9, at 542; *e.g.*, Drewery v. Daspit Bros. Mariner Divers, Inc., 317 F.2d 425 (5th Cir. 1963); Airline v. Brown, 190 F.2d 180 (5th Cir. 1951); Miller v. U.S., 196 F.Supp. 613 (Mass. 1961); Watts v. Safeway Cab, 193 Ark. 413, 100 S.W.2d 965 (1937); Hightower v. Landrum, 109 Ga. App. 510, 136 S.E.2d 425 (1964); Louisville & N.R. Co. v. Tomlinson, 373 S.W.2d 601 (Ky. Ct. App. 1964); Willis v. Grain Dealers Mutual Insurance Co.,—La.—, 185 So.2d 912 (1966);

negligence in the master-servant situation, just as it had in previous cases when the doctrine based on bailor-bailee relationships was repudiated.[20] The court concluded that:

> [T]he time has come to discard this rule which is defensible only on the grounds of its antiquity. In doing so we realize we may stand alone, but a doctrine so untenable should not be followed so as to bar recovery of one entitled to damages.[21]

The development of the automobile with its corresponding growth of auto accident problems, and the plight of uncompensated accident victims led to the increasing pressure for providing financially responsible defendants. The response to this pressure was the extention of vicarious liability and the doctrine of imputed negligence to other situations where the negligence of the driver is imputed to another exclusive of any actual agency or vicarious relationship.[22] One such extention was by the court-made "family-car" or "family-purpose" doctrine, which according to Prosser, was adopted by half of the states,[23] including North Dakota.[24] Under the "family-car" doctrine, the head of the household, usually the father, is liable for the negligence of any member of the household who injures another while operating the family car within the purpose for which the vehicle was intended.[25]

Other jurisdictions enacted "automobile consent statutes" which imposed liability on the automobile owners for the negligence of anyone operating the car with the owner's consent.[26]

The courts are not in agreement as to whether or not the both-way rule is to be applied to the family-car doctrine,[27] or to the

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Emmco Ins. Co. v. California Co., 101 So.2d 628 (La. Ct. App. 1958); Peterson v. Schneider, 154 Neb. 303, 47 N.W.2d 863 (1951); George Siegler Co. v. Norton, 8 N.J. 374, 86 A.2d 8 (1951); Clemens v. O'Brien, 85 N.J. Super. 404, 204 A.2d 895 (1964); Forga v. West, 260 N.C. 182, 132 S.E.2d 357 (1963); James, *Imputed Contributory Negligence.* 14 LA. L. REV. 340 (1954).

20. Christensen v. Hennepin Transp. Co., Inc., 215 Minn. 394, 10 N.W.2d 406 (1943) *Held,* the bailee's negligence is not imputed to the bailor in an action by the latter against a third party; followed by, Jacobson v. Daily, 228 Minn. 201, 36 N.W.2d 711 (1949); *See generally* RESTATEMENT (SECOND) OF TORTS § 489 (1965).

21. Weber v. Stokely-Van Camp, Inc., 274 Minn. 482, 487, 144 N.W.2d 540, 545 (1966).

22. HARPER & JAMES § 23.6 n.4; 14 LA. L. REV. 340 *supra* note 19.

23. Jacobsen v. Daily, *supra* note 20; PROSSER § 72; 40 U. DET. L. J. 268 (1962).

24. Ulman v. Lindeman, 44 N.D. 36, 176 N.W. 25 (1919).

25. *Supra* note 23.

26. An example of such is Minnesota's statute which provides that: " . . . (any operator who has either the) . . . expressed or implied . . . (consent of the owner) . . . shall . . . be deemed the agent of the owner . . . ." MINN. STAT. ANN. § 17.54 1960). This statute supersedes the family-purpose doctrine which had previously been adopted by Minnesota in Jacobsen v. Daily, *supra* note 20; *See also* IOWA CODE ANN. § 321.493 (1966). For a general discussion of various consent statutes see York v. Day's, Inc., 158 Me. 441, 140 A.2d 730 (1950).

27. Lucey v. Allen, 44 R.I. 379, 117 A. 539 (1922), *Held,* the contributory negligence of the husband-driver is imputed to the wife owner-passenger to bar her recovery under the family purpose rule. Michaelsohn v. Smith, 113 N.W.2d 571, 574 (N.D. 1962), *Held,* that any contributory negligence of the owner's minor son was not imputable to the

automobile consent statutes.[28]

In the jurisdictions which have consent statutes, it is a question of statutory construction, whether or not the liability imposed upon the consenting owner is to be imputed to him when he is the plaintiff in the suit. Some courts, in interpreting their respective statutes, have determined, just as North Dakota did under its family-purpose rule,[29] that the sole purpose of the statute is to provide a "deep pocket" for the injured party.[30] Based upon this construction the courts have reasoned that when the owner is the injured party there is no need of a "deep pocket", therefore, no legislative purpose would be served by imputing the negligence both-ways.[31]

California is one jurisdiction which has no problem interpreting its consent statute, for the statute expressly states that the negligence of the consent driver "shall be imputed to the owner for all purposes of civil damages."[32] One author points out that such a statute:

> leads to the paradox that a rule which departed from the common law in response to an urge towards wider liability is used to curtail liability by expanding the scope of a defense to it.[33]

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owner under the family purpose doctrine. The whole purpose of the invention has been to protect injured plaintiffs against financial irresponsibility, rather than to cut down on their recoveries. With this view the court said that "To extend the doctrine to deny the right of a non-negligent car owner to recover from a negligent driver of another car (through the application of the both-way rule) . . . would defeat the public policy the doctrine is intended to serve."

28. *See generally* Mills v. Gabriel, 259 App. Div. 60, 18 N.Y.S.2d 78, aff'd. 284 N.Y. 751, 13 N.E.2d 512 (1940), *Held,* the both-way rule does not apply; McMartin v. Saemisch, 254 Iowa 45, 116 N.W.2d 491 (1962), *Held,* the contributory negligence of the consent driver is not imputable to the owner under the automobile owners consent statute; IOWA CODE ANN. 321.493. York v. Day's, Inc., *supra* note 26. The court reasoned that since the owner would not be liable at common law for the negligence of a consent driver absent any special relationship, to construe the statute both-ways without an expressed legislative provision would be to make an innovation upon the common law. In 1931 a New York court viewed the application of the both-ways rule as broadening the scope of the doctrine of contributory negligence which is contrary to the "modern trend of the law . . . (toward limiting) . . . the effect of that doctrine." Gouchee v. Wagner, 232 App. Div. 401, 250 N.Y.S. 102, 105 (1931). *Cf.* National Trucking & Storage Co. v. Driscoll, 64 A.2d 304, 305 (D.C. Munic. App. 1949), under a statute similar to Minnesota's in that the "operator (is) deemed to be the agent of the owner . . .", the driver's negligence is imputed both-ways. The rationale of the court was that if the driver is to be deemed the owner's agent by statute, then under the common law principles of agency the owner would be liable whether plaintiff or defendant. For a discussion of various consent statutes, *see* note, 31 NOTRE DAME L. 724 (1956).

29. Michaelsohn v. Smith, *supra* note 27.

30. Stuart v. Pilgrim, 247 Iowa 709, 74 N.W.2d 212 (1956); Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711 (1949); Christensen v. Hennepin Transp. Co., Inc., 215 Minn. 394, 10 N.W.2d 406 (1943).

31. *Supra* note 30.

32. CAL. VEHICLE CODE § 17150 (West 1960); *See generally* Lambert v. Southern Counties Gas Co., 52 Cal. App.2d 327, 340 P.2d 608, 611 (1959), "[T]he phrase 'all purposes of civil damages' indicates application of the statute to 'all cases where the rights and obligations of the owner are involved in civil action for damages' . . . regardless of whether the owners be plaintiffs . . . or whether the owner be the defendant." *See also* Milgate v. Wraith, 19 Cal. App.2d 297, 121 P.2d 10 (1942).

33. HARPER & JAMES § 23.6 at 1274: The argument which is made in favor of hold-

Although some of the courts have construed consent statutes as imputing negligence only one-way,[34] some have held that the mere presence of the owner in the car at the time of the accident pre-supposes the concomitant control or right to control upon his part. Consequently, the owner will be barred from recovery on that basis, apart from statute, even though the owner was sitting in the back seat,[35] or was an invalid.[36]

A recent decision, however, has analyzed the factual relationship of the occupants of the car, and the owner's presence does not establish, as a matter of law, a right of control in the owner.[37] The present trend is toward a rule more consistent with the facts of life today.[38] Before the contributory negligence of a driver will be imputed to a passenger-owner, there must be, not only some right of control over the driver or an intention to control, but also actual control or an attempt to exercise such control.[39] Thus, in the case where the owner was a passenger asleep on the back seat at the time of the collision, the negligence of the driver of the auto was not imputed to the owner.[40] Similarily, in a case where the owner-passenger did not have a driver's license and did not know how to drive, the driver's contributory negligence was not imputed to the owner.[41] In New York "the application of the doctrine of imputed negligence depends upon circumstances involved and must yield to reason."[42]

North Dakota follows those jurisdictions which take a realistic approach in applying the doctrine of imputed negligence. In a recent North Dakota decision the instant case was relied upon when the Supreme Court of North Dakota found reversible error in a trial court's instruction that "There is a presumption . . .

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ing the owner liable both-ways is that there is a second purpose to be served under the consent statutes. This secondary aim is to induce a degree of care in the car owners in selecting persons to whom they entrust the car: National Trucking & Storage Co. v. Driscoll, *supra* note 28. The counter-argument to this is that the liability which the statute imposes on the owner is the strongest incentive to that end, and little will be added to it by cutting the innocent off from recovery for his own property damage.

34. Mills v. Gabriel; York v. Day's, Inc.; Gouchee v. Wagner, *supra* note 28.

35. Gouchee v. Wagner, *supra* note 28.

36. Standard Oil v. Thompson, 189 Ky. 830, 226 S.W. 368 (1920).

37. Linder v. State, 268 N.Y.S.2d 760 (1966).

38. Greyhound Lines, Inc. v. Caster, 216 A.2d 689 (Del. 1966). Linder v. State, *supra* note 37; Jasper v. Freitag, 145 N.W.2d 879 (N.D. 1966); Weber v. Stokely-Van Camp, Inc., 274 Minn. 482, 144 N.W.2d 540 (1966); Parker v. McCartney, 216 Ore. 283, 338 P.2d 371 (1959).

39. Johnson v. Los Angeles-Seattle Motor Express, Inc., 222 Ore. 377, 352 P.2d 1091 (1960).

40. Greyhound Lines, Inc. v. Caster, *supra* note 38.

41. Linder v. State, *supra* note 37; Parker v. McCartney, *supra* note 38.

42. Linder v. State, *supra* note 37: "To say a person who never has driven nor was licensed to drive an automobile had the legal right to control the operation of an automobile being driven by an experienced and licensed driver is not in the interest of the public safety. We cannot ignore completely the practical considerations involved in the operation of vehicles on the highways and find he could have exercised control over the operation of the automobile."

that an owner present in his or her car has the power to control it."[43] As pointed out by both the North Dakota court and the Minnesota court, in the instant case:

> the realities of the operation of a vehicle on a highway cannot be overlooked in dealing with the rights and obligations of persons in the car. Nothing could be more dangerous, while operating a car in congested traffic, than to permit the master or owner, riding as a passenger in his car, to interfere constantly with the driving of the car. To do so would be the clearest evidence of active negligence on the part of such owner-passenger.[44]

It was with this view of reality that the Minnesota Supreme Court abandoned the doctrine of imputed contributory negligence in automobile cases. The court could find "[N]o way to rationalize the rule . . ."[45] which:

(1) Permitted liability without fault. . .

(2) Was based upon a fiction of theoretic right of control. . .

(3) Denied a remedy to an injured innocent person. . .

(4) Absolved from liability a person whose negligence has resulted in harm. . .

without any compensating social end being served.

It is submitted that although the courts should strive to be as realistic as possible and avoid archaic fictions, as the Minnesota Supreme Court did in the present case, they should also, prior to abandoning a rule of law, review the principles upon which that rule has developed. One basic theory or principle underlying the doctrine of imputed contributory negligence and the concept of a master's being vicariously liable for the negligent acts of his servants is that, while an employee is engaged in the performance of his duties, he is, in effect, in the furtherance of an enterprise which the employer has set in motion for his own monetary gain. Any liabilities for wrongs committed during the functioning of this enterprise should be borne by the same. Any losses suffered by the enterprise, as a result of any negligence attributable to the

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43. Jasper v. Freitag, *supra* note 38 at 885. The injured plaintiff was the owner-passenger in her auto which was being driven by her husband when it collided with the rear of an oil truck on a public highway. The court at 886 *held* that "[T]he question submitted to the jury . . . should have been whether, under the circumstances of this case, the plaintiff was negligent in failing to control the driving of her husband, not whether the plaintiff, as owner, had the right to control."

44. *Supra* note 38, at 886.

45. Weber v. Stokely-Van Camp, Inc., *supra* note 38, at 545. Although the court has expressly limited this decision and the abandonment of the doctrine of imputed contributory negligence to automobile cases, it has expressly left the door open to "(O)ther situations where the same result should follow . . . ."

enterprise, should be absorbed as a cost of that enterprise. This loss is not to be shifted to a negligent defendant who under the common law doctrine of contributory negligence, would normally have an affirmative defense against such a transfer. This being the net result of the present decision, then, the overall effect is not only the weakening of the common law doctrine of contributory negligence, but also the erosion of the foundation upon which the concept of vicarious liability of a master rests.

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PRODUCTS LIABILITY — STRICT PRODUCTS LIABILITY — ABSOLUTENESS OF STRICT LIABILITY IN TORT—A customer who was injured when a soft drink bottle fell from a cardboard six-pack carton as she attempted to remove it from a shelf in a grocery store brought an action for personal injuries. Subsequently, the grocery store was awarded indemnity against the bottler for any sum it might be ordered to pay the customer. The court awarded plaintiff two thousand dollars on the new strict liability doctrine with one vigorous dissent attacking this new doctrine. *Kroger Co. v. Bowman*, 411 S.W.2d 339 (Kentucky 1967).

The Kentucky Supreme Court faced the problem of strict liability in tort and had to determine the extent of liability which a manufacturer is to be held in evidence of a defect in his product. In other words, whether or not to distinguish between the theory of absolute liability such as is found in cases dealing with ultra-hazardous activities[1] or dangerous animals[2] and the strict or "special" liability of a manufacturer to the ultimate user or consumer?

In the United States, the law of products liability has developed along various legal theories from the old doctrine of *caveat emptor* or "let the buyer beware." Until recently the notable characteristic of all these advancements toward increased seller's liability was that they required fault. The order of theories tending to increase the liability included: express warranty with privity; negligence in the absence of privity in inherently dangerous goods; express warranty without privity; and, lastly, implied warranty without privity. Since 1960, a few jurisdictions have taken a dras-

1. Boyd v. White, 128 Cal. App.2d 641, 276 P.2d 92 (1954).
2. Zarek v. Fredericks, 138 F.2d 689 (3rd Cir. 1943).