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Automobiles - Imputation of Negligence under Safety Responsibility Statutes - Agency and Bailment Theories

Richard L. Healy

NOTES

AUTOMOBILES — IMPUTATION OF NEGLIGENCE UNDER SAFETY RESPONSIBILITY STATUTES—AGENCY AND BAILMENT THEORIES. The avowed purpose of safety responsibility statutes is to impose financial liability for injuries to third persons upon the owner of the automobile causing the injury. The theory upon which liability is attached is that the negligence of the driver is imputed to the owner. Imputation of negligence in suits by the third party against the owner serves the purpose of the statute and no problem arises, but where the owner sues the third party for damages to car or person, the difficult question arises as to whether the defendant will be allowed the defense of contributary negligence—arguing that there is an imputation of negligence from the driver to owner.[1] The solution resolves on the narrow issue of whether the statute creates a bailment or an agency between driver and owner—the general rule being that there is no imputation in bailment cases while there is an imputation in agency cases.[2]

The safety responsibility statutes provide a remedy for an injured third person where at common law there was none.[3] Until 1897 contributory negligence of a bailee was imputed to the bailor when the latter sued for damages to the bailed article on the common law concept of there being an inseparable identity of property interests between the bailor and bailee.[4] The modern concept is one of separate property interests so that there is no imputation of negligence in the absence of a relationship between the bailor and bailee which would make the bailor liable to the third person as defendant.[5] The relationship referred to is usually either that of a master-servant[6] or one of joint enterprise[7].

Adopting the modern view of property interests between bailor and bailee the court held in *Christensen v. Hennepin Transp. Co.*[8] that the

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[1] Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406 (1943).

[2] Prosser, Torts 417 (1941). Restatement, Torts § 485 (1934).

[3] Without statutory declaration, a bailor is not liable to third persons for harms caused by the negligent use of the bailment. Gardner v. Farnum, 230 Mass. 193, 119 N.W. 666 (1918); Slater v. Advance Thresher Co., 97 Minn. 305, 107 N.W. 133 (1906).

[4] Thorogood v. Bryan, 8 C.B. 115, 137 Engl. Rep. 452 (1849).

[5] New York L.E. & W. Ry. v. New Jersey Electric Ry., 60 N.J.L. 338, 38 Atl. 828 (1897); *accord*, Rodgers v. Saxton, 305 Pa. 479, 158 Atl. 166 (1931); Nash v. Lang, 268 Mass. 407, 167 N.E. 762 (1929). *Contra*: Munster v. Hexter, 295 S.W. 245 (Tex. Civ. App. 1927); Illinois Cent. Ry. v. Sims, 77 Miss. 325, 27 So. 527 (1900). Restatement, Torts § 489 (1934).

[6] Prosser, Torts 471 (1941). See note, 8 Wash. & Lee L. Rev. 100 (after passage of Married Women's Act separating identity of wife and husband, negligence was often imputed on the theory of one spouse being agent of the other).

[7] Prosser, Torts 418 (1941).

[8] 215 Minn. 394, 10 N.W.2d 406 (1943).

Minnesota statute[9] created a limited agency which did not impute the negligence of the bailee to the bailor in a suit by the latter against the third party for injuries to his automobile. The husband, co-owner of the car with his wife and guilty of contributory negligence in the collision, was alleged by his plaintiff-wife to be in control and custody of the car at all times, and driving the car with her consent—she being his invitee.[10] The defense was predicated on two theories: that as a matter of law the relationship between the bailee and bailor gave the latter a right of control upon which the negligence was imputed, and that the safety responsibility statute imputed the negligence so as to bar plaintiff's action. The first line of defense failing,[11] defendant argued that the statute created an agency between bailor and bailee for all purposes. Rejecting the defendant's argument, the court quoted with approval from a Rhode Island decision that, ". . . the operator is not thereby made the agent of the owner with all incidents of the law of principal and agent. The statute is intended to be operative and to impose liability when there is an accident and there is no existing agency."[12]

The precise issue raised is whether the agency created by statute is limited to suits by the third person so that no negligence can be imputed in a suit by the bailor. This issue is determined upon an analysis of the statutes which fall into three general classifications: (1) No question arises in the interpretation of the amended California statute which in addition to the usual provision that the owner of a motor vehicle should be liable and responsible for the negligence of another person driving the car in the business, or with the permission of the owner, provides that " . . . the negligence of such person

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[9] "Whenever any motor vehicle . . . shall be operated upon any public street or highway of this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof." Minn. Stat. Ann. § 170.54 (1946).

[10] If the owner is the guest of the operator of the car the owner can not be imputed with the negligence of the operator unless they were engaged in a joint enterprise or where the operator is the owner's servant or agent. Sanjean v. Hyman, 302 Mass. 224, 19 N.W.2d 3 (1939).

[11] The court held that in the absence of a joint enterprise, the marriage relationship between bailor and bailee does not as a matter of law create an agency between them. Darian v. McGrath, 215 Minn. 389, 10 N.W. 2d 403 (1943); Nash v. Lang, 268 Mass. 407, 167 N.E. 762 (1929). Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711 (1949); see note, 11 A.L.R.2d 1429 (1950). Neither the marriage relationship nor the fact that the car was being driven with the permission of the wife-owner imputed negligence to the bailor. New York Telephone Co. v. Schofield, 31 N.Y.S.2d 393 (1941). Co-ownership does not impute negligence when both husband and wife are in the car. Jenks v. Veeder Contracting Co., 177 Misc. 240, 30 N.Y.S.2d 278 (1941). Owner's mere presence in car will not preclude his recovery but is evidence of agency relationship or joint enterprise. Johnson v. Newman, 168 Ark. 836, 271 S.W. 705 (1925); Grover v. Sharp & Fellows Contracting Co., 66 Cal. App. 2d 736, 153 P. 2d 83 (1944); *cf.* Restatement, Torts § 491, comment h (1934).

[12] Kernan v. Webb, 50 R.I. 394, 148 Atl. 186 (1929).

shall be imputed to the owner for all purposes of civil damages."[13] (2) Statutes in the second classification are not so clear-cut and are subject to divergent interpretations. Minnesota, Rhode Island, and the District of Columbia have statutes providing that the operator shall be deemed the "agent" of the bailor-owner.[14] Illustrative of the interpretive split are Minnesota[15] and Rhode Island[16] holdings of no imputation of negligence under the statute and a contrary decision reached in a District of Columbia court.[17] (3) In the third classification are statutes which merely provide that "the owner of the motor vehicle shall be liable for the negligence of the driver."[18] Demonstrating the split in construing this class of statute are New York[19] and Michigan[20] decisions holding no imputation, with Iowa[21] on the other side of the fence.

Adopting legislative intent as the proper criterion for statutory interpretation, the majority view that there is no imputation of negligence in the latter two types of statute[22] as found in Minnesota and New York becomes colored with logic and purpose. Without statutory declaration, a bailor is not liable to third persons for injuries caused by the negligent use of the bailed article.[23] These latter statutes abrogate the common law rule that the negligence of a bailee

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[13] Cal. Veh. Code § 402 (1943). See, holding the amended statute was properly interpreted to include actions by the owner against the third person so as to impute to the owner the negligence of the bailee, Milgate v. Wrath, 19 Cal. 2d 297, 121 P.2d 10 (1942); Fox v. Schuster, 50 Cal. App. 2d 362, 123 P.2d 56 (1942). See Idaho Code Ann. § 49-1004 (1948) for a similar unambiguous statute.

[14] See note 9 *supra* for Minn. Statute; See R.I. Gen. Laws c. 98 § 10 (1938) as amended R.I. Laws 1940, p. 476; D.C. Code § 40-403 (1940).

[15] Christensen v. Hennepin Trans. Co., 215 Minn. 394, 10 N.W.2d. 406 (1943).

[16] Kernan v. Webb., 50 R.I. 394, 148 Atl. 186 (1929).

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

[18] New York Veh. & Traf. Law Art. 5, § 59 (1939). Iowa Code Ann. § 321.493 (1949).

[19] Gochee v. Wagner, 232 App. Div. 401, 250 N.Y. Supp. 102 (4th Dep't 1931), holding no imputation of negligence to bailor. See 17 Corn. L.Q. 158 (1931) for excellent discussion of case. Mills v. Gabriel, 259 App. Div. 60, 18 N.Y.S.2d 78 (1940) holding that each owner could recover against the other for damages to the car of the other, caused by the negligence of the respective drivers on the theory that there was no imputation of negligence. *Contra*: Renza v. Brennan, 165 Misc. 96, 300 N.Y. Supp. 221 (City Ct. 1937); Darrohn v. Russell, 154 Misc. 753, 277 N.Y. Supp. 783 (City Ct. 1935).

[20] Major v. Southwestern Motor Sales, 314 Mich. 122, 22 N.W.2d 96 (1946). (no imputation of contributary negligence of husband-driver to the injured wife, a passenger); Ansaldi v. City of Detroit, 314 Mich. 73, 22 N.W.2d 77 (1946) (charge of imputation of driver's negligence to passenger-wife is reversible error).

[21] Secured Finance Co. v. Chicago, R.I. & Pac. Ry., 207 Iowa 1105, 224 N.W. 88 (1929) (negligence imputed to owner).

[22] Note, 82 U. of Pa. L. Rev. 213, 214 (1934).

[23] Restatement, Torts § 485, comments a, b (1934).

is not imputable to his bailor for purposes of holding the bailor liable.[24] Yet they are silent on the precise issue. It follows that in the construction of these remedial statutes there occurs a clash between two rules of interpretation: (1) that all statutes in derogation of the common law are to be strictly construed; and (2) that a remedial statute is to be given a liberal interpretation. The duty to interpret a remedial statute liberally extends only to the point at which the evil sought to be avoided is overcome,[25] and with this as a yardsick it is evident that the statute is to be liberally construed only in so far as it imposes financial liability for the driver's negligence on the bailor consenting to such operation of his car.[26] Recognizing this truth, Judge Sears, in the majority opinion of the *Gochee* case wrote with emphasis that the statute ". . . is not to be wrenched out of its intended purpose and its language distorted in order to conform it to the conventional pattern of common law agency.[27] Investigation of the "purpose" reveals a legislative intent to reach three goals: (1) to prevent the owner from escaping liability by claiming the driver was acting outside his scope of employment;[28] (2) to allow a financial recovery by a damaged innocent third party;[29] (3) to increase highway safety by motivating a more careful selection of drivers.[30] Analysis discloses no intent on the part of the legislature to protect the negligent third person from a suit by the owner of the car—the intent of the law-makers being focused on the sole purpose of germinating a right in the injured third person. Supporting this analysis which precipitates into a limited agency is the argument that a liability, and not an agency was in reality created by the statute[31]—the doctrine of respondeat superior being chosen merely as a convenient "conduit" for effectuating the purpose.[32]

A more convincing approach appealing to those unacquainted with statutory interpretation and adhering to "curb stone equity" is found in the bold fact that should the doctrine of contributory negligence be given full application, a grossly negligent defendant-third person could shield himself from a suit by the bailor-owner for damages by merely using the defence of imputed negligence. No one could argue

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[24] Potts v. Pardee, 220 N.Y. 413, 116 N.E. 78, 80 (1917); Prosser, Torts § 66 (1941).

[25] Christensen v. Hennepin Transp. Co., 215 Minn. 349, 10 N.W.2d 406 (1943).

[26] "While the statute is remedial, it is remedial solely in favor of an injured third person." Gochee v. Wagner, 232 App. Div. 401, 250 N.Y. Supp. 102, 105 (4th Dep't 1931).

[27] 250 N.Y. Supp. at 105.

[28] Plaumbo v. Ryan, 213 App. Div. 517, 210 N.Y. Supp. 225 (2d Dep't 1925); Note, 20 Notre Dame Law. 160 (1944).

[29] Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406 (1943); Cohen v. Neustadter, 257 N.Y. 207, 160 N.E. 12 (1928).

[30] National Trucking & Storage Co. v. Driscoll, 64 A.2d 304 (Munic. Ct. App. D.C. 1949); Note, 34 Minn. L Rev. 57 (1949).

[31] Note, 17 Corn. L.Q. 158 at 164 (1931). The author, in discussing *Gochee v. Wagner*, drew this sharp theoretical line of distinction.

[32] Ballman v. Brinker, 211 Minn. 322, 1 N.W.2d 365 (1941).

with conscience that this would be serving the purpose of the statute. It has been stated that, " . . . the rule of comparative negligence would serve justice more faithfully than that of contributory negligence."[33] Prosser affirms the injustice worked by an unexcepted application of the rule and points out that it operates to place upon one innocent party the entire burden of loss for which two are responsible.[34]

The minority argument that under the statutes negligence is imputed in a suit by the bailor rests upon the sandy foundation of theoretical consistency. Under a statute similar to that of New York,[35] Iowa courts have held that the relationship of principal and agent is created between the bailor and bailee.[36] Justification for this result is sought in reasoning identified as the "Two Way Rule": *i.e.*, because the statute imputes negligence to allow recovery by a damaged third party, it also imputes any contributory negligence of the bailee to the owner in a suit by the latter. The validity of this "rule" succumbs to a broadside of logic that the reason for holding a consenting owner responsible to an injured third person for the negligent operation of his automobile is totally absent in an action by the owner for recovery of damages sustained as a result of the concurrent negligence of his operator and the injured. "It is a non sequitur to say that, because the policy of the statute is to impose liability against the bailor, it also is its policy to impute to him the contributory negligence of his bailee."[37] An additional argument of the minority is that an illogical result would flow from a situation where two bailees are contributorily negligent and the owners sue each other for damages.[38] Not only is this a very logical result of the application of the statute, but its policy also bears fruit in that while the owner sustains the loss, the negligent party does not escape liabiilty for damages to the owner's car.[39] Further weakening the minority argument of "consistency" is the fact that the concept of a split liability is not new, the majority of modern cases holding no imputation of negligence so as to bar an action by the

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[33] Haeg v. Sprague, Warner & Co., 202 Minn. 425, 281 N.W. 261, 263 (1938).

[34] Prosser, Torts 403 (1941). For supporting arguments see Padway, *Comparative Negligence*, 16 Marq. L. Rev. 3 (1931); Mole and Wilson, *A Study of Comparative Negligence*, 17 Corn. L.Q. 333, 604, 655 (1932) (". . . only respect for its age can now be urged for its complete retention.")

[35] Iowa Code Ann. § 321.493 (1949).

[36] Secured Finance Co. v. Chicago R.I. & P. Ry., 207 Ia. 1105, 224 N.W. 88 (1929). Prosser, Torts § 66 n. 97 (1941).

[37] Christensen v. Hennepin Transp. Co. 215 Minn. 294, 10 N.W.2d 406 (1943). MacIntyre, *The Rationale of Imputed Negligence*, 5 U. of Toronto L.J. 368, at 377 (1944) approves this criticism.

[38] See 17 Corn. L.Q. 158 (1931), for an exacting review of the Gochee case.

[39] Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711 (1949) (where a double suit did arise).

bailor against the third person;[40] while in earlier cases negligence was imputed in a suit by the bailor,[41] but not when the third party sued the owner.[42]

It is important to note that liability under the statutes is gauged in proportion to the consent of the bailor,[43] so that an express limitation of the bailment may relieve the bailor from liability and in effect negative the value of the procedural aid provided by the statute.[44]

It is submitted that the preservation of rights in the bailor given by the interpretation of Minnesota and New York courts achieves the purpose of the statute in providing only a limited armor from the common law for the third person. Mesmerized by the logical appeal of the "Two Way Rule," the minority courts have unwittingly blessed the concurrently negligent defendant with an immunity from suit which by accepted rules of statutory interpretation can not be justified.

Richard L. Healy

EVIDENCE—JURY TRIALS—WEIGHT OF EVIDENCE—CREDIBILITY OF WITNESSES—JUDICIAL COMMENT THEREON. Perhaps the most heavily criticized factor in the administration of justice, subject to vicious attack by both laymen and practitioners, is the trial by jury. Arguments center not upon abolition of this constitutionally established right but upon the obvious defects in its practical results.

Among the many suggestions for improving this important aspect of democratic justice is the granting of greater powers to the trial judge, particularly permitting him to comment upon the weight of the evidence and credibility of witnesses. Such a suggestion is neither new nor untried, but has been a controversial question within our country for nearly 150 years.

HISTORICAL ORIGIN AND DEVELOPMENT

No study of the problem of judicial comment may be adequately undertaken without a thorough understanding of the political impli-

[40] See Note, 6 A.L.R. 316 (1920) for recent cases illustrating the change to the modern viewpoint taken by the courts after 1908.

[41] Puterbaugh v. Reasor, 9 Ohio St. 484 (1859); Welty v. Indianapolis & V. Ry., 105 Ind. 55, 4 N.E. 410 (1886).

[42] Premier Motor Co. v. Tilford, 61 Ind. App. 164, 111 N.E. 645 (1916); Pease v. Montgomery, 11 Me. 582, 88 Atl. 973 (1913).

[43] Chaika v. Vandenberg, 252 N.Y. 101, 169 N.E. 103 (1929); Stapleton v. Hertz Drivurself Stations, 131 Misc. 52, 225 N.Y. Supp. 661 (Sup. Ct. 1927).

[44] Note, 17 Corn. L.Q. 158 at 161 (1931).