

February 1967

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Recommended Citation

William D. Goodwin, *Torts--Discarding the Rule of Imputed Negligence in Automobile Cases*, 69 W. Va. L. Rev. (1967).
Available at: <https://researchrepository.wvu.edu/wvlr/vol69/iss2/16>

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It appears that the manufacturer of inherently dangerous products has a duty to protect the public from foreseeable injuries due to the very nature of the product, the purposes for which the product will be used or the necessity of additional safety devices upon installation. This duty to warn, instruct or inspect is not delegable to an intermediary party, but apparently the duty to make one's product more safe by the installation of safety devices is delegable through proper warnings and instructions to the consumer.

Paul R. Rice

Torts—Discarding the Rule of Imputed Negligence in Automobile Cases

P, while riding in an automobile driven by his servant within the scope of employment, was injured when his automobile was struck by another vehicle driven by *D*'s servant. *P*'s servant was contributorily negligent. *D* contended that the negligence of *P*'s servant should be imputed to *P*. Judgment in the lower court was in favor of *D*. *Held*, reversed. The negligence of a servant involved in an automobile accident in the scope of his employment should not be imputed to his master, who was riding with him at the time, so as to bar the master's right of recovery against a negligent third party. *Weber v. Stokley Van Camp, Inc.*, 144 N.W.2d 540 (Minn. 1966).

This Minnesota decision represents a rejection of a widely, if not universally, accepted principle that the negligence of a servant will be imputed to his master in automobile cases when the master would be vicariously liable.¹ The theory of imputed negligence is said to have its origin² in an old English case³ in which the negligence of an omnibus driver was imputed to a passenger who was struck and injured by another vehicle upon alighting from the omnibus. The omnibus driver was negligent in permitting the passenger to disembark in the middle of the street instead of at the curb as was proper. In imputing his negligence to the passenger, the court reasoned that the passenger was so *identified* with the driver that she must be precluded from recovering against the negligent driver of the other vehicle.

¹ *E.g.*, *Hightower v. Landrum*, 109 Ga. App. 510, 136 S.E.2d 425 (1964); *Divita v. Atlantic Trucking Co.*, 129 W. Va. 264, 40 S.E. 324 (1946).

² Lessler, *THE PROPOSED DISCARD OF THE DOCTRINE OF IMPUTED CONTRIBUTORY NEGLIGENCE*, 20 *Fordham L. Rev.* 156 (1951).

³ *Thorogood v. Bryan*, 8 C.B. 115 Eng. Rep. 452 (1849).

The identification theory of imputing negligence to passengers was discarded in England some forty years after its inception,⁴ but it was applied in a few American jurisdictions until the early part of the twentieth century.⁵ From the identification theory, however, evolved the principle of imputing negligence in certain relationships when there would be vicarious liability. The great majority of American courts have imputed negligence in automobile cases involving the negligence of a servant who was acting in the scope of his authority at the time the negligent act transpired.⁶

Some states, however, have imputed negligence to the owner of an automobile despite the nonexistence of a master-servant relationship. Under the "family-car doctrine" courts have imputed negligence to the owner of a motor vehicle when the vehicle was being used by a member of his household for their convenience or pleasure.⁷ In other states the same effect has been accomplished by enacting "automobile consent" statutes which create fictional agency relationships between the owner and any person driving the vehicle with his consent.⁸ Liability under the "family car doctrine" and the "consent" statutes is limited to the scope of consent.⁹ Generally, however, negligence is not imputed in these circumstances when it would preclude the owner's recovery against negligent third parties.¹⁰

In the master-servant situation, however, the owner has been precluded from recovery because of imputed negligence. Denial of recovery has been based on the "both ways" test which imputes negligence to bar a master's recovery as well as to render him liable

⁴ PROSSER, TORTS § 73 (3d ed. 1964).

⁵ Both Massachusetts and Michigan adopted the "identification theory." In *Bessey v. Salemme*, 302 Mass 188, 19 N.E.2d 75 (1939), the Massachusetts court rejected the rule but the Michigan courts continued to follow the theory until it was finally discarded in 1946 in *Brecker v. Green*, 313 Mich. 218, 21 N.W.2d 105 (1946).

⁶ E.g. *Hightower v. Landrum*, 109 Ga. App. 510, 136 S.E.2d 425 (1964); *Divita v. Atlantic Trucking Co.*, 129 W. Va. 264, 40 S.E.2d 324 (1946).

⁷ *King v. Smythe*, 140 Tenn. 217, 204 S.W. 396 (1918); *Allison v. Bartlett*, 121 Wash. 418, 209 Pac. 863 (1922).

⁸ CAL. VEHICLE CODE § 17150; R.I. GEN. LAWS ANN. 31-31-3 (1956).

⁹ *Psota v. Long Island R.R. Co.*, 246 N.Y. 388, 159 N.E. 180 (1927) (automobile consent statute); *Lallen, Vicarious Liability and the Family Auto*, 26 MICH. L. REV. 846 (1928).

¹⁰ *Mason v. Russell*, 158 Cal. App. 2d 324, 322 P.2d 486 (1958); *Brown v. Rowland*, 40 Cal. App. 2d 825, 104 P.2d 138 (1940). *Contra*, *Davis Pontiac Co. v. Sirois*, 82 R.I. 32, 105 A.2d 792 (1954).

to third parties who were injured as a result of the negligent acts of the servant.¹¹ The *Restatement of Torts (Second)* adopts the both ways test of imputing negligence in master-servant situations.¹² However, it should be noted that the test has been rejected in the *Restatement of Torts (Second)* with regard to other types of relationships.¹³

The "both ways" test has been the subject of much criticism because it seeks to punish a faultless owner for the negligence of his servant and thus permits a negligent third party to escape liability. Since the justification for the imputed negligence rule has been in part the desire to provide a solvent defendant,¹⁴ it would seem that the criticism has some merit. When the master seeks recovery, the deep pocket argument is illogical and inapplicable since the solvency of the master is not a problem. The inapplicability of such an argument in this situation is only magnified in states having a Financial Responsibility Act,¹⁵ the sole purpose of which is to impress financial liability upon an owner of a vehicle for the negligent acts of one who drives the vehicle with his consent.

The theory of imputed negligence has also been predicated upon the idea that since the master has the right to control the acts of his servant he should be barred from recovery.¹⁶ In pointing out the absurdity of this argument, a New York court stated that not only would it be dangerous for a master to take control of the wheel while traveling on the high speed highways of today, the act in itself could be deemed negligence.¹⁷

In proposing the rejection of the imputed negligence principle, one author stated that it is

unreasonable and illogical to hold that, although a servant is personally liable to a master for negligence while operating a

¹¹ *Hightower v. Landrum*, 109 Ga. App. 510, 136 S.E.2d 425 (1964); *Read v. City & Suburban R.R. Co.*, 115 Ga. 366, 41 S.E. 629 (1947).

¹² *RESTATEMENT (SECOND), TORTS* §486 (1966).

¹³ *RESTATEMENT (SECOND), TORTS* § 485 (1966).

¹⁴ Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 *FORDHAM L. REV.* 156 (1951).

¹⁵ See generally, *Christensen v. Hennepin Transp. Co., Inc.*, 215 Minn. 394, 10 N.W.2d 406 (1943).

¹⁶ *Mammelli v. Dufrene* 169 So. 2d 242 (La. Ct. App. 1964).

¹⁷ *Jenks v. Veeder Contracting Co.*, 177 Misc. 240, 30 N.Y.S.2d 278 (1941).

car for his master, the very same negligence must be imputed in an action against a third party.¹⁸

This author suggests that the rights and liabilities of a master should be no more nor less than if he were merely a passenger.¹⁹

The West Virginia Supreme Court of Appeals, however, has adhered to the majority rule despite its shortcomings. In *Divita v. Atlantic Trucking Co.*,²⁰ the court stated that since it was undisputed that the servant was acting for and in behalf of the master plaintiff at the time of the accident, any contributory acts of the servant were imputable to the master-plaintiff.

Although the decision of the Minnesota court rejecting such a rule was limited to automobile cases in which the plaintiff was the master, the decision may be indicative of a future trend in discarding the general theory of imputed negligence. However, as was indicated in the court's opinion, they may continue to be a minority of one.

William Douglass Goodwin

Trusts—Power of Revocation—Various Methods

Decedent prior to death executed two written trust agreements on bank accounts whereby the decedent was named trustee of the separate accounts and certain beneficiaries were designated. The trusts were, by express terms, declared to be revocable. Subsequently, decedent executed a will in which she specifically bequeathed the bank accounts to persons other than the beneficiaries under the trust agreements. The lower court held that the two bank accounts were revocable declarations of trust, not tentative or Totten trusts, and that the will did not revoke such trusts. *HELD*, affirmed. Where a depositor sets up bank accounts in his own name as trustee by means of written agreements specifically stated to be revocable, such trusts are absolute inter vivos trusts, not Totten trusts, and unless the power to revoke by will is specifically

¹⁸ Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 *FORDHAM L. REV.* 156 (1951).

¹⁹ *Ibid.*

²⁰ *Divita v. Atlantic Trucking Co.* 129 W. Va. 264, 40 S.E. 324 (1946).