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Imputed Contributory Negligence

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particular city). While these categories are not exhaustive, they illustrate the necessity for and possible means of judicial determination of definite boundaries of the class of public figures.

Furthermore, if a privilege to make misstatements of fact about public figures is ultimately allowed, proof that the false statements were made knowingly or *negligently*, rather than with reckless disregard, should be required for recovery by libeled public figures.[41] The suggestion for a less demanding burden of proof for public figures is based on the premise that, balanced against the possible injury to individual reputation, uninhibited discussion of public figures is not as necessary as such discussion of public officials. Some limitation on the application of *Sullivan* is needed; uninhibited public debate is a valuable instrument in the preservation of freedom and our democratic system, but not to the extent that it destroys the law of defamation and in turn the protection of individual reputation.

IMPUTED CONTRIBUTORY NEGLIGENCE

A master, riding as passenger in a vehicle operated by his servant within the scope of employment, sustained personal injuries and property damage when the vehicle collided with one negligently operated by an employee of defendant corporation. In the master's suit to recover from defendant corporation, his servant was found contributorily negligent. The trial court ruled that this contributory negligence was imputed to the master, as a matter of law, to bar recovery on his negligence claim. On appeal, the Minnesota Supreme Court reversed. *Held*: The rule that contributory negligence of a servant acting within the scope of his employment is imputed to a master so as to bar the master's right of recovery against a negligent third party is abandoned in automobile negligence cases. *Weber v. Stokely-Van Camp, Inc.*, 144 N.W.2d 540 (Minn. 1966).

Fault is the sine qua non of tort liability for negligence.[1] For reasons of social policy—principally, allocation of risk to the party better able to bear it—this fault standard has been departed from to hold a principal vicariously liable for negligence of his agent acting

[41] *But cf.* Time, Inc. v. Hill, 87 Sup. Ct. 534, 543 (1967) (standard of negligence too elusive in right of privacy action).

[1] See PROSSER, TORTS § 74, at 506-07 (3d ed. 1964).

within the scope of employment.[2] When a principal seeks recovery for his *own* damage from a negligent third party, the fault standard is again departed from by imputing to the principal his agent's contributory negligence so as to bar the principal's recovery.[3] This double frustration of a faultless principal has become known as the "both-ways" rule.[4] Although the rule, insofar as it operates to impute contributory negligence, has been repudiated in most agency relationships,[5] the principal case is the first reported decision[6] refusing to impute to a master the contributory negligence of his servant.

The court in the principal case noted that social policies which justify holding a master vicariously liable for his servant's negligence do not justify imputing a servant's contributory negligence to his master. The court noted that, while vicarious liability furthers compensation of accident victims by allowing recovery from a master's "deep pockets," imputed contributory negligence denies victims the right to recover at all.[7] It observed that a justification for imputation is a master's right to control the conduct of his servant.[8] The court asserted, however, that exercise of control by a master-passenger over his servant-driver on high-speed, congested highways might be the clearest evidence of *active* negligence by the master. In automobile negligence cases, therefore, a theory of right of control could not

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[2] *Id.* § 68, at 471. Other reasons advanced for vicarious liability are: a master controls his servant's behavior; he has "set the whole thing in motion;" he has selected the servant and trusted him and so should suffer for his wrongs, rather than innocent strangers without opportunity to protect themselves. *Ibid.* See also James, *Vicarious Liability*, 28 TUL. L. REV. 161 (1954).

[3] See generally Annot., 50 A.L.R.2d 1281 (1956); GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE CASES 148 (1936); 2 HARPER & JAMES, TORTS §§ 23.5-23.6 (1956); PROSSER, TORTS § 73 (3d ed. 1964); Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193 (1921); James, *Imputed Negligence and Vicarious Liability: The Study of a Paradox*, 10 U. FLA. L. REV. 48 (1957); Keeton, *Imputed Contributory Negligence*, 13 TEXAS L. REV. 161 (1936); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 FORDHAM L. REV. 156 (1951); Note, 17 CORNELL L.Q. 158 (1931); Note, 33 B.U.L. REV. 90 (1953).

[4] Origin of this term is attributed to Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831 (1932).

[5] Relationships in which the doctrine has been repudiated are: (1) driver—passenger, Underwood v. Tremaine, 64 Wn. 2d 12, 390 P.2d 533 (1964); RESTATEMENT (SECOND), TORTS § 490 (1965); (2) host-guest, Knight v. Borgan, 52 Wn. 2d 219, 324 P.2d 797 (1958); (3) husband—wife, Sherman v. Korff, 353 Mich. 387, 91 N.W.2d 485 (1958); RESTATEMENT (SECOND), TORTS § 487 (1965); (4) parent—child, Voien v. Cluff, 69 Wash. Dec. 2d 311, 418 P.2d 430 (1966); RESTATEMENT (SECOND), TORTS § 488 (1965); (5) bailor—bailee, United States v. Washington, 351 F.2d 913 (9th Cir. 1965); RESTATEMENT (SECOND), TORTS § 489 (1965).

[6] See Friedenthal, *Imputed Contributory Negligence: The Anomaly in California: Vehicle Code Section 17150*, 17 STAN. L. REV. 55, 66 (1964).

[7] See James, *supra* note 3.

[8] Poutre v. Sanders, 19 Wn. 2d 561, 143 P.2d 554 (1944). See RESTATEMENT (SECOND), AGENCY § 219, comment *a* (1958).

justify imputed contributory negligence, a doctrine which presupposes that a master is innocent of any personal fault.[9] Thus, unable to find any rationale for imputation in the principal case, the court abandoned the "both-ways" rule and permitted the master a cause of action against the negligent third party's principal.

Commentators long have been critical of imputed contributory negligence.[10] The principal case, however, rejected the rule only insofar as it had been applied in automobile negligence cases. Such cases are distinctive in that a master's property is subject to risks caused by concurrent negligence of his servant and a third party. This feature is necessary for a cause of action to accrue in a master which would be subject to an imputed contributory negligence defense. Furthermore, automobile negligence cases are distinctive because the public may be endangered by a master controlling his servant's driving. Situations where exercise rather than non-exercise of a master's control is against public policy are rare.[11] Only in these situations, however, does the right of control theory fail to justify imputation of contributory negligence.

In limiting its decision to automobile negligence cases, the court in the principal case may have been motivated by a greater likelihood of liability insurance coverage by the parties in such cases. If defendant carries automobile liability insurance, depriving him of the defense of imputed contributory negligence does not create the individual hardships which otherwise might arise in the absence of insurance. Financial responsibility statutes and prudent business practice dictate liability insurance coverage of automobile operation, so there is reasonable assurance that abolition of imputed contributory negligence in this situation would not cause an appreciable shift in financial burdens.

By abandoning imputation in automobile negligence cases, the court

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[9] 2 HARPER & JAMES, *op. cit. supra* note 3, at § 23.6.

[10] See, *e.g.*, GREGORY, *op. cit. supra* note 3; 2 HARPER & JAMES, *op. cit. supra* note 3; PROSSER, *op. cit. supra* note 3, at 501-02; James, *supra* note 3; Lessler, *supra* note 3, at 175; Comment, 26 TENN. L. REV. 531, 547 (1959).

Reasons advanced in opposition to the doctrine of imputed contributory negligence are: (1) it does not distribute accident losses among those whose conduct causes accidents; (2) it is not needed as an incentive to insure the careful selection and control of employees—vicarious liability already supplies that incentive. James, *supra.*

[11] In most cases where an employer's exercise of control over his employee would be against public policy, the agency relationship between them is that of employer-independent contractor, rather than that of master-servant. Rejection of right of control in the principal case does not change the relationship of the parties from master-servant to that of employer-independent contractor, as the master is still vicariously liable for his servant's torts. RESTATEMENT (SECOND), AGENCY § 2, comment *b* (1958).

evidenced a return to the fault standard of tort liability for negligence.[12] Yet, in imposing sole liability for plaintiff-master's injury upon the corporate employee (and vicariously upon the corporate defendant), plaintiff's servant escaped liability even though contributorily at fault. It is unlikely that a plaintiff-master will ever join his servant as defendant in a negligence action against a third party, as a servant usually has a "shallow pocket" and such joinder could be inimical to the employer-employee relationship. To conform liability with fault, a negligent third party should be allowed contribution[13] from plaintiff's servant as a concurrent tortfeasor,[14] either by impleading the servant as a third party defendant in the original suit[15] or by a separate action. If contribution is accomplished apportioning damages among concurrent tortfeasors on a pro-rata basis,[16] liability would not be aligned precisely with fault unless each tortfeasor's negligence was equal. A few jurisdictions allow contribution among concurrent tortfeasors according to comparative fault on a percentage basis.[17] Such a method would align liability with fault—plaintiff's servant would contribute in proportion to his responsibility for plaintiff's damage, while defendant servant (and vicariously defendant master) would contribute in proportion to his responsibility for the damage.

Had defendant master foreseen rejection of the "both-ways" rule in the principal case, it might have counterclaimed for damage to its vehicle caused by the negligence of plaintiff's servant. Indeed, a coun-

[12] Regarding a fault standard, the court in the principal case simply may have intended that no faultless party be barred from recovery by the imputed fault of another. A more rigorous application of the fault standard would impose liability in proportion to respective fault.

[13] Eight states have adopted the 1939 version of the UNIFORM CONTRIBUTION AMONG TORT FEASORS ACT; eight states limit contribution by statute to joint judgment defendants; six states have broad contribution statutes, leaving most questions to the courts; and six states recognize a common law right of contribution. 9 U.L.A. 120 (Supp. 1965). Washington does not generally recognize a right of contribution between joint tortfeasors. City of Seattle v. Andrew Peterson & Co., 99 Wash. 533, 170 Pac. 140 (1918).

[14] The apparent inconsistency between a master obtaining contribution directly from another's servant, and the doctrine of vicarious liability, where a master is liable for the negligence of his own servant is discussed in the text accompanying note 23 *infra*.

[15] See, *e.g.*, FED. R. CIV. P. 14(a); WASH. R. PLEAD., PRAC., PROC. 14(a) (1960).

[16] See, *e.g.*, White v. Johnson, 272 Minn. 363, 137 N.W.2d 674 (1965). This rule is also advocated by the Commissioners of the UNIFORM CONTRIBUTION AMONG TORT FEASORS ACT (1955), 9 U.L.A. 123 (Supp. 1965).

[17] Little v. Miles, 213 Ark. 725, 212 S.W.2d 935 (1948); Mitchell v. Branch, 45 Hawaii 128, 363 P.2d 969 (1961); Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962). Significantly, these three jurisdictions also have general comparative negligence statutes. Their courts would be better able to accommodate a comparative fault contribution doctrine than jurisdictions where comparative negligence is not recognized.

terclaim may be necessary if defendant is to obtain recovery at all under rules of procedure which make counterclaims compulsory when arising out of the same transaction as the subject matter of plaintiff's claim.[18] Two injured masters, each faultless, should be permitted to sue each other's negligent servant. A similar result is reached in host-guest cases where two negligent drivers, each accompanied by a guest, are involved in a collision.[19] The drivers, though not liable to each other because each may assert the defense of contributory negligence, are nevertheless liable to each other's guest.[20] Recovery by the two faultless guests is analogous to recovery by two faultless masters. Masters thus effectively become guests in their own vehicles, with the important difference that they may sue their own servant-drivers for indemnification,[21] whereas guests may not sue their host-drivers without proof of aggravated misconduct.[22]

The doctrine of vicarious liability, however, demands that masters sue each other for their respective injuries, rather than each other's servant.[23] Consequently, when each master pays the other's damages, the one who has sustained the lesser injury will incur a loss to the extent that the other's claim is larger, *i.e.*, greater liability is imposed upon the party sustaining the lesser harm. While this appears to depart from fault as the standard of negligence liability, each master is liable to the other solely because of vicarious liability; liability *is based* upon fault—his servant's negligence—for which a master is responsible. Furthermore, liability *will be aligned* with fault if contribution is allowed, so that each servant pays in proportion to his responsibility for his own master's damage.[24]

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[18] See, *e.g.*, FED. R. CIV. P. 13(a); WASH. R. PLEAD., PRAC., PROC. 13(a) (1960).

[19] See Friedenthal, *supra* note 6.

[20] See Rutherford v. Deur, 46 Wn. 2d 435, 282 P.2d 281 (1955) (in suit against third party, driver's negligence not imputable to plaintiff guest).

[21] *Cf.* Marshall v. Chapman's Estate, 31 Wn. 2d 137, 195 P.2d 656 (1948) (master liable for servant's negligence within general scope of employment can recover from servant).

[22] See, *e.g.*, WASH. REV. CODE § 46.08.080 (1961).

[23] Normally when a tort occurs as a result of concurrent fault, no party can recover because of the contributory negligence defense. Abandonment of the "both-ways" rule, however, makes this defense inapplicable between two faultless masters who may sue each other for damages caused by their negligent servants.

[24] A hypothetical illustrates this point. A master, M_1, whose servant, S_1, is 20% at fault, suffers injury to the extent of $100. The other master, M_2, whose servant, S_2, is 80% at fault, suffers injury to the extent of $50. Each master is held liable for the other's damages. *Case* 1: If no contribution is allowed, M_1 and M_2 must pay each other's damages (M_1 pays M_2 $50; M_2 pays M_1 $100) without regard to the relative negligence of their servants. *Case* 2: If pro-rata contribution is allowed, M_1 can obtain ½ of M_2's damage claim—$25—from S_2, his concurrent tortfeasor. Similarly, M_2 can obtain ½ of M_1's damage claim—$50—from S_1, his concurrent tortfeasor. M_1

The suggestion that contribution from negligent servants is a desirable concomitant to repudiation of imputed contributory negligence is consistent with a doctrine of vicarious liability. Vicarious liability seeks to provide a master's deep pocket as a reliable source of compensation for an innocent third party injured by a negligent servant. When a vicariously liable master seeks contribution from plaintiff's servant, however, his purpose is not to obtain compensation for his own harm, but rather to distribute liability among concurrent tortfeasors. A servant's personal responsibility in this regard does not jeopardize recovery by an injured party. It permits repudiation of an unjustifiable doctrine of imputed contributory negligence while returning negligence liability to the fault standard.

One final problem may be created by this unique situation. When two masters sue each other to recover for their respective damages, there is little doubt that, as between them, set-offs are proper. But if each carries liability insurance, should the insurers likewise be entitled to those set-offs? As a general proposition, an insurer would not have a right to set-off a claim which its insured had against the injured plaintiff.[25] Where, as in the principal case, however, the claims arise out of the same accident, such set-off might be allowed an insurer to balance the increased likelihood of liability resulting from repudiation of the defense of imputed contributory negligence.[26]

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therefore pays a net of $25 ($50 less $25 contribution) to M_2; M_2 pays a net of $50 to M_1 ($100 less $50 contribution). *Case* 3: If comparative contribution is allowed, M_1 can obtain 80% of M_2's damage claim—$40—from S_2. Similarly, M_2 can obtain 20% of M_1's damage claim—$20—from S_1. M_1 therefore pays a net of $10 ($50 less $40 contribution) to M_2; M_2 pays a net of $80 to M_1 ($100 less $20 contribution). M_1 is compensated for 80% of his harm, and M_2 for 20% of his, thus aligning fault with liability.

[25] Set-off is a judicial remedy to settle opposing affirmative demands between *parties* in a single action. See Harrison v. Adams, 20 Cal. 2d 646, 128 P.2d 9 (1942). A liability insurer may not be joined as a third party defendant in tort cases unless it is directly liable to plaintiff by statute or contract. WASH. R. PLEAD., PRAC., PROC. 14(c).

[26] See Farmers Mut. Auto. Ins. Co. v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 512, 99 N.W. 2d 746 (1959) (dictum). For a discussion of this problem under a comparative negligence statute, see Leflar and Wolfe, *Must the Insurer Reimburse the Insured for His Personal Loss Credited against the Judgment?*, 11 ARK. L. REV. 71 (1956). This set-off problem was later eliminated in Arkansas by enactment of a comparative negligence statute limiting recovery in an action to one party. Note, 11 ARK. L. REV. 391, 392 (1957).