Washington and Lee Law Review

Volume 24 | Issue 1 Article 13

Spring 3-1-1967

Both Ways Test in Negligence Actions

BOTH WAYS TEST IN NEGLIGENCE ACTIONS

In 1849 an English court in *Thorogood v. Bryan*[1] imputed the contributory negligence of the driver of a public omnibus to a passenger to bar recovery for the passenger's death in a suit against a third party. The doctrine of imputed contributory negligence is generally thought to have originated in this "unfortunate" [2] decision which was soon overruled in England[3] and, although accepted for a while by some American courts, has now been rejected.[4] However, its effect is still felt in the prevailing *both ways test* which serves to impute the contributory negligence of a third person to a plaintiff to bar his recovery, if the relation between them is such that the plaintiff would be vicariously liable[5] to another injured party as a defendant.[6]

[1]8 C.B. 115, 137 Eng. Rep. 452 (1849). This case involved an action for wrongful death brought against the owner of another omnibus. The case was decided on a theory of identification. The passenger was identified with the driver so that the driver's negligence would be imputed to him because he had chosen the means of conveyance and, thus, had a measure of control. This is not the earliest case in which negligence was imputed. It is referred to as the case in which the "imputed negligence rule" originated because most cases following the rule came after this case.

[2]PROSSER, TORTS § 73 (3d ed. 1964).

[3]Mills v. Armstrong (*The Bernina*), 13 App. Cas. 1 (H.L. 1888). The case arose from suits on behalf of the estates of passengers and crew members of the vessel *Bushure,* who were killed as a result of a collision with the *Bernina.* The defense pleaded the doctrine of identification as set down in *Thorogood,* claiming that the negligence on the part of the crew of the *Bushure* would bar recovery. The House of Lords overruled *Thorogood,* pointing out the fallacy in assuming that a passenger has any control over the driver of a public omnibus. The House also said it was illogical to impute negligence of a driver to a passenger in this situation when the passenger would not be vicariously liable as a defendant.

[4]Bessey v. Salemme, 302 Mass. 188, 19 N.E.2d 75 (1939); Koplitz v. City of St. Paul, 86 Minn. 373, 90 N.W. 794 (1902); Fechley v. Springfield Traction Co., 119 Mo. App. 358, 96 S.W. 421 (1906); Bunting v. Hogsett, 139 Pa. 363, 21 Atl. 31 (1891); Ashworth v. Baker, 197 Va. 582, 90 S.E.2d 860 (1956); Reiter v. Grober, 173 Wis. 493, 181 N.W. 739 (1921).

[5]Vicarious liability or *respondeat superior* is a principle which charges B with the negligence of A based on the relationship between the two. The doctrine stems from early common law. Jones v. Hart, Holt 642, 90 Eng. Rep. 1255 (K.B. 1698); PROSSER, TORTS § 68 (3d ed. 1964).

[6]Cases with facts similar to those in the principal case which have followed this rule include: Miller v. United States, 196 F. Supp. 613 (D. Mass. 1961); Johnson v. Battles, 255 Ala. 624, 52 So. 2d 702 (1951); Watts v. Safeway Cab & Storage Co., 193 Ark. 413, 100 S.W.2d 965 (1937); Louisville & Nashville R.R. v. Tomlinson, 373 S.W.2d 601 (Ky. Ct. App. 1963); Mammelli v. Dufrene, 169 So. 2d 242 (La. Ct. App. 1964); Emmco Ins. Co. v. California Co., 101 So. 2d 628 (La. Ct. App. 1958); Frankle v. Twedt, 234 Minn. 42, 47 N.W.2d 482 (1951); Rogge v. Great No. Ry., 233 Minn. 255, 47 N.W.2d 475 (1951); George Siegler Co. v. Norton, 8 N.J. 374, 86 A.2d 8 (1952); Forga v. West, 260 N.C. 182, 132 S.E.2d 357 (1963); Hampton v. Hawkins, 219 N.C. 205, 13 S.E.2d 227 (1941).

The same rule was applied in the following cases, the facts of which are some-

Vicarious liability arises most often in the master-servant relationship, and in recent years it has become more and more prevalent in automobile negligence cases. It is in these cases that the both ways test has also been applied, imputing contributory negligence to the master, not to help make a recovery possible, as is the purpose of the vicarious liability rule, but to bar recovery by a faultless master for his own injury. It is important to note that courts have applied the test giving no reason for such application other than saying that "this is the universal rule." The disputes which have brought these cases to the appellate level are those concerning the existence of vicarious liability or of negligence itself. Once this has been resolved the courts automatically, and without discussion, apply the imputed contributory negligence rule.[7]

In *Weber v. Stokely-Van Camp, Inc.*,[8] recently decided by the Minnesota Supreme Court, the plaintiff Weber presented a claim, which based on the case law of Minnesota, would be barred[9] by the application of the imputed contributory negligence rule. Weber was engaged in the business of supplying and servicing vending machines. Maynard Sunken was employed by him in this business. While driving the plaintiff's truck within the scope of his employment,[10] Sunken was involved in a collision with a truck owned by the defendant,

---

what dissimilar: Drewery v. Daspit Bros. Marine Divers, Inc., 317 F.2d 425 (5th Cir. 1963); Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942); Hightower v. Landrum, 109 Ga. App. 510, 136 S.E.2d 425 (1964); Petersen v. Schneider, 154 Neb. 303, 47 N.W.2d 863 (1951); East Vollentine Courts, Inc. v. Foust, 376 S.W.2d 320 (Tenn. Ct. App. 1963).

Research has failed to locate a case applying a contrary rule. This then, may in fact be the universal rule as many sources indicate. *E.g.*, Weber v. Stokely-Van Camp, Inc., 144 N.W.2d 540 (Minn. 1966); PROSSER, TORTS §§ 68-73 (3d ed. 1964); 38 AM. JUR. *Negligence* § 236 (1941, Supp. 1966); 65 C.J.S. *Negligence* § 162 (1950, Supp. 1966); Note, *Imputed Contributory Negligence*, 26 TENN. L. REV. 531 (1959); James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340 (1954); Lessler, *Imputed Negligence*, 25 CONN. BAR J. 30 (1951).

[7]*E.g.*, Mammelli v. Dufrene; Frankle v. Twedt; Rogge v. Great No. Ry.; Forga v. West; *supra* note 6.

[8]144 N.W.2d 540 (Minn. 1966).

[9]Imputation of negligence only indicates who will bear the burden of such negligence and not what the result will be in terms of liability. This result will depend on whether the jurisdiction is one of comparative negligence or of contributory negligence such as Minnesota where it completely bars recovery. If the case arose in a comparative negligence jurisdiction imputation would only result in a reduced recovery.

[10]It is a general requirement that a servant be working within the scope of his employment before his negligence will be imputed to the master. This is a vicarious liability requirement. Most cases applying the imputed contributory negligence rule concern themselves with this requirement.

Stokely-Van Camp, Inc., and driven by its employee. The plaintiff, riding with Sunken at the time, suffered personal injuries and damage to his truck. Weber sued Stokely-Van Camp, Inc. for the negligence of its employee, and the defendant alleged contributory negligence on the part of Sunken. If imputed to the plaintiff, this contributory negligence would bar recovery. Since Weber, as a defendant, would be vicariously liable for Sunken's negligence, the trial court, following the both ways test,[11] instructed the jury that as a matter of law the negligence of Sunken would be imputed to Weber as the plaintiff.

On appeal, one of the issues[12] was whether the trial court erred in so instructing the jury. The Supreme Court of Minnesota said: "It must be conceded that based on existing case law the trial court's instruction concerning imputed negligence was correct. . . ." [13]

The plaintiff in *Weber* contested the application of the rule in one situation only—when both parties, master and servant, are present in the vehicle at the time of the injury. Plaintiff stated that the general rule imputing the contributory negligence of a servant to a master is a good one but, being based on the fiction of theoretical control, should be limited to situations where the master is not present. He contended that there was no need to protect a wrongdoer and that, when both parties were present, liability on the part of a master should be based on a finding of negligence in fact and not on the doctrine of imputation.[14] However, the court went beyond the plaintiff's argument, struck down the traditional rule and reversed the trial court's decision. Finding in the plaintiff's favor, the court said:

> From an examination of the authorities there is just no way to rationalize the rule of imputed contributory negligence. . . . In

[11]Frankle v. Twedt, 234 Minn. 42, 45, 47 N.W.2d 482, 486 (1951), was the last case deciding the issue in Minnesota. It involved a claim by plaintiff for damages resulting from a collision between his car, driven by his brother, and a car owned by the defendant. The court's primary concern was whether an agency relationship in fact existed. Once they found such relationship, it applied the prevailing rule and imputed the negligence to the plaintiff.

[12]There were actually two issues in the case. The other involved a question of alleged misconduct on the part of the jurors and a subsequent motion for a new trial. A new trial was denied on this motion.

[13]144 N.W.2d at 541.

[14]Weber argued:

> The general rule that negligence, causing injury, should be imputable to the employee on the grounds that public policy demands it and other grounds so clearly stated by the authorities is clearly good law and should not be changed. It is based on the fiction of theoretical control and society in general needs the rule for its protection.
>
> However, there is no need to apply a fiction where the parties are present.

Brief for Appellant, 7-8, 144 N.W.2d 540.

> view of the fact that imputed negligence has now been abandoned in Restatement, Torts (2d) as to relationships where it formerly applied,[15] it is difficult to find any tenable reason why it should be retained in a master-servant relationship where the master is entirely without fault. . . . We are convinced that the 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. We limit this decision to automobile negligence cases.[16]

Actually, the term "imputed negligence" needs clarification because of a double meaning given to it by many writers. The term has been applied to vicarious liability, as when a master, as a defendant, is held liable for the negligence of his servant. The theory is that because of the special relationship the servant's negligence is imputable to the master. Imputed negligence has also been applied where a master, as a plaintiff, is denied recovery from a negligent party because of the contributory negligence of his servant. Some writers use this term as a general heading to encompass both of the more specific terms.[17] To avoid confusion here, the term imputed negligence will not be used. The terms vicarious liability and imputed contributory negligence will be separated, the former being applied where one is held liable for another's negligence as a defendant and the latter where one is chargeable with it as a plaintiff.

As *Weber* readily admitted, imputation of contributory negligence today follows vicarious liability.[18] If there exists a relation of "master or superior and servant or subordinate or other relation akin thereto," [19] relations which result in vicarious liability to a master-defendant, contributory negligence will be imputed to a master-plaintiff. Its original application was not so limited. The areas in which the rule was originally applied are those of driver and passenger, bailments, and domestic relations.[20]

---

[15]RESTATEMENT (SECOND), TORTS § 485 (1965).

[16]144 N.W.2d at 543-45.

[17]PROSSER, TORTS §§ 68-73 (3d ed. 1964); Note, *Imputed Contributory Negligence*, 26 TENN. L. REV. 531 (1959); James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340 (1954); Lessler, *Imputed Negligence*, 25 CONN. BAR J. 30 (1951).

[18]"Essentially, imputation of the negligence of a servant to a master rests on a so-called 'both-ways test'—that is, if the master is vicariously liable to a third party due to the agent's negligence, he is also barred from recovery because his agent's negligence is imputed to him." 144 N.W.2d at 541.

[19]38 AM. JUR. *Negligence*, § 235 at 921 (1941).

[20]See generally PROSSER, TORTS § 73 (3d ed. 1964); Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831 (1932); and articles listed in

Imputation of contributory negligence based merely on a driver-passenger relation, as in *Thorogood v. Bryan*, was rejected in every American court by 1946[21] because the passenger would not have been vicariously liable as a defendant. Today, under the both ways test a driver's negligence will be imputed to his passenger as a plaintiff if a master-servant relation exists between the two.[22]

Some courts have imputed a bailee's contributory negligence to his bailor to bar recovery for damage to the article bailed in an action against a primarily negligent third party. In *Puterbaugh v. Reasor*[23] the bailor was barred from recovery for the death of one of his horses caused by the negligence of the defendant. Imputation of the bailee's contributory negligence in this area seems to be based on an assumption of the risk doctrine—since the bailor chose the person to whom he bailed the horse, he assumed the responsibility for the bailee's actions concerning the article bailed. These earlier decisions have been overruled in all jurisdictions[24] except Texas,[25] because the bailor would not have been vicariously liable as a defendant. The current rule is that in the absence of statute the bailor will not be charged with such contributory negligence unless for some reason it is held that a master-servant relation exists.

Thus, imputation of negligence waned "except where negligence was imputed by rules of general and well accepted application—that is, where there was vicarious liability. In this development, and as long as there were vestiges of the older, harsher rules, the both-ways test[26] was the vehicle for humane law reform." [27]

---

note 6 *supra*. Although a discussion of domestic relations would deserve a place in a historical analysis it will not be discussed here. Imputation was only theoretical and curtailment of imputation was not based on the both ways analogy as in the other two areas.

[21]Bricker v. Green, 313 Mich. 218, 21 N.W.2d 105, 109-10 (1946); cases listed in note 4 *supra*.

[22]PROSSER, TORTS § 73 (3d ed. 1964); *but see* RESTATEMENT (SECOND), TORTS § 495 (1965).

[23]9 Ohio St. 484 (1859).

[24]White v. Saunders, 289 Ky. 268, 158 S.W.2d 393 (1942); Robinson v. Warren, 129 Me. 172, 151 Atl. 10 (1930); Nash v. Lang, 268 Mass. 407, 167 N.E. 762 (1929); New York, L.E. & W.R.R. v. New Jersey Elec. Ry., 60 N.J.L. 338, 38 Atl. 828 (Sup. Ct. 1896); Rodgers v. Saxton, 305 Pa. 479, 158 Atl. 166 (1931); Fisher v. Andrews & Pierce, Inc., 76 R.I. 464, 72 A.2d 172 (1950).

[25]Rose v. Baker, 138 Tex. 554, 160 S.W.2d 515 (1942).

[26]The term "both ways test" seems to have been coined by Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831 (1932). Its early meaning was that contributory negligence would only be imputed to a plaintiff in situations where the relationship of the parties would also lead to vicarious liability if that person were a defendant. It is now interpreted to mean that if one is

It appears to be at this point in its historical development that the imputed contributory negligence rule began to follow vicarious liability. Earlier, each developed separately and it was only *in reaction* to the practice of imputing contributory negligence in the two areas previously mentioned that the *both ways test* was used to curtail the imputation of contributory negligence and to allow the plaintiff's recovery.

However, as imputation based on the bailment alone was curtailed, vicarious liability began to expand in the automobile negligence area to meet the rising accident rate and the lack of financially responsible defendants. In order to make the owner of an automobile vicariously liable in the bailment situation, a variety of measures have been used. Courts have held the owner-bailor liable if he entrusts a car to an unsuitable driver[28] or if the owner's presence in the car indicates that he has retained the right to control.[29] Another device to which the courts have resorted is the "family purpose" doctrine.[30] Legislatures have accomplished the same result by passing automobile consent statutes.[31] The basis of these expansions of vicarious liability has been the creation of an arbitrary agency. The question also arises under these new statutory and judicial rules whether contributory negligence should be imputed. Some courts, following the prevailing both ways test, have done so;[32] but a greater number of courts have not,[33]

---

subject to vicarious liability as a defendant, negligence will *always* be imputed to him as a plaintiff.

[27]James, *Imputed Contributory Negligence,* 14 LA. L. REV. 340, 350 (1954).

[28]White v. Holmes, 89 Fla. 251, 103 So. 623 (1925); Lorts v. McDonald, 17 Ill. App. 2d 278, 149 N.E.2d 768 (1958); Deck v. Sherlock, 162 Neb. 86, 75 N.W.2d 99 (1956); Dinkins v. Booe, 252 N.C. 731, 114 S.E.2d 672 (1960); Wery v. Seff, 136 Ohio St. 307, 25 N.E.2d 692 (1940).

[29]Archambault v. Holmes, 125 Conn. 167, 4 A.2d 420 (1939); Sutton v. Inland Const. Co., 144 Neb. 721, 14 N.W.2d 387 (1944).

[30]Under this doctrine, the family purpose for which an owner lets members of his family use the car is treated as a business so that the driver is regarded as a servant. Benton v. Regeser, 20 Ariz. 273, 179 Pac. 966 (1919); Hutchins v. Haffner, 63 Colo. 365, 167 Pac. 966 (1917); Dibble v. Wolff, 135 Conn. 428, 65 A.2d 479 (1949); Griffin v. Russell, 144 Ga. 275, 87 S.E. 10 (1915); Kayser v. Van Nest, 125 Minn. 277, 146 N.W. 1091 (1914); King v. Smythe, 140 Tenn. 217, 204 S.W. 296 (1918); Allison v. Bartelt, 121 Wash. 418, 209 Pac. 863 (1922).

[31]*E.g.,* CAL. VEHICLE CODE § 17150; MICH. STAT. ANN. § 9.2101 (1959); N.Y. VEHICLE AND TRAFFIC LAW § 388.

[32]Birnbaum v. Blunt, 152 Cal. App. 2d 371, 313 P.2d 86 (1957); National Trucking & Storage Co. v. Driscoll, 64 A.2d 304 (D.C. Munic. Ct. App. 1949); Pearson v. Northland Transp. Co., 184 Minn. 560, 239 N.W. 602 (1931); McCants v. Chenault, 98 Ohio App. 529, 130 N.E.2d 382 (1954); Prendergast v. Allen, 44 R. I. 379, 117 Atl. 539 (1922).

[33]Westergren v. King, 48 Del. 158, 99 A.2d 356 (Super. Ct. 1953); Stuart v.

holding that the reason for expanding vicarious liability was to increase a plaintiff's recovery and not to cut it off. They have also indicated that imputation here would not follow the original purpose of the both ways test.

It is important to note the distinction between this earlier use of the both ways test and its use today. The purpose behind the original "negative rule" was to prevent imputation of contributory negligence in the particular areas where there *would not* be vicarious liability, thus allowing the worthy plaintiff a recovery. To formulate a rule that contributory negligence is then to be imputed in every situation where there *would* be vicarious liability is a logical absurdity. Yet, this "affirmative rule" is the basis upon which courts apply the both ways test today.[34]

In *Weber*, Minnesota has become the first jurisdiction to take a step toward rejection of the imputed contributory negligence rule in its last stronghold, the master-servant relationship. The court recognized that imputed contributory negligence had a historical origin and development separate from that of vicarious liability and that the principal reasons for making a master vicariously liable do not apply to the imputation of contributory negligence. The court pointed out that the most popular reason given for the vicarious liability rule is the deep-pocket theory.[35] The theory provides the injured party with a solvent defendant who can respond in damages.

> There is no necessity for creating a solvent defendant in that situation, nor can any of the reasons given for holding a master vicariously liable in a suit by third persons be defended on any rational ground when applied to imputing negligence of a servant to a faultless master who seeks recovery from a third person for his own injury or damage.[36]

Therefore, a hand-in-hand application of vicarious liability and imputed contributory negligence has no historical or logical basis.

Weber may have important long range effects. As has been shown, the use of the both ways test has swung in pendulum fashion from its

Pilgrim, 247 Iowa 709, 74 N.W.2d 212 (1956); York v. Day's, Inc., 158 Me. 441, 140 A.2d 730 (1958); Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711 (1949); Mills v. Gabriel, 284 N.Y. 751, 31 N.E.2d 512 (1940); Michaelsohn v. Smith, 113 N.W.2d 571 (N.D. 1962).

[34]See cases note 6 *supra*.

[35]Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406, 417 (1943); PROSSER, TORTS § 68 (3d ed. 1964); Note, *Imputed Contributory Negligence*, 26 TENN. L. REV. 531, 532 (1959); James, note 27 *supra* at 351.

[36]Weber v. Stokely-Van Camp, Inc., 144 N.W.2d 540, 542 (Minn. 1966).