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part of wisdom."[27] A better result will be reached if equity courts enjoin criminal acts only when the existence of a public nuisance is conclusively proven. When courts refuse to so limit themselves, the only alternative is for the legislature to take action prohibiting equity's intervention except when specifically authorized. Any other course of action must lead to widespread injunctive law enforcement and the corresponding injustices which will eventually cause the courts to lose the respect of the public.[28]

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IMPUTATION OF CHILD'S CONTRIBUTORY NEGLIGENCE TO PARENT

A father who allows his minor son to drive his car may find himself paying for the damages caused by his son's torts, either under the family purpose doctrine or under statutes having similar effect. Sometimes, however, the negligent driving of both the son and a third person results in a collision in which the father's car is damaged. Should the contributory negligence of the son be imputed to the father so as to bar a recovery by him from the negligent third person? This question was recently presented to the Supreme Judicial Court of

[27]Simpson, Fifty Years of American Equity, 50 Harv. L. Rev. 171, 228 (1936).

[28]This danger becomes apparent when one examines the history of equity in England. The Chancellor originally had jurisdiction to enjoin crimes, but as the country became more settled, there was less need for the exercise of this power and it finally ceased to exist in the fifteenth century. But the King's Council, which had concurrent jurisdiction with the Chancellor, relinquished its jurisdiction more slowly and continued to try criminal cases without a jury. This Council, which was known as the Court of Star Chamber, became so arbitrary and tyrannical that it was eventually abolished by statute in 1645. Mack, The Revival of Criminal Equity, 16 Harv. L. Rev. 389, 391 (1903). "These abuses in the Court of Star Chamber resulted in such ingrained distrust of the exercise of criminal jurisdiction without a jury as to prevent the revival of criminal equity jurisdiction in England." Maloney, Injunctive Law Enforcement: Leaven or Secret Weapon, 1 Mercer L. Rev. 1, 3 (1949). An early and apparently long-forgotten warning against such an exercise of equity's power in this country was given by Chancellor Kent in 1817. Faced with the problem of whether or not to enjoin a misdemeanor, the learned Chancellor said: "The process of injunction is too peremptory and powerful in its effects to be used in such a case as this, without the clearest sanction. I shall better consult the stability and utility of the powers of this Court, by not stretching them beyond the limits prescribed by the precedents." Attorney Gen. v. Utica Ins. Co., 2 Johns. Ch. R. 371, 391 (N.Y. 1817). But in the absence of an historical example of the abuses which may be suffered, the advance of criminal equity in the United States has met little opposition.

Maine in *York v. Day's Inc.*[1] The court held that the contributory negligence of the eighteen year old son-bailee would not be imputed to the father and allowed the father to recover for the damages to his car caused by the negligent third person.

At common law the negligence of a bailee was not imputed to the bailor.[2] Maine has changed this rule, to a certain extent, by a statute providing that the owner of a motor vehicle shall be jointly and severally liable with any minor under eighteen, whom the owner knowingly permits to operate the vehicle, for any damages caused by the negligence of the minor.[3] The Maine court held that this statute did not bar the father's recovery from the negligent third party, but other jurisdictions have not reached the same conclusion.

The plight of the uncompensated victims of negligent and financially irresponsible drivers has led to the "family purpose" doctrine,[4] under which the owner who permits members of his household to drive his automobile is regarded as making such family purpose his business, so that the driver is treated as the car owner's servant.[5] In some states not having the family purpose doctrine, a similar liability has been imposed on car owners under "owner's consent" or "owner's responsibility" statutes that make the bailor of the automobile responsible for the negligent acts of the bailee.[6]

These statutes, although many of them are similar in phraseology, have not always been construed to reach the same result. Thus, the plaintiff-father in the principal case would have been granted or denied a recovery depending largely upon a particular court's interpretation of the statute. For example, some courts emphasize that the statutes are in derogation of common law and should be strictly construed, with the result that contributory negligence is not imputed to the bailor;[7] whereas others, noting that the statutes are remedial in

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[1]153 Me. 441, 140 A.2d 730 (1958).

[2]James, Imputed Contributory Negligence, 14 La. L. Rev. 340 (1954).

[3]Me. Rev. Stat. Ann. ch. 22, § 156 (1954): "Every owner of a motor vehicle causing or knowingly permitting a minor under the age of 18 years to operate such vehicle upon a highway, and any person who gives or furnishes a motor vehicle to such minor, shall be jointly and severally liable with such minor for any damages caused by the negligence of such minor in operating such vehicle."

This statute was previously construed to hold a bailor-father liable for the negligence of his bailee-son, when the former was sued by an injured third party. Strout v. Polakewich, 139 Me. 134, 27 A.2d 911 (1942).

[4]2 Harper & James, Torts § 23.6 (1956).

[5]Prosser, Torts § 66 (2d ed. 1955).

[6]James, supra note 2, at 350.

[7]Westergren v. King, 48 Del. 158, 99 A.2d 356 (1953); Goochee v. Wagner, 232 App. Div. 401, 250 N.Y. Supp. 102 (4th Dep't 1931).

nature, are inclined to construe them liberally and are therefore prone to allow the imputation of contributory negligence.[8]

Three legislative purposes have been attributed to owner's consent statutes:[9] (1) The statute places the financial responsibility upon a person who is economically able to bear it.[10] As would seem probable, the courts so holding generally refuse to impute contributory negligence to the bailor, since the aim is to hold the bailor liable and not to deny him recovery from a negligent third party. (2) The statute removes the burden of proving agency, a prerequisite to the imputation of negligence under the common law.[11] Courts emphasizing this purpose also refuse to impute contributory negligence. (3) The statute promotes highway safety, because the threat of being held responsible for his driver's actions induces the owner to select his drivers more carefully.[12] Courts following this rationale tend to impute the driver's contributory negligence to the owner.

Perhaps the major factor giving rise to different interpretations of owner's consent statutes is the difference in their phraseology. Generally speaking, there are three broad categories:

(1) Statutes providing that an owner is liable for the damage caused by the negligence of a driver operating his car with his consent, and which have an added provision that "the negligence of such person [driver-bailee] shall be imputed to the owner for all purposes of civil damages."[13] The wording of this type statute is clear, and the courts have consistently held that the contributory negligence of the bailee is imputed to the bailor when he is suing or being sued.[14]

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

[9]Notes, 17 Cornell L.Q. 158 (1931); Note, 27 N.D.L. Rev. 194 (1951).

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

[11]Mills v. Gabriel, 259 App. Div. 60, 18 N.Y.S.2d 78, 80 (2d Dep't 1940); Plaumbo v. Ryan, 213 App. Div. 517, 210 N.Y. Supp. 225 (2d Dep't 1925).

[12]Baber v. Akers Motor Lines, Inc., 215 F.2d 843 (D.C. Cir. 1954); National Trucking & Storage Co. v. Driscoll, 64 A.2d 304, 308 (D.C. Munic. Ct. App. 1949); Davis Pontiac Co. v. Sirois, 82 R.I. 32, 105 A.2d 792 (1954).

[13]Cal. Vehicle Code § 402(a) (1937); Del. Code Ann. tit. 21, § 6106 (1953).

[14]Birnbaum v. Blunt, 152 Cal. App. 2d 371, 313 P.2d 86 (1957); Fox v. Schuster, 50 Cal. App. 2d 362, 123 P.2d (1942); Milgate v. Wraith, 19 Cal. 2d 297, 121 P.2d 10 (1942).

The Delaware statute, supra note 13, as amended in 1953, contains the added words "and the negligence of such minor shall be imputed to such owner or such person for all purposes of civil damages," and therefore resembles the California statute, supra note 13. Prior to this amendment, it closely resembled statutes of the second category, infra note 15, especially the statute of Minnesota. In Westergren v. King, 48 Del. 158, 99 A.2d 356 (1953), the Delaware court construed the State's original statute as not imputing the contributory negligence of a minor-bailee to his

(2) Statutes that create an agency relation between the owner and the driver, usually by providing that in case of an accident the driver shall be deemed to be the agent of the owner.[15] This type of statute has been interpreted in two different ways, each yielding a different result. Minnesota,[16] on the one hand, refuses to impute the contributory negligence of the bailee to the bailor when the latter is a plaintiff. The District of Columbia[17] and Rhode Island,[18] on the other hand, hold that such contributory negligence is to be imputed in all cases. In light of a recent decision, the District of Columbia rule, imputing the contributory negligence of the bailee to the bailor in all cases seems firmly entrenched.[19] The Supreme Court of Rhode Island in *Davis Pontiac Co. v. Sirois*,[20] construing the amended statute for the first time, recognized the conflict between the holdings of the District of Columbia and the Minnesota courts. The court found that the statute more nearly resembled that of the District of Columbia and imputed the operator's contributory negligence to the plaintiff-owner. However, the Rhode Island statute is not applicable when the operator is shown to be financially responsible;[21] furthermore, the statute is

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father-bailor so as to bar the latter's recovery from a negligent third party—a result in accord with the holdings of the Minnesota courts, infra note 16. This amended statute has not been construed to date, but it is submitted that a result will be reached imputing the contributory negligence of the bailee to the bailor when the bailor is suing or being sued. A contrary result would render the amendment meaningless.

[15]D.C. Code Ann. § 40-403 (1951); Minn. Stat. § 170.54 (1953); R.I. Pub. Laws, ch. 2595, § 1 (1950).

[16]In Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711, 714 (1949), the court stated: "[T]he driver causing an accident shall be deemed the owner's agent... for purposes only of holding the owner liable to persons injured by the driver's negligence." Cf. Peters v. Boden, 242 Minn. 849, 65 N.W.2d 917 (1954); Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406 (1943).

[17]The court stated the purpose of the District of Columbia statute was to provide for financially responsible defendants and to promote more careful driving, with emphasis on the latter. "Both of these purposes are served by imputing to the owner the negligence of one driving with the owner's consent, in all circumstances, whatever legal relationship between them." National Trucking & Storage Co. v. Driscoll, 64 A.2d 304, 308 (D.C. Munic. Ct. App. 1949).

[18]Davis Pontiac Co. v. Sirois, 82 R.I. 32, 105 A.2d 792 (1954).

[19]Baber v. Akers Motor Lines, 215 F.2d 843 (D.C. Cir. 1954), citing National Trucking & Storage Co. v. Driscoll, 64 A.2d 304 (D.C. Munic. Ct. App. 1949), with approval and reaching the same result.

[20]82 R.I. 32, 105 A.2d 792 (1954).

[21]R.I. Pub. Laws, ch. 2595, § 1 (1950): "Whenever any motor vehicle shall be used... with the consent of the owner... the operator... shall in case of accident, be deemed to be the agent of the owner... unless such operator shall have furnished evidence of financial responsibility...."

couched in terms of owner's "liability."[22] By referring to the owner as the "defendant," the Rhode Island Legislature clearly showed that it did not intend the act to apply when the owner is suing as a plaintiff. It would appear, therefore, that the Rhode Island court reached a result contrary to the manifest intent of the legislature.[23]

(3) Statutes in the third group merely state that the owner of the car shall be liable for the negligence of a person operating his car with the owner's consent. The Maine statute falls within this group, closely resembling the statutes of New York,[24] Iowa,[25] and Wisconsin.[26]

Although there is apparent conflict in the holdings of the lower New York courts,[27] the New York rule is stated in *Mills v. Gabriel*[28] as being: "The statute does not change the common-law rule respecting the owner's right to recover from third persons .... It is applicable ... only in actions brought by third persons against the owner."[29] Where a contrary result was reached, reliance was placed on the "both-ways" doctrine,[30] or the court, apparently confused by the fact that both negligent drivers were bailees, decided it would be "absurd" to award each bailor his damages against the other and drew nice distinctions from the wording of the statute to reach a decision the court thought just.[31] However, this so-called absurdity disappears when it is considered that this would have been the result at common law, and the purpose of the statute abrogating the common law in order to pro-

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[22]The title of the Rhode Island statute is: "Civil Liability of Owners and Operators of Motor Vehicles." Liability is usually used to express an obligation or debt owned, certainly not to bar recovery. 53 C.J.S. Liability 17 (1948).

[23]See an excellent dissenting opinion by Justice Condon in Davis Pontiac Co. v. Sirois, 82 R.I. 32, 105 A.2d 792 (1954).

[24]N.Y. Vehicle & Traffic Laws § 59.

[25]Iowa Code Ann. § 321.493 (1954).

[26]Wis. Stat. § 85.08(1a) (1937).

[27]Annot. 11 A.L.R.2d 1437, 1441 (1950).

[28]259 App. Div. 60, 18 N.Y.S.2d 78 (2d Dep't 1940).

[29]18 N.Y.S.2d at 80.

[30]"If the negligence of the operator is imputable to the owner in actions by third persons against the owner, the converse must also be true; that is, the negligence of the operator will be imputable to the owner in actions by the owner against third persons." Schuler v. Whitman, 138 Misc. 814, 246 N.Y. Supp. 528, 531-32 (Sup. Ct. 1930). For a discussion of the "both-ways" doctrine see note 39 infra and accompanying text.

[31]Renza v. Brennan, 165 Misc. 96, 300 N.Y. Supp. 221 (County Ct. 1937); Darrohn v. Russell, 154 Misc. 753, 277 N.Y. Supp. 783 (Rochester City Ct. 1935). In accord but decided on other grounds: Shuler v. Whitmore, Rauber & Vicinus, 233 App. Div. 892, 251 N.Y. Supp. 886 (4th Dep't 1931); Swarthout v. Van Auken, 227 App. Div. 644, 235 N.Y. Supp. 732 (4th Dep't 1929).

vide financially able defendants is fulfilled by allowing each bailor to recover his damages from the other.

The Iowa court overruled previous case law in *Stuart v. Pilgrim*[32] by construing the Iowa statute as not imputing the contributory negligence of the bailee to the bailor so as to bar the latter's recovery from a negligent third person. Previous Iowa decisions had interpreted the Iowa statute as creating a principal-agent relation between the owner and the driver,[33] and also had relied on the both-ways doctrine. However, language indicating the creation of an agency relationship is not contained in the statute, and the true legislative purpose, to provide a means of compensation for third parties injured in automobile accidents, would seem to have been restored by the overruling case.

The Wisconsin statute, though similar to the Maine, New York, and Iowa statutes, has been construed to reach a contrary result. In *Scheibe v. Town of Lincoln*,[34] the court held that the percentage of the total negligence attributable to the driver would be imputed, under the statute, to the owner when the owner was suing for damages to his car. The wording of the statute does not, on its face, support this imputation of contributory negligence both ways.[35] However, it is likely that this strained result may be attributed to Wisconsin's comparative negligence rule.[36]

Courts, such as those in Wisconsin, have attempted to justify the imputation of contributory negligence of the bailee to the bailor under the owner's consent statutes, when a statute is not clear in this respect, on three main grounds:[37] (1) the remedial nature of the

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[32]247 Iowa 709, 74 N.W.2d 212 (1956).

[33]Denny v. Green, 224 Iowa 1268, 278 N.W. 285 (1938); Rogers v. Jefferson, 224 Iowa 324, 275 N.W. 874 (1937); Secured Fin. Co. v. Chicago, R.I.&P.R.R., 207 Iowa 1105, 224 N.W. 88 (1929).

[34]223 Wis. 425, 271 N.W. 47 (1937).

[35]Wis. Stat. § 85.08 (1a) (1937) provides that the parent or guardian is responsible "for any and all damages growing out of the negligent operation ...." of a minor vehicle by the minor.

[36]Wis. Stat. § 331.045 (1937) provides that any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering.

[37]Two other minor grounds have also been asserted by the courts and legal writers.

If contributory negligence is not imputed to the owner when he is suing a negligent third party, then car owners will place the car title in the name of the family member who drives least, thereby circumventing the owner's consent statutes. Reno, Imputed Contributory Negligence in Automobile Bailments, 82 U. Pa. L. Rev. 213, 216 (1934). Should such circumstances arise, the remedy would be beyond the power of the courts, but it is a fair assumption that legislatures will take appropriate action to effectuate fully the intended result of the statutes.

Under the consent statutes, if two bailees are involved in an accident and both

statute; (2) the purpose of the statute, to promote more careful driving; and (3) the both-ways doctrine.

The rule of construction that a remedial statute is to be construed liberally should be resorted to only when the intent of the legislature is in doubt. As pointed out by the Minnesota court: "The duty to construe a remedial statute liberally simply means that the court should so apply it as to suppress the mischief sought to be avoided by affording the remedy intended."[38] The primary remedy intended by the owner's consent statutes is to provide financially responsible defendants, so that innocent victims of automobile accidents will not be left uncompensated. "The very reason for holding the consenting owner liable for negligence of the operator of his automobile, that of furnishing financial responsibility to an injured party, is completely absent in the owner's action to recover for damages sustained by him as a result of the concurrent negligence of the operator and the third party."[39]

If the court finds the purpose of the statute is to promote more careful driving, it may be reasoned that the imputation of the contributory negligence of the bailee to the owner, so as to bar the owner's recovery from a negligent third person, will encourage owners to select their drivers with greater care.[40] However, it seems that the liability which the statute imposes on the owner in case of his driver's negligence is the strongest incentive toward a more careful selection of drivers and that little is added by denying a recovery to the owner in the case of a third party's negligence. The imputation of the bailee's contributory negligence merely operates to allow a negligent third party to escape liability.

The rationale of the both-ways doctrine is that a statute which expressly changes the common law in one respect, by imputing the negligence of the bailee to the bailor, impliedly changes the common law in another respect by imputing the contributory negligence of the

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were negligent, then the bailors would be allowed to recover from each other. This, it is said, becomes an unjust result when the value difference in the cars is great. See the dissenting opinion in Gochee v. Wagner, 232 App. Div. 401, 250 N.Y. Supp. 102, 107 (4th Dep't 1931); Reno, supra at 223; and 17 Cornell L. Q. 158, 165 (1931). However, under the law, the size of the recovery is governed by the amount of the injury. This novel factual situation did arise in Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711 (1949), with the result that each bailor was compensated for the negligence of his bailee, and each bailor recovered for damages to his own car. The result seems both logical and equitable.

[38]Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406, 416 (1943).

[39]10 N.W.2d at 417.

[40]Davis Pontiac Co. v. Sirois, 82 R.I. 32, 105 A.2d 792 (1954).

bailee to the bailor.[41] However, if the legislature sees fit to impute the negligence of the bailee to the bailor with a specific purpose in mind, it does not necessarily follow that it also intends to burden the bailor even further by imputing contributory negligence to him.[42] The imputation of contributory negligence, by denying recovery to an innocent bailor, represents a deviation from the principle of fault and also tends to broaden the scope of the defense of contributory negligence, a departure from the modern trend.[43] A rule based on doubtful logic and contrary to the public need of an expansion of liability in the automobile accident cases is deserving of the criticism it has earned.[44]

Should the legislature want to give a statute the effect of imputing negligence both ways, appropriate language is available.[45] When the legislative intent is not clearly expressed to impute negligence both ways, it would be advisable to avoid the creation of such a result by judicial legislation. The Supreme Court of Maine in the principal case refused judicially to legislate such a rule and applied sound judicial reasoning that might well be adopted by courts faced with the same problem in the future.

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[41]The both-ways doctrine is embodied in the Restatement of Torts: "[A] plaintiff is barred from recovery by the negligent act or omission of a third person if . . . the relation between them is such that the plaintiff would be liable as a defendant for harm caused to another by such negligent conduct of the third person." Restatement, Torts § 485 (1934).

[42]Note, 17 Cornell L. Q. 158, 164 (1931).

[43]Prosser, Laws of Torts 296 (2d ed 1955).

[44]The both-ways doctrine has been severely criticized by the courts and legal writers. Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406, 416 (1943); 2 Harper & James, Torts 1274 (1956); Gregory, The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, 2 U. Chi. L. Rev. 173, 177-78 (1935); Gregory, Vicarious Responsibility and Contributory Negligence, 41 Yale L.J. 831, 843 (1932); James, supra note 2, at 351; Note, 17 Cornell L.Q. 158, 165 (1931).

[45]See the present Delaware statutory amendment, supra note 14.