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Imputed Negligence and Vicarious Liability: The Study of a Paradox

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IMPUTED NEGLIGENCE AND VICARIOUS LIABILITY: THE STUDY OF A PARADOX*

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The lawyer of today takes vicarious liability as a matter of course. And, by pretty much the same token, he takes the idea of imputed contributory negligence as a matter of course. By the general American law, Truck Owner – although altogether free from any personal fault – is liable to Highway Traveler who is injured by the negligence of Truck Owner's employee, Driver, while Driver is acting in the scope of his employment. And if Highway Traveler negligently damages the truck, Owner will be barred from recovering for this damage if Driver's negligence also contributes to causing it.[1] This is all perfectly familiar doctrine, and it therefore seems natural. But upon further analysis and after a longer look at history, several things about this situation will loom up as passing strange. These things in turn will raise the inquiries of whether vicarious liability or imputed contributory negligence may be justified at all; and, if either of them may be, whether they should go hand in hand as they generally do now.

First, let us take that look at history. Not every lawyer of today realizes that, while the doctrine of contributory negligence was developing during the nineteenth century, there were many ways in which imputed contributory negligence was a lot broader than vicarious liability.[2] For example, there was the doctrine of identification, which

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[1]2 HARPER and JAMES, TORTS c. 23 (1956); PROSSER, TORTS §54 (2d ed. 1955). This rule was applied in Powell v. Jackson Grain Co., 134 Fla. 596, 184 So. 492 (1938).

[2]See, in general, Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193, 257 (1921); Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831 (1932); James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340 (1954); Keeton, *Imputed Contributory Negligence*, 13 TEXAS L. REV. 161 (1935); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 FORDHAM L. REV. 156 (1951); sources cited note 1 *supra*.

imputed the negligence of the driver of a vehicle to all his passengers when they sued for injuries caused them by third persons. In early English and American cases this was applied occasionally even to defeat the action of a passenger in a public vehicle such as an omnibus,[3] a ship,[4] or a railroad train.[5] It was more often applied to defeat the action of the driver's friend or a member of his family even though no agency relationship existed between them.[6] In other words, in his suit against a third party each passenger in the vehicle was tarred with the stick of the driver's contributory negligence, even though he would not have been vicariously liable for the driver's negligence if the third person had sued the passenger.

There were other instances. Some courts imputed a parent's custodial negligence to his minor child so as to bar the child's own action against a stranger, though no one ever thought for a minute that the stranger, if he was injured, could hold the child vicariously liable for his parent's negligence in taking care of him.[7] There was also a good deal of nineteenth century authority for imputing a bailee's negligence to his bailor in the bailor's action against a stranger whose negligence contributed to injuring the subject of the bailment.[8]

Not all of these rules were adopted in all states, but it is fair to say that generally the doctrine of imputed contributory negligence was broader than vicarious liability. This situation was not, however, destined to last. Almost from the beginning the whole doctrine of contributory negligence has been assailed as harsh and unduly strict.[9]

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[3]Thorogood v. Bryan, 8 C.B. (Man. G. & S.) 115, 137 Eng. Rep. 452 (C.P. 1849).

[4]Cattlin v. Hills, 8 C.B. (Man. G. & S.) 123, 137 Eng. Rep. 455 (C.P. 1849).

[5]See Lockart v. Lichtenthaler, 46 Pa. 151 (1863); Armstrong v. Lancashire & Y. Ry., L.R. 10 Ex. 47 (1875); Bridge v. Grand Junction Ry., 3 M. & W. 244, 150 Eng. Rep. 1134 (Ex. 1838), and treatment of this case in Thorogood v. Bryan, *supra* note 3.

[6]See, *e.g.*, Prideaux v. Mineral Point, 43 Wis. 513 (1878). This seems not to have been the law in Florida. Bessett v. Hackett, 66 So.2d 694 (Fla. 1953).

[7]Hartfield v. Roper, 21 Wend. 615 (N.Y. 1839); Annot., 15 A.L.R. 414 (1921) (listing Delaware, Maine, Maryland, Massachusetts, and New York as then following this rule); *cf.* Pennsylvania R.R. v. Goodenough, 55 N.J.L. 577, 28 Atl. 3 (1893). Florida did not adopt this aspect of imputed negligence. Tampa Elec. Co. v. Bazemore, 85 Fla. 164, 96 So. 297 (1923).

[8]Illinois Cent. R.R. v. Sims, 77 Miss. 325, 27 So. 527 (1900); Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824); Forks Township v. King, 84 Pa. 230 (1877); Texas & P. Ry. v. Tankersley, 63 Tex. 57 (1885).

[9]See, *e.g.*, 2 HARPER and JAMES, TORTS c. 22 (1956); PROSSER, TORTS 284 (2d ed. 1955); Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674 (1934); Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 253 (1913); Thayer, *Public*

The last hundred years have been marked by constant inroads upon it by courts and legislatures alike.[10] As this development progressed, it is not surprising that attacks were made on imputed contributory negligence as well. Part of this attack was the suggestion that imputed contributory negligence should be cut down to those cases in which the plaintiff would be vicariously liable if he had been sued as defendant. As one writer, about the turn of the century, put it, "It is a poor rule that won't work both ways."[11] This suggestion was pretty widely adopted. The "both ways test," as it is sometimes called, came to prevail and was adopted in the *Restatement of Torts* in the 'thirties.[12]

But accident law is not a stable thing, and even as imputed negligence was being cut down to size — that is, to the same size as vicarious liability — yeast was at work to enlarge the scope of vicarious liability.[13] This raises a question whether we shall continue to apply the "both-ways test" and now expand imputed contributory negligence again as we are expanding vicarious liability.

History, then, tells us that the rule that seems so familiar and normal to us is a relatively new wrinkle and poses a question as to its future course. But history alone cannot answer the question. For the answer we are driven to ask what vicarious liability and contributory negligence are all about and how these concepts serve the interests of society.

In our accident law the prevailing basis of liability is fault. This represents, among other things, a moral judgment that it is fair to visit liability upon the blameworthy but not upon the innocent and, as a corollary, that only the innocent plaintiff may enforce that liability. But, in order to satisfy this moral judgment, fault must be taken in

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Wrong and Private Action, 27 HARV. L. REV. 317, 340-42 (1913).

[10]Examples of judge-made inroads are the last clear chance doctrine, Davies v. Mann, 10 M. & W. 546, 152 Eng. Rep. 588 (1842); the rules that contributory negligence is no defense to actions based on wanton and willful misconduct or to actions based on strict liability or a nuisance, see 2 HARPER and JAMES, TORTS §§22.4- .9, 22.12- .14 (1956); and the change in the rules concerning burden of proof, *id.* §22.11. Legislative inroads include statutes changing the burden of proof and statutes embodying a rule of comparative negligence. *Ibid.*

[11]See Gregory, *supra* note 2; Note, 32 AM. L. REG. 763, 765 (1893).

[12]RESTATEMENT, TORTS §485 (1934).

[13]See in general 2 HARPER and JAMES, TORTS c. 26 (1956). Examples are Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920); the family car doctrine, 2 HARPER and JAMES, TORTS §26.15; statutory extensions of vicarious liability, *id.* §26.16; FLA. STAT. §322.09 (3) (1955).

the sense of personal moral shortcoming. The party to be charged must voluntarily have chosen a wrong or an unreasonable course of action when a better or safer alternative was open to him. He must have acted willfully or unreasonably under all of the circumstances. If individualized fault is taken as the norm for liability or disability to recover, then vicarious liability or disability to recover must be regarded as an exceptional solution, to be justified only for reasons of policy sufficient *in each case* to warrant the exception. And certainly there is no general notion that innocent *A* must pay for, or be barred by, *B's* fault. This was clearly pointed out by Holmes in his famous articles on *Agency;*[14] and he concluded that vicarious liability could not be justified by reason, but only by a fiction.

In this, however, Holmes has few if any modern followers. Most people today do justify vicarious liability on grounds of policy very much like those that justify workmen's compensation, namely, that employers of labor and owners of vehicles are better distributors of the risks that their lawful activities create than are their victims[15] — a principle once recognized by the Supreme Court of Florida in the notable case of *Southern Cotton Oil Co. v. Anderson.*[16]

The question remains whether this, or any other ground of policy, justifies imputed contributory negligence. This rule clearly does not further the compensation of accident victims. Quite the contrary; it cuts them off from compensation. By the same token it does not generally aid in distributing accident losses among those whose conduct causes accidents. Instead, it generally frustrates such distribution. Further, imputed contributory negligence is scarcely needed as an incentive to be careful in selection and control of employees, since vicarious liability already supplies that incentive.

It will be seen, then, that the reasons of policy that emphatically justify vicarious liability signally fail to justify imputed contributory negligence. Rather they point in the opposite direction.

To the question, then, whether imputed contributory negligence

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[14] 4 HARV. L. REV. 345, 5 *id.* 1 (1891).

[15] See Johnston v. Long, 30 Cal.2d 54, 181 P.2d 645 (1947); Kohlman v. Hyland, 54 N.D. 710, 210 N.W. 643 (1926); Carroll v. Beard-Laney, Inc., 207 S.C. 339, 35 S.E.2d 425 (1945); Douglas, *Vicarious Liability and Administration of Risk,* 38 YALE L.J. 584, 720 (1929); James, *Vicarious Liability,* 28 TUL. L. REV. 161 (1954); Laski, *Basis of Vicarious Liability,* 26 YALE L.J. 105 (1916); Wigmore, *Responsibility for Tortious Acts,* 7 HARV. L. REV. 315 (1894).

[16] 80 Fla. 441, 86 So. 629 (1920).

should be expanded as vicarious liability is expanded, the answer is no. Indeed, there seems to be little if any justification for imputing contributory negligence in any case to an innocent plaintiff.[17]

[17]Pragmatic considerations may in some cases justify imputing negligence to those plaintiffs who regularly make provisions by insurance to cover their accident losses. I have tried to explore this problem somewhat in *Imputed Contributory Negligence,* 14 LA. L. REV. 340, 352-54 (1954). See also 2 HARPER and JAMES, TORTS 1276-77 (1956).