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TORTS-IMPUTED NEGLIGENCE IN MICHIGAN

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TORTS—IMPUTED NEGLIGENCE IN MICHIGAN—Husband was driving his wife and another passenger from work when, due to a combination of the negligence of the husband and that of the defendant, a collision occurred resulting in the death of the wife. Plaintiff as administrator of the wife brought an action under the Death Act¹ against the defendant to recover damages for the minor children of the deceased to the support of whom the deceased had contributed. The trial court directed a verdict in favor of the defendant on the ground that the contributory negligence of the husband as driver was imputed to the wife as passenger.² On appeal, *held*, negligence of the driver-husband is not to be imputed to the wife who is a passenger. *Bricker v. Green*, (Mich. 1946) 21 N.W. (2d) 105.

Seventy-four years after the imputed negligence doctrine was first applied in Michigan,³ its abandonment now places Michigan in an unbroken line of

¹ Mich. Public Acts (1848) Act No. 38, 3 Mich. Comp. Laws (1929), §§ 14061 et seq.; Mich. Stat. Ann. (1938) §§ 27.711 et seq. as last amended by Mich. Public Acts (1939) Act No. 297.

² *Ehrke v. Danek*, 288 Mich. 498, 285 N.W. 37 (1939). Contributory negligence of driver of car in which the decedent wife was riding as passenger held to be imputable to her in barring a recovery against the driver of other car involved in collision.

³ In *Lake Shore & Michigan Southern R. Co. v. Miller*, 25 Mich. 274 (1872), the opinion included a dictum that the negligence of the driver of a wagon in which the plaintiff was riding should equally affect the plaintiff's right to recover against the railroad for injuries arising out of an accident at a grade crossing.

Although no authority was cited for this statement in the *Miller* case, the doctrine is traceable to *Thorogood v. Bryan*, 8 C. B. 115, 137 Eng. Rep. 452 (1849), where it was held that the passenger in an omnibus had so identified himself with the driver of the omnibus that the negligence of the driver would be imputed to the passenger.

American authority holding that a driver's negligence is not imputable to a passenger unless the relation of master and servant, principal and agent, or joint enterprise exists between the negligent driver and the injured passenger.⁴ During the life of the doctrine it had been narrowed to exclude from imputation minor children,⁵ occupants of public carriers for hire,⁶ occupants of private carriers for hire,⁷ and city firemen.⁸ The doctrine proceeded on the assumption that a passenger in a private conveyance intrusts his personal safety in the conveyance to the person in control of it; that by his voluntary entrance into the conveyance he adopts the conveyance for the time being as his own, and that he assumes the risk of the skill and care of the person driving it. Logically, imputed negligence is a form of vicarious liability which should be limited to situations where the passenger controls or has a right to control the driver, and is therefore liable to third persons for negligence of the driver.⁹ Applied otherwise, the doctrine is an anomaly imposing responsibility for the purpose of imputation, but not for the purpose of liability.¹⁰ It is necessary to distinguish vicariously imputed negligence from contributory negligence of the passenger himself as where the passenger voluntarily rides with a driver whom he knows to be intoxicated, reckless, incompetent, or where the passenger unreasonably fails to warn the driver of a danger which he discovers and has reason to believe that the driver has not appreciated.¹¹ The absence in fact of any relationship between driver and passenger which would give the passenger control over the conduct of the driver is perhaps the most cogent reason for refusing to impute the negligence of the driver to the passenger.

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This doctrine was repudiated in *Mills v. Armstrong*, L. R. 13 App. Cas. 1 (1888), as an unwarranted extension of agency doctrine. The United States Supreme Court rejected the doctrine as one resting on indefensible grounds in *Little v. Hackett*, 116 U.S. 366, 6 S. Ct. 391 (1886).

⁴ For collection of cases see 90 A.L.R. 631 (1934); also see *Reiter v. Grober*, 173 Wis. 493, 181 N.W. 739 (1921), where the Wisconsin court repudiated the imputed negligence doctrine leaving Michigan as the only state adhering to the rule.

⁵ *Donlin v. Detroit United R. Co.*, 198 Mich. 327, 164 N.W. 477 (1917); *Mullen v. City of Owosso*, 100 Mich. 103, 58 N.W. 663 (1894). The Mullen case included a well-reasoned dissent by Judge Hooker reviewing the reversal of *Thorogood v. Bryan*, and attacking the imputed negligence doctrine on the fundamental ground that between driver and passenger there was no relationship calling for identification.

⁶ *Cuddy v. Horn*, 46 Mich. 596, 10 N.W. 32 (1881).

⁷ *Lachow v. Kimmich*, 263 Mich. 1, 248 N.W. 531 (1933).

⁸ *McKernan v. Detroit Citizens' Street-Railway Co.*, 138 Mich. 519, 101 N.W. 812 (1904).

⁹ See dissent by Judge North in *Lachow v. Kimmich*, 263 Mich. 1, 248 N.W. 531 (1933).

¹⁰ Keaton, "Imputed Contributory Negligence," 13 TEXAS L. REV. 161 (1935); 32 MICH. L. REV. 274 (1933); also Mechem, "The Contributory Negligence of Automobile Passengers," 78 UNIV. PA. L. REV. 736 (1930).

¹¹ 2 TORTS RESTATEMENT 857, § 315, comment (b) (1934); also see *Leclair v. Boudreau*, 101 Vt. 270, 143 A. 401 (1928), *Parker v. Helfert*, 140 Misc. 905, 252 N.Y.S. 35 (1931).