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Agency - Vicarious Liability - Abrogation of the Both Ways Rule

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CASE NOTES

AGENCY–VICARIOUS LIABILITY–ABROGATION OF THE BOTH WAYS RULE

The plaintiff, who was riding with his servant at the time of an automobile accident, brought an action against the defendant corporation alleging negligence on the part of the driver of its vehicle. Defendant alleged the contributory negligence of the plaintiff's servant, which when imputed to the plaintiff, would bar recovery.[1] The trial court found for the defendant, holding that the negligence of the servant was imputed to his master so as to bar the master's right of recovery against the negligent third party. The Supreme Court of Minnesota reversed and thereby abandoned the rule that the negligence of a servant is imputed to his master, so as to bar the master's right of recovery against a negligent third party when the master is vicariously liable to the third party. *Weber v. Stokley-Van Camp, Inc.*, – Minn. –, 144 N.W.2d 540 (1966).

The instant case is significant because it is the first and, as of this writing, the only case to have attacked the heretofore universally accepted doctrine of imputed contributory negligence in an action where the master was plaintiff, rather than defendant.[2] In abandoning this doctrine, the court refused to apply ancient precedents, which had neither offered nor were themselves supported by any rational basis for such imputation. Rather, it predicated its decision upon critical analysis, instead of upon unquestioning reliance on historical dogma. In order to fully understand the court's decision, and thereby evaluate its wisdom, this note will discuss the history of and the modern justification for the common law doctrine of respondeat superior. It will then be possible to examine the effects of the case on the substantive law, as well as its wider application to juristic philosophy and methodology.

The doctrine of respondeat superior has been a viable juristic concept for several centuries. The question of whether the precise etiology of the rule of vicarious liability has its roots in the antiquarianism of the Roman Law of pater familias[3] or whether it is the precipitate of some almost

[1] As to the manner and necessity of pleading imputed contributory negligence as a defense where still recognized as such, see Annot., 59 A.L.R.2d 273 (1958). As to the necessity of pleading that the tort was actually committed by the servant in an action brought by a third party against the master, see Annot., 4 A.L.R.2d 292 (1949).

[2] The court limited its holding to automobile negligence cases. – Minn. –, 144 N.W.2d 540, 565 (1966).

[3] Mr. Justice Holmes, in tracing the history of vicarious liability and the "identification fiction," concluded that their sources lay in the Roman Law of pater familias

imperceptible moral and/or social syncretism wrought by the emergence and growth of corporate enterprise and theory is not the burning polemic today it was a few years ago.[4]

Yet, this is not to say that the concept itself is no longer sufficiently novel or important to be worthy of careful investigation and possible amelioration or clarification. Indeed, in no branch of legal thought are the principles in such sad confusion.[5] Perhaps nowhere has it been so difficult to win assent to what some have deemed fundamental dogma,[6] and perhaps nowhere is the law more replete with "theories" which, upon close scrutiny, reveal themselves as dangerous generalizations which shiver into untruth upon the approach of fact.[7]

Because the courts have laid inordinate insistence upon the origins of the law rather than upon the ends it is to serve, there have been no satisfactory explanations of the results reached in cases arising out of the master–servant relationship. Instead, the courts have taken refuge in syllogisms and historical antecedents all of which have been, at best, impotent aids in the analytical process.[8]

A careful examination is required for an understanding of the modern justification for the doctrine of respondeat superior, which today is generally acknowledged to be based on policy considerations. These considerations are to the effect that if the employer is compelled to bear the burden of his servant's torts, even when he is himself without fault, it is because, in a social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained.[9]

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and the system of frankpledge, or Frithborh, familiar in England at the time of the Conquest. See Holmes, *The History of Agency*, 4 HARV. L. REV. 345 (1891) and 5 HARV. L. REV. 1 (1891), reprinted in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 368 (1909).

[4] 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 530 (1895); Wigmore, *Responsibility for Tortious Acts: Its History*, 7 HARV. L. REV. 315, 442 (1894).

[5] Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105 (1916).

[6] See BATY, VICARIOUS LIABILITY (1916); See also MECHEM, AGENCY § 499 (3rd ed. 1923).

[7] Parke, Alderson, and Cranworth ascribe the basis of liability to "qui facit per alium facit per se." See Quarman v. Burnett, 6 M. & W. 509 (1840); Hutchinson v. York, Newcastle Ry., 5 Ex. 343 (1850); Bartonshill Coal Co. v. Reid, 3 Macq. 266 (1858). Pothier ascribed its force to the necessity of making men careful in their selection of servants. See POTHIER, OBLIGATIONS 72 (Evans transl. 1826). For a synopsis of the divergent theories and a scholarly treatment of the entire subject see Laski, *supra* note 5; See also PROSSER, TORTS § 68 (3rd ed. 1964).

[8] PROSSER, *op. cit. supra* note 7, at § 68.

[9] Douglas, *Vicarious Liability and Administration of Risk*, 38 YALE L.J. 584 (1929); MECHEM, AGENCY § 351 (4th ed. 1952); Seavey, *Speculations As To Respondeat Superior*, HARVARD LEGAL ESSAYS 433 (1934).

It has been suggested by a weighty authority that the social interpretation of respondeat superior and the companion rule of imputed contributory negligence will yield the only satisfactory clue to the often bewildering labyrinth presented by the a priori methodology employed by the courts in rendering judgments in this area.[10] Indeed, as will be seen, it is upon this very premise that the rationale of the instant case is predicated.

Imputed contributory negligence is but the obverse of the doctrine of respondeat superior. Imputable contributory negligence, which will bar the plaintiff from recovery, exists when the plaintiff, although not chargeable with personal negligence, has been, by the negligence of a person in privity with him and with whose fault he is chargeable, exposed to the injury which he received through the negligence of the defendant. In cases of its character, if the negligence of the person exposing the plaintiff to injury is the proximate cause of the injury, the plaintiff cannot recover because the contributory negligence of such person will be imputed to him.[11]

Essentially, imputation of the negligence of a servant to a master rests on the so called "both ways" rule, that is, if the master is vicariously liable to a third party due to the servant's negligence, he is also barred from recovery because his servant's negligence is imputed to him.[12]

Prior to the decision in the *Weber* case, there had been a monolithic acceptance of the "both ways" rule, whose duality of operation had been assumed, sub silentio, to be an a priori necessity.[13] Yet, an examination of the cases fails to disclose just what, if anything, necessitated or justified the operation of the rule in cases where the master was the plaintiff rather than the defendant.[14]

The attitude of the courts toward this situation and their resolution of the problems presented by it are exemplified by the case of *City of Newark v. United States.*[15] In that action the plaintiff sought to recover for damage to its ambulance caused by a collision with the defendant's

[10] Laski, *supra* note 5, at 121.

[11] See generally BEACH, CONTRIBUTORY NEGLIGENCE 32–33 (1885); 3 COOLEY, TORTS § 492 (4th ed. 1932); SMITH, LAW OF MASTER AND SERVANT 344 (4th ed. 1886).

[12] *Supra* note 2, at –, 144 N.W.2d at 541. See also Gregory, *Vicarious Responsibility and Contributory Negligence,* 41 YALE L.J. 831 (1932).

[13] Knapp v. Styer, 280 F.2d 384 (8th Cir. 1960); Pass v. Firestone Tire & Rubber Co., 242 F.2d 914 (5th Cir. 1957); Louisville N.A. & C. Ry. v. Stommel, 126 Ind. 35, 25 N.E. 863 (1890); La Riviere v. Pemberton, 46 Minn. 5, 48 N.W. 406 (1891); Page v. Hodge, 63 N.H. 610, 4 Atl. 805 (1885).

[14] Van Lien v. Scoville Mfg. Co., 14 Abb. Pr. (n.s.) 74 (N.Y. 1873); Smith v. New York Cent. & H. Ry., 38 N.Y.S. 666 (1896); 4 AM. & ENG. ENCY. LAW 82 (1888); 29 CYC. LAW & PROC. 545 (1908).

[15] 149 F.Supp. 917 (1957), *aff'd* 254 F.2d 93 (1958).

mail truck. The defendant counterclaimed for damage to its vehicle, alleging the negligence of plaintiff's servant. The trial court held that the drivers of both vehicles were negligent and that such negligence was imputable to their respective employers, precluding recovery by either. In dismissing the defendant's counterclaim the court said that "the negligence of the mail truck driver, imputable *without question* to his employer, the United States, clearly establishes that judgment on the Government's counterclaim must be entered for the City."[16] The court apparently felt that the issue was so indisputable that it failed to support the above statement with either authorities or its own rationale.

The instant case then is salient not merely because it is the first, and as yet, the only case in the United States to have changed the dichotomous operation of the doctrine of imputed contributory negligence, but also because it is perhaps the only modern case dealing with the problem which has employed an analytical rationale rather than a scholastic dialectic, or no dialectic at all, in reaching its decision.

While the court has taken an unprecedented posture,[17] its decision was not dictated by the conclusion that the "both ways" rule was not a logical imperative. Rather, the court spent its energy on the study of the ends which the doctrine has sought to subserve. Indeed, implicit in the court's opinion is the notion that more important than either a formal, logical systematization of rules of law or an historical study of them is the establishment of their postulates from within, upon accurately measured social desires instead of traditions. For, as Mr. Justice Holmes once said, "a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words."[18]

Using the above methodology, the Minnesota Supreme Court reasoned that the justification for holding a master liable for the negligence of his servant, viz. the social necessity for creating a solvent defendant,[19] was "completely lacking"[20] in the instance where the master sues a third party tortfeasor for damages sustained by him as a result of the concurrent negligence of the servant and the third party. Thus, it is a non sequitur

[16] *Id.* at 920. (Emphasis added).

[17] Aside from the overwhelming body of case law which is antithetical to the instant case, see RESTATEMENT (SECOND), TORTS § 486 (1965), and RESTATEMENT (SECOND), AGENCY § 317 (1958).

[18] Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 468–69 (1897).

[19] BATY, *op. cit. supra* note 6. See also Baty, *The Basis Of Responsibility*, 32 JURID. REV. 1159 (1920).

[20] *Supra* note 2, at _____, 144 N.W.2d at 542.

to say that because the intendment of the doctrine of respondeat superior is to impose liability against a master, it also is its policy to impute to him the contributory negligence of his servant thus interdicting him from recovery. The court concluded that the rule barring recovery in such cases is "defensible only on the grounds of its antiquity."[21]

The court also took cognizance of the strong trend away from the strict application of the doctrine of imputed contributory negligence. Indeed, it noted that the entire doctrine, as it applied to relationships other than master and servant, has been abrogated in almost all jurisdictions, and where it still exists it is moribund.[22]

Yet, paradoxically, despite the obvious dissatisfaction with the doctrine, there has been a judicial reluctance to extend the renunciation into the master servant relationship. The court in the *Weber* case has, however, refused to so restrict its abrogation and has explicitly rejected a particular facet of the doctrine of imputed contributory negligence in this area as well.

Chief Justice Knutson, in arriving at, and in support of, this decision drew an analogy between the Minnesota Financial Responsibility Act[23] and the common law doctrine of imputed contributory negligence. He examined the doctrine in light of this statute, which makes the owner of an automobile liable for injuries to third persons caused by the negligence of any person who is operating the car with the owner's consent. In effect, a statutory agency is created, which results in vicarious liability.[24]

The majority of the courts which have considered the effect of these statutes imputing the contributory negligence of the driver to the owner have looked, as did the court in the instant case, to the purpose and intendment of the statute. They concluded that the legislative intent was to protect injured plaintiffs against the financial irresponsibility of drivers and to protect, rather than diminish, any right to recovery which would otherwise be allowed. Hence, they have held that the legislation does not have the effect of imputing contributory negligence.[25]

[21] *Supra* note 2, at _____, 144 N.W.2d at 545.

[22] See RESTATEMENT (SECOND), TORTS § 485 (1965); PROSSER, *op. cit. supra* note 7, at § 72; Annot., 59 A.L.R. 153 (1927); ANNOT., 110 A.L.R. 1099 (1937), Annot., 42 A.L.R.2d 937 (1955). In those jurisdictions subscribing to the doctrine of last clear chance or comparative negligence, the imputation of a servant's negligence to the master will not necessarily preclude the latter's recovery against a third party tortfeasor. See Knapp v. Styer, 280 F.2d 384 (1960); See also RESTATEMENT (SECOND), TORTS § 486 (1965).

[23] MINN. REV. STAT. § 170.54 (1960).

[24] Such statutes are in force in about a dozen states. See cases collected in PROSSER, *op. cit. supra* note 7, at § 72.

[25] *Ibid.* See also Annot., 11 A.L.R.2d 1437 (1950). The question of the application of the family car doctrine to impute the contributory negligence of the driver to the

The court, in the instant case, found precious little difference between the purpose of the common law rule of liability and the corresponding statutory progeny. Thus, if the latter did not preclude a bailor's action against a third party tortfeasor, the court was unable to find any reason why the former, whose basic purpose was the same as that of the statutory rule imposing liability, should bar a master's action. The court said that "in view of the fact that imputed negligence has now been abandoned . . . as to relationships where it formerly applied, 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."[26] Thus, the instant case expressly rejected the heretofore unquestioned assumption that the rule of imputed negligence "must work both ways if it is to work at all."[27]

After discussing certain "inconsistent applications of the rule,"[28] the court moved on to what seemed to them the most glaring inconsistency. The theory of liability in cases presenting the same factual milieu as in the instant case is predicated upon the master's theoretic right of control. Yet, the court was of the opinion that by virtue of contemporary conditions any attempt on the part of the master to exercise such control

> would be the clearest evidence of active negligence on the part of the master, for which he would be chargeable without imputing to him the negligence of his servant. Imputed negligence on the other hand, presupposes that the master is innocent of any fault. How, then, can we reconcile the theory of right to control, the exercise of which would charge the master with negligence and imputed negligence based on the theory that he is free from any fault? The two just don't hang together.[29]

Hence, the import of the instant case is manifest. It has completely changed one facet of the substantive law of vicarious liability in Minnesota, and its rationale may well serve as precedent in other forums. In addition, the methodology and the very hypostasis of the opinion manifest an impatience with attempts to settle matters of social policy by dialectic reasoning from obdurate concepts by pressing words to a drily logical extreme. To be sure, nothing is more antithetical to a jurisprudence of conceptions. The court is not indifferent to the claims of exact, explicit, and

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owner when the latter is suing for damages to his car or person has seldom arisen. Where it has, however, it has been held that the "both ways" rule applies thereby precluding the owner's recovery. See Prendergast v. Allen, 44 R.I. 379, 117 Atl. 539 (1922). *Contra,* Michaelsohn v. Smith, 113 N.W.2d 571 (N.D. 1962).

[26] *Supra* note 2, at ——, 144 N.W.2d at 544.

[27] See Gregory, *supra* note 12, at 831 where the "both ways" rule received its name. Prior to this, however, there had been a universal though tacit acceptance of the philosophy of the rule.

[28] *Supra* note 2, at ——, 144 N.W.2d at 543. [29] *Id.* at ——, 144 N.W.2d at 545.

consistent reasoning. In reality, it is not logic to which it takes exception. Rather, it objects to the specious logic which is involved in applying the classic systems of fictitious, fixed concepts, which were never meant to wear the aspects of immortality, and demonstrative exact subsumptions under them, to the decision of problems which emanate from a living conflict of desires and the seamless web of life.[30] Indeed, as Professor Laski said:

> [W]e can not run a world on the principles of formal logic. The test of our rule's worth must, in fact, be purely empirical in character. We have to study the social consequences of its application, and deduce therefrom its logic. We have to search for the mechanism of our law in life as it actually is, rather than fit the life we live to a priori rules of a rigid legal system.[31]

Thus, the court makes it abundantly clear that "neither the doctrine of respondeat superior nor any other principle governing master and servant [should be] amplified and extended so as to perpetrate wrong or work oppression upon the master. The rule should be [upheld] but should not be allowed to escape its bounds, so as to invade and perchance destroy the rights of the master."[32]

Just what effect the instant case will have on future decisions of other courts remains to be seen. Yet, if it is less than an effulgent apocalypse, it is certainly more than an apostasy from the principles of respondeat superior. The court in the *Weber* case has broken from the unquestioning, assumptive application of the legal fictions embodied in the doctrine itself and has adopted an analytical methodology, predicted upon contemporary social conditions, designed to yield a result consistent with the fundamental

[30] Mr. Justice Holmes expressed this thought most cogently when he said, "the whole outline of the law is the resultant of a conflict at every point between logic and good sense—the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the result becomes too manifestly unjust." Holmes, *The History of Agency*, 4 HARV. L. REV. 345, 346 (1891). See also Sleicher v. Sleicher, 251 N.Y. 366, 167 N.E. 501 (1929), and Gaines v. Jacobson, 308 N.Y. 218, 124 N.E.2d 290 (1954) where the court refused to carry the "relation back" fiction in annulment cases to its logical conclusion because to have done so would have resulted in injustice. Thus, it is clear that even had the Minnesota Supreme Court in the instant case found the dual operation of the "both ways" rule to be a logical necessity, it would not have been compelled to carry that fiction to its ultimate conclusion if to do so would work an injustice.

[31] Laski, *supra* note 5, at 113.

[32] Grubb v. Galveston, H. & S.A.Ry., 153 S.W. 694, 696 (Civ. App. 1913) *rehearing denied* 153 S.W.694 (1913). Conversely, it should not be amplified to capriciously create liabilities in a master. For an interesting illustration of how this might occur if the "both ways" rule were rigidly adhered to in all cases, see Shell Oil Company's unsuccessful contention in Drewry v. Dapsit Bros. Marine Divers Inc., 317 F.2d 429 (5th Cir. 1963). See also Haddock v. Haddock, 201 U.S. 562, 630 (1906) wherein Mr. Justice Holmes said, "fiction always is a poor ground for changing substantial rights."

intendment of respondeat superior, rather than to subserve the ends of formal logic.

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CONSTITUTIONAL LAW–DRAFT CARD BURNING–SYMBOLIC EXPRESSION NOT IN PUBLIC INTEREST

On October 15, 1965, the appellant, David Miller, burned his draft card while giving a speech at a street rally near the Army Building in Manhattan. The appellant believed the burning of his Notice of Classification to be a symbolic protest against the draft, the military action in Vietnam, and the law prohibiting the knowing destruction or mutilation of draft cards.[1] The trial court convicted Miller for knowingly destroying a Selective Services Notice of Classification. The United States Circuit Court of Appeals affirmed the judgment, holding that the public interest protected by the proper functioning of the Selective Service System, a purpose served by statute making it unlawful to mutilate or destroy a draft card, outweighs any alleged abridgement of freedom of symbolic expression of speech by a registrant's burning of his draft card. *Miller v. United States*, 367 F.2d 72 (2d Cir. 1966), *cert. denied*, No. 851, U.S., February 13, 1967.

The *Miller* case is significant because it is the first case to interpret the 1965 amendment of section 12(b)(3) of the Universal Military Service and Training Act which prohibits the knowing mutilation or destruction of draft cards. The purpose of this note is to analyze the constitutionality of the amendment in light of the guarantees of freedom of expression as embraced by the first amendment. In this analysis, the purpose of the amendment and the character of the act of destroying a draft card as symbolic speech will be discussed. It will then be possible to consider whether Congress may, under the pretense of its power to raise and support armies suppress a form of dissent hostile toward national policy.

It was contended by the appellant that section 12(b)(3) of the Universal Military Service and Training Act, as amended in 1965, under which he was convicted, was unconstitutional. The reasons posited for the alleged unconstitutionality were: (1) that the statute is unconstitutional on its face because its legislative history establishes that it was enacted deliberately, and for the purpose of suppressing dissent; (2) it is unconstitutional as ap-

[1] Universal Military Training and Service Act, § 12(b)(3), 62 Stat. 604 (1948), 50 U.S.C. App. § 462(b)(3) (1965). "Any person . . . (3) who forges, alters or knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon . . . (6) [shall], upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years or both."