CASE NOTES

AUTOMOBILE LAW—Under what circumstances will contributory negligence of his driver be imputed to the owner-passenger in the owner's action against the driver or owner of another vehicle involved in an accident with them?

Plaintiff, a young adult, was the owner of a Chevrolet automobile, which collided with defendant's at a street intersection. At the time of the collision the car was being driven by another while plaintiff sat in the rear seat with two friends. Two passengers also rode in the front seat with the driver. The trial court found that defendant was negligent and his negligence the proximate cause of the accident, but also that the driver of plaintiff's car was guilty of contributory negligence in driving at such a speed that he could not stop within the assured clear distance ahead. Following what it thought to be the ruling of *Stuart v. Pilgrim*,[1] the Court held that the contributory negligence of the driver was not imputed to the owner, allowing the plaintiff to recover. Defendent appealed. *Held*, reversed. "The true test in determining whether or not contributory negligence is imputable to the owner is the right to control and whether or not control has been surrendered." The burden was on the plaintiff to show that he had surrendered the right of control. *Phillips v. Foster*, 109 N.W.2d 604 (Iowa 1961)

Thus the court has circumscribed the bounds of the controversial *Stuart v. Pilgrim* doctrine.[2] In so doing, it has reaffirmed a concept which, although inadvertantly overlooked or purposely disregarded in the *Pilgrim* case,[3] was previously recognized in the earlier Iowa case of *Carpenter v. Campbell*,[4] and has been accepted in the majority of jurisdictions. This concept, termed the *right to control doctrine*, holds that there is a presumption, rebuttable by evidence to the contrary, that an owner present in his car has the power to

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1 247 Iowa 709, 74 N.W.2d 212 (1956).

2 *Ibid.* See discussion of the case in *Owner-Liability and Contributory Negligence—"Pilgrim's" Progress?* 5 DRAKE L. REV. 127 (1956), and in Hudson, *When a Vending Machine Is Not a Vending Machine*, 11 DRAKE L. REV. 3, 10 (1961). In *Pilgrim* plaintiff was a passenger in her car, being driven by her husband, when it collided with defendant's car. Both drivers were negligent. She sued for damages; the lower court imputed the husband's contributory negligence to her and denied recovery, on the basis of IOWA CODE § 321.493 (1958) (the consent driver statute). The Court reversed, stating that this statute does not in itself operate to impute the driver's contributory negligence to the owner, and the mere fact that she was present in the car was no legal reason for imputing her husband's negligence to her in the absence of facts showing she exercised any control over the manner of driving, or showing the existence of a principal-agent relationship.

3 "It is our conclusion that when the owner is present in his car, his right of control is presumed, and the burden is upon him to show that it has been surrendered." Phillips v. Foster, 109 N.W.2d 604, 609 (Iowa 1961). Compare with this: "Nor can we say . . . that the owner is guilty of imputed negligence for the reason that she was riding in the car with the consent driver when the accident occurred . . . *in the absence of any facts* showing she exercised any control over the manner of driving . . . . " Stuart v. Pilgrim, 247 Iowa 709, 712, 74 N.W.2d 212, 215 (1956). [Italics added.] The instant case envisages a presumption of control in the owner which was not recognized in *Pilgrim*.

4 159 Iowa 52, 62, 140 N.W. 225, 228 (1913). In this case defendant, an automobile dealer, was being driven, in his own car, by another. The Court held him liable for the driver's negligence, reasoning that: " . . . where the instrumentality used is under the control and direction and owned by the party charged, and where he has a right to control and direct it, whether he exercises that right or not, he is held for the negligence of the driver."

control it. And, the test of the owner's liability is the right to control and not whether this right is exercised.[5] This in effect, creates a presumptive agency relationship between the parties, and imputes the contributory negligence of the driver to the owner-passenger under the rules of *respondiat superior.*

However, attention is called to the Court's statement that *it is not sound to say as a matter of law that an owner, riding in a car, may sit idly by in the face of obvious statutory violation of the law of the road and then recover on the basis of his own silence concerning the contributory negligence of his own driver.*[6] In view of this statement, one wonders whether the liability of the owner could not more reasonably be based on a direct breach of his own duty to use reasonable care to prevent the driver from so conducting himself as to create an unreasonable risk to third parties.[7] "The owner indeed has a duty to control the driver. . . . The duty to control postulates the existance of the right to control."[8] And in the words of one court, the "use of the term *imputed negligence* is somewhat lacking in accuracy, and ordinarily might more fittingly be designated as direct contributory negligence of the passenger."[9] If an agency relationship correctly exists between the parties, the case of a minor owner-passenger would present an interesting problem. Since agency is a contractual relationship, either expressed or implied,[10] the general rule is that a minor is not liable for the tortious acts of one to whom he has undertaken to delegate authority to act as agent.[11] Consequently, under what theory would a minor owner-passenger be held liable for the contributory negligence of his driver? *Parks v. Pere Marquette Railway* held that the minor was guilty of *direct* contributory negligence, finding an actual authority to control in the owner which was exercised through another.[12] However, the fact that the owner-passenger was a minor would have been no problem had the court adopted the reasoning of the *Restatement of Torts*

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[5] Myles v. Philadelphia Transp. Co., 189 F.2d 1014 (3d Cir. 1951); Abbate v. Service Bus Lines, 323 Mass. 154, 82 N.E.2d 797 (1948); Mendolia v. White, 313 Mass. 318, 47 N.E.2d 294 (1943); Pearson v. Erb, 82 N.W.2d 818 (N.D. 1957); Beam v. Pittsburgh Rys., 366 Pa. 360, 77 A.2d 634 (1951); Mazur v. Klemans, 365 Pa. 76, 73 A.2d 397 (1950); Bell v. Jacobs, 261 Pa. 204, 104 Atl. 587 (1918); Santore v. Reading Co., 170 Pa. Super. 57, 84 A.2d 375 (1951); Spegele v. Blumfield, 120 Pa. Super. 231, 182 Atl. 149 (1935); 5 BLASHFIELD, CYCLOPEDIA OF AUTO. LAW & PRACTICE § 2930 (1954). *But cf.*: Peterson v. Schneider, 154 Neb. 303, 47 N.W.2d 863 (1951); Smalley v. Simkins, 194 Wis. 12, 215 N.W. 450 (1927).

[6] Phillips v. Foster, 109 N.W.2d 604, 609 (Iowa 1961).

[7] "If the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care so as to control the conduct of the third person so as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if the actor (a) knows or has reason to know that he has the ability to control the third person, and (b) knows or should know of the necessity and opportunity for exercising such control." RESTATEMENT, TORTS § 318 (1934).

[8] Wheeler v. Darmochwat, 280 Mass. 553, 556, 183 N.E. 55, 57 (1932).

[9] Parks v. Pere Marquette Ry., 315 Mich. 38, 41, 23 N.W.2d 196, 198 (1946).

[10] 2 AM. JUR. *Agency* § 3 (1936).

[11] Potter v. Florida Motor Lines, 57 F.2d 313 (S.D. Fla. 1932); Parks v. Pere Marquette Ry., 315 Mich. 38, 23 N.W.2d 196 (1946); PROSSER, TORTS 789-90 (2d ed. 1955).

[12] 315 Mich. 38, 23 N.W.2d 196 (1946). See also: 1 MECHEM, AGENCY § 147 (2d ed. 1914): "Under any view, an infant of sufficient age would doubtless be held liable for a tort committed under his immediate direction and control, without any reference to the question of agency, on the ground that it was his own act. *Qui facit per alium facit per se.*"

that if the actor permits a third person to use land or chattels in his possession otherwise than as a servant, he is, if present, under a duty to exercise reasonable care to so control the conduct of the third person as to prevent him from so conducting himself as to create an unreasonable risk of harm to others.[13]

Although there have been a few cases wherein the owner-passenger was considered to be a guest in his own automobile, and was not charged with the contributory negligence of his driver,[14] it is nevertheless difficult to envision how an owner, being present, could usually be considered to have surrendered this right to control his own vehicle. Since this right is an incident of ownership, a previous contractual surrender of control seems to be necessary to bar the imputation of the contributory negligence of the driver to the owner,[15] and such a case in actuality, would be very rare.

The effect of this doctrine seems, however, to have been somewhat muted in cases in which the passenger is co-owner with the driver of the vehicle.[16] The courts have generally refused to impute the contributory negligence of the driver to the co-owner passenger, perceptibly adopting the reasoning that parties having equal legal title to a motor vehicle cannot be permitted to contend for the wheel in moving traffic, and therefore, the imputation of negligence to the joint-owner present upon the theory of equal legal right to domination or control is untenable.[17] It is interesting to note, however, that one jurisdiction in which this distinctive reasoning in regards to co-ownership was expounded, refused to apply the same logic in the case of joint-adventurers.[18] "Are we then to conclude that joint-adventurers who also have an equal legal right to control of a vehicle are expected to contend for the wheel?"[19] In addition, in the majority of cases involving an owner-passenger who is the wife of the driver, the courts have refused to impute the contributory negligence of the husband to the wife, relying on the obvious legal fiction that the husband is still the head of the family, and is therefore assumed to be in complete control of the car.[20]

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13 RESTATEMENT, TORTS § 318 (1934).

14 Williamson v. Fitzgerald, 116 Cal. App. 19, 2 P.2d 201 (1931) (owner, requested to furnish her vehicle for a pleasure trip, turned the keys over to the driver who assumed complete control); Hathaway v. Mathews, 85 Cal. App. 31, 258 Pac. 712 (1927) (owner riding as guest of driver to whom she had loaned the car); Hartley v. Miller, 165 Mich. 115, 130 N.W. 336 (1911) (owner-passenger invited to accompany driver and others on a pleasure trip in her own car); Gorman v. Bratka, 139 Neb. 718, 298 N.W. 691 (1941) (plaintiff owner-passenger purchased the car for his daughter's use and never had driven it; daughter driving at time of accident).

15 Mendolia v. White, 313 Mass. 318, 47 N.E.2d 294 (1943); 5 BLASHFIELD, CYCLOPEDIA OF AUTO. LAW & PRACTICE § 2930 (1954).

16 Sherman v. Korff, 353 Mich. 387, 91 N.W.2d 485 (1958), 9 DRAKE L. REV. 48 (1959); Christensen v. Hennepin Transp. Co., 215 Minn. 394, 10 N.W.2d 406 (1943); Blevins v. Phillips, 218 Ore. 121, 343 P.2d 1110 (1959); Jenks v. Veeder Contracting Co., 177 Misc. 240, 30 N.Y.S.2d 278 (Sup. Ct. 1941).

17 Jenks v. Veeder Contracting Co., *supra*, note 16.

18 Stelling v. Public Lumber Supply Co., 3 App. Div. 2d 713, 159 N.Y.S.2d 459 (2d Dept. 1957).

19 Comment, 11 SYRACUSE L. REV. 314, 316 (1960).

20 Southern R.R. v. Priester, 289 Fed. 945 (4th Cir. 1923); Watkins v. Overland Motor Freight Co., 325 Pa. 312, 188 Atl. 848 (1937); Klein v. Klein, 311 Pa. 217, 166 Atl. 790 (1933); Rodgers v. Saxton, 305 Pa. 479, 481, 158 Atl. 166, 168 (1931) ("The husband is still the head of the family, and when he is at the wheel of the car, even with his wife present, the presumption is that he is in control of

In summary, it is probably safe to assume that in the future, the contributory negligence of the driver will be imputed to the owner-passenger in all but a few rare cases in Iowa. The doctrine of *Phillips v. Foster* certainly seems to be a harsh legal rule in view of the practical fact that in most cases the owner is powerless to control any sudden action by the driver. The rule even seems paradoxical when one considers the admonitions of one fluent jurist, who warns; "Any attempted exercise of the right to control by wresting the wheel from the driver would be foolhardy. Equally menacing to the driver's efficient operation of the machine are raucous reproaches, strident denunciations, or even persistent unctuous admonitions from the back seat . . . in the long run, the greater safety lies in letting the driver alone."[21]

PATRICK WALTER BRICK (June 1963)

FAMILY LAW—Duty of parent to support an adult child.

A natural child of full age, married, and the mother of several children was committed to the county hospital as an indigent person in 1930. The child's mother was 77 years old, a widow, and supporting herself as a charwoman at the time of her daughter's commitment. The mother was declared mentally incompetent in 1955 and became a patient in a private hospital. In 1957 the mother's estate received $300,000 in settlement of a contest relative to the purported will of another daughter. The State of Michigan and the County of Wayne brought actions against the mother's estate for reimbursement of expenditures for the daily care, support, and maintenance of the indigent natural daughter. The Probate Court found the mother's estate not liable for the expenditures before receipt of the $300,000, but was reversed by the Circuit Court. The estate appealed. *Held*, reversed. Ability on the part of the parent or her estate to support her adult child at the time services were rendered to the child as an indigent, is a condition precedent to liability to reimburse the county or state. In re *Van Etten's Estate*, 357 Mich. 206, 98 N.W.2d 499 (1959).

The duty of a parent to support an adult afflicted[1] child may arise in several ways. Some jurisdictions have held that at common law there was a duty to support an adult child who was incapable, either mentally or phys-

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the car, and, in the absence of evidence to the contrary, he is solely responsible for its operation.").

[21] Sherman v. Korff, 353 Mich. 387, 388, 91 N.W.2d 485, 487 (1958).

[1] For present terminology see: Iowa Laws ch. 152 (1959). The word "insane" has been changed to "mentally ill" and the word "feeble-minded" to "mentally retarded" throughout the Iowa Code.