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New York No Longer Applies the Doctrine of Imputed Contributory Negligence in Automobile Accident Cases.

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The *Boyd* decision represents a case which has set aside time-honored legal principles and authorities in favor of supposedly well-reasoned legal dicta. The implications that such decisions have for the public and public policy in general can be resolved by other courts analyzing these decisions, but *Boyd* should not represent the beginning of a new trend that absolves the owner or occupier of any duty to take protective measures and use reasonable care for the safety of his invitees. The court's ruling that landowners have no duty to accede to the demands of criminals under *any* circumstances could very well represent a backward step in tort law, specifically for the duty of one to use reasonable care for the protection of another, where the possibility of harm is anticipated or foreseeable. The court in *Boyd* presumably had the welfare of the general public in mind when it handed down its holding, but the practical effect of the ruling, if accepted, may produce the opposite result.

Dan Ray Waller

TORTS—Imputed Negligence—New York No Longer Applies The Doctrine Of Imputed Contributory Negligence In Automobile Accident Cases.

Kalechman v. Drew Auto Rental, Inc.,
353 N.Y.2d 414 (1973).

Hersz Kalechman was killed in a collision between the defendant's car, in which he was a passenger, and a truck. The car was on an extended lease to Kalechman's employer, Speizman Knitting Machine Co., and was being used to travel to Mexico on business. When the accident occurred, the car was being driven by Kalechman's father-in-law who, at his own expense, accompanied the deceased to help with the driving.[1]

The suit was brought by Kalechman's wife, as administratrix, for damages for wrongful death and conscious pain and suffering. The alleged liability of

sions of the extent and nature of the duty owed Boyd by the defendants were included. The robber was indeed an intervening cause which served to connect the injury to Boyd with the action of the teller in ducking behind the partition. And while it was within the realm of the defendant's actions to guard against injury to Boyd as an invitee by doing what the robber commanded, they failed to take those actions.

1. The father-in-law was attempting to pass two trucks at a speed of about 60 miles per hour when the second truck suddenly turned in front of him.

the defendant rested on Section 388 of New York's Vehicle and Traffic Law,[2] which made the owner of a vehicle liable for death or injuries resulting from negligence in the operation of the vehicle by any person driving with the permission, express or implied, of the owner.

The defendant raised the issue of contributory negligence on the part of the deceased as an affirmative defense and entered a motion for summary judgment. The trial court denied the motion and the appellate division reversed, holding that the deceased had dominion and control of the vehicle and, thus, the driver's negligence must be imputed to him in an action against the owner.[3] Held—*Reversed.* A passenger may recover for negligent operation of a motor vehicle—no matter what his relationshp to the driver may be—unless it is shown that his own negligence contributed to the injury.[4]

Generally, a person incurs liability in tort only when his action causes injury to another.[5] Conversely, a person is normally barred from recovery in those cases where he has contributed to his own injury.[6] The doctrine of imputed contributory negligence is an exception to these principles. If the plaintiff stands in a special relationship to a third person whose negligence has contributed to the plaintiff's injury, the plaintiff may be barred from recovery on the theory that the negligence of the third person is imputed to the plaintiff.[7] The relationships which are held sufficient to impute contributory negligence vary somewhat among jurisdictions,[8] but all are based on an agency principle that the plaintiff has control over the activities of the negligent third person.[9]

The modern application of the doctrine of imputed contributory negligence is confined primarily to automobile negligence cases.[10] The seminal recognition of imputed contributory negligence in the automobile field was in the English case of *Thorogood v. Bryan*[11] in 1849. In that case a passenger on an omnibus was injured through the combined negligence of the bus driver and the driver of another vehicle. The court reasoned that, by

2. N.Y. VEH. & TRAF. LAW § 388 (McKinney 1970).
3. Kalechman v. Drew Auto Rental, Inc., 331 N.Y.S.2d 711 (App. Div. 1972).
4. Kalechman v. Drew Auto Rental, Inc., 353 N.Y.S.2d 414, 420-21 (1973).
5. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 1, at 6 (4th ed. 1971).
6. *Id.* § 65, at 416-17.
7. *Id.* § 74, at 488.
8. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 74, at 488-91 (4th ed. 1971); James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340 (1954); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 FORD. L. REV. 156 (1951).
9. *E.g.*, Weber v. Stokeley-Van Camp, Inc., 144 N.W.2d 540, 545 (Minn. 1966). *See also* Note, *Imputed Negligence in Automobile Accident Cases*, 16 ST. JOHN'S L. REV. 222 (1942).
10. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 73, at 481-87 (4th ed. 1971).
11. 137 Eng. Rep. 452 (C.P. 1849).

choosing to use the conveyance, the passenger was "identified" with the driver because he had "employed" him and, consequently, had a right of control over him.[12] This right of control was deemed sufficient to impute the driver's negligence to the passenger and, thereby, to bar his recovery against the driver of the other vehicle. It is apparent that a passenger on a public conveyance has no legal right to control the operation of the vehicle and has no actual control over the driver; thus, the basis for imputation was ficticious. While the case initially received limited acceptance in the United States,[13] it was subsequently overruled in England[14] and was expressly rejected by the United States Supreme Court in 1885.[15] Nevertheless, it set a universally accepted precedent in analogous areas.[16]

One area of its modern application within the field of automobile negligence involves the concept that a master is vicariously liable for torts committed by his servant within the scope of his employment.[17] By analogy, it has been universally held that the contributory negligence of the servant will be imputed to the master in the master's suit, for his own injuries, against a third person.[18] It is noteworthy that the doctrine operates only in a suit against a third person and not in a suit between a passenger and a driver.[19] Thus, the master-passenger may recover from the contributorily negligent servant-driver but not from the negligent driver of the other vehicle. This limitation is valid in all modern applications of the doctrine of imputed contributory negligence.

The major problem with the second area in which the doctrine is traditionally applied, that of joint enterprise, is in determining just what situations it includes. Prosser says it "is something like a partnership" in which "all have an equal voice in directing the conduct of the enterprise."[20] Many courts hold that there must be an association for pecuniary benefit,[21] while

12. *Id.* at 458.

13. The states which did follow the case have subsequently overruled those decisions. See, for example, Bessey v. Salemme, 19 N.E.2d 75, 85 (Mass. 1939); Bricker v. Green, 21 N.W.2d 105, 109 (Mich. 1946); Ashworth v. Baker, 90 S.E.2d 860, 864 (Va. 1956); Reiter v. Grober, 181 N.W. 739, 740 (Wis. 1921).

14. Mills v. Armstrong (The Bernina), 13 App. Cas. 1 (1888).

15. Little v. Hackett, 116 U.S. 366 (1885). "[W]hen one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrong-doer." *Id.* at 371.

16. *See* James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340, 344 (1954).

17. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69, at 458-59 (4th ed. 1971).

18. Nagele-Kelly Mfg. Co. v. Hannak, 164 N.W.2d 540-541 (Mich. Ct. App. 1968); Bailey v. Jeffries-Eaves, Inc., 414 P.2d 503, 510 (N.M. 1966); Smalich v. Westfall, 269 A.2d 476, 480 (Pa. 1970); Fredrickson v. Kluever, 152 N.W.2d 346, 347 (S.D. 1967).

19. *E.g.*, Kleinman v. Frank, 309 N.Y.S.2d 651 (App. Div. 1970), *aff'd*, 319 N.Y.S. 2d 852 (1971).

20. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 72, at 475 (4th ed. 1971).

21. *E.g.*, Adams v. Treat, 472 P.2d 270, 271 (Ore. 1970). "A venture to constitute

others have applied the term "joint enterprise" to such non-pecuniary associations as, for example, bowling team members traveling together in a car.[22] At one time many courts considered marriage to be definable as a joint enterprise.[23] Thus, if a passenger-spouse was injured in an automobile accident and the driver-spouse was contributorily negligent, that negligence would be imputed to the passenger because of the existence of the marital relationship.[24] While what constitutes a joint enterprise is disputed, there is apparent agreement that, once a joint enterprise is found to exist, both vicarious liability and imputed contributory negligence will attach to enterprise members in suits by or against third parties.[25]

The remaining major area of modern application of the doctrine of imputed contributory negligence is more difficult to delineate. It consists of those situations where a principal-agent or similar relationship can be found.[26] One of two criteria is normally used. First is the so-called "both-ways" test,[27] which allows the imputation of contributory negligence only in cases where the plaintiff would be vicariously liable as a defendant.[28] This test would allow imputation in the master-servant and joint enterprise situations, but would limit its application in principal-agent situations to those in which the relationship was such that vicarious liability would be imposed. The second criterion involves the "right to control" concept. Modern applications require that there be some realistic basis for the finding of a right to control. An example is the instance of an automobile owner riding as

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a joint adventure must be for profit in a financial or commercial sense." Edlebeck v. Hooten, 121 N.W.2d 240, 244 (Wis. 1963). This is now the prevailing view. *But see* RESTATEMENT (SECOND) OF TORTS § 491, comment *i* at 551 (1965).

22. Matta v. Welcher, 387 S.W.2d 265, 271 (Mo. Ct. App. 1965).

23. Delaware & Hudson Co. v. Boyden, 269 F. 881, 883 (3d Cir. 1921); Caliando v. Huck, 84 F. Supp. 598, 599 (N.D. Fla. 1949).

24. This was based on the finding of a common purpose from the relationship itself. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 72, at 477 (4th ed. 1971). This concept is now generally repudiated. *See* Ingersoll v. Mason, 254 F.2d 899, 903 (8th Cir. 1958); Clemens v. O'Brien, 204 A.2d 895, 898 (N.J. Super. Ct. 1964); Virginia Transit Co. v. Simmons, 92 S.E.2d 291, 295 (Va. 1956).

25. See, for example, Stam v. Cannon, 176 N.W.2d 794, 797 (Iowa 1970); Matta v. Welcher, 387 S.W.2d 265, 271 (Mo. Ct. App. 1965); Stelling v. Public Lumber Supply Co., 159 N.Y.S.2d 459, 460 (App. Div. 1957); Adams v. Treat, 472 P.2d 270, 271 (Ore. 1970); Edelbeck v. Hooten, 121 N.W.2d 240, 243 (Wis. 1963).

26. This area is broader than the others and can be considered to be the legal basis for all three areas. Both joint enterprise and master-servant relationships are based on the general law of agency, and some courts view them in this manner, *e.g.*, Weber v. Stokeley-Van Camp, Inc., 144 N.W.2d 540, 541 (Minn. 1966). The distinguishing factor is that this area includes situations which do not constitute master-servant or joint enterprise relationships, *e.g.*, Kalechman v. Drew Auto Rental, Inc., 353 N.Y.S.2d 414, 415 (1973).

27. This term appears to have been coined by Gregory, *Vicarious Responsibility and Contributory Negligence*, 41 YALE L.J. 831, 832 (1932).

28. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 74, at 488 (4th ed. 1971).

a passenger in his own car while allowing someone else to drive. In such a case, if the driver is contributorily negligent in an accident, most courts impute the contributory negligence of the driver to the owner-occupant in the owner's suit against a third party.[29] Generally stated, the doctrine will apply if the passenger's right of control is superior to that of the driver.[30] Actual control is not required; only the superior legal right is necessary.

It is relevant to note that many states have enlarged the scope of vicarious liability through the imposition of "family purpose" doctrines[31] or "automobile consent" statutes.[32] These, through the use of the "both-ways" test, would appear also to enlarge the scope of imputed contributory negligence. Such has been the result in a few cases,[33] but most courts have interpreted the intent of the statutes as aiming at providing a financially responsible defendant for an injured plaintiff, and have therefore refused to use them to bar recovery by one who is personally innocent of negligence.[34]

With the increasing criticism of contributory negligence in recent years, the doctrine of imputed contributory negligence has lost favor with most writers in the field.[35] The viewpoint of the majority of prominent writers

29. Hession v. Liberty Asphalt Prods., Inc., 235 N.E.2d 17, 22 (Ill. Ct. App. 1968); Hamilton v. Slover, 440 S.W.2d 947, 952 (Mo. 1969); Red Ball Motor Freight, Inc. v. Arnspiger, 449 S.W.2d 132, 137 (Tex. Civ. App.—Dallas 1969, no writ). *Contra,* Pinaglia v. Beaulieu, 250 A.2d 522, 523 (Conn. Super. Ct. 1969); Weber v. Southwest Neb. Dairy Suppliers Inc., 193 N.W.2d 274, 277 (Neb. 1971) (jury question); Jasper v. Freitag, 145 N.W.2d 879, 886 (N.D. 1966); Smalich v. Westfall, 269 A.2d 476, 481 (Pa. 1970).

30. *E.g.*, Kalechman v. Drew Auto Rental, Inc., 353 N.Y.S.2d 414, 416 (1973).

31. "Family car" doctrines impose liability on the owner of an automobile which is maintained for the general use of the immediate family. These doctrines have been adopted in nearly half the states, *e.g.*, King v. Smythe, 204 S.W. 296, 297 (Tenn. 1918). Several states have expressly rejected the doctrines, *e.g.*, Grimes v. Labreck, 226 A.2d 787, 789 (N.H. 1967); Sare v. Stetz, 214 P.2d 486, 494 (Wyo. 1950). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 73, 483-86 (4th ed. 1971).

32. "Auto consent" statutes, which make the owner of a vehicle liable for any injuries caused by negligent operation of the vehicle by anyone using it with permission, have been adopted in about a dozen states and supercede the "family car" doctrines. *See, e.g.*, N.Y. VEH. & TRAF. LAW § 388 (McKinney 1970). *See also* Brodsky, *Motor Vehicle Owner's Statutory Vicarious Liability in Rhode Island,* 19 B.U.L. REV. 448 (1939).

33. Concerning "family car" doctrines see Pearson v. Northland Transp. Co., 239 N.W. 602, 604 (Minn. 1931); Lucy v. Allen, 117 A. 539, 540 (R.I. 1922). Concerning "auto consent" statutes see McCants v. Chenault, 130 N.E.2d 382, 383 (Ohio Ct. App. 1954).

34. Westergren v. King, 99 A.2d 356, 360 (Del. Super. Ct. 1953); Stuart v. Pilgrim, 74 N.W.2d 212, 216 (Iowa 1956); York v. Day's, Inc., 140 A.2d 730, 732 (Me. 1958); Jacobsen v. Dailey, 36 N.W.2d 711, 716 (Minn. 1949); Mills v. Gabriel, 18 N.Y.S.2d 78, 80 (App. Div. 1940).

35. *See generally* F. HARPER & F. JAMES, LAW OF TORTS § 23.6 (1956); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 74 (4th ed. 1971); Gregory, *Vicarious Responsibility and Contributory Negligence,* 41 YALE L.J. 831 (1932); James, *Imputed Contributory Negligence,* 14 LA. L. REV. 340 (1954); James, *Imputed Negligence and Vicarious Liability: The Study of a Paradox,* 10 U. FLA. L. REV. 48 (1957); Keeton,

is exemplified by Fleming James who has said, "there seems to be little if any justification for imputing contributory negligence in any case to an innocent plaintiff."[36] There has also been some support among the judiciary for complete repudiation of the doctrine.[37] The *Restatement (Second) of Torts*,[38] in partially reversing the original *Restatement*,[39] stated that imputed contributory negligence should be allowed only in the master-servant relationship and in the joint enterprise situation.[40] Adopting the "both-ways" test[41] and rejecting the control test in situations where vicarious liability would not apply, is an alternative device for imputing negligence to an innocent plaintiff.[42]

One case, *Weber v. Stokeley-Van Camp, Inc.*,[43] has significantly denounced the doctrine. In that case a master was riding in his car, driven by his servant who was contributorily negligent in an accident with the defendant's truck. The Minnesota court, recognizing that it stood alone, took the unprecedented step of abandoning the rule that the negligence of a servant would be imputed to the master in the master's suit against a negligent third party.[44] The court observed:

> There is no necessity for creating a solvent defendant in that situation, nor can any of the reasons given for holding a master vicariously liable in a suit by third persons be defended on any ground when applied to imputing negligence of a servant to a faultless master who seeks recovery from a third person for his own injury or damage.[45]

While *Weber* was rejected by a South Dakota Court,[46] the Minnesota Supreme Court, in *Pierson v. Edstrom*,[47] expanded the *Weber* holding by abolishing application of the doctrine of imputed contributory negligence in the joint enterprise situation.[48] The court in *Pierson* expressly limited the aboli-

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Imputed Contributory Negligence, 13 TEXAS L. REV. 161 (1935); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 FORD. L. REV. 156 (1951).

36. James, *Imputed Negligence and Vicarious Liability: The Study of a Paradox*, 10 U. FLA. L. REV. 48, 52 (1957).

37. Weber v. Southwest Neb. Dairy Suppliers, Inc., 193 N.W.2d 274, 278 (Neb. 1971) (McGown, J., concurring); Smalich v. Westfall, 269 A.2d 476, 483-84 (Pa. 1970) (Roberts, J., concurring).

38. RESTATEMENT (SECOND) OF TORTS §§ 486, 491 (1965).

39. RESTATEMENT OF TORTS §§ 485, 495 (1938).

40. One additional possible application is discussed in RESTATEMENT (SECOND) OF TORTS § 494 (1965).

41. The adoption of the test seems implicit in the limited applications which are sanctioned. *See* RESTATEMENT (SECOND) OF TORTS §§ 485, 486, 491 (1965).

42. *Id.* § 495.

43. 144 N.W.2d 540 (Minn. 1966).

44. *Id.* at 545.

45. *Id.* at 542.

46. Wilson v. Great N. Ry., 157 N.W.2d 19, 24 (N.D. 1968).

47. 174 N.W.2d 712 (Minn. 1970).

48. *Id.* at 716.

tion of the doctrine to automobile negligence cases involving a joint enterprise or a master-servant relationship.[49]

Kalechman v. Drew Auto Rental, Inc.[50] is the first case to unequivocally abolish the doctrine of imputed contributory negligence in automobile negligence cases. The opinion, by Judge Wachtler, is orderly and well-reasoned. After reviewing the facts, the court properly phrased the issue as being, "whether the driver's negligence should be imputed to the passenger so as to bar any recovery against the owner."[51] The leading case in New York was *Gochee v. Wagner*,[52] which announced the proposition that the negligence of the driver would be imputed to the owner-occupant, in the owner's suit against a third person, because he was present and had the legal right to control the vehicle.[53] By analogy, the present case falls under this rule because there was no evidence presented to dispute the fact that the deceased had the superior right of control over the vehicle.[54]

The plaintiff in *Kalechman* proposed that *Gochee* be distinguished on the basis that his suit was against the owner of the vehicle in which plaintiff was riding, whereas in *Gochee* the suit was brought against the driver of the other vehicle. The New York Court of Appeals reasoned that distinguishing the two cases would simply require modifying the *Gochee* doctrine to the extent that the owner of the vehicle in which the plaintiff is a passenger should not be considered a third person, but should be considered in the same position as the driver himself. Thus, the doctrine would not apply.[55] Support for the proposal was offered in the concurring opinion of Judge Shapiro in the appellate division, who stated:

> Plaintiff is denied recovery—with resultant unfair benefit to the insurance carrier—because she sued the owner of the vehicle directly instead of suing the negligent driver. If she had done the latter she would have been defended by this very defendant's insurance carrier and the recovery would have been the latter's responsibility.[56]

Judge Wachtler noted that such a proposal had been impliedly rejected in two prior cases.[57] The refusal to adopt the proposition was obviously not based on its lack of equitable merit, but apparently on the basis that the court wished to go further than a simple modification of the existing doctine.[58]

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49. *Id.* at 716.
50. 353 N.Y.S.2d 414 (1973).
51. *Id.* at 415.
52. 178 N.E. 553 (N.Y. 1931).
53. *Id.* at 554.
54. Kalechman v. Drew Auto Rental, Inc., 353 N.Y.S.2d 414, 417 (1973).
55. *Id.* at 417.
56. Kalechman v. Drew Auto Rental, Inc., 331 N.Y.S.2d 711, 712 (App. Div. 1972) (concurring opinion).
57. Ullery v. National Car Rental Sys., Inc., 295 N.Y.S.2d 929 (1968); Kleinman v. Frank, 309 N.Y.S.2d 651, 652 (App. Div. 1970), *aff'd*, 319 N.Y.S.2d 852 (1971).
58. It is noteworthy that the court could have adopted the proposal and granted

After disposing of plaintiff's proposal, Judge Wachtler presented a concise analysis of the criticisms of the doctrine of imputed contributory negligence.[59] Specifically, the court criticized the control theory which, while it may have been realistic at its inception, had long since become unrealistic: "[i]f the owner of a wagon and team handed the reins over to a passenger to let him drive, control of the horses was within easy reach . . . . Actual control was a possibility, not a fiction.[60] Judge Wachtler adds that

> with the advent of the modern automobile there is no longer any basis for assuming that the passenger, no matter what his relation to the driver may be, has capacity to assert control over or direct the operation of a moving automobile.[61]

Such criticism of the right to control, even in cases where the legal right to do so is beyond question, has been widespread.[62] A particularly pertinent remark was made in *Sherman v. Korff*:[63] "[a]ny attempted exercise of the right of control by wresting the wheel from the driver would be foolhardy."[64] *Sherman* adds that "denunciations" and "adminitions from the back seat" are "[e]qually menacing to the driver's efficient operation of the machine . . . ."[65] The criticism is quite justified, on the basis of common sense and experience alone. Judge Wachtler concluded that "the concept now rests on a pure legal fiction"[66]—that of control, which is found to be legally existent, but which is in actuality, non-existent.

The *Kalechman* decision considered the validity of the "both-ways" rule which limits the application of imputed contributory negligence to cases where vicarious liability would apply and determines that it "is undoubtedly correct as far as it goes."[67] The court did not specifically apply the "both-ways" test in the instant case. Use of the test would demand that unless the deceased were to be held vicariously liable for the negligence of the driver, his cause of action could not be barred by imputing contributory negligence. This point further supports the implication that the court desired to go further and repudiate the doctrine in its entirety.

Perhaps the strongest attack on the doctrine was based on the underlying theory of vicarious liability. The court said that the doctrine of imputed contributory negligence "is an illegitimate offspring of the vicarious liability

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relief to this plaintiff. Failure to do so enforces the implication that the court wished to abolish the doctrine in its entirety.

59. Kalechman v. Drew Auto Rental, Inc., 353 N.Y.S.2d 414, 417-18 (1973).

60. *Id.* at 418, *quoting* Note, *Imputed Negligence in Automobile Accident Cases*, 16 ST. JOHN'S L. REV. 222 (1942).

61. *Id.* at 418.

62. Authorities cited note 35, *supra.*

63. 91 N.W.2d 485 (Mich. 1958).

64. *Id.* at 487.

65. *Id.* at 487.

66. Kalechman v. Drew Auto Rental, Inc., 353 N.Y.S.2d 414, 418 (1973).

67. *Id.* at 419.

concept, which serves only to frustrate the broad policy goals of the parent rule."[68] This is because "a rule which departed from the common law in response to an urge towards wider liability is being used to curtail liability by expanding the scope of a defense to it."[69] This criticism has been extensively cited[70] and is difficult to refute. The evidence of its acceptance can be seen in the judicial interpretations of the "family purpose" doctrines and "automobile consent" statutes, which, as previously mentioned, refused to use concepts which were intended to provide relief for a plaintiff as a means of barring recovery and allowing a negligent defendant to escape liability.[71]

The court in *Kalechman* illustrated the harshness of the imputed contributory negligence doctrine by reference to *Mills v. Gabriel*,[72] in which the New York Court of Appeals refused to invoke that state's "auto consent" statute to bar an absent owner's recovery for damage to his auto.[73] Applying this to the situation in *Kalechman*, the court noted that in New York some relief has been allowed in cases of property damage, and the doctrine is most often imposed to bar relief for personal injury and death.[74] This is because, in personal injury cases, the person in legal control is necessarily present in the vehicle and, thus, the relief from the doctrine illustrated by *Mills* is not available.

The court also delineated the stare decisis in New York on related points under the doctrine. It was noted that the intra-family applications of the doctrine have been abolished[75] and that the guest statute has been rejected.[76] The examples were cited as having contributed to the establishment of a public policy which was stated, in *Continental Auto Lease Corp. v. Campbell*,[77] to be "that one injured by the negligent operation of a motor vehicle should have recourse to a financially repsonsible defendant."[78] This is actually a public policy of all the states but, until now, the blind application of the rule of imputed contributory negligence has often frustrated such a basic concept.

Relying on the stated criticisms and decisions, Judge Wachtler declared that "the general rule now is that the passenger's right to recover should not be barred merely because he bears some special relationship to

68. *Id.* at 418.
69 *Id.* at 419, *quoting* 2 F. HARPER & F. JAMES, LAW OF TORTS § 23.6, at 1274 (1956).
70. Authorities cited note 35, *supra.*
71. Cases cited note 34, *supra.*
72. 18 N.Y.S.2d 78 (App. Div. 1940).
73. *Id.* at 80.
74. Kalechman v. Drew Auto Rental, Inc., 353 N.Y.S.2d 414, 419 (1973).
75. Gelbman v. Gelbman, 297 N.Y.S.2d 529 (1969).
76. Babcock v. Jackson, 240 N.Y.S.2d 743, 750 (1963).
77. 280 N.Y.S.2d 123 (1967).
78. *Id.* at 124.

the driver—a rule to which *Gochee* represents a somewhat incongruous exception."[79] While, concededly, the scope of the doctrine was previously limited, it is possibly misleading to state that *Gochee* was an exception to the general rule. This is because, in addition to the agency relation involved in *Gochee,* the doctrine appears to have been consistently applied to cases involving mater and servant[80] and those of joint enterprise.[81] Thus, the statement is more meaningful in reference to the general rule of automobile negligence cases and not the rule of imputed contributory negligence.

The court stated its holding in very inclusive terms, saying:

> We have therefore concluded that Gochee v. Wagner should be overruled, and that the general rule should be applied without exception by allowing the plaintiff passenger to recover for negligent operation of the vehicle—no matter what his relationship to the driver may be—unless it is shown that his own personal negligence contributed to to the injury.[82]

The obvious interpretation of this holding would be that the doctrine of imputed contributory negligence is abolished in New York regardless of personal relationships, at least within the field of automobile negligence. This would include not only the master-servant relationship, to which the *Weber v. Stokeley-Van Camp, Inc.*,[83] decision was limited, and the joint involving situation, including *Pierson v. Edstrom*,[84] but also any relationship involving principal and agent or the right-to-control concept. It is conceivable that the holding was intended to be limited to the relationships exclusive of master-servant and joint enterprise questions. Such an interpretation would be enforced by the failure to mention these latter two relationships in the holding. It seems most reasonable, however, to interpret the words of the court literally. The court said "no matter what his relationship to the driver may be,"[85] and such terminology must be assumed to include any relationship which may exist.

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79. Kalechman v. Drew Auto Rental, Inc., 353 N.Y.S.2d 414, 420 (1973).

80. *See* Ferris v. Sterling, 108 N.E. 406, 407 (N.Y. 1915); Bennrona Corp. v. Mulroney, 3 N.Y.S.2d 87 (App. Div. 1938); Evans v. Zimmer, 220 N.Y.S.2d 139, 146 (Sup. Ct. 1961); Jenks v. Veeder Constr. Co., 30 N.Y.S.2d 278, 280 (Sup. Ct. 1941); Gould v. Flato, 10 N.Y.S.2d 361, 369 (Sup. Ct. 1938).

81. See, for example, Stelling v. Public Lumber Supply Co., 159 N.Y.S.2d 459, 460 (App. Div. 1957); Cass v. Third Ave. R.R., 47 N.Y.S. 356, 358 (App. Div. 1897); Schron v. Staten Island Elec. R.R., 45 N.Y.S. 124, 125 (App. Div. 1897). The decision in Ullery v. National Car Rental Sys., Inc., 295 N.Y.S.2d 929, 930 (1968), may appear to contradict this statement, but a reading of the case shows that it turned on the fact question of whether or not the passenger had any legal right to control of the vehicle. Jenks v. Veeder Constr. Co., 30 N.Y.S.2d 278, 280 (Sup. Ct. 1941), might also appear to hold otherwise, but that case is properly distinguished by the court in *Stelling.*

82. Kalechman v. Drew Auto Rental, Inc., 353 N.Y.S.2d 414, 420 (1973).

83. 144 N.W.2d 540, 545 (Minn. 1966).

84. 174 N.W.2d 712, 715 (Minn. 1970).

85. Kalechman v. Drew Auto Rental, Inc., 353 N.Y.S.2d 414, 420 (1973).

The effect of this holding can be seen in *Natiello v. Carroll.*[86] That case involved the owner-occupant of an automobile driven by his wife. The court found that the situation fell within the rule of *Gochee v. Wagner*[87] and noted that the *Gochee* rule was overruled by *Kalechman.* The application of *Kalechman* prevented the doctrine of imputed contributory negligence from being used to bar recovery by the injured owner-occupant.[88] It remains to be seen how the courts will hold when presented with different fact sitautions, but the reasoning of the court implies a disapproval of the doctrine in its entirety. A public policy, stated very generally, is found to exist against the use of the doctrine, and the holding is couched in broad, all-encompassing terms. It seems that, had any other holding been intended, the language of the court would have been restricted to show such an intention. It seems an inescapable conclusion that the doctrine of imputed contributory negligence is now abolished in New York.

Kalechman is, indeed, a "landmark" decision.[89] The court of appeals has recognized that the imputed contributory negligence doctrine is indefensible in modern times. It contravenes the general policies of negligence law and is condemned by virtually all prominent writers in the field. While founded as a complement to vicarious liability, imputed contributory negligence is shown to operate as an impediment to allowing the innocent compensation by those at fault. The court should be applauded for its willingness to be rid of the rule instead of limiting itself to the piecemeal operation which has abounded for years.

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86. 353 N.Y.S.2d 909 (Sup. Ct. 1974).
87. 178 N.E. 553 (N.Y. 1931).
88. Natiello v. Carroll, 353 N.Y.S.2d 909, 910 (Sup. Ct. 1974).
89. *Id.* at 910.