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Article 21

Negligence--Imputable and Contributory (Miller v. Union Pacific R.R. Co., 54 S. Ct. 172 (1934))

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wherein lies the tortious nature,[7] and sometimes it is in the manner in which the breach is accomplished.[8] The action for breach of warranty itself formerly sounded purely in tort.[9] Later warranty came to be treated as contractual in nature, although the history of the change is not clear.[10] Therefore, if the damages which the husband was seeking to recover arose from his consumption of the food, lack of privity of contract would have prevented his recovery.[11] But since the damages are loss of consortium, sounding in tort, and for which the husband has a cause of action,[12] he is not barred from recovery for any lack of privity of contract.

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NEGLIGENCE—IMPUTABLE AND CONTRIBUTORY.—In an action brought to recover for wrongful death of her husband and for personal injuries to herself, due to the negligence of the defendants, the negligence of the defendants in operating the railroad train and the contributory negligence of the plaintiff's intestate in operating his automobile being conceded, *held,* no recovery for death of husband; but judgment for wife because negligence of driver is not imputable to passenger in same vehicle. *Miller* v. *Union Pacific R. R. Co.,* — U. S. —, 54 Sup. Ct. 172 (1934).

A driver of an automobile is guilty of contributory negligence where he is familiar with the crossing and the train was in plain view at the time of the accident.[1] The doctrine that the negligence of the driver of a vehicle is imputed to a passenger, however, was never accepted in this state, and, after full consideration, distinctly repudiated.[2] Whether a person in a conveyance but having no con-

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[7] *Supra* note 2.

[8] Rich v. New York Central & Hudson River Railroad Co., 87 N. Y. 382 (1882).

[9] 1 WILLISTON, SALES (2d ed. 1924) §195, p. 373.

[10] WHITNEY, LAW OF SALES (2d ed. 1934) 201.

[11] Boardwell v. Collie, 45 N. Y. 494 (1871); Chysky v. Drake Bros. Co., 235 N. Y. 468, 139 N. E. 576 (1923); J. Aron Co. v. Sills, 240 N. Y. 588, 148 N. E. 717 (1925); Jaroniec v. Hasselbarth, Inc., 228 N. Y. Supp. 302, 223 App. Div. 182 (3rd Dept. 1928).

[12] Filer v. New York Central Railroad Co., 49 N. Y. 47 (1872); Bennett, v. Bennett, 116 N. Y. 584, 23 N. E. 17 (1889); Lagergren v. National Coke & Coal Co., 132 App. Div. 912, 117 N. Y. Supp. 92 (1909); Schaupp v. Turner, 188 App. Div. 338, 177 N. Y. Supp. 132 (3rd Dept. 1919); London v. Cunningham, 1 Misc. 408, 20 N. Y. Supp. 882 (1892); Lyons v. N. Y. City Railway Co., 49 Misc. 517, 97 N. Y. Supp. 1033 (1906); 1 COOLEY, TORTS (3rd ed. 1906) 470.

[1] Chicago, R. I. & P. Railroad Co. v. Houston, 95 U. S. 697 (1887); Northern Pacific R. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 769 (1899).

[2] Little v. Hackett, 116 U. S. 366, 6 Sup. Ct. 391 (1886); Union Pacific Ry. Co. v. Lapsley, 51 Fed. 174 (C. C. A. 8th, 1892).

trol over its movement may be denied recovery for injuries on the ground of contributory negligence depends on his own failure to use proper care and not upon that of the driver.[3] Nevertheless, a passenger is required to exercise a proper degree of care for his own safety, and any negligence on his part that contributes to his injury is fatal to his right to recover.[4] He is obliged to exercise such care as a reasonably prudent person would, when riding with another under similar circumstances.[5] This is true even though the driver himself was not negligent.[6] Recovery is denied to the occupant in such cases because of his own negligence, and not by virtue of the doctrine of imputed negligence.[7] While an occupant of a vehicle is not required to exercise the same watchfulness as the driver,[8] it is his duty to exercise ordinary care to observe and appreciate danger.[9] But he need not warn the driver of what the latter already knows and appreciates,[10] or point out dangers which would be apparent to any reasonably careful driver.[11] While there is some authority to the contrary,[12] it is well settled in most jurisdictions that the negligence of the husband cannot be imputed to the wife to prevent recovery by her for injuries she received as his passenger.[13] The negligence of the driver of an automobile colliding with a street car [14] or struck by a train at a crossing [15] cannot be imputed to an occupant of the vehicle at the time of the accident.[16]

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[3] Chicago, R. I. & P. Railroad Co. v. Fanning, 42 F. (2d) 799 (C. C. A. 9th, 1930); Blake v. Brown, 180 N. Y. Supp. 441 (1920).

[4] Flannigan v. New York Central R. R. Co., 70 App. Div. 505, 75 N. Y. Supp. 225 (4th Dept. 1902).

[5] Fitzpatrick v. Cinitis, 197 Conn. 91, 139 Atl. 639 (1927); Carnegie v. Great Northern Ry. Co., 128 Minn. 14, 150 N. W. 164 (1914); Chapman v. Missouri-Pacific R. Co., 217 Mo. App. 312, 269 S. W. 688 (1925).

[6] Schroeder v. Public Serv. R. Co., — N. J. —, 118 Atl. 337 (1921).

[7] Cominez v. Brooklyn R. R. Co., 127 App. Div. 138, 111 N. Y. Supp. 384 (2d Dept. 1908).

[8] Pyle v. Clark, 75 Fed. 644, 25 C. C. A. (C. C. D. U. 1896); Kilpatrick v. Phila. Rapid Transit Co., 290 Pa. 288, 138 Atl. 830 (1927).

[9] Griffenhan v. Chicago R. Co., 299 Ill. 590, 132 N. E. 790 (1921); Gordon v. Opalecky, — M. D. —, 137 Atl. 299 (1927).

[10] Southern Pacific R. Co. v. Wright, 248 Fed. 261, 160 (C. C. A. 9th, 1918); Ingalls v. Lexington R. R. Co., 205 Mass. 73, 90 N. E. 1154 (1910).

[11] *Ibid.*

[12] Peck v. New York R. R. Co., 50 Conn. 379 (1887).

[13] Hoag v. New York Central R. R. Co., 111 N. Y. 199, 18 N. E. 648 (1888); Lewin v. Lehigh Valley R. Co., 41 App. Div. 89, 58 N. Y. Supp. 113 (4th Dept. 1899); Burd v. Bleischer, 208 App. Div. 499, 203 N. Y. Supp. 754 (4th Dept. 1924).

[14] Alabama Power Co. v. Pentecost, 210 Ala. 167, 97 So. 653 (1923); Vanek v. Chicago City Ry. Co., 210 Ill. App. 148 (1918).

[15] Carpenter v. Atkinson, T. & S. F. Ry. Co., 51 Cal. App. 60, 195 Pac. 1073 (1921); June v. Grand Trunk Western Ry. Co., 232 Mich. 449, 205 N. W. 181 (1925).

[16] Parmenter v. McDougall, 172 Cal. 306, 156 Pac. 460 (1916); Willis v. Schertz, 188 Iowa 712, 175 N. W. 321 (1919).