

4/27/65

Memorandum 65-15

Subject: Study No. 62 - Imputed Contributory Negligence Under the Vehicle Code

This memorandum contains a draft statute to carry out the policy decisions made by the Commission at the last meeting. This memorandum is submitted in explanation of the draft statute.

Vehicle Code Section 17150 provides that the owner of a vehicle who permits it to be operated by another is liable for any injury caused by the negligence of the operator. Moreover, the negligence of the operator is imputed to the owner for all purposes of civil damages.

The provision of Vehicle Code Section 17150 that imputes the contributory negligence of a driver to the owner of the vehicle did not operate as a bar to an owner's recovery of damages when injured by the concurring negligence of his operator and a third party prior to the amendment of Vehicle Code Section 17158 (the guest statute) in 1961. Prior to that time this provision merely prohibited the owner from recovering from the negligent third party. It did not affect his remedy against the driver. Thus, in effect, it forced an owner who was injured by the concurring negligence of his driver and a third party to obtain his relief in damages from his driver alone. At a time when contribution between tortfeasors was unknown to the law, the choice thus forced upon an owner of a vehicle was not an unreasonable one. After all, he selected the driver, therefore he should bear the risk of that driver's negligence and ability to respond in damages rather than imposing the risk of the driver's negligence upon some third party. The amendment of the guest statute in 1961 deprived the owner of his option to recover from his driver damages for personal injuries caused while the owner was riding as a guest in his own car. The policy underlying the

guest statute--to prevent collusive suits--is undoubtedly as applicable to owners riding as guests as it is to others riding as guests; but the amendment deprived the innocent owner of his only remedy for personal injuries.

Within recent years California has abandoned the traditional common law view that there is no contribution between tortfeasors. The contribution principle seems to be a fairer one than to require one tortfeasor to bear the entire loss that his actions but partially caused. The principle of contribution provides a means for providing the owner with relief, preventing collusive suits between owners and operators, and proscribing the placement of the entire burden of liability upon either the negligent third party or the driver.

Accordingly, the draft statute provides that the third party tortfeasor may by cross-complaint join the operator as a party to the litigation, and if both are found guilty of misconduct contributing to the injury the operator is liable to make contribution to the third party in accordance with the existing statute providing for contribution between tortfeasors.

Because an operator should be required to contribute not only when he is negligent but also when he is guilty of more serious misconduct, the draft statute does not limit his duty to make contribution to those situations where he is found guilty of negligence. He is required to make such contribution when guilty of any negligent or wrongful act or omission in the operation of the vehicle. The third party tortfeasor, however, as under the existing contribution statute, is prohibited from obtaining contribution if he intentionally caused the injury or damage.

Another problem presented by present Vehicle Code Section 17150 involves the extent to which the owner should be liable for the acts or omissions of another who operates his vehicle with his permission. The

present statute provides that the owner is liable for the "negligence" of the operator. In Section 17158, the term "wilful misconduct" is used to describe the kind of conduct for which an operator is liable to his guest. The term does not appear in Section 17150. Nonetheless, the courts have held that there is no liability on the part of an owner for "wilful misconduct" of his operator under Section 17150. They have apparently treated the terms "negligence" and "wilful misconduct" as mutually exclusive terms. Yet, recent cases decided under the guest statute reveal that these terms are not mutually exclusive. In fact, recent interpretations of the term "wilful misconduct" reveal that almost any negligence involves wilful misconduct. For example, in Reuther v. Viall, 62 A.C. 486 (1965) the following conduct was held to be "wilful misconduct": The Reuthers and the Vialls were neighbors and friends. The Viall automobile was being used after a joint outing to return the Reuther's baby sitter to her home. Two small children of the Reuthers were in the car as well as the defendant's small daughter. The heat element of the cigaret lighter fell to the floor of the automobile, and Mrs. Viall, the driver, took her eyes off the road for a brief time and bent down to pick up the lighter. The car crossed the center line and collided with another automobile.

Of course, Mrs. Viall's action was misconduct--she should not have taken her eyes off the road. And, of course, her misconduct was wilful. But it seems difficult, if not impossible, to believe that she contemplated that any injury would ever occur to anyone as a result of her action. After all, both she and her small daughter were in the car and she was a close friend of all of the other occupants of the car. But if this is wilful misconduct, almost all negligence is wilful misconduct. Negligence almost invariably involves the wilful doing of some act when a reasonable person should be

able to foresee that some harm will result therefrom. A person may wilfully drive too fast, roll through a stop sign, look away from the road, etc. Such misconduct is usually wilful and, under the Reuther case, may subject a driver to liability to a guest. Such an interpretation of the guest statute may be proper and consistent with its purpose--to avoid collusive suits. But to apply this rationale to Section 17150 (as the courts have done in the past) and deny an owner's vicarious liability in such circumstances would virtually nullify the section. Accordingly, the draft statute revises the vicarious liability provisions of Vehicle Code Section 17150 to impose liability upon an owner for the negligent or wrongful act or omission of the operator of the vehicle. We must call to your attention the fact that the Commission has no legislative authorization to make a recommendation on this particular matter. In view of the fact that the insurance companies have opposed our recommendations in the past on the basis that the Commission is not authorized to recommend substantive changes even where authorized to study a subject, we do not believe it wise to recommend this change without first requesting that our legislative authorization be again expanded.

The amendments to Sections 17151, 17152, 17153, 17155, 17156, 17707, 17709, 17710, and 17714 would be unnecessary if the basis of the statutory vicarious liability were left unchanged.

Other statutes in this area of the Vehicle Code reflect ~~the same~~ policies found in Vehicle Code Section 17150. These have been included in the statute so that a consistent policy might be followed in all such situations. Comments on the details of the statute follow:

An act to amend Sections 17150, 17151, 17152, 17153, 17154, 17155, 17156, 17159, 17707, 17708, 17709, 17710, and 17714 of, and to add Chapter 3 (commencing with Section 17800) to Division 9 of, the Vehicle Code, relating to liability arising out of the operation of vehicles.

SECTION 1. Section 17150 of the Vehicle Code is amended to read:

17150. Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligenee a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner , ~~and the negligence of such person shall be imputed to the owner for all purposes of civil damages .~~ [An owner is not liable under this section for any death or injury to person or property intentionally inflicted.]

Comment. The term "negligent or wrongful act or omission" is the term used in Vehicle Code Section 17001 (as revised by Assembly Bill No. 1735 proposed by the Commission). The same term is used here in the interest of uniformity.

The last sentence of Section 17150 is in brackets because the Commission did not approve the inclusion of this sentence. The sentence is placed here to present the issue whether an owner should be liable vicariously for an intentionally inflicted injury. Liability for intentionally inflicted injuries is uninsurable. INS. CODE § 533. See, Escobedo v. Traveler's Insurance Company, 197 Cal. App.2d 118 (1961). Inclusion of this sentence, therefore, would limit the owner's vicarious liability to that which is insurable.

SEC. 2. Section 17151 of the Vehicle Code is amended to read:

17151. The liability of an owner, bailee of an owner, or personal representative of a decedent ~~for-imputed-negligence~~ imposed by this chapter and not arising through the relationship of principal and agent or master and servant is limited to the amount of ten thousand dollars (\$10,000) for the death of or injury to one person in any one accident and, subject to the limit as to one person, is limited to the amount of twenty thousand dollars (\$20,000) for the death of or injury to more than one person in any one accident and is limited to the amount of five thousand dollars (\$5,000) for damage to property of others in any one accident.

Comment. This is merely a conforming amendment.

SEC 3. Section 17152 of the Vehicle Code is amended to read:

17152. In any action against an owner, bailee of any owner, or personal representative of a decedent on account of ~~imputed-negligence-as liability~~ imposed by Sections 17150, 17154, or 17159 the operator of the vehicle whose negligence negligent or wrongful act or omission is imputed to the owner, bailee of an owner, or personal representative of a decedent shall be made a party defendant if personal service of process can be had upon the operator within this State. Upon recovery of judgment, recourse shall first be had against the property of the operator so served.

Comment. This is merely a conforming amendment.

SEC. 4. Section 17153 of the Vehicle Code is amended to read:

17153. If there is recovery under this chapter against an owner, bailee of an owner, or personal representative of a decedent ~~based-on-imputed negligence~~, the owner, bailee of an owner, or personal representative of a decedent is subrogated to all the rights of the person injured or whose property has been injured and may recover from the operator the total amount of any judgment and costs recovered against the owner, bailee of an owner or personal representative of a decedent.

Comment. This is merely a conforming amendment.

SEC. 5. Section 17154 of the Vehicle Code is amended to read:

17154. If the bailee of an owner with the permission, express or implied, of the owner permits another to operate the motor vehicle of the owner, then the bailee and the driver shall both be deemed operators of the vehicle of the owner within the meaning of Sections 17152 and 17153 and 17800 .

Every bailee of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the bailee or otherwise, by any person using or operating the same with the permission, express or implied of the bailee ~~, and the negligence of such person shall be imputed to the bailee for all purposes of civil damages~~ . [A bailee of a motor vehicle is not liable under this paragraph for any death or injury to person or property intentionally inflicted.]

Comment. The amendment to the first paragraph is a conforming amendment. The second paragraph presents the same issues presented by Section 17150. It should read the same as Section 17150 if the whole scheme of the Vehicle Code is to make sense.

SEC. 6. Section 17155 of the Vehicle Code is amended to read:

17155. Where two or more persons are injured or killed in one accident, the owner, bailee of an owner, or personal representative of a decedent may settle and pay any bona fide claims for damages arising out of personal injuries or death, whether reduced to judgment or not, and the payments shall diminish to the extent thereof such person's total liability on account of the accident. Payments aggregating the full sum of twenty thousand dollars (\$20,000) shall extinguish all liability of the owner, bailee of an owner, or personal representative of a decedent for death or personal injury arising out of the accident which exists ~~by-reason-of imputed-negligence,~~ pursuant to this chapter, and did not arise through the negligence negligent or wrongful act or omission of the owner, bailee of an owner, or personal representative of a decedent nor through the relationship of principal and agent or master and servant.

Comment. This is merely a conforming amendment.

SEC. 7. Section 17156 of the Vehicle Code is amended to read:

17156. If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this chapter ~~relating-to-imputed-negligence~~, but the vendee or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of the motor vehicle. A chattel mortgagee of a motor vehicle out of possession is not an owner within the provisions of this chapter ~~relating-to-imputed-negligence~~.

Comment. This is merely a conforming amendment.

[17158. No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or wilful misconduct of the driver.]

Comment. This section is not amended in this statute. It has been included for informational purposes only.

SEC. 8. Section 17159 of the Vehicle Code is amended to read:

17159. Every person who is a personal representative of a decedent who has control or possession of a motor vehicle subject to administration for the purpose of administration of an estate is, during the period of such administration, or until the vehicle has been distributed under order of the court or he has complied with the requirements of subdivision (a) or (b) of Section 5602, liable and responsible for the death of or injury to person or property resulting from ~~negligence~~ a negligent or wrongful act or omission in the operation of the motor vehicle by any person using or operating the same with the permission, express or implied, of the personal representative, ~~and the negligence of such person shall be imputed to the personal representative for all purposes of civil damages .~~ [A personal representative of a decedent is not liable under this section for any death or injury to person or property intentionally inflicted.]

Comment. This section presents the same issues that are presented by Section 17150. It should read the same if these provisions of the Vehicle Code are to make sense.

SEC. 9. Section 17707 of the Vehicle Code is amended to read:

17707. Any civil liability of a minor arising out of his driving a motor vehicle upon a highway during his minority is hereby imposed upon the person who signed and verified the application of the minor for a license and the person shall be jointly and severally liable with the minor for any damages proximately resulting from the ~~negligence-or-wilful-misconduct~~ negligent or wrongful act or omission of the minor in driving a motor vehicle, except that an employer signing the application shall be subject to the provisions of this section only if an unrestricted driver's license has been issued to the minor pursuant to the employer's written authorization.

Comment. This amendment to Section 17707 merely substitutes the term that has been used in Vehicle Code Section 17001 and in Sections 17150-17159 for that which now appears in Section 17707. The substitution has been made in order to make clear that the same meaning is intended. There is no substantive change made by the revision.

SEC. 10. Section 17708 of the Vehicle Code is amended to read:

17708. Any civil liability ~~negligence-or-wilful-misconduct~~ of a minor, whether licensed or not under this code, arising out of his ~~in~~ driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor ~~shall-be~~ ~~imputed-to.~~ is hereby imposed upon the parents, person, or guardian, ~~for-all~~ ~~purposes-of-civil-damages~~ and the parents, person, or guardian shall be jointly and severally liable with the minor for any damages proximately resulting from the ~~negligence-or-wilful-misconduct~~ negligent or wrongful act or omission of the minor in driving a motor vehicle .

Comment. The same reasons which justify the deletion of the provisions for imputed contributory negligence from Section 17150 justify the removal of the similar provisions from Section 17708. The language of the section has been revised to conform to that used in Section 17707.

SEC. 11. Section 17709 of the Vehicle Code is amended to read:

17709. No person, or group of persons collectively to whom ~~negligence or willful misconduct~~ a minor's negligent or wrongful act or omission is imputed shall incur liability under Sections 17707 and 17708 in any amount exceeding ten thousand dollars (\$10,000) for injury to or death of one person as a result of any one accident or, subject to the limit as to one person, exceeding twenty thousand dollars (\$20,000) for injury to or death of all persons as a result of any one accident or exceeding five thousand dollars (\$5,000) for damage to property of others as a result of any one accident.

Comment. This amendment is merely a conforming amendment.

SEC. 12. Section 17710 of the Vehicle Code is amended to read:

17710. ~~Negligence-or-wilful-misconduct~~ The negligent or wrongful act or omission of a minor shall not be imputed to the person signing a the minor's application for a license when the minor is acting as the agent or servant of any person.

Comment. This amendment is merely a conforming amendment.

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SEC. 13. Section 17714 of the Vehicle Code is amended to read:

17714. In the event, in one or more actions, judgment is rendered against a defendant under this chapter based upon the negligent or wrongful act or omission of a minor in the negligent operation of a vehicle by-a minor, and also by reason of such act or omission negligence rendered against such defendant under Article 2 (commencing with Section 17150) of Chapter 1 of Division 9, then such judgment or judgments shall be cumulative but recovery shall be limited to the amount specified in Section 17709.

Comment. This amendment is merely a conforming amendment.

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SEC. 14. Chapter 3 (commencing with Section 17800) is added to Division 9 of the Vehicle Code, to read:

CHAPTER 3. OPERATOR'S LIABILITY FOR CONTRIBUTION TO JOINT TORTFEASOR

17800. If a person liable for the negligent or wrongful act or omission of an operator of a motor vehicle under Section 17150, 17154, 17159, 17707, or 17708 brings an action against a person other than the operator for death or injury to person or property arising out of the operation of the vehicle, the defendant may cross-complain against the operator on the ground that the negligent or wrongful act or omission of the operator was a concurring cause of the death or injury to person or property.

Comment. Section 17800 permits a defendant to cross-complain against an operator of a vehicle in order to seek contribution from the operator in the event that the defendant is held liable to a person who would be vicariously liable for the operator's conduct under the specified sections of the Vehicle Code. The California courts have permitted the cross-complaint device to be used for this purpose in another context. In City of Sacramento v. Superior Court, 205 Cal. App.2d 398 (1962), the court held that a negligent defendant could cross-complain against the plaintiff's employer on the ground that the employer's negligence was a concurring cause of the employee's injury. Under this cross-complaint the court held that the defendant could prove the employer's contributory negligence or wrongdoing and obtain an offset of the employer's Workmen's Compensation payments against the total amount of damages found to be due to the plaintiff from the defendant. Similarly here, the third party is permitted to cross-complain against the operator on the ground that his negligent or wrongful conduct was a concurring cause of the injury; and if the defendant is able to establish the operator's concurring misconduct, the defendant is entitled to contribution as set forth in the remainder of the chapter.

17801. If the defendant is held to be liable to the plaintiff in an action described in Section 17800, and if in such action the operator's negligent or wrongful act or omission is held to be a concurring cause of the death or injury to person or property for which the defendant is liable, then whether or not the operator is liable to the plaintiff the operator shall be deemed to be a joint tortfeasor and liable to the defendant to make contribution in accordance with Title 11 (commencing with Section 875) of Part 2 of the Code of Civil Procedure.

Comment. Section 17801 applies only if the defendant is held to be liable to the plaintiff in an action described in Section 17800. Thus, no issue of contribution can arise if the defendant is not liable. In those instances where the contributory negligence or contributory wrongdoing of the operator is still imputed to the plaintiff--as in master-servant situations--the defendant is not liable to the plaintiff and, hence, no question of contribution can arise. Thus Section 17801 can apply only where the relationship of master-servant did not exist between the plaintiff and the operator insofar as the operator's acts were concerned.

Under Section 17801, if the defendant is held liable, he is entitled to contribution from the operator in the event that he establishes that the operator's negligence or misconduct was a concurring cause of the injury involved in the case. The extent of his right to contribution is governed by the provisions of the Code of Civil Procedure relating to contribution among joint tortfeasors. Thus, for example, the right of contribution may be enforced only after the tortfeasor has discharged the judgment or has paid more than his pro rata share. The pro rata share is determined by dividing the amount of the judgment among the total number of tortfeasors; but where

more than one person is liable solely for the tort of one of them--as in master-servant situations--they contribute one pro rata share. Consideration received for a release given to one joint tortfeasor reduces the amount the remaining tortfeasors have to contribute. And the enforcement procedure contained in the Code of Civil Procedure may be followed.

Under Section 17801 the defendant is entitled to contribution from the operator even though the operator might not be independently liable to the plaintiff. For example, if the operator has a good defense based on Vehicle Code Section 17158 as against the owner, he may still be held liable for contribution under Section 17801. The policy underlying Vehicle Code Section 17158 is to prevent collusive suits between the owner and the operator by which an insurance company can be defrauded. The reasons justifying Section 17158 are inapplicable when the operator's negligence is sought to be established by a third party who would be liable for all of the damage if the operator's concurring negligence or misconduct were not established. The third party and the operator are true adversaries and there is little possibility of collusion between them.

17802. The defendant is not entitled to contribution as provided in Section 17801 if he intentionally injured the person killed or injured or intentionally damaged the property that was damaged.

Comment. Section 17802 may not be necessary. Code of Civil Procedure Section 875(d) provides: "There shall be no right of contribution in favor of any tortfeasor who has intentionally injured the injured person." Section 17802, however, is included to make clear that this substantive provision in the joint tortfeasor's law applies to the right of contribution under this chapter. Moreover, Section 17802 applies to intentionally caused property damage, whereas Code of Civil Procedure Section 875(d) appears to apply only to intentionally caused personal injuries.

17803. Subdivision (b) of Section 877 of the Code of Civil Procedure is inapplicable to the right of contribution provided by this chapter.

Comment. Section 877(b) of the Code of Civil Procedure provides that a release, dismissal or covenant not to sue or not to enforce a judgment discharges the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors. The policy underlying this provision of the Code of Civil Procedure is to permit a defendant to finally settle with a plaintiff with the assurance that another defendant may not still hold him liable. Without such a provision in the joint tortfeasor's law, settlements could be made with a plaintiff only if all potential defendants agreed. Here, however, the close relationship of the parties involved would encourage plaintiffs to release operators from liability merely for the purpose of exacting full compensation from the third party tortfeasor. Frequently, the operator will be represented by the plaintiff's insurance company as an additional insured. To permit such releases to discharge an operator's duty to contribute under this chapter would frustrate the purpose underlying this law. Hence, the provisions of Code of Civil Procedure Section 877(b) are made inapplicable to contribution sought under this chapter.