FLORIDA'S DANGEROUS INSTRUMENTALITY DOCTRINE

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I. INTRODUCTION

In 1993, the Florida Supreme Court dramatically departed from Florida courts' previous approach to the dangerous instrumentality doctrine for automobiles with its decision in *Hertz Corp. v. Jackson*.[1] In *Hertz*, two lessees procured a vehicle from Hertz under a two-day rental agreement.[2] The lessees failed to return the vehicle when the agreement expired and, subsequently, the Metro-Dade Police Department informed Hertz that the lessees had fraudulently procured the rental vehicle.[3] Consequently, Hertz sent certified letters to the two lessees demanding that they return the car to Hertz.[4] Thereafter, a driver unknown to the rental company ran a stop sign while driving the rental vehicle and injured the plaintiff.[5]

The *Hertz* court held that when a lessee fraudulently rents a car or fails to return the car when the rental agreement has expired, the lessee is operating the vehicle without the owner's consent and has engaged in conversion or theft.[6] This represents a change in the definition of conversion or theft which has been ingrained in the dangerous instrumentality doctrine since the 1950's, and which provides an exception to owners' vicarious liability under the doc-

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1. 617 So. 2d 1051 (Fla. 1993).

2. *Id*. at 1052.

3. *Id*. The woman purporting to be Linda Major was an impostor and the credit card she presented to procure the rental was stolen. *Id*. The police had also determined that the driver's license King presented to the Hertz agent was invalid. *Id*.

4. *Id*. The post office was unable to deliver these letters. *Id*.

5. *Id*. Christopher Harris, the driver at the time of the accident, was not present when the lessees rented the car from Hertz, but allegedly participated in the fraudulent rental. *Id*. Jackson, a minor, was riding his bike when Harris ran a stop sign while driving the rented vehicle and struck Jackson. *Id*.

6. *Hertz*, 617 So. 2d at 1054.

trine.[7] The *Hertz* court held that since the lessees fraudulently procured Hertz's consent to relinquish possession of the vehicle, the dangerous instrumentality doctrine was not applicable.[8] Therefore, the owner of the car was not vicariously liable for injuries to third parties.[9] In reaching its holding, the *Hertz* court demonstrated a doctrinal shift toward placing the burden of an accident loss on the innocent victim, rather than on the owner of the vehicle. In addition, the court changed the course of vicarious tort liability under the dangerous instrumentality doctrine.

This Comment first describes vicarious liability and the historical development of Florida's dangerous instrumentality doctrine.[10] Exceptions to the doctrine negating car owners' liability will be discussed in an attempt to clearly delineate the breadth of the dangerous instrumentality doctrine.[11] Next, this Comment reviews the manner in which other states statutorily impose vicarious liability on vehicle owners.[12] Finally, this Comment provides a framework that courts should use when deciding cases based on the dangerous instrumentality doctrine for automobiles. Special emphasis will be placed on the importance of maintaining a broad form of Florida's dangerous instrumentality doctrine in light of social policy and traditional tort law objectives, particularly when the vehicle owner is a for-profit enterprise.[13]

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7. Susco Car Rental Sys. v. Leonard, 112 So. 2d 832, 835–36 (Fla. 1959).

8. *Hertz*, 617 So. 2d at 1054.

9. *Id*.

10. See *infra* notes 15–34 and accompanying text for a discussion of the historical development of Florida's dangerous instrumentality doctrine.

11. See *infra* notes 35–77 and accompanying text for exceptions to the doctrine.

12. See *infra* notes 78–135 and accompanying text for a discussion of other states' imposition of vicarious liability.

13. See *infra* notes 136–203 and accompanying text for a suggested framework.

II. BACKGROUND[14]

A. The Dangerous Instrumentality Doctrine: A Form of Vicarious Liability in Florida

1. Introduction

Using the theory of vicarious liability, courts impute negligence from the party who actually committed the negligent act to a third party who played no role in the negligent act and neither aided nor encouraged it.[15] Since the person held responsible is not at fault, vicarious liability is sometimes considered a type of strict liability.[16] The United States Supreme Court has stated that fault is no longer the sole test of liability, with vicarious liability being an alternative.[17] Courts have advanced a number of justifications for imputing liability to an innocent party. First, there is a public need to locate financially responsible defendants who can provide relief to innocent parties who suffer physical injuries.[18] In addition, there is a desire to equitably spread the loss incurred through accidents to the entire community.[19] Further, regardless of how blameless the defendant is, accidents may be reduced by imputing liability to parties in a better position to guard against the accidents and provide remedies for innocent victims injured through accidents.[20]

One form of vicarious liability is the dangerous instrumentality

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14. This overview is based on the premise that two primary goals of tort law are deterrence of undesirable behavior and compensation of innocent victims. *See* Christopher D. Stone, *The Place of Enterprise Liability in the Control of Corporate Conduct*, 90 YALE L.J. 1 (1980).

15. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499 (5th ed. 1984).

16. *Id*. Vicarious liability in tort is analogous to strict products liability in which a manufacturer is liable for injuries caused by a defective product, even in the absence of manufacturer fault. *See* Greenman v. Yuba Power Prods., 377 P.2d 897 (Cal. 1963) (holding non-negligent manufacturer liable for plaintiff's injuries caused by defectively designed power tool).

17. *See* Owen v. City of Independence, 445 U.S. 622, 657 (1980).

18. Nowak v. Nowak, 394 A.2d 716, 723 (Conn. 1978). This notion is related to the enterprise theory of liability which imposes vicarious liability on businesses that routinely engage in activities that may cause harm to innocent victims. *See* KEETON, *supra* note 15, at 500.

19. KEETON, *supra* note 15, at 500–01.

20. *Id*.

doctrine.[21] Historically, courts applied this doctrine in the master-servant context, in which a master entrusted a servant with a dangerous instrument that either was intrinsically highly dangerous or could be used in such a way that it involved a high degree of risk to others.[22] In such circumstances, the master was held liable for any injuries that occurred as a result of the servant's use of the instrument.[23]

The great majority of states have held that automobiles are not dangerous instrumentalities under this theory of vicarious liability.[24] However, Florida is an exception.[25] In 1920, the Florida Supreme Court extended the dangerous instrumentality doctrine to automobiles.[26] In doing so, the court anticipated that plaintiffs injured by negligent drivers would have a greater chance of financial protection because the car owner is in the best position to ensure that there will be adequate financial resources with which to pay damages to injured plaintiffs.[27]

In *Southern Cotton Oil Co. v. Anderson*, the Florida Supreme Court concluded that it was appropriate to consider the automobile as a dangerous instrumentality because of the large number of deaths occurring from automobile accidents.[28] The court stated, "[a]n automobile being a dangerous machine, its owner should be held

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21. A. Eugene Carpenter, Jr., Note, *The Dangerous Instrumentality Doctrine: Unique Automobile Law in Florida*, 5 U. FLA. L. REV. 412, 413 (1952). Another common law doctrine that courts created to provide a financially responsible defendant for innocent plaintiffs injured in automobile accidents is the "family purpose doctrine." Elizabeth K. Hillman, Note, *Use of the Family Purpose Doctrine When No Outsiders are Involved — Carver v. Carver*, 21 WAKE FOREST L. REV. 243 (1985). Under this doctrine, an owner who buys or maintains a vehicle for the pleasure of his family is liable if injuries occur while a family member is using the vehicle for her own convenience. *Id*. This historical review of the law will not include the family purpose doctrine because it is not applicable to cases like Hertz Corp. v. Jackson, 617 So. 2d 1051 (Fla. 1993), in which the driver of the vehicle and the owner are not related. However, states have adopted the doctrine in an attempt to provide injured plaintiffs with a remedy in cases where a vehicle owner lends the vehicle to a family member. Hillman, *supra*, at 243.

22. Carpenter, *supra* note 21, at 413.

23. *Id*.

24. *See, e.g.*, Greeley v. Cunningham, 165 A. 678 (Conn. 1933).

25. *See supra* note 15, at 524; *see, e.g.*, Langston v. Personal Serv. Ins. Co., 377 So. 2d 993, 994 (Fla. Dist. Ct. App. 1977).

26. Southern Cotton Oil Co. v. Anderson, 86 So. 629, 631 (Fla. 1920).

27. Kraemer v. General Motors Acceptance Corp., 572 So. 2d 1363, 1365 (Fla. 1990).

28. *Anderson*, 86 So. at 633.

responsible for the manner in which it is used; and his liability should extend to its use by anyone with his consent. He may not deliver it over to anyone he pleases and not be responsible for the consequences."[29]

Between 1925 and 1926, the Florida Supreme Court applied the dangerous instrumentality doctrine to automobiles only in master-servant or principal-agent cases.[30] Later, however, in *Lynch v. Walker*, the court held a car rental company liable when one of its lessees negligently drove the rented vehicle, causing injuries to the plaintiff in the resulting accident.[31] The *Lynch* court stated that when owners authorize other individuals to use their vehicles, they are liable for damages the permitted drivers negligently cause to third parties.[32]

The court in *Susco Car Rental System v. Leonard* later added that the owner is liable for the plaintiff's injuries, regardless of the owner's relationship with the driver of the automobile, as long as the driver negligently operated the vehicle.[33] Further, if the owner specifically revokes her permission for an individual to use the car and the individual uses the car anyway, the owner will not be responsible under the dangerous instrumentality doctrine for any injuries that may occur while the individual is operating the automobile.[34]

2. Owners' Liability When Bailment Terms Are Violated

Florida courts have generally held that owners are vicariously liable under the dangerous instrumentality doctrine even when the lessee or other permitted driver violates the terms of the bailment specified by the owner. For example, in *Ragg v. Hurd*, the owner's original consent was not abrogated when the owner directed the driver to return the car no later than Monday and the accident oc-

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29. *Id.* at 635 (citing Christy v. Elliott, 74 N.E. 1035 (Ill. 1905)).

30. *See, e.g.*, Warner v. Goding, 107 So. 406 (Fla. 1926); White v. Holmes, 103 So. 623 (Fla. 1925).

31. 31 So. 2d 268, 271 (Fla. 1947).

32. *Id.*

33. 112 So. 2d 832, 835–36 (Fla. 1959). Although courts hold owners of automobiles vicariously liable under the dangerous instrumentality doctrine, the doctrine does not extend liability to owners who merely have naked title. Palmer v. R.S. Evans, Inc., 81 So. 2d 635, 637 (Fla. 1955). Hence, in *Palmer*, once the owner signed a conditional sales contract with the buyer, the owner was not liable for injuries negligently caused by the buyer since the owner merely had naked title when the accident occurred. *Id.*

34. Martinez v. Hart, 270 So. 2d 438, 440 (Fla. 3d Dist. Ct. App. 1972).

curred on Thursday, after the driver failed to return the car as instructed.[35]

Susco Car Rental System v. Leonard also emphasized the breadth of a car owner's liability under the dangerous instrumentality doctrine.[36] The *Susco* court held that limitations delineated in the contract between the owner and the lessee, stating that no one except the initial lessee was to drive the car, did not bar the owner's liability for injuries resulting from another individual's negligent operation of the car.[37] The two primary considerations involved in determining whether a car owner is vicariously liable under the dangerous instrumentality doctrine are whether the owner voluntarily consents to the non-owner's use of the automobile and whether theft of the automobile occurs prior to the time the negligent driver operates the vehicle.[38] The *Susco* court defined the owner's consent broadly as "consent to the use or operation of such an instrumentality beyond his own immediate control."[39] Restrictions the lessee agreed to as terms of the contract did not alter the fact that the lessee was operating the vehicle with the owner's authority and consent.[40] Hence, under *Susco*, an owner who voluntarily relinquishes possession of his automobile is responsible for damages

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35. 60 So. 2d 673, 674 (Fla. 1952). The fact that Florida courts prior to *Hertz* have not abrogated an owner's vicarious liability under the dangerous instrumentality doctrine when the driver violates the terms of the bailment is analogous to the strict liability imposed on manufacturers of defective products, where liability is not created by a contract, but is imposed by law. *See* Greenman v. Yuba Power Prods., 377 P.2d 897, 901 (Cal. 1963). Like strict products liability, the dangerous instrumentality doctrine does not allow car owners to define the scope of their vicarious liability. *Susco*, 112 So. 2d at 836. Rather, once an owner gives consent to another individual to operate the vehicle, vicarious liability attaches, even when the driver violates the terms of the bailment. *Id*.

36. *Susco*, 112 So. 2d at 835–36.

37. *Id*.

38. *Id*.

39. *Id*. at 837. This definition of consent differs from that used when imputing liability to an employer in a master-servant relationship. *See* Keller v. Florida Power and Light Co., 156 So. 2d 775 (Fla. 3d Dist. Ct. App. 1963). Specifically, when an employer gives consent to an employee to operate a company vehicle, it is limited to operation of the vehicle within the scope of employment. *Id*. at 776. If an employee operates the vehicle outside the scope of employment, the owner is not liable for resulting injuries. *Id*. at 776–77. Thus, although under the dangerous instrumentality doctrine an owner is vicariously liable even when the permitted driver breaches the terms of the entrustment, employers are not liable under the doctrine of respondeat superior when the employee breaches the contract with the employer by using the car while not engaged in employer business. *Id*.

40. *Susco*, 112 So. 2d at 835–36.

resulting from another's negligent driving.[41]

Hertz Corp. v. Jackson dramatically departed from the *Susco* holding by stating that an owner's vicarious liability should not arise merely because the owner initially consented to the driver's use of the car.[42] Rather, when the lessee in *Hertz* breached the terms of the bailment by failing to return the vehicle on the contractual expiration date, he was no longer driving the vehicle with the rental company's consent and, therefore, Hertz' vicarious liability was nullified.[43]

3. Theft as an Exception to Owner's Liability

The primary exception to the dangerous instrumentality doctrine is if there is a "breach of custody amounting to a species of theft or conversion."[44] Courts have struggled with the specific lim

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41. The court in Ray v. Earl, 277 So. 2d 73, 75 (Fla. 2d Dist. Ct. App. 1973), stated that courts will typically imply an owner's consent to operate the vehicle in cases where no express limitation or negation of consent can be found in the facts. *Id*. Further, the owner's consent will be implied even when the person who was originally authorized by the owner to drive the car delegates that right to a second driver to whom the owner did not specifically give permission to drive. *Id*.

42. 617 So. 2d at 1053.

43. *Id*. at 1054. By markedly changing the common law dangerous instrumentality doctrine and not providing an alternative remedy to the innocent victim, the *Hertz* court may have violated Article I, section 21 of the Florida Constitution which guarantees "redress of any injury." FLA. CONST. art. I, § 21. See *infra* notes 160–63 and accompanying discussion regarding violation of the access to courts provision of the Florida Constitution as described in Kluger v. White, 281 So. 2d 1 (Fla. 1973).

44. *Susco*, 112 So. 2d at 836. Another exception to an owner's broad liability under the dangerous instrumentality doctrine has been referred to as the "shop-rule exception." *See* Roberts v. United States Fidelity & Guar. Co., 498 So. 2d 1037, 1038 (Fla. 1st Dist. Ct. App. 1986). This exception provides that the owner is not liable for injuries negligently caused by a repair person to whom the owner entrusted the automobile. Castillo v. Bickley, 363 So. 2d 792, 793 (Fla. 1978). The exception recognizes that an automobile owner has little or no control over his automobile while it is being serviced or repaired. *Id*. Further, while a vehicle is being repaired, the business completing the repair is in a better position to insure against injuries caused by some negligent act committed by an employee. *Id*. Courts have also deemed valet parking to be a service falling within the "shop-rule exception" to the dangerous instrumentality doctrine. *See, e.g.*, Fahey v. Raftery, 353 So. 2d 903, 905 (Fla. 4th Dist. Ct. App. 1977).

Courts have refused to apply this exception, however, when the service person picks up the vehicle and is driving it to the business for service when the accident occurs, Michalek v. Shumate, 524 So. 2d 426, 427 (Fla. 1988), or when the service person is returning the car to the owner following repair. Grilli v. LeBo Properties Corp., 553 So. 2d 352, 353 (Fla. 2d Dist. Ct. App. 1989). In such situations, the owner remains liable under the dangerous instrumentality doctrine because "[a]n owner who authorizes

its of this exception. In general, Florida courts have only found theft in circumstances when a driver operates the owner's vehicle without first obtaining the owner's permission.[45] Thus, even in situations where permissive drivers blatantly violate the scope of the owner's permission, courts have held owners vicariously liable under the dangerous instrumentality doctrine. For example, in *Tillman Chevrolet v. Moore*, an employee of Tillman Chevrolet gave a potential buyer permission to take a short test drive.[46] Instead, the man drove the car out of the county and subsequently allowed a hitchhiker to drive.[47] While driving, the hitchhiker struck a car, injuring the plaintiff.[48] The *Tillman* court held that the driver intending to steal the vehicle when he drove it from the dealership, leaving the county, and then picking up a hitchhiker who negligently drove the vehicle did not abrogate Tillman's liability.[49] Furthermore, Tillman Chevrolet's attempts to retrieve the vehicle after the lessee breached the terms of the bailment did not nullify its vicarious liability under the dangerous instrumentality doctrine.[50]

Similarly, when a rental company leases a car to two individuals, only one of whom possesses a driver's license, the company remains vicariously liable under the dangerous instrumentality doctrine when the unlicensed lessee drives the car and causes an accident, even though the rental agreement states that only licensed drivers are to operate the vehicle.[51] The court in *Avis Rent-*

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another to transport his car to a service agency remains in control thereof and ultimately liable for its negligent operation until it is delivered to an agency for service." *Shumate*, 524 So. 2d at 427.

45. *See, e.g.*, Cherokee Enters., Inc. v. Rogers, 451 So. 2d 553, 554 (Fla. 5th Dist. Ct. App. 1984).

46. 175 So. 2d 794, 795 (Fla. 1st Dist. Ct. App. 1965), *cert. discharged*, 184 So. 2d 175 (Fla. 1966), *overruled by* Hertz Corp. v. Jackson, 617 So. 2d 1051 (Fla. 1993). When the man returned from the test drive, he asked permission to drive the Chevrolet to a hotel about 12 blocks away so that he could discuss the possible trade with his wife. *Id*. Tillman's employee again gave him permission. *Id*. Subsequently, the employee became suspicious and called the police who said that the potential buyer was wanted for previously stealing a car in New Orleans. *Id*. Tillman's employee called the sheriff who immediately began a search for the vehicle. *Id*.

47. *Id*.

48. *Id*.

49. *Id*. at 796. This is similar to the holding in *Susco*, which emphasized that the terms of the bailment "have no bearing on the question of the owner's consent." *Susco*, 112 So. 2d at 836.

50. *Tillman*, 175 So. 2d at 796.

51. *See, e.g.,* Avis Rent-A-Car Sys., Inc. v. Garmas, 440 So. 2d 1311, 1313 (Fla. 3d

A-Car Systems, Inc. v. Garmas stated that although the permissive driver violates the terms of the bailment by allowing the unlicensed lessee to drive, this is not the "species of conversion or theft" that nullifies an owner's liability under the dangerous instrumentality doctrine.[52]

In situations where an owner or permissive driver has never given implied or express consent to another individual to drive the car, Florida courts have opined that the theft exception to the dangerous instrumentality doctrine may be applied. For example, in *Thomas v. Atlantic Associates, Inc.*, Atlantic owned an automobile that it allowed Roberts to use.[53] Without Roberts' knowledge, his unlicensed daughter drove the car and caused an accident.[54] The *Thomas* court stated that Atlantic had clearly consented to Roberts' use of the automobile.[55] However, the court held that a jury must determine whether the daughter's actions constituted theft under the dangerous instrumentality doctrine.[56] Thus, while Florida courts have typically held that mere breach of the conditions of the bailment is not theft per se under the dangerous instrumentality doctrine, conduct such as that exhibited by Roberts' daughter in *Thomas* represents a question of material fact regarding theft.[57]

Similarly, in *Stupak v. Winter Park Leasing, Inc.*, the Florida Supreme Court found an issue of material fact regarding the presence of theft when a lessee kept the leased vehicle beyond the expiration of the rental period and was involved in an accident.[58] In *Stupak*, the terms of the contract were conflicting. They suggested

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Dist. Ct. App. 1983).

52. *Id*. at 1314.

53. 226 So. 2d 100, 101 (Fla. 1969).

54. *Id*.

55. *Id*. at 102. The court based its holding on the fact that Atlantic's permission regarding Roberts' use of the car was unrestricted in terms of the type of use and the time period of use. *Id*.

56. *Id*. Florida courts have found conversion or theft when an unauthorized individual gained access to the vehicle by taking the keys out of the bailee's pocket while he was sleeping, Cherokee Enters., Inc. v. Rogers, 451 So. 2d 553, 553 (Fla. 5th Dist. Ct. App. 1984), and when an unauthorized individual took the keys from the bedroom while the bailee was asleep. Pearson v. St. Paul Fire & Marine Ins. Co., 187 So. 2d 343, 345–46 (Fla. 5th Dist. Ct. App. 1966). These cases are similar to *Thomas*; thus, it is likely that the jury in *Thomas* also found theft or conversion and, therefore, negated Atlantic's vicarious liability under the dangerous instrumentality doctrine.

57. *Thomas*, 226 So. 2d at 102.

58. 585 So. 2d 283, 284 (Fla. 1991).

both that automobiles kept past the due date were "considered theft by conversion," and that automobiles kept past the due date were not treated as "thefts or conversions for at least the first twenty-four hours after expiration of the rental term."[59] Because the accident occurred less than twenty-four hours after the rental period expired, the *Stupak* court stated that whether the lessee's use of the automobile past the contract's expiration constituted theft or conversion was a genuine issue of material fact and not simply a per se breach of the rental agreement which would not nullify the owner's vicarious liability.[60]

In finding liability for the rental company under the dangerous instrumentality doctrine, the Third District Court of Appeal in *Jackson* attempted to distinguish between the conversion or theft referred to in *Susco* and conversion or theft as defined in Florida Statutes, sections 812.012 through 812.014.[61] The *Jackson* court explained that statutory forms of theft should not be applied in the dangerous instrumentality doctrine because *Susco* defined conversion or theft specifically for purposes of the doctrine, long before the statutory language was adopted in Florida.[62] The *Jackson* court stated that theft under *Susco* was the "equivalent of common law

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59. *Id.*

60. *Id.* *Stupak* is important because it suggests that rental companies may be able to limit their liability under the dangerous instrumentality doctrine by placing a specific clause in the rental agreement defining conversion or theft as late return of the vehicle. This would provide a loophole in the general rule that breach of the terms of the rental agreement does not constitute conversion or theft. The theft-defining clause in *Stupak* is without basis in the law, as it magically defines theft based on a certain time period, with no mention of the lessee's intent. Since the first common law definitions an element of theft has been intent. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 702 (1986) [hereinafter LAFAVE]. The *Stupak* theft clause would arbitrarily impose theft charges on an individual who, for any reason, failed to return the vehicle in a timely fashion. Particularly with the high rate of tourism in Florida and the likelihood that lessees may fail to return the rental vehicle within the first 24 hours after expiration of the rental period, it is possible that such a clause would be held as void against public policy as an unconscionable provision in a rental agreement.

61. 590 So. 2d 929, 932 (Fla. 3d Dist. Ct. App. 1990) (en banc), *rev'd*, 617 So. 2d 1051 (Fla. 1993). Florida Statutes § 812.014 states in pertinent part: "A person commits theft if he knowingly *obtains or uses*, or endeavors to *obtain or use*, the property of another with intent to either temporarily or permanently: (a) Deprive the other person of a right to the property or a benefit therefrom." FLA. STAT. § 812.014 (1993) (emphasis added). Florida Statutes § 812.012 states in pertinent part that "[o]btains or uses means any manner of: . . . (c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise." FLA. STAT. § 812.012 (1993).

62. *Jackson*, 590 So. 2d at 940.

larceny, that is, the taking of property without consent of the owner,"[63] and did not include embezzlement or the taking of property by false pretenses, although the present statutory definition of theft does include these forms.[64] Hence, the *Jackson* court held that under the dangerous instrumentality doctrine the lessor of a vehicle would remain liable to injured plaintiffs even if the lessee fraudulently induced the lessor's consent to the rental.[65]

The Florida Supreme Court reversed the appellate court's holding in *Jackson*.[66] The supreme court stated that when a lessee fraudulently procures a rental vehicle, the lessee has engaged in conversion or theft.[67] Therefore, given the facts, the court held that the theft exception to the dangerous instrumentality doctrine had been satisfied and, consequently, Hertz was not vicariously liable for the plaintiff's injuries under the dangerous instrumentality doctrine.[68] The court openly acknowledged that this holding overruled

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63. *Id*. Although not explained by the *Jackson* court, common law larceny also included larceny by trick, where an individual lies to obtain possession of another's property, intending at the time of the procurement to convert the property. LAFAVE, *supra* note 60, at 711. Thus, if the lessees in *Jackson* intended to steal the car when they rented it and later converted it, they would be guilty of larceny by trick, a form of larceny under the common law. *Id*. However, if they decided to convert the car at some time after the actual rental, they would not be guilty of larceny. *Id*. The *Jackson* court confused the issue in its discussion of theft under the dangerous instrumentality doctrine. Specifically, theft under the dangerous instrumentality doctrine was the original, narrow form of common law larceny, which was taking possession of another's property without his consent, Susco Car Rental Sys. of Fla. v. Leonard, 112 So. 2d 832 (Fla. 1959), and not the broader, expanded form of common law larceny which included larceny by trick. LAFAVE, *supra* note 60, at 702.

64. *Jackson*, 590 So. 2d at 940–41. Embezzlement involves the taking of property after it had originally come into the possession of an individual through lawful means. *Id*. Taking of property by false pretenses involves consensually obtaining title "through the perpetration of a fraud." *Id*.

65. *Id*. In addition, the *Jackson* court stated that, under the dangerous instrumentality doctrine, the owner's liability is not nullified merely because the lessee violates the terms of the bailment, as long as the owner voluntarily gave original consent to use the vehicle. *Id*. See *supra* notes 35–43 and accompanying discussion regarding owners' liability under the dangerous instrumentality doctrine when terms of the bailment are violated. The *Jackson* court stated that deviation from the scope of the bailment includes conduct such as violation of an agreement that the lessee would not permit another person to drive the vehicle and that the vehicle not be driven beyond certain geographic boundaries. *Id*.

66. Hertz Corp. v. Jackson, 617 So. 2d 1051 (Fla. 1993).

67. *Id*. at 1053.

68. *Id*.

Tillman Chevrolet v. Moore.[69]

Justice Kogan, dissenting, found this view to be inconsistent with the public policy rationale for the dangerous instrumentality doctrine, which is to identify a financially responsible defendant who can compensate parties for their injuries.[70] Justice Kogan drew an analogy between a for-profit car rental company and a for-profit corporation that injects a potentially dangerous instrument into the stream of commerce.[71] In both cases, the for-profit enterprise should be required to compensate injured parties because it is in the best position to do so.[72] The dissent also indicated willingness to implement different versions of the dangerous instrumentality doctrine depending on whether the vehicle owner is a for-profit enterprise or a private individual.[73]

4. Statutory Limits on Owner's Liability

The Florida Legislature has placed a statutory limit on the liability of car rental companies under the dangerous instrumentality doctrine for leases of one year or greater.[74] However, the statute exempts lessors from liability only when the lessee carries liability insurance on the vehicle.[75] As indicated in *Kraemer v. General Motors*, if the lessee does not have such insurance, the owner of the vehicle will continue to be liable under the dangerous instrumentality doctrine, despite the fact that the lease may exceed one year.[76]

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69. 175 So. 2d 794 (Fla. 1st Dist. Ct. App. 1965), *cert. discharged*, 184 So. 2d 175 (Fla. 1966), *overruled by* Hertz Corp. v. Jackson, 617 So. 2d 1051 (Fla. 1993).

70. *Hertz*, 617 So. 2d at 1054 (Kogan, J., dissenting).

71. *Id*.

72. *Id*.

73. *Id*. Justice Kogan's apparent willingness to treat private vehicle owners differently from for-profit enterprises under the dangerous instrumentality doctrine is based on the theory that for-profit enterprises are better able than individuals to prevent accidents and to provide financial relief when accidents occur. *See, e.g.*, Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677 (1985).

74. 1986 Fla. Laws ch. 229 (codified at FLA. STAT. § 324.021(9)(b)).

75. FLA. STAT. § 324.021(9)(b) (1993).

76. *Kraemer*, 572 So. 2d at 1367. The public policy evidenced in Florida Statutes § 324.021(9) of ensuring that innocent victims can locate a financially responsible defendant pervades tort law. For example, although employers are not generally liable under the doctrine of respondeat superior for injuries caused by independent contractors, the employer has a duty to hire financially responsible independent contractors. Becker v. Interstate Properties, 569 F.2d 1203, 1209 (3d Cir.), *cert. denied*, 436 U.S. 906 (1978). Therefore, when an employer breaches this duty and hires an independent contractor

Therefore, in *Kraemer*, GMAC was liable under the dangerous instrumentality doctrine, notwithstanding section 324.021(9)(b), because the long-term lessee had allowed the automobile's insurance to lapse before the accident occurred.[77]

B. Statutory Alternatives to the Dangerous Instrumentality Doctrine

A number of states have enacted statutes that render the owner of a vehicle liable for injuries caused by others who operate the vehicle with the permission of the owner.[78] These statutes impose liability on vehicle owners in circumstances similar to those in which liability is imposed under the dangerous instrumentality doctrine in Florida. However, some differences are apparent between the statutory forms of owner liability and liability imposed under the dangerous instrumentality doctrine. This discussion will use the statutes enacted in California and New York to compare typical statutory enactments with Florida's dangerous instrumentality doctrine.

1. California

The California Legislature designed California Vehicle Code section 17150 to impose vicarious liability on vehicle owners:

> Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from 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

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who is not financially responsible or insured in a way that he could provide relief to innocent victims injured by his activities, liability shifts to the employer. *Id*. Although the employer is not in a position to effectively control the independent contractor's negligent conduct, he is in an optimal position to assure that the independent contractor is financially capable of providing relief to innocent victims injured by his activities. *Id*. at 1211. Likewise, rental companies are not in a position to control lessees' driving proficiency, but they are in an excellent position to make sure that lessees are properly insured prior to releasing a rental vehicle to them.

77. *Kraemer*, 572 So. 2d at 1367.

78. *E.g.*, CAL. VEH. CODE § 17150 (Deering 1994); N.Y. VEH. & TRAF. LAW § 388 (McKinney 1994). A few states have also enacted statutes that specifically impose vicarious liability on rental companies for damages caused by the negligence of a driver who operated the rental vehicle with the consent of the rental company. *See, e.g.*, R.I. GEN. LAWS § 31-34-4 (1994).

the same with permission, express or implied, of the owner.[79]

The basis for an owner's liability under this section is permission for another person to use the vehicle.[80] Whether the owner has given permission to the operator of the vehicle and whether that permission is still present at the time of the accident is a question of fact for the jury to decide.[81] Many California courts have examined the scope of permission and whether exceeding this scope will negate the owner's vicarious liability.[82] The California District Court of Appeal in *Bayless v. Mull*, for example, stated that an owner may limit permission to use his vehicle with respect to the time period for use, the particular place where it is to be used, and the particular purpose for which it is to be used.[83] However, courts have also made it clear that under the California statute, the owner's liability will be nullified only if there is a substantial violation of such restrictions.[84]

In *Engstrom v. Auburn Automobile Sales Corp.*, the California Supreme Court abrogated the car dealership's liability when the driver kept the vehicle beyond the limited two-hour test drive period and an accident occurred.[85] The *Engstrom* court explained that, at the time the accident occurred, the driver was operating the car "in violation of his agreement with and promise to the owner."[86] Hence, the defendant's use of the car at that time was not permissive and therefore amounted to theft.[87]

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79. CAL. VEH. CODE § 17150 (Deering 1994).

80. *Id*. Because the foundation of statutory liability is permission of the owner, cases in which keys are left in the car's ignition leading to theft of the car are not within the statute's scope. *See, e.g.*, Mucci v. Winter, 230 P.2d 22 (Cal. Dist. Ct. App. 1951). Rather than imputing liability to the owner, courts analyze this type of case using a traditional negligence approach. Hergenrether v. East, 393 P.2d 164, 167 (Cal. 1964).

81. Garmon v. Sebastian, 5 Cal. Rptr. 101, 105 (Ct. App. 1960).

82. *See, e.g.*, Engstrom v. Auburn Auto. Sales Corp., 77 P.2d 1059, 1064 (Cal. 1938).

83. 122 P.2d 608, 609 (Cal. Dist. Ct. App. 1942).

84. Peterson v. Grieger, Inc., 367 P.2d 420, 425 (Cal. 1961); Jordan v. Consolidated Mut. Ins. Co., 130 Cal. Rptr. 446, 454 (Ct. App. 1976).

85. 77 P.2d 1059, 1064 (Cal. 1938). The defendant did not actually return the car until the following day. *Id*. at 1061. After the two-hour time period expired, the salesperson attempted to locate the defendant and the automobile, and eventually reported the automobile to the police department as stolen. *Id*.

86. *Id*. at 1062.

87. *Id*. at 1064. *Engstrom* clearly indicated that, under the California statute, courts will negate an owner's vicarious liability if the terms of the bailment limiting the

When the terms of the bailment limit the particular geographical area within which the driver may operate the car and the driver violates those terms, the owner's vicarious liability under the California statute may also be negated.[88] However, violation of terms of the bailment specifying that only a particular driver is to operate the car will not negate the owner's liability under the California statute.[89] The court in *Souza v. Corti* stated that even when the permitted driver violates the terms of the bailment by allowing another individual to drive who subsequently causes an accident,

> the use which was being made of the borrowed car at the time of the accident was the use which was contemplated by the owner. Any secret restrictions imposed by him on the manner of its use do not negative the controlling fact that it was being used with the owner's permission at the time of the accident.[90]

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driver to a particular period of time are violated by the driver. *Id*. This stands in marked contrast to the case law in Florida under the dangerous instrumentality doctrine prior to *Hertz Corp. v. Jackson*. *See* Susco Car Rental Sys. v. Leonard, 112 So. 2d 832 (Fla. 1959); Ragg v. Hurd, 60 So. 2d 673 (Fla. 1952); Tillman Chevrolet Co. v. Moore, 175 So. 2d 794 (Fla. 1st Dist. Ct. App. 1965) (holding that violation of terms of bailment did not vitiate owner's liability under dangerous instrumentality doctrine because owner had still consented to operation of vehicle), *cert. discharged*, 184 So. 2d 175 (Fla. 1966), *overruled by* Hertz Corp. v. Jackson, 617 So. 2d 1051 (Fla. 1993).

88. *See, e.g.*, Northwestern Sec. Ins. Co. v. Monarch Ins. Co., 63 Cal. Rptr. 802 (Ct. App. 1967). In *Northwestern*, the driver took the car out to a club for the evening instead of to a garage designated by the owner. *Id*. The court found that the owner was not liable for the injuries caused by the driver because there was no permission from the owner, express or implied, for the driver to use the vehicle for general purposes, even though the owner had a close personal relationship with the driver. *Id*. at 804. The *Northwestern* court stated that implied permission must be established by examining all of the surrounding circumstances. *Id*. The court also acknowledged that the relationship between the parties is "of paramount importance" regarding whether there is implied permission for use of the vehicle. *Id*. However, because the owner had never given the driver permission to use the vehicle for general purposes, permission was neither express nor implied. *Id*.

89. Souza v. Corti, 139 P.2d 645 (Cal. 1943). In *Souza*, the father, who owned the car, gave his son permission to drive the car but expressly forbade his son to allow anyone else to drive the car. *Id*. Not heeding his father's admonition, the son allowed a friend to drive the car, during which time an accident occurred. *Id*. The California Supreme Court held that the owner father was vicariously liable for the plaintiff's injuries, despite his specific instructions to his son. *Id*. at 648.

90. *Id*. Obviously, in cases where the owner gives permission to a particular individual to drive her car without any express limitations on the permitted use, and that individual subsequently permits other people to drive the car, the owner will remain vicariously liable for injuries caused by other drivers. *See, e.g.*, Bloyd v. Senn, 224 P.2d 117 (Cal. Ct. App. 1950); Davidson v. Ealey, 158 P.2d 1000 (Cal. Ct. App. 1945).

Under California law, courts will nullify a vehicle owner's vicarious liability when there has been a conversion of the vehicle.[91] For example, in *Irvine v. Wilson*, the manager of a used car lot took the title of a car delivered to him to sell and put it in his own name, borrowed money on the security of the car, and lent the car to his wife for her personal use, all without authority of the original owner.[92] The court held that this constituted conversion.[93] Therefore, the owner was not liable for injuries caused by the manager's wife while she was driving the car.[94] The *Irvine* court distinguished this situation from one in which the owner is vicariously liable when a bailee merely disobeys the limitations on personal conduct placed by the owner on the bailment.[95]

Automobile rental companies are also deemed to be owners for purposes of the vicarious liability imputed to owners under section 17150.[96] Further, as with private ownership, rental companies will

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The *Souza* holding is similar to the dangerous instrumentality doctrine enunciated in *Susco*. In *Susco*, the rental contract specified that only Mr. Salicetti was permitted to drive the car. *Susco*, 112 So. 2d at 834. Mr. Salicetti violated the terms of the agreement by letting another individual drive the car. *Id*. This driver was involved in an accident. *Id*. Despite the fact that the contract clearly specified that only Mr. Salicetti was to drive the car, the court held that the rental company was vicariously liable for the plaintiff's injuries because restrictions agreed to by the lessee did not "change the fact that the automobile was being used with the owner's consent." *Id*. at 835.

91. *See, e.g., Souza*, 139 P.2d at 645; Irvine v. Wilson, 289 P.2d 895 (Cal. App. Dep't Super. Ct. 1955). As in Florida, the primary inquiry is what constitutes conversion or theft. See *supra* text accompanying notes 44–73 for a discussion of the theft exception to owners' vicarious liability in Florida.

92. 289 P.2d 895, 898 (Cal. App. Dep't Super. Ct. 1955). The car's owner had restricted the manager's authority to use the car to only those instances necessary to facilitate the car's sale. *Id*. at 897.

93. *Id*. at 898. Because the court considered Wilson to be a converter, the owner was not vicariously liable under the dangerous instrumentality doctrine for injuries resulting from the accident. *Id*.

94. *Id*.

95. *Id*. The *Irvine* court stated that Wilson converted the vehicle to his own use "in derogation of the title of the owner." *Id*. The court reasoned that it would be a fiction to hold that the owner consented to this type of use. *Id*. In contrast, had Wilson merely failed to follow the owner's instructions regarding personal conduct while operating the vehicle, the owner would be vicariously liable under the California statute because this would not amount to conversion. *Id*.

96. *See, e.g.*, Sutton v. Tanger, 1 P.2d 521 (Cal. Dist. Ct. App. 1931). In addition to traditional concepts of "owner," California Vehicle Code § 460 states, "[a]n `owner' is . . . the State, or any county, city, district, or political subdivision of the State, or the United States, when entitled to the possession and use of a vehicle under a lease, lease-sale, or

continue to be vicariously liable for injuries to plaintiffs, despite the fact that the rental agreement limited the use of the car to one specific person who was not driving the car at the time the accident occurred.[97] In *Financial Indemnity Co. v. Hertz Corp.*, the California Court of Appeals held that when a rental contract specifies that no one other than the lessee is to drive the vehicle, the rental company must anticipate that the lessee will not follow the directive.[98] Thus, the *Financial* court stated that since Hertz should have known that other individuals would drive the car, Hertz impliedly consented to their use of the vehicle.[99]

If the lessee makes fraudulent misrepresentations in an attempt to procure the vehicle from the lessor, the lessor will still be vicariously liable under California law.[100] For example, in *Tuderios v. Hertz Drivurself Stations, Inc.*, the rental company leased a car to a man who gave a false name and presented a fraudulent driver's license to procure the rental.[101] The lessee was involved in an accident.[102] The court held that the rental company had given express permission to the lessee to operate the car on the highway and that the actual name of the lessee in such a circumstance was irrelevant.[103] The *Tuderios* court went on to state that "[t]he statute was designed for the protection of the public and places upon the owner of a motor vehicle the responsibility of ascertaining the character, ability and responsibility of the person to whom he intrusts his automobile."[104] Because the lessor had an opportunity to conduct an investigation regarding the lessee's true identity prior to leasing him

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rental-purchase agreement for a period of 30 consecutive days or more." CAL. VEH. CODE § 460 (Deering 1994). Thus, when a division of the government has a long-term rental car, courts will consider the government to be the owner for purposes of vicarious liability imposed under California Vehicle Code § 17150.

97. Financial Indem. Co. v. Hertz Corp., 38 Cal. Rptr. 249 (Ct. App. 1964); *accord Susco*, 112 So. 2d at 837 (holding that rental company was liable for injuries caused by driver other than sole driver authorized by agreement to operate car).

98. *Financial*, 38 Cal. Rptr. at 254.

99. *Id.*

100. *See, e.g.*, Tuderios v. Hertz Drivurself Stations, Inc., 160 P.2d 554 (Cal. Ct. App. 1945); *accord* National Car Rental Sys. v. Bostic, 423 So. 2d 915 (Fla. 3d Dist. Ct. App. 1982) (holding that even if owner's consent was procured by fraudulent means, owner of vehicle is still vicariously liable under dangerous instrumentality doctrine).

101. *Tuderios*, 160 P.2d at 555.

102. *Id.*

103. *Id.* at 557.

104. *Id.*

the car, fraudulent misrepresentation by the lessee did not nullify the lessor's responsibility to innocent third parties.[105]

2. New York

New York Vehicle and Traffic Law section 388 is similar to the California statute. The New York statute states in pertinent part:

> Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.[106]

As with California Vehicle Code section 17150 and Florida's dangerous instrumentality doctrine, the owner's permission to use the vehicle is the basis for vicarious liability under the New York statute.[107] New York courts have discussed the scope of the owner's permission and conditions under which violation of the scope nullifies the owner's statutory liability.[108] The court in *Walls v. Zuvic* stated that an owner may restrict the use of the vehicle to a particular geographical area or for a specific purpose.[109] If a permitted driver violates the owner's restrictions, the statutory presumption that the driver is operating the vehicle with the owner's consent may be overcome.[110] However, the court in *Carey v. AAACON Transport, Inc.* stated that any restriction specified by the owner must be "clearly and unequivocally established so as to limit the permission granted and avoid liability."[111]

If the owner gives permission for another individual to use the car only for a specific purpose and the individual instead engages in a different use of the car, New York courts will not hold the owner

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105. *Id*. Apparently, the *Tuderios* court did not consider rental by false pretenses to be a form of theft, otherwise, the court would have abrogated the owner's liability. *Id*.

106. N.Y. VEH. & TRAF. LAW § 388 (McKinney 1994).

107. Phoenix v. Bolton, 399 N.Y.S.2d 914 (App. Div. 1977). The court stated that there is a statutory presumption of owner consent when the vehicle is operated by another individual at the time an accident occurs. *Id*. at 915.

108. *See, e.g.*, Walls v. Zuvic, 493 N.Y.S.2d 628 (App. Div. 1985).

109. *Id*. at 629.

110. N.Y. VEH. & TRAF. LAW § 388 (McKinney 1994).

111. 401 N.Y.S.2d 1015, 1018 (App. Div. 1978).

vicariously liable under the New York statute. For example, in *Harper v. Parker*, the vehicle owner gave her son permission to use her car to take his friends home.[112] The son started the automobile and he and his friends fell asleep while listening to the car radio, with the car still parked in the garage.[113] One of the son's friends died of carbon monoxide poisoning.[114] The *Harper* court held that the owner of the car was not liable under the New York statute because the son was not using the car within the scope of the owner's permission.[115]

Similarly, in New York, when an owner's permission imposes strict time restrictions on the permissive use, courts will not hold the owner vicariously liable if the driver does not abide by the time limits and is subsequently involved in an accident.[116] In such cases, the driver does not have the owner's permission, which is the requisite basis for establishing vicarious liability.[117]

If an owner's permission places restrictions on the geographical area in which another individual may drive the car, violation of these restrictions will also be sufficient to eliminate the owner's vicarious liability.[118] However, under New York law, courts will hold the owner vicariously liable for injuries if a permissive driver allows another person to operate the car despite the owner's specific instructions forbidding any other drivers from operating the car.[119] The fact that the permitted driver subsequently gives permission to another driver to use the vehicle does not rebut the statutory presumption that the permitted driver is operating the car with the owner's consent.[120]

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112. 184 N.E.2d 310, 310 (N.Y. 1962).

113. *Id*.

114. *Id*.

115. *Id*.

116. *See* O'Toole v. United States, 284 F.2d 792 (2d Cir. 1960) (applying New York law). In *O'Toole*, the owner permitted another individual to drive his car within strict time limitations. *Id*. at 793. The court held that the owner was not vicariously liable to plaintiffs injured in an accident caused by the driver because the owner placed time restrictions on his permission, and the driver violated these restrictions. *Id*. at 796.

117. *See id*.

118. *See* Walls v. Zuvic, 493 N.Y.S.2d 628, 629–30 (App. Div. 1985) (abrogating owner's liability when driver violated scope of permission to test-drive car by picking up friends, buying beer, and driving to park to have a party).

119. *See, e.g.*, Arcara v. Moresse, 179 N.E. 389 (N.Y. 1932).

120. Schrader v. Carney, 586 N.Y.S.2d 687 (App. Div. 1992). This comports with

Under New York Vehicle and Traffic Laws section 388, lessors of vehicles are also owners and are therefore vicariously liable when lessees and their permittees negligently drive their vehicles and cause accidents.[121] However, when an individual leases a vehicle for more than thirty days, the lessee is considered the owner and is consequently subject to vicarious liability under section 388.[122]

In contrast to New York law regarding private vehicle owners,[123] when a lessor places specific restrictions in the rental agreement and the lessee violates the restrictions, the rental company may still be liable under New York law. For example, in *Wynn v. Middleton*, when the lessee violated both the rental period and restrictions regarding who may drive the car, the court held that the rental company, for purposes of summary judgment, had "not met its burden of overcoming the presumption of consent created by the statute."[124] The court stated that public policy demands that innocent victims of

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both California statutory law and Florida law under the dangerous instrumentality doctrine. *See, e.g.*, Financial Indem. Co. v. Hertz Corp., 38 Cal. Rptr. 249 (Ct. App. 1964); Susco Car Rental Sys. v. Leonard, 112 So. 2d 832 (Fla. 1959). See *supra* notes 36–41 and accompanying discussion and notes 89–90 and accompanying discussion regarding an owner's vicarious liability in Florida and California when the permitted driver allows another individual to drive the vehicle, contrary to the owner's instructions.

121. N.Y. VEH. & TRAF. LAW § 388 (McKinney 1994).

122. *Id*. § 128. This section differs from California Vehicle Code § 460, which does not define a private lessee as an owner, even if the lease exceeds 30 days. CAL. VEH. CODE § 460 (Deering 1994). See *supra* notes 79–106 and accompanying discussion regarding California traffic law. However, when a governmental entity leases a vehicle for 30 days or more, the statute considers the government to be the owner. CAL. VEH. CODE § 460 (Deering 1994).

123. See *supra* notes 106–22 and accompanying discussion regarding private vehicle owner's vicarious liability under New York law.

124. 584 N.Y.S.2d 684, 685 (App. Div. 1992). In *Wynn*, the lessee rented a car for a five-day period. *Id*. When the lessee did not return the vehicle within five days, the rental company attempted to contact the lessee, but was unsuccessful. *Id*. Twenty-two days after the rental period expired, the car was involved in an accident. *Id*. Neither the lessor nor the lessee had given permission to operate the vehicle to the individual who was driving at the time of the accident. *Id*. *Accord* Susco Car Rental Sys. v. Leonard, 112 So. 2d 832 (Fla. 1959) (violation of terms of bailment does not vitiate owner's vicarious liability for injuries caused by other drivers). *But cf.* O'Toole v. United States, 284 F.2d 792 (2d Cir. 1960) (if private vehicle owners give permission for another person to drive car within restricted time period and time period is violated, owner's permission and consequent vicarious liability is nullified). In addition, the *Wynn* holding does not appear to agree with cases in California when the owner restricts the time period for which permissive use of the vehicle is granted and that time period is violated. *See, e.g.*, Engstrom v. Auburn Auto. Sales Corp., 77 P.2d 1059 (Cal. 1938). See *supra* notes 83–87 and accompanying text for a discussion of owners' liability under California law when permitted drivers violate owner's express time restrictions.

a negligent driver be able to seek damages from a financially responsible party.[125] Therefore, automobile rental companies may not place restrictions in the rental contract regarding the vehicle's use by the lessee and escape liability to an injured plaintiff simply because the lessee violated the restrictions.[126]

Although violation of time restrictions alone may not be enough to vitiate a rental company's vicarious liability under New York law, courts may abrogate the company's liability if, when the vehicle is not returned in a timely fashion, the lessor attempts to locate the vehicle and have it returned. For example, in *In re Utica Mutual Insurance Co.*, after the rental period expired and the lessee had not yet returned the car, the lessor tried to contact the lessee in person, by telephone, and by using certified mail.[127] The lessor also contacted the police and filed a formal criminal complaint against the lessee.[128] The *Utica* court concluded that the rental company's attempts to retrieve the vehicle following expiration of the rental period amounted to revocation of the lessor's consent for the lessee to operate the car.[129] Hence, the court nullified the owner's vicarious liability under these circumstances.[130]

New York courts acknowledge that theft or conversion of a vehicle vitiates an owner's vicarious liability under New York Vehicle and Traffic Laws section 388.[131] However if lessees simply retain a rental vehicle past the rental period, without payment, courts will not regard the conduct as theft, but as a breach of the rental contract.[132] The court in *Banner Casualty Co. v. Lazar* stated that "at least in the absence of a demand by the owner and refusal by the lessee to deliver, the original renting and retention does not become a crime by the lapse of time."[133]

New York law appears to be in agreement with Florida and

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125. *Wynn*, 584 N.Y.S.2d at 685.

126. *Id.* at 685–86.

127. 465 N.Y.S.2d 553, 554 (App. Div. 1983). An accident occurred on the 13th day following expiration of the rental agreement. *Id.*

128. *Id.*

129. *Id.* at 555.

130. *Id.*

131. *See, e.g.*, Banner Casualty Co. v. Lazar, 366 N.Y.S.2d 314 (Sup. Ct. 1975).

132. *Id.* at 319.

133. *Id. Compare Banner*, 366 N.Y.S.2d at 318 (characterizing lease as somewhat open-ended since lessee could renew it on an ongoing basis) *with Utica*, 465 N.Y.S.2d at 555–56 (holding that rental period terminated on specific date).

California law with respect to rental companies' continued vicarious liability when lessees procure the vehicle by fraudulent means. In *Lorippo v. Chrysler Leasing Corp.*, the court held that although the lessee accomplished the rental using a stolen driver's license, Budget could not escape vicarious liability for injuries caused in a subsequent accident.[134] Courts should not abrogate rental companies' vicarious liability in circumstances where they are "careless and negligent in the conduct of their business and rent vehicles without taking precautions in ascertaining the true identity of the lessee."[135]

III. A FRAMEWORK FOR JUDICIAL ANALYSIS OF CLAIMS ARISING UNDER FLORIDA'S DANGEROUS INSTRUMENTALITY DOCTRINE

A. The Scope of Florida's Dangerous Instrumentality Doctrine Should Be Broad

The *Hertz* court erred in abrogating the rental company's vicarious liability because the lessees procured the rental using fraudulent identification and violated the terms of the rental agreement by failing to return the car when the rental agreement expired.[136] Courts have not previously considered these factors either to abrogate the owner's consent or to constitute conversion or theft. With respect to consent, in *National Car Rental System v. Bostic*, the Third District Court of Appeal explicitly rejected the argument that obtaining a rental car with a fraudulent credit card indicates that the car was being driven without the owner's valid consent.[137] As the First District Court of Appeal held in *Tillman Chevrolet Co. v. Moore*, the owner's original consent to a permissible user is not negated when a lessee makes misrepresentations when procuring the

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134. 299 N.Y.S.2d 672, 673–74 (Civ. Ct. 1968). The court stated that the purpose of New York Vehicle and Traffic Law § 388 is to protect innocent plaintiffs who do not have any control over the conduct of the rental company's business. *Id.* at 674.

135. *Id.* Like California, New York courts apparently do not consider theft to include procurement of a rental vehicle by false pretenses. *See, e.g.*, *id.* If such procurement was considered to be theft, New York courts would not hold the owners vicariously liable. *See Banner*, 366 N.Y.S.2d at 317. See *supra* notes 100–06 and accompanying text for a discussion of the effect of fraudulent procurement of rental vehicles on owner's vicarious liability under California law.

136. See *supra* notes 1–5 and accompanying text for the facts of *Hertz*.

137. 423 So. 2d 915, 916 (Fla. 3d Dist. Ct. App. 1982).

vehicle.[138]

Obtaining a rental vehicle by fraudulent means or false pretenses has also not been previously considered as conversion or theft under the dangerous instrumentality doctrine.[139] Moreover, the facts in *Hertz* are readily distinguishable from the facts in Florida cases where courts have found the issue of theft or conversion sufficient to be sent to the jury.[140] As explained by the district court of appeal in *Jackson v. Hertz Corp.*, although Florida's theft statutes include the taking of property by false pretenses[141] which would encompass the situation in *Hertz*, theft under the dangerous instrumentality doctrine did not include this form.[142] Specifically, theft under *Susco Car Rental System v. Leonard* was the "equivalent of common law larceny, that is, the taking of property without consent of the owner."[143] Since Hertz had given consent to the lessees to use the vehicle beyond the owner's immediate control, common law larceny had not occurred.

In their statutory imposition of vicarious liability on vehicle owners, New York and California courts agree that fraudulent misrepresentations during procurement of the rental vehicle do not negate the owner's vicarious liability.[144] The court in *Tuderios v. Hertz Drivurself Stations, Inc.*, for example, stated that it is the responsibility of the rental company to determine the validity of the identification and driver's license presented by potential lessees.[145] The rental company has the opportunity to investigate these matters prior to releasing the vehicle to the lessee and failure to do so

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138. 175 So. 2d 794, 795–96 (Fla. 1st Dist. Ct. App. 1965), *cert. discharged*, 184 So. 2d 175 (Fla. 1966), *overruled by* Hertz Corp. v. Jackson, 617 So. 2d 1051 (Fla. 1993).

139. *See, e.g.*, *Bostic*, 423 So. 2d at 916.

140. See *supra* notes 53–60 and accompanying text for a discussion of Florida cases finding the facts were sufficient to raise the issue of whether theft or conversion had occurred.

141. FLA. STAT. §§ 812.012, 812.014 (1993).

142. 590 So. 2d 929, 941 (Fla. 3d Dist. Ct. App. 1990) (on rehearing en banc).

143. *Id*. at 940 (citing *Susco*, 112 So. 2d 832, 836 (Fla. 1959)). See *supra* notes 61–65 and accompanying text for a discussion of common law larceny and the definition of theft under the dangerous instrumentality doctrine.

144. *See, e.g.*, Tuderios v. Hertz Drivurself Stations, Inc., 160 P.2d 554 (Cal. Ct. App. 1945); Lorippo v. Chrysler Leasing Corp., 299 N.Y.S.2d 672 (Civ. Ct. 1968). See *supra* notes 100–05 and accompanying text, and notes 134–35 and accompanying text for a discussion of California and New York law regarding owner's vicarious liability when lessees fraudulently procure rental vehicles.

145. *Tuderios*, 160 P.2d at 557.

should not vitiate the owner's vicarious liability.[146] Similarly, in *Hertz Corp. v. Jackson*, the rental agent who relinquished the vehicle to the lessees had the responsibility of verifying the validity of the driver's license and the Visa card the lessees presented. The facts of *Hertz Corp. v. Jackson* do not indicate that either the lessees or the agent were unusually rushed on the day of the rental; even if unusually busy, the agent's job description undoubtedly stated that he had the responsibility of insuring that the lessees were the people they purported to be and that the identification and license they presented were valid. Courts should impose liability on rental companies that fail to uphold these responsibilities because statistical data support the premise that people unauthorized to operate a vehicle are more likely to drive in a way that is dangerous to the driving public.[147] Furthermore, innocent victims of accidents caused by negligent drivers of rental vehicles have no control over the conduct of rental companies. Therefore, these victims are unable to help themselves by ensuring that rental agents act more conscientiously when renting vehicles to the public. By negating Hertz' liability under these circumstances, the *Hertz* holding encourages rental agents to act sloppily in the future in order to nullify their liability under the dangerous instrumentality doctrine.

The *Hertz* court also erred in stating that violation of the terms of the bailment, specifically the time period of the rental, amounted to conversion or theft, thereby abrogating the owner's vicarious liability under the dangerous instrumentality doctrine. Like the *Hertz* approach, California courts negate rental companies' statutory liability when permitted drivers substantially violate restrictions placed on bailments.[148] However, pre-*Hertz* Florida cases have consistently held that violation of terms of the rental agreement, including the time period of the agreement, is simply a breach of contract, rather than theft or conversion of the vehicle under the dangerous instrumentality doctrine.[149] The New York Appellate Division

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146. *Id.*

147. Vining v. Avis Rent-A-Car Sys., Inc., 354 So. 2d 54, 56 (Fla. 1977) (citing Gaither v. Myers, 404 F.2d 216, 222–23 (D.C. Cir. 1968)).

148. *See, e.g.*, Engstrom v. Auburn Auto. Sales Corp., 77 P.2d 1059 (Cal. 1938).

149. *E.g.*, Ragg v. Hurd, 60 So. 2d 673 (Fla. 1952); Avis Rent-A-Car Sys. v. Garmas, 440 So. 2d 1311 (Fla. 3d Dist. Ct. App. 1983). Violation of terms of the bailment is treated somewhat differently in the statutory schemes of California and New York. In both states, substantial violations of restrictions pertaining to time, purpose, or location

in *Wynn v. Middleton* followed Florida's approach by holding that lessors of automobiles cannot escape vicarious liability to injured plaintiffs on the grounds that the lessee violated the restrictions of the bailment.[150] New York's approach to vicarious liability for rental companies in *Wynn* and Florida's approach prior to *Hertz* are preferable to the California courts' approach because they better effect the public policy goal underlying both the statutory and common law imposition of vicarious liability on vehicle owners to identify a financially responsible defendant to compensate innocent victims who are physically injured.[151] In addition, the approach taken by New York and Florida is preferable because rental companies choose to engage in vehicle rentals, even though they should foresee that lessees may violate the terms of their agreements. By deviating from previous holdings, the *Hertz* court ignored public policy and fairness issues underlying the dangerous instrumentality doctrine.[152]

The facts that Hertz attempted to regain possession of the vehicle through certified letters and subsequently reported the vehicle as stolen do not change the fact that Hertz originally consented to the lessees' operation of the vehicle. Under Florida's dangerous instrumentality doctrine, liability arises the moment the owner consents to the use of the vehicle "beyond his own immediate control."[153] Thus, in *Tillman*, the Florida Supreme Court held Tillman Chevrolet vicariously liable for injuries to the plaintiff, despite the fact that Tillman had reported the vehicle as stolen when the lessee did not return it as expected.[154] Following *Tillman*, the district court of ap-

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will negate owner's liability. *See, e.g.*, O'Toole v. United States, 284 F.2d 792 (2d Cir. 1960) (holding that owner's liability under New York Vehicle and Traffic Law § 388 was nullified when owner permitted driver to use his car solely to take his baggage home and instead, driver went bar-hopping with friends for the evening); Bayless v. Mull, 122 P.2d 608 (Cal. Dist. Ct. App. 1942) (holding that owner's liability would have been negated under California Vehicle Code if owner had placed definite restrictions on driver's use of car that were substantially violated). Under New York law, however, rental companies may still be vicariously liable if the lessee violates terms of the bailment, even if the rental company attempts to contact the lessee. Wynn v. Middleton, 584 N.Y.S.2d 684 (App. Div. 1992).

150. 584 N.Y.S.2d 684, 685–86 (App. Div. 1992).

151. See *supra* notes 18–20 and accompanying discussion of public policy goals in tort law.

152. See *infra* notes 165–203 and accompanying discussion regarding the public policy rationale for the dangerous instrumentality doctrine.

153. Susco Car Rental Sys. v. Leonard, 112 So. 2d 832, 837 (Fla. 1959).

154. Tillman Chevrolet v. Moore, 175 So. 2d 794, 795 (Fla. 1st Dist. Ct. App. 1965), *cert. discharged*, 184 So. 2d 175 (Fla. 1966), *overruled by* Hertz Corp. v. Jackson, 617 So.

peal reviewing the *Hertz* case stated that "no such efforts, even heroic ones, can be effective to obviate the owner's liability under the doctrine."[155] New York courts do not follow this approach under the statute imposing vicarious liability on vehicle owners. In *In re Utica Mutual Insurance Co.*, the court concluded that the rental company's attempts to retrieve the vehicle following expiration of the rental period amounted to revocation of the owner's consent.[156] However, Florida's pre-*Hertz* imposition of vicarious liability on vehicle owners, despite their conscientious attempts to retrieve a vehicle after the lessee has violated terms of the bailment, is preferable to the approach of New York courts; it recognizes that owners have an obligation to control their own vehicles and to do everything in their power to ensure that individuals to whom they lend their vehicles are trustworthy, competent drivers. Hence, the *Hertz* court should have followed *Tillman* because it encourages vehicle owners to engage in conduct that may protect other drivers on public highways. Rather, the *Hertz* court's holding suggests that when a lessee keeps a rental car beyond the rental period and *any effort* is made to retrieve the car, the rental company is not liable per se under the dangerous instrumentality doctrine.[157] This sets bad precedent for

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2d 1051 (Fla. 1993).

155. Jackson v. Hertz Corp., 590 So. 2d 929, 941 (Fla. 3d Dist. Ct. App. 1990) (en banc), *rev'd*, 617 So. 2d 1051 (Fla. 1993).

156. 465 N.Y.S.2d 553, 555 (App. Div. 1983).

157. The specific question that the Third District Court of Appeal in *Jackson v. Hertz* certified to the Florida Supreme Court as one of great public importance also appears to cast a shadow on the *Hertz* court's holding. Specifically, part (c) of the question asks "whether the liability of a car rental company under the dangerous instrumentality doctrine is affected by the facts that . . . (c) the car rental company *made efforts* to recover the vehicle after it became aware of the fraud and that the vehicle was not timely returned." Jackson v. Hertz Corp., 590 So. 2d 929, 942 (Fla. 3d Dist. Ct. App. 1990) (emphasis added). Neither the district court in its question, nor the supreme court in its answer, specifies the meaning of "made efforts." This phrase is very broad and could have numerous meanings in similar contexts. In *Hertz*, the rental company's efforts to recover the car included sending certified letters to the lessees upon hearing from the police that the driver's license and credit card used to procure the rental were invalid and reporting the vehicle to the police department as stolen. *Id.* at 930. These efforts were certainly not heroic and did not approach the attempts made in *Utica*, where the lessor attempted to contact the lessee in person, by telephone, and by mail, in addition to reporting the car to the police as stolen and filing a formal criminal complaint against the lessee. *Utica*, 465 N.Y.S.2d at 554. In *Utica*, the New York court held that the company's attempts to retrieve the vehicle amounted to revocation of the owner's consent, hence nullifying the owner's liability. *Id.* at 555. These facts must be distinguished from *Hertz*. See *supra notes* 127–30 and accompanying text describing the facts of *Utica*. Be-

rental companies, particularly in states like Florida where tourism is high and lessees are likely to keep rental vehicles beyond the time period specified in the agreement. If lessees unintentionally keep the rental car beyond the specified time period and the rental company makes any attempts to locate and retrieve the vehicle, the rental company's liability would be nullified under *Hertz* for subsequent accidents caused by the lessee.

When applying a common law doctrine such as the dangerous instrumentality doctrine, it is critical that courts apply it in its correct form to avoid potential violation of the access to courts provision of the Florida Constitution.[158] Florida courts developed the dangerous instrumentality doctrine, along with its theft exception to vicarious liability, long before the current statutory forms of theft existed.[159] By imposing the statutory definition of theft on the dangerous instrumentality doctrine, stating that violating the terms of the bailment constitutes theft, and stating that attempts to regain possession of the vehicle can negate vicarious liability under the dangerous instrumentality doctrine, the *Hertz* court significantly narrowed the applicability of the doctrine. Thus, the victim was left with no recourse to the vehicle owner for a loss that the victim did not cause and could not control. Article I, section 21, of the Florida Constitution bars the abolition "of an existing remedy without providing an alternative protection to the injured party."[160] According to the court in *Kluger v. White*, this constitutional guarantee generally bans the abolition of common law, as well as statutory remedies.[161] Courts and the legislature can only abolish these remedies without creating a reasonable replacement if they can show a compelling

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cause the district court in *Jackson v. Hertz Corp.* did not ask a well-defined question, and because the supreme court in *Hertz* did not rephrase the question or limit its answer to extreme circumstances in which the rental company goes to great lengths to retrieve the car after the terms of the bailment have been violated, the court's holding suggests that the rental company's vicarious liability is nullified per se under the dangerous instrumentality doctrine when it makes even the slightest effort to recover the vehicle.

158. FLA. CONST. art. I, § 21. This section of the Florida Constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." *Id*.

159. See *supra* notes 61–65 and accompanying text for a discussion of the definition of theft under the dangerous instrumentality doctrine, as compared to the statutory definition.

160. Kluger v. White, 281 So. 2d 1, 3 (Fla. 1973).

161. *Id*. at 3–4 (citing 16A C.J.S. *Constitutional Law* § 710 (1984)).

governmental interest, with no alternate method available for meeting the public necessity for a remedy.[162] The *Hertz* court neither provided an alternate remedy for the innocent victim, nor provided an overpowering governmental necessity for abolishing the dangerous instrumentality doctrine in cases where lessees fraudulently procure rentals or breach the contractual terms.[163] Thus, the court's holding violated article I, section 21 of the Florida Constitution.[164]

B. Courts Should Recognize the Strong Public Policy Rationale for the Dangerous Instrumentality Doctrine

Florida courts have applied the dangerous instrumentality doctrine to impose vicarious liability on car owners with rare exceptions.[165] The doctrine's purpose is to provide a financially responsible defendant to pay for injuries caused to innocent plaintiffs.[166] The underlying premise of the doctrine is that "the one who originates the danger by entrusting the automobile to another is in the best position to make certain that there will be adequate resources with which to pay the damages caused by its negligent operation."[167]

The law's success as a social instrument in deterring undesirable conduct and compensating innocent victims is highly dependent on its ability to deal with for-profit enterprises such as car rental companies.[168] The enterprise theory of liability is one method by which the law attempts to control the conduct of corporations and to shift the burden of the corporation's risks from innocent victims to

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162. *Id*. at 4.

163. Proponents of the *Hertz* decision may argue that the *Hertz* court did not completely abolish the dangerous instrumentality doctrine; therefore, article I, § 21 of the Florida Constitution does not apply. However, because the *Hertz* court severely limited the doctrine's application, a substantial number of innocent victims injured by permissive drivers will not have access to the courts under the dangerous instrumentality doctrine and will likewise have no alternative method of recourse to the vehicle's owner, who is likely to be the financially responsible party.

164. Although the innocent victim could still file a claim against the negligent driver, this is not a reasonable alternative to the remedy created by the imposition of vicarious liability under the dangerous instrumentality doctrine.

165. See *supra* notes 28–77 and accompanying text for a discussion of the scope of Florida's dangerous instrumentality doctrine.

166. Douglas P. Allen, Jr., *The "Shop-Rule Exception" to the Dangerous Instrumentality Doctrine*, FLA. B.J., May 1993, at 38.

167. Kraemer v. GMAC, 572 So. 2d 1363, 1365 (Fla. 1990).

168. Stone, *supra* note 14, at 1.

the enterprise itself.[169] Enterprise theory is policy oriented and presumes that society's principal interests are to compensate the innocent victim and to balance the enterprise's liabilities with its costs and benefits.[170] This theory is analogous to the dangerous instrumentality doctrine and its statutory alternatives where the rental car company is the vehicle's owner.

The policy underlying the dangerous instrumentality doctrine and the enterprise theory of liability is justified because for-profit enterprises are in a position to efficiently spread their losses by increasing the rental prices to all customers. Rental companies can reasonably anticipate that their cars will be involved in accidents because of the volume of rentals. Thus, they should set the price of the rental such that it reflects all of the company's costs, including the costs of liability incurred through the negligent driving of lessees.[171] In other words, by spreading losses, beneficiaries of the rental business bear the burdens of the business activities and accident costs through higher rental rates, but the companies themselves are not ruined by the vicarious liability imposed under the dangerous instrumentality doctrine. This is more equitable than imposing liability on innocent victims and emphasizes the disproportionate burden that the car rental business places on innocent victims of accidents caused by lessees' negligent operation of rental vehicles.

The enterprise has expertise in operating a for-profit corporation and is motivated to devise the most cost-effective methods of dealing with liability. Further, as a matter of fairness, car rental companies should not continue to profit from the business without being held responsible for accidents caused by their lessees because the companies continue to impose risks on "individually random but

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169. *Id*. at 8.

170. *Id*. at 12. Although this theory is typically associated with the doctrine of respondeat superior, it is also applicable to *Hertz*. Rental companies, like employers, are engaged in a business with known risks. Under respondeat superior, employers bear the risk that their employees might engage in negligent conduct, thereby injuring innocent victims during their employment-related activities. *See* Keller v. Florida Power and Light Co., 156 So. 2d 775 (Fla. 3d Dist. Ct. App. 1963). Similarly, rental companies should bear the risk that their lessees may drive negligently and cause accidents injuring innocent victims. Like the employer-employee relationship, these are normal risks associated with operation of a business. Thus, Hertz should have borne the burden of liability.

171. *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS 39–40 (1970).

collectively predictable victims of the activity."[172] This is in accord with the enterprise theory of liability which holds that businesses should be strictly liable for the risks associated with the routine operation of the business.[173]

Even if the dangerous instrumentality doctrine is well justified on the basis of loss spreading and fairness, a secondary benefit of modifying rental companies' behavior, referred to as social engineering, may also occur.[174] Social engineering analysis assumes that the manner in which courts impose liability influences actors' conduct with respect to the risks they generate.[175] In the context of vehicle rentals, because lessors know of their vicarious liability under the dangerous instrumentality doctrine, they may be more conscientious in following established policies and procedures in leasing a vehicle.[176] Thus lessors may be more careful to verify lessees' identity and the validity of the credit cards and driver's licenses presented under this system than they would be if they were not held vicariously liable for the lessees' negligent operation of the vehicle.

Imposing tort liability on a certain class of actors will significantly encourage behavior modification only if the actors on whom courts impose liability are likely to problem-solve regarding the risk that they generate.[177] Hence, when possible, tort liability should fall on groups of actors who are in the best position to problem-solve regarding prevention of accidents, spreading of losses, and the impact of legal doctrines and rules that govern their behavior.[178] According to Professor Howard Latin, the risk is "high-attention" for these actors and is "low-attention" for actors who are not in the best

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172. HENRY J. STEINER, MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS 71 (1987).

173. *See* Davies v. United States, 542 F.2d 1361, 1364 (9th Cir. 1976).

174. Latin, *supra* note 73, at 677.

175. *Id*.

176. *See, e.g.*, STEINER, *supra* note 172, at 57.

177. Latin, *supra* note 73, at 679.

178. *Id*. at 681. By placing liability on actors who are in the best position to think about and address these factors, the law provides an incentive for these actors to modify their behavior in such a way as to reduce their liability. *Id*. In some contexts, parties are equally capable and equally likely to contemplate the risk of accidents, mechanisms for their avoidance, and loss-spreading mechanisms. Therefore imposition of liability on either party is likely to have a positive impact on behavior. *Id*. at 680. However, in other contexts one of the parties is clearly in the best position to contemplate these factors and is also more likely to do so. *Id*.

position to engage in this type of problem-solving.[179] Within this framework, a class of actors is "high-attention" if it meets the following requirements for effective decision-making: 1) the class understands the risks involved in its conduct and the pertinent legal doctrines and rules imposing liability; 2) the class attends to these doctrines and rules while engaged in its risky conduct; and 3) the class performs a cost/benefit analysis of available alternatives when it is responsible for damages caused by accidents.[180]

In the context of car rentals, the risk is high-attention for the rental company and low-attention for the lessee for a number of reasons. First, because rental companies profit from a risk-creating activity, they are more likely than the drivers of their vehicles or other drivers on the highway to understand the risks associated with their activities and the applicable liability doctrines. Based on their experience in the business, rental companies are in the best position to predict the number of accidents that will occur. In addition, because rental companies exist for profit-making, they are highly likely to be attentive to legal rules and doctrines that have a financial impact on them when engaging in the operation of their businesses. Because their well-being depends on it, it is also probable that rental companies will consider alternative methods for minimizing their costs under the present liability system. Therefore, by holding rental companies liable for accident costs, their consciousness is heightened regarding preventive and compensatory strategies, and they are likely to problem-solve in these areas, resulting in positive behavior modification.

Lessees or other drivers who become innocent victims of accidents are low-attention actors within this context because they do not meet the requirements of effective decision-making stated previously. Specifically, although drivers typically understand the material risks involved in driving, they are not likely to be completely knowledgeable regarding the legal doctrines and rules governing liability. Further, it is unlikely that drivers continuously contemplate the inherent risks and liabilities while driving. Finally, it is improbable that these actors meaningfully evaluate the costs and benefits of available alternatives for dealing with liability for acci-

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179. *Id.*

180. Latin, *supra* note 73, at 697. Although this discussion focuses on enterprises such as rental companies, the same analysis can be applied to individuals.

dents. Although these low-attention actors may be capable of decision-making that would minimize accident costs, they are not as likely to do so as enterprises that have expertise in cost-minimizing decisions. Moreover, even if drivers attempt to make cost-minimizing decisions, it is likely that the decisions will not be as efficient as those made by rental companies that are specialists in assessing risks. Specifically, drivers, including both victims and negligent lessees, can procure insurance that would minimize costs if they are injured or cause an injury while driving. In this way, accident victims and drivers who cause accidents could spread the loss among insureds because the insurance payment to the victim would come from premiums paid by many insureds.[181] However, damages paid through the individual's own insurer may provide more limited relief than that provided by tort law.[182]

Moreover, since insurance policies may be complex and difficult to understand, individuals may not purchase the appropriate amount or type of coverage when they buy insurance on their own. Private individuals who purchase insurance typically do not have the information they need to accurately determine the extent of their risks.[183] Further, they could not acquire the necessary information as efficiently as the corporate enterprise.[184] Even if private parties acquire the information necessary to accurately assess their risks, they frequently demonstrate a psychological barrier to complete risk assessment with underestimation of risk being common.[185]

More importantly, even if private individuals are knowledgeable about insurance and risk assessment, the rental companies are in the best position to extend their own insurance to cover accidents occurring after the rental period has expired and in cases of fraudulent procurement of rental vehicles. Because rental companies buy insurance in volume, it is less burdensome and expensive for them to procure insurance for their own vehicles. To place this burden on

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181. STEINER, *supra* note 172, at 102.

182. *Id.* at 104. First-party insurance for personal injury generally covers only a percentage of medical costs and may not cover any other types of damages, such as pain and suffering. *Id.*

183. Jon Chait, *Continuing the Common Law Response to the New Industrial State: The Extension of Enterprise Liability to Consumer Services*, 22 UCLA L. REV. 401, 443 (1974).

184. *Id.*

185. *Id.*

innocent parties who are not engaged in the business of renting vehicles is neither fair nor efficient.

Beyond the fact that rental companies are the high-attention actors when lessees negligently cause automobile accidents, there is another reason why imposition of liability on rental companies is more likely to modify behavior than imposition of liability on drivers. Absent liability for accidents, drivers still have powerful incentives to prevent accidents, including the avoidance of injury or death to themselves or to other occupants of the vehicle, avoidance of anxiety to family and friends, avoidance of cost and inconvenience, and avoidance of injury to other parties.[186] In contrast, although a rental company's concern with its own reputation may provide an incentive to decrease the number of accidents caused by its lessees, absent liability for accidents caused by its vehicles, its incentives may not be strong enough to outweigh the costs of procuring adequate insurance coverage, the costs of researching alternative cost-minimizing strategies, and the costs of training programs to ensure that rental agents follow designated precautions when renting vehicles. Since drivers have stronger incentives to avoid accidents without the imposition of any legal liability than do rental companies, accident avoidance will likely be most enhanced by imposing liability on rental companies under the dangerous instrumentality doctrine, which may encourage rental companies to strictly adhere to precautionary rental procedures.

The *Hertz* court placed the responsibility of the accident on the innocent victim of the accident. In doing so, the court failed to consider the pitfalls involved in obtaining insurance as an individual.[187] Further, by expecting Jackson to provide his own relief, the court ignored the fact that Hertz was the high-attention actor in the situation, thereby undermining one of the principal justifications for strict liability: the potential behavior modification that may result from Hertz's internalization of accident costs.[188]

The *Hertz* court failed to provide a clear policy reason for its holding. Historically, courts employing the dangerous instrumental-

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186. Latin, *supra* note 73, at 690–91.

187. See *supra* notes 181–85 and accompanying discussion regarding the pitfalls involved when individuals procure their own insurance.

188. See *supra* notes 174–80 and accompanying text for a discussion of behavior modification that may result from imposition of legal liability.

ity doctrine have apparently viewed the litigants as representatives of larger social groups and have therefore considered any given accident as part of the larger picture of cost recovery for innocent victims. This approach may be considered statistical in nature, as it does not specifically address each individual event, but considers the specific event as part of an aggregated whole.[189] The premise underlying this approach is that accidents are recurrent and systematic events.[190] As such, they are predictable and their occurrence can be anticipated based upon previous calculations of accident occurrence. The certainty that an approximate number of people, determined through statistical calculations, will be injured through the ongoing activities of an enterprise strengthens the proposition that in fairness, burdens should be borne by the enterprise benefiting from the activity.

Although first impression of a statistical approach may suggest that it is cold and calculated, in actuality the approach is grounded in a concern for relief of innocent accident victims and sharing the cost of damages across a group of enterprises in the best position to spread the losses incurred.[191] This forms a complex social vision,[192] which was apparently the original justification for the dangerous instrumentality doctrine.[193] In enunciating the dangerous instrumentality doctrine as applied to automobiles, the Florida Supreme Court in *Southern Cotton Oil Co. v. Anderson* integrated its social vision of a more dangerous society due to the invention of the automobile with ideals of fairness.[194]

In contrast to this broad social vision, the *Hertz* court viewed the litigants and the accident as individual and unique. This viewpoint treats accidents as random, occasional, and not subject to prediction.[195] In addition, using this approach, each accident is understandable only within a well-defined and limited context, rather

189. STEINER, *supra* note 172, at 122–24.

190. *Id*.

191. *Id*.

192. Social vision refers to courts' perceptions regarding: 1) society, including socio-economic structure, moral and political goals and ideologies; 2) social actors, including their capacity, character, and conduct; and 3) accidents, including their number, causes, and damages. *Id*. at 92.

193. *See generally* Southern Cotton Oil Co. v. Anderson, 86 So. 629 (Fla. 1920).

194. *Id*.

195. STEINER, *supra* note 172, at 120.

than within a larger framework.[196]

The "individual and unique" approach is contrary to Florida courts' traditional approach to the dangerous instrumentality doctrine. Rather than recognizing the public policy imposing broad liability on the class of vehicle owners who lend their cars to others and the public policy of compensating the class of innocent victims injured by negligent drivers, the individual and unique approach views both the accident and the parties as isolated entities. As a result of using this approach, the *Hertz* court ignored the larger social concern of recurring accidents caused by non-owners and the recurring need to identify financially responsible defendants when non-owners negligently injure innocent victims.

The *Hertz* court also failed to address the implication of its holding for innocent victims whose only recourse without the dangerous instrumentality doctrine is likely to be a financially irresponsible defendant who cannot compensate victims for their injuries.[197] The public policy that innocent victims who are physically injured by negligent actors should have recourse from a financially responsible defendant is pervasive in tort law.[198] For example, in *Becker v. Interstate Properties*, the court held that employers have a duty to hire financially responsible independent contractors.[199] If employers breach this duty, they will be vicariously liable when the independent contractor negligently causes injuries to innocent victims.[200] Similarly, Florida Statutes, section 324.021(9), exempts lessors of long-term rentals from liability under the dangerous instrumentality doctrine only if lessees carry their own insurance on the vehicle.[201] Otherwise, lessors remain vicariously liable to innocent victims under the doctrine.[202]

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196. *Id*.

197. It is particularly predictable that lessees are uninsured when, as in *Hertz*, they fraudulently procure the rental and keep the vehicle well past the time period specified in the rental contract.

198. *See, e.g.*, Becker v. Interstate Properties, 569 F.2d 1203 (3d Cir.), *cert. denied*, 436 U.S. 906 (1978).

199. *Id*. See *supra* note 76 for a discussion of *Becker*.

200. *Becker*, 569 F.2d 1203 (3d Cir.), *cert. denied*, 436 U.S. 906 (1978). This is an extension of vicarious liability imposed under respondeat superior which does not treat independent contractors as employees in the traditional sense. *Id*.

201. FLA. STAT. § 324.021(9)(b) (1993).

202. See *supra* notes 74–77 and accompanying text for a discussion regarding Florida Statutes § 324.021(9)(b).

As demonstrated by *Becker*, one of the major thrusts of vicarious liability within enterprise theory is that the enterprise must ensure that individuals who are engaging in activities of the enterprise are financially responsible. Thus, when changing Florida's law under the dangerous instrumentality doctrine, the *Hertz* court should have at least imposed a condition precedent to negating rental companies' liability — that rental companies must determine at the time of the rental that the lessees are adequately insured such that innocent victims' injuries can be compensated, even when lessees violate terms of the bailment. In the absence of a financially responsible lessee, rental companies should remain vicariously liable under the dangerous instrumentality doctrine. The innocent victim in *Hertz* did not have recourse to any insured defendant and was therefore left to bear the burden of a situation over which he had no control.

The *Hertz* decision indicates a doctrinal shift toward emphasis on self-reliance, rather than collective protection through loss-spreading mechanisms implemented by for-profit enterprises.[203]

The court demonstrated concern for the business involved rather than concern for the innocent victim who was physically injured in the accident. Unfortunately, this decision may prompt implementation of less paternalistic ideology in tort law which may reverse the previous trend toward owner's liability under the dangerous instrumentality doctrine.

IV. CONCLUSION

One of the principal goals of tort law is to compensate innocent victims injured by negligent actors. Vicarious liability has attempted to fulfill this goal by imputing liability to financially responsible defendants in circumstances where the negligent actor is likely to be financially irresponsible. Moreover, vicarious liability places the loss on parties best able to bear the burden, rather than on innocent victims of accidents who are powerless to protect themselves.

The *Hertz* court violated its duty to attempt to locate a financially responsible defendant who could compensate the innocent victim for his injuries. In refusing to impose liability on Hertz under

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203. This trend was initially seen when the legislature enacted Florida Statutes § 324.021(9)(b) which limited liability of car rental companies when the lease was longterm. FLA. STAT. § 324.021(9)(b) (1993). See *supra* notes 74–77 and accompanying text for a discussion of Florida Statutes § 324.021(9)(b).

the dangerous instrumentality doctrine, the *Hertz* court abrogated vicarious liability in the most critical circumstance — where the tortfeasor is likely to be uninsured and not otherwise financially responsible. Hence, not only was the innocent victim unable to obtain recourse from Hertz, but he was also unable to obtain recourse from the tortfeasor himself.

Florida courts should employ the statistical approach, rather than the unique and individual approach when deciding cases under the dangerous instrumentality doctrine. The statistical approach perpetuates traditional tort goals of providing relief to innocent victims and efficiently spreading the loss incurred. Both pre-*Hertz* Florida law and, to some extent, statutory impositions of vicarious liability on vehicle owners have emphasized these dual goals by employing more of a statistical approach. In addition, courts should consider who is the high-attention actor in the particular situation and whose behavior is most likely to be positively modified as a result of imposition of liability. In this way, the judiciary will have a positive impact on society as a whole and will not be operating in a vacuum.

Finally, courts rendering opinions in cases like *Hertz* should guard against a narrow, superficial approach to the issues. The judiciary's responsibilities include consideration of the issues within the broader picture of tort law and its impact on society. The *Hertz* court barely scratched the surface of the issues involved and, therefore, rendered a superficial, yet damaging opinion with which Florida courts and innocent victims are left to grapple.