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Torts - Liability of Automobile Owner for Driver's Negligence

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of the stream when following the channels of the river,[23] thereby making it rather difficult to ascertain how much time was spent in a particular state. In the writer's opinion this case establishes an entirely new angle as to the rights of the states to tax, and it brushes aside the belief than an actual situs must first be proved in order to deprive the domiciliary state of her tax rights, in favor of a doctrine which merely requires the possibility of taxation by other states on an apportionment basis.

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TORTS—LIABILITY OF AUTOMOBILE OWNER FOR DRIVER'S NEGLIGENCE

Defendant and his friend, after eating dinner at the home of a relative of defendant, drove to a liquor store in defendant's automobile and purchased whiskey to be used in making egg nog. During their return to the relative's residence, defendant permitted the friend to drive the car, as the latter had never operated an automobile equipped with overdrive and "he wanted to see how it handled." The friend, in the course of the journey, negligently struck plaintiff's car and the plaintiff brought suit to recover damages. *Held*, negligence of the driver was imputed to defendant owner, inasmuch as both were participating in a joint venture or joint enterprise. *Buquet v. St. Amant*, 55 So. 2d 645 (La. App. 1951).

While the doctrine of joint enterprise is not new in the field of automobile law, its purpose at its inception was in marked contrast to the role it seems destined to assume. At the outset the doctrine represented a partial revival of the rule of "imputed negligence" as voiced by the classic English case of *Thorogood v. Bryan*.[1] Under both doctrines the negligence of the driver is imputed to the passenger on some theory of agency,[2] but joint enterprise is definitely an exception to the broad theory of negligence which the *Thorogood* case represents. The great majority

23. Id. at 311.

1. 8 C.B. 115 (1849).

2. On the point that the basis of joint enterprise doctrine is some theory of mutual agency, see Farthering v. Hepinstall, 243 Mich. 380, 220 N.W. 708 (1928); Bloom v. Leech, 120 Ohio St. 239, 166 N.E. 137 (1929); Robinson v. Oregon-Washington R.R. & Nav. Co., 90 Ore. 490, 176 Pac. 594 (1918). Of course, in all these cases no actual agency exists, for if one did exist there would be no need to resort to a theory other than respondeat superior to obtain the desired result.

of the joint enterprise cases involve the right of the passenger against a negligent third party, and the contributory negligence of the driver is imputed to the plaintiff as a bar to recovery.[3] But now, if the instant case and others[4] throughout the United States are of any significance, the courts have added the doctrine to their growing list of theories upon which the owner of an automobile is held liable for the negligence of the driver. From its role as a bar to recovery, the doctrine has now been employed as a means to impose liability. If this be true, it only substantiates to a greater degree the fact that the trend of decisions is to secure, if possible, a solvent defendant to answer in damages to the injured plaintiff.

Since the turn of the century, the havoc wrought upon the highways of America by the modern motor vehicle has compelled the courts to go to great lengths in employing fictions and presumptions in an effort to afford just recompense for those whose person or property is injured as a result of the negligent operation of motor vehicles. The flood of negligence actions together with the frequent financial irresponsibility of the individual driving has led both the courts and state legislatures to search for some basis of imposing liability upon the owner of the vehicle. Since 1928 a majority of the states have adopted financial responsibility acts.[5] The requirement for posting security after the accident is usually mandatory, regardless of who is at fault; thus time is not wasted in obtaining a fruitless judgment. If the party cannot post the security or show evidence of insurance, he loses his driver's license and car registration plates. The stringency of this requirement has brought about a high percentage of voluntary insurance. Some states have adopted statutes[6] which make the owner of an automobile liable for all deaths or injuries to persons or property resulting from the negligent operation of his automobile by any person using it with his con-

3. Blashfield, Cyclopedia of Automobile Law 1147 (1927); Mechem, The Contributory Negligence of Automobile Passengers. 78 U. of Pa. L. Rev. 736, 747 (1930); Comment, 38 Yale L.J. 810 (1929); 8 L.R.A. (N.S.) 597, 628 (1907); 48 A.L.R. 1055, 1077 (1927); 62 A.L.R. 440 (1929).

4. See Crescent Motor Co. v. Stone, 211 Ala. 516, 101 So. 49 (1924); Crawford v. McElhinney, 171 Iowa 606, 154 N.W. 310 (1915); Roland v. Anderson, 282 S.W. 752 (Mo. App. 1926); Counts v. Thomas, 63 S.W. 2d 416 (Mo. App. 1933); Howard v. Zimmerman, 242 Pac. 131, 132 (Sup. Ct. 1926).

5. Only Mississippi and Louisiana have not yet adopted acts of this type. However, the Mississippi legislature is now considering such an act and it is understood that one will be presented to the Louisiana legislature this spring.

6. For a summary of states having such a statute, see 42 A.L.R. 898 (1926), 74 A.L.R. 951 (1931), 96 A.L.R. 634 (1935).

sent. A few states[7] have achieved comparable results by statutes which make the car itself liable up to its value at a sheriff's sale for all accidents caused by its negligent operation on the public highways of the state.

The common law "family purpose" doctrine[8] imposes liability on the head of a family when the car is being used by one of the members of the family for the purpose for which it is furnished. The same result has been achieved in Louisiana by the "community errand" doctrine and by Article 2318 of the Louisiana Civil Code. The "community errand" doctrine since *Brantley v. Clarkson*[9] holds the husband liable for the torts of his wife regarding automobile accidents which occur within the scope of community affairs, which the court said included errands whether for wholesome recreation and pleasure or for other purposes consonant with the intangible and imponderable obligations of the marital relationship. Article 2318 imposes liability upon the parents for the torts of their minor or unemancipated children residing with them and has effectively placed the parent's solvency behind the wrongs of their minors.

The recent Illinois case of *Ostergard v. Frisch*[10] illustrates another tendency of the court to hold the owner liable. Defendant's car was stolen, and in the getaway the thief negligently drove into and injured the plaintiff. Plaintiff sued the owner of the automobile and was awarded damages. The court decided that a statute which required defendant to remove the keys and lock the automobile was designed to include plaintiff's interest in personal safety within its protective ambit, and also that the statute was designed to protect this interest from the risk of injury through the negligent operation of the motor vehicle by the thief. While the Louisiana court of appeal in the case of *Castay v. Katz and Besthoff*[11] refused to extend the owner's liability this far,[12] the *Ostergard* case shows the extent to which a court might go in statutory interpretation in an effort to impose

7. See S.C. Code 1942, § 8792; Williams' Tenn. Code Ann. 1934, § 2682.

8. See Hope, The Doctrine of the Family Automobile, 8 A.B.A.J. 359 (1922); Note, 38 Harv. L. Rev. 513 (1925); Note, 12 Ore. L. Rev. 72 (1932); Note, 14 Texas L. Rev. 234 (1936); Note, 39 Yale L.J. 1058 (1930); Benton v. Regesser, 20 Ariz. 273, 179 Pac. 966 (1919); Richardson v. Weiss, 152 Minn. 391, 188 N.W. 1008 (1922); King v. Smythe, 140 Tenn. 217, 204 S.W. 396 (1918).

9. 217 La. 425, 46 So. 2d 614 (1950).

10. 333 Ill. App. 359, 77 N.E. 2d 537 (1948), noted in 10 LOUISIANA LAW REVIEW 554 (1950).

11. 148 So. 76 (La. App. 1933).

12. Cf. Cons. Connot c. Franc, Cour de Cassation, Chambres Réunies, D.C. 1942.J.25.

liability upon the owner of the automobile. All the courts seem to feel that since automobiles are expensive the owner is more likely to be able to pay for damage than the person driving and that he is the obvious person to carry the necessary insurance to cover the risk.

The decision reached by the court in the instant case is undoubtedly sound. However, most courts[13] in a situation of this sort have applied principles of agency to hold the owner liable. The Restatement of Torts[14] says in effect that the fact that a person is owner of a car which he permits another to drive does not make the journey during which the other drives a joint enterprise, although his ownership may be important in other particulars. It may give the owner a peculiar ability to control the manner in which the driver operates the car. If the purpose of the journey is for the benefit of the owner, even though it is also for the benefit of him who is permitted to drive, the owner under principles of agency is regarded as master of the driver even though no wages or reward other than the participation in the drive is paid to him. It has been stated[15] that where an owner occupies the car at the time of the accident he is liable for the negligence of the driver if (1) he has not abandoned his right to control the car or (2) if he exercises or has a right to exercise any control over the driver or the operation of the car, or (3) if the ride is for his benefit or for the mutual benefit of himself and the driver. An examination of the language of the court in the *Buquet* case would lead one to the conclusion that the case falls within the scope of the law of agency.

The extension of joint enterprise to this type situation would seem to be justified in view of the court's trend toward effectuating worthwhile public policy. But one might question the propriety of the application of the doctrine to the factual situation involved in the *Buquet* case. By the decided weight of authority, two elements must appear to constitute a joint enterprise. There must be both (1) a community of interest in the object of the trip and (2) a mutual right of control over the operation of the vehicle.[16] By mutual right of control is meant

13. See C.J.S., Motor Vehicles, 1053, § 428(b) (presence of owner).
14. Restatement, Torts, 1276, § 491(h) (1938).
15. 5 Blashfield, Cyclopedia of Automobile Law and Practice 66-70, § 2930 (perm. ed. 1935).
16. 45 C.J. 1031-1032, § 588; Pope v. Halpern, 193 Calif. 168, 223 Pac. 470 (1924); Cunningham v. City of Thief River Falls, 84 Minn. 21, 86 N.W. 763 (1901); Russo v. Aucoin, 7 So. 2d 744 (La. App. 1942).

that there is an understanding between the parties that each will have an equal right in the direction and management of the vehicle. It is the writer's belief that the mutual right of control upon which the orthodox view of joint enterprise places such great emphasis is not present in the *Buquet* case. Thus the theory is objectionable here because it inferentially suggests that if the position of the occupants were reversed, the negligence of the owner-driver would be imputed to his friend and it is doubtful that any such conclusion was intended by the court.

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