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Automobiles - Community Mission - Burden of Proof

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Notes

AUTOMOBILES — COMMUNITY MISSION — BURDEN OF PROOF

Plaintiff sued to recover for damage to his automobile resulting from a collision with a truck driven by defendant's wife. Defendant was not present at the time of the accident. Plaintiff did not allege or prove defendant's wife to have been on a mission for the community at the time of the accident,[1] and no evidence of any nature was tendered on behalf of the defendant. A judgment for the plaintiff was reversed by the court of appeal.[2] On certiorari to the Louisiana Supreme Court, *held,* affirmed. In a suit against a husband for damage caused by his wife's negligent operation of an automobile, a petition which is devoid of an allegation that she was engaged in the service of the community presents no cause of action. By way of dictum the court reconciled the discordant positions[3] of the courts of appeal concerning the burden of alleging and proving a community mission. The plaintiff will have discharged his burden if he alleges the wife was on a community mission, proves actual or implied consent to her use of the community car by the husband, and establishes her negligence. Because of his peculiar knowledge of the facts, the husband then must assume the burden of showing that the wife was not on a community mission. *Martin v. Brown,* 124 So.2d 904 (La. 1960).

The increased use of the family automobile by insolvent members of the family for their own purposes posed a serious problem for the American courts in the early decades of this century.[4]

1. Plaintiff also failed to allege that the driver of defendant's car was defendant's wife. The Supreme Court was made aware of this fact only because she was referred to by counsel and in the opinion of the court of appeal as defendant's wife. Martin v. Brown, 124 So.2d 904, 906 (La. 1960).

2. There appears to be some question as to the res judicata effect of this judgment, which was reinstated by the Supreme Court. While the Supreme Court in its opinion indicates that the plaintiff failed to state a cause of action, the court of appeal made no mention that the defendant raised an exception of no cause of action. In fact the language used by the court of appeal seems particularly final: "It Is Now Ordered, Adjudged and Decreed that there be judgment in favor of defendant, Ernest Brown, rejecting the demands of plaintiff, Robert L. Martin, and dismissing his suit, at his cost." Martin v. Brown, 117 So.2d 665, 666 (La. App. 1960).

3. Certiorari was granted because of this conflict. LA. CONST. art. VII, § 11.

4. See Grad, *Recent Developments in Automobile Accident Compensation,* 50 COLUM. L. REV. 300 (1950); McCall, *The Family Automobile,* 8 N.C.L. REV. 256 (1930); McNiece & Thornton, *Automobile Accident Prevention and Compensation,* 27 N.Y.U.L. REV. 585 (1952); Smith, Lilly & Dowling, *Compensation for Auto-*

Many innocent victims of careless driving went uncompensated, although the owners of the cars involved were financially able to have borne the loss.[5] To remedy this inequitable situation a substantial number of common law jurisdictions developed the family purpose doctrine, which is designed to make the provider of an automobile who consents to its use by members of his family liable for their negligent driving.[6] In Louisiana this doctrine was not adopted,[7] perhaps because the code provision[8] for vicarious parental liability for the delicts of the minor provided a large measure of the protection offered by the common law device.[9] Furthermore, the family purpose doctrine is inconsistent with the general Louisiana[10] and French civilian[11]

mobile Accidents, 32 COLUM. L. REV. 785 (1932); *Report of Committee To Study Compensation for Auto Accidents*, Colum. U. Council for Research in the Social Sciences (1932); *Financial Protection for the Motor Accident Victim*, 3 LAW & CONTEMP. PROB. No. 4 (1936).

5. See 2 HARPER & JAMES, TORTS 1420, § 26.15 (1956). *E.g.*, Durso v. Cozzolino, 128 Conn. 24, 20 A.2d 392 (1941); Richardson v. True, 259 S.W.2d 70 (Ky. 1953); Jacobsen v. Dailey, 228 Minn. 201, 36 N.W.2d 711 (1949); King v. Smythe, 140 Tenn. 217, 204 S.W. 296 (1918).

6. See PROSSER, TORTS § 66 (2d ed. 1955); Lattin, *Vicarious Liability and the Family Automobile*, 26 MICH. L. REV. 846 (1928); Note, 16 NOTRE DAME LAW. 394 (1941). See also, *e.g.*, leading cases embracing the doctrine: Griffin v. Russell, 144 Ga. 275, 87 S.E. 10 (1915); Kayser v. Van Nest, 125 Minn. 277, 146 N.W. 1091 (1914); King v. Smythe, 140 Tenn. 217, 204 S.W. 296 (1918); Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020 (1913).

7. See Martin v. Brown, 124 So.2d 904 (La. 1960); Adams v. Golson, 187 La. 363, 174 So. 876 (1937); Benton v. Griffith, 184 So. 371 (La. App. 1938); Tuck v. Harmon, 151 So. 803 (La. App. 1934); Davis v. Shaw, 142 So. 301 (La. App. 1932); Globe Indemnity Co. v. Quesenberry, 1 La. App. 364 (1924).

8. LA. CIVIL CODE art. 2318 (1870). See Employer's Fire Ins. Co. v. Vincent, 52 So.2d 90 (La. App. 1951); Hingle v. Ahten, 43 So.2d 550 (La. App. 1950); Honeycutt v. Carver, 25 So.2d 99 (La. App. 1946); Dudley v. Surles, 11 So.2d 70 (La. App. 1942); Savoie v. Walker, 183 So. 530 (La. App. 1938); Balsamo v. Hall, 170 So. 402 (La. App. 1936); Stortz v. New Orleans Public Service, 141 So. 814 (La. App. 1932); Nelms v. Boswell, 17 La. App. 480, 136 So. 146 (1931); Whipple v. Lirette, 11 La. App. 485, 124 So. 160 (1929); Stout v. Lewis, 11 La. App. 503, 123 So. 346 (1929).

9. See *The Work of the Louisiana Supreme Court for the 1949-1950 Term — Torts*, 11 LOUISIANA LAW REVIEW 186, 190 (1951). *Cf.* Note, 6 LOUISIANA LAW REVIEW 478 (1945).

10. Adams v. Golson, 187 La. 363, 174 So. 876 (1937); McClure v. McMartin, 104 La. 496, 29 So. 227 (1901); Durel v. Flach, 1 La. App. 758 (1925).

11. FRENCH CIVIL CODE art. 1384 *et seq.* (transl. by Cachard, 1930). See 39 DALLOZ, JURISPRUDENCE GÉNÉRALE 420 (1858): "In principle, the husband is not at all responsible for the delicts and quasi-delicts of his wife; such a responsibility shall not exist except by virtue of an express provision: article 1384 does not contain one. Also, during the community, the penalties incurred by the wife can be executed only upon the personal estate of which she has the bare ownership; (c. nap. 1424.) evidently, it is to be the same way with her debt for damages. From which it follows that the husband is not responsible, otherwise he would be personally bound and the community with him. — Such was the acknowledged rule in the old law (Pothier, commun., n° 256; Lebrun, Commun., liv. 2, ch. 2, sect. 3, n° 7). — The modern commentators are interpreted only in this sense . . . , and the jurisprudence is equally consistent with this doctrine." (Translation by writer.)

See POTHIER, OBLIGATION, pt. II, c. VI, § VIII, p. 338 (transl. LeBrun, 1802):

rule that the husband is not liable for the torts of his wife committed out of his presence. Nevertheless, there appears to have been some dissatisfaction with a situation which left the family assets free from a claim for the careless driving of the wife.[12]

In *Adams v. Golson*[13] this gap was partly closed by the introduction of the community mission doctrine, which is based on the idea that the community is liable for the torts of the wife committed when she is using the community automobile in acting as an agent for the community.[14] However, the Supreme

"Another kind of accessory obligation is that of heads of families who are responsible for the torts of their minor children and wives, not preventing them when they had it in their power to do so.

"They are holden to have it in their power to prevent the tort when it was committed in their presence. If it was committed in their absence, we are to judge from circumstances, whether they had it in their power to prevent it."

See 3 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 1105 (1959).

12. Tarleton-Gaspard v. Malochee, 133 So. 409 (La. App. 1931) (wife in driving her mother, father, and sister to the movie was found to have been acting as husband's agent although the husband had only given general consent to use the automobile which was his separate property). See Paderas v. Stauffer, 10 La. App. 50, 120 So. 886 (1929), which appears to present the first expression of the community errand idea. Here the husband was liable for the negligence of his wife committed while driving her *own* car. The burden of proof was on the husband to show that she had been on a mission for her separate benefit. He failed to discharge this burden and the evidence pointed the other way: "[T]he evidence shows . . . that she was shopping. If she was shopping for the household she was on a community errand, and if she was engaged in selecting clothes, or hats, or any of the numberless things a woman requires for her own comfort or adornment, then, likewise, she was on a community errand, and in either such event she was just as much the agent of her husband as head and master of the community as would have been the family chauffeur."

See also Battalora v. Carnahan Creamery, 157 So. 612 (La. App. 1934), where the husband was liable for injuries to a guest resulting from collision brought about through the wife's negligence. The opinion did not reveal the nature of the wife's business at the time of the accident, but merely quoted language from the *Tarleton-Gaspard* case.

13. 187 La. 363, 174 So. 876 (1937).

14. The rationale may be described thusly: (1) there is no tort liability in this state except that predicated upon articles of the Civil Code; (2) Article 2317 imposes liability for the damage occasioned by the act of persons for whom we are answerable; (3) the husband is not liable for the torts of his wife committed out of his presence (McClure v. McMartin, 104 La. 496, 29 So. 227 (1901)); (4) the owner of an automobile is not liable for the damages caused by its borrower unless he was present or the borrower was acting as his agent (Atkins v. Points, 148 La. 958, 88 So. 231 (1921)); (5) under Louisiana Civil Code Article 2403 the husband is head and master of the community and under the jurisprudence the wife is without authority to contract a debt that will bind the community except for necessities (Schaffer v. Trascher, 165 La. 315, 115 So. 575 (1928)); (6) however, Louisiana Civil Code Article 2985 provides that an agency may exist for the interest of the principal, that of both agent and principal, that of a third person, and that of any other combination of two of the three parties mentioned; but the agency may not be created for the benefit of the mandatary or agent alone (10 DURANTON, COURS DE DROIT FRANCAIS 64, n° 200 (1834)); (7) therefore, to hold the husband liable as head of the community for the wife's torts, it must be shown affirmatively that she was expressly or impliedly authorized to and was, at the time of the commission of the act, actually attending

Court's application of the rule in that case narrowly constrained the meaning of the term community mission. The wife who negligently injured a motorcyclist with the family car while on an out-of-town visit for the purpose of attending a style show and a fraternal meeting was held not to have been on a community mission but merely to have been engaged in a trip for her own pleasure. Subsequent court of appeal cases seemed to envision the community as a business concern and apparently interpreted this ruling to mean that only missions resulting in a "business" expense or a financial gain to the community would be counted as a community errand.[15] However, in *Brantley v. Clarkson*[16] the Supreme Court enlarged the community mission concept to include any legitimate pursuit of the wife while using the community automobile.[17] The court reasoned that since the community owed the wife pleasure and recreation as well as food and clothing, a pleasure trip may properly be considered to be for a community purpose.

Prior to its adoption by the Supreme Court, the Orleans

to the affairs or business of the community (Adams v. Golson, 187 La. 363, 370, 371, 174 So. 876, 878, 879 (1937)).

15. Lambert v. McKinster, 44 So.2d 513 (La. App. 1950) (no community mission where the wife, after a quarrel with her husband, drove the car to town to regain composure, bought cosmetics and window-shopped, and negligently caused collision on returning home); Aetna Casualty & Surety Co. v. Simms, 200 So. 34 (La. App. 1941) (wife en route to shop to get ignition switch repaired preparatory to taking trip to visit sick aunt); Wise v. Smith, 186 So. 857 (La. App. 1939) (although the thrust of the opinion is aimed at lack of husband's consent to use car, the court specifically stated that wife's visit to sick mother-in-law was not a community mission); Matulich v. Crockett, 184 So. 748 (La. App. 1938) (wife's charitable activities were not community purpose because the alms she distributed were not supplied by the community and the husband objected to her activity).

16. 217 La. 425, 46 So.2d 614 (1950). The Supreme Court, one Justice dissenting, quoted with approval from the court of appeal opinion expressing the court's personal view which was contrary to its reluctant rejection of the plaintiff's demand: "Were this question res nova before this court on the facts presented it would be our inclination . . . that the legitimate pursuits of a wife, whether for wholesale recreation and pleasure or for other purposes consonant with the intangible and imponderable obligations of the marital relationship should be considered as within the scope of community activities." *Id.* at 432, 46 So.2d at 616.

17. In Vail v. Spampinato, 238 La. 259, 115 So.2d 343 (1959), the court followed its ruling in the *Brantley* case, *supra* note 16, by finding that a wife who maintained she had undertaken a trip to obtain "pocket money" had engaged in a community mission because the trip was partially for her enjoyment and pleasure. It is interesting to note that the court in the instant case made no mention of this case whatsoever. Perhaps this may be explained by the *Vail* opinion's limited interpretation of the *Brantley* decision: "[It] enlarged the scope of community activities by including therein the recreation and pleasure of the wife." Obviously, the inclusion of the wife's pleasure and recreational jaunts alone would not amount to the same thing as enlargement of the community mission concept to include all "legitimate pursuits" of the wife, which is the view taken in the instant case. Martin v. Brown, 124 So.2d 904, 907 (La. 1960).

Court of Appeal had, in essence, applied the community purpose doctrine and had placed the burden of proving an absence of a community mission squarely on the husband who sought to escape liability.[18] However, the Supreme Court, in the *Adams* case, held that it must be "shown affirmatively" that the wife was on a community errand in order to hold the husband liable.[19] The Second Circuit Court of Appeal subsequently relied on this statement in reversing judgments against husbands where the plaintiffs had failed to allege or prove a community mission,[20] but the First and Orleans Circuits adhered to the rule fashioned in the early court of appeal cases.[21]

The instant case held that the plaintiff, in order to state a cause of action, must allege that the wife was driving the automobile on a community mission at the time of her negligent act. In a dictum statement, which is the Louisiana Supreme Court's first clear expression on the matter, the court seems to have adopted the view of the Orleans and First Circuit Courts of Appeal as to the burden of proving a community mission. If the plaintiff succeeds in establishing the wife's negligence in a community car and the husband's express or implied consent to her use of the vehicle, the defendant husband must prove that she was not on a community mission in order to escape liability. This rule appears to be in line with the body of jurisprudence regarding the master's liability for the negligent driving of his servant[22] and also appears to move Louisiana nearer to a posi-

18. Paderas v. Stauffer, 10 La. App. 50, 119 So. 757 (1929). This case appears to be the only reported account of a husband being held liable for his wife's negligent operation of her *own* automobile.

19. Adams v. Golson, 187 La. 363, 371, 174 So. 876, 879 (1937).

20. Martin v. Brown, 117 So.2d 665 (La. App. 1959); Hart v. Hardgrave, 103 So.2d 910, on rehearing, 916 (La. App. 1958). *Cf.* Tuck v. Harmon, 151 So. 803 (La. App. 1934), where plaintiff alleged that the wife was on a community mission, but failed to allege any facts in support of this proposition.

Perhaps this view was engendered to some extent by the *Brantley* case, *supra* note 15, which not only found that the *Adams* case had correctly stated the law, but which also enlarged the husband's ambit of liability. The Second Circuit might have felt this in addition to a prima facie case on the issue of community mission to be too favorable to the plaintiff in a community errand case.

21. Johnson v. Delta Fire & Casualty Co., 110 So.2d 215 (La. App. 1959); Howard v. Toye Bros. Yellow Cab Co., 70 So.2d 465 (La. App. 1954). *Cf.* Levy v. New Orleans & N.E.R.R., 20 So.2d 559 (La. App. 1945). In this case the husband sued for damage to his automobile and wrongful death of his wife resulting from a car-train collision. Even though the husband was the plaintiff in this case the court held he had the burden of proving absence of a community mission in order to counteract the wife's contributory negligence posed as a defense by the railroad.

22. See cases holding that the owner of an automobile who consents to its use by another is not made liable for the driver's negligence unless he is present, or the driver is acting as his agent, at the time of accident. Tinker v. Hirst, 162

tion of accord with the common law family purpose doctrine. With the adoption of the presumption[23] that the wife using the community automobile with the consent of her husband is on a community errand, it would seem that the Louisiana plaintiff is now required actually to prove no more than is necessary under the family purpose doctrine.[24] This appears to be harmonious with the true basis of the community mission doctrine,[25] which in turn seems consistent with a general legislative policy of providing adequate protection for the victims of automobile mishaps.[26]

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La. 209, 110 So. 324 (1926) (employer not liable where employee drove truck without consent on Sunday); Atkins v. Points, 148 La. 958, 88 So. 231 (1921) (lessor of automobile not liable for negligence of his lessee); Anderson v. Carrick, 198 So. 385 (La. App. 1940) (pleasure ride in mother-in-law's automobile); Hadrick v. Burbank Cooperage Co., 177 So. 831 (La. App. 1938) (employee borrowed employer's truck for personal use); Lyle v. Guillot, 143 So. 511 (La. App. 1932) (young man at night club borrowed friend's car to take girl for a ride); Vuillemot v. August J. Claverie & Co., 125 So. 168 (La. App. 1929) (employee driving for own pleasure).

But where the plaintiff establishes ownership in the defendant and employment of the driver by the defendant, the defendant has the burden of proving that the driver was not acting within the scope of employment: See, *e.g.*, Cofield v. Burgdolf, 238 La. 297, 115 So.2d 357 (1959); May v. Yellow Cab Co., 164 La. 920, 114 So. 836 (1927); Harding v. Christiana, 103 So.2d 301 (La. App. 1958); Simms v. Lawrence Bros., 72 So.2d 538 (La. App. 1954); Futch v. Horace Williams Co., 26 So.2d 776 (La. App. 1946); Culver v. Toye Bros. Yellow Cab Co., 26 So.2d 296 (La. App. 1946); Murphy v. Henderson, 23 So.2d 369 (La. App. 1945); Movales v. Burns, 21 So.2d 893 (La. App. 1945).

23. The court's reason for establishing the presumption was the probable existence of special knowledge of the facts in the husband. A better reason would appear to be the likelihood that the wife is engaged in a legitimate pursuit, which under the *Brantley* case is the sole requisite characteristic of a community mission.

24. See 2 HARPER & JAMES, TORTS § 26.15 (1956); PROSSER, TORTS 369 (1955).

25. Since the need for the community mission doctrine, like that of the family purpose doctrine, was created by negligent automobile operation, it would seem reasonable to assume that the doctrine's operation will be restricted to automobile cases. If this assumption is correct, then the presumption that the wife's mission is for the benefit of the community should not be available outside this area of litigation.

Nevertheless, lower courts have discussed the wife's acts as agent of the community in cases involving tort claims in other areas. See Moses v. Metropolitan Cas. Ins. Co., 51 So.2d 830 (La. App. 1951) (wife who caused light to be turned out on stairway in order to pursue hobby of photography thereby causing tenant who was descending stairs to fall, was not acting as agent of community); Reneau v. Brown, 158 So. 406 (La. App. 1928) (wife cannot be sued for harboring vicious dog without joining husband, as this is a community act). *Cf.* decisions in jurisdictions which have adopted the family car doctrine, holding that it has no application to motorboats or motorcycles. Felcyn v. Gamble, 185 Minn. 357, 241 N.W. 37 (1932); Meinhardt v. Vaughn, 159 Tenn. 272, 17 S.W.2d 5 (1929). See Note, 16 MINN. L. REV. 870 (1932).

26. See LA. R.S. 22:655 (1950) (liability insurance omnibus clause requirement); *id.* 32:851 (Motor Vehicle Safety Responsibility Law).