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Agency -- Respondeat Superior -- Husband's Negligent Driving Renders Car Owner Liable to Wife

Robert J. Stampfl

CASES NOTED

AGENCY—RESPONDEAT SUPERIOR—HUSBAND'S NEGLIGENT DRIVING RENDERS CAR OWNER LIABLE TO WIFE

Plaintiff wife brought suit against her husband's employer for personal injuries resulting from an automobile accident. The plaintiff was a passenger in the employer's car, driven by her husband on a purely personal mission with the consent of the owner. From a dismissal of the complaint, based on grounds of public policy, the plaintiff appeals. *Held*, reversed, the immunity of the husband from liability does not extend to the owner of the automobile, whose liability is based upon the doctrine of *respondeat superior* arising from the principal and agent relationship implied in law. *May v. Palm Beach Chemical Company, Inc.*, 77 So.2d 468 (Fla. 1955).[1]

Under the doctrine of *respondeat superior*, a master is liable for the injuries caused by the tortious acts of his servants acting within the scope of their employment.[2] In some jurisdictions,[3] a notable exception to this general rule exists. This exception arises when the negligent servant is the husband of the plaintiff, the rationale being that the master should not be liable where his servant is not liable.[4] The reason given for this exception is that at common law husband and wife are in legal contemplation but one person, and the husband is that person.[5] Neither can, in the absence of statute, maintain an action in tort against the other.[6]

The common law identity of the husband and wife and the consequent disabilities of the wife remained until the advent of the various Married Women's (Property) Acts[7] which allowed the wife to sue in her own

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1. The plaintiff must prove her husband was grossly negligent in order to recover under Florida's Guest Statute: FLA. STAT. 320.59 (1953).

2. RESTATEMENT, AGENCY § 219 (1)(1933); 2 Am. Jur. Agency §§ 359, 360 (1936); 3 C.J.S. Agency § 255 (1936).

3. Maine v. J. Maine & Sons Co., 198 Iowa 1278, 201 N.W. 20 (1924); Sacknoff v. Sacknoff, 131 Me. 280, 161 Atl. 669 (1932); Riser v. Riser, 240 Mich. 402, 215 N.W. 290 (1927); Emerson v. Western Seed and Irrigation Co., 116 Neb. 180, 216 N.W. 297 (1927).

4. See note 3 *supra*. In Maine v. J. Maine & Sons Co., the court refused to allow the wife to recover from her husband's employer in spite of IOWA CODE § 5026, (1924), which provided that where damage is done by a car driven with the consent of the owner, by reason of the negligence of the driver, the owner shall be liable.

5. 41 C.J.S. *Husband and Wife*, § 5 (1944).

6. 30 C.J., *Husband and Wife*, § 317 (1923).

7. Three representative statutes have been chosen for comparison. Note that District of Columbia and Florida Statutes remove many disabilities although the unqualified right for either spouse to sue the court is not given. D.C. CODE, § 1155 (1901) entitled "Power of Wife to Trade and Sue and Be Sued."

> . . . and or torts committed against them, as fully and freely as if they were unmarried; contracts may also be made with them, and they may also be sued separately on their contracts, whether made before or during marriage, and for wrong independent of contract committed by them before

name under certain conditions. In *Thompson v. Thompson*,[8] a Federal court gave such a statute a narrow construction and refused to allow the wife to sue her husband in a tort action for assault and battery.[9] On the other hand, Connecticut has liberally interpreted[10] its statute[11] and allowed the wife to maintain a suit for a personal tort against her husband, using the revolutionary change wrought by the statute as the basis for its decision.[12] However, the majority[13] and Florida[14] view comes within the *Thompson* doctrine.

When a wife seeks recovery from her husband's employer under the doctrine of *respondeat superior*, the legal liabilities of the parties are most simply[15] described by the Restatement of Agency.[16] That is, in jurisdictions where the husband and wife cannot sue each other for personal tort,

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or during marriage as if they were fully unmarried, and upon judgments . . . as if they were unmarried . . . .

FLA. STAT. 708.08 (1953) entitled "Married Women's Rights"; separate property: Every married woman is hereby empowered to take charge of, and manage and control her separate property, to contract and be contracted with, to sue and be sued, and to sell . . . without restraint, without joinder of her husband, in all respects as fully as if she were unmarried . . . ; ; provided, however, that no deed, mortgage . . . conveying or encumbering real property owned by a married woman shall be valid without the joinder of her husband; provided further, that any claim against a married woman shall not be a claim or lien against such married woman's right of dower in her husband's separate property.

The law in New York is clear: N.Y. DOMESTIC RELATIONS LAW § 57 (1937) entitled "Right of Action by or Against Married Woman, and by Husband or Wife Against the Other, for Torts" provides:

> A married woman has a right of action for an injury to her person, property or character or for an injury arising out of the marital relation, as if unmarried. She is liable for her wrongful or tortious acts; her husband is not liable for such acts unless they were done by his actual coercion or instigation; and such coercion or instigation shall not be presumed, but must be proved. A married woman has a right of action against her husband for his wrongful or tortious acts resulting to her in any personal injury as defined in section thirty-seven-a of the general construction law, or resulting in injury to her property, as if unmarried, and she is liable to her husband for her wrongful or tortious acts resulting in any such personal injury to her husband or to his property, as if they were unmarried.

8. 218 U.S. 611 (1910).

9. A strong dissent in the *Thompson* case, note 8 *supra*, argued that the statute gave the wife the right to maintain an action for a personal tort against her husband.

10. Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914); *accord*, in Bushnell v. Bushnell, 103 Conn. 583, 131 Atl. 432 (1925). For similar holdings *see* Roberts v. Roberts, 185 N.C. 566, 118 S.E. 9 (1923); Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).

11. CONNECTICUT MARRIED WOMEN'S ACT c. 114 (1877).

12. See note 10 *supra*.

13. Rogers v. Rogers, 265 Mo. 200, 177 S.W. 382 (1915); Woltman v. Woltman, 153 Minn. 217, 189 N.W. 1022 (1922); Austin v. Austin, 130 Miss. 61, 100 So. 591 (1924); Harvey v. Harvey, 239 Mich. 142, 214 N.W. 305 (1927); Thompson v. Thompson, note 8 *supra*; see note 3 *supra*.

14. Corren v. Corren, 47 So.2d 774 (Fla. 1950).

15. Some terms used to describe the theory of the master's liability: derivately, theory of subrogation, imported, vicarious, constructive, imputed, imposed. See 6 N.Y.U.L. REV. 53, 55 (1928).

16. RESTATEMENT, AGENCY § 217(2)(1933):

> (2)A master or other principal is not liable for facts of a servant or other agent which the agent is privileged to do although the principal himself would not be so privileged; *but he may be liable for an act to which the*

an immunity exists which may[17] or may not[18] extend to the employer. Where the immunity is extended, the reason given by the courts is that a spouse should not be allowed to do indirectly what cannot be done directly, *i.e.*, sue the employer who would in turn sue the tort feasor husband.[19] In jurisdictions where immunity is not extended, the maxim *Qui facit per alium facit per se* governs,[20] the unity of the husband and wife being disregarded if recovery may be had over against the husband.

The conflicting legal principles of the two opposing views were resolved by Cardozo, C.J. in *Schubert v. A. Schubert Wagon Co.*[20a] in these words:

> We find no collision between the principle of liability [based on respondeat superior] established in this case and the principle of exemption established in actions against a husband. If such a collision, however, could be found, with the result that one or the other principle must yield, we agree with Hubbs, P.J., writing in the court below, that the exemption would have to give way as an exception, more or less anomalous, to a responsibility which today must be accepted as a general rule.

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agent has a personal immunity from suit. (emphasis supplied)
Comment: b. If a principal has a personal privilege which cannot be shared by another, he cannot of course confer this privilege upon an agent so as to escape liability for the agent's act. Thus, if a master has a privilege of personally entering a clubhouse, he may become liable for the entry therein by his servant upon his business. Likewise, if an agent has an immunity from liability as distinguished from a privilege of acting, *the principal does not share the immunity. Thus, if a servant, while acting within the scope of employment, negligently injures his wife, the master is subject to liability* (emphasis supplied)

17. See note 3 *supra*.

18. The reader is referred to the following cases which held that a wife could recover from her husband's employer for injuries she received as a result of her husband's negligent driving of his employer's automobile within the scope of employment: Pittsley v. David, 298 Mass. 552, 11 N.E.2d 461 (1937); McLaurin v. McLaurin Furniture Co., 166 Miss. 180, 146 So. 877 (1933). But the husband was held not the *alter ego* of the employer when the wife was riding for her own pleasure with the husband on a business trip; Mullally v. Langenberg Bros. Grain Co., 339 Mo. 582, 98 S.W.2d 645 (1936); Miltimore v. Milford Motor Co., 89 N.H. 272, 197 Atl. 330 (1938); Cerruti v. Simone, 13 N.J. Misc. 466, 179 Atl. 257 (1935); Schubert v. A. Schubert Wagon Co., 249 N.Y. 253, 164 N.E. 42 (1928); Metropolitan Life Ins. Co. v. Huff, 48 Ohio App. 412, 194 N.E. 429 (1933), *Rev'd on another grounds*, 128 Ohio St. 469, 191 N.E. 761 (1934); Koontz v. Messer, 320 Pa. 487, 181 Atl. 792 (1935); Ponlin v. Graham, 102 Vt. 307, 147 Atl. 698 (1929); Hensel v. Hensel Yellow Cab Co., 209 Wis. 489, 245 N.W. 159 (1932) (governed by the law of Ohio); LeSage v. LeSage, 224 Wis. 57, 271 N.W. 369 (1937).

19. Since an agent is personally liable for the torts he commits, 3 C.J.S., *Agency* § 220 (1936). Other reasons based on public policy are as follows:

1. Pointless extra litigation will be required. See Seaboard Airline Ry. Co. v. American District Protective Co., 106 Fla. 330, 143 So. 316(1932); Losito v. Kruse, 136 Ohio St. 183, 24 N.E. 2d 705(1940).
2. Domestic collusion and fraud will be encouraged. See note 3 *supra*.
3. A legislative enactment should be the basis of recovery. See Welch v. Davis, 410 Ill. 130, 101 N.E. 2d 547(1951). Zinman v. Newman, 51 N.Y.S. 2d 132(1942); *aff'd* 265 App. Div. 1052, 41 N.Y.S.2d 193 (1943); General Accident, Fire & Life Assurance Corp. v. Morgan, 33 F. Supp. 190(D.C.N.Y. 1940).

20. "He who acts through another acts himself." [*i.e.*, the acts of an agent are the acts of the principal] BLACK'S LAW DICTIONARY (1941).

20a. *Supra* note 18.

The Florida Supreme Court first came to grips with an issue similar to the *May* case in *Webster v. Snyder*.[21] In that case the plaintiff sued the owner of an automobile and the driver-servant for injuries received through its negligent operation while driven within the scope of employment. The plaintiff married the driver (the owner's son) after the suit had started but before it came to judgment. The court abated the action against the driver (now husband) on the theory of the common law identity of husband and wife but allowed the action against the owner to continue. As the liability of the parties was fixed at the time of the accident when the plaintiff and the driver were not married, the issue in the *May* case did not arise.

An additional difficulty in the *May* case is that the husband's activity was without the scope of his employment,[22] as the tort occurred on a purely personal mission. To bridge this hiatus, the court invoked the well-established Florida Dangerous Instrumentality Doctrine as applied to automobiles.[23] Although the doctrine was founded by judicial decision,[24] legislative approval might be implied.[25]

The *May* decision has two principal effects: first, it brings Florida law into accord with the Restatement of Agency (and majority) view in holding the employer liable to the employee's spouse for torts of his employee. Secondly, it reaffirms and extends the application of the Florida Dangerous Instrumentality Doctrine as applied to Automobiles.

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21. 103 Fla. 1131, 138 So. 755 (1932).

22. RESTATEMENT, AGENCY § 219 (2)(1933): "A master is not liable for the tortious conduct of servants acting outside the scope of employment."

23. Other jurisdictions have imposed liability on the car owner by statute: CAL. VEHICLE CODE § 402 (1937):

> Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor 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, and the negligence of such person shall be imputed to the owner for all purposes of civil damages . . . .

N. Y. Vehicle and Traffic Law § 59 (1941):

> Negligence of operator other than owner attributable to owner.
> Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from the negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner . . . .

24. Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920); Herr v. Butler, 101 Fla. 1125, 132 So. 815 (1931); Engleman v. Traeger, 102 Fla. 756, 136 So. 527 (1931). For complete analysis see 5 FLA. LAW. REV. 412 (1952), this doctrine makes the driver of the car the owner's agent if the owner's consent to its use has been obtained.

25. FLA. STAT. 51.12 (1953).