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Torts - Imputation of Son's Contributory Negligence To Mother

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method of procedure for interrupting or suspending the running of prescription against the lien."[26] The court's fear that a contrary interpretation would permit perpetual encumbrance could be avoided by construing the singular term "reinscription" to allow only one reinscription of the privilege.[27] Since judicial proceedings do not preserve the privilege, however, such restricted interpretation could create other serious problems; litigation could easily extend beyond the term of one reinscription.[28] In any event, this decision requires the materialman to file suit on his timely recorded claim within one year of recordation regardless of reinscription.[29]

Reid K. Hebert

TORTS — IMPUTATION OF SON'S CONTRIBUTORY NEGLIGENCE TO MOTHER

Plaintiff, a passenger in an automobile driven by her minor son with his father's permission, was injured when her son negligently attempted a left turn and was struck by defendant who was negligently attempting to pass him. The district court rendered judgment for the plaintiff in her suit for personal injury, but it was reversed in part by the court of appeal. On certiorari, the Louisiana Supreme Court reinstated the district court's judgment. *Held,* in absence of an agency or other legal relationship for which responsibility is imposed on one for the fault of another, contributory negligence cannot be imputed to

26. Shreveport Long Leaf Lumber Co. v. Wilson, 195 La. 814, 825, 197 So. 566, 569 (1940). It should be noted that the use of the terms "interruption" and "suspension" as effects of the reinscription is not entirely correct, but the scope of this Note is not intended to include an analytical criticism of such a use.

27. DAGGETT, LOUISIANA PRIVILEGES AND CHATTEL MORTGAGES 322 (1942).

28. If only one reinscription were allowed and the court interpreted the statute to permit that reinscription to preserve both the right of action and the privilege, when suit was filed after the first but within the second year, the defendant owner could effectively use delays which would cause the judicial proceedings to go beyond the second year — and the plaintiff materialman would lose his privilege. The court effectively avoided this situation by requiring suit to be filed within the first year and impliedly allowing an unlimited number of reinscriptions in the event judicial proceedings extend beyond the next year.

The Supreme Court reaffirmed its decision in the instant case in Arby Brothers, Inc. v. Tillman, 162 So. 2d 346 (La. 1964). Justice Hamiter, who dissented in the *Crochet* case, speaking for the majority, said: "The author of this opinion disagreed with that conclusion [of the *Crochet* case] and still entertains the same view. However, since the result reached in such a case does bear on the merchantability of titles to immovables he now feels compelled to abide by the conclusion until it is changed by legislative action."

bar recovery against a negligent third party. Presence of the mother in the automobile is not sufficient to establish the theoretical right of control essential to an agency relationship. *Gaspard v. LeMaire*, 158 So. 2d 149 (La. 1963).[1]

The large number of traffic accidents and the frequent occurrence of accidents involving insolvent drivers have led courts to seek means of placing the solvency of another, usually the car owner, behind the wrongdoing of the driver.[2] This vicarious responsibility of a third party generally has been achieved by positing an agency relationship between the driver and another person either under ordinary agency principles or under the theories of joint enterprise, the common law family purpose doctrine, and the civil law community errand doctrine.[3] The joint enterprise doctrine requires a mutual right of control by passenger and driver and a common purpose with mutual benefit to passenger and driver.[4] Under this doctrine both passenger and driver are considered agents of each other.[5] Under the common law family purpose doctrine, the wife driving the

1. The court's very significant holding with respect to damages is not discussed in this Note. It is hoped that its ramifications will be fully explored in a subsequent issue of the *Review*.

2. PROSSER, TORTS 368 (2d ed. 1955).

3. *Ibid.* For emphasis on the agency relationship see Rodriguez v. State Farm Mutual Ins. Co., 88 So. 2d 432 (La. App. 1st Cir. 1956); Weitkam v. Johnston, 5 So. 2d 582 (La. App. Orl. Cir. 1942); Waguespack v. Savarese, 13 So. 2d 726 (La. App. Orl. Cir. 1943); Smith v. Howard Crumley & Co., 171 So. 188 (La. App. 2d Cir. 1936).

Of course, an owner himself would be guilty of independent negligence if he allowed an incompetent person to drive his car or allowed such a person to remain in control when it became obvious that his incompetency could result in an accident. When such negligence by an owner plays a causal part in an accident, that person should be barred from recovery by his own contributory negligence. See PROSSER, TORTS 300 (2d ed. 1955); Lessler, *The Proposed Discard of Imputed Contributory Negligence*, 20 FORDHAM L. REV. 175 (1951).

4. Weintraub, *The Joint Enterprise Doctrine in Automobile Law*, 16 CORNELL L.Q. 325 (1931); RESTATEMENT (SECOND) TORTS § 491, comment c (Tent. Draft No. 9, 1963). The American Law Institute adds the further requirement that the interest held in common be of a pecuniary nature. Comment 38 YALE L.J. 810 (1929). The chief use of joint enterprise has been to bar recovery against a negligent third party. It is seldom used to allow recovery by a third party against an innocent member of a joint enterprise. The joint enterprise doctrine should never be used to bar recovery by a passenger against a negligent driver when they are members of a joint enterprise, as has been done in a few misguided cases.

5. Joint enterprise has not been too clearly defined by the Louisiana courts. In the case of Buquet v. St. Amant, 55 So. 2d 645 (La. App. Orl. Cir. 1951), the court discussed the case in terms of joint enterprise whereas the case should have been determined on an agency basis. Note, 12 LA. L. REV. 323 (1952).

An agency relationship is based on the passenger's right of control over the driver; joint enterprise requires *mutual* right of control by all parties engaged in the enterprise. Riggs v. Strauss, 2 So. 2d 501 (La. App. 2d Cir. 1941); RESTATEMENT (SECOND), TORTS § 491 (Tent. Draft No. 9, 1963).

car is considered the agent of the husband, and he will be vicariously liable for her negligence.[6] The civil law community errand doctrine, which is similar to the family purpose doctrine, considers the wife the agent of the community and holds the husband liable as head of the community.[7] In addition to these special relationships, Louisiana courts generally have held that an agency relationship exists between a third person and the driver if the third person has a theoretical right of control over the driver, and the ride is for the benefit of the third person or the driver and the third person.[8] When such an agency relationship is found, the courts will hold the third person liable for the primary negligence of the driver.[9]

The courts have not restricted agency doctrines to cases involving primary negligence of the driver, but have expanded them to cover situations in which the driver is contributorily negligent. Thus when the third party is a passenger in a car driven by his "agent" and is injured by the combined negligence of his agent and another party, he will be precluded from recovery against the other party. This practice of allowing imputation of contributory negligence whenever primary negligence may be imputed—known as the "both ways test"—has been consistently criticized by legal scholars.[10]

There is language in the instant case which would support a contention that the court has rejected the agency devices based on theoretical right to control as a ground for imputation of negligence. When this language is read in context with the remainder of the opinion, however, it seems that the court

6. Comment, 7 LA. L. REV. 558 (1947).

7. Note, 35 TUL. L. REV. 828 (1961).

8. Rodriguez v. State Farm Mutual Ins. Co., 88 So. 2d 432 (La. App. 1st Cir. 1956); Waguespack v. Savarese, 13 So. 2d 726 (La. App. Orl. Cir. 1942); Riggs v. Strauss, 2 So. 2d 501 (La. App. 2d Cir. 1941). In the *Riggs* case the owner-passenger was asleep at the time of the accident. In imputing the driver's contributory negligence to the owner, the court stated that theoretical right of control existed and the fact it was not being exercised at that particular time was irrelevant.

9. Rodriguez v. State Farm Mutual Ins. Co., 88 So. 2d 432 (La. App. 1st Cir. 1956). In this case plaintiff was allowed to recover against her own insurance company, since her policy contained an omnibus clause, insuring anyone driving plaintiff's car with her consent, but she was precluded from recovery against the driver of the other car by her driver-agent's negligence. This case also illustrates the principle that, even though a person is barred from recovery against a third party by his agent's negligence, he may still sue his agent for damages.

10. Gregory, *The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services*, 2 U. CHI. L. REV. 173, 177 (1935); Gregory, *Vicarious Liability and Contributory Negligence*, 41 YALE L.J. 831 (1932); 2 HARPER & JAMES, TORTS 1273 (1956).

has not rejected this agency device but has instead attacked the finding of a theoretical right of control based on the presence of the alleged principal in the automobile. The court emphatically stated that "it is unrealistic to hold, in the present day use of motor vehicles when heavy traffic is the rule and not the exception, that the occupant of a motor vehicle has factually any control or right of control over the driving of the operator." The import appears to be that, although contributory negligence may be imputed through an agency relationship, the finding of a theoretical right of control must be based on circumstances other than the presence of the alleged principal in the automobile. In other words, the presence or absence of the alleged principal in the automobile is immaterial to the determination of whether he had a theoretical right of control over the negligent driver.

When this principle is applied in the instant case, it is clear that contributory negligence should not have been imputed to the mother. Had she not been present in the automobile at the time of the accident, she would not have been liable for her son's primary negligence.[11] The only basis for imputing his contributory negligence was that the mother's presence gave rise to her theoretical right of control over her son which, when coupled with the obvious benefit of the trip to her, created an agency relationship. The Supreme Court refused to find that there was any theoretical right of control in this situation.[12] The court's position may also be illustrated

11. LA. CIVIL CODE art. 2318 (1870) makes the father, or after his death the mother, responsible for the torts of the unemancipated child. This article has been interpreted to mean that neither the primary nor the contributory negligence of the child can be imputed to the mother while the father is living. Central National Insurance Co. v. Vagas, 144 So. 2d 395 (La. App. 4th Cir. 1962); Grantham v. Smith, 132 So. 805 (La. App. 1st Cir. 1931). For a discussion of liability for damages caused by infants, see Note, 24 LA. L. REV. 656 (1964).

12. Appellate court decisions do not clearly disclose the factors used to determine whether or not a person has the "right of control" necessary to establish an agency relationship. In the interesting case of Geyen v. Toussard, 148 So. 2d 115 (La. App. 3d Cir. 1962), the court allowed recovery against a negligent third party by an owner-passenger, despite the contributory negligence of the driver, who was the owner's major son and who was driving with the owner's permission. The language of the court, however, would never lead to an expectation of recovery by the plaintiff. The court said that the owner would not be liable unless he is present or the driver is his agent. This statement, repeated in other decisions, would lead to the conclusion that the owner's presence alone is sufficient for imputing the driver's negligence to him. While the owner's presence alone has never been considered prima facie proof of right of control in Louisiana, a number of other jurisdictions presuppose a right of control based on the mere presence of the owner. Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 FORDHAM L. REV. 156

by its disapproval of the court of appeal decisions cited in the instant case.[13] Owner-passengers or, in one case, a borrower-passenger were denied recovery because their presence gave them a theoretical right of control which, in addition to mutual benefit, established an agency relationship through which contributory negligence could be imputed.[14]

This rejection of the presence or absence of the principal as a factor in determining the existence of a theoretical right of control is a sound step toward bringing the fictitious agency doctrines used to impute negligence more in line with reality.[15] Courts should be extremely careful when applying agency doctrines developed from master-servant and other business relations to ordinary social ventures. Joint enterprise and other agency relationships, when used to impute contributory negligence, are expanding the harsh doctrine of contributory negligence when the general trend is to restrict its use.[16] Moreover, the imputation of contributory negligence thwarts the original purpose of doctrines imputing primary negligence since a rule which was designed to create liability is used to destroy it.[17] It is hoped that the decision in the instant case will be the beginning of a trend away from the imputation of contributory negligence, and that the court will eventually reject the "both ways"

(1951).

13. Lawrason v. Richard, 172 La. 696, 135 So. 29 (1931); Rodriguez v. State Farm Mutual Ins. Co., 88 So. 2d 432 (La. App. 1st Cir. 1956); Bituminous Fire & Marine Ins. Co. v. Allen, 36 So. 2d 878 (La. App. 1st Cir. 1948); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence*, 20 FORDHAM L. REV. 165 (1951).

Right of control has also been used as a *justification* for vicarious liability. 2 HARPER & JAMES, TORTS 1366 (1956).

14. In Wolfe v. Toye, 138 So. 453 (La. App. Orl. Cir. 1931), the mother who owned the car asked her son to drive her to the railroad station to meet her parents. His negligence in an accident was imputed to her because the court found an agency relationship. However, the son had picked up his grandparents on previous occasions in his mother's car when she did not accompany him, and the court suggested that, had the accident occurred on one of these occasions, the agency relationship would not have existed, since the mother would not have had right of control.

15. See Lessler, *The Proposed Discard of Imputed Contributory Negligence*, 20 FORDHAM L. REV. 172 (1951). See also PROSSER, TORTS 300 (2d ed. 1955): "So far as imputed contributory negligence is still applied, it may be regarded as an historical survival of a rule which once had some reason for its existence, where that reason is gone."

With the advent of omnibus clauses in automobile insurance policies, a person driving with the owner's consent is insured by the owner's policy, so there is no reason to impute the driver's primary negligence, since recovery for damages due to the driver's negligence is insured.

16. Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674 (1934).

17. Keeton, *Imputed Contributory Negligence*, 13 TEXAS L. REV. 161 (1935).

test so that the contributory negligence of one person cannot be used to bar recovery by one who is himself free from fault.

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TORTS — LIABILITY OF CREDITOR FOR CONTACTING EMPLOYER OF DEBTOR AS COLLECTION METHOD[1]

Plaintiff, a trusted bank employee, and associates contracted with defendant printer to secure publication of a shoppers' guide. Subsequently, the plaintiff's venture was incorporated but the corporation soon failed. Defendant, a large depositor of the employer-bank, wrote the bank's president that he had been unable to collect a printing debt from plaintiff and would appreciate assistance in securing payment.[2] Plaintiff explained to his employer that the debt had been incurred during the existence of the corporation and that he was merely a stockholder and not personally liable.[3] When the employer communicated this explanation to the defendant, he responded that plaintiff had initiated the venture and had not disassociated himself from personal responsibility.[4] The employer then notified plaintiff that "he had heard enough of the matter and . . . wanted it to be settled."[5] Thereupon, plaintiff's attorney wrote defendant, warning him to cease his communication with plaintiff's employer. Defendant took this letter to the bank and following a meeting of defendant with plaintiff and his employer, plaintiff was dismissed. Plaintiff brought suit for damages, and the trial court dismissed the action. On appeal, the

1. This Note is concerned with attempts to collect just or disputed debts. There seems little question that an action would lie where a debt is falsely imputed to a person. See note 6 *infra*.

2. The letter concluded, "We dislike having to bring this to your attention and do so only because of the unsatisfactory response we get from Mr. Pack. We will greatly appreciate any assistance you may care to give us in securing payment so that we will not have to proceed further against Mr. Pack." 155 So. 2d at 911.

3. See LA. R.S. 12:19B (1950): "A shareholder of a corporation . . . shall not be personally liable for any debt or liability of the corporation."

4. There was evidence that defendant had been informed prior to incorporation by an associate of plaintiff that the associate would be personally liable for the debt. 155 So. 2d at 910. After incorporation this associate informed defendant that he no longer would be personally liable. Defendant at least knew plaintiff's relationship to the venture had changed, but it does not appear whether he had been specifically informed plaintiff had disassociated himself from personal responsibility for the enterprise. *Id.* at 911.

5. *Id.* at 911.