North Dakota Law Review

Volume 36 | Number 1 Article 12

1960

Motor Vehicles - Agency - Driver's Negligence Imputed to Passengers

Lyle R. Carlson

desirable, and certainly would afford the best protection for all parties concerned. JACK CHRISTENSEN.

MOTOR VEHICLES — AGENCY — DRIVER'S NEGLIGENCE IMPUTED TO PASSENGERS — Plaintiff suffered physical injury in a collision while a passenger in an automobile which was driven by his wife, and which was jointly owned by him and his wife. The plaintiff brought action against the driver and owner of the other car, irrespective of the fact that his wife was guilty of contributory negligence. The Supreme Court of Michigan *held*, three justices dissenting, that the negligence of the wife cannot be imputed to the husband on a theory of agency so as to bar his right of recovery. *Sherman v. Korff*, 91 N.W.2d 485 (Mich. 1958).

The majority of courts hold that should an owner be present in the car at the time of the accident a rebuttable *presumption* arises that the owner has the right to control the automobile.[1] The "right to control" in turn, gives rise to an agency relationship which makes the non-driving owner responsible for the negligence of the driver thereby barring a recovery by him against third persons.[2] However this presumption is not strengthened by reason of the fact that the co-owners are husband and wife.[3] The majority of the justices in the instant case state that this result is based on "sheer fiction," although it survives, in Huxley's words, "long after its brains have been knocked out."[4] It is argued that the exercise of a power or right to control in a swiftly moving automobile by interfering with the driver in his operation of the car is generally foolhardy and may be extremely dangerous.[5]

A minority of courts, with which the instant case agrees, dissent from affirmation of such a strong view, contending that the presence of an owner in the car should be but a *factor* to be considered in determining the existance of a master and servant, principal and agent, or joint enterprise relationship.[6] The practical effect of this result is to place the burden of proof on the defendant, thereby limiting the applicability of the increasingly unpopular doctrine of imputed negligence.[7]

North Dakota has intimated that should an owner be present in his car at the time of the accident, a rebuttable presumption arises that the owner has control and the driver is his agent in operating the vehicle,[8] which is consonant with the majority view.

A joint enterprise relationship, also founded on a theory of agency,[9] has

1. Pearson v. Erb, 82 N.W.2d 818 (N.D. 1957); Ross v. Burgan, 163 Ohio St. 211, 126 N.E.2d 592 (1955); Fox v. Lavander, 89 Utah 115, 56 P.2d 1049 (1936); Archer v. Chicago, M., St. P. & P. Ry., 215 Wis. 509, 255 N.W. 67 (1934).

2. Gaines v. Hardware, 86 So.2d 218 (La. 1956); Santore v. Reading Co., 170 Pa. Super. 57, 84 A.2d 375 (1951); Fox v. Lavander, *supra* note 1. See, Grover v. Sharp & Fellows Contracting Co., 66 Cal. App. 2d 736, 153 P.2d 83 (1944).

3. Pearson v. Erb, 82 N.W.2d 818 (N.D. 1957).

4. *Cf.* Parker v. McCartney, 338 P.2d 371 (Ore. 1959).

5. Southern Pac. Co. v. Wright, 248 Fed. 261 (9th Cir. 1918); Jenks v. Veeder Contracting Co., 177 Misc. 240, 30 N.Y.S.2d 278 (1941); Hoag v. New York Cent. & H.R.R., 111 N.Y. 199, 18 N.E. 648 (1888).

6. Painter v. Lingon, 193 Va. 840, 71 S.E.2d 355 (1952). See, Roach v. Parker, 48 Del. 519, 107 A.2d 798 (1954); Petersen v. Schneider, 154 Neb. 303, 47 N.W.2d 863 (1951); Rogers v. Saxton, 305 Pa. 479, 158 Atl. 166 (1931).

7. See Briker v. Green, 313 Mich. 218, 21 N.W.2d 105 (1946).

8. *Cf.* Pearson v. Erb, 82 N.W.2d 818 (N.D. 1957).

9. De Villars v. Hessler, 363 Pa. 498, 70 A.2d 333 (1950); Bolt v. Gibson, 225 S.C. 538, 83 S.E.2d 191 (1954); Straffus v. Barclay, 147 Tex. 600, 219 S.W.2d 65 (1949); Loomis v. Abelson, 101 Vt. 459, 144 Atl. 378 (1929). *Contra*, see Roach v. Parker, 48

been utilized to impute the driver's contributory negligence to his passengers, thereby preventing them from asserting a successful suit for damages against the other negligent driver.[10] Joint enterprise exists when it is shown that the parties have mutual right of control over the automobile and act together for a certain project of undertaking.[11] It has been held that mutual control and joint undertaking existed where: mother and son traveled in jointly owned automobile to bring other son home from army;[12] sisters shared expenses of trip taken for purpose of getting materials to decorate their home;[13] several boys borrowed a car and shared expenses of trip to attend a dance.[14] Since the existence of a right to control is based on "sheer fiction," according to the majority of justices in the instant case, it is apparent that they have different criteria in mind. Moreover they state "in joint enterprise situations the policies behind the doctrine of *respondeat superior* are equally applicable,"[15] which would imply that the importance of the doctrine of joint enterprise to impute negligence is eliminated.

North Dakota cases have stated that recovery will be denied to a passenger on the ground that his driver's contributory negligence is imputed to him on the following theories: passenger had right to control the automobile;[16] passenger and driver were engaged in a joint enterprise;[17] passenger himself is guilty of contributory negligence.[18]

The instant case presents a striking example of the general unwillingness on the part of most courts to impute a driver's negligence to his passengers thus preventing them from recovery against third persons.

LYLE R. CARLSON

PROPERTY — OWNERSHIP AND INCIDENTS — WEATHER CONTROL AS AN INFRINGEMENT OF LANDOWNER'S RIGHTS — Plaintiff owned a ranch in Texas. Defendant was hired by a group of Texas farmers to seed clouds for the purpose of preventing hailstorms. He conducted operations by airplane over land belonging to plaintiff. Rainfall on plaintiff's land diminished. Plaintiff sued for an injunction to prevent further weather control operations over property belonging to him. The Texas Court of Appeals *held,* that a landowner is entitled to the natural fall of water from clouds over his land, and entitled to enjoin interference therewith as an infringement of his rights in his property. Injunction granted. *Southwest Weather Research Inc. v. Rounsaville,* 320 S.W.2d 211 (Tex. Civ. App. 1959).

In the instant case the court resorted to the common law analogy of the

Del. 519, 107 A.2d 798 (1954); Cowart v. Lewis, 115 Miss. 221, 177 So. 531 (1928).

10. Saliba v. Abelson, 192 Ark. 1021, 96 S.W.2d 443 (1936); Collins v. Graves, 17 Cal. App. 2d 288, 61 P.2d 1198 (1936); Grubb v. Illinois Terminal Co., 366 Ill. 330, 8 N.E.2d 934 (1937).

11. Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 Pac. 385 (1917); Campbell v. Cambell, 104 Vt. 468, 162 Atl. 379 (1932); Offer v. Swancoat, 27 S.W.2d 899 (Tex. Civ. App. 1930); see Round v. Pike, 102 Vt. 325, 148 Atl. 283 (1930).

12. Johnsen v. Pierce, 262 Wis. 367, 55 N.W.2d 394 (1952).

13. Grubb v. Illinois Terminal Co., 366 Ill. 330, 8 N.W.2d 934 (1937).

14. Greenwell v. Burba, 298 Ky. 255, 182 S.W.2d 436 (1944).

15. Sherman v. Korff, 91 N.W.2d 485 (Mich. 1958) (dictum).

16. *Cf.* Billingsley v. McCormick Transfer Co., 58 N.D. 921, 228 N.W. 427 (1929); Ouverson v. Grafton, 5 N.D. 281, 65 N.W. 676 (1895).

17. Christopherson v. Minneapolis, St. P. & S. Ste. M. Ry., 28 N.D. 128, 147 N.W. 791 (1914).

18. See, Bolton v. Wells, 58 N.D. 286, 225 N.W. 791 (1929); Amenia & Sharon Land Co. v. St. P. & S. & S. Ste. M. Ry., 48 N.D. 1306, 189 N.W. 343 (1922).