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Spousal Imputation Of Negligence In Joint Enterprises

and confusion in the minds of jurors. The possibility suggests itself that these states, while limiting recovery to pecuniary losses, are, practically speaking, putting in issue, by the admission of evidence of character traits and habits, an element of damage they purport to exclude—loss of companionship and solace.

The fact that the subject of the admissibility of character evidence in a wrongful death action has rarely been the object of clear and distinct scrutiny by the courts perhaps indicates that lawyers do not often take advantage of the opportunity to go into the character of the deceased in such cases. The *Basham* case may serve to remind counsel for plaintiffs and defendants alike that certainly under a rule of damages for wrongful death in Virginia, and perhaps in all jurisdictions, the ban on character evidence has been lifted.

GERALD O'NEAL CLEMENS

SPOUSAL IMPUTATION OF NEGLIGENCE IN JOINT ENTERPRISES

To impute the negligence of the driver of an automobile to a passenger there must be a relationship between them sufficient to allow a court to find some degree of fault, no matter how slight, on the passenger's part. Joint enterprise, in modern tort law, is the magic doctrine that creates such a relationship. The doctrine operates irrespective of actual fault since it is based on right of control, an agency concept often incorrectly applied to tort law in this field. *Sherman v. Korff*[1] investigates this fault-imputing concept and correctly holds that negligence should not be imputed unless the relationship between the passenger and driver is such that a true agency relationship can be shown to exist.

In *Sherman v. Korff,* a husband, his wife, and his mother went on a weekend fishing trip. The husband and wife were co-owners of the car; the wife was driving. The wife's negligence, concurring with the negligence of the defendant, resulted in an accident in which the husband-passenger was injured. The lower court imputed the wife's contributory negligence to the husband, thereby preventing him from recovering compensation for his injuries, even though in fact he was not negligent. The Supreme Court of Michigan reversed the decision of the trial court, Dethmers, C.J., dissenting.

[1] 91 N.W.2d 485 (Mich. 1958).

The majority opinion in *Sherman v. Korff* deals with two distinct legal concepts used to impute the negligence of a driver to a passenger: (1) agency through right of control; and (2) the tort doctrine of joint enterprise.

It is pure fiction, states the court, to impute the negligence of a driver to a passenger on the ground that the passenger has a right of control over the driver. Generally, "it is the duty of the passenger to sit still and say nothing."[2] For the passenger to attempt to exercise control over the driver is a course fraught with danger, and co-ownership of the vehicle does not alter this situation. To say that a mutual right of control in respect to ownership gives a mutual right of control while traveling on a highway is to say that an agent for one purpose is an agent for all purposes. Although there might be a right of control in the sense of ownership, the court says in the principal case that the husband had no right of control over any factor causally connected with the accident.[3] Thus, as viewed by this court, imputation of negligence on grounds of right of control is clearly erroneous. The court concludes its discussion of possible agency by deciding that it is just as logical to find a bailee-bailor relationship as one of agency. This appears to be valid reasoning, as right of control is a test of agency, and where there is not enough right of control to create agency, there is no reason for the court to find such a relationship.[4] Thus the court refused to impute the negligence of the driver to a passenger on the theory of agency because the requisite right of control was lacking.

The court holds that the application of the joint enterprise doctrine to the present fact situation would be equally untenable. Prosser says that a joint enterprise exists when there is a common purpose plus a mutual right of control, and considers this relationship as "something like a partnership, for a more limited period of time and a more limited purpose.... The law then considers that each is the agent or servant of the others, and that the act of any one within the scope of the enterprise is to be charged vicariously against the rest."[5] The court has already established that there was no right of control sufficient to establish an agency relationship. It is further pointed out that the marital relationship alone does not create a joint enter-

[2]Id. at 487.
[3]Ibid.
[4]Restatement (Second), Agency § 1 (1958).
[5]Prosser, Torts 363 (2d ed. 1955). See 4 Shearman & Redfield, Negligence § 695 (2d ed. 1941).

prise similar to that required by law for the imputation of negligence.[6] A husband and wife on a weekend fishing trip are engaged in a family recreational project which has no legal significance greater than that created by the marital relationship itself.[7]

The majority in *Sherman v. Korff* has freed itself from the decisions which impute negligence through joint enterprise by destroying the one premise essential to its existence, i.e., right of control.[8] The decision, in effect, holds that co-ownership of an automobile does not create a right of control which is strong enough to create either an agency relationship or a joint enterprise, and thus co-ownership will not serve to impute the negligence of a driver to a nonnegligent passenger.

Chief Justice Dethmers' dissenting opinion treats the fact situation in a more usual manner, concluding that the husband and wife were engaged in a joint enterprise. The fishing trip raised a presumption of joint enterprise, which was reinforced by co-ownership of the automobile, and its consequent right of control.

Historically, *Thorogood v. Bryan*,[9] an 1849 English case, is the basis for the theory of imputed negligence in the United States.[10] In *Thorogood* the negligence of the driver of an omnibus was imputed to a passenger. The court "identified" the two as principal and agent by saying that the passenger had a right of control over the driver.[11]

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[6]91 N.W.2d at 488.

[7]Id. at 488. See also Brubaker v. Iowa County, 174 Wis. 574, 183 N.W. 690, 692 (1921).

[8]Hower v. Roberts, 153 F.2d 726 (8th Cir. 1946); Roach v. Parker, 48 Del. 519, 107 A.2d 798, 800 (Super. Ct. 1954); Snook v. Long, 241 Iowa 665, 42 N.W.2d 76 (1950); Silsby v. Hinchey, 107 S.W.2d 812, 815 (Mo. App. 1937); Prosser, Torts 363 (2d ed. 1955); Note, 33 B.U.L. Rev. 90, 92 (1953).

[9]8 C.B. 115, 137 Eng. Rep. 452 (1849).

[10]Sherman v. Korff, 91 N.W.2d 485 (Mich. 1958); Prosser, Torts 300 (2d ed. 1955); Weintraub, The Joint Enterprise Doctrine in Automobile Law, 16 Cornell L.Q. 320, 321 (1931).

[11]In Thorogood v. Bryan, and its companion case, Cattlin v. Hills, the idea was advanced that a driver and a passenger in an omnibus (horse-drawn bus) might be "identified" as master and servant, thus putting the passenger in the driver's shoes so that he could not recover against a third party if his servant driver was also negligent. In Thorogood, an omnibus negligently discharged a passenger, Mr. Thorogood, in the middle of the street. The defendant's omnibus negligently passed the one in which Thorogood had been riding, and in doing so, hit and killed him. The court held that the driver who let Thorogood out in the middle of the street was his agent, and thus Mrs. Thorogood was prevented from recovering from the company operating the omnibus which struck and killed Thorogood. It was mentioned in this case that Mr. Thorogood was also negligent. In the Cattlin case, the theory of "indentification" was seen as the reasoning behind the Thorogood decision. The court apparently overlooked that in Thorogood the decedent was also negligent. Here, two ships were traveling side by side toward the same destination.

The theory of identification as set forth in this case was temporarily adopted in some jurisdictions in the United States, but has now been completely repudiated.[12] It appears, however, that the principle underlying this theory of right of control by a passenger over the driver has survived and continues to serve as a device for imputing negligence under the name of joint or common enterprise.[13]

In the late 1800's and early 1900's the criterion for imputation of negligence between a husband and wife, in a vehicle of transportation, was right of control.[14] The 1897 case of *Reading Township v. Telfer*[15] is representative of this period. Here the court said that as between persons with mutual privileges of direction and control it is possible that the negligence might be imputed from the driver to the passengers on a theory of mutual agency or right of control. But as to a husband and wife, the court continued, the wife could not possibly have a right of control over her husband sufficient to impute to her his negligence in driving.[16] This implies that if such right of control could be found to exist, negligence would be imputed.

By the 1930's the courts seemed to have drifted away from this early idea that right of control sufficient to establish an agency relationship is necessary for the existence of a joint enterprise. In 1923,

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They brushed each other and a negligently fastened anchor dropped from the upper deck of the defendant's ship onto the plaintiff, a passenger on the second ship. He was denied recovery because the captain of the ship on which plaintiff was a passenger was treated as his agent and the two were "identified." Thus Cattlin v. Hills, through what appears to be a misinterpretation of Thorogood, invented the doctrine of "identification."

[12]Bricker v. Green, 313 Mich. 218, 21 N.W.2d 105 (1946), delivered the final deathblow to Thorogood, and "identification." In the Bricker case judicial notice was taken of the fact that England and all jurisdictions in the United States had overruled the theory of "identification." Michigan thus became the last state to overrule the doctrine.

[13]Prosser, Torts 364 (2d ed. 1955); Weintraub, The Joint Enterprise Doctrine in Automobile Law, 16 Cornell L.Q. 320, 322 (1931).

[14]In New York, C. & St. L.R.R. v. Robbins, 38 Ind. App. 172, 76 N.E. 804 (1905), it was said that negligence would not be imputed on the basis of the marital relationship alone, but that the administrator would be denied recovery if the decedent had a right of control over the driver. See also Munger v. City of Sedalia, 66 Mo. App. 629 (1896), which held that the negligence of the husband-driver is not imputable to the wife when there was no evidence that the husband was acting as her agent in driving the buggy. Additional cases supporting this point are: Chicago & E.R.R. v. Biddinger, 61 Ind. App. 419, 109 N.E. 953 (1915); Fishner v. Ellstron, 174 Iowa 364, 156 N.W. 422 (1916); City of Louisville v. Zoeller, 155 Ky. 192, 160 S.W. 500 (1913); Ploetz v. Holt, 124 Minn. 169, 144 N.W. 745 (1913); Senft v. Western Maryland Ry., 246 Pa. 446, 92 Atl. 553 (1914).

[15]57 Kan. 798, 84 Pac. 134 (1897).

[16]Id. at 136.

Bowley v. Duca[17] expressed the view that "there must be not only a joint interest in the objects or purposes of the enterprise, but also 'an equal right to direct and govern the movements and conduct of each other with respect thereto' " before a joint enterprise exists.[18] In cases such as this one, it is not necessary to establish agency before finding a joint enterprise. Between 1930 and the present, the view that there can be a joint enterprise between husband and wife if there is a right of control plus common purpose, even though an agency relationship cannot be established,[19] has solidified.[20] The weight of authority will not impute the negligence of the driver to the passenger on the ground of their marital relationship alone,[21] nor find a joint enterprise between a husband and wife when they have a mere common purpose, such as a pleasure trip.[22] However, when the courts find co-ownership of the automobile, even though there is no true agency, they do not hesitate to find a joint enterprise, for joint ownership brings with it the "mutual right of control" as required by most courts.[23]

This, it is submitted, is the result of historical development. With the overruling of *Thorogood v. Bryan* in the early 1900's, the theory of identification was discredited, and therefore the use of an agency relationship to impute negligence fell into disrepute.[24] In place of agency the doctrine of joint enterprise developed, requiring a lesser degree of control than that necessary to create agency. By using this

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[17]80 N.H. 548, 120 Atl. 74 (1923). See also Brubaker v. Iowa County, 174 Wis. 574, 183 N.W. 690 (1931).

[18]120 Atl. 74, 75 (1923). See also Pence v. Kansas City Laundry Serv. Co., 332 Mo. 930, 59 S.W.2d 633, 636 (1935); Alperdt v. Paige, 292 Pa. 1, 140 Atl. 555, 557 (1928).

[19]See note 25 infra.

[20]See text at note 5 supra. Caliando v. Huck, 84 F. Supp. 598 (N.D. Fla. 1949); Silsby v. Hinchey, 107 S.W.2d 812, 815 (Mo. App. 1937); Dederman v. Summers, 135 Neb. 453, 282 N.W. 261 (1938).

[21]Ross v. British Yukon Nav. Co., 188 F.2d 779, 781 (9th Cir. 1951); Besset v. Hockett, 66 So. 2d 694, 698 (Fla. 1953); Holmes v. Combs, 120 Ind. App. 331, 90 N.E.2d 822, 823 (1950); Bartek v. Glasers Provisions Co., 160 Neb. 794, 71 N.W.2d 466, 472 (1955); White v. Keller, 215 P.2d 980 (Ore. 1950).

[22]Holmes v. Combs, 120 Ind. App. 331, 90 N.E.2d 822, 823 (1950); Stilson v. Ellis, 208 Iowa, 1157, 225 N.W. 346, 351 (1929); Thompson v. Sides, 275 Mass. 568, 176 N. E. 623, 624 (1931); Remmenga v. Selk, 150 Neb. 401, 34 N.W.2d 757, 761 (1948).

[23]Caliando v. Huck, 84 F. Supp. 598 (N.D. Fla. 1949); Moore v. Skiles, 130 Colo. 191, 274 P.2d 311, 315 (1954). This is not to be confused with the holdings of community property states such as California and Louisiana. In these states the non-negligent passenger is denied recovery because it would result in unjust enrichment of the negligent spouse.

[24]Note 12 supra.

doctrine, a court was free of the word "identification," although the method used and the end result were substantially the same.[25]

In the *Sherman* case the court found the existing right of control insufficient to establish an agency relationship or a joint enterprise. While a majority of courts appear not to require an actual agency relationship before they will invoke the joint enterprise doctrine,[26] *Sherman v. Korff* recognizes the necessity of doing so, since a relationship not strong enough to create agency should not serve the purpose of bringing about the results of agency. *Sherman v. Korff* calls this imputation of negligence in the absence of agency an unjustified application of an undesirable fiction, and asks of the result: "Is this law or is this magic?"[27] The implication is that it is magic, but unfortunately it is the law in many jurisdictions. In the case of husband and wife co-owners, the fiction basic to many agency relationships has brought about an undesirable result. *Sherman v. Korff* reaches its conclusion by not incorrectly applying an agency concept to the tort doctrine of joint enterprise. By not adhering to what appears to be a fictional and incorrect intermixture of theory, *Sherman v. Korff* has rendered a decision of great merit in its intellectual honesty and just result.[28]

JOHN P. HILLS

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[25]Weintraub, The Joint Enterprise Doctrine in Automobile Law, 16 Cornell L.Q. 320, 322 (1931), says of these cases where joint enterprise is found without there being an agency relationship: [O]f course, in all of these cases no actual agency exists, for if an actual agency did exist there would be no need to resort to a theory other than respondeat superior to obtain the desired result."

[26]In Ross v. British Yukon Nav. Co., 188 F.2d 779, 781 (9th Cir. 1951), it was said that "the generally accepted rule is that the negligence of the husband is not to be imputed to the wife unless he is her agent in driving the automobile in which she is riding or they are engaged in the prosecution of a common enterprise." This statement leads to the conclusion that the two concepts are independent and thus a common enterprise can exist without there being an agency relationship.

[27]91 N.W.2d at 486.

[28]See Painter v. Lingon, 193 Va. 840, 71 S.E.2d 355 (1952), in which a similar result was reached.