Imputation of negligence between husband and wife

Torts
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The background of these cases is Thorogood v. Bryan, 8 C.B. 115 (1848), discussed in your casebook (and overruled by Mills v. Armstrong (The Bernina), 12 P.D. 58, 13 App. Cas. 1 (1888)).

For an extensive treatment of these and other cases, see Margo Schlanger, *Injured Women Before Common Law Courts, 1860-1930*, 21 HARV. WOMEN'S L.J. 79 (1998). (It's also posted on my web site, http://schlanger.wustl.edu).

THE CITY OF JOLIET
v.
SARAH M. SEWARD.

Supreme Court of Illinois.
86 Ill. 402 (1877)

APPEAL from the Circuit Court of Will County; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Plaintiff, with her husband, came into the city of Joliet, and the carriage drawn by horses, in which they rode, was stopped in Jefferson street, when the husband got out and went into a store near at hand to make some inquiry. The place where the team was stopped was near where the owner of the adjoining premises was having an inlet sewer constructed from premises, to connect with the main sewer on Jefferson street. The workman engaged had come upon rock, and it became necessary in the prosecution of the work to do blasting. While plaintiff was sitting in the carriage during the absence of her husband, a blast was discharged, which so frightened the horses that they ran away, and in their flight they drew the carriage against the sidewalk with such violence as threw plaintiff out, either upon the sidewalk or street, by which she sustained severe and perhaps permanent injury.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

* * *

The court refused to instruct the jury, as it was asked to do, if the injury to plaintiff was caused by the negligence of her husband, in whose care she was, she could not recover. The instruction contains a correct principle of law, and if there was sufficient evidence on which to base it, and we are inclined to think there was, it ought to have been given. Plaintiff had placed herself in the care of her husband, and submitted her personal safety to his keeping, and whether it was prudent, under all the circumstances, for him to leave her in the street as he did, is a question that might well have been submitted to the jury. Without intimating what in our opinion the evidence on this branch of the case tends to prove, we may say there was evidence enough given to authorize the giving of the instruction asked.

The judgment will be reversed and the cause remanded.

READING TP.
v.
TELFER.

Supreme Court of Kansas.
48 P. 134, 57 Kan. 798 (1897)

Action by Elizabeth A. Telfer against Reading township. From a judgment for plaintiff, defendant brings error. Affirmed.

DOSTER, C. J.

Mrs. Elizabeth A. Telfer and her husband lived in Reading township, Lyon county. July 19, 1892, they started to visit Mrs. Telfer's mother, some miles distant, in a spring wagon. Mr. Telfer acted as driver. The highway at a certain point crossed a ravine with steep and rocky banks, which rendered it a difficult and dangerous place. In endeavoring to cross, the wagon was "tipped over" on account of the roughness and difficulty of the descent of one of the banks, and Mrs. Telfer was severely injured thereby. The defect in the highway causing the accident was known throughout the neighborhood, and, being on an open prairie, most of the travel had avoided it by going around some distance on either side; but a few weeks previous to the accident the owners of the adjacent lands had fenced the same up, compelling travelers to pursue the line of the highway, and thus cross the place in question, and a short time before the accident the husband and wife had crossed the place where it occurred. The township trustee had actual knowledge of the defect in the highway at that point, and contemplated putting it presently in better condition. The plaintiff, Mrs. Telfer, brought suit against the township in which the accident occurred to recover for her injuries. . . . A verdict was returned and judgment rendered in her favor, from which the township prosecutes this proceeding in error.

It was contended in the court below that the evidence showed the husband to have been guilty of contributory negligence in driving over a highway known by him to be defective and dangerous, and that such negligence was imputable to the wife, and, being so, barred a recovery by her; and a request for instructions to the jury predicated upon this view of the law was preferred, and refused by the court. The first claim of error arises upon this refusal. This claim is rested upon an assumed or implied agency of the husband in driving the vehicle under the direction and command of the wife, or as a participant with her in a joint venture or enterprise. Before proceeding to the consideration of this claim of error, it may be well to state that no charge of negligence is made against the wife herself, either in the briefs or oral argument of counsel, other than the legal imputation to her of the husband's negligence under the facts proved. The question of her personal negligence in contributing to the injury was submitted to the jury under instructions of which no complaint is made, and was found in her favor. It is claimed that the visit to the mother was undertaken by the husband at the solicitation of his wife; that it was her visit, and not his; and that, if such does not appear as a fact from the evidence, the least that can be said is that it was a joint venture by both husband and wife; and from each of these alternative propositions of fact a deduction of agency in the husband for the wife is drawn, and from thence the legal imputation of negligence is derived.

The question is, therefore, squarely presented whether the contributory negligence of the husband in driving his wife over a defective highway can be imputed to her in bar of an action against the person principally or primarily responsible for the injury. Our judgment is that it cannot; but the authorities, it may as well be admitted, are conflicting, irreconcilably so, and are numerous in support of each side of the contention. That the principal cannot recover for injuries to which the negligence of his agent and a third person have contributed, is settled beyond dispute, both upon reason and authority. The difficult question is, under what circumstances can an agency be implied or said to exist? The plaintiff in error in this case would imply it, as some of the courts have done, from the relation of husband and wife. [citations] The fact, if it be such, that the journey was undertaken at the solicitation of the wife, possesses no weight. It cannot be that one who merely secures from another the favor of transportation in a private vehicle takes upon herself or himself all risk of the driver's negligence en route. To so hold would minimize the problem for consideration into a mere question of fact as to which of the travelers solicited the other,--the one the favor of a journey, or the other the pleasure of company. If the one who asks to be carried hence is the master, so, on the other hand, the one who invites to a ride is also the master. If the maiden who begs of her escort a carriage drive is the mistress throughout the journey, so the gallant who invites his lady would likewise be the master until her safe return.

It may be conceded that persons of mutual purpose and equal privileges of direction and control, who travel in the same vehicle, in pursuit of a common object, are the agents of each other in such a sense that the negligent act of one in furtherance of the common scheme is imputable to all; but such mutuality or equality of direction and control does not exist in the case of a journey taken by husband and wife. Say what we may in advocacy of the civil and political equality of the sexes, there are conditions of inequality between the same in other respects which the law recognizes, and out of which grow differing rights and liabilities. One of these is instanced in the case of a journey by husband and wife, such as was undertaken by the parties in question. By the universal sense of mankind, a privilege of management, a superiority of control, a right of mastery on such occasions is accorded to the husband, which forbids the idea of a co-ordinate authority, much less a supremacy of command in the wife. His physical strength and dexterity are greater; his knowledge, judgement, and discretion assumed to be greater; all sentiments and instincts of manhood and chivalry impose upon him the obligation to care for and protect his weaker and confiding companion; and all these justify the assumption by him of the labors and responsibilities of the journey, with their accompanying rights of direction and control. The special facts of cases may show the wife to be the controlling spirit, the active and responsible party, and the husband an agent, or even a mere passenger; but in cases where such facts are not shown the court must presume, in accordance with the ordinary--almost universal--experience of mankind, that the husband assumed and was allowed the responsible management of the journey. A review of the opposing decisions upon this question for the purpose of exhibiting the reasoning of the same, and approving that of some and combating that of others, would be profitless, and hence is not undertaken. It may be remarked, however, that the doctrine of imputable negligence, except when countenanced by statute, is a fiction of the law which finds small favor with the courts, and has been very infrequently applied in our own.

* * *

The judgment of the court below is affirmed.

All the justices concurring.

VIRGINIA RY. & POWER CO.
v.
GORSUCH.

Supreme Court of Appeals of Virginia.
91 S.E. 632, 120 Va. 655 (1917)

Error to Circuit Court of City of Richmond.

Action by Mrs. Sophia Gorsuch against the Virginia Railway & Power Company. Judgment for complainant, and defendant brings error. Affirmed.

PRENTIS, J.

A collision occurred at the intersection of Eighth and Grace streets, in the city of Richmond, on the night of September 19, 1914, between 11:30 and 12 o'clock, between a west-bound automobile and a north-bound street car of the Virginia Railway & Power Company. The occupants of the automobile were Mr. Thomas H. Gorsuch; his wife, Sophia; and their friend, Mr. John F. Stephenson. The front part of the automobile was seriously damaged, and Mrs. Gorsuch was injured.

Mr. Gorsuch was employed by the Virginia Railway & Power Company to do some work in the city of Richmond in connection with dismantling certain plants on Brown's Island and re-erecting them on Belle Isle. His wife lived in the city of Baltimore. She owned the automobile referred to, but Mr. Gorsuch, shortly before the accident, had told her that he had so far to walk to his work it would be a convenience to him to have the use of the automobile in Richmond, and she had sent it to him, and it had been in Richmond and in his possession for about a week before the date of the accident. On the afternoon of the day of the accident, Mrs. Gorsuch came from Baltimore to Richmond for a visit, was met at the train by her husband with the automobile, and after a pleasure ride Mr. Stephenson was invited to go with them to a local hotel, where the party had something to eat with some beer (though there is no suggestion of intoxication), and after watching the dancing they started home about 11:30 p. m. Within one square after the automobile started, the collision occurred. At that time the surface of Grace street was torn up because the company was relaying or repairing its tracks at that point. The excavations made it necessary to provide a temporary crossing over the tracks at the place of the accident, which consisted of railroad ties laid alongside of each other, making a crossing about twelve feet wide.

* * *

2. Another error assigned is the failure of the court below to instruct the jury that the contributory negligence of the husband, Mr. Gorsuch, should be imputed to Mrs. Gorsuch in bar of her recovery.

The doctrine of imputable negligence has been much discussed, and the books are full of cases dealing with the question. There are some conflicts in the decisions, but it may be regarded as settled by the overwhelming weight of authority that the negligence of the driver of an automobile will not be imputed to a mere passenger, unless the passenger has or exercises control over the driver. The negligence of the servant is imputed to the master, because the master employs and can discharge the servant and direct his actions. It seems to be well settled that the negligence of a husband driving

an automobile is not, as a general proposition, imputable to his wife merely because of the marital relation; nor is the negligence of the driver of an automobile imputable to his guest merely because he is riding with him by invitation. [Citations]

It is earnestly claimed, however, that, because of the fact that Mrs. Gorsuch owned the automobile involved in this collision, none of the rules above stated are applicable to this case, and that Mrs. Gorsuch, as the owner of the machine, had such control, or right of control, over it as to make her responsible for the negligence of her husband.

We cannot agree with this suggestion. Mr. Gorsuch was the gratuitous bailee of her automobile and had been for a week before the accident. His control of it while his wife remained in Baltimore was as absolute as if he had owned the machine, and the casual visit of Mrs. Gorsuch to Richmond did not change this control.

* * *

Mrs. Gorsuch, at the time of the accident, was no more responsible for the negligence of her husband than the other guest who was riding in the machine was responsible therefor. In order to defeat her recovery in this case, it would be necessary to prove that she was herself guilty of some negligence. This the record fails to show. She was on the front seat, on the side of the automobile from which the street car was approaching, half turned, so that she could not see the approaching street car, talking from time to time to their guest, Stephenson. This conduct was perfectly natural and such as is demanded by the ordinary rules of courtesy. She had no reason to distrust her husband's skill or carefulness, and, notwithstanding the advances made by modern women towards political and economic independence of man, it still remains true that the normal woman married to the normal man recognizes the obligation of obedience contained in the marriage vow, and observes the Pauline injunction to remain subject to her husband, as is suggested in Reading Township v. Telfer, supra; Ann. Cas., vol. 22, 1912A, 649.

There is nothing then in this record to indicate any negligence on the part of the plaintiff in the action, Mrs. Gorsuch.

* * *

It follows from this that it is unnecessary to pass upon the question as to whether the evidence indicates that the negligence of her husband contributed to the accident. Whether it did or not, under the circumstances of this case, it cannot be imputed to her.

* * *

The judgment will therefore be affirmed.

Affirmed.

STANDARD OIL CO. OF KENTUCKY
v.
THOMPSON.

Court of Appeals of Kentucky.
226 S.W. 368, 189 Ky. 830 (1920)

Appeal from Jefferson County, Circuit Court, Common Pleas Branch, First Division.

Action by J. B. Thompson against the Standard Oil Company of Kentucky. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

QUIN, J.

The correctness of the instructions, those given and refused, is the sole question involved on this appeal. This action was instituted to recover damages for personal injuries to appellee, and for repairs made necessary to his automobile by reason of a collision with appellant's truck. The accident happened about 12:30 p. m., January 11, 1919. Appellant's truck was moving eastwardly along the Shelbyville pike. Appellee, who had been an invalid for some time, was riding in his automobile with his wife who was operating the machine. They were going north on Brown's lane, which intersects the Shelbyville pike on the south at a point east of St. Matthews. There was nothing to obstruct the views of the operators of either machine. Mrs. Thompson testified that, as she approached the Shelbyville pike, she saw the truck which was in the middle of the road, and, as she turned to her right, west bound, the truck turned in the same direction, forcing her back to her left or to the south side of the pike. The driver of the truck again turned to his right or to the south of the road, and the cars collided. Fortunately no one was seriously injured. The jury awarded appellee a verdict of $740.71, the exact amount of the repairs to the automobile, thus indicating that probably nothing was allowed for personal injuries.

Appellant's counterclaim for repairs to its truck, made necessary by the collision, was dismissed.

* * *

Appellee is chargeable with the negligence of his wife, who was his agent in the operation of his automobile at the time of the collision.

[Reversed.]

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STICKNEY
v.
EPSTEIN.

Supreme Court of Errors of Connecticut.
123 A. 1, 100 Conn. 170 (1923)

Appeal from Superior Court, Hartford County; Frank D. Haines, Judge.

Action by John Stickney against Max M. Epstein. Judgment for plaintiff, and defendant appeals. No error.

Appeal of verdict and judgment for the plaintiff for $10,000.

Upon the trial of this action to a jury the plaintiff offered evidence to prove these facts:

[As the plaintiff was riding his motorcycle, the defendant's automobile, driven by the defendant's wife, ran into him.] The automobile colliding with the cycle and then driven by the defendant's wife was owned by the defendant and used and maintained by him for the business, use, pleasure, health, and convenience of his wife and family, and at the time the plaintiff was injured, the defendant's automobile was being used for the purpose for which the defendant purchased and maintained it. The defendant's wife had general authority from him to take and use the automobile when and as she pleased. . . .

The defendant's wife was negligent in failing to keep to the right, and in operating the car at a reckless and excessive rate of speed, and in failing to give warning of her approach and to keep a proper lookout.

* * *

On the night in question the defendant was at home, and she told the defendant that she was going to take a little ride, as the night was warm, and she took the automobile, drove to her sister-in-law's house, her sister-in-law being married and having a child about seven years of age, picked them up, and took them for a pleasure ride to East Hartford, and it was while she was returning that the collision with the plaintiff's motorcycle occurred.

CURTIS, J. (after stating the facts as above).

* * *

[Defendant's] remaining assignments of error are to the effect that the charge of the court did not correctly state the common law of this state when he charged the jury to this effect: That if they found that one of the purposes of the defendant in buying and keeping the automobile, which was driven on the occasion of this injury by his wife, was to give pleasure to members of his family by permitting them to use the car for their own pleasure, then his wife, while using the car for her own pleasure on this occasion in accord with such purpose of the defendant, was using the car in the

performance of the defendant's business within the scope of her authority, and she was his agent, and if they found that the plaintiff's injury was caused by the negligence of the wife while so acting, and the plaintiff was free from any contributory negligence, their verdict should be for the plaintiff.

We [have, in previous cases,] said in effect that at common law, while there is a conflict of authority, the weight of authority seems to be that when a motor car is maintained by the paterfamilias for the general use and convenience of his family, he is liable for the negligence of a member of the family having general authority to drive it, while the car is being used as a family car, and that the inherent justice of the rule thus stated is apparent. The rule rests on the broad ground that every man who prefers to manage his affairs through others remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others while they are engaged upon his affairs and within the scope of their authority. In that opinion we intended to sanction the claim that at common law when a paterfamilias maintains an automobile for the pleasure, use, and convenience of his family, and in pursuance of such purpose authorizes members of his family to use it for such purpose, he by so doing makes such pleasure uses his affair, and constitutes members of the family so operating the car his agents engaged in the prosecution of his affairs.

We are satisfied that the same rules of public policy and social justice which entailed former extended applications of the rule respondeat superior to new situations at common law still apply and entail its application to the situation presented in this case.

. . . .

There is no error.

The other Judges concurred.