

1950

## NEGLIGENCE-JOINT ENTERPRISE BETWEEN HUSBAND AND WIFE AS BASIS FOR IMPUTATION OF NEGLIGENCE

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### Recommended Citation

Theodore Sachs, *NEGLIGENCE-JOINT ENTERPRISE BETWEEN HUSBAND AND WIFE AS BASIS FOR IMPUTATION OF NEGLIGENCE*, 48 MICH. L. REV. 372 ().

Available at: <https://repository.law.umich.edu/mlr/vol48/iss3/16>

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NEGLIGENCE—JOINT ENTERPRISE BETWEEN HUSBAND AND WIFE AS BASIS FOR IMPUTATION OF NEGLIGENCE—*H's* car, driven by *H* with *W* as passenger, collided with *D's* car as *H* and *W* were traveling from their California home to visit relatives in Florida. Both intended to seek employment in Florida and, if successful, to take up residence there. Each had been employed since marriage, their salaries going into a common fund. From this fund the car was purchased and the trip financed. In suit by *W* and *H* against *D*, *held*, recovery of *W* denied. Because there was a joint enterprise between *W* and *H*, *H's* contributory negligence was imputed to *W*. *Caliando v. Huck*, (D.C. Fla. 1949) 84 F. Supp. 598.

An innocent plaintiff will not be denied recovery against a negligent defendant by the contributory negligence of a third person, in the absence of a special relationship between the plaintiff and third person such as master and servant,

principal and agent, or joint enterprise.<sup>1</sup> Joint enterprise is most frequently used as a defense in auto cases, when a negligent driver seeks to escape liability to an injured passenger of another car by showing that this relationship existed between the passenger and his driver. If the joint enterprise is established, the contributory negligence of a plaintiff's driver will almost universally be imputed to the plaintiff, thus defeating recovery.<sup>2</sup> Though the legal consequences of the relationship are clear, its definition is by no means settled.<sup>3</sup> Joint enterprise is generally considered, however, to be a relationship between parties in which each has an interest in the purposes of a venture and a right of control over other members in directing that venture.<sup>4</sup> The control element is considered most important,<sup>5</sup> though of significance as well are the potential liability of the plaintiff to the defendant for conduct of the third party<sup>6</sup> and common financial purpose.<sup>7</sup> Tending to establish the right of control are such factors as joint ownership or possession,<sup>8</sup> sharing of expenses,<sup>9</sup> and, less important, evidence of alternative driving<sup>10</sup> or directions as to manner of driving.<sup>11</sup> The fact of marital or blood ties between the parties has frequently been held insufficient of itself to effect the necessary control.<sup>12</sup> That the courts do refuse to find a joint venture when, as an only basis, the plaintiff and

<sup>1</sup> *Koplitz v. City of St. Paul*, 86 Minn. 373, 90 N.W. 794 (1902). See generally, *PROSSER, TORTS*, §§55, 65 (1941); 45 C.J., §§573, 574 (1928). But *Thorogood v. Bryan*, 8 C. B. 115, 137 Eng. Rep. 452 (1849), origin of the doctrine of imputed negligence, laid down the early broad rule that the contributory negligence of a driver will always be imputed to his passenger on a theory of "identification" of passenger with driver (at least in carrier cases). The case and its theory is everywhere repudiated today. See particularly, *Little v. Hackett*, 116 U.S. 366, 6 S.Ct. 391 (1886). Michigan, in 1946, was the last state to repudiate the doctrine.

<sup>2</sup> Weintraub, "The Joint Enterprise Doctrine in Automobile Law," 16 *CORN. L. Q.* 320 (1931).

<sup>3</sup> *Rosenstrom v. North Bend Stage Line*, 154 Wash. 57 at 60, 280 P. 932 (1929).

<sup>4</sup> *Cunningham v. City of Thief River Falls*, 84 Minn. 21, 86 N.W. 763 (1901). The theory of the relationship is said to be "quasi-partnership" in *Robison v. Oregon-Wash. R. & N. Co.*, 90 Ore. 490, 176 P. 594 (1919); or agency in *Harber v. Graham*, 105 N.J. 213, 143 A. 340 (1928).

<sup>5</sup> *Koplitz v. City of St. Paul*, supra, note 1.

<sup>6</sup> This is the so-called "two-way" test, often weighed as heavily as the control element; 2 *TORTS RESTATEMENT*, §485 (1934).

<sup>7</sup> *Robison v. Oregon-Wash. R. & N. Co.*, supra, note 4; *Peterson v. Norris*, 193 Minn. 400, 258 N.W. 729 (1935) (denying joint enterprise for lack of common financial purpose).

<sup>8</sup> *Zajic v. Johnson*, 126 Neb. 191, 253 N.W. 77 (1934). A possible distinguishing feature in that case is that the parties are partners.

<sup>9</sup> *Derrick v. Salt Lake and Ogden Ry. Co.*, 50 Utah 573, 168 P. 335 (1917).

<sup>10</sup> *Fisher v. Johnson*, 238 Ill. App. 25 (1925).

<sup>11</sup> *Ronan v. J. G. Turnbull Co.*, 99 Vt. 280, 131 A. 788 (1926).

<sup>12</sup> *Brubaker v. Iowa County*, 174 Wis. 574, 183 N.W. 690 (1921); 59 *A.L.R.* 153 at 154 (1929). Cases contra can generally be explained by reference to a community property statute in the jurisdiction, as in *Solko v. Jones*, 117 Cal. App. 372, 3 P. (2d) 1028 (1931); or an adherence to *Thorogood v. Bryan*, supra, note 1, as in the Michigan cases, which are cited and overruled in *Bricker v. Green*, 313 Mich. 218, 21 N.W. (2d) 105 (1946). If the wife may not sue in her own name, recovery will be precluded by her husband's contributory negligence, for he will not be permitted to sue in her behalf.

third party are husband and wife is justifiable. To hold otherwise would mean that throughout their lives, innocent parties would have no redress against tortfeasors, because of what an oft-present third person had done. Indeed, this result would obtain, though in fact no right of control existed. In the principal case certain elements tending toward joint enterprise are found, such as a common purpose (which is not clearly financial, however) and shared expenses, but these elements are common to a great percentage of marriages and marital activities. Further, the wife does not participate in the ownership of the vehicle.<sup>13</sup> To hold loosely that these factors with marriage establish a joint venture is to force a similar conclusion in the countless cases in which husband and wife ride together, and to revive, by virtue of result, the *Thorogood* rule.<sup>14</sup> Aware of these undesirable consequences, another court in a case somewhat similar in its facts came to an opposite conclusion.<sup>15</sup>

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<sup>13</sup> However, the statement of facts is ambiguous. *Lucey v. Allen*, 44 R.I. 379, 117 A. 539 (1922), held that the wife's sole ownership was a basis for concluding that she had the right of control. Rollison maintains ownership by the wife is the only proper basis for that conclusion: Rollison, "The Joint Enterprise in the Law of Imputed Negligence," 6 *NOTRE DAME LAWYER* 172 (1931). Perhaps implicit in the court's opinion is the feeling that beyond mere form of title registration, real ownership should be attributed to the common purchasers of an auto. Linking that premise with the view that ownership means control, the court reaches the conclusion of the principal case. Since the facts otherwise present few indices of joint enterprise, the decision must therefore rest upon this questionable premise.

<sup>14</sup> *Thorogood v. Bryan*, *supra*, note 1. The court in the principal case relies ambiguously on *Union Bus Co v. Smith*, 104 Fla. 569, 140 S. 631 (1932). Whether the *Union* case is cited to show determination of joint venture, or its effects, if found, is not clear. In any event, it is questionable whether the *Union* case denies its plaintiff recovery because of imputed negligence or his own contributory negligence.

<sup>15</sup> *H* and *W*, moving to another city, where *H* intended to teach and *W* to attend college, with a view to obtaining a position, were found not to be engaging in a joint venture. Financial arrangements were not discussed in the opinion. "Husbands and wives in their journey through life are always engaged in joint enterprises, sometimes successful, sometimes disastrous. But the mere fact that they travel in the same car, whether for pleasure or to change their abode, does not constitute a joint enterprise within the meaning of the rule." *Brubaker v. Iowa County*, *supra*, note 12.