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NEGLIGENCE-IMPUTED NEGLIGENCE-ACTION BETWEEN JOINT ENTERPRISERS

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NEGLIGENCE—IMPUTED NEGLIGENCE—ACTION BETWEEN JOINT ENTERPRISERS—Plaintiff and his wife were driving from Michigan to Iowa to visit a certain church to which plaintiff, a minister, was considering a call. Defendant desired to visit a college in Illinois, with the intention of enrolling as a student. It was agreed that defendant should ride in plaintiff's automobile to Illinois, where plaintiff was to help defendant gain admission to the college; later defendant was to return with the plaintiff to Michigan. The parties alternated in driving the automobile on the trip. At a certain stage in the journey, defendant negligently operated the automobile and caused it to become involved in an accident in which plaintiff suffered injuries and plaintiff's wife was killed. Plaintiff sued to recover

damages. On motion to dismiss, the trial court found that the allegations disclosed a joint enterprise, and that the negligence of the defendant should be imputed to the plaintiff, barring plaintiff from recovery. On appeal, *held*, reversed. The negligence of a member of a joint enterprise¹ is not imputable to his fellow member in an action by the latter against the former. *Bostrom v. Jennings*, 326 Mich. 146, 40 N.W. (2d) 97 (1949).

The term "imputed negligence" refers to the rule which places on one person responsibility for the negligence of another. It is usually invoked to defeat liability to the plaintiff in a negligence action by charging him with the concurrent negligence of a third person. In order to impute the negligence of one person to another, there must exist between the parties some special relation, such as master and servant, principal and agent, or joint enterprise.² The relation between them must be one invoking the principles of agency, one in which the person to whom the negligence is imputed had a legal right to control the action of the person actually negligent.³ The rule is applied to joint enterprisers because each member has authority to act for all in the control of the means used to execute their common purpose.⁴ However, it is generally held that the doctrine is inapplicable in actions between members of the joint enterprise.⁵ The reason usually given is that since the doctrine is based upon the agency relation between the parties, and an agent is liable to his principal for injuries caused by the agent's negligence,⁶ a negligent joint enterpriser should be liable to a fellow enterpriser for injuries caused by his negligence.⁷ Courts do not favor the doctrine, which is obviously a fiction, and they try to limit its application.⁸ Many courts emphasize the unjustness of allowing one joint enterpriser to injure another tortiously with immunity.⁹ However, since

¹ Three judges concurred, but thought the parties were not joint enterprisers.

² *Thorogood v. Bryan*, 8 C.B. 115, 137 Eng. Rep. 452 (1849) originated the doctrine of imputed negligence, holding that the contributory negligence of a driver will be imputed to a passenger to bar recovery against a third person. This case is repudiated everywhere today. Michigan was the last state to overrule it. *Bricker v. Green*, 313 Mich. 218, 21 N.W. (2d) 105 (1946).

³ *Hines v. Welch*, (Tex. Civ. App. 1921) 229 S.W. 681; *Koplitz v. City of St. Paul*, 86 Minn. 373, 90 N.W. 794 (1902); 45 C.J., Negligence §573 (1928); 38 AM. JUR., Negligence §235 (1941).

⁴ For a general discussion of imputed negligence and joint enterprisers see 20 MINN. L. REV. 401 (1936).

⁵ *Thompson v. Farrand*, 217 Iowa 160, 251 N.W. 44 (1933); *Garrotto v. Butera*, 123 Neb. 682, 243 N.W. 879 (1932). For other cases, see 62 A.L.R. 442 (1929) and 85 A.L.R. 632 (1933).

⁶ *Grusiecki v. Jaglay*, 260 Mich. 9, 244 N.W. 211 (1932); MECHEM, *OUTLINES OF THE LAW OF AGENCY*, 3d ed., §324 (1923); 3 C.J.S., Agency §162 (1936).

⁷ *Harber v. Graham*, 105 N.J.L. 213, 143 A. 340 (1928); *Campbell v. Campbell*, 104 Vt. 468, 162 A. 379 (1932); *Bloom v. Leech*, 120 Ohio St. 239, 166 N.E. 137 (1929).

⁸ *Gilmore v. Grass*, (C.C.A. 10th, 1933) 68 F. (2d) 150; *Lachow v. Kimmich*, 263 Mich. 1, 248 N.W. 531 (1933); PROSSER, *TORTS* §§55, 65 (1941). The doctrine of imputed negligence is not recognized in Oklahoma. *LaFayette v. Bass*, 122 Okla. 182, 252 P. 1101 (1926).

⁹ *McCombs v. Ellsberry*, 337 Mo. 491, 85 S.W. (2d) 135 (1935); *O'Brien v. Woldson*, 149 Wash. 192, 270 P. 304 (1928); *Wilmes v. Fournier*, 111 Misc. 9, 180 N.Y.S. 860 (1920).

Frisorger v. Shepse,¹⁰ the Michigan court has held, contrary to the overwhelming weight of authority, that the doctrine of imputed negligence would bar recovery in an action between the joint enterprisers. In previous cases, the court had held, along with other jurisdictions, that the contributory negligence of a driver member of a joint enterprise is imputable to a passenger member so as to bar the latter's rights to recover against a third party.¹¹ Then came the *Frisorger* case, in which the plaintiff was a passenger member of a joint enterprise, with the defendant the driver of the car. Suit was against the driver and his father, who owned the car and consented to its being driven, but who was not a member of the joint enterprise. The Michigan court found for the defendants, citing the previous cases, but it did not consider whether a distinction should be made between the son, a member of the joint enterprise, and the father who was not. This decision was followed in several later cases, without any consideration of its reasons or results.¹² It appears that the Michigan court drifted into this line of decisions without sufficient reflection. The court recognized that the doctrine of imputed negligence is based on an agency relation,¹³ but refused to follow the well-established rule of agency that an agent is liable to his principal for damages resulting to the principal from the agent's negligent conduct. The principal case places the Michigan court in line with the majority, and overrules a most unreasonable and unjust group of decisions.

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¹⁰ 251 Mich. 121, 230 N.W. 926 (1930).

¹¹ *Farthing v. Hepinstall*, 243 Mich. 380, 220 N.W. 708 (1928); *Hanser v. Youngs*, 212 Mich. 508, 180 N.W. 409 (1920).

¹² *Johnson v. Fischer*, 292 Mich. 78, 290 N.W. 334 (1940); *Hopkins v. Golden*, 281 Mich. 389, 275 N.W. 184 (1937); *Bushie v. Johnson*, 296 Mich. 8, 295 N.W. 538 (1941).

¹³ *Farthing v. Hepinstall*, 243 Mich. 380, 220 N.W. 708 (1928).