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## NEGLIGENCE-IMPUTED NEGLIGENCE-RECOVERY FROM OWNER UNDER STATUTE WHEN NO RECOVERY MAY BE HAD AGAINST NEGLIGENT DRIVER

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NEGLIGENCE — IMPUTED NEGLIGENCE — RECOVERY FROM OWNER UNDER STATUTE WHEN NO RECOVERY MAY BE HAD AGAINST NEGLIGENT DRIVER— Plaintiff, 12 years old, was injured as a result of his father's negligent operation of an automobile owned by defendant and operated with defendant's consent. In his complaint, plaintiff joined his father and the owner as defendants. There was no allegation that the father was acting as an agent of the owner nor that the owner himself was negligent. A demurrer interposed on behalf of both defendants was sustained by the trial court. On appeal, *held*, affirmed. Plaintiff may not maintain an action against the defendant-owner because the owner could recover over against plaintiff's father, the net effect of which would be to allow indirectly a recovery which could not be had directly because of a parent's immunity from such a suit.<sup>1</sup> *Ownby v. Kleyhammer*, (Tenn. 1952) 250 S.W. (2d) 37.

It is quite generally held today that there is no common law liability imposed on the owner of an automobile for the negligent operation of the vehicle by a bailee, negligence being imputed only when the doctrine of respondeat superior is applicable, requiring the existence of a master-servant or principal-agent relationship at the time of the negligence.<sup>2</sup> Several exceptions, not relevant

<sup>1</sup> The question of whether an unemancipated child may maintain an action in tort against his parent is beyond the scope of this note. The bulk of American courts have refused to allow such action. PROSSER, TORTS 905 (1941). See also the exhaustive recent annotation in 19 A.L.R. (2d) 423 (1951).

<sup>2</sup> 5 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE §2911 (1935).

here, have been developed by the courts.<sup>3</sup> Many states have further extended the automobile owner's liability by statute. These statutes, in varying terms, impose liability on the owner of a motor vehicle for negligent injury caused by anyone operating the vehicle with the consent of the owner.<sup>4</sup> They have the effect of extending the doctrine of respondeat superior to this particular type of bailor-bailee relationship.<sup>5</sup> In the principal case it is not clear on what theory plaintiff sought to hold the owner liable, since Tennessee does not have a statute expressly imposing liability on the owner of a motor vehicle for another's negligence in the operation thereof in the absence of agency,<sup>6</sup> nor is it clear that an owner could be held liable under the Tennessee Motor Vehicle Financial Responsibility Act.<sup>7</sup> Assuming, however, that such liability does attach to the owner by statute, the principal case raises the question of whether an injured plaintiff may recover from the owner under such a statute only if he could also recover from the driver of the automobile. The writer has been able to find few reported cases dealing with this precise question,<sup>8</sup> but because of the nature of the statutes, cases involving the master-servant relationship would seem to be in point,<sup>9</sup> and both

<sup>3</sup> E.g., the "family purpose" doctrine, cases collected in 132 A.L.R. 981 (1941), and negligence in lending a motor vehicle, resulting in liability on the owner. See 100 A.L.R. 923 (1936).

<sup>4</sup> This liability may be expressly imposed, e.g., Cal. Vehicle Code (Deering, 1948) §402(a): "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." See also Mich. Comp. Laws (1948) §256.29, and 62A N.Y. Consol. Laws (McKinney, 1952) §59. Another type of statute constitutes the driver an agent, e.g., Minn. Stat. Ann. §170.54 (1946): "Whenever any motor vehicle . . . shall be operated upon any public street or highway of this state, by any person other than the owner, with the consent of the owner, express or implied, the operator thereof shall in case of accident be deemed the agent of the owner of such motor vehicle in the operation thereof." See also, D.C. Code, Title 40, §403 (1951).

<sup>5</sup> *Maine v. James Maine & Sons*, 198 Iowa 1278, 201 N.W. 20 (1924). See also a good discussion of the various aspects of these statutes in 21 *MINN. L. REV.* 823 (1937).

<sup>6</sup> *Midwest Dairy Products Co. v. Esso Standard Oil*, (Tenn. 1952) 246 S.W. (2d) 974, which upheld the decision in *East Tenn. & Western N.C. Motor Trans. Co. v. Brooks*, 173 Tenn. 542, 121 S.W. (2d) 559 (1938) that §§2701, 2702 of Tenn. Code (Williams, 1934) merely creates a rebuttable presumption that an employee is operating a vehicle within the scope of his employment at the time of an accident.

<sup>7</sup> *Tenn. Pub. Acts*, 1949, c. 75, discussed in 21 *TENN. L. REV.* 341 (1950). Under this act an automobile owner must show proof of financial responsibility to a state official in case of any claim over \$50 arising out of the operation of his vehicle. Failure to do so subjects the owner to cancellation of the registration of his automobile and possible revocation of his driver's license. In case of any unpaid judgment, the owner may lose his road privileges. The writer has found no reported case allowing a recovery from an owner under this act. The problem is briefly discussed in 22 *TENN. L. REV.* 542 (1952).

<sup>8</sup> In a short annotation on this question in 152 A.L.R. 1043 (1944), the author states that few such cases have arisen.

<sup>9</sup> The court in the principal case apparently holds such cases controlling. See also *Maine v. James Maine & Sons*, *supra* note 5. Note particularly the language of the Minnesota or agency type statute referred to in note 4 *supra*.

types of cases are included in the discussion below. The courts have taken two distinct views as to whether a plaintiff may recover from the master for a tort committed by his servant in the course of his employment when the servant himself is immune from suit by the plaintiff. The older view is that such a plaintiff may recover only when the servant could be sued by the plaintiff, on the theory that the master should not be liable when the servant is not, and that the master's right of indemnity against the servant would result in allowing an action indirectly which could not be maintained directly.<sup>10</sup> In cases where the plaintiff sought to recover from the owner of a motor vehicle for a negligent injury caused by the driver, an agent of the owner, such agent being immune from suit because of a family relationship between such agent and the plaintiff, these courts have held that the statutes do no more than impose on the owner of a motor vehicle a liability measured by the liability of the person using the vehicle.<sup>11</sup> However, this view has been criticized by other courts<sup>12</sup> and by writers<sup>13</sup> and a substantial number of courts have allowed recovery by a plaintiff from an employer even though the employee was immune from suit because of a family relationship.<sup>14</sup> The courts following this second view as to the nature of the employer's liability usually take the position in the automobile cases that the liability created by the owner's liability statutes is independent of the right of the plaintiff to maintain an action against the negligent driver. Thus a wife has been allowed an action against the owner of an automobile for the negligent operation of it by her husband,<sup>15</sup> a minor child has been permitted to recover from the owner for an injury caused by the negligence of his father,<sup>16</sup> and a plaintiff was permitted to recover from the owner of an automobile even though the driver of the vehicle had a good defense under a workmen's compensation law.<sup>17</sup> It is submitted that the latter view is the more meritorious, and that the view of the principal case is unsound for two reasons. First, this view confuses the concept of liability with the concept of immunity. It overlooks the fact that the common law immunity of a parent against a tort

<sup>10</sup> *Graham v. Miller*, 182 Tenn. 434, 187 S.W. (2d) 622 (1945); *Maine v. James Maine & Sons*, supra note 5.

<sup>11</sup> *Maine v. James Maine & Sons*, supra note 5; *Riser v. Riser*, 240 Mich. 402, 215 N.W. 290 (1927).

<sup>12</sup> See opinion of Cardozo, C.J., in *Schubert v. August Schubert Wagon Co.*, 249 N.Y. 253, 164 N.E. 42 (1928).

<sup>13</sup> PROSSER, *TORTS* 909 (1941). 1 AGENCY RESTATEMENT §217(2) (1933) would permit recovery though the servant or agent is immune from suit by the plaintiff. See comment *b*.

<sup>14</sup> *Chase v. New Haven Waste Material Corp.*, 111 Conn. 377, 150 A. 107 (1930); *Mi-Lady Cleaners v. Mary Alice McDaniel*, 235 Ala. 469, 179 S. 908 (1938). In PROSSER, *TORTS* 909 (1941), it is stated that about two-thirds of the courts have taken this view.

<sup>15</sup> *Miller v. Tyrholm & Co., Inc.*, 196 Minn. 438, 265 N.W. 324 (1936); *Schubert v. August Schubert Wagon Co.*, supra note 12.

<sup>16</sup> *Chase v. New Haven Waste Material Corp.*, supra note 14; *Mi-Lady Cleaners v. Mary Alice McDaniel*, supra note 14.

<sup>17</sup> *Baugh v. Rogers*, 24 Cal. (2d) 200, 148 P. (2d) 633 (1944).

action by the child, or of a spouse against a tort action by the spouse, is based on a public policy intended to prevent disharmony in the family.<sup>18</sup> There would seem to be no reason to extend this exceptional, personal immunity to persons outside the family.<sup>19</sup> Secondly, assuming that the owner may recover over against the driver,<sup>20</sup> it may be argued that in light of the trend to allow *direct* tort actions between parent and child or husband and wife,<sup>21</sup> the family immunity rule should not be invoked as a bar when the action only *indirectly* affects members of the family.

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<sup>18</sup> *Myers v. Tranquility Irr. Dist.*, 26 Cal. App. (2d) 385, 79 P. (2d) 419 (1938).

<sup>19</sup> "A trespass, negligent or wilful, upon the person of a wife, does not cease to be an unlawful act, though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity." Cardozo, C.J., in *Schubert v. August Schubert Wagon Co.*, *supra* note 12, at 256-257. See also, *McLaurin v. McLaurin Furniture Co.*, 166 Miss. 180, 146 S. 877 (1932).

<sup>20</sup> The court in the principal case assumed such recovery could be had. It appears that such indemnity is expressly conferred in the California statute. See Cal. Vehicle Code (Deering, 1948) §402(d), as interpreted in *Baugh v. Rogers*, *supra* note 17. But *Kurzon v. Union Ry. Co. of N.Y. City*, 21 N.Y.S. (2d) 310 (1940), indicates that such indemnity may not be had between a mere bailee and bailor in absence of such statutory provision because the bailee owes the bailor no duty to indemnify.

<sup>21</sup> The parent and child cases are collected in 19 A.L.R. (2d) 423 (1951). See also note in 50 MICH. L. REV. 168 (1951) indicating this trend. Cases involving actions between spouses are collected in 160 A.L.R. 1406 (1946).