Michigan Law Review

Volume 45 | Issue 8

1947

TORTS-DUTY TO CONTROL CONDUCT OF ANOTHER-DUTY OF INFANT PASSENGER OWNER TO CONTROL INFANT DRIVER

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TORTS—DUTY TO CONTROL CONDUCT OF ANOTHER—DUTY OF INFANT PASSENGER OWNER TO CONTROL INFANT DRIVER—Plaintiff's decedent, an infant twenty years of age, owned an automobile which was being driven by a lad of seventeen at the request of decedent who, with a girl companion, occupied the rear seat of the automobile. The infant driver did not have a driver's license.[1] Plaintiff, as administratrix of the estate of the decedent brought an action under the Death Act [2] for damages arising from the death of the decedent which occurred as a result of a collision between the automobile and de-

[19] Seidman, "Section 820 of the Revenue Act of 1938," 17 TAXES 341 (1939). Five classes of cases are affected by the section.

1. Double inclusion of an item in gross income.
2. Double allowance of a deduction or credit.
3. Double exclusion of an item of gross income when tax has been paid on the second exclusion.
4. Correlative deductions and inclusions specified in § 162(b) and (c).
5. Determination of basis of property where there has been erroneous treatment of a transaction upon which such basis depends. For analysis of these classes see Maguire, Surrey and Traynor, "Section 820 of the Revenue Act of 1938," 48 YALE L. J. 509, 719 (1939). See also 2 MERTENS, LAW OF FEDERAL INCOME TAXATION, c. 14 (1942).

[20] The chief objection is to the omission of double disallowance from section 3801. No way has been found to include this situation without defeating the substance of the statutes of limitations. See Bayly and Dickson, "Bad Debts and Section 3801: A Proposal," 18 TAXES 599 (1940), for proposed amendments.

[21] Proceedings of the Seventh Tax Clinic of the American Bar Assn., 16 TAX MAN. 663 (1938).

fendant's locomotive. There was evidence bearing upon the defendant's negligence and negligence on the part of the infant driver. The trial court charged the jury that if they found the driver of the car was negligent, such negligence should be imputed to the decedent passenger owner, foreclosing plaintiff's recovery. On appeal, *held*, affirmed; while the charge to the jury was not literally accurate, it was not error as to the question presented on appeal. *Parks v. Pere Marquette Railway Co.*, 315 Mich. 38, 23 N.W. (2d) 196 (1946).

In its opinion, the Michigan Supreme Court recognized the probable inaccuracy of the term "imputed negligence," [3] and at least by implication approved the suggestion often made by legal scholars that in a case of this type, the owner passenger is really being charged with "primary" negligence.[4] The typical case of this sort is of interest because of its close resemblance to cases in which the negligence of another may be imputed to a principal, master or to joint enterprisers. But here the owner passenger was not held responsible on the basis of vicarious liability but was held negligent by reason of the breach of the personal duty to control the driver. Though the mere fact that the owner or possessor of a chattel permits another to use it, otherwise than as servant or agent, is not in itself regarded as sufficient to make such owner or possessor responsible for the negligent manner in which the chattel is used,[5] yet it is enough to require that an owner or possessor of an automobile, *if present*, exercise with *reasonable* care that ability which the possession and ownership gives him to control the driver so that the latter will not create unreasonable risks to others.[6] In what appears to be the original case of this type, decided over one hundred years ago,[7] the liability of the possessor of a horse and carriage who permitted a guest to drive was involved. The plaintiff was injured by the negligent acts of the driver while the possessor was in the carriage. The English court held the possessor liable, apparently not for the negligence of the driver, but for the possessor's fault in failing to prevent the driver from being negligent.[8] But in very few of the cases where this question has been involved, have the courts sharply distinguished between vicarious liability and liability for the owner's negligence. Many courts have attempted to rationalize the result by reference to the doctrine of respon-

[3] Principal case at 43.

[4] See Harper and Kime, "The Duty to Control the Conduct of Another," 43 YALE L. J. 886 (1934).

[5] TORTS RESTATEMENT, c. 12, § 318, comment a (1934). An owner of a motor vehicle is not liable, though present as a passenger when he has bailed the automobile to a third person, when the bailee is not using the vehicle in the owner's business, Hartley v. Miller, 165 Mich. 115, 130 N.W. 336 (1911). But on further questions of liability concerned with bailments of automobiles, examine also cases decided under appropriate owners' liability statute. Should an owner's liability be predicated on such a statute on the facts similar to the principal case? See Gochee v. Wagner, 257 N.Y. 344, 178 N.E. 553 (1931).

[6] As to the scope of the duty, must the owner passenger be constantly on the alert to discover dangers of which the driver is unaware? See TORTS RESTATEMENT, c. 12, § 318, comment c (1934).

[7] Wheatley v. Patrick, 2 M. & W. 650, 150 Eng. Rep. 917 (1837). For full discussion of this case see Harper and Kime, "The Duty to Control the Conduct of Another," 43 YALE L. J. 886 (1934).

[8] 2 M. & W. 650 at 652.

deat superior.[9] Certainly the existence of a duty on the part of the owner-occupant to control the driver is hard to deny in the principal case, for if there was evidence that the owner allowed an incompetent person [10] to drive the vehicle, the conclusion cannot be resisted that the owner was under a legal obligation to control the conduct of such incompetent driver when he was present in the car with him. Thus the court properly did not confuse the issue of the infant owner's direct contributory negligence in the duty problem before it with the question of whether an infant principal is responsible for the negligent acts of an agent.[11] Since the decision of the Michigan court in the principal case, a recent opinion by Parker, J., of the Circuit Court of Appeals for the Fourth Circuit, in the case of *Whitley v. Powell*[12] offers an interesting basis of comparison. In this case the contributory negligence of the driver of an automobile was "imputed" to the plaintiff owner-occupant, whom the evidence showed was a moron with the intelligence of a twelve year old child, thus precluding recovery against the defendant, receivers of the Seaboard Air Line Railway. Although the point was raised, the court refused to consider whether the plaintiff was guilty of direct contributory negligence.[13] Instead, it based its decision on the conventional agency theory.[14] Obviously, if the court wished to invoke the "duty" analysis, it is enough to say that as to the mental attributes of the moron occupant, the standard of care required is an external one [15]—the supposed conduct

[9] See PROSSER, LAW OF TORT 499, 500 (1941). Compare McMahen v. White, 30 Pa. Super. 169 (1906), with Beaudoin v. Mahaney, 131 Me. 118, 159 A. 567 (1932). But see Wheeler v. Darmochwat, 280 Mass. 553, 183 N.E. 55 (1932). Examine also Mendolia v. White, 313 Mass. 318, 47 N.E. (2d) 294 (1943); Guy v. Union Street Railway, 289 Mass. 225, 193 N.E. 740 (1935); Jones v. Carey, 219 Ind. 268, 37 N.E. (2d) 944 (1941); Harper v. Harper, 225 N.C. 260, 34 S.E. (2d) 185 (1945); Wisconsin & Arkansas Lbr. Co. v. Brady, 157 Ark. 449, 248 S.W. 278 (1923).

[10] The driver did not have a license required by statute; see note 1, supra.

[11] See McKerall v. St. Louis-San Francisco Ry. Co., (Springfield, Mo., Ct. App. 1923) 257 S.W. 166 (1923); Wilson v. Moudy, 22 Tenn. App. 356, 123 S.W. (2d) 828 (1938); Wilson v. Mullen, 11 Tenn. App. 319 (1930); Atchison T. & S. Ry. Co. v. McNulty, (C.C.A. 8th, 1922) 285 F. 97. Compare with the above cases, Masterson v. Leonard, 116 Wash. 551, 200 P. 320 (1921); and Robinson v. Atlantic Coast Line R. Co., 179 S.C. 493, 184 S.E. 96 (1936). See also Pope v. Halpern, 193 Cal. 168 at 176, 223 P. 470 (1924). Examine the analysis of Scott v. Schisler, 107 N.J. 397, 153 A. 395 (1931) in 44 HARV. L. REV. 1292 (1931).

[12] Whitley v. Powell, (C.C.A. 4th, 1946) 159 F. (2d) 625.

[13] Id. at 628.

[14] The court stated that the test of whether the doctrine of imputed negligence is applicable to this type of case is: "Did the owner, under the circumstances disclosed, have the legal right to control the manner in which the automobile was being operated. . . . If the owner possessed the right to control, that he did not exercise it is immaterial. . . . Plaintiff, although not of a high mentality, was not a child, but a person of full age and sui juris. She had legal right and power to appoint an agent or servant, and there was no reason why she could not assume toward Noble (the driver) a relationship to which in the language of Harper v. Harper, . . . 'the law of agency is applied.'" Whitley v. Powell, id. at 628.

[15] But suppose the owner-occupant is insane? See PROSSER, LAW OF TORT 1092 (1941).

under similar circumstances of the reasonable man of ordinary prudence.[16] Irrespective of whether or not it is desirable to hold an owner of an automobile, present as a passenger when it is driven by another, liable on a "duty" theory or an agency one, certainly a factor which has influenced courts in this area has been the alarming increase in traffic accidents, together with the frequent financial irresponsibility of the individual driving the car. As Prosser states it, this factor "has led to a search for some basis for imposing liability upon the owner of the vehicle, even though he is free from negligence himself. Bluntly put, it is felt that, since automobiles are expensive, the owner is more likely to be able to pay for any damage than the driver, and that he is the obvious person to carry the necessary insurance to cover the risk." [17] But where the owner occupant is a *plaintiff* in an action, is not the question of which legal theory will be employed crucial? In this situation, it is submitted that he should be charged only with the duty of exercising reasonable care.

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[16] See TORTS RESTATEMENT, c. 12, § 283 (1934).
[17] PROSSER, LAW OF TORT 499 (1941).