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Agency—Suit by Wife Against Negligent Husband's Employer

Arnold Lieberman

RECENT DECISIONS

AGENCY — SUIT BY WIFE AGAINST NEGLIGENT HUSBAND'S EMPLOYER

Employee of defendant corporation used a company car for a purely personal mission. While a passenger, the employee's wife sustained injury resulting from the husband's negligence. *Held:* Wife's action against employer was maintainable under doctrine of respondeat superior, notwithstanding that the husband was acting outside the scope of employment, and a similar suit for personal injuries against the spouse would be barred. *May v. Palm Beach Chemical Co.*, ___ Fla. ___, 77 So. 2d 468 (1955).

It is a well established general rule that in the absence of a statute the owner of a motor vehicle is not liable for its negligent operation by a third person "unless a relationship exists of master and servant or principal and agent, and at the time of the accident the vehicle was being used in pursuit of the owner's business". MECHEM, AGENCY § 364 (4th ed. 1952). Florida courts, evincing a preference for risk distribution, have consistently granted recovery in this type of case by utilizing legal fictions which dispense with certain elements of respondeat superior, including acting within the scope of employment, and existence of a master-servant or principal-agent relationship. *Hern v. Butler,* 101 Fla. 1125, 132 So. 815 (1931); *Southern Cotton Oil Co. v. Anderson,* 80 Fla. 441, 86 So. 629 (1920).

The majority of American courts permit the action against the employer-owner on an agency theory where the injury occurred in the scope of general employment. *Mullally v. Langenberg Bros. Grain Co.,* 339 Mo. 582, 98 S. W. 2d. 645 (1936); *Le Sage v. Le Sage,* 224 Wis. 57, 271 N. W. 369 (1937).

Many earlier decisions had denied recovery in these instances on a theory that since the owner is not personally at fault he has an action over against the negligent spouse, thus ultimately casting the burden of financial loss onto the family unit. *Emerson v. Western Seed & Irrigation Co.,* 116 Neb. 180, 216 N. W. 297 (1927). Later decisions such as the instant case have recognized this apparent difficulty and have met the problem with the practical realization that the negligent spouse is likely to be "judgment proof", and emphasizing that there is no universal identity between husband and wife. *Lubowitz v. Taines,* 293 Mass. 39, 198 N. E. 230 (1936).

Under common law auspices the New York courts had favored a risk distribution through the employer-owner of the vehicle.

This policy was attributable to the court's feeling that the owner would be better able to pay for any ensuing damage, and would be the logical person to carry liability insurance to cover and distribute such risks. *Schubert v. August Schubert Wagon Co.*, 249 N. Y. 253, 164 N. E. 42 (1928); PROSSER, TORTS § 66 (1941).

The majority of jurisdictions (Florida not included) presently have statutes which impose automatic liability on the owner for the negligent operation of the vehicle when used with his express or implied permission. *E. g.*, N. Y. Vehicle and Traffic Law § 59.

Jurisdictions which do not allow this action against the employer are frequently those which prohibit personal injury suits between husband and wife, the rationale being that it would be contrary to public policy to permit recovery against the employer-owner indirectly, where the action would be barred against the negligent spouse directly. *Miltimore v. Milford Motors,* 89 N. H. 272, 197 A. 330 (1938).

Presently in New York this situation is covered by Section 59 of the Vehicle and Traffic Law, providing *(inter alia)* that the owner of a motor vehicle shall be liable for injury caused by anyone legally using said vehicle, *in pursuit of the owner's business or otherwise.*

Prior to 1937 Section 109 of the New York Insurance Law provided that all contracts of insurance were to include under the liability coverage any personal or property damage caused by the named insured or his permittee. In 1937 the legislature enacted Section 57 of the Domestic Relation Law which, in derogation of the common law rule, authorizes a cause of action for personal injuries between spouses. Simultaneously with the latter enactment, Section 109 of the Insurance Law was amended as follows: "no such policy . . . shall be deemed to insure against any liability of an insured for injuries to his or her spouse, unless otherwise provided for in the insurance contract." Thus ultimately the legislature authorized a cause of action for personal injuries between spouses while shielding the insurer from sham claims by means of collusive actions between husband and wife.

In New York the consequences of an action against the employer under similar circumstances as in the instant case would probably result in the employer impleading the negligent spouse. See C. P. A. § 193-a. Thus, assuming that the husband is not "judgment-proof", the family wealth would remain the same, except as diminished by the cost of litigation.

Arnold Lieberman