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Imputed Negligence - Husband and Wife, Agency, Family Car Doctrine - Moore v. Skiles

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quired for an adit to be run, in, upon or along a lode is ten feet, without regard to depth". The Court rejected the argument advanced by the defendant that in order to make a valid discovery, plaintiffs must have cut, by their work in such discovery, ten feet below the surface.

In none of the three cases in which the Court discussed the sufficiency of an adit to hold the lode, was the question of uncovering a vein of mineral raised, that is to say, in each case, the adit did follow and uncover a vein of mineral. Just as it is necessary for a discovery shaft to show a well defined crevice, it is necessary for an adit to follow in along the lode. An adit which did not follow the lode would be no more effective in holding the claim than would be a ten foot shaft which did not disclose a crevice.

A mine is described as a pit or excavation from which ores, etc., are taken by digging. A scoop-out along the lode which uncovers ore would therefore be classified both as a mine and the entrance to the mine from which ores are removed, or an adit. We therefore believe the Colorado Supreme Court, following its former decisions, would hold that a scoop-out which uncovered fissionable ores for a horizontal distance of at least ten feet would constitute an adit and therefore be legally sufficient under the statute to hold the lode.

NOTES AND COMMENTS

IMPUTED NEGLIGENCE—HUSBAND AND WIFE, AGENCY, FAMILY CAR DOCTRINE.—*Moore v. Skiles,* 1954-55 C.B.A. Adv. Sheet No. 1.

The facts of the case are these: the plaintiff and her husband were riding in a pick-up truck owned jointly by them both; the husband was driving and the wife was occupying the seat next to him. During the course of the trip, a collision with a vehicle driven by the defendant occurred. The wife brought suit to recover damages to herself and the truck predicated on the negligence of the defendant.

After trial was had, the jury returned a verdict complying with instruction No. 4, in which it found for the defendant. Instruction No. 4 was, in substance, that if the jury found that the accident was caused by the negligence of both drivers, then the plaintiff, (who was neither of the drivers) could not recover. The plaintiff assigned error to the fact that the trial court allowed the negligence of the driver-husband to be imputed to the passenger-wife. The Supreme Court stated the problem thusly:

> When a husband and wife are journeying together in a vehicle jointly owned by both and engaged in a mission with a purpose common to both, can the negligence of the husband in operating the vehicle be imputed to the wife?

This question was answered in the affirmative. In arriving at its conclusion, the Court mentioned several theories, any of which in itself would have been sufficient.

The rules of imputed negligence are, rhetorically speaking, the rules of vicarious liability working in reverse: where a person against whom a claim for relief is asserted is not himself personally negligent, yet he may be held liable because of his relationship with the one who was the negligent party; so too may one who asserts a claim based on negligence be subject to the defense of contributory negligence because of his relationship with one who actively participated in the incident. It is the definition of that relationship that was the primary subject of this decision.

It is almost universally held that the relationship of driver and passenger between two persons is not in itself sufficient to impute negligence from one to the other.[1]

> . . . but there is a well-recognized exception to this rule when the injured person is in a position to exercise authority or control over the driver, or is guilty, or fails to exercise such care under the particular circumstances to protect himself.[2]

Moreover, the existence of the marital relationship is not adequate to impute the negligence of the husband to the wife "unless he is her agent in the matter at hand, or they are jointly engaged in the prosecution of a common enterprise."[3]

It is the substance of the relationship, therefore, that is the determinant factor, and not the form. As stated above, the connection as husband and wife, or as driver and passenger, or even as a combination of the two is not that substance out of which imputed negligence arises. The association between persons substantial enough to carry the imputation is that of agency, express or implied, and the quality of the association is tested by the right to control of one over the other.

In this case the Court found, or at least inferred, that the right to control may have arisen between the plaintiff in any one of several ways. The first to be considered is that of the family car doctrine.

This doctrine was first noted in Colorado in the case of *Hutchins v. Haffner*,[4] where the Court said:

> . . . a husband is liable for the injury inflicted by his automobile which he purchased for family use, while it was

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[1] Dale v. Denver Tramway Co., 173 F. 787, 97 CCA 511, 19 Ann. Cas. 1223, 8 LRA (NS) 597; Atchison, T. & S. RR. v. McNulty, 285 F. 97; Colo. Springs Co. v. Cohun, 66 Colo. 149, 180 P. 307.

[2] C. & S. RR. Co. v. Thomas, 33 Colo. 405, 81 P. 801, 70 LRA 681.

[3] Phillips v. Denver Tramway Co., 53 Colo. 458, 128 P. 460, Ann, Cas. 1914B, 29.

[4] 63 Colo. 365, 167 P. 966.

> being operated by his wife, solely for her own pleasure under his general permission to use the machine whenever and wherever she pleased, upon the theory that the wife was the husband's agent in carrying out one of the purposes for which the car was purchased and owned.

This principle is then an expression of the general law of agency, though it may be implied, based on the right to control and acts committed within the scope of authority. But the difficulty in this instance is apparent not only in that the negligence is to be imputed between co-owners, but also because it is to be imputed to the wife, who is not the "head of the family". A study of the record in this case would disclose that there is no evidence to the effect that the husband-driver had any general permission in the use of the car; no evidence that the "husband in this case had general authority to drive the car whenever and wherever he pleased", as the Court stated. It is the opinion of this writer that the Court would not have imputed the negligence in this case on the grounds of "family car" if that were the only possibility, because of the lack of evidence of the general permission.

Another theory used by the court was the presumption that an owner-occupant of a car has the right of control over the driver. The presumption that attends the situation in which the owner of a car is a non-driving occupant has never before appeared in the Colorado reports. This Court cited, with apparent approval, the case of *Fox v. Lavender*,[5] but did not expressly say that the rule of the Fox case was controlling. The rule is this:

> . . . where an owner is an occupant of his own car there arises a rebuttable presumption that has control and direction of it . . . Where a sole owner is driving it is presumed, without more, that he is in control and has the complete right of control; when the sole owner is present in the car and another is driving, it is presumed without more being shown, that the sole owner has the right of control, and that the driver is driving for him, that is, as his agent. If two or more joint owners are in the car, they will be presumed to have the joint right of control and therefore the driver will be presumed to be driving for himself and as the agent of the other present joint owners.

This view, though popular in an impressive number of jurisdictions, is by no means universally accepted, but represents one side of what is a decided split of authority in this country.[6] It is this writer's belief that the presumption of control should stand in a situation such as this because it facilitates the ascertainment

[5] 56 P. 2d 1049, 89 Utah 115, 109 ALR 105.
[6] 158 A. 166, 305 Pa. 479, 80 ALR 280.

of truth that would not otherwise be discoverable, and is based on common experience and usual connection.[7]

Although the Court indicated approval of imputing negligence in this case through the use of the family car doctrine, or the presumption of control by an occupant-owner, the decision is more correctly said to be based on the theory of joint enterprise. The Court said:

> Where, as here, joint ownership of the car is shown; where joint occupancy and possession of the vehicle is admitted, and where the occupant-owners of the car use it upon a joint mission, the driver will be presumed to be driving for himself and as agent for the other present joint owner.

This statement does not encompass the family relationship or general permission of the family car doctrine. Neither does it adopt the presumption of control by an owner-occupant, for it adds the requirement that there be a use upon a joint mission or common purpose.

The basis for decision is joint venture, which finding was facilitated by a presumption consisting of joint ownership, joint occupancy and common purpose to show such joint venture.

It should be remembered that the circumstances found in this decision do not give rise to any new substantive law. The law deciding this case is the conventional doctrine of the master's responsibility for his servant. The presumption which was indulged was only a device to find such a relationship, and this presumption was rebuttable. Subsequent litigants who find themselves in similar situations may defend their vicarious liability or disability by showing non-agency, the true relationship of driver and guest, or that of bailor and bailee, or any of the other possible defenses to such allegation. Not all joint owners who travel together carry with them this contagious negligence, but they must be prepared at trial to administer the serum of rebutting evidence.

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[7] American Insurance Co. v. Naylor, 101 Colo. 34, 70 P. 2d 349; Roberts v. People, 9 Colo. 458, 13 P. 630.

ANNOUNCING A.B.A. REGIONAL MEETING

Set aside the dates April 13-16, 1955 on your calendar. Those are the days you should plan to be in Phoenix, Arizona, at the Westward Ho Hotel! An excellent program of events is scheduled and will be in the mail soon. Here's a chance for a short vacation along with an opportunity to get the latest scoop on various phases of the law. All this—and deductible too!