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Partnership–Negligence–Wife of Partner Negligently Injured by Husband–Liability of Partnership and Its Members (Caplan v. Caplan, et al., 268 N.Y. 445 (1935))

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York, the duty which the driver of an automobile owes to an invited guest is to exercise ordinary and reasonable care⁸ and the guest assumes the risk of any defect in the automobile which was not known to the defendants, and the defendants were under no duty to exercise care to discover and repair defects not known to them.⁹ Thus, where there is no proof as to the cause of the accident, the doctrine of *Res Ipsa* properly does not apply,¹⁰ and the burden of proof is upon the plaintiff to prove his contention by a preponderance of evidence.¹¹ From a review of the principles which the courts have developed in the above cases, it therefore follows that when certain types of harms occur under circumstances which from common experience strongly suggest negligence, and when the agency or instrumentality which occasioned the harm is under the exclusive control and management of the defendant so that he is in a better position to prove his innocence than the plaintiff is to prove his negligence, the doctrine of *Res Ipsa Loquitur* may be applied.¹² Otherwise, the burden is always upon the plaintiff to prove negligence.

H. T. P.

PARTNERSHIP—NEGLIGENCE—WIFE OF PARTNER NEGLIGENTLY INJURED BY HUSBAND—LIABILITY OF PARTNERSHIP AND ITS MEMBERS.—Plaintiff, wife of defendant H. Caplan, sustained personal injuries, while riding as a passenger in an automobile of the defendant partnership, which was operated at the time by her husband, a member of the said partnership, and was concededly engaged

⁸ *Bolton v. Madsen*, 205 App. Div. 180, 199 N. Y. Supp. 353 (3d Dept. 1923); *Clark v. Traver*, 237 N. Y. 544, 143 N. E. 736 (1923).

⁹ *Higgins v. Mason*, 255 N. Y. 104, 174 N. E. 77 (1930).

¹⁰ *Grant v. Pennsylvania and N. Y. C. and R. Co.*, 133 N. Y. 657, 31 N. E. 220 (1892); *Ruppert v. Bklyn. Heights R. R. Co.*, 154 N. Y. 90, 47 N. E. 971 (1897); *Hoffman v. Third Ave. R. R. Co.*, 45 App. Div. 586, 61 N. Y. Supp. 590 (1st Dept. 1899); *Groarke v. Laemmle*, 56 App. Div. 61, 67 N. Y. Supp. 409 (1st Dept. 1900); *Strembel v. Bklyn. Heights R. R. Co.*, 110 App. Div. 23, 96 N. Y. Supp. 1147 (2d Dept. 1904); *Duhme v. Hamburg-American Packet Co.*, 184 N. Y. 404, 77 N. E. 386 (1906); *Robinson v. Consolidated Gas Co.*, 194 N. Y. 37, 86 N. E. 805 (1909); *Hardie v. Boland Co.*, 205 N. Y. 336, 98 N. E. 661 (1912); *White v. Lehigh Valley R. R. Co.*, 220 N. Y. 131, 115 N. E. 439 (1917); *Ruback v. McCleary, Wallin and Crouse*, 220 N. Y. 188, 115 N. E. 449 (1917); *Francey v. Rutland R. R. Co.*, 222 N. Y. 482, 119 N. E. 86 (1918); *Hammond v. Hammond*, 227 App. Div. 336, 237 N. Y. Supp. 557 (3d Dept. 1929).

¹¹ *Jones v. Union Ry. Co.*, 18 App. Div. 267, 46 N. Y. Supp. 321 (2d Dept. 1896); *Kay v. Metropolitan Street Ry. Co.*, 163 N. Y. 447, 57 N. E. 751 (1900); *Loudoun v. Eighth Ave. R. R. Co.*, 162 N. Y. 380, 56 N. E. 988 (1900); *Plumb v. Richmond Light & R. Co.*, 233 N. Y. 285, 135 N. E. 504 (1922); *Salomone v. Yellow Taxicab Corp.*, 242 N. Y. 251, 151 N. E. 442 (1926).

¹² HARPER, LAW OF TORTS (1933) §77, p. 183.

in the business of the partnership. Defendants moved for a dismissal of the complaint upon the pleadings on the ground that the admitted facts do not suffice to give her a cause of action. On appeal by the plaintiff from judgment for the defendant, *held*, affirmed (two judges dissenting); that since defendant husband is not legally liable for injuring his wife, and since the partnership, under the provisions of the Partnership Law,¹ is liable only to the same extent that plaintiff's husband is accountable, the partnership cannot be held liable. *Caplan v. Caplan, et al.*, 268 N. Y. 445, — N. E. — (1935), reported in N. Y. L. J., Oct. 21, 1935, at 1385.

By the theory of the common law the legal existence (the individuality) of the wife was suspended during coverture or incorporated into that of the husband, and upon this fiction depended most of the rights, duties, and liabilities growing out of the marriage relation.² The Married Women's Property Acts, or Emancipation Acts³ were designed primarily to secure to a married woman a right to a separate estate. The primary objects of these statutes were to emancipate a married woman from her husband's control in property matters. Courts are generally in agreement that the wife has enforceable property rights against the husband. Suits by the wife to enforce her separate estate have generally been permitted. Actions by the wife to enjoin interference with her property,⁴ to recover property,⁵ for fraud,⁶ ejectment,⁷ replevin,⁸ trover,⁹ have generally been permitted. Neither spouse can sue the other for personal torts, such as assault and battery,¹⁰ false imprisonment,¹¹ malicious prosecution,¹² slander,¹³ libel,¹⁴ fraud¹⁵ and negligence.¹⁶ The Court based its decision upon public policy, and the merger of the legal identity of the wife into that of the husband, resulting in a unity

¹ Section 24 of the N. Y. Partnership Law provides as follows: "Partnership bound by partner's wrongful act. Where, by any wrongful act or omission of any partner acting in the ordinary *course of the business* of the partnership, or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership or any penalty is incurred, *the partnership is liable therefor to the same extent as the partner so acting or omitting to act.*" (Italics ours.)

² 1 SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) 82.

³ N. Y. DOMESTIC RELATIONS LAW §§50-60.

⁴ *Wilkinson v. Wilkinson*, 147 La. 315, 84 So. 794 (1920).

⁵ *Greenwood v. Greenwood*, 113 Me. 226, 93 Atl. 360 (1915).

⁶ *Frankel v. Frankel*, 173 Mass. 214, 53 N. E. 398 (1899).

⁷ *Minier v. Minier*, 4 Lans. 421 (N. Y. 1871).

⁸ *Howland v. Howland*, 20 Hun 472 (N. Y. 1880).

⁹ *Whitney v. Whitney*, 3 Abb. Pr. (n. s.) 350 (N. Y. 1867).

¹⁰ *Schultz v. Schultz*, 89 N. Y. 644 (1882).

¹¹ *Rogers v. Rogers*, 265 Mo. 200, 177 S. W. 382 (1915).

¹² *Allen v. Allen*, 246 N. Y. 571, 159 N. E. 656 (1927).

¹³ *Fitzgerald v. Quam*, 109 N. Y. 441, 17 N. E. 354 (1888).

¹⁴ *Queen v. Lord Mayor of London*, 16 Q. B. D. 772 (1886); *Faris v. Faris*, 298 Fed. 727 (C. C. A. 8th, 1924).

¹⁵ *Seelan v. Seelan*, 198 N. Y. Supp. 41 (1923).

¹⁶ *Schubert v. Schubert Wagon Co.*, 249 N. Y. 253, 164 N. E. 42 (1928).

represented by her husband as head of the family, which fiction is a remnant of the common law theory of coverture. The question remains whether the partnership is liable to the wife of one of the partners for the negligent operation by such partner of an automobile owned by and engaged in the partnership business at the time in question.¹⁷ The Court of Appeals in the *Matter of Peck*¹⁸ said, "a tort for which a partnership is liable makes every member of the firm severally individually liable. Such liability is not dependent upon the personal wrong of the individual member of the partnership against which the liability is asserted. The test of the liability is based upon a determination of the question *whether the wrong was committed in behalf of and within the reasonable scope of the business of the partnership*. If it was so committed, the partners are liable as joint tortfeasors."¹⁹ (Italics ours.) All the members of a partnership are jointly and severally liable for torts committed in the course of the partnership business by an employee,²⁰ or by a partner.²¹ A partnership is not like a corporation, a complete and separate legal entity from its members. Every partner is an agent of the partnership with apparent power to bind his co-members in the partnership business.²² When the injury caused by the partner or agent did not occur in the actual or apparent course of the business, there is no liability.²³ By Sections 24 and 26 of the Partnership Law,²⁴ partners are made jointly and severally liable for any negligence by one partner acting in the ordinary business of the partnership, or with the consent of his co-partners, to the same extent as the partner guilty of such negligence. By these sections *the liability of a partner other than the one whose negligence caused the damage is made no greater and no less than the liability of the one causing the injury*. If the partner whose negligence caused the injury is not liable, another partner, not negligent, is not liable.²⁵

M. B. G.

¹⁷ Thus distinguishing this case from *Wadsworth v. Webster*, 237 App. Div. 319, 261 N. Y. Supp. 670 (3d Dept. 1932) where there is no allegation as to whether or not the car was used in the partnership business.

¹⁸ 206 N. Y. 55, 62, 99 N. E. 258 (1912).

¹⁹ *Supra* note 1.

²⁰ *Roberts v. Johnson*, 58 N. Y. 613 (1871).

²¹ *Kavanaugh v. McIntyre*, 210 N. Y. 175, *aff'd*, 242 U. S. 138 (1916).

²² N. Y. PARTNERSHIP LAW §4 (3); N. Y. PARTNERSHIP LAW §20 (1).

²³ *Nemeth v. Tracy*, 217 N. Y. 714, 112 N. E. 1061, *rev'g*, 159 App. Div. 497, 144 N. Y. Supp. 901 (1916), on dissent of Scott, J.

²⁴ N. Y. PARTNERSHIP LAW §24, *supra* note 1; N. Y. PARTNERSHIP LAW §26.

²⁵ *David v. David*, 161 Md. 532, 157 Atl. 755, 81 A. L. R. 1100 (1932); *Bellison v. Skilbeck*, 185 Minn. 537, 242 N. W. 1 (1932) is a negligence action by an eight-year-old unemancipated child against a partnership of which his father was a partner and the wrongdoer.