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Auto Owner's Liability for Injury Caused by Guest Permitted to Drive - Powers v. State, use of Reynolds

AUTO OWNER'S LIABILITY FOR INJURY CAUSED BY GUEST PERMITTED TO DRIVE

Powers v. State, use of Reynolds[1]

At midnight, on November 11, 1938, Raymond Coffman, Paul E. Powers, and Mary M. Reynolds left a Hagerstown night club for Hancock, Maryland, from whence they had motored earlier in the evening in a car owned by Powers. During the evening each member of the party had drunk a quantity of intoxicating liquor. Before leaving for Hancock, therefore, they all agreed to the common proposal of letting Coffman drive the Powers car, the reason being that Powers himself was in no fit condition to drive. On the return trip the car, while being operated by Coffman, struck a guard rail; and as a result Miss Reynolds was killed. In an action brought under the Maryland version of Lord Campbell's Act, the plaintiff was successful, and the verdict was affirmed by the Court of Appeals. In its majority opinion,[2] the Court ruled that Miss Reynolds was not guilty of contributory negligence as a matter of law in riding with a driver whom she knew had been drinking during the evening, and that the automobile owner who requests or allows another to drive the car while the owner occupies it is liable for any damage caused by the driver's negligence in the absence of proof that the owner abandoned the right of control.

It would seem evident that Maryland follows the weight of authority in this country in ruling that Miss Reynolds was not guilty of contributory negligence as a matter of law in riding in a car driven by an intoxicated driver. The courts are loath to hold, in any instance, an invited guest

[1] 11 A. (2d) 909 (Md. 1940).

[2] The decision of the Court rested on the views of three judges. A minority opinion, representing the views of two judges, was also filed.

in an automobile guilty of contributory negligence as a matter of law.[3] The facts of a California case are much the same as those of *Powers v. State.* There the guest and driver together had attended a dance, and during the evening the guest had repeatedly seen the driver drink intoxicating liquor. The court held that whether or not the guest was guilty of contributory negligence in riding home with the driver was a question for the jury.[4] Many cases have held, when there is some doubt as to the driver's ability to drive, that the guest is not guilty of contributory negligence as a matter of law in riding with such person;[5] and Maryland has held that when testimony is conflicting as to the driver's condition, the question of the guest's contributory negligence should go to the jury.[6]

In further considering the alleged contributory negligence of Miss Reynolds, it should be borne in mind that had she not accepted the ride with Powers and Coffman, she would have been left alone in Hagerstown at a late hour. The alternatives before her were either to ride home with an intoxicated driver, or be forced to spend the rest of the night in a strange city. To be guilty of a voluntary assumption of risk, the plaintiff must not only know of the danger, but must encounter it without any reasonable necessity for doing so.[7] It is certainly evident that the conduct of Miss Reynolds could not be called a voluntary exposure to an unreasonable risk. It would seem that the exposure, under the circumstances, was not voluntary, nor was the risk, in the light of decided cases, unreasonable.

Although the ruling on Miss Reynold's contributory negligence is not too difficult to follow, the ruling that Powers is answerable for the negligence of the driver is certainly open to question. The theory on which this liability was fastened to the car owner was that the parties were in such legal relationship that the negligence of the driver could be imputed to the car owner. In other words, the driver was acting, at the time of the accident,

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[3] Ford v. Maney's Estate, 251 Mich. 461, 232 N. W. 393, 70 A. L. R. 1315 (1930).

[4] House v. Schmelzer, 3 Cal. App. (2d) 601, 40 P. (2d) 577 (1935).

[5] Anderson et al v. Pickens, 118 Cal. App. 212, 4 P. (2d) 794 (1931); Beckman v. Wilkins et al, 181 Minn. 245, 232 N. W. 38 (1930); Caldbeck v. Flint, 281 Mass. 360, 183 N. E. 739 (1933); Denham v. Taylor, 15 La. App. 545, 131 So. 614 (1930); Bubar v. Fisher, 134 Me. 10, 180 A. 923 (1935); Steele v. Lackey, 107 Vt. 192, 177 A. 309 (1935).

[6] Meese v. Goodman, 167 Md. 658, 176 A. 621, 98 A. L. R. 480 (1935).

[7] 2 RESTATEMENT, TORTS (1934), Sec. 466.

as the agent of the owner, and under the doctrine of *Respondeat Superior* the car owner became answerable for the death of Miss Reynolds. The arguable question in the last analysis is, therefore, was the relationship between the car owner and the driver that of principal and agent.[8]

In some states statutes provide that a car owner is liable for the negligence of a driver who is operating the car with the owner's consent.[9] The status thus created by such statutes has been held to be that of agency.[10] Other jurisdictions hold a car owner responsible if he permits another to drive while at the same time the owner retains all dominion and control over the automobile.[11] Many of these decisions state that under such circumstances the driver becomes the agent of the owner, and therefore the negligence of the driver is imputed to the owner.[12] While Maryland has no statute which creates the relationship of master and servant between car owner and one who borrows it, yet this state has adopted the theory that the driver, in such instances, is the agent of

[8] For the purposes of this casenote, the legal relationship between Powers and Coffman will be referred to as master and servant, rather than as principal and agent. These terms have become confused in recent years, and in many court opinions they are used interchangeably. Strictly speaking, the terms principal and agent include those of master and servant. So it is that a master is always a principal and a servant is always an agent. But it by no means follows that a principal is always a master, and an agent is always a servant. The chief point of difference lies in the fact that the word master always connotates a degree of physical control, and the master always has the right to dominate and control his servant. This is not true of the principal, however, for in many cases he has no power physically to control his agent. For many purposes it is immaterial whether or not one who is an agent is also a servant. However, a master is always liable for the torts of his servant (within scope of employment) while in many instances a principal is not liable for the torts of his agent. See 1 RESTATEMENT, AGENCY (1933), Secs. 1, 2, 219.

[9] These states now include: Kentucky, Minnesota, Missouri, Nebraska, Oklahoma, New York, Connecticut, and Iowa.

[10] 2 Am. Jur. 281; Agency, Sec. 361, n. 10.

[11] Day v. Isaacson, 124 Me. 407, 130 A. 212 (1925); Reetz v. Mansfield, 119 Conn. 563, 178 A. 53 (1935); Bennett v. Edward, 267 N. Y. S. 417 (1933).

[12] On principle, the mere presence of the owner in an automobile, at the time of an injury resulting from its negligent operation while being driven by another, does not necessarily make him liable, if he would not have otherwise have been liable. The owner's presence, however, is an important element where recovery is sought on the theory that the operator was acting as his servant or agent, or that he had control over the operation of the car. An inference that the machine was being driven by his agent, or that he had some control over its operation is readily drawn if the owner was present. The strength of the inference, however, undoubtedly varies with the circumstances, and it is weakest where the facts show that the owner had loaned the car, and was riding therein merely as a guest of the borrower. See Annotation, *Owner's Presence in Automobile Operated by Another as Affecting Former's Liability*, 2 A. L. R. 888.

the owner.[13] In arriving at this conclusion, the question of the power and ability of the owner to direct and control the driver has been the ultimate test in determining whether or not a status of agency existed between the two.[14]

In the leading case of *Vacek v. State* the court held that where a group of friends accompanied the owner of an automobile to his residence at a shore resort, and where one of the friends asked and was allowed to drive the owner's car on the return trip home, the driver immediately became the agent of the owner. As a result, any subsequent negligence on the part of the driver was imputed to the owner under the doctrine of *Respondeat Superior*. The Court held that the theory of agency was applicable, basing its opinion on the fact that the owner had the power to direct and control the driver, and also had the sole power of granting to him the permission to drive. But to create a status of agency between two parties more is needed than the mere power of one party to direct and control the other.[15] Additional factors to be considered are whether or not the parties believed that they were creating a status of master and servant at the time the relationship was formed.[16] The fact that one assists another, does something for his benefit, or submits himself to the control of such other does not constitute such person the servant of the other. There must be consent or manifestation of consent to the existence of the relationship by the person for whom the service is performed.[17] Moreover, the alleged servant must be in the pursuit of his master's business before a true status of agency is created. It is difficult to see in the *Vacek* case how there was any agency involved, and it is doubly difficult to apply the tests of agency to *Powers v. State*. It is hard to conceive in either case that the parties intended that the driver should be the servant of the owner, or that the owner intended him to be such a servant. No actual employment was contemplated in either case, for in fact, in the *Vacek* case, the owner of the car was doing the driver a favor in allowing him to drive. It is even clearer that the status of the parties in either case was not that of master and servant when the question is asked,

[13] Hooper v. Brawner, 148 Md. 417, 129 A. 672, 42 A. L. R. 14, 37 (1925); Vacek v. State, use of Rokas, 155 Md. 400, 142 A. 491 (1928).
[14] Vacek v. State, use of Rokas, 155 Md. 400, 408, 142 A. 491, 494 (1928).
[15] 1 RESTATEMENT, AGENCY (1933), Sec. 225.
[16] *Ibid.*, Sec. 220.
[17] *Ibid.*, Sec. 225, Comment C.

whose business was the alleged servant pursuing at the time of the accident. In an action for damages against the master for his servant's negligent driving of an automobile, the proof must be clear that the driver, at the time of the collision, was engaged in his master's business.[18] But in both the *Vacek* case and the *Powers* case the driver was about his own business when the accident occurred. In the *Powers* case Coffman, the driver, did not take over the wheel because he was employed to drive Powers home, but rather because he wished to get home himself, and because in the opinion of all the parties concerned, he was the only member of the group deemed capable at the time of driving.

The position that when the owner of a car allows another member of a pleasure party to assist in the driving he does not thereby create a relationship of master and servant between himself and the driver is not without the support of decided cases.[19] In an Illinois case, the deceased was riding as a passenger in a car operated by defendant's brother. The defendant, the owner of the car, was also a passenger at the time. In answer to a suit brought for the death of the deceased, the court held that the defendant was entitled to a directed verdict on the ground that there was no legal evidence proving that at the time of the accident the car was being driven by an agent of defendant in or about defendant's business.[20] A somewhat similar conclusion was reached in California. There, where a guest sued both the driver and the owner of a car for injuries sustained due to the driver's negligence, and where the evidence showed that the driver had the owner's permission to drive, but where there was no other proof of a master-servant relationship, the owner was not held liable to the guest for the driver's wilful misconduct.[21] There are other cases supporting the view that where the owner of a car allows another to drive, there being no evidence of any employment of the driver by the owner, and where the driver drove for his own pleasure or business, there was no status of agency between

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[18] Hock v. Martin, 124 Pa. Supp. 445, 188 A. 602 (1936).

[19] Rodgers v. Saxton, 305 Pa. 479, 158 A. 166, 80 A. L. R. 280 (1931); McCoy v. Frutiger, 55 R. I. 492, 182 A. 494 (1936). A Massachusetts case based the owner's liability for the driver's negligence squarely on his power to control the driver, when it held that concurrent facts of ownership and occupancy alone did not give rise to liability: Wheeler v. Darmochwat, 280 Mass. 553, 183 N. E. 55 (1932).

[20] Paulson, Admrx. v. Cochfield, 278 Ill. App. 596 (1935).

[21] Berryman v. Quinlan et al, 85 P. (2d) 202 (Calif. 1938).

the two.[22] Applying these principles to *Powers v. State* the result is that it is indeed difficult to see how Coffman, a member of a joint pleasure party, by agreeing to drive Power's car who was also a member of the party, thereby became the servant of Powers. If this conclusion is sound, the doctrine of *Respondeat Superior* should not apply to the *Powers* case.

But even if it is conceded that the *Vacek* case and the *Powers* case are sound when they state that the driver acted as the servant of the owner, yet there is still another problem with which to be dealt. This question, which is clearly presented in the *Powers* case, is if the driver was the servant of the car owner, why was he not also the servant of the guest? In other words was not Coffman the servant of Miss Reynolds as well as he was the servant of Powers? Coffman was appointed driver by the insistence of each member of the party, Miss Reynolds taking as much a part in his selection as did Powers. It therefore follows that if Coffman is to be considered the legal representative of one, he must be considered the legal representative of all. It was stated in evidence that, after the car left Hagerstown, Powers occupied the back seat. His intoxicated condition would imply that his power to direct and control Coffman was little if any greater than that exercised by Miss Reynolds. Be that as it may, if Coffman is to be considered as an agent at all, he must be considered an agent for joint principals. It is not uncommon for a person to be the servant of two masters at one time, and as to one act.[23] Since Coffman must be considered the servant of both Powers and Miss Reynolds, the latter must be held just as responsible for the servant's negligence as was the former.

From the foregoing discussion, it has been seen that the liability of Powers for the death of Miss Reynolds turned on the theory of the legal relationship between the parties of a pleasure outing. For in determining that legal relationship it was felt that the negligence of the driver could be imputed to the owner of the car, thereby making him guilty of actionable negligence. It was pointed out in the court's opinion that the members of the party did not constitute the members of a joint enterprise. But it is difficult to see, in the absence of any controlling stat-

[22] Union Bank of Chicago v. Kalkhurst, 265 Ill. App. 254 (1932); Woods v. Franklin, 151 Miss. 635, 118 So. 450 (1928); Rosenberg v. Karas, 259 Mass. 568, 156 N. E. 711 (1927).

[23] 1 RESTATEMENT, AGENCY (1933), Sec. 226.

ute, how any negligence could be imputed to the car owner, in this particular case, on the theory of agency. Is there, then, any theory by which the negligence may be fixed on Powers, which would make him responsible for the unfortunate accident? There does seem to be a theory, in line with decided Maryland cases, which might fix the liability on Powers under the existing facts.

It has been decided in Maryland that if one entrusts his car to a person, incompetent at the time to drive, this in itself will be a negligent act for which the owner must suffer the consequences.[24] Berry, in his work on automobiles, says that aside from the relation of master and servant the owner of an automobile may be rendered liable for injuries inflicted by its operation by one whom he has permitted to drive, on the grounds that such person, by reason of his physical condition is incompetent to safely operate the machine.[25] This rule has been followed in Maryland.[26] In a case, the facts of which somewhat resemble *Powers v. State,* where the owner of a car allowed an intoxicated person to drive, and as a result the plaintiff was injured, the Court said:

> "It is not necessary to determine the nature of the legal relation between the defendant and Bridges, which, according to plaintiff's proof existed at the time of the accident. Apart from the question as to whether it was such a relation as would ordinarily have made defendant responsible for the negligence of Bridges, the submission of the case to the jury was justified by the evidence, which tended to charge defendant himself with negligence in committing to an intoxicated person the duty of testing the steering efficiency of the truck.[27]

It would seem, therefore, that if the *Powers* case had been based more on the theory of the owner's initial act of negligence, rather than on the driver's subsequent negligence which was then imputed to the owner, the ultimate decision could be more easily understood. If the decision be sound in its conclusion it would at least be easier to follow, if it were based on the car owner's own negligence, and not on the expanded doctrines of the law of agency.

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[24] Rounds, Admr. v. Phillips et al, 166 Md. 151, 170 A. 532 (1933), noted (1938) 2 Md. L. Rev. 288.
[25] BERRY, AUTOMOBILES (6th ed.). Sec. 1327.
[26] Rounds, Admr. v. Phillips et al, 166 Md. 151, 163, 170 A. 532, 536 (1933).
[27] Dorman v. Koontz, 164 Md. 535, 537, 165 A. 461 (1933).