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Duty of Care: The Partnership Cases

Norwood Beveridge

DUTY OF CARE: THE PARTNERSHIP CASES†

NORWOOD P. BEVERIDGE, JR.*

The first revision of the Uniform Partnership Act since its adoption in 1914 is now underway.[1] The current draft, considered by the National Conference of Commissioners on Uniform State Laws at its meeting on July 13-20, 1990, has reserved Section 21(c) for a duty of care provision, but the question is still under study, as is the application of the business judgment rule in the partnership context.[2] The Uniform Partnership Act itself is silent on a partner's duty of care to the partnership and his co-partners.

Section 21 of the current draft Revised Uniform Partnership Act is captioned "Fiduciary Duties of a Partner," and sets out a partner's duty of good faith and fair dealing and duty of loyalty.[3] It has long been recognized that other fiduciaries, such as agents,[4] trustees,[5] and corporate directors[6] additionally have a duty of care. In the case of corporate directors, the usual statutory formulation requires a director to act

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* Associate Professor of Law, Oklahoma City University. A.B., LL.B., Harvard University; LL.M., New York University. Professor Beveridge is a member of the American Bar Association Committee on Partnerships and Unincorporated Business Organizations and the Subcommittee on the Revised Uniform Partnership Act.

1. Revision was recommended by an ABA Subcommittee. *See* UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, *Should the Uniform Partnership Act Be Revised?*, 43 BUS. LAW. 121 (1987) [hereinafter ABA Subcommittee Report].

2. *See* Memorandum from Donald J. Weidner to H. Lane Kneedler, Chair (May 1, 1990) (Comments to § 21(c)), *reprinted in Current Developments in Substantive Partnership Law*, 1990 A.B.A. SEC. BUS. LAW [hereinafter *Current Developments*]; A. BROMBERG & L. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP 124-27 (Supp. 1990); Weidner, *The Revised Uniform Partnership Act Midstream: Major Policy Decisions*, 21 U. TOL. L. REV. 825, 850-54 (1990).

3. *Current Developments*, *supra* note 2, at 12-14; 1 A. BROMBERG & L. RIBSTEIN, *supra* note 2, at 118-19.

4. *See* RESTATEMENT (SECOND) OF AGENCY § 379 (1958).

5. *See* RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

6. *See* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 234 (3d ed. 1983).

"with the care an ordinarily prudent person in a like position would exercise under similar circumstances."[7] In addition, the corporate director is given the protection of the business judgment rule. This rule creates a presumption that a corporate director's decision was made on an informed basis, in good faith, and with an honest belief that the action taken was in the best interest of the company. The rule also insures that a corporate director will not be liable for an honest error of judgment made in good faith so long as he has exercised due care.[8]

The Drafting Committee to Revise the Uniform Partnership Act was appointed by the National Conference of Commissioners on Uniform State Laws in the Fall of 1987.[9] In its most current draft, the Committee reached no conclusion about whether a duty of care provision should be included in the revised Act.[10] However, the Committee decided that a "prudent person" liability rule should not apply among partners, nor should a lesser standard of "reasonable care."[11] The Committee felt that a "gross negligence" standard was appropriate, but did not want to use that term.[12] Finally, the Committee took no position on the application of the business judgment rule in the partnership context.[13]

The purpose of this article is to demonstrate that in fact, in regard to partners, the duty of care of an ordinarily prudent person is well recognized in the English and American cases, as is the protection of the business judgment rule. Both should therefore be included in the revised Act.

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7. REVISED MODEL BUSINESS CORPORATION ACT § 8.30 (1984). See E. BRODSKY & P. ADAMSKI, LAW OF CORPORATE OFFICERS AND DIRECTORS § 2.04 (1984 & Cum. Supp. 1989) for an all-state listing of standards. Not all states have a statutory standard for corporate directors; Delaware does not.

8. Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53 (Del. 1989).

9. UNIFORM PARTNERSHIP ACT (Draft 1990), *reprinted in Current Developments*, *supra* note 2, at i (prefatory note); 1 A. BROMBERG & L. RIBSTEIN, *supra* note 2, at 59.

10. *See Current Developments*, *supra* note 2, at 22; 1 A. BROMBERG & L. RIBSTEIN, *supra* note 2, at 127.

11. *Current Developments*, *supra* note 2, at 19; 1 A. BROMBERG & L. RIBSTEIN, *supra* note 2, at 124.

12. *Current Developments*, *supra* note 2, at 19; 1 A. BROMBERG & L. RIBSTEIN, *supra* note 2, at 124.

13. *Current Developments*, *supra* note 2, at 20; 1 A. BROMBERG & L. RIBSTEIN, *supra* note 2, at 126.

A. Hornbook Law

The 1988 edition of the leading text on partnership law states flatly that a general partner is not liable for negligent management.[14] It states the general rule as follows:

> A partner may be held accountable not only for deliberately appropriating an unauthorized benefit, but also for poor management. Partners, however, are not subject to the ordinary care standard applicable to a paid agent. Thus, the partner is not liable to the partnership for the whole burden of losses caused by mere errors of judgment and failure to use ordinary skill and care in the supervision and transaction of business.[15]

If this were a correct statement of the law, it would pose a question as to why partnership law, which is largely based on agency principles, took a detour when it came to the duty of care.[16] It is submitted, however, that this statement of the law is not supported by the weight of authority and is no more true today than when it was first made fifty years ago.[17]

Another noted scholar stated a contrary rule more than a century ago:

> [G]ood faith, reasonable skill and diligence, and the exercise of sound judgment and discretion, are naturally, if not necessarily, implied from the very nature and character of the relation of partnership. In this respect, the same doctrine applies, which ordinarily applies to the cases of mandataries or agents for hire . . . .
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> . . . It would, perhaps, have been more exact to say, that in cases of partnership the same diligence is ordinarily

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14. 2 A. BROMBERG & L. RIBSTEIN, BROMBERG & RIBSTEIN ON PARTNERSHIP 6:86 (1988). *See also* H. REUSCHLEIN & W. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP 273 (2d ed. 1989); Ribstein, *A Mid-Term Assessment of the Project to Revise the Uniform Partnership Act*, 46 BUS. LAW. 111, 140-41 (1990).

15. 2 A. BROMBERG & L. RIBSTEIN, *supra* note 14, at 6:85 (footnotes omitted).

16. *See* RESTATEMENT (SECOND) OF AGENCY § 14A comment a (1958) (Under agency principles, a partner is liable to his co-partners for negligence.).

17. The text of this passage is basically unchanged from earlier hornbooks. *See* J. CRANE & A. BROMBERG, CRANE & BROMBERG ON PARTNERSHIP 395 (1968); J. CRANE, HANDBOOK ON THE LAW OF PARTNERSHIP AND OTHER UNINCORPORATED ASSOCIATIONS 368 (2d ed. 1952); J. CRANE, HORNBOOK ON THE LAW OF PARTNERSHIP AND OTHER UNINCORPORATED ASSOCIATIONS 301 (1938).

> required of each partner, as reasonable and prudent men generally employ about the like business; unless the circumstances of the particular case repel such a conclusion.[18]

The classic text on English partnership law states that a partner must alone bear any loss to the firm caused by his culpable negligence.[19] Other scholars both before and after the advent of the Uniform Partnership Act in 1914 have said the same, adding that a partner is not liable for a mere error of judgment:

> If losses occur by reason of a breach of duty by a partner, in any way whatever, whether through fraud, negligence, ignorance, or extravagance, and whether by design or not, they must rest on the partner whose faulty conduct has caused them; and he cannot require the partnership to contribute in any way towards them. But a partner is not liable to his copartners for a loss caused by an honest mistake of judgment, unless it amounts to gross negligence or ignorance.[20]

An examination of the cases will illustrate what is meant by "culpable negligence" and "honest mistake of judgment": a partner's duty of care is one of liability for ordinary negligence, although he will not be liable for errors of judgment so long as he is exercising due care and his judgment is one which a reasonable person might make.

B. Case Law

The English cases are in accord with the foregoing rule. Thus, where one of two joint agents appointed to receive and distribute shares of prize money due on a captured Dutch ship negligently paid persons shares who were not entitled thereto, it was held that the one agent would have to stand the whole

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18. W. STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP 288, 290 (4th ed. 1955) (footnotes omitted).

19. N. LINDLEY, LINDLEY ON THE LAW OF PARTNERSHIP 562 (15th ed. 1984); *id.* at 472 (9th ed. 1924); *id.* at 917 (5th Eng. ed., 2d Amer. ed. 1888).

20. T. PARSONS, A TREATISE ON THE LAW OF PARTNERSHIP 194-95 (4th ed. 1893). *See also* C. BATES, THE LAW OF PARTNERSHIP 807-13 (1888); E. GILMORE, HANDBOOK ON THE LAW OF PARTNERSHIP INCLUDING LIMITED PARTNERSHIPS 374 (1911); F. MECHEM, ELEMENTS OF THE LAW OF PARTNERSHIP 156 (2d ed. 1920); S. Rowley, THE MODERN LAW OF PARTNERSHIP 457 (1916).

loss and was not entitled to contribution from his joint agent, even though both would have been liable to third persons.[21] Similarly, where one firm's partner paid the claim of a customer for goods lost in a fire at its warehouse, because the firm was not liable it was held that the paying partner had to bear the entire loss.[22] Also, where the managing partner of a firm exposed it to damages by negligently trespassing on the property of an adjoining proprietor, it was held that he alone had to bear the damages.[23]

On the other hand, where one of several assignees under a Commission of Bankruptcy induced the others not to join in a conveyance to a purchaser under a mortgage foreclosure, judging that there were prior acts of bankruptcy which would invalidate the mortgage, but it turned out that the mortgage was in fact enforceable and a deficiency was assessed against the assignees, it was held that the acting assignee would not have to bear the whole loss attributable to this error of judgment.[24] And where one of two partners induced the other to agree to a stock investment by the firm, telling him (as he had been told by the seller) that the shareholders' liability was limited when this was not in fact the case, it was held that the first partner would not have to bear the resulting loss.[25] Also, where one of two partners delayed in disposing of partnership cotton, honestly believing that the market would advance in price when in fact it declined sharply, it was held that the firm would have to bear the loss. Although the other partner had urged him to sell earlier, the court said that both partners had equal responsibility to sell the goods and either might have done so.[26]

The American cases followed the rule expressed in the English cases. Thus, it was said that a partner might be liable for neglect of duty in collecting outstanding accounts, but that he was only charged to take the same care of partnership con-

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21. M'Ilreath v. Margetson, 4 Doug. 278, 99 Eng. Rep. 880 (1785).
22. *In re* Webb, 8 Taunt. 443, 129 Eng. Rep. 455 (1818).
23. Thomas v. Atherton, 10 Ch. D. 185 (1878).
24. Lingard v. Bromley, 1 V.& B. 114, 35 Eng. Rep. 45 (1812).
25. *Ex parte* Letts and Steer, 26 L.J.Ch. 455, 112 Rev. Rep. 415 (1857).
26. Cragg v. Ford, 1 Y.& C.C.C. 280, 62 Eng. Rep. 889 (1842).

cerns that a prudent man would take of his own.[27] For example, where one partner sued the other for loss of partnership cattle the court held it was error to charge the jury that the defendant partner could not be liable, if he acted in good faith and upon his best judgment, unless he were guilty of gross negligence or ignorance.[28] The correct charge was stated as: "Each partner must not only act in good faith, but must also exercise ordinary care and prudence . . . . The omission of such ordinary care and prudence, is ordinary negligence; and a partner is responsible for losses resulting from ordinary negligence."[29]

In another early case, a partner was held liable to his co-partner for failure to use "ordinary, reasonable care."[30] Another partner was held liable for negligently paying a debt which was not due,[31] and another for buying up a claim which was invalid without consulting his partner, who knew of its invalidity.[32] Other cases, while agreeing that a partner might be liable for negligence, found no negligence on the facts.[33]

In a case involving a joint adventure to invest in timber lands where the parties inspected the wrong quarter section of land and thereby bought a parcel worth one-third of the value of the land they thought they were buying, the court reversed

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27. Jessup v. Cook, 6 N.J.L. 434, 437 (1798). *See generally* Note, *Fiduciary Duties of Partners*, 48 IOWA L. REV. 902 (1963).

28. Carlin v. Donegan, 15 Kan. 495, 500 (1875).

29. *Id.* (citatiom omitted).

30. Bohrer v. Drake, 33 Minn. 408, 23 N.W. 840 (1885) (partnership eggs spoiled through negligence); *cf.* Grove v. Miles, 85 Ill. 85, 87 (1877) (partner cannot get reimbursement for extravagant or wasteful expenditures).

31. Appeal of Moore, 134 Pa. 486, 19 A. 753 (1890).

32. Yorks v. Tozer, 59 Minn. 78, 60 N.W. 846 (1894).

33. *See, e.g.*, Morrison v. Smith, 81 Ill. 221 (1876) (loss of partnership funds due to bank failure); Campbell v. Stewart, 34 Ill. 151 (1864) (loss of partnership funds in bank failure); Jenkins v. Peckinpaugh, 40 Ind. 133 (1872) (partner is agent and liable for loss of funds through his fraud, negligence, or misconduct); Adm'rs of McCrae v. Robeson, 6 N.C. 127 (1812) (unexplained business losses not proved to be due to managing partner's mismangement); Peters & Reed v. McWilliams, 78 Va. 567 (1884) (failure to collect for bricks sold to Confederate government); *cf.* Hollister v. Simonson, 36 A.D. 63, 55 N.Y.S. 372 (1899) (partner liable for negligence for damages in equity action to settle accounts, but no right to recission of partnership agreement), *appeal dismissed*, 170 N.Y. 357, 63 N.E. 342 (1902); Lefever v. Underwood, 41 Pa. 505 (1862) (partner liable for loss of partnership funds through bank failure where he deposited them in his own bank account without knowledge of his co-partner).

a judgment for the defendant co-adventurer, a woodsman.[34] The court held that:

> The situation of a partner of [sic] joint adventurer is quite analogous to the situation of one who contracts to render services to another; he contracts for good faith and integrity, but not that he will commit no errors; for negligence, fraud, and dishonesty he is liable, but not for nonnegligent mistakes; if he contracts for a particular or extraordinary degree of skill or expertness, a higher degree of diligence and skill will be required of him.[35]

The trial court had exonerated the defendant, finding that by mistake honestly made because of an erroneous map, he had misled the plaintiffs into the mistaken purchase.[36] The Wisconsin Supreme Court, however, remanded the case for trial to determine whether the defendant failed "to exercise that degree of diligence and skill in locating the land that a woodsman of his supposed skill ordinarily exercises under like circumstances."[37]

In a case where a partnership bank lost money through an unwise investment, the court stated:

> It was the duty of Gardner to act in good faith and with entire honesty in transacting all the business of the bank, and to exercise as high a degree of care and skill as is generally exercised by business men in the management of such business. But he was not liable for honest errors in judgment, nor for the failure to take the utmost precaution possible in making investments for the bank.[38]

Thus, where partnership goods were damaged through the misjudgment of one partner in failing to recognize the danger posed by rising floodwaters, this was held to be an honest mistake of judgment not giving rise to liability.[39] The same result was reached in the case of losses caused by disposing of a

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34. Knudson v. George, 157 Wis. 520, 147 N.W. 1003 (1914).

35. *Id.* at 523, 147 N.W. at 1004.

36. *Id.*

37. *Id.*

38. Exchange Bank of Leon v. Gardner, 104 Iowa 176, 73 N.W. 591, 592-93 (1897) (partner held not liable).

39. Caldwell v. Leiber, 7 Paige Ch. 483, 507 (N.Y. Ch. 1839).

lease of premises unwisely rented by one partner.[40] A partner also was not found solely chargeable with the considerable expense of an unsuccessful defense of a lawsuit which could have been settled for a small sum,[41] and a partner was not charged with the loss resulting from a contract which a better judgment might have avoided.[42]

Where one partner's negligence exposes the firm to suits for losses caused to third parties, the negligent partner must bear the loss alone as between him and his partners, though all may be liable to the third party.[43] A fortiori, this is true where a partner has been guilty of fraud or misrepresentation directed towards third parties.[44] A partner must also bear alone any loss or expense caused by his violation of the partnership agreement.[45]

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40. Charlton v. Sloan, 76 Iowa 288, 41 N.W. 303 (1888).

41. Lee v. Dolan, 39 N.J.Eq. 193 (1884), *aff'd*, 40 N.J.Eq. 338 (1885).

42. Edinger v. Southern Oil Co., 69 W. Va. 34, 71 S.E. 266 (1911). *See also* Binning v. Miller, 55 Wyo. 478, 506, 102 P.2d 64, 76 (tenants in common, like partners, cannot charge one of their number for poor judgment alone), *reh'g denied*, 56 Wyo. 129, 105 P.2d 278 (1940). For other cases holding partners not chargeable under the facts shown, see Aiken v. Ogilvie, 12 La. Ann. 353 (1857); Edwards v. Zuck, 171 Mich. 29, 136 N.W. 1122 (1912); Hollister v. Barkley, 11 N.H. 501 (1841); Kraemer v. Gallagher, 18 A.D.2d 676, 235 N.Y.S.2d 874 (1962); J.E. Crosbie, Inc. v. King, 192 Okla. 53, 133 P.2d 543 (1943); Lyons v. Lyons, 207 Pa. 7, 56 A. 54 (1903); Markle v. Wilbur, 200 Pa. 457, 50 A. 204 (1901); *cf.* French v. Vanatta, 83 Ark. 306, 104 S.W. 141 (1907) (valid consideration for assumption of partnership loss where loss due to assuming partner's carelessness); Foster v. Ulman, 64 Md. 523, 3 A. 113 (1886) (no consideration for agreement by one partner alone to bear loss not due to his negligence or misconduct).

43. *See* Flynn v. Reaves, 135 Ga. App. 651, 218 S.E.2d 661 (1975) (doctor sued for malpractice can't bring third-party action for contribution against his former partners); Kiffer v. Bienstock, 128 Misc. 451, 218 N.Y.S. 526 (1926) (partner negligent in auto accident); United Brokers' Co. v. Dose, 143 Or. 283, 22 P.2d 204 (1933) (same).

44. *See In re* Flick, 75 Bankr. 204 (S.D. Cal. 1987); Eichberger v. Reid, 728 S.W.2d 533 (Ky. 1987); Gramercy Equities Corp. v. Dumont, 72 N.Y.2d 560, 531 N.E.2d 629, 534 N.Y.S.2d 908 (1988).

45. *See* Loy v. Alston, 172 F. 90 (8th Cir. 1909); Murphy v. Crafts, 13 La. Ann. 519 (1858); Bonis v. Louvrier, 8 La. Ann. 4 (1853); Stegman v. Berryhill, 72 Mo. 307 (1880); McCoy v. Crosfield, 54 Or. 591, 104 P. 423 (1909); Looney v. Gillenwaters, 58 Tenn. 133 (1872); Morris v. Wood, 35 S.W. 1013 (Tenn. Ch. App. 1896); Gill v. Wilson, 2 Tex. App. (Civ.) 330 (1884); *cf.* Beste v. His Creditors, 15 La. Ann. 55 (1860) (firm not chargeable with action of one partner in secretly putting his brother on the payroll where the brother's "business capacity was greatly impaired by gross and habitual intoxication").

C. Evaluation of the Crane-Bromberg-Ribstein Thesis

It remains to examine the authority cited by the authors of the texts referred to at the beginning of this analysis.[46]

1. Comparison of Partner and Paid Agent

No authority was cited originally by Professor Crane for the proposition that "[a] partner is not held to possess the degree of knowledge and skill of a paid agent."[47] It is submitted that this proposition is sufficiently refuted by the cases cited in Part B of this Article: a partner is held to the duty of care of an ordinarily prudent man under the circumstances.[48]

One case is cited by Professors Bromberg and Ribstein for the proposition that "[p]artners, however, are not subject to the ordinary care standard applicable to a paid agent."[49] The case involved a suit for recission of a limited partnership agreement for misrepresentation and fraud and in the alternative for damages for mismanagement.[50] It addressed the duty of care of the general partner in the production and promotion of a motion picture based on the life of Edith Piaf. While the court said that "defendants were not hired or employed by the plaintiff in any rational sense of the words,"[51] the court also said that a general partner is held to the standard of care of an ordinarily prudent person.[52]

2. Partner's Standard of Care

A series of cases, discussed below, are cited by Professors Bromberg and Ribstein to support the proposition that "the partner is not liable to the partnership for the whole burden of losses caused by mere errors of judgment and failure to use ordinary skill and care in the supervision and transaction of business."[53] It is agreed that a partner is not liable for honest

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46. *See supra* notes 14, 15, and 17 and accompanying text.

47. J. CRANE, HANDBOOK OF THE LAW OF PARTNERSHIP AND OTHER UNINCORPORATED ASSOCIATIONS 301 (1938).

48. *See supra* notes 21-34.

49. A. BROMBERG & L. RIBSTEIN, *supra* note 14, at 6:85.

50. Wyler v. Feuer, 85 Cal. App. 3d 392, 149 Cal. Rptr. 626 (1978).

51. *Id.* at 402, 149 Cal. Rptr. at 632.

52. *Id.* at 403, 149 Cal. Rptr. at 633.

53. 2 A. BROMBERG & L. RIBSTEIN, *supra* note 14, at 6:85.

errors of judgment; the issue is the partner's duty to use ordinary skill and care.

Northen v. Tatum[54] was a bill for settlement and dissolution of a partnership in which the complainant sought to charge the managing partners with damages for failure to cut timber, process it into shingles, and sell the shingles. This charge was not allowed since the respondents were not guilty of "culpable negligence."[55] As already indicated, this phrase has been used by the courts and commentators to mean, essentially, ordinary negligence.

Wyler v. Feuer[56] has already been discussed.[57] *Snell v. De Land*[58] was a bill in equity for a partition of lands and an accounting. The court held that it perceived no ground upon which the managing partner could be held liable for the lumber account, but there is no discussion of negligence.

Thomas v. Milfelt[59] was a suit in equity for an accounting and the appointment of a receiver for an automobile sales and repair partnership. The holding is identical to that of *Northen v. Tatum*, discussed above.

Knipe v. Livingston[60] involved the settlement of partnership affairs between a surviving partner and the estate of a deceased partner who had charge of the firm's bookkeeping, to

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54. 164 Ala. 368, 51 So. 17 (1909). "This bill contains no averments imputing fraud, bad faith, or culpable negligence to the managing members of the partnership, in consequence of which the losses described in the bill resulted." *Id.* at 375, 51 So. at 19.

55. *Id.*

56. 85 Cal. App. 3d 392, 149 Cal. Rptr. 626 (1978).

57. *See supra* notes 50-52 and accompanying text.

58. 136 Ill. 533, 27 N.E. 183 (1891). "The managing partner of a firm is not to be treated as an insurer of the assets in his hands; he can only be held for a loss of property when such loss occurs from a willful disregard of duty." *Id.* at 533, 27 N.E. at 184.

59. 222 S.W.2d 359 (Mo. Ct. App. 1949). "A careful review of the evidence in this record fails to disclose anything from which it could be inferred that any of the losses of the partnership were the result of fraud or culpable negligence or bad faith on the part of defendant." *Id.* at 365.

60. 209 Pa. 49, 57 A. 1130 (1904).

> It also appeared that the assets of the firm were greatly overvalued for a series of years . . . . The result of this was the misleading of the firm as to its financial strength. But this was caused by error of judgment, not by fraud. It operated to mislead both partners alike, and no advantage was intended or accrued to Bodey from it.

Id. at 51, 57 A. at 1130.

which he applied a defective and unscientific method. The court held that no injury or disadvantage resulted to the firm from this imperfect bookeeping method.[61] For example, if a partner neglects to include depreciation in the partnership expenses the partnership does not thereby have less money than it should, but only less profitability than the partners think.

Hurter v. Larrabee[62] falls in the same category as *Knipe v. Livingston*. It was a bill for accounting by two retiring members of a partnership against three remaining general partners. The retiring partners were to be paid for their interest in the firm according to the amount standing to their credit on the books of the partnership. However, due to the lack of care and diligence of the departed bookkeeper for the firm, the books were full of mistakes and errors which overstated the financial health of the partnership.[63] The court rejected plaintiff's attempt to hold one of the defendant partners liable for negligently carrying out his responsibility to supervise the bookkeeping and accounting department, saying that the negligence of one partner was irrelevant.[64] The basis for settlement of the partnership accounts was that shown by a set of books which were a reasonably correct representation of the firm's affairs. The court also said that a partner is not in any event liable for his honest mistakes of judgment.[65]

Ferguson v. Williams[66] is, finally, a case in which the court holds as a matter of law that a negligent partner is not liable to his co-partners. But, not only does the court cite no

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61. *Id.*

62. 224 Mass. 218, 112 N.E. 613 (1916).

63. *Id.* at 220, 112 N.E. at 614.

64. *Id.*

65. "So far as losses result to a firm from errors of judgment of one partner not amounting to fraud, bad faith, or reckless disregard of his obligations, they must be borne by the partnership." *Id.* at 220, 112 N.E. at 614.

66. 670 S.W.2d 327 (Tex. Ct. App. 1984).

> [W]e hold as a matter of law that negligence in the management of the affairs of a general partnership or joint venture does not create any right of action against that partner by other members of the partnership. It is only when there is a breach of trust, such as when one partner or joint venturer holds property or assets belonging to the partnership or venture, and converts such to his own use, would such action lie.

Id. at 331.

authority for that proposition, it says that it is unable to find any cases to the contrary.[67]

Lyons v. Lyons[68] was a bill for accounting filed by one partner who charged the other with negligence in collecting a debt. The court held that the proof of negligence was insufficient and that the complainant herself might have collected the debt if she were so advised.[69]

A student note cited by Professor Crane concludes that there is no liability on a partner for damage caused to the firm by his negligence, citing two of the cases discussed above.[70] However, the author states that this is an anomolous situation.[71]

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67. *Id.* The court might have cited in support of its decision Kartage v. Interocean, 167 So.2d 76, 76 (Fla. Dist. Ct. App. 1964), which holds that "one member of a joint venture is not liable to the other for mere negligence." The *Kartage* court cites 48 C.J.S. *Joint Adventures*. That authority, however, has always held that a joint venturer is liable to his associates for losses caused by his negligence. 48A C.J.S. *Joint Ventures* § 25 (1981); 33 C.J. *Joint Adventures* § 37 (1924). *See also* 68 C.J.S. *Partnership* §§ 83, 97 (1950); 47 C.J. *Partnership* § 234 (1929); Annotation, *Joint venturers' comparative liability for losses in absence of express agreement*, 51 A.L.R. 4th 371, 430-37 (1987). Part of the confusion may be caused by the common law doctrine that one partner cannot ordinarily sue another at law for damages, but only in equity for a final accounting. *See* Annotation, *Actions at Law Between Partners and Partnerships*, 21 A.L.R. 21 (1922), supplemented 58 A.L.R. 621 (1929) and 168 A.L.R. 1088 (1947). For more recent cases holding a partner liable for his negligence, see Rosenthal v. Rosenthal, 543 A.2d 348 (Me. 1988); Glanzer v. St. Joseph Indian School, 438 N.W.2d 204, 212 (S.D. 1989); Hooper v. Musolino, 234 Va. 558, 364 S.E.2d 207, *cert. denied*, 488 U.S. 823 (1988); Shinn v. Thrust IV, Inc., 56 Wash. App. 827, 786 P.2d 285 (1990); *cf.* Roper v. Thomas, 60 N.C. App. 64, 298 S.E.2d 424 (1982) (limited partner entitled to return of investment for general partner's negligence), *rev. denied*, 308 N.C. 191, 302 S.E. 2d 244 (1983). *See generally* ABA Subcommittee Report, *supra* note 1, at 151.

68. 207 Pa. 7, 56 A. 54 (1903). "If there was any evidence of negligence upon his part, it was certainly not sufficient to show what portion, if any, of the claim was lost through the negligence of Simpson." *Id.* at 11, 56 A. at 55.

69. *Id.*

70. Note, *The Permissible Conduct of a Partner in Carrying on the Firm Business*, 29 COLUM. L. REV. 66 (1929) (citing Knipe v. Livingston, 209 Pa. 49, 57 A. 1130 (1904); Hurter v. Larrabee, 224 Mass. 218, 112 N.E. 613 (1916)). The note also cites Staples v. Sprague, 75 Me. 458 (1883), but there the court found no negligence. "The evidence shows that the price of ice immediately went up, but the evidence fails to show that on the day of the sale of this ice, the market price was much, if any, above what was obtained for it." *Staples*, 75 Me. at 459.

71. "It is submitted that such cases are unsound. There is no logical reason for any distinction between a partner's liability for negligence in driving the firm automobile on partnership business, and his negligence in overvaluing the firm asset accounts, or making improvident contracts." Note, *supra* note 71, at 74.

The explanation that there is no necessity to hold a partner liable for ordinary negligence since he already has an incentive to be careful due to the fact that he shares in all the firm's losses[72] will not support the Crane-Bromberg-Ribstein thesis. The same incentive exists where a partner's negligence or fraud exposes the firm to suit by third parties and where the loss is caused by failure to act according to the partnership articles, but the cases there clearly hold the individual partner liable.[73]

Under principles of civil law, partners are not obliged to use the care of a prudent man in his own affairs. They are only obliged to use the care which they themselves possess, since it is that degree of care for which their partners have contracted.[74] If in fact a lower degree of care was the basis of the bargain, the point would be well taken as a matter of common law, but this issue is not addressed in the cases discussed in this article.

If the partners provide in the partnership agreement that they shall not be liable as among themselves to reimburse the partnership for loss due to their negligence, such a provision would not be contrary to public policy.[75] However, this should be a matter for their voluntary choice. Since existing law holds a partner to a standard of ordinary care, this rule should not be changed in a revision of the Uniform Partnership Act unless the present rule is shown to be unjust or unworkable in some way, which it has not. Also, since the provisions of the Uniform Partnership Act are default provisions which apply in the absence of a contrary agreement, they should reflect legitimate expectations of the parties. It is not likely that a partner, to the extent that he considers the question, would expect his co-partners to be held to a lower stan-

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72. "The difference between a partner and a paid agent is, of course, that the partner is subject to individual liability for partnership debts, so that legal liability is less necessary to encourage the agent to act carefully." A. BROMBERG & L. RIBSTEIN, *supra* note 14, at 6:86.

73. *See supra* notes 26-28 and accompanying text.

74. T. BEVEN, NEGLIGENCE IN LAW 1210 (3d ed. 1908).

75. Grider v. Boston Co. Inc., 773 S.W.2d 338 (Tex. App. 1989). *See* RESTATEMENT (SECOND) OF CONTRACTS § 195 (1981); *cf.* DEL. CODE ANN. tit. 8, § 102(b)(7) (Supp. 1988) (corporate certificate of incorporation may contain provision eliminating director liability for negligence, with certain exceptions).

dard of care than employees of the partnership. If anything, the contrary would be true. A partner would naturally expect a co-partner to indemnify the partnership for loss caused by that partner's negligence and gross error of judgment before he would expect the same of an employee.

CONCLUSION

Unless there is exculpatory language in the partnership agreement, a general partner is subject to a duty to use ordinary care in the transaction of partnership business and is entitled to the protection of the business judgment rule.