Indiana Law Journal

Volume 1 | Issue 2 Article 3

2-1926

The Family Automobile and the Family Purpose Doctrine

Walter E. Treanor
Indiana University School of Law

COMMENTS

THE FAMILY AUTOMOBILE AND THE FAMILY PURPOSE DOCTRINE

Is the recognition and acceptance of the so-called "family-purpose" doctrine merely an application to new facts of the recognized fundamental rules governing liability in the master-servant or principal-agent relation, or does it represent "an advanced proposition in the law of principal and agent" presenting "a case of such theoretical and attenuated agency, if any, as would be beyond the recognition of sound principles of law as they are ordinarily applied to that relation?"[1] The issue is sharply drawn. In *Jones v. Cook*[2] the majority opinion declared: "The doctrine of agency is not confined to merely commercial business transactions, but extends to cases where the father maintains an automobile for family use, with a general authority, expressed or implied, that it may be used for the comfort, convenience, pleasure and entertainment or outdoor recreation of members of the owner's family. This view was also applied in case of horse-drawn vehicles before the introduction of the automobile. It is not a new graft on the law of agency. It is merely applying old principles to new conditions." But this decision, in the opinion of the dissenting judge, "although sustained by an apparent weight of authority, contravenes fundamental principles of the laws of agency and master and servant and the rule respondeat superior." In *Arkin v. Page*,[3] the majority opinion gave expression to the following: "It seems rather a fantastic notion that a son, in using the family automobile to take a ride by himself for pure pleasure, is the agent of his father in furnishing amusement for himself, is really carrying on his father's business, and that his father, as principal, should be liable for result of the son's negligent manner of furnishing the entertainment to himself." But the two dissenting judges saw "nothing fantastic in these statements of the relation between the owner of an automobile furnished for general family use and a member of the family operating it in the authorized use nor in the decision of many courts to the same effect;" and they emphasized that "the relation is not based upon the purpose which the parent has in mind in buying the automobile but upon the authorized application to the family use."

Naturally this conflict of opinion which is evidenced by dissenting opinions within courts exists between courts. And not only is there sharp conflict on the general doctrine but there is considerable diver-

[1] *Van Blaricom v. Dodgson* (1917) 220 N. Y. 111, 115 N. E. 443, L. R. A. 1917F 363.

[2] (1912), 90 West Va., 710, 111 S. E. 828.

[3] (1919) 287 Ill. 420, 123 N. E. 30, 5 A. L. R. 216.

gence in results between courts that accept the doctrine. This seems to be due to a difference in interpretation of the phrase "father's business." In *Arkin v. Page, supra,* the accident occurred while the defendant's son was driving the automobile unaccompanied by any member of his family and while he was on his way to make arrangements to enroll in a school. In a later Illinois case, *Graham v. Page,*[4] the car was being driven by the daughter of the defendant for the purpose of taking a pair of her shoes to a shoe-repairing shop when the accident took place. The court said that the daughter was engaged in a "family errand" and was in effect acting for the father in the performance of this "family errand," and that the father was responsible for the manner in which his business,—*i. e.* the family errand, was carried on. The court insisted that the facts distinguished *Graham v. Page* from the earlier case of *Arkin v. Pake,* but, judging from comments, the court seems to be alone in finding any such difference as to justify the application of a different rule of liability.

Some courts have refused to apply the family-purpose doctrine when the driver is the only member of the defendant's family in the vehicle. This distinction has been made by the Court of Errors and Appeals of New Jersey. In *Doran v. Thomsen*[5] the facts disclosed that the defendant's daughter, whose negligent driving caused the accident, took his automobile out for her own pleasure and the pleasure of her three friends who accompanied her and that no other members of the father's family were in the car. The court refused to recognize defendant's liability under the family-purpose doctrine and the case was thought to have repudiated the doctrine. In the later case of *Missel v. Hays*[6] the evidence showed that members of the defendant's family, other than the driver, who was his son, were in the automobile at the time of the accident. In comparing and distinguishing the two cases the court said: "In the present case there exists a very important fact (the absence of which was commented upon in the opinion of Mr. Justice Voorhees speaking for this court in the Doran case), which is that the automobile at the time of the accident was occupied by the father's immediate family and their guests. This fact constituted affirmative evidence that the automobile was being used in the father's affairs or business. It was within the scope of the father's business to furnish his wife and daughter who were living with him as members of his immediate family, with outdoor recreation just the same as it was his business to furnish them with food and clothing, or to minister to their health in other ways." The court indicated that the father would not be liable if the facts should show that the son had taken the automobile out primarily for his own pleasure and convenience and had invited his mother and sister

[4] (1921) 300 Ill. 40, 132 N. E. 817.
[5] (1909 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335.
[6] (1914) 86 N. J. L. 348, 91 Atl. 322.

to go along as his guests. But in *Birch v. Abercombie*[7] the court, refusing to make this distinction, stated its view in the following language: "The fact that only one member of the family was in the vehicle at the time is in no sense a differentiating circumstance, abrogating the agency. It was within the general purpose of the ownership that any member of the family should use it, and the agency is present in the use of it by one, as well as by all. In this there is no similitude to a lending of a machine to another for such other's use and purposes, unconnected with the general purpose for which the machine was owned and kept." The same view is expressed in the dissenting opinion in *Arkin v. Page, supra,*: "There is no possible ground of difference concerning liability, whether there is one member of the family in the automobile or the whole family. If it is within the scope of a father's business to furnish members of his family with an automobile for family use, just the same as it is his business to furnish them with food and clothing, or to minister to their health in other ways, it was just as much the business of the plaintiff in error when his son drove the automobile for his convenience as if all the family had been riding in it. The only ground upon which it can be said that he was not liable for negligence in the operation of the automobile would be that it was none of his affair."

The courts that accept and apply the doctrine deny any purpose, or any need, of basing liability on the mere fact of ownership, and they do not question that tort liability cannot be predicated upon the fact of family relationship. On the other hand the courts that reject the doctrine do not question the possibility of a master-servant relation being created between the head of the family and a member in respect to the use of the family automobile. For example: "In other words we reject the so-called 'family-purpose' doctrine, as stated by some of the courts in its broadest sense, though we do not mean to hold that there may not be circumstances under which it would be a question of fact for the jury to determine, whether the person so operating the car was the agent of the head of the family, or was the agent of the particular member or members of the family for whose pleasure and benefit the car was then used."[8] However, the tendency to leave the question to the jury called forth the caustic comment that "some courts were inclined to get rid of the difficulty of resting liability on the one existing fact, ownership of the car, by declaring that the question of 'agency' was one for the jury, a process known in some quarters as 'passing the buck'."[9]

Although the automobile is purchased by the father for the general use of his family, nevertheless the father cannot be held for liability

[7] (1913) 74 Wash. 493, 133 Pac. 1020, 50 L. R. A. (N. S.) 59.

[8] *Norton v. Hall* (1921) 149 Ark. 428, 232 S. W. 934, 19 A. L. R. 384. To same effect, *Smith v. Jordan* 211 Mass. 269, 97 N. E. 761.

[9] *Watkins v. Clark* (1918) 105 Kans. 629, 176 Pac. 131.

where a member, against the father's command, has surreptitiously taken the car and negligently injured another.[10] This necessarily follows from the admittedly consensual character of the relation out of which the liability arises.

In most cases in which the family-purpose doctrine has been invoked the father has been sued for the negligence of a son or daughter, but, for the purposes of the rule, it would seem that any member of the family is the head who furnishes the automobile for the family use, with authority expressed or implied to the other members to use it as their customary conveyance, and the cases have so held in respect to the husband and wife. But in the Minnesota case of *Morken v. St. Pierre*[11] the court questioned whether the family-purpose doctrine should be extended to cases where the car is owned by a son of the family. The court was not required to decide the question, as the case went off on the point that the defendant was not shown to have knowingly permitted members to use his car for their own purposes.

If, in order to impose vicarious liability on the head of the family, it is necessary to find the conventional characteristics of the typical master-servant or principal-agent relation in the relation between the head of the family and the driver of the automobile, then the family-purpose doctrine does present a "case of theoretical and attenuated agency." But the principle of vicarious liability as a part of our legal system has not been confined in its operation to the modern master-servant or principal-agent relation nor limited to its present "attenuated" effects. The earliest rule of liability made a man absolutely liable for injuries caused to others by members of his family, by his servants, his animals or even by the inanimate things within his property limits. By a process of rationalization the law began to recognize excuses until under the test of Command or Assent the master's liability was greatly limited, and, under the doctrine of Particular Command, which appears in the cases during the sixteenth and seventeenth centuries, the tendency was to limit the master's liability to injuries caused by the very act commanded. "The doctrine would require, in effect, that the master should be liable, (unlawful errands apart) only when the deed in all its details had been expressly and specifically commanded."[12] Thus far the rationalizing process disregarded the interests of the one injured and failed to take note of any general social interest. Under Lord Holt a reaction,—a sort of counter-rationalization—set in, which avowedly recognized that questions of masters' liability could not be resolved by the single test of

[10] *Jensen v. Fischer* (1916) 134 Minn. 366, 159 N. W. 827. *Linville v. Nissen* (1913) 162 N. C. 95, 77 S. E. 1096.

[11] (1920) 147 Minn. 106, 179 N. W. 681.

[12] *Wigmore: Tortious Responsibility.* 3 Select Essays Anglo-American Legal History.

culpability of the master, and that the question properly involved considerations of the relation between masters' liability and the conduct of business generally. This "counter-rationalization" of Lord Holt, characterized by consideration of the interests of the injured party as well as of broader social interests, has continued to the present time. "The distinctions of today stand for an attempt (as yet more or less incomplete) at a rationalized adjustment of legal rules to considerations of fairness and social policy."[13]

It would seem that a judicial treatment of the problem of the vicarious liability of the head of the family for the tortious act of a member of the family while using the family automobile should aim "at a rationalized adjustment of legal rules to considerations of fairness and social policy." The rationalization of the rule of liability of the head of the family has not at present proceeded further, however, than that he is not liable for the tort of a member by reason of the family relationship *per se*. Neither has the rationalization of the rule of liability of the principal or master for the tortious acts of the agent or servant delimited with any great degree of certainty and accuracy the field within which vicarious liability will be imposed. In the recent case of *Nalli v. Peters*[14] the court said: "The liability for the acts of another is not dependent upon the strict relationship of master and servant, but upon relationship of similar nature, where one acts for another, at his request, express or implied, for his benefit, and under his direction." Between the case of strict master-servant relation and the "act within the scope of employment" on the one hand and the case of a tort committed by a member of a family under circumstances entirely disconnected with any family interest, on the other hand, there is a twilight zone in which are found the family-automobile cases and many cases involving a relationship "similar to" or "analogous to" cases of strict master-servant relation. Granting that in the average family- automobile case the facts of a strict agency do not exist, still it seems a very superficial conclusion to deny the presence of any facts of legal significance, except the two facts of ownership of the car and the family relationship. Surely the court was not the victim of a pure delusion when it declared: "It seems too plain for cavil that a father who furnishes a vehicle for the customary conveyance of the members of his family makes their conveyance by that vehicle his affair, that is, his business, and any one driving the vehicle for that purpose with his consent, express or implied, whether a member of the family or another, is his agent. In this there is no similitude to a lending of a machine to another for such other's use and purpose, unconnected with the general purpose for which the machine was owned and kept."[15] And, as far as the

[13] *Wigmore ibid.*

[14] Court of Appeals of N. Y., Oct. 27, 1925, reported in 149 N. E. 343.

[15] *Birch v. Abercrombie,* (1913) 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59.

public generally is concerned, it must be accepted as a fact "that the father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and streets, or he can forbid its use altogether."[16] And there is the further "fact of the parent furnishing an automobile for family use, with a general authority, expressed or implied, that it may be used for the pleasure, comfort and entertainment or outdoor recreation of members of the family."[17]

If the facts normally present in the family automobile cases create a relation between the head of the family and the driver of the automobile which can reasonably be called "representative"; and if, under the facts, it may be fairly said that "the son must be regarded as in the father's employment, discharging the duty usually performed by a slave, and, therefore must, for the purposes of this suit, be regarded as his father's servant;"[18] or if it can be reasonably said that there is a "relationship of similar nature (*i. e.* to master-servant relation) where the driver acts for the owner on his request, express or implied, for his benefit, and under his direction," then it would seem that the courts, in applying the family-purpose doctrine are well within the spirit of the historical development of the doctrine of respondeat superior. It is true that the courts have emphasized the social and economic effects of a failure to impose liability on the owner of the automobile, and this has led to the charge that they are arbitrarily declaring a master-servant relation in order to secure or avoid certain social and economic results. But a fairer appraisal of the situation would seem to be that the courts first find (to their own satisfaction, at least,) the existence of a representative relation, sufficiently characterized by the familiar features of the typical master-servant relation, as to call for the application of the doctrine of respondeat superior. They then do what the courts from the time of Lord Holt have done,—set over against the hardship visited upon the personally innocent "superior" the plight of the equally innocent person who has suffered and then cast into the balance considerations of a more or less general social and economic nature.

The family-purpose doctrine was before the Indiana Appellate court in the case of *Smith v. Weaver*.[19] In this case the plaintiff had been injured by the alleged negligent driving of an automobile, driven by the husband of the owner. The wife had purchased the car for the use of the family and the accident had occurred while the husband was

[16] *King v. Smith* 140 Tenn. 225, 204 S. W. 296, L. R. A. 1918F 293.

[17] Dissenting opinion in *Arkin v. Page, supra* note 3.

[18] *Lashbrook v. Patten*, (1864) 1 Div. (Ky.) 317. In this case the vehicle was a carriage drawn by a team of horses. Naturally the Kentucky Court considered the family-purpose doctrine already a part of Kentucky law when the question was presented in a family-automobile case. *Stowe v. Morris* (1912) 147 Ky. 388, 144 S. W. 52, 39 L. R. A. (N. S.) 224.

[19] (1919) 73 Ind. App. 350 124 N. E. 503.

driving the car alone and for a special purpose of his own. The instructions given by the lower court adopted the family-purpose doctrine in full. There was a verdict for the plaintiff and on appeal the case was reversed with instructions for a new trial, the court remarking: "The case was tried on a wrong theory. The evidence wholly fails to sustain the verdict." On the facts of the case it is not necessarily authority for the rejection in toto of the family purpose doctrine, for it is possible that a future decision may make the distinction which has been made by the New Jersey Court of Errors and Appeals.[20] At least it is to be hoped that some later decision will give the question the thorough consideration which its importance deserves.

WALTER E. TREANOR.

Indiana University School of Law.

[20] See Notes 5 and 6 *supra*.