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RECENT CASE COMMENTS

AGENCY — FAMILY PURPOSE DOCTRINE — LIABILITY OF WIFE FOR HUSBAND'S NEGLIGENT OPERATION OF AUTOMOBILE. — Plaintiff sued *W* for personal injuries sustained from negligent operation by *H* of a family automobile owned by *W* but maintained by *H*. *Held*, that *W*, although having no independent income, is liable under the family purpose doctrine. *Wyant v. Phillips*.[1]

Since the case of *Jones v. Cook*,[2] West Virginia has firmly adhered to the family purpose doctrine.[3] Although ostensibly based on the agency principle of *respondeat superior* the true explanation of the rule is the underlying policy of the court to impose liability upon a financially responsible person.[4] Prior to the principal case the local decisions, although extending the doctrine to various family relationships, are justifiable under this policy. Our cases have held the father liable under this doctrine for the negligent operation of the family automobile by (1) a minor son,[5] (2) an adult son,[6] (3) a step-daughter.[7] Here, however, in permitting recovery from the wife, who has no independent income, the court apparently ignores this reason.[8]

Not all jurisdictions have gone as far as West Virginia in the application of this doctrine.[9] The Tennessee and Kentucky courts, for example, although adhering to the doctrine, have denied its application to similar facts.[10] A number of states, however,

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[1] 179 S. E. 303 (W. Va. 1935).

[2] 90 W. Va. 710, 111 S. E. 828 (1922).

[3] Ambrose v. Young, 100 W. Va. 425, 130 S. E. 810 (1925); Aggleson v. Kendall, 92 W. Va. 138, 114 S. E. 454 (1922); Watson v. Burley, 105 W. Va. 416, 143 S. E. 95 (1928); Thalmon v. Schultze, 111 W. Va. 64, 106 S. E. 303 (1931). See Note (1922) 29 W. VA. L. Q. 53.

[4] The case of Jones v. Cook, *supra*, says: "This doctrine puts the financial responsibility of the owner behind the automobile while it is being used by a member of the family who is likely to be financially irresponsible."

[5] Jones v. Cook, *supra* n. 2.

[6] Ambrose v. Young, *supra* n. 3.

[7] Watson v. Burley, *supra* n. 3. Under strict rules of agency, the principal who is held liable for the negligence of the agent has an action against the agent. It would seem further objectionable in this case to allow a recovery against the wife since our court follows the rule that one spouse cannot sue another in tort, therefore leaving the wife without an action. See Poling v. Poling, 179 S. E. 609 (W. Va. 1934).

[8] It is possible of course that the wife was financially responsible at least to the extent of the value of the car or that she carried insurance thereon.

[9] Smith v. Weaver, 73 Ind. App. 350, 124 N. E. 503 (1920); Surdock v. Pittman, 165 Tenn. 17, 52 S. E. 155 (1931); Cowe v. Schmicki, 152 Minn. 126, 233 N. W. 805 (1930).

[10] In Surdock v. Pittman, *supra* n. 9, the court says: "A wife owning an automobile given her by her husband is not liable under the family purpose doctrine for the negligent operation of the car by her husband, who was the

wherein this doctrine is applied, are in accord with the principal case.[11]

It is believed that the instant case represents a tendency toward absolute liability predicated upon ownership alone for the negligent operation of the automobile by a third person. A few states have by statute practically achieved this result.[12]

CRIMINAL LAW — INDICTMENT AS ACCESSORY BEFORE THE FACT HELD SUFFICIENT TO SUSTAIN CONVICTION AS PRINCIPAL. — Defendant, indicted as an accessory before the fact to murder, was convicted of voluntary manslaughter. From an order of the trial court discharging defendant on a writ of habeas corpus, the sheriff brought error. *Held*, that an indictment for accessory before the fact to murder will sustain a conviction of voluntary manslaughter. Judgment reversed. *Moore v. Lowe, Sheriff.*[1]

The principal case purports to apply by analogy the rule of *State v. Prater*[2] to the effect that a verdict of manslaughter under a murder indictment, where the evidence is compatible only with murder or innocence, will not be reversed. The thought is that the accused should not be permitted to complain of the propensity of the compassionate jury to convict of a lesser offense than the evidence warrants.[3] As a matter or practical administration of criminal law, the doctrine is not without merit. It involves, how-

head of the family, supporting his wife and himself, and who maintained the car and who at the time of the accident was using it in his own business.'' In an earlier decision, however, this same court had applied the family car doctrine where a minor son was driving the family car. See King v. Smythe, 140 Tenn. 217, 204 S. E. 296 (1918).

[11] Steele v. Ages' Adm'x, 233 Ky. 714, 26 S. E. 653 (1930); Venghis v. Nathanson, 101 N. J. L. 110, 127 Atl. 175 (1925).

[12] CAL. CIV. CODE § 1741½ provides: ''Every owner of a motor vehicle shall be liable and responsible for the death of or injury to persons or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.'' In the case of O'Neil v. Williams, 127 Cal. App. 385, 15 Pac. (2d) 879 (1932), this statute was applied and the wife held liable on facts similar to those of the principal case. For similar statutes see Codes of Michigan, Connecticut and New York. CONN. GEN. STAT. § 1572; New York, CAHILL'S CONSOL. LAWS (1930) c. 69A, § 59; MICH. COMP. LAWS (1915) § 4125.

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[1] 180 S. E. 1 (W. Va. 1935).

[2] 52 W. Va. 132, 143, 43 S. E. 230 (1930).

[3] A defendant cannot be heard to complain of an error in his favor. State v. Johnson, 111 W. Va. 653, 164 S. E. 31 (1932); State v. Prater, *supra* n. 2.