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## The Answer in Equity as Evidence in West Virginia

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claims against estates of decedents which the writer has seen defeated by this rule of evidence. If a change from the previous practice is advisable, it is believed that it would have been more expedient to seek a legislative change in the rules of evidence than to undertake to avoid the effect of the statute by introducing complications into the rules of pleading.

—L. C.

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PARENT'S LIABILITY FOR CHILD'S NEGLIGENCE IN OPERATING FAMILY AUTOMOBILE.—The question whether the owner of an automobile bought for, and used by, his family with his permission should be held liable for the negligence of his child while driving the car solely for his own pleasure, has been answered recently for West Virginia in the case of *Jones v. Cook*.<sup>1</sup> In that case the minor stepdaughter of the owner of a pleasure vehicle was, with his permission, driving it home from a football game with some of her friends and on her way negligently injured the plaintiff. The court below directed a verdict for the defendant which the Supreme Court reversed. The grounds of the decision were two: first, that the facts of ownership by the defendant and possession by the stepdaughter raised a presumption that she was in his service and acting on his account; second, that regardless of the presumption, the facts were sufficient to make defendant liable under the rule *respondet superior*.

In spite of the frequency with which this question has come before the courts and the consideration given to its solution, the direct conflict between two lines of decisions shows no signs of abating.<sup>2</sup> While all agree that a parent is not liable for the wrongful acts of his child unless he induced or approved the acts or unless the relation of master and servant existed between them,<sup>3</sup> one class of cases<sup>4</sup> denies that the mere use of the family car by a child for his own pleasure creates any such relation, and consequently refuses to impose liability on the owner. On the other

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<sup>1</sup> 111 S. E. 828 (W. Va. 1922).

<sup>2</sup> "The Doctrine of the Family Automobile," by Edward W. Hope, 8 Am. Bar Ass'n Jour. 359.

<sup>3</sup> *Denison v. McNorton*, 228 Fed. 401, 142 C. C. A. 631 (1916); *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761 (1912); *Blair v. Broadwater*, 121 Va. 301, 93 S. E. 632, L. R. A. 1918A, 1011 (1917). If the father entrusts his car to a very young or incompetent son, he would be held, of course, because of his own negligence. *Meers v. McDowell*, 110 Ky. 926, 62 S. W. 1013 (1901).

<sup>4</sup> *Arkin v. Page*, 287 Ill. 420, 123 N. E. 30 (1919); *Watkin v. Clark*, 103 Kans. 629, 176 Pac. 131 (1918); *Farnum v. Clifford*, 118 Me. 145, 106 Atl. 344 (1919); *Weiner v. Mairs*, 234 Mass. 156, 125 N. E. 149 (1919); *Loehr v. Abell*, 174 Mich. 590, 140 N. W. 926 (1913); *Hays v. Hogan*, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918C, 715 (1917); *Doran v. Thomsen*, 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335 (1908); *Van Blaricom v. Dodgson*, 220 N. Y. 111, 115 N. E. 443, L. R. A. 1915F, 363 (1917); *Blair v. Broadwater*, *supra* n. 3.

hand, many cases,<sup>5</sup> perhaps a majority,<sup>6</sup> say with the principal case that such relation does exist on the ground that in purchasing an automobile to be used by the family for their pleasure the father has entered upon the business of furnishing pleasure for the family, and the child, even in carrying out its own designs in pleasure seeking, is acting as the father's agent or servant and conducting the father's business thereby.

That this latter view is an extension of the doctrine *respondet superior*—"a new and anomalous slant applied by the courts to the principles of agency,"<sup>7</sup> can scarcely be denied. In basing the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle, and the permissive use by the child, the courts "ignore an essential element in the creation of that status as to third persons—that such a use must be in furtherance of and not apart from the master's service and control—and fail to distinguish between a mere permission to use and a use subject to the control of the master and connected with his affairs."<sup>8</sup> "The relation of master and servant exists only between persons of whom the one has the order and control of the work done by the other."<sup>9</sup> Thus, an independent contractor acts for another, but is distinguished from an agent or servant, in that he owes no duty of obedience to his employer as to the details of his work.<sup>10</sup> And similarly, in the so-called "lent servant" cases, the servant is the agent of the party who has control over the details and management of his work.<sup>11</sup> In the principal case, the stepdaughter was using the car purely for her own pleasure, having borrowed it for such purpose, and was under no duty as to how, where or whom she should drive, and was on no errand for the defendant. Hence it would seem that she was a bailee and not a servant, just as a stranger who had borrowed or hired the car would be a bailee.

That the owner of a motor vehicle who permits his chauffeur to use the car upon the personal business of the latter is not liable

<sup>5</sup> *Chafin v. Russell*, 144 Ga. 275, 87 S. E. 10, L. R. A. 1916F, 216 (1915); *Baldwin v. Parsons*, 186 N. W. 665 (Ia. 1922); *Miller v. Weck*, 186 Ky. 552, 217 S. W. 904 (1920); *Kayser v. Van Nest*, 125 Minn. 277, 146 N. W. 1091, 51 L. R. A. (N. S.) 970 (1914); *Lewis v. Steele*, 52 Mont. 300, 157 Pac. 575 (1916); *Boes v. Howell*, 24 N. Mex. 142, 173 Pac. 966, L. R. A. 1918F, 238 (1918); *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487 (1914); *King v. Smythe*, 104 Tenn. 217, 204 S. W. 296, L. R. A. 1918F, 293 (1918); *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59 (1913).

<sup>6</sup> The numerical weight of authority is probably with this view. See 36 HARV. L. REV. 434; *Denison v. McNorton*, *supra*, n. 3.

<sup>7</sup> *Hiscock, C. J.*, in *Van Blaricom v. Dodgson*, *supra*, n. 4.

<sup>8</sup> *Doran v. Thomsen*, *supra*, n. 4.

<sup>9</sup> See POLLOCK, LAW OF TORTS, 10th ed., p. 84.

<sup>10</sup> See SALMOND, LAW OF TORTS, 4th ed., (1916), § 28.

<sup>11</sup> *Ibid.*

for the negligence of such chauffeur, is the view supported by the overwhelming weight of authority,<sup>12</sup> and it is equally well settled that the owner is not liable for negligence in the operation of the machine when it is loaned to another and is used for the personal business of the borrower.<sup>13</sup> The reasons given are that in such cases the driver is not under the control of the owner, and, in the case of the chauffeur, that he is not acting within the scope of his master's business.<sup>14</sup> This first reason would seem to apply equally well to the stepdaughter in the principal case. That her father "owned the machine and had the right to say where, how and by whom it might be used," as the West Virginia court argues<sup>15</sup> would be as true in the former cases as in the latter.

The courts which follow this family purpose doctrine do not limit its application to minor children. Negligence of a wife in operating the family car for her own pleasure imposes liability on the husband on the same theory,<sup>16</sup> while a twenty-two year old son, living at home and borrowing the car solely for his own purposes is likewise a servant or agent of the owner if the car was bought for the convenience and pleasure of the family.<sup>17</sup> It is evident therefore that the element of control, which heretofore has been regarded to the existence of the master-servant relation has been lost sight of by these courts.

The fact that this new doctrine was never recognized until the advent of the automobile, or in the case of any other instrumentality, raises a further doubt as to its soundness. If the son is his father's agent to amuse himself with an automobile, is he any less an agent for his own amusement with bicycles, horses, guns, golf clubs, bats and boats, if these should happen to be provided for the pleasure and recreation of the family, and if, "in carrying on his father's business by the use of any of these articles, as his father's agent, to amuse his father's son, he should negligently injure anyone?"<sup>18</sup> Yet, the courts have uniformly refused to impose a liability in such cases.<sup>19</sup>

In rejecting this family purpose doctrine, the Court of Appeals of New York said:<sup>20</sup> "It seems to us that the present theory is

<sup>12</sup> *Mogle v. A. W. Scott Co.*, 144 Minn. 173, 174 N. W. 832 (1919); *Cunningham v. Castle*, 127 App. Div. 580, 111 N. Y. Sup. 1057 (1908).

<sup>13</sup> *Arkin v. Page*, *supra*, n. 4; *Doran v. Thomsen*, *supra*, n. 4.

<sup>14</sup> *Scheel v. Shaw*, 255 Pa. 451, 97 Atl. 685 (1916); *Gewanski v. Ellsworth*, 166 Wis. 250, 164 N. W. 998 (1917).

<sup>15</sup> *Jones v. Cook*, *supra*, n. 1 at p. 830.

<sup>16</sup> *Hutchins v. Haffner*, 63 Colo. 365, 167 Pac. 966, L. R. A. 1918A, 1008 (1917).

<sup>17</sup> *Linch v. Dobson*, 188 N. W. 227 (Neb. 1922).

<sup>18</sup> *Dunn, J. in Arkin v. Page*, *supra*, n. 4 at p. 32.

<sup>19</sup> *Brohl v. Lingeman*, 41 Mich. 711, 3 N. W. 189 (1879); *Maddox v. Brown*, 71 Me. 432, 36 Am. Rep. 336 (1880).

<sup>20</sup> *Van Blaricom v. Dodgson*, *supra*, n. 4, at p. 445.

largely due to the thought that because an automobile may be more dangerous when carelessly used than any of the other articles mentioned, there ought to be a larger liability upon the part of the owner, and to this end an extension of the doctrine of principal and agent in order properly to safeguard its use . . . . . It seems to disclose the idea, as an essential part of the argument, that, because an automobile is different than a horse or boat, some advanced rules ought to be applied to its use. But the rules of principal and agent are not thus to be formulated. They are believed to be constant, and not variable in response to the supposed exigencies of some particular situation. The question whether one person is the agent of another in respect to some transaction is to be determined by the fact that he represents and is acting for him, rather than by the consideration that it will be inconvenient or unjust if he is not held to be his agent."

In throwing the loss upon the owner, the courts have been influenced undoubtedly by the dangerous character of the automobile and by the social necessity of providing an adequate remedy for those injured by negligent drivers who are only too often financially irresponsible. Yet, they have agreed with practical unanimity that the automobile is not a dangerous instrumentality which the owner must at his peril, keep from doing harm,<sup>21</sup> and financial irresponsibility of an agent is not the basis of *respondeat superior*, for, if it were, it would also be its measure. It is difficult to escape the conclusion that decisions such as that in the principal case, do, in the language of President Poffenbarger in his vigorous dissenting opinion, "contravene fundamental principles of the laws of agency and master and servant and the rule *respondeat superior*,"<sup>22</sup> and that if liability is to be imposed in such cases, a different and better ground for so doing should be found.

Indications are not wanting that the courts asserting this doctrine are not entirely satisfied with it and would justify their course on the broad ground of public policy.<sup>23</sup> If the automobile

<sup>21</sup> *Danforth v. Fisher* 75 N. H. 111, 71 Atl. 535 (1908); *Boes v. Howell*, *supra*, n. 5; See also 30 YALE L. J. 413; 25 W. VA. L. QUAR. 154. *Contra*, *Southern Cotton Co. v. Anderson*, 86 So. 629 (Fla. 1920).

<sup>22</sup> *Jones v. Cook*, *supra*, n. 1 at p. 831.

<sup>23</sup> In the case of *King v. Smythe*, *supra*, n. 5, quoted with approval in the principal case, the Tennessee Court said: "We think the practical administration of justice between the parties is more the duty of the court than the preservation of some esoteric theory concerning the law of principal and agent." And in *Graham v. Page*, 132 N. E. 817 (Ill. 1921), the court said: "We agree with the Supreme Court of Tennessee that where a father provides his family with an automobile for their pleasure, comfort and entertainment, the dictates of natural justice requires that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be obtained." In the principal case also, at page 830, we find the following: "There are practical

is not a dangerous instrumentality,<sup>24</sup>—if the parental relationship alone is not sufficient to throw the loss on the owner,<sup>25</sup> and if the family purpose doctrine results in an unwarranted warping of the doctrine *respondeat superior*, then no other ground than policy would seem to be available to courts that wish to impose such a liability. But if the whole question is one of conflicting considerations of policy alone,<sup>26</sup> as it appears to be, then its solution is properly within the province of the legislatures, and not the courts, and should not be arrived at by distorting the principles of agency and torts to fit the case.<sup>27</sup>

—E. C. D.

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considerations involved to which courts cannot close their eyes. This doctrine puts the financial responsibility of the owner behind the automobile while it is being used by a member of his family (who is likely to be financially irresponsible) in furtherance of the business and purposes for which it is maintained."

<sup>24</sup> See n. 21, *supra*.

<sup>25</sup> See cases in n. 3, *supra*.

<sup>26</sup> See 25 W. VA. L. QUAR. 154; 36 HARV. L. REV. 102.

<sup>27</sup> See 23 HARV. L. REV. 91. This course has been followed in Michigan. Sec. 29 of Acts 302, Public Acts 1915, (§4825, Comp. Laws 1915). That such a law is constitutional, see *Stapleton v. Independent Brewing Co.*, 198 Mich. 170, 164 N. W. 520, L. R. A. 1918A, 916 (1917).