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Automobiles: Agency: Husband and Wife

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NOTES AND COMMENT

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The defendant permitted his wife to take his car and drive to Madison from Monroe for the purpose of getting her mother and bringing her to the Zastrow home in Monroe. He had bought the car before their marriage. On the way back to Madison there was a collision between the car of the defendant and that of the plaintiff. The jury found facts upon which the plaintiff was entitled to recover, if Mrs. Zastrow was the agent of the defendant husband, in driving the car. The question of agency was for the court to decide, and the trial court found for the plaintiff, saying that Mrs. Zastrow was an agent. Defendant appealed. Held: Mrs. Zastrow was not the agent of the defendant in driving the car, for which reason the judgment must be reversed, cause remanded, with instructions to dismiss the complaint. *Novak* v. *Zastrow, (Wis.)* 228 N.W. 473.

The question of whether Mrs. Zastrow was the agent of her husband, the defendant, was left for the court to decide. The trial court first decided that Mrs. Zastrow was not the agent of her husband, but after its attention was called by counsel to *Enea* v. *Pfister,* 180 Wis., 329, it made a finding that, "at the time of the collision Mrs. Zastrow was driving the car, owned by the defendant, as his agent and in the scope of his business and within the scope of her authority," and then entered judgment in *favor of the plaintiff. Enea* v. *Pfister* was a case, though, that called for the doing of justice. There a five year old girl was run down through negligence on the part of a truck driver. The plaintiff then sought to hold the owner of the truck liable for the injuries inflicted while the truck was driven by another, and it was held that proof of the ownership of the car makes out a prima facie case, on the theory that this fact justifies an inference or raises a presumption that he who was driving the car was the agent or servant of the owner and that he was driving it in the pursuit of the owner's business and within the scope of his employment; and the evidence in this case was not sufficient to overcome the probative force of the inference. But this rule loses its probative force where the evidence is undisputed concerning the purposes for which the car was being used at the time of the accident.

The ordinary rules as to actual, apparent, or *ostensible agency must be applied. 13 R.C.L. 1178.* The mother was desirous of the visit, yet no legal duty of seeing to her transportation could be implied in any way. There was no duty on the defendant's part to see to this, so it cannot be said that upon the trip the wife was prosecuting the hus-

band's business. There was absolutely no evidence of any request or direction given to or by the defendant. It was a mere courtesy extended by the defendant and his wife to the wife's mother. In driving the car the defendant's wife was simply performing a service for her mother. The wife did some shopping in Madison, and granting that she had authority, if needed, to pledge her husband's credit, yet that does not mean that in doing her own shopping she was acting as defendant's agent.

Justice Crownhart in dissenting said, "The wife, authorized by her husband, took his car to transport his mother-in-law to his home, to be the family guest. I contend that this was the husband's business and so recognized by him." Such is perhaps a disappearing view in the face of all of the new laws of the last decade or so that deal with the freedom and emancipation of womankind. He further says, "The marriage relation has not yet degenerated into a mere business compact." Quite true, so then why should the honorable Justice try to make out that the wife was about her husband's business? Is getting and driving her own mother her husband's 'business'? If so, then we may say that the terms "wife" and "agent" are synonymous and interchangeable.

The general and rather uniform rule in the United States is that the relationship of son, daughter, or wife to the owner of the car does not make for agency when they drive the car. That is, unless the evidence directly shows that unless the driver is about the business of the car owner, no liability exists, through agency, because of accidents of the driver. (*195.2 Automobiles,* Third Decennial Digest.) It seems that something more than permission or a request to use the car is needed before making the owner liable for the acts of the driver. *Mast* v. *Hirsch,* 199 Mo., App. 1, is directly in point. It held that a husband's mere permission that his wife may use his automobile for pleasure for herself and relatives, without his direction or request that she so use it, does not make her his agent so as to render him liable for her negligence resulting in injury to a third person. Also if the wife takes the automobile out on her own business or pleasure, the husband, though consenting, is not liable for the driver's negligence. There are very few cases that seem to hold the other way; 52 Montana 300; 181 North Carolina 214; 41 North Dakota 260. These few cases, however, rely upon the doctrine of *respondeat superior,* but even in these few cases it seems that the evidence tends to show some agency coupled with a need of doing justice, especially where the driver is almost judgment proof.

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