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Article 8

Master and Servant: Family purpose doctrine in connection with family automobile

E. E. J.

the packer of the common law duty to the public that the meat is fit and wholesome and the liability is not shifted to the government.[18]

M. T. L.

Master and Servant: Family purpose doctrine in connection with family automobile.—In the recent case of *Payne v. Leininger* (Minn. 1924) N. W. 435 the defendant owned a family automobile. His son was of age but a member of the household and, with the father's permission, took the car for a trip to South Dakota with a young woman with whom he was keeping company and her mother. The automobile overturned and the young woman was killed and her mother severely injured. There was testimony that the purpose of the son and young woman in going to South Dakota was to be married there. Plaintiff requested the trial court to charge that if such were the facts the automobile was in use for a "family purpose." The trial court left the question to the jury and there was a verdict for defendant. On appeal, the Supreme Court held that the trial court did not err in refusing plaintiff's instruction.

In this class of cases there are two possible theories on which to hold the owner liable. First, that of master and servant, and second, negligence of the owner in intrusting his automobile to an incompetent person.

In order to hold the owner liable upon the latter theory, aside from the master and servant relation, it is essential that he might reasonably have anticipated the injury as a consequence of permitting the incompetent person to employ the instrument which produced the injury and further that the owner's negligence made the injury possible.[1] Thus, if a father places his car in charge of a child of tender years he is liable for the resulting injuries. This rule is not based upon the theory of imputed negligence but upon his own negligence in intrusting his automobile to the child.[2]

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the anticipated refreshing drink. He was in the frame of mind to approve the poet's words:

"The best laid schemes o' mice an' men
Gang oft aglay
An' lea'e us nought but grief an' pain,
For promis'd joy!"

Held, when a manufacturer makes, bottles and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious." In this case it was further held that the bottler owes this duty to the general public for whom his drinks are intended as well as to the retailer to whom he sells.

[18] *Catani v. Swift Co.,* 521 Pa. 52; 95 Atl. 391. (1915). The defendant sold pork which contained trichinæ of which the plaintiff ate and became sick. *Held,* that although the government inspector had passed on this meat the packer still owed the duty to the public to sell only wholesome and fit meat.

[1] *Allen v. Bland,* Tex. Civ. App. (1914) 168 S. W. 35.

[2] *Ferris v. Sterling,* 214 N. Y. 249, 108 N. E. 406.

Turning now to the former: namely, that of master and servant relationship, it is well settled at common law that the parent is not liable for the torts of even his minor child.[3] Neither is the mere relationship of parent and child sufficient in itself to create the relation of master and servant.[4] It has been repeatedly held that an automobile is not in itself an inherently dangerous instrumentality so that its mere use will render the owner liable for accidents caused by one handling it, although at the time the driver is not acting for the owner.[5] The "family purpose" doctrine as to the use of an automobile and the liability of the owner is not adopted in Wisconsin and is specifically rejected in the leading case of *Crossett v. Goelzer, supra.* From these propositions it is evident that, in Wisconsin, to render the father liable for damages inflicted by the negligent operation of his automobile by his competent minor son such liability must be predicated upon the same fundamental principles of master and servant which would govern in the case of the use of any other instrumentality owned by the father and used or operated by the son and no presumption of liability results solely from the domestic relationship.[6] While the "family purpose" doctrine is not accepted in Wisconsin, yet it has been held that where it is proved that the father is the owner of the instrumentality causing the injury and that his competent minor son was negligent, there is a *prima facie* case and the presumption is that the son was acting in the father's behalf and upon the father's direction.[7] However, this is a

Meers v. McDowell, 110 Ky. 926, 62 S. W. 1013.

[3] *Chastain v. Johns,* 120 Ga. 977, 48 S. E. 343.

[4] *Blair v. Broadwater,* 121 Va. 301, 93 S. E. 632.

Smith v. Jordan, 211 Mass. 269, 97 N. E. 761.

[5] *Crossett v. Goelzer,* 177 Wis. 455, 188 N. W. 627.

Danforth v. Fisher, 75 N. H. 111, 71 Atl. 535.

But see: *Hays v. Hogan,* 273 Mo. 1, 165 S. W. 1125, L. R. A. 1918 C. 715.

[6] In the case of *Kumba v. Gilham,* 103 Wis. 312, 79 N. W. 325 the court said, "The law is well settled that no general liability of the father for torts of a minor son exists. Such a liability in general results only from the rule of respondent superior when the fact of agency for the father is proved. In the Wisconsin case of *Hiroux v. Baum,* 137 Wis. 197, 118 N. W. 533, where the father purchased an automobile on solicitation of his minor son and is was understood between the father and son that the son should learn to operate the car while the son was operating it under the direction of the man from whom the car was purchased the injury occurred and it was held that it was a question for the jury whether or not the son was acting for the father.

Hopkins v. Droppers, 184 Wis. 400, 198 N. W. 738.

[7] "Where the plaintiff has suffered injury from the negligent management of a vehicle, such as a boat, car or carriage, it is sufficient *prima facie* evidence that the negligence was imputable to the defendant, to show that he was the owner of the thing, without proving affirmatively that the person in charge was the defendant's servant. It lies with the defendant to show that the person in charge was not his servant, leaving him to show, if he can, that the property was not under his control at the time." *Shearman & Redfield,* Law of Negligence (6th Ed.) Sect. 158. The case of *Schaefer v. Osterbrink,* 67 Wis. 495, 30 N. W. 922, holds that this is a mere presumption and the courts in Wisconsin apparently refuse to extend this doctrine.

mere presumption and may be rebutted by the father showing that no such relation existed in fact. As to competent adult children who are living as members of the family the liability of the parent can be based only upon the relation of master and servant.[8] Also, the owner is liable for the negligence of his chauffeur only while he is acting within the apparent scope of his authority.[9]

It is evident from the principal case and the authorities cited, that Minnesota has fully accepted the "family purpose" doctrine. However, this state does not stand alone upon this proposition.[10] One of the leading cases in support of this doctrine is the Tennessee case of *King v. Smythe, supra.* Says the court, "If an instrumentality of this kind (automobile) is placed in the hands of his family by a father, for the family's pleasure, comfort and entertainment, the dictates of natural justice should require that the owner should be responsible for its negligent operation. . . . A judgment for damages against an infant daughter or infant son, or a son without support or property, who is living as a member of the family, would be an empty form."

The courts which adopt the "family purpose" doctrine place it upon the theory that the father had made it part of his business to furnish entertainment for the members of his family and that therefore, when he permitted one of them to use the car, even for the latter's personal and sole pleasure, the father is liable as principal because the child was really carrying out the business of the father.[11] Those jurisdictions which reject the doctrine hold "that it is" 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 the result of the son's negligent manner of furnishing the entertainment to himself."[12]

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[8] *Drakenberg v. Knight,* 178 Wis. 386. *Smith v. Burns,* 142 Pac. 352 (Ore.) *Mooney v. Canier,* 197 N. W. 625 (Iowa) 1924.

[9] In the case of *Parker v. Barber,* 177 Wis. 588, where a chauffeur was charged with the duty of keeping his employer's automobile in repair, had discovered and fixed a leaky pump, and in order to test the pump to see whether or not it still leaked, and also to make a call on a friend, started on a trip, a distance of fifteen miles, and an accident occurred during such trip, it was held to be a jury question as to whether the chauffeur was acting within the scope of his employment at the time of the accident. *Youngquist v. L. J. Droese Co.,* 167 Wis. 458. See also *Jones v. Hage,* 47 Wash. 663, 92 Pac. 433.

[10] *McNeal v. McKain,* 33 Okla. 449, 126 Pac. 742, 41 L. R. A. (N. S.) 775.
Stowe v. Morris, 147 Ky. 386, 144 S. W. 52, 39 L. R. A. (N. S.) 224.
Gurgnon v. Campbell, 141 Pac. 1031 (Wash.).
King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918 F. 293.
Jones v. Cook, (1922) 111 S. E. 828 (W. Va.).
Benton v. Regeser, 179 Pac. 966 (Ariz.).
Griffin v. Russell, (1915) 144 Ga. 275, 87 S. E. 10, L. R. A. 1916 F. 216.
Collison v. Cutter, (1919) 170 N. W. 421 (Iowa).
Lewis v. Steele, 52 Mont. 300, 157 Pac. 575.

[11] *Lashbrook v. Patten,* (1864) 1 Dur. (Ky.) 316.

[12] *Arkin v. Page,* 287 Ill. 420, 123 N. E. 30, 5 A. L. R. 216 (1919).

While this doctrine may be legally sound yet those jurisdictions which reject it[13] do so, apparently, refusing to apply any advanced or hypothetical reasoning to the fundamental principles of agency, or to extend those rules applicable to master and servant. The courts of New York, Wisconsin and other jurisdictions hold that it is within the province of the legislature to distinguish the liability of the automobile owner from that of the owner of any other instrumentality not inherently dangerous,[14] and, such being the case, it is not within the purview of the courts to fix the liability of the owner by distorting the fundamental principles of master and servant.

E. E. J.

Navigable Waters: United States may enjoin withdrawal of water from Lake Michigan in excess of that authorized by Secretary of War.—*Sanitary District of Chicago v. United States,* 45 Supreme Court Reporter 177.—It has long been a boast of Chicago that it has reversed the current of the Chicago River and has made it flow out of the lake instead of into it. As a mere engineering feat, this cannot, however, be considered as a notable achievement. Not only is the watershed between Lake Michigan and the tributaries of the Mississippi River very close to the lake but it is also very low and, hence, presents no outstanding physical difficulties. It was, therefore, a comparatively simple matter to reverse the river.

The object of Chicago, or technically speaking the Sanitary District, in reversing the river, of course, was an extremely practical one. Chicago naturally produces an enormous amount of sewage which must be disposed of. Since throwing this refuse into the lake would tend to poison the water supply of the city, and since erecting modern sewage disposal plants is quite expensive, what could be simpler than to make the lake run through the city via the Chicago River and connect the Chicago River through the Des Plaines River with the Illinois River and thus empty the sewage of the city into the Mississippi River some distance above St. Louis? That the smaller cities of Illinois situated along the Illinois River would be unpleasantly affected was true, but such a small consideration could not be taken into account when thrown into the balance against the much greater convenience which Chicago thereby achieved for itself. That the sanitary condition of large cities on the Mississippi River, such as St. Louis, would not be improved by emptying such an enormous open sewer into the Father of Waters was hardly even to be regretted from a Chicago viewpoint and certainly was no reason whatsoever for changing the situation. Besides, the canal

[13] *Watkins v. Clark,* (1918) 103 Kan. 629, 176 Pac. 131, L. R. A. 1917 F. 363.
Van Blaricom v. Dodgson, 220 N. Y. 111, 115 N. E. 443.
Pratt v. Ceautier, 110 Atl. 353 (Me.) 1920.
Bright v. Thacher, (1919) 202 Mo. App. 301, 215 S. W. 788.
Elms v. Flick, (1919) 126 N. E. 66 (Ohio).

[14] *Cunningham v. Castle,* 127 N. Y. App. Div. 580.
Van Blaricom v. Dodgson, supra.
Crossett v. Goelzer, 177 Wis. 455, 188 N. W. 627.