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LIABILITY OF THE FATHER FOR TORTS COMMITTED BY THE SON WHILE USING THE FATHER'S AUTOMOBILE

BY L. E. VAUDREUIL, '22

The question of whether or not the father, who is the owner of an automobile, is liable for the torts committed by the son or daughter when using the automobile, is a question involving many legal propositions, and is of interest not only to the legal profession but to almost any person who is the owner of an automobile.

The usual familiar facts are, that the father buys an automobile for the use of himself and his family. His minor son or daughter learns to drive and then the possibility of injury to third persons commences, and the question of liability for such injury arises.

As a general rule of law, the parent is not liable for the torts of his children.

Liability in this class of cases can be predicated only on the basis of the relationship of master and servant. In order to hold the father liable for the tort committed by the child when using the car, it must be shown that such injury was inflicted while the child was acting as the servant of the father.

We have another general fundamental rule, which lays down the proposition that the relationship of parent and child does not in itself create the relationship of master and servant.

However, no contract of hire is necessary to create the relation of master and servant. It is sufficient to create that relation, that one charged as such servant, whether a child or a person in no way related, is permitted habitually to perform work, drive the car or otherwise act as a servant of the owner, according to the circumstances of the case, with the knowledge and consent or acquiescence of the owner.

So it would seem that mere authority given by the father to the child to drive the car, would create the relationship of master and servant and thus render the father liable.

In the case of *Schaefer vs. Osterbrink,* 67 Wis. 502, the following charge to the jury was upheld:

> The presumption is that a minor child living with his father and using his conveyance in and about the business of such father, is acting on his behalf and under his directions, until the contrary is made to appear by the evidence. The burden to show that the child was not acting as his agent is on the father.

All the principles involved in the creation of the relationship of master and servant are applicable in determining whether or not that relationship existed between parent and child, and when that relationship is once established, the liability of the parent for the torts of his child is exactly the same as the liability of the master for the torts of the servant. If the tort is committed within the scope of the authority or employment, the master or parent is liable.

The whole situation finally resolves itself into the question of whether or not, at the time the tort was committed, the child was acting within the scope of his agency. It is well settled that if a child is on a frolic of his own, and against directions and without authority of the parent, the latter is not liable for the tort.

In the case of *Hiroux vs. Baum*, 137 Wis. 197, the plaintiff was at work in the street and was run down and injured by an automobile owned by the defendant, and driven at the time of the accident by the defendant's son. One of the members of the firm from whom the car had been purchased was teaching the son to drive the car at the time of the accident in accordance with an agreement between the vendor and the defendant. The court held the father liable, saying:

> If the son was running the car by authority of the father, that would be sufficient to make a *prima facie* case of master and servant.

On the facts shown the jury was warranted in finding that the son was the agent and servant of the defendant in the operation of the car.

The relationship of master and servant, in this case, is established not only by the fact that the son was authorized to drive the car; but also because he was learning to drive the car for subsequent services and was clearly within the scope of his employment.

In the case of *Jaeger vs. Salentine*, 171 Wis. 632, the son was the only member of the family who drove the car owned by the father. He was in the habit of taking the car whenever he wished without any objection on the part of the father. When any member of the family wanted to go anywhere, the son simply took them. On the day of the accident of the defendant's daughter was visiting at his home, and while the son was taking her back to the city with the father's car, the accident occurred. The court held that the jury was warranted in finding that the

son was the agent of the father and that the accident happened when the son was acting as such agent.

The theory of agency in this case can also be supported on the basis that it was the father's business to take his daughter back to the city after her visit and that the son acted in his behalf and as his agent in driving the car.

It seems that a blanket and general authority to use the automobile at any time and for all occasions will constitute the relationship of master and servant, as to transactions involving the use of the car. However, if we take mere authorization as sufficient to establish the relationship of master and servant, and if we apply it logically to other propositions, we will run on to some stumbling blocks. Starting out with the rule that the relation of parent and child does not affect the relation of master and servant, we can logically deduce, that authority given to any person to drive the owner's car, will render the owner liable for torts committed by the use of the car.

That conclusion would be manifestly unjust and very impracticable. Under such circumstances no man could ever lend his car to a friend, without assuming liability for the torts which might result.

However, the relation of master and servant can be based on the theory that the father of a family may take it upon himself and make it his business to furnish amusement and pleasure for his family and when any member of the family is putting the father's purpose into execution and is driving the car for his own pleasure, he is performing the business of his father, and he is the servant of his father, and his father is therefore liable for torts which might be committed by the use of the car.

It would seem that if the father takes it upon himself to furnish a mode of amusement for his family and if such means of amusement are the weapons by which injury is inflicted upon third persons the father should be held liable.

It is a manifestly unjust situation when a father can buy an automobile which in itself has qualities of potential harm; turn it over to his minor son who in many cases is judgment proof, and allow him to drive at any time and any place and under any conditions. When an innocent third person is injured, the father should not be allowed to say, "I know I furnished the car to my son, I let him have it whenever he wanted it, but I am not responsible for the accident; I am not liable to the third person who is

injured simply because the parent is not liable for the torts of his child."

Some courts have held that an automobile is in itself a dangerous article, and have predicated liability to the owner on the theory that he who furnishes another with a dangerous implement is responsible for the injury done. However, this theory is applicable only in those jurisdictions where it is held that an automobile is in itself dangerous.

The question of the danger in driving an automobile is an open one, and opens up a fruitful field of discussion. With the inexperienced driver it is dangerous not only to himself but anyone who might venture out of doors. Considering the number of accidents even to experienced drivers, there is much evidence to show that an automobile is dangerous in itself.

The phase of imputed negligence deserves some discussion in this connection. By imputed negligence is meant, that the negligence of the driver is chargeable to the owner or other occupants of the car. However, this doctrine is applicable only to the case where one of the occupants of the car is injured by the negligence of the driver, and does not affect third persons.

In the case of *Reiter vs. Goohes,* 173 Wis. 493, the father owned the automobile which was driven by the son. The son had invited the father to take a trip with him, and while on this journey the accident occurred. In an action to hold the father liable for the injury the court said:

> A man may be a guest in his own automobile. So even if the man owned the machine, . . . he would have to be classed as a guest therein so far as this trip is concerned. . . .

As a guest is he liable to the plaintiff for the negligence of the driver? The case of *Prideaux vs. Mineral Point,* 43 Wis. 513, holds that the driver of a private conveyance is the agent of a person riding therein to the extent that if his negligence contributes jointly with that of a third person to an injury received by the occupant there can be no recovery against the third person because the negligence of the driver is imputed to the occupant, thus creating contributory negligence barring recovery. There is a difference between the rule as announced in the Prideaux case and the claim made by the plaintiff in the Reiter case. A person may well be content to trust his own safety to a driver, and yet not be willing to indemnify third persons who may suffer through his negligence.

In the Reiter case the court said:

> To extend the doctrine to that degree would make a guest in a private conveyance an insurer of third persons against the negligence of the driver. Instead of being invested with the liabilities of a guest he would shoulder those of a master. We not only decline to so extend the rule of *Prideaux vs. Mineral Point,* in so far as it imputes the negligence of the driver of a private vehicle to an occupant therein, but we take this occasion to expressly overrule it.

In this case the son was on an errand of his own, was not about his father's business and the relation of master and servant was not created.

Even though the father was the owner of the car, he was simply a guest of his son for that particular trip, and since the son was not about the business of his father, but on his own business, the father was in no way liable.

In summing up, the law in this state is that the father is liable for the torts of his child when driving the family car, only on the theory of agency. The relationship of master and servant must exist. The problem in each case is to determine whether or not that relationship existed at the time of the accident. Considering the facts necessary to show this relationship, it is clear that all these problems can be solved justly and on a firm legal basis.

The legal theories upon which the solution of these problems depend, are old, but their applicability and extreme importance are new, and the fundamental principles will apply.