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Frederick B. McCall

THE FAMILY AUTOMOBILE

FREDERICK B. MCCALL*

In recent years the tort liability of the owner of a family automobile has, by judicial decision and legislative enactment, undoubtedly been extended beyond that responsibility imposed upon him by strict common law rules. In this connection much has been written on the "Family Purpose Doctrine," and it would seem that the saturation point has been reached. As a possible justification for any further contribution on the subject of the family automobile, it seemed to the writer that it might prove of interest to indicate how the courts, in the light of a pressing social need, have gradually developed and justified an enlarged liability on the part of the automobile owner. Legislative activity along this line will also be noted, briefly.

As a general proposition—nothing else appearing—no one is responsible for the act or omission of another.[1] However, with the increasing complexity of our social, economic, and industrial life, human relationships have correspondingly become more complex and difficult of adjustment, and the courts in the proper administration of justice have recognized the need for holding one person responsible for the acts of another under certain circumstances. Hence the development of the doctrine of *respondeat superior* whereby the master becomes responsible to third persons for the acts of his servant in the course of his employment or the principal for the deeds of his agent when the latter is acting within the scope of the agency.

The advent of the automobile as a new means of transportation has clearly emphasized the importance of vicarious liability. Possibly no other single invention in the history of the world has so revolutionized the work of the courts,—cluttering the dockets with numerous personal injury and property damage suits, and rendering increasingly difficult the administration of justice—as has the invention of the automobile.

At first automobiles were few in number; they would run only at a moderate rate of speed, and were generally operated, because of their very novelty, by the owner himself or perhaps by his regularly

* Associate Professor of Law, University of North Carolina. This article was prepared partly under the direction of Professor Walter F. Dodd of the Yale Law School.

[1] 1 SHEARMAN AND REDFIELD, NEGLIGENCE (6th ed. 1913) §144.

employed chauffeur. Under such conditions the courts had very little difficulty in determining liability for negligent use; they needed only to apply the well-known rules of one's responsibility for his own negligent acts or of the master's liability for the negligent acts of his servant or agent, under the general doctrine of *respondeat superior.*

However, the prodigious growth in recent years in the number of machines together with their increased size, weight and speed, and the infliction of serious injury and death to an alarming extent through their operation by financially irresponsible persons—especially by members of families using them for their own personal pleasure and convenience—these factors have raised a new problem for the courts to deal with, that of determining who should be liable for the wrongful acts of these irresponsible persons.

No trouble has been experienced by the courts in placing liability when the relationship of master and servant or of agency can be shown clearly to exist, as where it can be proved that in driving the car a member of the car owner's family was about the business or in the employment of the master or father in the use of the car at the time the accident occurred.[2] The old category of *respondeat superior* relieves the courts of any embarrassment in such situations.

The real difficulty lies in this situation: The head of a family purchases an automobile for the pleasure and convenience of his wife and children. He either expressly or impliedly permits them to use the car for their own purposes whenever they see fit to do so. What is the liability of the owner of the automobile when a member of the family negligently injures a third person while driving the car entirely for his own pleasure or that of his friends, or while about his own business? Should it make any difference in the liability of the owner, if, at the time the accident occurs, one member of the family is driving another member of the family? Should the responsibility of one person for the negligent acts of another be extended to hold the purchaser of the family automobile liable under such circumstances?

How may the courts meet this difficulty and solve the problem? Three possible avenues of procedure present themselves for consideration: first, that the courts should attempt gradually to enlarge the car owner's liability by the use and application of existing legal formulae, rules, and principles; second, that they might frankly

[2] See Erlick v. Heis, 193 Ala. 669, 69 So. 530 (1915); Smith v. Jordan, 211 Mass. 269, 97 N. E. 761 (1912).

recognize the existence of a new and pressing problem which calls for the *creation* and establishment *of a new tort liability* of one person for the acts of another; third, that the courts play hands off and leave the whole problem to the Legislature for solution.

The second of these suggested solutions is possible but not probable. A review of the authorities will disclose the fact that, although the courts have realized that the family use of the automobile has raised a serious problem in the administration of justice, yet they have not clearly and frankly created *a new tort liability as such* which will make the owner liable for the negligent use of his car regardless of whether or not the person using the car was the owner's agent or servant at the time the accident occurred. This may be explainable on several grounds. It must be remembered that a court never has the whole issue before it at any one given time; it is passing on the fact situation of one particular case and is writing the law for that particular fact situation. It must be governed largely by what it has decided in the past upon similar or analogous facts. The development of a legal principle is slow and the court must of necessity take short and gradual steps in working it out. A court in passing on the tort liability of the owner of an automobile in 1908 could not possibly foresee the necessity for holding the owner absolutely liable for the negligent acts of members of his family who were merely driving the car with the owner's permission or consent. The necessity for such action has gradually become more apparent from the almost universal use of the automobile as a family vehicle and the many deaths and injuries to others resulting from such use by minors or dependents in the owner's family who were financially irresponsible. It must be borne in mind also that a court in writing an opinion in a particular case is writing for publication and it must justify its position in the eyes of the bar and the public. There is therefore a tendency for the courts to stick to established legal principles as a basis for their decisions.[3]

It is fairly obvious, then, that we may eliminate from our consideration the second possible line of procedure that might be followed by the courts and proceed to determine how they have handled the problem in the light of the first and third possibilities.

[3] The recent and growing use of the memorandum opinion, by which a case is decided and no reasons given for the decision, tends to relieve the courts of the burden of justification and to give them more freedom in reaching a desirable result.

With the growth of necessity for judicial action in the fixing of responsibility for the negligent use of the family automobile when the member of the family so using the car is unable to answer in damages to the injured party, it seems but natural that the courts should attempt gradually to enlarge the car owner's liability by the use of definitely fixed and recognized legal principles. We shall endeavor, in the discussion which follows, to indicate what steps they have taken in the development of a legal doctrine by which the car owner's liability has been extended so as to hold him responsible for the negligent operation of his car by a member of his family even though the driver of the car at the time of the accident was engaged in pleasure or business entirely his own.

Upon some phases of the problem the courts are pretty well agreed. It is well settled that the owner of an automobile is not liable because of mere ownership of the car,[4] though at least one court has held that proof of ownership raises *a presumption* that the car was being used at the direction of and in the business of the owner when the accident occurred.[5] Nor is he liable merely because of the marital or parental *relationship* which he bears to members of the family using the car.[6] Of course this does not preclude the possibility that as to third persons, the minor child or other member of the family may by particular arrangement become the servant of the car owner, and this without agreement for compensation.[7]

It is also well established by a majority of the decisions that an automobile is not inherently a dangerous instrumentality so that its owner is liable for injuries to travelers on the highways inflicted while the car was being driven by another, irrespective of the relationship of master and servant or principal and agent.[8] The courts,

[4] Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096 (1913); Hays v. Hogan 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C. 715 (1917).

[5] Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59 (1913).

[6] Blair v. Broadwater, 121 Va. 301, 93 S. E. 632, L. R. A. 1918 A, 1011 (1917); Jones v. Cook, 90 W. Va. 710, 111 S. E. 828 (1922); Tyree v. Tudor, 181 N. C. 214, 106 S. E. 675 (1922).

[7] Parker v. Wilson, 179 Ala. 361, 60 So. 150, 43 L. R. A. (N. S.) 87 (1912); Spence v. Fisher, 184 Cal., 209, 193 Pac. 255 (1920); see also Griffin v. Russell, 144 Ga. 275, 278, 87 S. E. 10, 11, L. R. A. 1916 F. 216, Ann. Cas. 1917 D. 994 (1915).

[8] King v. Smythe, 140 Tenn. 217, 204 S. W. 296 (1918); Parker V. Wilson, 179 Ala. 361, 60 So. 150. 43 L. R. A. (N. S.) 87 (1912); Cohen v. Meador, 119 Va. 429, 89 S. E. 876 (1916); McFarlane v. Winters, 47 Utah 598, 155 Pac. 437 (1916); Arkin v. Page, 287 Ill. 420, 123 N. E. 30 (1919); Jones v. Cook, 90 W. Va. 710, 111 S. E. 828 (1922).

however, have held that an automobile may become a dangerous instrumentality so as to hold the owner liable *for his own negligence* in placing it in the hands of one who by reason of his youth, lack of skill, or want of experience is incompetent to operate it.[9] And at least in one jurisdiction—Florida—the court has extended the owner's liability by holding that an automobile is a dangerous instrumentality *in its operation and use* so as to make the superior respond in damages for the negligent acts of persons to whom he has entrusted it with his consent and permission.[10] The theory of the court is that, in entrusting a servant with a highly dangerous agency, the master puts it in his servant's power to mismanage it, and so long as it is in his custody or control under such authority the master should be responsible for any injury resulting from the servant's negligence.

While the courts have almost unanimously held that an automobile is not *per se* a dangerous instrumentality, yet we find that the *nature of the automobile* has received rather serious consideration by them in working out the liability of the owner. In one case the court went so far as to say that the nature of the car *should affect* the liability of the owner. We refer to the case of *Crittenden v. Murphy*[11] (since overruled) in which the court cites with approval the leading case of *Birch v. Abercrombie*[12] where the liability of the car owner was decided on the basis of the "family purpose" doctrine. In the *Crittenden Case* the court said:

We are satisfied that the rule was thus laid down not only because of the fact that the use of the machine by the son for his own pleasure was contemplated when it was purchased, but also because of the very nature of the automobile itself. While it is true that the automobile is not in itself a dangerous instrument, nevertheless it demands a very high degree of care and skill in its management upon the highway; and it must be recognized, that in the hands of a reckless and incompetent youth, it has immense potentiality for harm to others. Therefore the owner owes the duty to the traveling public to see to it that his car, when driven on the streets with his permission and for the purposes for which the car was purchased, should be driven carefully and with due consideration for their rights; and the

[9] Elms v. Flick, 100 Oh. St. 186, 126 N. E. 66 (1919). See also Tyree v. Tudor 183 N. C. 340, 111 S. E. 714 (1922); Daily v. Maxwell, 152 Mo. App. 424, 133 S. W. 353 (1911).

[10] Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920). Defendant held liable for injuries negligently inflicted by defendant's employee while driving defendant's car on business distinctly the employee's.

[11] 36 Cal. App. 803, 173 Pac. 595 (1918).

[12] 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N. S.) 59 (1913).

owner should not in good conscience be allowed to disclaim his responsibility on the ground that the use thus contemplated and authorized by him was permissive only.

In the case of *Lewis v. Steele*[13] we find the court refusing to concede that the nature of the automobile makes any difference in the owner's liability. The court said, in part:

Whether these circumstances (under which the action arose) make a case for the application of *respondeat superior* depends upon considerations entirely beside the fact that the device employed was an automobile. That instrument is now too well established to be singled out for judicial preference or animadversion. It has taken its place among the common methods of transportation, and no good reason occurs to us, in the absence of legislation, for denying to its use the same general rules of responsibility, direct and consequential, as are applicable to other common methods of transportation, having in mind, of course, its potentialities for harm as well as good.

To the same effect we find the Supreme Court of Utah speaking in the case of *MacFarlane v. Winters:*[14]

If it were assumed that a distinction should be made between automobiles and other vehicles and instrumentalities, it should be made by the Legislature, the law-making power, and not by the courts who merely declare the law as they find it. We, however, can conceive neither reason nor logic in attempting to make such a distinction. The reciprocal rights and duties of the owners of automobiles and those who own and use other vehicles on the streets and highways are now well defined and understood.

The courts, however, are in irreconcilable conflict in their solution of the general problem. A study of some of the decisions will indicate the trend of judicial thought.

We find some of the more conservative courts refusing to recognize the existence of a new problem raised by the family use of the automobile. They cling tenaciously to the old established principles of tort liability and refuse to extend or enlarge even by the use of those principles the car owner's liability. The Virginia court[15] says that "the only safe course to pursue is to revert to first principles and adhere to ancient landmarks, rather than to yield a too ready allegiance to an admittedly new principle sought to be ingrafted upon the

[13] 52 Mont. 300, 157 Pac. 575 (1916).
[14] 47 Utah 598, 155 Pac. 437 (1916).
[15] See Blair v. Broadwater, 121 Va. 301, 93 S. E. 632 (1917).

law of master and servant and principal and agent to meet supposed exigencies of new conditions incident to the advent of automobiles." The Alabama court[16] very strongly expresses the opinion that a doctrine that would seek to hold the father liable for the negligence of his minor son while the son was operating the family car for his own pleasure has no firm foundation in reason or common sense; that in theory it overlooks well settled principles of law while in practice it would interdict the father's generosity and his reasonable care for the pleasure or even the well-being of his children by imposing a universal responsibility for their acts.[17] In the case of *Watkins v. Clark*[18] the Kansas court exhibits no disposition whatsoever to get aroused to the fact that the advent of the automobile *has created any problem at all.* It feels that the notion the courts have of imposing general liability on the owner of an automobile had its inception in the days when the automobile was new and there was a tendency to look upon it as a dangerous thing. The court ridicules the attempts of other courts to impress liability on the owner of an automobile by using such devices as "family purpose," "business of the owner," "representation," etc., and to thus extend the doctrine of *respondeat superior* to fit the situation. It concludes its opinion with the vigorous statement that "the sooner the courts settle down and deal on the basis of fact and actuality with the vehicle which has revolutionized the business and pleasure of the civilized world, the better it will be not only for society but for the courts."

In other words, the conservative courts say that the particular fact situation with which they are dealing must fall clearly within the master and servant or principal and agent category of vicarious liability, otherwise they will not hold the automobile owner responsible for the negligent acts of the member of the family using the car.[19] Perhaps these courts feel reluctant to extend the already harsh doc-

[16] See Parker v. Wilson, 179 Ala. 361, 60 So. 150 (1912).

[17] To same effect see Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918 C. 715 (1917).

[18] 103 Kan. 629, 173 Pac. 131 (1918).

[19] This conservatism is particularly well set forth in the case of McFarlane v. Winters, 47 Utah 598, 155 Pac. 437, 439 (1916) as follows: "We think it may still be safely affirmed that where it is sought to hold one person responsible and civilly liable for the torts committed by another, whether such other be the child of the owner or a stranger, it must be made to appear by competent evidence that the relationship of principal and agent or that of master and servant existed between the two at the time the tort was committed, and in addition to that, that the tortious act complained of was committed in the course of the employment of the servant, or was within the scope of the agency."

trine that renders a master responsible for even the unauthorized acts of his servant, provided only they were done within the scope of his employment.

The New York court in *Van Blaricom v. Dodgson*[20] realized and frankly admitted its limitations in attaching a new tort liability to the owner of an automobile simply on the theory that a member of the family in using the car for his own purpose and pleasure was carrying out the purpose for which the car was bought and was therefore engaged in the business of the owner. Judge Hiscock said that if, contrary to ordinary rules, the owner of a car ought to be responsible for the carelessness of every one whom he permits to use it in the latter's own business, *that liability ought to be sought by legislation* rather than by some new and anomalous slant applied by the courts to the principles of agency.

Other courts, which we might designate as the more forward-looking, have recognized the existence of a very vital problem growing out of the negligent operation of the family automobile, and have dared to take a step forward on the basis of settled legal principles in determining the owner's liability. They have developed what has come to be known as the "Family Purpose Doctrine."[21] Under this doctrine the owner of an automobile, which is purchased and maintained for the pleasure of his or her family, is held liable for injuries inflicted by the machine while it is being used by members of the family for their own pleasure. The theory is that the car is being used for the *purpose* or *business* for which it is purchased and kept, and the person operating it with the owner's consent express or implied is, therefore, acting as the owner's agent or servant in using it.[22] These courts seem to start out with the assumption that *under such circumstances* there *should be* an agency or master and servant relationship between the operator and the owner; then they proceed to *find* such a relationship in order to hold the car owner liable.[23]

[20] 220 N. Y. 111, 115 N. E. 443 (1917).

[21] In Mogle v. Scott, 144 Minn. 173, 174 N. W. 832, 833 (1919), the court said: "The doctrine is a development of the rules applicable to the relation of master and servant and principal and agent, which have been extended to meet a new situation brought about by the invention of the automobile and its common use, with the owner's permission, by the members of his family for whom he has provided it."

[22] Note (1920) 5 A. L. R. 226.

[23] In Payne v. Leininger, 160 Minn. 76, 199 N. W. 435 (1924), the court said: "The liability of the owner of an auto for damage done by it rests upon the doctrine of principal and agent or master and servant. *With this doctrine as a basis* the liability of the head of the family for injuries occurring in the

By the magic art of *definition* they span the gap from the non-liability of one person for the acts or omissions of another to the tort liability of the automobile owner for the negligence of a member of his family who is neither the agent nor the servant of the owner in any ordinary sense of the terms. "Purpose" and "business" are the two words upon which the courts have seized to supply the main supports for their bridgework. By some means the *pleasure* of the son must be made the business of the father so as to hold the father liable.[24] To effectuate this end the judicial mind reasons that where a car is so provided and maintained by a father for the use of the members of his family for their pleasure and convenience, he makes that pleasure and convenience his own "business," and any member of the family in using the car exclusively for his or her own purposes is carrying on the business of the father as the father's agent or servant.[25] By such reasoning sufficient agency or master and servant relationship *is found* to justify placing of liability on the owner.

At this point we might pause to remark that some courts have refused to follow the family purpose theory of liability for the very reason that such liability is made to turn on the *motive* or *purpose* for which the car was bought plus its *permissive use* by the driver, instead of the fact that at the time of the accident it was being used in the master's service and under his control—the essential basis of the liability of a master for the acts of his servant, or of a principal for the acts of his agent.[26]

Some courts, not being willing to shoulder quite all the responsibility, hold that it is a question for the jury whether a machine was used as a "family car" so as to render the owner liable for its operation by members of his family under the family car doctrine.[27]

Thus we see a group of courts extending, by rather gradual and experimental steps, the liability of an automobile owner by making use of the well known doctrine of *respondeat superior*. They seem unwilling to break entirely away from the old legal theories, but in

use of an auto kept for the pleasure and use of the family has been accorded a free and natural development from case to case until we have definitely adopted the family automobile doctrine."

[24] See (1922) 8 A. B. A. J. 362.

[25] See Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020 (1913); Benton v. Reseger, 20 Ariz. 273, 179 Pac. 966 (1919), good example of reasoning of court. See also Spence v. Fisher, 184 Cal. 209, 193 Pac. 255 (1920).

[26] Doran v. Thomsen, 76 N. J. L. 756, 71 Atl. 296 (1908); Elms v. Flick, 100 Oh. St. 186, 126 N. E. 66 (1919); Arkin v. Page, 287 Ill. 420, 123 N. E. 30 (1919).

[27] Payne v. Leininger, 160 Minn. 75, 199 N. W. 435 (1924).

reality they are merely *justifying* by use of existing legal formulae and rules, the creation—to all practical intents and purposes—*of a new tort liability.*

This justification on an agency or master and servant basis is comparatively easy when a member of the family is driving another member or guest of the family at the time of the accident. The courts have generally held the owner liable under such circumstances. The family driver is readily analogized to the paid chauffeur for whose negligent driving on such an occasion the owner would clearly be liable on the *respondeat superior* doctrine. In other words, in order to hold the owner liable the courts do not have to stretch a well-established legal principle so far. They do, however, experience a real difficulty in justifying their position when a member of the family is driving *alone* for his own purposes and pleasure.[28] And here is where the decisions are in irreconcilable conflict. Some courts, designated above as the more conservative, refuse absolutely to hold the owner liable; others, in order to reach a socially desirable result, practically create a new tort liability, through the medium of the family purpose doctrine. We may even find an instance where the same court has held the owner responsible if another member of the family was being driven in the car at the time of the accident,[29] and has refused to fix responsibility where a member of the family was driving for his own pleasure or for that of his guests.[30]

The Tennessee case of *King v. Smythe*[31] marks the limit to which the courts have gone in determining the tort liability of the owner of an automobile by the extension of a recognized legal principle. In that case the defendant father was held liable for injuries resulting to plaintiff from an accident caused by the negligent driving of defendant's car by his son, aged twenty-five years, who lived with his father and who was using the car for his own pleasure under the general permission of his father. The court *justifies* its decision on the theory that the son in operating the car for his own pleasure was carrying out one of the purposes for which it was bought and was therefore engaged in the father's business as his servant or agent.

[28] See Johnson v. Smith, 143 Minn. 350, 173 N. W. 677 (1919).
[29] Missell v. Hayes, 86 N. J. L. 348, 91 Atl. 322 (1914) (Minor son driving his mother and sister).
[30] Doran v. Thomsen, 76 N. J. L. 756, 71 Atl. 296 (1908) (Daughter driving her friends for their mutual pleasure).
[31] 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918 F. 293.

However, an examination of the language used by the court will reveal the real basis of its decision. Said the court:

It is true that an automobile is not a dangerous instrumentality so as to make the owner liable, as in the case of a wild animal loose on the streets; but, *as a matter of practical justice to those who are injured,* we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and when moving rapidly upon the streets of a populous city, it is dangerous to life and limb and must be operated with care. If an instrumentality of this kind 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, because only by doing so, as a general rule, *can substantial justice be attained.* A judgment for damages against an infant daughter or an infant son, or a son without support and without property, who is living as a member of the family, would be an empty form. The father, as owner of the automobile and as head of the family, can prescribe the conditions upon which it may be run upon the roads and streets, or he can forbid its use altogether. He must know the nature of the instrument and the probability that its negligent operation will produce injury and damage to others. *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.*[32] If owners of automobiles are made to understand that they will be held liable for injury to persons and property occasioned by their negligent operation by infants or others *who are financially irresponsible,* they will doubtless exercise a greater degree of care in selecting those who are permitted to go upon the public streets *with such dangerous instrumentalities.*[33]

It will thus be seen that the Tennessee court practically admits that it must disregard fixed rules of law and hold the owner liable on the ground of the practical administration of justice between the parties. By reason of the fact that substantial justice demands it, a *new* tort liability is imposed upon the owner of the family automobile so as to make him answerable in damages for the negligence of the

[32] In the Van Blaricom Case, *supra* note 20, the New York court had said that the question whether one person is the agent of another in respect of 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. The Tennessee court in criticising the reasoning of the New York court said: "It seems to us that the foregoing reasoning is more concerned with what the learned court considered pure logic *than with the practical administration of the law.*"

[33] The italics in the above excerpts from the opinion are by the author.

financially irresponsible person to whom he has entrusted the use of the car. An unusually high degree of care is placed upon the owner in the selection of those whom he would have operate his automobile. The court states that an automobile is not a dangerous instrumentality and yet it predicates its extension of the owner's liability largely upon the dangerous nature of the automobile. Of course the thought uppermost in the court's mind was the just compensation of the injured party.

We also find the Colorado court, in a case decided a year before the Tennessee case, holding that, if the family car owner were not responsible in damages, in many instances the injured party would be deprived of any remedy, owing to the usual financial irresponsibility of the owner's wife or child who may have been driving the automobile at the time of the accident; and that in insuring justice to the injured party, no undue hardship is imposed upon the owner.[34]

In the case of *Goss v. Williams*,[35] decided in 1928, the Supreme Court of North Carolina held that the owner of a family purpose car was liable for the negligence of one sitting beside the owner's wife and driving the car with the wife's permission. A tenuous "implied agency" theory was the justification for the result reached by the court. However, the real basis of the decision is disclosed in the following language, which is strikingly similar to that used by the Tennessee court:

> Human life is too cheap and restraint is necessary. The numbers killed and crippled each year are appalling. It is necessary, in reason, for the courts to hold owners of automobiles, when they turn over an instrumentality of this kind to the family for family use, to strict accountability. This is one of the means to safeguard the public. The head is usually the one of financial responsibility. At least he is the owner of the instrumentality. Upon the principles cited, consonant with natural justice, he should be held responsible.

The Tennessee, North Carolina, and Colorado courts, emboldened by the successful use—by other courts—of the family purpose doctrine, have dared to take even a further step forward toward a practical solution of the problem. The influence, particularly of the Tennessee case, has already been felt in at least one other jurisdiction. In the case of *Arkin v. Page*[36] decided in 1919—one year after the

[34] Hutchins v. Haffner, 63 Colo. 365, 167 Pac. 966 (1917).
[35] 196 N. C. 213, 145 S. E. 169 (1928).
[36] 287 Ill. 420, 123 N. E. 30 (1919).

Tennessee Case—we find the majority of the Illinois court adhering to a strict application of the *respondeat superior* doctrine and refusing to hold a father liable for the negligence of his twenty year old son while the son, unknown to the father, was driving the family car to a distant city to see about registration in a school. The majority opinion, speaking of the Tennessee court's argument in *King v. Smythe,* said: "This argument may be sound enough, but it has no application to the doctrine of master and servant." The dissenting judges show the influence of the *King Case* when they say in their opinion: "The only ground upon which it can be said that he (the father) was not liable for negligence in the operation of the automobile would be that it was none of his affair, which is not only contrary to the weight of authority, *but against the public interest and natural justice.*"

Two years later the Illinois court held the father responsible when his sixteen year old daughter, while driving the family car with a friend to get the daughter's shoes from a repair shop, negligently injured the plaintiff. In this case[37] (which upon a close analysis of its fact situation is difficult to distinguish from the *Arkin Case*) the court adopted the view of the dissenting judges in *Arkin v. Page* and clearly followed *King v. Smythe,* the Tennessee case on the public policy theory. The Illinois court said:

> The weight of authority supports the liability of the owner of a car which is kept for family use and pleasure where an injury is negligently caused by it while driven by one of his children by his permission, and the reasoning of those cases seems sound and more in harmony with principles of justice. 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 should require that the owner should be responsible for its negligent operation, because only by doing so, as a general rule, can substantial justice be attained."

In connection with the family purpose doctrine, it may be of interest to note, briefly, how the courts of the same state have handled the liability of the head of the family for the negligent use of the family vehicle both in the day when the mode of conveyance was a horse-drawn vehicle and at the present time when the automobile is almost universally used for transportation purposes. In the early

[37] Graham v. Page, 300 Ill. 40, 132 N. E. 817 (1921).

Kentucky case of *Lashbrook v. Patten*[38] a minor son, while driving his two sisters to a picnic in his father's carriage drawn by his father's horses, and with his father's approbation, through negligence ran against the carriage of another, causing damage. In holding the father liable the court said: "The son must be regarded as in the father's employment, discharging a duty usually performed by a slave, and therefore must, for the purposes of this suit, be regarded as his father's servant." This case was cited and followed by the same court in *Stowe v. Morris*[39] where the father was held liable on the ground that the automobile which caused the injury had been provided for the comfort and pleasure of the family and that the son, having been given the right to use it, was to be treated as the servant of his father when operating it for the entertainment of his sister and her friends. The court, however, failed to note that in the *Lashbrook Case* the act was being done not for the pleasure of the child driving but for the pleasure of some one else, and under the direction and control of the father.[40] It will be seen, therefore, that in the *Stowe Case* the Kentucky court went a step further in holding the automobile owner liable because of the fact that the vehicle being used was the family automobile.

The Maine court has been more consistent. In the case of *Maddox v. Brown*,[41] decided in 1880, a son for purposes of his own, in the absence of his father and without his knowledge, took his father's horse and carriage (which he had been allowed to use without restriction) and left the horse unfastened in the streets; the horse became frightened, ran away, and the carriage collided with plaintiff's, injuring the same. *Held:* the father was not liable. The plaintiff claimed to recover, not on the ground of the parental and filial relation, but because the son in the management of the defendant's team was his servant *and engaged in his business* and that defendant was liable for his negligence. The court said: "The relation of master and servant must exist at the time of the injury. It cannot be pretended that, under the circumstances stated, the boy was engaged *in the business of his father.*" In 1920 the Maine court was faced with the problem of determining the father's liability for his son's negligent operation of the family automobile, while the son was driv-

[38] 1 Duv. 316 (1864).
[39] 147 Ky. 386, 144 S. W. 52 (1912).
[40] (1923) 2 WIS. L. REV. 125.
[41] 71 Me. 432 (1880).

ing the car in the entertainment of a young lady friend. It was held that the defendant father was not liable since there was no relation of agency or master and servant arising from the son's permissive use of defendant's car for his exclusive pleasure and purpose. The court in this case[42] said: "Before motor cars as now known were invented, a case involving the same principle arose in this State." (The court had reference to the case of *Maddox v. Brown,* which it cited and followed as a precedent.) It felt that the son's operation of the family automobile for his own pleasure could no more be made the "business" of the father than could the driving of the family *horse and buggy* under like circumstances.

Perhaps we might safely generalize to the effect that before the automobile became the most used vehicle in travel the head of the family was not held liable for the wrongful acts of his relatives when the acts were not authorized by him, had no connection with his business, were not ratified by him and from which he received no benefit.[43]

That the courts should use well-established legal principles as a basis for augmenting the car owner's liability seems most natural and logical. However, much violence may have been done by them to the doctrine of *respondeat superior* in formulating the family purpose doctrine, their course of action is to be commended rather than criticised in view of the desirability of the result reached. Perhaps it may be said that the same desirable end could have been attained and with less embarrassment, if the courts, instead of using the agency camouflage to give stability to the family purpose doctrine, had adopted the policy of the Florida court and had held that a motor vehicle is an inherently dangerous instrumentality in its use and operation.

In our discussion thus far we have attempted to trace, through the medium of judicial decision, the growth and extension of an automobile owner's liability. The major steps in the study have brought us from the point where—nothing else appearing—the owner is not liable for the acts or omissions of another; thence to his responsibility for the acts of his servants or agents in the course of their employment or within the scope of their agency; thence to his

[42] Pratt v. Cloutier, 119 Me. 203, 110 Atl. 353 (1920).

[43] (1924) 11 VA. L. REV. 130; Baker v. Haldeman, 24 Mo. 219, 69 Am. Dec. 430 (1857); Edwards v. Crume, 13 Kan. 348 (1874); Moon v. Towers, 8 C. B. (N. S.) 611, 141 Eng. Rep. 1306 (1860); see also Brohl v. Lingeman, 41 Mich. 711 (1879); Ricci v. Mueller, 41 Mich. 214 (1879).

liability for the negligence of members of his family under the family purpose doctrine—with the Tennessee court stretching the doctrine to its limit on the ground of public policy. Then we have seen the position of the Florida court which makes the mere ownership of an instrumentality like the automobile, plus its permissive use and operation, the basis of liability. The courts have gone about as far as they have dared; but they have crystallized the problem and have furnished an adequate background and basis for legislative action.

We have said that the third possible solution of the problem was to leave it to the legislature. In view of the growing sentiment that persons injured by the negligent operation of automobiles in the hands of financially irresponsible persons should, at all events, be given some recourse against the owner of the car, the legislatures of several states have passed laws extending and enlarging the common law tort liability of the automobile owner. But just as we have seen that the extension of this liability by the courts was a rather slow and painful process, so must we realize that legislation in this new field must be, to a great extent, experimental at first, and that it must develop step by step as time sheds new light on the problem. And furthermore, such legislation must be subjected to judicial construction, both with reference to its constitutionality and its applicability to particular fact situations.

For the purposes of the present discussion the writer will consider the statutory enactments of but one or two jurisdictions. To do more would be but to duplicate the splendid effort of Professor Lattin, who, in a recent article[44] tabulated and analyzed the statutes passed by the various states in connection with the liability of the family automobile owner.

In 1909 the Michigan Legislature attempted to charge the owner of an automobile with liability for all injuries occasioned by the negligence of the driver of the machine, except in case it was stolen.[45] But the statute was held unconstitutional as depriving the owner of his property without due process of law—by an invalid exercise of the police power—in so far as it attempted to impose liability where a trespasser obtained possession of the car without

[44] *Vicarious Liability and the Family Automobile,* (1928) 26 MICH. L. REV., 846, 869 *et seq.*

[45] Mich. P. A., 1909, Act no. 318, §10, s. s. 3. See also Johnson v. Sergeant, 168 Mich. 444, 134 N. W. 468 (1912).

the consent of the owner and without his fault.[46] A subsequent statute passed in 1915[47] cured the defect of the former law by providing that the owner would not be liable unless at the time of the injury the motor vehicle was being driven with his express or implied consent or knowledge.[48] This later statute has been held constitutional, although it imposes a liability on the owner greater than that allowed by the common law, as, for example, rendering him responsible for negligence in the operation of the machine when it is loaned to another.[49] In order to provide for the family automobile problem the 1915 statute expressly provides that if the vehicle was driven at the time of the accident by an immediate member of the owner's family, it shall be *conclusively presumed* that it was being driven with the knowledge and consent of such owner. In 1927, however, the statute was amended, the word "conclusive" being omitted.[50] Again, in 1929,[51] the Michigan legislature amended the law by adding a proviso to the effect that no person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation should have an action for damages against such owner or operator unless the accident resulting in death or injury to the guest shall have been caused by the gross negligence or wilful and wanton misconduct of the owner or operator and that such negligence or misconduct contributed to the alleged injury or death.

It is interesting to note these stages of statutory growth as evidence of the legislature's effort to cope with the problem created by the advent of the automobile.

By judicial construction of the Michigan statute, liability is also imposed on the owner when the machine is driven by a member of the owner's family although against his express orders and direc-

[46] Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L. R. A. (N. S.) 699 (1913). In this case defendant left his car at a garage to be repaired and plaintiff was injured by negligence of two repairmen while testing the car. The court said: "It may be laid down as a general proposition that absolute liability, without fault on his part, cannot ordinarily be imposed upon a citizen."

[47] Mich. P. A., 1915, Act. no. 302, §29.

[48] *Cf.* with the effect of this statute the rule of liability laid down by the Florida court in Southern Cotton Oil Co. v. Anderson, *supra* note 10.

[49] Stapleton v. Independent Brewing Co., 198 Mich. 170, 164 N. W. 520 L. R. A. 1918 A. 916 (1917). See also Hatter v. Dodge Bros., 202 Mich. 97, 167 N. W. 935 (1918).

[50] Mich. P. A. 1927, No. 56, §29, p. 67.

[51] Mich. P. A. 1929, No. 19, §29, p. 44.

tions.[52] "Knowledge or consent of the owner" has been construed in the case of *Union Trust Co. v. American Commercial Car Co.*,[53] where the owner of a truck loaned its use until 6:00 P.M. to another, and after that hour an employee of the bailee, without the knowledge or consent of his employer or of the owner, used the truck for his own private purposes. It was held that the owner was not liable for injuries occasioned while it was being so used. It has also been held that this statute was not so intended to operate as to hold one joint owner of an automobile liable for the negligence of another joint owner while the latter was using the car in the prosecution of his own business.[54]

As the Michigan statute now stands, it makes the automobile owner a virtual insurer. He is personally liable "where the car is in any one's hands with his permission express or implied, and through that person's wilful or negligent act, damage arises."[55]

In 1924 the New York legislature provided that every owner of a motor vehicle operated upon a public highway should be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner. It is clear that by this statute the liability of the owner of the family automobile is definitely fixed. The constitutionality of the statute has been sustained.[56] It applies whether at the time of

[52] Hawkins v. Ermatinger, 211 Mich. 578, 179 N. W. 249, 251 (1920). It is interesting to compare with the language used by the Tennessee court in King v. Smythe,—in which the court extended, on the grounds of substantial justice to the injured party and without legislative aid, the car owner's liability,—the language of the Michigan court in the construction of the *statute* in its application to the facts of the Ermatinger case. In the latter case the court said: "The owner of such a vehicle has complete dominion over it and the absolute right of control thereof. He may, if he will, retain its possession and so prevent its use by persons other than careful, experienced operators. The legislature may impose upon him the obligation to do so as a legal duty. It has determined, in its judgment, that the most practical way in which it can compel the performance of such duty is to provide for his personal liability for damages occasioned thereby. The purpose of the act in this respect is not to provide a cause of action which did not exist before, but to protect the public in the use of the streets and highways. . . . *It simply insures to the injured party a right of action against a party presumably able to respond in damages therefor.*" (Italics ours).

[53] 219 Mich. 557, 189 N. W. 23 (1922).

[54] Mittelstadt v. Kelly, 202 Mich. 524, 168 N. W. 501 (1918).

[55] Laws of N. Y., 1924, c. 534, § 282-e.

[56] Dawley v. McKibben, 245 N. Y. 557 (1927); Brooks v. McNutt Auto. Delivery Co., 126 Misc. 730 (N. Y. 1926).

the accident in question the machine was operated by the bailee or by some driver selected by him.[57] The owner, however, is not responsible for the acts of one whom the bailee permits to use the car without the knowledge of the owner.[58]

As an illustration of how a general statutory enactment may be subsequently modified and limited because of pressure brought to bear upon the legislature by certain persons or commercial interests adversely affected by the general statute, we find the New York statute amended in 1925 and 1926[59] to the extent that a conditional sales vendor (or his assignee) who has retained the title to a motor vehicle sold under a conditional sales contract shall not be deemed *an owner* under the statute but that the vendee or his assignee shall be deemed the owner, notwithstanding the terms of the contract, until the vendor or his assignee shall retake possession of the vehicle. It is also provided that a chattel mortgagee of a motor vehicle out of possession is not an owner within the purview of the statute. It is obvious that such modifications of the statute were brought about through the influence of automobile dealers and credit men, the great volume of whose business in motor vehicles is transacted on a credit basis by means of conditional sales contracts and chattel mortgage security. They did not wish to assume responsibility as owners (as imposed by the statute) for the operation of the thousands of cars sold by them; their position is entirely justifiable. In 1928 a further amendment to the statute[60] exempts from its operation that class of persons, like the "U-Drive-It" people, who are engaged in the business of renting cars for hire and placing the operation thereof in the hands of the bailee; provided, however, that the bailor must carry liability insurance insuring the renter against liability arising out of his negligent operation of the car. Under such circumstances the bailor is not *an owner* within the statute.

Thus we see how, both in Michigan and in New York, legislation with reference to the liability of an automobile owner is still passing through the experimental stages. The courts, too, are still engaged in construing the statutes in their application to particular fact situations. In *Cohen v. Neustadter*[61] the New York court held that the statute applies where a guest of the person who is driving by the

[57] Feitelberg v. Matuson, 208 N. Y. Supp. 786 (Mun. Ct. 1925).
[58] Owen v. Gruntz, 216 App. Div. 19 (N. Y. 1926).
[59] Laws of N. Y. 1925, c. 167, §282-e; Laws of N. Y., 1926, c. 730, §282-e.
[60] Laws of N. Y. 1928, c. 508, §282-e.
[61] 247 N. Y. 207, 160 N. E. 12 (1928).

owner's permission is injured by the driver's negligence. In a recent case[62] it was held by the Michigan court, that under the "conclusive presumption" statute a defendant would not be liable for injuries caused by the negligent operation of defendant's car by his nephew who was employed by defendant and roomed at his house. The car had been placed in dead storage whence it was taken without the owner's consent or knowledge. Here is limitation by judicial decision of a rather strict statutory liability.[63]

The type of legislation illustrated by the New York and Michigan statutes is, according to Professor Lattin, "the most efficient, and the one which goes farthest in the direction of vicarious liability; it puts an almost absolute liability on the owner who places the car in the hands of a member of his family or a third party." Two other types of statutes in force are designated by Professor Lattin as: (1) "The type which gives a lien on the car causing the injury, where the vehicle is operated in violation of the provisions of the law, or negligently and carelessly, except where the car has been stolen and the thief caused the injury. (2) The type that prohibits minors under a certain age from driving, and perhaps allows them after a certain age to drive, but only where granted a driver's license; the parents or guardian or other person in charge, perhaps, being required to sign the application for the license, and being made jointly and severally liable for injuries occasioned by the negligent driving of the minor."[64]

Another type of legislation, now in force in ten states of the Union (California,[65] Connecticut,[66] Maine,[67] Minnesota,[68] New Hampshire,[69] New Jersey,[70] New York,[71] Rhode Island,[72] Vermont[73] and Wisconsin[74]), requires compulsory insurance by owners of automobiles, so as to insure financial responsibility in the event

[62] Rogers v. Kuhnreich, 225 N. W. 622 (Mich. 1929).
[63] See comment on this case (1929) 28 MICH. L. REV. 73.
[64] See (1928) 26 MICH. L. REV. 869; statutes illustrative of these types of legislation cited in notes 72, 73, and 74 of Prof. Lattin's article, *supra* note 44. For a recent discussion of legislation in this field, see W. J. Heyting, *Automobiles and Vicarious Liability* (1930) 16 A. B. A. J. 225.
[65] Stat. of Cal., 1929, c. 259, p. 563.
[66] Conn. P. A. 1927, c. 161, p. 4242.
[67] Laws of Maine 1929, c. 209, p. 169.
[68] Mason's Minn. Stat., 1927, §2720-61, subd. (b).
[69] N. H. Laws, 1927, c. 54, p. 64.
[70] N. J. Laws, 1929, c. 116, p. 195.
[71] Laws of N. Y., 1929, c. 695.
[72] R. I. Acts and Resolves, 1929, c. 1429, p. 346.
[73] Laws of Vermont, 1927, No. 81, p. 74.
[74] Wis. Laws, 1925, c. 94.

of the recovery of a judgment against them for personal injuries or death. Legislation of this sort tends to increase the financial responsibility of the owner or driver after his first accident. "The fully developed laws of this kind follow either the Connecticut plan, the American Automobile Association Safety Responsibility plan or the Stone plan, sponsored by Edward C. Stone of the Employer's Insurance Company. Under all these proof of financial responsibility by insurance policy, surety bond, or the deposit of cash or collateral is required only from those who have been involved in an accident or have been convicted of violating a motor vehicle law. Under the Connecticut plan this proof of responsibility is required only with respect to future accidents, while under the American Automobile Association and Stone plans the motor license is revoked until proof of responsibility is given with respect to the accident which has already happened."[75]

The tort liability of the owner of an automobile has been greatly enlarged, and justifiably so, through substantive law changes brought about by judicial decision and legislative enactment. The courts have, through the Family Purpose Doctrine, extended the principle of *respondeat superior* so as to make the owner of a motor vehicle responsible, without the ordinary limitations of agency law, where the vehicle is being operated with his consent, express or implied. The legislatures have approved the results reached by the courts by definite statutory enactments that have the same or a similar effect on the owner's liability. We have pointed out the further legislative tendency at present to increase the owner's financial responsibility by means of compulsory insurance statutes. It will be noticed, however, that the statutes, as well as the judicial decisions, leave *negligence*—coupled with the permissive use of the car—as the basis of liability. The injured party must still bring suit in court and establish by adequate proof, before he can recover a judgment, that the injury was caused by the negligence of the driver of the car. Thousands of cases brought by those injured, or by the legal representatives of those killed in automobile accidents, must continue to clog

[75] 16 A. B. A. J. 99 (Feb. 1930). See also W. H. Elsbree and H. C. Roberts, *Compulsory Insurance Against Motor Vehicle Accidents* (1928) 76 U. PA. L. REV. 690; Harry J. Loman, *Compulsory Automobile Insurance,* Annals of the American Academy of Political and Social Science, March, 1927.

the dockets of the courts. Litigants must be subjected to legal expense and delay, uncertainty, and the lack of uniformity in juries' verdicts. Has the problem become so acute and pressing as to call for legislation that would place upon the owner of a motor vehicle liability without fault?

It has been suggested that:

"The most effective method of dealing with the problem would be to extend the principle of the Workmen's Compensation Law to cover motor vehicle accidents. Every owner of a motor vehicle, as a condition of obtaining a license to operate what courts have deemed to be a dangerous instrumentality over the public highways, would be required to provide compensation for the disability or death of any person, caused by an injury arising from the use or operation of a motor vehicle on the public highway without regard to fault as a cause of injury, except when solely occasioned by the intoxication of the injured person, or by his wilful intention to bring about injury to himself or another. The provisions of the Workmen's Compensation Law relative to insurance, informal administration by a board or commission, medical treatment, payment up to a stated maximum amount for disability or death, according to fixed schedules, would be applicable to motor vehicle accidents. The proposal is fraught with difficulties, actuarial, administrative and legal, which demand impartial, expert study at the hands of a Commission."[76]

A voluntary commission, known as the Committee to Study Compensation for Automobile Accidents, and composed of eminent judges, lawyers, and law school teachers, has already begun the work of preparing and publishing an impartial study of the questions relating to the compensation and financial protection of persons injured by motor vehicles.[77] The results of the investigation of this committee and any solution of the problem which it may propose will be awaited with keenest interest. The day does not seem far distant when the owner of an automobile will be called upon to assume complete responsibility for death or injury caused by his machine, regardless of any question of fault. That such responsibility will be

[76] Shientag, *Motor Vehicle Accidents and the Law* (April, 1929) 1 NEW YORK STATE BAR ASSOCIATION BULLETIN, 134, 140 and 141.

For a discussion of the essential features of such a proposed act, see W. H. Elsbree and H. C. Roberts, *Compulsory Insurance Against Motor Vehicle Accidents, op. cit., supra* note 75.

[77] For an interesting statement of the problem involved and of the proposed work of the committee, see Ballantine, *A Study of Compensation for Automobile Accidents* (Feb. 1930) 16 A. B. A. J. 97.

imposed by legislation formulated along the lines of the Workmen's Compensation Law seems almost inevitable.[78]

[78] There is now pending before the Legislature of Massachusetts an "Act to Create a Motor Vehicle Insurance Fund for the Purpose of Providing Compensation for Injuries and Deaths Due to Motor Vehicle Accidents," H. B. No. 202; see (1930) 15 MASS. LAW QUARTERLY (Supplement, Feb. 1). In general, it provides for the creation of a commission to administer a general fund to which the owners of motor vehicles must contribute certain sums before they will be allowed to register and operate said vehicles; and if such contribution is made, the commission agrees to insure and indemnify the owner of the vehicle against damages up to certain amounts. The commission has the right to settle out of the fund all claims against the assured.