View metadata, citation and similar papers at core.ac.uk

brought to you by CORE

provided by University of Kentucky

Kentucky Law Journal

Volume 38 | Issue 1 Article 10

1949

The Family Car Doctrine and Its Application

Marne Q. Miller
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Torts Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Miller, Marne Q. (1949) "The Family Car Doctrine and Its Application," *Kentucky Law Journal*: Vol. 38 : Iss. 1 , Article 10.
Available at: https://uknowledge.uky.edu/klj/vol38/iss1/10

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

THE FAMILY CAR DOCTRINE AND ITS APPLICATION

It may be stated that generally a parent is not liable for the torts of his minor children.[1] One exception which is recognized in some jurisdictions is the "family car doctrine",[2] also given such names as "family purpose doctrine",[3] "family automobile doctrine",[4] or the "family rule",[5] and probably others. Whatever it may be called, it seems to be an illegitimate child of the law which has been accepted only out of social necessity and then rationalized by means of legal fictions.

The family car doctrine, as it shall be referred to herein,[6] has been stated to be " that, where the head of a family maintains an automobile for pleasure, convenience, and use of his family, he is liable for injuries inflicted in the negligent operation of the car while it is being used by members of the family for their own pleasure or purpose. "[7] A review of the decisions indicates that it extends not only to the protection of a pedestrian who may be injured by the operation of a family automobile,[8] but also to the operators of other motor vehicles,[9] and that it relates to both property[10] and personal[11] injury.

Although a parent is not responsible for the torts of the infant simply by reason of paternity, the infant has generally been held liable himself.[12] The relationship of parent and child will not, *per se*, establish the liability of the parent for the negligent operation of the family automobile. There must exist in addition the relationship of master and servant, or principal and agent.[13] Likewise, as between the spouses, under some statutes one is generally not liable for the torts of the other,[14] and thus some basis for liability must be found to

---

[1] PROSSER, TORTS sec. 100 (1941).

[2] Bryant v. Keen, 43 Ga. App. 251, 158 S.E. 445 (1931), Felcyn v Gamble, 184 Minn. 357, 241 N.W 37 (1932), Hart v. Hogan, 173 Wash. 598, 24 P 2d 99 (1933)

[3] Morton v Hall, 149 Ark. 428, 232 S.W 934 (1921)

[4] Morken v St. Pierre, 147 Minn. 106, 179 N.W 681 (1920).

[5] Mooney v Canier, 198 Iowa 251, 197 N.W 625 (1924)

[6] The term "family car doctrine" seems more descriptive of the function that this concept serves than some of the other terms, since it demonstrates that this rule relates only to the family and to the car furnished for the family use; it also has the merit of being short.

[7] Jones v Knapp, 104 Vt. 5, —, 156 Atl. 399, 400 (1931).

[8] Emanuelson v. Johnson, 148 Minn. 417, 182 N.W 521 (1921).

[9] Grier v Woodside, 200 N.C. 759, 158 S.E. 491 (1931).

[10] Turner v Gackle, 168 Minn. 514, 209 N.W 626 (1926).

[11] Hart v Hogan, 173 Wash. 598, 24 P 2d 99 (1933).

[12] PROSSER, TORTS sec. 100 (1941).

[13] *See* Litz v Harman, 151 Va. 363, —, 144 S.E. 477, 481 (1928).

[14] MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS sec. 64 (1931), 27 AM. JUR. secs. 478-479 p. 476 (1936) (to the effect that many statutes have abolished the liability of a

exist. To create the latter, where no *actual* agency exists, the family car doctrine, which has been said to be " a fictitious agency without any basis in fact "[15] is invoked. It is " one of the fictions most commonly resorted to "[16]

In order fully to understand this doctrine, certain questions must be answered. At the outset it should be noted that less than half of the forty-eight states appear to have accepted it.[17] Obviously, the answers to the questions raised in the ensuing discussion are applicable only in those states which do purport to apply the doctrine.

First, what is the legal basis of the doctrine? The courts under the maxim *respondeat superior,* long ago established that the principal is liable for the torts of the agent when committed within the scope of the employment.[18] This liability is predicated on considerations of social policy and is not dependent upon authorization of the tort by a principal; otherwise there might never be a basis for liability because a tort would rarely be authorized.[19] Although a wife is not an agent *per se* of her husband, nor is a child agent *per se* of the parent, yet if employed in the business of the husband or parent either may become an agent, and the usual consequences of the principal's liability for the agent's tort may ensue. The family car doctrine goes a step further and not only establishes this liability for an unauthorized tort, but places liability on one who is not in reality a principal or master by creating a sort of family agency which makes a member of the family using the family automobile an agent of the head of the family during such use.[20]

The courts in jurisdictions where the doctrine is applied have expressed two possible legal bases for it. A Kentucky court[21] states:

> "The family purpose doctrine is founded on the relationship of principal and agent; the theory being

husband for the torts of his wife). The following states which have accepted the family car doctrine are among those that have statutes either completely or partially abrogating the common law liability of the husband for wife's torts: Georgia, Iowa, Kentucky, Minnesota, North Carolina, North Dakota, Texas, Washington, and West Virginia. *Compare* McDowell v Hurner, 142 Ore. 611, 20 P 2d 395 (1933) (showing states accepting the doctrine) *with* 3 VERNIER, AMERICAN FAMILY LAWS sec. 157 p. 72-84 (1931) (showing states having statutes removing husband's common law liability), 41 C.J.S. sec. 219 (b) p. 711 (1944) (wife cannot be held liable for husband's torts in which she did not participate in the absence of agency reaction.)

[15] PROSSER, TORTS sec. 66 (1941).

[16] *Ibid.*

[17] McDowell v Hurner, 142 Ore. 611, 20 P 2d 395 (1933)

[18] 2 AM. JUR. sec. 359 p. 278 (1936).

[19] MECHEM, OUTLINES OF THE LAW OF AGENCY secs. 499-501 (3d ed. 1923).

[20] *Id.* sec. 515.

[21] Steele v. Age's Administratrix, 233 Ky 714, 26 S.W 2d 563 (1930).

> that if one maintains an automobile or other vehicle[22] for the general use, pleasure and convenience of members of his family, and it is being used by one of them for that purpose when an accident occurs, the one so using the machine will be deemed the agent of the owner and to have been operating the car under the owner's authority, which may be either express or implied."[23]

Nearly all other states adopting the doctrine place it on a similar basis of either principal and agent, or master and servant.[24] In accord is a North Carolina decision[25] which maintains that a member of the family in using the family automobile for his convenience and pleasure represents the head of the family in so doing, and this court stresses the point that liability will depend only on whether the member of the family was using the car for the purpose for which it was provided.[26]

However, a federal court[27] has said that the family car doctrine is a departure from the master-servant theory and is based on the "dangerous instrumentality" theory. This basis is not widely accepted, but rather, "The courts have very generally refused to apply the dangerous instrumentality doctrine to automobiles. The Florida cases are a conspicuous exception ..."[28]

Upon whom does the family car doctrine impose liability? The courts have been unanimous in fixing liability upon the head of the family, at least where he was the owner of the automobile which was involved in the accident. However, when a question has arisen involving the extension of the doctrine to place liability upon another member of the family who owns the automobile and furnishes it for the pleasure and convenience of the family, conflicts are found in the courts' decisions.

---

[22] Meinhardt v. Vaughn, 159 Tenn. 272, 17 S.W 2d 5 (1928), Hopkins v Droppes, 184 Wisc. 400, 198 N.W 738 (1924) (family motorcycle doctrine), *cf.* Felcyn v. Gamble, 185 Minn. 357, 241 N.W 37 (1932) (where the court refused to apply the doctrine to motorboats although it was applied to automobiles in that jurisdiction).

[23] Steele v Age's Administratrix, 233 Ky. 714, 716, 26 S.W 2d 563, 564 (1930)

[24] Donn v Kunz, 52 Ariz. 219, 79 P 2d 965 (1938), Griffin v. Russell, 144 Ga. 275, 87 S.E. 10 (1915), Buss v. Wachsmith, 190 Wash. 673, 70 P 2d 417 (1937)

[25] Grier v. Woodside, 200 N.C. 759, 158 S.E. 491 (1931).

[26] In Lashbrook v. Patten, 1 Duv. 316 (Ky 1864) the court stated that a minor son was dicharging a duty usually performed by a slave when he was driving his sisters to a picnic in his father's carriage, and for purposes of this suit he was to be regarded as his father's servant.

[27] Turoff v Burch, 50 F 2d 986, 987, 60 App. D.C. 221 (1931).

[28] MECHEM, SELECTED CASES ON THE LAW OF AGENCY p. 116 (3d ed. 1942)

In a Minnesota case in 1920,[29] it was questioned whether the doctrine would extend to include such cases. The question was not then decided, but later the court placed liability on a son, who owned and kept the automobile, for injuries caused by his father when the father was driving with his consent.[30] In Georgia,[31] a married woman who was not the head of the family was held liable when her minor son caused injury by the negligent operation of her car. The court was of the opinion that there was no merit in a contention that this rule was applicable only when the father, who was the head of the family, owned the auto. They said the doctrine would apply to a mother or to any other member of the family.[32]

North Dakota takes a very different view when the owner of the automobile is not the head of the family. In *Posey* v. *Krogh*,[33] an adult daughter, the owner of an automobile, consented to her minor brother operating it and was not liable for his negligent operation. Both she and the minor brother were members of their father's household, and the court pointed out that the brother was not a member of her family and "She was not herself the head of a family ..."[34]

In Kentucky,[35] the court refused to hold the head of the family, the father, liable under the family car doctrine when the wife owned the automobile, even though she deferred to the wishes of her husband in the operation of it. In another case in the same state,[36] where there was a dispute which turned on whether a mother or a father was the owner of the automobile, it was held that one of the indispensable requisites of the family car doctrine is that the person on whom it is sought to fix liability must own, maintain or provide an automobile for the family use. At the same time, it is not necessary in Kentucky that the defendant be both the head of the family and the owner of the car.[37] Ownership is sufficient in Kentucky, as in Minnesota and Georgia. And as has been previously indicated, merely being the head of the family has apparently never been held sufficient if some other member of the family owns or provides the car. In *Mitchell* v. *Mullen*[38] the court expressly refused to hold the

---

[29] *See* Morken v. St. Pierre, 147 Minn. 106, —, 179 N.W. 681, 682 (1920).

[30] Turner v. Gackle, 168 Minn. 514, 209 N.W. 626 (1926).

[31] Ficklen v. Heichelheim, 49 Ga. App. 77, 176 S.E. 540 (1934).

[32] *Id.* at —, 176 S.E. at 541.

[33] 65 N.D. 490, 259 N.W. 757 (1934).

[34] *Id.* at —, 259 N.W. at 760.

[35] Smith v. Overstreet's Admr., 258 Ky. 781, 81 S.W. 2d 571 (1935).

[36] Euster v. Vogel, 227 Ky. 735, 13 S.W. 2d 1028 (1929).

[37] Steele v. Age's Administratrix, 233 Ky. 714, 26 S.W. 2d 563 (1930) (mother, owner of automobile was held liable for son's negligent operation, although not the head of the family).

[38] 45 Ga. App. 285, 164 S.E. 278 (1932).

defendant father liable, where a mother-in-law owned the automobile and at the time the defendant's son was operating it, he was using it with the consent of the defendant's wife and was on an errand for her.

It would appear that in states such as North Dakota where the family car doctrine is applied but where there is a refusal to extend it to situations where the car is owned by one not the head of the family, the party injured through the negligent operation of a car by a financially irresponsible member of the family would be without remedy in the absence of a statute.[39]

Of course, as will be seen, if there is a bailment to the father, or some property interest in the automobile resting in the head of the family, there would be a basis on which to predicate liability, and control of the automobile by the father might alone be sufficient.[40] But cases frequently arise where none of these requisite elements exist in the father, and if it is desirable to hold him liable in any event, it can only be done by statute. No statute of this type has been found. The better approach in any event would seem to be to impose liability on the owner of the car, as is done in Minnesota, Georgia and Kentucky.

What, if any, property interest in the automobile must the defendant have as a prerequisite to liability? It is not necessary that he be the owner of the automobile if he has some property interest in it.[41] In Kentucky,[42] when an automobile was left with a son by an owner and an accident occured while the father, not the owner, was riding in it with the son, the court refused to apply the doctrine and would not impose liability on the father because there was no evidence of either ownership or control on the father's part. On the other hand, a Minnesota court[43] placed liability on a father where he borrowed an automobile for his adult daughter to drive some visitors to a station, although he was not in the car when the accident occurred. And in an early Texas case,[44] the defendant was held liable when he had the custody and control of his employer's automobile, and his son had an accident, even though the father was not

[39] Michigan and New York have statutes imposing liability upon the owner of the automobile for its negligent operation by another which are construed in the following cases: Stapleton v Independent Brewing Co., 198 Mich. 170, 164 N.W 520 (1917), Atwater v. Lober, 133 Misc. 652, 233 N.Y.S. 309 (1929), *cf.* Gordon v Rose, 54 Idaho 502, 33 P 2d 351 (1934) (Statute providing for owner's liability as jointly and severally with minor when he knowingly permits minor under 16 to drive), Ostergard v Frisch, 333 Ill. App. 359, 77 N.E. 2d 537 (1948) (defendant held liable for a thief's negligent operation of his automobile under the Illinois statute)

[40] Holland v Goode, 188 Ky. 525, 526, 222 S.W 950, 951 (1920).

[41] PROSSER, TORTS sec. 66 (1941)

[42] Holland v. Goode, 188 Ky 525, 222 S.W 950 (1920)

[43] Emanuelson v. Johnson, 148 Minn. 417, 182 N.W 521 (1921).

[44] 23 S.W 2d 860 (Tex. Civ App. 1929).

in the auto, and he claimed that he did not know his son was using it. On the basis of these cases, it would appear that some property interest, even if only that of mere bailee, is a prerequisite to liability.

What relationship must exist between the defendant and the negligent operator of the automobile before liability will be imposed on the former? It may be stated broadly that the family car doctrine is applicable only to acts of members of the family for whose use the defendant maintains the automobile and who are permitted by the defendant to use it.[45] But who are "members of the family"?

(a) *The Child.* Little question, if any, seems to have arisen concerning the applicability of the family car doctrine to the unemancipated minor child, since the latter is generally recognized as falling within the rule.[46] The courts are not in such agreement concerning the adult child, and much variance is found in the decisions of different jurisdictions. For instance, Georgia and Kentucky take conflicting stands concerning the adult child. Georgia has placed a self-supporting, adult son, residing in the home of the father without charge, in the same category as the minor child, and held the father liable under the doctrine.[47] Kentucky maintains that the rule does not apply to the use of the family automobile by adult children, whether living in the home with their father[48] or not.[49] The reason given by the court is that there is no legal or moral duty on the father to support, even though the adult child lives in the household.[50]

(b) *The Spouse.* Since the Married Women's Act have emancipated the wife in practically all the American states and she is now legally able to hold real and personal property in her own name, separate and free from the control of her husband,[51], a judgment against a wife may be satisfactorily enforced. It is often the case, however, that the family automobile and all other property is, in fact owned by the husband, even where there is such an emancipation statute. Therefore, a judgment and levy against a wife might frequently be returned unsatisfied for lack of property. The family car doctrine properly applied might relieve hardship in such a situation. Of course, in states such as Michigan which have statutes imposing liability upon the owner of the automobile for the negligent operation by another with his consent (see *infra*) the same result may be obtained by the application of the statute.

---

[45] 42 C.J. sec. 840 p. 1083 n. 7-8 (1928).

[46] Stowe v. Morris, 147 Ky. 386, 144 S.W 52 (1912).

[47] Hubert v. Harpe, 181 Ga. 168, 182 S.E. 167 (1935).

[48] United States Fidelity and Guaranty Company v. Hall, 237 Ky. 393, 35 S.W 2d 550 (1931).

[49] Creaghead v Hafele's Administrator, 236 Ky 250, 32 S.W 2d 997 (1930).

[50] Miracle v. Cavins, 254 Ky 644, 72 S.W 2d 25 (1934).

[51] MADDEN, HANDBOOK OF THE LAW OF PERSONS AND DOMESTIC RELATIONS sec. 42 (1931).

In jurisdictions where this doctrine is applied, the husband is generally held liable for his wife's negligent operation of his car.[52] In order to establish such liability, it must be shown that the automobile was kept by the husband for the family use.[53] But a wife who is the owner of the car has also been held liable for her husband's negligent driving, even when it was maintained for both family and business purposes.[54] *Wyant* v. *Phillips*[55] illustrates the usual rule that the owner of the car need not be the head of the family to come within the family car doctrine. In another case[56] it was left to the jury whether the husband should be liable for his wife's negligence when neither of them owned the automobile, but it was owned by a minor daughter, who had won it in a contest. There was sufficient evidence that the father so used and controlled the automobile as to make him liable.

When a conflict arose between the family car doctrine and a statute declaring that a husband is not liable *per se* for the torts of his wife, it was held that the statute did not preclude liability under the doctrine.[57]

In community property states the problem is somewhat different. Thus in Washington,[58] both the marital community and the husband were held liable for the negligent operation of the automobile by the husband although the wife was not a passenger. In Arizona, however, the court refused to impose liability on the husband for a tort committed by his wife in the community automobile although the community was held.[59] This decision was based on the fact that the automobile was furnished by the husband not as the head of the family but as an agent for another entity, the community. It was stated here that if there was any liability for an accident aside from that of the wife, the liability under the doctrine of *respondeat superior* had to be imposed on the owner of the car, the community, and not upon either of the individual members. If these cases are construed together, it would seem that the community is liable in any event.

(c) *Other Members of the Family.* The rule under discussion both by definition[60] and by precedent[61] is restricted to members of the

[52] Petway v McLeod, 47 Ga. App. 647, 171 S.E. 225 (1933), Hart v. Hogan, 173 Wash. 598, 24 P 2d 99 (1933), *see* Lyon v Lyon, 205 N.C. 326, —, 171 S.E. 356, 357 (1933)

[53] Williams v Rubenstein, 61 App. D.C. 266, 61 F 2d 575 (1932).

[54] Goldstein v Johnson, — Ga. App.—, 12 S.E. 2d 92 (1940), *But see* Webb v Daniel, 261 Ky. 810, 88 S.W 2d 926 (1935).

[55] 116 W Va. 207, 179 S.E. 303 (1935)

[56] Matthews v. Cheatham, 210 N.C. 592, 188 S.E. 87 (1936)

[57] Plasch v Fass, 144 Minn. 44, 174 N.W 438 (1919)

[58] King v Williams, 188 Wash. 350, 62 P 2d 710 (1936), *cf.* Newbury v. Remington, 184 Wash. 665, 52 P. 2d 312 (1935) (court refused to apply the doctrine to a tort committed by alighting from the automobile and assaulting another).

[59] Donn v Kunz, 52 Ariz. 219, 79 P 2d 965 (1938).

[60] Jones v Knapp, 156 Atl. 399 (Vt. 1931).

[61] Wolfson v Rainey, 180 S.E. 913 (Ga. App. 1935)

family. As a general rule, it may be said that this means members of the immediate family, such as the spouse and children.[62] However, some courts construe the term "members of the family" broadly, and circumstances may arise where a relative other than one of the immediate family will be considered such.[63] Thus, whether a person is a member of the family within the rule may be a question for the jury, as in the North Carolina case of *McGee* v. *Crawford*.[64] There it was said that the term "family" is

> " an elastic expression, and must necessarily vary with given facts and circumstances, but the description of the relationship given by our court implies: (1) Those who live in the same household, subject to the general management and control of the head thereof; (2) dependence of the members upon such supervising, controlling, and managing head; (3) mutual gratuitous services with no intention on one hand of paying for such services, and no expectation on the other receiving reward or compensation."[65]

However, as will appear, this broad definition is rarely accepted. Although, as has been seen, the Georgia court has included the adult son in applying the doctrine, it held in another case[66] that "family" does not include a son-in-law, even one living in the same house with his father-in-law. "The son-in-law is not a member of the father-in-law's family; neither, for that matter is the daughter after she becomes the son-in-law's wife."[67]

A son has been held liable for his father's negligence by a Minnesota court, under the doctrine, where the father was driving the son's car.[68] And liability has been imposed upon an unmarried man for the tort of his unmarried sister, where the man owned the car and was the head of the household in which the sister lived.[69] But, attempts have failed, to extend the doctrine to include a minor nephew residing in the household,[70] brother-in-law residing in the household and sharing expenses,[71] an adult stepson,[72] and a cousin.[73]

---

[62] 5 AM. JUR., sec. 370 p. 708 (1936).

[63] *Ibid.*

[64] 205 N.C. 318, 171 S.E. 326 (1933)

[65] *Id* at —, 171 S.E. at 327.

[66] Bryant v. Keen, 43 Ga. App. 251, —, 158 S.E. 445, 446 (1931).

[67] *Ibid.*

[68] Turner v. Gackle, 168 Minn. 514, 209 N.W 626 (1926)

[69] Levy v. Rubin, 181 Ga. 187, 182 S.E. 176 (1935).

[70] Kentucky v. Maryland Casualty Co., 112 F 2d 352 (C.C.A. 6th 1940).

[71] Jones v. Golick, 46 Nev. 10, 206 Pac. 679 (1922)

[72] Mooney v. Canier, 198 Iowa 251, 197 N.W 625 (1924)

[73] Johnston v. Hare, 30 Ariz. 253, 246 Pac. 546 (1926) (an additional ground that it was not a family car also precluded the application of the doctrine in this case).

For what purpose must the car be used in order to make a defendant liable? The comfort and pleasure of the family are generally held to be proper purposes for the application of the family car doctrine.[74] In *Wolfson* v. *Rainey*,[75] a Georgia case, it was said that " when an automobile, kept by a father for the comfort and pleasure of his family is being used for the purpose, it is being used within the scope of the business of the father."[76]

On the other hand, where the car is used for some purpose other than mere pleasure or convenience, even though the use be very advantageous to the driver, the owner or head of the family is not liable. Thus, where a son was using the father's car incident to the son's employment, the father was not liable.[77]

According to the Nebraska court[78] the weight of authority is that the owner of an automobile is liable for the negligent driving of his child when the car is also occupied by other members of the family and is being used for one of the purposes for which it is kept when the accident occurs. In such situations, where one member of the family is driving other members, the courts can easily find a family purpose. Such was the case of *Litz* v. *Harman*,[79] where the defendant's minor son was operating the car with his mother and sister as passengers for the purpose of taking groceries to camp. It was stated in this case that the family car doctrine was applicable, the car being used by members of the family for a purpose for which it was bought. The father was here held liable without modifying decisions of that state, which would not impose liability on the basis of a relationship of father and son alone.

In *Litz* v. *Harman*, the family car doctrine was applied although the court acknowledged that the state had rejected it[80] and that in general it was not followed. In such cases, the courts easily find a master-servant relationship between the father and the son in that the son was operating the automobile on behalf of the father to provide pleasure for other members of the family *A fortiori*, when a child or other member of the family is driving the owner and an accident occurs, an agency relationship is discernible. A widow was chargeable for the negligent operation of a car by her son, when she

---

[74] Bryant v Keen, 43 Ga. App. 251, 158 S.E. 445 (1931), Griffin v Russell, 144 Ga. 275, 87 S.E. 10 (1915).

[75] 180 S.E. 913 (Ga. App. 1935)

[76] *Ibid.*

[77] Scates v Sandefer, 163 Tenn. 558, 44 S.W 2d 310 (1931)

[78] *See* Stevens v Luther, 105 Nev 184, —, 180 N.W 87, 88 (1920).

[79] 151 Va 363, 14 S.E. 477 (1928)

[80] Rule was rejected in Blair v Broadwater, 121 Va. 301, 93 S.E. 632 (1917). For other states that have rejected the family car doctrine see McDowell v Hurner, 142 Ore. 611, —, 20 P 2d 395, 400 (1933) (dissenting opinion)

was with him at the time of the accident.[51] Both the doctrine of principal and agent (or master and servant) and the family car doctrine were said to be applicable. But there is authority for holding that where an actual agency exists the family car doctrine does not apply.[52]

Is defendant's consent to the use of the car a prerequisite to his liability? The matter of consent and knowledge of the parent as to the use of the automobile by a child has been of importance in several cases. It has been held that the parent would not be liable where the child was driving the automobile without either the express or implied consent of the parent.[53] And where a son surreptitiously took the family automobile without his father's knowledge and in direct violation of his instructions, the father was not liable for the negligent operation.[54] But the requirement of consent has been liberally construed by some courts and tacit acquiescence of the father has been held sufficient.[55] Circumstances surrounding the use of the family car may be sufficient proof of consent, or may at least raise a presumption. For example, some courts place the burden on the defendant mother to overcome the presumption that her son was driving the automobile for her when the evidence showed that the automobile was habitually and openly used by the child, the inference being that the automobile was operated with the authority of the parent.[56]

"The great weight of authority," it is said,[57] " neither upholds nor condemns this doctrine." It has, however, been subjected to considerable criticism and a very large portion of this is due to the fact that the rule is founded on a fictitious agency. "Some courts have stretched the law of agency to the breaking point in order to fasten liability on a paying defendant "[58] And insofar as the courts have attempted to create an agency relationship from the circumstances surrounding the family car and its use, the criticism probably was merited. One court[59] maintains that after the automobile came into common use, it was no longer considered a dangerous thing, and then the courts had to resort to the rules of agency to establish a defendant's liability, since the general liability of the owner of the automobile lingered. The phrasing of the court is novel when it says, "If son took his best girl riding, prima facie

[51] Pearson v. Northland Transp. Co., 1184 Minn. 560, 239 N.W 602 (1931).

[52] Trice v. Bridgewater, 125 Tex. 75, 81 S.W 2d 63 (1935).

[53] Steele v. Hemmers, 40 P 2d 1022 (Ore. 1935)

[54] Sale v. Atkins, 206 Ky 224, 267 S.W 223 (1924).

[55] Barr v. Searcy, 280 Ky 535, 133 S.W 2d 714 (1939).

[56] Ficklen v. Heichelheim, 49 Ga. App. 777, 176 S.E. 540 (1934), Wells v. Lockhart, 258 Ky. 698, 81 S.W 2d 5 (1935).

[57] McDowell v. Hurner, 142 Ore. 611, —, 20 P 2d 395, 398 (1933).

[58] *Id.* at —, 20 P 2d at 401.

[59] Watkins v Clark, 103 Kan. 629, 176 Pac. 131 (1918).

it was father's little outing by proxy, and if an accident happened, prima facie father was liable."[90]

There are decisions, on the other hand, that sustain the agency basis, or at least refuse to condemn the doctrine on that account. It has been stated[91] that the law of agency extends to more than business transactions, and if a father buys an automobile for the convenience and pleasure of his family, and gives it to a son who uses it for this purpose, the son is furthering the father's purpose, and this is true whether it is called his "business" or not. In *Griffin* v. *Russell*,[92] the opinion of the court is to the effect that although "business" is most commonly used in regard to renumerative businesses, it is not limited to such pursuits. It has further been 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."[93]

One court declared that this rule " is merely applying old principles to new conditions."[94] It is now suggested that the old principles are no longer adequate and that statutes, similar to those already enacted in some states,[95] are needed. These statutes not only serve as guides to the courts and render the law more stable, but also when properly enacted and interpreted by the courts are more efficient.

The Michigan statute provides (1) that the owner of the automobile is responsible for all injuries negligently inflicted while it is being operated with his consent, express or implied; and (2) that it shall be conclusively presumed that the automobile is being used with the knowledge and consent of the owner, if it is being operated at the time of the injury by a member of the immediate family of the defendant.[96]

It is doubtful that, even if the family car doctrine were applied by a *very liberal court,* it could be as effective in its application to the owner of the automobile as the above statute. Such a court by following precedent could only make the rule apply to (a) the owner, when the automobile is owned by the head of the family, and used with permission by a member of the family; (b) the owner, when the automobile is owned by a member of a family and used with permission by another member; (c) the owner, when the automobile is owned by a marital community and used by one of the members; (d) the head of the family, when he is a bailee of an automobile being used with his permission by a member of the

[90] *Id.* at —, 176 Pac. at 131-132.
[91] King v. Smythe, 140 Tenn. 217, 204 S.W 296 (1918).
[92] 144 Ga. 275, 87 S.E. 10 (1915).
[93] King v Smythe, 140 Tenn. 217, —, 204 S.W 296, 298 (1918).
[94] Jones v Cook, 90 W Va. 710, 111 S.E. 828 (1922).
[95] See note 38 *supra.*
[96] MICH. LAWS 1929, c. 4648, sec. 29.

family. Perhaps too, such a court could sanction a very liberal definition of "member of the family," as well as a rebuttable presumption that the car was being operated with the consent of the owner when operated by a member of his (or her) family

But it is doubtful if even a *very liberal court* would close its eyes to the purpose for which the automobile was supplied and used, while under such a statute it easily could. And, of course, the court could not hold the owner liable under the doctrine where he had bailed the car to any person not connected by family ties, unless for the purpose of a "true agency." The doctrine applies only to operation of a car for family purposes by members of the family, and for this reason a statute is more effective since it can extend liability beyond the family relationship to include any situation where the owner allows another to drive his automobile. Indeed, the Illinois statute has been held to impose liability upon the owner for the negligent operation by a thief.[97]

If the majority of the courts had in the beginning accepted the automobile as a dangerous instrumentality, the same results, or even better results in some situations, could have been arrived at under that rule than under the family car doctrine. The dangerous instrumentality theory, insofar as it would pertain to the automobile, would be based on negligence in entrusting a dangerous thing to an incompetent person.[98] This would abolish legal fiction and establish symmetry in the law.[99] Under it an owner would be liable both in the family situation and beyond. But a statute might still go farther and place liability on the owner even where he was not negligent and had entrusted the automobile to an apparently capable person, thus imposing a strict liability

In order for a court to impose strict liability without fault, in the absence of statute, the thing must be inherently dangerous and the automobile is felt to be comparatively safe if operated carefully.[100] Automobiles have become so commonly used in traffic as supposedly to forbid the application of extraordinary rules of liability for their reckless operation,[101] and have been placed in the same classification with golf clubs which *may* be handled carelessly to the injury of some person.[102] Although the automobile has been regarded as a dangerous instrumentality by a few courts,[103] it is doubtful if many courts would go so far as to impose strict liability under this theory.[104]

---

[97] Ostergard v. Frisch, 333 Ill. App. 359, 77 N.E. 2d 537 (1948)

[98] McDowell v. Hurner, 142 Ore. 611, —, 20 P 2d 395, 399 (1933) (Specially concurring opinion).

[99] Cockrill, *The Family Automobile*, 2 VA. L. REV. 189 (1914)

[100] PROSSER, TORTS sec. 59 (1941).

[101] Turoff v. Burch, 50 F 2d 986 (App. D.C. 1931)

[102] Van Blaricom v. Dodgson, 220 N.Y. 111, 115 N.E. 443 (1917).

[103] See notes 26 and 27 *supra.*

[104] Cockrill, *The Family Automobile*, 2 VA. L. REV. 189 (1914).

The family car doctrine and a qualified dangerous instrumentality theory might overlap where one allowed an incompetent member of his family to drive. But neither rule is sufficiently inclusive. The instrumentality theory would not include a competent member of the family who was financially irresponsible and who had caused injury by the negligent operation of another member's automobile. Nor would the family car doctrine include a "bailee" of an automobile not a member of the owner's family who is incompetent and financially irresponsible. Only by legislative enactment can this problem be solved, but the family car doctrine properly applied appears to serve a beneficial and necessary purpose as far as it goes.

MARNE Q. MILLER.