Kentucky Law Journal

Volume 14 | Issue 3 Article 1

1926

Liability of the Owner of an Automobile for the Negligence of His Chauffeur and of His Family in the Operation of His Car

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KENTUCKY LAW JOURNAL

Volume XIV MARCH, 1926 Number 3

LIABILITY OF THE OWNER OF AN AUTOMOBILE FOR THE NEGLIGENCE OF HIS CHAUFFEUR AND OF HIS FAMILY IN THE OPERATION OF HIS CAR.

The law governing and applicable to the ownership and operation of the relatively new machine denominated "automobile," due to that machine's general, common and constant use on public highways, has become so voluminous as well as important, its development so enormously rapid and exceptionally varied that it may be classified as a distinct branch of our legal system which in turn may be subdivided and classified under a greater diversity of heads possibly than were even employed in the whole subject of negligence before the introduction of this hitherto unknown method of transportation. The governing principles, the basis of the law, however, is not new but merely a new application of old and tried rules of the common law to new and varied conditions arising out of the general use of this mode of travel upon our thoroughfares. Of course, it would be utterly impossible to deal in the most general way with the whole subject of the law of automobiles in a single article. So, I have concluded to confine the scope of this discourse to certain phases of the law which fix the rights and measure the responsibilities of the owner of an automobile, when driven or operated (1) by his hired chauffeur; and (2) by his infant son or daughter, the latter subdivision being sometimes denominated "the family purpose doctrine." Nor can we, in the short space allowed, do more than classify the cases upon these extensive branches of the subject, briefly examine their basic reasoning and hurriedly discuss their relative merits.

The liability of the owner of a car is readily apparent when an injury occurs to a third person from the negligent operation of the car by the hired chauffeur engaged in the master's business, or acting within the scope of his employment. In such cases the chauffeur is merely the servant or agent

of the owner and the common law rule of *respondeat superior* applies with full force. Anciently it was said, and it is yet the law, that whenever the master intrusts a horse or carriage or anything which may be readily made an implement of mischief, to his servant to be used by him in furtherance of his master's business, or for the execution of his orders, the master will be responsible for the negligent management of the thing intrusted to the servant so long as the latter is using it or dealing with it in the ordinary course of his employment. And it has likewise been and is now the law that if the act is done without the authority of the master and not for the purpose of executing his orders or doing his work, then he is not responsible. The rule requiring the master to respond in damages so well expressed by the old maximum "*qui facit per alium facit per se,*" is just as sound and useful today as when first formulated, and its application to the owner of an automobile operated by his chauffeur is recognized everywhere. In fact, the owner of an automobile stands in the relation of master, and every legal wrong committed by the chauffeur in the course of his employment, though no express command or order of the master be given, or proven, the owner is nevertheless liable. Such liability springs out of the relation itself, and does not depend on the stipulations of the parties Within the scope of his authority the servant may be said to be the medium through which the master acts. It follows, as a general rule, that for the tortuous acts of the chauffeur or servant the master or owner is liable. This principle, an old one, was applied in *Robinson* v. *Webb*,[1] but, of course, it was not applied in that case to an automobile as that instrumentality was not then in common use. The reason assigned for the rule, as stated by Chief Justice Shaw, is "every man in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he must answer for it. But the master is not liable for the acts of his servant or driver committed out of the course of his employment; nor for his willful trespass unless committed by the command of the owner or master, with his assent." The hired chauffeur is,

[1] 11 Bush 465.

therefore, a mere agent or servant of the owner in the operation of the car and the owner must respond in damages for any legal wrong which the chauffeur may commit by operating the car in the regular course of his employment.[2]

Where, however, the wrong is committed while the chauffeur is operating the car for his own pleasure or upon his own business, as distinguished from that of the owner or master, the latter is not liable. In 1925 our court announced the rule as follows:

> "The universal test of the master's liability for the acts of his servant is, was there authority, express or implied, for doing the act; that is, was it done in the course and within the scope of the master's employment? If so, the master will be liable for the act, whether negligent, fraudulent, deceitful, or an act of positive malfeasance. However, the master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only arise when the act done is within the real or apparent scope of the master's business. Hence, when a servant steps outside of his employment to do an act for himself not connected with his master's business no liability attaches. The reason for the rule is that beyond the scope of his employment a servant is as much a stranger to his master as a third person. In every such case the proper inquiry is was the servant engaged in serving his master? If the act be done while the servant is at liberty from the service and pursuing his own ends exclusively, the master is not responsible."

Frequently cases have arisen where the hired chauffeur who had the right to take out the car, caused an injury while pursuing some business of his own independent of his regular employment; and the courts have uniformly held, so far as we are able to discover, that the owner was not liable for the tort. Sometimes, however, it is difficult to determine from the proven facts whether the chauffeur was engaged in the service of his master or was pursuing some object of his own, in the operation of the car at the time the injury was inflicted, and upon the turn of the facts depends the whole question of liability of the owner of the car. Even more difficult questions are presented when the chauffeur while on an errand for his employer, departs for a few minutes from the direct course and engages in a detour for purposes of his own, especially is this true when the detour employed by the chauffeur leads back to his place of employment and thus brings himself by an indirect course to the place his master expected him to reach by a more

[2] See 2 R. C. L. 1190-98; 18 R. C. I. 791, 792; 26 L. R. A., N. S. 382; 18 R. C. L. 248-249. Berry on Automobiles, page 1039.

direct one. Of course, these questions do not arise when the owner of the automobile is himself occupying the car or directing its movements. There is and must always be a strong presumption that the owner riding in his own car has complete control over it. The contributory negligence of the chauffeur may likewise be imputed to the master when the latter is riding in the machine so as to preclude recovery by the master of injury to himself or the machine.

Coming now to the case of an owner whose driver varies from the direct course and while doing so causes an injury, the result of negligence, it must be said that there is no complete unanimity of opinion among courts upon the subject but the liability of the owner is made to depend, in some degree, on the amount of variance from the proper course. A slight diversion from the course indicated by the owner does not necessarily relieve the master from responsibility for the negligence of his driver. But where the driver departs so far from the line of his duty that for the time being his acts constitute an abandonment of his services, the master is not liable.[3] The test of the master's liability laid down by our court in such cases is found in *Tyler* v. *Stephan's Admr.*,[4] where is was said:

"In the case under consideration, the chauffeur had no duties to perform for the owner until the hour of twelve o'clock p. m., approached. There was a period of about two hours and a half during which time he was at liberty from the service. While thus at liberty he set out on a journey exclusively his own and having no connection with his master's business. The case is not one where the journey, if continued until its termination, would have resulted in carrying out the object for which the chauffeur had been employed. It is not a case of mere deviation from the established route or of temporary departure from duty. It is a case where the servant was at liberty and was serving his own purposes wholly independent of his master's business. It will not do to say, therefore, that although the chauffeur had undertaken the journey exclusively for his own purposes, the mere fact that he had turned the automobile around and was coming back into the city with the ultimate intention of returning to the Wood residence for the defendant and her family, shows a resumption of the master's business."

Again, where the diversion of the driver is not great in comparison to the course and distance directed to be taken, the owner cannot escape liability; but if the departure is such

[3] *Eakins* v. *Anderson*, 169 Ky. 1.
[4] 163 Ky. 780.

as to show an abandonment of the owner's service by the driver, the owner is relieved.[5]

Many illustrative cases from states throughout the union intended to enable students and courts to determine when the diversion made by the driver was such as to relieve the owner of the car from responsibility for the negligence of the former, are cited in the texts where this subject is discussed, and they are varied.

Another phase of the subject much akin to the one we have just been considering, is that which arises when the negligent injury occurs after the chauffeur, who has deviated from the line of his employment, has returned to his course before the happening of the accident In such cases the owner is generally held liable; but sometimes the question of fact is submitted to the jury.[6] Upon this subject the court in the case of *Barmore* v. *Vicksburg Railway Company*,[7] observed:

"The rule that, where a servant has made a temporary departure from the scope of his employment, the responsibility of the master for the tort of the servant attaches immediately after the purpose of such departure has been accomplished and as soon as the servant re-engages in the discharge of his duty, applies where an employe of a railroad company, whose duty requires him to use a railroad tricycle to aid in gathering wood, leaves the place where he is thus employed, to carry a sick friend on the tricycle to a station, and, after leaving such friend at the station, injures a third person through his negligence in running the tricycle though the accident happens before the servant reaches the place from which he started."

The contrary view, however, seems to have the support of a majority of the courts, and it is thus stated in *Anderson* v. *Nagle*:[8]

"The defendant's son, where he had turned about and started upon his homeward journey had not then completed the trip upon which he had embarked for his own purposes. He had not then returned, he was but returning to his employment. He was upon his own trip until he had returned to the point of departure from the path of duty, or to a point where, in the performance of his duty, he was required to be. This view is supported by practically all the authorities, and is not out of accord with the decisions of the courts of this state."

As to when a driver has sufficiently returned to his mas-

[5] *Tyler* v. *Stephan's Admr.*, *supra*; *Wood* v. *Indianapolis Abattoir Company of Kentucky*, 178 Ky. 188; *Crady* v. *Greer*, 183 Ky. 675; *Eakins, Admr.* v. *Anderson*, *supra*.

[6] *Brooks* v. *Swift*, 98 Southern 16.

[7] 85 Miss. 426; 70 L. R. A. 627.

[8] (Mo. App.), 259 S. W. 858.

ter's business to fix liability upon the latter, the court in *Cummings* v. *Republic Truck Company*,[9] said:

> "*In order to constitute a re-entry* upon the business of the master under such circumstances, it was not essential for the servant to have reached the zone of his employment or the territory in which he was employed to make deliveries."[10]

It must be conceded, however, that no formula can be stated that will enable courts in all cases to solve the problem whether at a particular moment a particular servant is engaged in his master's business. This will always depend upon the precise facts of each case. What the servant was doing and why, when and where, and how he was doing it, will effect the case. Seemingly it has been held that where the owner allows his chauffeur, after carrying him to his destination, to employ the car to pay a visit to his relatives with instruction to return for the owner at a given hour, in pursuance to that direction the chauffeur, after leaving the home of his relatives to go for his employer, negligently causes an injury, the master is liable on the theory that the chauffeur had again entered the service of his employer.[11]

Another closely related phase of the liability of the owner of an automobile for the negligence of the driver, is that which arises when the same is driven by a member of his family, but, of course, it has never been held that the relation of parent and child of itself is sufficient to render the parent liable for the negligent operation of his automobile by the child, even though an infant. But, if the child occupies the position of a servant or agent of the parent and owner, the rule applicable to master and servant immediately becomes effective. In a few states, especially Michigan, by statute the owner of an automobile is made liable for all injuries inflicted by the negligent operation of his machine when operated by his consent, and it is to be conclusively presumed that the car is operated by the consent of the owner when it is shown that a member of his family had it in charge. This, of course, changes the common law rule to the extent of the terms of the statute.

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[9] 241 Mass. 292; 155 N. E. 134.

[10] *Glass* v. *Wise*, 155 La. 477, 99 So. 409 (1924), and *Wyatt* v. *Hodson*, 210 Ky. 47.

[11] *Tyler* v. *Stephen's Admr., supra; Wyatt v. Hodson, supra.*

It is generally declared by courts supporting the family purpose doctrine that the liability of parent for the tort of a minor rests upon the same basic principles as the liability of a master for the acts of his servant, but there is a distinction, it would seem, with respect to those acts which are done at a time when the child is driving on a mission of his own. However, our court as well as that of several other states, has adopted the rule that one who provides an automobile for the pleasure and convenience of himself and family, is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of a member of his family.[12]

Even though the automobile was owned by the father for the use of his family, he is not liable for injury occasioned by the car when driven by his infant son without the knowledge or consent of the father.

A strong clear statement of the reason for the rule and the rule itself is found in *Birch* v. *Ambercrombie*,[13] the court saying:

"It seems too plain for cavil that a father who furnished a vehicle for the customary conveyance of the members of his family makes their conveyance by that vehicle his affair, that is, his business, and anyone driving the vehicle for that purpose with his consent, express or implied, whether a member of his family or another, is his agent. The fact that only one member of the family was in the vehicle at the time is in no sound sense a differentiating circumstance, abrogating the agency. It was within the general purpose of the ownership that any member of the family should use it, and the agency is present in the use of it by one as well as by all. In this there is no similtude to a lending of a machine to another for such other's use and purpose, unconnected with the general purpose for which the machine was owned and kept."

The Minnesota court concluded that this rule was based upon the theory that the principal or master is responsible for

[12] *Doss* v. *Monticello Electric Company*, 193 Ky. 499; *Miller* v. *Weck*, 186 Ky. 552; *Holland* v. *Goode*, 188 Ky. 525. Courts of other states that have adopted the "Family Purpose Doctrine" are Arizona, in *Benton* v. *Regeser* (1919), 179 Pac. 966; California, in *Crittenden* v. *Murphy*, 36 Cal. App. 803; Georgia, in *Griffin* v. *Russell* (1919), 144 Ga. 275; L. R. A. 1916F 216; Minnesota, in *Kayser* v. *Van Nest*, 51 L. R. A. 970; Missouri, in *Dailey* v. *Maxwell*, 133 S. W. 351; Montana, in *Lewis* v. *Steele*, 157 Pac. 575; Tennessee, in *King* v. *Smythe*, L. R. A. 1918F, 293; South Carolina, in *Davis* v. *Littlefield*, 97 S. W. 171; Texas, in *Allen* v. *Bland*, 168 S. W. 35, and Washington, in *Birch* v. *Abercrombie*, 74 Wash. 486. See also 5 A. L. R. 216; 10 A. L. R. 1860, 1459; 12 A. L. R. 816; 22 A. L. R. 1403; 36 A. L. R. 1150, 1156; 9 A. L. R. 1248; 2 R. C. L. 1199.

[13] 50 L. R. A. (N. S.)

the wrongful acts of his agent or servant, committed while acting under his express or implied authority and in furtherance of his business. And in Iowa it was held that if a man owns a car which he keeps, among other things, for use as a pleasure vehicle by his family, and permits his son to drive it, if the son takes the mother out for a drive in the car, the son would be the agent of the father, and the car under which such circumstances would be used in the father's service, the furnishing of comfort and enjoyment within his means to his wife and family being part of a father's business, or service. That rule insofar as it relates to the negligence of the child while on a drive for purposes exclusively his own, it would seem, is largely based upon expediency rather than sound reasoning, as shown by the opinion in the case of *Hutchins* v. *Haffner*.[14] where it was said:

"The adoption of any rule contrary to that followed in this opinion would, in many instances, deprive the injured party 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. The view taken herein tends to insure justice to parties injured by the negligence of the drivers of automobiles without imposing undue hardships upon the owner, is favored by the weight of authority, and is supported by principle and reason."

Much to the same effect is the opinion in the case of *Linch* v. *Dobson*,[15] where the court said:

"Where the car is kept for the use and pleasure of the family, and one member of the family is using it for his individual pleasure, or for one of the family purpose for which it is kept, it comes strictly within the reason of the rule that, in such use, the member of the family is acting as the agent, in furthering the purposes of the owner, as truly as though other members of the family were in the car with him, and that the owner can be held responsible for damages resulting from the negligent operation of the car while so used."

Perhaps the most elaborate if not the best statement of this theory is found in *King* v. *Smythe* (Tenn),[16] where the court indulged in the following reasoning:

"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 is, capable of running at a rapid rate of speed,

[14] 65 Colo. 365, 169 Pac. 966.
[15] 108 Neb. 632, 188 N. W. 227.
[16] 204 S. W. 297.

and, when moving rapidly upon the streets of a populace city, it is dangerous to life and limb 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. If owners of automobiles are made to understand that they will be held liable for injury to person 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."

The family purpose doctrine was first adopted in this state in 1912, when our court delivered an opinion in the case of *Stowe* v. *Morris*,[17] basing it, as it seems, entirely upon the old case of *Lashbrook* v. *Hatton*,[18] where an injury was caused through the negligence of the minor son while driving his father's carriage, with his approbation, and the more recent case of *Dailey* v. *Maxwell*.[19] This latter opinion was delivered in January, 1911. In the Stowe-Morris case our court, Judge Winn writing, said:

"In consonance with the Kentucky authority named,[20] enlarging the discussion and applying the same principles to the modern automobile, instead of the carriage, the case of *Dailey* v. *Maxwell*, upon facts largely similar to those proven in the case at bar, establishes the liabilities of the father. It is interesting to observe the facts in that case and the conclusions reached as a growth from the Kentucky case."

Further along in the opinion it is stated:

"It was the boy's party, and the father had naught to do with it, except to give his consent to the use of the car for the pleasure of his son and his son's friends. The father's liability was made to turn upon the precise question we have named as the single vital question in this case."

Then from the Missouri case this quotation is taken.

"The evdience discloses that the machine was devoted to the use of the family of which Ernest was a member. It was a pleasure vehicle,

[17] 147 Ky. 386.
[18] 1 Duvall 317.
[19] 152 Mo. App. 415, 133 S. W. 351.
[20] *Lashbrook v. Hatton, supra.*

and, when used for the pleasure of one of the minor children of the owner, how can it be said it was not being used on business of the owner? It is the practice of parents to provide their children with healthy and innocent amusements and recreations; and certainly it is as much the business of parentage to supervise and control the pleasure of their children as it is to give them nurture and education. . . . The rule that a father is not liable for the torts of his minor child applies only to cases where the tort is committed without the consent of the parent and without the scope of any duty he owes his child. We conclude that, in running the car, with the consent of his father and within the scope of the family uses, Ernest was the agent and servant of his father."

Our court after copying and adopting the foregoing from the opinion of the Missouri court, added:

"So, in the case at bar, the father had provided his family with this car as a means of recreation and amusement; and the son, in the use of the car for that purpose, was not performing an independent service of his own, but was carrying out what, within the spirit of the matter, was the business of the father."

Since that opinion was delivered adopting the family purpose doctrine in Kentucky, came the cases of *Doss* v. *Monticello Light Company, supra; Holland* v. *Goode, supra; Miller* v. *Weck, supra,* and many others, all recognizing the doctrine as a part of the law of this jurisdiction.

Blakemore in his work on the law of automobiles, says the more recent tendency of the courts seem against the so-called family purpose doctrine, and proceeds to cite a number of cases. Further discussing the subject the same author, on page 743, says:

"This doctrine has strong reasons of convenience and public policy to recommend it but has no basis whatever in the law of agency and according to the great weight of authority in this country the owner is not liable on evidence merely that the owner permitted his minor son to operate his car for his own pleasure as it is held this does not show that the son was the agent of the father acting in the scope of his employment as agent."

Much to the same effect is the text of Huddy on Automobiles,[21] and Barry on Automobiles.[22]

Certainly the doctrine except when applied to cases where the injury results while the child is in his father's service or engaged in performing some service for him, is not based upon the law of master and servant, or principal and agent, except by assumption or by implication, but rather upon the exigencies

[21] Page 854.
[22] Page 1146.

of the situation and it is not, it seems to me, altogether logical or sustainable upon reason. Perhaps this doctrine came about in response to the then prevailing thought that the automobile, then very imperfect on the highway, was a dangerous instrumentality which the owner was obliged to master and control with and by a competent and experienced driver, or else suffer the consequence. Now all the courts are of one accord in holding the automobile not to be a dangerous instrumentality per se.[23] If it be true, as I have suggested, that the family purpose doctrine had its origin in some measure in the idea that the automobile was a dangerous instrumentality that reason having ceased, the rule should cease. This theory finds support in the fact that some of the courts which in early times held to the family purpose doctrine have modified the rule so as to make the parent liable only for such negligent injuries as result while the child is operating the car either with the parent as a passenger or following his instructions and directions, but holding the parent is not responsible for injuries caused by the negligence of the child where the child was operating the car upon a mission of his own either of business or pleasure. One of the late cases supporting this view is *Arkin* v. *Page*,[24] it being there held that a parent is not liable for the torts of a capable minor child, occuring when the child was driving the parent's automobile, not upon the business for the parent but solely upon business of pleasure of the child. If the tortious act done by the son is in furtherance of some independent design of his own, the father is not liable. And a parent is only liable for injuries resulting from the negligent operation of his automobile by his child when driven under a general authority from the parent and with his consent, express or implied, upon the business of the parent, and his business may be pleasure, convenience, comfort or education of his family, or any member thereof, as well as the trade, occupation, employment, or undertaking from which he derives financial gain. A great number of cases may be cited in support of the foregoing proposition. In the course of the opinion it is said: "It seems rather a fantastic notion that a son, in

[23] *Tyler* v. *Stephen's Admr*, *supra*, and *Keck's Admr.* v. *Gas and Electric Company*, 179 Ky. 317.

[24] 5 A. L. R. (Ill.).

using the family automobile to take a ride by himself for pure pleasure, is the agent of his father in furnishing amusement for himself, is really carrying on his father's business, and that his father, as principal, should be liable for the result of the son's negligent manner of furnishing the entertainment to himself."

The "family purpose doctrine" seems to rest upon the theory that inasmuch as the parent purchased the automobile for the purpose of giving his family the pleasure and comfort of such service as it could render, that his business with respect to the automobile was alone to furnish pleasure to his family to operate the car, he constituted them his agents to carry out his business by furnishing pleasure to the family, which it would appear is a little far-fetched.

The first opinion of the courts of Missouri upon the subject fully sustained the family purpose doctrine in its entirety; but in *Hays* v. *Hagan*[25] the rule was in part relaxed, the court saying:

> "After a careful consideration of all the authorities cited, we have reached the same conclusion, and hold that the mere ownership of an automobile, purchased by a father for the use and pleasure of himself and family, does not render him liable in damages to a third person for injuries sustained thereby, through the negligence of his minor son while operating the same on a public highway, in furtherance of his own business or pleasure; and the fact that he had his father's special or general permission to so use the car is wholly immaterial."[26]

So it would seem from this brief survey of the authorities on merely two branches of the subject, the owner of an automobile is enveloped in a maze of law, which if he should fully contemplate is calculated to strike terror to his heart and make his bank account play "hide and seek" with every threatening pedestrian whom he may chance to pass on the highway.

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[25] 273 Mo. 1; also L. R. A. 1918C 715.

[26] To the same effect are the cases of *Lineville* v. *Nisson*, 162 N. C. 95, 77 S. E. 1096; *Blair* v. *Broadwater*, 121 Va. 301, L. R. A. 1918A, 1011; *Parker* v. *Wilson*, 179 Ala. 361, 43 L. R. A. (N. S.) 87; *Van Blaricom* v. *Dodyson*, 220 N. Y. 111, L. R. A. 1917F, 363; *Cohen* v. *Meador*, 119 Va. 429, 89 S. E. 876; *Loehr* v. *Abell*, 174 Mich. 590, 140 N. W. 926.