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THE FAMILY AUTOMOBILE

LIABILITY OF THE OWNER

*Donald Campbell**

THE family pictures and the family bible have been in legal bibliography since the time of Blackstone. The family automobile has appeared only recently but the doctrine of liability attendant thereon has caused a great deal of interest and confusion among laymen, underwriters, lawyers and courts.

Where the head of a family owns an automobile which he keeps for the use and pleasure of his family, he becomes a potential principal of any member of his family who may drive it.

There is no dispute and no difficulty presented when the agency is established by the ordinary and accepted use of the phrase "an agent on his principal's business." If the owner accompanies the driver, or if the owner orders or requests a member of his family to drive the car, or if a member of the family is driving the car upon some business of the owner, and an accident occurs, because of negligent operation, then the owner becomes liable.

The courts are not in accord in holding the owner liable for negligent operation where the owner's *permission* has been given even for a particular occasion.

And where general *permission* only has been given, and where occasional use has been made with knowledge of the owner, but without particular permission, and where the owner has kept the car for the use and pleasure of the family and has never objected to its use for pleasure by members of his family—and the mission has been for the pleasure or on the individual business of the

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particular member of the family who drove the automobile or who rode in it—then we find the courts splitting into two definite groups.

One line of decisions holds the owner of the family automobile not liable for its negligent operation by a member of the family, when that member of the family is on his own business or driving for his own pleasure and a Missouri court said, in a typical case¹.

“The fact that he, the son, had his father’s special or general permission to use the car is wholly immaterial.”

A second line of decisions holds that a father who has bought an automobile for the pleasure of the family, has made it his business to furnish entertainment for members of his family, and

“A daughter driving for her own pleasure (or on her own business), her father’s car, kept for the use of the family, is his servant, for whose negligence in operating the car he is liable”².

Under the first line of decisions there is no reason to consider the litigation as involving “The Family Automobile” for under those decisions the courts have consistently refused to consider an automobile as a family automobile. They do not distinguish between an automobile and any other movable property. They do not consider an automobile as an instrumentality of dangerous potentialities and, of course, they do not consider an automobile to be dangerous *per se*. They insist that the accepted theory of principal and agent, or master and servant, be applied strictly to each case whether an automobile, a horse or a shotgun be involved. In short, they do not recognize “The Family Automobile.”

At the present writing—the states of Missouri³, New York⁴ Alabama⁵, Utah⁶, Michigan⁶, Virginia⁷ and North

¹ Hays v. Hogan, 273 Mo. 1.

² Birch v. Abercrombie, 74 Wash. 486.

³ Van Blaricom v. Dodgson, 220 N. Y. 111.

⁴ Parker v. Wilson, 179 Ala. 361.

⁵ McFarlane v. Winters, 47 Utah 598.

⁶ Loehr v. Abell, 174 Mich. 590.

⁷ Blair v. Broadwater, 121 Va. 301.

Carolina⁸ have decided according to the strict rule. However, New Jersey⁹⁻¹⁰, New York and North Carolina have rendered decisions both ways.

The "equitable" doctrine has been upheld by Kentucky¹¹, Minnesota¹², Oklahoma¹³, Washington¹⁴, Georgia¹⁵, Massachusetts¹⁶, Tennessee¹⁷, Iowa¹⁸, and New Mexico and by Illinois²⁰.

In the states where the strict doctrine has been adhered to, however, the courts have been quick to seize upon slight evidence which would fasten liability upon a "responsible" meaning solvent defendant: i.e., the owner of the family car.

In the first New Jersey case, where a daughter was driving the car and was the only member of the family in it, the court found the owner not liable—but in the later case, because there were several other members of the family in the car, which was driven by the son, it was held that the father was liable. In the latter case the court seemed to feel that taking several members of the family out for a ride was the father's business—but in the former case, the daughter being alone, was on her own business.

In the first case before the Illinois Supreme Court²¹, Justice Dunn in delivering the opinion adopted by the

⁸ *Linville v. Nissen*, 162 N. C. 95.

⁹ *Missel v. Hayes*, 86 N. J. L. 348.

¹⁰ *Doran v. Thomsen*, 76 N. J. L. 754.

¹¹ *Stowe v. Morris*, 147 Ky. 386.

¹² *Upphoff v. McCormick*, 139 Minn. 132.

¹³ *McNeil v. McKain*, 33 Okla. 449.

¹⁴ *Birch v. Abercrombie*, 74 Wash. 486.

¹⁵ *Griffin v. Russell*, 144 Ga. 275.

¹⁶ *Jordan v. Smith*, 211 Mass. 269.

¹⁷ *King v. Smythe*, 140 Tenn. 217.

¹⁸ *Crawford v. McElhinney*, 171 Iowa 606.

²⁰ *Gates v. Mader*, 316 Ill. 313.

¹¹ *Doran v. Thomsen*, 76 N. J. L. 754.

¹² *Missel v. Hayes*, 86 N. J. L. 348.

²¹ *Arkin v. Page*, 287 Ill. 420, at 430.

majority after commenting upon the equitable reasons assigned for holding an owner of the family automobile, liable in cases from other states, disposes of the theories advanced there by this laconic statement:

"The argument may be sound enough, but it has no application to the doctrine of Master and Servant."

In an opinion rendered two years and six months later, our Supreme Court seized upon the fact that the minor daughter driving the family automobile was on her way to pick up a pair of shoes at the cobblers. As it was her father's business to furnish her with shoes or other necessaries, the court then said in short that the daughter was the agent of her father in the performance of the business she was on. Therefore, the father was liable²².

The decisions have been based upon such matters as the age of the driver, whether the driver was dependent on the owner for support; whether the permission to drive was special or general and whether the purpose of the drive was for a family errand, family pleasure or for the sole pleasure of the driver.

From a perusal of the various cases, it would seem that two essentials must exist before the doctrine of the family automobile can be applied:

FIRST, an automobile maintained by the father for the use and pleasure of the family.

SECOND, a *permission* express or implied to the members of the family to use the car.

It is not contended by the writer that even though these essentials exist that the courts adopting the strict application of the rule of agency will now find the owner liable, but it is believed that the courts adopting the equitable rule will then so determine where these two essentials are shown to exist. Since we are concerned here primarily with the adoption of the doctrine of the

²² Graham v. Page, 300 Ill. 40.

family automobile, we will dismiss the contrary view with a quotation from *Van Blairicom v. Dodgson*, 222 New York Court of Appeals, 111:

"If the owner of a car ought to be responsible for the carelessness of everyone 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 principals of agency."

That statement in brief is the attitude of the courts of those states adopting the strict rule.

We may now turn to a discussion of the chronological holdings of the Supreme Courts of Illinois.

In the case of *Arkin v. Page* (opinion filed April 15, 1919), a father had provided an automobile which by the evidence was for the use and pleasure of his family. It appeared in that case that the car was used at times by the son, with his father's permission, or at least, without objection by his father, which is merely another way of saying that the son had implied permission from his father to use the car. The son was driving the automobile alone on his way to a private school where he expected to register and pay for the tuition out of money of his own, which he had in the bank. His father did not know where he was going, nor did he know that he had the automobile on this particular occasion. The son injured the plaintiff in this case by negligent driving, and the lower court found the son to be the agent of the father. The judgment was sustained by the Appellate Court, but reversed by the Supreme Court, although with three judges dissenting. The majority opinion held that at the time and place of the happening of the accident, there was no agency shown which could in any way fasten liability upon the father. The court quoted elaborately from cases holding contrariwise under the doctrine of the family automobile, and after stating that an automobile was not dangerous *per se*, insisted that the ordinary rules of agency should

be applied to this case. The arguments of counsel with respect to the practical administration of justice and the necessity of finding a responsible defendant, rather than a defendant against whom a judgment would be a mere form, were said by the court to be, perhaps, sound enough, but not based upon law.

Illinois thereupon became a state in which this strict rule had apparently been adopted.

Nevertheless, three justices wrote a dissenting opinion in the same case wherein they insisted that if a parent has provided an automobile for the family use, he has then made it his business, and any member of the family driving the car with permission must be considered to be upon the owner's business. In other words, the minority decision insisted that pleasure driving by members of the family or driving on missions of their own with permission, was as much a part of the owner's business as the furnishing of the necessities of life in the usually accepted sense. About two years later, in the case of *Graham v. Page*²², a minor daughter residing with her father, who had provided the family with an automobile was driving the car to the cobblers to pick up a pair of shoes that she had left there to be repaired, and on the way she injured the plaintiff by her negligent driving. The Appellate Court reversed the finding of the trial court where a verdict had been entered in favor of the plaintiff, basing their decision upon what they understood to have been the law announced in *Arkin v. Page*, by the Supreme Court. The Supreme Court reversed the judgment of the Appellate Court and Justice Farmer who had dissented in the *Arkin v. Page* case, delivered the opinion of the court in this latter case. The Supreme Court seemed to base the finding of agency in this latter case upon the fact that,

"In this case defendant's daughter was not merely driving the car for pleasure, but was using it on a family errand, one of the purposes her father testified he kept the car for and one of the

purposes he testified his daughter was authorized to drive it for. The daughter was only sixteen years old, was engaged in no business, earning no money, but lived with her parents and was clothed by them. It was the duty and business of her father to provide her shoes and when needed, to have them repaired. Instead of her father taking the shoes to the shop for repair and getting them there when that had been done, he permitted his daughter to do it and authorized the use of the car by her for that purpose. She was performing the business and duty of her father in the manner and with the means authorized by him. She was, if not the servant, at least the agent of her father in the performance of the duty or business."

Had the court stopped right there the writer is of the opinion that the strict rule as applied in *Arkin v. Page*, might be said to have been adhered to in the case of *Graham v. Page*, for certainly in the latter case the court plainly pointed out the distinguishing feature, i.e., that the daughter was upon her father's business. The holding in *Graham v. Page* could then be considered to be consistent with the holding in *Arkin v. Page*, although it would seem that the age of the daughter and the nature of her errand were necessary facts in order to make her errand her father's business. Fortunately or unfortunately, as the case may be, the court did not stop with that distinction, but continued with a discussion of the general principle involved in determining the agency, to wit:

"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 seem sound and more in harmony with the 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. *King v. Smythe*, 140 Tenn. 217'."

The above discussion and statement of the court, whether it may be considered dicta or part of the opin-

ion, certainly changes the line up of the State of Illinois. It appears to the writer that the Supreme Court of Illinois thereby committed itself to the equitable doctrine.

Following that decision by the Supreme Court, the Appellate Court of the First District, in the case of *Cloyes v. Plattje*²³, discussed and reiterated the holding of the Supreme Court, and again referred to the leading case of *King v. Smythe*²⁴, quoting from that case and stating that the weight of authority now supports the liability of the owner of a car which is kept for family use and pleasure, etc. Meanwhile, on February 17, 1925, in the case of *Gates v. Mader*²⁵, the Illinois Supreme Court affirmed, if not advanced the doctrine of the family automobile given out in the case of *Graham v. Page*, but it is interesting to note that three judges in this last case dissented from the holding of the majority opinion which is written by Justice Farmer, one of the dissenters in the first case of *Arkin v. Page*.

In this last case, a son independent and not living at home, at the request of his mother, drove the automobile of the father, containing his mother and her friends, for the pleasure and convenience of the mother. The son had his father's knowledge and general permission to drive the car. The Supreme Court found that the son was the agent of the father and in the opinion, practically admitted that they had receded from the attitude held at the time the *Arkin v. Page* case was decided.

"We said in that case (*Graham v. Page*) that the weight of authority supported the liability of the owner of a car kept for family use and pleasure when an injury was negligently caused by it while driven by one of his children * * *. In our opinion, liability in this case is based on reason and justice. Defendant denied he knew that the car was going to be used on a particular occasion, but admits its use was authorized by him. This case is not controlled by the *Arkin* case."

²³ 231 Ill. App. 183.

²⁴ 140 Tenn. 217.

²⁵ 316 Ill. 313.

The court then again refers to *King v. Smythe*, as well as a number of other cases, in all of which cases the doctrine of the family automobile has been adopted²⁶.

In January 1926 the Appellate Court for the First District had to again consider a case²⁷, wherein a daughter who was single, living at home and had her father's general permission to use his automobile, was out driving with her fiance and her sister. The father had no knowledge of the particular trip and the defendant contended in this case that it fell outside of the case of *Gates v. Mader* for the reason that in *Gates v. Mader*, the automobile was being used for the purpose for which it was bought and that in this case the purpose was foreign to that for which the defendant maintained it. In other words, that the daughter was not driving it for the pleasure of the family, but on a mission of her own. The court, however, found itself unable to appreciate the distinction sought to be made and stated that the driving of her fiance and sister about the city was well within the purpose mentioned, i.e., the use and pleasure of the family.

While it is not possible to foretell what opinion might be rendered by the Supreme Court of Illinois in a similar case, where it might be possible to point out a distinction in facts, yet it would seem that Illinois has definitely and consciously adopted the doctrine of the family automobile.

The various courts in arriving at their decisions to hold the owner of the family automobile liable, have stated in different ways that liability does not rest upon a relationship of parent and child nor upon the solvency of the defendant. It would seem, however, that they have broadened the scope of the principal's business and, perhaps, extended the relation of principal and agent more than they might have done had the automobile not come into such common use. The word *permis-*

²⁶ See classified cases *supra*.

²⁷ *Beesley v. Goldstein*, 239 Ill. App. 231.

sion has been freighted with liability. From the following excerpts taken from various cases, the reader might come to the conclusion that the doctrine of the family automobile has been adopted in the interests of justice and equity, rather than strict application of law.

King v. Smythe, 140 Tenn. 217.

"If an instrumentality (automobile) 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."

"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."
Birch v. Abercrombie, 74 Wash. 486.

"Any other view would set a premium upon the failure of the owner to employ a competent chauffeur."

"The adoption of a doctrine so callously technical would be little short of calamitous."

Arkin v. Page, 287 Ill. 420 (dissenting opinion).

"The owner must anticipate that negligence in operating may produce the most serious consequences."

Gates v. Mader, 316 Ill. 313.

"In our opinion liability in this case is based on reason and justice."

Missell v. Hayes, 86 N. J. L. 348 (usually contra) where court seized upon the fact that son was driving mother and sister:

"It is within the scope of the father's business to furnish his wife and daughter with outdoor recreation, just the same as it is his business to furnish them with food and clothing * * *"

The courts that refuse to adopt these equitable and modifying rules to the strict rules of agency say that here is a fine example of legislation by the courts.

The adherents of the family automobile doctrine respond to the effect that courts may apply the old rules of agency to new conditions and still function properly and justly. Popular sentiment or legislation will probably bear them out.