Agency--The Family Purpose Doctrine

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It is interesting to note in reading these cases that after saying the constitutional provision should be liberally construed, the first case drew a distinction between the search of a man's private papers for the purpose of convicting him of a crime and a search for contraband goods "which rightfully belongs to the custody of the law." The second case added that the 4th Amendment permits search and seizure when justified by the interest of the public and when the lawful exercise of police power renders possession of the goods sought unlawful and provides for their seizure.

In defense of the decision, which unquestionably resulted in the defendant escaping the penalty for breaking the law, it might be argued that the responsibility lies with Congress and not with the court. In the section of the National Prohibition Act above quoted, Congress provided that the search of a private dwelling might be made only where it was used for the unlawful sale of intoxicating liquor. If they had intended manufacture and sale they should have so stated. The Florida Statute which is otherwise similar to the federal act did insert the word manufacture. Compiled Laws of Florida 1927, Section 8518. The writer, however, prefers the view taken by the court in United States v. Berger, 22 F. (2d) 867 (1927), that a dwelling that is used for the unlawful manufacture of liquor which is either sold there or is removed from thence for sale, is subject to search. Here the statute was interpreted to give the expression, "for the sale," a meaning equivalent to "in connection with the sale," under authority of Title 2, Section 3 of the National Prohibition Act (27 U. S. C. A., sec. 12), which provides that "all the provisions of this shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

There must necessarily be a lack of uniformity in decisions which must rest on "what a reasonably discrete and prudent man" would think. Many border line cases will depend on the attitude of the judge or judicial officer. Just how much weight will be given to general suspicion, hearsay, reputation of the defendant and judicial notice of the character of the neighborhood where the property to be searched is located, will vary with the judge for "judges are human."

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AGENCY—THE FAMILY PURPOSE DOCTRINE—In the recent case of Steele v. Age's Admr., 229 Ky. 714, 26 S. W. (2d) 563 (1930), a minor son, driving with his father's consent, had a collision in the family automobile. The boy was driving recklessly at the time, and the machine was precipitated onto the sidewalk, where it struck and killed the plaintiff's intestate. The father, who maintained the automobile for the general use and convenience of the family, was held liable. The court based its decision on the "family purpose doctrine," which has been adopted in Kentucky. Stowe v. Morris, 147 Ky. 886, 144 S. W. 52 (1912); Miller v. Weck, 136 Ky. 552, 217 S. W. 904 (1920),

The "family purpose doctrine" is based on the relationship of principal and agent and the rule of agency, quod facit per alium, facit per se. The theory is that one who maintains an automobile for the use or pleasure of the family has made it his business to furnish pleasure for the family. It follows that when the owner's child is using the family automobile for his own pleasure and convenience he is furthering the "business" of the owner, and is deemed to be the agent of the owner. Davis v. Littlefield, 97 S. C. 171, 81 S. E. 487 (1914), Stickney v. Epstein, 100 Conn. 170, 123 Atl. 1 (1923), Griffin v. Russell, 144 Ga. 275, 87 S. E. 10 (1915).

Before examining the authorities on the doctrine we might consider the Kentucky court's basis for its adoption, which basis is novel, to say the least. Stowe v. Morris, 147 Ky. 386, 144 S. W 52 (1912), is the first Kentucky case on the question. It is based on the early case of Lashbrook v. Patten, 1 Duv. 317 (1864). In that case a minor son of the defendant negligently caused an injury to the plaintiff while driving his sister to a picnic. He was driving the family carriage with the consent of his father. The father was held liable on the ground that the son was performing a service usually performed by a slave, and hence must be deemed the servant of his father.


The weight of authority is opposed to this view and represents what appears to be the better rule. The majority rule is that where a member of the family uses such a vehicle for his own purposes, the machine is not being used within the scope of the owner's business and he is not liable for the driver's negligent operation of it. Ala., Parker v. Wilson, 60 So. 150, 179 Ala. 361 (1913), Ark., Norton v. Hall, 149 Ark. 428, 222 S. W. 934 (1921), Cal., Spence v. Fisher, 184 Cal. 209, 193 Pac. 255 (1920), Ill., Aiken v. Page, 287 Ill. 420, 123 N. E. 30 (1919), Kan., Whiten v. Clark, 103 Kan. 633, 176 Pac. 131 (1918), Me., Farnum v. Clifford, 113 Me. 145, 106 Atl. 345 (1919), Md., Whitlock v. Dennis, 139 Md. 557, 117 Atl. 68 (1921), Mich., Laehr v. Abell,
As stated, the weight of authority is represented by the latter view, but it is by no means overwhelming. So far as the writer has been able to ascertain, as shown above, sixteen jurisdictions apply the doctrine, while twenty have repudiated it. This is of course a fairly even division; however, in his article in the Kentucky Law Journal, Judge Sampson states that the recent tendency of the courts is against the “family purpose doctrine.” 14 Ky. L. Jour. 201.

It is a broad general rule of torts that a father is not liable for the torts of his child. 46 C. J. 1331. The child may be the agent of the father, but the relationship of principal and agent cannot be inferred from the bare family connection of parent and child. Sale v. Atkins, 206 Ky. 224, 267 S. W. 223 (1924), Smith v. Jordan, 97 N. E. 761, 211 Mass. 269 (1912), Maher v. Benedict, 108 N. Y. Supp. 228 (1908).

Further the general rule is that mere ownership of an automobile does not render the owner liable for the negligent operation of the machine. Tyler v. Stephen’s Admr., 163 Ky. 770, 175 S. W. 790 (1915), Gardner v. Farnum, 230 Mass. 193, 119 N. E. 666 (1918), Potts v. Pardee, 220 N. Y. 431, 116 N. E. 73 (1917), Decker v. Hall, 72 Ind. App. 139, 125 N. E. 786 (1920). The principal is liable for tortious acts of the agent committed within the course of and the scope of the master’s business, the principle of respondent superior applying with full force. Can it be said that a child driving the family car on an independent mission of his own, is acting within the scope of the owner’s business? That is exactly what the “family purpose doctrine” holds. No doubt the courts in adopting the doctrine felt that here was a situation that sadly needed a remedy. They did not want an innocent public to bear the burden of a car being placed in the hands of a financially irresponsible child by a responsible parent—hence the doctrine pinning liability on the parent.

As the doctrine is based on the relation of principal and agent, it has no application where a child surreptitiously obtains the family automobile and drives it without the consent of the owner. Sale v. Atkins, 206 Ky. 224, 267 S. W. 223 (1924), Weiner v. Mairs, 234 Mass. 156, 125 N. E. 149 (1919), Reynolds v. Buck, 127 Iowa 601, 108 N. W. 946 (1905). An indispensable requisite of the “family purpose doctrine” is that the person upon whom it is sought to pin liability, owns, maintains and, provides the automobile for the general use or convenience of the family. Buster v. Vogel, 227 Ky. 735, 13 S. W. (2d) 1028 (1929).
Where a father provided an automobile for his minor son to drive to school, it was held that he furnished the automobile for the customary convenience of the family and was liable for its negligent operation. Stevens v. Luther, 105 Neb. 184, 180 N. W 87 (1920). No plausible distinction can be made between the members of the family to whom the doctrine should apply. Apparently the rule is the same, where the "family purpose doctrine" is applied, regardless of whether the driver is a minor child or wife of the owner. The husband was held liable for the negligence of his wife in the operation of an automobile, which he furnished for the comfort and pleasure of the family, and which he permitted her to use for that purpose. Pasch v. Fass, 144 Minn. 44, 174 N. W 438 (1919); Collinson v. Cutter, 186 Iowa 276, 170 N. W 421 (1919), Hutchins v. Hoffner, 63 Colo. 365, 187 Pac. 966 (1917).

Of course if a mother maintains an automobile for the general use of the family, the "family purpose doctrine" is applicable to her. Steele v. Age's Admr., 223 Ky. 714, 26 S. W (2d) 563 (1930). In Kennedy v. Wolf, 221 Ky. 111, 288 S. W 185 (1927), a wife owned a machine and her husband negligently caused an injury to a third person, while driving on a business errand of his own. The court indicated that the wife would be liable if the husband had been using the automobile for the purpose for which it was maintained by her. Another variation arises where a self-supporting son, over twenty-one, resides with his father and used the family car for his own purposes. He is, strictly speaking, not a member of the family and where he negligently operated the car the "family purpose doctrine" was held not applicable. Malcolm v. Nunn, 226 Ky. 275, 10 S. W (2d) 517 (1928), Bradley v. Schmidt, 223 Ky. 784, 4 S. W (2d) 703 (1928).

It seems that Steele v. Age's Admr., 223 Ky. 714, 26 S. W. (2d) 563 (1930), causes a just result to be reached, but really has no sound legal basis. The doctrine applied places responsibility where it should be. The owner has control of the machine. It is he who directs the use of it, and he should be accountable. Convenience and sound public policy justify the application of the doctrine. On the other hand, as stated above, its basis is not legally sound. Early attempts to base it on the ground that an automobile is a dangerous instrumentality fail in view of the well settled doctrine that an automobile is not dangerous per se. Tyler v. Stephen's Admx., 163 Ky. 770, 175 S. W 790 (1915); Mullen v. Haynes Co., 207 Ky. 31 (1925).

The doctrine surely is misplaced in the law of agency. It seems far-fetched to say that a child, driving an automobile for his own pleasure and on an expedition of his own, is engaged in the execution of his father's business, i. e., furnishing pleasure and comfort for his family.

The law in regard to automobiles is comparatively new, and it will be interesting to note the reaction of the courts to the "family purpose doctrine" in the future.

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