

has ample remedy in civil actions of assault, or trover for money or the goods taken against his consent, and since the court will make out an intent from the circumstances of the case, if it is at all possible, there is little fault to find with the law as it is today.

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## PARENTS' LIABILITY FOR INJURIES CAUSED BY FAMILY CAR.

Is the mother who allows her son to drive her car liable for an injury caused by the negligence of a friend whom the son has allowed to drive the car?

This question was answered in the affirmative in a recent Kentucky case, *Thixton v. Palmer*.<sup>1</sup> A mother allowed her son to have her car to take a boy friend and two girls riding. During the evening the son climbed into the back seat and allowed his friend to drive the car. The friend, while driving, negligently allowed the front wheels of the auto to become lodged in the street car tracks, and while trying to extricate the car, it veered over to the curb and injured a boy on a bicycle. The injured boy sued the mother and recovered. The court said the negligence of the friend whom the son allowed to drive was the negligence of the son, basing that conclusion on agency and master and servant precedents where the servant allowed a stranger to execute or help to execute his duties, and held the mother liable for the negligence of her son on the so-called "family car" doctrine.

Thus, the case is authority for two propositions. One, that a parent who allows her son to drive the family car is liable for the negligence of the son while driving, and the other, that a parent is liable for the negligence of a third party whom the son has allowed to drive. The writer will discuss the liability of the parent for the negligence of a son driving the parent's car as exemplified in the "family car" doctrine in order to show the basis for the ruling that the negligence of the friend whom the son has allowed to drive is the negligence of the son for which the parent is liable.

As to the liability of the parent for the negligent acts of the son while driving his car: it is fundamental tort law that a parent is not liable for the torts of his child. To make a parent liable there must

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1. 276 S. W. 971.

be something more than the mere filial relationship existing between the parent and the child.<sup>2</sup> As a result it is generally necessary to establish the relationship of master and servant or principal and agent to make the parent liable. In order to establish this relationship some courts have adopted the "family car" doctrine. This doctrine holds that the owner who buys the car for the use and pleasure of his family is liable for the injuries inflicted by the car on the theory that the car is being used for the purpose for which it is kept, and therefore, the person using the car is agent of the owner. This doctrine presupposes that the car is a family car, and is not merely a car which an owner allows the members of his family to use on certain limited occasions.

There is a direct conflict among the various states as to the recognition of the "family car" doctrine. Courts in Arizona,<sup>3</sup> California,<sup>4</sup> Georgia,<sup>5</sup> Minnesota,<sup>6</sup> Montana,<sup>7</sup> South Carolina,<sup>8</sup> Tennessee,<sup>9</sup> Texas,<sup>10</sup> Washington,<sup>11</sup> Illinois,<sup>12</sup> and Missouri<sup>13</sup> have recognized this doctrine; however, the Missouri Supreme Court, in a recent case,<sup>14</sup> overruled the earlier appellate court cases recognizing the "family car" doctrine, and held the father not liable. However, in that case, the son had taken the car against the father's wishes.

The "family car" doctrine is exemplified in a Kentucky leading case,<sup>15</sup> where a son of his own volition took his sister and other girls riding with him, and the father was held liable, the court saying: "The car was bought for the pleasure of the family; that at the time of the accident the son was carrying out the general purpose for which the car was bought, and he took it at the time in pursuance . . . of the purpose for which it was bought, i. e., the supplying of recreation for the family."

2. *Linville v. Nisson*, 162 N. C. 95, 77 S. E. 1096; *McCauley v. Wood*, 2 N. J. L. 81.

3. *Benton v. Regeser* (1919), 179 Pac. 966.

4. *Crillenden v. Murphy* (1918), 36 Cal. A. 803; 173 Pac. 595.

5. *Griffin v. Russell* (1915), 144 Ga. 275, L. R. A. 1916 F. 216, 87 S. E. 10, Ann. Cas. 1917, D. 994.

6. *Kaysor v. Van Nest*, 125 Minn. 277, 51 L. R. A. (N. S.) 970, 146 N. W. 1091.

7. *Lewis v. Steele*, 52 Mont. 300, 157 Pac. 575.

8. *Davis v. Littlefield*, 97 S. C. 171, 81 S. E. 487.

9. *King v. Smythe*, 140 Tenn. 217, L. R. A. 1918 F. 293, 204 S. W. 296.

10. *Allen v. Bland*, 168 S. W. 35.

11. *Birch v. Abercrombie*, 74 Wash. 486, 50 L. R. A. (N. S.) 59, 135 Pac. 1020.

12. *Gates v. Mader*, 316 Ill. 313.

13. *Daily v. Maxwell*, 152 Mo. A. 415, 133 S. W. 351.

14. *Hays v. Hogan*, 273 Mo. 1, L. R. A. 1918, C. 715, 200 S. W. 286.

15. *Stowe v. Morris*, 147 Ky. 386, 144 S. W. 52, 392 L. R. A. (N. S.) 224.

The doctrine is also exemplified in a Washington case where the court held that a daughter using her father's car for her own pleasure is his servant in doing so.<sup>16</sup> The court said, "A father who furnishes 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." In another case it is said,<sup>17</sup> "We have been unable to find any case holding that where the father bought an automobile to be used for the purpose of the pleasure of his family, and a minor child, who was a member of the family, either with the express or implied consent of the father took the automobile out and drove it, carrying therein members of the family, including guests, the child who drove the machine was not a servant expressly or impliedly of the father." There is, however, much authority contrary to the cases in which the "family car" doctrine is laid down. In *Doran v. Thomson*,<sup>18</sup> the leading case against the "family car" doctrine, the court refused to impose liability on a father for the negligent acts of his daughter who was driving the family car. In criticizing the "family car" doctrine the court said, "It would subject a parent to liability if he bought for his son a baseball or for his daughter a golf club, and by permitting them to be used by his children for their appropriate purposes, injury occurred. It bases the creation of the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child. This proposition ignores an essential element in the creation of that status as to a third person . . . and fails to distinguish between a mere permissive use and a use subject to the control of the master." There are many cases following the rule in *Doran v. Thomson*.

In Illinois the liability of the father, based on the "family car" doctrine, has gone through a recent change. In *Arkin v. Page* (1919),<sup>19</sup> the Illinois Supreme Court held a father not liable for the injuries caused by the negligent driving of the family car by his son on his way to register at a school. Two judges dissented. Two years later, in *Graham v. Page*,<sup>20</sup> the same court held a father liable

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16. *Infra* 11.

17. *McNeal v. McKain*, 126 Pac. 742, 41 L. R. A. (N. S.) 775.

18. *Doran v. Thomson*, 76 N. J. L. 754, 19 L. R. A. (N. S.) 335, 131 A. S. R. 677, 71 Atl. 296.

19. 287 Ill. 420.

20. 300 Ill. 40.

for the injury inflicted by a daughter driving the family car to a cobbler's. The court distinguished the latter from the former case by saying that in the latter the going of the daughter to get her shoes at the shop was an act of agency, while no such relation existed in the former case. An appellate court case in 1924 followed *Graham v. Page*, and held the parent liable.<sup>21</sup> In 1925, the Supreme Court, in *Gates v. Mader*,<sup>22</sup> apparently following *Graham v. Page*, without expressly overruling *Arkin v. Page*, held the father liable for the negligence of an adult son who was driving the family car. It is interesting to note that Justice Farmer, who dissented in *Arkin v. Page*, wrote the majority opinion in *Gates v. Mader*. Another interesting point to notice is the fact that, in *Gates v. Mader*, the son driving the family car was an adult son, 24 years old, home only about once a week, and the son's age had no bearing on the father's liability. Judging from the tendency of decision in the cases mentioned above, the fact that the court in *Gates v. Mader* cited the liability of the father under the "family car" doctrine as the weight of authority, and the fact that the court even in *Arkin v. Page* admitted that the decision in that case was contrary to the weight of authority, it would seem that the Illinois courts have definitely recognized the liability of the father based upon the "family car" doctrine.

The trend of decision in Missouri seems to be directly opposite to the trend of decision in Illinois, for while the earlier Missouri cases seem to impose liability upon the father for the negligence of the son in driving the family car, the later cases seem to disclaim any liability on the part of the father merely because he allows the son to drive the family car. In *Daily v. Maxwell* (1910),<sup>23</sup> the Kansas City Court of Appeals held a father liable for an accident which occurred while his sixteen-year-old son was driving the family car. In 1912, the same court, in a case on similar facts, said that the burden was on the parent to show that the son, who was operating the car, was operating without his consent, and that the son driving the family car was presumptively doing so with the father's consent.<sup>24</sup> In *Hays v. Hogan*,<sup>25</sup> the Appellate Court held the father liable for the negligent acts of his son driving the family car, but on appeal the Supreme Court reversed the case,<sup>26</sup> saying, "after a careful consid-

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21. 231 Ill. A. 183.

22. 316 Ill. 313.

23. 152 Mo. A. 415, 133 S. W. 351.

24. *Marshall v. Taylor*, 168 Mo. A. 240, 153 S. W. 527.

25. 168 S. W. 1125.

26. 200 S. W. 286, 273 Mo. A. 1.

eration of all the authorities, 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 the 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." This last case throws Missouri in line with New Jersey and the states that refuse to recognize the "family car" doctrine. In Kentucky, the jurisdiction of the principal case, briefed at the beginning of this note, the "family car" doctrine seems established, the background for the "family car" doctrine being *Lashbrook v. Patten* (1864),<sup>27</sup> in which a father was held liable for the injuries inflicted by the negligent driving of his son, taking his sisters to a picnic in a family carriage, the court saying, "The son must be regarded as in the father's employment, discharging duties usually performed by a slave, therefore must for the purpose of this suit be regarded as his father's servant." The doctrine of *Lashbrook v. Patten* was adopted in *Stowe v. Morris* (1912),<sup>28</sup> referred to before, where the "family car" doctrine was distinctly laid down. In *Miller v. Weck* (1920)<sup>29</sup>, the court, following *Stowe v. Morris*, held the father liable for injuries inflicted by a son driving a car purchased by the father for the use of the family. The court said that, in driving the family car, the son was the servant of the father, who bought the car for the use of the family. The relationship of master and servant being established through the "family car" doctrine, the court, as it did in *Thuxton v. Palmer*, mentioned at the beginning of the note, could then hold the parent liable for the negligent acts of a third party whom the son allowed to drive on master and servant principles.

From early times we find cases where the master was held liable for negligent acts of volunteers who are assisting his servant. In *Booth v. Mister*,<sup>30</sup> the English leading case, the court held a master liable when a servant without authority allowed a stranger to drive and an accident occurred while the stranger was driving. Lord Abinger said, "As the defendant's servant was in the cart, the reins being in the hands of another man makes no difference." The statement, "as the defendant's servant was in the cart," has been of

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27. 1 Duv. 317.

28. *Infra* note 15.

29. 186 Ky. 552, 217 S. W. 904.

30. 7 Carr & P. 66.

much import in later decisions, for some courts imposed liability when the stranger was working in co-operation or in the presence of the servant and refused to impose liability where the servant turned his employment over to a third party and left.

The English case, *Booth v. Mister*, was followed by the American leading case, *Althorfe v. Wolf*,<sup>31</sup> where the court held a master liable for the acts of a third party who was, without authorization by the master, assisting the servant in removing snow from the roof, the snow breaking a window pane and the flying glass injuring a passer-by. Shortly thereafter another New York court held a theatre owner liable for an injury caused by a third party who was assisting the owner's servant in opening cab-doors without authorization by the theatre owner.<sup>32</sup> The Texas court, about the same time, held a master liable for an injury occasioned when a servant allowed a third party to hold the master's horse, and the horse injured a neighbor's colt while the third party was holding him.<sup>33</sup> The same year (1889) a Missouri Appellate Court held a brewer liable for the negligent acts of a stranger who was assisting the driver unload,<sup>34</sup> the court saying, "If a servant in charge of his master's carriage should take a stranger with him into the driver's seat, hand him the reins, and tell him to drive at a run, and an injury happened in consequence of the speed, the master must answer for the damage; for the negligence of his servant." In 1915, the Missouri Appellate Court reiterated the same doctrine in a case where the master directed his chauffeur to get his son and the chauffeur took in a friend to ride with him whom he allowed to drive.<sup>35</sup> An accident ensued and the master was held liable. A similar point was considered in *Wetherman v. Handy*,<sup>36</sup> but the court distinguished that case by the fact that the servant, after his unauthorized delegation of duties to a third party, left and was not present, and did not co-operate with the third party, and therefore his master was not liable, the court saying, "Whenever the facts show combined or commingled acts of negligence on the part of the servant and the third party . . . there is liability. . . . The master being liable for the negligent acts of one of the parties is liable for all." This distinguished principle is cited in

31. 22 N. Y. 355.

32. 19 Misc. Rep. 644.

33. *Campbell v. Trimble*, 15 Tex. 270, 12 S. W. 863.

34. *James v. Muelebach*, 34 Mo. A. 512.

35. *Sholhower v. Clark*, 191 Mo. A. 105.

36. 198 S. W. 459.

*Blumenfeld v. Meyer-Schmid Grocer Company*<sup>37</sup> as the weight of authority.

In *Hollidge v. Duncan*,<sup>38</sup> the Massachusetts court held the owner of a wagon liable when the driver, his wagon having broken down, asked a bystander to assist him, and the bystander by his acts caused a pane of glass to break and injure the plaintiff. However, the facts were such that there was an implication of authority by necessity on the part of the driver to secure help. About the same time the Iowa Supreme Court held that an ice company was liable for the negligent acts of an unemployed third party whom the driver allowed to ride on the wagon, and who injured a bystander when helping unload.<sup>39</sup> In New York an ice company was held liable on much the same general facts.<sup>40</sup> There are decisions both ways in New York, however. The decision depends much upon the facts of the particular case. Where a servant disobeyed express instructions and allowed a stranger to take charge of a horse, the owner was held not liable.<sup>41</sup> Also the owner of a car was held not liable when an accident occurred while the brother of the car owner's chauffeur was driving at the request of the chauffeur who had no authority to allow his brother to drive.<sup>42</sup>

The Minnesota cases indicate some latitude in allowing the injured party to recover from a master for the acts of a stranger assisting his servant. In *Geiss v. Twin City Taxi Cab Company*,<sup>43</sup> the court said, "Master is liable when the act is done in the presence of the servant, and by his direction, or with his acquiescence, though the person doing the act is not a servant of the master and though the master has not authorized his servant to employ the assistant." In *Kayser v. Van Nest*,<sup>44</sup> the same court held a parent liable for an injury which occurred while the daughter out with the family car allowed a cousin to drive. The daughter was declared a servant of the parent. When the daughter allowed the other party to take the wheel "It was still used in furtherance of the purpose for which she had taken it out. The fact that the person authorized another to

37. 230 S. W. 132.

38. 192 Mass. 21.

39. *Thysen v. Davenport Ice Co.*, 134 Ia. 749, 112 N. W. 177, 13 L. R. A. (N. S.) 572.

40. *Bamberg v. Int. Ry. Co.*, 53 Misc. Rep. 403.

41. *Long v. Richmond*, 68 App. Div. 466.

42. *Orlando v. Pioneer Barber Towell Co.*, 205 N. Y. S. 534, 210 App. Div. 219.

43. 120 Minn. 368, 139 N. W. 611, 45 L. R. A. (N. S.) 382.

44. 125 Minn. 277, 146 N. W. 1091.

operate the car temporarily does not absolve the owner from responsibility under such circumstances."

This last mentioned case is directly in point with *Thurston v. Palmer*, mentioned at the beginning of the note. In both cases the car was a family car. In both cases the child allowed a third party to drive. In both cases it was a pleasure trip, and in both cases the injured party recovered from the parent who owned the car. The rule in these cases is particularly distinguishable from the other cases mentioned by the fact that in the other cases mentioned the servant was in the pursuance of a task for the benefit of the master and the negligent help of a third party was a helping the servant execute his duty; whereas, in *Kayser v. Van Nest* and *Thurston v. Palmer*, the child was not directly in the service of the parent, and the agency of the child was based upon the idea that in using the family car for the pleasure of a member of the family the child became an agent of the parent in executing the purpose for which the car was purchased, namely, the general use and pleasure of the family.

Although there is little authority contrary to the two last mentioned cases, there being little litigation on that point, there is much authority contrary to the ruling that the master is liable for the acts of the unauthorized volunteer who assists his servant; based upon a strict construction of the rule that the master is liable only for the acts of a servant within the scope of his authority and in pursuance of the master's business. The contra cases follow *Gilliam v. Twist*,<sup>45</sup> an English case contra to *Booth v. Mister*,<sup>46</sup> where the court said the master was not liable for the unauthorized delegation of the servant's authority to another. One recent case holding the employer not liable for the act of a stranger assisting the employee unless the employee had express or implied authority to hire him.<sup>47</sup> One state has repeatedly held the master not liable for the negligence of a stranger to whom a servant has delegated his duties without the consent of the master.<sup>48</sup>

There has been little litigation on the point directly involved in *Thurston v. Palmer*, the principal case, namely, the liability of the parent when the son has allowed a friend to drive. Therefore, it is a difficult task to say where the weight of authority lies. However, it would seem that if the state had repudiated or refused to follow

45. 1895; 2 Q. B. 84.

46. 7 Carr & P. 66.

47. *Leven v. City of Omaha*, 167 N. W. 214.

48. 137 Ga. 269, 13 S. E. 376; 4 Ga. A. 120, 60 S. E. 1015.



the "family car" doctrine, then there would be less ground on which to hold the father liable for the son's negligent driving of the family car for his own pleasure, and inferentially it would mean that the parent could not be held liable for the negligence of one whom the son has allowed to drive. In both cases where, under such circumstances, the father was held liable the court was one which recognized the "family car" doctrine.

The "family car" doctrine is much criticised, and there is much good reasoning on the part of its critics.<sup>49</sup> In its inception it is a technical doctrine applied to make somebody liable for the injury done. As is said in one case, the mere fact that a father owns the car which the son drives should not be enough to make the father liable.<sup>50</sup> The father could own a car for the use of the members of a club or a church, and should the mere relation of owner make him liable? To make the owner liable on agency or master and servant principles there should be elements such as the pursuance of the principal's business and acts done for the principal's benefit, and these are not present when a son is using the car for his own pleasure.

It is not difficult to understand the parent's liability when he has allowed a child too young to handle the car or a child too weak physically to drive the family car. For these cases there is negligence on the part of the father in allowing the child to have the car. As is said in many cases, an automobile is not a dangerous instrument per se, but allowing a young child to operate a car might amount to almost the same thing.

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49. *Doran v. Thomsen*, 76 N. J. L. 754; *Hay v. Hogan* *infra* note 14.

50. *Infra* note 49.