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Automobiles - The Community Errand and the Family Purpose Doctrine

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Comments

AUTOMOBILES—THE COMMUNITY ERRAND AND THE FAMILY PURPOSE DOCTRINE

The advent of the family automobile, coupled with the peculiar dangers and financial responsibilities incurred in its use, has resulted in the adoption of a doctrine, called the "family purpose" doctrine, which places the solvency of the family head behind the wrongdoings of the dependent members of his family.[1] Under this theory the owner who permits members of his family to drive his car for their pleasure makes the driver's pleasure his "business" and thus the driver becomes his servant.[2] To be held liable, the owner must either own the automobile or have a property interest in it.[3] The driver must also be a member of the owner's immediate family[4] with either express or implied permission[5] to drive the automobile.

A substantial number of the American courts reject this doctrine, however, and consider it a "fictitious agency without any basis in fact."[6] This attitude is supported by the fact that this liability is restricted to automobiles.[7]

Louisiana has expressly rejected the "family purpose" doctrine[8] on the ground that liability for damages in Louisiana must clearly be expressed or implied from the articles of the code. The courts have interpreted Articles 2315-2320, dealing with offenses and quasi offenses, as not recognizing the liability upon which the doctrine is based. Actually Louisiana courts, as well as the courts which recognize the "family purpose" doctrine, proceed from the same starting point—that the master is liable for the torts of his servant; but the Louisiana courts have been unwilling

1. Prosser, Handbook of the Law of Torts (1941) 500-501.
2. Id. at 501; Lattin, Vicarious Liability and the Family Automobile (1928) 26 Mich. L. Rev. 846.
3. Holland v. Goode, 188 Ky. 525, 222 S. W. 950 (1920); Emanuelson v. Johnson, 148 Minn. 417, 182 N. W. 521 (1921).
4. Smart v. Bissonette, 106 Conn. 447, 138 Atl. 365 (1927); Lattin, supra note 2.
5. Sale v. Atkins, 206 Ky. 224, 267 S. W. 223 (1924); Dow v. Legg, 120 Neb. 271, 231 N. W. 747, 74 A.L.R. 5 (1930).
6. Prosser, op. cit. supra note 1, at 502.
7. Felcyn v. Gamble, 185 Minn. 357, 241 N. W. 37 (1932).
8. Globe Indemnity Co. v. Quesenberry & Wife, 1 La. App. 364 (1924); Davis v. Shaw, 142 So. 301 (La. App. 1932); Tuck v. Harmon, 151 So. 803 (La. App. 1934); Benton v. Griffith, 184 So. 371 (La. App. 1938).

to extend the agency theory to the extent necessary to recognize liability in the instances under consideration.

Although Louisiana courts refuse to recognize the broad "family purpose" doctrine of the common law it is not improbable that the same search for a solvent defendant has led the courts of Louisiana to develop a similar doctrine based on a theory of "community errand." Under this doctrine, if the wife is driving with the express or implied consent of her husband, on an errand for the community, the husband as head and master is liable. But, if the wife's mission is for her own pleasure or convenience, or if she is driving without her husband's consent, the community is not liable.

The leading Louisiana case on this subject, *Adams v. Golson*,[9] established the principle of liability of the husband for the tort of the wife when the latter is acting as the agent of the community. In order to hold the husband liable as head and master the wife must be either expressly or impliedly authorized to and actually attending to the business of the community. Since a mandate may not be created in the interest of the mandatary alone,[10] the use of the community automobile for the wife's pleasure cannot establish such a relationship.

Because the plaintiff's right of action against the husband depends principally upon the character of the wife's mission, it is important to determine how particular errands have been designated by the courts. If the wife is shopping for the household, she is engaged in a community errand, since this involves the expenditure of funds for the benefit of the community. This was extended in *Paderas v. Stauffer*[11] to include any errand for selecting clothes, hats, or "any of the numberless things that a woman requires for her own comfort and adornment."[12] Other examples of community errands are trips to the wife's dressmaker[13] or to repair furniture used in the community household.[14] Personal errands, for which no liability attaches, include any trip made for

9. 187 La. 363, 174 So. 876 (1937).
10. Art. 2986, La. Civil Code of 1870; Adams v. Golson, 187 La. 363, 174 So. 876 (1937).
11. 120 So. 886 (La. App. 1929).
12. 120 So. 886, 887.
13. Levy v. New Orleans and Northeastern Ry., 20 So.(2d) 559 (La. App. 1945).
14. Meibaum v. Campisi, 16 So.(2d) 257 (La. App. 1944).

the wife's enjoyment, such as a "joy ride,"[15] attending a style show[16] or fraternal meeting,[17] or a visit to her relatives.[18]

The recent court of appeal case of *Levy v. New Orleans and Northeastern Railway*[19] makes a departure from the previous jurisprudence on the liability of the husband. The court stated: "We see no reason why if the husband either expressly or by implication authorizes the wife to use the car for her own pleasure, the community and the husband as its head, should not be liable for her negligence."[20] After stating that it had no intention to engage in the "futile pastime of a disagreeing" with the *Golson* case, the court interpreted that decision as relieving the husband from liability only when the wife is unauthorizedly driving the car. Several decisions prior to the *Golson* case express views similar to those in the *Levy* case. In *Tarleton-Gaspard v. Malochee*[21] the wife was driving her parents to a movie, which was clearly a personal mission. Nevertheless, the husband was held liable because the court considered that under the circumstances his wife was just as much his agent as the family chauffeur. The opinion of another case in which the husband was held liable apparently did not attach sufficient importance to the errand to warrant its mention.[22] It seems, therefore, that at one time the court was prepared to reach the same result attained under the "family purpose" doctrine insofar as the husband-wife relationship is concerned.

The court has correctly placed the burden of proving the nature of the errand on the husband. This seems justified since the matter is normally "completely and exclusively" within his knowledge.[23] In order to escape liability the husband must, therefore, sustain the burden of proof either that the automobile was not being used in the interest of the community at the time of the accident,[24] or that it was being used without his consent.[25]

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15. Durel v. Flach, 1 La. App. 758 (1925).
16. Adams v. Golson, 187 La. 363, 174 So. 876 (1937).
17. Ibid.
18. Aetna Casualty & Surety Co. v. Simms, 200 So. 34 (La. App. 1941).
19. 20 So.(2d) 559 (La. App. 1945), noted in (1946) 20 Tulane L. Rev. 279.
20. 20 So.(2d) 559, 568.
21. 16 La. App. 527, 133 So. 409 (1931).
22. Battalora v. Carnahan Creamery, 157 So. 612 (La. App. 1934).
23. Paderas v. Stauffer, 120 So. 886 (La. App. 1929).
24. Levy v. New Orleans and Northeastern Ry., 20 So.(2d) 559 (La. App. 1945).
25. Wise v. Smith, 186 So. 857 (La. App. 1939); Maibaum v. Campisi, 16 So.(2d) 257 (La. App. 1944).

When the wife's mission includes both community business and pleasure, the question then arises as to which purpose shall control. In the *Golson* case the wife had driven the community automobile with her husband's consent to attend a style show and a meeting of a fraternal organization. The accident occurred while she was en route to a restaurant for her evening meal. The court held that the main purpose of Mrs. Golson's trip was to attend the show and meeting for her own pleasure and the meal was merely incidental to the principal use of the automobile. The importance of determination is illustrated by *Aetna Casualty & Surety Company v. Simms.*[26] In this case the wife entered the car for the purpose of visiting her aunt, but upon having trouble with the switch key she decided to drive to a garage to have it repaired. The accident occurred while she was trying to negotiate an entrance at the latter place. Under these facts the court concluded that the primary purpose for using the car was the personal mission; and, therefore, since the repair of the key was merely secondary to the main object, the husband was not responsible.

Under the traditional civil law theory of individual rights and liabilities the husband has never been held responsible for his wife's torts committed out of his presence.[27] The Civil Code contains no provision specifically rendering the husband liable merely because of the marital relationship.[28] The jurisprudence has established this doctrine and a question arises as to its desirability. The injured plaintiff in many instances would be left with a vacant right if the wife did not possess sufficient separate funds to satisfy a judgment. The effect upon the wife would otherwise work an injustice in certain instances. In those cases where the wife has sufficient separate property to satisfy the plaintiff's claim, the entire amount is taken from her separate funds; whereas the husband may liquidate his liability from community funds. In administering this doctrine difficulties are encountered not only in ascertaining what errands are community or separate but also in determining where the trips include several purposes, which is the primary one.

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26. 200 So. 34 (La. App. 1941).

27. Art. 2317, French Civil Code. McClure v. McMartin, 104 La. 496, 29 So. 227 (1901); Durel v. Flach, 1 La. App. 758 (1925); Adams v. Golson, 187 La. 303, 174 So. 876 (1937); 1 Pothier, A Treatise on the Law of Obligations or Contracts (3rd ed. 1853) c. vi, § viii, art. 11, p. 362; Daggett, The Oklahoma Community Property Act—A Comparative Study (1940) 2 LOUISIANA LAW REVIEW 575, 583.

28. Tuck v. Harmon, 151 So. 803 (La. App. 1934).

Under the present doctrine, in order to hold the community liable the wife must be engaged in the business of the community with her husband's consent; but the community is liable for the husband's negligence although his mission is one for his own pleasure. It would appear that the same rule should apply to both husband and wife under the present day conditions, since the community owes to the wife as well as to the husband the duty of furnishing recreation and pleasure.[29] Since the wife actually has a vested half interest[30] in the community, a more desirable result would be reached by holding the community liable for her negligence in all instances, as in the case of the husband.

Because of the peculiar danger to individuals and property resulting from the use of the automobile, as much responsibility as possible should be placed behind its use. The desirability of such a situation in order to meet present day social, economic, and mechanical changes is evidenced by the development of the "family purpose" doctrine elsewhere. This result can be attained in Louisiana by adherence to the approach taken in the *Levy* case.

Article 2318 imposes liability upon the parents for the torts of their minor or unemanicipated children residing with them. If these requisites are present, the father and, after his death, the mother are virtually insurers against the wrongs committed by their children.

The parents' liability for the negligence of minors while driving automobiles is greater in Louisiana in some respects than would be recognized under the "family purpose" doctrine. Under that doctrine the minor must at least have the implied permissive use of the parent, but in this state liability will be imposed although the parent had expressly forbidden the use of the automobile. The "family purpose" doctrine also requires that the family owner have at least a property interest in the motor vehicle,[31] but in Louisiana the ownership of the vehicle does not alter the result. On the other hand, several aspects of the "family purpose" doctrine impose liability which is not recognized in this state. For example, in Louisiana the parent is not responsible for the negligence of an emancipated minor,[32] whereas under the "family purpose" system the owner is responsible although the

29. Levy v. New Orleans and Northeastern Ry., 20 So.(2d) 559 (La. App. 1945).

30. Succession of Wiener, 203 La. 649, 14 So.(2d) 475 (1943).

31. Hilland v. Goode, 188 Ky. 525, 222 S.W. 950 (1920); Emanuelson v. Johnson, 148 Minn. 417, 182 N.W. 512 (1924).

32. Stough v. Young, 185 So. 476 (La. App. 1938).

son is an adult.[33] Liability in Louisiana is also restricted to the parents, but under the common law doctrine the owner may be another member of the family. The purpose of Article 2318 apparently is to place the parent's solvency behind his minor's wrongs.[34]

If the minor permits a third person to drive the automobile entrusted to him, his parent is liable if the minor is present in the automobile and exercised control over the driving[35] or if the car was surrendered to an incompetent driver. Liability, however, will not attach where control is surrendered to a competent driver and the minor exercises no supervision.[36] In the "family purpose" jurisdictions practically the same result is reached in most of the cases, for generally the family owner will be responsible for the negligent act of the third party committed in the presence of the member of the family who has borrowed the car.[37] No provision of our code authorizes a minor to bind himself for the torts of another and recovery is not based on a theory of agency. If the minor is not guilty in this situation of any offense or quasi offense, the parent is not liable.

Of course, if any member of the family is in fact acting as the agent of the owner, the latter will be responsible upon ordinary agency principles. Thus, even in the case of emancipated or major children the parent is frequently made liable.[38] Where the owner merely lends his motor vehicle to a member of his family for the borrower's own pleasure, however, an agency relationship is not thereby established, and there can be no liability, except as above indicated.[39]

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33. King v. Smythe, 140 Tenn. 217, 204 S.W. 296 (1918).
34. Note (1945) 6 LOUISIANA LAW REVIEW 478.
35. Grantham v. Smith, 18 La. App. 519, 132 So. 805 (1931).
36. Gott v. Scott, 199 So. 460 (La. App. 1940); Foti v. Myers, 8 So.(2d) 349 (La. App. 1942).
37. Kayser v. Van Nest, 125 Minn. 277, 146 N.W. 1091 (1914); Golden v. Medford, 189 Ga. 614, 7 S.E.(2d) 236 (1940); King v. Cann, 182 Wash. 552, 52 P.(2d) 900 (1935)(although the son had been forbidden to let others drive). But see Smith v. Sladovich, 3 La. App. 527 (1926)(suit dismissed against owner whose major son permitted his friend to drive).
38. Wolfe v. Toye Bros. Auto and Taxicab Co., Inc., 18 La. App. 321, 138 So. 453 (1931); Weitkam v. Johnson, 5 So.(2d) 582 (La. App. 1942).
39. The owner, however, may render himself liable by lending his car to an incompetent driver provided the former is aware of this incompetency. Baader v. Driverless Cars, Inc., 10 La. App. 310, 120 So. 515 (1929); Anderson v. Driverless Cars, Inc., 11 La. App. 515, 124 So. 312 (1929); Davis v. Shaw, 142 So. 301 (La. App. 1932); Bailey v. Simon, 199 So. 185 (La. App. 1940).