SMU | Dedman School of Law

SMU Law Review

Volume 7
Issue 3 *Survey of Southwestern Law for 1952*

Article 4

January 1953

Agency and Partnership

Samuel M. Mims Jr.

AGENCY AND PARTNERSHIP

THE FAMILY PURPOSE DOCTRINE — HAS ITS SCOPE BEEN INCREASED?

New Mexico. Since the case of *Boes v. Howell*[1] was decided in 1918, New Mexico has accepted the family purpose doctrine as the rule for determining the parent's liability where a minor child has negligently injured another while driving the family automobile. Apparently, there have been no further reported cases on this point in New Mexico until *Stevens v. Van Deusen*[2] and *Pouliot v. Box*[3] were decided in 1952.

In both cases the question involved was whether a parent is liable for the negligence of a minor child who causes injury or damage to another where the automobile was one which had been bought by the minor child out of his own earnings and was used more or less exclusively by such minor child. In the *Stevens* case the defendant's son, a student at the University of New Mexico, had been to a party on the night of the accident and was returning home when his car stalled on the highway. The son failed to leave any lights showing, and the plaintiff's car, traveling in the same direction, ran into the rear of the parked automobile causing the injuries which resulted in the action for damages. The facts brought out during the trial showed that the son was a minor and had lived with his mother continuously except for several periods when he was engaged in out-of-state construction work. During one of his out-of-state working periods, the son bought and paid for the car involved in the accident. After returning home in his car, he again lived with his mother, a widow, and she resumed supporting him as before. The son maintained the car out of his earnings and out of a $5.00 weekly allowance given him by his mother. The evi-

[1] 24 N. M. 142, 173 Pac. 966.
[2] 56 N. M. 128, 241 P. 2d 331.
[3] 56 N. M. 566, 246 P. 2d 1050.

dence showed that the son's car did not serve as the family car, since defendant mother had her own car and had used his car on only two prior occasions.

In the *Pouliot* case the defendant's son was 17 years of age at the time of the accident and lived at home and was supported by his parents. The automobile was bought with the money he had earned from various after-school, week-end, and vacation jobs and was maintained out of his earnings. His parents permitted him to use the car for transportation to and from school and his place of employment, as well as for his own pleasure and recreation. It does not appear from the opinion that it was used by any other member of the family; certainly there was no finding that it was so used. Probably the only real difference between the facts in the two cases is that in the first the son bought the car when he was away from home and without his mother's knowledge, while in the second the son bought the car when living at his parents' home and with their knowledge.

In each case the defendant contended that the family purpose doctrine did not apply because the vehicle involved was the property of the minor son, and the defendant prevailed on a motion for summary judgment. In each case the supreme court reversed the district court and ordered a new trial, stating in effect that if the minor son was unemancipated, the parents might be liable under the family purpose doctrine, and that the question of emancipation was one of fact for the jury and could not be decided as a matter of law.

The family purpose doctrine, which, according to a recent survey, is followed in 21 states,[4] represents an attempt by the courts to provide redress for persons injured by cars negligently driven by financially irresponsible members of a family. The typical case has involved a car owned by the head of the family

[4] Spalding, *The Family Purpose Doctrine — Who Are Members of the Family and What is the Family Car for the Purpose of This Doctrine*, 16 Notre Dame Law. 394, 395 (1941).

and made available by him to other members of the family for purposes of recreation and pleasure. In this event the purpose is said to be a "family purpose" which the head of the family has made his "business," and the driver of the car is said to be a "servant" of the family head;[5] this accomplished, it is a relatively easy step to hold the family head liable for the negligent driving of such "servants." In a small number of cases it has been sought, under the family purpose doctrine, to hold the owner of a "family purpose" car liable even where such owner was not himself the head of the family. On this there is a division of authority, with some courts applying the family purpose doctrine to hold liable an owner who is not the head of a family.[6]

Most jurisdictions, however — 26 according to the survey[7]— refuse to follow the family purpose doctrine. These jurisdictions agree that if the family member causing the injury was engaged in the business of the owner of the automobile—and they tend to take a rather liberal view as to what constitutes the "business" of the owner[8]— then the latter is liable under the well-established doctrine of *respondeat superior*.[9] But, where the car is used for purely personal purposes by a member of the family other than the owner, no liability attaches to the owner.[10]

In the instant New Mexico cases the court apparently assumed that liability may not be fastened upon the head of the family

[5] Lattin, *Vicarious Liability and the Family Automobile*, 26 Mich. L. Rev. 846, 848 (1928).

[6] Spalding, *supra* note 4, at 399. Also see Ficklin v. Heichelheim, 49 Ga. App. 777, 176 S. E. 540 (1934); Mitchell v. Mullen, 45 Ga. App. 285, 164 S. E. 278 (1932); McNamara v. Prather, 277 Ky. 754, 127 S. W. 2d 160 (1939); Euster v. Vogel, 227 Ky. 735, 13 S. W. 2d 1028 (1929); Gossett v. Van Egmond, 176 Ore. 134, 155 P. 2d 304 (1945).

[7] Spalding, *supra* note 4, at 395.

[8] *E.g.*, Graham v. Page, 300 Ill. 40, 132 N. E. 817 (1921), where defendant's daughter was driving the family automobile to pick up a pair of shoes which had been left for repair; Kichefsky v. Wiatrzykowski, 191 Wis. 319, 210 N. W. 679 (1926), where defendant's son was on his way to purchase a hat for himself; Mebas v. Werkmeister, 221 Mo. App. 173, 229 S. W. 601 (1927), where a parent allowed the son to drive to school.

[9] Smith v. Smith, 116 W. Va. 230, 179 S. E. 812 (1935).

[10] Spalding, *supra* note 4, at 395.

under the family purpose doctrine unless he is also the owner of the car, and the problem, as the court saw it, was essentially one of determining ownership of the car. New Mexico is not entirely without company in this view, since Washington held the same on facts very similar to the *Stevens* and *Pouliot* cases.[11]

As the New Mexico court noted, a parent's claim to the earnings of his minor children is established by statute,[12] but the statute in this respect is merely declaratory of the common law.[13] Since the parent is entitled to the earnings of his child, it is but a natural consequence of this right that the earnings of the child can be reached by the creditors of the parent.[14] Further, it has been held that it makes no difference that title to the property in which the child's earnings have been invested is taken in the name of the child.[15] However, a parent may relinquish his right to the earnings of his child, and this relinquishment may be by consent of the parent, by operation of law, or by estoppel.[16] If, for instance, a child makes a contract on his own

[11] Robinson v. Ebert, 180 Wash. 387, 39 P. 2d 992, 995 (1935). In this case the court made the following statement, which was quoted with approval by the New Mexico Supreme Court: "Whether a parent gives to an unemancipated minor child an automobile with permission to use the same, or whether he gives the child the money with which to buy an automobile, or whether he permits the child to purchase a car with money given the minor by someone else or earned by him, would, under circumstances similar to those here shown, appear to make little difference to the question of whether or not the parents' responsibility constitutes a question of fact to be determined by the jury." The plaintiff in the Washington case was injured in a collision in which the automobile driven by the defendant's minor son was one he had purchased out of his own earnings and without the knowledge or permission of the father. The court held that with respect to the parents' liability for injuries sustained in an automobile collision caused by the negligent driving of their minor son, the question of the son's emancipation was one for the jury.

[12] N. M. STAT. 1941 ANN. § 35-102: "The parents of a minor shall have equal powers, rights and duties concerning the minor. The mother shall be as fully entitled as the father to the custody, control and earnings of their minor child or children. In case the father and mother live apart the court may, for good reasons, award the custody and education of their minor child or children to either parent or to some other person." N. M. STAT. 1941 ANN. § 65-307: "The earnings and accumulations of the wife and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife."

[13] TIFFANY, DOMESTIC RELATIONS (3d ed. 1921) 355.

[14] Atwood v. Holcomb, 39 Conn. 270, 12 Am. Rep. 386 (1872); Schuster v. Bauman Jewelry Co., 79 Tex. 179, 15 S.W. 259 (1890).

[15] Weimhold v. Hyde, 294 S. W. 899 (Tex. Civ. App. 1927).

[16] *Op. cit. supra* note 13, at 358-363.

account to serve another, and the parent knows of it and makes no objection, the other party to the contract may safely pay the child his earnings, and the payment will bar a claim to such earnings by the parent.[17] The effect of relinquishment by the parent of the earnings of his child is that the child may claim his earnings against his parent, and it necessarily follows that this right may be claimed against all persons claiming through the parent including creditors of his parent.[18]

As previously indicated, the principal cases were remanded for inquiry into the question of emancipation. It does not appear that the parents had made any attempt to claim the earnings of their sons, although entitled thereto by statute. While the fact that the sons received their wages for their own use does not conclusively show emancipation, acquiescence by the parent in such a practice would be evidence from which the jury might infer emancipation in fact.[19] If on re-trial the sons are found not to have been emancipated, the effect of the supreme court's holding will be to place constructive ownership of the cars in the parents by virtue of the statutory right to the earnings of their sons and presumably make them liable for the negligence of the sons in driving the cars. Since a parent receives the benefit of having his creditors satisfied out of the earnings or property of an unemancipated minor, perhaps it is not unsound or unfair to impute ownership of the car to the parent on this theory.

A more serious problem suggested by these New Mexico cases, and one which was not considered by the court, is whether, despite "ownership" by the head of the family, the cars were in fact "family purpose" cars. The question is vital, for, in general, the parent is not liable for the torts of his unemancipated children, even when perpetrated through the use of instrumentali-

[17] Vance v. Calhoun, 77 Ark. 35, 90 S.W. 619 (1905); Culberson v. Alabama Construction Co., 127 Ga. 599, 56 S. E. 765 (1907); Schoonover v. Sparrow, 38 Minn. 393, 37 N. W. 949 (1888).

[18] *Op. cit. supra* note 13, at 357, 364.

[19] Lackman v. Wood, 25 Cal. 147 (1864); Scott v. White, 71 Ill. 287 (1874).

ties owned by the parent.[20] Thus, the parent has escaped liability for torts effected by the child through the use of firearms, [21] motorboats, [22] motorcycles,[23] and other instrumentalities even when such instrumentalities have actually been furnished to the child by the parent. Hence, from the standpoint of liability under the doctrine of *respondeat superior,* the fact that the child is serving his own purposes through an instrumentality furnished by the parent does not establish that he is acting in the "business" of, or on behalf of, the parent.

It is difficult indeed to perceive why the pleasure of the child should be equated with the "business" of the parent simply because the instrumentality involved happens to be a car. Various reasons have been assigned. Thus, one court, in commenting upon the exception made in the case of automobiles when liability does not extend to other instrumentalities furnished by the parent, has said, "The necessities of the situation prompted such application and public policy required it."[24] In earlier times the exception has been attributed to the dangerous character of the automobile.[25] In the typical case, however, the family purpose doctrine has been predicated upon the purchase of a car by the head of a family for general family use; indeed general family use is almost a universal element in these cases.[26] Absent the factor of general family use, it is difficult to perceive a rational basis for parental liability in the automobile cases in the face of the general rule that, except for his own negligence, the parent is not liable for torts perpetrated by his children through the use of instrumentalities furnished by the parent.

---

[20] Of course, in appropriate circumstances a parent may be liable for his own negligence in entrusting dangerous instruments to a young child or for failing to exercise suitable control over the conduct of the child. PROSSER, TORTS (1941) § 100.

[21] Lopez v. Chewiwie, 51 N. M. 421, 186 P. 2d 512 (1947).

[22] Felcyn v. Gamble, 185 Minn. 357, 241 N. W. 37 (1932).

[23] Meinhardt v. Vaughn, 159 Tenn. 272, 17 S. W. 2d 5 (1929).

[24] Felcyn v. Gamble, 185 Minn. 357, 241 N. W. 37, 38 (1932).

[25] Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 So. 629 (1920). Also see Lattin, *supra* note 5, at 861, 865.

[26] Spalding, *supra* note 4, at 399, 400.

From the opinion in the *Pouliot* case, it is not clear whether the car bought by the minor child was used exclusively by such child. However, it appears from the opinion in the *Stevens* case that the mother had her own car and had used the son's car on only two prior occasions. It might be argued that where the use by a child of a personal car frees the family car for other uses, the child's car may be deemed to be kept and furnished for family use — but such an argument appears to be thin. It would seem that New Mexico, in following the precedent set by Washington, has taken a long step towards making parents insurers when their unemancipated minor children drive automobiles.

As a branch of the law of *respondeat superior,* the family purpose doctrine is difficult enough to accept even when the car is provided for the use of the family; the strain upon the underlying principles of agency approaches the breaking point when the doctrine is applied in a case where the car is not a family purpose car. The result, considered solely from a social point of view, is, of course, more readily defensible. The cases illustrate the dilemma of the conscientious court when the legislature fails to cope with what is essentially a legislative problem.

Samuel M. Mims, Jr.