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LIABILITY OF WIFE

At common law an unmarried woman occupied no special status as far as tort liability was concerned, and the same rules and standards of responsibility applied to her as to society generally. Since marriage imposed upon a woman a very extensive disability, however, there developed a number of special rules concerning tort responsibility of the married woman.[1]

Marriage did not impose upon the wife any special or peculiar liability for wrongful acts committed by her husband at common law, and, except in certain instances hereafter noted, she is not thus liable today.[2] It is true that since the enactment of married women's emancipation statutes, enabling the wife to own and control property, a married woman may employ agents and servants.[3] Consequently, she may be held vicariously liable for the torts of such servants or agents under modern law—a liability rarely imposed upon her under the disability of coverture, which generally prevented her from entering into contractual relationships.[4] Therefore, if the wife today permits her husband to act for her, as agent or servant, she may be held liable for his torts committed in such capacities.[5] This liability, however, is not predicated upon the marital relationship between the parties, although, as a practical matter, the courts may be more prone to find the existence of an agency or a master-servant relationship when the husband acts for his wife than when the wife is charged with responsibility for the acts of a third person.[6]

Although the common law did not impose upon the married any greater liability than upon a single woman, it did not, except in a few

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1. See generally MADDEN, DOMESTIC RELATIONS §§ 64-67 (1931); PROSSER, TORTS § 102 (2d ed. 1955); 27 AM. JUR., *Husband and Wife* §§ 476-90 (1940).
2. Annot., 12 A.L.R. 1459 (1921).
3. 2 AM. JUR., *Agency* § 13 (1936).
4. MADDEN, DOMESTIC RELATIONS 211-12 (1931); 27 AM. JUR., *Husband and Wife* § 477 (1940).
5. Annot., 12 A.L.R. 1459, 1466-77 (1921).
6. Even here, however, there must be some showing of employment or authority by direct or circumstantial evidence. Hammond v. Hood Co., 31 Tenn. App. 683, 691, 221 S.W. 2d 98, 102 (W. S. 1948). Thus the mere presence of the wife when her husband commits a tort raises no presumption that he acts as her servant or agent, even though the act is committed in connection with her separate property. Carnahan v. Cummings, 105 Neb. 337, 180 N.W. 558, 12 A.L.R. 1455 (1920). See generally 26 AM. JUR., *Husband and Wife* §§ 227-35 (1940).

instances, relieve her from tort liability. The married woman was generally liable for her "pure" torts, or a "torts simpliciter,"[7] that is, those torts not connected with a contractual undertaking. As to the latter, she was granted immunity upon the theory that her disability of coverture made the contract invalid; accordingly, the courts would not indirectly enforce the contract by imposing liability for torts committed in connection therewith.[8] With the conferring of capacity to contract upon married women, however, this immunity has largely disappeared.[9]

Because of the superior position occupied by the husband at common law, if a married woman committed a tort in the presence of and at the direction of her husband, it was presumed that her act was the result of his coercion.[10] In such cases liability rested upon the husband alone, and the wife was exonerated, unless the husband rebutted the presumption of coercion. In the latter event, both the husband and wife were held liable, the husband's liability being based upon common-law rules hereinafter mentioned. In modern law, while coercion by her husband is still a defense to a married woman, the presumption of its existence has been greatly weakened, and not infrequently the burden is cast upon her to prove that she acted as a result of coercion.[11]

In the great majority of jurisdictions today, then, the married woman has neither greater nor less responsibility in tort than any other person. With a few special exceptions, largely confined to the law of automobiles,[12] she is not liable for the torts of her husband, or of other members of the family, in the absence of a showing of agency, or unless she herself in some manner participates in such torts or ratifies them so as to be deemed a tortfeasor herself.[13]

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7. PROSSER, TORTS 679 (2d ed. 1955).
8. MADDEN, DOMESTIC RELATIONS 211-12 (1931).
9. Of course if some phases of the disability are preserved by the statutes, presumably the common-law rules would still apply as to them. Thus in several states the married woman is prohibited from becoming surety or guarantor for her husband. Strictly applied, the common-law rules would relieve her from liability for fraud or deceit in making such forbidden contracts, and under the statutes the wife could avoid the contracts themselves. Increasingly, however, the courts have either imposed tort liability for fraud or have invoked estoppel to prevent rescission. See, *e.g.*, Farmington Nat. Bank v. Buzzell, 60 N.H. 189 (1880); COMPTON, CASES ON DOMESTIC RELATIONS 272-73 (1951); 26 AM. JUR., *Husband and Wife* §§ 211-13 (1940); Annot., 107 A.L.R. 309, 331 *et seq.* (1937).
10. MADDEN, DOMESTIC RELATIONS 207-10 (1931); PROSSER, TORTS 679-80 (2d ed. 1955). A similar rule existed in criminal law, but like the tort rule, the presumption in criminal cases has been weakened or destroyed as a result of the emancipation statutes. State v. Renslow, 211 Iowa 642, 230 N.W. 316, 71 A.L.R. 1111 (1930); Morton v. State, 141 Tenn. 357, 209 S.W. 644, 4 A.L.R. 264 (1918).
11. See, *e.g.*, Moore v. Doerr, 199 Mo. App. 428, 203 S.W. 672 (1918); PROSSER, TORTS 680 (2d ed. 1955).
12. See "Automobile Statutes and Decisions," *infra*.
13. Annot., 12 A.L.R. 1459 (1921).

Liability of Husband

At common law, under rules whose origin are obscure, a very broad liability was placed upon the husband for torts committed by his wife, both before and subsequent to the marriage.[14] This liability was largely a vicarious one except in situations where the wife acted as a result of the husband's coercion, or in cases where the husband himself participated in the wrong.[15] As above mentioned, the wife herself was also held liable for her torts, but because of her extensive disability of coverture, judgment against her alone would usually have been of little value. Further, she could not generally sue or be sued in her own name because of her disability, so that her husband was normally regarded as being a necessary party in actions brought against her.[16]

The extent to which this common-law liability has been removed by modern legislation varies considerably from state to state.[17] A large number of states have expressly relieved the husband from such liability by statutes.[18] In others the statutes have only partially removed such liability by their express terms, and in still others no specific mention is made of the subject.[19] In the two latter groups of states, therefore, the continued existence of or the modification of the husband's liability depends largely upon the construction given by the local courts to the married women's emancipation statutes. By far the

14. 2 Kent, Commentaries *149; Note, 3 U. Fla. L. Rev. 206 (1950); 11 Mo. L. Rev. 327 (1946); see note 1 *supra*.

15. See notes 10 and 11 *supra*.

16. Price v. Clapp, 119 Tenn. 425, 105 S.W. 864 (1907).

17. Madden, Domestic Relations 212 *et seq.* (1931); Annots., 59 A.L.R. 1468 (1929), 27 A.L.R. 1218 (1923), 20 A.L.R. 528 (1922).

Because of the different rules of liability under the various state statutes and decisions, an interesting problem of choice of law is sometimes presented. Thus in the leading case of *Siegmann v. Meyer*, 100 F.2d 367 (2d Cir. 1938), a wife committed a tort in Florida while there on a personal mission, her husband remaining at home in New York. At that time Florida law held a husband liable for his wife's torts; no such liability eisted in New York. In an action against the husband, plaintiff invoked the *lex loci*, which usually governs in tort cases. The court refused to apply the Florida rule, however, since the husband had not authorized his wife to act for him, had committed no tort himself and had never been within the borders of Florida. Had agency been shown, presumably the result would have been different. *Cf.* Young v. Masci, 289 U.S. 253 (1933); Scheer v. Rockne Motors Corp., 68 F.2d 942 (2d Cir. 1934).

18. Prosser, Torts 680 (2d ed. 1955). For a listing of the various state statutes, see Note, 3 U. Fla. L. Rev. 206 (1950).

19. See, *e.g.*, Tenn. Code Ann. § 36-601 (1955), which removes the disability of coverture but does not refer to the husband's liability. The statute further provides that the husband is relieved from all antenuptial "debts, contracts or obligations" of the wife. *Id.* § 36-605. It is no longer necessary in Tennessee to join the husband as a party in actions for tort against the wife. Forman v. Washington, 3 Tenn. App. 567, 572 (W.S. 1926). And the Tennessee courts have held that the husband is no longer liable for his wife's torts committed with respect to her separate property. Foster v. Ingle, 147 Tenn. 217, 246 S.W. 530 (1922) (wife driving own automobile). Whether he is liable for her torts not connected with such separate property appears to remain undecided in the state, but presumably the Tennessee courts would follow the general rule of nonliability in view of the broad language of the emancipation statute.

majority of courts have held that the removal of the disability of coverture has extinguished all necessity for holding the husband liable for his wife's torts, and as a result the liability is no longer deemed to exist.[20] Some of the courts, however, have held that the emancipation statutes apply only to the wife's separate property; consequently the husband is relieved from liability only for her torts connected with such property, but otherwise remains liable for her wrongs.[21] In a very few jurisdictions the courts have given a strict construction to the emancipation statutes, as being in derogation of common law and have held the statutes not to alter the common-law rules of liability.[22]

In view of the modern social and legal equality accorded to the married woman, the common-law liability of the husband seems to be largely archaic. Its abolition would seem to be a necessary incident to the purpose and spirit of emancipatory legislation, and only if expressly preserved by the emancipation statutes would its continued existence seem to be justified.

The general trend in tort law, then, may definitely be said to be toward the removal of liability of either spouse for tortious conduct of the other spouse, based solely upon the marital relationship. Despite this fact, however, there may be other predicates upon which a husband may be held liable for his wife's torts, just as in the converse situation. If the wife can be shown to be acting in concert with her husband, or as a joint tortfeasor with him, of course, he would be held liable for her wrong.[23] Similarly her conduct may be imputed to him if the spouses can be shown to be engaged in a "joint enterprise."[24] The courts have, however, generally been reluctant to hold the husband liable for ordinary mishaps occurring in the home without his participation, and have not broadly applied the "joint enterprise" theory to the operation of the household.[25]

The rules of respondeat superior, of principal and agent, and of partnership are likewise applicable to the conduct of husband and

20. *See* McDonald v. Senn, 53 N.M. 198, 204 P.2d 990, 10 A.L.R.2d 966 (1949); PROSSER, TORTS 680 (2d ed. 1955); Note, 4 MIAMI L.Q. 358 (1950); see note 17 *supra*.

21. COMPTON, CASES ON DOMESTIC RELATIONS 406 (1951); MADDEN, DOMESTIC RELATIONS 213 (1931).

22. *E.g.*, Rogers v. Newby, 41 So. 2d 451 (Fla. 1949). This decision was sharply criticized in Note, 3 U. FLA. L. REV. 206 (1950), and the rule which it announced has been since changed by statute. FLA. STAT. ANN. § 741.23 (Supp. 1955).

23. *E.g.*, Bryant v. Smith, 187 S.C. 453, 198 S.E. 20 (1938) (husband directed wife to commit assault and battery).

24. See generally, PROSSER, TORTS 363 (2d ed. 1955).

25. Laube v. Stevenson, 137 Conn. 469, 78 A.2d 693 (1951) (husband not liable for wife's failure to warn social guest of danger in home); Greer v. McCrory, 197 S.W.2d 669 (Mo. 1946), *modifying* 192 S.W.2d 431 (Mo. App. 1946), 11 Mo. L. REV. 327 (husband not liable for wife's negligence causing injury to maid since operation of household not a "joint enterprise"); Mack v. Mackiewicz, 9 N.J. Misc. 1219, 157 Atl. 117 (Sup. Ct. 1931).

wife, and the husband may well be liable for his wife's torts if he permits her to act as his servant, agent or partner.[26]

Liability under the foregoing theories, however, is not peculiar to the domestic relations of the parties and does not specifically arise out of those relations, but must rest upon proof of a legal relationship other than marriage. In husband-wife cases, of course, the family relationship will be a very important evidentiary fact in determining the exact legal relationship obtaining between the parties; but in and of itself it would not properly seem to be an independent basis of tort liability.

Liability of Parents

In contrast to the broad liability imposed upon the husband for his wife's torts at common law, it was a well-settled rule that parents were not liable for the torts of their children merely because of the family relationship.[27] Except as modified by statute in a few jurisdictions, this is still the general rule, although there is much popular belief to the contrary and although to some extent parents frequently assume voluntarily some degree of financial responsibility for the wrongs of their children.

As in other cases involving members of the family, however, it is entirely possible that one parent or both may be held liable for torts committed by a child upon some other theory than mere blood relationship. Here again, for example, if an agency or a master-servant status can be found to exist between the child and its parent, the latter will be held liable for the torts of the child.[28] Also the parent may be held for his own lack of social responsibility if he entrusts to or negligently leaves available to a child a highly dangerous instrumentality;[29] if he entrusts a nondangerous instrument to a child whom he knows or reasonably should know is unable properly to handle it;[30] or if he fails to restrain the child from dangerous activity imperiling others when he knows or should know of the propensities of

26. Annot., 168 A.L.R. 937 (1947).

27. Steinberg v. Cauchois, 249 App. Div. 518, 293 N.Y. Supp. 147 (2d Dep't 1937); Madden, Domestic Relations 398 (1931); Prosser, Torts 681 (2d ed. 1955). In Louisiana the parent is made liable by statute. Phillips v. D'Amico, 21 So. 2d 748 (La. App. 1945). See Annot., 12 A.L.R. 812, 818 (1921).

28. Meinhardt v. Vaughn, 159 Tenn. 272, 17 S.W.2d 5 (1929); Madden, Domestic Relations 399 (1931).

29. *E.g.*, in the following cases firearms were left accessible to the child: Dickens v. Barnham, 69 Colo. 349, 194 Pac. 356, 12 A.L.R. 809 (1920); Salisbury v. Crudale, 41 R.I. 33, 102 Atl. 731 (1918); Sullivan v. Creed, [1904] 2 Ir. R. 317; see also Vallency v. Rigillo, 91 N.J.L. 307, 102 Atl. 348 (1917) (dynamite caps).

30. Taylor v. Stewart, 172 N.C. 203, 90 S.E. 134 (1916) (automobile to twelve-year-old child); Highsaw v. Creech, 17 Tenn. App. 573, 69 S.W.2d 249 (W.S. 1933) (air rifle—jury issue with verdict for parent upheld on facts); Hopkins v. Droppers, 184 Wis. 400, 198 N.W. 738, 36 A.L.R. 1156 (1934) (motorcycle).

the child toward such conduct.[31] Similarly, if the parent ratifies or participates in the child's wrongdoing, he will be held liable for the same.[32] In all of these instances, however, liability rests upon the parent's own conduct, not that of the child, or upon the vicarious liability of the master or principal. In establishing such liability, the fact of the family relationship naturally is important as a matter of proof, but it is not itself generally regarded as the predicate or basis of liability.

The foregoing rules apply whether the plaintiff seeks to hold a natural parent, a parent by adoption, a step-parent or one standing *in loco parentis*.[33] Liability, if found, ultimately will be rested, for example, upon the reasonableness or unreasonableness of the parent's own conduct or upon the existence or nonexistence of agency, and not alone upon the fact that the child dwelt in the home of the defendant or was supported by him. Similarly the fact that the child involved is a minor or an adult,[34] or that he is emancipated or dependent,[35] or that he is sane or insane[36] are important matters of evidence which reflect upon the relationship between the parties and give color to the defendant parent's conduct. They do not, however, in and of themselves, either fix upon or exonerate the parent from liability for the plaintiff's damages.

In most of the reported cases in which the plaintiff has sought judgment against a parent, the father has been the defendant. The mother, however, may be held for her negligence toward the plaintiff in not preventing or anticipating dangerous conduct by her child, or upon any of the other theories mentioned above.[37] Interesting problems exist as to whether the negligence of one parent in not anticipating or preventing injury inflicted by the child might be imputed to the other

31. Ellis v. D'Angelo, 116 Cal. App. 2d 310, 253 P.2d 675 (1953) (failure to warn baby-sitter of child's vicious habits); PROSSER, TORTS 681-82 (2d ed. 1955); 2 RESTATEMENT, TORTS § 316 (1934); Annot., 155 A.L.R. 85 (1945).

32. Howell v. Norton, 134 Miss. 616, 99 So. 440 (1924); Hower v. Ulrich, 156 Pa. 410, 27 Atl. 37 (1893).

33. MADDEN, DOMESTIC RELATIONS 359, 367 (1931); 39 AM. JUR., *Parent and Child* §§ 61 *et. seq.* (1942).

34. Zeeb v. Bahnmaier, 103 Kan. 599, 176 Pac. 326, 2 A.L.R. 883 (1918) (father not liable for driving of adult son merely on family relationship); Woodfin v. Insel, 13 Tenn. App. 493 (M.S. 1931) (grandmother not liable for driving of minor grandson living in same home where no agency shown).

35. *E.g.*, Easterly v. Cook, 140 Cal. App. 115, 35 P.2d 164 (1934) (parent who signed minor's application for driving license not relieved from statutory liability by marriage of minor).

36. Whitesides v. Wheeler, 158 Ky. 121, 164 S.W. 335, 50 L.R.A. (n.s.) 1104 (1914) (no liability for tort of adult incompetent son who had shown no violent tendencies for years); Meers v. McDowell, 110 Ky. 926, 62 S.W. 1013, 53 L.R.A. 789 (1901) (parent liable for use of rifle by intoxicated mentally deficient child).

37. Mazzilli v. Selger, 13 N.J. 296, 99 A.2d 417 (1953) (mother negligently left gun and shells accessible to son); Steinberg v. Cauchois, 249 App. Div. 518, 293 N.Y. Supp. 147 (2d Dep't 1937) (mother exonerated on facts but dissenting justices deemed evidence sufficient for liability).

parent so as to render both liable to the plaintiff. Despite the fact that the doctrine of imputed negligence has received much criticism in modern tort law,[38] there are several cases holding that in an action against third persons for injury or death of a child, one parent may be barred by the contributory negligence of the other.[39] If such holdings be sound, it would seem to be but one step further for one parent to be held liable for negligence of the other in failing to prevent tortious conduct by the child. Theories of agency, or of "joint enterprise," between the parents would seem to be as readily available here as in other areas of family responsibility, if such liability should be deemed socially desirable.[40] Such liability might result in particular in states whose statutes make parents joint guardians of their children.[41] It may well be, however, that the expanding field of homeowners' liability insurance, with its broad coverage, insuring against torts of members of the household, will afford adequate remedy to injured plaintiffs, and that the vicarious liability of one parent for the negligence of the other may not be developed to any appreciable extent.

Liability of Child

It is, of course, elementary that a child is liable for his own torts, and that the common law has never afforded him an immunity in tort comparable to the disability of minority in the fields of contracts and property.[42] There are, of course, certain limits to the liability of a child with reference to particular torts which require malicious intent,[43]

38. James, *Imputed Contributory Negligence,* 14 La. L. Rev. 340 (1954); Lessler, *The Proposed Discard of the Doctrine of Imputed Contributory Negligence,* 20 Fordham L. Rev. 156 (1951); Prosser, Torts 299 (2d ed. 1955); 2 Restatement, Torts § 485 (1934).

39. Wheat's Adm'r v. Gray, 309 Ky. 593, 218 S.W.2d 400, 7 A.L.R.2d. 1336 (1949); Connelly v. Kaufmann & Baer Co., 349 Pa. 261, 37 A.2d 125, 152 A.L.R. 555 (1944); Nichols v. Nashville Housing Authority, 187 Tenn. 683, 216 S.W.2d 694 (1949), 2 Vand. L. Rev. 722; Annot., 2 A.L.R.2d 785 (1948).

40. "The doctrine . . . seems to easily satisfy every test of logic and truth that can be made when applied to parents in the common care and control of their infant child within their own residence and requires in proper response to reason, justice and sound public policy the conclusion that . . . the proximate contributory negligence of each parent is imputable to the other so as to preclude recovery by either in an action for the death of their infant." Nichols v. Nashville Housing Authority, 187 Tenn. 683, 691, 216 S.W.2d 694, 697 (1948). Little, if any, extension of the rule would be necessary to impute negligence in the care of the child from one parent to the other so as to render both liable to an injured third party.

41. *E.g.,* Tenn. Code Ann. § 34-101 (1955): "Fathers and mothers are joint natural guardians of their minor children, and they are equally and jointly charged with their care, nurture, welfare, education and support, and also with the care, management and expenditure of their estates. Fathers and mothers have equal powers, rights and duties with respect to the custody of their minor child or children, and the control and the services and earnings of such minor child or children . . ."

42. Madden, Domestic Relations 604 *et seq.* (1931); Prosser, Torts 788 *et seq.* (2d ed. 1955).

43. Bohlen, *Liability in Tort of Infants and Insane Persons,* 23 Mich. L. Rev. 9 (1924); Prosser, Torts 788 (2d ed. 1955).

and special standards of conduct for determining negligence or contributory negligence of children.[44] Within these limitations, however, the tort law imposes responsibility upon the child for his own conduct, as upon the adult. It does not, however, impute to the child any negligence or other fault on the part of his parent, guardian or custodian.[45]

It seldom occurs that a plaintiff seeks to hold a minor liable for the tort of his parent or of another member of the family. It may be possible for a minor to employ agents or servants,[46] and to the extent that a minor child might be shown to be the principal or master of his parent or other relative, he might theoretically be held vicariously liable for the conduct of such relative. Here, however, the minor may usually disaffirm the contractual relationship of principal and agent, or master and servant, and accordingly he is normally not held liable for torts of servants or agents.[47] It is, of course, possible for the child to be deemed a joint tortfeasor with a parent or any other person, and thereby held liable upon this basis.

An adult child, of course, is fully responsible for his own conduct but he has no special liabilities or immunities for the conduct of his parents and is liable for their conduct only to the extent imposed by some other relationship than family ties.

AUTOMOBILE STATUTES AND DECISIONS

The advent of the automobile created many social and economic problems, and these were accompanied by perplexing legal problems, involving the adaptation of rules of tort liability to a changing society. In tracing the trends and currents of tort law in any area, one finds eddies and cross-currents, but this is particularly true in the area of family responsibility for the use of automobiles.

By the beginning of the automobile age there was a definite trend in tort law toward the exoneration of the husband from liability for the torts of his wife—at least insofar as such liability rested solely upon the marital relationship.[48] As previously noted, the common law did not, in general, render the wife liable for her husband's torts, nor the parent liable for torts of a child.[49] Further, the doctrine of "imputed negligence" had so far fallen into disrepute that a bailor normally was not held liable for the conduct of a bailee.[50]

The tremendous increase in the use of the automobile and the custom

44. See note 42 *supra.*
45. Neff v. Cameron, 213 Mo. 350, 111 S.W. 1139 (1908); 2 RESTATEMENT, TORTS § 488 (1934); see note 38 *supra.*
46. 2 AM. JUR., *Agency* § 12 (1936).
47. Hodge v. Feiner, 338 Mo. 268, 90 S.W.2d. 90, 103 A.L.R. 483 (1935); Covault v. Nevitt, 157 Wis. 113, 146 N.W. 1115 (1914); Messer v. Reid, 186 Tenn. 94, 208 S.W.2d 528 (1948); Annot., 103 A.L.R. 487 (1936).
48. See notes 18-22 *supra.*
49. See notes 2, 27 *supra.*
50. See note 38 *supra.*

of permitting other persons than the owner to operate the automobile posed serious legal problems, particularly in view of the rules of tort liability above described. Liability insurance was not generally required in the early days of the automobile, nor widely purchased, and such policies as were written frequently did not extend coverage to anyone other than the owner himself.[51] Under these circumstances, special rules to impose liability upon the owner of the vehicle—who presumably was better able to respond in damages than the driver thereof—began to develop both by statute and by decision.

To a very large degree the liability of the owner of a vehicle for its use by another is today controlled by statute.[52] In many states, the statutes make the owner absolutely and completely liable for the use made of his automobile by any one using it with his permission, whether such person be a member of his family or not.[53] Where such statutes prevail, the plaintiff is simply required to prove permission by the owner, express or implied; there sometimes is a presumption of permission, however, if the operator is a member of the owner's family.[54] In other states, statutes have been enacted under which proof of registered ownership gives rise to a presumption that the owner consented to the use of the car and that it was being used on his business by the operator at the time of the accident.[55] These statutes, likewise, are not particularly concerned with whether there is a family relationship between the owner and the operator.

Specifically in the field of family responsibility, many statutes have been enacted, and others are increasingly being passed. Generally the pattern of these statutes is to require that when a minor under a specified age applies for a driving permit or license, one or both of his parents, or some adult standing *in loco parentis,* must sign the application and thereby accept full liability for any tort of such minor in operating an automobile.[56]

While statutes such as the foregoing, together with elaborate requirements that the owner of an automobile carry liability insurance

51. MORRIS, TORTS 364 (1953).

52. PROSSER, TORTS 371 (2d ed. 1955); 5 AM. JUR., *Automobiles* §§ 397 *et seq.* (1936).

53. *E.g.,* CAL. VEHICLE CODE ANN. § 402(a) (Ogilvie 1951). For collections of cases under the various statutes, see Annots., 159 A.L.R. 1309 (1945), 135 A.L.R. 481 (1941), 112 A.L.R. 416 (1938), 88 A.L.R. 174 (1934), 83 A.L.R. 878 (1933), 61 A.L.R. 866 (1929), 4 A.L.R. 361 (1919).

54. *E.g.,* Hawkins v. Ermatinger, 211 Mich. 578, 179 N.W. 249 (1920) (conclusive presumption created by statute held valid exercise of police power).

55. *E.g.,* TENN. CODE ANN. §§ 59-1037 *et seq.* (1955); Note, 4 VAND. L. REV. 151 (1950).

56. The recent Tennessee statute, for example is of this type and requires signature of the application by a parent or other responsible adult when the applicant is eighteen or under. It provides that the tortious driving of such minor "shall be imputed to the person who has signed the application . . . ; which person shall be jointly and severally liable with such minor . . . ." TENN. CODE ANN. § 59-704(d) (Supp. 1955).

or show financial responsibility, are currently being employed to help alleviate the social and legal problems arising out of increasing use of the automobile, most of these safeguards were not available in the early days of the automobile era. Consequently, the courts themselves stepped into the breach and enunciated, as a matter of common law, the much debated and highly controversial "family purpose" doctrine.[57] Although the argument was presented to the courts on many occasions that the owner of an automobile should be held strictly liable for all damage caused by its use, upon the theory that the automobile was a "dangerous instrumentality," comparable to a wild animal or an ultrahazardous activity, almost unanimously the courts declined to place the automobile within this category or to impose this form of strict liability upon the owner.[58] Through the family purpose doctrine, however, the courts did impose liability upon the parent or spouse who permitted a member of his immediate family to use an automobile which he maintained for the pleasure and entertainment of the family.

The courts were not in agreement as to the exact extent of liability to be imposed under this rule. Some of the courts, for example, did not hold a parent liable when he permitted a child to take the automobile for the child's own pleasure and benefit.[59] Only when other members of the family were passengers was the vehicle said to be employed for a family purpose. Most of the courts, however, concluded that liability should not be thus restricted, and imposed liability upon the owner of the vehicle even though his spouse or child was using the car for that person's own pleasure, unaccompanied by other members of the family.[60]

Liability under the family purpose doctrine was predicated upon a master-servant theory.[61] Of course, if the member of the family using the automobile were in fact performing some business mission for the owner, there would be an actual master-servant relationship, and the owner would be liable as in any other such case. In situations where a father merely permitted his son to use the family car for the son's

57. King v. Smythe, 140 Tenn. 217, 204 S.W. 296, 1918F L.R.A. 293 (1918). See generally, Appleman, *Special Phases of the Family Purpose Doctrine*, 14 TENN. L. REV. 307 (1937); McCall, *The Family Automobile*, 8 N.C.L. REV. 256 (1930); PROSSER, TORTS 369 (2d ed. 1955).

58. Annot., 16 A.L.R. 270 (1922).

59. *E.g.*, Stumpf v. Montgomery, 101 Okla. 257, 226 Pac. 65, 32 A.L.R. 1490 (1924); Trice v. Bridgewater, 125 Tex. 75, 81 S.W.2d 63, 100 A.L.R. 1014 (1935).

60. PROSSER, TORTS 371 (2d ed. 1955); Annots., 132 A.L.R. 981 (1941), 100 A.L.R. 1021 (1936), 88 A.L.R. 601 (1934), 64 A.L.R. 845 (1929).

61. "Every case which has come to our attention holds that liability must be predicated solely on the theory of respondeat superior—i.e., that the car was being maintained by a member of the family for family use and that, at the time of the injury, it was being operated by a member of the family in furtherance of that purpose, thus making the operator the agent of the person maintaining the car." Boles v. Russell, 36 Tenn. App. 159, 163, 252 S.W.2d 801, 802 (E.S. 1952).

own pleasure, however, the legal relationship between the father and son would, in the final analysis, seem to be nothing more than that of bailor and bailee. It would seem to be entirely fictitious to say that the son was in any sense an agent or servant of the father. Consequently, those courts which criticized or refused to accept the family purpose doctrine did so upon the basis that such a doctrine did violence to the ordinary rules of bailment or else was predicated upon a master-servant relationship which simply did not exist.[62] Those courts which accepted the family purpose rule, however, while predicating it upon the doctrine of respondeat superior, usually admitted that the ultimate basis of liability was in fact one of social policy, and that liability was imposed to require some responsible individual to bear the loss caused by a member of his household in using his automobile.[63] Critics of the doctrine, of course, pointed out that if this result was to be achieved, it should be achieved through appropriate legislation, not through judicial extension or distortion of common-law principles.[64]

Undoubtedly the family purpose doctrine was and is highly debatable. It was a direct outgrowth of a social and economic change, however, brought about by the advent of the automobile, and represented an attempt by the courts at social justice by imposing liability upon one member of the family for the torts or wrongs of other members. It has been confined to immediate members of the household, usually to the spouse or child of the owner of the automobile.[65] It has not been applied beyond the field of motor vehicles,[66] and at the present time there seems to be little likelihood that it will be accepted in states

62. *E.g.*, Norton v. Hall, 149 Ark. 428, 232 S.W. 934, 19 A.L.R. 384 (1921); Arkin v. Page, 287 Ill. 420, 123 N.E. 30, 5 A.L.R. 216 (1919).

63. "It is true that an automobile is not a dangerous instrumentality so as to make the owner liable, as in the case of a wild animal loose on the streets; but, as a matter of practical justice to those who are injured, we cannot close our eyes to the fact that an automobile possesses excessive weight, that it is capable of running at a rapid rate of speed, and when moving rapidly upon the streets of a populous city, it is dangerous to life and limb and must be operated with care. If an instrumentality 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. A judgment for damages against an infant daughter or an infant son, or a son without support and without property, who is living as a member of the family, would be an empty form." King v. Smythe, 140 Tenn. 217, 225-26, 204 S.W. 296, 298, 1918F L.R.A. 293 (1918); 3 VAND. L. REV. 644 (1950).

64. See Belt, J. (dissenting opinion), McDowell v. Hurner, 142 Ore. 611, 60 P.2d 395, 88 A.L.R. 578 (1933); PROSSER, TORTS 371, 681 (2d ed. 1955).

65. *E.g.*, Samples v. Shaw, 47 Ga. App. 337, 170 S.E. 389 (1933) (rule inapplicable to nephew living apart from owner); McGee v. Crawford, 205 N.C. 318, 171 S.E. 326 (1933) (same as to grandson living with owner as hired employee); Messer v. Reid, 186 Tenn. 94, 208 S.W.2d 528 (1948) (owner not liable when son permits third person to drive).

66. Felcyn v. Gamble, 185 Minn. 357, 241 N.W. 37, 79 A.L.R. 1159 (1932) (motorboat); *see* Meinhardt v. Vaughn, 159 Tenn. 272, 17 S.W.2d 5 (1929) (motorcycle, but father held on agency theory).

which have not yet considered the doctrine. Because of the enactment of remedial legislation referred to above, there seems to be little reason to expect that the family purpose doctrine will continue to grow, and on the contrary there are strong indications that the doctrine is on the decline and may well be repudiated in states which have previously accepted it as a matter of common law.[67] Of course, much of the remedial legislation has codified the principle of the doctrine into the automobile statutes of the various states.[68]

Not only has legislation in the field of automobile liability contributed to the decline of the family purpose doctrine, but perhaps an even more important factor has been the development of automobile liability insurance. Customarily today the automobile liability policy contains an "omnibus" coverage provision, which insures the liability not only of the owner of the vehicle but of any person using the vehicle with his permission.[69] Such bailee may or may not be a member of the family of the owner. The principal question of coverage under such insurance policies normally is whether or not the bailee did or did not have express or implied permission from the owner for the use to which he was putting the vehicle.[70]

Where insurance coverage is available under the "omnibus" clause, there is little or no need for the family purpose doctrine. Further, if a member of the owner's household puts the vehicle to a totally unauthorized use, or uses it without permission, then neither the omnibus insurance nor the family purpose doctrine would apply.[71] Consequently, the omnibus clause seems to afford an insurance coverage generally comparable to the liability imposed by the family purpose rule, so that the two normally coincide rather than complement each other. Of course, if the limits of insurance are not adequate to cover the plaintiff's damages, then there may still be a real reason to seek to impose personal liability upon the owner through the family purpose doctrine. Certainly, however, this problem is not as acute as the

67. The rule has been repudiated in several states which had previously sanctioned it. *E.g.*, Hackley v. Robey, 170 Va. 55, 195 S.E. 689 (1938); see dissenting opinion of Belt, J., McDowell v. Hurner, 142 Ore. 611, 60 P.2d 395, 88 A.L.R. 578 (1933). For collections of cases see note 60 *supra*.

68. See notes 52 and 53 *supra*.

69. The omnibus clause typically provides: "The unqualified word 'insured' includes the named insured, and, except where specifically stated to the contrary, also includes . . . any person legally responsible for the use thereof, provided the actual use of the automobile is with the permission of the named insured." Moore v. Liberty Mut. Ins. Co., 193 Tenn. 519, 246 S.W.2d 960 (1952).

70. Annot., 5 A.L.R.2d 600 (1949).

71. *E.g., family purpose cases:* Jensen v. Fischer. 134 Minn. 366, 159 N.W. 827 (1916); Linville v. Nissen, 162 N.C. 95, 77 S.E. 1096 (1913); Steel v. Hemmers, 149 Ore. 381, 40 P.2d 1022 (1935). *Insurance cases involving family members:* Caldwell v. Standard Acc. Ins. Co., 98 F.2d 364 (6th Cir.), *cert. denied*, 305 U.S. 640 (1938); Liberty Mut. Ins. Co. v. Stilson, 34 F. Supp. 885 (D. Minn. 1940); see note 70 *supra*.

situation which existed when the family purpose doctrine was first announced, when there was substantially no insurance coverage available for any member of the family other than the owner.

The widespread development of automobile liability insurance then may in a real sense fill the need for which the family purpose doctrine was first designed. There would seem to be little doubt but that the imposition of vicarious personal liability upon a parent or spouse for tortious conduct of another member of the family, as accomplished by the family purpose doctrine, runs counter to the general trend in tort law outside of the special field of automobile law. The automobile owner whose insurance extends coverage to bailees of the vehicle is, of course, not held personally liable simply because his insurance policy affords the additional coverage; and if the point of universal insurance coverage for automobiles is ever reached, either voluntarily or because of compulsory legislation, then the common-law doctrine of the family purpose will probably be entirely outmoded. As stated above, however, the vicarious liability which it sought to achieve may be preserved in the statutory law of the various jurisdictions. Until financial responsibility for the use of an automobile is fully achieved, however, either by statute or by insurance, it seems likely that some of the states will continue to adhere to the family purpose rule to cover possible gaps.

Apart from the family purpose rule or some special statutory provision, there may still be other grounds upon which one member of a family could be held liable for negligent operation of an automobile by another. If, for example, a parent lends or makes a gift of an automobile to a child at a time when the child is known to be incompetent to operate the vehicle, then the parent may be held liable for the damages done by the child.[72] The courts, however, have not been willing to make this liability one of indefinite duration, at least in the gift cases, and there have been several recent decisions exonerating the parent for negligence of the child occurring after the lapse of an appreciable period of time beyond the date of the gift.[73] While these holdings have been criticized,[74] they seem to be founded upon the very practical proposition of fixing some limit to a liability which otherwise might result in exposure for an indefinite period of time.[75]

72. 21 ST. JOHN'S L. REV. 62 (1946); PROSSER, TORTS 513 (2d ed. 1955); Annots., 168 A.L.R. 1364 (1947), 100 A.L.R. 920 (1936), 68 A.L.R. 1008 (1930), 36 A.L.R. 1137 (1925).

73. Shipp v. Davis, 25 Ala. App. 104, 101 So. 366 (1932); Estes v. Gibson, 257 S.W.2d 604, 36 A.L.R.2d 729 (Ky. 1953); Brown v. Harkleroad, 287 S.W.2d 92 (Tenn. App. E.S. 1955); Annot., 36 A.L.R.2d 735 (1954).

74. PROSSER, TORTS 513 (2d ed. 1955).

75. "If a father incurs liability by giving an automobile to his son, knowing him to be drunken or incompetent driver, when would it end? Would it last for the life of the automobile? Would it apply to a new automobile in the event of a trade-in?" Brown v. Harkleroad, 287 S.W.2d 92, 96 (Tenn. App. E.S. 1955).

CONCLUSION

The trend in tort law generally has been to relieve one member of the family from liability for wrongs of other members, insofar as such liability had previously been rested solely upon the family relationship. Legislation in the field of automobile law increasingly is broadening the liability of the owners of motor vehicles, both within and without the family, and in this field social policy may ultimately require development of strict liability or specialized treatment comparable to workmen's compensation statutes.[76] Apart from legislation, however, in the early automobile era the courts openly experimented with social justice in promulgating the family purpose doctrine, which cut across general rules of tort liability and extended, perhaps unjustifiably, normal rules of agency and bailment.

The necessity for imposition of personal liability under common-law rules of "family purpose" has decreased, however, both as a result of specific legislation on the subject and as a result of the general use of liability insurance with broad coverage. Though usually kept in the background, there is little doubt that the use of liability insurance has been effective in the past in bringing about changes in rules of tort law in other areas, such as charitable immunity[77] and intra-family immunity.[78] The widespread use of automobile and homeowners' liability insurance may, in the same way, prevent the undesirable extension of family liability in areas where it might otherwise develop.

76. MORRIS, TORTS 353-74 (1953); PROSSER, TORTS 347 (2d ed. 1955).
77. *E.g.*, Vanderbilt University v. Henderson, 23 Tenn. App. 135, 127 S.W.2d 135 (M.S. 1938) (charitable hospital liable in tort but recovery limited to insurance coverage); PROSSER, TORTS 785 (2d ed. 1955).
78. See McKinney v. McKinney, 59 Wyo. 204, 135 P.2d 940 (1943); PROSSER, TORTS 677 (2d ed. 1955).