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Automobiles—Family Purpose Doctrine—Nebraska Rejects Extension to Third Person Driving with Permission of Accompanying Family Member

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AUTOMOBILES—FAMILY PURPOSE DOCTRINE —NEBRASKA REJECTS EXTENSION TO THIRD PERSON DRIVING WITH PERMISSION OF ACCOMPANYING FAMILY MEMBER

In an action to recover damages sustained in an automobile accident, judgment was entered on a verdict for plaintiff against the owner of a family-purpose car and another defendant who had been driving at the time of the accident with the permission of the owner's minor son.[1] On appeal, *held*: Judgment against the owner reversed and remanded with directions to dismiss.[2]

The Supreme Court of Nebraska, committed to the family

[19] *But cf.* Finnerty v. Consolidated Tel. & Elec. Subway Co., 82 N.Y.S.2d 529 (Sup. Ct. 1948). The New York Supreme Court rejected the contention that the minority rule was no longer applicable in the state because of the elimination of a statutory provision to the affect that a cause of action for personal injuries abated upon death of the injured party before said party had recovered a verdict.

[1] The accident occurred near North Bend, Nebraska, on a return trip from Nevada to Illinois made with the consent of the owner, who knew that his son was to be accompanied by two guests, including the defendant driver. The son, who was permitted to drive the car whenever he wished, permitted his two guests to take turns at driving, so that each of the three could drive several hundred miles. The son, asleep in the back seat at the time of the accident, was killed in the collision. The trial court found the defendant driver guilty of negligence as a matter of law, and this finding was not disturbed on appeal.

[2] Christensen v. Rogers, 172 Neb. 31, _____ N.W.2d _____ (1961).

purpose doctrine[3] at least since 1922,[4] has applied the doctrine consistently in a well-developed line of cases.[5] In the instant case, however, the court has clearly limited extension of the doctrine; the owner of a family car is not liable for the negligence of a third party driving that car without the owner's knowledge, consent, or direction, and not in the performance of his work, even where permission has been given by a member of the owner's family present in the automobile at the time with authority to drive the car himself.

[3] In Nebraska, an automobile is not regarded by the courts as an inherently dangerous instrumentality. See Deck v. Sherlock, 162 Neb. 86, 75 N.W.2d 99 (1956); *cf.* Christensen v. Rogers, 172 Neb. 31, ____ N.W.2d ____ (1961). The owner of an automobile is not ordinarily liable for the negligence of third persons to whom his automobile has been entrusted. See Deck v. Sherlock, 162 Neb. 86, 75 N.W.2d 99 (1956); Sutton v. Inland Construction Co., 144 Neb. 721, 14 N.W.2d 387 (1944); Snyder v. Russell, 140 Neb. 616, 1 N.W.2d 125 (1941). The family purpose doctrine, however, is an exception to the general rule. "Where the head of a family has purchased or maintains a car for the pleasure of his family, he is, under the so-called 'family purpose' doctrine, held liable for injuries inflicted in the negligent operation of the car while it is being used by members of the family for their own pleasure, on the theory that it is being used for the purpose for which it is kept, and that in operating it the member of the family is acting as the agent or servant of the owner." Linch v. Dobson, 108 Neb. 632, 635-36, 188 N.W. 227, 228 (1922). As to the doctrine in general, see SIMMONS, NEBRASKA AUTOMOBILE NEGLIGENCE LAW 449-54 (1957); 5A BLASHFIELD, AUTOMOBILE LAW AND PRACTICE §§ 3111-21 (Perm. ed. 1954); 60 C.J.S. *Motor Vehicles* § 433 (1949); 5A AM. JUR. *Automobiles and Highway Traffic* §§ 591-608 (1956); PROSSER, TORTS § 66 at 369-71; § 102 at 681 (2d ed. 1955).

[4] The doctrine was first applied, "by the weight of authority, in the jurisdictions where the question has been determined," in Stevens v. Luther, 105 Neb. 184, 186, 180 N.W. 87, 88 (1920), and the Court declared itself "committed to that rule" in Linch v. Dobson, 108 Neb. 632, 635, 188 N.W. 227, 228 (1922).

[5] Watson Bros. Transp. Co. v. Jacobson, 168 Neb. 862, 97 N.W.2d 521 (1959) (rule stated); Bell v. Crook, 168 Neb. 685, 97 N.W.2d 352 (1959) (doctrine applied without descission); Barajas v. Parker, 165 Neb. 444, 446, 85 N.W.2d 894 896 (1957) (doctrine effective by stipulation); Wieck v. Blessin, 165 Neb. 282, 291-92, 85 N.W.2d 628, 635-36 (1957) (father's payment of wages to adult son not bar to doctrine); Werner v. Grabenstein, 165 Neb. 231, 85 N.W.2d 297 (1957) (car owned and maintained subject to doctrine); Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 802, 71 N.W.2d 466, 473 (1955) (doctrine not applicable to impute driver's negligence to owner riding as guest); Stark v. Turner, 154 Neb. 268, 276, 47 N.W.2d 569, 574 (1951) (son operated car with father's knowledge and consent and as member of family); Lund v. Holbrook, 153 Neb. 706, 714-15, 46 N.W.2d 130, 137 (1951) (adult son living at home; alone in car); Thoren v. Myers, 151 Neb. 453, 456, 37 N.W.2d 725, 728 (1949) (son required to obtain permission); where an unmarried adult son living in another state used his father's car

About the same number of jurisdictions reject the family purpose doctrine as accept it.[6] The Nebraska Court, however, had refused to apply the doctrine in cases where the driver, although related to the owner, is not a member of his household;[7] where an unrelated driver lives at the owner's home but is not dependent upon him for support;[8] where extreme circumstances surrounding the use of a family car utterly deny a family purpose;[9] or where to do so would defeat its own purpose.[10] If the owner knows or

during a visit to the home he had left six years before, evidence was insufficient to bring son within scope of doctrine in Piechota v. Rapp, 148 Neb. 442, 446, 27 N.W.2d 682, 684 (1947) (son had consent); Loudy v. Union Pac. R.R., 146 Neb. 676, 678, 21 N.W.2d 431, 433 (1946) (conceded negligence of driver imputed to non-passenger owner); Jennings v. Campbell, 142 Neb. 354, 6 N.W.2d 376 (1942) (minor son disobeyed father's instructions); Gorman v. Bratka, 139 Neb. 718, 298 N.W.691; 139 Neb. 84, 296 N.W. 456 (1941) (doctrine not applicable where married daughter living elsewhere had entire use of car); Sterns v. Hellerich, 130 Neb. 251, 253-54, 264 N.W. 677, 679 (1936) (father liable for son's gross negligence where use of car was with his consent and permission); Roberts v. Kubik, 129 Neb. 795, 263 N.W. 143 (1935) (owner liable where jury found son hit plaintiff with car intentionally; Carter, J., dissenting on ground owner would be liable only for negligence, if any; not for the criminal assault); Hogg v. MacDonald, 128 Neb. 6, 257 N.W. 274 (1934) (doctrine not applicable where unrelated driver an employee rather than dependent, although living in owner's household); Moran v. Moran, 124 Neb. 379, 381-82, 246 N.W. 711, 712 (1933) (father had actual knowledge of purpose, gave permission, and evidently knew son was fast driver); Dow v. Legg, 120 Neb. 271, 279-80, 231 N.W. 747, 751 (1930) (doctrine not applicable where lack of consent, knowledge, and permission, and adult son took car against express command); Galpin v. Fisher, 109 Neb. 700, 192 N.W. 205 (1923) (dictum; father knew his orders had been violated); Linch v. Dobson, 108 Neb. 632, 188 N.W. 227 (1922) (adult son driving; owner not present); Stevens v. Luther, 105 Neb. 184, 180 N.W. 87 (1920) (doctrine adopted).

[6] See 5A BLASHFIELD, *op. cit. supra* note 3, § 3120; PROSSER, *op. cit. supra* note 3, § 66 at 369.

[7] See Piechota v. Rapp, 148 Neb. 442, 27 N.W.2d 682 (1947); Gorman v. Bratka, 139 Neb. 718, 298 N.W. 691; 139 Neb. 84, 296 N.W. 456 (1941). Marital status, age, occupation, residence, and support are matters of evidence for the jury. *Cf.* Wieck v. Blessin, 165 Neb. 282, 292, 85 N.W.2d 628, 635-36 (1957), and the cases there cited.

[8] See Hogg v. MacDonald, 128 Neb. 6, 257 N.W. 274 (1934).

[9] See Dow v. Legg, 120 Neb. 271, 279-80, 231 N.W. 747, 751 (1930).

[10] See Bartek v. Glasers Provisions Co., Inc., 160 Neb. 794, 71 N.W.2d 466 (1955). In this case the owner was riding in the car as a guest while her husband drove. In her action against the driver of another car for damages sustained in an accident, the Court refused to apply the family purpose doctrine to impute any negligence on the part of her husband to her and thereby defeat recovery, saying: "The family purpose doctrine

should know that he has entrusted the family car to an unreliable dependent, the rule has nevertheless been applied.[11] Similarly, instances of disobedience to or deviation from the owner's instructions will not ordinarily take a case outside the rule.[12]

The doctrine, as applied to operation of a family car by a member of the owner's family, was restated in the principal case,[13] but the Court reached the conclusion that liability is not to be attached to the owner for the negligence of a third person since:[14]

> . . . the initial permission of an automobile owner to members of his family to use a family-purpose car does not include authority to delegate the driving of the automobile to a third person not a member of the family.

To extend the doctrine, the Court said,[15]

> . . . solely upon the theory that automobile accidents are numerous and injured persons should be provided a more certain means

does not have for its objective the purpose of defeating a claim for damages by a guest by imputing the negligence of a driver to such guest but rather to impose upon the owner of a car being used for family purposes the responsibility for its operation as a matter of public policy." *Id.* at 802, 71 N.W.2d at 473.

[11] See Moran v. Moran, 124 Neb. 379, 246 N.W. 711 (1933). See also Galpin v. Fisher, 109 Neb. 700, 192 N.W. 205 (1923).

[12] See Jennings v. Campbell, 142 Neb. 354, 6 N.W.2d 376 (1942); *cf.* Galpin v. Fisher, 109 Neb. 700, 192 N.W. 205 (1923) (dictum). A substantial deviation may be sufficient to avoid operation of the rule. See Dow v. Legg, 120 Neb. 271, 279-80, 231 N.W. 747, 751 (1930). What constitutes "substantial" deviation has been an important issue in a number of cases. See, *e.g.*, Vaughn v. Booker, 217 N.C. 479, 8 S.E.2d 603 (1940) (deviation relieved father of liability); Schnebly v. Bryson, 158 Wash. 250, 290 Pac. 849 (1930) (deviation beyond family purpose); Forman v. Shields, 183 Wash. 333, 48 P.2d 599 (1935) (deviation not beyond scope of authority). Furthermore, "so long as the child uses the car for the purposes of pleasure, comfort, and enjoyment, no question of deviation arises, but only a question of disobedience of instructions." Evans v. Caldwell, 184 Ga. 203, 190 S.E. 582, 584 (1937), *quoted in* Jennings v. Campbell, *supra*, at 360, 6 N.W.2d at 379. *Cf.* Richardson v. True, 259 S.W.2d 70, 73 (Ky. 1953). See also 5A BLASHFIELD, *op. cit. supra* note 3, §§ 3116; 3118.

[13] Christensen v. Rogers, 172 Neb. 31, 33-34, _____ N.W.2d _____, _____ (1961), *citing* Stevens v. Luther, 105 Neb. 184, 180 N.W. 87 (1920); Linch v. Dobson, 108 Neb. 632, 188 N.W. 227 (1922).

[14] Christensen v. Rogers, 172 Neb. 31, 34-35, _____ N.W.2d _____, _____ (1961). The case was briefed on the family purpose doctrine in behalf of three separate parties. See Brief of Appellant Rogers, pp. 18-40; Brief of Appellant Wilkenson, pp. 18-36; Brief of Appellee, pp. 8-13, Christensen v. Rogers, *supra*.

[15] Christensen v. Rogers, 172 Neb. 31, 34, _____ N.W.2d _____, _____ (1961).

> for recovering damages for injuries sustained . . . is to establish a rule of liability based wholly on public policy and not on legal principle. . . . If the negligent operation of automobiles has become such a menace as to require the imposition of extraordinary liabilities which exceed the scope of common-law liability, it is a matter for the Legislature and not the courts.[16]

Citing only *Turoff v. Burch*,[17] a divided 1931 decision of the District of Columbia Court of Appeals which alone supports the position taken in the instant case,[18] the Court neither cited nor dis-

[16] Whether the "omnibus clause" of an automobile liability insurance policy would protect an owner in the situation presented by the *Christensen* case is, of course, dependent upon the particular clause of the insurance contract involved. The Nebraska Motor Vehicle Safety Responsibility Act, NEB. REV. STAT. § 60-534 (Supp. 1959), provides only that an " . . . owner's policy of liability insurance: . . . (2) shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages . . . ." *Cf.* GREGORY & KALVEN, TORTS 559-60 (1959) (quoting The National Standard Policy provisions); RICHARDS, INSURANCE §§ 174, 286 (5th ed. 1952). See also Holthe v. Iskowitz, 31 Wash. 2d 533, ____, 197 P.2d 999, 1007 (1948): " . . . a person driving another's car, under the protection of an 'omnibus clause,' may not be the agent of the insured owner of the car, under the family purpose doctrine." If the third party driver's own insurance protects him only while driving another's car with the owner's permission, an injured stranger may be left unable to recover from an insured but otherwise judgment-proof driver as well as the owner. See also turpin v. Standard Reliance Ins. Co., 169 Neb. 233, 99 N.W.2d 26 (1959).

[17] 50 F.2d 986 (D.C. Cir. 1931), *cited in* Christensen v. Rogers, 172 Neb. 31, 34, ____ N.W2d ____, ____ (1961). The court in *Turoff* thought the extension of the doctrine to liability for the negligence of third persons "not warranted by the great weight of authority." Turoff v. Burch, *supra* at 988, citing no authority. The authorities *contra* are cited in both the majority opinion and the dissent. *Id.* at 987; 988.

[18] In addition to *Turoff*, the appellant-father cited Foti v. Myers, 8 So. 2d 349 (La. App. 1942); Gott v. Scott, 199 So. 460 (La. 1940), and Samples v. Shaw, 47 Ga. App. 337, 170 S.E. 389 (1933). See Brief of Appellant Rogers, pp. 39-40, Christensen v. Rogers, 172 Neb. 31, ____ N.W. 2d ____ (1961). The Court in *Christensen* cited none of these, probably because, as pointed out in the Brief of Appellant Wilkenson, pp. 35-36, Christensen v. Rogers, *supra*, the family purpose doctrine itself does not prevail in Louisiana, Benton v. Griffith, 184 So. 371, 374 (La. App. 1938), and the Georgia Court of Appeals decision is distinguished by the Georgia court in the opinion in Cohen v. Whiteman, 75 Ga. App. 286, 43 S.E.2d 184 (1947), which laid down a rule contrary to that of both *Turoff* and *Christensen*. Schnebly v. Bryson, 158 Wash. 250, 290 Pac. 849 (1930), is sometimes cited as supporting the *Turoff* rule, along with Zurn v. Whatley, 213 Wis. 365, 251 N.W. 435 (1933), and Harber v. Smith, 40 Tenn. App. 648, 292 S.W.2d 468 (1956). See 5A BLASHFIELD, *op. cit. supra*

cussed any of an impressive number of contrary authorities.[19]

It is submitted that the language of the Court[20] casts doubt upon the validity of the entire Nebraska family purpose doctrine which is itself recognized by the Court to be based on public policy.[21] A rule of policy must, of course, be limited by the policy which the rule is designed to serve. The instant case does not appear to rest upon an evaluation of the policy underlying the doctrine, but rather on the basis that a specific policy does not alone warrant extension of the rule. Other courts have relied on other factors

note 3, § 3121 at nn. 91-92. But these were not cited by appellant Rogers to the Nebraska Court, perhaps because in *Schnebly* the car was not being operated within the family purpose for which it was kept, and the Washington rule is contrary to *Turoff*, see King v. Cann, 184 Wash. 554, 52 P.2d 900 (1935); the doctrine has not been regarded as adopted in Wisconsin, at least not in this connection, see 5A BLASHFIELD, *supra*, § 3120 at 71-72, and perhaps not at all, see Burant v. Studzinski, 234 Wis. 385, 291 N.W. 390 (1940), and Crosset v. Goelzer, 177 Wis. 455, 188 N.W. 627 (1922); and in *Harber*, evidence was insufficient to establish a family car or a family purpose. Harber v. Smith, *supra*, at ——, 292 S.W.2d at 470-71, *quoting* Redding v. Barker, 36 Tenn. App. 132, 230 S.W.2d 202 (1950). As to the effect of specific permission required for each use, an element of the *Harber* and *Redding* cases, Thoren v. Myers, 151 Neb. 453, 37 N.W.2d 725 (1949), is *contra*.

[19] See Norwood v. Parthemos, 230 S.C. 207, ——, 95 S.E.2d 168, 169 (1956): "It is immaterial to [the application of the family purpose doctrine] that the actual operation of the automobile was by a companion of the son for whom it was maintained and to whom it was furnished by the defendant."; Turner v. Hall's Adm'x, 252 S.W.2d 30 (Ky. 1952); Atkins v. Churchill, 30 Wash. 859, 194 P.2d 364 (1948); Cohen v. Whiteman, 75 Ga. App. 286, 43 S.E.2d 184 (1947); Bushie v. Johnson, 296 Mich. 8, 295 N.W. 538 (1941); Eagon v. Woolard, 122 W.Va. 565, 11 S.E.2d 257 (1940); King v. Cann, 184 Wash. 554, 52 P.2d 900 (1935); Rubel v. Weiss, 8 N.J. Misc. 269, 149 Atl. 756 (1930); Goss v. Williams, 196 N.C. 213, 145 S.E. 169 (1928); Thixton v. Palmer, 210 Ky. 838, 276 S.W. 971 (1925); Ulman v. Lindeman, 44 N.D. 36, 176 N.W. 25 (1919); Kayser v. Van Nest, 125 Minn. 277, 146 N.W. 1091 (1914). *Cf.* F.D. McKendall Lbr. Co. v. Ramieri, 85 R.I. 92, 126 A.2d 560 (1956) (under family-purpose-type statute); Dibble v. Wolff, 135 Conn. 428, 65 A.2d 479 (1949); Schreder v. Litchy, 190 Minn. 264, 251 N.W. 513 (1933). These cases represent a rather large proportion of the jurisdictions which have adopted the doctrine. See 5A BLASHFIELD, *op. cit. supra* note 3, §§ 3111-21.

[20] See text at note 15, *supra*.

[21] The public policy is laid out at length in Jennings v. Campbell, 142 Neb. 354, 360-61, 6 N.W.2d 376, 379-80 (1942). *Cf.* Linch v. Dobson, 108 Neb. 632, 188 N.W. 227 (1922), and note 10 *supra*. See also Christensen v. Rogers, 172 Neb. 31, 33-34, —— N.W.2d ——, —— (1961): "The family purpose doctrine . . . is a departure from the law of master and servant, principal and agent, and respondeat superior."

such as an owner's express limitation on driving to the family member entrusted with the car;[22] lack of permission or consent from the owner;[23] and absence of the family member from the automobile at the time of the accident,[24] to reach the limits of extension of the doctrine. Although there is no specific language to this effect in the opinion, the decision will most likely be construed as applying the family purpose doctrine to drivers who are members of the family, but as requiring a showing that a third party driver was acting with the owner's knowledge, consent, or direction.[25]

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[22] See Costanzo v. Sturgill, 145 Conn. 92, 139 A.2d 51 (1958); Fischer v. McBride, 296 Mich. 671, 296 N.W. 834 (1941). *But see* Turner v. Hall's Adm'x, 252 S.W.2d 30, 32 (Ky. 1952): The doctrine "is a humanitarian one designed for the protection of the public generally, and resulted from recognition of the fact that in the vast majority of instances an infant has not sufficient property in his own right to indemnify one who may suffer from his negligent act. We believe the purpose of this doctrine would be destroyed entirely if a father could relieve himself of responsibility by specific instructions known only to himself and his son."; King v. Cann, 184 Wash. 554, 52 P.2d 900 (1935).

[23] The Nebraska Court regarded the operation of the vehicle in the *Christensen* case to be "by a third party with the son's permission but without the father's knowledge or consent." Christensen v. Rogers, 172 Neb. 31, 34, ____ N.W.2d ____, ____ (1961). The problem of knowledge and consent received considerable argument in the briefs. Brief of Appellant Rogers, pp. 32-33; Brief of Appellant Wilkenson, pp. 23-25; Brief of Appellee, pp. 11-12, *Ibid.* Had the Court not adopted the rule of the *Turoff* case, this issue would doubtless have become important, if not controlling. *Cf.* note 16 *supra.* Permission has been the controlling factor in several cases. See Mason v. Powell, 92 Ga. App. 496, 88 S.E.2d 734 (1955) (owner not liable); Dibble v. Wolff, 135 Conn. 428, 65 A.2d 479 (1949) (owner liable); Holthe v. Iskowitz, 31 Wash. 2d 533, 197 P.2d 999 (1948) (owner not liable); Golden v. Medford, 189 Ga. 614, 7 S.E.2d 236; 62 Ga. App. 229, 8 S.E.2d 531 (1940) (owner liable); Schreder v. Litchy, 190 Minn. 264, 251 N.W. 513 (1933) (owner liable); Wilde v. Pearson, 140 Minn. 394, 168 N.W. 582 (1918) (owner not liable).

[24] "We believe the Thixton case [see note 19 *supra*] . . . extended the doctrine far enough, and in order to hold the owner liable, at least a member of the family should be present in the automobile when it is being operated by a third party." Griffith v. Fannin, 306 Ky. 279, ____, 206 S.W.2d 965, 967 (1947). *Cf.* Johnson v. Brant, 93 Ga. App. 44, 90 S.E.2d 587 (1955); Mason v. Powell, 92 Ga. App. 496, 88 S.E.2d 734 (1955); Holthe v. Iskowitz, 31 Wash. 2d 533, 197 P.2d 999 (1948); Messer v. Reid, 186 Tenn. 94, 208 S.W.2d 528 (1948); Wilde v. Pearson, 140 Minn. 394, 168 N.W. 582 (1918).

[25] See note 23, *supra. Cf.* Piechota v. Rapp, 148 Neb. 442, 27 N.W.2d 682 (1947); Gorman v. Bratka, 139 Neb. 718, 298 N.W. 691; 139 Neb. 84, 296 N.W. 456 (1941).