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Torts: A Limitation of the Family Car Doctrine in Colorado

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NOTES AND COMMENTS

Torts: A Limitation of the "Family Car Doctrine" in Colorado?

The essential facts presented by the record in *Vick v. Zumwalt*[1]

M. M. Vick of Loveland, Colorado was, on February 16, 1952, the owner of a Mercury automobile. On that date, while his parents were out of town, 15-year-old David Vick took said automobile from its garage and drove into the country with plaintiffs as his guests and passengers. While so driving, David Vick played "ditch em" with the driver of another car, and the Mercury he was driving left the road and overturned. In this accident plaintiffs were injured, and as a result of these injuries this action was instituted against the defendants M. M. Vick and David Vick. Plaintiffs sought recovery against M. M. Vick under the "Family Car Doctrine".

To show circumstances within the "Family Car Doctrine" the complaint alleged "that the said motor vehicle driven by David Vick was owned by his father, that said motor vehicle had been purchased for family use; that the said motor vehicle at the time of the said negligence was being operated by David Vick solely for his own pleasure under the general permission of the defendant M. M. Vick; and that David Vick was a member of the household of the defendant M. M. Vick at the time of said negligence."

The case was submitted to the jury for determination of the issues, and for answers to certain special interrogatories submitted by the court. We need concern ourselves with but one of the interrogatories which was as follows:

> "4. Was David Vick driving the automobile at the time of the accident with the consent of the defendant M. M. Vick?"

Together with interrogatory number four the court instructed the jury as follows:

> * * * If you find from a preponderance of the evidence that David Vick, on the occasion in question, was using the automobile with the consent, either express or implied, of his father M. M. Vick, then you shall find for such plaintiffs

[1] Vick v. Zumwalt, ... Colo. ...., C.B A. Adv. Sh. Vol. 6, P. 470; 273 P. 2d 1010.

> and against the defendants David Vick and M. M. Vick jointly. Implied consent, as used in this instruction, is a consent arising from facts and circumstances which would lead a reasonable person to believe that consent had been given.

The jury was further instructed that "consent" as used in the instruction above quoted could be a general consent to the use of the automobile at any or all times or "a special consent to the use of the automobile on this particular occasion."

In answer to interrogatory number four, the jury found David Vick had the "implied consent" of his father to the "general" or "special" use of the automobile.

The Supreme Court held in reviewing the judgment of the trial court that the instructions relating to "consent" were faulty and constituted reversible error. In so finding the Supreme Court said,

> If the parent over a period of time permitted and allowed his son to use his automobile and made no complaint, that might constitute implied permission for him to use it, whether or not there was any express permission for its use on the particular occasion under examination. . . . To establish the elements required to bring into operation the family car doctrine, resort must be had to the circumstances, frequency and notoriety of operation of the automobile by a member, or members, of the owner's family. * * * there must be consent, either *express* or *implied*, on the part of the parent to the *general* use of the car, or an *express* consent to the use of the car on the *particular* occasion.

The court laid emphasis on the necessity of "customary or continued" use of the automobile by the child, to lead to a finding of "implied" consent. Further, in quoting from an undisclosed source, the court said, "Implied authority is actual authority circumstantially proved, or evidenced by conduct, * * * it is authority which the principal intended that the agent should have."

It is clear from the language of the Supreme Court that the circumstances of each case must show a "customary or continued use" of the automobile by the minor child, *and* such "customary or continued use" known of and intended by the head of the household sought to be charged. These are the ingredients necessary to a formulation of "implied" consent to "general" use of the vehicle by the child. In the absence of a showing of "implied" consent the plaintiff would have to prove "express" consent to use on a *particular* occasion. The instruction given relating to implied consent did not contain the necessary ingredients. It did not include the necessary element of intent or knowledge on the part of the parents to the use of the vehicle by the child. Although the evidence indicated David Vick had at times used the car, it was not shown the parents knew of this use. The state of the evidence then demanded the inclusion of the necessary element of knowledge by the parent in the instruction. The omission was held to be error. The court said "Implied consent cannot be shown by some conjec-

tural situation or conclusion of the jurors or assumptions indulged by them. It can only be shown by competent evidence, direct or circumstantial".

Our attention should be focused on the Court's holding concerning the "Family Car Doctrine". To determine the effect of this holding upon the state of the law concerning the "Family Car Doctrine" in this jurisdiction, prior decisions of the court should be reviewed.

The "Family Car Doctrine" saw its beginning in Colorado in the case of *Hutchins v. Haffner,* 63 Colo. 365, 167 P. 966. In that case a husband, who owned an automobile conceded to be kept for family purposes, was held liable for damages caused by the negligent operation of the car by his wife. Liability was thus imposed even though the husband was not present at the time of the accident nor in any way participated in the negligence. The court said,

> A majority of this court have chosen to adopt the doctrine that a husband is liable for an injury inflicted by his automobile, which he purchased for family use, while it was being operated by his wife, solely for her own pleasure under his general permission to use the machine whenever and wherever she pleased * * *

The court laid the theory of the husband's liability upon an agency fiction, considered the husband-owner as Principal and the family member-driver as agent, thus making use of the doctrine of Respondiat Superior. The family member, in such circumstances, is to be considered as furthering the interests of the principal by using the auto for the purpose for which it was maintained, namely family business or pleasure.

The doctrine as adopted in *Hutchins v. Haffner,* supra, was extended considerably however in the case of *Boyd v. Close et al.,* 82 Colo. 150, 257 P. 1079. In that case action was brought against the mother of one Dennis Phillips, 19 years old, and a passenger in the car which struck plaintiff, for damages occasioned by the automobile collision. The automobile involved, was part of the estate of Mrs. Phillips' late husband, Dennis's father, and Mrs. Phillips was in possession of the automobile as executrix of the decedent's will. The evidence in the case indicated that at the time

of the accident Dennis was not driving, but had relinquished control of the car to his friend Close who was with him on the occasion. Both boys had been to a dance and were returning home at the time of the accident. The evidence also indicated that Close was driving while intoxicated. The Supreme Court reversed judgment of the trial court based on a directed verdict and remanded the case for a new trial allowing plaintiff to go to the jury on the matter of negligence. In doing this the court held that Mrs. Phillips could be held liable for the negligence of Dennis either in allowing Close to drive or negligence of Close imputed to Dennis because of a "joint enterprise". The court arrived at this conclusion by applying the "Family Car Doctrine", as declared in *Hutchins v. Haffner,* supra. Mr. Chief Justice Burke on delivering the opinion of the court said, "Liability under that doctrine is not confined to owner or driver. It depends upon control and use". He went on further to find that Mrs. Phillips had control and that the car was kept for family use, therefore her liability was established. The court continued saying *"that Mrs. Phillips did not know of or expressly sanction the particular trip is also immaterial.* It was clearly within the purview of the general purpose for which the car was kept and used, and her liability is thereby fixed".

It is interesting at this point to note that the court laid particular emphasis on the factors of "control and use" of the automobile and well nigh eliminated any necessity of finding knowledge of or consent to the particular use by the child.

Seven years later in the case of *Boltz v. Bonner,* 95 Colo. 350, 35 P 2d 1015, the "Family Car Doctrine" was again applied. In that case Mrs. Boltz was held liable as owner of an automobile involved in a collision as a result of the negligence of her daughter who was driving at the time. Here again the court found that the automobile was kept for the use and pleasure of the family and was within the definition of a "Family Car" as laid down in *Hutchins v. Haffner,* supra, and *Boyd v. Close,* supra. The Supreme Court held that the trial court was correct in treating the automobile as a "family car" as a matter of law when the owner of the car testified that the car was at the disposal of the child whenever such use did not interfere with the requirements of the owner.

The last interpretation by the Colorado Supreme Court of the "Family Car Doctrine", immediately preceding the case of *Vick v. Zumwalt,* is found in the case of *Greenwood et al. v. Cecil Kier,* 125 Colo. 333, 243 P. 2d 317. In that case it was held to be error committed by the trial court in submitting instructions to the jury concerning liability of the defendant under the "Family Car Doctrine" because, *as a matter of law,* there was no indication that the automobile involved was kept or maintained for the use and convenience of the members of the family. The automobile involved was owned by a corporation, and the evidence showed the auto to be principally used in connection with corporation business. Judgment for plaintiffs was reversed.

After the decision in *Boyd v. Close,* supra, the "Family Car Doctrine" seemed well established in Colorado. That case extended the doctrine to broad limits when the court said, "That Mrs. Phillips

did not know of or expressly sanction the particular trip is also immaterial." In *Boyd v. Close* there appeared to be no "general permission" extended to Dennis by Mrs. Phillips, yet the court found her sanction of the particular trip was unnecessary. The cases of *Boltz v. Bonner,* supra, and *Greenwood v. Kier,* supra, did not turn on the necessity of a consent to the use of the auto, but merely on what was or was not a "family car". The subject case of *Vick v. Zumwalt* seems definitely to limit the effect of the decision in *Boyd v. Close,* supra, and to limit the extension of the doctrine created therein.

As we have seen the court has found that there must be consent, express or implied, to the use of the car by the child. Where the elements of knowledge and consent had heretofore seemed to be overlooked, or at least considered not to be necessary to the decisions by the court, (indeed considered immaterial in *Boyd v. Close*) they are found essential to a finding of liability in *Vick v. Zumwalt.* Colorado now seems to stand with the states denying liability where the car is taken surreptitiously and in violation of instructions.

In summary, a review of the Colorado decisions involving the "Family Car Doctrine" to this date seems to hinge liability on four factors, the absence of any one of which would be fatal to the action:

1. Right to control the use of the car vested in the defendant.
2. Auto maintained by the one with the right to control for the convenience, pleasure and use of the family.
3. Consent to the general use, either express or implied, or express consent to use on a particular occasion in the absence of general consent—such consent issuing from the one with the right to control, who maintains the auto for family use.
4. Such use on the occasion of an accident must be within the scope of family purposes for which the auto is maintained.

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