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Parents' Responsibility for Children's Auto Accidents

Some of the questions most frequently asked by insurance claim professionals involve scenarios where an insured's vehicle is driven by their children or their children's friends and an accident occurs. These scenarios are based upon convoluted fact patterns and involve a claim by the parent of alleged unauthorized use of a motor vehicle. For personal lines carriers, especially out of state, it is difficult to comprehend the broad interpretation of permissive use in New York and its far reaching implications.

- Permissive Use - Vehicle and Traffic Law § 388(1)

VTL § 388 imputes to the owner of the car the negligence of one who uses it or operates it with the owner's permission express or implied.¹ This section creates a very strong presumption that the vehicle is being operated with the owner's consent. That presumption must be rebutted by substantial evidence to the contrary. A plaintiff must only prove that the negligently operated vehicle was owned by the defendant to get the case before a jury.² Statutes based on VTL § 388 have been enacted for snowmobiles³, all-terrain vehicles⁴ and boats⁵.

In weighing whether to move for dismissal based on non-permissive use, the legislative intent behind this historical statute⁶ must be considered. The legislature's goal was to ensure that vehicle owners act responsibly with regard to their vehicles. Vicarious liability is linked to the owner's obligation to maintain adequate insurance.⁷ The courts, in weighing a dismissal motion, will consider that the purpose of the statute is to allow access by the injured party to the financially responsible defendant.⁸

The defendant's burden of rebutting the presumption of permissive use with substantial evidence is not an easy one. In *Rodak v. Longnecker*,⁹ the defendant father allowed his son to take his car to college in New York State where he was enrolled as a student. While at college the son allowed a friend and fellow student to use the car for local trips, one, at least, to a local ski resort. The friend was driving the father's vehicle when an accident occurred. The defendant father in his affidavit stated that his son was advised that he, and only he, had permission to drive the car. The father moved to dismiss based on the ground that the friend did not have permission to operate the car and that he was not vicariously liable for his negligence.

The Court denied the motion reasoning that clearly no express permission was claimed but that the issue of implied permission must go to the jury. The Court weighed the circumstantial facts and held:

"Given the climate of the times, a jury might conclude, a parent should be held to the knowledge that so generous an entrust-

ment, so far from home and for such a protracted period, is not reasonably susceptible to a limitation of the kind relied upon by the father. Hence, the jury might find, the entrustment to the son implied a consent that a friend might be allowed an occasional use of the car for local errands."

In *Schrader v. Carney*,¹¹ the issue of permissive use went to the jury. Therein it was uncontroverted that the defendant father had given express permission only to his son. While on a drinking spree in motel with the son, a non-party to the action handed the keys to the defendant's vehicle to the defendant driver, a friend of the son. He, in turn, lost control of the automobile hitting a utility pole causing plaintiff to suffer severe brain injuries. The jury found that although express permission was not given there was some vague testimony that the son may have given his friend permission to drive the vehicle. On those facts the statute's presumption was not overcome and the jury's finding of permissive use was not unreasonable.

In comparing *Rodak* and *Schrader* it is significant to note the extent to which a Court will find that permissive use was given. In *Rodak* the car keys went from the father to the son with permission and then to the son's friend again with permission. The presumption of permissive use went to the jury as there was permission down the chain. In *Schrader* the keys went from father to son to a non-party, apparently without permission, however, who in turn gave the keys to the

defendant driver and still the presumption of permissive use was not rebutted to the satisfaction of the jury or the reviewing Appellate Court.

The limitation of time upon the permission does not overcome the presumption. In *Lawrence v. Myles*,¹² the defendant driver submitted an affidavit of his mother along with her deposition. In both she claimed that she gave him express permission to operate the vehicle on the day before the accident but did not give him permission to operate it on the day of the accident. Summary judgment was denied and the issue of permissive use was again allowed to go to the jury.

In rare instances owners have rebutted the presumption that a defendant driver was operating the vehicle with owner's consent. In *Jimenez v. Regan*,¹³ the vehicle owner rebutted the presumption that the defendant Regan, his daughter's boyfriend, had been driving with his consent. At a framed issue hearing the owner presented uncontroverted evidence that he explicitly told Regan that he was not permitted to drive his vehicle and that his daughter allowed the boyfriend to drive the car after she arrived at his home on the date of the accident. Obviously, the fact that the owner of the car expressly told the driver that the driver did not have permission to drive the car weighed heavily with the Court. This element was lacking in *Rodak* and *Schrader*.

If an owner establishes a theft of the vehicle by a family member the presumption of permissive use is rebutted. In *Manning v. Brown*,¹⁴ the defendant driver and her high school friend were involved in a one car accident involving a car owned by her grandparents. The granddaughter had found the keys under loose papers in the car's console while it was parked at a local community college. The granddaughter and her plaintiff friend, both unlicensed, took turns operating the vehicle.

The defendant granddaughter testified that she was not given permission to use the car and had, in fact, pleaded guilty to its theft. The grandfather testified and submitted an affidavit that he never allowed the defendant to operate his cars. Lastly, plaintiff testified she knew the car was stolen. Under those circumstances the defendant owner's motion for summary judgment dismissing the complaint was granted.

The Court also found that the defendant owner bore no responsibility under Vehicle and Traffic Law § 1210(a)¹⁵. That statute holds the owner of a stolen vehicle liable for proximately caused injuries if the car keys were negligently left in the ignition switch. This statute only applies to vehicles upon public highways, private roads open to public motor vehicle traffic, and any other parking lot.¹⁶ Thus, if a vehicle is stolen from a private garage liability does not attach.¹⁷ In *Manning, Id.*, the statute did not apply since it specifically states that the ignition key may be left in or on



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the vehicle, provided it is not in plain view.¹⁶ The defendant had testified that the keys were located in the console covered by loose papers, such that they were hidden from sight.

- Negligent Entrustment of a Motor Vehicle

Plaintiffs have contrived a negligent entrustment theory of liability in situations where the defendant child's motor vehicle policy has minimum limits and the parents' motor vehicle policy is clearly unavailable. Plaintiffs will assert a negligent entrustment cause of action in an attempt to bring into the lawsuit the parents' homeowners, excess or other personal policies and thus artificially create sufficient coverage.

In a situation related to *Manning, Id.*, the defendant's infant son a 15 year-old took his mother's car keys from her and gave them to a friend who was involved in an accident. The Court in *Sherri v. Gerwell*,¹⁸ found no evidence that the son had a propensity to utilize automobiles without permission or to steal or borrow items he was not authorized to use. The cause of action for negligent entrustment was dismissed.

In other cases involving infants and the issue of negligent entrustment the Courts have found that when an infant bought his own automobile, had successfully completed a driver's education course and possessed a junior operator's license his parents were not charged with negligent entrustment.²⁰ This despite the fact that there was some evidence the infant plaintiff had caused damage on two separate incidents by spinning the tires of his automobile.

In *Alfano v. Marlboro Airport*,²¹ the mother of the decedent sued his father for negligent entrustment of a snowmobile. The Court found the 17 year-old son was properly trained in the operation of a snowmobile 6 years prior. Additionally, the father had legally separated from his wife and had no custody over the son or the snowmobile. Under these circumstances, the Court dismissed the cause of action based on negligent entrustment.

If negligent entrustment is difficult to prove with infant children, it is virtually impossible with adult children. This is true despite a history of prior traffic accidents, criminal convictions and other histories. The adult son in *Weinstein v. Cohen*,²² had two previous accidents. The Court found that this did not support a finding of negligent entrustment. A stronger argument for negligent entrustment was rejected in *Mimoun v. Bartlett*,²³ where the adult son had previous convictions for excessive speeding. The Court did not find it constituted a propensity sufficient to sustain a claim of negligent entrustment. Co-signing a loan for the vehicle's purchase knowing the son's license had been suspended was also found not to be a basis to cast the father in liability.

Generally, once a vehicle is registered in an adult child's name, he is the insured under the policy, he holds a valid New York State operator's license and only he possesses the key to the vehicle a theory of negligent entrustment will be dismissed.²⁴

Negligent entrustment of a motor vehicle to children of an insured is virtually impossible to prove in New York. The attempt to attach a parental policy of insurance is usually unsuccessful.

- The Family Automobile Doctrine

In another attempt to bring into the realm of available insurance coverage a parents' homeowner's policy, excess/umbrella policy or other assets plaintiffs have relied upon the "family automobile doctrine". This is an indemnification cause of action based upon a principal-agent relationship. It is widely subscribed to throughout the United States.²⁵ Basically a parent is vicariously liable for damages which occur if a vehicle is owned and used for family purposes, by a member of the household with a parents' authorization or in a parent's business.

In *Lajacona v. Ten Eyck*, the Court of Appeals, in applying New Jersey law, addressed the family automobile doctrine, apparently for the first time, and determined that a father was liable for the actions of his daughter in an automobile collision accident.²⁶ At the time of the accident, defendant's daughter was twenty years old and driving home from college where she was a student. The father conceded that he paid the tuition charges for his daughter, and paid for all automobile maintenance and repairs. At the time of the collision, the automobile was available for use of any member of his family who cared to use it.

Justice Steuer, dissenting, stated that in New Jersey, by case law, an absent owner is liable if the automobile is used in his business, and that in case of an automobile owned by the head of the family and driven by a member of the family, there is a rebuttable presumption that the driver is the agent of the

owner. Under New Jersey law, where an automobile is being used by one member of the family for his own purpose the presumption is rebutted.²⁷

In 1993, the Second Department adopted the family automobile doctrine in New York State. In *Maurillo v. Park Slope U-Haul* a father instructed his son to rent a U-Haul vehicle in the father's name with the father's credit card and instructed him to transport furniture to the family's summer home.²⁸ After delivering the furniture from the family home to the summer residence the son along with his brothers were returning home when they stopped at a nightclub. While in the nightclub parking lot the van came to a sudden and abrupt stop. One of the sons standing in the cargo area was thrown to the floor of the van and sustained severe cervical injuries which rendered him paraplegic.

A motion to dismiss the counterclaim for indemnification against the father was denied. The Court, applying the widely accepted family automobile doctrine, reasoned that the son was acting upon the request of his father, at the father's direction and for the father's benefit. Under these circumstances a triable issue of fact regarding agency defeated the plaintiff's motion to dismiss. The doctrine of the "family automobile" is recognized in New York as a viable means to attach intra-familial insurance policies or assets in a motor vehicle case.

In sum, parental responsibility for their children's motor vehicle accidents is broadly based under the theory of vicarious liability pursuant to VTL § 388. It is difficult to establish under the theory of negligent entrustment yet possible under the not widely used theory of the "family automobile doctrine". Parents must think twice before they answer the question: "Can I have the car keys?".

FOOTNOTES

1. Vehicle and Traffic Law § 388(1) provide as follows:

"Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. Whenever any vehicles as hereinafter defined shall be used in combination with one another, by attachment or tow, the person using or operating any one vehicle shall, for the purposes of this section, be deemed to be using or operating each vehicle in the combination, and the owners thereof shall be jointly and severally liable hereunder."

2. *Horvath v. Lindenhurst Auto Salvage, Inc.*, 104 F.3d 540 (2d Cir. 1997).

3. Parks, Recreation and Historic Preservation Law § 25.23.

4. Vehicle and Traffic Law § 2411.

5. Navigation Law § 48.

6. § 388 traces its origin to § 282-c of the Highway Law of 1909.

7. *Fried v. Scippel*, 80 N.Y.2d 32, 587 N.Y.S.2d 247 (1992).

8. *Griffin v. Fung Jung La*, 229 A.D.2d 468, 645 N.Y.S.2d 528 (1996).

9. *Rodak v. Longnecker*, 176 Misc.2d 833, 673 N.Y.S.2d 998 (Tompkins Cty Sup.Ct. 1998).

10. *Id.*, at 999.

11. *Schrader v. Carney*, 180 A.D.2d 200, 586 N.Y.S.2d 687 (4th Dept. 1992).

12. *Lawrence v. Myles*, 221 A.D.2d 913, 634 N.Y.S.2d 316 (4th Dept. 1995).

13. *Jimenez v. Regan*, 248 A.D.2d 510, 669 N.Y.S.2d 968 (2d Dept. 1998).

14. *Manning v. Brown*, 232 A.D.2d 849, 649 N.Y.S.2d 202 (3d Dept. 1996).

15. § 1210 of the Vehicle and Traffic Law provides:

"Unattended Motor Vehicle.

(a) No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle...provided, however, the provisions for removing the key from the vehicle shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency."

16. Vehicle and Traffic Law § 1199(a).

17. *Albough v. County of Suffolk*, 62 N.Y.2d 681, 476 N.Y.S.2d 522 (1984).

18. See also, *Banellis v. Yackel*, 49 N.Y.2d 882, 427 N.Y.S.2d 941 (1980).

19. *Sherri v. Gerwell*, 262 A.D.2d 394, 691 N.Y.S.2d 144 (2d Dept. 1999).

20. *Larsen v. Heitman*, 133 A.D.2d 533, 519 N.Y.S.2d 904 (4th Dept. 1997).

21. *Alfano v. Marlboro Airport, Inc.*, 85 A.D.2d 674, 445 N.Y.S.2d 517 (2d Dept. 1981).

22. *Weinstein v. Cohen*, 179 A.D.2d 806, 579 N.Y.S.2d 693 (2d Dept. 1992).

23. *Mimoun v. Bartlett*, 162 A.D.2d 506, 556 N.Y.S.2d 705 (2d Dept. 1990).

24. See, *Fischer v. Lunt*, 162 A.D.2d 1016, 557 N.Y.S.2d 220 (4th Dept. 1990).

25. *Marshall v. Whaley*, 238 Ga.App. 776, 520 S.E.2d 271 (1999); *Willert v. Ifrah*, 298 N.J. Super. 218, 689 A.2d 195 (1997); *Hunt v. Richter*, 163 Conn. 84, 302 A.2d 117 (1972); *Murphy v. Barron*, 236 N.Y.S.2d 770 (1962).

26. *Lajacona v. Ten Eyck*, 21 N.Y.2d 980, 290 N.Y.S.2d 570 (1968).

27. The collision took place in New Jersey.

28. *Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142, 606 N.Y.2d 243 (2d Dept. 1993).