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Evidence -- Employer's Vicarious Liability for Negligent Operation of Automotive Vehicle -- Presumptions from Ownership

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is indeed a factor in the test of pre-enforcement justiciability the United States Supreme Court seems peculiarly influenced by it.

With increasing state and federal legislation regulating business activities and civil rights,[28] it is safe to assume that persons such as petitioners in the instant case will continue to resort to the declaratory judgment procedure as a possible mode of obtaining surcease from the restraints of such legislation before actually violating its provisions. The fact that their chances of even getting such complaints considered on their merits will probably vary with the place of the enacting legislature and of the court in the governmental hierarchy is an anomaly. The anomaly is the more serious because the higher the prestige, and probably the effect, of such legislation, the less opportunity there will be for obtaining pre-enforcement relief.

A repudiation of the doctrine of Ex parte *Young*[29] to lift state immunity from such actions, and legislation making the United States suable in such actions might help to de-emphasize the threat of enforcement as a factor and lead to its repudiation by the highest Court for reasons already suggested. However, if this procedural aspect be not the crux of the problem, but merely a handy device to buttress the Supreme Court's desire not to handle such cases before actual violation as a matter of policy,[30] then the anomoly will probably remain until the court reconsiders this policy in the light of the quandary in which it places the affected individuals, and therein finds it wanting. Perhaps the dissent in the instant case, particularly that of Mr. Justice Black, presages such a reconsideration.

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Evidence—Employer's Vicarious Liability for Negligent Operation of Automotive Vehicle—Presumptions from Ownership

In *Carter v. Thurston Motor Lines*,[1] the North Carolina Supreme Court held in a four to three decision that the plaintiff failed to make

Barber Examiners, 45 N. M. 57, 109 P. 2d 779 (1941) (regulating prices in barber shops). *Contra:* De Cano v. State, 7 Wash. 2d 613, 110 P. 2d 627 (1941).

For earlier cases to the same effect as these and those in note 26, *supra*, see BORCHARD, *op. cit. supra*, at 969-971, and cases there collected.

[28] Probably most striking recent examples are those federal and state measures designed to curb subversive activities, particularly among federal and state employees. The president's executive order "prescribing procedure for the administration of an employee's loyalty program in the executive branch of the government," Exec. Order No. 9835, 12 FED. REG. 1935 (1947), has already been questioned by eminent jurists as respects its procedural sufficiency. Chafee, Griswold, Katz, and Scott, *The Loyalty Order*, N. Y. Times, April 13, 1947, §4, p. 8E, col. 4.

A recent example of state legislation on the same subject is North Carolina's amendment to N. C. GEN. STAT. §14-12 (1943) by (1947) session of N. C. General Assembly, S. B. No. 1028; H. B. No. 980.

[29] See notes 22 and 24 *supra*. [30] See notes 17 and 18 *supra*.

[1] 227 N. C. 193, 41 S. E. 2d 586 (1947).

a case under the doctrine of *respondeat superior* and should have been nonsuited below. His evidence was that about 1:15 a.m. he was awakened by "an awful noise" and found that a large tractor-trailer type truck had crashed into his combined cafe and living quarters, which was 100 feet from an intersection, and that the truck and trailer had the name of the defendant painted thereon. Plaintiff further testified, over objection, that Belton King, while standing beside the tractor which was inside the cafe, said that he was driving the truck; that he fell asleep and lost control of the truck, and "tore it all to pieces." The statement was made two minutes after the collision. The defendant in its answer admitted only that it is engaged in the business of hauling freight by motor truck upon the highways of North Carolina and other states. There was no evidence that the truck was or had ever been used in the business of the defendant. Neither was there any evidence that the driver was then or had ever been in the employ of the defendant. The defendant denied all the essential allegations of the complaint, so the plaintiff was put to proof of every fact necessary to support his action. The defendant, having no duty to explain, offered no evidence. On appeal, to sustain his recovery against the owner, the plaintiff relied on a presumption of agency supposedly established by *Jeffrey v. Osage Mfg. Co.*[2] However, the defendant relied on the same authority and the court cited that case as settling the question, that there is no presumption of liability from ownership of a motor vehicle in North Carolina. The driver's declaration was ruled out as inadmissible against this defendant.[3] The plaintiff, having no evidence in the record on agency and scope of employment, failed to make a prima facie case; his recovery was reversed.

It is said that the plaintiff must offer competent evidence on four essentials, requisite elements, to establish a prima facie case for the jury: (1) that the truck or automobile inflicting the injury was at the time operated in a negligent manner, or that the driver thereof was guilty of negligence which was the proximate cause of the injury, (2) where the driver or operator of the conveyance at the time of the injury was other than the owner, the plaintiff must offer evidence tending to show the ownership of the vehicle if such owner is sought to be charged with the negligence of the driver or operator, (3) that if the injury was caused by the negligence of an agent, evidence must be offered tending to establish the agency, (4) that the agent or employee at the time of the injury was acting within the scope of his employment as contemplated and defined by law.[4]

[2] 197 N. C. 724, 150 S. E. 503 (1929).
[3] See note 37 *infra*, for discussion.
[4] Smith v. Duke University, 219 N. C. 628, 14 S. E. 2d 643 (1941); Van Landingham v. Sewing Machine Co., 207 N. C. 355, 177 S. E. 126 (1934); Cole

Difficulty in obtaining evidence tending to prove the element of negligence and proximate cause is no greater than in other negligence cases. If ownership is not stipulated, there is usually enough circumstantial evidence available to prove it. In certain cases no evidence of ownership is required.[5] However, sufficient evidence tending to prove agency,[6] and even if that be conceded, then evidence tending to prove that the transaction out of which the injury arose was within the scope of employment of the agent,[7] is extremely difficult to produce. This is true since no one but the employer and employee could, if they would, furnish direct evidence on these elements and the thin mist of circumstantial evidence may have evaporated during the interval before the plaintiff's attorney is given the case.

The dissenting opinion, recognizing the plaintiff's plight and observing the defendant's silence, advocates allowing a "presumption" of the third and fourth elements to arise from the introduction of evidence of negligence of the driver and ownership of the truck by the defendant.[8] Such a presumption, better labeled an inference of fact,[9] would force the apparent truck owner to clarify the issues by offering the facts peculiarly within his knowledge or risk an adverse verdict. It is not a change in the substantive law, but in the quantum or mechanics of proof that is called for.

It will be interesting to note the existing judicial handicap to just compensation under the doctrine of *respondeat superior* in North Car-

v. Funeral Home, 206 N. C. 271, 176 S. E. 553 (1933); Jeffrey v. Osage Mfg. Co., 197 N. C. 724, 150 S. E. 503 (1929); Martin v. Bus Line, 197 N. C. 720, 150 S. E. 501 (1929); Cotton v. Transportation Co., 197 N. C. 709, 150 S. E. 505 (1929).

[5] Pinnix v. Griffin, 219 N. C. 35, 39, 12 S. S. 2d 667, 669 (1941) ("This court has adopted the view that the employer is liable where the employee causes an injury by the negligent operation of his own car, used in the prosecution of the employer's business, when the latter knew, or should have known, that he was so using it."); Barrow v. Keel, 213 N. C. 373, 196 S. E. 366 (1938); Miller v. Wood, 210 N. C. 520, 187 S. E. 765 (1936); Donalson v. Western Union, 207 N. C. 790, 178 S. E. 603 (1935); *see* note, 140 A. L. R. 1150 (1942).

[6] Brown v. Wood, 201 N. C. 309, 312, 160 S. E. 281, 283 (1931) (where owner visited hospitalized plaintiff, offered to pay medical bills, and said "everything was all right," held to be susceptible of broad meaning and interpretation, a jury question as this evidence was competent to prove agency).

[7] Salmon v. Pearce, 223 N. C. 587, 589, 27 S. E. 2d 647, 649 (1943) ("Proof of general employment alone is not sufficient to impose liability. It must be made to appear that the particular act in which the employee was at the time engaged was within the scope of his employment and was being performed in the furtherance of the master's business."); McLamb v. Beasley, 218 N. C. 308, 11 S. E. 2d 283 (1940) (relation of master and servant must exist at time of and in respect to very transaction out of which the injury arose).

[8] Carter v. Thurston Motor Lines, 227 N. C. 193, 199, 41 S. E. 2d 586, 590 (1947).

[9] Pozzobon v. O'Donnell, 36 P. 2d 236 (1934) (instruction that law presumes person operating automobile is doing so as agent of owner held to be erroneous because of use of word "presumes" instead of word "infers," that is, the jury from proof of ownership may draw conclusion that driver was acting as agent of owner, but it is not bound to do so).

olina and also the background occasioning the timely opinion of Justice Seawell and the minority. Only an analysis of North Carolina cases of imputed negligence has been attempted.[10] An effort has been made to avoid the partially distinct and partially overlapping phases of the doctrine of *respondeat superior;* namely, the liability of the owner of the "family car,"[11] and the liability of the employer to the invitee passenger of his driver.[12]

Broad language of a comparatively early case supports the proposed view.[13] In 1918 Chief Justice Clark stated, "The natural presumption is that one who is employed in operating an automobile is doing so in the service of the owner . . . it will be difficult for the plaintiff in such cases to show that the automobile was being driven and operated under the direct supervision of the owner, which was a matter peculiarly in the owner's knowledge. We thing there was error to nonsuit the plain-

[10] The owner or person in control, being liable for his own negligence, is not liable for that of another, gratuitously using the automobile. McLamb v. Beasley, 218 N. C. 308, 11 S. E. 2d 283 (1940); Robertson v. Aldrige, 185 N. C. 292, 116 S. E. 742 (1923) (automobile is not inherently dangerous); Linville v. Nissen, 162 N. C. 95, 77 S. E. 1096 (1913); Cook v. Horne, 198 N. C. 739, 153 S. E. 315 (1930) (furnishing unlighted vehicle at night, negligence *per se*); Jones v. Stancil, 198 N. C. 541, 52 S. E. 492 (1930); Taylor v. Caudle, 210 N. C. 60, 185 S. E. 446 (1936) (owner negligent in intrusting automobile to reckless and incompetent driver; one given to habitual and excessive use of liquor); Hoke v. Atlantic Greyhound Corp., 226 N. C. 692, 40 S. E. 2d 345 (1946) (owner may be negligent in permitting 13-year-old daughter to drive); see note, 42 A. L. R. 899 (1926).

[11] Vaughn v. Booker, 217 N. C. 479, 481, 8 S. E. 2d 603, 604 (1940) ("True, it is the recognized principle that a parent is not ordinarily responsible for the torts of a minor child, solely by reason of the relationship, and that generally liability will only be imputed on some principle of agency or employment. But it is also held in our opinions by the great weight of authority that where a parent owns a car for the convenience and pleasure of the family, a minor child, who is a member of the family, though using the car at the time for his own purposes, with the parent's consent or approval, will be regarded as representing the parent in such use, and the question of liability for negligent injury may be considered and determined in that aspect. It will be noted that the very genesis of the family purpose car doctrine is agency, and the question here presented is governed by the rules of principal and agent or of master and servant."); Hawes v. Haynes, 219 N. C. 535, 14 S. E. 2d 503 (1941) (evidence of prior use by others, members of owner's family, necessary); Wallace v. Squires, 186 N. C. 339, 119 S. E. 569 (1923) (where there was evidence that son habitually used family car, it was incumbent upon father to show that son had no permission at that particular time to drive that car).

[12] Russell v. Cutshall, 223 N. C. 353, 354, 26 S. E. 2d 866, 867 (1943) ("Ordinarily, one who is engaged to operate a motor vehicle has no implied authority, by virtue of his employment, to invite or permit third persons to ride; the employer is not liable for personal injuries sustained by the invitee while riding in such machine except, perhaps where willfully or maliciously inflicted."); Weatherman v. Ramsey, 207 N. C. 270, 176 S. E. 568 (1934) (to recover for ordinary negligence there need be evidence that driver was transporting passenger for or on behalf of the owner); Cotton v. Transportation Co., 197 N. C. 709, 150 S. E. 505 (1929); Peters *et al.* v. A. & P. *et al.*, 194 N. C. 173, 138 S. E. 595 (1927); see Note, 8 N. C. L. Rev. 306 (1930).

[13] Sutton v. Lyons, 156 N. C. 3, 72 S. E. 4 (1911) (although often cited as allowing the presumption from ownership of an automobile, the case merely presents a comparable situation where agency was presumed; *held,* to be defendant's duty to affirmatively show that she was not operator of mill situated on her land).

tiff."[14] However, a survey of subsequent cases shows the unpredictability of suffering a nonsuit.

No case directly in point where both agency and scope of employment were inferred has been found. One case, where the precise point was not involved, contemplated that it might be done.[15] But, there is a distinct line of authority granting one-half the proposed inference.[16] Scope of employment has repeatedly been inferred from evidence tending to prove agency. However, the defendant's attorney can find an equally strong line of cases, where the inference was not allowed.[17] Neither line of cases entertain an unbroken chronological sequence.

Leading cases allowing the inference of scope of employment include *Freeman v. Dalton*[18] where it is stated, "There may be a presumption that the car was being used in the defendant's business, but it is not a presumption of law, but one of fact, and it does not shift the burden of the issue to the defendant in the sense that he must rebut the presumption, or disprove the allegations by the greater weight of the evidence. It merely is, in itself, evidence of the fact and carries the case to the jury." It has been said that *Jeffrey v. Osage Mfg. Co.*[19] limits the doctrine,[20] possibly due to the court's terse restatement of the facts as follows: "A truck, which is in itself a business vehicle devoted exclusively to business purposes, is found on the highway on a business day during business hours, operated by the regular employee of the defendant and one whose regular business or employment was the duty

[14] Clark v. Sweaney, 175 N. C. 280, 95 S. E. 568 (1918).

[15] Freeman v. Dalton, 183 N. C. 538, 111 S. E. 863 (1922) (distinguished in Grier v. Grier, 192 N. C. 760, 135 S. E. 852 (1926), limited by Martin v. Bus Line, 197 N. C. 720, 724, 150 S. E. 501, 503 (1929) by quotation, "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered, Marshall, C. J., U. S. v. Burr, 4 Cranch, 470.").

[16] Pinnix v. Griffin, 219 N. C. 35, 12 S. E. 2d 667 (1941); West v. Baking Co., 213 N. C. 526, 181 S. E. 551 (1935); Puckett v. Dyer, 203 N. C. 684, 167 S. E. 43 (1932); Lewis v. Basketeria Stores, Inc., 201 N. C. 849, 161 S. E. 924 (1931); Lazarus v. Grocery Co., 201 N. C. 817, 161 S. E. 553 (1931); Jeffrey v. Osage Mfg. Co., 197 N. C. 724, 150 S. E. 503 (1929); Misenheimer v. Hayman, 195 N. C. 613, 143 S. E. 1 (1928); Freeman v. Dalton, 183 N. C. 538, 111 S. E. 863 (1922).

[17] Smith v. Mariakakis, 226 N. C. 100, 36 S. E. 2d 651 (1945); Salmon v. Pearce, 223 N. C. 587, 27 S. E. 2d 647 (1943); Smith v. Moore, 220 N. C. 165, 16 S. E. 2d 701 (1941); McLamb v. Beasley, 218 N. C. 308, 11 S. E. 2d 283 (1940); Tribble v. Swinson, 213 N. C. 550, 196 S. E. 820 (1938); Swicegood v. Swift and Co., 212 N. C. 396, 193 S. E. 277 (1937); Cole v. Funeral Home, 207 N. C. 271, 176 S. E. 553 (1934); Martin v. Bus Line, 197 N. C. 720, 150 S. E. 501 (1929); Grier v. Grier, 192 N. C. 760, 130 S. E. 617 (1926); Reich v. Cone, 180 N. C. 267, 104 S. E. 530 (1913).

[18] 183 N. C. 538, 111 S. E. 863 (1922).

[19] 197 N. C. 724, 150 S. E. 503 (1929).

[20] Brown v. Wood, 201 N. C. 309, 160 S. E. 291 (1931) (where the court phrased the question on appeal, "Does proof of ownership of a pleasure car constitute a prima facie case of liability against the owner for injuries resulting from the negligent operation thereof by the driver? The law answers the question in the negative," and cited Jeffrey v. Osage Mfg. Co., 197 N. C. 724, 150 S. E. 503 (1929).

of driving and operating said vehicle. We are of the opinion, and so hold, that these facts furnish a sound and reasonable basis for a jury to infer that the truck at the time was being operated in the furtherance of the master's business." This case was submitted to the jury although the defendant offered uncontradicted evidence that the driver had taken the truck during the lunch hour without permission and to visit his sick mother near whose house the collision occurred. Merely from the answer an inference was allowed in *West v. Baking Co.*[21] where the defendant admitted "that the defendant driver was an employee of the company . . . that as such employee was authorized and directed from time to time to drive said truck." This was held to be evidence tending to prove that the employee was driving the truck within the scope of his employment at the time of the injury. Where an insurance collector had made a collection a few minutes before the accident, which was in the middle of the afternoon of a working day, the court held that from these facts a reasonable inference could be drawn that the employee was engaged in the duties of his employment and that this inference could not be defeated in the few minutes it took the employee to drive to the scene of the accident, still within his territory,[22] and cited the principle: "That where it is doubtful whether a servant in injuring a third person was acting within the scope of his authority, it has been said that the doubt will be resolved against the master because he set the servant in motion."[23] However, there was a similar division of the court as in the instant case. The three dissenting justices concluded that the evidence was not sufficient to be submitted to the jury in that "it fails to show that the relation of master and servant existed . . . at the time of and in respect to the very transaction out of which the injury arose, a fatal defect in the plaintiff's case," and even cited *Jeffrey v. Osage Mfg. Co.* as supporting their view.

Leading cases adhering to strict proof of the elements of the owner's liability by the plaintiff include *Grier v. Grier*,[24] where an automobile salesman was driving a "demonstration" car and by the defendant's evidence was on a pleasure trip. The court spoke of a requirement that evidence should be in the record of an act in furtherance of the employer's business. In *Cole v. Funeral Home*[25] it was held that the doctrine in *Jeffrey v. Osage Mfg. Co.* was not applicable, although the injury occurred during regular business hours, for there was no evidence that the automobile was a business vehicle and there was no competent evidence that the driver was engaged in the business of his employer.

[21] 208 N. C. 526, 181 S. E. 551 (1935).
[22] Pinnix v. Griffin, 219 N. C. 35, 12 S. E. 2d 667 (1941).
[23] 39 C. J. 1274 (1925).
[24] 192 N. C. 760, 130 S. E. 617 (1926).
[25] 207 N. C. 271, 176 S. E. 553 (1934).

In *McLamb v. Beasley*[26] the regular driver was permitted to take the delivery truck home each evening, a distance of three miles. Plaintiff offered the defendant's bookkeeper who testified, ". . . and if anything should have to be hauled or delivered after the store was closed, we could get in touch with him and he would do it . . . not in all the time I worked there did I ever know Hood to be called on during the night. He was simply working there, and we all felt, if an emergency arose, we were liable to be called on." It was held that this evidence, in its entirety, expressed no more than a sense of loyalty on the part of the employees of the defendant and that it did not even carry the suggestion that Hood had the truck in order that he might be accessible after closing hours. The defendant did not offer evidence. The dissenting opinion stated, "The fact that he did not deny the wrong done by his driver was a pregnant circumstance for the jury to consider."

When the inference has been denied, the plaintiff's difficulty in proving the owner's liability for his driver's negligence during business hours is readily seen. The difficulty is increased when the tort occurs after normal business hours.[27] Sunday cases present additional obstacles.[28] In *Smith v. Moore*[29] the plaintiff changed his plans for the Sunday evening and accepted the salesman's invitation to dinner in a nearby town and drove the salesman's "demonstration" car to that place at the request of the salesman to "try it out." Several months previously, the salesman and his employer had interviewed the plaintiff as a prospective purchaser of a car. After dinner, on the way home, the salesman driving, plaintiff was negligently injured and recovered from the employer. However, the appellate opinion held that the plaintiff should have been nonsuited as to this defendant for "the record clearly discloses that the request that plaintiff drive Yelton's car on the trip over and 'try it out' was purely incidental to the primary purpose, which was social. Even if we conceded that the trip was in part for demonstration purposes . . . which is not supported by the evidence, the business ended and the party was on as soon as they gathered at the home of Mrs. Cos."

We might assume, even if the law of *respondeat superior* in North

[26] 218 N. C. 308, 11 S. E. 2d 283 (1940).

[27] Smith v. Mariakakis, 226 N. C. 100, 36 S. E. 2d 651 (1945); Salmon v. Pearce, 223 N. C. 587, 27 S. E. 2d 647 (1943); McLamb v. Beasley, 218 N. C. 308, 11 S. E. 2d 283 (1940); Martin v. Bus Line, 197 N. C. 720, 150 S. E. 501 (1929); Peters *et al.* v. A. & P. Tea Co. *et al.*, 194 N. C. 173, 138 S. E. 595 (1927).

[28] Smith v. Moore, 220 N. C. 165, 16 S. E. 2d 701 (1941); Riddle v. Whisnant, 220 N. C. 131, 16 S. E. 2d 698 (1941) (where the Act of 1741, N. C. GEN. STAT. (1943) §103-1, which assesses a penalty of one dollar on those who exercise the work of their ordinary calling on Sunday, is cited); Tyson v. Frutchey, 194 N. C. 750, 140 S. E. 718 (1927); Grier v. Grier, 192 N. C. 760, 130 S. E. 617 (1926).

[29] 220 N. C. 165, 16 S. E. 2d 701 (1941) (liability of master is not to be determined by the extent of authority of agent, but by purpose of act in which agent was engaged at the time).

Carolina be settled, that the plaintiffs in substantially similar cases receive unequal justice due to the uncertain value of shreds of circumstantial evidence."[30] The defendant may offer evidence that the driver was on a personal venture and the plaintiff, having no knowledge of facts to the contrary, may find himself nonsuited;[31] especially is this true for injuries caused by vehicles other than of a recognized business type.[32] The defendant may remain silent, even may leave unexplained how a large tractor-trailer bearing his name left the highway in the early morning hours and wrought havor as in the instant case. He should be required to offer evidence that it was stolen or leased,[33] or that he loaned the large expensively operated vehicle to someone for a pleasure trip and have the credibility of that explanation tested by the jury. Sometimes the plaintiff overlooks the available authority for an inference of scope of employment,[34] but always he has the risk that all the evidence available to him tending to prove agency will be determined a mere scintilla.[35] The plaintiff in his efforts to produce sufficient evidence of agency and scope may prove himself out of court.[36] Again, he may rely too heavily on the admissibility of the utterances of the driver, made at the scene, and discover too late that he has nothing left when they are ruled out as hearsay.[37] From the very nature of the action, the

[30] Misenheimer v. Hayman, 195 N. C. 613, 614, 143 S. E. 1, 2 (1928) (Plaintiff's recovery was sustained over defendant's contention that there was no evidence of scope of employment. "There is at least some evidence that the driver of the truck was acting within the scope of his authority and in the furtherance of his master's business . . . there is evidence that his truck was frequently seen on the road in question coming from and returning to the city, according to one witness, sometimes once a day and sometimes every other day. While the evidence on the point is not necessarily convincing we cannot hold as a matter of law that it is devoid of such probative force as not to require its submission to the jury.").

[31] Rogers v. Black Mountain, 224 N. C. 119, 29 S. E. 2d 203 (1944); Swicegood v. Swift and Co., 212 N. C. 396, 193 S. E. 277 (1937).

[32] Smith v. Mariakakis, 226 N. C. 100, 36 S. E. 2d 651 (1945); Salmon v. Pearce, 223 N. C. 587, 27 S. E. 2d 647 (1943); Grier v. Grier, 192 N. C. 760, 130 S. E. 617 (1926).

[33] By proper phrasing of a "trip lease," the owner, though paying the driver's regular wages, may relieve himself from liability for the driver's negligence for lessee shipper was held responsibile on respondeat superior; therefore by implication the owner is not liable. Wood v. Miller, 226 N. C. 567, 39 S. E. 2d 608 (1946).

[34] Salmon v. Pearce, 223 N. C. 587, 27 S. E. 2d 647 (1943); Swicegood v. Swift and Co., 212 N. C. 396, 193 S. E. 277 (1937).

[35] Smith v. Mariakakis, 226 N. C. 100, 36 S. E. 2d 651 (1945) (plaintiff's wife testified that she saw the driver in the defendant's cafe, cleaning tables on the night of the accident, and had seen him there practically every day).

[36] The plaintiff of necessity offers the driver as his witness, who testifies that his was a pleasure trip, and is unable to secure contradictory evidence that the driver was on the business of the owner. Riddle v. Whisnant, 220 N. C. 131, 16 S. E. 2d 698 (1941).

[37] North Carolina courts in recent years have tended to make it harder to get in extra-judicial admissions of agents. This is shown by the fact they exclude them to prove agency. Agency must be shown *aliunde* before the agent's admission will be received. Hunsucher v. Corbitt, 187 N. C. 496, 122 S. E. 378 (1924). More recent cases exclude them as proof of scope of employment. Caulder v.

plaintiff is unable to secure the competent judicial admissions of the frightened employee who is fearful of his continued employment. Extra-judicial admissions of the driver need to be distinguished from those infrequently made by the owner which are competent if relevant.[38]

Since the plaintiff has the burden of producing all the evidence, the owner or more often his insurers, by answering in denials under the supposed wisdom of preventing unfounded claims, places an often insurmountable burden on the plaintiff. Of what value is a judgment against a financially irresponsible driver? We might observe that the owners of vehicles who employ chauffeurs and the owners of commercial vehicles have definite tactical if not legal advantage over the injured plaintiff; whereas, the negligent owner who drives his own vehicle is liable solely on proof of negligence proximately causing the injury.

The rule of the majority of jurisdictions is that proof of ownership of the automobile by the defendant at the time of the accident creates a prima facie case by inference that the negligent operator was the servant or agent of the defendant and was engaged in his business, acting within the scope of his employment.[39] When adopted by statute the rule has been interpreted to be a rule of evidence only;[40] however, at least one jurisdiction regards it as a change in the substantive law.[41]

Sound reasons advanced in the decided cases for the adoption of the inference, whether by statute or judicial decision, include the following: (1) That if the defendant is in fact the owner, it should be easier for him to bring forward evidence showing that the driver was not his servant or not acting within his scope of employment.[42] (2) That experience demonstrates that the probabilities are that an automobile figuring in an accident will be driven by the owner or by someone for

Motor Sales, Inc., 221 N. C. 437, 20 S. E. 2d 338 (1942); STANSBURY, NORTH CAROLINA EVIDENCE §169 (1946). Barnhill, J., by dicta, in the instant case says, "Even if said statement constitutes a part of the res gestae, it is not admissible against this defendant as evidence, either of negligence or agency, for the reason the record fails to disclose any testimony tending to show that he was at the time the agent of the defendant." If this be adopted, it is a new restriction for the admission is clearly evidence of negligence when part of the res gestae, notwithstanding agency, for even that of a by-stander would be. Queen City Coach Co. v. Lee, 218 N. C. 320, 11 S. E. 2d 341 (1940); STANSBURY, NORTH CAROLINA EVIDENCE §164 (1946).

[38] Toler v. Savage, 226 N. C. 209, 37 S. E. 2d 485 (1946); Tribble v. Swinson, 213 N. C. 550, 196 S. E. 820 (1938).

[39] See Notes, 122 A. L. R. 228 (1939), 96 A. L. R. 634 (1935), 74 A. L. R. 951 (1931), 42 A. L. R. 898 (1926).

[40] Greenbury v. Gorvine, 279 Mass. 339, 181 N. E. 128 (1932).

[41] Woodfin v. Insel, 13 Tenn. App. 493 (1931).

[42] Howard v. Amerson, 236 Ill. App. 587 (1925); Borger v. McKeith, 196 Wis. 315, 224 N. W. 102 (1944) (the exigencies of justice require application of the rule); Toranto v. Hattaway, 219 Ala. 520, 122 So. 816 (1929) (owner has special knowledge of relation between himself and the driver); Newell v. Contracting Co., 223 Ala. 109, 134 So. 870 (1931) (the rule that proof of ownership raises presumption of owner's responsibility applies when car is found unattended in apparent violation of traffic regulations, thereby causing injury).

whose negligence he will be responsible, and if not true, it is fair that he be required to explain.[43] (3) That the present extensive use of the automobile, causing commensurate injuries, has taken it beyond a neighborhood affair and makes it more difficult to establish facts necessary to recovery and compels inquiry into the existing rule.[44] (4) That the principle advanced is the same as that permitting juries to infer, in the absence of an explanation to the contrary, that a man found in possession of recently stolen goods, is the person who stole.[45]

Other jurisdictions have said that by the rule one having a just and meritorious case is protected, and no hardship is imposed upon the owner.[46] Also, it has been held that the presumption of the owner's responsibility is based upon policy and not upon a fact inference.[47]

The only arguments against adoption are outworn precedent and the legalistic fallacy that one presumption cannot be founded upon another.[48] This seems to be splitting one presumption into two, rather than basing one on another.[49] It could be argued that the rule should be limited to business or commercial vehicles,[50] but it is believed that the better reasoning is with the majority which makes no distinction.[51] The reasons for the rule extend to pleasure type vehicles.

It is suggested that North Carolina adopt the modern rule applicable to this motor age—a rule of evidence that the plaintiff having offered evidence tending to prove negligence of the driver and ownership of the vehicle by the defendant be deemed to have established a prima facie case for the jury thereby placing the duty on the defendant of going forward with evidence of lack of agency or lack of action within the scope of employment,[52] otherwise risking an adverse verdict. The weight of the inference should be for the jury to determine.[53]

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[43] Ahlberg v. Griggs, 158 Minn. 11, 196 N. W. 652 (1924) (it is reasonable to presume that a person driving another's automobile on a public highway is doing so rightfully as agent of owner); Laundry v. Oversen, 187 Iowa 284, 174 N. W. 255 (1919) (the rule is a mere inference that an owner is likely to be in control of his own property); see Note, 42 A. L. R. 903 (1926).

[44] Carter v. Thurston Motor Lines, 227 N. C. 193, 199, 41 S. E. 2d 586, 590 (1947) (dissenting opinion, Seawell, J.).

[45] Dowing v. Nicholson, 101 Fla. 672, 135 So. 288 (1931).

[46] Baker v. Maseek, 20 Ariz. 201, 179 Pac. 53 (1919).

[47] Philip v. Schlager, 214 Wis. 370, 253 N. W. 394 (1934).

[48] STANSBURY, NORTH CAROLINA EVIDENCE §215, n. 43 (1946).

[49] See Note, 42 A. L. R. 902 (1926).

[50] Double v. Myers, 305 Pa. 226, 157 Atl. 610 (1931) (limits the rule to commercial vehicles, used for commercial purposes).

[51] See Note, 96 A. L. R. 644 (1935).

[52] See Note, 8 N. C. L. REV. 298 (1930) (author commenting on Jeffrey v. Osage Mfg. Co., 197 N. C. 724, 150 S. E. 503 (1929) assumed that case to have adopted the rule in North Carolina giving an inference of scope and suggests the basis, a "logical core").

[53] There is a split of authority whether the court may as a matter of law direct a verdict against the plaintiff when the defendant offers uncontradicted evidence that the driver was not the owner's agent, or if he was, that he was not acting within