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Conly Purcell

OWNERSHIP OF AUTOMOBILE AS PRIMA FACIE EVIDENCE OF RESPONSIBILITY FOR NEGLIGENCE OF PERSON OPERATING IT

Generally speaking, absent statutory change, an owner of an automobile is responsible for injuries resulting from its negligent operation by another, only if it is shown that, at the time of the injury, the relationship of principal and agent or master and servant existed between the owner and the operator, and that the operator was then acting in the scope of his employment.

Ordinary human experience and knowledge show clearly that in the great majority of cases automobiles are operated by their owners or by some servant or agent on the owner's business. It is equally apparent that in the cases where this is false, the knowledge of the facts and the ability to show them are peculiarly in the cognizance of the owner. Understanding this, the great majority of the courts of the United States recognize that it is desirable and fair to aid the plaintiff in establishing his case by giving him the assistance of some sort of a presumption of the agency of the driver and that he was in the scope of his employment—either from ownership of the automobile alone, or from ownership plus some other related fact.[1]

In Missouri the nature of this so-called presumption is not clear. For the point under discussion, however, it suffices to say that the plaintiff, by introducing certain facts, the nature of which will be discussed, may get to the jury without bringing forth certain of the positive evidence usually necessary to establish the defendant's liability under the doctrine of *respondeat superior*.

The rule, as generally stated, is that where the plaintiff introduces proof that the defendant owned the automobile causing the injury, a presumption arises that the operator of the machine was the defendant's servant, and was then acting within the scope of his employment. This rule is followed by a majority of the courts in the United States.[2]

The Missouri courts have always followed this rule where the motor car involved in the injury was a commercial vehicle belonging to the defendant.[3] However, originally, a different rule was applied where the injury was caused by a pleasure automobile.[4] The Missouri rule as to pleasure cars was the same as the minority rule as to both types of vehicles. That is, where the plaintiff introduced proof that the defendant owned the car, and that the driver was his agent or servant, a presumption arose that the driver was acting in the scope of his employment. The leading Missouri case supporting this rule in the case of pleasure automobiles was *Hays v. Hogan*,[5] in which the court stated that a presumption must be based upon a fact—that it would not presume from the defendant's ownership that the car was being driven by his agent, and from that presumption presume that the driver was acting in the scope of his employment. In other words, such a presumption was held to violate the oft-quoted rule that "a presumption cannot be based upon a presumption."

This difference in the rules persisted in Missouri until 1928 when in *Edwards v. Rubin*[6] it was held that mere proof of ownership of the automobile in the defendant, whether the car was a pleasure or commercial vehicle, was sufficient to take the plaintiff to the jury. This case cited as authority for the proposition laid down:

1. 42 A. L. R. 898; continued in 74 A. L. R. 951.
2. *Supra* note 1.
3. Fleischman v. Polar Wave Ice & Fuel Co., 148 Mo. App. 117, 127 S. W. 660 (1910); O'Malley v. Heman Construction Co., 255 Mo. 386 164 S. W. 565 (1914); Mann v. Stewart Sand Co., 211 Mo. App. 256, 243 S. W. 406 (1922); Barz v. Fleischmann Yeast Co., 308 Mo. 288, 271 S. W. 361 (1925); Spellmeyer v. Theodore Hiertz Metal Co., 272 S. W. 1068 (Mo. App. 1925); but cf. Byrnes v. Poplar Bluff Printing Co., 74 S. W. (2d) 20 (Mo. Sup. 1934).
4. Long v. Nute, 123 Mo. App. 204, 100 S. W. 511 (1907); Guthrie v. Holmes, 272 Mo. 215, 198 S. W. 854 (1917); Hays v. Hogan, 273 Mo. 1, 200 S. W. 286 (1917).
5. *Supra* note 4.
6. 221 Mo. App. 246, 2 S. W. (2d) 205 (1928).

Linton v. St. Louis Lightning Rod Co.[7], *Ford v. Ford Roofing Products Co.*[8], *Beeson v. Fleming*,[9] and *State ex rel Smith v. Trimble*,[10] none of which bear particularly on the point in issue. It further cited *Snyder v. Western Union Telegraph Co.*[11], *Jacobson v. Beffa*,[12] *Barz v. Fleischmann Yeast Co.*[13], and *Spellmeyer v. Hiertz Metal Co.*[14] The *Telegraph Company* case held only that proof of the driver's employment by the defendant raised a presumption that he was acting in the scope of his employment. The *Jacobson* case held that a *prima facie* case was established when proof was introduced that defendant owned the car and was in it at the time of the accident. This involves the doctrine applicable where the owner is present in his car driven by another, and thus seems to have no bearing on the presumption under consideration. The two cases last cited both involved commercial vehicles, and so, under the rules in effect at that time, should hardly have been used as authority in a case involving a pleasure car. At any rate, the case, though weak, changed the Missouri law, and a line of Missouri Appeals cases following *Edwards v. Rubin*[15] sprang up.[16]

The rule then persisted unquestioned until the recent case of *Kurz v. Greenl ase Motor Co.*[17] In this case, the plaintiff was injured by a sedan belonging to the defendant automobile sales agency. The proof negatived any principal-agent relationship between defendant and the driver, but, as *dictum*, the court said that ". . . the mere admitted ownership of the Peerless sedan is not sufficient to supply the necessary proof of agency or that the alleged agent was engaged in the work of his supposed master." As authority for this proposition, the court cited *State ex rel. Vesper Buick Motor Co. v. Daues.*[18] The Supreme Court of Missouri in this case merely held that a ruling by an appellate court, that proof of ownership plus proof of the driver's employment by the defendant was sufficient to take plaintiff's case to the jury, was not inconsistent with prior decisions by the Missouri Supreme Court. The court cited with equal approval the rules laid down in *Guthrie v. Holmes*[19] and in *O'Malley v. Heman Construction Co.*,[20] both of which were decided prior to *Edwards v. Rubin.*[21] The *Guthrie* case involved a pleasure car and set forth the original pleasure car rule which required proof of ownership plus proof that the driver was the defendant's agent; the *O'Malley* case concerned a pleasure vehicle and laid down that rule—that mere proof of ownership was sufficient to take the plaintiff to the jury. From the citing of the two rules, it is at least thinkable that the court in the *Daues* case evidenced a tendency toward a return to the old "split" rule in effect prior to *Edwards v. Rubin.*[22] At best, however, it is apparent that the *Daues* case can be considered as only very weak inferential *dictum* in support of the holding in *Kurz v. Greenlease Motor Co.*[23]

The *Kurz* case was then taken to the Supreme Court of Missouri on *certiorari*[24] to the judges of the appellate court, the plaintiff seeking to quash the record on the ground that this decision of the Court of Appeals was in conflict with controlling Supreme Court decisions. The Supreme Court pointed out that "the decision of the

7. 285 S. W. 183 (Mo. App. 1927).
8. 285 S. W. 538 (Mo. App. 1927).
9. 315 Mo. 177, 285 S. W. 708 (1927).
10. 315 Mo. 166, 285 S. W. 729 (1927).
11. 277 S. W. 362 (Mo. App. 1925).
12. 282 S. W. 161 (Mo. App. 1926).
13. *Supra* note 3.
14. *Supra* note 3.
15. *Supra* note 6.
16. McCarter v. Burger, 6 S. W. (2d) 979 (Mo. App. 1928); Murphy v. Tumbrink, 25 S. W. (2d) 133 (Mo. App. 1930); Hampe v. Versen, 32 S. W. (2d) 793 (Mo. App. 1930); Benson v. Smith, 38 S. W. (2d) 743 (Mo. App. 1931).
17. 52 S. W. (2d) 498 (Mo. App. 1932).
18. 323 Mo. 388, 19 S. W. (2d) 700 (1929).
19. *Supra* note 4.
20. *Supra* note 3.
21. *Supra* note 6.
22. *Supra* note 6.
23. *Supra* note 17.
24. State ex rel Kurz v. Bland, 64 S. W. (2d) 638 (Mo. Sup. 1933).

Court of Appeals. . .does not, as relator seems to be of the impression it does, involve the question of the sufficiency of plaintiff's *prima facie* case to surmount the demurrer . . . and it is not upon the state of the record at that juncture of the case that the respondents predicated their opinion; but the case was, on appeal, determined upon the question of the substantiality of the plaintiff's *prima facie* case as finally submitted to the jury upon the facts in this record." The court then went on and upheld the decision of the Appellate Court, repeating that mere proof of ownership of the automobile was insufficient to take plaintiff to the jury. It seems apparent that the Supreme Court was of the opinion that the plaintiff, in his *certiorari*, had totally misconstrued the reason for the Appellate Court's determination of the case in the defendant's favor. This being true, it seems equally clear that the Supreme Court's holding on the precise point involved on the plaintiff's writ of *certiorari* was merely *dictum*, and as such, should not be used as the basis of a jurisdiction to review not otherwise existing in applications for *certiorari* on the same point.

When it is noted that the Appellate Court's holding in the *Kurz* case was *dictum*, and that the Supreme Court's approval of this *dictum* was also *dictum*, it seems obvious that the *Kurz* case is very weak authority for a return to the original pleasure car rule. Nevertheless, the case throws doubt on the probable future rules in Missouri. Should the *dictum* be followed, Missouri would again return to the "split" rule. Probably, although the language was broad enough to include commercial vehicles, the *dictum* was not intended to refer to them.

*CONLY PURCELL

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