Master and Servant -- Presumption as to Scope of Employment

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The Supreme Court of North Carolina in the recent case of *Jeffrey v. Osage Manufacturing Co.*[1] has decided that upon proof of defendant's ownership of the car that caused the plaintiff's injury and that the negligent driver thereof was in the general employ of defendant, the plaintiff is entitled to the "permissive" presumption[2] that said driver was acting within the scope of his employment at the time of the accident and has therefor established a *prima facie* case to be presented to the jury.

The decision is in accord with the majority elsewhere.[3] The reason for this rule is quite evident: that whether the car was at the time of the injury being used in furtherance of the master's business and according to his instructions involves matter peculiarly within the defendant's knowledge and upon which it is generally difficult for the plaintiff to obtain proof.[4] "The *prima facie* inference that may be drawn from ownership is analogous to the *prima facie* inference of negligence that may be drawn from the happening of an accident of a certain class, where the doctrine of *res ipsa loquitur* applies.[5]

Variations of the above rule are met in a number of jurisdictions. Pennsylvania, while approving the doctrine in cases of cars used for business purposes,[6] and during business hours,[7] disaffirms it where the car is a family or pleasure vehicle.[8] Massachusetts,[9] while

[1] 197 N. C. 724, 150 S. E. 503 (1929).

[2] See McCormick, *Charges on Presumptions and Burden of Proof* (1927) 5 N. C. L. Rev. 291.

[3] D'Aleria v. Shirey, 286 Fed. 523 (C. C. A. 9th, 1923); Orlando v. Pioneer Barber Towel Supply Co., 239 N. Y. 342, 146 N. E. 621 (1925); Yellow Cab Co. v. Nelson, 35 Ga. App. 694, 134 S. E. 822 (1926); Crowell v. Duncan, 145 Va. 489, 134 S. E. 576 (1926); Fame Laundry Co. v. Henry, 195 Ind. 456, 144 N. E. 545 (1924); Wagnitz v. Scharetz, 265 Pac. 318 (Cal. App. 1928); Note L. R. A. 1918D 924.

[4] Long v. Nute, 123 Mo. App. 204, 100 S. W. 511 (1907); Bogorad v. Dix, 176 N. Y. App. Div. 774, 162 N. Y. Supp. 992 (1917).

[5] Robb, J., in Curry v. Stevenson, 26 F. (2d) 534, 536 (Ct. of App. D. C. 1928).

[6] Seiber v. Russ Bros. Ice Cream Co., 276 Pa. 340, 120 Atl. 272 (1923); Laubach v. Colley, 283 Pa. 366, 129 Atl. 88 (1925).

[7] Williams v. Ludwig Floral Co., 252 Pa. 140, 97 Atl. 206 (1924).

[8] Lotz v. Hanlon, 217 Pa. St. 339, 66 Atl. 525, 10 Ann. Cas. 731, 10 L. R. A. (N. S.) 202 (1907).

[9] Subsequent to the writing of this case comment Massachusetts, in the case of Thomas v. The Meyer Stores, Inc., Mass. Adv. Sh. (1929) 2023, has applied its recent statute, Mass. St. 1928, c. 317, which provides that: In all actions to recover damages for injuries to the person or the property, or for the death of a person arising out of an accident or collision in which a motor

generally refusing to follow this rule,[10] did so where the master's tools were in the truck.[11] A leading Ohio case[12] holds that the presumption does not arise unless it is shown that one of the duties of the driver is the operation of the car. A different rule is often invoked where the car is operated by a member of the defendant's family,[13] although proof of defendant's ownership of car and its operation by his wife has been held to raise the presumption that the wife was driving as the husband's agent.[14] A number of jurisdictions allow the *prima facie* inference to be raised from mere proof of ownership of the automobile.[15]

Those courts which refuse the plaintiff the benefit of the presumption assign as a reason that the jury might thereby find for the plaintiff on mere speculation and conjecture.[16] Inasmuch as the presumption is rebuttable and opportunity is afforded the defendant for the introduction of evidence tending to disprove the plaintiff's allegations concerning the driver's scope of authority, a refusal to invoke the rule would give rise to the greater possibility of non-suit of a plaintiff with a good cause of action because of his inability to procure evidence accessible only to the defendant.[17]

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vehicle was involved, evidence that at the time of such accident or collision it was registered in the name of the defendant as owner shall be *prima facie* evidence that it was being operated by and under the control of a person for whose conduct the defendant was legally responsible, and absence of such responsibility shall be an affirmative defence to be set up in the answer and proved by the defendant."

[10] Porcino v. DeStefano, 243 Mass. 398, 137 N. E. 664 (1923).

[11] Brien v. Dedham Water Co., 241 Mass. 217, 135 N. E. 130 (1922).

[12] White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N. E. 302, 46 L. R. A. (N. S.) 1091, Ann. Cas. 1914C 1082 (1914).

[13] Hays v. Hogan, 273 Mo. 1, 200 S. W. 286, L. R. A. 1918C 715, Ann. Cas. 1918E. 1127 (1917).

[14] Willet v. Heyer, 140 Atl. 411 (Ct. App. N. J. 1928); Clark v. Sweaney, 175 N. C. 280, 95 S. E. 568 (1918). The presumption of liability clearly exists in those states invoking the "family purpose doctrine." Landry v. Overseen, 187 Iowa 284, 174 N. W. 255 (1919); King v. Smythe, 140 Tenn. 217, 204 S. W. 296, L. R. A. 1918F 293 (1918).

[15] Lilly v. Duckworth, 140 Atl. 397 (Ct. App. N. J. 1928); Ercole v. Daniel, 105 W. Va. 118, 141 S. E. 631 (1928). See Clark v. Sweaney, *supra* note 12. Note L. R. A. 1918D 924.

[16] Porcino v. DeStefano, *supra* note 8; Ronan v. J. G. Turnbull Co., 99 Vt. 280, 131 Atl. 788 (1926); Welch v. Checker Taxi Co., 159 N. E. 622 (Mass. 1928).

[17] The weight, effect, and significance to be given the presumption are of course dependent upon local laws, practices, and rules of evidence. See Heckel and Harper, *Effect of the Doctrine of Res Ipsa Loquitur* (1928) 22 ILL. L. REV. 724; (1930) 10 BOSTON U. L. REV. 83.