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Torts - Negligence - Liability of a Lessor of Personal Property

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doctrine may be no more than a myth. The Court has, however, for this case resolved the conflict between the Congressionally determined public interest in preserving competition by the prevention of mergers and the private interests of the parties to this merger in favor of the public interest. It is submitted that while the Court has not formally retreated from its contention that the failing company doctrine is a Congressionally mandated exception to the rule against mergers, this case, with all others decided by the Supreme Court in which the failing company doctrine was determinative of the outcome, strongly indicates that should the Court be placed in the position of having to define the scope of the doctrine with precision, that definition will be of a class which has no members.

Although it was the purpose of the Court to "confine the failing company doctrine to its present narrow scope,"[42] *Citizen Publishing*, because of the new importance attached to efforts short of merger to save the failing company, represents a considerable narrowing of the doctrine as it was announced in *International Shoe*.

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TORTS—NEGLIGENCE—LIABILITY OF A LESSOR OF PERSONAL PROPERTY—The Pennsylvania Supreme Court held that the lessor of a truck is not liable to lessee's passenger for injuries which resulted from acts of the lessee, and that Section 390 of the *Restatement (Second) of Torts* is not applicable.

Littles v. Avis Rent-A-Car System, 433 Pa. 72, 248 A.2d 837 (1969).

Plaintiff, a minor, brought an action for injuries suffered while a passenger in a truck leased from defendant, Avis. The truck was leased by one Kemp, who was driving at the time the plaintiff suffered her injuries.

The truck was twenty-four feet long, eight feet wide, approximately eleven feet high[1] and weighed eight tons. Kemp was asked by defendant's agent if he had driven a truck before, and he stated he

42. *Id.* at 931.

1. There is some disagreement in the report as to the height of the truck. The majority referred to a receipt which recited a height of twelve feet. 433 Pa. 72 at 74, 248 A.2d 837 at 838. The dissent stated the truck was eleven feet high. 433 Pa. at 76, 248 A.2d at 839.

had driven a pick-up truck. Kemp also produced a valid Pennslyvania driver's license upon a request by defendant's agent. While operating the truck, Kemp attempted to drive it under a railroad bridge with insufficient clearance. The top of the truck struck the bridge, causing plaintiff's injuries.

The trial court granted a compulsory nonsuit, and denied plaintiff's motion to dismiss it. The Superior Court affirmed the denial[2] and plaintiff appealed to the Pennsylvania Supreme Court. The Supreme Court affirmed, holding that the lessor had no liability in such situation.

The plaintiff argued that defendant (through its agent) had been negligent in leasing such a vehicle to a person it knew or should have known was incompetent to drive it. It was also alleged that § 390 of the *Restatement (Second) of Torts*,[3] which states that a supplier of chattels can be liable if he has reason to know that injury could result from the use of such chattel by third persons, was applicable.

The majority, per Chief Justice Bell, stated that plaintiff had failed to bring herself within the language of § 390 and that, therefore, "we need not decide whether [§ 390] should be adopted by us."[4] The court relied heavily on the fact that the Avis agent had asked to see a Pennsylvania driver's license, and had also inquired whether Kemp had any previous experience in driving a truck. The court also pointed out that it was "quite possible . . . the accident was not due to the inexperience or incompetency of the driver, but rather to mere lack of attention or error in judgment on his part."[5] In support of their holding the majority cited *Piquet v. Wazelle*[6] for the proposition that an automobile is *not* an instrument inherently dangerous, and stated that a valid operator's permit is prima facie evidence of fitness to operate a motor vehicle.[7]

2. 211 Pa. Supr. 745, 235 A.2d 819 (1969).
3. RESTATEMENT (SECOND) OF TORTS § 390 (1965) provides:
One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.
4. 433 Pa. at 74, 248 A.2d 837 at 838.
5. *Id.* at 75, 248 A.2d at 838.
6. 288 Pa. 463, 136 A. 787 (1927). It was held in *Piquet* that a defendant-father was not liable for injuries resulting from the negligence of his driver-son to whom he had loaned the family automobile because there was no evidence the boy was "incompetent." Also, the son was not acting as the agent of the father at the time of the accident.
7. The court also cited PA. STAT. ANN. tit. 75, § 608(a) (1959):
(a) Before issuing an operator's license to any permittee, except as otherwise provided, the secretary shall require the applicant to demonstrate personally to him,

The dissent, speaking through Justice Roberts,[8] felt that § 390 of the *Restatement* should apply, and also that the case should be remanded in order that there could be findings of fact as to (a) what Avis' responsibility was once they realized Kemp was unfamiliar with the operation of such a large truck, and (b) if it should be found that Avis was negligent, whether or not their negligence was the proximate cause of the injury.[9]

At common law, generally, the owner of a motor vehicle was not liable for injuries when the vehicle was operated by a third person, except in agency situations where the cases turned on questions of "control" and "scope of employment."[10] An owner of a vehicle has also been held liable for a third person's negligence when the owner leased the vehicle *plus* the driver.[11]

In most jurisdictions there have been exceptions to the requirement of an agency relationship in cases in which the owner entrusted the vehicle to one whom he knew, or should have known, to be an incompetent, reckless or careless driver and likely to cause injury to others in operating the vehicle.[12] The cases relating to "careless, reckless and incompetent" drivers usually have involved drivers who were underage,[13] or drivers who were either drunk at the time the car was loaned or who had a reputation for drunk driving.[14]

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or his representative, in such manner as the secretary may direct, that such applicant is a proper person to operate a motor vehicle or tractor, has sufficient knowledge of the mechanism of motor vehicles or tractors to insure their safe operation, and a satisfactory knowledge of the laws and regulations concerning motor vehicles or tractors and their operation.

433 Pa. at —, 248 A.2d at —.

8. Justice Cohen joined in the dissent.

9. 433 Pa. 72 at 77, 248 A.2d 837 at 839-840.

10. See Scheel v. Shaw, 252 Pa. 451, 97 A. 685 (1916), where a chauffer received permission from his master to use the master's car to pick up his (the chauffeur's) family, and while on this excursion he injured the plaintiff. The master (defendant) was held not liable. The court said the plaintiff, in order to recover from the defendant, must show, in addition to the fact that the defendant was the owner of the car and the chauffeur was his servant, that at the time the injury occurred the chauffeur was engaged in the defendant's business and was acting within the scope of his employment. See also Double v. Myers, 305 Pa. 266, 157 A. 610 (1932).

11. In Thatcher v. Pierce, 281 Pa. 16, 125 A. 302 (1924), defendant leased a truck and driver for construction work. The court said that a lessor cannot place an incompetent and reckless person in charge of a machine and expect to escape liability, especially when the one who was negligent was also his servant.

12. *See, e.g.*, Cebulak v. Lewis, 320 Mich. 710, 32 N.W.2d 21 (1948); Williamson v. Eclipse Motor Lines, 145 Ohio St. 467, 62 N.E.2d 339 (1945).

13. In Laubach v. Colley, 283 Pa. 366, 129 A. 88 (1925), the court held a father, who owned the car, liable for injuries inflicted by his driver-son. The father had loaned the car to his son in violation of a statute setting the minimum age for drivers. (There was no agency relationship involved in this case because at the time of the accident the son was not about his father's business.)

14. In Williamson v. Eclipse Motor Lines, 145 Ohio St. 467, 62 N.E.2d 339 (1945), the court discussed at length the rule that when an owner allows a reckless and incompetent

There are few Pennsylvania cases on situations which involve the entrusting of an automobile to an "incompetent" driver, and it would appear that an injured plaintiff would have little chance of recovery in such a situation unless the driver was the agent of the owner. In *Raub v. Donn*,[15] the Pennsylvania Supreme Court held that it was not error to submit to the jury the question of whether or not defendant was negligent in allowing his son, who had a reputation for reckless driving, to use the family automobile. However, the court stated that that finding was not necessary in that case because they held the defendant liable on an agency theory. In *Chamberlain v. Riddle*,[16] a nonsuit was granted in an action against one who had entrusted his car to an 18-year-old unlicensed driver. The court established that the defendant was not negligent as a matter of law for entrusting his car to someone who did not have a driver's license. The *Chamberlain* court also stated:

> If the record had shown any circumstances sufficient to acquaint a reasonably prudent person of some incompetence on the part of [the driver] then the fact that [the driver] was unlicensed would have been some evidence of negligence to go to the jury together with other testimony. . . . However, appellants have failed to produce any. And, in our opinion, proof merely that [the driver] had no license is insufficient to show that appellee was negligent in letting him have his car. We would not impose a duty upon an owner to see the license card of an apparently mature and competent person before entrusting his car to him.[17]

In *Chamberlain* there was no agency relationship.

In *Littles*, the court adhered to the majority rule that an automobile is not a dangerous instrumentality.[18] There is one Pennsylvania lower court decision, however, which has held that when one allows another to drive his automobile, and the driver is known to be reckless and incompetent, whereby the automobile becomes a dangerous instrumentality in his hands, then the owner may be liable for the driver's negligence.[19] The case involved an automobile dealer who had allowed a

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driver to operate his motor vehicle the owner is liable for resulting injuries. The court did not hold the defendant owner liable in that case, however, because the court said that, although the driver had a reputation for drinking and driving, the defendant had made inquiries about the driver's competence and was not informed about his reputation.

15. 254 Pa. 203, 98 A. 861 (1916).

16. 155 Pa. Super. 507, — A.2d — (1944).

17. *Id.* at 511, — A.2d at —.

18. For a jurisdiction which holds that an automobile *is* a dangerous instrumentality *see* Koger v. Hollahan, 144 Fla. 779, 108 S. 685 (1940), and Southern Cotton Oil Co. v. Anderson, 80 Fla. 441, 86 S. 629 (1920).

19. Eachus v. Cadillac Motor Car Company, 18 D&C 754 (1932).

prospective purchaser with a reputation for reckless driving to drive one of its cars. The court held that there should be a trial on the merits, and evidence of the defendant's knowledge of the driver's incompetency should be heard at trial.

It appears that, aside from the one lower court decision, the only situation in which an owner was held liable in Pennsylvania for the negligence of a bailee (or lessee) in the absence of an agency relationship was in *Laubach v. Colley*[20] which involved an underage son. In situations not involving agency, the Pennsylvania courts have almost uniformly given judgment for the defendant-owner.

Other jurisdictions have determined that for public policy reasons the above result was not satisfactory, and therefore have enacted statutes which recognize the liability of an automobile owner who has entrusted his car to a negligent driver.[21] In California, an owner has statutory liability for death or injuries which result from negligent operation of a vehicle by any person operating it with the owner's expressed or implied permission. This liability is absolute and is not even dependent upon the owner's *negligence* in selection of the driver.[22]

Pennsylvania does not have a statute extending the common law liability of automobile owners for the negligent operation of their cars by third persons. However, it would appear that the instant court may have declined an opportunity to at least reach the limit of common law liability.

Although the instant court cited *Piquet v. Wazelle*[23] to the effect that an automobile is not an inherently dangerous instrument, it is submitted that this is not to say that an *eight-ton truck* is not, or at least *cannot* be, an inherently dangerous instrument (even in the hands of a licensed driver), especially when the driver has had little or no truck driving experience. Although a valid Pennsylvania operator's

20. 283 Pa. 366, 129 A. 88 (1925). See discussion at note 13, *supra*.

21. *E.g.*, IOWA CODE § 321.493 (1966):

> In all cases where damage is done by any motor vehicle by reason of negligence of the driver, and driven with the consent of the owner, the owner of the motor vehicle shall be liable for such damage.

See also *Mich.* — § 9.2101, 401 (1949); *New York Veh. & Traf.* § 388 (McKinney 1959).

22. *E.g.*, CAL. VEHICLE CODE § 17150 (West Supp. 1967):

> Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of a motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner.

See discussion of a prior similar provision of the California Vehicle Code at 14 HASTINGS LAW JOURNAL 436 (1963).

23. 288 Pa. 463, 136 A. 787 (1927).

license may be prima facie evidence of competence to operate an automobile, surely it should be a rebuttable presumption, at best, as to the holder's competence to drive the type of vehicle involved in the present case.

There is an increasing volume of truck rentals today. In addition to the major rental companies, there are scores of others leasing trucks for do-it-yourself moving jobs. An increasing number of gas stations have trucks available for hire. In view of this, it would seem that the court should have approached the issue from the point of view of public safety. As a result of the instant decision, it is apparently now the law in Pennsylvania that anyone who can produce a valid Pennsylvania operator's license can go to a rental office, rent a large and powerful vehicle and drive it onto the public streets, and the rental company will be free of liability for the driver's negligence—whether or not the lessee is, in fact, inexperienced or incompetent to drive such a vehicle.

It is submitted that although a valid operator's license is prima facie evidence of competence to operate an automobile, the lessor of a larger and more powerful vehicle should have *more* of an obligation than merely asking to see a driver's license. Perhaps in *Littles*, the lessor *had* discharged that obligation by asking if the lessee had had any previous truck driving experience. However, the matter of whether or not the lessor had acted in a reasonable manner in believing the driver was "competent" was a question of fact, which should have been determined by a jury, as suggested by the dissent.[24]

The majority stated there was "no evidence of any knowledge on the part of the lessor of lessee's inability to drive a truck or any reason for lessor to have taken any more precautions than it did before leasing the vehicle."[25] It seems just as valid to say that there was no real evidence of lessee's *ability* to drive such a vehicle, and that it was incumbent upon Avis to determine the driver's ability before leasing the truck. The majority also said it was "quite possible . . . the accident was not due to the inexperience or incompetency of the driver, but rather to mere lack of attention or error in judgment on his part."[26] The reverse was *also* quite possible, i.e., that the accident *did* result from his inexperience or incompetence, and therefore this also appears to be a question within the province of a jury.

24. 433 Pa. at 78, 248 A.2d at 839-840.
25. *Id.* Pa. at 75, 248 A.2d 837 at 838-839.
26. *Id.*, 248 A.2d at 838.

In an action between an innocent third party and a rental company which chose to lease a large and powerful truck relying simply on the lessee's having a valid driver's license, it would certainly appear that *Restatement* § 390 could easily apply; and the questions of whether or not lessee was "incompetent" or "inexperienced," and whether or not the lessor knew or should have known of the incompetence or inexperience were questions for jury determination. It does not appear to be unreasonable to include this risk as a part of the "cost" of engaging in the truck leasing business.[27]

In this connection, it appears to be relevant that the Pennsylvania Motor Vehicle Code was amended in 1968 to require a special test to qualify a person to operate a motorcycle. Upon qualification a special notation is made on the operator's license, and the statute specifically provides that "any licensee whose operator's card has not been so marked and who operates a motorcycle shall be deemed to be operating a motor vehicle without a valid license."[28]

It appears to be somewhat ironic that in a state which requires one to take a special test before he is qualified to operate a motorcycle, the Supreme Court requires no "special" precautions by a lessor before he entrusts a lessee with an eight-ton truck.

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27. The Justices said that if one engages in the business of renting automobiles to persons of unknown responsibility it is not unreasonable to require him to be responsible for any damage which such person may inflict on the general public.

28. PA. STAT. ANN. tit. 75, § 608(b) (Supp. 1968).