Shifting Gears: Updating New York VTL §388 and Restoring Protection for Vehicle Owners

New York Vehicle and Traffic Law §388 (hereinafter VTL §388) holds vehicle owners vicariously liable for any accidents when their vehicle is operated by another person. This liability is rooted in the presumption that vehicle owners consent to the operation of their vehicle by others, and this presumption may only be overcome by a showing of substantial evidence to the contrary. An owner's consent may be express or implied. Distinguishing between the two is dependent on the facts of each case.

The legislative intent of the statute is to urge vehicle owners to exercise caution and good judgment when allowing others to use their vehicle and not to hide behind self-serving claims that their vehicle was used without their permission. The interpretation of the statute by the courts has set a high bar for vehicle owners to rebut the strong presumption of permissive use. Recent decisions demonstrate that owners of vehicles may have more protection from the statute than previously believed.

Allstate Ins. Co. v. Shim, 185 A.D.3d 919 [2d Dep't 2020] addresses the issue of whether an owner who surrenders her vehicle to a mechanic for a repair may be liable for an accident. Ashley Johnson, a Pennsylvania resident, dropped her car and keys off at Murph's Garage in Coatesville, PA, so that her vehicle could be repaired. Johnson testified that she did not give Murph or anyone at the garage permission to drive the car, with the exception that someone at the garage may "have to test drive [the car] around the block, but that's it." *Id*. at 920. After Johnson dropped off the car, Sheroon Shabazz, a family member of one of Johnson's friends, reached out to Johnson about purchasing her car. Unbeknownst to Johnson, Murph allowed Shabazz to take the vehicle. The vehicle eventually came into possession of defendant-driver Frierson, who was operating the vehicle at the time of the accident in New York.

Consent to operate another's vehicle is traditionally presumed, however, there are obviously limits. The Second Department ruled in favor of Johnson and held that the presumption of permissive use was rebutted by substantial evidence. Johnson was explicit in her conversation with Murph that no one at the shop or elsewhere was permitted to drive the car, aside from a "test drive…around the block." The fact that the car ended up in New York is evidence of Johnson's lack of consent. A trip to New York is not a test drive around the block. Johnson was shielded from liability.

This ruling followed the holding in *Croke v. Osburn*, 32 Misc. 3d 1233(A) (N.Y. Sup. Ct. 2011). In *Croke*, the defendant-vehicle owner left his keys with a repair shop to have a flat tire fixed. The defendant stated that he assumed the keys needed to be left with the repair shop to unlock the vehicle, but at no time during the transaction did he give the repair shop any authority, express or implied, to operate the vehicle, even for a test drive. The co-defendant repair shop contended that leaving the keys with the repair shop qualified as implied consent to operate the vehicle. The Court held that this argument was merely speculative, and the owner was not held liable for plaintiff's injuries.

In *American Country Insurance Co. v. Umude*, 176 A.D.3d 542 [1st Dep't 2019], the defendant owned a Cadillac Escalade and used it as a limousine for hire. He parked the car at his mother's house in preparation for a trip he was making to the airport the next day. While he slept, his brother took the keys to the vehicle from defendant's jacket pocket. Defendant later received a call from a police officer that his brother was injured in an automobile accident. Defendant searched for his keys to drive to the hospital, only to find that both his keys and his car were gone.

Upon arrival at the hospital, defendant made a statement to a police officer that he disavowed his brother's use of his vehicle. Defendant filed a police report, formally stating that he did not give any permission to his brother to operate his vehicle. Though the Court emphasized that "disavowals by the owner…without more, should not automatically result in [a ruling in favor of] the owner," *id*, the disavowal, coupled with the police report, were sufficient to negate the presumption of permissive use. Defendant was not found liable to the injured party in the accident.

Even in instances where a vehicle owner gives a person explicit consent to operate his vehicle, liability is not automatically assumed by the owner. In *Shepard v. Power*, 190 A.D.3d 63 [2d Dep't 2020], the plaintiff's decedent was operating defendant's vehicle with defendant's permission, but tragically lost control of the vehicle, struck a guardrail, and was killed. Plaintiff, both individually and as the administrator of his decedent's estate, commenced an action against the defendant-owner seeking to recover damages stemming from the accident caused by the decedent-driver's own negligence. The Second Department stated that the statutory purpose of VTL §388 was to alleviate the harshness of the common law rule that vehicle owners could only be held liable for the negligent driving of their employees or agents. By expanding the scope of liability for vehicle owners, VTL §388 allows persons injured by negligent drivers to have access

to a financially responsible insured person against whom to recover for injuries. The expansion of liability is not without its limits. In prior cases, plaintiffs have been third parties, not the operator of the vehicle owned by a defendant. The Court here recognized that allowing negligent drivers to recover damages for their own negligence simply because the vehicle they were operating was owned by someone else would set a dangerous precedent that would result in unfair judgments.

Heins v. Vanbourgondien, 180 A.D.3d 1019 [2d Dep't 2020] limits the ability of plaintiffs to recover against vehicle owners for their own negligence when consent to operate the vehicle was implied. Here, defendant-owner entrusted her vehicle to her daughter who then allowed plaintiff to operate the vehicle. Plaintiff swerved the vehicle into a median, causing the vehicle to roll over before coming to a stop. Plaintiff pled several causes of the accident and brought action against several parties, including the owner of the vehicle, who plaintiff claimed implicitly consented to plaintiff's operation of the vehicle. Even if this implicit consent existed, the Second Department declined to "expand the scope" of VTL §388 to include vehicle operators. The Court underscored §388's purpose: to allow "innocent third parties," not vehicle operators, to recover from owners. *Id*. at 1024.

Piano Exchange v. Weber, 168 A.D.3d 1017 [2d Dep't 2019] holds that careless behavior by a vehicle owner does not necessarily create liability. Defendants parked their Range Rover in their driveway and routinely left the keys to the vehicle in the glove compartment of another vehicle also parked in their driveway. Two individuals discovered the keys to the Range Rover in the glove compartment of the other car, stole the Range Rover, and crashed it into another vehicle. Plaintiff sued defendants for negligence based on their leaving the keys in the glove compartment of the other vehicle. Applying VTL §388, plaintiff sought to use the presumption of permissive use to hold defendants liable. The Second Department found the defendants demonstrated a prima facie entitlement to judgment as a matter of law because their testimony showed that the Range Rover was parked in their private driveway with the keys left in another vehicle, also in their driveway. Though their actions may have been irresponsible, their actions did not constitute consent for the two individuals to steal and use their car, and under VTL §388, the actions of the owners were not the basis of liability.

Courts are reluctant to protect vehicle owners from vicarious liability for the actions of intoxicated drivers. In *Williams v J. Luke Constr. Co., LLC*, 172 A.D.3d 1509 [3rd Dep't 2019], the Court found that an employee's breach of a company policy while operating a vehicle will not necessarily protect an employer from liability. An employee-defendant was driving to a job site when he struck plaintiff's car head-on, injuring plaintiff. His employer claimed he breached

a company policy because defendant drove the company vehicle while intoxicated. The employer argued that the unwritten company policy was an "unambiguous and unequivocal agreement restricting authorization" which "negates an owner's liability." *Id*. at 1512. The Court rejected this argument, stating that a policy restricting intoxicated driving is more closely aligned with controlling how the vehicle is operated rather than a restriction on who may operate the vehicle. The employee had his employer's permission to operate the vehicle despite his intoxication, making defendant-employer liable to plaintiff. In these instances of gross negligence by drivers, vehicle owners will be held responsible.

Courts have interpreted what constitutes a vehicle under VTL §388. *Wright v O'Leary*, 172 A.D.3d 1495 [3rd Dep't 2019] holds that VTL §388 applies only to "motor vehicles" driven on "public highways." A motor vehicle is any vehicle "propelled by any power other than muscular power," excluding farm equipment and "all-terrain type" vehicles, and s public highway is "[a]ny highway, road, street, avenue, alley, public place, public driveway or any other public way." *Id*. at 1496. In *Wright*, defendant's teenage son was operating defendant's John Deere Gator Utility Vehicle (hereinafter vehicle) on defendant's private property with plaintiff's teenage son in the passenger seat when the vehicle overturned, injuring plaintiff's son. Plaintiff's father sued defendant and attempted to hold him liable under VTL §388 and other statutes. Defendant was found liable for negligently entrusting his son to operate the vehicle but was not found liable under VTL §388 because the vehicle did not fall within the statutory definition of a vehicle and the accident did not occur on a public highway.

Conclusion

VTL §388 holds vehicle owners accountable and ensures that victims of accidents involving a vehicle owned by a person but driven by a non-owner could seek financial redress for their injuries. Recent applications of VTL §388 by New York Courts have protected owners from liability where their vehicles are clearly used without their consent.

Andrea M. Alonso and Kevin G. Faley are partners in the firm of Morris Duffy Alonso Faley & Pitcoff. Bradley Austin, a paralegal, assisted in the preparation of this article.