INSURANCE LAW

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The Confluence of Vehicle & Traffic Law §388 and VTL §1210(a)

In our previous article,[1] we discussed the presumption of permissive use that arises under Vehicle & Traffic Law (VTL) §388, which imputes liability to the owner of a motor vehicle (except for car leasing and rental companies)[2] for negligence in the use or operation of the vehicle by any person using the vehicle with the owner's express or implied permission, and we noted that this presumption can be rebutted and overcome by "substantial evidence to the contrary."

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In an earlier article,[3] we noted that "Even when the presumption of permissive use is overcome and it is clearly established that the vehicle was stolen or operated without permission, there may still be liability imposed upon the owner of the vehicle based upon a violation of VTL §1210(a), the "key in the ignition statute."[4] As we wrote at that time, the court, in *Guaspari v. Gorsky,* 36 AD2d 225, 228 (4th Dept. 1971), explained §1210 as follows: "The statute changed the prior case law and it is now clear that the intervention of an unauthorized person no longer operates to break the chain of causation. Its purpose is twofold: (1) as a public safety measure designed to protect life and property of others by conferring a cause of action upon anyone damaged as a consequence of its violation and (2) as a deterrent to theft. (*Matter of Smith (MVAIC),* 57 Misc2d 576, mod. 34 AD2d 629; *Padro v. Knobloch,* 28 Misc2d 898; *Kass v. Schneiderman,* 21 Misc2d 518)."

'Merchants v. Haskins'

One of the more interesting cases in the past several years dealing with the confluence of the presumption of permissive use and the "key in the ignition" statute is *Merchants Insurance Group v. Haskins,* 11 AD3d 694 (2d Dept. 2004). In that case, a van owned by Mr. Shepley and insured by Allstate was involved in an accident that resulted in injuries to Haskins, an occupant of another vehicle (insured by Merchants). At the time of the accident, Mr. Shepley had loaned the van to his friend, Donati. Donati left the van parked on a public roadway with the keys on the dashboard, without concealing them in any way, and the vehicle was subsequently stolen. Neither Mr. Shepley nor Mr. Donati was operating the vehicle when it was involved in the accident. Allstate denied coverage based upon the theft of the vehicle. A claim for uninsured motorist benefits was thereafter made by Haskins against Merchants, which then sought a permanent stay of arbitration on the ground that the vehicle was insured by Allstate.

Although the Supreme Court held that Allstate and/or its insured, Mr. Shepley, were not responsible for the loss, on appeal, the Appellate Division, Second Department reversed, and found that Mr. Donati was a permissive user who violated VTL §1210(a), thus "precipitating the theft, and the resulting injuries to the claimant." Accordingly, the court held that Allstate's policy "was in effect at the time of the accident," i.e., was applicable to cover Haskins' damages, and granted Merchants a permanent stay of arbitration.

Question Presented

In *Merchants,* supra, VTL §1210(a) functioned as a liability link to the owner of the vehicle notwithstanding the fact that he was not the one who violated the statute because the actual violator was a permissive user and the scope of his permission was unlimited and unrestricted. Under such circumstances, the chain connecting the thief to the owner was unbroken. The question naturally arises, then, whether the same result would or should obtain when the permission granted to use the vehicle is conditioned, or restricted, in some way—for example, permission to drive only in a certain locality or at a certain time, or instructions not to allow any passengers—and an accident occurs after the restriction has been breached and §1210(a) has been violated by the user? In such cases, may it properly be argued that the link to the owner was broken and, therefore, the owner (and his insurer) should be exempt from liability, which should rest solely with the violator?

General Rule

In numerous (non-VTL §1210[a]) cases, the courts have upheld conditional or restricted permissions and found that the use of a vehicle outside the scope of the permission granted exonerated the owner from liability. Thus, in *Murdza v. Zimmerman,* 99 NY2d 375 (2003), the Court of Appeals observed that "we have noted that where 'substantial evidence established that permission was conditioned upon driving in a certain locality only or conditioned upon instructions not to allow any riders, the owner was exonerated from liability when an accident occurred subsequent to a breach of the restriction [citing *Leotta v. Plesinger,* 8 NY2d 449, 461 (1960)]."

In *Walls v. Zuvic,* 113 AD2d 936 (2d Dept. 1985), the court held that "in granting permission for the use of an automobile, the owner may limit its use to a specific area or purpose. Any use outside of this scope of permission negates the owner's liability under VTL §388. And, in *Clarke v. Longo,* 132 Misc2d 39 (Sup. Nassau 1986), the court stated that "where the operator of a vehicle has restricted permission to use the owner's automobile for a specific purpose, any breach of that restriction by the operator exculpates the owner from liability."

In the following cases, the presumption of permissive use was held to be overcome where the evidence established a use beyond and/or contrary to the scope of permission granted by the owner:

- *Chaika v. Vandenberg,* 252 NY 101 (1929): owner's son disregarded owner's limitation upon the use to which he might put the car; owner told him he could use it for a trip to Long Island, but not take it into the city.
- *City of New York v. LoCicero,* 43 NYS2d 52 (App. Term, 1st Dept. 1943): vehicle operated by corporate

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defendant and its employee against the express orders of the owner.

- *Conch v. Cushman's Sons, Inc.*, 277 AppDiv 360 (1st Dept. 1950): driver violated owner's instructions not to permit anyone to ride on owner's trucks (and vehicle had a "No Riders" sign).
- *Lozada v. Copeland*, 207 Misc2d 382 (Sup. Kings 1955): statute does not impose liability upon an owner where permission to use the car is given only for a particular territory; owner's cousin told to operate the vehicle in the vicinity of Ebbets Field only.
- *Aetna Cas. & Sur. Co. v. Santos*, 175 AD2d 91 (2d Dept. 1991): no permission to use vehicle except in an emergency; use of car to attend Department of Social Services appointment was not an emergency; therefore, presumption rebutted.
- *Jimenez v. Regan*, 248 AD2d 510 (2d Dept. 1998): owner explicitly told daughter's boy friend he was not permitted to drive the vehicle; daughter let him drive.

Repair Shop Conundrum

One of the more common situations where these questions may arise is where the owner brings his car to a body shop or repair shop and, naturally, leaves the keys with the shop's proprietor. Although it is reasonable to assume that permission to use the vehicle is granted to the shop owner and his employees for the purpose of moving the car while it is on the shop's premises, i.e., from the parking area to the repair dock, etc., and even, in certain situations, for the purpose of performing a test drive, such implied permission is not without limits.

In *Svenson v. Zakrocki*, 268 AD2d 777 (2d Dept. 1944), the owner delivered his car to an auto mechanic for the purpose of making repairs. The mechanic took the car for a trip during which he made tests, and invited the plaintiff, along with the mechanic's wife and baby, for the ride—without the owner's knowledge. The plaintiff was injured when an accident occurred during this trip.

Notwithstanding that the owner knew in advance that a road test would be necessary and failed to give the mechanic specific instructions not to take passengers in the car, the court held that the owner was not liable for the plaintiff's injuries. As stated by the court, "It was not the intention of the Legislature that the provisions of [the predecessor of VTL §388] should insure the safety of passengers riding in a car which had been left in the custody of a repairman for the purpose of making repairs, when the passengers were in the car for their own benefit and enjoyment through no invitation of the owner, express or implied, but through the invitation of the repairman, who had no authority, express or implied, to invite them. Such an owner reasonably could not have contemplated or anticipated that his car would be used upon the street or roadway for any such purpose."

In *Malone v. Liss, Inc.*, 5 Misc2d 1002 (City Ct. Kings Co. 1957), the owner brought his car in for service on its brakes. While at the shop, the vehicle was dispatched to another location and was taken by an employee of the shop—who was unlicensed —and who got into an accident 2 or 3 miles from the shop. In ruling in favor of the owner on the issue of permissive use, the court held that "even though (the owner) had reason to assume needed repairs by defendant Liss Inc. would require [a test drive] and, thus he might be charged with implied assent to such use, this consent can only be implied as to lawful acts on the part of the defendant Liss and clearly not from a personal usage by the latter for other than a required test for a reasonable distance and period of time at the hands of one lawfully entitled to be entrusted with a motor vehicle on or about the streets of New York...."

In *Celani v. Interstate Motor Freight Systems, Inc.*, 30 AD2d 772 (4th Dept. 1968), the court recognized that although an owner is liable when an accident occurs during a road test incidental to the garage's repairs, he is not liable if the garageperson or employees put the vehicle to a personal use. See also, most recently, *Padilla v. Felson*, __AD3d__, __NYS2d__, 2006 WL 948096 (2d Dept. 2006) (owner not liable where repair shop employee used vehicle without express or implied permission to drive to a dealership to pick up parts for another vehicle).

Contrary Result

In *GEICO v. Delacruz*, Sup. Ct. Queens Co., Index No. 12809/03 (a case in which the authors recently were involved), however, the court reached a different conclusion under a different set of facts. There, the owner brought his vehicle to a body shop for collision damage repairs, gave keys to the mechanic and left the cle on the shop's premises. The mechanic repaired the vehicle and informed the owner to pick it up later that day. In order to prepare the vehicle for pickup, the mechanic moved it out of the repair area to a location on the public street in front of the body shop, where he left the vehicle unattended, with the keys in the ignition. Shortly thereafter, an employee of the body shop witnessed the vehicle being driven away (by a stranger) and notified the police that the vehicle was stolen. The vehicle was subsequently involved in an accident in which bodily injuries were sustained by the operator of another vehicle.

At the framed issue hearing held in the context of the injured party's claim for uninsured motorist benefits, the undisputed testimony—from both the owner of the vehicle and the mechanic—was that the body shop did not have permission to operate the vehicle anywhere other than on its immediate premises. The work to be performed was body work only—there was no need and, therefore, no contemplation or anticipation of a road test—off the premises. There was no permission to use the vehicle on the street—which is where, of course, the accident took place—for a ride off the premises.

Under those circumstances, the owner's insurer argued that there was and should be no liability on his part because he never gave permission to the body shop to use the vehicle on the street. Further, they contended that permission or consent to drive the vehicle off the premises of the body shop could not be transferred from the body shop to a third party because the body shop never had such consent to transfer.

Thus, even if the "key in the ignition" statute applied under the circumstances presented, it could not be construed to create any greater connection to the owner than if the body shop actually and expressly gave consent to its employee or a friend to take the vehicle for an off-premises, personal purpose ride. Since the vehicle was used by the mechanic in violation or in excess of the scope of permission granted, the link to the owner was broken.

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The uninsured motorist carrier, on the other hand, argued that this factual scenario was conclusively governed by the decision in *Merchants Ins. Group v. Haskins*, supra, and that the mechanic was a permissive user and was within the scope of his permission when he parked the vehicle in the street because it was reasonable to conclude that the owner gave him the keys for the purpose of moving the vehicle around within the general shop area.

Faced with these contrary arguments, Justice Jaime Rios granted the UM carrier's petition to stay arbitration upon his determination that the owner (and his insurer) were liable for the claimant's injuries. Specifically, the court found that the owner gave the mechanic "direct permission...to operate the vehicle in whatever reasonable fashion is necessary to accomplish the ends of repairing damage to the body of the vehicle." He further stated that it was "disingenuous" for the owner to contend that the mechanic had no right to move the car—even to the street just outside the shop—and suggested that the owner must have known and understood when he gave the keys to the mechanic that there would be movement of the car while it was in the mechanic's custody.

Further, the mechanic did not use the car to travel to another destination, or for his own purposes, but, rather, solely to facilitate his work. The court thus concluded that "the movement of the vehicle to the driveway intersection within the public street is certainly something that is reasonable and can be anticipated by any person who had ever taken their car to a body shop to be repaired."

Insofar as, in the court's view, there was no violation of the scope of permission granted by the owner to the mechanic, and "it was certainly negligent behavior on the part of the repair shop to leave...the keys inside directly in the ignition—in violation of VTL §1210(a)—the link to the owner remained intact and, consistent with *Merchants Ins. Group v. Hawkins*, supra, liability was imposed on the owner.

1. Dachs, N. and Dachs, J., "Rebutting the Presumption of Permissive Use," NYLJ, March 14, 2006, p. 3, col. 1).

2. See Subchapter 1 of Chapter 301 of Title 44, United States Code, eff. Aug. 10, 2005.

3. Dachs, N. and Dachs, J., ("Stolen Vehicle and the 'Key in the Ignition' Law," NYLJ, July 14, 1998, p. 3, col. 1).

4. VTL §1210(a) provides that "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle, and effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to curb or side of the highway, provided, however, the provision for removing the key from the vehicle shall not require the removal of keys from sight about the vehicle for convenience or emergency."