Evidence–Identity of Driver in Absence of Direct Evidence

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cluded that the competition between the parties was centered around and greatly effected "the point where the profit was reaped."

It is uncertain how many of the states would agree with the doctrine of unfair competition presented in the present case. Some courts have refused to extend the doctrine of International News Service v. Associated Press, supra, beyond its precise facts. R.C.A. v. Whiteman, 114 F.2d 86 (2d Cir. 1940), Raenore Novelties Inc. v. Superb Stitching Co., 47 N.Y.S.2d 831 (1944). Other courts in determining what constitutes unfair competition still rely on the "passing off" aspect. Crump Co. v. Lindsay, 130 Va. 144, 107 S.E. 679 (1921).

In determining unfair competition in West Virginia the court held in Household Finance Corp. v. Household Finance Corp., 11 F. Supp. 3 (N.D. W. Va. 1935), that the general purpose of the law of unfair competition was to prevent one person from passing off his goods or his business as goods or business of another. In another West Virginia case, General Shoe Corp. v. Rosen, 29 F. Supp. 102 (S.D. W. Va. 1939), it was determined that the test of unfair competition was whether the acts of the defendant were such as were calculated to deceive the ordinary buyer making his purchases under the ordinary conditions which prevailed in the particular trade and if the acts of the defendant were such as would probably deceive the public with whom he dealt, these acts would constitute unfair competition.

On the basis of these decisions it would seem that West Virginia would not follow the doctrine of the International News case and would still rely on the "passing off" element for establishing unfair competition. However, the view of the court of any particular jurisdiction on this problem could well be an academic point, as federal regulatory action appears imminent.

Eugene Triplett Hague, Jr.

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Two wrongful death actions arising out of a one car collision in which all three occupants were killed were consolidated for trial. The facts were stipulated: D's decedent was the owner of the car; all three occupants were licensed operators; the accident occurred when the vehicle failed to make a curve, ran off the road, and struck a tree; there were no eyewitnesses. The description of the physical
facts as they appeared after the accident was vague, but testimony tended to show that the body of one of Ps' decedents was found inside of vehicle and that the other two occupants were thrown clear. The evidence as to the position of these two bodies in relation to the wreckage was conflicting. The trial court directed a verdict for D. Held, reversed. The record presented facts sufficient for jury consideration. The physical facts and the inferences legitimately drawn from them presented a prima facie showing that D's decedent was the operator of the automobile at the time of the accident. Spaur v. Hayes, 126 S.E.2d 187 (W. Va. 1962).

This case presents a unique factual situation in which all of the occupants of the vehicle were killed in an accident to which there were no eyewitnesses. Thus the very practical problem of how to make a prima facie showing of who was the driver at the time of the collision is raised. In cases with similar factual situations the courts have used different theories to overcome the problems involved in establishing the driver's identity. Sometimes habit evidence has been utilized and often presumptions have been relied upon. But in most cases the courts have had to face the problem of whether the physical evidence at the scene of the accident was sufficient to raise a jury question as to the identity of the driver at the time of collision.

When a person is in the custom or habit of doing or not doing a certain thing, evidence of such habit would tend to show that the probabilities are that he did or did not do that thing on the occasion in question. But evidence of a driver's habits is generally not admitted where there is ample evidence of his conduct at the time of the accident. Jackson v. Chesapeake & O. Ry., 179 Va. 642, 20 S.E.2d 489 (1942). But the absence of direct evidence may lead the courts, of necessity, to admit habit evidence for what probative value it has. Graham v. Commonwealth, 127 Va. 808, 103 S.E. 565 (1920). In Fuller v. Bailey, 237 S.C. 573, 118 S.E.2d 340 (1961), the court held that the testimony of a witness, who was well acquainted with the defendant, to the effect that he had never seen anyone else drive defendant's car was competent circumstantial evidence tending to support a reasonable inference that the defendant was the driver of the car at the time of the accident. And in Judd v. Perkins, 83 N.H. 39, 138 Atl. 312, 314 (1927), the court held that "it is not erroneous to permit evidence of custom, where there is no direct proof of the party's behavior on the particular occasion." However, in some jurisdictions evidence of the deceased's habits is held inadmis-
sible and incompetent even where there are no eyewitnesses to the accident. *Ashtown v. Tresise*, 26 Ohio App. 575, 160 N.E. 502 (1927); 9C BLASHFIELD, AUTOMOBILE LAW AND PRACTICE 6190 (Perm. ed. 1954).

No West Virginia cases were found in which the court took a stand on the admissibility of such habit evidence. However, the West Virginia court does admit proof of acts other than the one charged when such proof would tend to show the existence of a plan or system. *Shingleton Bros. v. Lasure*, 122 W. Va. 1, 6 S.E.2d 252 (1939). It is probable that, in the absence of direct evidence, the West Virginia court would tend to admit habit evidence for what probative value it is worth, if accompanied by proper instructions.

At common law the owner of a chattel would not be liable for the negligence of one using it in the absence of a situation invoking the principles of respondeat superior, except in those cases where the owner knows or should know the person so entrusted is incompetent to use it safely. But this rule as applied to automobiles has been abrogated in many states by legislation. PROSSER, TORTS § 66 (2d ed. 1955). Many of these statutes take the form of financial responsibility acts imposing upon the owner liability for the negligence of anyone operating his car with his express or implied consent.

The effect of such statutes has led to the adoption, in some jurisdictions, of a general rule to the effect that proof of the defendant's ownership of and his presence in a vehicle involved in an accident raises a rebuttable presumption that at the time of the accident the owner was operating the vehicle. *Limes v. Keller*, 365 Pa. 258, 74 A.2d 131 (1950); Annot., 32 A.L.R.2d 988, 989 (1953). In *Welty's Estate v. Wolf's Estate*, 345 Mich. 408, 76 N.W.2d 52 (1956), the car in which both occupants were killed belonged to defendant's decedent. Quoting from *Rodney v. Stamen*, 371 Pa. 1, 89 A.2d 313 (1952), the court held: "The fact [ownership] gives rise to a rebuttable presumption that he was driving at the time..." So the presumption arising from proof of ownership, if unrebutted by other evidence, is held to present a prima facie showing that the owner of the vehicle was the driver at the time of the accident. *Hilyard v. Duncan*, 21 Ill. App.2d 514, 198 N.E.2d 438 (1959). In the principal case, the court found it unnecessary to take a stand on this presumption and reserved the question until presented in a proper case.
Another presumption often relied upon where the facts warrant its application is that of a continuing situation. Thus where competent evidence shows that one was driving an automobile prior to an accident, he will be presumed to have continued as the driver. *Shirley v. Shirley*, 261 Ala. 100, 73 S.2d 77 (1954); Annot., 32 A.L.R.2d 988, 992 (1953). This is well illustrated by the first syllabus point in the opinion of *Erickson v. Paulson*, 251 Minn. 183, 87 N.W.2d 585 (1957), as follows:

"Where evidence indicated that the party killed in automobile accident was driving shortly before accident, jury might properly find that such party was driving at time accident occurred, but jury would not be compelled to so find where there is also evidence which would sustain contrary finding."

But in most of the cases found containing factual situations similar to that of the principal case, the courts have not had any presumptions to rely on, or have failed to apply them. Establishment of the driver's identity is thus dependent upon the inferences reasonably to be drawn from the physical facts at the scene of the accident and whether such circumstantial evidence is sufficient to raise a jury question or support a jury finding as to who was the driver at the time of the accident. In *Stegall v. Sledge*, 247 N.C. 718, 102 S.E.2d 115 (1958), the evidence was held sufficient "to permit, but not to compel, a jury to draw the legitimate inferences from the established facts that defendant's intestate was driving the car at the time of the fatal wreck." Accord, *Kimberly v. Reed*, 79 Ga. App. 137, 53 S.E.2d 208 (1949). But the courts have gone the other way on similar fact situations. *Parker v. Wilson*, 247 N. C. 47, 100 S.E.2d 528 (1957). Accord, *Shaw v. Sylvester*, 253 N.C. 197, 116 S.E.2d 351 (1960).

Thus it is seen that the establishment of the identity of the driver by means of circumstantial evidence puts a great burden upon the court. The "scintilla of evidence" rule, requiring a case to be submitted to the jury when there is any evidence to support the plaintiff's claim, has been abolished in most jurisdictions. But the definition of the term "scintilla" is an impediment to precision. One writer defines it as "a spark, the least particle." BLACK, LAW DICTIONARY (3d ed. 1933). To hold that any evidence, more than a mere scintilla, presents a jury question, would be meaningful only in relation to the construction given to the term "scintilla". There
must not only be some evidence tending to support the plaintiff's claim, but that evidence must be of such quality and quantity as to justify the jury in basing a verdict thereon in favor of the plaintiff. 10A Blashfield, Automobile Law and Practice sec. 6592 (Perm. ed. 1954). Otherwise the application of a rule involving such uncertain terms would lead into the realm of conjecture and verdicts based on the barest of possibilities. Cleveland-Akron Bag Co. v. Jaite, 112 Ohio St. 506, 148 N.E. 82, 84 (1925).

There can be no ready test to guide the judge in ruling on the sufficiency of such circumstantial evidence. Each ruling must necessarily depend upon the nature of the evidence in the case under consideration. In the words of Justice Cardozo, "One struggles in vain for any verbal formula that will supply a ready touchstone." Perhaps if the West Virginia Court had embraced the rebuttable presumption arising from ownership of the vehicle, trial court judges would have had a yardstick or touchstone to guide them should like situations arise in the future.

William Thomas Harrison

Evidence—Lie Detector Testimony Admissible on Stipulation

D, accused of possession of narcotics, agreed by written stipulation with his counsel and the prosecution to submit to a polygraph (lie detector) test, the results of which were to be admissible in evidence at trial. A polygraph operator was accordingly allowed to testify at trial over D's objection, and gave evidence unfavorable to D. D was convicted and, on a certified question, the Arizona Supreme Court held that lie detector evidence "has developed to a state in which its results are probative enough to warrant admissibility on stipulations," at the discretion of the trial judge. The parties were given the right to examine (a) the qualifications and training of the polygraph examiner, (b) the conditions under which the test was administered, (c) the technique of interrogation used, and (d) any other matters the trial court deemed pertinent. The jury was instructed that polygraph testimony does not tend to prove or disprove any element of the crime charged, but only indicates that at the time of the examination the accused was or was not telling the truth; and it is for the jury to determine the corroborative weight and effect such testimony should be given. State v. Valdez, 371 P.2d 894 (Ariz. 1962).