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ELRAC, Inc. v. Masara: Is the New York Court of Appeals Undermining the Concept of Permissive Use Under the Vehicle and Traffic Law?

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ELRAC, INC. V. MASARA: IS THE NEW YORK COURT OF APPEALS UNDERMINING THE CONCEPT OF PERMISSIVE USE UNDER THE NEW YORK VEHICLE AND TRAFFIC LAW?

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INTRODUCTION

In the 1930's, New York enacted Sections 370[2] and 388[3] of the New York Vehicle and Traffic Law. The statute's purpose was to guarantee that insurance coverage would be available to

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[2] N.Y. VEH. & TRAF. LAW § 370 (McKinney 1996) The statute states in pertinent part:

> Every person, firm, association or corporation engaged in the business of carrying or transporting passengers for hire in any motor vehicle or motorcycle . . . for damages for and incident to death or injuries to persons . . . or destruction of property; for each motor vehicle . . . such bond or policy of insurance shall contain a provision for a continuing liability thereunder . . . . Any such bond or policy of insurance shall also contain a provision that such bond or policy of insurance shall inure to the benefit of any person legally operating the motor vehicle or motorcycle in the business of the owner and with his permission, in the same manner and under the same conditions and to the same extent as to the owner.

[3] N.Y. VEH. & TRAF. LAW § 388 (McKinney 1996) The statute states in pertinent part:

> Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

injured parties in as many situations as possible.[4] Additionally, the purpose of the statute was to promote the public policy that an injured party would be able to seek redress from a defendant, even if the owner of the vehicle was not the actual person driving the car at the time of the accident.[5] Two sections -- Section 370 and 388 -- specifically extend the spirit of the statute to cover rental companies and their rentees by mandating that the rental company provide coverage to any permissive user of the automobile.[6]

The New York Court of Appeals recently decided *ELRAC, Inc. v. Masara.*[7] This decision now threatens to undermine the statutory intention and the policy behind Sections 370 and 388. This decision affects car rental companies as well as rentees; it also affects the rentees primary insurance company. In effect, *Masara* held if a person is not designated as a "permissive user" on the face of a rental car policy agreement, in the event of an accident the rental company may seek indemnification from the rentee for the full amount of damages caused by the driver's negligence.[8] This decision has narrowed the concept of "permissive use." Thus, rental companies have been completely freed of their statutory obligation to provide insurance to an entire category of drivers. This note will examine case law that has applied the New York Vehicle and Traffic Law Statute Sections 370 and 388 and determine if, in fact, the legislative intent behind the New York Vehicle and Traffic Law Statutes have been undermined by the recent New York Court of Appeals interpretation of the term "permissive use."

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[4] *Id.* This section was passed to establish liability where none existed, not to limit an existing liability. It fixes liability on an absentee owner where his or her car is being operated by another with his or her consent. Morris v. Snappy Car Rental Inc., 84 N.Y.2d 21, 28, 614 N.Y.S.2d 362, 364 (1994).

[5] *See* Utica Mut. Ins. Co. v. Lahey, 95 A.D.2d 150, 153, 465 N.Y.S.2d 553, 556 (2d Dep't 1983).

[6] N.Y. VEH. & TRAF. LAW § 388.

[7] 96 N.Y.2d 847, 729 N.Y.S.2d 60 (2001).

[8] *Id.* at 849, 729 N.Y.S.2d at 62.

II. STATUTORY HISTORY OF THE NEW YORK VEHICLE AND TRAFFIC LAW SECTIONS 370 AND 380

At common law, the owner of a motor vehicle who permitted another person to use the vehicle was not liable for that driver's negligence.[9] The only exception to that rule was for a plaintiff to seek recovery from the owner under a theory of *respondeat superior* or agency.[10] The New York Vehicle and Traffic Law Statute Section 388 was enacted to change the common law rule. In fact, New York Vehicle and Traffic Law Statute Section 388 imposes liability on owners of vehicles who allow another person to operate the vehicle.[11]

Regarding the term "permissive user," the New York Vehicle and Traffic Law Statute Section 388 has been interpreted by case law to mean that "permissive use" is the same as consent.[12] Case law has also defined that an owner of a vehicle may be liable for death or damages resulting from a driver's negligent use or operation of a vehicle when used with the owner's permission, express or implied.[13]

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[9] *See* ELRAC, Inc. v. Ward, 96 N.Y.2d 58, 73, 724 N.Y.S.2d 692, 697 (2001).

[10] *Id.* at 73, 724 N.Y.S.2d at 697 (The statutory presumption is that an automobile operated under an insured owner and with consent supports the policy that there should be recourse to financially responsible defendants for the negligent operation of a vehicle, provided they gave permission to the driver, express or implied, to operate the vehicle); *see also* Plath v. Jones, 28 N.Y.2d 16, 319 N.Y.S.2d 433 (1971); Miller v. Sullivan, 174 Misc.2d 690, 694, 666 N.Y.S.2d 892, 895 (Sup. Ct. Monroe County 1997).

[11] *Ward,* 96 N.Y.2d at 72-73 ("for the negligence of a person legally operating the car with the permission, express or implied, of the owner"); *see also* N.Y. VEH. & TRAF. LAW § 388.

[12] *See e.g.,* Darlow v. Drake Bakeries, Inc., 2 A.D.2d 749, 153 N.Y.S.2d 243, 244 (2d Dep't 1956), *aff'd,* 2 N.Y.2d 983, 163 N.Y.S.2d 598 (1957).

[13] N.Y. VEH. & TRAF. LAW § 388(1). *See e.g.,* Lincoln v. Austic, 60 A.D.2d 487, 401 N.Y.S.2d 1020 (3d Dep't 1978) The court examined evidence that the owner of a motor vehicle gave his son unrestricted use of the car. The court reasoned that during a short time prior to the actual accident, the son had given his friend implied permission to drive the vehicle. In fact, the son told his friend that he could use the car so long as he filled it up with gas. The court held this satisfied the definition of "permissive use," and thus

On the other hand, courts have also found where there is strong evidence that the defendant's automobile was used without permission, there is no "permissive use." Thus, liability resulting from an accident will not be imposed on the owner.[14] Ironically, these cases have been presented to the court on motions for summary judgment. This seems misplaced. Plaintiff's attorneys want the court to decide these cases based on the statute rather than a fact specific inquiry into each case. However, prior case law that has interpreted the language of the New York Vehicle and Traffic Law Statute Section 388 distinguish questions of facts from questions of law.[15] For example, in *Vincinere v. Ward,*[16] the court held that when there is contradictory testimony as to the "permissive use" of an automobile, the question of "permissive use" is for the jury.[17] In *Leotta v. Plessinger,*[18] the court reasoned it is "axiomatic that proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied, until there is evidence to the contrary."[19] If contested, it is "presented to the jury for final determination."[20]

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the statutory requirement of the New York Vehicle and Traffic Law Section 388. *Id.* at 490, 401 N.Y.S.2d at 1022.

[14] Aetna Cas. & Surety Co. v. Santos, 175 A.D.2d 91, 573 N.Y.S.2d 695, (2d Dep't 1991). *See e.g., Darlow*, 2 A.D.2d at 749, 153 N.Y.S.2d at 244 (where the court held that the defendant's automobile was not being used with his permission. The driver at the time of the accident was only hired to wash the vehicle. The court therefore reasoned that the driver was not given permission to use the automobile as he was on his personal time).

[15] Vincinere v. Ward, 259 A.D. 1019, 1020, 20 N.Y.S.2d 451, 452 (2d Dep't 1940), *aff'd*, 285 N.Y. 823 (1941)) (where the court upheld the granting of a motion to set aside a jury verdict, holding that the issue of permissive use was a material issue of fact and should therefore have been submitted to the trier of fact rather than decided by the trial judge).

[16] *Id.*

[17] *Id.* at 1019-20, 20 N.Y.S.2d at 452; *see also Lincoln*, 60 A.D.2d at 491, 401 N.Y.S.2d at 1022.

[18] 8 N.Y.2d 449, 459, 209 N.Y.S.2d 304, 312 (1961).

[19] *Id.*

[20] *Id.* at 460, 209 N.Y.S.2d at 312-13.

III. PUBLIC POLICY UNDERLYING THE NEW YORK STATUTES

Older New York case law rests on solid public policy and crystallizes the legislative intent which prompted the New York Vehicle and Traffic Law Statutes Sections 370 and 388. For example, in *Motor Vehicle Accident Indemnification Corp. v. Continental National American Group*,[21] the court reasoned that restrictions excluding coverage for a permitted driver but not deemed a "permissive user" on the face of the lease agreement violated the public policy of the state.[22] The court in *Motor Vehicle Accident Indemnification Corp.* reasoned that car rental agencies are not in the same position as private car owners.[23] In this case, the rentee gave his friend constructive consent to operate the rented vehicle to take his family to a funeral as he could not leave work.[24] The court held that restrictions placed on the rentee were against sound public policy and against the intent of the New York Vehicle and Traffic Law Statute Section 388.[25] The court reasoned that the rental company "knew or should have known the probability of the car coming into the hands of another person was exceedingly great."[26] The New York Court of Appeals concluded that any other interpretation of the statute would violate sound public policy or would "be placing an unreasonable limitation on the 'permission' contemplated by" the New York Vehicle and Traffic Law Statute Section 388.[27] The court reasoned that constructive consent was appropriate and therefore the statutory requirement was satisfied.[28]

However, in *Utica Mutual Insurance Co. v. Lahey*,[29] the court held that victims of an automobile accident could not

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[21] 35 N.Y.2d 260, 360 N.Y.S.2d 859 (1974).
[22] *Id.* at 264, 360 N.Y.S.2d at 862.
[23] *Id.* at 263, 360 N.Y.S.2d at 861.
[24] *Id.*
[25] *Id.*
[26] *Motor Vehicle Accident Indemnification Corp.*, 35 N.Y.2d at 264, 360 N.Y.S.2d at 862.
[27] *Id.*
[28] *Id.*
[29] 95 A.D.2d at 150, 465 N.Y.S.2d at 553.

recover from the rental company or their insurance carrier if the vehicle was operated without a "permissive user" designated on the rental agreement. The court reasoned although it is the state's policy to provide an injured party recourse to a financially responsible defendant, there are limitations on public policy.[30] Thus, an innocent accident victim may not recover from a car rental agency if the driver of a rented car was operating the vehicle without the permission of the car rental company.[31] However, the court implied if the rented automobile was being driven with the consent and permission of the rental company, the rental company would be responsible.[32] The court also reasoned that at the time of the accident, "there was no showing that the vehicle was being operated by an individual who had the lessee's permission."[33] The court ultimately held that "permissive use" was not established.[34] Interestingly, regardless of its holding, the court considered the relationship between the rentee and any "permissive users" that were designated.[35]

Motor Vehicle Accident Indemnification Corp v. Continental National American Group and *Utica Mutual Insurance Co. v. Lahey* are not in concert with each other nor is the latter in concert with prior cases that have interpreted the New York Vehicle and Traffic Law Statute Sections 370 and 388.

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[30] *Id.* at 153, 465 N.Y.S.2d at 555; *see also* Vasquez v. Christian Herald Assn., 186 A.D.2d 467, 468, 588 N.Y.S.2d 291, 292 (1st Dep't 1992).

[31] *Utica Mutual*, 95 A.D.2d at 153, 465 N.Y.S.2d at 555.

[32] *Id.* at 152, 465 N.Y.S.2d at 555. In this case, the rentee rented the vehicle for a period of one (1) day. He did not return the vehicle for an additional 21 days. The rental company wrote numerous letter to get the automobile back, instituted criminal charges, had an arrest warrant issued and contacted the rentee's family. The court held that under these circumstances "where the lessee was guilty of unauthorized use of a vehicle for a period of some 21 days beyond the term of his rental agreement and where the lessor/owner took all the necessary steps previously set forth, the victims should not be permitted to recover from the lessor/owner or its insurer". *Id* at 153, 465 N.Y.S.2d at 555-56.

[33] *Id.* at 152, 465 N.Y.S.2d at 555.

[34] *Id.* at 153, 465 N.Y.S.2d at 555.

[35] *Id.*

The New York Vehicle and Traffic Law Statute Section 370 also sets forth the responsibility for rental car companies in New York. In kin with the statutory requirements of Section 388(1), the Vehicle and Traffic Statute Section 370 requires common carriers, including rental companies, to obtain insurance or file a surety bond for their vehicles. Specifically, the requirements of this statute must "inure to the benefit of any person legally operating the motor vehicle in the business of the owner and with his permission, in the same manner and under the same extent as to the owner."[36] This provision is not defined in later case law.[37] Section 370 requires rental companies to provide minimum coverage for their rentees. Case law has held that rental companies are precluded from enforcing rental agreements to the extent those agreements deny coverage to rentees below the statutory minimum amount imposed by law.[38] There is also a requirement that the rentee indemnify the rental company for liability that falls in excess of the statutory minimum amount.[39] This rational is consistent with Section 3420 of the New York Insurance Law which requires "automobile insurance policies to cover not only the named insured but also any person operating or using the vehicle with the permission, express or implied, of the named insured."[40] New York case law has recognized the public policy that supports the New York Vehicle and Traffic Law Statute Section 388; in fact, this rational has been analougously applied to Section 370.[41]

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[36] *Utica Mutual*, 95 A.D.2d at 153, 465 N.Y.S.2d at 555; *see also* N.Y. VEH. & TRAF. LAW § 370.

[37] *See e.g.*, *Ward*, 96 N.Y.2d at 58, 724 N.Y.S.2d at 692; *see also Masara*, 96 N.Y.2d at 847, 729 N.Y.S.2d at 60.

[38] *See Ward*, 96 N.Y.2d at 78, 724 N.Y.S.2d at 701.

[39] *See* Worldwide Ins. Co. v. United States Capital Ins. Co., 181 Misc. 2d 480, 485-86, 693 N.Y.S.2d 901, 905 (Sup. Ct. N.Y. County 1999).

[40] N.Y. INS. LAW § 3420 (McKinney 2000).

[41] *Ward*, 96 N.Y.2d at 78, 724 N.Y.S.2d at 701.

IV. CAR RENTAL AGENCIES AND LIABILTIY INSURANCE

Basic automobile insurance policies have six different types of coverage that can be purchased.[42] Usually, rentees have their own primary insurance. However, if they do not, they can purchase insurance from the rental agency for an additional price.[43] Depending on what type of primary automobile insurance the rentee has, there may be no need to purchase additional automobile insurance from the rental agency.[44]

Courts in New York have held that "no public policy was violated by private contract making rental customer's insurance primary and rentees insurance secondary."[45] For instance, in *Miller v. Sullivan,*[46] the court held the statutory requirements were satisfied.[47] The court reasoned the rentee was free to either bargain for a lower rate with the rental company, rely on his or her own primary insurance coverage or even purchase additional coverage from the rental company for an added amount.[48]

The cost of insurance at the rental agency depends on several factors. The most important factor is the age of the rentee and the state where the car is rented.[49] New York law does not

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[42] Insurance Information Institute, *Do I Need Insurance to Rent a Car, available at* www.iii.org (last visited Jan. 7, 2002). The standard automobile insurance policy requires the driver to have (1) bodily injury liability; (2) Medical Payments or Personal Injury Protection (PIP); (3) Property Damage Liability; (4) Collision; (5) Comprehensive; and (6) Uninsured and Underinsured Motorist Coverage.

[43] *Id.*

[44] *Id.* (Specifically, if the driver already has collision and comprehensive coverage, this may be sufficient and no additional insurance may be required. If a driver does not have collision or comprehensive coverage on his or her primary automobile insurance policy, in the event the rental car is stolen or damaged in an accident, the driver or renter may be liable).

[45] Miller v. Sullivan, 174 Misc.2d at 697, 666 N.Y.S.2d at 897 (Sup. Ct. Monroe County 1997).

[46] *Id.*

[47] *Id.* at 695, 666 N.Y.S.2d at 896.

[48] *Id.*

[49] New York State Insurance Department, Collision Damage Waivers & Rental Vehicle Coverage: Some Questions & Answers, *available at* www.ins.state.ny.us/autorent.htm (last visited Jan. 7, 2002). This is an

allow car rental companies to sell Collision Damage Waivers on rented passenger cars.[50] In fact, New York "prohibits car rental agencies from, in most circumstances, holding the rentee liable for more than $100 in the event the automobile is stolen or damaged."[51]

V. HOW LAWSUITS UNDER THESE SECTIONS ARISE

It is well settled in New York that a rental company's insurer can "stand in the shoes" of its insured and bring a third party claim against a tortfeasor, the rentee, for the amount paid to the insured provided the insured has been made whole.[52] A rental company is able to seek indemnification from the rentee; sue the rentee directly or sue the rentee's primary insurance company by standing in the shoes of its rentee.[53] Subrogation is an equitable doctrine that entitles an insurer to "stand in the shoes" of its insured to seek indemnification from third parties whose "wrongdoing has caused a loss for which the insurer is bound to re-imburse."[54] The insurer has an equitable right to bring a subrogation action against a third party whose wrongdoing has caused a loss to its insured.[55]

In essence, the rental company can assert the rights of the rentee by bringing forth an action or defending an action on behalf of another person. Generally, an individual brings an action or defends an action in their own representative capacity.

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important factor that rental agencies take into consideration because they are giving out a car for personal use without doing a through background check on the individual in most instances. Some rental car companies may check the credit of the rentee and examine his or her prior driving history to determine if they qualify to rent an automobile.

[50] *Id.*

[51] *Id.* (Interestingly, what is not mentioned on the New York State Insurance Department's website is what is meant by the phrase "in most circumstances").

[52] *Ward*, 96 N.Y.2d at 76, 724 N.Y.S.2d at 699.

[53] *Id.* at 75, 724 N.Y.S.2d at 699.

[54] *Id.* at 75-76, 724 N.Y.S.2d at 699.

[55] *Id.*

The exception to the subrogation rule is the anti-subrogation rule.[56] Under this theory, an "insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered . . . ."[57] The purpose of this rule is to prevent an insurer from applying the doctrine of subrogation to avoid its duty to pay under its insurance policy.[58] A recent decision from the New York Court of Appeals reasoned " 'for the purposes of the anti-subrogation rule, there is simply no reason for treating a "permissive user" ' who qualifies as an insured under the policy 'differently than a named insured.' "[59] The court also stated that contrary to the arguments raised by the plaintiff, self-insurers are "not immune from anti-subrogation principles."[60]

VI. NEW YORK'S COURT OF APPEALS LANDMARK DECISION: *ELRAC, INC. V. WARD*

The undermining of the term "permissive use" began when the court departed from applying the principles of *Aetna Casualty & Surety Co. v. Santos.*[61] The *Aetna* court held that an automobile insurer must present sufficient evidence to rebut a strong presumption of "permissive use" under Section 388 of the New York Vehicle and Traffic Law where the driver of the vehicle at the time of the accident was not the actual rentee.[62] In *Aetna,* the driver testified that the owner of the automobile did not permit him to use the vehicle unless an emergency existed. The court reasoned that Section 388 of the New York Vehicle and Traffic Law did not classify the driver in this situation as being a

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[56] *Id.*

[57] *Ward*, 96 N.Y.2d at 75-76, 724 N.Y.S.2d at 699 (citing Pennsylvania Gen. Ins. Co. v. Austin Powder Co., 68 N.Y.2d 465, 470, 510 N.Y.S.2d 982, 985 (1986)).

[58] *Id.* at 76, 724 N.Y.S.2d at 699.

[59] *Id.* at 77, 724 N.Y.S.2d at 700 (citing Jefferson Ins. Co. v. Travelers Indemnity Co., 92 N.Y.2d 363, 374-75, 681 N.Y.S.2d 208, 214 (1998)).

[60] *Id.* at 73, 724 N.Y.S.2d at 697.

[61] *Aetna,* 175 A.D.2d at 91, 573 N.Y.S.2d at 695.

[62] *Id.*

"permissive user."[63] This is a very tight and narrow reading of the statute. However, it illustrates that courts have examined the relationship between the rentee and the driver of the vehicle. This case also illustrates that the New York Vehicle and Traffic Law Section 388 presumes "permissive use" exists unless there is evidence to the contrary presented to the court.[64]

Additionally, the holding of *Morris v. Snappy Car Rental, Inc.*,[65] re-affirmed the purpose and public policy behind Section 388 of the New York Vehicle and Traffic Law. The *Morris* court reasoned that the purpose of Section 388 was to:

> remove the hardship which the common-law rule visited upon innocent persons by preventing 'an owner from escaping liability by saying that his car was being used without authority or not in his business' . . . [the] linkage of an owner's vicarious liability to an owner's obligation to maintain adequate insurance coverage suggests that the Legislature's goal was to ensure that owners of vehicles that are subject to regulation in New York 'act responsibly' with regard to those vehicles.[66]

The main case that paved the way for *ELRAC, Inc. v. Ward* and its progeny was *Allstate Insurance Company v. Snappy Car Rental*.[67] In *Allstate Insurance Company*, the federal district court applying New York law held that contractual provisions obligating rentees to indemnify rental companies for liability were invalid if the indemnification sought to undermine or eviscerate the minimum amount of automobile liability insurance coverage required of every owner of a motor vehicle in the State of New York.[68] In essence, the court reasoned that primary liability could not be shifted from rental companies to customers, nor

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[63] *Id.*
[64] *Id.*
[65] 84 N.Y.2d 21, 614 N.Y.S.2d 362 (1994).
[66] *Id.* at 27, 614 N.Y.S.2d at 364 (citations omitted).
[67] 16 F. Supp. 2d 410 (S.D.N.Y. 1998).
[68] *Id.* at 411.

could primary liability coverage be shifted to customers' primary insurers entirely.[69]

In April 2001, the New York Court of Appeals addressed the issue of indemnification agreements between rentees and rental car companies.[70] The court clarified the amount of indemnification rental companies can seek from their rentee's. Specifically, the New York Court of Appeals decided that rental companies are permitted to seek indemnification from their rentees only for amounts in excess of the statutory minimum amount of insurance coverage.[71] The statutory minimum amounts imposed in New York are $25,000 for bodily injury, $50,000 for death, and up to $10,000 for property damages.[72] In *Ward,*[73] the New York Court of Appeals held that Section 370 of the New York Vehicle and Traffic Law required rental companies to provide a minimum amount of insurance for its vehicles.[74] Additionally, the court held that the rental company, in this case ELRAC, may only enforce an indemnification agreement in excess of the statutory minimum amount of insurance coverage required by the New York Vehicle and Traffic Law Statute Section 370.[75] In this case, ELRAC was prohibited from seeking indemnification from its renters for amounts less than the minimum liability requirement.[76] However, the court, on its own initiative, held that the insurance policy must "inure to the benefit" of the "permissive user".[77] The court reasoned that a rentee is a "permissive user" and therefore Section 370 of the New York Vehicle and Traffic Law is applicable.[78] Thus, the New York Vehicle and Traffic Law Section 370 required the

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[69] *Id.*

[70] *Ward*, 96 N.Y.2d at 58, 724 N.Y.S.2d at 692.

[71] *Id.* at 73, 724 N.Y.S.2d at 701.

[72] *Id.* at 73, 724 N.Y.S.2d at 697. In *Masara*, the Court specifically held that the amount of coverage for property damages is up to $10,000. 96 N.Y.2d at 847, 729 N.Y.S.2d at 62. *See also, infra* note 98.

[73] *Ward*, 96 N.Y.2d at 58, 724 N.Y.S.2d at 692.

[74] *Id.* at 78, 724 N.Y.S.2d at 701.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 72, 724 N.Y.S.2d at 697.

[78] *Ward*, 96 N.Y.2d at 72, 724 N.Y.S.2d at 697.

rental company to provide the minimum amount of insurance coverage to the rentee.[79] In writing this decision, the court stated the language of the New York Vehicle and Traffic Law Section 370 was "plain and precise."[80]

The *Ward* court relied on the anti-subrogation theory. Under the theory of anti-subrogation, an " 'insurer has no right of subrogation against its own insured to a claim arising from the very risk for which the insured was covered . . . even where the insured has expressly agreed to indemnify the party . . . .' "[81] The *Ward* decision was extremely imperative and timely. This case acknowledged that rental companies are allowed to seek indemnification from their rentees as long as the amount is above the statutory minimum required by the Section 370 of the New York Vehicle and Traffic Law.[82] The court reasoned, that "indeed, to further 'abrogate the right of indemnification' would disparage 'the important countervailing right of freedom of contract.'"[83] The New York Court of Appeals held that the standard indemnification clause presented to the rentee by the rental company violated public policy and the anti-subrogation rule. Thus, ELRAC could only seek indemnification from its lessees for amounts above the required minimum coverage.[84] This rule was not clearly set forth before this case was decided. Thus, this landmark case changed the policy and holdings for many cases that followed.[85] In essence, this case clearly explained the rights and obligations of rental companies as well as obligations of the rentee; at least insofar as indemnification agreements are concerned.

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[79] *Id.*

[80] *Id.*

[81] *Id.* at 74, 724 N.Y.S.2d at 698 (citing *Pennsylvania Gen. Ins. Co.*, 68 N.Y.2d at 470, 510 N.Y.S.2d at 985).

[82] *Id.* at 78, 724 N.Y.S.2d at 700.

[83] *Ward*, 96 N.Y.2d at 78, 724 N.Y.S.2d at 701 (citing *Morris*, 84 N.Y.2d at 28-29, 614 N.Y.S.2d at 364).

[84] *Id.*

[85] *See, e.g., Masarra*, 96 N.Y.2d at 847, 729 N.Y.S.2d at 61; *Haight*, 286 A.D.2d at 369, 728 N.Y.S.2d at 790; *AIU Ins. Co.*, 287 A.D.2d at 668, 732 N.Y.S.2d at 106.

The holding in *Ward* relied on the reasoning of prior case law. Specifically, in *Morris v. Snappy Car Rentals,*[86] the court reasoned that under New York State Vehicle and Traffic Law Statute Sections 370 and 388, a rental company is required to maintain minimum liability coverage for bodily injury, death and property damages.[87] The New York Court of Appeals in *Morris* stated there was "nothing in the statute's scheme, language, or legislative history suggests that a lessor/owner cannot by contract secure indemnification from a lessee/driver for liability stemming from the latter's negligence which exceeds the amounts for which owners are required to be insured."[88]

A string of cases emanated from the recent *Ward* decision.[89] The Appellate Division, Second Department followed the reasoning of *Ward* when it held an indemnification agreement valid and enforceable as long as it "exceeded the minimum amount of insurance it was required to maintain . . . ."[90] The court re-enforced the holding of *Ward* when it stated that to the extent the indemnification provision contained in the rental agreement sought total indemnification from the rentee, it is invalid under New York Law.[91]

VII. TAKING *ELRAC, INC. V. WARD* A STEP TOO FAR: *ELRAC, INC., V. MASSARA* AND ITS PROGENY

A few months after *Ward* was decided, the New York Court of Appeals expanded the *Ward* holding in *Masara.*[92] The court, on its own motion, rendered a rather solid, but

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[86] *Morris,* 84 N.Y.2d at 21, 614 N.Y.S.2d at 362.

[87] *Id.* at 28, 614 N.Y.S.2d at 255.

[88] *Id.*

[89] Haight v. Estate of DePamphilis, 286 A.D.2d 369, 371, 728 N.Y.S.2d 790, 792 (2d Dep't 2001); AIU Ins. Co. v. ELRAC, Inc., 287 A.D.2d 668, 669, 732 N.Y.S.2d 105, 106 (2d Dep't 2001); *Masara,* 96 N.Y.2d at 847, 729 N.Y.S.2d at 60.

[90] *Haight,* 286 A.D.2d at 371, 728 N.Y.S.2d at 790.

[91] *Id.* at 371, 728 N.Y.S.2d at 792 (citing *Ward,* 96 N.Y.2d at 78, 724 N.Y.S.2d at 701).

[92] *Masara,* 96 N.Y.2d at 847, 729 N.Y.S.2d at 60.

questionable decision. The court held that rental companies must provide minimum insurance to rentees under the New York Vehicle and Traffic Law Section 370 if it "inures to the benefit" of any "permissive user" of the rented automobile.[93] In *Masara*, the court rejected the defendant's argument that ELRAC could not seek indemnification from the defendant. In effect, *Masara* held if a person is not designated as a "permissive user" on the face of a rental car policy agreement, in the event of an accident the rental company may seek indemnification from the rentee for the full amount of damages caused by the driver's negligence.[94] The court reasoned because the driver of the vehicle was not a "permissive user" of the rented automobile, the statutory minimum did not "inure to his benefit." In this case, the court looked to the face of the rental agreement; it prohibited the rentee from allowing someone not on the rental agreement to operate the car. The rentee's father was operating the car and was involved in the accident. As a result, the rental company sought total indemnification from the rentee, including the statutory minimum amount it would have otherwise been required to provide under New York law.[95] That is all the court said. The court did not define the term "permissive use" or distinguish prior case law that defined "permissive use" as being express or implied. The *Masara* decision comes from the New York Court of Appeals and sets the precedent for the lower courts to adhere to.

The court in *Masara* also defined the extent that rental companies are responsible for property damages. Specifically, the court stated that Section 370 of the New York Vehicle and Traffic Law requires rental companies to obtain a maximum amount of coverage of $10,000 for property damages.[96] The legislature explicitly specified "minimum" coverage amounts for other types of injuries, but not for property damages.[97] Since New York Vehicle and Traffic Law Statute Section 370 specifies

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[93] *Id.* at 857, 729 N.Y.S.2d at 62; *see also* N.Y. VEH. & TRAF. LAW § 370.
[94] *Masara*, 96 N.Y.2d at 856, 729 N.Y.S.2d at 61.
[95] *Id.* at 857, 729 N.Y.S.2d at 62.
[96] *Id.*
[97] *Id.*

no minimum insurance requirement for property damages, a rental company may seek indemnification from its rentees for property damage awards to the extent otherwise legally permissible with a capped maximum of $10,000.[98]

New York courts have followed the reasoning in *Masara* without skipping a beat. Specifically, a recent decision on point illustrates that the New York Appellate Division, Second Department upheld *Masara's* interpretation of "permissive use."[99] In *AIU Insurance Company v. ELRAC, INC.*,[100] the New York Appellate Division held, in a one page opinion, that the insurance company was not obligated to defend or indemnify the

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[98] *Id.* The New York State Legislature proposed amendments to Section 1. Subdivision 1 and 3 of Section 388 of the Vehicle and Traffic Law to read as follows:

> A lessor of a vehicle, under an agreement to rent or lease such vehicle for a period of less than one year, shall be deemed the owner of the vehicle for the purpose of determining liability for the use or operation of the vehicle, but for not more than one hundred thousand dollars per person nor not more than three hundred thousand dollars per incident for bodily injury, and not more than fifty thousand dollars for property damage. If the lessee, renter or operator of the vehicle is uninsured or has any insurance with limits less than five hundred thousand dollars combined property damage and bodily injury liability, the lessor shall be liable for up to an additional five hundred thousand dollars in economic damages only arising out of the use or operation of the vehicle. The additional specified liability of the lessor or rental company for economic damages shall be reduced by amounts actually recovered from the lessee, from the operator, and from any insurance or self insurance covering the lessee, renter or operator. The limits on liability in this paragraph shall not ally to an owner of vehicles that are used for commercial activity in the owner's ordinary course of business, other than a rental company that rents or leases vehicles . . . .

For further information, see A.B. 6089, 224th Ass. Reg. Session. (N.Y. 2001). As of the date of this publication, this bill not been enacted.

[99] AIU Ins. Co. v. ELRAC, Inc., 287 A.D.2d 668, 669, 732 N.Y.S.2d 105, 106 (2d Dep't 2001).

[100] *Id.* at 668, 732 N.Y.S.2d at 105.

defendants.[101] Relying on the reasoning of *Masara*, the court held that the rental company was entitled to full indemnification because, at the time of the accident, an unauthorized driver was operating the car.[102] Based on the prior holdings of *Ward* and *Masara*, the rentee's violation of the rental agreement created the loophole for the rental company to wash their hands clean of all liability and responsibility.[103] However, if the court attempted to distinguigh *Masara* rather than just go along with the decision as if it had no other choice in the matter, the outcome may have been different.

The New York Appellate Division, Second Department, recently decided another decision that is in concert with *Ward.*[104] The *Haight* court held that "to the extent that the indemnification provision contained in ELRAC's rental agreement seeks total indemnification from the renter, it is invalid under New York law."[105] However, the facts of *Haight* were distinguishable from *AUI Insurance Co.*, as the renter of the vehicle was the actual driver that rented the vehicle. Thus, there was no opportunity to distinguish *Masara* and attempt to elaborate on the meaning of "permissive use." The court re-affirmed the principle holding of *Ward.*

VIII. IMPLICATIONS OF THE NEW YORK COURT OF APPEALS DECISION IN *MASARA*

The most important implication stemming from *Masara* is that it affects rental companies and their rentees. The court has narrowly defined the term "permissive use." In essence, rental companies have a loophole. Specifically, if the rentee does not designate a "permissive user" to the rental company, the rental company may avoid complete liability. Rental companies, based on recent New York case law, have to provide minimum

[101] *Id.* at 668, 732 N.Y.S.2d at 106.
[102] *Id.*
[103] *Id.*
[104] *Haight*, 286 A.D.2d at 369, 728 N.Y.S.2d at 790.
[105] *Id.* at 371, 728 N.Y.S.2d at 792 (citing *Ward*, 96 N.Y.2d 58, 78, 724 N.Y.S.2d 692, 748).

insurance coverage, however, this insurance coverage will now turn on the definition and application of the word "permissive user."[106]

If the New York courts continue on their current trend, rental companies will get off the hook rather easily. In fact, they will not be held liable to their rentee's or third parties that are injured if their rentees do not designate additional drivers that are specifically authorized to operate the vehicle.[107] For instance, if a driver is involved in an accident and is not deemed a "permissive user" on the face of the rental car company agreement, then the rental company is not liable for the negligent acts of that driver at all.[108] The bottom line is that in these instances, rental companies can seek indemnification for the full amount of the damages from their rentees. This includes damages that the statutory minimum amount of insurance coverage requires rental companies to provide. This is where the disparity lies.

The rentee has the option to fill out the rental agreement accurately and include any "permissive users" on the form directly. However, if the rentee fails or forgets to list a "permissive user," but "permissive use" could have been implied from the circumstances, the Court of Appeals has chosen not to address this reality. Thus, the New York Court of Appeals concluded that rental companies have no responsibility to their rentees in these circumstance. The Court of Appeals ignored the public policy motivation as well as the statutory minimum insurance requirement that the New York Vehicle and Traffic Law Statutes Sections 370 and 388 mandate.[109] However, the Court of Appeals in New York and the Second Department, have consistently applied this contradictory rational in their holdings.[110]

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[106] *Ward*, 96 N.Y.2d at 77, 724 N.Y.S.2d at 700.

[107] *See, e.g., Masara*, 96 N.Y.2d at 847, 729 N.Y.S.2d at 61.

[108] *Id.* at 857, 729 N.Y.S.2d at 62.

[109] *Id.*

[110] *See, e.g., Masara*, 96 N.Y.2d at 849, 729 N.Y.S.2d at 61; *AIU Ins. Co.*, 287 A.D.2d at 669, 732 N.Y.S.2d at 106.

The legislative intent behind the New York Vehicle and Traffic Law Statutes Sections 370 and 388 as explained in earlier case law, unlike the recent case law, emphasizes the public policy aim. The aim is to protect the public and to make an owner liable for an injury caused by the negligent operation of his car.[111] However, New York case law has become dispositive on the term "permissive user." In fact, the court does not look to see if the driver of the rental vehicle had the implied or express permission of the rentee.[112] Older case law that has decided this issue considered the plain meaning of the New York Vehicle and Traffic Law Statute Section 388 and reasoned "permissive use" should be determined from the surrounding circumstances at the time that the car was negligently operated.[113]

The question under scrutiny here is how the courts have interpreted the term "permissive use" and to what extent is the term in conflict with the legislative intent behind the New York Vehicle and Traffic Law Statutes Sections 370 and 388. The plain meaning of the term "permissive use" seems to apply to the relationship between the rentee and any driver he or she gives express or implied consent to. Obviously, the rentee is a "permissive user" as he or she rents the vehicle directly from the rental company.

However, what about the driver involved in an accident who is not the rentee? Should the term "permissive use" be interpreted to encompass the relationship between the driver and any additional users he or she designates, an agency theory, or should the relationship be limited to that of the rental company and the actual rentee. This is a determinative factor that needs to be clarified either by the New York Court of Appeals or the New

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[111] *See, e.g.*, Dittman v. Davis, 299 N.Y. 601 (1949).

[112] *See, e.g., Masara*, 96. N.Y.2d at 849, 729 N.Y.S.2d at 61. *But see, Motor Vehicle Accident Indemnification Corp.*, 35 N.Y.2d at 260, 362 N.Y.S.2d at 859; *Worldwide Ins. Co.*, 181 Misc.2d at 480, 693 N.Y.S.2d at 901; Bindert v. Elmhurst Taxi Corp., 168 Misc. 892, 6 N.Y.S.2d 666 (Mun. Ct. Queens County 1938).

[113] *Motor Vehicle Accident Indemnification Corp.*, 35 N.Y.2d at 260, 362 N.Y.S.2d at 859; *see also Worldwide Ins. Co.*, 181 Misc.2d at 480, 693 N.Y.S.2d at 901; *see also Bindert*, 168 Misc. at 892, 6 N.Y.S.2d at 666.

York Vehicle and Traffic Law Statutes Sections 370 and 388 need to be amended to reflect the New York Court of Appeals new interpretation of a "permissive user."

Indeed, there are cases which have interpreted the New York Vehicle and Traffic Law Statutes Sections 370 and 380 and concluded that "permissive use" can be expressly or implicitly designated by the rentee.[114] Even the legislature acknowledged that "permissive use" may be given to any driver the rentee designates.[115] In fact, these cases were never expressly overruled by the court. Thus, it is my understanding that the main issue of disparity here is that New York case law does not look beyond the rental agreement between the rentee and the rental company to determine who had "permissive use" to operate the automobile.[116]

As simple as it may seem, there are grave repercussions that are associated with the determination as to who is a "permissive user." One of the problems that may stem from these recent cases in New York is that the burden of liability is completely shifted from the rental car company, even if it was only bound to pay the statutory minimum amount of insurance in the first place, to the primary insurance company. The primary insurance company therefore has to pay the bill when a driver of a rental vehicle let another person operate the vehicle without first checking the box or circling the form correctly on the rental

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[114] *See* cases cited *supra* note 113.

[115] N.Y. VEH. & TRAF. LAW § 388. Under Section 388, the owner of a motor vehicle is presently held liable for injuries to another resulting from the negligent operation of their automobile when the owner gave permission to the driver to operate the vehicle regardless of the purpose for which the car was used.

[116] *Masara*, 96 N.Y.2d at 857, 729 N.Y.S.2d at 62. The court reasoned that the driver was not a "permissive user" and the statutory minimum did not apply to the rental agency. However, the court did not consider if the rentee gave the driver implied or express permission to drive the vehicle. If the rentee gave the driver his implied or express permission to drive the vehicle, then the statutory minimum should apply. However, the court did not look beyond the four corners of the rental agreement and held that as the rentee did not designate any additionally drivers, the rental company was "off the hook" entirely.

car company agreement designating a "permissive user." Thus, the primary insurance company will have to cover the liability in full because it is the rentee's primary insurance carrier.

But why should the rental company avoid all liability and shift the burden directly to the primary insurer? Case law interpreting the New York Vehicle and Traffic Statute Section 388 reasoned that the public policy behind the Statute is to provide an avenue of relief to an injured party.[117] This is a good public policy argument and is well supported by case law.[118] However, nothing in the statute, or prior case law, suggests that the primary insurance company should be fully responsible in such an incidence.[119] The court in *Ward* held that rental companies can seek indemnification from their rentees for amounts in excess of the statutory minimum amount required by law.[120] The court in *Ward* also held that a rentee is a "permissive user" of the vehicle.[121] However, the court did not define what a "permissive user" was, rather it referenced the New York Vehicle and Traffic Law Statutes. Moving in a narrower direction, the court in *Masara* applied the term "permissive user" to encompass the relationship between the rentee and the car rental company and looked solely to the rental agreement. Reasoning there were no authorized drivers listed on the rental agreement, the court held there were no "permissive users."[122] The approach the New York court has undertaken is narrow minded and misconstrued. Specifically, the New York Court of Appeals in *Masara* centers on the relationship between the renter and the rental car company thereby eviscerating the legislative intent underlying the New York Vehicle and Traffic Law.

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[117] N.Y. VEH. & TRAF. LAW § 388. This section is designed in the interest of public safety in the exercise of police power of the state, and is applicable to a carrier engaged in interstate commerce. *See Dittman*, 299 N.Y. at 601.

[118] *See* cases cited *supra* note 113.

[119] *See* Schuler v. Whitmore Rauber & Vicinus, 233 A.D. 892, 892, 25 N.Y.S. 886, 886 (4th Dep't 1931); Hatch v. Lovejoy, 142 Misc. 137, 137, 254 N.Y.S. 35, 37 (Sup. Ct. Schuyler County 1931).

[120] *Ward*, 96 N.Y.2d at 73, 724 N.Y.S.2d at 78.

[121] *Id.*

[122] *Masara*, 96 N.Y.2d at 849, 729 N.Y.S.2d at 61.

It is my position that the term "permissive user" in the New York Vehicle and Traffic Law Statute Section 370 and 388 was construed by the *Masara* court contrary to the definition that earlier case law had established.[123] The term "permissive user" is meant to include those drivers that have the express or implied consent of the owner or lessor or rentee of the vehicle.[124] Since *Masara* was decided in 2001, courts have narrowed their interpretation of the term "permissive user."[125] In doing so, the New York Court of Appeals has interpreted "permissive user" to apply to the relationship between the rental company and the rentee, rather than looking to the relationship between the rentee and the actual driver of the automobile.[126] Clearly, the rentee is a "permissive user" but what about a person that he or she designates to drive the car? This question will turn on the issue of whether the rentee disclosed this information to the rental car agency. If not, then there was no "permissive use." Flashing in the face of both public policy as well as the New York Vehicle and Traffic Law Statute Sections 370 and 388 that was enacted to change the strict common law rules, recent New York Court of Appeals cases are following this arcane rational.

For instance, *AIU Insurance Co.*, clearly followed in the wake of *Masara* without a ripple. In fact, the Second Department basically said this is what the Court of Appeals has held and therefore we must adhere to it.[127] In light of the shifting of responsibility from the secondary insurance company to the primary insurance company, my opinion is that primary insurance

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[123] *See* cases cited *supra* note 113.

[124] N.Y. VEH. & TRAF. LAW § 388 (The statutory presumption is that a vehicle being operated under an insured owner with the owner's consent at the time of the accident supports the policy that there should be recourse to financially responsible insured defendants for injuries); *see Morris*, 84 N.Y.2d at 27, 614 N.Y.S.2d at 364.

[125] *Masara*, 96 N.Y.2d at 849, 729 N.Y.S.2d at 61.

[126] *Id.* (It is uncontroverted that the rentee is a "permissive user" of the car as it is he or she that elects to rent from the rental company).

[127] *AIU Ins. Co.*, 287 A.D.2d at 668, 732 N.Y.S.2d at 106; *see also* Hannibal v. Ford Credit Titling & Trust, 289 A.D.2d 446, 447, 735 N.Y.S.2d 567, 568 (2d Dep't 2001).

companies will attempt to appeal these verdicts. They will argue they should not have to be 100% liable for these accidents.

Conversely, the older New York Court of Appeals decision in *Motor Vehicle Accident Indemnification Corp.*, looked to the relationship between the rentee and the driver of the vehicle.[128] The court reasoned the rentee gave constructive consent to the driver of the rented vehicle. As such, the statutory requirement was satisfied as "permission can be given expressly or impliedly."[129] This decision clearly illustrates the term "permissive user" is not limited to the narrow reading it has been given by the recent New York Court of Appeals decision in *Masara*. Rather than looking to older case law when the New York Court of Appeals once looked at the relationship between the rentee and the driver to determine if in fact "permissive use" was given, the court did not chose this approach. In fact, recent decisions have departed from this mode of analysis completely without legal justification.

Furthermore, deciding questions of "permissive use" on summary judgment motions has grave implications and legal consequences aside from liability damage determinations. Interestingly, prior cases that have interpreted the New York Vehicle and Traffic Law Statute Section 388 concluded that if there is a question of "permissive use" or consent, the question should be given to the trier of fact.[130] Surprisingly, recent cases are coming to the New York courts on summary judgment motions. This also seems contradictory to the cases that have interpreted the New York Vehicle and Traffic Law and concluded that questions of ambiguity as to interpretation of "permissive use" go to the jury and should not be decided as a matter of law.[131] If courts continue to look at the plain meaning of the

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[128] 35 N.Y.2d at 264, 360 N.Y.S.2d at 861.

[129] *Id.*

[130] *See e.g, Vincinere,* 259 A.D. at 1019, 20 N.Y.S.2d at 452; *Lincoln,* 60 A.D.2d at 491, 401 N.Y.S.2d at 1022; *Leotta,* 8 N.Y.2d at 459, 209 N.Y.S.2d at 312; Wynn v. Middleton, 184 A.D.2d 1019, 1020, 584 N.Y.S.2d 684, 685 (4th Dep't 1992).

[131] *Wynn,* 184 A.D.2d at 1020, 584 N.Y.S.2d at 685 (the court held that a rental company was not entitled to summary judgment dismissing wrongful

rental agency agreement and not at the intention of the rentee and at least explore the possibility that "permissive use" was given to the driver involved in the accident, then many cases will automatically be disposed of. This approach undermines and cuts right to the heart the New York Vehicle and Traffic Law Statute Sections 370 and 388.

IX. CONCLUSION

In light of the recent decisions that have come down from the New York Court of Appeals last year, it is clear that the New York courts will continue to hold that rentees who allow another person to drive their rental car but who do not designate them as a "permissive user" on the rental agreement, will be fully liable for any damages in the event an "unauthorized user" gets into an accident.

However, now that the burden has passed to the rentee's primary insurance company for full liability, a serious issue may arise. Specifically, will the primary insurer just acquiesce and offer to be responsible for the floodgate of litigation that is about to pile up? If rental car companies can evade liability as a result of a rentee not having designated a "permissive user," why should the primary insurance company pick up the tab without at least a challenge. Since these decisions just came down during the past year, it is likely there will be challenges to this line of case interpretation. No one wants to be 100% liable for the negligent acts or wrongdoing of another, especially insurance companies. The solution is not clear as the law is not clear itself as to the meaning of "permissive use" and its various case law interpretations.

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death action brought on behalf of a passenger killed in a rental car driven by a friend of the rentee. The court did not take into account that the car was being driven beyond the term of the lease or that the car was driven by a driver who was not listed on the rental agreement as a "permissive user." The court reasoned that the rental company failed to overcome the presumption that the vehicle was being used with the owner's consent); *see also Vincinere*, 259 A.D. 1019, 1020, 20 N.Y.S.2d 451, 452.

The New York Court of Appeals has relied on some of the prior cases interpreting the New York Vehicle and Traffic Law Statutes Sections 370 and 388 respectively. However, there is still ambiguity that needs to be addressed. The intent and public policy supporting the New York Vehicle and Traffic Law Statutes Sections 370 and 388 has been overlooked by the high court in New York. The other possibility is that the high court erred when it reasoned that rental companies are free from liability as far as the statutory minimums mandated by the statute are concerned if a rentee does not designate a "permissive user" on the face of a standard rental agreement without overruling prior case law.[132] It is possible that the New York Court of Appeals did not take into consideration these factors and their repercussions. Someone should ultimately be responsible and an injured person should have a legal redress. Nonetheless, as a result of these decisions, I speculate a floodgate of litigation will present itself and the New York Court of Appeals may have to address this issue in the near future.

[132] *Masara*, 96 N.Y.2d at 849, 729 N.Y.S.2d at 61.

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