CASE NOTES

EVIDENCE—In suit against automobile owner for negligent entrustment, is driver's past record of traffic violations admissible, in spite of statute forbidding the admission of such evidence?

In an action for injuries to plaintiff, caused when the automobile in which plaintiff was riding collided with one owned by defendant and driven by co-defendant, who was defendant's minor son, plaintiff first claimed against the father, for the son's alleged negligence, only under an ownership liability statute.[1] The father filed an answer admitting that the car was being driven by his son with his knowledge and consent. Subsequently, plaintiff moved to amend her declaration to incorporate a specific charge of negligence on the part of the father in entrusting his vehicle to a driver known by him to be incompetent by reason of his past bad record. The lower court denied plaintiff's motion to amend, pointing to a statute forbidding admission in a civil action of evidence of the conviction of a driver for violation of motor vehicle law,[2] noting the fact that the father was apparently liable under the owner liability statute if his son had in fact driven negligently in this instance, and concluding that the sole purpose of the proposed amendment was to bring in a bad driving record and thereby influence the jury as to defendant-driver's alleged negligence. HELD, on second rehearing, reversed and remanded. At first hearing[3] the court concluded that the statute should be strictly construed so as to bar evidence of convictions but not the *facts* of past occurrences. However, on second rehearing, three judges dissenting, a majority of the court chose to overrule the statute entirely, in the face of a strong dissent emphasizing the prejudicial aspects of admitting such evidence. Both majority and minority justified their positions by heavy reliance on an Iowa case.[4] *Perin v. Peuler,* 373 Mich. 531, 130 N.W.2d 4 (1964).

The court's majority, speaking through Justice Black, first unequivocally stated that Michigan's 55-year-old owner liability statute does not supersede common-law liability for negligent entrustment of an automobile. This was said to be the same conclusion which the Iowa court had reached in *Krausnick v. Haegg Roofing Co.*[5] The minority opinion, however, emphasized the point which they considered distinguishing; that is, that since the *Krausnick* case was up on appeal from defendant's motion to strike portions of plaintiff's petition, it was not yet clear whether liability could be imposed on defendant by means of the owner liability statute.[6] several Michigan cases

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1 Michigan Comp. Laws Supp. 1956, § 257.401.

2 Michigan Comp. Laws Supp. 1956, § 257.731.

3 Perin v. Peuler, 369 Mich. 242, 119 N.W.2d 552 (1963).

4 Krausnick v. Haegg Roofing Co., 236 Iowa 985, 20 N.W.2d 432, 163 A.L.R. 1413 (1945).

5 *Ibid.* For further discussion of the *Krausnick* case and exploration of the theory of negligent entrustment, see 4 DRAKE L. REV. 98 (1955).

6 The minority is correct in that the Iowa court in *Krausnick* did not clearly hold that liability under the theory of negligent entrustment might be imposed on an owner who was also liable under the owner liability statute. Nevertheless, *Krausnick* is cited at 8 AM. JUR. 2d, *Automobiles and Highway Traffic* § 573 (1963), for the proposition that "Even though in some states statutes have been enacted which have the general effect of making the owner of a motor vehicle liable . . . the common-law liability for entrusting the operation of one's motor vericle to a known incompetent driver is not superseded thereby."

cited by the majority[7] were similarly distinguished, the dissenters making it clear that they especially objected to the use of both theories of liability (common-law plus statutory) where, as here, the use of the common-law theory of negligent entrustment appeared to be superfluous, and to require the injection of unduly prejudical material into the case.

At the same time they seemed to approve the use of the negligent entrustment theory in cases where the owner liability statute did not apply, the minority also would uphold the Michigan statute, invalidated by the majority, which reads:

> No evidence of the conviction of any person for any violation of this chapter or of a local ordinance pertaining to the use of motor vehicles shall be admissible in any court in any civil action.[8]

Thus the minority avoided a crucial question in negligent entrustment cases: how to prove knowledge on the part of the owner of the unfitness or incompetence of the entrusted driver.

In some entrustment cases such proof has involved presentation of facts as to driver's intoxication,[9] his failure to have a driving license,[10] or that he suffered from some measure of mental or physical incapacity.[11] In the instant case however, plaintiff sought to allege that defendant-driver had been guilty of repeated traffic violations, had been involved in prior accidents, and had undergone a temporary suspension of his operator's license for habitual negligence.[12] Much of this could have been admitted without coming into direct conflict with the statute by following the path of "strict construction" of the words of the statute, as was done in the first hearing of the *Perin* case, thereby finding that only evidence of "conviction" was inadmissible. This was the path also taken in an earlier Michigan case, *Elliott v. A. J. Smith Contracting Co.*,[13] purporting to be the first case construing the same statute. There plaintiff was permitted to establish, as to the driver involved, that his license had in the past been revoked, that he did not remember whether

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[7] Haring v. Myrick, 368 Mich. 420, 118 N.W.2d 260 (1962); Elliott v. A. J. Smith Contracting Co., 358 Mich. 398, 100 N.W.2d 257 (1960) (here the distinguishing factor was that driver was not being sued); Tanis v. Eding, 265 Mich. 94, 251 N.W. 367 (1933).

[8] Michigan Comp. Laws Supp. 1956, § 257.731. Actually only two members of the court approved the statute, the third dissenter agreeing with the majority that it should be abrogated, but disagreeing as to the simultaneous use of both theories where statutory liability was applicable.

[9] Krausnick v. Haegg Roofing Co., 236 Iowa 985, 20 N.W.2d 432, 163 A.L.R. 1413 (1945).

[10] Hardwick v. Bublitz, 254 Iowa 1253, 119 N.W.2d 886 (1963) (holding that parents who were not owners of the automobile involved were liable under negligent entrustment theory if they knowingly permitted their unlicensed son to drive; an earlier case based on the same accident, Hardwick v. Bublitz, 253 Iowa 49, 111 N.W.2d 309 (1961), held that an owner is protected, by the Iowa guest statute, from liability for negligent entrustment of an automobile to an unlicensed driver whose actions were not reckless, but only negligent); Gulla v. Straus, 154 Ohio St. 193, 93 N.E.2d 662 (1950).

[11] Sanders v. Walden, 214 Ark. 523, 217 S.W.2d 357 (1949); Eleason v. Western Cas. & Sur. Co., 254 Wis. 134, 35 N.W.2d 301 (1948); Bensman v. Reed, 299 Ill. App. 531, 20 N.E.2d 910 (1939); Halsan v. Johnson, 155 Ore. 583, 65 P.2d 661 (1937).

[12] Perin v. Peuler, 373 Mich. 531, 547, 130 N.W. 2d 4, 13 (1964). See also Tortora v. General Motors Corp., 373 Mich. 563, 130 N.W.2d 21 (1964), a case decided with the *Perin* case, where the record was held sufficient to prove incompetence but the requisite knowledge of owner was lacking.

[13] 358 Mich. 398, 100 N.W.2d 257 (1960).

he had been convicted of reckless driving, and that his application for a chauffer's license had been denied.[14] The court, in *Elliott*, approached the problem in the time-honored manner of attempting to determine the evils sought to be cured by the statute.[15] It felt them to be those in situations where a driver is sued civilly with respect to the *same* accident, or where a driver's negligence in a prior case might be regarded as evidence of his negligence in a later case. *Elliott* was not such a case, as the driver was not a party, the action having been brought against the owner alone. The court purported to deduce, not only what the legislature meant, but what it didn't mean, with these words:

> The best possible evidence, and often the only evidence, of the driver's fitness, or lack thereof, is his own driving record. This is his own doing. He built it. We need not rely upon reputation or opinion. But if we construe the above statute as defendant contends, we must ascribe to the legislature an intent to prevent an injured party's demonstration of the very factor that may have been primarily at fault with respect to his injury. . . .[16]

The Iowa court, in the recent case of *Book v. Datema*,[17] presented with the problem of construing an exclusionary statute[18] nearly identical to Michigan's, also adopted a strict construction of the words "record of conviction" and held that the statute did not prevent consideration of a prior guilty plea as an admission against interest, in a civil suit arising out of the same accident for which the guilty plea was entered.[19] The Iowa court noted a modern tendency in civil cases to admit records and evidence of convictions. It pointed out that Michigan,[20] Arkansas[21] and Minnesota[22] all have substantially identical exclusionary statutes, and that both Michigan[23] and Arkansas[24] had nevertheless admitted a guilty plea as an admission against interest, although Minnesota had refused to do so,[25] possibly because of the unusual elements of unfair procedure involved in the case there. However, Justice Snell of the Iowa court, dissenting in *Book v. Datema*, remarked that the result "places

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14 *Id.* at 267.

15 Or, as recited in *Heydon's Case*, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (Ex. 1584), "What was the mischief and defect for which the common law did not provide?"

16 Elliott v. A. J. Smith Contracting Co., 358 Mich. 398, 414, 100 N.W.2d 257, 262 (1960). In support of admitting evidence of specific instances of past negligence in entrustment cases where there is no statutory prohibition, see Williamson v. Eclipse Motor Lines, 145 Ohio St. 467, 62 N.E.2d 339, 168 A.L.R. 1356 (1945); Guedon v. Rooney, 160 Ore. 621, 87 P.2d 209, 120 A.L.R. 1298 (1939); Bock v. Sellers, 66 S.D. 450, 285 N.W. 437 (1939); Tanis v. Eding, 274 Mich. 288, 264 N.W. 375 (1936); Laney v. Blackburn, 25 Ala. App. 248, 144 So. 126 (1932); Linville v. Nissen, 162 N.C. 95, 77 S.E. 1096 (1913). For cases holding that evidence of past accidents is not proper without the entrustment theory, see annotations at 20 A.L.R.2d 1210 and 1217.

17 ..... Iowa ....., 131 N.W.2d 470 (1964).

18 IOWA CODE § 321.489 (1962): "No record of the conviction of any person for any violation of this chapter shall be admissible as evidence in any court in any civil action."

19 *Cf.*, Mathews v. Beyer, 253 Iowa 1391, 116 N.W.2d 477 (1962).

20 Michigan Comp. Laws Supp. 1956, § 257.731.

21 ARK. STATS. § 75-1011 (1957).

22 MINN. STATS. § 169.94, subd. 1 (1961).

23 Diamond v. Holstein, 373 Mich. 74, 127 N.W.2d 896 (1964) (statute not mentioned).

24 Harbor v. Campbell, 235 Ark. 492, 360 S.W.2d 758 (1962).

25 Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943).

a strained, unnatural and destructive construction and interpretation on the statute" and "for all practical purposes, repeals the statute."[26]

Nevertheless, once it is decided that the literal effect of a statute should be avoided,[27] such circuitous methods, though belabored, are often used by courts and are, in fact, supported by some of the most frequently espoused maxims of constitutional law; that is, that courts will not rule upon the constitutionality of a statute when the case can be settled without such a ruling,[28] and that a statute will, if possible, be so construed as to render it valid.[29]

Such decisions have the obvious disadvantage of evading a fundamental issue, thereby creating further controversy. These considerations appeared to be uppermost in the minds of a majority of the Michigan court when it chose to invalidate the statute in *Perin v. Peuler*. After asserting that the function of enacting and amending judicial rules of practice and procedure has been committed exclusively to Michigan's Supreme Court by constitution,[30] that rules of procedure include rules of evidence,[31] and that a Court Rule had been in effect validating statutory rules of practice not in conflict with any other Court Rule, the majority proposed a new Rule holding the traditional rules of evidence to be in full force and effect, Section 731 of the Michigan vehicle code (the statute at issue) to the contrary notwithstanding.[32]

Many courts would have difficulty finding constitutional justification for so bold an action. The Iowa Constitution empowers the Supreme Court in the following words:

> The Supreme Court shall have appellate jurisdiction only in cases in chancery, and shall constitute a Court for the correction of errors at law, under such restrictions as the General Assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior Judicial tribunals throughout the State.[33]

Another section states that it shall be the duty of the General Assembly to provide for a general system of practice in all the courts.[34] Statutes give the Supreme Court authority to prescribe rules and forms for all proceedings of a civil nature[35] and to submit same to the General Assembly, which may make changes therein.[36] This has been interpreted as a legislative veto power, and in fact the 61st General Assembly has recently disapproved all

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[26] . . . Iowa ....., 131 N.W.2d 470 (1964).

[27] That this decision should ever be made has been doubted; see Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

[28] *E.g.*, Rosenberg v. Fleuti, 374 U.S. 449, 83 Sup. Ct. 1804 (1963); State v. Dunley, 227 Iowa 1085, 290 N.W. 41 (1940); McClure v. Owens, 21 Iowa 133 (1866).

[29] *E.g.*, Baggett v. Bullitt, 377 U.S. 360, 84 Sup. Ct. 1316 (1964); Spurbeck v. Statton, 252 Iowa 279, 106 N.W.2d 660 (1960); Iowa Homestead Co. v. Webster County, 21 Iowa 221 (1866).

[30] MICH. CONST. 1963, art. 6, § 5. For similar provisions see HAWAII CONST. art. 5, § 6; FLA. CONST. art. 5, §3.

[31] The court cited 1 Wigmore on Evidence (3d ed.), 1962 pkt. supp., p. 51. This theory is not without conflict; see Green, *To What Extent May Courts Under the Rule-Making Power Prescribe Rules of Evidence?* 26 A.B.A.J. 482 (1940).

[32] Perin v. Peuler, 373 Mich. 531, 130 N.W.2d 4, n. 11 (1964).

[33] IOWA CONST. art. V, § 4.

[34] IOWA CONST. art. V, § 14.

[35] IOWA CODE § 684.18 (1962).

[36] IOWA CODE § 684.19 (1962).

but two of some twenty-six Rules changes submitted by the Supreme Court in 1965.[37] Recent rule changes,[38] even though in the limited area of appellate procedure reserved to the Supreme Court without legislative approval by Iowa Rule 371, have also been subjected to criticism.[39] Thus it appears unlikely that the Iowa court would consider a statute relating to the admission of evidence to be invalid as a usurpation of its power. It may be unfortunate that this power is so placed by the Iowa Constitution, since the Supreme Court is obviously in the position of closest contact with the rules as they work out in practice, and would seem to be the body best prepared to formulate expeditious measures. Presumably the rule-making power carries with it inherent danger as does any power misused, but it should be possible to minimize the danger by some provision less dogmatic than a "legislative veto".

At any rate, the Michigan court did find that the demands of justice as well as judicial prerogative required them to invalidate the statute. Did the demands of justice support their action? There are several reasons for the possible exclusion of such evidence, regardless of statute. As McCormick states:

> There are several counterbalancing factors which may move the court to exclude relevant circumstantial evidence if they outweigh its probative value. In order of their importance they are these. First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side-issue that will unduly distract the jury from the main issues. Third, the likelihood that the evidence offered and the counter-proof will consume an undue amount of time.[40]

The second and third mentioned factors were dismissed by the Michigan court majority with little more than fleeting notice and it, in turn, placed great emphasis on a traditional right of cross-examination for credibility which could be denied by literal interpretation of the statute. The first factor, that of undue prejudice, seemed to be the prime consideration motivating the dissenters, and indeed it is obvious that, even with a limiting instruction, a jury might consider a past bad record as bearing on defendant-driver's own negligence in the case, as well as on defendant-owner's negligence in entrusting the vehicle. However, Wigmore has stated that a negligence case arising out of a motor vehicle accident is precisely where such use of a former conviction should be condoned,[41] and the majority dismissed the argument as to prejudice with these colorful words:

> [I]f plaintiff succeeds in proving by due preponderance her amendatory allegation, this defendant parent should take stoically the bitters all like parents neglectfully brew for themselves. When father, without personal and constant attention to junior's training for the public as well as personal hazard of motor car driving, and without like attention to junior's ensuing driving habits, lets the boy continue use of father's car after one or more convictions have been adjudged to father's knowledge, and bothers not from that time on to train with due discipline before the inevitable occurs, he and that boy—

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37 Ch. 487, Laws 61st G.A., Iowa, 1965.
38 IOWA CODE R.C.P. 344(f) (1962).
39 48 IOWA L.REV. 919 (1963).
40 MCCORMICK, EVIDENCE § 152, at 319 (1954).
41 3 WIGMORE, EVIDENCE § 987 (3d ed. 1940).

> certainly not the victim of his and the boy's negligence—should bear the "prejudicial" consequences. Such "prejudice" is due solely to the negligence of those who decry it. That kind of prejudice manufacturers no judicial error, reversible or otherwise.[42]

The majority opinion is persuasive. The motive for its conclusion is obvious, and whether or not it will have the desired result, the Michigan Supreme Court is on record as being willing to take creative steps in the attempt to affect what Justice Black terms "Michigan's beset and dismally failing effort to prevent traffic carnage."[43]

JoAnn Shirley (June, 1966)

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[42] Perin v. Peuler, 373 Mich. 531, 544, 130 N.W.2d 4, 11 (1964).
[43] *Id.*, 130 N.W.d at 6.