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INSURANCE

Collateral Estoppel—Scope of Prior Adjudication of Facts. In *East v. Fields*,[1] an automobile insurance policy contained a provision excluding coverage of accidents occurring while the car was being driven by members of the armed forces other than the owner unless the owner was present in the car. When an action was brought against the owner for injuries suffered because of the negligent operation of the car by a soldier-friend of the owner, the insurance company refused the defense since both the owner and the driver signed statements in which they declared the owner was not in the car at the time of the accident.[2] In the tort action, the court found the defendant was the owner of the car, that the driver was driving with the owner's *express* permission, under his *express* direction, for and on behalf of the owner, and *the owner was present in the car at the time.* These facts supported the agency relation between the owner and the driver, and allowed a judgment against the owner of the car.

In a subsequent garnishment proceeding against the insurance company, the trial court accepted the evidence of the insurance company that the owner was not present at the time of the accident rather than the finding of the court in the tort action, and dismissed the writ of garnishment. Upon appeal, the judgment creditor claimed, and the insurance company denied, that the findings of fact in the tort action were res judicata in the garnishment proceeding. The court held that res judicata did not apply since the causes of action for tort liability and indemnity liability are different, but collateral estoppel was applicable to preclude the company from relitigating the question of the owner's presence in the car since it was a fact essential to the tort judgment and also decisive of the policy coverage.

That the owner's presence was *essential* to support the agency relation here is open to question. The liability of a car owner for injuries caused by the negligent operation of someone driving his car with his permission is based upon the doctrine of respondent superior. Establishment of the defendant's ownership of the car which causes the injury raises a prima facie case against the owner. Proof of ownership raises a presumption that the driver was the agent of the owner and was driving within the scope of his authority at the time of the acci-

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[1] 42 Wn.2d 924, 259 P.2d 639 (1953).
[2] Respondent's Brief, East v. Fields, note 1 *supra.*

dent.[3] Although either interested or disinterested testimony can rebut this presumption,[4] without rebutting testimony that is clear, convincing, and unimpeached, the presumption will permit a verdict for the plaintiff.[5] The presence of the owner strengthens the inference of agency that arises upon proof of ownership,[6] but when such other facts as express permission to drive under the express directions of the owner, and for the benefit of the owner are present to bolster the presumption, it is doubtful if the owner's presence is necessary at all to support a judgment in favor of the plaintiff.

Prior cases indicate that the court has been more liberal in allowing a relitigation of a fact which supports a tort judgment in a subsequent action to determine the indemnity liability of the insurer. Where coverage of a policy excluded accidents to employees, and the employee status of an injured person was a fact supporting the liability of the owner of a car, the employee status found in the tort action was not conclusive upon the parties in a subsequent action on the policy.[7] In another case, the tort judgment was supported by the ownership and control of a truck driven by someone with the permission of the defendant. In a subsequent action on the policy, the court allowed a relitigation of the question of ownership without any thorough discussion or application of the doctrine of collateral estoppel.[8] Although both cases were discussed in respondent's brief, the court made no reference to them, preferring to base its decision on a rather broad interpretation of the doctrine of collateral estoppel, and the fact that "It would . . . be anomalous for a court to find such a critical fact one way in the tort action, and to the opposite effect in the garnishment proceeding."[9] The existence of an anomaly should be no reason for perpetuating one version of a disputed fact when there is good reason for believing that the other determination, based upon the litigation of that particular fact, was the correct one.

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[3] McGinn v. Kimmel, 36 Wn.2d 786, 221 P.2d 467 (1950).
[4] Bradley v. S. L. Savidge, Inc., 13 Wn.2d 28, 123 P.2d 780 (1942).
[5] Davis v. Browne, 20 Wn.2d 219, 147 P.2d 263 (1944).
[6] White v. Keller, 188 Or. 378, 215 P.2d 986 (1950).
[7] Braley Motor Co. v. Northwest Casualty Co., 184 Wash. 47, 49 P.2d 911 (1937).
[8] Baxter v. Central West Casualty Co., 186 Wash. 459, 58 P.2d 835 (1936).
[9] East v. Fields, 42 Wn.2d 924, 926, 259 P.2d 639, 640 (1953).