

The Claim Professional's Tip Sheet

How to Determine if Vehicle and Traffic Law § 388 Applies to Your Loss

THE LAW:

Vehicle and Traffic Law § 388 (1) imputes to the owner of an automobile the negligence of one who uses that vehicle with the owner's permission. That section provides, in relevant part, that:

“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 . . . by any person using or operating the same with the permission, express or implied, of such owner.”

THE TEST:

For liability to accrue pursuant to Vehicle and Traffic Law § 388, a plaintiff must establish compliance with each of the conditions set forth in that statute. In other words, it must be shown that the party against which an assessment of vicarious liability is sought (1) *owned* the automobile in question, that the plaintiff's loss arose out of the (2) *use or operation* of a (3) *vehicle* in (4) *New York State*, and that those injuries occurred because of (5) *negligence* arising out of the (6) *permissive use* of that vehicle (see Vehicle and Traffic Law § 388 [1]).

Question	Step 1	Step 2	Step 3	Step 4
<p>Is the party alleged to be vicariously liable to the vehicle owner?</p>	<p>Was the party the . . .</p> <ul style="list-style-type: none"> (1) assignee to the vehicle lease? (2) administrator of the vehicle lease? (3) holder of the lessor's right and interest in the lease? (4) named on the vehicle? (5) the titleholder of the registered owner of the vehicle? <p>If yes, to any of the above, a rebuttable presumption of ownership likely applies.</p>	<p>If a rebuttable presumption of ownership applies, did the “owner” . . .</p> <ul style="list-style-type: none"> (1) retain only a security interest in the vehicle? (2) act only as a lienholder relative to that vehicle? (3) only own stock in the corporation that owns that vehicle? (4) insurer, but not hold title to that vehicle? <p>If yes to any of the above, the presumption of ownership may be rebutted.</p>	<p>Is there a non-rebuttable presumption of ownership? Did the alleged owner . . .</p> <ul style="list-style-type: none"> (1) fail to comply with state vehicle registration law; (2) transfer a vehicle without removing its plates; or (3) negligently provide dealer plates without limiting the use of those plates? <p>If yes to any of the above, there may be a non-rebuttable presumption of ownership.</p>	<p>If none of the aforementioned criteria applies, the party is likely not the “owner” of the subject vehicle within the meaning of Vehicle and Traffic Law § 388.</p>
<p>Is the automobile or similar device involved in the accident a motor vehicle?</p>	<p>Was the device . . .</p> <ul style="list-style-type: none"> (1) an electric mobility assistance device operated by a person with a disability? (2) an all-terrain vehicle? (3) a boat? (4) a snowmobile? <p>If yes, to any of the above, that device is likely not considered by section 388, but may fall under a vicarious liability statute specific to each of those machines.</p>	<p>If no to Step 1, was the device . . .</p> <ul style="list-style-type: none"> (1) an emergency vehicle? (2) used solely for farming or construction and not operated on a public highway? <p>If yes to any of the above, that device is likely not considered by section 388.</p>	<p>If no to Step 2, was the device . . .</p> <p>An automobile or similar vehicle primarily operated on a public highway?</p> <p>If yes, that device is likely a “vehicle” within the meaning of section 388.</p>	

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Question	Step 1	Step 2	Step 3	Step 4
<p>Did the accident occur at a <i>location</i> considered by section 388?</p>	<p>Did the accident . . .</p> <p>occur in New York State?</p> <p>If yes, section 388 considers that loss.</p>	<p>If no to question 1, did the accident . . .</p> <p>involve only domicilliarities of New York State, but occur outside this state?</p> <p>If yes, section 388 likely considers that loss.</p>	<p>If no to questions 1 and 2, did the accident . . .</p> <p>involve persons domiciled in different states?</p> <p>If yes, section 388 likely does not consider that loss.</p>	
<p>Did the accident involve the <i>use or operation</i> of a motor vehicle?</p>	<p>Did the accident involve any of the following acts:</p> <p>driving, loading, unloading parking, towing, entering exiting or repairing a motor vehicle?</p>	<p>If yes, to any of the criteria referenced in Step 1, that act is likely considered by section 388.</p>		
<p>Did the accident involve the <i>permissive use or operation</i> of the vehicle?</p>	<p>Did the vehicle owner grant <i>express permission</i> to the operator?</p> <p>If yes, use was permissive.</p>	<p>If no to Step 1 . . .</p> <p>Was the vehicle . . .</p> <ol style="list-style-type: none"> (1) co-owned and operated by a co-owner? (2) left in the unrestricted control of a second person, who permits a third person to use that car? (3) allowed to be operated by an alleged permissive user on a prior occasion? (4) Left for repair that required road-testing? (5) operated through the use of an unattended key? <p>If yes to any of the above, implied permission will likely be found.</p>	<p>If yes to Step 2 . . .</p> <p>Was the vehicle . . .</p> <ol style="list-style-type: none"> (1) stolen, and was the theft of that vehicle reported promptly upon recognition of the theft of that automobile? (2) the subject of restrictive consent to operate that did not consider the subject accident? <p>If yes to any of the above, implied permission may be rebutted.</p>	<p>If no to Steps 1 and 2, or if the vehicle was stolen and that theft promptly reported . . .</p> <p>Was the vehicle . . .</p> <ol style="list-style-type: none"> (1) involved in an accident before the police were notified of the theft of that car? (2) a rental car involved in an accident that was sued before August 10, 2005? <p>If yes to either of the above, constructive permission may be found.</p>
<p>Did the accident arise out of a <i>proximally-related, negligent</i> act of the permissive user?</p>	<p>Is the loss complained of harm that was expected or intended by the tortuous act of the permissive user?</p>	<p>If no to step 1, the tortuous act is likely negligent, rather than intentional.</p>		

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