San Diego Law Review

Volume 6
Issue 2 *1969*

Article 11

5-1-1969

Torts - Non-delegable Duty - Automobile Owner Is Liable Under a Non-delegable Duty For the Negligence of an Independent Contractor Who Failed to Maintain Her Brakes in Compliance With the Vehicle Code. Maloney v. Rath (Cal. 1968)

Richard Alan Berman

TORTS—NON-DELEGABLE DUTY—AUTOMOBILE OWNER IS LIABLE UNDER A NON-DELEGABLE DUTY FOR THE NEGLIGENCE OF AN INDEPENDENT CONTRACTOR WHO FAILED TO MAINTAIN HER BRAKES IN COMPLIANCE WITH THE VEHICLE CODE. *Maloney v. Rath* (Cal. 1968).

On December 27, 1962, Mrs. Rath turned her car into a left turn lane behind the car of the plaintiff. When she stepped on her brake pedal, the brakes failed to function, and she struck the rear end of the plaintiff's automobile causing injuries to plaintiff and damage to her car. Prior to the collision, the brakes had been functioning properly, and Mrs. Rath neither knew nor had reason to know of their impending failure which was due to their negligent installation by her independent contractor.[1] The Superior Court denied plaintiff's motion for judgment notwithstanding the verdict. On appeal to the Supreme Court of California, *held*, reversed: Mrs. Rath is liable under a non-delegable duty for the harm caused by the independent contractor's[2] negligent installation of the brakes. *Maloney v. Rath*, 69 Adv. Cal. 455, 445 P.2d 513, 71 Cal. Rptr. 897 (1968).

Under early common law, an employer was not liable for the harm caused by his independent contractor.[3] The rationale for this rule was that the employer has no control over the actions of the contractor, and therefore should not be liable for the harm that he causes.[4] However, this rule has been gradually

1. Approximately three months before the accident defendant hired Peter Evanchik of Pete's Chevron Service to completely overhaul the brakes. Two weeks before the accident defendant's car had been involved in another collision and it was repaired and inspected although no repairs were made to the brakes. A rupture of the brake's hydraulic hose caused by rubbing against the automobile's right front wheel produced the brake failure. Maloney v. Rath, 69 Adv. Cal. 455, 457, 445 P.2d 513, 514, 71 Cal. Rptr. 897, 898 (1968).

2. The distinction between a servant and an independent contractor is based on whether the employer has retained the right to control the details of the work. In determining whether an individual is an independent contractor or a servant, the courts generally consider the length of employment, degree of skill involved, where the work is done, method of payment, extent of control the master may exercise by the terms of the agreement, whether the employee is paid by the time or by the job, whether the employee is engaged in a distinct occupation or business and whether by local custom the job is usually done under the employer's supervision. RESTATEMENT (SECOND) OF AGENCY § 220(2) (1958). Since Mrs. Rath is vicariously liable for the tort of her independent contractor, she has a right of indemnity against Pete's Chevron Service. W. PROSSER, LAW OF TORTS § 48 at 279 (3d ed. 1964).

3. Laugher v. Pointer, 5 B. & C. 547, 108 Eng. Rep. 204 (1826); RESTATEMENT (SECOND) OF TORTS § 409, comment b (1965).

4. W. PROSSER, LAW OF TORTS § 70 (3d ed. 1964).

altered, and many exceptions are now recognized.[5] The justification for these exceptions is based on the grounds that the employer is primarily benefited by the work, selects the contractor, and may employ one who is financially responsible.[6] These exceptions are generally divided into three categories, and are determined by: (1) the employer's failure to exercise reasonable care in selecting, instructing or supervising the contractor;[7] (2) a particular relationship of the employer to the public imposed on the basis of statute, charter, franchise, contract or common law;[8] (3) activities of the employer's contractor which are specially, peculiarly, or inherently dangerous.[9] The *Maloney* court held that improperly maintained automobile brakes fall within the second and third categories, as they violate express statutory provisions,[10] present a serious risk of bodily harm,[11] and are highly dangerous.[12] Since many duties created by statute are regarded as non-delegable because of the highly dangerous nature of the activity,[13] these categories are somewhat overlapping.

In support of its finding of a statutory non-delegable duty to maintain brakes, the *Maloney* court cited Restatement of Torts (2nd) section 424 which provides that:

> One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the

---

5. *Id.*

6. *Id.*

7. The employer will be held liable for his independent contractor's negligence if he hires a contractor whom the employer should have known to be incompetent for the job. RESTATEMENT (SECOND) of TORTS § 411 (1965). He is also liable for failure to exercise supervision over parts of a contract which he has not delegated to anyone else or which he has assumed to perform. RESTATEMENT (SECOND) OF TORTS § 413 (1965); RESTATEMENT (SECOND) OF TORTS §§ 410, 412, 414, 415 (1965).

8. Under common law, an employer may not delegate his landowner's duty of care to keep premises safe for invitees. RESTATEMENT (SECOND) OF TORTS § 422 (1965). For a collection of cases dealing with non-delegable duties imposed on the basis of statute, charter, contract, franchise or common law, *see* 44 CAL. L. REV. at 763 n.14 (1956).

9. The employer is held to a non-delegable duty where the activity is highly dangerous unless special precautions are taken. RESTATEMENT (SECOND) OF TORTS § 423 (1965); see cases cited in notes 30 and 31 *infra*.

10. 69 Adv. Cal. at 457, 445 P.2d at 514, 71 Cal. Rptr. at 898. *See* notes 15-17 *infra*.

11. *Id.* at 461, 445 P.2d at 516, 71 Cal. Rptr. at 900.

12. *Id.*

13. Snyder v. Southern California Edison Co., 44 Cal. 2d 793, 285 P.2d 558 (1948), where a duty imposed by statute involved considerable risk unless properly executed.

> safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.[14]

Since the brakes on Mrs. Rath's car were improperly maintained, she violated California Vehicle Code sections 26300,[15] 26435[16] and 26454.[17] The court's position was that Restatement section 424 sustains imposition of a non-delegable duty under these statutes. Recent California decisions dealing with the violations of these vehicle code sections do not, however, support the imposition of a non-delegable duty. In *Alarid v. Vanier*,[18] which the *Maloney* court cited in recognizing that Mrs. Rath was not strictly liable,[19] the defendant violated the vehicle code by failing to maintain adequate brakes;[20] this violation raised a rebuttable presumption of negligence.[21] *Alarid* made no express determination with respect to the delegability of defendant's duty. However, since the court emphasized the reasonable care of the defendant in (1) not having reason to suspect that the brakes were faulty, and (2) having the brakes recently inspected prior to the accident as factors which would rebut the presumption of negligence,[22] it is reasonable to conclude that it would have found the duty to be delegable.

---

14. RESTATEMENT (SECOND) OF TORTS § 424 (1965).

15. 69 Adv. Cal. at 457, 445 P.2d at 514, 71 Cal. Rptr. at 989. CAL. VEHICLE CODE § 26300 (West 1960) provides: "Every motor vehicle, other than a motorcycle, shall be equipped with brakes adequate to control the movement of the vehicle and to stop and hold the vehicle."

16. CAL. VEHICLE CODE § 26453 provides: " All brakes and component parts thereof shall be maintained in good condition and in good working order."

17. *Id.* at § 26454 provides that all automobiles designed to carry not more than nine persons shall be capable of stopping from a speed of twenty miles an hour within 25 feet after the brakes are applied.

18. 50 Cal. 2d 617, 327 P.2d 897 (1958).

19. 69 Adv. Cal. at 458, 445 P.2d at 514, 71 Cal. Rptr. at 898; in *Alarid*, the defendant stepped on his brake pedal but it did not function due to a failure of the brakes and defendant collided with the rear end of plaintiff's car. A few weeks before the collision a garage worked on his clutch but did not inform defendant that there was anything wrong with his brakes. Immediately before the collision, defendant's brakes were working satisfactorily and defendant had no reason to know of their impending failure. 50 Cal. 2d at 620-21, 327 P.2d at 898.

20. The *Alarid* court held that defendant violated CAL. VEHICLE CODE § 670 (West 1935) which at that time provided: "No person shall operate on any highway any motor vehicle . . . unless such motor vehicle . . . is equipped with brakes adequate to bring such motor vehicle . . . to a complete stop . . . ." 50 Cal. 2d at 621, 327 P.2d at 898.

21. 50 Cal. 2d at 621, 327 P.2d at 898.

22. *Id.* at 624-25, 327 P.2d at 900.

The *Maloney* court indicated that there is "language in *Ponce v. Black*[23] suggesting the duty is at least in part non-delegable."[24] The *Ponce* court recognized that brake failure raises a presumption of negligence[25] and developed five guidelines to determine whether the presumption had been rebutted. The defendant must show (1) the cause of the malfunction; (2) that nothing had happened to impute knowledge of the defective brakes to him; (3) that nothing in the prior performance of the car known to him or attributed to him had contributed to the malfunction; (4) that the automobile was inspected and maintenance performed within a reasonable time before the accident; and (5) that the cause of the malfunction could not have been disclosed by a reasonable inspection within a reasonable time prior to the collision or had occurred after the inspection.[26] The first four guidelines are aimed at the reasonable care of the defendant. Arguably, the fifth guideline might be interpreted to suggest that not only the defendant, but also the independent contractor must be unable to discover the defect.[27] However, since the *Ponce* court does not indicate whether an independent contractor was involved in the case,[28] this ambiguity renders such an interpretation dubious authority to support the contention that defendant's duty is non-delegable.

In finding a non-delegable duty based on the highly dangerous nature of the activity, the *Maloney* court cited Restatement of Torts (2nd) section 423 which states that:

> One who carries on an activity which threatens a grave risk of serious harm or death unless the instrumentalities used are carefully constructed and maintained, and who employs an independent contractor to construct or maintain such

23. 224 Cal. App. 2d 159, 36 Cal. Rptr. 419 (1964).

24. 69 Adv. Cal. at 459, 445 P.2d at 515, 71 Cal. Rptr. at 899.

25. 224 Cal. App. 2d at 163, 36 Cal. Rptr. at 421.

26. *Id.*

27. Mrs. Rath argued that the fifth guideline referred only to the employer and that she "was not capable of making an examination and discovering the faulty installation made by Pete's Chevron Service." Brief for Respondant at 11, Maloney v. Rath, 69 Adv. Cal. 455, 445 P.2d 513, 71 Cal. Rptr. 897 (1968).

28. Since Justice Traynor in *Maloney* questions whether the court in *Ponce* addressed itself to the issue of non-delegability, the significance of citing *Ponce* in his decision is not apparent. The court may have believed that the five guidelines in sum indicate a trend toward placing a heavy burden of proof on the defendant in order to rebut the presumption of negligence which may be tantamount to establishing a non-delegable duty.

> instrumentalities, is subject to the same liability for physical harm caused by the negligence of the contractor in constructing or maintaining such instrumentalities as though the employer had himself done the work of construction or maintenance.[29]

The cases supported by this section involve a peculiar risk of bodily harm to others unless special precautions are taken as in loading highly dangerous propane gas[30] and spraying poisonous solution for killing weeds.[31] Because repair of automobile brakes does not require special precautions, a faultily equipped automobile does not fall within section 423 even though it does represent a grave risk of serious bodily harm or death.[32]

The *Maloney* court did cite numerous California decisions which have imposed a non-delegable duty upon the employer to protect severed parcels from damage,[33] to maintain streets,[34] to keep land in a reasonably safe condition[35] and to guard open fires.[36] However, since the automobile owner does not have a special relationship to the public, decisions imposing non-delegable duties upon government agencies and landowners because of such a relationship are not precedent to support the contention that the duty to maintain automobile brakes is non-delegable.

It appears that neither California decisions, the California Vehicle Code nor the Restatement of Torts supports the imposition of a non-delegable duty upon Mrs. Rath. The decision, however, represents a predictable extension of the scope of non-delegable duties and will facilitate the growing need of providing compensation.[37] Since many California automobile

29. RESTATEMENT (SECOND) OF TORTS § 423 (1965).

30. Community Gas Co. v. Williams, 87 Ga. App. 68, 73 S.E.2d 119 (1952).

31. Alexander v. Seaboard Air Line R. Co., 221 S.C. 477, 71 S.E.2d 299 (1952).

32. 69 Adv. Cal. at 461, 445 P.2d at 516, 71 Cal. Rptr. at 900.

33. *Id.* at 460, 415 P.2d at 516, 71 Cal. Rptr. at 900; Los Angeles County Flood Control District v. Southern California Building and Land Association, 188 Cal. App. 2d 850, 10 Cal. Rptr. 811 (1961).

34. 69 Adv. Cal. at 460, 445 P.2d at 516, 71 Cal. Rptr. at 900; Van Arsdale v. Hollinger, 68 Cal. 2d 245, 437 P.2d 508, 66 Cal. Rptr. 20 (1968).

35. 69 Adv. Cal. at 460, 445 P.2d at 516, 71 Cal. Rptr. at 900; Knell v. Morris, 39 Cal. 2d 450, 247 P.2d 352 (1952).

36. 69 Adv. Cal. at 460, 445 P.2d at 516, 71 Cal. Rptr. at 900; Courtell v. McEachen, 51 Cal. 2d 448, 334 P.2d 870 (1959).

37. In 1967, there were 53,100 death, 1,900,000 injuries which caused disability beyond the day of the accident and costs of $10,700,000,000 because of motor vehicle

owners have liability insurance,[38] the *Maloney* court has imposed this non-delegable duty as a means of distributing the costs of automobile accidents throughout society in the form of liability insurance. While defendant will incur a small increase in insurance premiums,[39] compared to the many thousands of dollars of recovery made available to the victim, it seems socially desirable to allow compensation.

The immediate impact of the *Maloney* decision may be seen in *Clark v. Dziabas*.[40] The plaintiffs, Mr. and Mrs. Clark, were injured when their automobile was struck by a car driven by the defendant. As in *Maloney*, the collision was caused by a failure of the defendant's brakes and he had no reason to know that his brakes were defective until they failed.[41] In holding defendant liable, the *Clark* court cited *Maloney*[42] as authority for the principle that the presumption of negligence must be rebutted by the defendant's showing not only that he exercised reasonable care in maintaining his brakes, but also that "failure was not owing to the negligence of any . . . independent contractor employed by him to inspect or repair the brakes."[43]

Since the automobile owner's maintenance of brakes is now subject to a non-delegable duty, it is probable that California decisions relying on *Maloney* will subject his maintenance of lights,[44] horns,[45] steering mechanisms[46] and all other parts of

accidents. NATIONAL SAFETY COUNCIL, ACCIDENT FACTS at 40 (1968). In California, during 1958, there were 90,306 total accidents causing 135,565 injuries and 3,510 deaths which have risen to 156,356 total accidents causing 233,834 injuries and 4,883 deaths during 1967. STATE OF CALIFORNIA, DEP'T OF HIGHWAY PATROL, REPORT OF FATAL AND INJURY MOTOR VEHICLE TRAFFIC ACCIDENTS 1967 at 12 (1968).

38. In California, the owner or operator of a motor vehicle must show ability to respond in damages to the amount of $30,000 for personal injuries and $5,000 for property damage caused in any one accident. CAL. VEHICLE CODE § 16430 (West 1959) *as amended* (Supp. 1967). Proof of ability to respond in damages as required by § 16430 may be satisfied by certificate of insurer, *Id.* § 16431, by bond, *Id.* § 16434, by deposit of money, *Id.* § 16435 and by proof of self-insurance, *Id.* § 16436.

39. *See* BRAINARD, AUTOMOBILE INSURANCE (1961).

40. 69 Adv. Cal. 463, 445 P.2d 517, 71 Cal. Rptr. 901 (1968).

41. Six months prior to the accident the brakes had been overhauled and approximately five weeks before the accident the brakes were inspected and adjusted by a service station. *Id.* at 464, 445 P.2d at 518, 71 Cal. Rptr. at 902.

42. *Id.* at 465, 445 P.2d at 518, 71 Cal. Rptr. at 902.

43. *Id.*

44. CAL. VEHICLE CODE §§ 24250-26119 (West 1960).

45. *Id.* at § 27000.

46. *Id.* at § 24002; Brandes v. Rucker-Fuller Desk Co., 102 Cal. App. 221, 282 P. 1009 (1929).

automobiles[47] covered by Vehicle Code safety standards to a non-delegable duty.

California decisions relying on *Maloney* may promote a further expansion of the scope of activities subject to a non-delegable duty as this would be consistent with the recently developing trend in California toward greater liability and compensation. Within the last few months, the California Supreme Court has further expanded the scope of negligence liability in *Dillion v. Legg*[48] which eliminated duty limitations on negligent infliction of emotional distress and *Rowland v. Christian*[49] which eliminated the duty limitations on landowners and occupiers. Because of this trend[50] and the *Maloney* decision, the courts will probably justify extending the scope of non-delegable duties on the bases of either the highly dangerous nature of the activity or a special relationship to the public or both. However, their underlying consideration will be a twofold analysis of (1) the number of injuries the activity causes and (2) whether the activity is generally insured thereby enabling distribution of the costs throughout society.

Recognizing that many legal scholars are dissatisfied with the present principles of negligence as a means of providing compensation,[51] the California Supreme Court is developing this trend in *Maloney* and the other recent cases in an attempt to provide a more satisfactory system of compensation within the

47. CAL. VEHICLE CODE §§ 24000-27907 (West 1960).

48. 69 Adv. Cal. 766, 441 P.2d 912, 69 Cal. Rptr. 72 (1968), *noted in* 47 TEXAS L. REV. 518 (1969).

49. 69 Adv. Cal. 89, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), *noted in* 3 U.S.F. L. REV. 170 (1969).

50. In Elmore v. American Motors Corporation, 70 Adv. Cal. 615, 451 P.2d 84, 75 Cal. Rptr. 658 (1969), the California Supreme Court found that a defective drive shaft proximately caused an automobile accident and held American Motors, the automobile manufacturer, and Maywood Bell, the automobile retailer, liable to the plaintiffs, thus extending strict liability for the defective products to manufacturers and retailers of automobiles for the harm proximately caused to bystanders. To protect the bystander, the California court is reaching into the "deep pocket" of the manufacturer and retailer of automobiles who may allocate the cost of this protection between themselves throughout their business transactions. The significance of this decision lies in its extension of the current trend toward greater tort liability in California and foretells further bystander protection by imposition of strict liability to all manufacturers and retailers.

51. *See* A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951); R. KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1956); FRANKLIN, REPLACING THE NEGLIGENCE LOTTERY: COMPENSATION AND SELECTIVE REIMBURSEMENT, 53 VA. L. REV. 774 (1967).

present concept of negligence. It is probable that these cases foreshadow a substantial legislative change in the law of torts. Only the legislature can completely deal with this problem by developing compensation plans which will allow recovery regardless of fault without placing unreasonable burdens upon society in the form of insurance premiums.[52] *Maloney* illustrates the need for California to adopt an automobile compensation plan and such a plan may eventually be implemented for all types of personal injuries.

RICHARD ALAN BERMAN

52. Among the various alternatives to negligence that have been proposed are: the Columbia Plan which imposes strict liability and compulsory insurance upon the owner of an automobile—claims and awards are determined by a special board following procedures similar to Workman's Compensation; Saskatchewan Automobile Insurance Act which provides for a state insurance fund for compensation of automobile accident victims without regard to fault—yearly assessment of every driver and automobile owner provides the funds for this program; Full Aid Insurance which proposes an insurance policy clause to compensate automobile accident victims for all expenses within one year of the injury regardless of the liability of the insured. R. KEETON & O'CONNELL, *supra* note 51 at 125-39, 140-47, 165-79.