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Negligence-Stolen Vehicles - The Owner of a Vehicle Parked by Employees Who Left the Keys in the Ignition Held Liable for Injuries to Third Parties Resulting from the Motoring Activities of a Thief. Hergenrether v. East (Cal. 1964)

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NEGLIGENCE — STOLEN VEHICLES — THE OWNER OF A VEHICLE PARKED BY EMPLOYEES WHO LEFT THE KEYS IN THE IGNITION HELD LIABLE FOR INJURIES TO THIRD PARTIES RESULTING FROM THE MOTORING ACTIVITIES OF A THIEF. *Hergenrether v. East* (Cal. 1964).

Defendant Christy, a roofing contractor, employed defendants East and Collier, who parked Christy's partially loaded two-ton truck in a 'skid row' area of the city. The doors were unlocked, and the keys were left in the ignition. The truck was stolen, and Hergenrether and his son were injured as a result of the negligent operation of the truck by the unapprehended and unidentified thief. The jury returned a verdict for the plaintiffs Hergenrether. The granting of the defendants' motion for a judgment *non obstante veredicto* was reversed on appeal, and judgment was directed to be entered on the verdict. The court held that the special circumstances of the case constituted a foreseeable, unreasonable risk which imposed upon defendants a duty to third persons. *Hergenrether v. East*, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964), *reversing* 223 Adv. Cal. App. 757, 36 Cal. Rptr. 88 (1963).

In *Richards v. Stanley*,[1] the California Supreme Court said that it is the duty of the owner of an automobile to manage it so as not to create an unreasonable risk of harm to others.[2] However, *Richards* held that in the absence of statute the owner[3] of an automobile has no duty to protect the public from the motoring activities of one who steals the car, since such a judicially created duty would impose a greater liability upon an owner than that imposed by statute.[4] The California Vehicle Code imposes liability only upon an owner who *voluntarily* entrusts his car to another.[5] In construing the statute

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1 43 Cal. 2d 60, 271 P.2d 23 (1954).

2 *Id.* at 65, 271 P.2d at 27.

3 CAL. VEH. CODE § 460, as amended, defines an owner as, "a person having all the incidents of ownership, including the legal title of a vehicle whether or not such person lends, rents, or creates a security interest in the vehicle; the person entitled to the possession of a vehicle as the purchaser under a security agreement; . . . ."

4 43 Cal. 2d at 65, 271 P.2d at 26. Ingraham v. Bob Jaffe Co., 139 Cal. App. 2d 193, 293 P.2d 132 (1956) (owner is charged with negligence of operator, not with his willful misconduct).

5 CAL. VEH. CODE § 17150 provides, "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of the motor vehicle, . . . by any person using or operating the same with the permission, express or implied, of the owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages." CAL. VEH. CODE § 17151 limits the liability of an owner for imputed negligence imposed by the statutes to $5000 for the death or injury to one person in any one accident subject to a $10,000 limitation for the death or injury to more than one person in any one accident. Liability for property damage to others is limited to $5000 in any one accident.

California has held, in 1951, that while an owner may be negligent in leaving his automobile unlocked with the key in the ignition, no implication arises therefrom that one who subsequently steals the auto takes it with the owner's implied permission.[6] Mere possession of an automobile does not of itself establish that its possession was with the owner's permission.[7] Therefore, the owner of a stolen vehicle is not liable under California Vehicle Code § 17150 for ensuing property damage or personal injuries. The *Richards* court said that any expansion of the statute to include the owner of a stolen vehicle was for the Legislature and not for the judiciary to accomplish.[8]

California, along with other states, has held that in the absence of a statute or special circumstances, personal injuries and/or property damage caused by the operation of a vehicle by a thief are not ordinarily foreseeable consequences of the owner's conduct.[9] If it is assumed that the owner was negligent, then the theft represents a break in the casual chain connecting the negligence and the subsequent damage. Hence, the unforeseeable criminal act of a third person is regarded as an intervening cause of the resultant injury,[10] and supersedes the owner's prior negligence, since it occurs independently of the owner's wrongful act or omission, and is of itself adequate to bring about the injurious result.

Lacking a statutory guide, the California courts have examined the peculiar circumstances of each of these theft cases in order to determine whether other factors may impose upon the owner of the vehicle a legal duty to protect third persons. Liability has been imposed in those instances where, at the time of the incident, there existed a foreseeable risk of harm to others and the owner's negligence was the proximate cause of the accident. In *Richardson v. Ham*,[11] where a twenty-six ton bulldozer was left unattended and unlocked, a foreseeable risk of harm to third persons was said to exist. The *Richardson* court held that the danger created by a bulldozer in uncontrolled motion and the foreseeable risk of intermeddlers fully justified a finding that the machine's owner had a duty to protect third parties from injuries caused by the operation of the machine by intermeddlers. The fact that the bulldozer was set in

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[6] CAL. VEH. CODE § 402 (now CAL. VEH. CODE § 17150), Mucci v. Winter, 103 Cal. App. 2d 627, 230 P.2d 22 (1951).
[7] Mucci v. Winter, *supra* note 7, at 631.
[8] 43 Cal. 2d at 68, 271 P.2d at 28.
[9] *Id.* at 65, 271 P.2d at 26.
[10] For a discussion of the subject of proximate cause see PROSSER, TORTS § 49 (3rd ed. 1964).
[11] 44 Cal. 2d 772, 285 P.2d 269 (1955).

motion by the intentional misconduct of others was not considered to supersede the owner's negligence in those circumstances.

The facts in *Murray v. Wright*[12] also were held to have imposed a duty to protect third persons. There the defendants owned a used car lot, and intentionally left the keys in the ignition locks of all the cars on the lot. A car was taken from the lot by an intoxicated person who subsequently ran into the plaintiff. The court felt that the totality of these facts was sufficient to constitute a cause of action.

In the case at bar the court identified four special circumstances bearing upon the issue of the defendants' liability. *First*: The character of the neighborhood. The vehicle was left in an area frequented by persons who, the court said, "had little respect for the law and the rights of others." *Second*: The neighborhood was heavily populated by "drunks and near drunks." *Third*: The vehicle was intended to be left in the area for an extended period of time. *Fourth*: The vehicle was a partially laden two-ton truck, the safe and proper operation of which is not a matter of common knowledge. Such a vehicle was deemed to be more capable of inflicting serious injuries and great damage when not properly controlled than an ordinary vehicle.[13]

Liability has usually been imposed on an owner in cases where control of the vehicle was voluntarily surrendered to intoxicated persons or the auto was parked in an area where intermeddlers would be expected. These situations were held to constitute the 'special circumstances' prerequisite to the imposition of a duty to third persons upon the owner. The vicinity involved had to be such that a particular type of intermeddler was foreseeable.[14] Therefore, the court's use of the first and second points above is in conformity with the general rule. It no doubt will be more difficult for the courts to identify the circumstances mentioned in these points, because of their innate ambiguousness, as compared to the identification of factors such as "proximity to a school," but the courts have not shrunk from tasks which are much more difficult.

Recalling that the test is to be applied with respect to the time of the pertinent act, it is readily apparent that the third point, the intent to leave the truck overnight, adds weight to the court's holding of negligence. Certainly there is an enhancement of the foreseeability factor if the vehicle is to be left unguarded, and therefore

[12] 166 Cal. App. 2d 589, 333 P.2d 111 (1958).
[13] 61 Cal. 2d at 445, 393 P.2d at 167, 39 Cal. Rptr. at 7.
[14] RESTATEMENT, TORTS, § 302, illustration 7 (1934) (children expected to tamper with car parked in front of school.)

open to wrongful inspection, for a long period rather than for a moment or so. Perhaps, in these circumstances, it might be reasonable to find negligence after only a few minutes. The greater the risk inherent in points one and two, the shorter the reasonable time under point three, and vice versa. The precise time allowable under a given set of environmental factors is, of course, to be determined by the trier of fact.

The fourth point seems *a priori* to be valid, and is only a slight extension of the bulldozer situation dealt with in the *Richardson* case. Perhaps one of the most interesting points is not discussed at all in *Hergenrether*, 'though it might have been. Assuming that the defendants were all negligent under points one through four, and the truck was subsequently stolen, for what period of time thereafter will the defendants remain liable? Or if time alone does not determine the point at which liability abates, what does? Since the test of liability is defendants' ability to foresee danger to third persons at the time of the negligent act, what criteria are to be used to measure the limits which obviously must be imposed? The mind boggles at the possibilities, and the court offers no help.

It is not uncommon for municipalities to prohibit the leaving of keys in an auto's ignition.[15] However, evidence of a violation of such an ordinance has been held irrelevant in a civil case, on the ground that the ordinance was not enacted for the benefit of those persons who might be injured by stolen vehicles.[16] But why not enact a statute for such purpose? A state criminal statute within the Vehicle Code imposing upon motor vehicle owners, and secondarily upon their operators, the duty of locking the ignition switch whenever the vehicle is left unattended, could easily be worded so as to serve the dual functions of motor vehicle theft regulation and the definition of an objective standard of conduct for owners, by providing that violation constitutes either negligence per se or a rebuttable presumption of negligence.[17] Such an idea is not new. Several states have followed this view.[18]

Several benefits would accrue from passage of a statute which would proscribe the leaving of keys in an unlocked vehicle's ignition. Obviously the clarification of the owner's duty would be beneficial, since there would be an objective standard of conduct to follow.

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[15] A list of cases involving violations of car-locking ordinances is contained in PROSSER, *op. cit. supra* note 11, at 323 n.38.
[16] Richards v. Stanley, 43 Cal. 2d at 62-63, 271 P.2d at 25.
[17] Satterlee v. Orange Glen School District, 29 Cal. 2d 581, 177 P.2d 279 (1947).
[18] *E.g.*, ILL. REV. STAT. ch. 95½, § 92(a), par. 189(a) (1947) (now ILL. REV. STAT. ch. 95½, § 189 (1961), Ostergard v. Frisch, 333 Ill. App. 359, 77 N.E.2d 537 (1948); See Annot., 51 A.L.R.2d 633 (1957).

Such a statute would of necessity leave flexible the determination of proximate cause. However, the statute could provide some guidance in the determination of proximate cause by language to the effect that the theft shall not constitute a break in the casual chain if damages or injuries arise from the thief's immediate flight or within the immediate area of the theft. The proposed statute would reduce the complexity of future cases by eliminating the necessity for testimony designed to prove or disprove the premise that the section of the city in which a vehicle was parked was one frequented by persons who have little respect for the law. The proposed statute would also resolve the difficulties associated with the question of the length of time the vehicle was intended to be parked. These problems are inherent in the application of a general negligence rule, such as that utilized by the *Hergenrether* court, but they go only to the balancing process required by the determination of how foreseeable the injury to third persons may be under a particular set of facts. We would be naive to suppose that thefts do not occur in areas of comparative wealth, and yet under the *Hergenrether* test the leaving of the same truck for the same time in such an area might cut off the injured persons' remedy.

It is submitted that California motor vehicle owners and operators have no vested right to leave ignition keys in parked vehicles and thereby encourage thefts and injuries which might not otherwise occur.

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