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Torts--Negligence--Duty of a Donor of an Automobile--Estes v. Gibson

C. Gibson Downing Jr.
University of Kentucky

It is completely unrealistic to construe the constitutional guarantee against self-incrimination, whether occurring in a state or federal constitution, as permitting compulsion of a witness to testify when it is certain or probable that he will be prosecuted in a court of the other jurisdiction a few blocks away. The constitutional guarantee should be given its full implication or it should be amended. Otherwise, courts could give it full effect by refusing to compel testimony in any situation where prosecution is likely to follow within either state *or* federal jurisdiction. This could be done by judicial interpretation, or if that would bring about confusion, then a declaratory statute might be adopted to avoid conflict with previous decisions to the contrary.

WENDELL SAFRIET WILLIAMS

TORTS—NEGLIGENCE—DUTY OF A DONOR OF AN AUTOMOBILE—ESTES V. GIBSON

The plaintiff was injured when the defendant's adult son negligently ran an automobile, given to him by the defendant mother, into a gasoline pump and caused an explosion which showered the plaintiff with burning gasoline. The plaintiff brought an action against the defendant mother, alleging that having knowledge, actual or constructive, that her son "by reason of his physical and mental condition and by reason of his habits of insobriety and his addiction to the use of hypnotic drugs and narcotics . . . was, at all times mentioned herein, a careless, reckless and incompetent operator of a motor vehicle," she carelessly and negligently purchased the automobile for her son, placed it in his possession, and permitted and allowed him to operate it. The title to the automobile at the time of the accident was in the son. The defendant mother's general demurrer to the petition was sustained and the complaint against her was dismissed. On appeal, held, judgment affirmed by a divided court, 4-3.[1]

It would seem that to sustain the general demurrer is to hold flatly that, as a matter of law, one who transfers an automobile by gift to an adult is not liable to a third party who is subsequently injured by the negligent operation of the automobile by the donee, even if at the time of the gift the donor had knowledge that the donee was an incompetent operator of any motor vehicle.

The decision of the majority seems to turn chiefly on the fact that

[18] *Supra* note 1 at 447.

[1] Estes v. Gibson, 257 S. W. 2d 604 (Ky. 1953).

the defendant passed title to her son, and that at the time of the accident he was the absolute owner.[2] It seems to be admitted that had the defendant merely rented or lent the car with knowledge that her son was an incompetent driver, she would have been liable for the plaintiff's injuries which arose through the subsequent negligent operation by the son.[3] Her liability in such a case would not have rested upon her ownership of the automobile, but upon her own negligent conduct in furnishing it to one known to be an incompetent driver.[4]

The plaintiff's case is pitched on the legal principle set out in the *Restatement of Torts,* section 390:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or from the facts known to him should know to be likely because of his youth, inexperience or otherwise, to use it in a manner involving unreasonable risk of bodily harm to himself and others whom the supplier should expect to share in, or be in the vicinity of its use, is subject to liability for bodily harm caused thereby to them.[5]

Both the majority and the minority opinions in the instant case recognize the validity of this general principle of law.

The majority of the court determined, however, that a supplier within the meaning of this *Restatement* section does not include a vendor, donor or any person who passes title to the one supplied. In so determining, the court observed that:

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[2] The majority opinion also noted that KY. REV. STAT. 186.440 (4) denies an operator's license to "an habitual drunkard or drug addict". In the absence of a plea to the contrary, the court presumed that the defendant's son had been issued an operator's license, which indicated that the state, through its officers, sanctioned his ownership and right to drive the automobile involved. In Tipton v. Estill Ice Co., 279 Ky. 793, 132 S. W. 2d 347 (1939), the Kentucky Court of Appeals held that it was not competent for the General Assembly to make the mere failure to secure an operator's license prima facie evidence of negligent driving since such a violation of the law has no evidentiary relation to or logical tendency to prove the fact of negligence. Since that time, in 1940, the Kentucky statute has been amended to require an examination to obtain a driver's license, and no decision has been made as to the constitutionality of the law as amended. If failure to have a driver's license is no evidence of negligence, how then can possession of a license be evidence of competence?

[3] Owensboro Undertaking and Livery Ass'n v. Henderson, 273 Ky. 112, 115 S. W. 2d 563 (1938). (An owner who rented an automobile to a person whom he knew, or in the exercise of ordinary care should have known, was intoxicated and incompetent to drive was held liable for injuries to a third party arising out of the incompetent operation of the car by the person so receiving it.) Sanders v. Lakes, 270 Ky. 98, 109 S. W. 2d 36 (1937); Brady v. B & B Ice Co., 242 Ky. 138, 45 S. W. 2d 1051 (1931); See also 5 BLASHFIELD, CY. OF AUTO LAW AND PRAC., secs. 2924, 2927 (1935); 60 C.J.S. 1062 (1949). All of these citations are included in the majority opinion of the instant case in support of this general principle of law.

[4] In Brady v. B & B Ice Co., *supra* note 3, the court stated: "If an owner lends his automobile to another under circumstances that do not warrant the application of the doctrine of respondeat superior, any liability attaching to him does so by reason of his own negligence in knowingly permitting the use of it in such a way as would probably cause injury to others." See also 5 AM. JUR. 696 (1936).

[5] RESTATEMENT, TORTS sec. 390 (1934).

> . . . the various explanatory illustrations [to Section 390 of the *Restatement*] show the broad and abstract statement of the rule has its limitations. The illustrations are confined to cases of agency and bailment, as by permitting the use of, lending or hiring an automobile or other potentially or inherently dangerous instrumentality.[6]

To further support their decision to restrict the applicability of this *Restatement* section, the majority cited at length an Alabama decision[7] closely in point which held that in the absence of an allegation of relationship constituting a legal control over the donee at the time of the accident, the donee would be liable for his own negligence, but the liability would not extend and attach to the donor, even if he gave him the automobile with the knowledge that the donee was an incompetent operator.

Since the case law makes it clear that the liability of one who rents or lends his automobile to a known incompetent is not predicated on his ownership, but upon his own negligent conduct in so placing an automobile in the possession of an incompetent,[8] the minority of the court refused to recognize the validity of the contention of the majority that the liability set out in this *Restatement* section is limited to cases in which a legal relationship, such as agency or bailment, can be shown between the supplier and the one supplied at the time of the accident.

In other sections of the *Restatement of Torts*, it is expressly provided that section 390 shall apply to a donor.[9] An intermediate court in New York has applied section 390 to a case analogous to the one at hand.[10] That court ruled that a complaint against a father alleging that he had bought an automobile for his adult son whom the father knew to be an epilptic stated a cause of action for damages resulting from the son's wrecking the car when he had an epileptic fit. The epileptic son was most likely a capable driver at times, but he was unfit to drive because at any time his defect might become active. The defendant's son in the instant case may have been capable of driving at times, but was unfit because his habits of insobriety and addiction to narcotics might at any time make him

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[6] *Supra* note 1, at 605.

[7] Shipp v. Davis, 25 Ala. App. 104, 141 So. 366, 367 (1932).

[8] *Supra* notes 2 and 3.

[9] RESTATEMENT, TORTS sec. 390 is a component part of Topic 1, Chapter 14. The introductory scope note to Topic 1 states: "This topic states the rules which are equally applicable to all persons who in any way or for any purpose supply chattels for the use of others or permit others to use their chattels." RESTATEMENT, TORTS sec. 405 provides expressly that "One who directly or through a third person gives or lends a chattel for another to use, knowing it to be or likely to be dangerous for the use for which it is given or lent, is subject to liability as stated in secs. 388-390 [which sections comprise Topic 1, Chapter 14 of the RESTATEMENT.]" Comment (a) to sec. 405 lists comment (c) to sec. 388 as pertinent, which defines persons to be included as "suppliers" as being "vendors, lessors, donors or lenders." Thus within the RESTATEMENT, it is expressly provided that sec. 390 shall apply to a donor situation such as presented in the instant case.

[10] Golemberg v. Blumberg, 262 App. Div. 759, 27 N. Y. S. 2d 692 (1941).

dangerous. It would seem that the negligence involved in placing an automobile in the possession of an habitual drunkard and dope addict is equally as great as that involved in placing such a vehicle in the possession of an epilpetic.

The majority opinion seems to suggest in conclusion that the problem presented is one of extending "the vicarious liability of an owner or controller" to a donor or seller of an automobile. Vicarious liability, however, is defined as the responsibility of one person, without fault or any wrongful conduct of his own, for the tort of another.[11] It is submitted that the question presented in the instant case is not whether to extend liability of the donor without fault of his own, but whether to allow a donor to escape liability for his own negligent conduct merely because the title to the chattel is passed to the donee.

In support of the decision, the majority opinion also considered at length the causal connection between the gift of the car to the incompetent son and the subsequent injury to the plaintiff through the son's negligent operation of the automobile. In holding that the causal connection was too tenuous and remote to allow recovery, the court considered chiefly the time element.[12] The declaration contained no allegation of the time elapsing between the gift and the accident. Construing the pleading strictly against the pleader, the court decided that there must have been a considerable interval of time between the two acts, during which time the son may have operated the automobile without mishap. *Restatement of Torts,* section 433, is cited in the opinion of the majority of the court as authority supporting their contention that one of the elements to be considered in determining causal connection is the lapse of time between the negligent act and the injury complained of. The majority opinion

[11] PROSSER, TORTS 471 (1941). The "family purpose doctrine" is an instance of this vicarious liability. The mother of a 20 year old son may be liable for a single negligent lapse of the youth in driving the family automobile, although she had no notice of any incompetence on his part and he is in fact a careful driver. The mother of a 21 year old son will not be liable for providing him with an automobile regardless of how incompetent the son may be even if she has knowledge of the incompetency under such family purpose doctrine.

[12] The majority of the court also considered in regard to the causation factor the allegation of the plaintiff as to the physical condition of the defendant's son at the time of the accident. It was merely alleged that the son was by reason of his habits of insobriety and his addiction to the use of hypnotic drugs and narcotics, "at all times mentioned herein, a careless, reckless and incompetent driver of any motor vehicle." The majority court opinion states briefly that it was not alleged that at the time of the accident that the defendant's son was under the influence of drugs or intoxicants. However, since the demurrer admits all matters of fact which are well pleaded, it is submitted that under the allegations made the only logical conclusion which may be reached is that it is alleged that the son was at the time of the accident an incompetent driver by reason of his habits of insobriety and his addiction to the use of hypnotic drugs and narcotics. Any other interpretation of the pleadings would be fatal to the cause of the plaintiff.

seems to take no note, however, of the comment to clause (d) of the *Restatement,* section 433 which states:

> Where it is evident that the influence of the actor's negligence is still a substantial factor, mere lapse of time, no matter how long, is not sufficient to prevent it from being the legal cause of the other's harm.

Certainly the placing of the automobile in the possession of one who is known by him to be an habitual drunkard and drug addict, and thus an incompetent operator of any motor vehicle, is a substantial factor in any subsequent injury arising out of the incompetent operation by the person receiving it, regardless of the time elapsing between the act of placing the car in the other's possession and the injury to a third party.

It is submitted that the holding of the majority in the instant case is an unfortunate one. It establishes as law in Kentucky that a donor of an automobile is not liable to a third party who is injured by the negligent operation of the automobile by the donee, even if at the time of the gift the donor knows the donee is an incompetent driver. The reasoning is not entirely clear. The majority is willing to accept as law in this jurisdiction that an owner who lends his car to a known incompetent is liable for injuries to third parties arising from the negligent operation of the one so receiving it, and that such liability is not predicated on the ownership of the automobile, but upon the owner's negligence in so supplying the vehicle.[13] Yet they hold that ownership in the supplier at the time of the accident is prerequisite to his liability for furnishing the automobile to a known incompetent.[14] A fine line of distinction is thus drawn between the negligence of one who supplies by lending or hiring and the negligence of one who supplies by giving or selling. It is submitted that the minority opinion is

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[13] *Supra* notes 2 and 3.

[14] A question which seemed to disturb the majority of the court throughout was at what point the liability of a supplier should be limited. If such liability is not to be limited to suppliers who retain title or control of the chattel, just where is the line to be drawn. It is submitted that the proper limits of any supplier's liability, whether or not he passes title to the chattel to the one supplied, are set forth in RESTATEMENT, TORTS sec. 390. Such liability is limited to suppliers who, at the time of furnishing the chattel, know, or in the exercise of ordinary care should know, that the one supplied is a careless, reckless or incompetent user of such a chattel. Recovery is limited to persons whom the supplier can expect to share in or to be in the vicinity of the chattel's use. The chattel involved must be such as to involve an unreasonable risk of bodily harm to others when used in a careless, reckless or incompetent manner. The harm caused must be bodily harm and the supplier is not liable for injuries to property interests. And in each of these cases the particular carelessness, recklessness or incompetence which the supplier is charged with knowledge must be the proximate cause of the injury to the plaintiff. It is submitted therefore that the limits of liability of a supplier under this general principle of law are well founded and sufficient and that to further limit such liability because the supplier merely passes title to the one supplied is error.

correct in observing that if a distinction is to be drawn between the negligence of one who lends his car and one who gives his car to a known incompetent or reckless driver, "the more reasonable view would suggest that one who gives an automobile to a known incompetent driver, placing in him the power to use it at any and all times, drunk or sober, sane, or insane, is more negligent than one who merely lends the vehicle for one specific occasion."[15] The mere passing of title does not change the character of the negligence of the defendant, and it is submitted that the law should not operate to relieve him of his responsibility for the natural and probable consequences of his own negligent act.

C. GIBSON DOWNING, JR.

WORKER'S RIGHT TO REFUSE TO CROSS A PICKET LINE

National Labor Relations Board v. *Rockaway News Supply Co., Inc.*,[1] was brought to the United States Supreme Court by a grant of certiorari[2] to the United States Court of Appeals, Second Circuit, which had denied the enforcement of a National Labor Relations Board order.[3] This order sought to have one Charles Waugh reinstated as a chauffeur and routeman of the respondent, Rockaway News Supply Co., Inc.[4]

Waugh, an employee of respondent for seven years, had the job of driving a truck along a regular route picking up and delivering certain newspapers. He, like others similarly employed, was a member of the Newspaper and Mail Deliverers' Union of New York and Vicinity.

On the morning of Thursday, March 2, 1950, Waugh learned that a union, other than the one of which he was a member, had placed pickets before the premises of the Daily Review Corporation, a plant which his duties required him to enter. He immediately went to his foreman and stated that, as a union member, he would not cross the picket line, but would pick up the consignments of the strike bound plant if they were brought to a point outside the picket line. This was done for two days, but on the third day the foreman told him that

[15] 257 S. W. 2d 604, 608.

[1] National Labor Relations Board v. Rockaway News Supply Co., Inc., 345 U. S. 71 (1952).

[2] 344 U. S. 863 (1952).

[3] National Labor Relations Board v. Rockaway News Supply Co., Inc., 197 F. 2d 111 (2d Cir. 1952).

[4] National Labor Relations Board v. Rockaway News Supply Co., Inc., 95 N. L. R. B. 336 (1951).