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Torts - Liability of Owner for the Negligent Driving of Automobile Thief

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TORTS — LIABILITY OF OWNER FOR THE NEGLIGENT DRIVING OF AUTOMOBILE THIEF

The defendant owned and operated a used car lot. The keys to one of the cars were stolen by a fourteen-year old boy who was in the habit of playing there. The defendant, aware of the theft, reported it to the police but did not change the ignition lock or take other precautions to prevent the car from being stolen. Two days later, while the lot was unattended, another fourteen-year old boy used the stolen keys to drive the car off the lot. His negligent driving caused injury to the plaintiff, who sued the owner for damages. The trial court held that the facts alleged failed to state a cause of action. On appeal to the Supreme Court of Pennsylvania, *held* reversed and remanded. One injured by the negligent driving of a child automobile thief states a cause of action against the owner of the automobile by alleging that the owner knew that children played on his lot and that the keys had been stolen. Whether the defendant took reasonable precautions to prevent the car from being stolen is a question for the jury. *Anderson v. Bushong Pontiac Co.*, 404 Pa. 382, 171 A.2d 771 (1961).

Most attempts to hold an automobile owner liable for the negligent driving of one who has stolen his car have involved a private owner who had parked his car with the keys left in the ignition switch.[1] No prior theft of the keys has been involved. The courts, when faced with these situations, have usually articulated the issues in terms of "foreseeability" and "proximate cause." The problem in these cases has been whether the owner owes a duty to the plaintiff or, if so, whether the duty has been breached.[2] In resolving both of these matters, the courts have

1. See, *e.g.*, Fulco v. City Ice Service, 59 So.2d 198 (La. App. 2d Cir. 1951); Midkiff v. Watkins, 52 So.2d 573 (La. App. 1st Cir. 1951); Castay v. Katz & Besthoff, 148 So. 76 (La. App. Orl. Cir. 1933); Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954); Kiste v. Red Cab, Inc., 122 Ind. App. 587, 106 N.E.2d 395 (1952); Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945); Slater v. Baker Co., 261 Mass. 424, 158 N.E. 778 (1927); Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950); Permenter v. Milner Chevrolet Co., 229 Miss. 385, 91 So.2d 243 (1956); Saracco v. Lyttle, 11 N.J. Super. 254, 78 A.2d 288 (1951); Rapczynski v. Cowan, 138 Pa. Super. 392, 10 A.2d 810 (1939).

2. See PROSSER, TORTS 276 (2d ed. 1955): "Almost invariably these cases present no issue of causation in fact, since the defendant has created a situation acted upon by another force [the negligence of the thief] to bring about the result; and to deal with them in terms of 'proximate cause' is only to avoid the real issue. The question is one of negligence and the extent of the obligation: whether the defendant's responsibility extends to such interventions which are foreign to the risk he has created. It might be stated as a problem of duty to protect the plaintiff against such an intervening cause. A decision that the defendant's con-

articulated the applicable test as whether the defendant-owner should have foreseen or anticipated that his car might be stolen and that someone might be injured by the thief's negligent driving.

In some jurisdictions a statute[3] or ordinance prohibits leaving keys in an unattended automobile. It has been held as a matter of law that the breach of such a statute is negligence and is the "proximate cause" of the injury negligently inflicted by the thief.[4] In some decisions, the statute has been viewed as designed to promote the safety of the public from negligent automobile thieves.[5] However, a majority of courts have construed its purpose to be the protection of automobile owners or an aid to law enforcement officers and have not held the owner liable for the thief's negligence.[6]

In those jurisdictions where no statute exists, recovery against the owner is generally denied. Various reasons in support of these decisions have been given, *e.g.*, lack of reasonable grounds to anticipate the thief's action,[7] the thief's negligence alone was the "proximate cause" of the injury[8] or the owner's negligence was not the "proximate cause."[9] A few courts have held that a jury is to decide negligence and "proximate cause" even though no statute prohibits leaving keys in unattended automobiles.[10]

Louisiana does not, by statute, prohibit leaving keys in the switch of an unattended automobile. The Louisiana courts have

duct is not the 'proximate cause' of the result means only that he has not been negligent at all, or that his negligence, if any, does not cover such a risk."

3. *E.g.*, 6 MD. CODE art. 66 ½, § 247 (1957), which provides: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition and removing the key. . . ."

4. Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943); Ney v. Yellow Cab Co., 2 Ill.2d 74, 117 N.E.2d 74 (1954); Ostergard v. Frisch, 333 Ill. App. 359, 77 N.E.2d 537 (1948).

5. *E.g.*, Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943); Ostergard v. Frisch, 333 Ill. App. 359, 77 N.E.2d 537 (1948).

6. See, *e.g.*, Frank v. Ralston, 145 F. Supp. 294 (W.D. Ky. 1956); Kiste v. Red Cab, Inc., 122 Ind. App. 587, 106 N.E.2d 395 (1952); Liberto v. Holfeldt, 221 Md. 62, 155 A.2d 698 (1959); Gailbraith v. Levin, 323 Mass. 255, 81 N.E.2d 560 (1948); Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945); Slater v. Baker, 261 Mass. 424, 158 N.E. 778 (1927); Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950); Wannebo v. Gates, 227 Minn. 194, 34 N.W.2d 695 (1948); Kennedy v. Hedberg, 159 Minn. 76, 198 N.W. 302 (1924); Permenter v. Milner Chevrolet Co., 229 Miss. 385, 91 So.2d 243 (1956); Gower v. Lamb, 282 S.W.2d 867 (Mo. App. 1955).

7. Lustbader v. Traders Delivery Co., 67 A.2d 237 (Md. App. 1949).

8. Teague v. Pritchard, 38 Tenn. App. 686, 279 S.W.2d 706 (1954).

9. Howard v. Swagart, 161 F.2d 651 (D.C. Cir. 1947).

10. *E.g.*, Schaff v. R. W. Claxton, Inc., 144 F.2d 532 (D.C. Cir. 1944); Garbo v. Walker, 129 N.E.2d 537 (Ohio Com. Pl. 1955).

concluded that the owner owes no duty to protect the public at large against the risk of a thief's negligence[11] or that the leaving the keys in an unattended automobile does not of itself constitute negligence.[12] However, two decisions have suggested that if there were a statute prohibiting this type of conduct, an automobile owner would owe the duty.[13]

In cases where one has been injured by the intervening negligence of a child automobile thief, some courts have permitted recovery where they would have denied it if the thief had been an adult.[14] However, before such cases are permitted to go to the jury, it must be shown that the owner had knowledge that children frequently played around the automobile.[15] The negligence is specified as the owner's failure to anticipate and take proper steps to guard the public against the mischievous propensities of children.

Generally, no distinction has been made between private and commercial owners. However, in a recent case[16] it was observed that the risk of unauthorized use is markedly increased where one is in the business of selling automobiles.

In the instant case, the court held that the owner owed a duty to the public at large and left the question of negligence and "proximate cause" for jury determination. In determining the duty issue, the court laid emphasis on the fact that the keys were stolen prior to the theft of the automobile and noted that the defendant was aware that children frequently played on his lot.

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11. Boudreaux v. New Orleans Public Service, 142 So. 802 (La. App. Orl. Cir. 1932); Tabary v. New Orleans Public Service, 142 So. 800 (La. App. Orl. Cir. 1932).

12. Midkiff v. Watkins, 52 So.2d 573 (La. App. 1st Cir. 1951); Fulco v. City Ice Service, 59 So.2d 198 (La. App. 2d Cir. 1951). See also Town of Jackson v. Mounger Motors, 98 So.2d 697 (La. App. 1st Cir. 1957).

13. Fulco v. City Ice Service, 59 So.2d 198, 201 (La. App. 2d Cir. 1951); Maggoire v. Laundry and Dry Cleaning Service, 150 So. 394, 396 (La. App. Orl. Cir. 1933).

14. Jackson v. Mills Baking Co., 221 Mich. 64, 190 N.W. 740 (1922); Kennedy v. Hedberg, 159 Minn. 76, 198 N.W. 302 (1924); Lomano v. Ideal Towel Supply Co., 25 N.J. Misc. 162, 51 A.2d 888 (1947); Mann v. Parshall, 229 App. Div. 366, 241 N.Y. Supp. 673 (1930).

15. See cases cited in note 14 *supra;* Tierney v. New York Dugan Bros., Inc., 288 N.Y. 16, 41 N.E.2d 161 (1942).

16. Murray v. Wright, 166 Cal. App.2d 589, 592, 333 P.2d 111, 113 (1958): "It is quite apparent that the instant case presents a factual situation far more serious than the parking of a single car on a city street as in Richards [Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954)] case. Here it is alleged that defendants purposely left the keys in the ignitions of all vehicles parked on their lot which was at all times open and unattended, in order to encourage the general public to . . . operate the vehicles, and they did so 'without regard for the fitness or competence of said general public so to do'."

It was also emphasized that the defendant was a commercial owner. It is to be noted that the court did not find negligence or impose liability but merely held that the facts alleged stated a cause of action. It is submitted that this was a sound conclusion. It required little imagination on the part of the defendant to suspect that the one who had purloined the keys would return for the car. The defendant also had reason to suspect that the keys had been taken by an incompetent driver since he knew that children were in the habit of playing on the lot. In view of these facts, it does not seem to be an undue burden on the defendant to hold that reasonable execution of his duty to the public required that he change the ignition lock or take some other precaution to prevent the car from being taken by an incompetent driver. This inconvenience is certainly slight when compared with its effectiveness in minimizing the risk.

It is suggested, however, that the decision should be limited to its facts and should not be extended to cases where the keys are not stolen prior to the theft of the automobile or where the owner has little or no reason to suspect that the thief would be an incompetent driver. In the absence of facts which would lead the reasonable man to anticipate the theft and subsequent injury, leaving the keys in the switch of an unattended automobile should not of itself be considered negligence or disregard for the safety of others such as will justify the imposition of liability. In determining when an owner should be held to anticipate such misconduct it is suggested that among the factors to be considered should be the location of the unattended automobile, the length of time and the time of day that it was left unattended, and whether the owner knew that the keys had been previously stolen.

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TRUSTS — PROHIBITED SUBSTITUTIONS

The recent case of *Succession of Meadors*[1] illustrates how the Louisiana courts have restricted the utility of trusts under the Trust Estates Law.[2] In that case a Tennessee domiciliary be-

1. 135 So. 2d 679 (La. App. 2d Cir. 1961); cert. denied, 135 So. 2d 679 (La. 1962).

2. LA. R.S. 9:1791-2212 (1950). The legislature is authorized to provide for trust estates under LA. CONST. art. IV, § 16. Discussions of the Trust Estates Law are found in Daggett, *Comments by Harriet S. Daggett*, 3 WEST'S LOUISIANA