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Torts—Liability of Vehicle Owner to Third Parties Injured by Thief's Negligent Operation of Vehicle, Where Keys Left in Ignition Led to Theft

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to a distribution of the estate's assets. The resulting standard does not permit a valuation above the amount of cash the executor can realize upon a sale of the mutual fund shares. If this standard is followed in other courts, it seems clear that the application of the retail market test as a whole, and not merely in the area of mutual fund shares, will be found unreasonable, although the retail market test is a fair application of intent of the estate tax.

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TORTS—LIABILITY OF VEHICLE OWNER TO THIRD PARTIES INJURED BY THIEF'S NEGLIGENT OPERATION OF VEHICLE, WHERE KEYS LEFT IN IGNITION LED TO THEFT

On June 28, 1969 between 10:00 and 10:30 p.m. defendant, Gorsky, attended a V.F.W. field day event with a close friend. The defendant parked his car in the vicinity of the event. At approximately 11:30 p.m. that evening the car was stolen by two youths aged 16 and 17. The elder thief drove and, as a result of his negligence, the Gorsky vehicle collided with a car driven by the plaintiff, Guaspari, and occupied by his wife and daughter. The plaintiff brought actions against the defendant for personal injuries, medical expenses, property damages and wrongful death. The actions were based on the defendant's alleged violation of New York's Vehicle and Traffic Law, section 1210 (a),[1] the plaintiff claiming that the defendant left the keys in the ignition. Both Gorsky and his friend testified that the keys were removed from the ignition, but that a spare set was left in the glove compartment of the car. However, the thief testified that the keys *were* in the ignition when he entered the vehicle, though his testimony was attenuated by the discovery that the other thief had entered the automobile first and searched the glove compartment. Jury verdicts were rendered for the plaintiff and the defendant appealed on the law and facts. The Appellate Division for the Fourth Department affirmed. *Held,* defendant's

1. N.Y. VEHICLE AND TRAFFIC LAW § 1210 (a) (McKinney 1970) 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, removing the key from the vehicle . . . ."

violation of the statute created jury questions as to defendant's negligence and the proximate cause of the injury. *Guaspari v. Gorsky,* 36 App. Div. 2d 225, 319 N.Y.S.2d 708 (4th Dep't 1971).[2]

Liability for negligence generally depends on the establishment of four factors: (1) the finding of a duty owed by one party to another; (2) breach of that duty; (3) damages; and (4) a finding that the proximate cause of those damages was the breach of the duty.[3] Negligence itself is often considered to encompass only the first two factors; that is, a duty and its breach.[4] Liability, however, depends on all four elements. Absent a statutory provision such as section 1210 (a), courts have generally been unwilling to impose liability on a party under facts similar to those described above.[5] These decisions have been based on either or both of two grounds: (1) that the owner[6] owed no duty to a third party injured by a thief's negligent driving of a stolen vehicle and (2) that the proximate cause of the injury was not the failure to remove the keys from the ignition. In examining the question of the duty owed by an owner in this situation the courts have often held, as a matter of law, that the foreseeability of these occurrences was such that no duty could be imposed on the defendant.[7] "The risk reasonably to be perceived defines the duty . . . ."[8] Those courts which apply this reasoning have concluded that an owner could not reasonably foresee the harm to third parties which might result upon a failure to remove the ignition key from a vehicle. They do not see the risk of harm to innocent persons as substantial enough to warrant the imposition of a duty on an owner. Other courts have either passed over the issue of a duty, or alternatively rested their denial of liability on the lack of a legally sufficient causal relation between negligence in failing to remove the keys and

2. Hereinafter cited as the instant case.

3. W. PROSSER, LAW OF TORTS 146 (3d ed. 1964).

4. *Id.*

5. *But see* Schaff v. R.W. Claxton, Inc., 144 F.2d 532 (D.C. Cir. 1944).

6. Unless otherwise specified "owner" will refer to the party responsible for leaving keys in the ignition.

7. *E.g.,* Shafer v. Monte Mansfield Motors, 91 Ariz. 331, 372 P.2d 333 (1962); Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); Smith v. Leuthner, 156 Conn. 422, 242 A.2d 728 (1968); Consiglio v. Ahem, 5 Conn. Cir. 304, 251 A.2d 92 (App. Div. 1968); George v. Breising, 206 Kan. 221, 477 P.2d 983 (1970).

8. Palsgraf v. Long Island R.R., 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928).

the eventual injury to an innocent third party.[9] It has been held that the owner could not reasonably foresee the independent criminal activity of the thief and his negligent driving,[10] or that the thief's activity was an intervening and superseding cause which operated to insulate the defendant from liability.[11] The latter ground would appear to assume the first, for if the thief's movements were reasonably foreseeable, then it would generally follow that his criminal act was not a superseding cause.[12] In this area it is apparent that foreseeability plays a significant role in both questions of duty and proximate cause. At times, courts have attempted to distinguish the application of foreseeability to duty from its application to proximate cause.[13] Consequently, foreseeability may be employed differently in an analysis of duty than in an analysis of proximate cause. If so, it is possible to view an event as foreseeable in terms of proximate cause, yet still perceive the same event as unforeseeable in terms of duty.[14] Yet, foreseeability may not be the only factor relevant to questions of duty and proximate cause.[15] If this is the case, courts may well be using foreseeability as a convenient formula to be applied in various situations while not intending that its function in an examination of duty be identical with its functon in an examination of proximate cause. Although the elements of duty may not correspond precisely with those involved in proximate cause, both determinations may be used to make policy decisions with respect to liability.[16] Consequently, foreseeability may on occasion simply be the rationalized grounds on which a court decides

9. *E.g.*, Kalberg v. Anderson Bros. Motor Co., 251 Minn. 461, 88 N.W.2d 197 (1958); Lotito v. Kyriacus, 272 App. Div. 635, 74 N.Y.S.2d 599 (4th Dep't 1947), *appeal dismissed*, 297 N.Y. 1027, 80 N.E.2d 542 (1948); Stone v. Bethea, 251 S.C. 157, 161 S.E.2d 171 (1968). *See also* George v. Breising, 206 Kan. 221, 477 P.2d 983 (1970); and cases cited note 25, *infra*.

10. *See, e.g.*, 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 (App. Div. 1951); Stone v. Bethea, 251 S.C. 157, 161 S.E.2d 171 (1968).

11. *See* Kalberg v. Anderson Bros. Motor Co., 251 Minn. 461, 88 N.W.2d 197 (1958).

12. *See* Meihost v. Meihost, 29 Wis. 2d 537, 547, 139 N.W.2d 116, 121 (1966) (concurring opinion). *See also* RESTATEMENT (SECOND) OF TORTS § 447 (1965).

13. Richards v. Stanley, 43 Cal. 2d 60, 68-69, 271 P.2d 23, 28-29 (1954).

14. *Id.*

15. *See generally* Green, *The Duty Problem In Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); Green, *The Duty Problem In Negligence Cases: II*, 29 COLUM. L. REV. 255 (1929).

16. *See* W. PROSSER, LAW OF TORTS 288, 305-09, 331-34 (3d ed. 1964). *See generally* Green, *supra* note 15.

to limit the liability of a party for his acts. However, courts do not always free the owner from liability where there is no statute proscribing the leaving of keys in the ignition. All the facts of a given case are necessary for a determination of foreseeability and thus liability. Consequently, where factors such as the character of the neighborhood[17] or the great attraction of a vehicle[18] exist to put a reasonable man on notice that theft or tampering is likely to occur, the owner may well be held liable.[19]

The existence of a statute similar to New York's section 1210 (a) has occasionally had the effect of changing the common law. However, the presence of a statute should not alter the basic questions of duty and proximate cause; it should simply change the examination of the question, at least with respect to duty. Although violation of a statute may often constitute negligence[20] this should not conclusively determine the issue of liability, for it must also be determined that the violation was an act of negligence with respect to a particular plaintiff. The plaintiff may be outside the class designed to be protected by the statute.[21] The statute may be designed to protect interests other than those which were invaded.[22] It may have been intended to protect against harms or hazards different from those occurring in a given case.[23] These considerations relate to the question of duty. That is: does the statute require the defendant to act in a certain manner because it is designed to protect *this* plaintiff with *such* an interest from *these* possible harms? Where a statute similar to section 1210 (a) exists, courts occasionally resolve the duty question in favor of the owner and thus attach no liability to his acts. In so holding, it is usually determined that the statute was not enacted to protect the interests of in-

17. *See* Hergenrether v. East, 61 Cal. 2d 440, 393 P.2d 164, 39 Cal. Rptr. 4 (1964).

18. *See* Richardson v. Ham, 44 Cal. 2d 772, 285 P.2d 269 (1955); Bronk v. Davenny, 25 Wash. 2d 443, 171 P.2d 237 (1946).

19. Thus, special circumstances are sometimes sufficient to allow a finding of foreseeability of harm to third parties and consequently liability of an owner. *See* Mezyk v. National Repossessions, Inc., 241 Ore. 333, 405 P.2d 840 (1965), allowing the plaintiff to show special circumstances before the trier of fact. For an application of this rule in Oregon, see Roberts v. Pendleton Airmotive, Inc.,..... Ore. ....., 484 P.2d 308 (1971) (not imposing liability).

20. *See* W. PROSSER, LAW OF TORTS 191 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 286 (1965).

21. *See* RESTATEMENT (SECOND) OF TORTS § 288 (1965).

22. *Id.*

23. *Id.*

jured third parties or public safety. Instead, the courts construe the legislation as a measure to aid police by reducing thefts or as a means of furthering the owner's property interests.[24] In these instances, the courts do not perceive the statute as defining a reasonable standard of conduct with respect to the public. Yet in denying liability where ignition key legislation exists, most courts have not given primary consideration to the question of duty or standard of care defined by the statute. Rather they have declared that the proximate cause of the injury was the intervening act of the thief.[25] Once again the question becomes one of foreseeability as applied to proximate cause, with a judicial determination that the events were unforeseeable, thus requiring a finding of no proximate cause as a matter of law. In ignoring the question of duty while finding no proximate cause it would seem that a court is implicitly assuming that the statute did not contemplate injury to third parties by a thief. It is hard to imagine a court deciding that injury occurring in a manner foretold by the statute, in other words foreseeable in terms of duty, is however, unforeseeable in terms of proximate cause.[26] Thus, those jurisdictions denying liability could possibly have based their decisions on duty under the statute as well as on proximate cause. This is not to say that proximate cause is an inappropriate means of determining liability, but rather to point out that questions of duty and proximate cause are not necessarily independent and that either may be a satisfactory ground on which to rest policy decisions.

Not all courts deny liability where appropriate legislation has been enacted. A number of jurisdictions with statutes similar to New York's have found them to be public safety measures.[27] In those jurisdictions it has usually been held that the effect of the

24. *See* Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945); Meihost v. Meihost, 29 Wis. 2d 537, 139 N.W.2d 116 (1966).

25. *E.g.*, Kiste v. Red Cab, Inc., 122 Ind. App. 587, 106 N.E.2d 395 (1952); Call v. Huffman, 163 So. 2d 397 (La. Cir. Ct. App.), *writ refused*, 246 La. 376, 164 So. 2d 361 (1964); Galbraith v. Levin, 323 Mass. 255, 81 N.E.2d 560 (1948); Anderson v. Theisen, 231 Minn. 369, 43 N.W.2d 272 (1950); Ross v. Nutt, 177 Ohio St. 113, 203 N.E.2d 118 (1968).

26. *See* Ross v. Hartman, 139 F.2d 14, 15 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944).

27. Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954); Davis v. Thornton, 384 Mich. 138, 180 N.W.2d 11 (1970); Justus v. Wood, 209 Tenn. 55, 348 S.W.2d 332 (1961).

statute is to reverse the common law rule that no liability exists as a matter of law. However, this does not necessarily mean that liability is conclusively established. These jurisdictions hold that the statute has the effect of allowing the jury to determine liability via proximate cause, foreseeability, or negligence itself.[28] However, at least one court has determined that liability may exist as a matter of law.[29]

In New York the course of decisions has been typical of other jurisdictions. In the absence of a statute the owner has not been held liable to third parties unless circumstances were such as to put the owner on notice that his vehicle might be interfered with.[30] After the enactment of section 1210 (a) the courts turned to an examination of the statute and its history to determine whether it should be deemed to modify the common law rule. This is the line of reasoning adopted in the instant case. Here the court was faced with problems of fact as well as law.[31] The court resolved the factual issue in favor of the plaintiff by holding that there was sufficient conflict in the evidence to warrant a jury determination and thus sustained the jury's finding that the keys were left in the ignition and not in the glove compartment.[32] The court then proceeded to examine the statute and its history and found in accordance with the previous case law that

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28. *See* cases cited, *supra* note 27.

29. *See* Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied,* 321 U.S. 790 (1944), *followed in* Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968).

30. For cases holding no liability, see Maloney v. Kaplan, 233 N.Y. 426, 135 N.E. 838 (1922); Dwarte v. First Westchester Nat'l Bank, 5 App. Div. 2d 1011, 174 N.Y.S.2d 308 (2d Dep't 1958); Lotito v. Kyriacus, 272 App. Div. 635, 74 N.Y.S.2d 599 (4th Dep't 1947), *appeal dismissed,* 297 N.Y. 1027, 80 N.E.2d 542 (1948); Walter v. Bond, 267 App. Div. 779, 45 N.Y.S.2d 378 (2d Dep't 1943), *aff'd,* 292 N.Y. 574, 54 N.E.2d 691 (1944); Mann v. Parshall, 229 App. Div. 366, 241 N.Y.S. 673 (4th Dep't 1930); Kaplan v. Shults Bread Co., 212 App. Div. 110, 208 N.Y.S. 118 (1st Dep't 1925). For cases where there is possible liability under given circumstances, see Tierney v. New York Dugan Bros. Inc., 288 N.Y. 16, 41 N.E.2d 161 (1942); Connell v. Berland, 223 App. Div. 234, 228 N.Y.S. 20 (1st Dep't), *aff'd,* 248 N.Y. 641, 162 N.E. 557 (1928); Gumbrell v. Clausen Flanagan Brewery, 199 App. Div. 778, 192 N.Y.S. 451 (2d Dep't 1922); Lee v. Van Beuren & New York Bill Posting Co., 190 App. Div. 742, 180 N.Y.S. 295 (1st Dep't 1920).

31. There was a substantial question as to whether the defendant did in fact violate the statute by leaving his keys in the ignition. The weight of the evidence tended to show that the theft was accomplished with the use of a spare set of keys which were accidentally left in the glove compartment. However the jury reached another conclusion.

32. Instant case at 227, 319 N.Y.S.2d at 711.

one purpose of the legislation was to protect the public safety.[33] The court quoted the legislative history which stated that the act was " 'designed to obviate the risk of a vehicle moving from the place where it was left parked and possibly injuring the person or property of others as well as itself being damaged. It serves to lessen the likelihood of theft.' "[34] Consequently, the statute was deemed to modify the common law rule, thus presenting jury questions as to defendant's negligence and the proximate cause of the injury. One judge dissented on the law holding that the theft *and* the negligence of the thief were not reasonably foreseeable and thus no liability should attach to the defendant.[35]

Since the decision in the instant case rests on the New York statute and its purpose as discerned from the legislative history, it is relevant to briefly examine that history in somewhat greater detail than did the court.[36] It has been noted that the Joint Legislative Committee on Motor Vehicle Problems intended this section as a measure designed to prevent vehicles from leaving their parked position and harming other parties as well as from being stolen.[37] In addition, the committee commented on the then "present law" noting that owners were not liable to third parties when unknown persons moved a vehicle.[38] However, the committee stopped short of claiming that the proposed law would create such liability. Instead they merely pointed out that their proposal, although probably ineffective against a professional thief, would tend "to deter youngsters intending to 'joyride.' "[39] Thus, the committee saw that the statute would be

33. *Id.* at 228, 319 N.Y.S.2d at 711. As to prior cases reaching similar conclusions, see *In re* Smith, 57 Misc. 2d 576, 293 N.Y.S.2d 373 (Sup. Ct. 1968), *modified*, 34 App. Div. 2d 629, 309 N.Y.S.2d 536 (1st Dep't 1970); Padro v. Knobloch, 28 Misc. 2d 898, 214 N.Y.S.2d 216 (Sup. Ct. 1961); Kass v. Schneiderman, 21 Misc. 2d 518, 197 N.Y.S.2d 979 (New York Mun. Ct. 1960). *See also* Waldorf v. Sorbo, 10 App. Div. 2d 226, 198 N.Y.S.2d 555 (3d Dep't 1960) (Bergan & Gibson, JJ., dissenting); Watts v. Colonial Sand & Stone, Inc., 64 Misc. 2d 889, 316 N.Y.S.2d 482 (Sup. Ct. 1970).

34. Instant case at 228, 319 N.Y.S.2d at 711, *citing* 7 N.Y. LEG. DOC. 1954 No. 36 at 106-07.

35. *Id.* at 230, 319 N.Y.S.2d at 713. There were two dissenting opinions; both felt that the case should be reversed on the facts and only one judge stated a disagreement on the law.

36. The history is contained in 7 N.Y. LEG. DOC. 1954 No. 36 at 106-07. This is a Joint Legislative Committee report advocating the enactment of a section to the Vehicle and Traffic Law identical in its relevant part to the present section 1210(a).

37. *See* 7 N.Y. LEG. DOC. 1954 No. 36 at 106.

38. *Id.*

39. *Id.* at 107.

most effective against those "thieves" whose purpose was not basically economic, but rather excitement. Furthermore, they went on to speak of the attraction which automobiles hold to children: "An unlocked car with keys left in the ignition is, [*sic*] likely to seem an irresistible plaything to many children."[40] Given these passages it appears that the committee was anticipating the danger to innocent parties when inexperienced or "joy-riding" persons gain control of a powerful mechanical device, and felt it substantial enough to deserve mention. Thus, depite the lack of precise language to the effect that the proposal was intended to overrule the common law, there does exist significant support for the contention that the statute was promulgated as a safety measure.

Although it appears that the New York statute alters the common law solution to the question of liability in the instant situation, it unfortunately may not be the final answer. In a decision subsequent to the instant case it was held as a matter of law that an owner would not be liable for the negligence of a thief in causing injury to third parties where the stolen vehicle was left unattended on *private property*.[41] The controlling distinction was the inapplicability of the statute upon private land not open to the public.[42] Consequently, the court relied on the old common law formula and found no liability because the owner was fortunate enough to park his car in his own driveway, some 30 feet from the public road.[43] This result may indeed be consistent with a strict reading of the instant case. However, it appears that such a holding would create an anomolous situation within New York.[44] Liability would depend upon factors quite unrelated to any functional justification for either rule. The distinction between parking in the street or in one's nearby driveway would be controlling. However, liability should not be predicated on such irrelevant circumstances. The distinction be-

40. *Id.*

41. *See* General Accident Group v. Noonan, 66 Misc. 2d 528, 321 N.Y.S.2d 483 (Sup. Ct. 1971).

42. N.Y. VEHICLE AND TRAFFIC LAW § 1100(a) (McKinney 1970).

43. 66 Misc. 2d at 530, 321 N.Y.S.2d at 485 (Sup. Ct. 1971).

44. Some jurisdictions which have based liability, in the instant situation, on statutes have also retained the common law formula where the statute is inapplicable. *See* Lorang v. Heinz, 108 Ill. App. 2d 451, 248 N.E.2d 785 (1969); Young v. Castner-Eagleton Motors, Inc., 214 Tenn. 306, 379 S.W.2d 785 (1964); Martel v. Chattanooga Parking Stations, Inc., ... Tenn. ....., 453 S.W.2d 767 (1970).

tween these two situations does not appear to be of major significance. To sanction the existence of different rules in the cases of private and public areas it would appear desirable to have a functional difference between the two situations. Such a basis would exist if it were shown that the likelihood of theft is materially lessened when automobiles are parked on private land. However, such an assertion seems tenuous at best. Typically the private driveway is not so isolated that it presents a significant deterrent to the theft of a vehicle. Consequently, if there is essentially no difference other than title to the land, the appropriate solution would be to create a uniform rule of law.[45] The question then arises as to which rule should prevail. An answer to this requires a broader examination of the various issues involved.

With or without a statute, it is necessary to examine both the issues of duty and proximate cause in attempting to assess whether an owner should ever be liable to a third party injured by a stolen vehicle where theft results from leaving the keys in the ignition. In terms of proximate cause the issue is whether in today's world it can reasonably be foreseen that failure to remove the ignition key may lead to theft *and* that the thief will be negligent in his operation of the stolen vehicle. Different jurisdictions have at times determined this question "as a matter of law" and reached differing results upon similar facts.[46] Each court determined that no reasonable man could differ in his view, yet opposite results were reached. It may be that one conclusion is justified in a rural environment given the possibility of a low theft rate, while the reverse is correct in an urbanized area. Thus, there may be some jurisdictions where "matter of law"determinations are appropriate because of certain social and environmental factors. In addition, some factual settings may be so extreme that a "matter of law" holding would be warranted in any jurisdiction.[47]

45. Of course it is conceivable that the courts may desire to free the owner of liability in both circumstances, yet feel constrained by the statute to impose liability where the violation occurred on public roads. However, this does not appear to be the case; the opinions do not indicate hostility toward the statute, but rather tend to be slightly liberal in their interpretation of the statute and its history

46. *Compare* Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied,* 321 U.S. 790 (1944), *with* Hersh v. Miller, 169 Neb. 517, 99 N.W.2d 878 (1959).

47. For example, a professional thief may steal a vehicle, keys being left in the ignition, and transfer it to someone who believes he has valid title. An ensuing accident caused by this new "owner" would probably not be sufficient to impose liability on the originally negligent owner.

Nonetheless, it would seem that in general the question of proximate cause, in the instant situation, should be one for the jury, since reasonable men may readily differ in their views.[48]

The issue of the existence of a duty raises somewhat different considerations. If relevant legislation exists, yet is found to create no duty, or is found not to govern the precise situation before the court, then no liability can attach for violation of the statute. This, however, should not end the inquiry.[49] Even though the *statute* may not impose a duty running toward third persons, it is still relevant to examine the question of a common law duty. Times change and so must the standards which govern reasonable men. That which may not have been reasonably foreseeable in the first half of this century may today be a readily perceivable consequence of an act or omission. Indeed, several courts have been influenced by some recent statistics concerning the accident rate for stolen vehicles.[50] These statistics indicate that stolen cars are 200 times more likely to be involved in an accident than the average vehicle.[51] In the past, some courts in denying liability in the instant situation have felt that it would be anomolous to hold an owner liable at common law for a thief's negligence when the same owner would not be liable *at common law* for the negligence of one given permission to use the vehicle.[52] However, if the above statistics are correct, it would appear that the risk of injury to third parties is significantly enhanced when a car is stolen as opposed to merely being loaned. Consequently, it may be logical to impose a duty

48. This, of course, assumes that the court does not wish to use proximate cause as the basis for reaching a decision on policy grounds. It is conceivable that a court could view the instant situation as establishing proximate cause but not a common law duty. *See supra* note 13 and accompanying text. However, the court may also be faced with a statute which strongly suggests that it creates a duty. Thus, if for some reason, the court is convinced that it should not impose liability despite these prerequisites, it may wish to use proximate cause as the grounds on which to rest its decision.

49. *See* Meihost v. Meihost, 29 Wis. 2d 537, 540, 139 N.W.2d 116, 118 (1966).

50. *See* Gaither v. Myers, 404 F.2d 216 (D.C. Cir. 1968); Davis v. Thornton, 384 Mich. 138, 180 N.W.2d 11 (1970).

51. *See Hearings on H.R. 15213 Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 90th Cong., 2d Sess., 34 (1968); Gaither v. Myers, 404 F.2d 216, 222-23 (D.C. Cir. 1968). *See also* Peck, *An Exercise Based Upon Empirical Data: Liability For Harm Caused by Stolen Automobiles,* 1969 WIS. L. REV. 909, 915, which gives some critical insights into these statistics as well as providing a reprint of the statistical summary.

52. *See* Bennett v. Arctic Insulation, Inc., 253 F.2d 652, 654 (9th Cir. 1958); Richards v. Stanley, 43 Cal. 2d 60, 65-66, 271 P.2d 23, 28 (1954).

on owners to take precautions toward preventing their vehicles from being easily stolen.

Although it appears that the danger to the public is greater when a thief has possession of a vehicle than when a lawful driver is in control, courts in the absence of an applicable statute are still prone to discuss duty in terms of foreseeability.[53] While this may indeed be quite convenient at times, such terms may also mask the policy determinations which can be relevant to questions of duty. A thief is negligent in his operation of a stolen vehicle and injures a third party. The faultless victim begins to look for a defendant capable of adequately compensating him and this is generally not the thief. However, the owner has made a seemingly innocuous error; a minor mistake whose possible consequences are not glaringly apparent. Thus the issue: who should bear the loss? A proper answer to this question is not always easy. A statute may help, but unless the statute is explicit and applicable, other values must necessarily enter the picture. Factors such as the extent of damage which may result, the possibility that it will occur, the social utility in the owner's acts, the hardship placed on an owner by requiring compliance, and the existence of "moral" blame are all relevant to the issue. In addition, other considerations including foreseeability may also be important to a determination of whether a duty exists.[54] In the final analysis it is for the court to balance the countervailing policies and attempt to do justice. While this may not be easy given the changing nature of our society, a solution should be reached. In New York, the lower courts have used ignition key legislation to expose an owner to possible liability, but have not extended such beyond those situations where the statute is directly applicable.[55] However, to limit liability on this basis tends to ignore some important considerations. The fact that the Joint Legislative Committee was able to foresee and comment on the danger to innocent parties when keys are left in the ignition of a vehicle should still

53. *See, e.g.,* Shafer v. Monte Mansfield Motors, 91 Ariz. 331, 372 P.2d 333 (1962); Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954); George v. Breising, 206 Kan. 221, 477 P.2d 983 (1970); McKinney v. Chambers, 347 S.W.2d 30 (Tex. Ct. Civ. App. 1961).

54. *See* Green, *Foreseeability in Negligence Law,* 61 COLUM. L. REV. 1401, 1420-24 (1961); Green, *The Duty Problem in Negligence Cases,* 28 COLUM. L. REV. 1014 (1928); Green, *The Duty Problem In Negligence Cases: II,* 29 COLUM. L. REV. 255 (1929).

55. *See* General Accident Group v. Noonan, 66 Misc. 2d 528, 321 N.Y.S.2d 483 (Sup. Ct. 1971).

be relevant despite the inapplicability of the statute in a given situation. The committee's discussion begins to point out the degree of risk created under such circumstances. In addition the statistics concerning the accident rate for stolen vehicles should not be brushed aside lightly. When these factors, along with the great potential for injury inherent in automobile operation, are weighed against the utility of freely permitting an owner to leave his keys in the ignition, it would appear that any decision to categorically deny liability must necessarily be based on other considerations. It is here that foreseeability plays its primary role, for a court may still feel justified in reaching a conclusion that no liability should attach if it truly believes that a reasonable man would not generally be able to foresee the possibility of injury to third parties. Why should a man be held liable for the negligent driving of another unless he is capable of discerning the risk and proceeding in a manner designed to insulate himself from that contingency? The answer is *not* that this is a situation for strict liability. But rather, as was attested to by the committee report, there does exist some degree of foreseeability in this class of cases. This, when coupled with the ease with which an owner may prevent the possibility of harm as well as the relatively high incidence of accidents of this variety, supplies the basis for the contention that the owner and not the innocent third party should be the one to bear the loss.[56]

LAURI STEVEN FILPPU

56. Whatever the rule in New York should eventually be, not all innocent third parties will be forced to bear the entire loss. Assuming a penniless thief and no liability on the part of the owner, a motorist with insurance prescribed by the State of New York may be able to collect on the uninsured motorist provision in his policy. However, he will be limited to an amount of $10,000 for an individual injury and $20,000 for one accident. *See* N.Y. INS. LAW § 167 (2a) (McKinney 1970).