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Torts - Liability of Owner of Stolen Automobile

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made that this will happen. The physical limitations that the Court will place on premises is also indefinite. It is, however, doubtful that the Court would consider an apartment house or an entire office building as a premise subject to search in connection with a valid arrest. But it appears safe to say that any premise that can be said to be under the immediate control of the defendant is subject to a search and seizure as an incident of a lawful arrest.

The decision in *United States v. Rabinowitz* brings a degree of certainty to this phase of the law that has been lacking since the pre-*Davis* days. This is true in spite of the fact that the *Rabinowitz* case was a 5-3 decision and that Justice Douglas, who in light of his past record would more than likely have voted with the minority, was absent.

During the period that lapsed between the three cases of *Johnson, Trupiano,* and *McDonald* and the case of the *United States v. Rabinowitz,* Justices Murphy and Rutledge, who voted with the majority in those cases, died and were replaced by Justices Clark and Minton,[32] who sided in the *Rabinowitz* case with the minority in the above mentioned cases to form a new majority. In reality, the *Rabinowitz* case can be considered a 6-3 decision when it is realized that Justice Black's dissent in that case was not in protest against the extension of the right to search concurrent with a valid arrest but was motivated by a desire for certainty, which he felt could be obtained by adhering to the *Trupiano* rule long enough to see how it worked.[33] When that is taken in conjunction with his view as expressed by the *Davis* and *Harris* cases, it is not mere conjecture to assume that if the situation is again presented, Justice Black will side with the present majority.

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TORTS—LIABILITY OF OWNER OF STOLEN AUTOMOBILE—A car owner left his car unattended and unlocked on a public street, with the key in the ignition. The car was stolen, and in the getaway the thief negligently drove into and injured plaintiff, who was exercising reasonable care. Financially responsible car

32. It is interesting to note that both Justice Clark and Justice Minton, who have long been associated with "New Deal" and "Fair Deal" Civil Rights programs in other civil liberties questions, sided with the government and against civil liberties in this case.

33. Justice Black, dissenting in United States v. Rabinowitz, 70 S.Ct. 430, 445, 94 L.Ed. 407, 414.

thieves being rather scarce, the plaintiff sued the owner of the automobile for damages. Plaintiff was awarded judgment. *Ostergard v. Frisch*, 333 Ill. App. 359, 77 N.E.(2d) 537 (1948).

This case has perhaps been the subject of more notes and comments than any other case in recent tort history. Interest has centered mainly on the aspect of proximate cause and foreseeable risk. In the writer's opinion, another facet of the case also presents interesting possibilities. It is suggested that the decision in *Ostergard v. Frisch* represents a further extension of tort liability of automobile owners, by including thieves within the class of third persons for whose negligent driving the owner is liable.

The rules defining the liability of an automobile owner for injuries resulting from the negligent operation of his automobile were formulated to a large extent in the years immediately following its invention. These rules consisted mainly of applications of the well-settled common law doctrines of personal fault and agency. During this period the number of automobiles was small and their rate of speed slow, due both to their early stage of development and the poor quality of highways. Therefore attendant risks were not so numerous nor of such degree as to prevent the courts from dispensing adequate justice under such rules.

As better highway systems and faster automobiles were developed, the situation rapidly changed. The number and uses of automobiles greatly increased, and along with all this came a corresponding increase in the risks connected with their use.

One of the risks which gained in significance was that of injury through the negligent operation of an automobile by some person other than its owner. The plaintiff's only recourse in such cases was against the driver, unless he could show an orthodox agency relationship between the driver and the owner, or unless the owner was personally at fault. If these non-owner drivers had been as a general rule financially solvent, the changing situation would not have greatly affected a plaintiff's chance of recovery. As a matter of fact, *insolvency* was the general rule, so much so that under the restrictive doctrines that existed the courts witnessed an increasing "crop" of empty judgments for injured plaintiffs. Feeling that as between an injured plaintiff who usually could ill afford to shoulder the risk and the car

owner who could adequately protect himself through insurance[1] the latter should bear the burden, many courts sought to extend the car owner's liability to cover injuries resulting from the negligent operation of his automobile by other persons.

Personal fault does not easily lend itself to judicial extension and courts generally confine its application. If the owner has allowed a driver to operate a defective automobile when the owner knew or should have known of the defect, he can be found personally at fault.[2] Also under the concept of personal fault, and long established in the common law as applicable to other vehicles, is the rule making the owner of an automobile liable for injuries caused by the meddling of children and other non-culpables when he knew, or should have known, that such meddling was likely under the circumstances of the case.[3]

Agency doctrines provided the courts with a somewhat more plastic tool with which to shape owner liability. The agent could be sued for his own negligence, but more often than not he was financially irresponsible, and the courts were quick to apply the doctrine of respondeat superior to automobile cases in order to reach the solvent automobile owner. Where the servant is authorized to drive his master's automobile and allows a third party to drive without the master's knowledge, some courts hold the owner liable for the negligence of the third party if the servant is present in the automobile.[4] Even if the servant and the third party wilfully disobey the owner's command not to let the third party drive the automobile, the owner has still been held liable if the automobile was being used within the scope of the servant's employment at the time of the accident.[5] But in the case of *Lanauze v. Baldwin Company*[6] the Lou-

1. The ordinary automobile liability insurance protects the owner from claims of persons injured by a driver operating the car with the owner's express or implied permission. It would seem that for slightly higher premiums the owner could acquire protection against any claim resulting from the operation of his automobile by anyone. Ins. L. J. 519, 521 (June, 1947). See Compensation for Automobile Accidents: A Symposium (1932) 32 Col. L. Rev. 785, for an excellent discussion of this problem.

2. Ficklen v. Heichelheim, 49 Ga. App. 777, 176 S.E. 540 (1934); Coker v. Moose, 180 Okla. 234, 68 P.(2d) 504 (1937). For cases where the owner's negligence lay in knowingly allowing a person under the statutory age to drive, see Roark v. Stone, 224 Mo. App. 554, 30 S.W.(2d) 647 (1930); Wery v. Seff, 136 Ohio 307, 25 N.E.(2d) 692 (1940); Laubach v. Colley, 283 Pa. 366, 129 Atl. 88 (1925).

3. Spanko v. Spitalnick, 101 N.J. Law 5, 127 Atl. 663 (1925); Barbanes v. Brown, 110 N.J. Law 6, 163 Atl. 148 (1932).

4. Geiss v. Twin City Taxicab Co., 120 Minn. 368, 139 N.W. 611 (1913); Slothower v. Clark, 191 Mo. App. 105, 179 S.W. 55 (1915).

5. Emison v. Wylam Ice Cream Co., 215 Ala. 504, 111 So. 216 (1927).

6. 2 La. App. 345 (1925).

isiana court of appeal made it clear that it was not willing to hold the owner liable where his agent allows a third party to drive, in the absence of a showing that the agent permitted an incompetent person to drive. It intimated that the owner would be liable in the latter case.

Using agency theory as a basis, a number of jurisdictions have extended its principles so as to hold the owner liable for negligent operation of his automobile by members of his family.[7] The "family purpose" doctrine was well stated in *King v. Smythe*:[8] "If an instrumentality of this kind is placed in the hands of his family by a father for the family pleasure, convenience, and entertainment, the dictates of mere justice should require that the owner be responsible for its negligent operation."[9] The family purpose doctrine marks the farthest extension, with one exception, of owner liability predicated upon the common law rules of personal fault or agency. That exception is the "dangerous instrumentality" doctrine.

Statutes have further extended the owner's liability for the negligent operation of his automobile by others. Some states have statutes which extend the owner's liability by holding him liable for all deaths or injuries to persons or property resulting from the negligent operation of his automobile by any person using the automobile with his consent. These statutes are expressions of legislative policy, imposing liability without fault on the owner. Under such statutes, if the owner lends his mechanically perfect automobile to a thoroughly competent driver, he is still liable for the negligent operation of his automobile by

7. About half the states have adopted the "family purpose" doctrine. For a grouping of the states which have, and which do not have this doctrine, see (1929) 64 A.L.R. 844, (1936) 100 A.L.R. 1021, and (1928) 26 Mich. L. Rev. 846, 848. That the person liable is not always the father, but rather the solvent car owner, see Smith v. Overstreet Adm'r, 258 Ky. 781, 81 S.W. (2d) 571 (1935), where recovery was allowed against a mother, not the head of the family, who allowed the family use of her car. That the family includes not only blood relationship but also those who come closely in contact with it, such as housekeepers, see Smart v. Bissonette, 106 Conn. 447, 138 Atl. 365 (1927). That the family purpose doctrine applies only to automobiles, see Felcyn v. Gamble, 185 Minn. 357, 241 N.W. 37, 79 A.L.R. 1159 (1932).

8. 140 Tenn. 217, 204 S.W. 296 (1918).

9. 140 Tenn. 217, 226, 204 S.W. 296, 298 (1918). Even in jurisdictions which do not have the "family purpose" doctrine, the tendency appears to be to stretch the principles of agency as far as possible. A child going after his own pair of shoes was held to be his father's agent in Graham v. Page, 300 Ill. 40, 132 N.E. 817 (1921), as was a boy driving his younger brother to school, in Gray v. Meadows, 24 Ala. App. 487, 136 So. 876 (1931).

that driver.[10] Typical of these is that of New York:[11] "Negligence of operator other than owner attributable to owner. Every owner of a motor vehicle . . . operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle . . . by any person legally using or operating the same with the permission, express or implied, of such owner."[12]

A few states have reached comparable results by legislation, although not having a statute of this type. South Carolina[13] and Tennessee[14] for instance, each have a statute which makes the car itself liable up to its value at a sheriff's sale for all accidents caused by its negligent operation on the public highways of the state. Florida is the only jurisdiction which has reached this point in owner liability by way of common law. In *Southern Cotton Oil Company v. Anderson*[15] an automobile owner was held liable for the negligent operation of his car by an unauthorized third person on the ground that an automobile is a dangerous instrumentality when operated on the public highways.[16]

In the instant case, the plaintiff relied upon an Illinois statute which makes it unlawful for a person driving, or in charge of a motor vehicle to leave it unattended, without first stopping it, locking the ignition and removing the key.[17] The statute in itself does not hold the automobile owner liable for the negligent driving of a thief, yet the court held that the defendant's violation of the statute was the "proximate cause" of plaintiff's injuries. The Illinois court was called upon to interpret the statute. Considerations of public policy are always present whenever a court indulges in statutory interpretation. It is submitted that the impulses discussed in the opening paragraphs were the mo-

10. New York Consol. Laws, c. 25, § 282-e; Thompson's Laws of New York (1939) 912—Vehicle and Traffic § 59.

11. For a summary of states having a statute similar to that of New York, see (1926) 42 A.L.R. 898, (1931) 74 A.L.R. 951, (1935) 96 A.L.R. 634.

12. Atkins v. Hertz Drivurself Stations, 261 N.Y. 352, 185 N.E. 408 (1933); Young v. Masci, 109 N.J. Law 453, 162 Atl. 623, 83 A.L.R. 869 (1932).

13. S.C. Code (Supp. 1942) § 8792.

14. Tenn. Code Ann. (Williams, 1934) § 2682.

15. 80 Fla. 441, 86 So. 629, 16 A.L.R. 255 (1920).

16. There appeared to be a tendency in several subsequent cases to rely upon a statute requiring the licensing of automobiles by taking the view that a person driving an automobile did so under the authority of the owner's license and hence was the owner's agent. Herr v. Butler, 101 Fla. 1125, 132 So. 815 (1931); Green v. Miller, 102 Fla. 767, 136 So. 532 (1931). But the latest Florida case in point expressly reaffirms the rationale of Southern Cotton Oil v. Anderson, Lynch & Walker, 159 Fla. 188, 31 So.(2d) 268 (1947).

17. Ill. Rev. Stat. (1937) c. 95½, § 189.

tivating factors behind the court's decision, and that, disposed toward placing the liability on the owner of the automobile, it seized upon the statute as a convenient "peg" upon which to hang its decision. Having found the owner to be guilty of an unlawful act in leaving his car unlocked and with the keys in the ignition, the court was willing to extend his liability resulting from the unlawful act to include injuries resulting from the negligent driving of the thief. To use the language of modern tort analysis, the Illinois court decided that the statute which required defendant to remove the keys and lock the automobile was designed to include plaintiff's interest in personal safety within its protective ambit, and also that the statute was designed to protect this interest from the risk of injury through the negligent operation of the motor vehicle by a thief.

Other states have statutes similar to that of Illinois. Massachusetts, for example, has an identical statute, and in one case, the Massachusetts Supreme Judicial Court[18] interpreted it so as to hold the owner liable under facts very similar to those in the present case. In a later decision,[19] however, this case was expressly overruled, and today Massachusetts follows the general rule that the owner of an automobile is not liable for the negligent driving of a thief. As mentioned earlier, the owner has long been held liable for injuries resulting from the meddling of children or other non-culpables, but the precedent established in *Ostergard v. Frisch* is seen as the inclusion of a new class of unauthorized third persons, namely, thieves, for the negligence of whom the owner of the car can be held liable. At the present time only one other jurisdiction can be said to have committed itself to the rule established in *Ostergard v. Frisch.* The federal district court of Washington, D. C., favored this extension of owner liability in the recent case of *Ross v. Hartman.*[20] The Supreme Court of Minnesota has also given some indication that it might follow the *Ostergard v. Frisch* decision in a proper case. In the case of *Wannebo v. Gates,*[21] the Minnesota court refused to hold the owner liable, on the ground that the injury caused by the thief's negligence did not occur during the flight but at a later time. The Court thus distinguished the case from that of *Ostergard v. Frisch.*

18. Malloy v. Newman, 310 Mass. 269, 37 N.E.(2d) 1001 (1941).
19. Galbraith v. Levin, 323 Mass. 255, 81 N.E.(2d) 560 (1948).
20. 78 App. D.C. 217, 139 F.(2d) 14, 158 A.L.R. 1370 (1943), cert. denied, 321 U.S. 790, 64 S.Ct. 790, 88 L.Ed. 1080 (1944).
21. 227 Minn. 194, 34 N.W. 695 (1948).

Louisiana has also had occasion to consider the problem presented in the present case. In *Castay v. Katz and Besthof*,[22] the court of appeal held on facts similar to those in the principal case that the negligence of the owner's agent, in leaving the automobile unattended and with the motor running, was not the "proximate cause" of plaintiff's injuries. No statutory violation was involved. In another court of appeal case, *Maggiore v. Laundry & Dry Cleaning Service*,[23] decided the same year, the plaintiff was allowed recovery for injuries received in attempting to push defendant's truck from in front of a driveway, where it had been parked in violation of a city ordinance.

What the position of the Louisiana Supreme Court would be in a case similar to *Ostergard v. Frisch* is not known. Yet, in view of what appears to be a definite trend toward extending the liability of an automobile owner for injuries caused by the negligent operation of the automobile by third persons and in view of the considerations of public policy behind this search for a solvent defendant, it is expected that the precedent established in *Ostergard v. Frisch* will gradually find a wide-spread acceptance in jurdisdictions other than Illinois.

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22. 148 So. 76 (La. App. 1933).
23. 150 So. 394 (La. App. 1933).