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Owner's Liability for Harm Done by Thief Operating Stolen Vehicle

TORTS

OWNER'S LIABILITY FOR HARM DONE BY THIEF OPERATING STOLEN VEHICLE

Defendant, in violation of an Illinois statute,[1] parked his car and left it unattended without locking the ignition and removing the key. The car was taken by a thief who, shortly after the theft, negligently collided with plaintiff's parked car, damaging it. In a suit brought to recover damages, the trial court gave judgment for plaintiff. On appeal, the Illinois Appellate Court affirmed. Defendant's violation of the statute was negligence. The conduct of the thief was not an intervening efficient cause, exculpating defendant, since the statute was designed to prevent the very type of harm which occurred—injury to the public from negligent operation of the vehicle by unauthorized persons. *Ostergard v. Frisch,* 77 N.E.2d 537 (Ill. App. 1948).

The instant case illustrates the harsh results which may be attendant upon a mechanical application of the statutory violation-negligence per se doctrine in areas where the culpable conduct is vastly disproportionate to the harm resulting. The general class to which it belongs includes all cases involving the liability of owners and operators of unattended motor vehicles for damage resulting when the vehicle is set in motion, most of which have reached logically sound and just results by reference to existing doctrines of the common law, without adverting to statutory standards.

The reported cases can be classified into three main groups, according to the type of force which causes the vehicle to leave its state of rest: (1) gravity or fortuitous events, there being no intervening human act, (2) the intervening act of irresponsible human agencies, *e.g.*, meddling by small children, or (3) the intervening act of a responsible human agency. Further subdivision of the third group is necessary, since the result reached will vary according to whether the conduct of the intervening party is criminal, negligent, or nonculpable.

Two questions must be decided in the affirmative to establish liability on the part of the owner or operator. It must first appear that he has been guilty of some negligent

1. Ill. Ann. Stat. (Smith-Hurd 1947) c.95½, §189 (a). The text of the section is set out in full, infra n.15.

act. Certainly he is not an insurer of public safety, though it has been said that the result in the instant case would go far toward making him that.[2] In the determination of the question of negligence, whether or not the defendant has been guilty of a statutory violation must be considered. Further, it must be established that the negligence, if it be determined, is a legal or "proximate" cause of the harm. Strangely, statutes have also influenced the determination of questions of causation.[3]

In the first two classes named—accidental starting and meddling by irresponsible persons—little difference is perceived between the cases decided with reference to statutory standards and those decided on a pure common law basis. This is to be expected; in these two areas, it is fairly easy to see that the resultant harm is precisely the type of harm which the legislature intended to prevent by the imposition of its explicit standards of conduct. Courts had already declared the forbidden conduct unreasonable in many cases, in the first two areas. It should be borne in mind that, whether or not a statute is involved, the problems faced are identical: negligence and proximate cause must be established, and the statute is simply an aid in the determination of these issues.

In the first class, where the vehicle has been set in motion without human intervention, the operator has been held responsible for damage caused to third persons by the runaway car, even where no statute or ordinance was involved.[4] Thus, liability has ensued where an automobile, negligently parked on an incline, was set in motion by gravity[5] or a slight jar,[6] as well as where an automobile left with the motor running inexplicably started upgrade.[7] The doctrine of *res ipsa loquitur* has been applied in these cases.[8]

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2. Sullivan v. Griffin, 318 Mass. 359, 362, 61 N.E.2d 330, 332 (1945).
3. On the doctrine of negligence per se, see generally Prosser, "Handbook of the Law of Torts" §39 (1941); Harper, "A Treatise on the Law of Torts" §78 (1933); Lowndes, "Civil Liability Created by Criminal Legislation," 16 Minn. L. Rev. 361 (1932), criticizing Thayer, "Public Wrongs and Private Actions," 27 Harv. L. Rev. 317 (1914).
4. See Note, 66 A.L.R. 439 (1930).
5. Henderson v. Horner, 287 Pa. 298, 135 Atl. 203 (1926).
6. Don v. Ivins Sons, 90 Pa. Super. 105 (1926).
7. Helfrich v. Gumari, 78 Pa. Super. 449 (1922).
8. Biller v. Meyer, 33 F.2d 440 (C.C.A. 7th 1929); Glaser v. Schroeder, 269 Mass. 337, 168 N.E. 809 (1929). On the general application of res ipsa loquitur where an unattended automobile

Where the vehicle is set in motion by irresponsible persons, chiefly children intermeddling, negligence and proximate cause are generally treated as matters for jury determination, absent any statute such as the one in the instant case.[9] The cases which have treated these problems as questions of law in the absence of legislative pronouncement do so only to the end of exculpating the defendant owner or operator.[10] No case has been found which, without statutory guidance, *imposes* liability as a matter of law by settling the elemental questions of negligence and proximate cause as purely legal inquiries. Such a result has been reached, however, under the Illinois statute concerned in the principal case, and seems sound.[11] Nevertheless, the problem is less difficult in this class of cases (and in the first class) than in those where a responsible person, bent upon mischief or crime, intervenes. Here, the operative effect of defendant's negligence is more easily perceived. Where there is no intent on the part of the intermeddling stranger to set the automobile in motion, the negligent failure of the defendant to make it secure is much more likely to be a *sine qua non* of the car's leaving its state of rest.

The instant case belongs to the third class, where the intervening criminal conduct of a responsible stranger sets the car in motion.[12] In this area, no case has been found which has held, in the absence of statute, that liability ensues. To do so would be to say that criminal conduct of a third party is a foreseeable risk which must be guarded against at

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starts from an unknown cause, see Note, 5 A.L.R. 1240, 1244 (1920), supplemented in 64 A.L.R. 255, 260 (1929) and 93 A.L.R. 1101, 1116 (1934). Where injury to a child results therefrom, see Note, 140 A.L.R. 539 (1942).

9. Bergman v. Williams, 173 Minn. 250, 217 N.W. 127 (1927); Tierney v. N.Y. Dugan Bros., 288 N.Y. 16, 41 N.E.2d 161 (1942); Bronk v. Davenny, 25 Wash.2d 443, 171 P.2d 237 (1946). The doctrine of attractive nuisance was applied in the first two cases.

10. Walter v. Bond, 267 App. Div. 779, 45 N.Y.Supp. 378 (1943) (intoxicated taxi-passenger started taxi); Mann v. Parshall, 229 App. Div. 366, 241 N.Y.Supp. 673 (1930) (unknown person started and abandoned car).

11. Moran v. Borden Co., 309 Ill. App. 391, 33 N.E.2d 166 (1941).

12. On intervening criminal acts of third parties, see generally Harper, "A Treatise on the Law of Torts" §124 (1933); Prosser, "Handbook of the Law of Torts" §49 (1941); Feezer and Favour, "Intervening Crime and Liability for Negligence," 24 Minn. L. Rev. 635 (1940); Harper and Kime, "The Duty to Control the Conduct of Another," 43 Yale L. J. 886 (1934); Eldredge, "Culpable Intervention as Superseding Cause," 86 U. of Pa. L. Rev. 121 (1937).

the operator's peril. Without legislative encouragement, courts have not ordinarily reached this result except where the surrounding circumstances clearly point to a high probability of intervening crime.[13] On the contrary, however, it has been held as a matter of law that criminal conduct of a third party is an intervening efficient cause, relieving the defendant of liability.[14]

All but fourteen states have enacted some sort of provision regulating motor vehicles parked and left unattended,[15] but of the thirty-four states having such provisions, only twelve have any relation to the problems raised by intervening crime. Those adopting the exact provision of the Uniform Act are obviously concerned only with accidental starting, or, more dubiously, innocent intermeddling. Among the jurisdictions having statutes which can be brought to bear in cases falling in the same category as the instant case, diametrically opposite results have been reached.

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13. Brauer v. N.Y. Central & H.R.R.R., 91 N.J.L. 190, 103 Atl. 166 (1918); Hines v. Garrett, 131 Va. 125, 108 S.E. 690 (1921).

14. Castay v. Katz & Besthoff, 148 So. 76 (La. App. 1933). The same jurisdiction has imposed liability on the owner where the intervening conduct of the third person was not criminal. Maggiore v. Laundry & Dry Cleaning Service, 150 So. 394 (La. App. 1933). In that case, defendant negligently parked his electric truck across a drive. Due to faulty mechanism, the truck started in motion when two persons, without negligence, attempted to shove it forward a few feet to clear the drive. Defendant was held liable for damage done a third person by the truck.

15. The basic source of provisions regulating the safeguarding of parked motor vehicles left unattended is found in §52 of the Uniform Act Regulating Traffic on Highways, which reads: "§52. Motor Vehicle Left Unattended, Brakes to Be Set and Engine Stopped. No person having control or charge of a motor vehicle shall allow such vehicle to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor of said vehicle, and when standing upon any perceptible grade without turning the front wheels of such vehicle to the curb or side of the highway."

This section is contained in the following statutory provisions: Ala. Code (1940) tit.36 §27; Ariz. Code (1939) §66-118; Cal. Veh. Code (Deering 1943) §595; Del. Rev. Code (1935) §5643; Idaho Code (1932) §48-526; Iowa Code (Reichman 1939) §321.362; La. Gen. Stat. (Dart 1939) §5220 (e); Mich. Comp. Laws (1929) §4720; Minn. Stat. (Henderson 1941) §169.36; Neb. Rev. Stat. (1943) §39-759; N.J. Rev. Stat. (1937) §39:4-137; N.M. Stat. Ann. (1941) §68-525; N.Y. Veh. & Traf. Law §86-3, 4; N.C. Gen. Stat. (Michie et al., 1943) §20-163; N.D. Rev. Code (1943) §39-1024; Ore. Comp. Laws Ann. (1940) §115-355; Pa. Stat. Ann. (Purdon 1939) tit.75 §613; S.D. Code (1939) §44.0326; Tenn. Ann. Code (Williams 1934) §2691; Tex. Laws 1947, c.421 §97; Va. Code (Michie et al., 1942) §2154(146)(c); Wash. Rev. Stat. Ann. (Remington Repl. Vol. 7A, 1937) §6360-109. (Twenty-two states.)

The Illinois statute involved in the instant case is a common

The Massachusetts court, in a case indistinguishable from the *Ostergard* case, and with a similar statute[16] under consideration, denied recovery.[17] It was held that though the defendant's violation of the statute was prima facie evidence of negligence, the causal relation was too remote. Though it was found that the legislative intent had been directed in part toward the prevention of theft, it did not necessarily follow that this included all the possible consequences of a theft which actually occurred.[18]

In direct conflict with the Massachusetts cases is the doctrine laid down in *Ross v. Hartman*,[19] the leading case in the District of Columbia. In that case, Judge Edgerton, speaking for the Court of Appeals, held that violation of the pertinent traffic regulation[20] was negligence per se. Further,

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variation of the provision in the Uniform Act. It reads: "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, or when standing upon any perceptible grade without effectively setting the brake thereon and turning the front wheels to the curb or side of the highway."

Eight states have enacted the provision in this form: Ark. Dig. Stat. (Pope 1937) §6951; Colo. Stat. Ann. (Michie et al., 1935) c.16 §232; Ill. Ann. Stat. (Smith-Hurd 1947) c.95½, §189; Ind. Stat. Ann. (Burns Repl. 1940) §47-2124; Ky. Rev. Stat. (1946) §189.430(3); Miss. Code Ann. (1942) §8219; Utah Code Ann. (1943) §57-7-169; Wyo. Comp. Stat. Ann. (1945) §60-530.

Four additional states have statutory provisions regarding the safeguarding of unattended automobiles, but do not follow either of the above common forms: Md. Ann. Code Gen. Laws (Flack 1939) Art. 56 §200; Mass. Ann. Laws (1933) c.90 §13 (set out infra n.16); Mo. Rev. Stat. (1939) §8401(k); Vt. Pub. Laws (1933) §§5127, 5128.

The traffic regulation of the District of Columbia is set out infra n.20.

No general statutory provisions were found in the remaining fourteen states. However, in many instances local ordinances will raise the question of negligence per se in this field.

16. Mass. Ann. Laws (1933) c.90 §13. " . . .No person having control or charge of a motor vehicle shall allow such vehicle to stand in any way and remain unattended without first locking or making it fast or effectively setting the brakes thereon, and stopping the motor of said vehicle."

17. Sullivan v. Griffin, 318 Mass. 359, 61 N.E.2d 330 (1945); Slater v. T. C. Baker Co., 261 Mass. 424, 158 N.E. 778 (1927).

18. Sullivan v. Griffin, 318 Mass. 359, 361, 61 N.E.2d 330, 332 (1945).

19. 78 App. D.C. 217, 139 F.2d 14 (1943). The case is approved in Note, 32 Geo. L. Rev. 202 (1944) where the author suggests that it be restricted to its facts, because of the extension of liability involved. The result was followed in Bullock v. Dahlstrom, 46 A.2d 370 (Muni. Ct. of App. for D.C. 1946), as well as in the Illinois case here noted.

20. Traffic and Motor Vehicle Regulations for the District of Columbia, §58. "Locks on Motor Vehicles. Every motor vehicle shall be equipped with a lock suitable to lock the starting lever, throttle,

since theft was a consequence to be prevented, and reckless driving by an escaping thief was a foreseeable consequence of the theft, it would follow that the legislature intended to include, within the class of harms to be prevented, damage done to third persons as a result of the thief's operation of the vehicle. Thus the questions of both negligence and causation were settled by reference to a legislative pronouncement.

The difficulty with the position taken in the *Ross* case is that the legislative intent to prevent the type of harm which occurred is far from apparent. It can be discerned only by the most astute examination of the particular section involved in context.[21] This, it has been said, makes the intent apparent,[22] though it cannot be denied that reasonable men might differ with this conclusion. Certainly, the opposite conclusion would be reached by examination of the Illinois provision concerned in the *Ostergard* case. The section construed is a part of an act "regulating traffic on highways" and is a variation of the provision of the Uniform Act which requires stopping the engine, setting the brakes, and turning the wheels to the curb—measures which are clearly directed only toward accident or intermeddling, and which would deter a thief not at all.[23] None of the adjacent or nearby sections contain provisions which might be construed as having been designed for the prevention of theft and harms resulting therefrom.[24] If an implied legislative intent is to be found, no aid is forthcoming from resort to the remainder of the act. And it is clear that an intent to prevent the class of harm involved in the instant case would be most difficult to find on the face of the section.[25] Yet, in spite of the impossibility of spinning out the legislative intent from "the four corners of the act," neither line of authority has buttressed its conclusions with the legislative history of the section involved. The legislative

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or switch, or gearshift lever, by which the vehicle is set in motion, and no person shall allow any motor vehicle operated by him to stand or remain unattended on any street or in any public place without first having locked the lever, throttle, or switch by which said motor vehicle may be set in motion."

21. Ibid.
22. Note, 32 Geo. L. Rev. 202 (1944).
23. The pertinent section, §52 of the Uniform Act Regulating Traffic on Highways, is set out in full, supra n.15.
24. Uniform Act Regulating Traffic on Highways, Ill. Ann. Stat. (Smith-Hurd 1947) c.95½. As adopted by Illinois, many provisions of the Uniform Act were greatly changed.
25. Ill. Ann. Stat. (Smith-Hurd 1947) c.95½ §189(a).

intent "found" by the courts appears to be little more than a guess.

Perhaps it is more than that. Perhaps the court is delineating what its own intent would have been, had it participated in the passage of the act—outlining the class of harms which it would have desired to eliminate through operation of the new law. How does this process fit with the standard rationalization of negligence per se—that the legislature rather than the court defines, for the particular field, what shall constitute reasonable conduct?[26]

That rationale works perfectly well where the legislative intent is express, necessarily implied, or capable of proof by committee reports, speeches from the floor, and other contemporary legislative expressions. Yet such materials are seldom available to throw light on the enactments of state legislatures. And where the intent is vague and inarticulate, a court must interpret the statute in the light of its own best judgment in order to capture the elusive legislative motivation. It has been said that they are not only permitted to do so; they cannot avoid doing so.[27] The legislature has paternally foreseen for the parties some dangerous results of the proscribed conduct, but has coyly refrained from specifying what parties it aims to protect, as well as what dangers it is guarding against. Thus: The legislature has defined reasonable conduct under the circumstances, but the court must in turn interpret the legislative definition before it can discover precisely what conduct is unreasonable in a given circumstance. If legislatively established criteria are missing, the court must substitute its own judicial definition. But in the absence of legislative direction, courts have themselves the power to define reasonable conduct. It is this power which should be exercised where the legislative fiat is so tenuous and insubstantial as to afford no practical guidance to the court. There is no difference in this situation and that in which the legislature has spoken not at all. It is idle to require that the judicial definition of reasonableness be distorted into the pattern of a statute which touches the problem only tangentially. Especially is this true where the only basis for the

26. Harper, "A Treatise on the Law of Torts" §78 (1933).
27. Horack, "In the Name of Legislative Intention," 38 W. Va. L. Q. 119 (1932).

conclusion that the statute was intended to apply at all is a strained and doubtful reasoning, bare of corroborative facts.

Neither negligence per se nor any extension of existing doctrines of proximate cause should be determined in reliance upon an imperfectly-expressed, or perhaps wholly non-existent, legislative intent. Legally sound results have been reached in many jurisdictions without reference to any statute.[28] Negligence in these cases is not ordinarily so difficult of proof that an injured plaintiff requires assistance from the doctrine of negligence per se. Where proof is difficult, *res ipsa loquitur* springs to his aid.[29] As to the matter of causation, even the instant case concedes that statutory extensions of proximate cause are recognized only where the statute "by its obvious intent" demands it.[30] As has been demonstrated, the intent behind the Illinois statute is far from obvious, and the prevalence of dissenting opinions in this class of cases gives testimony that this is everywhere true. Absent such obvious legislative intent, existing common-law doctrines should prevail. Unique facts do not make for universal solution, and each case of the entire class is better settled by reference to common-law principles of negligence and causation, viewed in relation to all the circumstances, than by an arbitrary attempt to lay down mechanical rules of law as to both.

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28. See cases cited supra n.4 through n.10.
29. Glaser v. Schroeder, 269 Mass. 337, 168 N.E. 809 (1929). See also annotations collected, supra n.8.
30. The instant case affords an instance of statutory extension of the concept of proximate cause. " . . . a statute may by its obvious intent enlarge upon the general definition of proximate cause." 77 N.E.2d 537, 541 (Ill. App. 1948).