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Torts - Leaving Keys in Ignition Held Not Actionable Negligence

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TORTS–LEAVING KEYS IN IGNITION HELD NOT ACTIONABLE NEGLIGENCE

Plaintiff brought an action to recover for damages to her parked automobile which resulted from an automobile thief's negligent driving of defendant's vehicle. The defendant parked his car on a main thoroughfare and turned off the motor, but neglected to remove the keys from the ignition. During his absence the automobile was stolen. The thief, in the process of taking it, negligently collided with plaintiff's parked vehicle. The plaintiff alleged that the damages to her automobile were proximately caused by the defendant's negligence in violating a Missouri statute making it unlawful to leave the key in the ignition of an unattended automobile, but which also provided that such an act shall have no bearing in any civil action.[1] In addition, the plaintiff alleged a breach of a common law duty to the plaintiff without regard to the defendant's violation of the statute. The trial court sustained defendant's motion for judgment, from which plaintiff appealed. The Court of Appeals affirmed on the grounds that a violation of the statute, in view of its broad exclusionary language, did not constitute negligence per se. Also, it held that the plaintiff failed to disclose a duty on the defendant's part to discover the presence of thieves in the vicinity where he parked his car, thereby failing as a matter of law to adduce sufficient evidence of negligence or of proximate cause to make a submissible case of common law negligence. *Garver v. Lamb*, 282 S.W. 2d 867 (Mo., 1955).

Where an action is brought under a legislative enactment, such as the statute in the instant case, the applicability of the civil remedy provisions of the statute may be questioned and liability under the statute may be contested either on the basis of the absence of any negligence, or the want of any causal connection between the violative conduct and the injury. Each point presents distinct problems within its own restricted sphere, requiring separate analysis, inasmuch as the latter point introduces for consideration all of the elements involved in a common law action of negligence, namely, duty, breach, causation and injury.

The court's conclusion as to statutory negligence based on the de-

[1] "No person shall leave a motor vehicle unattended on the highway without first stopping the motor and cutting off the electric current, and no person shall leave a motor vehicle . . . unattended . . . unless the mechanism, starting device or ignition of such motor vehicle shall be locked. The failure to lock such motor vehicle shall not mitigate the offense of stealing the same, nor shall such failure be used to defeat a recovery in any civil action for the theft of such motor vehicle, or the insurance thereon, *or have any other bearing in any civil action.*" Mo. Rev. Stat. (1949) sec. 304.150; Emphasis added.

fedant's violation of the Missouri statute was determined by its conception of the legislative intent: that a violation thereof should not affect civil liability "or have any other bearing in any civil action."[2] Such broad exclusionary language distinguishes this statute from similar ones adopted in a number of other states, where the problem has arisen as to whether the violation of a criminal statute which does not provide for civil liability should, of itself, constitute negligence in a civil action. Civil liability may extend to the violation of such a criminal statute where the plaintiff is one of the class of persons whom the statute was designed to protect, and the injury was the kind the statute was designed to prevent.[3]

Although the almost universal American and English attitude requires that the statutory prescription as to a standard of conduct at least be considered in determining civil rights and liabilities, the courts are virtually in complete disagreement on the effect to be given such a statute. Two firmly entrenched attitudes are, however, clearly reflected. The majority of the jurisdictions hold that an unexcused violation of such a statute is negligence per se, i.e., negligence as a matter of law.[4] An articulate minority considers such a statutory violation only as evidence of negligence to be weighed by the jury.[5] The majority finds justification for its position on the rationale that the legislature has, by forbidding certain acts, made absolute the standard of care required. Thus, any violation of the statute is deemed to be inconsistent with the minimum degree of care which the legislature established.[6] The minority, on the other hand, theorizes that the legislature, in enacting a criminal statute for the purpose of preserving the peace or of protecting life and limb, does not intend to

[2] Mo. Rev. Stat. (1949) sec. 304.150. See Richards v. Stanley, 43 Cal. 2d 60, 271 P. 2d 23 (1954), where similar treatment was accorded a municipal ordinance in California containing the same exclusionary language.

[3] Prosser, Torts 152 (1955); Rest., Torts Sec. 430 (1949).

[4] R. W. Claxton, Inc. v. Schaff, 169 F. 2d 303 (D.C. Cir., 1948), cert. denied 335 U.S. 871 (1948); Barsch v. Hammond, 110 Colo. 441, 135 P. 2d 519 (1943); Larkins v. Kohlmeyer, 229 Ind. 391, 98 N.E. 2d 896 (1951); Pryor's Adm'r v. Otter, 268 Ky. 602, 105 S.W. 2d 564 (1937); Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814 (1920); Schell v. Du Bois, 94 Ohio St. 93, 113 N.E. 664 (1916); Buddenberg v. Morgan, 110 Ind. App. 609, 38 N.E. 2d 287 (1942); Tooke v. Muslow Oil Co., 183 So. 97 (La. App., 1938).

[5] Satterlee v. Orange Glenn School Dist., 29 Cal. 2d 581, 177 P. 2d 279 (1947); Nadeau v. Perkins, 135 Me. 215, 193 A. 877 (1937); Anderson v. Robbins Incubator Co., 143 Neb. 40, 8 N.W. 2d 446 (1943); Costanza v. Cavanaugh, 131 N.J.L. 175, 35 A. 2d 612 (1944); Landry v Hubert, 101 Vt. 111, 141 A. 593 (1928).

[6] Authorities cited note 5 supra. See also Thayer, Public Wrong and Private Action, 27 Harv. L. Rev. 317 (1914), in particular, and, in addition, Harper, A Treatise on the Law of Torts § 78 (1933); Morris, Criminal Statutes and Tort Liability, 46 Harv. L. Rev. 453 (1933).

change the ordinary common law duty to use due care under the circumstances.[7]

Either theory, in dogmatic and rigorous application, produces untenable results which has elicited harsh criticism from respected legal commentators.[8] Professor Morris, having written extensively on the subject, suggests that the best solution to the conflict is to take the most desirable features of each position, i.e., allow the court, in cases where it decides that the legislative standard is the correct one, to take it as being determinative; and, where the court is uncertain that the legislative standard is proper as the criterion for negligence, it should be permitted to state that the standard required is due care under the circumstances and that the violation of the statute may be considered as evidence of negligence in determining the issue.[9]

Once it has been determined, however, that a given injury falls outside the scope of the statute, any civil action based solely on the statute must necessarily fail, although it by no means necessarily follows that the action cannot be sustained on some other basis (for example, common law negligence) or that the statutory standard must be regarded as entirely irrelevant. In recognizing this, the court in the instant case, having disposed of the statutory question, considered the allegation of common law negligence. Relying on *Zuber v. Clarkson Construction Co.*[10] because of the unique factual situation presented in the instant case, the court concluded *as a matter of law* that the defendant was neither negligent, inasmuch as he was under no duty to discover thieves in the vicinity where he parked his car, nor was his act the proximate cause of the plaintiff's injury.[11]

An injured plaintiff, to recover from the owner of an automobile left unattended in the street and negligently driven by a third person in the owner's absence without his permission, must show (1) that the owner was negligent under the circumstances in leaving the car unattended,[12]

[7] Authorities cited note 6 supra. Also, Lowndes, Civil Liability Created by Criminal Negligence, 16 Minn. L. Rev. 361 (1932).

[8] Cf., e.g., Fleming, 11 La. L. Rev. 95, 105, where the author characterizes the Massachusetts doctrine of treating an unregistered motor vehicle as a trespasser on the highway as "a barbarous relic of the worst there was in puritanism."

[9] The Role of Criminal Statutes in Negligence Actions, 49 Col. L. Rev. 21 (1949).

[10] 363 Mo. 352, 251 S.W. 2d 52 (1952).

[11] Emphasis added.

[12] Ross v. Hartmann, 139 F. 2d 14 (D.C. Cir., 1943), cert. denied, 321 U.S. 790 (1943); Richards v Stanley, 43 Cal. 2d 60, 271 P. 2d 23 (1954); Touris v. Brewster & Co., 235 N.Y. 226, 139 N.E. 249 (1923); 38 Am. Jur., Negligence sec. 72 (1936).

and (2) that such negligence was the proximate cause of the plaintiff's injury.[13]

The question of the owner's negligence in such situations is usually considered to be one of fact for the determination of the jury in the light of all the circumstances.[14] Circumstances requiring that the court declare as a matter of law that the defendant was not negligent are not, however, unknown.[15] Notwithstanding his negligence, however determined, the owner may still avoid liability if his act is not deemed the proximate cause of the resultant injury, as where the thief's interposition is held to be an intervening efficient cause interrupting the chain of causation.[16] This too has been held to be either a question of fact within the province of the jury[17] or a question of law to be decided by the court.[18] Irrespective of the manner in which both issues are resolved, a decision favorable to the defendant is ultimately reached in the vast majority of cases, usually on the basis that the theft of the defendant's car was an intervening act which negatives his negligence. This is true though both acts were necessary for the damage to accrue, since the second cause could not reasonably have been foreseen by the defendant.[19]

To resolve an apparent conflict on the appellate level,[20] the Illinois Supreme Court in *Ney v. Yellow Cab Company*[21] has clarified the Illinois

[13] E.g., Katz v. Helbing, 215 Cal. 449, 10 P. 2d 1001 (1932). It should be noted that the dangerous instrumentality doctrine is inapplicable, for an automobile is not inherently dangerous. Roberts v. Lundy, 301 Mich. 726, 4 N.W. 2d 74 (1942).

[14] Tierney v. N.Y. Dugan Bros., 288 N.Y. 16, 41 N.E. 2d 161 (1942).

[15] See, e.g., Tabary v. New Orleans Pub. Service Co., 142 So. 800 (La. App., 1932); Touris v. Brewster & Co., 235 N.Y. 226, 139 N.E. 249 (1923).

[16] Howard v. Swagart, 161 F. 2d 651 (D.C. Cir., 1947); Schaff v. R. W. Claxton, Inc., 79 App. D.C. 207, 144 F. 2d 532 (1944); Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E. 2d 74 (1954); Castay v. Katz and Besthoff, 148 So. 76 (La. App., 1933).

[17] Schaff v. R. W. Claxton, Inc., 79 App. D.C. 207, 144 F. 2d 532 (1944); Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E. 2d 74 (1954); Garis v. Eberling, 18 Tenn. App. 1, 71 S.W. 2d 215 (1934).

[18] Howard v. Swagart, 161 F. 2d 651 (D.C. Cir., 1947); Curtis v. Jacobson, 142 Me. 351, 54 A. 2d 520 (Maine, 1947); Williams v. Greene, 181 Va. 707, 26 S.E. 2d 89 (1943); Castay v. Katz and Besthoff, 148 So. 76 (La. App., 1933); Walter v. Bond, 267 App. Div. 779, 45 N.Y.S. 2d 378 (1943).

[19] Richards v. Stanley, 43 Cal. 2d 60, 271 P. 2d 23 (1954); Galbraith v. Levin, 323 Mass. 255, 81 N.E. 2d 560 (1948); Curtis v. Jacobson, 142 Me. 351, 54 A. 2d 520 (1947); Walter v. Bond, 267 App. Div. 779, 45 N.Y.S. 2d 378 (1943). Contra: R. W. Claxton, Inc. v. Schaff, 169 F. 2d 303 (D.C. Cir., 1948), cert. denied 335 U.S. 871 (1948); Reti v. Vaniska, Inc., 14 N.J. Super. 94, 81 A. 2d 377 (1951); Kiste v. Red Cab, Inc., 122 Ind. App. 587, 106 N.E. 2d 395 (1952); Midkiff v. Watkins, 52 So. 2d 573 (La. App., 1951).

[20] Compare Ostergood v. Frisch, 333 Ill. App. 359, 77 N.E. 2d 537 (1948), with Cockrell v. Sullivan, 344 Ill. App. 620, 101 N.E. 2d 878 (1951).

[21] 2 Ill. 2d 74, 117 N.E. 2d 74 (1954).

position with respect to the numerous problems relating to civil liability arising generally from the violation of a statute, and those relating specifically to a statute similar to the one litigated in the instant case.[22] The court concluded, in affirming a judgment for the plaintiff, that the entire section viewed as a whole, was a public safety measure, the violation of which under the prevailing rule in the state being prima facie evidence of negligence. However, this, in itself, creates no liability because the injury must have a "direct and proximate" connection with the violation of the statute—to be determined by a jury—before liability will be imposed. It appears that this decision places Illinois among the minority of jurisdictions having adjudicated the question.

In conclusion, it is submitted that imposing civil liability upon the automobile owner, whether by virtue of his violation of an applicable statute or by common law negligence, is somewhat incongruous in light of the recognized principle of agency that when an automobile is used by one to whom it was loaned, for the borrower's purposes, the lender is not liable unless, possibly, where the lender knew that the borrower was incompetent and that injury might occur because of his incompetency.[23] Such civil liability as is imposed leads to the interesting result that if someone takes the owner's car with his permission, the owner escapes liability; if someone takes it without his permission in his absence, the owner is liable.

WILLS—PAROL EVIDENCE ADMITTED TO SHOW WILL NOT REVOKED BY SUBSEQUENT MARRIAGE

A few days prior to executing his will, testator proposed marriage to a Mrs. Allison. Married when the proposal was made, Mrs. Allison left for Reno, Nevada, where she was granted a divorce, marrying testator the day the decree was granted and returning with him to Illinois where they lived until his death in 1953. Reversing an order of the County Court refusing probate to the will on the ground that it was revoked by testator's marriage, the Circuit Court held that the divorce decree was void for want of jurisdiction, that testator's marriage was of no effect, and that the will was therefore not revoked. Testator's son, who received one-fourth of the estate, appealed to the Supreme Court of Illinois, where it was held that while the marriage was valid, it did not revoke the will.[1]

[22] Ill. Rev. Stat. (1955) c. 95½, § 189; note, however, that this section does not have the exclusionary language found in the Missouri statute.

[23] Weatherman v. Ramsey, 207 N.C. 270, 176 S.E. 568 (1934).

[1] In holding testator's marriage valid, the court rejected the contention that Mrs. Allison's divorce was null and void because of a lack of jurisdiction on the part of the Nevada court. It was held that the fact that Mrs. Allison's former husband was