EJAG Legal Clinic

ADDING LIABILITY TO INJURY: RESPONSIBILITY FOR THE NEGLIGENTLY DRIVING THIEF

by LAWRENCE E. SAVELL

To a devoted Jaguar owner, there is little that could evoke the profound grief that would no doubt result from the purloining of his or her treasured vehicle. The very thought of having a Jag stolen I am sure brings a chill to the readers of this magazine. Nevertheless, you should be aware that in such a situation, you could stand to lose more than just your investment in the automobile. If your skillful thief turns out to be a less-than-skillful driver, you may, under certain circumstances, be liable for the injuries and property damage that result from the wrongdoer's negligence.

The Common-Law Rule

On March 12, 1978, two teenage boys broke into a locked, indoor storage garage of a Brooklyn, New York Fiat dealer. Although the dealer had removed the car keys and had placed them in the showroom, the pair nevertheless were able to steal one of the Fiats and began driving it around the area. At approximately 12:30 P.M., they sped down a block where Rhonda Epstein, age seven, and her father, Lawrence Epstein, were loading or unloading the trunk of the family car. Elizabeth Epstein, Rhonda's mother, was also present. The stolen Fiat struck Rhonda and Lawrence, and then slammed into the Epstein vehicle, which in turn, struck Elizabeth. As a result of the accident, Rhonda was left a spastic quadriplegic with brain damage. Lawrence required amputation of his left leg above the knee. Elizabeth suffered traumatic shock and neurosis and soft tissue injury.

The Epsteins brought a civil lawsuit against the owner of the offending vehicle, the Fiat dealer. They did not sue the two teenagers (who had been apprehended after they left the scene and arrested by police), presumably on the basis that the pair lacked assets to satisfy any judgement that could have been rendered against them.

At the trial court level, the defendant made a motion to dismiss the plaintiffs' complaint and to have judgement rendered in the defendant's favor. The lower court denied that motion, opining that the plaintiffs would be afforded their "day in court."

The defendant appealed the lower court's decision. In an opinion by Justice James F. Niehoff handed down on July 8, 1985 in Epstein v. Mediterranean Motors, Inc., the Appellate Division of the New York Supreme Court, while acknowledging that the facts set forth "an exceptionally tragic case," reversed that decision and dismissed the plaintiffs' complaint.

As Justice Niehoff noted, the traditional rule applied in such cases has been that the owner of a stolen vehicle is not liable, as a matter of law, for the negligence of a thief. The rationale behind such a rule is that the use of the car by the thief was an "intervening act" between any negligence of the owner and the unskillful driving of the car by the thief. In essence, the plaintiffs were proposing a new common-law rule that would impose on the defendant a duty to take "reasonable precautions" to prevent the risk of the theft of its automobiles from the storage garage. Thus, the plaintiffs argued that if the defendant were found to have failed in such duty, and if the theft and use were a normal or forseeable consequence of the situation created by the defendant, then the defendant could be held responsible for the acts of the thief.

Although recognizing that the plaintiffs were "innocent and unfortunate victims of the car thieves' misconduct," the Court recognized that it was "not afforded the luxury of sympathy or compassion at defendant's expense" but was bound by the law and the facts. Consequently, Justice Niehoff concluded that the defendant owed no duty to the plaintiffs and, consequently, could not be called upon to pay damages to them.

The Court speculated, however, that, in a different case, it might be willing to poke a small hole in the common-law rule.

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Specifically, if it were shown that "by utterly reckless and careless conduct the owner of the stolen vehicle had created a situation which virtually invited criminal activity so very clearly that no reasonable person could fail to forsee it," the Court "would have to pause to consider" carving out an exception to the common-law rule. Nevertheless, the level of proof required would be high in such a case, and would not be met by the mere failure of the owner to make his or her premises burglar proof or by evidence of the unfortunate owner's prior losses to thieves.

The "Key in the Ignition"

In his opinion in the Epstein case, Justice Niehoff did note one widely acknowledged exception to the traditional rule of non-liability of the owner of a stolen car: the so-called "key in the ignition" statutes. The New York version in effect at the time provided that "[n]o 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, and effectively setting the brake thereon and, when standing upon any grade, turning the front wheels to the curb or side of the highway." The statutory provision was found to be inapplicable under the facts of the Epstein case, given the defendant's extreme precautions of removing the key from the ignition and placing it separate from the vehicle (which had been locked in the garage).

The statute was also unavailing given a further provision which essentially limited the application of the statute to situations where vehicles had been left by their owners "upon highways and upon private roads open to public motor vehicle traffic." Cases dealing with the statute had held that no liability would attach to the owner of a stolen vehicle where the vehicle had been left in a parking lot or a private driveway - - settings even less secure than a locked garage on private property. [Ironically, and perhaps as a result of such distinctions, the statute was amended in 1984 to cover "parking lots."]

Many states have enacted such "key in the ignition" statutes, and the reader should consult the particular legislation in effect in those jurisdictions where his or her car may be found. In those states without such legislation, the courts have differed on whether or not liability will be imposed. In some cases, where the risks presented by the motorist's failure to remove his or her key were not viewed as excessive or abnormal under the circumstances, liability on the part of the owner has often been denied. Among the factors that such courts have considered are the type of vehicle involved, the neighborhood and illumination in and time of day at which the vehicle was parked, the reason and duration the owner left the vehicle unattended, the degree of surveillance, if any, by the owner, and the distance in time and space between the point of theft and the site of the accident.

Lock It and Pocket the Key

Police statistics indicate that a significant percentage of cars that are stolen contained keys left in the ignition by their owners. Although a motorist foolish enough to leave his or her keys may, depending on the local laws in effect, escape liability to individuals injured by the thief's inept driving, he or she still has lost the car. The safest route to follow is to heed the familiar slogan: lock it and pocket the key. The Jaguar you save will be your own.