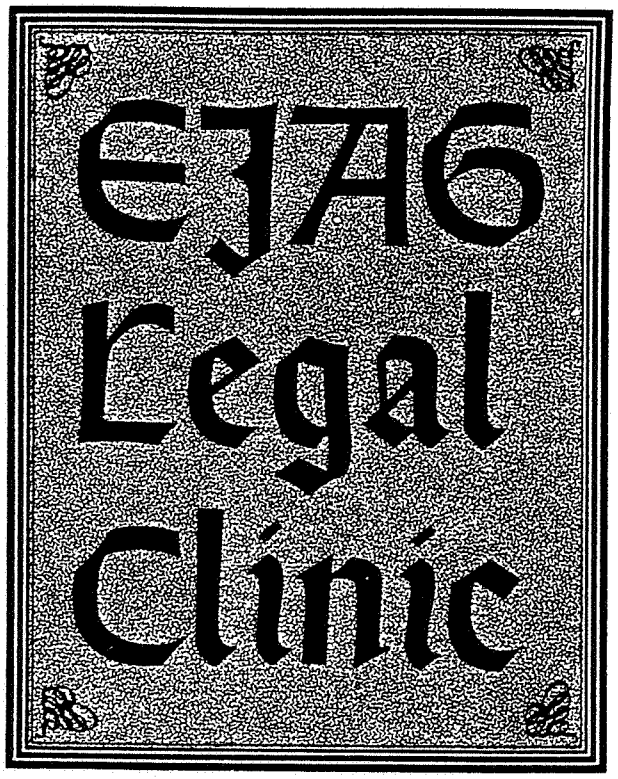

CAVEAT LENDER: LIABILITY FOR NEGLIGENT ENTRUSTMENT OF AN AUTOMOBILE

by LAWRENCE E. SAVELL

William Shakespeare, who never drove a Jaguar, made up for such a shortcoming by creating great works of literature filled with insight. In Hamlet, act I, scene iii, he wrote: "Neither a borrower, nor a lender be;/For loan oft loses both itself and friend . . . ." Had Mr. Shakespeare been acquainted with the automobile (as well as with twentieth-century American law), however, he might have written those lines a bit differently, for one who loans his car may not only lose the car and the friend, but may also find himself liable for the negligence of the borrowing driver.

General Considerations

Prior to the passage of any legislation on the subject, the traditional or "common-law" rule was that the owner of an automobile ordinarily would not be liable for the negligent operation of one whom the owner had permitted to use the vehicle. Liability would only be found in certain cases, such as, for example, where the driver was using the car as the owner's employee or agent, or where the owner was present in the vehicle and was exercising some control over its operation. Thus, the mere fact of ownership was insufficient to render the owner liable for the acts of the person to whom he loaned the car.

Today, many states have enacted legislation which provides that the owner of a vehicle will be liable for the negligent driving of one whom the owner has allowed to use the automobile. Cases interpreting such legislation have developed the concept of "negligent entrustment," which focuses on the competency or lack of competency of the borrowing driver, and the lender's awareness of it.

Sharing the Wealth

A recent California court decision explored the concept of negligent entrustment in a case with an additional factual twist: the injuring driver and his father were co-owners of the vehicle which hit another's car. The case thus raised the question whether one co-owner of a vehicle could be found to have negligently entrusted the co-owned vehicle to another. In its November 5, 1985 opinion in Mettelka v. Superior Court, the California Court of Appeal, First District, ruled that the allegation that one co–owner had power over the use of the vehicle by the owner and that the negligently driving co-owner drove with the express or implied consent of the controlling co-owner, who knew of the driver's incompetence, stated a valid cause of action for negligent entrustment.

The court began its analysis by pointing to a provision in the California Vehicle Code which provided that "[e]very owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle . . . by any person using or operating the same with the permission, express or implied, of the owner." Prior California cases dealing with the concept of negligent entrustment had set forth the rule that "one who places or entrusts his motor vehicle in the hands of one whom he knows, or from the circumstances is charged with knowing, is incompetent or unfit to drive, may be held liable for an injury inflicted by the use made thereof by the driver, provided the plaintiff can establish that the injury complained of was proximately caused by the driver's disqualification, incompetency, inexperience or recklessness . . . ." Thus, an owner's liability for the negligence of the incompetent driver to whom the vehicle is entrusted exists only as a result of the act of entrusting the vehicle, with permission to operate it, to one whose incompetency, inexperience, or recklessness is known or should have been known by the owner. The key consideration, therefore, is the owner's carelessness in lending the vehicle, not the relation between the parties or the negligence of the borrowing driver (as long as the damages are shown to result from the driver's incompetency).

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The court was unpersuaded by the argument that since the father and son were co-owners, each having the right to use the vehicle, neither needed permission from the other to use it, and no act of entrustment could have occurred. According to the court, the assumption in that argument that one co-owner may not control another co-owner's use of the co-owned vehicle was unwarranted. Since the possession or use by one co-owner must necessarily exclude the possession or use by the other, a co-owner who desired the exclusive possession and use of the vehicle for a time would need permission, express or implied, of the other co-owner. Of course, there would only be an inference that such permission had been granted. Such an inference could be refuted by persuasive evidence that no such consent had ever been given.

A Lot of Nerve

In a recent decision, New York's intermediate level Appeals Court went so far as to rule that the owner of a car may be held accountable for the negligence of a parking lot attendant with whom the owner deposited the vehicle.

On March 16, 1981, Dr. Stanley Goldstein drove his car to the premises of the Kings County Medical Society in Brooklyn, New York. Upon arriving, Dr. Goldstein left his vehicle in the Society's parking lot which the Society maintained, free of charge, for its staff, employees, and visitors. Following the usual procedure, he left his keys so that, if necessary, his vehicle could be moved. He then went inside the building to attend a meeting.

Henry Smith, an employee of a guard agency, was a security guard at the Society's premises, where his duties included escorting those who used the parking lot. On days of special occasions, such as meetings, when the lot would become congested, Mr. Smith was also assigned to assist in parking and moving vehicles. Mr. Smith had been assigned to the parking lot on that day. He was relieved for his luncheon break by Albert Carter, a custodial employee of the Society. During the ten years of his employ, Mr. Carter had worked in the lot approximately four days per week, and was occasionally left in charge. Mr. Carter's driver's license had expired prior to that day. When Mr Smith returned, the lot was congested. He therefore joined Mr. Carter in parking and moving cars. As Mr. Carter was operating Dr. Goldstein's vehicle, which had a stick shift with which he was apparently unfamiliar, he struck Mr. Smith.

In its November 21, 1985 opinion in Carter v. Travelers Insurance Company, the New York Supreme Court, Appellate Division, First Department, ruled that Mr. Carter had used the vehicle with the owner's permission, and, as a result, the actions of that parking lot attendant were imputed to the owner. Consequently, the court ruled, the owner's insurance company was obligated to defend the attendant and reimburse him (or, in actuality, the Society's insurance company) for any damages he had to pay.

The court noted a provision of the New York Vehicle and Traffic Law which provided, like its California counterpart, that "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner." According to this statute, the owner of a vehicle will be held responsible for the negligent acts of anyone who, with the owner's consent, operates the vehicle, whether on a public or privatehighway or a parking lot. Cases examining the provision had stated that once proof of ownership had been found, a presumption that the operator had used the vehicle with the owner's consent (either express or implied) would be established. Such a presumption could only be overcome or rebutted by substantial contrary evidence.

Turning to the facts of the case, the court concluded that it was "clear" that Mr. Carter, or any other person employed at the parking lot, had Dr. Goldstein's permission to operate his vehicle within the lot. According to the court, such permission was either explicit in the doctor's turning the vehicle over to the attendant with the keys so that it could be parked or implicit in the doctor's parking and leaving the vehicle in the lot with the keys inside.

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The court characterized as unpersuasive evidence that the doctor would have withheld his permission had he known that Mr. Carter was not licensed at the time or that neither person working in the lot was experienced in operating a vehicle with a stick shift. In essence, such evidence was not sufficient to undermine the presumption that the attendant had operated the vehicle with the doctor's permission. The court referred to other cases where even stronger arguments (i.e., that the operator had duped the owner regarding the operator's identity or authority) had been found similarly insufficient. In these cases, the fact that further inquiry or investigation might have revealed information that could have prompted the owners to withhold permission was not enough to defeat a finding that consent had been given. Thus, the court pointed out that in this case the doctor "chose the convenience and relative security of the attended parking lot which the Society provided free of charge" and, "[i]n placing his vehicle under the parking attendant's control, knowing that the attendant could, or would, move it about the lot, . . . took the situation as he found it." As a result, the court concluded, "[h]e should not now be heard to say he would not have given permission had he known otherwise."

The court also rejected the argument that an automobile owner who leaves his vehicle and keys in a parking lot has the right to assume that the parking lot operator employs attendants who are lawfully licensed and capable of driving competently without having to investigate the driving qualifications of each employee who might operate the vehicle. Although conceding that this argument was "appealing," the court concluded that the argument was undermined by the clear statutory presumption of permissive use. The court further observed that the rule was essentially one of practicality, avoiding the need to deal with situations where the evidence of a limitation of the owner's consent was less than clear.

This argument did, nevertheless, persuade one of the five justices of the court. As the dissenter noted, when "we turn our automobile over to a garage parking attendant or to valet parking at some restaurant or club . . . [w]e assume that the person who takes the car is qualified and that the organization to whom the person reports exercises some supervision [since i]n the ordinary course, we would not. . . give custody of the automobile to someone not qualified." As the dissenting justice concluded, "[i]f the majority opinion is good law, then no thinking individual will accept valet parking or allow a garage attendant to park the car."

Discretion is the Better Part of Ownership

In an earlier article ("Adding Liability to Injury: Responsibility for the Negligently Driving Thief," EJAG Legal Clinic, December 1985), we saw that, under certain circumstances, an automobile owner who made it more likely that an unknown intruder would steal and operate his car could be liable for damages caused by the thief's poor driving. In this article, we have taken the situation a step further, dealing with circumstances where the owner's consent to the use by another is far more explicit. As a result, in such situations, liability will more often be found.

Perhaps our friend Mr. Shakespeare did foresee a future where people would own sleek automobiles and entrust others with their operation. If so, he seemed to feel that while one may befriend all people, one should not let them all have one's car keys. As he wrote in act I, scene i of his appropriately titled All's Well That Ends Well, "Love all, trust a few. . . ."