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Liability for Negligence in Parking - Effect of Statute - Hochschild, Kohn & Co. v. Canoles

LIABILITY FOR NEGLIGENCE IN PARKING—EFFECT OF STATUTE

Hochschild, Kohn & Co. v. Canoles[1]

The plaintiff's evidence showed that he had parked his automobile on the lower slope of a city street with the wheels closely in line with the curb. Witnesses saw the defendant's oil truck running down the steep incline with no one in the driver's seat, and with the defendant's driver vainly running behind the truck in an endeavor to catch it. The truck struck the plaintiff's automobile, and threw the plaintiff therefrom with the result that he was permanently injured. The plaintiff rested his case upon the theory that the facts recited raised a presumption of negligence on the part of the defendant. The defendant's evidence showed that his driver had been in the act of making a delivery of oil to a customer when he parked on the incline above the plaintiff. The driver testified that in parking he set the hand brake as tightly as he could, put the gear in neutral, turned the wheel of the oil truck slightly to the curb at about five inches from it, and allowed the motor to continue running. He then went to the rear of the house to check the oil tank, returned to the truck, and pulled the hose to the rear of the house to make the connection. When the oil truck began to move, the driver testified that he was a distance of approximately one hundred feet from it. He ran after the truck but was unable to overtake it. The driver had previously had trouble with the foot brake, and had taken the truck to an independent mechanic to have this brake investigated. In the course of his investigation the mechanic discovered that the hand brake was not operating properly. He did not, however, correct the trouble with the hand brake. The mechanic testified that the ratchet and pawl of the hand brake were not properly engaged,

[1] 66 A. 2d 780 (Md. 1949).

and that it was his opinion that the vibration of the motor in pumping the oil would cause them to fly apart and release the brake. The defendant moved for a directed verdict on the ground that there was no evidence in the case legally sufficient to entitle the plaintiff to recover against it. The trial court overruled the motion, and allowed the case to go to the jury on the question of negligence. The jury returned a verdict for the plaintiff. On appeal, held that there had been sufficient evidence of negligence to submit the case to the jury.

The interesting point of the instant case is that it involved a violation of Article 66½, Section 192 of the Maryland Code, which provides that certain precautions must be taken when a motor vehicle is parked and left unattended.[2]

The cases dealing with unattended motor vehicles may be divided into two categories according to the factual situations involved: (1) Where the vehicle is parked on a perceptible grade and adequate precautions are not taken to prevent its running away; (2) Where the driver has parked a vehicle, leaving it unattended, in such condition as not to comply with the statute, and a third person interferes causing injury to himself or another. In either category, the existence, or non-existence, of a statutory standard of care may be a significant factor which has varied from state to state.

Before the statute in question was enacted the Court of Appeals had considered this problem in the case of *American Express Co. v. Terry*,[3] where plaintiff was permitted to recover for injury to himself in attempting to stop a runaway truck. In that case it was held that it is not negligence *per se*[4] to leave a motor vehicle unattended in a public street, provided the one in charge exercises such care as a person of ordinary prudence would exercise under the circumstances. Most courts, in the absence of statutes, have agreed with the *American Express Co.* case and have

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[2] Md. Code Supp. (1947) Art. 66½, Sec. 192 provides: "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."

[3] 126 Md. 254, 94 A. 1026, Ann. Cas. 1917 C (1915).

[4] The cases employing the term "negligence *per se*" often do so loosely. It is often used in the sense that the conduct in question constituted presumptive evidence of negligence only. The term is used here in the sense that the conduct in question constituted negligence as a matter of law. See cases collected in 170 A. L. R. 661.

held that where the vehicle is parked on a perceptible grade and left unattended the question of negligence is for the jury.[5] Furthermore the Court in the *American Express Co.* case held that if a car is parked on a perceptible grade, unattended, and without fixing the brakes, and turning the front wheels to the curb, a strong implication of negligence arises from which the jury might well find the defendant liable.[6] This is also the majority view in the absence of statute.[7]

Some of the reported cases require nothing more to be shown than that the defendant parked the car on a grade and that, shortly after the defendant left, the vehicle rolled down the grade injuring the plaintiff.[8] In most cases so holding, the time interval between the parking of the car and the running away was short.[9] These cases are based upon the rule of *res ipsa loquitur, viz:* "When a thing that causes injury without fault of the injured person is shown to be under the exclusive control of the defendant, and the accident is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence in the absence of explanation, that the injury arose from the defendant's want of care."[10] However, most courts, in the absence of statutes, have required the plaintiff to show that the defendant failed to exercise reasonable care, holding that negligence is a question to be determined from the facts by the jury. Such was the holding of the *American Express Co.* case.

Since the problem is the proof of negligence, and most courts prior to the enactment of statutes similar to Article 66½, Section 192, held that if the brakes were not set and the front wheels turned to the curb a strong implication of negligence arose, the purpose of the statute in requiring such precautions would seem to be to place a positive duty upon the defendant which if violated would constitute negligence. Most courts have so interpreted such statutes,

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[5] Spanko v. Spitalnick, 101 N. J. 5, 127 A. 663 (1925), Hughes v. Rentschler Floral Co., 193 Wis. 49, 213 N. W. 625 (1927). Sheridan v. Arrow Sanitary Laundry Co., 105 N. J. 1, 608, 146 A. 191 (1929).

[6] *Supra*, n. 3, 261.

[7] Latky v. Wolfe, 85 Cal. App. 332, 259 Pac. 470 (1927), Henderson v. Horner, 287 Pa. 298, 135 A. 203 (1926), Elliott v. Seattle Chain & Mfg. Co., 141 Wash. 157, 251 Pac. 117 (1926), and Fuller v. Magatti, 231 Mich. 213, 203 N. W. 868 (1925).

[8] Biller v. Meyer, 33 F. 2d 440 (7th Cir. 1929), 66 A. L. R. 43 C.

[9] Glasser v. Schroeder, 269 Mass. 337, 168 N. E. 809 (1929).

[10] Biller v. Meyer, *supra*, n. 8. For a discussion of the Maryland cases on the general topic of *res ipsa loquitor* see Thomsen, *Presumptions and Burden of Proof in Res Ipsa Loquitor Cases in Maryland*, 3 Md. L. Rev. 285 (1939), Farinholt, Comment, *Res Ipsa Loquitor*, 10 Md. L. Rev. 337 (1949).

holding that where the vehicle is parked in violation of the statute the defendant is negligent *per se*.[11] If such a view be accepted, the plaintiff need only show a violation of the statute to set up his case of negligence. Such a holding does not preclude the defendant from showing contributory negligence on the part of the plaintiff, but it does serve the purpose of establishing defendant's negligence in the first instance.[12]

The principal case deals with the problem of the statute for the first time in Maryland as applied to category number one above, that is where no third party has interfered. The court could have overlooked the statute and reached the same conclusion it did on the authority of the *American Express Co.* case,[13] or it could well have decided that the statute set up a standard of conduct which if violated would constitute negligence as a matter of law. Instead the court discussed the case from the standpoint of negligence in general; and, although the requirements of the statute were discussed, the opinion did not clearly rest its conclusion on the violation thereof. The growing tendency in other states is to interpret such a statute as one of that class which set up a statutory standard of conduct which if not met establishes negligence as a matter of law.[14] Such an interpretation is a reasonable one, and might well have been applied as a direct basis for finding negligence in the instant case.

Where the statute which is violated in a particular case is interpreted as intended to protect a certain class of persons of which the plaintiff is a member against the risk of the type of harm which has in fact occurred, the great weight of authority holds that the violation is negligence in itself, and that the court must so direct the jury.[15] Precedent in Maryland, however, is against such statutory interpretation. *Sothoron v. West*[16] involved a violation of Article 56, Section 194 (1) of the Maryland Code which provides that every vehicle while in use in the public highways should be provided with adequate brakes. The court in ruling on the effect of the violation said: "In some states

[11] McCoy v. Courtney, 25 Wash. 2d 956, 172 P. 2d 596, 170 A. L. R. 603 (1946), Jacklin v. North Coast Transportation Co., 165 Wash. 236, 5 P. 2d 325 (1931).

[12] McCoy v. Courtney, *supra*, n. 11.

[13] *Supra*, n. 3.

[14] *Supra*, n. 11.

[15] Martin v. Herzog, 228 N. Y. 164, 126 N. E. 814 (1920), Schell v. DuBois, 94 Ohio 93, 113 N. E. 664 (1916), Annis v. Britton, 232 Mich. 291, 205 N. W. 128 (1925), Osborne v. McMasters, 40 Minn. 103, 41 N. W. 543 (1889).

[16] 180 Md. 539, 26 A. 2d 16 (1942).

having similar statutes, it has been held that driving with defective brakes is negligence *per se*. The better and more general rule, however, seems to be that failure of brakes to operate makes only a *prima facie* case which the driver may defend by showing proper inspection." The court then held that the violation raised only a *prima facie* presumption of negligence. This is not, as the court seemed to think, the view of the majority of states. The rule supported by the weight of authority is that the violation of a statute or ordinance containing specific requirements as to brakes is negligence *per se*.[17]

The earlier Maryland case of *Kelly v. Huber Baking Co.*[18] involved the violation of a statute which required that all vehicles upon meeting others upon public highways must turn to the right of the center of the highway so as to pass without interference. The Court in discussing the statute said: "While it has been generally held that such a statute may create a *prima facie* presumption of negligence, it has never been held in this state to be negligence *per se*." The Court cited no authority for this statement, but it has since been referred to with approval in several Maryland cases.[19] These cases present a potential barrier to a future adoption in Maryland of the majority rule that a violation of such a statute is negligence as a matter of law.

The cases dealing with the problem of an interfering third person (second category above) have generally held, in the absence of statute, that the liability of the driver, who parked the car is a question of fact for the determination of the jury.[20] This has been held even though the vehicle was left unlocked with the key in the ignition.[21] According to these decisions the injured person must show that the defendant had under the circumstances been negligent, and that such negligence was the proximate cause of plaintiff's injury.[22] Some courts in jurisdictions which have enacted statutes similar to Article 66½, Section 192 have

[17] Harden v. Harden, 29 Ala. App. 44, 197 So. 94 (1940), Womack v. Preach, 63 Ariz. 390, 163 P. 2d 280 (1946), Smith v. Finkel, 130 Conn. 354, 34 A. 2d 209 (1943), Black v. Ambs, 307 Mich. 644, 12 N. W. 2d 381 (1943), Tysinger v. Coble Dairy Products, 225 N. C. 717, 36 S. E. 2d 246 (1945).

[18] 145 Md. 321, 125 A. 782 (1924).

[19] Consol. Gas, Etc. Co. v. O'Neill, 175 Md. 47, 200 A. 359 (1938), Kaline v. Davidson, 146 Md. 220, 126 A. 68 (1924).

[20] Connell v. Berland, 248 N. Y. 641, 162 N. E. 557 (1928), Don v. J. S. Ivins, 90 Pa. Super. Ct. 105 (1927), Bergman v. Williams, 173 Minn. 250, 217 N. W. 127 (1927), Albanon v. Tapley & Co., 234 N. Y. 522, 138 N. E. 431 (1922).

[21] Schaff v. R. W. Claxton, Inc., 79 App. D. C. 207, 144 F. 2d 532 (1944).

[22] *Supra*, n. 16.

likewise held that where a person intermeddles with the vehicle parked in violation of the statute the question of the defendant's liability is for the jury.[23] Other courts have held as a matter of law that the defendant's negligence is superseded by the act of the third party who intermeddles.[24] Such courts have little difficulty in disposing of the defendant's liability by applying the rule of an intervening cause which supersedes the defendant's negligence. This rule relieving the defendant of liability as a matter of law has been applied where the intermeddler himself has been injured,[25] as well as where the injury was to some third party.[26] Two Massachusetts cases,[27] in the face of a statute similar to Article 66½, Section 192, held that where a vehicle was parked by the defendant with the key left in the ignition the act of a thief in running down a pedestrian was as a matter of law such an intervening act as to supersede the defendant's negligence in violating the statute. The Court in *Sullivan v. Griffin*[28] said that the interference by thieves with a parked vehicle was not one of the "consequences that were intended to be prevented" by the statute.

A few recent cases have reached a result opposed to the earlier decisions. These cases hold that a violation of the statute imposes liability on the owner or operater as a matter of law even though a third person has intermeddled.[29] The case of *Ross v. Hartman*[30] decided in the District of Columbia reaches such a result. In that case the defendant's truck driver in violation of a traffic ordinance left the truck parked in a public alley with the ignition switch unlocked, and the key in the switch. Two hours later an unknown and unauthorized person drove the truck away, and in making his escape negligently ran down the plaintiff. The Court stated that, in absence of a statute, the leaving of the truck in such condition might be negligence

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[23] Moran v. Borden Co., 309 Ill. App. 391, 33 N. E. 2d 166 (1941), Malloy v. Newman, 310 Mass. 269, 37 N. E. 2d 1001 (1941).

[24] Castay v. Katz & Besthoff, 148 So. 76 (La. App. 1933); Mann v. Parshall, 229 App. Div. 336, 241 N. Y. S. 673 (1930).

[25] Wright v. Powers & Sons, 238 Ky. 572, 38 S. W. 2d 465 (1931).

[26] Rapczywski v. W. T. Cowan, Inc., 138 Pa. Sup. Ct. 392, 10 A. 2d 810 (1940).

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

[28] *Supra*, n. 27.

[29] Ross v. Hartman, 78 App. D. C. 217, 139 F. 2d 14 (1943), Maggoire v. Laundry & Dry Cleaning Service, 150 So. 394 (La. App. 1933), Ostergard v. Frisch, 333 Ill. A. 359, 77 N. E. 2d 537 (1948), Bullock v. Dahlstrom, 46 A. 2d 370 (D. C. Mun. App., 1946).

[30] Ross v. Hartman, *supra*, n. 29.

according to the circumstances, but that the existence of the ordinance made parking without taking the required precautions negligence, and that the negligence and causation were too clear for submission to the jury. In justification of this the Court said: "The evident purpose of requiring motor vehicles to be locked is not to prevent theft for the sake of the owner or the police, but to promote the safety of the public in the streets. Since it is a safety measure, its violation is negligence." The Court was careful to point out that a person is not liable for all harm that might follow a violation of a safety ordinance, but if the harm that results springs directly from the violation and is the type that the ordinance was designed to prevent then liability should be imposed. Statutes designed for the public safety have generally been so construed.[31]

Ostergard v. Frisch,[32] a recent Illinois case reached the same result as the *Ross* case when a similar statute was violated and the intermeddler was a thief. The Illinois court likewise based its decision on the idea that the statute was enacted for the benefit of the public, and that any harm arising from a violation would impose liability on the operator as a matter of law. There was a strong dissent in the case, however, which felt that the criminal act of the thief in stealing the car, plus his tortious act in negligently operating it, and not the negligent parking of the car, was the proximate cause of the injury. As pointed out earlier there is much authority for this view.[33] However, the majority opinion in the *Ostergard* case and the court in the *Ross* case did not doubt that the intermeddler's acts were the proximate cause of the harm, but it was felt in both cases that this was immaterial in the light of the purpose of the statute as construed by the Court. As stated in the *Ostergard* case: "Proximate cause has been fertile field for a contrariety of opinion. In determining whether the negligence involved in the violation of the statute is the proximate cause of the resulting injury, *the statute may by its obvious intent enlarge upon the general definition of proximate cause.*"[34]

In both the *Ostergard* case and the *Ross* case the thief was still in flight when the plaintiff was harmed. This would seem to be the type of situation at which the statute is

[31] *Supra*, n. 15, Flynn v. Gordon, 86 N. H. 198, 165 A. 715 (1933), Larrimore v. Amer. Nat. Ins. Co., 184 Okla. 614, 89 P. 2d 340 (1939), RESTATEMENT, TORTS, Sec. 286.

[32] Ostergard v. Frisch, *supra*, n. 29.

[33] *Supra*, n. 24, 27.

[34] Italics supplied. Ostergard v. Frisch, *supra*, n. 29.

aimed, and to which the defendant's liability should be limited. A recent case[35] has held that protection should be extended only to harm arising immediately following the act of the intermeddler, and in the case of a thief only to his immediate flight.

While no Maryland case deals squarely with the factual situation under consideration, it is to be noted that in the instant case the Court uses language in construing the purpose of the statute which is practically identical with those cases which have held the owner or operator liable even though there is an intermeddler who may be a thief,[36] saying: "The purpose of Section 192 was either *to prevent some unauthorized person from starting the car* or to prevent the starting of the car by gravity. *In either case the object was the protection of the public.*"[37] Such language could easily suggest that the Court of Appeals would reach the same result as the *Ross* and *Ostergard* cases if a similar situation should be presented to it. However, the holdings of the Maryland cases which rejected the idea of a legislative determined standard of care for establishing negligence as a matter of law,[38] stand as a potential bar to such a result.

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[35] Wannebo v. Gates, 227 Minn. 194, 34 N. W. 2d 695 (1948).
[36] *Supra*, n. 29.
[37] Italics supplied. *Supra*, n. 1, 783.
[38] See text *circa*, n. 16, 18 and 19.