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## LEAVING KEYS IN A VEHICLE: SHOULD THERE BE A STATUTE?

By CARL J. FERNANDES\*

AMERICAN automobile owners are operating a "red carpet" service for car thieves. An all-time high of 350,000 automobiles valued at \$290,000,000 were stolen in 1962, a 9 per cent increase from 1961. An alarming percentage of these cars were left with keys in the ignition.<sup>1</sup>

There is no California statute prohibiting this by automobile owners, but the courts have formulated their own rules in two general areas. First, courts will not impose liability where the owner's negligence is considered to endanger primarily his own proprietary interest in the automobile rather than interests of some other person.<sup>2</sup> Second, in applying the doctrine of "dangerous instrumentalities or extra hazardous activities," courts have tended liberally to construe the legal issue of duty and impose liability on the owner who leaves his keys in the vehicle in the face of a realizable likelihood that it may be taken by a thief who is incompetent to drive it.<sup>3</sup>

When confronted with this problem for the first time in *Richards v. Stanley*,<sup>4</sup> the California Supreme Court held that the defendant owed no duty to the plaintiff to protect him from injury caused by a thief. However, this decision was distinguished by the same court approximately one year later in *Richardson v. Ham*.<sup>5</sup> In that case the court imposed a duty on the owner of a bulldozer to protect third parties from injuries arising from the bulldozer's operation by intermeddlers.

The question presented in both cases is whether or not, in the absence of a statute or ordinance, the court will construe a duty owing to a plaintiff by such a vehicle owner?

### *No Liability in Absence of a Statute*

In *Richards v. Stanley*,<sup>6</sup> the defendant, in violation of a San Francisco municipal ordinance,<sup>7</sup> left her car unattended and unlocked on a

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<sup>1</sup> N.Y. Times, Mar. 2, 1963, p. 4, col. 6 (West. ed.).

<sup>2</sup> *Richards v. Stanley*, 43 Cal. 2d 60, 271 P.2d 23 (1954).

<sup>3</sup> *Richardson v. Ham*, 44 Cal. 2d 772, 285 P.2d 269 (1955).

<sup>4</sup> 43 Cal. 2d 60, 271 P.2d 23 (1954).

<sup>5</sup> 44 Cal. 2d 772, 285 P.2d 269 (1955).

<sup>6</sup> *Richards v. Stanley*, 43 Cal. 2d 60, 271 P.2d 23 (1954).

<sup>7</sup> San Francisco, Calif., Municipal Traffic Code § 69: "No person shall leave a motor

city street without removing the keys from the ignition. The car was stolen and the thief negligently ran into plaintiff's motorcycle, causing personal injuries. Plaintiff offered the ordinance in evidence, but it was excluded by the trial court because of a specific provision in the ordinance forbidding the application of it to any civil action. On appeal a nonsuit was affirmed, two justices dissenting. The court concluded that *if the state legislature* had provided a statute which prohibited the leaving of keys in unattended vehicles on public streets, then it could reasonably be held that it had established a duty on the part of vehicle owners to protect persons from injuries caused by thieves,<sup>8</sup> *but not otherwise.*

### Other Jurisdictions

Without here attempting to explore the problem of whether the breach of a statute may constitute negligence *per se* or raise a rebuttable presumption of negligence, the majority of states which have statutes prescribing standards as to leaving keys in unattended autos still do not allow recovery against the car owner.<sup>9</sup> The legislative purpose of such statutes has generally been said to be: to prevent the car from inadvertently being set in motion; or, to prevent children and thieves from meddling and causing injuries to the public; or, to help in law enforcement against theft.

These statutes generally have no provisions within the specific section which makes it *unlawful* for the owner to leave keys in the ignition, and give no indication as to how it is to be punished. Usually a separate, inclusionary provision makes it a misdemeanor to violate any provi-

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vehicle . . . unattended on any street, alley, used car lot, or unattended parking lot, without first stopping the engine, and removing and taking the ignition keys from the vehicle; . . . nor shall this section or any violation thereof be admissible as evidence affecting recovery in any civil action for theft of such motor vehicle, or the insurance thereon, or have any other bearing in any civil action. . . ."

<sup>8</sup> In the minority of courts where the owner has been held liable there generally has been a statute involved: *Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943), *cert. denied*, 321 U.S. 790 (1944) (violation of statute requiring driver to remove keys from the ignition); *Ney v. Yellow Cab Co.*, 2 Ill. 2d 74, 117 N.E.2d 74 (1954) (Resolving split of authority in Illinois as to owner's liability for failing to remove keys); *Garbo v. Walker*, 57 Ohio Op. 363, 129 N.E.2d 537 (1955) (violation of ordinance requiring driver to remove keys from ignition).

<sup>9</sup> *Lambrotte v. Payton*, — Colo. —, 363 P.2d 167 (1961); *Brill v. Wilbanks*, 222 Md. 248, 159 A.2d 657 (1960); *Liberto v. Holfeldt*, 221 Md. 62, 155 A.2d 698 (1959); *Permanente v. Milner Chevrolet Co.*, 229 Md. 385, 91 So.2d 243 (1956); *Anderson v. Theisen*, 231 Minn. 369, 43 N.W.2d 272 (1950); *Gower v. Lamb*, 282 S.W.2d 867 (Mo. App. 1955); *Lotito v. Kyriacus*, 272 App. Div. 635, 74 N.Y.S.2d 599 (App. Div. 1947), *appeal dismissed*, 297 N.Y. 1027, 80 N.E.2d 542 (1948); *Clements v. Tashjoin*, — R.I. —, 168 A.2d 472 (1961); *contra: Ross v. Hartman*, 139 F.2d 14 (D.C. Cir. 1943); *Ostergard v. Frisch*, 333 Ill. App. 359, 77 N.E.2d 537 (1948).

sions of the act or code and imposes a penalty of not less than \$1.00, nor more than \$100, for a first conviction, with gradual increases for the second and third convictions, not to exceed \$300.<sup>10</sup> It appears that the only time such statutes come into play is when there has been an injury to a third person, or damage to another's property, which the injured party is attempting to link to the owner's violation. Interestingly, while one might think that states with a statute of the type under discussion have been more apt to find the owner liable for the negligent acts of a thief, this is not the case.<sup>11</sup>

### *Common Law Application*

The dissenting opinion in *Richards v. Stanley*<sup>12</sup> asserted that the majority had summarily dismissed the test of foreseeability, which is stated to be the proper test for determining the existence of a duty owing to plaintiff.<sup>13</sup> By failing to emphasize this test the trial court had not only prevented any question of causation from going to the jury, but had also prevented plaintiff from amending his complaint or introducing additional evidence to show circumstances under which a duty might be owing.<sup>14</sup> It is significant that this test was not emphasized by the majority because the majority opinion did note, apparently as dicta, *special circumstances* where an owner might be liable for negligent driving resulting from theft of his unlocked vehicle, such as: "leaving it in front of a school where she might reasonably expect irresponsible

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<sup>10</sup> The Illinois statute is illustrative of those relied on by the minority of courts which hold an owner liable. *Ill. Rev. Stat. c. 95½, § 189* (1961): "No person . . . shall permit it to stand unattended without first stopping the engine, locking the ignition, and removing the key. . . ." § 234 then provides: "(a) [I]t is a misdemeanor for any person to violate any of the provisions of this Act, unless such violation is by this Act or other Law of this state declared to be a felony. (b) Every person convicted of a misdemeanor . . . for which another penalty is not provided shall for a first conviction thereof be punished by a fine of not less than \$1.00 nor more than \$100. . . . Upon a third or subsequent conviction within one year after the first . . . such person shall be punished by a fine of . . . not more than \$300." But see similar statutes, which the courts have *not* construed to hold the owner liable: *Colo. Stat. Ann. c. 1b, § 232* (1935); *Md. Ann. Code General Laws art. 66½, § 247* (1957); *Mass. Gen. Laws c. 90, § 13* (1954); *Miss. Code Ann. c. 2, § 8219* (Supp. 1942); *N.H. Rev. Stats. Ann. c. 263, § 47* (Supp. 1955); *R.I. Gen. Laws, §§ 3-22* (1956); *Utah Code Ann. §§ 41-6-105* (1953); *Wyo. Stat. Ann. §§ 31-152* (1957).

<sup>11</sup> See Annot., 51 A.L.R.2d 624 (1957).

<sup>12</sup> 43 Cal. 2d 60, 271 P.2d 23 (1954).

<sup>13</sup> See Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 372, 416 (1950), where it was said that the problem of causation is not to be settled by begging the question of whether there is or is not a duty, a word merely used for stating a conclusion. It is essentially a problem of foreseeability.

<sup>14</sup> 43 Cal. 2d 60, 271 P.2d 23 (1954) (dissenting opinion).

children to tamper with it, or leaving it in charge of an intoxicated passenger."<sup>15</sup>

The majority further reasoned that, since limited monetary liability is provided by the vehicle code<sup>16</sup> which imputes the negligence of the operator to the owner only if he expressly or impliedly has permitted the former to drive, it would be anomalous to allow *unlimited* liability if a thief took his car.

Thus, the court was unyielding in its position that if liability were to be extended in this case it would be for the legislature and not the court to do so. A statute would at least have gotten the case to the jury, but would the owner's liability be any more certain than without such a statute?

In appraising the position of the California courts with reference to the effect given the violation of a statute, their position has been unique, but consistent. While professing allegiance to the negligence *per se* rubric, the majority of the California Supreme Court have been inclined to allow considerable latitude to the jury by allowing it to consider the violation as a *presumption of negligence*.<sup>17</sup> Through resort to the reasonably prudent man formula the jury then has the power to substitute its judgment for that of the legislature. While the courts have not limited this presumption to violations of the motor vehicle code, the frequency of their occurrence has exposed these statutes, more so than others, to this construction.<sup>18</sup>

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<sup>15</sup> *Connell v. Berland*, 223 App. Div. 264, 228 N.Y. Supp. 20 (1928) (children known to be playing in the streets); *Morris v. Bolling*, 31 Tenn. App. 577, 218 S.W.2d 754 (1948) (Cab driver left intoxicated passenger alone in front street). The dissenting opinion in *Richards v. Stanley* noted the preceding cases which illustrated instances in which the majority would agree the owner should be found negligent. The dissent then pointed out that the Richards car was left on a public street during rush hours in the business district of populous city where it was not unforeseeable that it might be taken.

<sup>16</sup> CAL. VEH. CODE § 17150.

<sup>17</sup> See Malone, *Contrasting Images of Torts—The Judicial Personality of Justice Traynor*, 13 STAN. L. REV. 779, 784 (1961).

<sup>18</sup> See *Stickel v. San Diego Elec. Ry. Co.*, 32 Cal. 2d 157, 195 P.2d 416 (1948) (failing to yield right of way at entrance to highway); *Satterlee v. Orange Glenn School District*, 29 Cal. 2d 581, 177 P.2d 279 (1947) (failing to yield right of way at uncontrolled intersection); *Mathers v. County of Riverside*, 22 Cal. 2d 781, 141 P.2d 419 (1943) (failure to drive as close as practicable to right side of road); *Berkovitz v. American River Gravel Co.*, 191 Cal. 195, 215 Pac. 675 (1923) (no tail light); *Roth v. Bankston*, 101 Cal. App. 274, 281 Pac. 1081 (1929) (auto parked on highway). *But see*: *Lindebaum v. Barbour*, 213 Cal. 277, 2 P.2d 16 (1931); *Stevenson v. Fleming*, 47 Cal. App. 2d 225, 117 P.2d 717 (1941); *Mason v. Crawford*, 17 Cal. App. 2d 529, 62 P.2d 420 (1936). For an enumeration of other California cases which construe a violation of the Motor Vehicle Code as a presumption of negligence see *Satterlee v. Orange Glenn School District*, 29 Cal. 2d 581, 177 P.2d 279 (1947).

In *Richardson v. Ham*,<sup>19</sup> the court found that *as a matter of law* there was a duty to protect plaintiff from the negligent driving of a thief. In that case defendant was engaged in an earth moving operation. He parked his bulldozer for the night and left it unattended and unlocked at the top of a mesa. The bulldozer was stolen and the thieves negligently abandoned it while it was still in motion. Considerable damage to plaintiff's house, trailer and automobile resulted.

In considering the issues admittedly under a somewhat different fact situation—the court based its analysis of defendant's duty on foreseeability. It reasoned that a bulldozer, *unlike a car*, aroused curiosity and was attractive to those not competent to operate it. All drivers of cars are deemed to be competent to drive.<sup>20</sup> Thus, the court, however, did spell out foreseeability as the basis for establishing a duty to plaintiff without being hampered by any considerations of the presence or absence of a statute.<sup>21</sup>

Whether courts will be more inclined to impose civil liability upon automobile owners based on *Richardson* is quite doubtful, since in a later case, *Holder v. Reber*,<sup>22</sup> the district court of appeals stated that the rule of *Richards v. Stanley*<sup>23</sup> remained unaltered. In that case plaintiff was injured by a passenger car stolen by two boys. He sought to join the owner of the car as a defendant on the theory that, since he had parked the car in a public street unlocked and with the key in the ignition, his negligence concurred with the negligence of the boys to cause the injuries. The owner's demurrer was sustained without leave to amend. The appellate court approved, ruling that since plaintiff did not present facts essentially different from those involved in *Richards v. Stanley*, the owner was under no duty to plaintiff. The court reasoned that *Richardson v. Ham* did not modify the supreme court's earlier decision because, unlike a case involving the theft of a bulldozer, the owner of an automobile could not foresee that a car thief would be an incompetent driver. This being unforeseeable, there was no duty to plaintiff.<sup>24</sup>

There is no question, however, that the dicta in *Richards v. Stanley* as to civil liability arising under *special circumstances*, has been readily accepted and applied by the courts,<sup>25</sup> perhaps in an effort to enlarge the concept of duty which the courts so strictly construed.

<sup>19</sup> 44 Cal. 2d 772, 285 P.2d 269 (1954).

<sup>20</sup> *Id.* at 776, 285 P.2d at 271.

<sup>21</sup> 44 Cal. 2d 772, 285 P.2d 269 (1955).

<sup>22</sup> 146 Cal. App. 2d 557, 304 P.2d 204 (1956).

<sup>23</sup> 43 Cal. 2d 60, 271 P.2d 23 (1954).

<sup>24</sup> 146 Cal. App. 2d at 560, 304 P.2d at 205 (1956).

<sup>25</sup> See note 15 *supra*.

Since the decisions in *Richards v. Stanley*, *Richardson v. Ham*, and *Holder v. Reber*, the district court of appeals, in *Murray v. Wright*,<sup>26</sup> has had occasion to review the liability of an owner who left many cars unattended and unlocked without removing the keys from the ignition. This case presented the unusual situation of a used car lot owner who purposely left the ignition keys in the locks of all cars on an unattended lot. It was alleged that this was a matter of common knowledge and that, in any event, it was known to the thief who stole one of the cars and negligently collided with plaintiffs. Defendant, the used car lot owner, relied on the decisions in *Richards v. Stanley* and *Richardson v. Ham* to sustain his position that even if he were negligent in maintaining the cars with keys in them, it did not appear that the thief was incompetent to operate a motor vehicle. The trial court sustained defendant's demurrer without leave to amend.<sup>27</sup> This was reversed with directions to overrule the demurrer and allow plaintiff reasonable time to amend. The court held that, while it was not unmindful of the decisions in both *Richards v. Stanley* and *Richardson v. Ham*, the principal case presented a factual situation far more serious than the parking of a single car on a city street. Therefore, it was not prepared to say, as a matter of law, that there was no duty owing, that the thief was not incompetent to operate a motor vehicle, and that the thief was not operating the car with the implied consent of plaintiff.<sup>28</sup>

### Conclusion

The distinctions made by California courts in determining whether civil liability exists for injuries resulting from the owner's act of leaving the keys in his car are generally similar to those made in the majority of jurisdictions which deny liability.<sup>29</sup>

It is doubtful whether the adoption of legislation would make the car owner more careful or aware of the dangers of leaving his keys

<sup>26</sup> *Murray v. Wright*, 166 Cal. App. 2d 589, 333 P.2d 117 (1958).

<sup>27</sup> Plaintiff's complaint alleged four causes of action: (1) negligence in maintaining the lot; (2) the thief's operation of the car with the implied consent of defendant (CAL. VEH. CODE § 17150); (3) maintenance of a nuisance in so leaving cars on the lot; (4) wanton and reckless disregard for the safety of others in so maintaining the lot. The trial court's rulings, dismissing counts 3 and 4 were affirmed.

<sup>28</sup> 166 Cal. App. 2d 589, 333 P.2d 111 (1958).

<sup>29</sup> *Midkiff v. Watkins* (1951, La. App.), 52 So.2d 573 (in absence of statute, no liability); *Fulco v. City Ice Service* (1951, La. App.), 59 So.2d 198 (in absence of statute or ordinance to contrary, no liability); *Jackson v. Mills Baking Co.*; 221 Mich. 64, 190 N.W. 740 (1922) (no duty to injured plaintiff, insufficient evidence to support submission to the jury); *Roberts v. Lundy*, 301 Mich. 726, 4 N.W.2d 74 (1942) (court decided as a matter of law that there was liability as against the owner); *Gower v. Lamb* (Mo. App. 1955), 282 S.W.2d 867 (evidence insufficient as a matter of law to show negligence).

in the ignition. Unless the statute were peculiarly comprehensive, the courts would still be faced with problems similar to those now encountered: Is liability imposed upon the owner even if the thief is not negligent in injuring another? Is the creator of the risk to escape liability, thus denying a remedy to an innocent victim? And how would local police agencies enforce this statute?

On the other hand there may still be advantages to be gained from legislation on this subject. Even though automobile owners would not be strictly liable for this act, the threat of a suit and the greater certainty that a jury would at least get to hear the plaintiff's case should be an added inducement for the owner to remove his keys. Having this value alone, it would certainly lessen the incidence of car theft and the possibility of having to seek relief from judgment proof joy riders.