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Automobiles--Liability of Owner of Motor Vehicle Under § 59, Vehicle and Traffic Law, When Car in Possession of Repairman (Zuckerman v. Parton, 260 N.Y. 446 (1933))

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RECENT DECISIONS

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AUTOMOBILES—LIABILITY OF OWNER OF MOTOR VEHICLE UNDER §59, VEHICLE AND TRAFFIC LAW, WHEN CAR IN POSSESSION OF REPAIRMAN.—In a recent case, defendant left his car at a garage, in custody of the manager, in order to have the battery replaced. One Ryan, an employee at said garage, took the car and while operating it, caused injury to the plaintiff. Evidence tended to show that Ryan took the car to get a new battery. The Appellate Division [1] affirmed the trial court's dismissal of the complaint. On appeal; *held reversed,* the facts were sufficient to justify a submission of the question of plaintiff's implied assent to the jury. *Zuckerman* v. *Parton,* 260 N. Y. 446, 184 N. E. 49 (1933).

The Court in the above case lays down the rule that an owner of an automobile, having same repaired, is deemed to have impliedly assented to its use, when he should have contemplated or anticipated that it would be used upon the street or roadway in the performance of the work and is liable under §59, *supra.*[2]

The repairman is an independent contractor since no right of control or right to direct the work is in the owner.[3] The negligence of the independent contractor, under the common law, exempted the owner of a motor vehicle from liability due to the negligent operation of such vehicle by the independent contractor while driving on the public highway to test the car.[4] But by statute [5] the legislature "has somewhat restricted the common-law rule regarding non-liability for negligence of an independent contractor." [6] A repairman therefore can make the owner liable for former's negligent operation of the car when the owner impliedly gives permission for the use of the vehicle.[7] This is strictly in accord with the

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[1] 235 App. Div. 824, 256 N. Y. Supp. 994 (2d Dept. 1932).

[2] Section 59 of the Vehicle and Traffic Law (formerly 282-e of the Highway Law) makes the owner of a motor vehicle operated on a public highway liable for death or injuries to person or property resulting from negligence in the operation of such motor vehicle by any person legally using or operating it by express or implied assent of such owner. See (1932) 6 ST. JOHN'S L. REV. 396.

[3] Woodcock v. Sartle, 84 Misc. 488, 146 N. Y. Supp. 540 (1914).

[4] *Ibid.;* Thorn v. Clark, 188 App. Div. 411, 117 N. Y. Supp. 201 (3d Dept. 1919); McCloskey v. Nagel, 206 App. Div. 467, 202 N. Y. Supp. 34 (2d Dept. 1923).

[5] VEHICLE AND TRAFFIC LAW §59, *supra* note 2.

[6] Zuckerman v. Parton, instant case, at 449, 184 N. E. at 50.

[7] O'Tier v. Sell, 226 App. Div. 434, 235 N. Y. Supp. 534 (4th Dept. 1929), *rev'd* on other grounds 252 N. Y. 400, 169 N. E. 624 (1930).

intent of the legislature.[8] The owner is not liable under the statute in any event if permission, either expressed or implied, to use the automobile is not given.[9] But if such permission is given, the law applies with full vigor.[10]

V. G. R.

BAILMENTS—LIABILITY OF SLEEPING CAR COMPANIES FOR PASSENGER'S BAGGAGE—PRIMA FACIE CASE—BURDEN OF PROOF.—Van Dike, plaintiff, arrived at the Hoboken, N. J., station of the Delaware, Lackawanna and Western R. R. in order to take a train. Van Dike had already purchased both railway and Pullman accommodations and he and his party proceeded down the platform toward the train, the plaintiff carrying his own bag. As the party reached the Pullman assigned to the plaintiff, a porter wearing the regular Pullman uniform and a hat with a brass shield, on which was inscribed "Pullman," took plaintiff's bag and entered the Pullman to place it on Van Dike's berth. In about five minutes, plaintiff proceeded to his designated berth where he discovered that the bag he had handed the Pullman porter was missing. He immediately notified the train porter but a thorough search was of no avail. Plaintiff could not identify any particular porter as the one who took his bag. *Held,* defendant liable to plaintiff for negligence of servant, who on taking the baggage of Van Dike, assumed the liability of bailee. Passenger's proof of delivery of bag to the Pullman porter, demand for the return of same, and defendant's inability to return same, constituted a *prima facie* case which defendant failed to rebut. *Van Dike* v. *Pullman Co.,* 145 Misc. 452, 260 N. Y. Supp. 292 (1932).

The liability of sleeping car companies for the loss of personal effects and baggage of a passenger is not that of insurer, as in the case of inn-keepers and common carriers, but they are liable only for loss or injury due to their negligence.[1] Mere proof of loss of

[8] In the case of Katz v. Wolff and Reinheimer, Inc., 129 Misc. 384, 221 N. Y. Supp. 476 (1927), the Court states that the statute was designed to make the owner of a vehicle liable for injuries caused by negligent operation of *any* person whose permission to operate same, *can be implied from all the surrounding circumstances.*

[9] Fluegal v. Coudert, 244 N. Y. 393, 155 N. E. 683 (1927); Bamonte v. Davenport, 245 N. Y. 594, 157 N. E. 871 (1927).

[10] Psota v. L. I. R. R. Co., 246 N. Y. 388, 159 N. E. 180 (1927); Cohen v. Neustadter, 247 N. Y. 207, 160 N. E. 12 (1928).

[1] Carpenter v. N. Y., N. H. & H. R. R. Co., 124 N. Y. 53, 26 N. E. 277 (1891); Adams v. N. J. Steamboat Co., 151 N. Y. 163, 45 N. E. 369 (1896); Goldstein v. Pullman Co., 220 N. Y. 549, 116 N. E. 376 (1917); Sneddon v. Payne, 114 Misc. 537, 187 N. Y. Supp. 185 (1921).