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Parental Liability for Incapable Minor Child's Operation of Automobile

Keith S. Sutton

yield also to the less advantageous provisions of the same statute. In effect the legislation would establish the property as abandoned, after the one year has elapsed, thereby creating in the finder a title paramount to the loser's. It can not be fairly contended that a loser who makes no effort to reclaim his chattel has not abandoned it. Clearly, the statute could have no retroactive effect. Prospectively it would be valid as to residents of the state who lose property, but a problem might be anticipated as to non-residents. That is, may a non-resident who loses property here be deprived of it by operation of the statute?

Irrespective of the constitutional difficulties which may be encountered, a statute, clearly defining the rights and duties of a finder, is preferable to the nebulous status of a finder in this state, where, if the presumptions enumerated above prevail, a finder may be vested with title only after six years. If he does not hold adversely, his property is always subject to divestment by the true owner. A statute modeled after the Massachusetts statute is undeniably advantageous and would erase an existing anomaly in the law. It is not contended that the one-year limitation, as prescribed in the Massachusetts statute, would be a satisfactory period in this state, since the size and population of the state are factors to be taken into account. Such determination rests properly in the legislature. It is submitted, however, that a finder, who has complied with the law and in good faith given a true owner every opportunity to recover his chattel, is entitled to something more than an ownership "good against all but the rightful owner."

WILLIAM J. HARRIS.

PARENTAL LIABILITY FOR INCAPABLE MINOR CHILD'S OPERATION OF AUTOMOBILE

As an elementary principle, a parent is not liable for the torts of his minor children unless they are committed at his direction or authorized by him or subsequently ratified by him. This principle is subject to certain well known exceptions. Thus, a statute may impose liability on the parent regardless of his culpability,[1] or the act of the parent in relation to the child and the ensuing tort may have been negligent of itself.[2]

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[1] CAL. VEH. CODE § 352 (b)—"Minor's Negligence Imputed to Parent in Certain Cases. Any negligence or wilful misconduct of a minor whether licensed or not under this code in driving a motor vehicle upon a highway with the express or implied permission of the parents or the person or guardian having custody of the minor shall be imputed to such parents or such person or guardian for all purposes of civil damages and such parents or such person or guardian shall be jointly and severally liable with such minor for any damages proximately resulting from such negligence or wilful misconduct."

[2] HARPER, LAW OF TORTS (1933) § 283, p. 622.

Under the latter exception has arisen the rule that a parent who entrusts a dangerous chattel to a child may be liable to injured third parties as a result of the child's misconduct with the dangerous chattel.[3] The cases on this point generally involve liability arising out of dangerous instrumentalities such as firearms or explosives.[4] It is usually held that the parent need not actually entrust the weapon to the child; it is enough if he leave it in such a place that the use of it by the child and the danger to persons of the class likely to be in the vicinity is reasonably foreseeable.[5] Such foreseeability of harm need not relate to the precise person injured or to the precise manner of injury; it is enough that an unreasonable risk of harm in some manner to a class of persons is foreseeable.[6] Perhaps the leading case involving this principle is *Sullivan v. Creed.*[7] There the defendant had left his gun, loaded and at full cock, leaning against a fence on his own lands near a path leading to a public highway. The defendant's son, aged 15, passed along the path and took the gun to the highway. Not knowing it to be loaded, he playfully pointed it at the plaintiff. The gun was discharged and the plaintiff suffered the injuries complained of. The Court of King's bench held for the plaintiff and this rule was affirmed by the Court of Appeals. In the King's Bench decision, Judge Gibson wrote as follows:

> Our decision depends on the answer to the question, was the misfortune the direct consequence of a danger which a prudent man ought to have perceived? It is immaterial that the specific mischief was not actually foreseen. The possessor of a dangerous article is bound to exercise diligence for the protection of those likely to be injured by a probable use of such article. Thus, there is actionable liability where the vendor of a dangerous commodity, without warning, sells it to a purchaser presumably unaware of such danger: Clarke v. Army and Navy Co-operative Society, Limited (1903), 1 K. B. 155; where a master entrusts to a young and unfit messenger a gun negligently left loaded which it was his duty to have made safe: Dixon v. Bell, 5 M & S 198 . . . . The master in Dixon v. Bell, 5 M & S 198, never thought for a moment that the girl, after laying aside the gun (which he had been led to believe was safe), would unexpectedly have taken it up again and pointed it at the child. The argument that the handling and use of the gun were trespassory and unauthorized is also inadmissible, as the cases demonstrate.

This case stands for the rule that conduct is negligent when the actor creates a situation which is unreasonably dangerous to others because of the likelihood of the action of third parties or inanimate forces.[8]

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[3] Dickens v. Branham, 69 Colo. 349, 194 Pac. 356 (1920).

[4] Sullivan v. Creed, (1904) 1 Ir. R. 317.

[5] HARPER, LAW OF TORTS (1933) § 8.

[6] City of Dixon v. Scott, 181 Ill. 116, 54 N. E. 897 (1899); HARPER, LAW OF TORTS (1933) § 75.

[7] (1904) 1 Ir. R. 317.

[8] RESTATEMENT, TORTS (1934) § 302 (b).

I

The question is presented whether these principles apply to cases where the chattel, though not dangerous *per se,* is likely to be put to a dangerous use because of the user's known propensities.[9] Logically, it would seem that to ask the question is to answer it. And, courts have held, with fair uniformity, that the entrusting of such a non-dangerous article to an unfit or reckless person constitutes negligence if such person is likely to use it in a dangerous manner.[10] In the case of parents, the duty is affirmative—not merely negative—and the parent is under a duty:

(1) To refrain from giving the child such a chattel;[11] and,

(2) To take positive action to prevent the child from using it.[12]

This rule has been applied to the allowing of insane persons,[13] drunkards,[14] known reckless drivers,[15] or inexperienced minors,[16] the use of automobiles. Although by the great weight of authority a car is not a dangerous instrumentality of itself,[17] liability has been imposed on the owners of cars when they have permitted the above classes of persons to use them.[18]

In *Rocca v. Steinmetz,*[19] the California court held that an owner who permits his son to use the family car with knowledge that the son was a careless and reckless driver is guilty of negligence and hence is liable for all damages caused by the son in the operation of the machine. To the same effect is *Knight v. Gosselin,*[20] wherein it was held that liability extended to the owner in a case where he permitted a known drunkard to use his automobile. In this situation it

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[9] By the great weight of authority an automobile is not a dangerous instrumentality *per se.* Parker v. Wilson, 179 Ala. 361, 60 So. 150 (1912); Rocca v. Steinmetz, 61 Cal. App. 102, 214 Pac. 257 (1923).

[10] The cases are collected in the annotation to 36 A. L. R. 1150, 1162 (1925); 42 C. J. § 836, n. 54; BERRY, THE LAW OF AUTOMOBILES (5th Ed.) § 1351 ("Thus, if a parent should place an automobile in charge of a child of tender years, who is incompetent and unable on account of his youth to safely operate such a machine, he will be held liable for injuries caused thereby. But this liability is on account of his own negligence in entrusting his automobile to the child and does not arise from any imputed negligence of the child.")

[11] Johnson v. Glidden, 11 S. D. 237, 76 N. W. 933 (1898).

[12] HARPER, LAW OF TORTS (1933) § 283, p. 622.

[13] McCalla v. Grosse, 42 Cal. App. (2d) 546, 109 P. (2d) 358 (1940).

[14] Knight v. Gosselin, 124 Cal. App. 290, 12 P. (2d) 454 (1932).

[15] Kanananakoa v. Badalamente, 119 Cal. App. 231, 6 P. (2d) 338 (1931).

[16] Rocca v. Steinmetz, 61 Cal. App. 102, 214 Pac. 257 (1923).

[17] See note 9 *supra.*

[18] See notes 13 through 16 *supra.*

[19] 61 Cal. App. 102, 214 Pac. 257 (1923).

[20] 124 Cal. App. 290, 12 P. (2d) 454 (1932).

was held that liability was independent of the "imputed negligence" statute.[21]

II

The above cases and authorities clearly delineate the proposition that the liability of the parent or other lender is based on a dual theory:

(1) His *own* (as distinguished from imputed) negligence in entrusting the vehicle to the known reckless driver or in permitting it to remain in such a position that the natural consequence is injury to others through the acts of third parties;[22] and,

(2) The negligence of the inexperienced minor child (or other intervening actor whose intervention was foreseeable) in injuring the plaintiff.[23]

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[21] CAL. VEH. CODE § 402(a)—"Liability of Private Owners. Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor 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, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

[22] See note 8 *supra*. The history of decisional law in California reveals an interesting discrepancy. Prior to the decision in Rocca v. Steinmetz, 61 Cal. App. 102, 214 Pac. 257 (1923), it had been held that a parent was not liable where he permitted his child to have access to a firearm and the child negligently shot someone. (Figone v. Guisti, 43 Cal. App. 606, 185 Pac. 694 (1919); Hagerty v. Powers, 66 Cal. 368, 5 Pac. 622 (1885).) Examination of the brief filed by the respondent-defendants in the Rocca case indicates that this line of decisions was strongly relied on as a defense in that action. Respondents stated that if a parent was not liable for handing a gun to his minor child—or in permitting him access thereto—that by no means should a parent be held liable, in the absence of statute, for entrusting an automobile to a child which in turn resulted in injury to the plaintiff. The Court rejected this theory and attempted to distinguish between the two classes of cases. The principle was thus settled in California law that a parent may be liable for negligently allowing his minor child to operate the parent's automobile. Analysis of the prior firearms cases indicates that the California Supreme Court was not fully cognizant of tort legal history. The Court went so far as to say that liability of the parent (in the firearms situation) was unknown to the common law. This was not the case. Examination of Sullivan v. Creed, (1904) 1 Ir. R. 317, clearly indicates that the California Supreme Court did not extend its research far enough; for, the Sullivan case shows that the principle was fully recognized in many cases—most of which antedate the Hagerty and Figone decisions. At least in England the rule of strict liability (or negligent liability) had grown up in regard to the entrustment of dangerous chattels. To carry this process but one step farther and extend liability to instrumentalities that may become dangerous through improper operation, is a logical and reasonable extension of the doctrine involving no new principle, nor, in fact, does it need particular justification to exist as a valid legal premise.

[23] If the injury to the plaintiff were a pure accident, liability could not be imposed on the parent for although he would be negligent to all men in general in permitting the child to operate the car, nevertheless that negligence

Implicit in these holdings is the fact that the rule does not depend on the application of the doctrine of *respondeat superior* as such doctrine is clearly inapposite to this genus of case.[24] Here there is no need of the rules pertaining to master and servant or principal and agent. If these doctrines were applicable, the cases could be resolved purely by the application of the doctrine.

This presents the important question: Are the cases solved or controlled by another form of imputed liability found in the common statutes such as Section 59 of the New York Vehicle and Traffic Law?[25] These statutes are remedial in nature and apply where the doctrine of *respondeat superior* is not available as where the wrongdoer merely has possession of the car and is not an agent or servant of the owner. Such statutes are designed to meet the felt necessities of the times, and under them a lender who has allowed a perfectly competent driver to take the car has the negligence of such borrower imputed to him.[26] Hence, the general rule of a bailment that the privity is that of property and not of contract is avoided. It has been held that the type of case under discussion is not alone controlled by the "imputed negligence" statute.[27]

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could not reasonably be said to have been the legal cause of the injury, assuming that it were in fact unavoidable. For, even though an act may be a breach of legal duty, it still must be a legal cause. (Palsgraf v. Long Island Railroad, 248 N. Y. 339, 162 N. E. 99 [1928].) If the child were not negligent in injuring the plaintiff, then it cannot be said that the negligence of the parent in permitting the incompetent to operate the vehicle was a legal cause, for the negligent act of the parent presupposes that the child will negligently injure someone, and thus to hold the parent liable for the child's non-negligent act would be to extend liability farther than that which was reasonably foreseeable. Even the statutes imposing liability on the parent regardless of his fault recognize this. (See note 1 *supra.*) In sum, the liability of the parent is predicated on his own negligence and on the theory that the child will negligently injure someone. Furthermore, it is relatively hard to conceive a situation where the parent would be liable and the child would not. Hence the act of the parent might have been a cause in fact; it might have been the *sine qua non* without which the injury would not have happened. Nevertheless, for reasons of policy and practicality the line is drawn. *See* Brown v. Kendall, 6 Cush. 292 (Mass. 1850). It was the prevailing rule of the common law that neither trespass nor case would lie save where there was fault. See The Nitroglycerine Case, 15 Wall. 524, 21 L. ed. 206 (1872); Burkes v. Lieberman, 218 App. Div. 600, 218 N. Y. Supp. 593 (1st Dep't 1926), *aff'd,* 245 N. Y. 579, 157 N. E. 865 (1927).

[24] Gardiner v. Solomon, 200 Ala. 115, 75 So. 621 (1917); the same conclusion is reached by the annotator in 36 A. L. R. 1162 (1925).

[25] N. Y. VEH. AND TRAF. LAW § 59—"Negligence of operator other than owner attributable to owner. Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner."

[26] Fluegel v. Coudert, 244 N. Y. 393, 155 N. E. 683 (1927).

[27] McCalla v. Grosse, 42 Cal. App. (2d) 546, 109 P. (2d) 358 (1941).

Why is it important or noteworthy that such statutes are not (or should not be) controlling in the cases of negligent permission to incapable drivers to operate automobiles? The answer is two-fold:

(1) From the standpoint of the injured plaintiff it is vitally important, for:

(a) In many jurisdictions the lender's liability is limited if the case is decided under an imputed negligence statute. For example, California Vehicle Code, Section 402, limits liability to $5,000.00 where one person is injured or killed and, where more than one is injured or killed, the total liability may not exceed $10,000.00.[28]

(b) Even if the case is to be decided under an imputed negligence section which does not limit liability in money damages (for example, Section 59 of the New York Vehicle and Traffic Law), the plaintiff is likewise subject to the defense that the borrower was operating the vehicle outside of the scope of the express or implied permission. In sum, *secret restrictions* may operate so as to negative liability. Normally, such a defense is a complete one.

(2) Secondly, it is important that liability be not controlled by such statutes from the standpoint of social policy.

It is with the matters noted in (1) above that this note is principally concerned. A typical situation might be presented as follows:

Assume that by the decisional law of State *X* it is negligent conduct to permit a known reckless person to operate your car. Nevertheless, a parent permits his careless or reckless minor child to operate the family car. However, he tells the minor: "You may use the car here in town, but don't go to Easton." The child does drive to the forbidden town and a collision occurs due to the sole negligence of the minor. The plaintiffs suffered serious injuries for which $20,000 would be adequate compensation. There is an imputed negligence statute in State *X* which limits the lender's liability to $5,000 or $10,000. The decisional law of State *X* also holds that a lender may delimit the area of operation of the loaned vehicle and that transgression of this area is a defense available to the lender. Is the lender liable on any theory? If so, in what amount?

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[28] CAL. VEH. CODE § 402(b)—"The liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant is limited to the amount of five thousand dollars ($5,000) for the death of or injury to one person in any one accident and subject to said limit as to one person is limited to the amount of ten thousand dollars ($10,000) with respect to the death of or injury to more than one person in any one accident and is limited to the sum of one thousand dollars ($1,000) for damage to property of others in any one accident."

It is submitted that the only proper result is one in which the lender is held completely liable. As indicated there are authorities holding that the situation is independent of the imputed negligence statutes.[29] However, would restrictions be available as a defense? Or, are there any authorities holding expressly, or by implication, that the case would be solely decided under an imputed negligence statute?

It is well settled that under the common imputed negligence statutes the owner may place reasonable restrictions on the operation of the vehicle.[30] Such secret restrictions include: the designation of a forbidden area of operation;[31] prohibition against the picking up of riders;[32] the length of time for which the vehicle may be used;[33] and, the purpose for which the vehicle may be used.[34] Such secret restrictions have been held to be valid as complete defenses against injured third parties.[35] The *ratio decidendi* of this current of judicial thought appears to be that such statutes are in derogation of the common law and hence must be strictly construed against undue enlargement of liability.[36] Further, the common law allowed the owner of a vehicle to place restrictions on its use; the statutes do not expressly change this rule, hence it still exists. However, in a recent California case,[37] Judge Carter, in his concurring opinion served notice that he was ready to discard the rules relating to secret restrictions.

In the light of the above, the recent New York case of *Winnowski v. Polito* [38] raises significant and provocative issues which may well compel a complete restatement of the law relating to permissive use in New York. In addition, it seemingly introduces a new concept relating to the presumption of authorized use. The facts were as follows: The owner of the vehicle double-parked it on a busy thoroughfare in the shopping district of Albany. He left the key in the ignition switch and the car wheels were turned to the curb. The owner and his wife entered a nearby store, leaving their 14-year-old son sitting in the rear of the car. The boy moved up into the front seat of the car. He testified that while sitting there a policeman directed him to move the car to the curb. The boy protested that he had no license and did not know how to drive. The policeman was

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[29] See note 27 *supra*.
[30] Psota v. Long Island Railroad, 246 N. Y. 388, 159 N. E. 180 (1927).
[31] Chaika v. Vandenberg, 252 N. Y. 101, 169 N. E. 103 (1929).
[32] Psota v. Long Island Railroad, 246 N. Y. 388, 159 N. E. 180 (1927).
[33] Union Trust Co. v. American Commercial Car Co., 219 Mich. 557, 189 N. W. 23 (1922).
[34] Arcara v. Moresse, 258 N. Y. 211, 179 N. E. 389 (1932).
[35] Rhodes v. Ocean Accident and Guarantee Corp., 239 App. Div. 92, 266 N. Y. Supp. 681 (4th Dep't 1933).
[36] Psota v. Long Island Railroad, 246 N. Y. 388, 159 N. E. 180 (1927), ("The Legislature may not be presumed to make any innovation upon the common law further than is required by the mischief to be remedied").
[37] Burgess v. Cahill, 26 Cal. (2d) 239, 158 P. (2d) 393 (1945).
[38] 294 N. Y. 159, 61 N. E. (2d) 425 (1945).

adamant and the boy stepped on the starter. As the car was in gear it ran forward over the curb and struck the plaintiffs. The testimony of the boy was uncontradicted. The mother and father testified that the boy was forbidden to drive and that no permission to drive had ever been given him. This testimony was also uncontradicted. The policeman was not called as a witness. The trial court found for the plaintiffs on the ground that the *prima facie* case created by the presumption of authorized use with the owner's permission had not been overcome. On appeal, the Court of Appeals, in reversing the Appellate Division,[39] upheld the trial court.

Seemingly, the basis of the Court of Appeals decision was that: (1) it was within the discretion of the trial court, weighing the testimony of the interested witnesses, to hold that the presumption of authorized use had not been overcome; and (2) the leaving of a vehicle on a street under such circumstances gives implied permission to a person left in charge to operate it.

Little fault can be found with the result; in fact, it is submitted that it is the only correct result under the cases and authorities heretofore cited. In sum, the result is correct because the parent negligently allowed the vehicle to be left in such a position that the use of it by the incapable child was reasonably foreseeable.

It is the *ratio decidendi* that warrants criticism. There can be little doubt, as a general rule, that a presumption of authorized use arises from the mere operation of the vehicle.[40] And, the credibility of witnesses who testify in opposition to this presumption is for the trier of fact.[41] Had the decision been placed solely on that ground, the reasoning might be acceptable even though a presumption ordinarily should not be given undue effect in the face of circumstances clearly rendering the effect of such presumption an unusual result. Particularly is this so of a statutory presumption not having a logical core as its basis.[42] It would seem safe to state that it is relatively difficult to *presume* permission to a known incapable minor child, under these circumstances, to drive the car. The probabilities are against such express permission; in all the cases where express permission existed there was clear evidence of such permission. But here there is none. It is unequivocally denied. Nor should it be presumed that reasonable people do give such permission unless there are some facts in evidence warranting the inference or presumption. In the absence, as here, of any evidence of permission save for the actual fact of an accident, it seems an unreasonable and unwarranted inference.

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[39] Winnowski v. Polito, 267 App. Div. 849, 45 N. Y. S. (2d) 747 (3d Dep't 1944).

[40] St. Andrassy v. Mooney, 262 N. Y. 368, 186 N. E. 867 (1933).

[41] Ferris v. Sterling, 214 N. Y. 249, 108 N. E. 406 (1915).

[42] O'Toole, Cases and Materials on the Law of Evidence (2d ed. 1937), p. 57: "By the weight of authority a presumption is not evidence, but a rule

Apparently this was felt by the court for it attempted to find other bases of justification to bolster up the fictional presumption. There may well have been a lurking doubt—what if the patrolman *had* testified in corroboration of the child? What if it *had* actually happened that way? How then could it be said that there was operation with permission when the child protested vigorously against operating the car. This would not be operation with permission. Rather it would be operation under duress of law. True, we do not know why the policeman did not testify; that we are not told. Inferentially, perhaps, he may not have existed; or, if he did exist, a sense of self protection might render his testimony unfavorable to the defendant. But regardless of these speculations, to allow credibility to oppose, as a negativing factor, the clear and unequivocal testimony of no consent taken in conjunction with the unusual manner of the accident, is difficult to justify.[43] Hence, it was necessary for the court to find implied permission in order to have a basis upon which to predicate liability.[44] To do so, the court stated (per Dye, J.):

> While it is not easy to formulate a universally applicable definition as to the meaning of implied permission mentioned in the statute, it must be recognized as a basic proposition that when one leaves his motor vehicle in a busy street in such a position that a reasonably prudent person should anticipate that in the event of an emergency or other necessity, it must be moved, it imposes upon the owner responsibility for the negligent acts of the person left in charge.[45]

To the author it would seem that implied permission is more than merely mentioned in the statute; it would seem that it is a condition precedent to liability and is required. Is this not in the teeth of the statute and of prior decisions long regarded as binding?[46] Permission at the very least connotes an intent to allow the bailee the use of the vehicle. Again, is it not unusual and improbable to state that a parent would impliedly permit (that is, intentionally) his known incapable minor child to drive as here? Is it natural or probable to think that a parent would think to himself: "I'll let the child drive it

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of evidence. In order, therefore, to understand the effect of proof in rebuttal to a presumption, it becomes necessary to distinguish between those presumptions which are arbitrarily created such as an arbitrary presumption that a motor vehicle is being operated in the owner's service, and those which result from a series of facts admitting of a logical deduction, such as the presumption of death after seven years absence under circumstances tending to negative the existence of life."

[43] Christiansen v. Hilber, 282 Mich. 403, 276 N. W. 495 (1937); St. Andrassy v. Mooney, 262 N. Y. 368, 186 N. E. 867 (1933).

[44] See note 25 *supra.*

[45] 294 N. Y. 159, at 162.

[46] If intentional permission is not required why have the courts before allowed reasonable restrictions to be put on the use of the vehicle? The very concept of restrictions implies intent on the part of the lender to let the vehicle for certain purposes. See cases cited in notes 30-36, incl., *supra.*

if necessary, although I know full well he doesn't know how to drive"? Yet, that is what the court holds in its decision. That this is highly unusual and improbable matters not. The fact that it has formerly been held that implied permission under the statute meant express permission circumstantially proved is in limbo.[47] And here there was not a scintilla of evidence to support express permission or implied intentional permission.

Apparently the court failed to see that the true basis of liability was outside of the statute and merely consisted of the actual negligence of the parent in leaving the vehicle as he did. What should have been said is that the parent should have foreseen that which was reasonably foreseeable: namely, the necessity for moving the car and that that moving might be done by one incapable of driving, such as his minor child. It would be immaterial that he did not actually foresee this, as a reasonable man he should have. Hence he would be liable for failing to take affirmative action. The recovery then would have been on actual negligence and not on a strained interpretation of a statute never intended to cover such an anomalous situation.

We are thus left with two vital issues:

(1) Has the rule as to reasonable (secret) restrictions been abolished?

(2) Does the court mean to hold that a parent may be held liable for the negligent operation of his vehicle by an incapable child solely under the provisions of Section 59?

A combination of a negative answer to (1) and an affirmative answer to (2) would result in freeing the parent from liability in the problem case set forth above. That this would be an unjust and unworkable result can be garnered from logic and history. The very nature of the case precludes such a result. It must be regarded as sound law that the "secret restrictions" rule and the imputed negligence statutes cannot and should not apply in cases of this nature. As previously stated, the act of the parent is negligence in itself, because of the reasonably apparent (foreseeable) and probable consequence of harm to persons as a result of his failure to take steps which would have prevented the use of the chattel by the minor. The purport of the statutes is to embrace the innocent lender; they never were intended to apply to a party whose own negligence was a cause in fact of the disaster. Nor is there want of a historical reason. Consideration must be given to the factors which have allowed the "secret restrictions" rule to stand even though it is socially desirable that injured parties be compensated for their injuries wherever possible. Under the Anglo-American system of law, before a defendant

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[47] Atwater v. Lober, 133 Misc. 652, 233 N. Y. Supp. 309 (Cayuga County Ct. 1929); Houlihan v. Selengut, 175 Misc. 854, 25 N. Y. S. (2d) 371 (Sup. Ct. 1941), *reversed*, 263 App. Div. 811, 31 N. Y. S. (2d) 560 (1st Dep't 1941).

may be charged with money damages it must first be shown (save in the exceptional cases of strict liability) that he has in some way been negligent or that he intentionally caused the harm.[48] This result stems from the nature of trespass *vi et armis* and trespass on the case. Save for an early formative period, trespass never lay without fault or guilty intent on the part of the defendant. There had to be transgression in a sinful (moral) sense or liability was not present.[49] Thus, the historical reason is the key to the exception in the statutory imputed negligence statutes: they impose liability without fault, hence, any possible defense should be permitted and encouraged. Conversely, if the defendant were at fault the exception should not be allowed for that would amount to "no liability even though you are at fault."

Hence, there being no fiction of identity between the defendant and the wrongdoer (as there would be in agency and like vicarious relationships) and as the relation was that of property, the fault would not be carried over except where the statute applied. And as the statute says: "with the permission, express or implied, of the owner . . .", the concept of permissive use naturally called into play a subjective approach and the subjective role of restrictions could be invoked to show that the permission was transcended.

Logically the "secret restrictions" rule is inapposite in relation to dangerous instrumentalities or where the defendant's relation to a non-dangerous instrumentality capable of doing harm in the hands of an incompetent person is, in fact, extra-hazardous,[50] in that such conduct involves an unreasonable risk to persons at large and is negligent. This underlying philosophy is clearly indicated in the foregoing case of *Sullivan v. Creed* [51] where the court held that the fact that the taking was trespassory or unauthorized could not be relied on by the defendant as a defense and was inadmissible for such a purpose. Why not? Because the defendant's liability was based on the fact that he foresaw, or should have foreseen, that his conduct involved the probability of harm to persons who might be expected in that vicinity and that such foreseeability of harm extended even to an unauthorized or trespassory use of the instrument.

Conclusion

The *Winnowski* decision must be viewed as aberrational; the foregoing analysis demonstrates, it is believed, the errors and dangers implicit in the enunciated rule. Yet, the case cannot be considered as overruling *sub silentio* the previous line of decisions under the

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[48] See note 23 *supra.*

[49] HOLMES, THE COMMON LAW (1881), p. 89. "Tresspass and Negligence." "In spite, however, of all the arguments which may be urged for the rule that a man acts at his peril, it has been rejected by very eminent courts, even under the old forms of action."

[50] See RESTATEMENT, TORTS (1934) §§ 316, 317.

[51] (1904) 1 Ir. R. 317.

statute permitting the lender to place reasonable restrictions on the use of the vehicle; neither should it be viewed as holding that the parental liability for allowing an incompetent minor access to a vehicle or expressly permitting the operation thereof, is solely controlled by Section 59. The decision must be regarded as an inadvertence of the true principles involved. The rule must then be viewed as one not supported by principle or authority and should be repudiated at the earliest opportunity. Barring this, the effect on the decisional law in the future may be significant.

KEITH S. SUTTON.

THE APPLICABILITY OF SECTIONS 50 AND 51 OF THE NEW YORK CIVIL RIGHTS LAW TO WORD PICTURES

Decisions of the state and federal courts have led to some confusion as regards the proper interpretation to be accorded Sections 50 and 51 of the New York Civil Rights Law. These sections provide that any person whose name, portrait, or picture is used within this state for advertising purposes or for the purposes of trade without his written consent, first obtained, may sue and recover damages for any injuries sustained by reason of such use. They also provide for the granting of injunctive relief and contain a penal element.[1]

The point in controversy is whether or not the words "portrait" and "picture" as used in the above sections apply to a word-painting. Does a graphic description of an individual wherein he is identifiable by reference to appearance, habits or details of his private life constitute a picture or a portrait within the purview of the act?

This question has never been passed upon either by the state or federal courts. Statements made by the courts by way of dicta, however, intimate that such a portraiture published without the consent of the subject would be sufficient to support an action under this statute.[2]

Were it not for two circumstances these dicta might be of no great significance. But the cases construing these statutes are as yet so few in number that these casual expressions of opinion assume an importance out of proportion to the weight that would ordinarily be accorded such statements in a better documented branch of the law. They are even more significant when considered from the standpoint of their possible effect in circumscribing the right of the individual to complete freedom of expression.

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[1] N. Y. CIVIL RIGHTS LAW §§ 50, 51.

[2] *See* Levey v. Warner Bros. Pictures, Inc., 57 F. Supp. 40, 42 (D. C. N. Y. 1944); Binns v. Vitagraph Co., 210 N. Y. 51, 57, 103 N. E. 1108, 1110 (1913).