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Negligence--Bailment--Section 59 of the Motor Vehicle Law Construed (Jackson v. Brown and Kleinhenz Inc., 273 N.Y. 365 (1937))

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result complained of and without which the result would not have occurred.[3]

As a matter of law, the defendant had the right of way[4] for "Every driver of a vehicle approaching an intersection shall grant the right of way at such intersection to any vehicle approaching from his right".[5] Irrespective of traffic and police regulations, a driver of a vehicle turning across traffic must use care commensurate with the situation and look out for approaching cars, but he is not obliged to wait until all in sight have passed. Others have the duty of exercising like reasonable care so as not to collide with the turning car.[6] However, one is not bound to use the highest degree of care.[7]

According to the *Guest Rule,* a passenger may recover for injuries received in a collision between two automobiles even though both drivers were at fault.[8] However, to allow recovery against the defendant, the negligence of the defendant must be the direct and proximate cause of the injury.[9] In the instant case, had the jury found that the negligence of the defendant was a proximate cause of the plaintiff's injuries, the latter would not have been denied a recovery even if both drivers were at fault.

R. D.

NEGLIGENCE—BAILMENT—SECTION 59 OF THE MOTOR VEHICLE LAW CONSTRUED.—The Forbes Motor Agency Inc., an automobile selling agency, delivered one of its cars to the defendant Brown and Kleinhenz Inc., for the purpose of effecting a sale. The Forbes Agency vested control of the car in the defendant without limitation of authority and also knew that dealers in general, and the Brown

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[3] 45 C. J. 898; Laidlaw v. Sage, 158 N. Y. 73, 56 N. E. 679 (1899).

[4] Robinson v. Insurance Co. of North America, 198 N. Y. 523, 91 N. E. 373 (1910); Thomas v. Union Ry., 18 App. Div. 185, 45 N. Y. Supp. 920 (2d Dept. 1897); Hurley v. Olcott, 134 App. Div. 631, 119 N. Y. Supp. 430 (2d Dept. 1909); Bresslin v. Star Co., 166 App. Div. 89, 151 N. Y. Supp. 660 (2d Dept. 1915); Zvonik v. Interurban St. Ry., 88 N. Y. Supp. 399 (1904).

[5] VEHICLE AND TRAFFIC LAW § 82, subd. 4 (Cons. Laws c. 71); Traffic Regulations promulgated by the Police Dept. art. 2, § 6.

[6] Farr v. Wright, 248 App. Div. 48, 289 N. Y. Supp. 399 (3d Dept. 1936).

[7] Zvonik v. Interurban St. Ry., 88 N. Y. Supp. 399 (1904).

[8] Michelson v. Stuhlman, 272 N. Y. 163, 5 N. E. (2d) 185 (1936); Prindle v. Rockland Transit Corp., 271 N. Y. 580, 3 N. E. (2d) 194 (1936); Burd v. Bleischer, 208 App. Div. 499, 203 N. Y. Supp. 754 (4th Dept. 1924).

[9] Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99 (1928), no recovery was allowed against a defendant railroad whose guard, in pushing passengers into a train, caused a package containing fireworks to fall from the arms of one of the passengers; they exploded upon striking the ground, and the concussion dislodged a pair of scales some distance down the platform; the plaintiff, standing near the scales, was struck by them.

Company in particular, permitted their own cars to be used by employees for their own personal business. Months later, said defendant gave to its employee, one Juan Lord, permission to use said car for his own personal purpose and while the car was thus under Lord's care the plaintiff's intestate was struck and killed. The sole producing cause of the accident was Lord's negligent operation of the vehicle. Plaintiff, in an action for wrongful death, seeks to hold Forbes Inc., liable under the Vehicle and Traffic Law, Section 59.[1] The Appellate Division dismissed the complaint against the Forbes Agency finding conversion by the defendant Brown and Kleinhenz Inc., in that the car was used in an unauthorized manner so that the statute no longer applied to the situation. On appeal, *held,* judgment of the Appellate Division reversed and that of the Trial Term, in favor of the plaintiff, affirmed. Since it was a *question of fact* whether Forbes' consent to the use of the car as made by the Brown Agency could be implied from all the facts and circumstances, the jury's finding on this point should not have been disturbed as a *matter of law. Jackson* v. *Brown and Kleinhenz Inc.,* 273 N. Y. 365, 7 N. E. (2d) 265 (1937).

At common law mere ownership of a motor vehicle did not render the owner liable for its negligent operation by another not standing in the relation of agent or servant to him and over whom he had no control.[2] Thus, the owner was not liable for an injury occasioned by one negligently operating the vehicle, as an independent contractor, or, as in this case, a bailee using the car exclusively for his own benefit.[3]

However, by statute,[4] our legislature has modified the common law rule so that today the owner's liability has been extended so as to include liability for death or injuries, to person or property, while his car is being negligently operated by another with his permission, express or implied, and this regardless of whether the car is being used in the owner's behalf or solely for the benefit of the borrower.[5]

While the law holds the owner free of any liability when his permission to use the car, express or implied, cannot be established [6] or where once established it also develops that the borrower, not being

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[1] VEHICLE AND TRAFFIC LAW § 59: "Every owner of a motor vehicle operated upon a public highway shall be liable for deaths or injuries to a person or property resulting from negligence in the operation of such vehicle * * * in the business of such owner or otherwise, by any person operating same with the permission, express or implied, of such owner."

[2] Cunningham v. Castle, 127 App. Div. 580, 111 N. Y. Supp. 1057 (1st Dept. 1908); Towers v. Errington, 78 Misc. 297, 138 N. Y. Supp. 119 (1912).

[3] Blaircom v. Dodgson, 220 N. Y. 111, 115 N. E. 443 (1917); Doersam v. Isenburg, 205 App. Div. 447, 199 N. Y. Supp. 569 (4th Dept. 1923); Brooks v. McNutt Auto Del. Co., Inc., 126 Misc. 730, 214 N. Y. Supp. 562 (1926); James Butler, Inc. v. Jackson, 126 Misc. 568, 214 N. Y. Supp. 23 (1926).

[4] See note 1, *supra.*

[5] Cohen v. Neustadter, 247 N. Y. 207, 160 N. E. 12 (1928).

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

faithful to the trust imposed upon him by the owner, converts the car by going beyond the scope of the permission granted,[7] yet the law is firm and settled in instances such as this: where all the elements necessary to hold the owner liable are present; and where a liberal construction of the implied permission clause of the statute will result in the fulfillment of the legislator's aims by placing the responsibility upon the owner of the vehicle. Although the statute is to be limited to those cases which fairly fall within the scope of its language, it must be given a construction which will result in the fulfillment of the purpose for which it was enacted.[8]

The border line between the implication of the owner's implied permission from the circumstances surrounding the changing of control over the vehicle, and the finding of a conversion on the other hand, thus relieving the owner of liability, is often so narrow that the danger in giving Section 59 a too narrow construction in regard to the implied permission clause becomes obvious.

There were sufficient facts surrounding the whole situation to warrant the jury's finding and to deny them the right to so find was error which the Court of Appeals was quick to remedy.[9]

L. I.

NEGLIGENCE—MUNICIPAL CORPORATIONS—JOINT ENTERPRISE —LIABILITY OF PUBLIC SERVANT FOR NEGLIGENT DEATH OF FELLOW EMPLOYEE.—Plaintiff's intestate, a volunteer fireman, while riding on a fire truck driven by defendant, also a fireman, was killed due to latter's negligence. A judgment recovered against the village of Rockville Centre and the driver was reversed on the ground that the municipality was not liable.[1] On a reargument of the appeal as to the liability of the individual defendant, the Appellate Division dismissed the complaint holding that the intestate and the defendant, being employed in a public service, were engaged in a joint enterprise and each assumed the risk arising out of their relationship. On appeal, *held,* reversed. Individuals engaged in a public service are personally liable for their negligence resulting in injury to fellow employees. *Ottmann* v. *Village of Rockville Centre,* 275 N. Y. 270, 9 N. E. (2d) 862 (1937).*

[7] Nee v. Slaboda, 270 N. Y. 571, 1 N. E. (2d) 335 (1936).

[8] Rolfe v. Hewitt, 227 N. Y. 486, 125 N. E. 804 (1920); Fleugal v. Coudert, 244 N. Y. 393, 155 N. E. 683 (1927); Katz v. Wolfe, 129 Misc. 384, 221 N. Y. Supp. 476 (1927).

[9] Jorgenson v. Jaegers, 257 N. Y. 171, 177 N. E. 410 (1931); Zuckerman v. Parton, 260 N. Y. 446, 184 N. E. 49 (1933).

* It should be noted that the sections of the General Municipal Law cited were enacted *after* this cause of action arose and are not controlling in this