TORTS—NEGLIGENCE—OWNER OF MOTOR VEHICLE HAS NO DUTY TO THIRD PERSON INJURED BY INTERMEDDLER

In *Robinson v. Pollard*,[1] the Georgia Court of Appeals held that a motorist who fails to remove the ignition keys from his vehicle does not have a duty to a third person injured by an intermeddler.[2] On the morning of September 9, 1972, the defendant Pollard's employee, Bowden, was informed that the truck on which he was working would not be used that particular day. Bowden then left the truck with the keys in the ignition. Later that day an intermeddler named Porter drove the truck off the defendant's lot; while driving the truck he collided with plaintiff Robinson's automobile. Thereafter, the plaintiff brought suit against the defendant alleging that the defendant was liable on the basis of "special circumstances"[3] and also on the theory of "negligent entrustment."[4] The trial court granted the defendant's motion for summary judgment, and the court of appeals affirmed.

The problem of a motorist's liability for injuries to a third person caused by a thief or an intermeddler who has found the keys in the ignition is one upon which there has been frequent litigation and considerable disagreement between different jurisdictions. Most courts refuse to hold the owner of the vehicle liable for his failure to remove the ignition keys.[5] Most of these jurisdictions base their holding on the theory that when nothing is shown beyond the normal risks of leaving the keys in the motor vehicle, the actions of a thief or an intermeddler pose a danger not reasonably to be foreseen by a motorist. Therefore, the leaving of the keys in the vehicle does not give rise to a common law duty toward the injured third party.[6] Other courts reach the same conclusion by speaking in terms of proximate cause. These jurisdictions find that either the negligent driving of an intermeddler or the theft of the motor vehicle is an unforeseeable supervening act which breaks the causal connection between the motorist's

1. 131 Ga. App. 105, 205 S.E.2d 86 (1974).

2. In *Robinson*, the court noted that "in most jurisdictions a third party cannot recover from the owner or operator who leaves keys in an ignition in the absence of a statute obligating the motorist to remove his keys from the ignition when leaving his car unattended on a public street." 131 Ga. App. at 106, 205 S.E.2d at 88.

3. The "special circumstances" alleged by the plaintiff were the leaving of the key in a vehicle while that vehicle was in an alleged high crime area of Atlanta, Georgia.

4. The theory of "negligent entrustment" was brought into focus when the plaintiff alleged that the employee who failed to remove the keys from the ignition had a propensity for drinking excessively.

5. *See* Shafer v. Monte Mansfield Motors, 91 Ariz. 331, 372 P.2d 333 (1962); Clements v. Tashjoin, 92 R.I. 308, 168 A.2d 472 (1961); Kalberg v. Anderson Bros. Motor Co., 251 Minn. 458, 88 N.W.2d 197 (1958).

6. Lorang v. Heinz, 108 Ill. App.2d 451, 248 N.E.2d 785 (1969).

negligence and the third person's injury.[7] In those cases where the motorist is held liable there is usually a statute or ordinance which proscribes the failure to remove the ignition key from an unattended motor vehicle. The statute or ordinance usually forbids the leaving of unlocked vehicles with the keys remaining in the ignition on public streets and highways; however, most courts hold that such a statute is not applicable to vehicles parked upon private property.[8]

Although the problem has generated much litigation elsewhere, there is a paucity of case law on this subject in Georgia. The first Georgia case dealing with the problem, *Roach v. Dozier*,[9] refused to impose liability on the motorist. In *Roach* a 15-year-old boy drove his uncle's hearse without permission and collided with the plaintiff. The plaintiff attempted to hold the uncle liable under the attractive nuisance doctrine. The court of appeals rejected this contention and found no liability. The court also noted that a finding of negligence would have to be based "on the failure of the defendant to exercise ordinary care under the circumstances."[10] The court added that the defendant could have been found negligent only if he possessed actual knowledge that the nephew would drive the hearse if the keys were left there and if the hearse was left unattended.

The second Georgia case concerning ignition keys, *Chester v. Evans*,[11] also held that no liability arises from the fact of ignition keys being left in a vehicle. In *Chester*, a 13-year-old son drove his father's car without permission, and was involved in an accident with the plaintiff. The court of appeals refused to impose liability on the parent unless the child had previously disobeyed his father's instructions not to drive the automobile. *Roach* and *Chester* pointed out that for a motorist's duty of care to arise, the risk of an injury to the third person must have been reasonably foreseeable or reasonably anticipated.[12]

Following the holdings of *Roach* and *Chester*, the trial court in *Robinson* kept the case from the jury because the alleged "special circumstances" could not have been reasonably foreseen by the defendant and the alleged incompetency of the employee could not have been actually known to the defendant. In affirming the grant of summary judgment, the court of ap-

7. *See* George v. Breising, 206 Kan. 221, 477 P.2d 983 (1970); McAllister v. Driever, 318 F.2d 513 (4th Cir. 1963); Williams v. Mickens, 247 N.C. 262, 100 S.E.2d 511 (1957); Sarraco v. Lyttle, 11 N.J. Super. 254, 78 A.2d 288 (1951).

8. General Accident Group v. Noonan, 66 Misc.2d 528, 321 N.Y.S.2d 483 (Sup. Ct. 1971) (statute held inapplicable to vehicle left on owner's driveway); Dersookian v. Helmick, 256 Md. 627, 261 A.2d 472 (1970) (statute held inapplicable to vehicle left on repair shop premises); Stone v. Bethea, 251 S.C. 157, 161 S.E.2d 171 (1968) (statute held inapplicable to vehicle left on business premises).

9. 97 Ga. App. 568, 103 S.E.2d 691 (1958).

10. *Id.* at 571, 103 S.E.2d at 693.

11. 115 Ga. App. 46, 153 S.E.2d 583 (1967).

12. *See* 97 Ga. App. at 571, 103 S.E.2d at 693; 115 Ga. App. at 51, 153 S.E.2d at 586.

peals said that the plaintiff Robinson's reliance on *Hergenrether v. East*[13] and on the legal theory of "special circumstances" was "contrary to the overwhelming majority view"[14] of other jurisdictions.

In *Hergenrether* employees of the defendant left the defendant's two-ton truck with the keys in the ignition and unattended on a city street located in a disreputable neighborhood with the intention of leaving it there overnight. Later that evening a thief stole the truck and drove it on the wrong side of a street, injuring the plaintiffs. The California court ruled that if there are "special circumstances" the questions of foreseeability and negligence are for the jury to decide. Furthermore, this court held that in light of the instant "special circumstances"[15] the owner of the two-ton truck was liable for the personal injuries of the plaintiffs caused by the thief's negligent operation of the vehicle. The Georgia Court of Appeals appeared to have little difficulty in distinguishing *Hergenrether* from *Robinson*. First, the court pointed out that in *Robinson* the vehicle was left on private property and not on the street as in the California case. Second, even if the court assumed that the key had not been removed from the ignition, it still was not foreseeable that five hours later the defendant's truck would be taken from his lot by a total stranger.

The Georgia Court of Appeals had previously noted in *Lewis v. Amorous*,[16] that in the absence of a statute regulating motor vehicles, the responsibility of one's owning, keeping, and operating a motor vehicle would be determined according to the common law. Since Georgia has not adopted a statute obligating the motorist to remove his key from the ignition when leaving his car unattended, the Georgia courts will, therefore, decide the key-in-ignition cases according to the common law. In general, the owner will not be held liable for the negligent operation of a motor vehicle at common law merely because of his ownership of the vehicle.[17] Moreover, in *Robinson*, the court of appeals cited *Price v. Star Service & Petroleum Corp.*[18] and *Finnocchio v. Lunsford*[19] to support the general rule

13. 61 Cal.2d 440, 39 Cal. Rptr. 4, 393 P.2d 164 (1964).
14. 131 Ga. App. at 106, 205 S.E.2d at 88.
15. In *Hergenrether*, the court stated:
> (1) The vehicle was left in a neighborhood which was frequented by persons who had little respect for the law and the rights of others; (2) the neighborhood was heavily populated by drunks and near drunks; (3) the vehicle was intended to be left there for a relatively long period of time — from mid-afternoon to the following morning — and, of particular importance, it was intended that it would be left for the entire night; and (4) the vehicle was a partially loaded two-ton truck, the safe and proper operation of which was not a matter of common experience, and which was capable of inflicting more serious injury and damage than an ordinary vehicle when not properly controlled. 61 Cal.2d at 445, 39 Cal. Rptr. at 7, 393 P.2d at 167.
16. 3 Ga. App. 50, 59 S.E. 338 (1907).
17. Blount v. Sutton, 114 Ga. App. 767, 769, 152 S.E.2d 777,779 (1966).
18. 119 Ga. App. 171, 166 S.E.2d 593 (1969).
19. 129 Ga. App. 694, 695, 201 S.E.2d 1, 3 (1973).

that one's mere ownership of a motor vehicle is not enough to create liability upon the owner. The court also pointed out that the defendant's large diesel truck should not be regarded as an inherently dangerous machine. *Fielder v. Davison*[20] was then cited for the proposition that in Georgia, as in most jurisdictions,[21] the owner of a motor vehicle cannot be found liable for its negligent use by another on the theory that such vehicles are inherently dangerous instrumentalities so as to render their owners liable on that basis alone for the injuries resulting from their operation.

Brown v. Sheffield[22] was also cited by the court in *Robinson* as controlling in regard to plaintiff Robinson's theory of "negligent entrustment." Certain portions of *Brown* were quoted as dispositive of the issue.[23] In support of its affirmance of the grant of summary judgment, the court specifically pointed out that "Bowden had received specific instructions from Pollard that the vehicle was not to be used for personal matters and that under no circumstances was he to allow any other person to operate his equipment."[24]

In the two dissenting opinions, it was urged that the question of the defendant's negligence and the question of foreseeability were proper matters for the jury; consequently, both opinions refused to conclude as a matter of law that the leaving of a key in the ignition cannot render the defendant liable. Those arguments are not without cogency, but the majority opinion appears to be the more acceptable position. The defendant's responsibility must end somewhere. As the court of appeals has noted:

> "One is bound to anticipate and provide against what usually happens and what is likely to happen; *but it would impose too heavy a responsibility* to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, as it is sometimes said, is only remotely and slightly probable."[25]

Under the court's rulings in *Robinson*, in the absence of an applicable

20. 139 Ga. 509, 77 S.E. 618 (1913).

21. 8 AM. JUR.2d *Automobiles and Highway Traffic* §571 (1963).

22. 121 Ga. App. 383, 173 S.E.2d 891 (1970).

23. The headnotes so cited are:

> "1. The owner of a vehicle is not liable under the doctrine of respondeat superior for injuries inflicted by negligence of the operator while it was being operated on a mission purely personal to the operator. 2.(a) Unless it appears that the owner had actual knowledge of the operator's incompetency as a driver there is no liability on the owner's part on the theory of negligent entrustment. . . .3. (a) When one drives the vehicle of another contrary to the owner's express instructions not to do so and without the knowledge or consent of the owner, there is no entrustment of the vehicle to the driver, and the owner cannot be held on the theory of negligent entrustment." 131 Ga. App. at 108, 205 S.E.2d at 88-89.

24. *Id.* at 108, 205 S.E.2d at 89.

25. Peggy Ann of Georgia, Inc. v. Scoggins, 86 Ga. App. 109, 116, 71 S.E.2d 89, 95 (1952) (emphasis in the original).

key-in-ignition statute and in the absence of foreseeable circumstances, an owner of a motor vehicle will not be held liable for injuries caused by an intermeddler. This holding is in accord with the majority of American courts, and it appears to be the better rule on this subject. As another jurisdiction has concluded: "The plaintiff's contentions go far toward making the defendant an insurer as to the consequences of every accident in which his automobile might become involved while operated by the original thieves or their successors in possession."[26]

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26. Sullivan v. Griffin, 318 Mass. 359, ____, 61 N.E.2d 330, 332 (1945).