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TORTS: OWNER'S LIABILITY—LEAVING IGNITION KEYS IN UNATTENDED AND UNLOCKED VEHICLE: *HERGENRETHER v. EAST* (CAL. 1964)

East, a construction worker, left the job site at the end of the day and drove himself and a co-worker into the nearby city for food and lodging. East had the permission of his employer, the co-defendant, to use the company's two ton truck for this purpose. Without removing the ignition key, he parked the truck, unattended and unlocked, in the "skid row" area of the city, intending to leave it there until the following morning. Sometime during the evening the truck was stolen and, shortly thereafter, the thief negligently collided with the vehicle driven by plaintiffs. The plaintiffs, a father and minor son, were seriously injured, and the unknown thief escaped.

The perennial problem of the key in the ignition of an unattended and unlocked vehicle is not new in the California courts.[1] In 1955, the California Supreme Court was first presented with this situation in the much publicized[2] case of *Richards v. Stanley*.[3] In the *Richards* case, with two justices dissenting, the court held, as a matter of law, that the defendant, who had left her car unlocked and unattended on a downtown San Francisco street with the key in the ignition, owed no duty to protect the plaintiff from injuries sustained by the negligent driving of a thief.[4]

The majority opinion in *Richards* relied upon the common law rule that the owner of an automobile is under no obligation to keep it out of the hands of a third person, in the absence of facts putting the owner on notice that the third person is an incompetent driver. The court indicated that in the situation of permissive use by a third person, limited liability, up to $10,000, is imposed by statute and the negligence of the driver is imputed to the owner.[5] Following

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[1] A general survey of the law in other jurisdictions can be found in an extensive annotation in 51 A.L.R.2d 633 (1957).

[2] See, *e.g.*, 6 HASTINGS L.J. 94 (1954); 2 U.C.L.A. L. REV. 146 (1954); 16 OHIO ST. L.J. 281 (1955); 2 WITKIN, SUMMARY OF CALIFORNIA LAW 1500-01 (7th ed. 1960).

[3] 43 Cal.2d 60, 271 P.2d 23 (1954).

[4] *Ibid.*

[5] *Id.* at 68, 271 P.2d at 28 CAL. VEH. CODE § 402 (1935) as cited in *Richards* has since been changed to CAL. VEH. CODE § 17151.

this reasoning, the court considered the possibility that if a duty were imposed on a person whose car was stolen, this would subject the owner to unlimited liability, although a person who intrusted his car to another would be protected by the $10,000 limit set forth in the Vehicle Code. The court concludes that this would follow although the risk created by the owner of the stolen car, by leaving the key therein, was materially less than that created by the owner who gave permission to another to use his car.[6]

One year later, the Supreme Court, in *Richardson v. Ham*,[7] had occasion to distinguish the *Richards* case. The defendant had left, unattended and unlocked, a 26 ton bulldozer which was known to attract spectators. Three teen-age inebriants were able to start the bulldozer but could not control it. Plantiffs sustained personal injuries and property damage, and the court held, as a matter of law, that there was a duty to protect plaintiffs from the negligent driving of the thieves. The *Richards* case was not a bar to recovery because the foreseeable intervening conduct, as well as the risks created by such conduct, were deemed materially different from those facts as presented in *Richards*.

In *Holder v. Reber*[8] the plaintiff submitted that the facts presented were almost identical to those in *Richards*, but argued that *Richardson* had materially extended that decision. The court held that *Richardson* was not an extension of *Richards* as the former was decided on the basis of the extreme danger involved, plus the foreseeable intermeddling conduct, which was deemed not present in *Richards*.

A later case provided an occasion to review the liability of an owner who left many cars unattended and unlocked without removing the keys from the ignitions.[9] The defendant, a used car dealer, purposely left keys in the ignition locks of cars parked on his lot for the benefit of prospective customers. This habit allowed the customers, or others who had knowledge of this practice, to start and drive the vehicles from the lot. The court, in referring to *Richards* and *Richardson*, held that the factual situation was far more serious than parking a single car on a city street, and concluded that this, coupled with the virtual invitation to theft, precluded it from finding, as a matter of law, that there was no duty owing.[10]

With this background of pertinent decisions, *Hergenrether v.*

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[6] Richards v. Stanley, 43 Cal.2d 60, 68, 271 P.2d 23, 28 (1954).
[7] 44 Cal.2d 772, 285 P.2d 269 (1955).
[8] 146 Cal.App.2d 557, 304 P.2d 204 (1956).
[9] Murray v. Wright, 166 Cal.App.2d 589, 333 P.2d 111 (1958).
[10] *Ibid.*

East[11] was decided. The jury returned a verdict for plaintiffs but the trial court granted defendants' motion for judgment notwithstanding the verdict. The motion was based on the absence of a duty of care owed by the defendants to plaintiffs or to the class to which they belonged. The District Court of Appeals affirmed the judgment notwithstanding the verdict by holding that the special circumstances of *Richardson* and *Murray* were much different than those in the case under consideration.[12] In determining that no duty of care was owed to the plaintiffs, the court relied on the four factors used by the Supreme Court in *Richards* and *Richardson*: (1) magnitude of the risk; (2) the moral blame attached to defendant's conduct; (3) workability of a rule of care; (4) the body of statutory and judicial precedents.[13] The court stressed the trial court's findings that the defendants were strangers in the city and had no reason to know that the area was frequented by drunks and thieves. The court also emphasized the defendants' custom of leaving the keys in the truck to enable other workmen on the job to move the truck when necessary. In addition, the court felt that to establish strict standards of conduct in such cases would create anomalies in relation to standards of conduct applicable to cases involving imputed negligence and loaned cars. These factors, taken together, were held to bar the court from extending liability in the case at bar.

On appeal the Supreme Court reversed the judgment and held that the special circumstances and facts of the case, taken *in toto*, required the imposition of a duty owed to plaintiffs, which was breached by the co-defendant driver and co-defendant owner of the truck.[14] The unanimous court affirmed the decision in *Richards* but held that *Richards* would not bar the door to recovery in all cases. The court stated:

> Special circumstances which impose a greater potentiality of foreseeable risk or more serious injury, or require a lesser burden of preventative action, may be deemed to impose an unreasonable risk on, and a legal duty to, third persons.[15]

Because the appeal was from a judgment notwithstanding the verdict, the court was required to resolve any factual controversies in favor of plaintiffs.[16] The court found that the character of the neighborhood, the type of people who frequented it, the intent to leave the vehicle there all night, and the fact that a two ton truck

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[11] 61 A.C. 482, 393 P.2d 164, 39 Cal. Rptr. 4 (1964).

[12] This case was previously entitled Hergenrether v. Collier, 223 A.C.A. 757, 36 Cal. Rptr. 88 (1964).

[13] *Id.* at 764, 36 Cal. Rptr. at 92.

[14] Hergenrether v. East, 61 A.C. 482, 393 P.2d 164, 39 Cal. Rptr. 4 (1964).

[15] *Id.* at 486, 393 P.2d at 166, 39 Cal. Rptr. at 6.

[16] *Id.* at 485, 393 P.2d at 165, 39 Cal. Rptr. at 5-6.

requires special skill to operate and therefore possesses a high potentiality of harm and injury, were sufficiently serious to require the imposition of a duty on defendants.

The California courts, in the absence of a statute establishing a duty,[17] are still committed to the rule of *Richards* which generally limited liability. However, in *Richards*, the court suggested two possible exceptions where liability might be imposed: one, if the vehicle were left in the hands of an intoxicated person; or, two, if the vehicle were left in front of a school where the owner might reasonably expect irresponsible children to tamper with it.[18] It would appear that the facts of *Hergenrether* are analogous to the latter situation. A review of the cases in point indicate that the courts have been unduly naive in their attempt to limit liability in this ever-increasing problem area. For instance, the court has been willing to establish a duty when the vehicle involved was a 26 ton bulldozer,[19] but not when it was a passenger car.[20] It is true that a bulldozer has the inherent capability to inflict great property damage. But, can it be said that a bulldozer, with its slow and cumbersome speed and forewarning noise, presents the same danger to life and limb as a passenger car hurtling down a California highway at one hundred miles per hour, in the hands of a "joy rider" with little or no driving experience?

Hergenrether merely enunciates the rule that the determination of the duty, which is a question of law for the judge,[21] has to be determined by the particular facts as presented in each case. Such a standard fails as a yardstick to guide future litigants in actions of this type. Perhaps, in all cases wherein reasonable men can differ as to the facts, and as to the inferences to be drawn from the facts, a *duty* should be assumed, i.e., a duty to remove the keys from the ignition so as not to facilitate use of the vehicle by unknown people who may be incompetent and negligent to the detriment of innocent plaintiffs. Then, the issue of breach of the duty could go to the jury. It is submitted that this approach would avoid harsh and strict results, and would arrive at more equitable conclusions because each case would then be considered on its merits by the combined efforts of both judge and jury.

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17 Hergenrether v. Collier, 223 A.C.A. 482, 393 P.2d 164, 39 Cal. Rptr. 4 (1964) stated that Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954) suggested a legislative policy and five legislatures have met without broadening that rule by statute.

18 Richards v. Stanley, 43 Cal.2d 60, 66, 271 P.2d 23, 27 (1954).

19 Richardson v. Ham, 146 Cal.App.2d 557, 304 P.2d 204 (1956).

20 Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23 (1954) and Holder v. Reber, 146 Cal.App.2d 557, 304 P.2d 204 (1956).

21 PROSSER, TORTS 207 (3d ed. 1964); GREEN, JUDGE AND JURY 56 (1930); FLEMING, TORTS 139 (2d ed. 1961). And see *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal.2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).