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TORTS — AUTOMOBILES — LIABILITY OF OWNER FOR INJURIES RESULTING FROM NEGLIGENCE OF DRIVER — To demonstrate the endurance of the cars which it was selling, a promoter induced defendant sales company to furnish a car to be driven for 100 consecutive hours without stopping, by a driver handcuffed to the steering wheel. The promoter hired the driver, instructing him to seek shelter (permitting the motor to continue running) should it start to rain, to protect the advertisements on the car. After driving for 20 hours, it commenced to rain and the driver found refuge in an open barn by the side of the road. After the rain had subsided, finding himself unable to get out, the driver "rocked"the car by putting it first into low gear, then in reverse. He smelled smoke and shortly thereafter there was an explosion (evidently from the exhaust). The barn and contents were ignited and demolished. *Held*, the sales company was liable for damages to the barn. *Hogan v. Comac Sales Co.*, (App. Div., 1935) 281 N. Y. S. 207.

The owner of an automobile is liable where the injuries were inflicted as the result of the activity of a negligent servant or employee, on the familiar ground of *respondeat superior*.[1] But the court, in the instant case, found that the handcuffed driver was not the agent of the sales company owner, having no agreement with, nor being paid by, nor receiving any of his instructions from it.[2] The majority of the court, however, did find that the defendant might be held liable on the theory of negligence—not from mere ownership of the car as such, but negligence in entrusting an instrument which might assume dangerous propensities to a physically handicapped driver. By analogy to the cases where the owner of an automobile has knowingly permitted an intoxicated person, a lunatic, or an infant to drive such car, and has been found to be negligent,[3] here also it might be found that a handcuffed driver was physically incompetent to be intrusted with the auto. Once this step was made, upon the usual principles of proximity

[1] See 22 A. L. R. 1397 (1923), 45 A. L. R. 477 (1926), 68 A. L. R. 1051 (1930) for annotations. Magee v. Hargrove Motor Co., 50 Idaho 442, 296 P. 774 (1931); Gray v. Sawatzki, 272 Mich. 140, 261 N. W. 276 (1935); Johnson v. Great Atlantic & Pacific Tea Co., (App. Div. 1935) 280 N. Y. S. 765; Schmidt v. Leary, 213 Wis. 587, 252 N. W. 151 (1934).

[2] Hogan v. Comac Sales Co., (App. Div. 1935) 281 N. Y. S. 207 at 209.

[3] Gardiner v. Solomon, 200 Ala. 115, 75 So. 621, L. R. A. 1917F 380 (1917); Nugrape Bottling Co. v. Knott, 47 Ga. App. 539, 171 S. E. 151 (1933); Rounds v. Phillips, 166 Md. 151, 170 A. 532 (1933); Levy v. McMullen, 169 Miss. 659, 152 So. 899 (1934); Elliott v. Harding, 107 Ohio St. 501, 140 N. E. 338, 36 A. L. R. 1128 (1923), 68 A. L. R. 1008 (1930) (supplementing annotation in 36 A. L. R.); Mitchell v. Churches, 119 Wash. 547, 206 P. 6, 36 A. L. R. 1132 (1922); Jones v. Harris, 122 Wash. 69, 210 P. 22 (1922); HUDDY, THE LAW OF AUTOMOBILES, 6th ed., § 36 (1922).

of result [4] and substantiality of defendant's negligence (which questions are characteristically left to the jury), the court permitted the owner of the barn to recover from the defendant sales company owner. Though there was in New York the recently familiar statutory provision [5] making every owner of a motor vehicle operated on a public highway responsible for damages to property resulting from negligence in the operation of such motor vehicle by any person legally using or operating the same with the permission express or implied of such owner, the court found it to be inapplicable to the principal case since the damages were not "caused by the operation of the motor vehicle 'upon the *public highway*.' " [6] Resort had to be had to the negligence theory, and, it is submitted, that theory is not a strained one, despite the dissent of Justice Heffernan who thought the application of the negligence theory was erroneous.

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[4] Atchison, Topeka & Santa Fe R. R. v. Stanford, 12 Kan. 354 (1874); Palsgraf v. Long Island R. R., 248 N. Y. 339, 162 N. E. 99, 59 A. L. R. 1253 (1928).

[5] Vehicle and Traffic Law, N. Y. Consol. Laws (Cahill 1930), § 59, p. 2573.

[6] Italics are the author's. Sylvester v. Brockway Motor Truck Corp., 232 App. Div. 364, 250 N. Y. S. 35 (1931), holding that where an accident occurred on *private grounds,* it was not covered by Sec. 59 of the Vehicle and Traffic Laws, which expressly refers only to accidents on the *public highways.* Cf. Michigan Comp. Laws 1929, § 4648, which provides:

> "The owner of a motor vehicle shall be liable for any injury [this would seem to include both injuries to person or property] occasioned by the negligent operation of such motor vehicle whether such negligence consists in a violation of the provisions of the statutes of the state or in the failure to observe such ordinary care in such operation as the rules of the common law require. The owner shall not be liable, however, unless said motor vehicle is being driven with his or her express or implied consent or knowledge."

In view of the fact that the New York court regarded its own statute as sufficiently in point to consider its application and to disregard it because of the "upon the public highway" restriction, and noting that the Michigan statute has no restriction as to "operation upon the public highway," query whether said Michigan statute could not be found to apply to a case similar to the New York case—an injury to property off the highway—and whether the demolishing of such property would be found to be the result of negligent *operation* of a motor vehicle, without a resort to common law principles of negligence of the owner in intrusting the vehicle to a physically handicapped driver.