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NOTE

GRATUITOUS BAILOR'S LIABILITY TO THIRD PERSONS FOR INJURIES CAUSED BY UNDISCOVERED DEFECTS

It is well-settled that a bailor for hire is under a duty to make a reasonable inspection of the chattel for hidden defects[1] and if either the bailee or a third person is injured because of a defect which the bailor could have discovered in the exercise of ordinary diligence, the bailor is liable to both.[2] It is also clear that in the case of a gratuitous bailment (for the sole benefit of the bailee), the gratuitous bailor is under a duty to the bailee to disclose only defects which are known to the

[1]CONN v. HUNSBERGER, 224 Pa. 154; 73 A. 324; HARTFORD BATTERY SALES CORP. v. PRICE, 119 Pa. Super 165; 181 A. 95; WHITE CO. v. FRANCIS, 95 Pa. Super. 315; 8 C.J.S. 258; 68 A.L.R. 1002; 25 L.R.A. (N.S.) 372; 6 Am. Jur. 286.

[2]BRANT v. ASARNOW, 7 N.J. Misc. 803; 147 A. 233; 61 A.L.R. 1336; 19 L.R.A. 283; 6 Am. Jur. 288; 8 C.J.S. 258.

bailor.[3] In addition, it has been decided that a third person who shares the use of the chattel with the bailee under such a gratuitous bailment has no greater rights than has the bailee.[4]

These situations will not be discussed in this article. They are mentioned above in order to show the limitations of the problem and to prevent the confusion which is occasionally evident in the cases.[5]

The scope of this paper is confined to the liability of a gratuitous bailor for injuries to a third person, who is not associated with either the bailor or the bailee, caused by defect in the bailed chattel unknown to the bailor, which defect could have been ascertained by the bailor in the exercise of ordinary or reasonable diligence. For example, suppose D lends his car to X, and unknown to D or X, the car has defective brakes or a faulty steering apparatus. Because of such a defect, X injures P, a pedestrian, who now sues D. Is D liable? The answer to this interrogatory constitutes the range of this paper.

There is very little authority on the topic. As will be shown, in some cases the point is merely discussed by the court as a dictum; in the few cases in which the problem has squarely arisen, the courts often base their decisions on reasons which are wholly inapplicable to the question here at issue.

The first case in which the precise problem arose was *Donovan v. Garvas*.[6] In that case, D owned a taxicab which was operated by X. While X was on an errand of his own (thus, a gratuitous bailment), he parked the taxi on a hill. Because of defective brakes, the taxi coasted down the hill and killed P's intestate. Held: D is liable to P. The decision seems to be based on the ground that the owner has a statutory duty to provide adequate brakes, which duty is merely an affirmance of a common law duty. To quote from the court:

> "An automobilist is under the duty of equipping his machine with proper brakes. This duty not only exists under common law principles, but it is generally affirmed by statutory enactments. It is the owner who is required to provide adequate brakes, and if he fails in this duty through lack of inspection, or want of proper care, he must be responsible for the consequences arising from his negligence.
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> "The defendant has been held liable, not for the negligence of his employee, but for his own lack of proper care. An *absolute duty* was

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[3]DICKASON v. DICKASON, 84 Mont. 52, 274 P. 145; 8 C.J.S. 261; 5 Am. Jur. 401, 698; 12 A.L.R. 766; 131 A.L.R. 855.

[4]RUTH v. HUTCHINSON GAS. CO., 209 Minn. 248, 296 N.W. 136 (1941); 25 Minn. L. Rev. 800; 6 Am. Jur. 401; 5 Am. Jur. 698; JOHNSON v. BULLARD CO., 95 Conn. 251, 111 A. 70 (1920).

This also applies to a servant of the bailee: GAGNON v. DANA, 69 N.H. 264, 39 A. 982 (1898); MACCARTHY v. YOUNG, 158 Eng. Reprint 136 (1861); 12 A.L.R. 794.

A person called by the bailee to his assistance likewise has no higher rights than the bailee: BLAKEMORE v. BRISTOL & E. R. CO., 120 Eng. Reprint 385 (1858); 12 A.L.R. 795.

[5]See: The Pegeen, (D.C., Cal.) 14 Fed. Supp. 748 (1936); FOSTER v. FARRA, 117 Ore. 286, 243 P. 778 (1926); BOGART v. COHEN-ANDERSON MOTOR CO. (Ore.), 98 P. 2nd 720 (1940).

[6]200 N.Y.S. 253 (1923).

[7]117 Ore. 286, 243 P. 778 (1926).

> placed upon the defendant to see that his car was equipped with proper brakes, and when he negligently omitted to perform this duty, and *turned loose upon the public streets an instrument of death,* he ought to be held liable for the results caused by his failure to obey the law."

It seems doubtful that the liability of the gratuitous bailor of an automobile would be extended to other chattels, if the reasoning of this *Donovan Case* is followed, unless the other chattel also had the element of public policy involved in its use. This question is, of course, completely unsettled.

The next case in which the problem arose was *Foster v. Farra.* In this case, D loaned his car to his son, X, who injured P, because of defective brakes and negligence. It is not clear whether D knew of the defective brakes. In a suit by P against D, it was held that D is liable. As in the *Donovan Case, supra,* the liability is based on a statute requiring brakes to be in good condition. Similarly, the automobile is condemned as a dangerous instrumentality.

The court then bases the liability on the so-called "Family Purpose Doctrine." It would seem, however, that this doctrine only applied to the son's negligence. The case is mainly valuable in that it throws some light on the drift of the courts toward the imposition of liability on the gratuitous bailor.

The case of *Bolin v. Corliss Co.*[8] was the next to arise. Here, D company gratuitously loaned its car to X. While driving, a rim and tire came off and injured P, a pedestrian on the sidewalk. It was found that D. would have had to remove the rim to discover the defect which caused the injury. In a suit by P. against D, it was held that D was not liable. The court based its conclusion on the fact that the defect would not have been disclosed by the exercise of ordinary diligence. As may be seen in the following quotation from the opinion, the court, on the basis of an assumption, implies that D *would* have been liable if the defect had been ascertainable through a reasonable inspection:

> "There was . . . no evidence to support the plaintiff's contention that at that time the rim or tire was defective, or, even if it were defective, that a reasonable inspection would have disclosed its condition. Assuming that the defendant would be liable in permitting (the bailee) to use a defective automobile when it knew of the defect or, as a reasonably prudent person, could have discovered it, the plaintiff did not show that the defendant possessed such knowledge or that the defect, if it then existed, might have reasonably been discovered."

The next case to arise was the English case of *Chapman or Oliver v. Saddler & Co.*[9] The facts are as follows: D company was a firm of stevedores engaged in lifting bags of grain from the hold of a ship to its deck. In so doing, D attached slings around the bags. D's duty ended with the deposit of the bags on the deck, from which they were transported by a porterage company to the dock. The

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[8]262 Mass. 115, 159 N.E. 612 (1928).
[9]A.C. 584—H.L. (1929). On this case see also the note in 131 A.L.R. 857.

gratuitous bailment arose when D allowed the porterage company to use the same slings without charge. A sling broke and the falling of a bag killed plaintiff's intestate, a servant of the porterage company. It was held that D company was liable, but the case is decided on its special circumstances. The court says:

> "It is in the interests of everyone concerned in the expeditious discharge of the cargo that these operations should be continuous. These circumstances did disclose a duty cast on the (defendants) to take proper steps to see that the ropes were safe. The duty continued towards the men who were concerned in the second part of the operation."

Thus, the court strictly limits the case to its facts. It is interesting to note that the four members of the House of Lords who listened to the case wrote three separate, concurring opinions, and they admitted that there was no precedent for the holding.[9(a)]

In the same year that this English case was decided, a case arose in New Jersey, *Hinsch v. Amirkanian,*[10] which was somewhat similar to *Donovan v. Garvas,*[11] *supra,* on its facts. In this case, D loaned his car to X (it seems). Because of faulty brakes, the P's intestate was killed by the car. Held: D is liable. The decision is not based on a statute. However, there is nothing in the case as reported from which it can be ascertained whether D knew the brakes were defective. The court says:

> ". . . these facts . . . were sufficient to justify an inference of negligence."

The facts in *The Pegeen*[12] are not quite in point but some dicta by the court are interesting. In this case Ds gratuitously bailed their motor cruiser to X. The boat seemed to be in excellent condition, D having recently overhauled it. While X was on a short trip with eight guests, the boat exploded, for some unknown reason, injuring the guests, who now sue Ds. It was held that Ds were not liable. But the court seems to imply that Ds would be liable if the cause of the explosion had been the unseaworthiness of the boat. (Under the statement of facts, the explosion *could* have resulted from the negligence of one of the guests as well as from a defect in the boat). The court says:

> "The petitioners (Ds) are entitled to exoneration from liability because of the absence of any evidence that the injuries were caused by any defect in the vessel or its equipmnt known to them or *which an inspection might have disclosed.*"

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[9](A). For an American case involving the same principle see: McGLONE v. ANGUS, INC., 248 N.Y. 197; 161 N.E. 469 (1928).

[10]104 N.J.L. 260, 145 A. 232 (1929).

[11]See footnote 6.

[12](D.C., Cal.) 14 Fed. Supp. 748 (1936).

In *Sturtevant et al v. Pagel et ux*,[13] D gratuitously loaned his car to his son S. The brakes were defective. This was not known to D, but *may* have been known to S (the opinion is not clear). S allowed X to drive the car. Because of the defective brakes, P's intestate was killed. Suit is brought against D, S, and X. Held: D and X are liable. The court bases the liability of D on a duty to use reasonable care in inspecting the car before it is loaned. The opinion states:

> "If the owner of the car knows, or should know by the use of ordinary diligence, that the brakes on his car are in bad working order, and are inadequate to stop and control the speed of the car, and he permits another to use such car upon the public highways and streets, he would be liable for all damages resulting from the use of such car due to the inadequacy of the brakes.
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> ". . . (D) . . . knew, or should have known by the use of reasonable diligence that the brakes on the car were in bad working order."

In an appeal on this same case by D,[14] in which D claims he did not know of the defective brakes, D's liability is affirmed on the theory that, even though he did not know the brakes were defective, his son knew this fact, and this is imputed to D on agency principles. It is difficult for this writer to see how any theory of agency could be applied here, because the car was used by the son on the son's own business. In addition, the court itself says that the "Family Purpose Doctrine" is not applicable in Texas. The court would have been more accurate if it had admitted that there was a duty on D's part to make an antecedent examination, as did the court in the *Donovan Case*.[15]

Another case showing the trend toward recognition of the duty to make a reasonable inspection is *Bogart v. Cohen-Anderson Motor Co.*[16] The facts in this case are not in point, since the gratuitous bailor is being sued by a companion of the bailee for injuries because of the defect, but a dictum of the court is relevant:

> ". . . (the gratuitous bailor) must use ordinary care to see that it (the car) is in a reasonably safe condition to use on the public highways. The failure to comply with this legal duty or obligation makes the bailor liable to third persons if the injury is the proximate result of such negligence." But the court further states: ". . . there is no substantial evidence tending to show that D knew or ought to have known that the brakes were in a dangerous condition."

In other words, in this case, the court would have held the gratuitous bailor liable *even to the companion of the gratuitous bailee* if the defect could have been discovered by the exercise of ordinary diligence. In addition, this dictum also seems to imply that the defect can be other than bad brakes (although such was the fact in this case).

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[13](Texas) 109 S.W. 2nd 556 (1937).
[14]STURTEVANT ET AL v. PAGEL ET UX, 130 S.W. 2nd 1017 (1939).
[15]See footnote 6.
[16](Ore.) 98 P. 2nd 720 (1940).

To summarize the results of the cases: It seems clear that the gratuitous bailor of an *automobile* is under a greater duty to an innocent third person than he is to the gratuitous bailee, at least as far as defective brakes are concerned. The cases show a strong trend toward requiring the bailor to make a reasonable inspection of the brakes before the gratuitous bailment is made, and if the brakes are found to be defective, there may be a duty to repair them.

It would logically seem that this duty should be extended to other defects in automobiles, such as defective steering wheels, deficient lights, faulty horns, etc. It is at least debatable whether the duty should be extended to bailments of chattels other than automobiles. A dictum shows that it might be applied to the loan of a boat. If the duty is rightfully based on public policy, it would certainly seem to follow that it should be expanded to the gratuitous bailment of an airplane as well.

Although the rule may be harsh in its effect on the bailor, it seems to this writer that, of the two innocent persons involved, the bailor is *slightly* less innocent, in that he *alone* has the opportunity to inspect the chattel for defects.

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