when the defendant has interfered to protect a presently existing economic interest,[28] or to give advice in response to a request by one of the contracting parties,[29] or to protect the interests of a person toward whom he stands in a position of responsibility.[30] It would seem that if recovery is to be permitted at all in an action involving interference with an unenforceable contract, these same privileges should be recognized.[31]

Apparently the court in the principal case has determined that actions for interference with contract should be restricted to situations in which there is a legally enforceable contract. To those who view with suspicion the tort of inducing breach of contract, such an attitude seems perfectly justifiable. Courts which accept the view adopted in the principal case thus will dismiss the action as a matter of law whenever the pleadings disclose that the contract was unenforceable between the parties. If the majority view is accepted, however, whether recovery is to be permitted should depend, not merely on a matter of pleading, but rather on a careful factual determination of whether the interest of the defendant is of sufficient merit to justify his interference with the relationship between the contracting parties.

TORTS—LIABILITY OF AUTOMOBILE OWNER FOR NEGLIGENCE OF EX-CONVICT SERVANT

Boland v. Love, 222 F.2d 27 (D.C. Cir. 1955)

Plaintiff was injured due to the negligent driving of defendant's gardener, who had taken defendant's automobile from its garage in

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(b) the nature of the expectancy with which his conduct interferes,
(c) the relations between the parties,
(d) the interest sought to be advanced by the actor and
(e) the social interests in protecting the expectancy on the one hand and the actor's freedom of action on the other hand.

For specific privilege situations, see RESTATEMENT, TORTS §§ 768-74 (1939); § 768 (privilege of competitor), § 769 (privilege of one having financial interest in business of person induced), § 770 (privilege of person responsible for welfare of another), § 771 (inducement to influence another's business policy), § 772 (privilege to advise), § 773 (privilege to assert bona fide claim), § 774 (privilege to break restriction violative of public policy).

27. The following list is intended to be illustrative, not exhaustive.

28. Meason v. Ralston Purina Co., 56 Ariz. 291, 107 P.2d 224 (1940) (mortgagee); O'Brien v. Western Union Tel. Co., 62 Wash. 598, 114 Pac. 441 (1911) (lessor of property).

29. It is often the duty of lawyers, doctors, and bankers to give such advice. However, the privilege is not limited to professional persons. See Arnold v. Moffitt, 30 R.I. 310, 75 Atl. 502 (1910) (in answer to request, electrical inspector for insurance company advised employer that plaintiff's bill for electrical work was exorbitant).

30. Legris v. Marcotte, 129 Ill. App. 67 (1906) (mother attempting to protect child); Terry v. Zachry, 272 S.W.2d 157 (Tex. Civ. App. 1954) (employee inducing corporation to litigate claim).

31. One writer has suggested that liability should depend on motive; there should be no liability unless the interfering defendant sought the same object as did the plaintiff in making the contract. Sayre, *supra* note 3, at 663.

the District of Columbia and, without permission to leave the premises, had gone to Virginia for purposes of his own. In addition to his duties as gardener, the servant was at times required to idle the engines of defendant's automobiles in order to keep the batteries charged and occasionally to drive the automobiles around to the front of the house. At no time was he given permission to drive the automobiles off the premises. On the day of the accident the keys to the automobiles were placed at his disposal so that he might charge the batteries. He was left at the house alone and without supervision. It was known to defendant that the servant had twice been convicted of larceny and had no driver's license. The United States District Court for the District of Columbia granted defendant's motion for a directed verdict after plaintiff's opening statement. The court of appeals, in reversing the judgment for defendant, held that upon these facts negligence and proximate cause were jury questions.[1]

In the opening statement, plaintiff offered to prove that: (1) defendant knew that the servant had twice been convicted of larceny and had spent almost half his life in penal institutions—this was to show that defendant should have known that the servant was untrustworthy; (2) defendant, knowing that the servant had no driver's license, should have known that he was an incompetent driver and thus was not qualified for such a license; (3) defendant gave the keys to his automobile to this untrustworthy, incompetent servant and left him without any supervision whatsoever.[2] Giving plaintiff the benefit of all inferences which may be drawn from the opening statement, and resolving all doubt in plaintiff's favor,[3] did plaintiff state a cause of action?

It is submitted that there are three separate theories upon which a plaintiff could proceed in cases of this general nature. (1) A master is liable under the doctrine of respondeat superior for the negligent acts of his servant done within the course of employment.[4] (2) The owner of an automobile who knows or should know of the incompetency, intemperance, or recklessness of a third person, and who permits the third person to use the automobile, converts the automo-

1. Boland v. Love, 222 F.2d 27 (D.C. Cir. 1955). Since the accident occurred in Virginia and suit was brought in the District of Columbia, a question as to the proper law to be applied was presented. The court held that Virginia law should govern, but since there apparently was no Virginia case in point, the Virginia law would be presumed to be the same as that of the District of Columbia. *Id.* at 32. The conflict of laws problem in the case is beyond the scope of this comment.

2. *Id.* at 36.

3. *Id.* at 36-37; see Best v. District of Columbia, 291 U.S. 411, 415-16 (1934); Gunning v. Cooley, 281 U.S. 90, 94 (1930); Tobin v. Pennsylvania R.R., 100 F.2d 435, 436 (D.C. Cir. 1938).

4. RESTATEMENT, AGENCY § 219 (1933); 2 MECHEM, AGENCY § 1874 (2d ed. 1914).

bile into a dangerous instrumentality[5] and is liable for his own negligence[6] under the doctrine of entrustment.[7] (3) If an owner of an automobile creates an unreasonable risk of harm, he can be held accountable under general principles of tort liability for negligence when an injury occurs from a realization of that risk.[8] While upon the facts of the instant case defendant is not liable under the first of these theories (the servant's acts were clearly beyond the scope of his employment), it is not clear whether the court determined that the jury might find liability on the basis of the entrustment doctrine or whether it relied upon general principles of negligence law, or both. It would appear, however, that the entrustment doctrine does not apply to these facts for the reason that the servant was never given permission to *operate* the automobile beyond defendant's premises—there simply was no *entrustment*.[9]

In other District of Columbia cases involving similar factual situations, liability has been based upon general principles of tort liability for negligence. In *Ross v. Hartman*,[10] where a thief stole defendant's automobile and negligently injured plaintiff, the court held, as a matter of law, that there were both negligence and proximate cause. Defendant's violation of a statute prohibiting the leaving of keys in the ignition of an unattended automobile was held to be negligence per se. In *Schaff v. Claxton*,[11] another "key-in-the-ignition" case, it was held to be a jury question whether defendant was negligent and, if so, whether that negligence was the proximate cause of the injuries which plaintiff received as a result of the negligent operation of the defendant's automobile by a thief.[12]

On the facts of the principal case, it would be possible for a jury to find in support of the view that defendant was negligent that: (1) defendant knew or should have known that the servant was untrust-

5. Crowell v. Duncan, 145 Va. 489, 509-10, 134 S.E. 576, 581-82 (1926), quoting from Gardiner v. Solomon, 200 Ala. 115, 117, 75 So. 621, 623 (1917).

6. Williamson v. Eclipse Motor Lines, Inc., 145 Ohio St. 467, 62 N.E.2d 339, 168 A.L.R. 1356 (1945).

7. Crowell v. Duncan, 145 Va. 489, 134 S.E. 576 (1926); RESTATEMENT, TORTS §§ 302(b), 308, 309 (1934); 5 AM. JUR., *Automobiles* § 355 (1936); Annot., 168 A.L.R. 1364 (1947).

8. Claxton v. Schaff, 169 F.2d 303 (D.C. Cir. 1948); Schaff v. Claxton, 144 F.2d 532 (D.C. Cir. 1944); Ross v. Hartman, 139 F.2d 14 (D.C. Cir. 1943); Morris v. Bolling, 31 Tenn. App. 577, 218 S.W.2d 754 (1948).

9. This was the major premise of the dissent. Boland v. Love, 222 F.2d 27, 37 (D.C. Cir. 1955) (dissenting opinion).

10. 139 F.2d 14 (D.C. Cir. 1943); *accord*, Ney v. Yellow Cab Co., 2 Ill. 2d 74, 117 N.E.2d 74 (1954); Ostergard v. Frisch, 333 Ill. App. 359, 77 N.E.2d 537 (1948). In the latter two cases, violations of "key-in-the-ignition" statutes were held to be merely evidence of negligence. See generally, Note, 1955 WASH. U.L.Q. 173. *Contra, e.g.*, Richards v. Stanley, 43 Cal. 2d 60, 271 P.2d 23 (1954) (held that there was no negligence because there was no duty owed to plaintiff).

11. 144 F.2d 532 (D.C. Cir. 1944).

12. The District of Columbia "key-in-the-ignition" statute was not applicable because the automobile was not parked on a public street.

worthy,[13] and therefore should have anticipated that the servant might either steal the car (the reasonable man looks upon ex-convicts with suspicion) or go on a "frolic of his own" (for the same reasons); (2) defendant should have known that the servant was an incompetent driver, since he knew that the servant had no license to drive (licenses are granted to those who are qualified but are withheld from incompetent drivers);[14] (3) persons apt to go on "frolics" are likely to take unnecessary chances in their haste to return without having their disobedience discovered; (4) with knowledge of these factors, defendant left the servant in control of the automobile without supervision of any kind. Thus, the jury could conclude that a reasonable man would have taken steps to prevent the servant from obtaining access to the car, that defendant failed to take such steps, and that he therefore was negligent. If, as was determined in the *Ross* and *Schaff* cases, it is negligent to leave the keys in the ignition of an unattended automobile because of the danger that a thief might take the automobile and cause injury to another, it would certainly seem that the jury could find that it constitutes negligence to leave automobile keys in the possession of an unsupervised servant who is *known* to be an ex-convict and who is *known* to have no license to drive. It is therefore submitted that the principal case logically follows the *Ross* and *Schaff* decisions.[15]

It should be noted that upon the facts of the principal case there should be no problem of intervening independent cause negating liability.[16] If there was negligence here, it consisted in the creation of an unreasonable risk of danger because of the probable negligent acts of the defendant's servant. It cannot be said that the materialization of the very danger, the creation of which constitutes negligence, also constitutes an intervening independent force insulating defendant from liability for that negligence. The chance of harm is included in the negligence for which defendant is sought to be held.[17] If the de-

13. 222 F.2d at 36.

14. *Id.* at 33.

15. Five of the eight judges on the present Court of Appeals for the District of Columbia have concurred in the reasoning of this line of cases [Judges Danaher and Bazelon in Boland v. Love, *supra* note 1; Edgerton and Prettyman in Claxton v. Schaff, 169 F.2d 303 (D.C. Cir. 1948); Edgerton and Miller in Schaff v. Claxton, *supra* note 11]. Judge Bastian, in Boland v. Love, *supra*, is the only member of the present court who has expressly rejected the doctrine laid down by these cases.

16. *Contra*, 222 F.2d at 41 (dissenting opinion).

17. See cases cited in notes 8 and 10 *supra* (Richards v. Stanley, *supra* note 10, agrees with the other cases cited in regard to the problem of intervening negligence). See also PROSSER, TORTS 268-70 (2d ed. 1955); RESTATEMENT, TORTS § 449 (1934) states:

> If the realizable likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby.

See also Note, 1955 WASH. U.L.Q. 173.

fendant in the principal case was negligent because he made it possible for his servant to harm someone, it certainly cannot be said that defendant should not be liable for the harm actually caused by the servant.

Because, upon these facts, there is "an unbroken chain of causes and effects" leading from the act of the defendant to the injury of the plaintiff, the only remaining problem of causation is whether the act constituted a substantial factor in bringing about the resultant injury.[18] It is submitted that there is no doubt that defendant's act was such a substantial factor.[19] Therefore, the question of defendant's liability, if submitted to the jury, should turn solely upon the issue of negligence.

The point is made in the dissenting opinion that the effect of this decision is that ex-convicts can be employed only at an employer's peril,[20] and it thus becomes even more difficult for these persons to achieve rehabilitation. While the majority of the court denies that such is the effect of this case,[21] it is perhaps more realistic to concede that the reluctance of District of Columbia employers to hire ex-convicts will hereafter be increased as a result of this decision. Thus, the court has had to weigh two opposing policy considerations—the policy of favoring the rehabilitation of former convicts and that of compensating innocent injured plaintiffs. In deciding that defendant's conduct may constitute negligence, the court indicates that the latter of these policies is overriding. It should be noted, however, that the court emphasized the fact that the servant was known to have no license to drive, as well as the fact that he was known to be an ex-convict. Thus, in the absence of either one of these factors, a contrary result would seem to be indicated.

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18. RESTATEMENT, TORTS § 433, reasons for changes i, ii, iii at 733-34 (Supp. 1948).

19. RESTATEMENT, TORTS § 433 (Supp. 1948) provides that the following facts are important in determining whether conduct is a substantial factor in bringing about the result:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(c) lapse of time.

The exact period of time which elapsed between the taking of the car and the accident does not appear in the instant case. The car was taken in the morning, however, and the accident occurred in the afternoon of the same day. See 222 F.2d at 30. It is submitted that, as a matter of law, such a short time lag should not serve as a basis for assertion of lack of proximate cause as a defense. See, however, Note, 1955 WASH. U.L.Q. 173, 181, where it is suggested that a situation of this sort might create a jury question as to proximate cause.

For an interesting discussion of the problems, and for a substantial clarification of the issues involved in proximate cause, see Edgerton, *Legal Cause*, 72 U. PA. L. REV. 211 (1924).

20. 222 F.2d at 41.

21. *Id.* at 36.