The Sleeper – Negligent Entrustment as an Additional Source of Liability in Canada

By David Zarek and Kate M. MacLeod

1. Introduction – An old U.S. tort becomes a (relatively) new kid on the Canadian block

Negligent entrustment, while considered old hat in the United States, is relatively new on the Canadian negligence scene. It has been considered a sleeper of sorts – an underused additional source for finding liability in certain circumstances. The basic concept is that the supplier of a chattel (for our purposes this is often a car or a snowmobile) has a duty not to supply it to someone he/she knows is incompetent to safely use it[1]. If a supplier ought to have known that giving someone the chattel would cause an unreasonable risk of harm, there is a duty not to supply it.

In the context of motor vehicle litigation, negligent entrustment claims arise where a plaintiff injured in a car accident goes after the person who entrusted the other driver with the vehicle. It occurs where the driver causing the accident is not the owner of the vehicle and may have been the third person in line with possession from the owner. The basic argument is that the 'entrustor' defendant caused the plaintiff's injuries by supplying another person with the vehicle, knowing this other person was somehow incompetent, inexperienced or reckless[2].

For negligent entrustment in the United States, business is booming. The tort has been extended (in a typical American fashion) beyond motor vehicles to include air rifles[3], motor boats[4], airplanes[5] and firearms[6]. It has even been suggested as a remedy for cyber bullying[7]. The number of these types of lawsuits in the U.S. is increasing, with large settlements and often judgments including punitive damages.

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[1] Andrew Holder, *Negligent Entrustment: The Wrong Solution to the Serious Problem of Illegal Gun Sales in Kansas*, 50 Washburn L.J. 743 2011, at p. 746.

[2] Henry Woods, *Negligent Entrustment: Evaluation of a Frequently Overlooked Source of Additional Liability*, 20 Ark. L. Rev. 101 1966-1967, at p. 101. Note: Woods' article has been accepted by both American and Canadian Courts as providing the proper analytical framework for the law on negligent entrustment.

[3] Robert McWilliams Jr., *Negligent Entrustment in South Carolina: An Analysis of South Carolina's Consistent Application and Inconsistent Statements of the Standard After Gadson v. ECO Services of South Carolina Inc.*, 59 S.C. L. Rev. 633 2007-2008, at p. 641.

[4] Daniel Whitebook, *Who's Driving, Anyway? The Status of Negligent Entrustment in Florida After Horne v. Vic Potamkin Chevrolet, Inc.* 12 Nova. L. Rev. 939 1987-1988, at p. 950.

[5] Woods, *supra* note 2, at p. 107 and 108.

[6] Holder, *supra* note 1.

[7] Benjamin Walther, *Cyberbullying: Holding Grownups Liable for Negligent Entrustment*, 49 Hous. L. Rev. 531 2012, at p. 558. The argument here is that an adult may be liable for the negligent entrustment of a computer to a minor whom the adult knows or should know is likely to use the computer for the negligent purposes of cyber bullying his/her peers.

In recent years, the doctrine of negligent entrustment has come to be adopted by Canadian Courts. While we currently lack the fleshed out case law that exists in the U.S., there are several useful cases outlining the tort of negligent entrustment involving a vehicle in Canada.

For both plaintiff and defense counsel, it is valuable to have this additional source of liability on your radar. This paper aims to provide an overview of the tort, pulling useful insights from the U.S. experience and looking forward to the future of negligent entrustment in Canada.

2. A (Very Brief) History of the Negligent Entrustment Doctrine

The history of negligent entrustment can be traced back to England in the 1816 case of *Dixon v. Bell*[8]. Bell provided a loaded gun to his servant, a ten year old girl (whom he knew to be incompetent), and told her to bring it to Dixon. Ultimately, Dixon's son was shot and injured when the servant tampered with the firearm. The Court found Bell liable as he owned the gun, knew of his servant's incompetence and yet still entrusted her with a dangerous weapon[9]. This was a first – the supplier of a chattel to an incompetent person was held liable for the injuries that followed[10]. With that, a new tort was born.

Fast forward to the 1920s in the United States – the doctrine of negligent entrustment was being extended from strictly guns to include vehicles[11]. However, claims were reigned in by requiring a close relationship between the supplier of the chattel and the incompetent person using it.

This all changed in the 1930s. As more cases developed, a close relationship (such as master/servant or parent/child) was not always required. Liability was beginning to be imposed on vehicle owners for entrusting their cars to drivers who were incompetent, inexperienced or habitually drunk[12].

The influx of cases in these circumstances prompted the drafters of the First Restatement of Torts in 1934 and the Second Restatement of Torts in 1965 to include a section outlining the law of negligent entrustment.

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[8] 105 Eng. Rep. 1023 (K.B. 1816).

[9] Kayce McCall, *Lydia v. Horton: You No Longer Have to Protect Me From Myself*, 55 S.C. L. Rev. 681 2003-2004, at p. 682.

[10] Whitebook, *supra* note 4, at p. 950.

[11] *Ibid.* at p. 951.

[12] *Ibid.*

3. The Second Restatement of Torts – the Meat & Potatoes of Negligent Entrustment

The American Law Institute's Restatement (Second) of Torts, section 390, outlines the basics of the tort of negligent entrustment:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reasons to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them[13].

Broken down into its essential elements, an entrustment claim must have the following:

1) Proof that the entrustee was ***incompetent, inexperienced or reckless***;
2) that the entrustor ***"knew or had reason to know" of the entrustee's condition*** or proclivities;
3) that there was an ***entrustment*** of the chattel;
4) that the entrustment created an ***appreciable risk of harm to the plaintiff*** and a ***relational duty*** on the part of the defendant; and
5) that the harm to the plaintiff was ***"proximately" or "legally" caused by the negligence of the defendant***.

The Restatement also provides useful commentary on negligent entrustment, noting:

- A supplier cannot assume that humans will act reasonably if facts that are known or should be known by the supplier indicate otherwise[14].
- If the person being supplied the chattel is "one of a class which is legally recognized as so incompetent as to prevent them from being responsible for their actions", liability should be imposed on the supplier of the chattel[15].
- Liability is imposed on a supplier only when the supplier knows or should know that the person to whom he supplied the chattel is incapable of using the chattel with the care of a normal sober adult[16].

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[13] Woods, *supra* note 2, at p. 101.

[14] Holder, *supra* note 1, at p. 747.

[15] *Ibid.*

- An individual who accepts and uses a chattel knowing that he is incompetent to use it safely will usually be in such contributory fault as to bar recovery[17].

Negligent entrustment embodies the basic principle that with a right of control comes responsibility. There is a subsequent duty to exercise that control with due care[18]. The bottom line is that where you have control over a thing and negligently entrust it to a person who is likely to cause an unreasonable risk of harm to others, liability may follow[19].

The policy considerations underlying this concept are that the person with control over the chattel is in a unique position. This person has the power to prevent injury to others by using due care in entrustment[20]. The tort can be seen as simply an extension of the causal chain – looking backwards to the event that set the sequence for the injury in motion[21].

Since its introduction via section 390 of the Restatement, negligent entrustment has been recognized in virtually every state in the U.S.[22] The majority of cases under this tort involve reckless driving. Someone borrowed a vehicle from its owner and caused injury. It is then argued that the owner knew or should have known of the driver's inability to drive the vehicle safely.

4. Particular Elements Examined

Entrustee's Incompetence, Inexperience or Recklessness

How does one establish incompetency? Incompetency of an entrustee can generally be shown by proof that at the time of the entrustment he/she was intoxicated or suffered from some mental or physical defect[23]. Counsel will be looking for evidence of alcohol, illegal drugs or strong prescription medication use. Medical records highlighting physical and mental deficiencies should also be reviewed.

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[16] *Ibid.*

[17] McCall, *supra* note 9, at p. 686.

[18] McWilliams, *supra* note 3, at p. 633.

[19] *Ibid.*

[20] *Ibid.*

[21] Walther, *supra* note 7, at p. 547.

[22] Holder, *supra* note 1, at p. 747.

[23] Woods, *supra* note 2, at p. 102.

Inexperience is comparatively easier to establish. It is shown by proof of age or lack of a driver's license[24]. If the entrustee only has a G1 license, is still a young teen or has no license at all, the category of choice will be inexperience.

Recklessness is the most challenging of the three conditions to establish. It is somewhat easier to show an individual was underage, unlicensed, physically defective or actually intoxicated – there are birth certificates, licenses, medical records and so on to assist you. However, how do you establish someone's disposition for 'recklessness'? What needs to be shown?

In the U.S. there has been a divide as to whether recklessness must be proven by evidence of *specific acts* or whether evidence of *general reputation* will suffice. It is generally agreed that evidence of specific acts is admissible. However, the admissibility of evidence of a reputation for recklessness varies[25]. For specific acts, counsel should look for prior convictions and guilty pleas on traffic violations, as well as any license revocations and prior accidents.

One strategic advantage for plaintiff's counsel is that the tort of negligent entrustment opens an avenue for the introduction of evidence that is normally excluded in a negligence action[26]. Prior convictions suggesting reckless behavior would normally be considered inadmissible. This tort provides an opportunity to get prior 'bad acts' – poor judgment, irresponsible driving and possibly one's reputation for gross intoxication – into the record.

An important issue remaining is the question of *how much*. How much evidence is needed to establish recklessness? Are one or two specific incidents sufficient? The answer remains unclear. Those fending off a negligent entrustment claim under the condition of recklessness will want to take the position that:

a) there is no evidence of recklessness; or in the alternative

b) the evidence being offered by the plaintiff is *not sufficient to establish* the reckless designation.

Defendants will also want to argue against general reputation evidence being admissible. They will want to put the plaintiff to task, requiring specific acts which highlight recklessness.

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[24] *Ibid.*

[25] *Ibid.* at p. 103. For example, proof of reputation evidence is admissible in Alabama, Georgia and Arkansas but not in Oregon.

[26] *Ibid.* at p. 101.

Entrustor's Knowledge of Entrustee's Condition

It is essential to a negligent entrustment claim that the plaintiff establish that the entrustor *knew or ought to have known* of the entrustee's condition or propensities[27]. Again, there is a similar divide in the U.S. over whether it is knowledge of *reputation* or *specific acts* that counts. While some states have held that establishing the entrustor's knowledge of reputation is sufficient, others require knowledge of specific conduct[28].

There is also division in American jurisprudence over whether a plaintiff need only prove that the defendant *should have* known, or whether *actual knowledge* is necessary[29].

Plaintiff's counsel will aim to establish that the defendant entrustor of the vehicle knew or ought to have known about the entrustee's condition, whether it was a bad driving record, propensity to drink and drive or any other of the conditions previously discussed.

Tactically, it is often easier to establish knowledge where there is a close relationship between the entrustor and entrustee. An example is a situation involving parents and their children. If a child is entrusted with his/her parents' vehicle and is a negligent driver, there is a strong argument for entrustor knowledge. This is especially true if the child lives at home with his/her parents. Surely parents should have been aware that their child was constantly receiving speeding tickets or getting into accidents.

This close connection could also be made if the entrustor is a friend of the negligent driver. For example, perhaps they have been out drinking together on numerous occasions. This may bolster a claim that the friend should have known of the entrustee's propensity to drive while intoxicated and, as such, is liable for negligent entrustment.

As for the defendant, the name of the game is to establish a lack of knowledge. The key is to show that the defendant did not know the danger of entrusting the vehicle to the driver. There was no knowledge of the poor driving record, intoxication or other condition alleged, and there was no reason to know of it.

Entrustment of the Chattel

While the typical case will deal with the entrustment of the vehicle to an entrustee for the purpose of driving, not all cases are typical. Counsel can get creative and there are other types of

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[27] *Ibid.* at p. 106 and 107.

[28] Henry Woods, *Negligent Entrustment Revisited: Developments 1966-76*, 30 Ark. L. Rev. 288 1976-1977, at p. 301. See, for example, the Massachusetts case of *Leone v. Doran*, 292 N.E. 2d 19 (Mass. 1973). The Court held that general reputation was not sufficient and knowledge of specific conduct must be established.

[29] *Ibid.* at p. 302. For example, in Arkansas, it is enough that the defendant *should have known*. Georgia, however, requires *actual knowledge*.

chattels relevant to motor vehicle litigation. For example, the entrustee may be given funds to buy a vehicle or may be given the vehicle to repair (and not drive)[30].

The identity of the entrustee is also a potentially wide spectrum. Vehicles may be entrusted to an employee, independent contractor, family member or even a stranger[31]. The vehicle may be entrusted for work, loaned or even sold[32]. As will be discussed later, there have been claims for negligent entrustment in the U.S. for selling a car to a purchaser who was an incompetent or inexperienced driver. The fact that the entrustor did not mean to entrust the vehicle to the incompetent person may not excuse him[33].

The nature of the entrustment is another issue that remains somewhat unclear. Entrustment does not have to be specific. The entrustor may have simply engaged in a course of conduct that permitted an incompetent to secure possession of the chattel[34]. For example, entrustment has been found in the U.S. where a father left his truck keys on the mantel in his living room, where they were easily accessible (to anyone, including his hard-drinking, reckless son)[35].

5. Canadian Case Law – Negligent Entrustment Acknowledged But Still in Its Infancy

Doctrine Accepted & U.S. Restatement Adopted – Cella, Unger, Schulz and Perkull

Canadian courts, including the Ontario Court of Appeal, have recognized negligent entrustment as a cause of action. The discussion of this tort has been by and large in the context of insurance coverage issues.

In *Cella (litigation guardian of) v. McLean,* it was acknowledged that the tort of negligent entrustment was recognized in law[36]. The Ontario Court of Appeal noted that liability will be imposed where:

- there is a sufficient relationship between the injured party and another person (the entrustor);

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[30] Woods, *supra* note 2, at p. 108.

[31] *Ibid.* For example, if the keys were left by the owner in an unattended vehicle and then later used by an incompetent thief, the owner may be liable for negligent entrustment. Note: This actually happened in a case Oregon – *Roberts v. Pendleton Airmotive Inc.*, 258 Or. 554, 484 P.2d 308 (1971).

[32] *Ibid.*

[33] *Ibid.*

[34] Woods, *supra* note 28, at p. 302.

[35] *Chaney v. Duncan*, 194 Ark. 1076, 110 S.W. 2d 21 (1937).

[36] [1997] O.J. No. 2439 (C.A.), at para. 10.

- this relationship makes it reasonable to conclude that a duty was owed to the injured party; and
- the entrustor should have foreseen that the plaintiff would be injured.

This liability does not depend on any aspect of control in relation to the vehicle[37].

In *Unger (litigation guardian of) v. Unger et al.*, the Ontario Court of Appeal confirmed that negligent entrustment was composed both of the *entrustor's negligence* in entrusting the instrumentality and the *entrustee's negligent use* of the instrumentality[38]. The triggering element is negligent use of the item. Even if the entrustment is negligent, ***no cause of action will arise without an injury caused by the negligent use of the item***. Negligent use is essential[39].

The British Columbia Court of Appeal's decision in *Schulz v. Leeside Developments Ltd*[40] provides a helpful overview of the tort of negligent entrustment and officially adopts the American line of thought, as outlined in the Restatement.

This case considered negligent entrustment against the owner of a boat who rented it to an 18 year old. The renter subsequently sat on the edge of the boat, fell off and was injured by the propeller. The Court of Appeal looked to the American law and adopted, as a statement of principle, section 390 of the Restatement (Second) of the Law of Torts[41]. The Court also approved of the analysis established by the academic works of Mr. Henry Woods (who is cited in this paper) and identifies the five essential elements of the tort. In particular, the Court confirms:

- Incompetency is generally established by proof that the entrustee was intoxicated or suffered some physical or mental defect;
- Inexperience is usually established by proof of age or want of license;
- Recklessness may be shown by proof of specific acts; and
- The means of proving knowledge of the entrustee's condition varies, but evidence must be found if the plaintiff is to succeed[42].

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[37] *Ibid.* at para 12.

[38] [2003] O.J. No. 4587 (C.A.), at para. 25.

[39] *Ibid.*

[40] [1978] B.C.J. No. 1319 (C.A.).

[41] *Ibid.* at para 21.

[42] *Ibid.* at para. 24.

The Court ultimately held that the evidence, far from showing a propensity for recklessness, supported the conclusion that Mr. Schulz was normally a capable and careful person. It was held that the evidence did not establish the first two elements of negligent entrustment – neither incompetence, inexperience or recklessness, nor the entrustor's knowledge of these conditions[43].

Perkull v. Gilbert[44], another British Columbia decision, dealt with a case where the plaintiff was injured by the negligent operation of a snowmobile by two children who were eleven and five years old. A claim was launched against the parents of the two children on the basis of negligent entrustment. Following the Court of Appeal, the Court held that the concept of negligent entrustment had precedent in Canada, noting its initial recognition in the Manitoba decision of *School Division of Assiniboine v. Hoffer*[45]. In that case, the court found a father and a son liable for the damages sustained when a Ski Daddler auto toboggan struck a gas pipe and eventually caused an explosion in a school which caused extensive damage. The father had rigged up the Ski Daddler to be started by the son who was not big enough or strong enough to do it in the usual way. When the son tried to start it, the Ski Daddler took off and struck the gas pipe 100 meters away. Though neither the Court of Appeal nor the Supreme Court of Canada used the words, "negligent entrustment", they found liability based on the father having provided this dangerous machine to his young and not strong enough child.

While this tort has now been officially acknowledged and its elements outlined, there are few decisions that provide a step-by-step analysis of a negligent entrustment claim.

Negligent Entrustment Successfully Argued – Palmquist v. Ziegler

One instance of a successful claim for negligent entrustment comes from the Alberta case of *Palmquist v. Ziegler*[46]. On February 22, 2005, just outside Edmonton, Joseph Palmquist was driving a half ton truck. He was struck from behind by a car driven by Carlin Ziegler and owned by Murray Adams. The impact cause the truck to veer into the opposite lane where it was struck again by a semi-trailer. Joseph Palmquist died.

It was later discovered that Murray Adams' vehicle was borrowed by Tarrant Adams, his son. Tarrant had a drug problem – he and his friends were smoking crystal methamphetamines and hanging out at a friend's house. The Adams vehicle was ultimately driven by Ziegler – a 16 year old unlicensed driver who had been smoking crystal meth prior to driving. Basically, a sleepy

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[43] *Ibid.* at para. 25.

[44] 1993, CanLII 583 (BC SC).

[45] (1970), 16 D.L.R. (3d) 703. The Court held that a father who entrusted his snowmobile to his 14 year old son was liable for the consequences. This decision was affirmed by the Manitoba Court of Appeal (1971, 4 W.W.R. 746) and the Supreme Court of Canada (1973, 6 W.W.R. 765).

[46] [2010] A.J. No. 752 (AB QB).

intoxicated teenager gave the keys to his parent's car to a friend who did not have a license and was also high.

The Court confirmed the *Schulz v. Leeside* decision, adopting the principle in section 390 of the Restatement (Second) on negligent entrustment and the British Columbia Court of Appeal's summary of the law[47].

It was claimed that Ziegler should not have been given the car under the circumstances. Plaintiff's counsel argued that Taggart Adams knew or ought to have known that Ziegler had no driver's license, was high on crystal methamphetamines and intended to drive the vehicle to Edmonton[48]. It was further argued that it was negligent to entrust the vehicle to Ziegler, there was an appreciable risk of harm to other drivers using the road and that the risk was not too remote.

The Court held that:

- Carlin Ziegler was not competent to drive – he had no license and had ingested illicit drugs within hours of driving;
- Tarrant Adams knew or ought to have known at the time of Ziegler's condition; and
- Tarrant Adams gave Ziegler possession of the vehicle.

The Court noted that the real issue was whether what occurred was foreseeable. It cited the case of *Mustapha v. Culligan of Canada Ltd*[49]. It confirmed that the degree of probability that satisfies the foreseeability requirement is a "real risk" – one which would occur to the mind of the reasonable man in the position of the defendant and which he would not brush aside as "far-fetched". The Court in this case concluded that there *was* a real risk that someone would be injured if a high and unlicensed driver was permitted to drive the vehicle. It noted that this risk should have occurred to the mind of a reasonable person in the position of Tarrant Adams[50].

Applying a classic tort analysis, the Court held that the tort of negligent entrustment was made out on the facts when Tarrant Adams (the son) gave possession of the car to Ziegler[51].

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[47] *Ibid.* at para 208.

[48] *Ibid.* at para 209.

[49] [2008] 2 S.C.R. 114.

[50] *Ibid.* at para. 215.

[51] *Ibid.* at para. 216.

Negligent Entrustment Not Successfully Argued – Persaud v. Bratanov and Unifund

An example of the case for negligent entrustment not being made out is *Persaud v. Bratanov and Unifund Assurance Co*[52]. It also provides the most thorough analysis to date of a negligent entrustment claim, working through each element of the tort. This case dealt with a teenager, Andrew Suedat, who took a van belonging to his grandmother, Juliet Bratanov. He then used the van to run down and ultimately kill another teen, Kevin Persaud, in a public park after a drug deal went wrong.

Ms. Bratanov left her van in her son Annand's driveway, leaving the keys in a glass bowl in the front foyer of his home. She said that no one was to use it. Annand's son Andrew and his cousin K.D. later decided to take the van, last minute, to go to a party. En route, K.D. told Andrew they needed to make a stop at a school in Toronto so that he could complete a drug transaction. They met up with several teens looking to purchase marijuana on the street near the school's parking lot.

Things did not go as planned. The potential buyers took the marijuana and fled towards the school and the park behind the school without paying. K.D. chased after them through the park adjacent to the school. Andrew Suedat decided to help his cousin, driving along the road to the front of the school, and then driving the van over the curb and into the public park. During the course of his off-terrain pursuit, Andrew twice struck and ran over Kevin Persaud, one of the buyers involved in the rip-off. Persaud died almost immediately from his injuries in the park.

One of the plaintiffs' claims was that Ms. Bratanov negligently entrusted her vehicle to her son, Annand Suedat (Andrew's father). It was argued that she ought to have known that this entrustment created a real risk of harm to others[53]. Ms. Bratanov moved for summary judgment, arguing there was no genuine issue for trial and no chance that the claim could succeed.

The plaintiffs pled that Ms. Bratanov negligent entrusted her vehicle to her son. This was negligent as she knew or ought to have known that:

- Andrew (her grandson) would likely use her vehicle;
- He was incapable or incompetent to drive safely; and
- Given his past history, including socialization with others who had criminal records and engaged in illicit activities, this entrustment created a real risk of danger to other members of society[54].

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[52] 2012 ONSC 5232.

[53] *Ibid.* at para. 1.

[54] *Ibid.* at para. 39.

In response, Ms. Bratanov advanced four arguments:

- As there was no longer any allegation of negligence against her son Annand, the claim against her for negligent entrustment could not succeed;
- There was no evidence that entrusting her vehicle to Annand was negligent and no evidence her son was incompetent, inexperienced or reckless;
- She did not owe a duty of care to the plaintiffs; and
- Any potential negligence on her part was not the proximate cause of the damages suffered by the plaintiff. It was simply not foreseeable that Andrew would use her van in a public park to commit manslaughter[55].

Justice Campbell provided a useful overview of the law on negligent entrustment in Canada, citing the decisions of *Unger*, *Perkull*, *Schulz* and *Palmquist*[56]. In their application to the facts, Justice Campbell held that there was no basis to conclude that Ms. Bratanov was liable for negligent entrustment. While the element of entrustment was admitted, as she clearly entrusted the vehicle to her son Annand, the other four elements of the tort could not be established[57].

(a) Entrustee Not Negligent

It was held that Ms. Bratanov could *not* be found liable for negligent entrustment of her vehicle *in absence of any negligence on the part of the entrustee*, her son Annand. This is in line with the *Unger* decision, which notes that there can be no cause of action for negligent entrustment without negligent use of the item. Justice Campbell stated that while the entrustee need not have personally driven the vehicle negligently, he must have been, in some way, negligent[58].

The Court found no evidence that Annand was in any way negligent with the van. There was no longer even an allegation that Annand was negligent – the plaintiffs had withdrawn this claim. There was also no basis for Ms. Bratanov to have reasonably anticipated that her son might be negligent in connection with the vehicle. The Court also concluded that the evidence was clear that Ms. Bratanov only entrusted her van to her son Annand, not her grandson[59].

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[55] *Ibid.* at para. 40.

[56] *Ibid.* at paras. 41-44.

[57] *Ibid.* at para. 48.

[58] *Ibid.* at para. 49 and 50.

[59] *Ibid.* at para. 50, footnote 2.

(b) No Duty of Care Owed to Plaintiffs

The Court next considered whether Ms. Bratanov owed a duty of care to the plaintiffs. It held that the entrustment did not create any relational duty of care. There was "no doubt" that, in entrusting her van to her son, Ms. Bratanov owed a duty of care to other motorists and pedestrians who might use the highways. There was a sufficiently close relationship between the owner of a vehicle and other vehicles using highways. As such, it would be within Ms. Bratanov's reasonable contemplation that the negligence of the entrustee using her vehicle might cause damage to those individuals[60].

However, this was an unusual case. Kevin Persaud was not a motorist or pedestrian using a highway. He was a person fleeing through a public park. Justice Campbell concluded that there was not a sufficient degree of reasonable foreseeability or proximity to establish a duty of care supporting the claim of negligent entrustment. Kevin Persaud's sole involvement with K.D. and Andrew Suedat was in relation to an illegal drug transaction. It had nothing to do with motor vehicles or highways[61].

Ms. Bratanov should have reasonably foreseen the possibility that her grandson might use her van and that he might drive it negligently on a highway, causing an accident or injuries to other users on the highway. However, she could not have reasonably anticipated that he would use her vehicle, as noted by Justice Campbell, "as a weapon in a public park to criminally take the life of a fleeing pedestrian"[62].

The Court concluded that the relationship between Ms. Bratanov and Mr. Persaud did not have any degree of reasonable foreseeability or proximity to establish a duty of care[63].

(c) Entrustment Not Proximate Cause of Damages

Finally, the Court addressed issues of causation and remoteness. As in *Palmquist*, one real point of contention was foreseeability. Was the harm suffered by the plaintiffs too unrelated to fairly hold Ms. Bratanov liable? Justice Campbell cited the *Mustapha* decision, noting a reasonable person must have considered that there was a "real risk" that the plaintiff could suffer harm and not brush it aside as being far-fetched[64].

Justice Campbell concluded that the death of Kevin Persaud was not reasonably foreseeable. In line with his prior analysis, he found that while it was foreseeable that the negligence of the

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[60] *Ibid.* at para. 51.

[61] *Ibid.* at para. 54 and 55.

[62] *Ibid.* at para. 57.

[63] *Ibid.* at para. 56.

[64] *Ibid.* at para. 61.

entrustee driving the vehicle might result in injury on a highway, no owner of a vehicle in these circumstances could have reasonably foreseen that the vehicle would be used in a public park to cause the death of a fleeing person[65].

The plaintiffs claimed that Ms. Bratanov should have known the van would be driven by her grandson and that, based on his background and associates, his use of the vehicle would create an increased risk of danger. However, the Court found that the evidence did not support this claim[66]. In particular:

- Andrew was 18 years old;
- He possessed a valid diver's license and had no driving offences;
- He was a competent driver with a high school education and needed no special skills to operate the van; and
- There was no evidence suggesting that Andrew had a history of reckless driving.

Andrew had in the past received a probationary sentence when he was 15 years old for stealing someone's MP3 player. He also did on occasion associate with his cousin K.D. who was a high school drop out with a more significant criminal record. However, this evidence did not establish that Ms. Bratanov ought to have foreseen that, in entrusting her vehicle to her son, her grandson would use it "as a weapon, following a failed drug transaction, to criminally take the life of a fleeing pedestrian-drug purchaser in a public park"[67].

The Court held that the killing of Kevin Persaud was simply too disconnected and unrelated to the alleged negligent entrustment of the vehicle by Ms. Bratanov to her son. Any potential negligence by Ms. Bratanov was not the proximate or legal cause of the damages suffered by the plaintiffs[68].

After working through the five elements of the tort, the Court concluded that four of the five elements of negligent entrustment were not made out on the facts. The claim could not possibly succeed. As such, the motion for summary judgment was granted[69].

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[65] *Ibid.* at para. 62.

[66] *Ibid.* at para. 63.

[67] *Ibid.* at para. 65.

[68] *Ibid.* at para. 67.

[69] *Ibid.* at para. 68.

6. Interesting Issues Moving Forward

The U.S. has tackled some interesting issues that have evolved with claims of negligent entrustment. As Canada moves forward and the case law of this tort develops, we may face similar questions. The following is a brief review of three such issues: claims by the plaintiff against the entrustor, extension to sales and use against employers.

Claims by the plaintiff against the entrustor

The Restatement (Second) does contemplate a first party action for negligent entrustment. However, several states in the U.S., most notably South Carolina, do not recognize such an action[70].

Lydia v. Horton[71] is a frequently cited South Carolina case on this issue. Here, the plaintiff was drunk, borrowed the defendant's car, lost control of the vehicle and struck a tree. This was a single-car accident and left the plaintiff a quadriplegic. He then sued the defendant for negligent entrustment[72]. The Court ultimately held that South Carolina's public policy and negligence system barred an intoxicated plaintiff from recovering for this type of negligent entrustment claim[73].

It remains to be seen whether this type of claim would be successful in Canada. Without any legislation prohibiting this type of claim the Courts may be sympathetic on similar facts at least to find some liability on the entrustor. However, it is clear that the plaintiff would be found to be the author of his own misfortune, placing himself in harm's way. This is in line with the commentary for section 390 of the Restatement, noting that someone who accepts and uses a chattel knowing he is incompetent to use it safely will usually be at "such contributory fault as to bar recovery"[74].

However, there may be situations where the plaintiff was of a class recognized as "so incompetent" as to not be responsible for their actions where liability on the entrustor may be found appropriate.

Extension of Negligent Entrustment to Sales

Another issue to consider is whether the doctrine of negligent entrustment should be extended to sales. According to the Restatement, entrustment applies to sellers, lessors, donors, lenders and

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[70] McWilliams, *supra* note 3, at p. 646.

[71] 343 S.C. 376, 379, 540 S.E. 2d 102, 104 (Ct. App. 2000), rev'd 355 S.C. 36, 583 S.E. 2d 750 (2003).

[72] McWilliams, *supra* note 3, at p. 646.

[73] McCall, *supra* note 9, at p. 681, 688 and 689. It is also important to note that South Carolina has a comparative negligence system – if the plaintiff's negligence exceeds the defendant's then the plaintiff is barred from recovery.

[74] *Ibid.* at p. 686.

all kinds of bailors[75]. Should car salesmen be held liable for selling a vehicle to someone they knew or ought to have known to be an incompetent or reckless driver? Such an extension would afford plaintiffs with another deep pocket.

This is an issue that has been tackled in the U.S.. Some states, including California, Alaska and Michigan have applied the doctrine of negligent entrustment to sales[76]. Other states have refused – including Texas, Tennessee, Illinois, Kansas and Florida[77].

Those opposed to the extension of this doctrine to sales note that:

- There would be a flood of litigation – every car accident victim would have a possible claim against the seller of the car[78];
- It would impede commerce – in order to protect themselves, sellers would have to probe into each buyer's background to determine the buyer's fitness to drive[79]; and
- It would create additional litigation for denial of sale – in situations where sellers refuse to sell a vehicle to a buyer whom he *believes* is incompetent, the rebuffed buyer may launch a discrimination lawsuit[80].

The current policy argument being made in the U.S. is that it is up to the legislature to determine who is qualified to drive. A car dealer is not in the position to determine who is competent to drive, if a person is issued a driver's license by the state. However, this argument might not hold up if a car dealer can be shown to have actual knowledge of the driver's incompetence[81].

Claims Against Employers

Negligent entrustment has also been used in the U.S. to hold employers liable for employees' negligence as an additional action to vicarious liability[82]. The basis for the claim is that an employer who entrusts an incompetent employee to operate a motor vehicle is liable for any

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[75] Whitebook, *supra* note 4, at p. 953.

[76] *Ibid.*

[77] *Ibid.* at p. 956. See also the Florida case of *Horne v. Vic Potamkin*, where a car salesman and dealership were held liable at trial level, but on appeal it was held that the doctrine of negligent entrustment did *not* extend to the seller of a chattel (505 So. 2d 560 (Fla. 3d Dist. Ct. App. 1987)).

[78] *Ibid.* at p. 940.

[79] *Ibid.* at p. 946.

[80] *Ibid.* at p. 948.

[81] *Ibid.* at p. 946 and 947.

[82] Michelle Johnson, *Negligent Entrustment: How the Employer Becomes Liable for Punitive Damages for the Employee's Ordinary Negligence*, 8 Okla. City U. L. Rev. 63 1983, at p. 63.

resulting damages[83]. Again, evidence would be required showing that the employer was aware of the employee's incompetence.

This might be a viable claim where, for example, there's been an accident and the driver of the vehicle is an employee in a company vehicle. Unfortunately, the facts suggest that this event was outside the scope of employment (perhaps it was after hours) and the employer cannot be held on traditional agency grounds. Another snag might be that the driver is an independent contractor and vicarious liability is not available. How can a plaintiff rope in an employer under the circumstances?

Negligent entrustment can be used. Counsel will want to show that the driver was not properly screened before being entrusted with the vehicle, or that the employee/contractor was known to be reckless or irresponsible. They will want to examine whether the driver was properly investigated, screened and trained. Counsel should also look into whether there were any instances of incompetence on the job and how those incidents were handled by employers.

Again, the strategic value in this is that the prior specific acts of the employee, and the handling of these incidents by the employer, become relevant[84]. Evidence of an employee's past misconduct is rarely admissible under other causes of action[85]. Also, vicarious liability claims require a heavy burden of proof that the employee caused the injury while acting within the scope of employment. The scope of employment becomes irrelevant in a negligent entrustment action[86].

While currently underused, negligent entrustment may be a viable alternative cause of action against employers, in addition to or in the place of vicarious liability[87].

Conclusion – Additional Source of Liability that Should Be on Your Radar

Negligent entrustment is a recognized tort in Canada, yet currently it is not widely known or used. It offers an additional source of liability, and as such, is important for counsel to have on their radar. It is a claim that can arise in many situations, including:

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[83] Brent Powell, *Submitting Theories of Respondeat Superior and Negligent Entrustment/Hiring*, 61 Mo. L. Rev. 155 1996, at p. 155.

[84] Donald Armstrong, *Negligent Hiring and Negligent Entrustment: The Case Against Exclusion*, 52 Or. L. Rev. 296 1972-1973, at p. 301.

[85] Johnson, *supra* note 82, at p. 69.

[86] *Ibid.* at p. 70.

[87] *Ibid.* at p. 87.

- When a car is driven by someone other than the owner and the driver has a bad driving history (incompetent, inexperience, recklessness);
- When an employee is driving a company vehicle or other company property outside the scope of employment;
- When an independent contractor is operating machinery of the company it contracted with; and
- While the jury is still out on whether injured party claims and seller claims will succeed, these are also potential grounds for negligent entrustment.

In Canada, most provinces have vicarious liability for an owner under provisions such as our *Highway Traffic Act*. Finding liability upon the owner is often not required. However, it would likely be required in the case of an owner providing a vehicle to one person who then, unauthorized by the owner, provides it to a third person.

Negligent entrustment also has application in motor vehicle cases where the accident did not occur on a "Highway" within the meaning of the *Highway Traffic Act*, such as off road cases where there is a possible coverage issue for the driver of the car.

Lastly and most obviously, this tort may have application in cases where an instrument of injury provided to the entrustee may be dangerous if used incorrectly such as a boat, snowmobile, airplane or firearm.

The rule of negligent entrustment can seem rather harsh. It imposes liability on an entrustor where the item is not being used on his behalf and he has no direct control or supervision at the time of its use[88]. It does not matter that the entrustee was engaged in a strictly personal mission at the time of the accident[89]. However, this is balanced by the hurdles involved in making out a claim in this tort. All five elements of negligent entrustment must be satisfied. Liability of an owner will only exist where there is adequate evidence that the driver was somehow incompetent and that the entrustor knew or ought to have known of such incompetency and that the damages were forseeable[90]. Moving forward in our practices, this "old tort" is definitely one to keep in mind on certain of your claims.

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[88] Frank Knapp, *Liability for Negligent Entrustment of a Motor Vehicle*, 1 S. Tex. L. J. 1 1954-1955, at p. 9.

[89] *Ibid.* at p. 1.

[90] *Ibid.* at p. 9.