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ILLINOIS LAW MANUAL
CHAPTER II
NEGLIGENCE

E. NEGLIGENT ENTRUSTMENT

1. Basic Law

An action for negligent entrustment "consists of entrusting a dangerous article to another whom the lender knows, or should know, is likely to use it in a manner involving an unreasonable risk of harm to others." Norskog v. Pfiel, 197 Ill. 2d 60 (2001).

One essential element of the negligent entrustment cause of action is that persons charged with liability have a superior right to control the property at issue. Umble v. Sandy McKie and Sons, Inc., 294 Ill. App. 3d 449 (1998). An action for negligent entrustment consists of entrusting a dangerous article to another whom the lender knows, or should know, is likely to use it in a
dangerous manner. Payne for Hicks v. Churchich, 161 F.3d 1030 (1998).

Although Illinois courts once took issue with whether or not an automobile is a "dangerous article," it is now clear that:

> a person may be liable for negligent entrustment of an automobile where that person entrusts an automobile to one whose incompetency, inexperience, or recklessness is known or should have been known by the owner or entruster of the automobile.

Kosrow v. Acker, 188 Ill. App. 3d 778 (1989), citing Giers v. Anten, 68 Ill. App. 3d 535, 538 (1978). See also, Zedella v. Gibson, 165 Ill. 2d 181 (1995).

Kosrow adopted the definition of negligent entrustment set forth in the Restatement (Second) of Torts, Section 308 (1965). That definition is broader than the one that the Illinois Supreme Court announced in Teter v. Clemens, 112 Ill. 2d 252 (1986). The Restatement states:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

The Kosrow definition does not require "the thing" entrusted to be dangerous, but only that its use by the person to whom it is entrusted is likely to create an unreasonable risk of harm. Normally, this type of negligence action is pled when there is no agency relationship between the entrustor and the entrustee. If there were, there would be no need to prove negligent entrustment; the plaintiff would only have to prove the entrustee had negligently injured the plaintiff. The entrustor would then be vicariously liable on an agency theory. Later cases have adopted Kosrow without rejecting or distinguishing Teter.

Prior to the adoption of comparative negligence in Illinois, courts were split on the issue of whether an admission that an agency relationship existed between entrustor and the entrustee prevents a plaintiff from bringing a negligent entrustment action. In the case of Nicholas v. Alliance Communications, 199 Ill. App. 3d 327 (1990), the Fourth District Appellate Court, by way of *dicta*, appeared to approve of a negligent entrustment action against an employer if it were alleged that the employee was acting within the scope of his employment, and the employer knew or had reason to know of the recklessness and incompetence of the employee as a motor vehicle operator. This is true

even though the employer admitted that its employee was an agent of the employer.

In a later case, the First District denied a plaintiff leave to amend his complaint to add a count for negligent entrustment, stating that negligent entrustment could not stand against an employer where it had already admitted responsibility for the conduct of the employee. Martin v. Yellow Cab Company, 208 Ill. App. 3d 572 (1990), citing Ledesma v. Cannonball, Inc., 182 Ill. App. 3d 718 (1989), and Neff v. Davenport Packing Company, 131 Ill. App. 2d 791 (1971).

However, in Lorio, an Illinois court clarified the confusion by holding the rule in Neff no longer viable because of the adoption of comparative negligence. Lorio v. Cartwright, 768 F. Supp. 658, 661 (N.D. Ill. 1991).

2. Analysis

In a contributory negligence jurisdiction, the entrustee will be either totally liable for plaintiff's damages or not at all liable for plaintiff's damages. Thus, if the entrustee is not at all liable for plaintiff's damages, whether it is because the entrustee was not negligent or the plaintiff was contributorily negligent, the entrustor-principal cannot be liable for any part of plaintiff's injuries under either the *respondeat superior* theory or the negligent entrustment theory.

Conversely, if the entrustee was liable and the entrustor's responsibility for the agent's acts were admitted, the entrustor-principal would be liable under the *respondeat superior* theory. Thus, it would be unnecessary to determine whether the entrustor-principal was also liable under the negligent entrustment theory as the amount of the plaintiff's recovery under either theory would be identical. Because the evidence of negligent entrustment tends to be highly prejudicial, the rule set forth in Neff is a logical and powerful rule in a contributory negligence jurisdiction.

However, the rule in Neff is inapposite in a comparative negligence jurisdiction. Under comparative negligence, it is necessary for a trier of fact to determine the percentages of fault for a plaintiff's injuries attributable to the negligence of each defendant, plaintiff, and other non-parties. It is illogical to argue that the entrustee's negligence is the sole proximate cause of a plaintiff's injuries, as such argument would run counter to comparative negligence law and cut off the liability of an entrustor to a third-party plaintiff.

Under contributory negligence, the negligence of the entrustor-principal and the negligence of the entrustee-agent does not matter for purposes of liability, because the entrustor-principal would be necessarily liable under *respondeat superior* for the entrustee-agent's liability. Thus, whether the enstrustor-principal also negligently entrusted the vehicle to the entrustee-agent would be immaterial because the liability under the negligent entrustment theory would not add to the amount of judgment against the entrustor-principal.

However, under comparative negligence, the difference between the negligence of the entrustor and the entrustee matters immensely. For example, if a plaintiff were to prevail on both the negligence claim against the entrustee-agent and on the negligent entrustment claim against the entrustorprincipal, the entrustor-principal would be liable for the percentage of plaintiff's damages caused by the entrustee-agent's negligence and for the percentage of plaintiff's damages caused by the entrustor-principal's separate negligence in entrusting the vehicle to the entrustee-agent. Further, it would not be possible for a finder of fact to make the necessary determination of degrees of fault without having before it the evidence of the entrustor-principal's negligence in entrusting the vehicle to the entrustee-agent. Therefore, after the adoption of comparative negligence in Illinois, evidence of negligent entrustment is not precluded by a principal's admission of responsibility for the conduct of the negligent actor.

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