



1966

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Recommended Citation

Sam P. Burford Jr., *The Doctrine of Negligent Entrustment in Texas*, 20 Sw L.J. 202 (1966)
<https://scholar.smu.edu/smulr/vol20/iss1/12>

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and an appreciation of the special problems involved in conglomerate mergers should be considered by the courts. In the majority of conglomerate merger situations and in most mergers within imperfectly competitive markets prediction of probable results is guesswork at best. Consideration of post-merger effects, when such evidence is available, would reduce speculation by presenting to the courts actual results instead of projected theory. Giving weight to the post-acquisition evidence in such cases, moreover, in the long run might tend to increase economic diversification, encourage competition in many cases, and greatly simplify the problems faced by the courts in applying section 7.

Teddy M. Jones, Jr.

The Doctrine of Negligent Entrustment in Texas

I. BACKGROUND

Negligent entrustment is a general doctrine by which a vehicle owner may be held liable for the subsequent negligence of one to whom he entrusts his vehicle. In Texas, the doctrine of negligent entrustment has been applied in two main areas: (1) entrustment of a vehicle by the owner to an unlicensed,¹ incompetent,² or reckless³ driver, and (2) entrustment by the owner of defective vehicles.⁴ This discussion is limited to cases involving the doctrine as it has been applied in the first area, *i.e.*, entrustment of a vehicle to an unlicensed, incompetent, or reckless driver.

In *Mundy v. Pirie-Slaughter Motor Co.*,⁵ the Supreme Court of Texas stated the elements that one must prove in order to establish the owner's liability under the doctrine of negligent entrustment: (1) entrustment by the owner, (2) negligence in entrustment to (a) an incompetent or reckless driver which was (b) known or should have been known by the owner, (3) liability of the driver which (4) proximately resulted from the entrustment.

¹ *Spratling v. Butler*, 150 Tex. 369, 240 S.W.2d 1016 (1951); *Mundy v. Pirie-Slaughter Motor Co.*, 146 Tex. 314, 206 S.W.2d 587 (1947); *Seinsheimer v. Burkhart*, 122 S.W.2d 1063 (Tex. Comm. App. 1939), noted, 17 TEXAS L. REV. 506 (1939); *Mayer v. Johnson*, 148 S.W.2d 454 (Tex. Civ. App. 1941).

² *Russell Constr. Co. v. Ponder*, 143 Tex. 412, 186 S.W.2d 233 (1945); *McIntire v. Sellers*, 311 S.W.2d 886 (Tex. Civ. App. 1958) *error ref. n.r.e.*

³ *Murray v. Pasotex Pipe Line Co.*, 161 F.2d 5 (5th Cir. 1947).

⁴ *Russell Constr. Co. v. Ponder*, 143 Tex. 412, 186 S.W.2d 233 (1945); *Goff v. Lubbock Bldg. Products*, 267 S.W.2d 201 (Tex. Civ. App. 1953) *error ref. n.r.e.*; *Texas Co. v. Veloz*, 162 S.W. 377 (Tex. Civ. App. 1913).

⁵ 146 Tex. 314, 206 S.W.2d 587, 591 (1947).

II. ANALYSIS OF ELEMENTS OF NEGLIGENT ENTRUSTMENT

A. Entrustment By Owner

It is necessary to show that the driver of the vehicle obtained possession with permission of its owner or from someone with authority to grant such permission; *i.e.*, if the owner customarily lent his vehicle to the driver, but if the driver took the vehicle and drove it away without the owner's express permission on that particular journey there is no entrustment, and the owner is not liable for subsequent negligence by the driver.⁶ However, if all other elements are proved, the fact that at the time of the collision the driver had deviated from the scope of the bailment, agency, or designated route is no defense to the owner's liability.⁷

B. Negligence In Entrustment To (1) Incompetent Or Reckless Driver Which Was (2) Known Or Should Have Been Known By The Owner

In finding the requisite negligence on which to predicate the owner's liability in the "no driver's license" cases, Texas courts, in line with the weight of authority, hold that the violation of a statute⁸ making it unlawful for a person knowingly to permit an unauthorized individual to drive a motor vehicle is negligence *per se*.⁹ The basis for finding such a violation to be negligence *per se* is that the statute¹⁰ was designed to secure a minimum of competence and skill for drivers of automobiles and to fix a standard of conduct for persons lending their automobiles to others.¹¹ Furthermore, its principal aim is to afford some protection to the interests of other persons on or near public highways.¹² Some jurisdictions, however, hold that the violation of such a statute is mere evidence of negligence,¹³ or is *prima facie* proof of negligence.¹⁴

⁶ *Worsham-Buick Co. v. Isaacs*, 87 S.W.2d 252, 126 Tex. 546 (Tex. Comm. App. 1935); *Vaughn v. Watkins*, 344 S.W.2d 902 (Tex. Civ. App. 1961) *error ref. n.r.e.*; *Hanson v. Green*, 339 S.W.2d 381 (Tex. Civ. App. 1960) *error ref.*; *Long Floral and Nursery Co. v. Sherman*, 245 S.W. 467 (Tex. Civ. App. 1922).

⁷ *Spratling v. Butler*, 150 Tex. 369, 240 S.W.2d 1016 (1951); *Frontier Theatre v. Whisenant*, 291 S.W.2d 395 (Tex. Civ. App. 1956).

⁸ TEX. REV. CIV. STAT. ANN. art. 6687b-22 (1960).

⁹ *Carter v. Montgomery*, 226 Ark. 989, 992, 296 S.W.2d 442, 444 (1956); *Smith v. Thomas*, 126 Ind. App. 59, 130 N.E.2d 85 (1955); *Thomasson v. Winsett*, 310 S.W.2d 33 (Mo. Civ. App. 1958); *Mundy v. Pirie-Slaughter Motor Co.*, 146 Tex. 314, 206 S.W.2d 587 (1947); PROSSER, TORTS § 34 (2d ed. 1955).

¹⁰ TEX. REV. CIV. STAT. ANN. art. 6687b-22 (1960).

¹¹ *Mundy v. Pirie-Slaughter Motor Co.*, 146 Tex. 314, 319, 206 S.W.2d 587, 589 (1947).

¹² *Ibid.*

¹³ See, *e.g.*, *Le Blanc v. Pierce Motor Co.*, 307 Mass. 535, 30 N.E.2d 684 (1940).

¹⁴ See, *e.g.*, *Owens v. Carmichael's U-Drive Autos*, 116 Cal. App. 348, 2 P.2d 580 (1931), See also Annot., 69 A.L.R. 2d 978, 983 (1960).

Perhaps the greatest difficulty encountered in proving negligent entrustment arises when there is no *per se* negligence arising from violation of a statute. These cases require proof of the driver's general incompetency and of the owner's (defendant's) knowledge thereof at the time of the entrustment. A number of evidentiary requirements must be met establishing the substantive issues of incompetency and knowledge.

The *DWI cases*¹⁵ illustrate the most definitely established rules as to admissibility of evidence in proving general incompetency from repeated (habitual) intoxication. In the recent Fifth Circuit decision of *Cheaney Co. v. Gates*,¹⁶ the trial court had allowed the plaintiff to introduce pretrial interrogatories to which defendant had answered that prior to the present action he had been charged with and had pled guilty to a DWI violation. The court of appeals held the testimony inadmissible, saying: "In proving a Texas-based theory of driver incompetency arising out of a history of repeated incidents of driving while intoxicated, Texas holds that past convictions . . . (or of charges to which a defendant pleads guilty) . . . even of felony charges, of driving while intoxicated are not admissible."¹⁷ Relying on a contemporaneous decision of the Texas Supreme Court in *Compton v. Jay*,¹⁸ the court held that where the basis of a negligent entrustment action is general incompetency arising from repeated driving while intoxicated, this issue must be proved by *general reputation* evidence, not by proof of isolated instances.¹⁹ Though not a negligent entrustment case, *Compton* was concerned with admissibility of evidence of prior convictions for DWI for the purpose of impeaching the credibility of the defendant or for corroborating other evidence which tended to show that the defendant was intoxicated at the time of the accident. The *Compton* case was an action against the *driver* for personal injury arising out of an automobile accident. The court in the *Cheaney* case held that the underlying theory of the *Compton* decision is substantially the equivalent of a negligent entrustment claim. The court went on to say that if prior DWI convictions cannot be used for the purpose of impeachment, certainly the prior DWI charge in the *Cheaney* case could not be admitted to prove the substantive issue of negligent entrustment. Thus, only general reputation evidence can be admitted in establishing incompetency in the DWI cases.

¹⁵ The phrase, "DWI cases," as used in this context, does not refer to DWI prosecutions, but to negligent entrustment actions in which liability is based on the driver's intoxication.

¹⁶ 346 F.2d 197 (5th Cir. 1965).

¹⁷ *Id.* at 206.

¹⁸ 389 S.W.2d 639 (Tex. 1965).

¹⁹ *Cheaney Co. v. Gates*, 346 F.2d 197 (5th Cir. 1965).

In *Cheaney*, while disallowing specific prior DWI convictions to prove driver incompetency, the court said by way of dicta that "for other types of driver incompetence, specific prior instances would certainly be proper."²⁰

The general rule in Texas has been that evidence of a driver's previous accidents or instances of negligence is inadmissible in a civil action arising out of a motor vehicle accident, because such evidence is immaterial in the determination of the driver's negligence on the occasion in question.²¹ Further, the analysis of two eminent Texas writers is that "character for care or negligence (competency), when such character is in issue has always been regarded as provable by reputation."²² Thus, it would appear that for other types of incompetency the general rule for admissibility of evidence of such incompetency would be the same as the ruling in the DWI situations. The *Cheaney* dicta, however, expressly contradicts this rule. The court cited several Texas cases that have recognized the admissibility of prior automobile accidents or specific instances of recklessness or carelessness, as tending to show, the driver's underlying general competency as distinguished from negligence at the time of the accident in question.²³ However, the cases admitting specific prior instances of accidents, traffic offenses, and convictions have been those in which either gross negligence was alleged²⁴ by the plaintiff or where all the evidence and testimony was concerned with the driver's competency.²⁵

In establishing that the entrustor knew or should have known of the driver's incompetence, the courts have generally adhered to the "reasonable man" standard, *i.e.*, if a reasonable man by exercise of due care could have ascertained that the driver was generally incompetent to drive, then such owner is negligent in entrusting the

²⁰ *Id.* at 207.

²¹ "Generally, similar facts and transactions are inadmissible, even if of an identical nature to prove a specific fact." *Houston Elec. Co. v. McElroy*, 153 S.W.2d 617, 618 (Tex. Civ. App. 1941). See also *Cameron v. Downing*, 147 S.W.2d 963 (Tex. Civ. App. 1941); *Davidson v. Swanson*, 24 S.W.2d 776 (Tex. Civ. App. 1930); *Baker v. Schoeder*, 198 S.W. 394 (Tex. Civ. App. 1917).

²² McCORMICK AND RAY, *TEXAS LAW OF EVIDENCE* §§ 1502, 1506 (2d ed. 1956).

²³ *Union Transports, Inc. v. Braum*, 318 S.W.2d 927 (Tex. Civ. App. 1958); *McIntire v. Sellers*, 311 S.W.2d 886 (Tex. Civ. App. 1958) *error ref. n.r.e.*; *Allen v. Bland*, 168 S.W. 35 (Tex. Civ. App. 1914) *error ref. n.r.e.*

²⁴ The gross negligence allegation is directed to the driver's negligence, not to the entrustor's negligence, *i.e.*, when the driver is guilty of several or numerous acts of negligence while within the entrustment. Thus, if plaintiff's pleadings are sufficient to present the issue of gross negligence, then evidence of prior traffic violations of the driver is admissible on the issue of gross negligence itself on the theory that the driver was a reckless, careless and incompetent driver. *Union Transports, Inc. v. Braum*, 318 S.W.2d 927 (Tex. Civ. App. 1958).

²⁵ Cases "where all the evidence and testimony is concerned with the driver's competency" arise when the entrustor entrusts his vehicle to one whose appearance or conduct is such as to indicate his incompetency or inability to operate the vehicle with due care. Here, specific

vehicle.²⁶ It follows that if specific prior acts are allowed in proving the driver's general incompetence in the enumerated non-DWI cases, prior acts may also be admitted into evidence to determine whether the entrustor (defendant) knew or should have known of such acts at the time of the entrustment.

C. Liability Of Driver

The necessity of showing that the driver was liable is a prerequisite to liability of an entrustor who allowed the unauthorized or incompetent person to operate a vehicle.²⁷ This is such a fundamental requirement in establishing negligent entrustment that attorneys may overlook its significance. It matters little whether the driver has a license, whether he is intoxicated at the time of the accident, or whether he is notorious for recklessness if at the time of the accident it is not proved that the driver's negligence was the proximate cause. It should be remembered, however, that in the "no driver's license" cases, the establishment of proximate cause is aided by the fact that negligence of the driver is established as a matter of law, for in Texas, violation of a criminal statute is negligence *per se*.²⁸

D. Entrustment Must Be The Proximate Cause Of Plaintiff's Damages

Though a negligent act of the driver is the cause of damages, there must be proof that the act proximately resulted from the owner's entrustment of the vehicle. To constitute the entrustment a proximate cause, the defendant entrustor should be shown to be reasonably able to anticipate that an injury would result as a natural and probable consequence of the entrustment.²⁹ It must be observed, however, that where there is a violation of the statute prohibiting unauthorized persons to drive, and where it is further shown that the negligence of the operator caused the damage to the plaintiff, the necessary causal connection is shown between the negligence of the owner in lending the automobile and the damage to the plaintiff.³⁰ Thus, the Texas rule that the owner is negligent *per se* for violating

instances of carelessness or recklessness are admissible in proving both the driver's incompetency and the entrustor's knowledge thereof. *McIntire v. Sellers*, 311 S.W.2d 886, 895 (Tex. Civ. App. 1958) (concurring opinion) *error ref. n.r.e.*

²⁶ *Mundy v. Pirie-Slaughter Motor Co.*, 146 Tex. 314, 206 S.W.2d 587, 591 (1947).

²⁷ *Id.* at 591.

²⁸ *Id.* at 590.

²⁹ *Frontier Theatre v. Whisenant*, 291 S.W.2d 395 (Tex. Civ. App. 1956).

³⁰ *Railway Express Agency v. Knebel*, 226 S.W.2d 922 (Tex. Civ. App. 1949), following the reasoning of the *Mundy* case, *i.e.*, it is negligence *per se* to entrust a car to a driver with knowledge that he does not have a license, knowledge being determined by the "reasonable man" standard.

the statute prohibiting unauthorized persons to drive aids considerably in establishing proximate causation.

It should be noted that contributory negligence of the plaintiff is a defense to a cause of action based on negligent entrustment.³¹ Also, the stipulation that the doctrine of *respondeat superior* applies is an effective bar to any evidence of the driver's prior recklessness or negligence, for in *respondeat superior* cases all that is needed to hold defendant (employer) liable is proof that the driver (employee) was acting within the scope of his employment. Proof of the competency of the driver is immaterial and inadmissible.³²

III. Conclusion

Though the *Mundy* decision clearly delineates the elements of negligent entrustment in Texas, one can readily perceive the practical difficulties encountered and the thoroughness required in establishing those elements. The apparently conflicting rules concerning admissibility of evidence of past specific instances of negligence or incompetence is a striking example of the interrelationship of the elements. If the courts follow the *Cheaney* dicta to the effect that past specific acts of the driver are admissible to prove incompetence in non-DWI cases, such evidence might easily prejudice the jury on the issue of the driver's specific negligence at the time of the accident. It seems peculiar indeed to allow past specific instances of negligence to be used to hold the entrustor liable, when such evidence supposedly could not be admitted had the suit been merely to establish the negligence of the driver.³³

Can we assume that admission into evidence of prior specific instances of negligence is meant to be peculiar to the establishment of negligent entrustment in non-DWI cases? The *Cheaney* decision does not specifically so limit its application. In fact, the *Cheaney* dicta conflicts with the long established and fundamental policy of law—that prior specific instances of negligence or prior convictions of a particular offense have no relevancy to the offense or occurrence under consideration. If the courts are attempting to limit the admissibility of such evidence to negligent entrustment cases a clearly defined policy should be formulated. Reference to the provisions of article

³¹ *Hardage v. Rouly*, 349 S.W.2d 616 (Tex. Civ. App. 1961) *error ref. n.r.e.*

³² *Patterson v. East Texas Motor Freight Lines*, 349 S.W.2d 634 (Tex. Civ. App. 1961) *error ref. n.r.e.*

³³ See note 22 *supra*.