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Feature Article

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Negligent Entrustment of Fuel? Not the Law in Illinois… For Now

In 2005, the Supreme Court of Tennessee recognized that a gas station that sold fuel to a visibly intoxicated driver may be liable for ensuing harm that driver caused by his or her driving under the influence. *West v. East Tenn. Pioneer Oil Co.*, 172 S.W.3d 545, 556 (Tenn. 2005). For over 15 years, Tennessee was alone in this regard. In 2021, however, New Mexico joined Tennessee as the second state to hold that a sale of fuel to a noticeably intoxicated driver could give rise to liability for negligent entrustment of chattel. *Morris v. Giant Four Corners, Inc.*, 2021-NMSC-028, *10. In deciding the issue, the high courts of both states cited to the Restatement (Second) of Torts' definition of negligent entrustment of chattel as persuasive authority to support their decisions. *West*, 172 S.W.3d at 555; *Morris*, 2021-NMSC-028, *9-11. Illinois recognizes the tort of negligent entrustment, as defined in the Restatement (Second) of Torts §§ 308 and 390, but liability is typically limited to the negligent entrustment of an automobile and does not extend to sale of fuel or other "enabling instrumentalities," which merely allows the vehicle to operate. *See, e.g., Zedella v. Gibson*, 165 Ill.2d 181, 186 (Ill. 1995). To date, Illinois courts have not directly confronted the issue of whether a sale of fuel to an intoxicated driver can give rise to direct or vicarious liability under the doctrine of negligent entrustment. However, future plaintiffs harmed by drunk drivers may seek inspiration from the emerging caselaw in Tennessee and New Mexico. This is especially true under circumstances where the tortfeasor driver lacks resources or insurance coverage to fully compensate a plaintiff. This presents the question; will Illinois join Tennessee and New Mexico in recognizing negligent entrustment of fuel?

Two States Recognize Negligent Entrustment of Fuel

Tennessee Finds Tortious Sale of Fuel Under Negligent Entrustment of Chattel

On June 22, 2000, a visibly intoxicated Brian Tarver entered an Exxon convenience store and gas station operated by the East Tennessee Pioneer Oil Company. *West*, 172 S.W.3d at 548. Tarver bypassed a line of patrons waiting to be checked out to directly ask the store clerk if she would "go get [him] some beer." *Id.* The clerk later testified that Tarver smelled of alcohol and was staggering as he walked. *Id.* The clerk refused to sell Tarver beer because she believed he was already intoxicated. *Id.* Tarver proceeded to swear, make threatening statements, and generally cause a scene, before placing three dollar bills on the counter and stating, "we need gas." *Id.* Tarver then left the store and, with the assistance of two other gas station employees, dispensed three-dollars' worth of gasoline into his vehicle's tank and drove away. *Id.* at 548-49. One of the two other employees noted she could "smell it on him," and "when we seen him walk away, [we] could tell he was drunk." *Id.* Tarver traveled 2.8 miles from the station, reportedly with his headlights off and in the wrong lane of traffic, before striking another vehicle head on. *Id.* at 549. Notably, a mechanical engineering professor, Dr. Jeffrey Hodgson, determined that "at the time Tarver stopped at the defendant's store his vehicle contained only

enough fuel to travel another 1.82 miles. Therefore, without the three dollars' worth of gas he obtained at the store, Tarver would have 'run out' of gasoline approximately one mile before reaching the accident scene." *Id.*

The two occupants of the vehicle with which Tarver collided sustained serious injuries and brought suit against East Tennessee Pioneer Oil Company alleging, *inter alia*, that "furnishing gasoline to an obviously intoxicated driver constituted negligent entrustment." *Id.* at 553. The trial court dismissed the claim of negligent entrustment of fuel at summary judgment, noting that "[p]laintiffs' claim for relief is not recognizable under the law as it stands right now." *Id.* at 549-50. On appeal, the appellate court affirmed the dismissal, because, although negligent entrustment of chattel is a viable cause of action in the state, "a supplier of a chattel who relinquishes all ownership rights, such as the present defendant, cannot be liable for negligent entrustment." *Id.* at 553-54.

The Supreme Court of Tennessee disagreed. In its decision, the court noted that Tennessee relied on the Restatement (Second) of Torts' definition of negligent entrustment of chattel:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason 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.

Restatement (Second) of Torts, § 390 (1965). A comment in the Restatement notes that § 390 "applies to sellers, lessors, donors or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for a consideration." Restatement (Second) of Torts, § 390 cmt. a (1965) (emphasis added). The Tennessee Supreme Court also observed that at least 31 other states, including Illinois, relied on § 390 when defining common law negligent entrustment of chattel. *West*, 172 S.W.3d at 555, n.7 (citing *King v. Petefish*, 185 Ill. App. 3d 630 (4th Dist. 1989).

Based on § 390, the court ultimately held that "[l]iability for negligent entrustment is founded upon the supplier's direct negligence in entrusting the chattel to an incompetent user," and "[c]ontrol therefore need only exist at the time of the entrustment for a prima facie case of negligent entrustment." *Id.* at 555. In conclusion, the court found that gas station employees "owed a duty of reasonable care to persons on the roadways…when selling gasoline to an obviously intoxicated driver." *Id.* at 556. By breaching that duty, the gas station itself became liable under an ordinary theory of negligence as well as negligent entrustment of fuel. *Id.*

Fifteen Years Later, New Mexico Joins Tennessee

After a night of drinking, extending into the morning hours of December 30, 2011, Andy Denny ran out of gas while driving. *Morris*, 2021-NMSC-028, *2. Denny and a passenger then walked to a nearby gas station, operated by Giant Four Corners, Inc., to purchase fuel. *Morris*, *2. A clerk at the store noted Denny and his companion were intoxicated and, initially, refused to sell them anything. *Id.* Eventually, however, the clerk sold Denny a gallon of water and one gallon of fuel. *Id.* The store did not sell fuel canisters, so Denny emptied the gallon of water to use as a receptacle for the purchased gasoline. *Id.* After filling the container, Denny and his passenger left on foot to return to the vehicle. *Id.* Denny subsequently returned to the gas station with his automobile and purchased nine more gallons of gasoline. *Id.* Denny left the store, dropped off his passenger, and returned to the highway. *Id.* As he drove, Denny's vehicle crossed the highway centerline and collided with another vehicle, driven by Marcellino Morris, who was killed in the collision. *Id.*

Franklin Morris, acting as representative of Marcellino Morris' estate, brought suit against Giant Four Corners, Inc., in the U.S. District Court for the District of New Mexico, alleging the gas station was vicariously liable for its employee's

negligent entrustment of fuel to the intoxicated driver. *Id.* at *4. The district court, sitting in diversity jurisdiction, noted that New Mexico recognizes negligent entrustment of chattel but ultimately granted Four Corners' motion for judgment on the pleadings as no New Mexico case or statute recognized a duty "to refrain from selling gasoline to an allegedly intoxicated driver." *Id.* at *5. Morris appealed the district court's dismissal to the Court of Appeals, Tenth Circuit, which in turn, certified the question of whether a duty existed for consideration by the Supreme Court of New Mexico. *Id.*

> The Tenth Circuit asks this Court to address, in the context of our adaption of negligent entrustment of chattel, whether a vendor of gasoline has a duty to refrain from selling gasoline to a driver it knows or should know is intoxicated. To answer this question, we must examine whether Defendant owed a duty of care to Plaintiff to refrain from selling gasoline to a driver Defendant knew or had reason to know was intoxicated.

Id. at *5-6. In analyzing whether a duty of care existed, the Supreme Court of New Mexico examined both § 390 (relied on by the Supreme Court of Tennessee in *West*) and § 308 of the Restatement. *Id.* at *9-10.

Although the court noted that "no New Mexico cases have applied the doctrine of negligent entrustment of chattel, as described by the Restatement, outside the context of the negligent entrustment of automobiles," it ultimately concluded that "the application of negligent entrustment of chattel to the sale of gasoline is consistent with the Restatement." *Id.* at *11, 17. New Mexico, the court reasoned by analogy, recognized that "entrustors owe a duty to refrain from voluntarily supplying a vehicle to an entrustee who is intoxicated," and "[g]asoline, alcohol, and the vehicle itself are all enabling instrumentalities involved in intoxicated driving." *Id.* at *19, 25. Consequently, "[p]roviding gasoline to an intoxicated driver is like providing car keys to an intoxicated driver." *Id.* at 25. The majority opinion concluded, unequivocally, that "under New Mexico law and the doctrine of negligent entrustment of chattel, a commercial gasoline vendor owes to a third party using the roadway a duty of care to refrain from selling gasoline to a driver the vendor knows or has reason to know is intoxicated." *Id.* at *37.

Illinois Recognizes Negligent Entrustment of Automobiles, but Not Fuel

Like New Mexico and Tennessee, Illinois recognizes the tort of negligent entrustment of chattel. In Illinois, "[a]n 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.'" *Zedella v. Gibson*, 165 Ill. 2d 181, 186 (Ill. 1995) (quoting *Teter v. Clemens*, 112 Ill. 2d 252, 257 (Ill. 1986)). Although some items, like automobiles, are not dangerous *per se*, they may satisfy the requirement if they become dangerous when operated by someone who is "unskilled…incompetent, inexperienced, or reckless." *Id.* In the context of negligent entrustment of an automobile, the two primary considerations are "whether the owner of the vehicle entrusted the car to an incompetent or unfit driver, and . . . whether the incompetency was a proximate cause of a plaintiff's injury." *Evans v. Shannon*, 201 Ill. 2d 424, 434 (Ill. 2002).

Illinois Defines "Entrustment" Based on Right of Control

When hearing negligent entrustment cases, Illinois courts typically rely on § 308 of the Restatement, rather than § 390. *See*, *e.g.*, *Zedella*, 165 Ill. 2d at 186 ("Section 308 of the Restatement (Second) of Torts provides the proper threshold for determining whether an entrustment has occurred in Illinois."), *but cf. King v. Petefish*, 185 Ill. App. 3d

630, 638 (4th Dist. 1989) ("We find section 390 of the Restatement is appropriately applied to negligent entrustment cases of the type before us."). Section 308, "Permitting Improper Persons to Use Things or Engage in Activities," reads:

> 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 to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Restatement (Second) of Torts, § 308 (1965). Comment a to § 308 clarifies the meaning of the phrase "under the control" as follows:

> The words "under the control of the actor" are used to indicate that the third person is entitled to possess or use the thing or engage in the activity only by the consent of the actor, and that the actor has reason to believe that by withholding consent he can prevent the third person from using the thing or engaging in the activity.

Restatement (Second) of Torts, § 308, cmt a (1965). "[F]rom an examination of section 308 and comment a, entrustment must be defined with reference to the right of control of the subject property." *Zedella*, 165 Ill.2d at 187. In the context of the sale of gasoline, the gas station initially maintains exclusive right of possession and control of the gasoline. However, once the sale is complete, the gas station no longer has any ownership interest in the gasoline. The question is, therefore, if control is relinquished prior to injury, can a gas station be held liable for negligent entrustment? The text of § 308 suggests otherwise. Most pointedly, § 308 defines negligent entrustment as allowing a "third person to use a thing or engage in an activity which *is* under the control of the actor." Restatement (Second) of Torts, § 308 (1965).

Entrustment, under § 308 of the Restatement, encompasses transactions whereby the entrustor maintains a superior right of control of the entrusted item. The prototypical example is the loan of an automobile. This inference is reinforced by the Restatement itself, which offers four illustrations of instances of negligent entrustment—all involving the permissible use of a vehicle by someone other than the vehicle's owner. Restatement (Second) of Torts, § 308, Illustrations 1-4 (1965), *see also*, *Zedella*, 165 Ill. 2d at 187 ("In essence, if the actor does not maintain an exclusive or superior right of control, no entrustment of the property can occur."). A gas station, which relinquishes all right of control of the chattel upon completion of the sale, therefore would not be liable under § 308, at least as Illinois has applied it in the past. Further, an entrustor may deny or revoke permission to use the object at any point and thereby "prevent the third person from using the thing." Fuel, however, merely facilitates the operation of an automobile, its sale does not constitute consent to use the automobile itself. The consent element is lacking because a vendor has no right to deny a driver the use of his or her own vehicle.

Illinois Has Abstained from Extending a Duty to Analogous Circumstances

Illinois has never recognized a duty of care owed by fuel vendors to motorists and pedestrians who may be harmed by intoxicated, reckless, or incompetent drivers. In the past, Illinois courts have expressed concern for recognizing similar duties under a theory of negligent entrustment, for fear they would be too-far reaching. For example, Illinois has found that, for employers, there is no "additional burden of inquiry upon the entrustor of an automobile . . . [which requires] the imposition of a general legal obligation to check the driver's license of an employee of an independent contractor to whom one entrusts one's vehicle, barring some reason to know that the employee may be incompetent to operate that

vehicle." *Evans*, 201 Ill. 2d at 438. The *Evans* court observed "[a] duty so imposed would have far-reaching consequences, logically extending to every person who takes his or her vehicle for repair or servicing." *Id.*

In a closely analogous situation, the Illinois Appellate Court Second District declined to recognize a duty of care for a mechanic that repaired and then returned a vehicle to a visibly intoxicated driver. *Umble v. Sandy McKoe & Sons, Inc.*, 294 Ill. App. 3d 449, 454 (Ill. App. Ct. (2d) 1998). In *Umble*, a noticeably intoxicated Jerome Butzen brought his car to defendant to fix a leaking tire and replace a headlight. *Id.* at 450-51. The defendant completed the repairs and, after Butzen paid for the service, returned to vehicle to his possession. *Id.* at 451. Shortly after returning the keys, Butzen collided with another vehicle, killing its occupant, Philip Umble. *Id.* Umble's next-of-kin brought suit against the repair shop, alleging it "was negligent in giving car keys to an obviously intoxicated driver." *Id.* The circuit court dismissed the claim under 735 ILCS 5/2-615, for failure to state a claim.

On appeal, the Second District noted that the defendant was a bailee for hire, and thus did not maintain a superior right of control of Butzen's vehicle. *Id.* at 454. "Once Butzen paid for the repairs and demanded the return of his keys, defendant had no discretion to refuse without being found liable for conversion." *Id.* at 454-55. Although the car keys in *Umble* constituted an enabling instrumentally, which allowed the noticeably drunk Butzen to operate the vehicle, the repair shop could not be held liable for the subsequent harm Butzen caused while driving under the influence. *Id.* at 455. In analyzing the plaintiff's claim under a theory of negligent entrustment, the appellate court favorably quoted a New Jersey Superior Court, which found no duty existed which would allow the bailee to prevent a driver from using his or her own vehicle:

> One problem with such an extension of that particular form of a duty is that the standard is so broad that it would conceivably apply to gas station attendants, toll booth collectors, parking lot attendants, repair services, and onlookers who may have observed the participants get into a vehicle driven by an intoxicated person.
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> Further, such an over-broad duty would open a Pandora's Box of potential liability and responsibility problems. Potential liability would then exist (on the passenger attempting to prevent the owner from driving) for conversion of another's property, or even theft or robbery charges. There has been no indication or consideration of a concomitant privilege for the actor for being honestly mistaken about a person's sobriety if one takes the keys or automobile from the rightful owner of a vehicle. There is also the potential mischief of affording a defense to potential or actual perpetrators of criminal acts.

Id. at 453-54 (quoting *Lombardo v. Hoag*, 269 N. J. Super. 36, 53 (1993)). As Justice Vigil emphasized in her dissenting opinion in *Morris*, New Mexico has now adopted a similarly broad duty and now must grapple with its contours. *Morris*, 2021-NMSC-028, *15-18.

Negligent Entrustment of Fuel Creates Far-Reaching, Ill-Defined Duty of Care

The *Umble* opinion highlighted a potential problem in recognizing a duty to refrain from returning a vehicle to its intoxicated owner—the duty would extend well beyond the circumstances at issue in that case. The same logic applies to recognizing negligent entrustment of any "enabling instrumentalities," such as fuel. If, as New Mexico and Tennessee have recognized, a vendor may be liable for negligently entrusting fuel to a visibly intoxicated driver, would a vendor who sold a car battery to a visibly intoxicated driver also be liable for any resultant harm? Further still, imagine the same

facts in *Morris*, except a tow truck was called and towed Denny's car to the gas station where he filled up and drove off. Although the tow truck operator did not entrust any chattel to the intoxicated driver, the service itself would have enabled Denny to continue operating his vehicle while intoxicated. Would the tow-truck operator also be negligent? Probably not if he was merely a bailee, as in *Umble*, but possibly yes if he was a vendor under *Morris*.

The duty articulated in *Morris* concerns all potential customers a gasoline vendor knows or has reason to know is intoxicated. *Morris*, 2021-NMSC-028, *9. In her dissenting opinion, Justice Vigil noted several potential pitfalls regarding the recognition of such a duty of care. Namely, the duty of care to not sell fuel to intoxicated drivers imposes an affirmative duty on all potential vendors to investigate 1) whether a customer is presently intoxicated, 2) whether the fuel is intended to be used in an automobile, and 3) whether the intoxicated customer is the driver, or a mere passenger, of the automobile for which the fuel is intended. *Id.* at *15 (Vigil, J. dissenting). Yet, intoxication is not always readily apparent and can be confused with certain medical conditions. *Id.* at *15 (Vigil, J. dissenting) (noting that "many medical conditions can mimic drug or alcohol impairment," including "brain tumors, brain damage, some diseases of the inner ear, stroke, diabetes, conjunctivitis, shock, and multiple sclerosis"). Moreover, there is no apparent duty to prevent sale of fuel to an intoxicated customer if the purpose of the fuel is for any other reason besides operating an automobile. As such, unless the purpose is readily apparent, vendors in New Mexico now must investigate the customer's intentions with the purchased fuel, before permitting the sale. *Id.* at *15. Perhaps more troubling, Justice Vigil noted that the duty would incentivize invidious discrimination against individuals with medical conditions that could impair driving ability, just to avoid the possibility of litigation or as a pretext for racial animus. *Id.* at *11.

Lastly, the circumstances under which the Tennessee and New Mexico courts recognized the duty were based on irregular encounters between vendors and the intoxicated motorists. In *West*, Tarver entered the store, attempted to buy more alcohol, made a memorable scene, requested three dollars in fuel from an employee, and interacted with at least three employees, before leaving the gas station. *West*, 172 S.W.3d at 548-49. In *Morris*, Denny was forced to walk to the gas station after running out of gas, purchase a gallon container of water and gasoline from a store clerk, and dispense his purchased gallon of gas into the emptied water jug. *Morris*, 2021-NMSC-028, *2-3. In both cases, the intoxicated drivers directly interacted with store employees, who were able to unequivocally observe their state of intoxication. Most gas sales, however, occur with no direct involvement from station employees. Motorists typically purchase gasoline directly from the pump, dispense the fuel, and leave the station without ever interacting with an employee. Under these more common circumstances, it is much more difficult to determine how or if vendors would know that their customers were impaired, let alone the cause of that suspected impairment.

Even if employees can observe customers at the pumps through a window or video surveillance, such limited observation may not be enough to accurately gauge a driver's sobriety. In cases where the employee denies ever directly observing the intoxicated customer, can a jury reasonably find the employee *should have known* the driver was drunk without actually seeing them? Depending on the outcome, will station owners react by implementing measures designed to ensure sobriety before fuel is dispensed? This would further the laudable goal of preventing motorists from driving under the influence, to an extent, but might also hinder most drivers, who are not driving under the influence. More concerning, if liability turns on actual observation, would fuel vendors by incentivized to limit visibility of pumps, to ensure employees are *unable* to observe customers as they dispense fuel? The latter method may help to prevent liability by ensuring employees did not and could not have known any individual customer was intoxicated but would not help to prevent intoxicated motorists from purchasing fuel. Further still, a station's "willful blindness" may create additional safety concerns and open the door to further liability.

Conclusion

Illinois, at present, does not recognize a duty of care between fuel vendors and third-party motorists or pedestrians who may be injured by intoxicated drivers. Although some Illinois appellate courts have cited § 390 of the Restatement, (the comments to which suggest an extension of liability for negligent entrustment to vendors) it has never been expressly adopted by the Illinois Supreme Court. Rather, the Supreme Court of Illinois has explicitly found § 308 to provide the proper test for determining whether an "entrustment" has occurred. *Zedella*, 165 Ill. 2d at 186. Under that section, entrustment turns on whether the defendant had a superior right of control of a vehicle or dangerous item, an element arguably lacking in the context of a sale of fuel.

Further, at least one Illinois court has been reticent to acknowledge the duty of a bailee to withhold an enabling instrumentality to a vehicle's owner, partially out of concern that the created duty would be "so broad that it would conceivably apply to *gas station attendants*, toll booth collectors, parking lot attendants, repair services, and onlookers who may have observed the participants get into a vehicle driven by an intoxicated person." *Umble,* 294 Ill. App. 3d at 453 (emphasis added). Justice Vigil expressed similar concern that a sale of fuel could constitute "negligent entrustment." She explained the duty recognized by the majority of the New Mexico Supreme Court created an overly broad and ill-defined duty, under which vendors now had an affirmative duty to investigate the condition of their customers as well as the intended use of the fuel. *Morris*, 2021-NMSC-028, *15-17. (Vigil, J. dissenting).

Drunk driving is a grave matter, the deadly results of which are felt throughout the United States. The Illinois legislature has authority to recognize a cause of action against a vendor, based on the tortious acts of an intoxicated customer made possible by the vendor's actions or inactions. At present, Illinois has limited such liability to vendors of alcoholic beverages, owners and lessors of the property where the alcohol was sold, and hotels that knowingly provide rooms to minors who consume alcohol on the premises. 235 ILCS5/6-21(a). The Illinois Dram Shop Act, however, does not extend to fuel vendors. New Mexico and Tennessee courts have recognized a cause of action for the negligent entrustment of fuel to intoxicated drivers, but it remains unclear whether Illinois will do the same. If confronted with the question, Illinois courts must look both to precedent and policy concerns to determine whether it would be appropriate to recognize a fuel vendor's duty to withhold gasoline from drivers they know, or should know, are intoxicated. However, given the practical implications of creating such a broadly-applicable and vaguely-defined duty, courts should also consider whether the issue is better left to the Illinois General Assembly.

About the Author

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