IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

ROSA PEREZ-MELCHOR, Individually and as Personal Representative of JOSE ALFREDO TOVAR-CASTILLO, and as Parent and Natural Guardian of Her Minor Children, NORAYDE TOVAR PEREZ and ANDRES TOVAR PEREZ; MARTHA MARTINEZ, and her husband, ANGEL MARTINEZ,	)	C. A. No. 04C-05-269 RRC
Plaintiffs,	)	
v.	)	
MEHDI C. BALAKHANI; Dr. MEHDI BALAKHANI and LYNN BALAKHANI, his wife,	)	
Defendants.	)	

Submitted: July 11, 2005
Decided: September 21, 2005

On Defendants Dr. Mehdi Balakhani's and Lynn Balakhani's
Motion to Dismiss Count III.
DENIED.

MEMORANDUM OPINION

Frederick S. Freibott, Esquire, The Freibott Law Firm, P.A., Wilmington, Delaware, Attorney for Plaintiffs.

Michael I. Silverman, Esquire, Silverman, McDonald & Friedman, Wilmington, Delaware, Attorney for Defendant Mehdi C. Balakhani.

Daniel A. Griffith, Esquire, and Jos. Scott Shannon, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware, Attorneys for Defendants Dr. Mehdi Balakhani and Lynn Balakhani.

COOCH, J.

I. INTRODUCTION

This case arises from an automobile collision occurring on August 21, 2003, resulting in the death of Jose Alfredo Tovar-Castillo and injuries to Plaintiff Martha Martinez. Plaintiffs originally filed this action solely against Mehdi C. Balakhani ("Mehdi"), the alleged tortfeasor and the driver of one of the vehicles involved in the collision. The Complaint was later amended to add Count III, alleging negligent entrustment by Mehdi's parents, Dr. Mehdi Balakhani and Lynn Balakhani, his wife. Count III is the only count in which Dr. and Mrs. Balakhani are defendants. Dr. Balakhani and Lynn Balakhani have filed this Motion to Dismiss Count III of Plaintiffs' Amended Complaint.

The issue raised by this motion is whether the parents of an adult child can potentially be "suppliers" or "entrustors" of a negligently entrusted instrumentality when they gave money to their adult son to purchase an automobile, knowing, among other things, that he then had a drug and alcohol problem, a poor driving record and that he had been specifically excluded as an insured under their automobile insurance policy, but where the parents had no legal control of the automobile after supplying their son with the money to purchase the automobile.

This Court finds, under the facts of this case, that it was unnecessary, as a matter of law, for moving defendants to have had "control" of the automobile at the time of the accident. The Moving Defendants may potentially be found to be the "suppliers" or "entrustors" of the automobile that was involved in the fatal

accident by a jury sitting as trier of fact if the tortfeasor's later conduct was foreseeable by Moving Defendants. Defendants' motion to dismiss is DENIED.

II. FACTS

The key facts, as alleged in the Amended Complaint, are as follows: Mehdi had a history of drug use and poor driving prior to the accident, of which his parents were aware. He had had his license suspended for two years as a consequence of his drug use on board a Greyhound bus on February 20, 2001.[1] Dr. and Mrs. Balakhani posted bail for him after that incident.[2] On April 20, 2003, Mehdi, while driving his 1984 Mercedes Model 300, struck a legally parked automobile in the 2900 block of West 4th Street and fled the scene.[3] Mehdi was apprehended and taken to the police station. The investigating officer found that Mehdi did not remember how he ended up at the police station and that Mehdi was uncooperative.[4] Mehdi later pled guilty to inattentive driving and failure to report an accident.[5] Apparently because of his poor driving record, Montgomery Mutual Insurance Company, Dr. and Mrs. Balakhani's automobile insurance company, would not renew its policy with Dr. and Mrs. Balakhani unless Mehdi was

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[1] Pls. Am. Compl., D.I. 18, ¶ 30.

[2] *Id.* at ¶ 31.

[3] *Id.* at ¶ 33.

[4] *Id.* at ¶ 36.

[5] *Id.* at ¶ 37.

excluded from the policy.[6] He was thereupon excluded from the policy at some point prior to the automobile accident. The Balakhanis apparently did not allow Mehdi to drive their vehicles.

Mehdi was apparently not employed in the summer months of June, July and August 2003.[7] Sometime during the summer of 2003, Mehdi purchased a 1996 white Cadillac from his uncle, Todd Davis, of Florida.[8] Mr. Davis was Mrs. Balakhani's brother. The purchase price of the vehicle was $7,000.[9] Dr. and Mrs. Balakhani provided the funds for Mehdi to purchase the vehicle.[10] The vehicle was then solely owned and operated by Mehdi.

On August 21, 2003, at 4:20 a.m., Mehdi, driving the Cadillac, collided with an automobile operated by Jose Alfredo Tovar-Castillo ("Tovar") as Tovar waited at a red traffic light.[11] As a result of the collision Tovar suffered serious bodily injuries and died approximately 45 minutes later.[12] Tovar's passenger, Martha

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[6] *Id.* at ¶ 40.

[7] *Id.* at ¶ 43.

[8] *Id.* at ¶ 41.

[9] *Id.* at ¶ 42.

[10] *Id.* at ¶ 42.

[11] *Id.* at ¶ 7.

[12] *Id.* at ¶ 7-8.

Martinez, also suffered serious bodily injury.[13] At the time of the collision Mehdi was intoxicated, with a blood alcohol content greater than the legal limit of .10.[14] Mehdi was an adult at the time of the accident, having reached at least 19 years of age by August 2003.

III. DISCUSSION

A. Standard of Review

When deciding a motion to dismiss "all allegations in the complaint must be accepted as true,"[15] and the Court must determine "whether a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[16]

B. Plaintiffs Have Set Forth Facts Sufficient to Survive Defendants' Motion to Dismiss

1. The Two Different Approaches in the Tort of Negligent Entrustment with Respect to the "Supply" or "Entrustment" of an Automobile.

The general standard for negligent entrustment is set forth at § 390 of the Restatement (Second) of Torts (1965). That section reads, in pertinent part:

> 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

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[13] *Id.* at ¶ 19.

[14] *Id.* at ¶ 10.

[15] *Plant v. Catalytic Constr. Co.,* 287 A.2d 682, 686 (Del. Super. Ct. 1972), *aff'd* 297 A.2d 37 (Del. 1972).

[16] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

> 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.

This Court has held, similarly, that "the elements of negligent entrustment are '(1) entrustment of the automobile, (2) to a reckless or incompetent driver whom, (3) the entrustor has reason to know is reckless or incompetent, and (4) resulting damages.'"[17] The only element relevant to this motion is whether Dr. and Mrs. Balakhani can potentially be found to have "supplied" or "entrusted" the chattel (the Cadillac) to their adult son, Mehdi.

Courts have generally taken two divergent approaches regarding this element of "control." One authority has summarized the two theories as follows:

> Those courts relieving donors of vehicles to adults of liability have asserted the rationale that the vicarious liability of a donor for putting a motor vehicle in possession of another person known to be unfit to drive, with the foreseeable and probable consequence that he will injure somebody, is at most a secondary liability that ought not be extended to charge a person having no control over the motor vehicle which is owned by one sui juris who actually commits the injurious wrong (citation omitted). Other courts have not hesitated to impose liability on one giving a vehicle to an adult incompetent driver, particularly where it appeared that had the vehicle not been given to the adult incompetent, he would have had no other means of acquiring a vehicle, so that the act of giving the vehicle to him could rightly be said to have been a proximate cause of the accident (citation omitted).[18]

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[17] *Harris v. Harris*, 1997 WL 366855, *1 (Del. Super.), citing *Fisher v. Novak*, Del. Super., 1990 LEXIS 205, at *3.

[18] Wanda Ellen Wakefield, Annotation, *Liability of Donor of Motor Vehicle for Injuries Resulting from Owner's Operation*, 22 A.L.R.4th 738, 741 (1983).

Moving Defendants urge this Court to follow those courts that have adopted the first part of the analysis quoted above.[19]

Plaintiffs, however, ask this Court to follow another line of cases (including a Delaware case) which have applied this “control” element more broadly, as the latter part of the above summary demonstrates.[20] Both sets of courts derive their conflicting reasoning from Restatement (Second) of Torts § 390.

This Court 26 years ago in *Bennett v. Foulk* examined § 390 of the Restatement (Second) of Torts.[21] *Bennett* was a wrongful death action arising out of an automobile collision brought against an adult tortfeasor as well as against the father of the adult tortfeasor.[22] The plaintiff claimed that the collision resulted from the negligent operation of a motor vehicle by an adult defendant, who was intoxicated at the time of the collision, and further claimed that the defendant’s

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[19] *See, e.g.*, *Broadwater v. Dorsey*, 688 A.2d 436 (Md. 1997) (concluding that parents, who have given or sold an automobile to their adult child and lack the power to control their adult child or the automobile, are not responsible for damages caused by the child with the automobile); *Tosh v. Scott*, 129 Ill.App.3d 322 (Ill. 1984) (holding that there was no liability when a father sold a car to his son where the son was known to have a drinking problem and had no driver’s license).

[20] *See Bennett v. Foulk*, 1979 WL 185840 (Del. Super.) (denying defendant’s motion for summary judgment in a wrongful death action because Delaware recognizes a cause of action for negligent entrustment against a donor who had entrusted a motor vehicle to a known incompetent driver); *Vince v. Wilson*, 561 A.2d 103, 105 (Vt. 1989) (holding that recovery for negligent entrustment is not limited to situations where defendant owns or has right to control the instrumentality); *Johnson v. Casetta,* 197 Cal.App.2d 272 (Cal. 1961) (allowing recovery against an automobile dealer who sold a vehicle to an incompetent driver, whose driving injured several people, when the seller knew or should have known of the incompetence).

[21] *Bennett v. Foulk*, 1979 WL 185840 (Del. Super.), at *2.

[22] *Id.* at *1.

father was also liable for having negligently entrusted the motor vehicle to his son.[23] The defendant's father moved for summary judgment on the ground that he was not liable for negligent entrustment because, although he knew his son to be incompetent, he had transferred ownership of the vehicle to his son before the date of the collision.[24]

Rejecting the tortfeasor's father's position, this Court in *Bennett* held that there was a right of action for negligent entrustment against a donor, and that it was "unnecessary to determine whether there [was] a fact issue as to the ownership of the vehicle."[25] In *Bennett*, this Court specifically followed § 390 of the Restatement as well as the commentary, which "expressly states that the rule applies to donors as well as other suppliers."[26] *Bennett* held further that "[t]he only remaining question is whether there is a fact issue as to whether the father knew or had reason to know that his son was likely to use the motor vehicle in a manner involving unreasonable risk of harm to others."[27] The *Bennett* court addressed the concern that allowing the tort to extend to donors would extend liability too far: "[O]nly a supplier who 'knows or has reason to know' that the chattel is likely to

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[23] *Id.*

[24] *Id.*

[25] *Id.* at *2.

[26] *Id.* (citing Restatement (Second) of Torts § 390 cmt. a (1965)).

[27] *Id.*

be used in a manner involving unreasonable risk of harm is subject to liability."[28] This Court held that foreseeability was the test. Thus, *Bennett* falls in line with the line of cases that apply the element of "ownership" or "control" more broadly, and focus instead upon the foreseeability of the harm.

Similarly, the Vermont Supreme Court in *Vince v. Wilson* held that the defendant in that case did not have to own or control the instrumentality (an automobile) entrusted.[29] *Vince* had a fact pattern very similar to the present case. In *Vince*, the defendant provided her grandnephew with money to purchase a vehicle, knowing that he did not have a driver's license and that he abused alcohol and drugs.[30] Later, the grandnephew was involved in a collision while driving that vehicle.[31] The court held that the great aunt's providing funds to buy a car was sufficient to satisfy the "control" element of the tort.[32] The *Vince* court additionally held that "the issue is clearly one of negligence to be determined by the jury under proper instruction; the relationship of the defendant to the particular

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[28] *Id.* at *1.

[29] *Vince v. Wilson*, 561 A.2d 103, 105 (Vt. 1989).

[30] *Id.* at 104, 106.

[31] *Id.* at 106.

[32] Furthermore, some courts have found that "not only the donor of a motor vehicle, but also the vendor of a motor vehicle may … be held liable for negligent entrustment." Wakefield, Annotation, *Liability of Donor of Motor Vehicle for Injuries Resulting from Owner's Operation*, 22 A.L.R.4th 738, 741 (1983).

instrumentality is but one factor to be considered."[33] The *Vince* court stated also that "the key factor" is the foreseeability of the harm.[34] The court pointed out that the absence of a merely technical relationship does not change the character of the negligence of an individual.[35]

Moving Defendants point to cases from the jurisdictions that do require ownership of the chattel or control of the tortfeasor. Those cases hold that "control" is the key element of the tort. For example, in *Broadwater v. Dorsey*, the Maryland Court of Appeals concluded that "parents who sell or give an automobile to an adult child are not responsible for damages when they lack the power to control the child or the automobile."[36] The *Broadwater* court focused on the fact that the parents had no control over the child because he was an adult, and no control over the vehicle because they transferred ownership of it to him.[37] The *Broadwater* court stated that "[w]e agree with our sister states that have concluded that 'the paramount requirement for liability under a theory of negligent entrustment is whether or not the defendant had the right to control the vehicle.'"[38]

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[33] *Vince*, 561 A.2d at 105.

[34] *Id.*

[35] *Id.*

[36] *Broadwater v. Dorsey*, 688 A.2d 436, 437 (Md. 1997).

[37] *Id.*

[38] *Id.*, at 442 (citations omitted).

The *Broadwater* court reasoned that without limiting the tort by requiring a legal right of control "liability would be too expansive and would subject all vendors to liability long after the vendor had relinquished control over the chattel."[39] Furthermore, these courts find that without a power to control, a duty to guard against negligent use of the property does not exist. They argue that it is unfair to impose such a duty where the power to control the chattel is absent at the time of the harm.[40]

Thus, there is a distinct split of authority on the issue at bar. One group of jurisdictions holds that the element of control should be the main focus of the tort, and that no duty can exist without it. The other group finds that the negligence of an individual does not change in the absence of ownership of the chattel or control of the tortfeasor, and that as long as the harm is foreseeable, a duty exists. *Bennett v. Foulk* is part of that line of cases. Both approaches claim descent from § 390 of the Restatement (Second) of Torts but cannot be reconciled.

2. In Delaware, It is Not Always Necessary for the Entrustor to Have Owned the Chattel.

Delaware case law and public policy considerations support this Court's conclusion that Dr. and Mrs. Balakhani may be potentially considered "suppliers" or "entrustors" for the purposes of the tort of negligent entrustment because the

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[39] *Id*.

[40] *See Id.*

Amended Complaint alleges that they gave their adult son Mehdi the money to purchase a vehicle, allegedly knowing him to be reckless or incompetent. This Court holds that the key element in the tort of negligent entrustment in this case is the foreseeability of the harm, and not ownership of the chattel or control of the tortfeasor. The question of foreseeability is usually a finding of fact left to the jury, and should be so left in this case.[41]

Bennett v. Foulk, apparently the only Delaware case directly on point, supports the holding of this Court. The *Bennett* Court found that ownership of the chattel was unnecessary, and that the fact that the father's son was an adult played no part in the analysis.[42] The *Bennett* Court additionally held that foreseeability was the only issue left after it decided that it would not follow the technical approach regarding "ownership" or "control."[43]

Defendants attempt to distinguish *Bennett* from the present case by pointing out that:

> the father [in *Bennett*] directly transferred ownership of the automobile to his son before the date of the alleged negligence. In other words, it was the chattel itself, in a direct and unbroken line of title, that passed from father to son, as opposed to the indirect facts

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[41] *See Sanchez-Caza v. Estate of Susan Gordon Lloyd Whetstone*, Del. Super., 2005 WL 1953179 (denying defendant-father's motion for summary judgment in a wrongful death case as it was a question of fact whether the father's entrustment of his vehicle to his daughter was negligent based on his level of knowledge of his daughter's drug and alcohol abuse and stating that such an issue "should be left to the jury to decide…").

[42] *Bennett*, at *2.

[43] *Id*.

here in which Dr. and Mrs. Balakhani are alleged merely to have facilitated their adult son's purchase of the automobile.[44]

This distinction is unconvincing. There is little difference in giving an individual a vehicle and giving the individual the money to purchase a vehicle when the proper focus of the tort is foreseeability. Moving Defendants rely on cases that rest upon the technical distinction between one who transfers the chattel to another, and one who lends the chattel to another, the latter being held liable. That distinction was not countenanced by *Bennett*. Once that distinction is eliminated, the technical relationship is no longer required and the focus of the tort becomes foreseeability. It will be a question for the jury to decide whether giving money to an alleged known incompetent or reckless individual to buy a car under all the attendant facts could foreseeably lead to the harm caused.

Additionally, many commentators have found that the proper focus of the tort is foreseeability, and have stated that cases, such as *Estes v. Gibson*,[45] that focus on "ownership" or "control," "look definitely wrong."[46] Dean Prosser explained that "[i]t is the negligent entrusting which creates the unreasonable risk; and this is none the less when the goods are conveyed."[47] Another commentator

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[44] Defs. Reply Br., D.I. 27, at 2.

[45] 257 S.W.2d 604 (Ky. 1953)(4-3 decision) (holding that the donor-mother was not liable for injuries to the plaintiff after giving an automobile to the donee-son, whom the mother knew to be a habitual drunkard, because title to the car had passed from the mother to the son).

[46] Prosser and Keeton on Torts § 104, at 718 (5th ed. 1984).

[47] *Id.*

has stated: "[M]ere passing of title does not change the character of the negligence of the defendant, and … the law should not operate to relieve him of his responsibility for the natural and probable causes of his own negligent act."[48]

This Court endorses the views of those commentators and courts who have found a distinction between a non-owner and an owner of a dangerous instrumentality such as an automobile to be both illogical and contrary to public policy. One commentator has asserted that this distinction, from a practical standpoint, "proves itself illogical."[49] "[I]t is considered negligent to give a limited chance to cause harm, as in bailment, but it is not negligent to present an unlimited opportunity to cause harm. Thus, the result achieved seems to be: the greater wrong will incur the lesser liability."[50] Giving unlimited access to a potentially dangerous chattel to an incompetent individual can involve a greater danger to the public than merely lending the chattel, giving that individual only temporary access.[51]

This Court finds that the more modern and reasonable approach is to focus on the element of foreseeability in this tort, and not the element of "ownership" or "control." This Court declines to follow the line of cases such as *Broadwater*,

[48] C. Gibson Downing, Jr., Notes and Comments, 43 Ky. L.J. 178, 183 (1954).

[49] George M. Belsky, Comment, 33 B.U. L.Rev. 538, 539 (1953).

[50] *Id*.

[51] *See* Herbert H. Hopper, Case Note, 2 Kan. L. Rev. 311 (1954).

which would also result in this Court's declining to follow *Bennett*, a case otherwise not distinguishable. A jury should determine, among other things, whether the furnishing of funds by Moving Defendants to Mehdi to purchase an automobile could have foreseeably led to the harm that befell the Plaintiffs under all of the relevant facts of this case.

Plaintiffs have pled facts adequate to survive the moving Defendants' motion to dismiss.

IV. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss is **DENIED**.

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cc: Prothonotary