25A. NEGLIGENT ENTRUSTMENT

A. Introduction

The tort of negligent entrustment is based upon the principle that a person should not entrust a dangerous instrumentality to an unfit individual who may use it in a manner involving an unreasonable risk of harm to that individual or others. The "crux of the negligence is the knowledge of the entrustor of the youth, inexperience, known propensity for reckless and irresponsible behavior, or other quality of the entrustee, indicating the possibility that the entrustee will cause injury."[1] If the supplier of a dangerous instrumentality permits its use by a person that the supplier knows, or has reason to know, is unfit to have control over it, the supplier will be held accountable for all causally-related injuries to others.

B. Restatement of Torts

The elements of a claim of negligent entrustment are set forth in Sections 308 and 390 of the *Restatement (Second) of Torts* (1965) (hereinafter "*Restatement*"), as follows:

Section 308

> 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.

Section 390

> 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.

Comment b to section 390 describes this rule as a special application of the rule stated in

[1] J. Lee & B. Lindahl, *Modern Tort Law, Liability & Litigation* §33:1 (2nd ed. 2008).

section 308.

C. Colorado Courts' Recognition of Negligent Entrustment

Prior to their formal recognition of the tort of negligent entrustment, the Colorado appellate courts and their federal counterparts informally acknowledged the viability of such a claim. For example, in *Dickens v. Barnham*,[2] a 1920 case, plaintiff Barnham was injured by a bullet discharged from a rifle fired by Lloyd Dickens, an eight-year-old boy. Lloyd's father, William Dickens, was found liable for Barnham's injuries, because he had taken no steps to make the gun inaccessible to the children in the home. Upholding this judgment, the Colorado Supreme Court noted that "a father may be liable on the ground that his own act in permitting the child to have access to some instrumentality potent for mischief is, in view of the child's want of capacity properly to manage it, the proximate cause of the injury."[3] Thereafter, in *Douglass v. Hartford Ins. Co.*,[4] a 1979 case, the Tenth Circuit upheld the Federal District Court's determination that the Colorado appellate courts would recognize the tort of negligent entrustment. Noting that "[n]egligent entrustment is a common law tort, recognized in virtually every state,"[5] and that the *Dickens* case concerned a claim equivalent to negligent entrustment, the Tenth Circuit had "no problem holding Colorado would recognize a complaint based on negligent entrustment . . ."[6]

In 1983, in *Hasegawa v. Day*,[7] the Colorado Court of Appeals "expressly adopt[ed]

---

[2] *Dickens v. Barnham,* 194 P. 356, 69 Colo. 349 (1920).

[3] *Dickens, supra,* 194 P. at 357.

[4] *Douglass v. Hartford Ins. Co.*, 602 F.2d 934 (10th Cir. 1979).

[5] *Id.* at 936.

[6] *Id.* at 937.

[7] *Hasegawa v. Day*, 684 P.2d 936 (Colo. App. 1983).

negligent entrustment as a theory of liability in this state."[8] Finally, in 1992, in the case of *Casebolt v. Cowan*,[9] the Colorado Supreme Court expressed a formal position regarding the tort of negligent entrustment, "confirm[ing] that the doctrine of negligent entrustment is part of the law of negligence in this state."[10] In reaching this conclusion, the Supreme Court stated further that "[s]ection 308 of the *Restatement* provides guidance for our use in determining the applicability and scope of the doctrine," and that "section 390 provides a basis for resolving the issues of duty."[11]

D. Elements of a Negligent Entrustment Claim

The doctrine of negligent entrustment is a part of the general law governing liability for negligence.[12] In order to prevail on a basic negligence claim, it must be proven that the defendant owed the plaintiff a duty, that the defendant breached that duty, and that the defendant thereby proximately caused injury to the plaintiff.[13] The issue of whether the defendant owes a plaintiff a duty is a question of law, to be determined by the trial court,[14] whereas the determination of whether a duty has been breached is generally a fact question for the jury. The doctrine of negligent entrustment provides trial courts with a framework for the resolution of the

---

[8] *Id.* at 939.

[9] 829 P.2d 352 (Colo. 1992).

[10] *Id.* at 357.

[11] *Id.* at 357, 358.

[12] *Casebolt, supra*, at 355.

[13] *Id.* at 356.

[14] *Id.* at 356. Of course, if the trial court's determination is appealed, duty is an issue to be determined on a *de novo* basis by the Colorado appellate courts.

issue of duty, and provides juries with criteria for assessing whether that duty has been breached.[15] Because both Section 308 and Section 390 require proof that the Defendant's conduct created an "unreasonable" risk to the Plaintiff, these determinations can sometimes be difficult.[16]

As described above, the Colorado Supreme Court, in *Casebolt*, held that both section 308 and section 390 were instructive in evaluating negligent entrustment claims. However, as quoted above, those two Restatement sections differ in one significant respect. Whereas section 308 requires proof that the supplier of the chattel "knows or should know" that the user is likely to use the thing in a manner creating an unreasonable risk of harm, section 390 sets a higher standard for a finding of liability, requiring proof that the supplier of the chattel "knows or has reason to know" of the risk. A standard of "should know" creates a duty to use reasonable diligence to ascertain the existence or non-existence of the fact in question, whereas a standard of "reason to know" does not impose any obligation to ascertain unknown facts.[17] Although post-*Casebolt* case law is not completely uniform, the Colorado appellate courts, and their federal

---

[15] *Id.*

[16] *See Casebolt, supra*, 829 P.2d at 359 ("Although the very purpose of the doctrine of negligent entrustment is to establish criteria by which to resolve the difficult issues of duty and breach when negligent entrustment elements are established, the *Restatement* anticipates some fluidity through its employment of the term 'unreasonable risk' in both section 308 and section 390. Only if the risk of harm resulting from the entrustment can be characterized as 'unreasonable' are the standards of sections 308 and 390 satisfied."); *accord, Peterson v. Halstead*, 829 P.2d 373, 377 n.7 (Colo. 1992).

[17] *Liebelt v. Bob Penkus Volvo-Mazda, Inc.*, 961 P.2d 1147, 1149 (Colo. App. 1998) (citing *Restatement (Second) of Torts §§12, 401* (1965)).

counterparts, have generally applied section 390, rather than section 308, to claims of negligent entrustment.[18]

The elements of a claim under section 390 of the *Restatement (Second) of Torts* are as follows: (1) an entrustment of a chattel, (2) to an unfit entrustee, (3) with knowledge or reason to know of the entrustee's unfitness; (4) proximate cause; and (5) damages.[19] Although no particular chattel need be supplied, the vast majority of cases concerning claims of negligent entrustment have involved either motor vehicles or guns.

1. *Entrustment of a Chattel*

Even when the facts are undisputed, the determination of whether a defendant has entrusted or supplied another person with a chattel can be a tricky question. Comment a to section 390 provides that "[t]he rule stated applies to anyone who supplies a chattel for the use of another . . ." The Colorado Supreme Court has interpreted this comment to refer only to "persons having possession or right of possession of a chattel at the time of entrustment and who directly supply the chattel to the user."[20]

Regarding the timing of possession or control, the *Casebolt* Court held that a party asserting a claim of negligent entrustment need not show that the entrustor had the right and ability to exercise control of the instrumentality at the time of the entrustee's negligent act. Rather, if the entrustor had possession or control over the instrumentality at the initial point of

[18] *Liebelt, supra*, 961 P.2d at 1149 ("[T]he supreme court in *Casebolt v. Cowan, supra*, expressly adopted [*Restatement* §390] for suppliers of chattels. We are not free to ignore that approach."); *accord, Beasley v. Best Buy Cars, Ltd.*, 363 P.3d 777, 779 (Colo. App. 2015).

[19] J. Lee & B. Lindahl, *Modern Tort Law, Liability & Litigation* §33:4 (2nd ed. 2008); *Martell v. Driscoll*, 297 Kan. 524, 302 P.3d 375, 382 (Kan. 2013) (citing *Restatement* §390).

[20] *Peterson v. Halstead,* 829 P.2d 373, 378 (Colo. 1992).

entrustment, that person may be found liable for negligent entrustment, regardless of whether he or she had the ability to exercise control thereafter.[21]

Regarding the right of possession or control, the Court of Appeals has held that a bailee, who holds property in trust for a bailor until the bailor reclaims that property, has only a restricted right of possession or control, which is subject to the rights of the bailor.[22] In light of this limited right of possession, the Court of Appeals has held that parents who stored their adult son's rifle at their home, and then returned the rifle to the son at his request, could not be held liable for negligent entrustment.[23]

Regarding the issue of whether the entrustor has "directly supplied" the instrumentality to the entrustee, Colorado appellate courts have concluded that lending an unfit person money or credit to buy a car does not constitute entrustment or supply of a chattel, and thus does not come within the ambit of section 390.[24] However, gifting money to purchase a car may meet the standard for negligent entrustment.[25]

---

[21] *Casebolt, supra*, 829 P.2d at 360. The *Casebolt* Court also held that an entrustor has "a duty to take reasonable action to terminate the entrustment if the entrustor acquires information that . . . an unreasonable risk exists or has come into being after the entrustment."

[22] *Payberg v. Harris*, 931 P.2d 544, 545 (Colo. App. 1996).

[23] *Id.*

[24] *See Peterson v. Halstead,* 829 P.2d 373, 377-78 (Colo. 1992) (indirect facilitation of purchase of vehicle, by lending credit, did not constitute entrustment or supply of a chattel under section 390, although such action can constitute general negligence under some circumstances); *accord, Jones v. Estate of Brady*, 2011 WL 6096303 (D. Colo. 2011).

[25] *See Jones v. Estate of Brady*, 2011 WL 6096303 (D. Colo. 2011) (gifting a car qualifies as entrustment in relation to a negligent entrustment claim; because parents purchased car with

There is no Colorado case directly addressing whether granting another person access to a dangerous instrumentality is equivalent to "entrusting" that person with the instrumentality. However, several cases have implied that liability will attach when the defendant negligently leaves a dangerous instrumentality at a place where a minor or other unfit person is likely to find and use it. As described above, in *Dickens v. Barnham*,[26] the Colorado Supreme Court did not utilize the term "negligent entrustment," but did state that "a father may be liable on the ground that his own act in permitting the child to have access to some instrumentality potent for mischief is, in view of the child's want of capacity properly to manage it, the proximate cause of the injury."[27] Subsequent Colorado case law has suggested,[28] and respected commentators have opined,[29] that granting access to a dangerous instrumentality is legally equivalent to negligent entrustment of such an instrumentality.

---

check drawn from their checking account, and evidence did not firmly establish that adult child repaid this sum, summary judgment was inappropriate).

[26] *Dickens v. Barnham,* 194 P. 356, 69 Colo. 349 (1920).

[27] *Dickens, supra,* 194 P. at 357.

[28] *See Butcher v. Cordova*, 728 P.2d 388 (Colo. App. 1986) (doctrine of negligent entrustment in Colorado is based on *Dickens v. Barnham*, in which the Supreme Court held that "a father may be liable for permitting his child to have access" to a gun).

[29] *Dobbs' Law of Torts* §422 (2nd ed. 2011) (under doctrine of negligent entrustment "liability is appropriate not only when the defendant intentionally 'entrusts' the chattel to a dangerous person, but also when he negligently leaves the chattel at a place where he should expect that a dangerous person is likely to find and use it."); J. Lee & B. Lindahl, *Modern Tort Law, Liability & Litigation* §33:6 (2nd ed. 2008) ("Entrustment can include . . . [l]eaving the instrumentality for use.").

2. *Unfit Entrustee*

Section 390 requires that the entrustee "be likely because of his youth, inexperience, or otherwise, to use [the instrumentality] in a manner involving unreasonable risk of physical harm to himself and others." There is universal agreement by the Colorado appellate courts that young children and intoxicated persons, because of their "youth, inexperience, or otherwise," are incompetent to possess either a gun or a car.[30] However, the incompetence of other types of entrustees is not as clear. For instance, depending upon the circumstances, an older child may be competent to possess a gun,[31] and a person with a past history of alcoholism may be competent to

---

[30] *See Casebolt v. Cowan, supra*, 829 P.2d at 358 (finding that section 390 applies "to instances where the entrustee's incompetence to operate a vehicle centers on or includes the consumption of alcohol [which] accords with the general understanding that driving while intoxicated presents an unreasonable risk of physical harm to the driver and others"); *Butcher v. Cordova*, 728 P.2d 388 (Colo. App. 1986) (reversing directed verdict, and finding that plaintiff had stated a claim for negligent entrustment where he showed that defendant had granted a nine-year-old boy access to a BB gun).

[31] *See Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236 (Colo. App. 1988), overruled on other grounds, *Casebolt v. Cowan*, 829 P.2d 352 (Colo. 1992) (no negligent entrustment where store sold gun to father, knowing he intended to gift it to his 14-year-old son, but store employee had no knowledge regarding "the competence, maturity, judgment or propensity for carelessness or recklessness of either Mr. Johnson or his son"); *Butcher v. Cordova*, *supra,* 728 P.2d at 390 (noting that defendant-parent had acted appropriately when "he required his [ll-year-old] son to obtain permission before using the BB pistol, and that he had taken the time and effort to instruct his son on the pistol's use . . .").

drive a car.[32] Vehicle operators who lack a license or insurance,[33] who have a history of bad driving or other criminal conduct,[34] or who otherwise have a history of irresponsible behavior,[35] may or may not be incompetent to drive a vehicle.

3. *Know or Have Reason to Know of Entrustee's Incompetence*

[32] *See Peterson v. Halstead*, 829 P.2d 373, 379 (Colo. 1992) (no negligence or negligent entrustment relating to entrustee who had a history of alcoholism, because vehicle was purchased three years prior to fatal accident).

[33] *Beasley v. Best Buy Cars, Ltd.,*363 P.3d 777, 782 (Colo. App. 2015) ("We cannot conclude that [seller] had "reason to know" that [purchaser] would use the car in a manner likely to cause harm . . . merely because [purchaser] did not present a valid driver's license"); *Draper v. DeFrenchi-Gordineer*, 282 P.3d 489 (Colo. App. 2011) ("[T]he record does not establish whether the parents and the son were aware of the friend's lack of experience as a driver or whether she had a driving permit. Such facts are relevant to deciding whether they knew, or had reason to know, that she was an unsafe driver."); *Liebelt v. Bob Perkins Volvo*, 961 P.2d 1147 (Colo. App. 1998) ("[W]e decline plaintiffs' invitation to recognize a duty on sellers of vehicles to inquire whether potential purchasers have liability insurance, and to refuse sales to those who do not.")

[34] *Schneider v. Midtown Motor Co.*, 854 P.2d 1322 (Colo. App. 1992) (trial court erred in granting summary judgment where car dealer knew that purchaser was a "crazy driver" who would "drive the wheels off a car," and that he was always "spinning the tires and driving like a wild man"); *Connes v. Molalla Transport Systems, Inc.*, 817 P.2d 567 (Colo. App. 1991) (declining to extend liability for negligent entrustment for an employer who entrusts a vehicle to an individual who has a criminal record); *Hasagawa v. Day*, 684 P.2d 936 (Colo. App. 1983)

Section 390 sets a high standard for a finding of liability, requiring proof that the supplier of the chattel "knows or has reason to know" of the risk. Whereas a standard of "should know" creates a duty to use reasonable diligence to ascertain the existence or non-existence of the fact in question, a standard of "reason to know" does not impose any duty to ascertain unknown facts.[36] Thus, a car seller who knows that a purchaser is a bad driver can be held liable for negligent entrustment, whereas a seller who lacks such knowledge cannot.[37] Likewise, a gun or

---

(parents could be liable for entrusting car to 17-year-old son who had "44 juvenile police and court contacts involving allegations of being a runaway and of theft, burglary, and robbery, plus abuse of drugs, narcotics, and alcohol," and who had been diagnosed as "impulsive, anti-social, and possibly a sociopath").

[35] *Almedard v. San Juan Pilot Training, Inc.*, 133 F.3d 932, 1998 WL 3289 (unpublished) (10th Cir. 1998) (pilot's habit of "borrowing" airplanes without officially signing them out did not constitute evidence that he was incompetent to fly airplane prior to fatal crash)

[36] *Liebelt v. Bob Penkus Volvo-Mazda, Inc.*, 961 P.2d 1147, 1149 (Colo. App. 1998) (citing *Restatement (Second) of Torts* §§12, 401 (1965)).

[37] *Compare Schneider v. Midtown Motor Co.*, 854 P.2d 1322 (Colo. App. 1992) (trial court erred in granting summary judgment where car dealer knew that purchaser was a "crazy driver" who would "drive the wheels off a car," and that he was always "spinning the tires and driving like a wild man") *with Beasley v. Best Buy Cars, Ltd.,*363 P.3d 777, 782 (Colo. App. 2015) (under "reason to know" standard, car seller has no duty to inquire into buyer's driving history or status of his license when seller has no reason to believe that buyer has dangerous driving habits) *and Baker v. Bratkovsky*, 689 P.2d 722, 724 (Colo. App. 1984) (car seller had no

ammunition seller who knows that a purchaser may use those items can be held liable for negligent entrustment, whereas a seller who lacks such knowledge cannot.[38]

4. *Proximate Cause*

A negligent act is the legal or proximate cause of an injury when that injury is foreseeable.[39] Thus, in negligent entrustment cases, the defendant can be held liable for foreseeable injuries caused by the entrustee.[40] This principle applies not only to the entrustee's negligent acts, but also to his or her intentional torts.[41] Thus, in *Ireland v. Jefferson County*

"duty to investigate" buyer's driving record).

[38] *Compare Ireland v. Jefferson County Sheriff's Department,* 193 F.Supp.2d 1201, 1229-1230 (D. Colo. 2002) (gun seller could be held liable for misuse of gun by buyers, where seller knew that buyers were minors, and buyers sought seller's advice on how to saw off the barrel) *with Phillips v. Lucky Gunner, LLC*, 84 F.Supp.3d 1216, 1225 (D. Colo. 2015) (ammunition seller not liable for negligent entrustment, under Colorado law, where it had no knowledge of purchaser's intent to utilize ammunition in improper manner; "The standard of care in negligent entrustment cases does not include a duty to investigate the background of the person to whom the chattel is entrusted.").

[39] *Walcott v. Total Petroleum*, 964 P.2d 609, 611 (Colo. App. 1998) ("[F]oreseeability is the touchstone of proximate cause").

[40] *See Restatement (Second) of Torts* §390 cmt. c ("[A] supplier is liable [for negligent entrustment] if, but only if, his conduct is the legal cause of the bodily harm complained of . . .").

[41] *See Ekberg v. Greene*, 196 Colo. 494, 588 P.2d 375, 376 (Colo. 1978) ("[A]n intentionally tortious or criminal act of a third party is not a superseding cause immunizing the

Sheriff's Department, the United States District Court, citing Colorado law, held that the conduct of private gun sellers who knew that the gun purchasers were minors, and who showed them how to saw off the shotgun barrel, could be deemed the proximate cause of the injuries caused to victims of the minors' shooting spree.[42] In contrast, in *Walcott v. Total Petroleum*, the Colorado Court of Appeals held that a gas station owner could not be liable for negligent entrustment based upon the sale of a cup of gasoline to a purchaser/tortfeasor who used that gasoline to commit a crime, because "the risk that a purchaser would intentionally throw gasoline on a victim and set the victim on fire was not reasonably foreseeable."[43]

When the entrustor has negligently entrusted an instrumentality to the entrustee, but the entrustee has not engaged in any tortious conduct, the entrustor's negligence cannot be considered the cause of any injury to a third party.[44] Rather, an entrustor can only be held liable

---

defendant from liability, if it is reasonably foreseeable.")

[42] *See Ireland v. Jefferson County Sheriff's Department, supra*, 193 F.Supp.2d at 1229-1230.

[43] *Walcott, supra*, 964 P.2d at 611.

[44] *Connes v. Molalla Transport Systems, Inc.*, 817 P.2d 567, 572 (Colo. App. 1991) (in order to prevail on a claim of negligent entrustment of a car, "plaintiff must also show that the entrusted vehicle was used in a negligent manner"); *Budde v. Kentron Hawaii, Ltd.*, 703 F.2d 456, 459 n.9 (10th Cir. 1983) ("Negligence by the entrustee is an element of negligent entrustment"); *see also* E. Bublick, *Dobbs' Law of Torts* §211 (2nd ed. 2011) ("If the driver causes an injury without driving dangerously, the entrusting defendant would not be responsible, since the risk he unreasonably created was the risk of dangerous driving, not the risk of safe driving.");

for negligent entrustment when the entrustee has negligently or intentionally caused injury to a third party.[45] In those negligent entrustment cases that proceed to trial against both an entrustor and an entrustee, the jury will necessarily be required to apportion the relative fault of those two defendants.[46]

5. *Damages*

Section 390 explicitly states that the entrustor's negligence must cause "physical harm."[47] Thus, it appears that some sort of physical injury is an essential element of a negligent

---

J. Lee & B. Lindahl, *Modern Tort Law, Liability & Litigation* §33:12 (2nd ed. 2008) ("Both the entrustor and the entrustee must be negligent to support a claim" of negligent entrustment).

[45] *Smith v. Zufelt,* 856 P.2d 8, 12 (Colo. App. 1992), rev'd on other grounds, 880 P.2d 1178 (1994) (where rifle was negligently entrusted to minor, but another minor caused injury to plaintiff, conduct of entrustor was not a cause of plaintiff's injury); *Connes, supra*, 817 P.2d at 572 (no basis for finding negligent entrustment based upon entrustment of truck because "defendant's truck was not used improperly or negligently"); *Budde, supra,* 703 F.2d at 459 (no basis for finding negligent entrustment of jeep where evidence presented at trial offered "no basis for concluding that [entrustee] was or was not negligent").

[46] *See* COLJI-CIV. 9:29 (2017) (requiring that jury, in multi-defendant cases, "determine to what extent the negligence or fault of each contributed to the damages of the plaintiff, expressed as a percentage of 100 percent")

[47] *See Restatement (Second) of Torts §390* (1965) (entrustor is " is subject to liability for physical harm").

entrustment claim in Colorado.[48] Of course, the term "physical harm" encompasses the emotional consequences of such harm.[49]

E. Claims Brought by Entrustee

Under the Colorado Dram Shop Act, C.R.S. §12-47-801, a bar or restaurant that serves alcohol to a minor or visibly intoxicated person, thereby causing further alcohol-related impairment, can be held liable to a third person who is injured by the minor or intoxicated person.[50] However, the Act explicitly states that if the minor or intoxicated person who was served alcohol by the bar or restaurant is injured as a result of that service, neither that person nor the estate of that person can bring a civil lawsuit.[51]

In contrast with statutory Dram Shop Act claims, which prohibit an intoxicated person from recovering from a supplier for the intoxicated person's own injuries, common law claims of

---

[48] *See Houston v. Mile High Adventist Academy*, 846 F.Supp. 1449, 1458 (D. Colo. 1994) ("Physical injury is . . . an essential element of a claim for negligent entrustment under the Restatement formula adopted in Colorado."); *see also Casebolt v. Cowan, supra*, 829 P.2d at 359 (under section 390, a claimant can "recover for physical harm").

[49] *See Parr v. L & J Corp.*, 107 P.3d 1104, 1108-1109 (Colo. App. 2004) (risks associated with "physical harm" include "noneconomic losses in the form of emotional distress").

[50] C.R.S. §12-47-801.

[51] C.R.S. §12-47-801(3)(b). This statute supercedes Colorado common law which, prior to the enactment of the statute, permitted an injured patron or his estate to bring a claim against a bar or restaurant for overselling alcohol to that patron. *See Lyons v. Nasby*, 770 P.2d 1250 (Colo. 1989).

negligent entrustment are subject to no such limitation.[52] Rather, in *Casebolt*--a case in which a man died after driving his employer's vehicle while intoxicated, and his estate sought compensation from the employer--the Supreme Court stated that "[u]nder section 390 it is clear that an entrustee can recover for physical harm to himself resulting from the negligent entrustment."[53] In support of this conclusion, the Supreme Court cited the plain language of section 390, which recognizes that an incompetent entrustee can cause harm "to himself and others,"[54] and states that an entrustor can be held liable for such harm. The Court also cited to illustration 7 to section 390, which describes a fact pattern in which the entrustee is injured, and the entrustor is held liable.[55] In addition, the *Casebolt* Court cited public policy considerations that weigh in favor of allowing an entrustee to bring a negligent entrustment claim against and entrustor.[56]

---

[52] *See Casebolt, supra*, 829 at 362 & n.11 (Dram Shop Act does "not apply to entrusting a motor vehicle to an intoxicated person").

[53] *Casebolt, supra*, 829 P.2d at 352.

[54] *Casebolt, supra*, 829 P.2d at 373 n.7 (citing *Restatement* §390).

[55] *Casebolt, supra*, 829 P.2d at 358 & 373 n.7. Illustration 7 to section 390 states as follows:

> A, who makes a business of letting out boats for hire, rents his boat to B and C, who are obviously so intoxicated as to make it likely that they will mismanage the boat so as to capsize it or to collide with other boats. B and C by their drunken mismanagement collide with the boat of D, upsetting both boats. B, C, and D are drowned. A is subject to liability to the estates of B, C, and D under the death statute, although the estates of B and C may also be liable for the death of D.

[56] *Casebolt*, 829 P.2d at 362 ("We recognize that voluntary intoxication is socially

F. Negligent Entrustment Claims vs. Negligent Supervision Claims

Colorado recognizes the tort of negligent supervision, by either parents[57] or employers.[58] Liability for negligent supervision is based upon the supervisor's negligent failure to adequately monitor and control the actions of the supervisee.[59] This tort is distinguishable from the tort of

---

undesirable conduct and that individual responsibility to refrain from such conduct should be promoted. These considerations, however, cannot be permitted to obscure the fact that a vehicle owner who has the right and ability to control the use of the vehicle and takes no action to prevent the continued use of the vehicle by a borrower who the owner knows is likely to operate the vehicle while intoxicated is also engaged in morally reprehensible behavior that should be discouraged. Comparative negligence provides the appropriate framework for examining any negligence on the part of the individual who drives after consuming alcoholic beverages.")

[57] *Mitchell v. Allstate Ins. Co.*, 534 P.2d 1235 (Colo. App. 1975) (citing *Restatement (Second) of Torts* §316 (1965))

[58] *See Destefano v. Grabrian*, 763 P.2d 275, 287 (Colo. 1988) (citing *Restatement (Second) of Agency* §213 (1958)).

[59] *See Restatement (Second) of Torts* §316 (1965)) ("A parent is under a duty to exercise reasonable care to control his minor child so as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them . . ."); *Restatement (Second) of Agency* §213 (1958) ("A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the supervision of the activity").

negligent entrustment which, as set forth above, imposes liability based upon the entrustment of a potentially dangerous instrumentality to an unfit person.[60] Although the elements of negligent supervision and negligent entrustment claims are different, in the context of the parent-child relationship these claims are virtually indistinguishable.[61] As to both of these torts, when a claim is brought against a parent for injuries caused by the tortious acts of a child, the elements of the claim must be proven, and liability cannot be imposed "merely because of [the parent-child] relationship."[62]

G. Employer Liability for Negligent Entrustment

It is well-settled that an employer can be held liable for negligently entrusting a vehicle to

---

[60] *See Douglass v. Hartford Ins. Co.*, 602 F.2d 934, 936-37 (10th Cir. 1979) ("There is a logical distinction between negligent entrustment, which may apply to any person entrusting a potentially dangerous instrumentality to a third person, and the duty of parents to control and supervise their children.").

[61] *See Lahey v. Benjou*, 759 P.2d 855, 857 (Colo. App. 1988) (with regard to claims of negligent entrustment of motor vehicle and negligent supervision of daughter while driving vehicle "we see no practical difference between the two theories of recovery").

[62] *Houston v. Mile High Adventist Academy*, 846 F.Supp. 1449 (D. Colo. 1994) (quoting *Mitchell v. Allstate Ins. Co.*, 36 Colo.App. 71, 534 P.2d 1235, 1237 (1975)).

an employee.[63] However, in *Ferrer v. Okbamicael*,[64] the Colorado Supreme Court held that where an employer is sued under the doctrine of *respondeat superior*,[65] and acknowledges vicarious liability for its employee's negligence, a plaintiff is barred from also bringing direct negligence claims against the employer, such as negligent entrustment and negligent supervision.[66] As grounds for this ruling, the *Ferrer* Court noted that *respondeat superior* claims and direct negligence claims both require proof of a tortious act by the employee, and that therefore these two types of claims are duplicative:

> Under either theory, the liability of the principal is dependent on the negligence of the agent. If it is not disputed that the employee's negligence is to be imputed to the employer, there is no need to prove that the employer is liable. Once the principal has admitted its liability under a respondeat superior theory ... the cause of action for negligent entrustment is duplicative and unnecessary. To allow both causes of action to stand would allow a

---

[63] *See Perkins v. Regional Transportation District*, 907 P.2d 672 (Colo. App. 1995) (reversing summary judgment on negligent entrustment claim made against employer of bus driver responsible for bus accident); *Casebolt, supra* (reversing summary judgment on negligent entrustment claim made against employer who allowed employee to drive company car while intoxicated).

[64] 390 P.3d 836 (Colo. 2017).

[65] Under the doctrine of *respondeat superior*, the employer is responsible for the negligent acts of the employee committed within the course and scope of employment. There is no requirement that the employer act in a negligent manner. J. Lee & B. Lindahl, *Modern Tort Law, Liability & Litigation* §33:3 (2nd ed. 2008).

[66] *Id.*

jury to assess or apportion a principal's liability twice.[67]

H. Defenses

Negligent entrustment claims are subject to the same defenses applicable to standard negligence claims. In negligent entrustment cases, these defenses will generally be presented in the same manner as they would be presented in standard negligence cases, and will have the same force and effect. However, with regard to claims brought by the entrustee against the entrustor, there are unique concerns surrounding the defense of comparative negligence. In such situations, the entrustor may assert a defense of comparative negligence against the entrustor.[68]

When the entrustee, prior to operating the instrumentality, realizes that he or she is unfit to do so, the comparative negligence of the entrustee will exceed the negligence of the entrustor, and recovery will be prohibited as a matter of law.[69] This result is mandated by *Restatement* §390, comments c and d, which state that "[o]ne who accepts and uses a chattel knowing that he

---

[67] *Ferrer, supra*, 390 P.3d at 845 (quoting *Gant v. L.U. Transp., Inc.*, 331 Ill.App. 924, 264 Ill.Dec. 459, 770 N.E.2d 1155, 1160 (2002)).

[68] *See Casebolt, supra*, 829 P.2d at 362 (holding that entrustee may bring a negligent entrustment claim against entrustor, and that "comparative negligence provides the appropriate framework for examining any negligence on the part of the individual who drives after consuming alcoholic beverages").

[69] *See Checkley v. Allied Property & Cas. Ins. Co.*, 635 Fed.Appx. 553 (10th Cir. 2016) ("Mr. Checkley cannot recover for [negligent entrustment by the entrustor] because he knew of his own inexperience" in driving a car).

is incompetent to use it safely. . . is usually in such contributory fault as to bar recovery," [70] and that when "the person to whom the chattel is supplied realizes his incompetence, [he] is in such contributory fault as to bar his right to recover for any harm which he himself sustains."[71] However, when the entrustee does not realize his incompetence or unfitness to operate a dangerous instrumentality, the comparative negligence of the entrustee may or may not exceed that of the negligence of the entrustor. In such situations, the fact-finder must compare the entrustor's fault in entrusting the instrumentality to an unfit entrustee to the fault of the entrustee in operating the instrumentality in an unfit condition. Specifically, in cases involving an intoxicated entrustee who sustains injuries as a result of driving drunk, the fact-finder must compare the negligence of the car owner who knowingly entrusted the vehicle to a drunk driver to the negligence of the injured driver who drove while intoxicated.[72]

I. CONCLUSION

The tort of negligent entrustment can serve to protect those persons injured by minors, intoxicated persons, or other individuals who are unfit to operate a dangerous instrumentality. Practitioners whose clients are injured by such unfit persons should consider pursuing a negligent entrustment claim.

---

[70] *Restatement (Second) of Torts* §390, cmt. c (1965); *accord, Checkley v. Allied Property & Cas. Ins. Co.*, 635 Fed.Appx. 553 (10th Cir. 2016).

[71] *Restatement (Second) of Torts* §390, cmt. d (1965); *accord, Checkley v. Allied Property & Cas. Ins. Co.*, 635 Fed.Appx. 553 (10th Cir. 2016).

[72] J. Lee & B. Lindahl, *Modern Tort Law, Liability & Litigation* §33:13 (2nd ed. 2008). *See also Casebolt, supra*, 829 P.2d at 362.