Nova Law Review

Volume 12, *Issue* 2 1988 *Article* 15

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Daniel S. Whitebook*

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Abstract

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KEYWORDS: court, appeal, Florida

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I. Introduction

This paper is a three part analysis of *Horne v. Vic Potamkin*

1. 505 So. 2d 560 (Fla. 3d Dist. Ct. App. 1987) [hereinafter *Potamkin II*].

Chevrolet, Inc.[2] It examines the controlling law in Florida relevant to the *Potamkin* case, the history of the doctrine of negligent entrustment, and the policy considerations underlying the doctrine of negligent entrustment. The paper focuses on the issues of whether Florida should adopt section 390 of the Restatement (Second) of Torts and whether Florida courts should extend the negligent entrustment doctrine to sales.

The application of the negligent entrustment doctrine to the sale of automobiles could create a new area of litigation in the business world which would affect every consumer in the country. If the negligent entrustment doctrine were extended to cover the sale of automobiles, the doctrine could just as easily be extended to cover the sale of *all* products. The current flood of products liability litigation for defective products would pale in comparison to the negligent entrustment litigation based on defective customers. Every automobile accident victim would have a cause of action against the seller of the car because the issue of actual knowledge would always be an issue of fact for the jury to decide. The extension of the doctrine would afford plaintiffs another deep pocket. Even if a driver hit a tree, the driver would have a case against the seller of the car to determine whether the seller had actual knowledge of the driver's incompetence. If a car dealer sold the car, the dealer, due to its deep pocket, would probably be required to satisfy the entire judgment. Even if a private seller sold the car, the plaintiff could recover at least the proceeds of the sale. As such, the extension of the negligent entrustment doctrine could lead to dire consequences — more so than proponents today could ever expect.

II. The Case: *Horne v. Vic Potamkin Chevrolet, Inc.*[3]

A. *Facts*:

On March 9, 1982, Nora Newry went to Vic Potamkin Chevrolet to buy a car.[4] At the time, Newry had a restricted license.[5] She picked out a car and went on a test drive with a salesman from Potamkin.[6]

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2. *Id.*
3. *Id.*
4. *Id.* at 561.
5. *Id.* A restricted driver's license requires that a licensed driver be present when the restricted driver is driving.
6. Vic Potamkin Chevrolet, Inc. v. Horne, 11 Fla. L. Weekly 1770 (3d Dist. Ct.

During the test drive, Newry had difficulty driving the car to the extent that the salesman had to grab the steering wheel from her to avoid an accident with a bus.[7] The drive with Newry led the salesman to predict that "Newry would not drive one block without causing an accident."[8] The salesman advised Newry to bring someone back with her when she came to pick up the car.[9] Later that day, she returned to execute the sale and pick up the car.[10] When Newry returned, Junie Horne, an old friend of Newry's, happened to be on the lot.[11] Horne, a licensed driver, rode as the passenger in the car as Newry drove home.[12] On the way home, about one mile away from the dealership, the salesman's prediction came true. Newry lost control of the car and hit a tree on the other side of the road.[13] Horne was injured in the accident and sued Potamkin.[14]

B. *Procedure*:

Horne sued Potamkin for negligent entrustment of the automobile to Newry.[15] The trial court rendered a final judgment pursuant to a jury verdict which found Potamkin negligent in entrusting the car to Newry.[16] The Third District Court of Appeal affirmed the trial court's decision,[17] but on rehearing the case en banc, the third district withdrew its decision, this time holding that the doctrine of negligent entrustment does not extend liability to a seller of a chattel.[18] The court, noting the exceptional public importance of this issue, certified the is-

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App. Aug. 12, 1986) [hereinafter *Potamkin I*].

7. *Id.*
8. *Id.*
9. *Potamkin II*, 505 So. 2d at 561.
10. *Potamkin I*, 11 Fla. L. Weekly at 1770.
11. *Id.*
12. *Potamkin II*, 505 So. 2d at 561.
13. *Potamkin I*, 11 Fla. L. Weekly at 1770.
14. *Potamkin II*, 505 So. 2d at 561. Horne also sued the salesman and Newry. *Potamkin I*, 11 Fla. L. Weekly at 1770. They were both dismissed from the suit. Brief of Appellant at 3, Vic Potamkin Chevrolet, Inc. v. Horne, 11 Fla. L. Weekly 1770 (3d Dist. Ct. App. Aug. 12, 1986) (No. 84-2813) [hereinafter Brief of Appellant].
15. *Potamkin II*, 505 So. 2d at 561.
16. *Id.*
17. *Potamkin I*, 11 Fla. L. Weekly at 1770.
18. *Potamkin II*, 505 So. 2d at 563. ("This court, on its own motion, has determined to grant [a] rehearing en banc pursuant to Florida Rule of Appellate Procedure 9.331 (c), on the ground that the case is of exceptional importance."). *Id.* at 561.

sue to the Florida Supreme Court.[19]

C. *Basis Of Decision*

1. *Trial Court*

Horne initially joined Newry, Potamkin, and the salesman as defendants,[20] but only the issue of negligent entrustment[21] against Potamkin remained at the time of trial.[22] Potamkin moved for a directed verdict on this issue, claiming that there was no theory of recovery in Florida for negligent entrustment against the seller of a car.[23] Believing it was time for a change in the law, the trial court allowed the jury to hear the negligent entrustment issue.[24] The jury found in favor of Horne and awarded her $195,000 in compensatory damages.[25]

2. *Original Third District Court of Appeal Panel Opinion*

Potamkin filed an appeal with the district court of appeal, contending that the trial court erred in instructing the jury that if it found

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19. *Id.* The Florida Supreme Court held oral argument on January 4, 1988. As of this writing, no decision has been rendered.

20. *Potamkin I*, 11 Fla. L. Weekly at 1770.

21. Section 390 of the Restatement (Second) of Torts established the doctrine of negligent entrustment. It provides:

> 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 (1966).

22. *Potamkin I*, 11 Fla. L. Weekly at 1770. Newry did not appear at the trial and the court entered a default judgment against her. When the issue of comparative negligence arose, Horne avoided presenting this issue to the jury by dismissing the car's owner and driver, Newry. During the jury instruction conference, Horne dismissed her claim against the salesman. Brief of Appellant, *supra* note 14, at 3.

23. Brief of Appellant, *supra* note 14, at 4.

24. *Id.* at 4, 6. The trial court instructed the jury that the issue for its determination on Horne's negligent entrustment claim against Potamkin was "whether this defendant negligently entrusted the subject vehicle to Nora Newry on the evening of March 9, 1982 and whether such negligence was the legal cause of loss, injury or damage sustained by the plaintiff Junie Horne." *Id.* at 6.

25. *Potamkin I*, 11 Fla. L. Weekly at 1770.

that Potamkin was negligent in entrusting the car to Newry and that Potamkin's negligence proximately caused the injuries, Potamkin would be liable for the injuries sustained.[26] Potamkin again asserted that Florida did not recognize negligent entrustment as a cause of action.[27] It further maintained that the only permissible theory of recovery would be under the dangerous instrumentality doctrine, which would absolve Potamkin of liability.[28] The third district dismissed this argument, stating that the dangerous instrumentality doctrine did not apply and that Newry had not sought relief on this basis.[29] The court refused to characterize Potamkin's liability as vicarious, but found instead that its liability "arose from its direct obligation to refrain from selling a car once it possessed actual knowledge of the purchaser's deficient driving ability and her intention to drive" the car.[30] The court stated that this duty derived from section 390 of the Restatement (Second) of Torts, and cited various Florida cases which have relied on this section in their decisions.[31] Recognizing that Florida's courts had not yet addressed the issue of negligent sale, it applied the common law rules of negligent entrustment.[32] Finally, the court concluded that Florida Stat-

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* (The court reasoned that dangerous instrumentality did not apply "because Potamkin did not own the vehicle when the accident occurred." The dangerous instrumentality doctrine could be applied even though Potamkin does not own the car, but Newry would not win under the doctrine because of Potamkin's ownership. Since the dangerous instrumentality doctrine is a vicarious liability theory and Newry sued on primary liability, the doctrine does not apply.).

30. *Id.*

31. *Potamkin I*, 11 Fla. L. Weekly at 1770, 1771. *E.g.*, Mullins v. Harrell, 490 So. 2d 1338 (Fla. 5th Dist. Ct. App. 1986); Rio v. Minton, 291 So. 2d 214 (Fla. 2d Dist. Ct. App.), *cert. denied*, 297 So. 2d 837 (Fla. 1974).

32. *Potamkin I*, 11 Fla. L. Weekly at 1771. (It is interesting to note that the court claimed that "[u]nder the common law of negligent entrustment, a seller may be held liable even though it no longer owns the car."). *Id.* But, of the many states that have addressed this issue, only California and Alaska have found that negligent entrustment extends to sales. The court failed to mention that under the common law of Colorado, Georgia, Illinois, Kansas, Tennessee, and Texas, the negligent entrustment doctrine does *not* extend to sales of automobiles. *See* Flieger v. Barcia, 674 P.2d 299 (Alaska 1983); Johnson v. Casetta, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (Ct. App. 1961); Baker v. Bratrsovsky, 689 P.2d 722 (Colo. App. 1984); Pugmire Lincoln Mercury, Inc. v. Sorrells, 142 Ga. App. 444, 236 S.E.2d 113 (1977); Tosh v. Scott, 129 Ill. App. 3d 322, 472 N.E.2d 591 (1984); Kirk v. Miller, 7 Kan. App. 2d 508, 644 P.2d 490 (1982); Irwin v. Arnett, Case No. 86-162 (Tenn. Ct. App. Dec. 12, 1986); Rush v.

ute section 319.22(2)[33] did not apply because the statute only protects a car dealer from liability for a driver's negligence arising *after* the sale and not for negligence which occurs *before* the sale.[34] Thus, the third district held that Potamkin's actual knowledge of Newry's poor driving skills imposed a duty on Potamkin to refrain from selling her a car it knew she intended to drive, and that Potamkin's breach of that duty rendered Potamkin liable for Horne's injuries.[35]

3. *Third District Court of Appeal En Banc Opinion*

On rehearing en banc,[36] the Third District Court of Appeal withdrew its prior opinion and ruled in favor of Potamkin.[37] The court determined that the correct issue presented on appeal was whether Florida should extend the law of negligent entrustment to include negligent sales.[38] The third district declined to do so and, for reasons discussed below, vacated its original opinion and reversed the trial court's judgment originally under review.[39]

The first issue concerned the difference between liability for negligence in lending and liability for negligence in selling.[40] The majority cited cases which refused to extend liability to sellers, but it failed to mention the cases that did extend the law to sellers.[41] The majority stated that holding a seller liable was different from holding a lender

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Smitherman, 294 S.W.2d 873, 876 (Tex. Civ. App. 1956).

33. This statute protects owners who have made a bona fide sale or transfer and have delivered possession of a motor vehicle. After the sale or transfer, the seller is not the owner of the vehicle, so the seller is not subject to civil liability for the operation of the vehicle after the sale because of another person's negligence. In order to be protected, the seller must fulfill certain requirements of proper endorsement and delivery, or give notice of sale to the Department of Highway Safety and Motor Vehicles. FLA. STAT. § 319.22(2) (1981).

34. *Potamkin I*, 11 Fla. L. Weekly at 1771.

35. *Id.*

36. *Potamkin II*, 505 So. 2d at 560. Potamkin filed a motion for rehearing in the third district. The same court granted rehearing en banc, on the grounds that the case was of exceptional importance. *Id.* at 561.

37. *Id.*

38. *Id.* (The dissent indicated the issue "is whether a dealer incurs *direct* liability for selling an automobile to an incompetent driver when the dealer knew of the incompetence *before* the sale."). *Id.* at 564.

39. *Id.* at 561.

40. *Id.*

41. *Id.* at 562.

liable,[42] but gave no reason for this distinction. One reason may be that when an owner lends, bails, or leases something which he owns, he is the actual owner and has the right to determine how the chattel is going to be used. The owner has control over the chattel even when someone else is using it, leasing it, or holding it. Moreover, the owner is in a closer relationship with a lendee, bailee, or lessee than he is with a buyer. As a seller, the owner has no relationship with the buyer once the sale is consummated, except as to any warranty which follows the product. The lessor, lender or bailor can say "this is my car, don't drive too fast," or "don't drive in this neighborhood." The seller, however, relinquishes any and all control over the car after the sale. Therefore, the seller should only be responsible for that over which he has control and the actions of those with whom he is in a close relationship.

The court next examined section 319.22 of the Florida Statutes.[43] The majority stated that under section 319.22, a seller is not vicariously liable for injuries sustained after the sale as a result of a buyer's subsequent negligence.[44] The dissent correctly distinguished vicarious liability from primary liability,[45] noting that Horne had brought suit on the latter.[46] Horne alleged that Potamkin was directly negligent for its own actions in selling Newry the car.[47] Therefore, the majority's reliance on cases which would relieve Potamkin of liability under a vicarious liability theory is misplaced.

The next issue the majority addressed is the time of the occurrence of the negligence. The majority stated that "[a]t the time of the accident, Potamkin had no control over the circumstances."[48] In response, the dissent maintained that the negligence occurred before the accident. As the dissent pointed out, the question is whether the selling itself constituted a negligent entrustment.[49] Because Potamkin knew at the time of the sale that Newry could not drive, the sale was negligently made.[50]

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42. *Id.* at 561.
43. *Id.* at 562. (Section 319.22 may be construed as a codification of the dangerous instrumentality doctrine, a vicarious liability theory of recovery, in that it delineates a specific point at which transfer is deemed to legally occur.).
44. *Potamkin II*, 505 So. 2d at 562.
45. *Id.* at 564 (Baskin, J., dissenting).
46. *Id.*
47. *Potamkin I*, 11 Fla. L. Weekly at 1770.
48. *Potamkin II*, 505 So. 2d at 563.
49. *Id.* at 564 (Baskin, J., dissenting).
50. *Id* at 565. Moreover, it follows that the time of the occurrence of the acci-

Another issue in the Potamkin case is the extent of knowledge necessary to satisfy the knowledge requirement of negligent entrustment.[51] The majority complains that it would be too difficult to quantify the amount of knowledge necessary for the seller to know or have reason to know of the buyer's incompetence.[52] As this argument goes, in order to protect themselves, sellers would have to probe into each buyer's background to determine the buyer's fitness to drive.[53] The dissent refuted this theory by stating that even if the doctrine of negligent entrustment were extended to cover sales transactions, the car seller would have no legal duty to find out about the buyer's driving ability.[54] The duty would arise only under facts like those presented in *Potamkin*, when the seller, due to no inquiry of his own, was put on notice of the buyer's incompetence.[55] Therefore, contrary to the majority assertion, the knowledge requirement would not cause the dealers to probe into the buyer's background, nor have the seller assume the risks normally assumed by the buyer.

A second policy underlying the court's decision is that the extension of the negligent entrustment doctrine to sales would hinder commerce because of the seller's duty to probe.[56] Even though there would be no duty to probe, the uncertainty of what constitutes actual knowledge may well hinder commerce. In this respect, the majority is correct in insisting on a bright line test which extends liability only to those who own the car at the time of the accident.

The most persuasive argument the majority offered is that the Florida legislature has decided to regulate the area of automobile liability through their enactment of section 319.22(2) of the Florida Statutes.[57] The legislature has set certain requirements for the issuance of driver's licenses. The state —not car dealers — determines who is qualified to drive.[58] Car dealers are not, nor should they be, in the position

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dent only goes to the issue of proximate cause of the injury.

51. *Id.* at 563.
52. *Id.*
53. *Id.*
54. *Id.* at 565 (Baskin, J. dissenting) (citing Johnson v. Casetta, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (Ct. App. 1961)).
55. *Id.*
56. *Id.* at 563.
57. *Id.* at 562. *See also Potamkin I*, 11 Fla. L. Weekly at 1770, 1771; Mullins v. Harrell, 490 So. 2d 1338 (Fla. 5th Dist. Ct. App. 1986); Rio v. Minton, 291 So. 2d 214 (Fla. 2d Dist. Ct. App.), *cert. denied*, 297 So. 2d 837 (Fla. 1974).
58. *Potamkin II*, 505 So. 2d at 563.

to determine who is competent to drive. The fact that the state of Florida had already decided that Newry was capable of driving was enough to clear Potamkin of liability according to the majority.[59] However, this ignores the fact that Potamkin would not in fact have had to second guess the legislature. Because Potamkin had actual knowledge of Newry's incompetence, the majority's judicial deference argument fails.

III. The Controlling Law In Florida

A. *Dangerous Instrumentality In Florida*

To recover for damages due to negligence, there are two theories upon which a person can base his claim: vicarious liability and primary liability.[60] Many cases have arisen in which a car owner entrusted his car to a third party, whose negligence caused the victim's injuries. This long history of cases has established a clear law in Florida on the "dangerous instrumentality doctrine" as applied to automobiles.[61] The dangerous instrumentality doctrine holds that the principles of the common law do not permit the owner of an instrumentality that is peculiarly dangerous in its operation to authorize another to use such instrumentality on the public highways without imposing upon such owner liability for negligent use.[62] The liability grows out of the owner's duty to have the vehicle properly operated when it is on the public highway by the owner's authority.[63] Once the owner "gives his express or implied consent to another to operate his automobile, he is liable for the negligent operation of it, no matter where the driver goes, stops or starts."[64]

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59. *Id.*

60. RESTATEMENT (SECOND) OF AGENCY Scope Note to ch. 7 & § 215 (1958).

61. *See* Union Air Conditioning v. Troxtell, 445 So. 2d 1957 (Fla. 3d Dist. Ct. App. 1984) (citing Roth v. Old Republic Insurance Co., 269 So. 2d 3 (Fla. 1972); Susco Car Rental System of Florida v. Leonard, 112 So. 2d 832 (Fla. 1959); Commercial Carrier Corp. v. S.J.G. Corp., 409 So. 2d 50 (Fla. 2d Dist. Ct. App. 1981), *rev. denied*, 417 So. 2d 328 (Fla. 1982)).

62. *Id.*

63. *Id.*

64. *See* Whalen v. Hill, 219 So. 2d 727, 730 (Fla. 3d Dist. Ct. App. 1969) (quoting Boggs v. Butler, 129 Fla. 324, 176 So. 174, 176 (Fla. 1937)). *See also* Avis Rent-A-Car Systems, Inc. v. Garmas, 440 So. 2d 1311 (Fla. 3d Dist. Ct. App. 1983). This also applies when the driver "grossly violates the owner's express instructions concerning" the vehicle's use.

In *Whalen v. Hill*,[65] the court found that the owner could not be held liable for injuries sustained in a car collision after the owner transferred both legal and beneficial title of the car to the buyer.[66] As the First District Court of Appeal stated in *Register v. Redding*,[67] "the sale of the vehicle will in legal effect be considered effectuated and the vendor absolved from any liability for the vehicle's subsequent negligent operation." The *Whalen* court found that under the dangerous instrumentality doctrine, when an owner authorizes or permits another to use his automobile, he is liable for injuries to third parties caused by negligent operation of the vehicle."[68] Liability extends regardless of the relationship between the owner and operator. The responsibility is attached to *ownership* of the instrumentality.[69]

In Florida, the dangerous instrumentality doctrine has never been extended liability to owners who had mere naked title. In *Palmer v. R. S. Evans, Jacksonville, Inc.*,[70] the buyer and seller signed a conditional sales contract, so the legal title to the automobile remained with the seller when the accident occurred. The court found that the seller, Evans, was not the owner in this case, because the rationale of the Florida cases which impose tort liability upon the owner of an automobile operated by another would not be served by extending the doctrine to one who holds naked title to the car as a security payment of the purchase price.[71]

Three later cases used the same logic to relieve the actual owner of liability. In *McAfee v. Killingsworth*,[72] the buyer made a down payment of $200.00, drove the car more than four days, and then got in an accident. The buyer then unsuccessfully tried to escape liability by claiming that he did not own the car.[73] In *Platt v. Dreka*,[74] the Florida

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65. 219 So. 2d 727 (Fla. 3d Dist. Ct. App. 1969).
66. *Id.*
67. 126 So. 2d 289, 291 (Fla. 1st Dist. Ct. App. 1961) (quoting Palmer v. R.S. Evans, 81 So. 2d 635 (Fla. 1955)).
68. *Whalen*, 219 So. 2d at 729. *See also* Susco Car Rental System of Florida v. Leonard, 112 So. 2d 832 (Fla. 1959) (holding that when an owner of an automobile permits another to operate the owner's vehicle, and the operator negligently injures a third person, the owner is liable to the third person).
69. *Susco*, 112 So. 2d at 837.
70. 81 So. 2d 635 (Fla. 1955).
71. *Id.* at 637.
72. 98 So. 2d 738 (Fla. 1957).
73. *Id.* at 738-40. The court found that "the holding of mere naked title as security for payment was not sufficient to impose tort liability for the negligent operation of the car by another." *Id.* at 740.

Supreme Court held that even though the records of the Motor Vehicle Commissioner's office did not show a regular transfer of title by the seller, the seller was not liable. The buyer was the "owner" of the car because the bona fide sale and transfer coupled with the insurance which the buyer had bought eight months before the accident outweighed the invalid transfer.[75] In *Register v. Redding*,[76] the seller accepted a down payment on a used car from the buyer. The seller claimed no responsibility because at the time of the accident, the seller no longer owned the car.[77] It is clear from the above cases that under Florida's dangerous instrumentality doctrine, if the facts establish a definite intention to transfer beneficial ownership of the car to a buyer, and if an actual delivery and acceptance has taken place, the transaction will be considered a sale. Once the car is sold, the seller is absolved of all liability.

It should be noted that under such analysis, ownership is not a dispositive characteristic. In *Re-Mark Chemical Co. v. Ross*,[78] the dangerous instrumentality doctrine was extended to one who had no title at all. This occurred because Re-Mark, the non-owner, entrusted a car over which it had dominion and control.[79] This relationship was sufficient to deem Re-mark as the "owner" in order to impose liability.[80]

The facts of the *Potamkin* case do not justify recovery under the dangerous instrumentality doctrine. Potamkin should not be held liable under a vicarious liability theory because Newry was the *driver*, the *beneficial owner*, the *actual owner* and the one with *dominion and control* of the car at the time of the accident. Due to the clarity of the outcome, Horne did not pursue this theory of recovery, but instead based her claim against Potamkin on negligent entrustment — a theory of primary liability.

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74. 79 So. 2d 670 (Fla. 1955).
75. *Id.* at 672.
76. 126 So. 2d 289 (Fla. 1st Dist. Ct. App. 1961).
77. *Id.* at 290.
78. 101 So. 2d 163 (Fla. 3d Dist. Ct. App. 1958).
79. *Id.* at 165. (The president of Re-Mark Chemical Company instructed an employee to drive a car home to do company business on the way. Re-Mark did not own the car, but possessed it, exercised dominion and control over it, and paid its upkeep and operating expenses.).
80. *Id.*

B. *Negligent Entrustment In Florida*

Florida courts have allowed recovery in many cases under the theory of negligent entrustment as embodied in section 390 of both the First and Second Restatements of Torts.[81] These cases generally involved the bailment of automobiles, guns, and the rental of motor boats.[82] The question facing the Florida Supreme Court was whether to adopt section 390 of the Restatement (Second) of Torts to firmly establish the theory of negligent entrustment in Florida.[83] If the supreme court decides to adopt the Restatement section, it will then have to determine whether to extend section 390 to the sale of automobiles.

IV. History Of The Negligent Entrustment Doctrine

A. *Development Of The Doctrine*

The origin of negligent entrustment can be traced as far back as 1816 to the case of *Dixon v. Bell*.[84] The First Restatement position stems from the holding in *Dixon*.[85] In *Dixon*, Bell gave a loaded gun to his servant, a feeble-minded girl of ten, and told her to carry it to Dixon.[86] While the girl was carrying the gun she tampered with the

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81. *See* cases cited *infra* note 82.

82. Engleman v. Traeger, 102 Fla. 756, 136 So. 527 (Fla. 1931) (car); Clooney v. Geeting, 352 So. 2d 1216 (Fla. 2d Dist. Ct. App. 1977) (car); Rio v. Minton, 291 So. 2d 214 (Fla. 2d Dist. Ct. App. 1974) (car); Brien v. 18925 Collins Avenue Corp., 283 So. 2d 847 (Fla. 3d Dist. Ct. App. 1970) (gun); Seabrook v. Taylor, 199 So. 2d 315 (Fla. 4th Dist. Ct. App. 1967) (gun); Boland v. Suncoast Rent-A-Scooter, 39 So. 2d 916 (Fla. 2d Dist. Ct. App. 1983) (motor boat); Cashell v. Hart, 143 So. 2d 559 (Fla. 2d Dist. Ct. App 1962) (motor boat). For a recent First District decision recognizing a cause of action for the negligent entrustment of an automobile, see Gorday v. Brown, 13 Fla. L. Weekly 1511 (1st Dist. Ct. App. April 8, 1988).

83. Although the district court addressed this issue in *Potamkin I*, 11 Fla. L. Weekly 1770, it did not reach a conclusion. Accordingly, the issue is still open because the court certified the following question to the supreme court: "SHOULD FLORIDA ADOPT SECTION 390 OF THE RESTATEMENT (SECOND) OF THE LAW OF TORTS, AND IF SO, SHOULD THE SECTION BE CONSTRUED SO AS TO EXTEND LIABILITY TO A *SELLER* OF A CHATTEL?" *Potamkin II*, 505 So. 2d at 563-64.

84. 5 M. & S. 197, 105 Eng. Rep. 1023 (1816).

85. *Id.* at 1023; *See also* RESTATEMENT (SECOND) OF TORTS § 390 Comment b, Illustration 1 (1966).

86. *Dixon*, 105 Eng. Rep. at 1023.

trigger causing the gun to discharge and harm Dixon's son.[87] *Dixon* was one of the first cases which recognized that an owner who supplies a chattel to a child or someone likely to harm himself or another is liable to the injured person. Important in *Dixon* was that the relationship of bailor and bailee was also that of master and servant. This relationship, as well as the bailee's youth, placed a high degree of responsibility on the master, for the servant's actions. Also, the servant was incompetent and the master knew of this incompetence. A final factor which was present in *Dixon* was that the servant was the bailor of a gun, a very dangerous weapon. All of these factors contributed to the court's decision to extend liability to the master, who owned the gun. This case heightened bailors' duty to third persons.

Beginning in the 1920's, the courts extended the application of the negligent entrustment doctrine from bailment of guns to bailment of automobiles.[88] In the early car bailment cases, the close relationship still existed because the entrustee was still a minor, and the entrustment took the form of a bailment.[89] This extension of the doctrine was not so drastic because an automobile was considered as deadly as a gun.

The next extension involved a case where the bailee was an adult son who had borrowed his father's car. The father knew of the son's drinking habits. Even though the son had reached the age of maturity, the father was nevertheless held liable because the son was still under his control.[90]

As more cases developed, the close relationships such as master/servant or parent/child were not always required. By the 1930's, many courts imposed liability on automobile owners for entrusting their car to incompetent, inexperienced or habitual drunk drivers.[91]

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87. *Id.*

88. *E.g.* Anderson v. Daniel, 136 Miss. 456, 101 So. 498 (1924) (A father, who permitted his 16 year old son to drive the father's car, was found guilty of negligence and liable for the injuries suffered as a result of his son's accident because of his entrustment and his son's age).

89. *Id.* at 457, 101 So. 2d at 499.

90. Crowell v. Duncan, 145 Va. 489, 134 S.E. 576 (1926).

91. *See e.g.*, Moran v. Moran, 124 Neb. 379, 246 N.W. 711 (1933) (minor driving car); Greeley v. Cunningham, 116 Conn. 515, 165 A. 678 (1933) (owner entrusting car to young lady who was incompetent, inexperienced, and a reckless driver); Crowell v. Duncan, 145 Va. 489, 134 S.E. 576 (1926) (adult son in habit of getting under the influence of intoxicants and father knew of son's habits). *See also* Brady v. B. & B. Ice Co., 242 Ky. 138, 45 S.W.2d 1051 (1931) (intoxicated truck driver). *Cf.* Fisher v.

These cases prompted the drafters of the First Restatement of Torts to include a section solidifying the law of negligent entrustment.[92] Once the Restatement recognized a cause of action for negligent entrustment, it was inevitable that the doctrine would be examined throughout the country. Since the First Restatement did not specify whether the term "supplies" meant "lends," "leases," "bails," "gives" and/or "sells," the law was applied very inconsistently by different states.

Since its introduction, almost every state has adopted a law similar to section 390 to impose liability on an owner for injuries caused by the driver whom the owner knew to be incompetent at the time of the entrustment.[93] Most of the recent development of the doctrine of negligent entrustment focuses on refining the scope of the elements.

Fletcher, 191 Ind. 529, 133 N.E. 834 (1922) (owner not liable for the negligence of his chauffeur.) In *Fisher*, the chauffeur was not on duty, but the owner knew that the chauffeur was a habitual drunkard who drove while intoxicated, that he "was a wild and reckless driver" who drove at a "high, dangerous and unlawful rate of speed," and that he had been convicted and fined for hitting other cars and people. Although the owner admitted that the chauffeur was dangerous to others, he was not liable when the chauffeur hit Fisher's horse and wagon, killing the horse and injuring Fisher. *Fisher*, 191 Ind. at 530, 133 N.E. at 834, 836.

92. The elements that most states require appear in § 390, which states:

> [O]ne 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 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 (1966).

Some of the cases which helped the drafters arrive at the wording of § 390 are: Parker v. Wilson, 179 Ala. 361, 60 So. 150 (1912); Rocca v. Steinmetz, 61 Cal. App. 797, 214 P. 257 (Ct. App. 1923); Anderson v. Daniel, 136 Miss. 56, 101 So. 98 (1924); Round v. Phillips, 166 Md. 151, 170 A. 532 (1934). RESTATEMENT (SECOND) OF TORTS § 390 (app. 1966).

93. These states include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington. RESTATEMENT (SECOND) OF TORTS § 390 (1966).

B. *Current State Of The Doctrine*

1. *Elements Under the Doctrine*

Under the Second Restatement, the four elements[94] of negligent entrustment are (1) the entrustment, (2) the incompetence, (3) the knowledge of the incompetence, and (4) causation. According to the First and Second Restatements, the entrustment element of the doctrine applies to sellers, lessors, donors, lenders, and all kinds of bailors. Not all states have adopted the Restatement's broad scope of applicability, but most states agree that an entrustment occurs when the owner lends his chattel to another.[95] Courts also frequently apply the doctrine to lessors[96] and bailors.[97] As the owner's control of the chattel decreases, as with a gift or a sale, the policy for holding them responsible also decreases. This may be why there is a split of authority on whether a gift constitutes an entrustment, *i.e.*, whether to apply the doctrine to donors,[98] and why only two states have applied an entrustment to sales.[99]

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94. Anthony v. Covington, 187 Okla. 27, 28, 100 P.2d 461, 462 (1940), was one of the first cases to recognize the existence of four elements of negligent entrustment.

95. *See generally* Buchanan Contracting Co. v. Denson, 262 Ala. 592, 80 So. 2d 614, 615 (1955) (owner allowed employee to drive truck); Priestly v. Skourup, 142 Kan. 127, 130, 45 P.2d 852, 854 (1935) (owner lent automobile to careless driver); Pennington v. Davis-Child Motor Co., 143 Kan. 753, 755, 57 P.2d 428, 429, 430 (1936) (owner allowed an intoxicated person to use automobile); Rounds v. Phillips, 166 Md. 151, 160, 170 A. 532, 535 (1934) (both parents allowed minor son to drive car); Richton Tie & Timber Co. v. Smith, 210 Miss. 148, 48 So. 2d 618, 621 (1950) (owner furnished truck to incompetent, reckless driver); Sadler v. Draper, 46 Tenn. App. 1, 326 S.W.2d 148, 157, 160 (1959) (dealer's agent entrusted car to unfit, reckless, unlicensed habitual drunkard).

96. Evans v. Allen Auto Rental, 555 S.W.2d 325, 326 (Mo. 1977); U-Haul Co. v. Rutherford, 10 Md. App. 373, 270 A.2d 490, 491 (1970).

97. Abraham v. S.E. Onorato Garages, 446 P.2d 821, 826 (Haw. 1968).

98. *See* Bugle v. McMahon, 35 N.Y.S.2d 193 (Sup. Ct. 1942) (parents gave automobile to son who overindulged in liquors and were held liable); Golembe v. Blumberg, 262 A. D. 759, 27 N.Y.S.2d 692 (1941) (Father gave his adult, epileptic son a car. While driving, the son had a seizure and injured the plaintiff; the father was held liable). *Contra* Estes v. Gibson, 257 S.W.2d 604 (Ky. 1953) (parents who bought a car for inebriate and drug addict son were not held liable for son's accident); Brown v. Harkleroad, 39 Tenn. App. 657, 287 S.W.2d 92 (1956) (father gave car to habitual reckless driver, son who was addicted to drink, and was not liable for injuries because father no longer owned car); Sikora v. Wade, 135 N.J. Super. 62, 324 A.2d 580 (1975) (father who gave car to unlicensed son was not liable when son injured passenger while driving on private property).

99. *See* Johnson v. Casetta, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (Ct. App. 1961); Flieger v. Barcia, 674 P.2d 299, 301 (Alaska 1983).

The remaining elements are more straightforward. The second element, the entrustee's incompetence, takes four distinct forms. The entrustee may be incompetent by reason of age,[100] inexperience,[101] habitual recklessness,[102] or otherwise.[103] The third element is the entrustor's knowledge of the incompetence. This means that the entrustor must know, or have reason to know, of the entrustee's incompetence.[104] The fourth element requires that the entrustor's negligence concur with the entrustee's conduct as the proximate cause of the harm to the plaintiff.[105]

Although recognizing the doctrine, Missouri and Alabama use different elements to test for negligent entrustment. These elements are: (1) entrustment of a chattel (either directly or through a third party) to another; (2) likelihood that the person to whom the chattel is entrusted will, due to his youth, inexperience or otherwise, use the chattel in a manner involving an unreasonable risk of harm to himself and others; (3) knowledge (actual or imputed) of the entrustor of such likelihood; and (4) proximate cause of the harm to the plaintiff by the conduct of the entrustee.[106]

The plaintiff establishes negligent entrustment in Colorado by proving permission, control and knowledge.[107] Colorado splits the entrustment element into two parts: permission and control.[108] Colorado then incorporates the entrustee's incompetence and the entrustor's knowledge of the incompetence into one element, which is the third part. Colorado does not expressly address the causation element, but causation is required as in all negligence claims.

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100. *See* Coker v. Moose, 180 Okla. 234, 68 P.2d 504 (1937).
101. *See* Greeley v. Cunningham, 116 Conn. 515, 165 A. 678 (1933).
102. *See* Richton Tie & Timber Co. v. Smith, 210 Miss. 148, 48 So. 2d 618, 621 (1950).
103. *See* Golembe v. Blumberg, 262 A. D. 759, 27 N.Y.S.2d 692 (1941) (epileptic son); Evans v. Allen Auto Rental, 555 S.W.2d 325, 326 (Mo. 1977) (incompetent truck driver).
104. *See* Abraham v. S.E. Onorato Garages, 446 P.2d 821, 826 (Haw. 1968).
105. *See* Evans v. Allen Auto Rental, 555 S.W.2d 325, 326 (Mo. 1977).
106. Pritchett v. Kimberling Cove, Inc., 568 F.2d 570 (8th Cir. 1977); Chiniche v. Smith, 37 So. 2d 872 (Ala. 1979). *Cf.* Williams v. Steves Industries, Inc., 699 S.W.2d 570 (Tex. 1985) (The causation element (4) is a two part element: (4)(a) the driver was negligent on the occasion in question and (4)(b) the driver's negligence proximately caused the accident.)
107. Hasegawa v. Day, 684 P.2d 936 (Colo. App. 1983).
108. *Id.* at 939.

2. *The Doctrine as Applied to Sale of Automobiles*

Eight states have already addressed the question of whether to apply the negligent entrustment doctrine to the sale of automobiles.[109] Even though section 390 of the Second Restatement specifically states that the rule applies to sellers,[110] only Alaska and California have found that liability was possible against an owner for negligent entrustment in the sale of an automobile.[111] The first decision extending liability to a seller injuries caused by for negligent entrustment occurred in California in the landmark case of *Johnson v. Casetta*.[112] In this case, the court strictly construed section 390 to include sellers, even though it had never been done anywhere in the country. The court did not consider the policy behind the expansion, and gave an illusory answer to the question of how long a seller's liability lasts, stating that it continues as long as the driver remains incompetent.[113] In Alaska, the supreme court determined that ownership of the car on the date of the accident is irrelevant.[114] Negligence occurs when the owner delivers possession.[115] The Alaska court offered no reasoning to support its extension of the negligent entrustment doctrine, but simply extended the doctrine.

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109. The eight states are Alaska, California, Colorado, Georgia, Illinois, Kansas, Tennessee, and Texas. *See* Flieger v. Barcia, 674 P.2d 299 (Alaska 1983); Johnson v. Casetta, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (Ct. App. 1961); Baker v. Bratrsovsky, 689 P.2d 722 (Colo. App. 1984); Pugmire Lincoln Mercury, Inc. v. Sorrells, 142 Ga. App. 444, 236 S.E.2d 113 (1977); Tosh v. Scott, 129 Ill. App. 3d 322, 472 N.E.2d 591 (App. Ct. 1984); Kirk v. Miller, 7 Kan. App. 2d 508, 644 P.2d 490 (Ct. App. 1982); Irwin v. Arnett, Case No. 86-162 (Tenn. Ct. App. December 12, 1986); Rush v. Smitherman, 294 S.W.2d 873, 876 (Tex. Civ. App. 1956).

110. RESTATEMENT (SECOND) OF TORTS § 390, comment (a) (1966). The rule, as stated, applies to anyone who supplies a chattel for the use of another. It applies to *sellers*, lessors, donors or lenders, and to all kinds of bailors, irrespective of whether the bailment is gratuitous or for a consideration (emphasis added).

111. *See* Flieger v. Barcia, 674 P.2d 299 (Alaska 1983); Johnson v. Casetta, 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (Ct. App. 1961).

112. 197 Cal. App. 2d 272, 17 Cal. Rptr. 81 (Ct. App. 1961). It should be noted that the *Johnson* holding did not yet impose liability upon the sellers. The case was remanded for trial to determine whether the sellers had knowledge of the driver's incompetence.

113. *Id.* at 275, 17 Cal. Rptr. at 83.

114. *Flieger* 674 P.2d at 301. This court, curious as it may sound, cited to cases and states which refused to extend liability to sales, did not mention any California cases, and then held that negligent entrustment includes sales.

115. *Id.* at 301.

Georgia[116] and Colorado[117] have avoided addressing the question of whether to extend the doctrine of negligent entrustment to sales by concluding that the knowledge element was not fulfilled. The Georgia Supreme court refused to apply negligent entrustment to the sale of an automobile in *Pugmire Lincoln Mercury, Inc. v. Sorrells*,[118] because the seller had no knowledge of the intended driver's incompetence.[119] A Georgia court recently analyzed the law in light of the *Pugmire* decision, but did not clarify whether a seller is subject to liability for negligent entrustment.[120] Similarly, the Colorado Court of Appeals avoided the question of whether negligent entrustment applies to sales.[121] The Colorado court found that the plaintiff did not establish the "actual knowledge" element.[122]

Texas, Tennessee, Illinois, and Kansas are states which have refused to extend liability to the seller of an automobile.[123] In *Rush v. Silverman*,[124] Texas became one of the first states to hold that liability for negligently entrusting an automobile to an unlicensed driver is part of the law of bailments, but not part of the law of sales or gifts. The Texas court decided that it was not the legislative intent to extend the rule to sales.[125] In *Rush*, a Texas court persuasively argued that a

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116. *See* Pugmire Lincoln Mercury, Inc. v. Sorrells, 142 Ga. App. 444. 236 S.E.2d 113 (Ct. App. 1977).

117. *See* Baker v. Bratrsovsky, 689 P.2d 722 (Colo. App. 1984).

118. 142 Ga. App. 444, 236 S.E.2d 113 (Ct. App. 1977).

119. *Id.* at 445, 236 S.E.2d at 114. The *Pugmire* court acknowledged, in dicta, that the seller *could* be held liable even if there were in fact a "sale" if the sale had been made with actual knowledge of the driver's intoxication.

120. Selph v. Brown Ford Co., 181 Ga. App 547, 353 S.E.2d 11 (Ct. App. 1987). The *Selph* court distinguished *Pugmire* on its facts. In *Selph* the accident occurred 64 days after the sale, while in *Pugmire*, the accident occurred three hours after the sale. The *Selph* court went further by stating that *Pugmire*'s analysis was dicta, and that in Georgia, the proper defendant in a negligent entrustment case must be the owner of the vehicle, the party in control of the vehicle, or the party who placed the vehicle in the hands of the incompetent driver. This still does resolve the question of whether the seller of a vehicle is liable when the seller places the vehicle in the hands of the incompetent driver.

121. Baker v. Bratrsovsky, 689 P.2d 722, 723 (Colo. Ct. App. 1984).

122. *Id.*

123. *See* Tosh v. Scott, 129 Ill. App. 3d 322, 472 N.E.2d 591 (Ct. App. 1984); Kirk v. Miller, 7 Kan. App. 2d 508, 644 P.2d 490 (Ct. App. 1982); Irwin v. Arnett, Case No. 86-162 (Tenn. Ct. App. December 12, 1986); Rush v. Smitherman, 294 S.W.2d 873, 876 (Tex. Civ. App. 1956).

124. 294 S.W.2d 873, 876 (Tex. Civ. App. 1956).

125. *Id.* ("[T]he object of the rule was to prevent the lending of automobiles to

bailor is an entrustor, for during the bailment, what he bails remains his property. Then the court stated that a seller does not entrust because once the sale is consummated, the property is no longer the seller's.[126] Many recent Texas cases have upheld *Rush* and clarified the law in regard to negligent sales of automobiles.[127]

The three other states which have followed Texas are Kansas, Tennessee, and Illinois. In *Kirk v. Miller*,[128] the Kansas court found that if a sale is valid, the seller no longer owns the automobile, so the seller can not be held to have negligently entrusted the vehicle to the buyer.[129] The Tennessee courts also look at whether a valid sale took place. If so, the seller is not liable for negligent entrustment; if not, the seller may be liable for negligent entrustment.[130] The Illinois courts have dealt with sales of automobiles as the Tennessee courts have. In *Tosh v. Scott*,[131] the Illinois court held that the elements of ownership and right to control are necessary to trigger liability under negligent entrustment.[132] The policy behind the Illinois law comes from *Fugate v. Galvin*.[133] In *Fugate*, the court recognized that the imposition of a duty on sellers would assist injured plaintiffs by spreading the loss beyond the class of negligent drivers to a new class of defendants. However, the court considered it inequitable to make someone else, in this case the seller, pay for the driver's negligence just because the driver has no money.

C. *Impact of Potamkin*

Viewed in the context of the above decisions, the *Potamkin* case

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persons not shown by examination and license to be competent to drive.") (quoting Rundy v. Pirie-Slaughter Motor Co., 146 Tex. 314, 206 S.W.2d 587 (1947)).

126. *Id.* at 877. The Texas statute states that no person "shall authorize or knowingly permit" certain use of a vehicle. When a vendor sells a vehicle, he can no longer authorize or permit use because he has no control over the vehicle.

127. *See, e.g.*, Williams v. Steves Industries, Inc., 699 S.W.2d 570 (Tex. 1985); Hines v. Nelson, 547 S.W.2d 378 (Tex. Civ. App. 1977); Arias v. Aguilar, 515 S.W.2d 313 (Tex. Civ. App. 1974); Firestone Tire and Rubber Company v. Blacksher, 477 S.W.2d 338 (Tex. Civ. App. 1974).

128. 7 Kan. App. 2d 508, 644 P.2d 490 (Ct. App. 1982).

129. *Id.*

130. *See* Irwin v. Arnett, Case No. 86-162 (Tenn. Ct. App. December 12, 1986); Martindale v. Granville Pillow, Case No. 86-337-II (Tenn. Ct. App. May 27, 1987).

131. 129 Ill. App. 3d 322, 472 N.E.2d 591 (Ct. App. 1984).

132. *Id.* at 323, 472 N.E. at 592.

133. 84 Ill. App. 3d 573, 406 N.E.2d 19 (Ct. App. 1980).

puts the common law of negligent entrustment at a cross road. The Supreme Court of Florida could set a precedent which would greatly affect the relatively new cause of action of negligent sales. Never has there been a case holding a person negligent for selling a car to someone who was properly licensed by the state examiner. The *Potamkin* case could open up a new avenue of recovery for not only every party to a car accident, but it could also easily be applied to all types of products. *Potamkin*'s impact in the area of torts could equal *Miranda v. Arizona*'s impact on evidence or *Brown v. Board of Education*'s impact on constitutional law, because *Potamkin* adopts a principle consistently rejected in all other jurisdictions.

V. The Future Of Negligent Entrustment: Recommendations and Conclusion

The supreme court should analyze negligent sale and negligent entrustment differently. Dealers and manufacturers should not be held responsible for selling safe products which have been negligently used. A seller should not have to evaluate the competency of every purchaser. It would significantly burden commerce to hold all sellers liable for injuries caused after the sale.

The extension of the negligent entrustment doctrine to the area of sales would lead to an unnecessary flood of litigation. If extended, a buyer may be denied a product if the salesman has any fear that the buyer is incompetent to use the product. Because of the difficulty in assessing the extent of the buyer's knowledge, the seller could justifiably refuse to sell to a particular buyer whom he *believes* is incompetent.[134] Thus, aside from the predictable rise in the number of negligence cases against sellers, the establishment of a cause of action for negligent sales could have the surprising effect of encouraging discrimination suits.

Negligent sales should be governed by statute. A violation of a statutory duty alone should confer liability on sellers for negligence. For example, the legislature could impose liability for the sale of an automobile to an unlicensed driver. This would not be an unreasonable restraint on commerce and would avoid the difficulty of proving knowledge element of negligent entrustment.

The Florida Supreme Court should distinguish the *sale* of a chat-

134. For example, a car salesman, who believes that all women are incompetent drivers, could be justified if he refused to sell cars to women.

tel from other ways in which chattel is supplied. As set forth above, this is *not* a mere distinction without a difference; the sale of a chattel provides a unique legal theory for analysis. There may be plausible reasons to hold sellers liable for negligent entrustment. But the overwhelming policy weighs against such a holding. Indeed, the plaintiff is not left without a remedy because he can still recover against the primarily negligent driver. Moreover, the courts should examine the *effects* of applying the different laws set forth above instead of basing their decision solely on whether they believe the plaintiff should collect and if they can find a deep pocket to pay.

If the legislature decides that negligent sale should be a viable cause of action in Florida, it should mandate a comparative negligence analysis of the facts. For example, in *Potamkin*, Newry, as a licensed adult responsible for her own acts, probably would be at least 75% responsible for Horne's injuries. This solution would not have such adverse effects on commerce and car dealers.

Negligent entrustment should not be extended to include sales because the burden on the sellers is not justified. Even where the seller possesses actual knowledge of the buyers incompetence, it is the buyer's negligence or recklessness which actually causes the injury.[135]

Daniel S. Whitebook

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135. This author wishes to thank the Nova Law Review staff, especially Gary Gaffney, Editor-in-Chief, for editing assistance. Special appreciation goes to my parents, who taught me how to read, and my sister, Jodi W. Lerman, who taught me how to write. Additional thanks to my wife Hedy for always being there while I learned.