| | | |
|---|---|---|
| CHAD COHICK. | : | IN THE COURT OF COMMON PLEAS OF |
| | : | LYCOMING COUNTY, PENNSYLVANIA |
| Plaintiff | : | |
| | : | |
| vs. | : | NO. 03-00,731 |
| | : | |
| MICHELLE McCUSKER, | : | |
| | : | |
| Defendant | : | PRELIMINARY OBJECTIONS |

***Date: October 11, 2004***

***OPINION and ORDER***

Before the Court for determination are the Preliminary Objections of Defendant Michelle McCusker (hereafter "McCusker') filed May 21, 2004. The Court will grant the Preliminary Objections.

The above-captioned matter was instituted by a Praecipe for a Writ of Summons filed May 9, 2003. A Complaint was filed on May 7, 2004 alleging three counts (Count I – Negligence; Count II - Negligence *Per Se* Violation of 75 Pa.C.S.A. §1574; Count III – Negligent Entrustment). The present Preliminary Objections are to that Complaint. The Complaint alleges the following facts. On July 23, 2001, Plaintiff Chad Cohick (hereafter "Cohick") and McCusker were at The Wander Inn located in Williamsport, Pennsylvania consuming alcoholic beverages. Cohick and McCusker left The Wander Inn together and went to McCusker's 1990 Oldsmobile. McCusker was the initial operator of the vehicle, while Cohick was the passenger. A short time after leaving The Wander Inn, McCusker asked Cohick if he would drive her vehicle despite knowing that Cohick had been consuming alcoholic beverages, that he did not posses a valid Pennsylvania driver's license, and that he did not know how to operate a motor vehicle. Cohick agreed to McCusker's request and began to

drive the vehicle. While Cohick was operating the vehicle on the 800 block of Pearl Street in Williamsport, he hit a parked car. Cohick sustained injuries to his head and spine as a result of the collision.

In the Preliminary Objections, McCusker asserts a demurrer to all three counts of Plaintiff Cohick's Complaint. As to Count I, McCusker argues that she cannot be held liable for damages that Cohick caused to himself solely as a result of his own negligence. As to Count II, McCusker contends that pursuant to ***Department of Public Welfare for Use of Malek v. Hickey***, 582 A.2d 734, 736 (Pa. Cmwlth. 1990), a violation of 75 Pa.C.S.A. §1574, allowing an unlicensed driver to operate one's vehicle, would not impose strict liability upon her or constitute negligence *per se*. As to Count III, McCusker argues that the negligent entrustment theory does not create a cause of action in favor of a driver against the owner of a vehicle for damages the driver causes to himself solely as a result of his own negligence.

Cohick responds by initially conceding that Count II of the Complaint does fail to state a cause of action in light of ***Hickey***, *supra*. However, Cohick argues that Counts I and III do state causes of action against McCusker. As to Count I, Cohick argues that McCusker has a duty to operate her vehicle in a safe and prudent manner, and that McCusker breached that duty by permitting Cohick to operate her vehicle after the two had been drinking and knowing that Cohick did not possess a valid Pennsylvania driver's license and had never driven a car before.

As to Count III, Cohick argues that, under the negligent entrustment theory, it is negligent for an owner of a vehicle to entrust it to someone she knows is incompetent to operate the vehicle and can be liable for injuries that person sustains while operating the

vehicle. Cohick asserts that the Complaint pleads that it was negligent for McCusker to allow Cohick to operate her vehicle when she knew that he had been drinking, that he did not possess a valid Pennsylvania driver's license or know how to drive, and that he was mentally challenged.

A preliminary objection, in the nature of a demurrer, should only be granted when it is clear from the facts that the party has failed to state a claim upon which relief can be granted. ***Sunbeam Corp. v. Liberty Mut. Ins. Co.***, 781 A.2d 1185, 1191 (Pa. 2001). The reviewing court in making such a determination "is confined to the content of the complaint." ***In re Adoption of S.P.T.***, 783 A.2d 779, 781 (Pa. Super. 2001). "The court may not consider factual matters; no testimony or other evidence outside the complaint may be adduced and the court may not address the merits of matter represented in the complaint." ***Ibid***. The court must admit as true all well pleaded material, relevant facts and any inferences fairly deducible from those facts. ***Willet v. Pennsylvania Med. Catastrophe Loss Fund***, 702 A.2d 850, 853 (Pa. 1997). "'If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected … .'" ***Ibid***. (quoting ***The County of Allegheny v. The Commonwealth of Pennsylvania***, 490 A.2d 402, 408 (Pa. 1985)).

Initially, the Court will grant the demurrer to the negligence *per se* claims asserted in Count II, since Cohick concedes that Count II fails to state a cause of action in light of ***Hickey***, *supra*. As to the other preliminary objections, the resolution of the demurrers comes down to one question: Whether McCusker owed Cohick a duty? That question must be

answered in the context of a general duty theory and a negligent entrustment theory. As will be discussed *infra*, that question is answered in the negative under both theories.

Under the general negligence theory, the question is whether McCusker owed Cohick a duty to prevent him from operating her vehicle when she knew he had recently consumed alcohol, was not licensed, and had no experience driving a motor vehicle. A plaintiff must prove four elements to make out a negligence cause of action. A plaintiff must establish: "(1) the existence of a duty or obligation recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure on the part of the defendant to conform to that duty, or a breach thereof; (3) a causal connection between the defendant's breach and the resulting injury; and (4) actual loss or damage suffered by the complainant." ***Atcovitz v. Gulph Mills Tennis Club***, 812 A.2d 1218, 1222 (Pa. 2002); ***Rabutino v. Freedom State Realty Co.***, 809 A.2d 933, 938 (Pa. Super. 2002).

"The primary element in any negligence cause of action is that the defendant owes a duty of care to the plaintiff." ***Althaus by Althaus v. Cohen***, 756 A.2d 1166, 1168 (Pa. 2000); ***Gutteridge v. A.P. Green Servs., Inc.***, 804 A.2d 643, 655 (Pa. Super. 2002), *app. denied*, 829 A.2d 1158 (Pa. 2003). Whether a duty should be imposed is a question of law for the court to decide. ***Sharpe v. St. Luke's Hosp.***, 821 A.2d 1215, 1219 (Pa. 2003); ***Brisbine v. Outside in School of Experiential Education, Inc.***, 799 A.2d 89, 95 (Pa. Super. 2002), *app. denied*, 816 A.2d 1101 (Pa. 2003). " 'A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.'" ***Atcovitz***, 812 A.2d at 1222 (quoting W. Page Keeton et al, Prosser and Keeton on the Law of Torts, §53 at 356 (5th ed. 1984)). As a general rule, there is no duty

to control the actions of a third party unless the " 'defendant stands in some special relationship with either the person whose conduct needs to be controlled or in a relationship with the intended victim of the conduct, which gives the intended victim a right to protection.'" ***Brisbine***, 799 A.2d at 93 (quoting ***Brezenski v. World Truck Transfer, Inc.,*** 755 A.2d 36, 40 (Pa. Super. 2000)). Those relationships are limited to the types set forth in §§316-319 of the Restatement (Second) of Torts which include: a parent's duty to control a child (§316); a master's duty to control a servant (§317); a possessor of land's duty to control a licensee (§318); and the duty of those in charge of individuals with dangerous propensities to control those individuals (§319). ***Ibid***.

McCusker did not owe Cohick a duty under a general negligence theory. Under this theory, Cohick argues that McCusker had a duty to operate her vehicle in a safe and prudent manner. To fulfill her duty, Cohick asserts that McCusker had to prevent him, an individual who had been drinking, who did not have a driver's license, and who had no experience operating a motor vehicle, from operating her car. To hold would be to impose upon McCusker a duty to control Cohick's behavior. The law imposes no such duty upon McCusker unless there was a special relationship between her and Cohick.

There was no such relationship. The relationship between McCusker and Cohick was that of friends or social companions. This type of relationship does not fall within one of the categories enumerated in the Restatement. The fact that McCusker may have asked Cohick to operate her vehicle does not transform their relationship. In that instance, it would be one friend asking another to do something for her. The key being their relationship is still a

friendship type of relationship. The relationship between McCusker and Cohick is not the type recognized by law as to create a duty to control the behavior of the other.

Absent a special relationship, the law will not impose a duty upon one to control the behavior of another. The law will not require one to act as another's guardian angel and protect him from the errant choices he may make. Such a requirement would fly in the face of the idea that each individual is responsible for his own actions. Consequently, the Court finds that, under a general negligence theory, McCusker did not owe a duty to Cohick to prevent him from operating her vehicle.

Turning now to the negligent entrustment cause of action, the question here is whether McCusker owed Cohick a duty to prevent him from operating the vehicle when she knew that he would likely use the vehicle in such a manner as to create an unreasonable risk of harm to himself. Section 308 of the Restatement (Second) of Torts defines negligent entrustment as:

> 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.

***Donegal Mut. Ins. Co. v. Fackler***, 835 A.2d 712, 720 (Pa. Super. 2003), *app. denied*, 2004 Pa. Lexis 1888. Under this theory, a defendant's liability is based on his conduct with regard to the instrumentality or activity under his control. ***Ibid***; ***Ferry v. Fisher***, 709 A.2d 399, 400 (Pa. Super. 1995). The entrustor's liability is not dependant on, derivative from, or imputed from the entrustee's liability. ***Donegal***, 835 A.2d at 720; ***Ferry***, 709 A.2d at 400.

Under the negligent entrustment theory, a duty is imposed upon the one in control of the instrumentality to prevent one who is incompetent to use it from doing so. This is done in an effort to ensure that the instrumentality does not injury others, which would be likely if the user was incompetent. As such, the duty is owed to the class that could be injured by the incompetent use of the instrumentality. The question now is whether the entrustee of the instrumentality is included within that group. If not, then the entrustee cannot assert a cause of action under a negligent entrustment theory, as no duty was owed him.

Aside from the footnote in ***Hickey***, *supra*, which was dicta and of little precedential value, no Pennsylvania appellate court has addressed the issue as to whether an entrustee may bring an action against an entrustor.[1] Cohick cites to the Beaver County case of ***Camp v. Ruckert***, 2 D. & C. 4th 279 (1989) to support his position that such is permissible. In ***Camp***, the Beaver County Court denied the defendant's demurrer and held that an entrustee can bring a cause of action against the entrustor under a theory of negligent entrustment for damages

---

[1] The footnote stated:

> In ***Laubach v. Colley***, 129 A. 88 (Pa. 1925), the Court held that permitting an unlicensed driver who is under the legal age to be licensed establishes the requisite causal connection. It is obvious that ***Laubach*** was decided on the basis of negligent entrustment, i.e., permitting one who is incompetent to drive to operate one's vehicle. In the present case, had Ms. Hickey loaned the car to Mr. Lloyd knowing that he was a habitual drunkard, Ms. Hickey could have been found liable on the basis of this independent tort. No such allegation has been made by DPW, even after the trial court gave it an opportunity to amend its pleadings to make appropriate new allegations.

***Hickey***, 582 A.2d at 737, n. 3. This Court would note that ***Laubach*** did not address the issue as to whether an entrustee could bring a negligent entrustment cause of action against an entrustor. The issue in ***Laubach*** was whether the father of the driver could be liable for the injuries caused to a third party arising out of a motor vehicle accident. 129 A. at 88. The Supreme Court held that he could because his son was incompetent to operate the vehicle since he was under sixteen at the time of the accident. ***Id***. at 89. The Court based this conclusion on the statute that prohibited anyone under the age of sixteen from operating a motor vehicle. The statute was a legislative pronouncement that anyone under the age of sixteen was incompetent to operate a motor vehicle.

the entrustee suffered as a result of the entrustor negligently permitting the entrustee to use his automobile. 2 D. & C. 4th at 280. In reaching this conclusion, the Beaver County Court found guidance from ***Cogni by Cogni v. Portersville Valve Co.***, 470 A.2d 515 (Pa. 1983). The Beaver County Court said that, "The inference may be drawn from the Supreme Court's discussion that in a case of alleged negligent entrustment where the entrustor had control over the "automobile in question" a cause of action on the part of the entrustee may be recognized." ***Id***. at 282. With due respect to the Beaver County Court, this Court does not agree with the inference it drew from ***Cogni***.

In ***Cogni***, an eighteen-year-old employee of the defendant attended a Christmas party held at the defendant's plant at which alcohol was served. 470 A.2d at 516. The eighteen-year-old employee consumed an undisclosed amount of alcohol and became intoxicated. The eighteen-year-old employee decided to leave the party and got his keys from one of the defendant's agents who had control over them. ***Ibid***. The agent gave him the keys despite being aware of his intoxicated condition and was going to drive home. The eighteen-year-old employee was involved in a motor vehicle accident on the drive home and sustained serious injuries. ***Ibid***.

The eighteen-year-old employee's parents brought suit against his employer on his behalf and on their own. They asserted that the employer was liable on three basis: (1) that it was negligent in providing alcohol to the eighteen-year-old employee to the point that he became intoxicated; (2) the defendant was negligent in surrendering the car keys to the eighteen-year-old employee knowing he was intoxicated and would drive; and (3) as a landowner, defendant was negligent in breaching a duty owed to the eighteen-year-old

employee as an invitee. ***Cogni***, 470 A.2d at 516-17. The Supreme Court held that the employer defendant was not liable under a negligent entrustment theory because it had no right of control over the eighteen-year-old employee's vehicle. ***Id***. at 519. The Supreme Court stated that:

> However, this cause of action has been recognized only in those situations where the person sought to be held liable was "the owner or other person responsible for its (automobile) use." See Anno.: Liability Based on Entrusting Automobile to One Who is Intoxicated or Known to be Excessive User of Intoxicants. 19 A.L.R.3d 1175 (1968). Appellants have cited no cases which extend this liability to persons who were not the owner or otherwise responsible for the automobile in question. *See e.g.*, ***Mills v. Continental Parking Corp.***, 86 Nev. 724, 475 P.2d 673 (1970) (holding parking lot attendant not liable for surrendering car to owner who was intoxicated). The appellee here had no right of control over Mark Congini's car, and we see no basis upon which to extend liability to the situation posited here.

***Ibid***.[2] This is the language relied upon by the Beaver County Court in ***Camp***, *supra*. This language and the holding of the Supreme Court make it clear that to be liable under the negligent entrustment theory one must own or have control over the instrumentality. What ***Cogni*** did was answer the question of who has the duty under a negligent entrustment theory (owner); what it did not do was answer the question of to whom is that duty owed (entrustee and/or third party).

The Court concludes that, under a negligent entrustment theory, the duty is owed to a third party and not the entrustee. This is the same conclusion reached by the Court of Appeals of Wisconsin in ***Erickson v. Prudential Property & Casualty Insurance Company***, 479 N.W.2d 552 (Wisc. Ct. App. 2002). In ***Erikson***, the wife of the man killed while cutting

---

[2] The A.L.R. article cited in ***Cogni***, *supra*, did not address the issue of whether a duty is owed by the entrustor to the entrustee.

tree branches with a chainsaw brought a claim against the individual who gave her husband the chainsaw under a negligent entrustment theory as defined by §308. The Court of Appeals stated that the trial court was correct in dismissing her §308 claim. The Court of Appeals held that the drafters of the Restatement did not intend for §308 to apply to self-inflicted injuries the entrustee suffered, but to injuries suffered by third parties. ***Id***. at 557.

Likewise, this Court believes that the duty imposed under the negligent entrustment theory was not intended to run to the entrustee. This is clear from the language of §308. Section 308 imposes liability based upon the knowledge that the entrustee is likely to use the instrumentality or conduct himself in the activity so as to "create an unreasonable risk of harm to *others*." (emphasis added) If §308 was meant to apply to the entrustee, then the language could have said "an unreasonable risk of harm to himself and others." Such was the case in §390 of the Restatement (Second) of Torts, Chattel for Use by Person Known to Be Incompetent. Section 390 imposes liability upon one who provides a person with chattel knowing that it is likely the person given that chattel will use it in such a manner as to create an unreasonable risk of harm to himself and others. Under §390, the entrustee is explicitly included within the class of people designed to be protected. The absence of such a statement in §308 is telling of the intended beneficiaries of the duty.

The illustrations accompanying §308 also make it clear that the duty was not intended to run to the entrustee.[3] In every illustration, the duty is owed to a third party. From the language and illustrations of §308, it is clear that negligent entrustment was not intended to encompass a claim by the entrustee against the entrustor as the duty is owed to third parties, not the entrustee.

Aside from the clear language of §308, an entrustor does not owe an entrustee a duty under a negligent entrustment theory because that would impose upon the entrustor a duty to control the behavior of another for that other's benefit. As noted earlier, the law does not impose a duty on one to control the behavior of another absent a special relationship. ***Brisbine***, 799 A.2d at 93. Imposing a duty on an entrustor would be to require the entrustor to protect the entrustee from his own incompetence.

In this case, Cohick did not have to accept the keys to McCusker's vehicle or agree to operate it. Cohick was aware of his own limitations. By choosing to drive despite

---

[3] The following are the illustrations given for §308:

1. A permits B to drive his car. B is a girl of 14 who, to A's knowledge, has never driven a car before. B's inexperience causes a collision in which C is hurt. A is negligent toward C.

2. A lends his car to B, whom he knows to be intoxicated. B's intoxicated condition leads him to cause harm to C. A is negligent toward C.

3. A and B have agreed to take two young women, in A's car, to a dance at a roadhouse and have stocked the car with liquor. A, the owner of the car, is prevented from going on the party and lends his car to B. The party takes place and B gets drunk, as A knows that he has done on other similar occasions, and while drunk drives the car recklessly, causing harm to C. A is negligent toward C.

4. A lends his automobile to B, whose license has to A's knowledge been revoked for reckless driving. B drives the automobile negligently, running down C. A is negligent toward C.

those limitations, Cohick cannot impose a duty upon McCusker. Therefore, McCusker owed no duty to Cohick under a negligent entrustment theory.

The Court made reference earlier in this opinion to §390 of the Restatement (Second) of Torts. While neither party addressed its applicability to the negligent entrustment theory issue, the Court feels compelled to address whether it could support the claim asserted by Cohick. Section 390 states as follows:

> One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them.

Restatement (Second) of Torts §390 (1965). Section 390 is a special application of the negligent entrustment theory expressed in §308. ***Id***., comment b. Sections 390 and 308 both impose liability for allowing a person to use an instrumentality in such a manner as to create an unreasonable risk of harm.

The status of §390 in Pennsylvania is unclear. In ***Littles v. Avis Rent-A-Car System***, 248 A.2d 837 (Pa. 1969), the plaintiff sued the company that had leased a van type truck to an individual who had driven that truck into an overhead bridge causing injury to the minor plaintiff passenger. The Supreme Court had an opportunity to address the applicability of §390, but declined to decide whether §390 would be adopted in Pennsylvania, because even if it was adopted, the Plaintiffs failed to meet its requirements. ***Id***. at 838. The Supreme Court held that the Plaintiffs failed to demonstrate that the defendant knew or should have known that the driver of the van was incompetent to operate the vehicle. ***Ibid***.

In ***Jahn v. O'Neal***, 475 A.2d 837 (Pa. Super. 1984), the plaintiff sued the company that had leased a car to the individual that struck her car from behind and injured her. In beginning its analysis, the Superior Court set forth the general rules governing the liability of a lessor of vehicles. It noted that generally a lessor of motor vehicles is not liable for the negligence of the lessee while operating the vehicle. ***Id***. at 838. The Superior Court also stated that, "A lessor may be held liable, however, for the lessor's *own* negligence in leasing the vehicle for use by a person whom the lessor has reason to know is incompetent." ***Ibid***. (emphasis in original).

It is this later statement that is of importance to the issue before this Court. For the statement, the Superior Court cited to ***Littles***, *supra*, and §390 of the Restatement. It is unclear whether, from this statement as to a lessor of vehicles' liability, the Superior Court has adopted §390 as a basis for negligent entrustment liability. What makes it even more confusing is the fact that the plaintiff in ***Jahn*** did not assert a theory of liability under §390, but instead on the theory that the Pennsylvania No-Fault Motor Vehicle Insurance Act imposed liability on a lessor of a motor vehicle for property damage caused by a lessee's negligent operation of such vehicle. Therefore, negligent entrustment and the applicability of §390 was not an issue in the case.

In the course of our research, the Court has been unable to locate any Pennsylvania appellate court decision that has permitted negligent entrustment liability to be based on §390.[4] Absent a clear directive from the appellate courts of this Commonwealth, this

[4] In ***Maxwell v. Enterprise Leasing Co.***, 4 D. & C. 4th 497 (Delaware Cty. 1989), the plaintiff brought a suit against the company that had leased a vehicle to the individual that hit her vehicle from behind. Plaintiff's theory of liability against the company was negligent entrustment. The Delaware County Court defined negligent entrustment as set forth in §390. ***Id***. at 501.

Court is reluctant to venture into unexplored territory. Especially where to do so would carve out an exception to the clearly established rule that there is no duty to control the actions of a third party absent a special relationship. The facts alleged clearly do not establish such a relationship, as both Cohick and McCusker were adults who had decided to go out and consume alcoholic beverages as social companions. Under the factual circumstances of this case the Court is unwilling to use §390 of the Restatement (Second) of Torts to create a duty to McCusker, which would exonerate Cohick from his own mistakes.

Accordingly, the Preliminary Objections demurring to the Complaint will be GRANTED.

***O R D E R***

It is hereby ORDERED that the Preliminary Objections of Defendant Michelle McCusker filed May 21, 2004 are GRANTED. The Complaint is DISMISSED.

BY THE COURT:

William S. Kieser, Judge

cc: Robert B. Elion, Esquire
Louis C. Schmitt, Jr., Esquire
McIntyre, Dugas, Hartye & Schmitt
P. O. Box 533; Hollidaysburg, PA 16648
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)