

## Negligent Entrustment

by Paul Farrell

**Editor's Note:** This article originally appeared in *TransActions*, the newsletter of the Transportation Practice Specialty, Volume II, No. 2 by the American Society of Safety Engineers, and is reprinted here with permission.

**Author's Note:** Disclaimer—The author is not an attorney, and the information contained in this article is not to be considered legal or professional advice.

■ **Paul Farrell** is the CEO of SafetyFirst, a team of experts from the transportation, insurance, and software industries that specialize in reducing commercial auto collisions through management information systems and programs, such as 24/7 call center and "Safety Is My Goal" decals for vehicles. The decals feature a phone number to a call center encouraging motorists to report risk-taking behaviors by drivers. The company provides solutions in partnership with insurance carriers and transportation firms. More information can be found at [www.safetyfirst.com](http://www.safetyfirst.com).

The pursuit of negligent entrustment verdicts in the aftermath of commercial auto claims is unsettling for policyholders and defending insurers. Settlements are often large, and judgments can often include punitive damages. In effect, the pursuit of a negligent entrustment verdict is a second claim for the same collision event—the first claim is that of negligence on the part of the driver, but the second is against the management team for having entrusted the vehicle to the driver. Fortunately, there are basic steps that management teams can take to guard against the allegation of negligent entrustment.

### What Does Negligent Entrustment Mean?

In simple terms, negligent entrustment means to charge someone with a trust or duty in an inattentive or careless fashion or without completing required process steps.

In commercial vehicle operations, a case of "negligent entrustment" may arise when someone allows another person to use a vehicle knowing, or having reason to know, that the use of the vehicle by such person creates a risk of harm to others.

There are two other theories of employer liability that are closely related to negligent entrustment: *respondeat superior* and *negligent hiring*.

Simply stated, *respondeat superior* holds an employer responsible for the conduct of an employee while the employee is acting within the scope of his or her employment.

*Negligent hiring* holds an employer responsible for the conduct of an employee if the employer failed to use due care in hiring and retaining such employee. An example of a circumstance involving negligent hiring would be the employer's failure to check a driver applicant's driving record where it would have revealed a poor driving history.

In the case of commercial vehicle operations, charges of negligent entrustment often arise after a collision where the employee or contractor was dispatched on a run without due regard for his or her qualification/ability to safely operate the vehicle.



Although the driver's own negligence in causing the accident is usually the primary issue, the two main focuses of investigation of a negligent entrustment charge are your company's policies and practices. Basic questions are asked: Did your company have a policy regarding driver selection and training? Did your management team actually adhere to the terms and conditions of that policy?

### What Elements "Make Up" Negligent Entrustment?

There are several issues that are examined in a case or claim alleging negligent entrustment:

- The driver must be incompetent.
- The employer knew or should have known of this incompetence.
- The employer must have entrusted the vehicle to the driver.
- The driver was negligent on the occasion in question.
- The driver's negligence proximately caused the crash.

Let's examine each of these five issues in more detail.

### How Can It Be Shown that the Driver Is Incompetent?

Cases in many jurisdictions have focused on establishing the minimum

*Continued on page 2*

# Negligent Entrustment

Continued from page 1

competency of drivers by using the Federal Motor Carrier Safety Regulations (FMCSR) as a reference. In simple terms, these regulations require that a driver:

- be of legal driving age for the state where his or her license was issued
- be able to read and speak the English language
- by reason of experience or training, be able to safely operate the vehicle
- by reason of experience or training, be able to determine whether the cargo is securely loaded
- be physically qualified to operate the vehicle
- hold a valid driver's license
- complete an application form for employment
- complete a driving test in the type of vehicle the applicant is expected to operate and be deemed qualified to operate the vehicle (have not committed a criminal offense)

A complete review of the FMCSR is beyond the scope of this document.

Although enacted to govern companies that are under the authority of the Department of Transportation (DOT), the Federal Motor Carrier Safety Regulations are increasingly being referenced as a benchmark to measure the qualifications of a "professional driver" (a person with driving as a regular part of his or her job duties). When allowed as evidence in cases involving companies who are not under the authority of the DOT, this principle can make a big impact on the outcome of a court decision.

Of course, the easiest method of demonstrating a driver's incompetence is a long history of traffic violations and/or collisions.

## How Can It Be Shown that the Employer Knew or Should Have Known of the Driver's Incompetence?

Typically, all pertinent employment records of the driver will be reviewed by

the plaintiff's counsel. They will also do a thorough investigation of the driver's background, including his or her driving record. If the employment records do not contain an accurate and complete driving history of that employee, then the plaintiff's attorney will assert that the employer "knew" or should have known of the incompetence. If the plaintiff's counsel independently discovers records indicating incompetency, then the employer should have been able to discover the same knowledge.

## How Can It Be Shown that the Employer Entrusted the Vehicle to the Driver?

If the driver is performing within the scope of his or her job duties and the vehicle was not taken without permission, the vehicle has presumably been entrusted to the driver by the employer.

## How Can It Be Shown that the Driver was Negligent on the Occasion in Question?

An investigation of the accident scene, interviews with the parties involved and witnesses, and other evidence, such as a citation issued to the driver, can be used to prove a finding of negligence.

## How Can It Be Shown that the Driver's Negligence Proximately Caused the Crash?

There are several ways that this may be established, often involving investigations by "expert witnesses," but a simple test is to determine whether the driver was issued a citation, was criminally charged, or otherwise ruled to have been "at-fault" after a presentation of evidence.



## What Can My Company Do to Reduce Our Exposure?

There are several areas of a human resources and safety program that should be examined:

- driver recruiting and selection practices
- new hire evaluation and orientation
- ongoing driver review and training
- post-accident reviews and training

## Driver Recruiting and Selection Practices

How your company attracts and then selects drivers is very important. Regardless of negligent entrustment allegations, it just makes good business sense to attract and hire the very best candidates for the job.

When recruiting drivers, you should make it clear in the advertisement that the position requires driving, and that candidates, in order to be qualified, should possess certain qualifications. These qualifications should be spelled out in detail to avoid interviewing unqualified prospects. These qualifications will vary from job to job, but examples could include:

- Possess a valid drivers license.
- Possess a specific type of license (i.e., commercial license with applicable endorsements).
- Have a clear Motor Vehicle Record.
- Have experience operating a vehicle similar to the one that they will use on the job.

Some companies may need to focus on selecting people for their technical skills or sales skills as a first priority, and then consider their driving ability. In this situation, the company should set and follow certain standards for driving ability: if the person can not meet those standards, he or she will not drive. If he or she meets the minimum standards, but is considered "conditional" (i.e., the candidate could fall below the standard with one new violation or accident), then a training and monitoring plan should

be enacted to enhance driving skills and to watch for inappropriate risk-taking behaviors that could endanger the driver or the public.

Companies with multiple locations that do not have centralized control of recruiting and hiring need to conduct audits to be sure that corporate guidelines are being carried out at every location. Exceptions to existing guidelines should not be tolerated.

Management teams should review their driver recruiting and selection practices annually to be sure that they continue to attract a suitably qualified driver for each position. The review should also note any changes in position descriptions, especially if driving time increases or is added to a position's responsibilities. Changes in state or federal regulations affecting the position should also be reviewed and incorporated into company policy as needed.

The "bottom line" is this: job requirements need to be clearly communicated, and only qualified candidates should be placed in those jobs.

### **New Hire Evaluation and Orientation**

Once an employee has been hired, additional verification of qualifications may be necessary. Medical reviews, drug and alcohol screening, road testing, and other types of required evaluations may need to be completed in order to meet state or federal regulations. Any newly discovered shortcomings should be documented and addressed. For example, a driver who demonstrates inappropriate behaviors during a road test should receive documented training aimed at improving those demonstrated behaviors. If a driver has serious problems in this phase, he or she should not drive until the issues have been fully rectified.

Management also has an opportunity to provide some type of indoctrination to the duties and expectations that come with the job. This may be accomplished in a number of ways:

- deliver a "driver handbook"
- deliver an "employee manual"
- provide classroom instruction

If delivering written materials, the employer should have the employee sign an acknowledgment that he or she has received the manual and is required to read it. It may also be necessary to follow up with each employee at a later time to verify that the manual has, indeed, been read.

Management should monitor their driver orientation, testing, and training programs to be sure that poor driving behaviors are discovered and addressed promptly. Periodic review of the effectiveness of the programs will ensure that programs that are becoming outdated can be replaced.

For a multi-location company, periodic reviews of each location should occur to make sure company evaluation and orientation standards are followed consistently.

### **Ongoing Driver Review and Training**

It is not prudent to qualify a driver only once, at the time of hire, and then never revalidate his or her qualifications. People change over time, and so do their habits. Drivers who are subject to the Federal Motor Carrier Safety Regulations need to participate in an annual review of their performance conducted by their employer. This often includes obtaining an up-to-date motor vehicle record (MVR) from the driver's state of license.

Companies that are not subject to the authority of the DOT should carefully consider implementing some form of annual review. This may be as simple as obtaining an updated MVR on each driver or as extensive as holding a formal performance review that includes annual road tests designed to validate behind-the-wheel performance.

Ongoing training is also helpful in maintaining safety awareness among drivers. Training can take on many forms:

- skill training delivered via audio cassette (while operating the vehicle)
- video training programs (classroom)
- self-led training programs (at home)
- oral presentations by management or technical expert (classroom)

Other awareness-building opportunities exist via safety posters, newsletters to drivers, and safety announcements in payroll checks.

Training shows a commitment to safety by management, but should be carefully documented to verify, precisely, which drivers actually attended and/or completed the coursework.

### **Post-Accident Reviews and Training**

Most companies have established specific accident reporting procedures. Typically, a driver completes a recordkeeping kit at the scene of the collision, and then reports the details of the crash to a supervisor at his or her home terminal/location. Follow-up investigations may be completed by special teams, committees, specially trained managers, or experts.

Although the purpose of these investigations is not to establish blame or fault, the records associated with the investigation may appear to do so. These records could become evidence especially if the driver in question has had multiple accidents that have been investigated.

The process is important to improving safety by understanding why accidents happen. The investigations should not be abandoned simply because the report may be discoverable. Investigators should exhibit care when documenting their case to avoid humorous remarks that could be misinterpreted, and they should keep the file and its contents confidential.

*Continued on page 4*

# Negligent Entrustment

Continued from page 3

Additionally, when it becomes clear that a lawsuit is being filed, the records should be secured to ensure their availability.

The results of any investigation should be carefully considered by management. If a gap in safety procedures is found, an action plan to correct the deficiency should be made and carried out. Ignoring the report's conclusions invites trouble by potentially painting a picture of management as indifferent toward safety results.

If the driver was responsible for the accident and specific behaviors or a lack of knowledge/ability was involved, plan and enact a driver-specific action plan. This might include driver training or coaching by a supervisor. Again, to ignore skill or knowledge gaps may reflect poorly on management's commitment to safety.

## What About Contracted Employees or Loans of Vehicles to Non-Employees?

Contracted employees who operate company-owned/leased vehicles could expose your company to allegations of negligent entrustment. Examples of this type of situation could include:

- a contracted security guard who uses a company pool car for patrols
- a temporary employee (from an employment service) who takes a car to the post office
- a temporary employee (from an employment service) who makes deliveries
- a maintenance contractor who needs to run out for a part or another location to do work
- transportation operations who contract with owner operators or run on other companies' DOT rights
- trip leasing

If this exposure exists, qualify the operators of the vehicles, or avoid the risk.

Similarly, providing company vehicles to non-employees represents a risk to your company. Although the entrusted person is not acting within the scope of employment for your firm, your company's vehicle has been made available for their use, and their qualifications should be evaluated.

What was perceived as a harmless use of the vehicle can be potentially damaging, e.g., loaning a delivery vehicle on the weekend to accomplish a household move to a new residence.

Another potential exposure comes from permitting spousal use of company cars without attempting to qualify their driving ability/history. If you haven't seen the benefit of a corporate vehicle use policy until now, there is no better justification than the issue of negligent entrustment!

## Summary

Negligent entrustment and its associated theories of liability can lead to costly litigation. Effective safety and qualification programs are critical to avoiding these types of litigation, and top management's commitment to make these programs produce results; your firm may be able to avoid unfortunate outcomes.

Additional resources and information are available through your insurance carrier, trade associations, and specialty firms that provide products and service to the fleet industry. ■

## Don't Miss This 2006 Annual Meeting Seminar Developed by the Loss Control Section

### Cage the Cat: Practical Application for the New Reality of Catastrophes

Sunday, September 10 • 2:45 – 4:45 p.m.

Those cats will keep coming . . . Are you prepared? Risk managers, business owners, agents, brokers, underwriters—in fact, everyone—must know what to do before, during, and after a catastrophe. Attendees will learn valuable and practical information at this “do-it-yourself” seminar.

#### Presenters:

Jane M. Wahl, CPCU, CLU, FLMI  
State Farm Insurance Companies (moderator)

Leslie Chapman-Henderson  
Federal Alliance for Safe Homes (FLASH)

Dakin Kinser, SCLA  
State Farm Insurance Companies

Larry Vannozzi  
National Weather Service



Photographs are from the Loss Control Section's 2005 Annual Meeting seminar.

**Register today for the 2006 Annual Meeting and Seminars at [www.cpcusociety.org](http://www.cpcusociety.org)!**