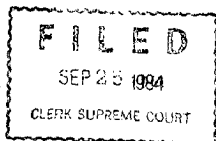


IN THE COURT OF APPEALS OF IOWA



BRENT L. COOPER and
SUSAN B. COOPER,

Plaintiffs-Appellants/
Cross-Appellees,

vs.

TIMOTHY HOLT, CARL HOLT, and
DARLENE HOLT,

Defendants-Appellees/
Cross-Appellants.

Filed September 25, 1984

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4-151
83-936

Appeal from the Iowa District Court for Polk County - Ray Hanrahan,
Judge.

In this tort suit arising from a collision between a motorist and a bicyclist, the jury awarded the plaintiffs a verdict on some of the plaintiffs' causes of action. The trial court then entered a judgment for the plaintiffs on part of the verdict, granted the plaintiffs a new trial as to part of the verdict, and denied the plaintiffs a new trial as to certain other parts of the case. The plaintiffs have appealed from the trial court's rulings, contending the trial court erred by denying them a new trial on the issue of damages and by granting the defendants a directed verdict on a cause of action accusing two of the defendants of negligently entrusting a car to their minor son (the third defendant). The defendants have cross-appealed. AFFIRMED.

Mark C. Smith and Janet Bryan-Galloway, Des Moines, for plaintiffs-appellants/ cross-appellees.

Paul C. Thune and John Wharton of Peddicord and Sutphin, P.C., and Allan Rauch, Des Moines, for the defendants-appellees/cross-appellants.

Heard by Snell, P.J., and Schlegel and Sackett, JJ., but decided en banc.

This tort action arose from a collision between plaintiff Brent Cooper and defendant Timothy Holt. Brent was riding a bicycle home from work when Timothy drove his car into him from the side. Timothy was charged with failure to yield the right-of-way. At the time of the accident, Timothy was sixteen. Timothy's parents are divorced; he was in the physical custody of his father, Carl Holt.

Brent filed suit against Timothy and against his parents, Carl and Darlene Holt. Brent's wife, Susan, was also named as plaintiff; she sought damages for loss of consortium.

During trial the court granted the Holts a directed verdict as to that part of the Coopers' petition which alleged that Carl and Darlene Holt had negligently entrusted an automobile to Timothy, who had a record of traffic infractions. In removing this part of the petition from the jury's consideration, the trial court relied on undisputed evidence that Timothy owned the vehicle in question.

The jury awarded Brent \$25,000 and awarded Susan \$1,000 from Timothy. In addition, the jury awarded Brent and Susan each \$100 from Carl. The awards against Carl were based upon Iowa Code section 613.16, which provides that a custodial parent of a minor may be held liable for actual damages of up to \$1,000 caused by the unlawful acts of the minor.

The Coopers responded to the verdict by filing various post-trial motions. In ruling on those motions, the trial court refused to grant the Coopers a new trial as to the damages awarded against Timothy. However, the trial court did grant the Coopers a new trial as to the damages awarded against Carl pursuant to Iowa Code section 613.16. The trial court also confirmed the previous ruling granting the Holts a directed verdict as to the cause of action for negligent entrustment.

The Coopers have appealed and the Holts have cross-appealed from the trial court's rulings and from the resulting partial judgment and partial grant of new

trial We review the case on assigned error. Iowa R. App. P. 4 (1983).

I.

The Coopers contend the trial court erred by granting the Holts a directed verdict as to that part of the petition which alleged negligent entrustment of a car to Timothy. The Coopers argue that in spite of Timothy's ownership of the car, there was evidence permitting the jury to find that his parents had negligently entrusted a car to him by allowing him to buy it or by allowing him to operate it in light of his driving record.

The accident in issue occurred on March 19, 1980. Timothy had received his driver's license only the summer before. His driving record thereafter included the following incidents: in September 1979 he had been involved in an accident in which he had run into the back of a car; he received two speeding tickets between the time when he received his license and the accident in this case; in February 1980 he received a citation for permitting an unauthorized person to drive his car; and on March 9, 1980, he was cited for having an improper muffler on his car. Timothy bought the car involved in the accident with Brent in December.

The Coopers claim Carl and Darlene failed in their duty to exercise control over their minor child, and that this failure took the form of negligent entrustment. We find this theory of recovery inapplicable to the circumstances of this case.

Only an "owner of a motor vehicle may be held liable for a resulting injury to a third person upon the ground of negligence if he knowingly entrusts its operation to an inexperienced or incompetent driver." Krausnick v. Haegg Roofing Co., 236 Iowa 985, 988, 20 N.W.2d 432, 434 (1945) (emphasis added). Carl and Darlene did not own the car in which Timothy struck Brent; Timothy was the owner. Normally, "a parent has no authority to divert, or in any manner exercise control or custody over, the property of the child, in the absence of statutory authority, or the existence of special circumstances." 67A C.J.S. Parent & Child § 113 (1978) (footnotes omitted).

The Coopers argue that "ownership alone cannot possibly be dispositive of the issue of negligent entrustment in this case." Because they claim that when parents have the ability to exercise control over a minor child, "they may be held liable for the child's injury of another, where the injury is a probable consequence of the failure of the parents to exercise such control over the child or in failing to restrain the child." They cite *Corpus Juris Secundum* for this proposition. That source states:

As a general rule, a parent may be liable for an injury which is directly caused by the child, where the parent's negligence has made it possible for the child to cause the injury complained of and probable that the child would do so, and a parent is liable if his or her negligence combines with the negligence of the child and the two contribute to injury by the child. In this respect, a parent is under a duty to exercise reasonable care so to control a minor child as to prevent the child from intentionally harming others or from engaging in conduct such as to create an unreasonable risk of bodily harm to them. . . .

So, where a parent has the ability to exercise control over the child, he or she may be liable in the event of failure to exercise proper control where the parent knows, or, in the exercise of due care, should know, that injury to another is a natural and probable consequence of such failure. The parent may also be liable for negligence . . . for failure to correct or restrain the child where the parent knows, or should know, of dangerous habits, propensities, or tendencies of the child which are likely to cause injury to others. Further, liability may exist where the parent negligently permits a young child to use or have access to a dangerous instrumentality.

Generally, liability of the parent is based on the rules of negligence rather than the relationship of parent and child. "Negligence" in this connection has been regarded as a relative term and the duty imposed on the parent as dependent on the particular circumstances. In accordance with rules applicable in negligence cases generally, the negligence of the parent must have been the proximate cause of the injury. In other words, the injury must have been the natural and probable consequence of the negligent act, that is, a consequence which, under the surrounding circumstances might and ought reasonably to have been foreseen as likely to flow from such act.

Ordinarily, a parent is not required to keep a child under constant surveillance, and mere negligent parental supervision or control is not a tort. Mere knowledge by the

parent of a child's mischievous and reckless or heedless or vicious disposition is not of itself sufficient to impose liability with respect to torts of the child, and there is no liability on a parent's part for the general incorrigibility of a minor child. In order to render a parent liable, his or her negligence in the exercise of parental supervision must have some specific relation to the act of which complaint is made. . . . In any event, a parent is not an insurer that the child will not harm another person.

67A C.J.S. Parent & Child §125 (1978) (emphasis added) (footnotes omitted).

Because a person may be held liable for the conduct of another over whom he has a duty to control, and because a parent has the duty to exercise control over his minor child, a parent can be held liable for the negligent operation of a motor vehicle by his child, even if the parent is not the owner of the motor vehicle, when he has the ability to exercise such control and should know of the necessity for doing so. Dortman v. Lester, 380 Mich. 80, 83-85, 155 N.W.2d 846, 848-49 (1968).

The Coopers point out the supreme court's recognition that "though the automobile may not be technically a dangerous instrumentality it is nevertheless one capable of doing great damage in the hands of an incompetent driver." Krausnick v. Haegg Roofing Co. at 988, 20 N.W.2d at 434. Despite the automobile's potential danger in the wrong hands, we do not view Timothy's driving record as one likely to cause his parents to know that injury to another was the natural and probable consequence of their failure to exercise control over him. "There is no showing of prior accidents or conditions which would apprise decedent that the driver was incompetent." Beardsley v. Ostrander, 254 Iowa 356, 362, 118 N.W.2d 61, 64 (1962). See also Hardwick v. Bublitz, 254 Iowa 1253, 1266, 119 N.W.2d 886, 893 (1963). For that matter, we do not believe the evidence demonstrated that Carl or Darlene failed to exercise proper control over Timothy. The Coopers' claim of negligent entrustment therefore fails to generate a jury question on the issue of liability of Carl and Darlene Holt.

II.

The Coopers next contend the trial court erred by refusing to grant them a

new trial as to the amount of the verdict against Timothy Holt. They argue that the jury's verdict failed to administer substantial justice in light of their evidence concerning damages.

The scope of review for the adequacy of a jury award for damages is stated in Householder v. Town of Clayton as follows:

The inadequacy of damages may be cause for setting aside a jury verdict and granting a new trial in a proper case.

... The trial court has considerable discretion in ruling on a motion for new trial on the ground of the inadequacy of a verdict. Whether damages are so inadequate as to warrant a new trial is usually left for the trial court to decide, and its discretion in granting or refusing to grant a new trial will not ordinarily be disturbed on appeal unless an abuse of discretion is shown.... The question as to whether damages awarded in a given case are inadequate must be determined on the peculiar facts of that case.... Generally, damages should be commensurate with the injury, and be sufficient to right the wrong done to the injured party.... The test of adequacy is for the court to determine what will fairly and reasonably compensate an injured party for the injury sustained.... Several jurisdictions follow the rule that a verdict will be set aside as inadequate where it appears clearly from uncontradicted evidence that the amount of the verdict bears no reasonable relationship to the loss suffered by the plaintiff.

221 N W 2d 488, 492-93 (Iowa 1974).

In the instant case, the injury Brent incurred primarily consisted of a compound fracture of one leg. Surgery was performed to set the leg and to close the open wound caused by the broken bone piercing the skin. The leg was put in a cast. Three weeks later, the leg was reset because the bones were not aligned correctly; a new cast was placed on the leg. The leg was slow in joining at the fracture site. In November 1980, the cast was removed and replaced by a metal brace with a plastic liner, which Brent wore until April 1981. He continued to use a cane to assist him when he walked.

Brent was about 26 when the accident occurred. He was unable to work for over a year. During much of this time his limited mobility confined him to his house. He was bedridden initially and movement was painful for quite a while.

His hospital and medical expenses were over \$4,000. His lost wages were over \$12,000. Coopers' petition requested \$100,000 as compensation for Brent's injuries. The jury awarded a total amount of \$25,000 to Brent against Timothy. This amount allows only \$6,000 for past and future pain and suffering.

Susan requested \$50,000 for loss of consortium as a result of Brent's injuries. She evidently was unable to sleep in the same bed with her husband for a period of time because any movement caused him great pain. While he was out of work for the year, she was required for financial reasons to work six days per week. Both Susan and Brent testified that Brent's unemployment and immobility placed great strain on their marriage relationship and on their relationships with friends. The jury awarded Susan \$1,000.

Although these awards seem low, we do not believe the amounts of the judgments bear no reasonable relationship to the losses suffered by the plaintiffs. It was within the jury's capacity to assess from the evidence before it what amount of damages would be commensurate with the injuries. We find no evidence, as the Coopers argue, of the influence of passion or prejudice on the jury or that it overlooked some material element of damage or misconceived or misinterpreted the facts which would have led them to a just conclusion. See Albee v. Berry, 119 N.W.2d 230, 233 (Iowa 1963). Therefore, we cannot say that the trial court abused its discretion in denying the Coopers' motion for a new trial on the issue of damages.

III.

Parental liability statutes, such as section 613.16, have been enacted in almost every state. Many of these statutes predicate parental liability on the "willful" nature of the child's acts. E.g. Conn. Gen. Stat. Ann § 52-572 (1955); Ill. Ann Stat. ch. 70 § 53 (Smith-Hurd 1969); Mass. Ann. Laws ch. 231, § 85G (1969); Mich Comp. Laws Ann. § 600.2913 (1961); Minn. Stat. Ann. § 540.18 (1967). In cases

interpreting these statutes, a requirement that specific intent to cause injury be shown has been imposed. See, e.g. Peterson v. Stone, 56 Ohio St. 2d 255, 257, 383 N.E.2d 886, 888 (Ohio 1978) (initial act of stealing a car was intentional but the specific act causing injury was not); Town of Groton v. Medbery, 301 A.2d 270, 272 (Conn. 1972); The requirement that willfulness be shown indicates that these statutes have a primary goal of curbing juvenile delinquency. See 55 Mich. L. Rev. 1205, 1206-07 (1957).

In lieu of a willful requirement, the Iowa statute uses the term "unlawful act." This term, within the context of section 613.16, has not been defined, and it is not clear what the legislature intended by using this phrase. See, Note, 55 Iowa L. Rev. 1037, 1042 (1970).

We find that by omitting the phrase "willful" as is used in many of the other statutes, the Iowa legislature intended to eliminate a requirement that an "intentional action" must be shown. "[I]n the field of statutory construction, legislative intent is expressed by omission as well as by inclusion. Stated otherwise, the express mention of one thing implies the exclusion of others." In re Estate of Wilson, 202 N.W.2d 41, 44 (Iowa 1972). Had the legislature intended to include a requirement of "willfulness" or "intent," such wording could easily have been included.

In a case defining "tort" under the Iowa long arm statute, the Iowa Supreme Court stated: "Generally speaking and without undertaking in the least an all inclusive definition, a tort has a meaning somewhat similar to wrong and is an unlawful act injurious to another independent of contract." Andersen v. National Presto Indus., Inc., 257 Iowa 911, 915, 135 N.W.2d 639, 641 (1965) citing Price v. State Highway Comm., 62 Wyo. 385, 396, 167 P.2d 309, 312 (1945) (emphasis added).

In State v. Campbell, 217 Iowa 848, 251 N.W. 717 (1934), the phrase "unlawful act" was interpreted as follows:

The question, therefore, resolves itself into what is the meaning of the words "unlawful act" as used in this instruction. Webster's New International Dictionary defines "unlawful" as follows: "Not lawful; contrary to law." "That which is contrary to law." Black's Law Dictionary. The same definition is given in Rawle's Edition of Bouvier's Law Dictionary. "Unlawful implies that an act is done or not done as the law allows or requires." Anderson's Law Dictionary.

It is apparent from these definitions that an act, to be unlawful, must be contrary to law.

Id. at 850, 251 N.W. at 718.

Timmy's actions here were clearly contrary to the law. Although not a criminal act, the failure to yield the right-of-way is a violation of the statutory law of the road. It is, therefore, an "unlawful act" for which Timmy's parents can be liable under section 613.16. We find that the trial court acted properly in submitting the question of the Coopers' liability under section 613.16 to the jury.

The Holts contend that if section 613.16 applies to this case, the trial court erred in granting the Coopers a new trial as to the amounts awarded by the jury against Carl. They contend the jury was not required to award the \$1,000 statutory maximum.

"The court is slower to interfere with the grant of a new trial than with its denial." Iowa R. App. P. 14(f)(4) (1981). We do not find the trial court's granting Coopers' motion for a new trial to be an abuse of discretion.

AFFIRMED.

Division I: All judges concur, except Sackett and Hayden, JJ., who specially concur, and Schlegel, J., and Oxberger, C.J., who dissent.

Division II: All judges concur, except Schlegel, J., and Oxberger, C.J., who dissent.

Division III: Affirmed by operation of law.

SCHLEGEL, J. (dissenting)

I cannot subscribe to the holding of the majority in two important areas, and therefore, must respectfully dissent.

I. Negligent Entrustment. The majority correctly states the general principles upon which the cause of action for negligent entrustment is based. That statement includes the principle that a parent may be liable for failure to control a child when the "parent knows, or in the exercise of due care, should know, that injury to another is a natural and probable consequence of such failure." 67A C.J.S. Parent & Child § 125 (1978) (emphasis added). The majority, however, goes on to state: "Despite the automobile's potential danger in the wrong hands, we do not view Timothy's driving record as one likely to cause his parents to know that injury to another was the natural and probable consequence of their failure to exercise control over him." (Emphasis added). I disagree.

There was at least a jury question whether the Holts were guilty of negligent entrustment. Timothy was a sixteen-year-old driver. Under Iowa law, he could not have been a licensed driver for very long. In that short time, he had demonstrated such a complete disrespect and disregard for the motor vehicle laws that his parents had a duty to take measures to protect the public from what was bound to follow, and what did, in fact, happen to the plaintiff. The cause of action based upon negligent entrustment should have been submitted to the jury.

II. Inadequate Damages. I do not feel that the award of damages to the plaintiff was such that we can say that it failed to achieve substantial justice. It is a close question, but will not permit a reversal on that ground. However, on the issue of the adequacy of damages for Mrs. Cooper's claim for loss of consortium, there is no question that an award of only \$1,000, under the circumstances of this case, is clearly inadequate.

While such a claim cannot, in this case, include the value of Brent's support as a spouse, see Iowa Code § 613.15 (1983), Mrs. Cooper's action for loss of consortium embraces any damages to the "conjugal fellowship of husband and wife; and the right of each to the company, cooperation, affection, and aid of the other in every conjugal relation." Acuff v. Schmit, 248 Iowa 272, 274, 78 N.W.2d 480, 482 (1956) (citations omitted). Her claim also includes the value of any lost tangible services performed by Brent. Madison v. Colby, 348 N.W.2d 202, 209 (Iowa 1984).

Under the record in this case, it is clear that Mrs. Cooper was substantially deprived of the conjugal fellowship of her husband, and was deprived of her right to his company, cooperation, affection, and aid in the normal conjugal relations. Her husband experienced substantial pain and discomfort, causing him an inability to give to her the full cooperation and affection she had a right to expect. To allow only \$1,000 for such loss is to refuse to follow the court's instructions concerning the existence of such a right. The trial court should have granted a new trial on this claim, due to the inadequacy of the award of damages.

I would reverse the trial court's order directing a verdict on the issues of negligent entrustment and would reverse the trial court's refusal to grant a new trial on Susan Cooper's claim for loss of consortium. I would not interfere with the court's rulings as to the other issues raised by this appeal.

Oxberger, C.J., joins in this dissent.

I would specially concur with Division I of the majority opinion. The first division involves a recovery theory grounded in negligent entrustment. While I concur with the result, I disagree with the majority's reasoning. What the majority and the dissent (J. Schlegel, dissenting) failed to appreciate was the fact that Timmy was a duly licensed driver pursuant to the laws of the State of Iowa. In light of the fact that, other than a driving record adulterated with a collision with another automobile, two (2) speeding tickets among others, Timmy was perfectly capable to operate a motor vehicle on March 19, 1980. Carl and Darlene Holt did not have it within their power or authority to revoke Timmy's driving privileges in this circumstance. Only the State has the authority to grant driving privileges or to see to their revocation. The State of Iowa was knowledgeable of Timmy's past driving record, but continued to allow him the privilege of operating his automobile. As the State has usurped power in this area, for this reason I would deny the plaintiff's right to recover against Carl and Darlene Holt on a theory of negligent entrustment.

I am of this opinion knowledgeable of the fact that for certain reasons an otherwise capable driver may be rendered temporarily incompetent. Case law shows this situation to occur when intoxication is involved, or extreme fatigue and others. As the State would not be aware of these temporary conditions of its licensed drivers, "where a parent has the ability to exercise control over the child, he or she may be liable in the extent of failure to exercise proper control where the parent knows, or, in the exercise of due care, should know, that injury to another is a natural and probable consequence of such failure." 67 A.C.J.S. Parent & Child §125 (1978).

I concur with Division II.

I dissent from Division III. I would reverse the trial court on the award of a new trial and find that the Cooper's theory of recovery under Code of Iowa section

613.16 should not have been submitted to the jury. The record shows that the actions of Timmy on March 19, 1980 amounted to no more than mere negligence. Most statutes dealing with parental responsibility for actions of children use terms such as "wanton," "willful," and "unlawful" to show the intentional nature of the actions of the child(ren) involved. See, e.g., Conn. Gen. Stat. Ann. §52-572(1958); Iowa Code Ann. §613.16(Supp. 1984-85); Minn. Stat. Ann. §540.18(Supp. 1970).

I determine that simple negligent conduct was not such as was contemplated by the legislature in passing this statute.

Hayden, J., joins this special concurrence and dissent.