IMPLIED CONSENT TO POSSESSION OF A MOTOR VEHICLE

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Sometimes the law is a living tree and sometimes the law is a bramble bush. Despite some recent attempts by the Ontario Court of Appeal to clarify the law on implied consent to possession of a motor vehicle, this area of the law remains a bramble bush.

Recently, our firm was faced with two competing summary judgment motions on the issue of implied consent in which we had to take opposite positions. We were successful in both cases, convincing two different courts of the correctness of our opposing arguments.

In *Michaud-Shields v. Gough*,[1] David Bierstone successfully argued before the Honourable Justice de Sa that an unlicensed son who took his mother's car keys while she was away did not have implied consent to possess her vehicle. At the same time, Joshua Henderson was successful in convincing the Honourable Justice Schreck, in *Misir v. Pereira*,[2] to order a two-day mini-trial in response to an insurer's motion for summary judgment on behalf of a mother who claimed that her daughter did not have implied consent. After Justice Schreck ordered the two-day mini-trial, the owner's insurer capitulated and agreed that there was implied consent for the daughter to possess the vehicle and it paid the plaintiff's insurer costs to avoid the mini-trial.

We argued opposite positions based on the same law and we were both successful. While this may seem unusual, it likely occurred because there is no real clarity in the bramble bush. There is no clear guidance from the Court of Appeal on how to resolve these cases and a review of the case law shows that each of the two motions probably had about a 50% chance of succeeding, making it almost impossible to predict the outcome.

In this article we hope to shed some light on the issue, so that perhaps we can start untangling the maze. The article will be organized in the form of competing arguments for a court to consider, with each of us taking opposing points of view. First, we

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1. 2018 ONSC 4977, 295 A.C.W.S. (3d) 615, 2018 CarswellOnt 13842 (Ont. S.C.J.).
2. 2018 ONSC 2675 (Ont. S.C.J.).

will discuss the law in support of our position. Second, we will canvass the evidence each side should consider proffering on a summary judgment motion. We will leave it to the reader to decide if clarity and predictability can in fact be brought to this area of the law.

LAW

The automatic vicarious liability of an owner for giving consent, whether express or implied, to drive a vehicle arises from s. 192(2) of the *Highway Traffic Act*. Section 192(2) states that the owner is liable for negligence resulting from the operation of his/her vehicle if he/she consented to the driver *possessing* the vehicle. The provision reads as follows:

> 192(2) The owner of a motor vehicle or street car is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or street car on a highway, unless the motor vehicle or street car was without the owner's consent in the possession of some person other than the owner or the owner's chauffeur.

Josh's Position

The only question of law in these motions is whether the owner *impliedly consented* to the driver *possessing* the vehicle. Explicit consent is not necessary, nor is consent to *drive* required. In fact, an explicit prohibition to drive is not sufficient to avoid vicarious liability for the owner, so long as there is implied consent to possess: *Myers-Gordon (Litigation Guardian of) v. Martin*,[3] *Seegmiller v. Langer*,[4] and *Deakins v. Aarsen*.[5]

In *Finlayson v. GMAC Leaseco Ltd.*,[6] at para. 16, the Court of Appeal confirmed that an owner is vicariously liable in situations where he/she grants possession to the operator, even if the owner explicitly tells the operator not to drive the vehicle.

> 16. . . . pursuant to s. 192(1), if an owner gives a lessee possession of a vehicle that may be driven on a highway, even if the lessee is expressly prohibited from operating the vehicle, the owner remains vicariously liable for any damages that are suffered as a result of the negligent operation of the vehicle.

3. 2014 ONCA 767, 69 M.V.R. (6th) 1, 247 A.C.W.S. (3d) 209 (Ont. C.A.).
4. (2008), 301 D.L.R. (4th) 454, 77 M.V.R. (5th) 46, [2008] O.J. No. 4060 (Ont. S.C.J.).
5. (1970), [1971] S.C.R. 609, 17 D.L.R. (3d) 494, 1970 CarswellOnt 209 (S.C.C.).
6. 2007 ONCA 557, 284 D.L.R. (4th) 747, 53 C.C.L.I. (4th) 84 (Ont. C.A.).

The rationale in *Finlayson* has been confirmed by a five-member panel of the Court of Appeal in *Fernandes v. Araujo*:[7]

> 4. . . . as the vicarious liability of an owner rests on possession rather than operation of the vehicle, the owner will be vicariously liable if the owner consented to possession, even if the driver operated the vehicle in a way prohibited by the owner.

The Court of Appeal has confirmed that the purpose of s. 192(2), is to provide protection for the public by forcing owners to be careful about who they give possession of their vehicle to: *Fernandes*, para. 20. This is an ameliorative purpose that should be given a large and liberal interpretation: *Chu v. Madill*.[8]

In *Henwood v. Coburn*,[9] the Court of Appeal was faced with a situation where an unlicensed driver got drunk, punched the person in possession of the vehicle in the face, took the keys by force, and then drove away with the car. The person with possession of the vehicle jumped in the front seat and pleaded with the unlicensed drunk driver to stop the vehicle. The driver then got into an accident. The owner's insurer brought a motion and argued that the unlicensed drunk driver was operating the vehicle without the owner's consent. The Court of Appeal rejected the insurer's argument and indicated that if the passenger had possession of the vehicle then the owner was vicariously liable for the actions of the unlicensed drunk driver. While the Court of Appeal decided that whether the passenger had possession of the vehicle was a genuine issue for trial, the court stated clearly that the owner would be liable for the negligent, drunk driving of the unlicensed driver who took the vehicle by force, if the passenger were found to have remained in possession of the vehicle.

This raises the issue of what are "possession" and "implied consent". *Black's Law Dictionary* outlines dozens of different types of possession, including actual, legal, physical, etc., and the Supreme Court has dealt with implied consent numerous times, as in *Palsky (Next friend of) v. Humphrey*,[10] and *Aarsen v. Deakins*.[11]

Summarizing the law, I would suggest that my four-year-old daughter would be in physical possession of my car if I were unfortunate enough to leave my keys in the car and she locked the doors. Because I put her in the car, I would have given her implied

7. 2015 ONCA 571, 387 D.L.R. (4th) 649, 53 C.C.L.I. (5th) 42 (Ont. C.A.).
8. (1976), [1977] 2 S.C.R. 400, 71 D.L.R. (3d) 295, [1977] I.L.R. 1-810 (S.C.C.).
9. 2007 ONCA 882, 289 D.L.R. (4th) 157, [2008] I.L.R. I-4664 (Ont. C.A.)
10. [1964] S.C.R. 580, 45 D.L.R. (2d) 655, 48 W.W.R. 38 (S.C.C.).
11. (1970), [1971] S.C.R. 609, 17 D.L.R. (3d) 494, 1970 CarswellOnt 209 (S.C.C.).

consent to possess, sufficient to bind me with liability, should she knock the car into neutral and cause an accident.

David's Position

I think that much of the inconsistency in the case law stems from the fact that in many instances the courts have gotten away from the plain meaning of the word "consent", sometimes stretching it beyond recognition in order to "imply" consent for the purpose of achieving the policy objective of protecting the public by imposing on the owner responsibility for the careful management of the vehicle. While that is a time-honoured and obviously important objective, it has sometimes led judges to focus narrowly on certain so-called "indicia" of implied consent, such as the failure to safeguard one's car keys, regardless of whether there actually was consent within the normal meaning of the word. The result has been an ongoing, underlying ambivalence in the jurisprudence, as the courts struggle to reconcile the policy objective and the dictionary.

In *Michaud-Shields v. Gough*, Justice de Sa emphasized the importance of being true to the ordinary meaning of "consent" when interpreting s. 192(2) of the *Highway Traffic Act*. On that basis, he rejected the moving party's position that liability should be imposed on an owner unless he/she takes steps to prevent unauthorized use of the vehicle, an interpretation which, as he said, essentially requires owners to "hide their keys in order to avoid liability" and which does not accord with the plain meaning of the word:

> Consent connotes permission, or acquiescence. In my view, in the context of s. 192(2) of the *Highway Traffic Act*, consent means permission or authorization to "possess" the vehicle. It is a positive conferral of the right to possess the vehicle understanding that the vehicle may be driven.[12]

There is a long distance between the obvious responsibility of the negligent driver and the less obvious responsibility of the owner, but because the driver is not insured if there was no consent, whereas the owner is, there is an understandable temptation to imply consent to possession of the vehicle even if there was clearly no consent on the plain meaning of the words "consent" and "possession" – when the court is really just trying to make the owner pay for not taking steps to prevent the unauthorized taking of the vehicle. But consenting to possession means more than simply failing to prevent someone from taking the vehicle. As Justice Strathy noted in his well-known list of

12. *Supra*, footnote 1, at para. 27.

basic principles governing the issue of consent in *Seegmiller v. Langer*:[13] "Possession is a concept capable of different meanings and there are different types of possession. The primary definition of possession contemplates power, control or dominion over property: see *Black's Law Dictionary* (8th ed., 2004)."

Justice de Sa robustly summarized his view of the matter as follows:

> . . . to import a notion of liability on the basis of a lack of appropriate diligence to prevent use is to take the meaning of consent much too far. Indeed, if [the moving party's] position were accepted, arguably a thief would be found to have the consent of the owner to possess the vehicle.[14]

Justice de Sa's approach is a refreshingly "back to basics" way of dealing with the implied consent issue, rejecting artificial, purpose-based interpretations of "consent", in favour of a commonsense, plain meaning approach. That approach is in fact well-rooted in the case law, as Justice de Sa noted, going back to a 1964 decision of the Supreme Court which our Court of Appeal in *Myers-Gordon* has called "the seminal case in this area": *Palsky (Next Friend of) v. Humphrey*.

In *Palsky*, the Supreme Court endorsed the trial judge's interpretation of when implied consent has been given, as follows:

> In his reasons for judgment the learned trial judge had said:
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> > It is my conception of the meaning of that statute [*i.e.* Alberta's equivalent of section 192(2) of our *Highway Traffic Act*] that in dealing with the implied consent it means that one must approach the problem in a somewhat subjective fashion from the point of view of the person who was driving. That is to say whether under all the circumstances the person, who was driving, would have been justified in deeming that he had an implied consent to drive.
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> > . . . . .
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> > What the learned trial judge was doing was putting to himself the question of whether all the circumstances were such as would show that the person who was driving had the implied consent of the owner and therefore, of course, whether he would have been justified in deeming that he had such consent. (at p. 3)

Palsky sometimes seems to get shunted aside in the more recent jurisprudence, perhaps because of its description of the test as being "somewhat subjective". But, as the Court of Appeal noted in

13. *Supra*, footnote 4, at para. 34.
14. *Supra*, at para. 28.

Fernandes v. Araujo at paras. 27-28, the test is not wholly subjective though there is a subjective component to it.

In reality, *Palsky* provides a simple, straightforward approach to implied consent, one which accords with the plain meaning of the words, and on that basis it was appropriately embraced by Justice de Sa.

Carelessness on the part of a vehicle owner, for example in the management of his/her car keys, can be dealt with through negligence law, without any need to resort to a contrived notion of "implied consent". In fact, these cases are sometimes pleaded, and rightly so, on the basis of both "implied consent" and, in the alternative, negligence. So, for example, in Josh's example of leaving his keys in his car, with his four year-old daughter present, such a situation can be adequately dealt with using traditional negligence principles and therefore it should not be necessary to have recourse to a fictitious finding of "implied consent", when there clearly was no consent within any reasonable interpretation of the word.

Of course, the reverse onus contained in s. 192(2) of the *Highway Traffic Act* would not apply to negligence, nor should it, since the provision is about consent, not negligence : the owner has the burden of proving that he/she had no intention of giving the operator control over the vehicle.

It would be much less confusing and intellectually more honest if the term "implied consent" were reserved for situations where there really was consent, although not expressed – in other words, where the circumstances show that the owner truly had no objection to the driver being in possession of the vehicle and therefore having the opportunity to operate it.

FACTS

Josh's Position

These motions often come down to a factual dispute, in which the plaintiff (or more realistically the insurer who will have to indemnify the plaintiff if the owner is not vicariously liable) is at a significant disadvantage.

In the old days, there were instances of insurance adjusters forcing wives to charge husbands with theft of a vehicle after the husband drove the family car with a suspended licence and got into an accident. In *Miner v. The General Accident Assurance Company of Canada*,[15] the insurance company told the wife that she would lose coverage for an accident caused by her husband unless she pressed

charges against him. The wife then had her husband charged with theft and he was convicted under s. 295 of the *Criminal Code*, taking a motor vehicle without consent of the owner.

Forcing spouses to criminally charge each other to obtain insurance coverage is obviously reprehensible (and, if a lawyer is involved, possibly contrary to the *Rules of Professional Conduct*). However, there may still be instances of attempts to influence an insured owner by suggesting that if he/she gave the prohibited driver permission to drive the vehicle, that is a breach of a statutory condition that may void coverage. In fact that happened in my case, *Misir*.

The incentive to the adjuster is simply too strong in our adversarial system. Forcing the vehicle owner to allege lack of consent is a simple way for an insurer to totally avoid paying a claim, with a very low chance of getting caught. And even if the insurer is caught red-handed (as in *Misir*, where I obtained the factually incorrect letter threatening coverage denial) there are no repercussions.

When a lay person, vehicle owner, is faced with the possible denial of insurance coverage by his/her own insurance company, the person becomes very worried and asks the insurer how he/she can be assured of coverage. The insurer then advises the owner that he/she needs to give a statutory declaration confirming that there was no consent to drive the vehicle. The owner's insurer then tells the plaintiff's insurer that it will not pay the claim.

That is exactly what happened in *Misir*. The mother gave the daughter permission to drive the vehicle, because the daughter misled the family and made them believe that she had her licence. The insurer then found out that the daughter was unlicensed and told the mother that she would lose her insurance coverage if she gave permission to her daughter to drive. That advice was demonstrably false, either by mistake or not, because so long as the mother believed that the daughter was licensed to drive coverage could not be denied.

Such a situation is a very difficult fact scenario to crack, for the plaintiff's insurer. Both the mother and the daughter are now on board with the owner's insurance company's story that the daughter took the vehicle without the mother's consent. How can the plaintiff prove otherwise?

The way we proved otherwise in *Misir* was by subpoenaing the other family members in the household and explaining how due diligence and vicarious liability for *implied consent to possess* works.

15. (1983), [1984] I.L.R. 1-1728, 1983 CarswellOnt 849, [1983] O.J. No. 2482 (Ont. Co. Ct.), at para. 14.

Once the family understood that the mother would not lose her insurance coverage even if they told the truth that:

1) the mother had the mistaken belief that the daughter was licensed and allowed her to drive based on this mistaken belief, or
2) the mother allowed the daughter to access the vehicle to get groceries from the trunk (*i.e.* gave implied consent to possess but not drive),

the children then opened up and told the truth, admitting that the mother was under the belief that the daughter was licensed and had asked her to drive her vehicle to pick up the siblings hundreds of times before. However, it should be noted that the mother was so scared of her own insurance company that she never admitted the truth and ended up calling two of her own adult children liars, even though there were initial records indicating that she had in fact told the insurer that she had given her daughter permission. But that should surprise no one, because it is well documented in the old case law that people are willing to have their family members convicted of criminal offences so as not to lose insurance coverage (*Miner*) and so they are certainly willing to capitulate to insurance company demands that they swear that there was no consent.

There is no way that a mother would call her own children liars, if she was not being misled, either by mistake or not, by her insurance company. The exact opposite would most likely be true; if she realized that she could help her daughter and maintain her coverage by admitting the truth that she gave the daughter implied consent to possess, then her evidence would come out truthfully and exactly the opposite of how it did in *Misir*.

As such, if you do act for the insurer of the plaintiff it is crucial to subpoena the family members and friends who can tell the truth about the vehicle usage, given that owners are often scared to death they will lose insurance coverage because of a mistaken belief about what the law says, forced upon them by their insurers. I would suggest issuing subpoenas to:

1) the adjuster and the field adjuster;
2) the driver; and
3) the family members who lived with the owner and driver.

It may also be useful to send a letter to the driver, explaining the above, at his/her last known address. While that address may very well be the same address as the owner's, counsel is entitled to directly contact the unrepresented driver.

Finally, it is also worthwhile to remember that the *HTA* does not apply on private parking lots and so the vicarious liability provision is probably inapplicable (although there may be 100-year-old common law that imputes vicarious liability).

David's Position

There may well be cases where, as Josh suggests, an overzealous insurance adjuster crosses the line and tries to pressure an insured to distort the truth. However, the reality is that if the evidence shows that the insured knowingly entrusted his/her vehicle to someone who was not authorized by law to operate it, the insured could indeed lose coverage. In any event, whether the insured has been deliberately frightened by the insurer or frightened by the reality of what happened or is simply worried about the effect on his/her insurance rates if he/she is held vicariously liable for the negligence of the driver, it is our job as lawyers to advocate as forcefully as possible for the owner who insists that he/she did not consent.

It is of course the court's job to decide whether the owner's story is credible and these cases almost always turn on credibility, because they are fact-driven. Indeed, the first principle in Justice Strathy's list of "well-settled" principles (in *Seegmiller*) is: "The question of whether a motor vehicle is in the possession of some person without the consent of the owner is a question of fact to be determined by the evidence in a particular case." The inevitable consequence of that is the "bramble bush" of decisions that often seem to be very difficult to reconcile. But if one looks closely at those decisions, credibility usually emerges as the key factor. If both the owner and the driver convincingly maintain that there was no consent, whether expressed or otherwise, and if there is no contradictory evidence, that should be determinative – as indeed it was in *Michaud-Shields v. Gough*.

It may not be determinative, if the court decides that there were circumstances justifying a finding of "implied consent". But, as discussed above, such a finding should not be resorted to simply as a means of punishing an owner for his/her carelessness. Rather, it should be based on the ordinary meaning of the words "consent" and "possession". There must have been an intention, even if not expressed, to allow another person to assume power and control over the vehicle.

CONCLUSION

"Implied consent" to possession of a motor vehicle has remained a vexing issue over many decades and it continues to spawn a multitude of judicial decisions. Reading through the decisions is likely to leave one hopelessly confused as to how to resolve these fact situations in any sort of consistent, principled manner. In some sense, that is inevitable, given that it is well-established that the issue of consent is a question of fact to be determined by the evidence of the particular case. But it is disconcerting to see the courts so often come to opposite conclusions on facts which, at least on the surface, seem very similar.

We are both arguing that these cases should not be a mere game of chance, as they unfortunately seem to have become. The words "consent" and "possession" have meaning, but unfortunately the term "implied consent" seems to have become simply a means to an end, with little discernible connection to the ordinary meaning of the words, and that is arguably the source of much of the confusion and inconsistency in the case law.

It does not necessarily have to be that way. There is much to be said for going back to basics and going back to the dictionary, to the plain meaning of the words, as Justice de Sa did. It is a simple solution, but one which could bring some much needed clarity to this very muddled area of the law. Alternatively, if the courts choose to go down the other path and broaden implied consent, with a view to protecting the public, that is also a viable option. What is certain, however, is that the current ambiguity in the case law is of no benefit to anyone except perhaps to lawyers who continually argue the same issue.

There are ways out of the bramble bush. A path needs to be chosen.