

Focus INSURANCE

Big difference between possession and operation

Determining vicarious liability for owners under the Highway Traffic Act



Stacey Stevens

In his ruling last Nov. 4 in *Fernandes v. Araujo* [2014] O.J. No. 5248, Justice Paul Perell held that a motor vehicle owner's vicarious liability, imposed under sections 192(1) and (2) of the *Highway Traffic Act* for the loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle, is triggered once consent to possession of the vehicle is given, as opposed to consent to operate.

In the case, Sara Fernandes was injured on May 26, 2007, after the driver of an all-terrain vehicle (ATV) in which she was a passenger lost control while driving on a highway. There is no dispute that the owner of the ATV consented to the driver's possession of the vehicle and permitted its operation on his farm property. There was no evidence the owner expressly prohibited the driver from taking the ATV off his property.

Section 192(1) of the HTA provides that an owner of a motor vehicle is not vicariously liable for negligence in the operation of his/her motor vehicle on a highway, unless the motor vehicle was, without the owner's consent, in the possession of some person other than the owner.

Section 192(1) has been interpreted in two arguably conflicting Court of Appeal decisions: *Newman and Newman v. Terdik* [1952] O.J. No. 477, and *Finlayson v. GMAC Leaseco Ltd.* [2007] O.J. No. 3020.



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Justice Perell referred to a similar line of reasoning taken by Justice Anne Mullins in *Case v. Coseco Insurance Co.* [2011] O.J. No. 3233, where the owner of a school bus was held to be vicariously liable for an accident caused by an employee who was driving the bus after hours and against the owner's express instructions not to do so.

Stacey Stevens
Thomson Rogers

In *Newman*, the defendant Terdik owned a tobacco farm. He gave his employee Perkinson possession of his farm truck for the sole purpose of driving it on the farm, with express instructions not to take it on the highway. Perkinson took the truck on the highway and subse-

quently injured the plaintiff Newman. The trial judge and the Court of Appeal held that given Terdik expressly forbade Perkinson from driving the truck on the highway, there was no consent to Perkinson's possession, and therefore Terdik was not vicariously liable.

The *Finlayson* decision follows a line of authority that began with *Thompson v. Bouchier* [1933] O.R. 525 (C.A.), wherein the Court of Appeal held that vicarious liability under 192(1) of the *Highway Traffic Act* is based on possession, not operation, of the vehicle. In *Finlayson*, the defendant GMAC leased a motor vehicle to John Simon and Theresa Jefferies. Section 18 of the lease expressly prohibited Simon from operating the vehicle. Simon and Jefferies each signed an acknowledgement to that effect. On March 3, 2000, Simon was operating the vehicle when it was involved in a single-vehicle collision. His passengers were injured and commenced an action against him and GMAC. GMAC subsequently brought a motion for summary judgment, arguing that its vicarious liability under section 192(1) was limited by the terms of the contract. The motion judge agreed. The plaintiff appealed. The Court of Appeal overturned the lower court's decision and in doing so, ruled that consent to possession is the triggering event for owner's liability.

Justice Eileen Gillese interpreted the triggering event in section 192(2) of the HTA is based on possession, not use of the vehicle, and public policy dictates that a motor vehicle owner cannot escape vicarious liability simply because the person he trusted with possession of the vehicle breaches some condition attached to it. In her opinion, public policy requires that an owner must be held responsible for the careful management of whom he entrusts possession of his vehicle to.

Justice Perell followed the reasoning in *Thompson v. Bouchier* and *Finlayson*. He distinguished

Fernandes from the *Newman* case for three reasons. First, in his view, the owner in *Fernandes* consented to the possession and driving of his ATV. Secondly, he held that in *Newman*, Justice John Mackay did not properly consider *Thompson v. Bouchier*, and therefore it may have been wrongly decided. Thirdly, Justice Perell reasoned it is possible that the finding in *Newman* can be distinguished from the case at hand because Terdik had never consented to Perkinson having legal possession of the automobile on the highway—in *Fernandes*, the owner did not place any restrictions on the driver's use of his ATV.

Justice Perell referred to a similar line of reasoning taken by Justice Anne Mullins in *Case v. Coseco Insurance Co.* [2011] O.J. No. 3233, where the owner of a school bus was held to be vicariously liable for an accident caused by an employee who was driving the bus after hours and against the owner's express instructions not to do so. At the conclusion of her reasons, Justice Mullins followed the reasoning in *Finlayson*, ruling that an owner's vicarious liability under s. 192 is based on possession, as opposed to the use of the vehicle, rather than that in *Newman*, as the Court of Appeal did not consider the difference between consent to possession and consent to use.

The defendant in *Fernandes* has filed a notice of appeal. The issue of a motor vehicle owner's vicarious liability under s. 192 of the *Highway Traffic Act*, and in particular whether it is triggered by possession or use of the vehicle, remains unsettled. The appeal is scheduled to be heard in June.

Stacey Stevens is a partner with Thomson Rogers in Toronto.

Racing: Insurer couldn't intervene, insured lost lawyer of choice

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Despite defence counsel acknowledging that his actions were inappropriate and Mihali's preference that counsel continue to act, the Chief Justice decided that it was necessary to remove counsel from the record. Counsel breached his duty of loyalty and good faith to the client. The removal order was required "to protect the integrity of the administration of justice and avoid the appearance of impropriety."

In the second motion, RSA sought to intervene in the appeal as an added party on the basis

that the finding of coverage may adversely affect its interests, relying on Rule 13.01(1)(b) of the *Rules of Civil Procedure* which authorizes intervention if the non-party is adversely affected by a judgment in the proceeding. The minor distinction aside, Chief Justice Strathy did not accept that RSA would be affected by the trial judge's finding.

In any event, even to the extent that this finding could adversely affect RSA's interests, Justice Strathy found that the insurer was partially to blame for the situation it found itself in. He noted that the trial judge

had attempted to clarify the scope of issues to determine, including coverage, at the opening of trial. Counsel failed to delineate the boundaries of the trial, despite the fact that there were coverage issues in the background and the appellant was being defended under a non-waiver agreement.

Indeed, the trial judge specifically addressed the question of coverage with defence counsel, who responded that absent a finding that the defendants had been racing or engaging in a speed test, RSA would provide coverage and the claim against

Security National could be dismissed. As the trial judge made no finding of racing or a speed test, Justice Strathy held it was understandable why she concluded that Mihali had coverage from RSA.

It was incumbent on RSA to ensure that its coverage position was properly communicated and the scope of trial clearly defined for the trial judge. It took no steps prior to the judgment being released to clarify these points. It did not contact the trial co-ordinator as suggested, while the trial judge remained seized. It did not avail itself of the right to be added

as a statutory third party under the *Insurance Act*. Therefore, the Chief Justice held that RSA bore some responsibility for the resulting confusion surrounding coverage, and could not complain about this on appeal.

Nina Bombier is a partner at Lenczner Slaght whose litigation practice focuses on commercial, insurance, professional negligence and regulatory matters. Jaclyn Greenberg is an associate with a focus on corporate-commercial disputes, professional liability and regulation, insurance litigation and estate litigation matters.