COURT OF APPEAL FOR ONTARIO

CITATION: Fernandes v. Araujo, 2015 ONCA 571
DATE: 20150810
DOCKET: C59682

Sharpe, MacFarland, Rouleau, Lauwers and Pardu JJ.A.

BETWEEN

Sara Fernandes

Plaintiff (Respondent)

and

Eliana Araujo, Carlos De Almeida, Carlos M. Almeida, and The Superintendent of Financial Services

Defendants (Respondents)

and

Allstate Insurance Company of Canada added by Order pursuant to section 258(14) of the *Insurance Act*, R.S.O. 1990, c. I.8

Third Party (Appellant)

Sheldon A. Gilbert, Q.C., for the appellant

L. Craig Brown and Stacey L. Stevens, for the respondent Sara Fernandes

Lorraine E. Takacs, for the respondents Eliana Araujo and The Superintendent of Financial Services

Heard: June 18, 2015

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated November 4, 2014, with reasons reported at 2014 ONSC 6432, 123 O.R. (3d) 294.

Sharpe J.A.:

[1] In this appeal we are confronted with the difficult question of whether we should overrule a prior decision of this court.

[2] The issue involves the vicarious liability of an owner of a vehicle for the negligence of a person who had possession of the vehicle with the owner's consent. The *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 192 (2) provides that the owner is liable unless the vehicle "was without the owner's consent in the possession of some person other than the owner...."

[3] The case involves an all-terrain vehicle ("ATV"). The owner's insurer contends that it should be found as a fact that the operator was told she could drive the ATV on a farm property but not on the highway and that it follows that the owner is not vicariously liable for damages sustained in a highway accident.

[4] In *Finlayson v. GMAC Leaseco Ltd.*, 2007 ONCA 557, 86 O.R. (3d) 481, this court affirmed a long line of authority going back to 1933 holding that 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.

[5] However, in *Newman and Newman v. Terdik*, [1953] O.R. 1 (C.A.), this court held that where the owner gave the driver permission to drive on private property

but expressly prohibited the driver from operating the vehicle on the highway, the owner is not vicariously liable for damages sustained as a result of a highway accident when the person with possession of the vehicle violated the condition and drove the vehicle on a highway.

[6] For the following reasons, I conclude that the decision in *Newman* is inconsistent in principle with the prevailing line of authority culminating in *Finlayson.* I also conclude that the interests of legal clarity and certainty would best be served by overruling *Newman.*

FACTS

[7] Sara Fernandes, the plaintiff/respondent, sustained serious injuries as a passenger on an ATV driven on a highway by Eliana Araujo, the defendant/respondent. The ATV was beneficially owned by Carlos Almeida and insured by the statutory third party/appellant, Allstate Insurance Company of Canada.

[8] On the day of the accident, Carlos, his cousin John Paul Almeida and Araujo, John Paul's girlfriend (now wife), drove to Carlos' farm. They were joined there by Carlos' uncle Frank Almeida, his cousin David Almeida and Fernandes, David's girlfriend.

[9] Carlos used his ATV to transport some tools to a fence that needed repair. He then returned the ATV to a garage, left the key in it, and told Araujo and

Fernandes that that they could try it out. John Paul explained how to use the ATV and, in Carlos' presence, told Araujo not to leave the farm property with the ATV.

[10] Later that day, without asking permission, Fernandes and Araujo decided to drive the ATV to David's farm nearby. Fernandes drove the ATV with Araujo as passenger. They arrived safely, but on their return to Carlos' farm, they were involved in a single-vehicle accident while Araujo was driving and Fernandes was the passenger. The ATV rolled over and Fernandes was injured.

[11] Fernandes commenced this action for damages for the injuries she sustained. Carlos did not defend the action. Allstate denied Araujo third party coverage, as she did not have the class of licence required to operate an ATV in contravention of a statutory condition of the standard Ontario Motor Vehicle Policy. The Ministry of Financial Services assumed Araujo's defence pursuant to the *Motor Vehicle Accident Claims Fund Act*, R.S.O. 1990, c. M.41, and issued a third party claim against Allstate. Allstate defended the third party claim and was added as a statutory third party to defend the main action.

MOTIONS FOR SUMMARY JUDGMENT

[12] Allstate brought two motions for summary judgment: the first, in the main action, on behalf of Carlos to dismiss Fernandes' claim on the ground that Araujo was not driving the ATV with his consent, and the second, to dismiss Araujo's third

party claim on the ground that she was not entitled to coverage, as she was driving the ATV without a proper licence.

[13] The motion judge dismissed Allstate's summary judgment motion in the main action but allowed the motion to dismiss Araujo's third party claim for coverage. No appeal is taken with respect to the dismissal of the third party claim.

[14] The motion judge's thorough and comprehensive reasons refusing Allstate's motion to dismiss the main action rest on two grounds, one factual and the other legal.

[15] First, the motion judge found as a fact, at para. 65, that Carlos permitted Araujo "to possess and drive the ATV and did not impose any restrictions on the use of the ATV". He found that John Paul's statement that Fernandes and Araujo should not leave the farm property with the ATV could not be attributed to Carlos. He stated: "Whatever [Carlos] may have thought, he did not expressly forbid the ATV from being taken off the property and he did nothing to prevent that from happening."

[16] To these factual findings, the motion judge added a legal ground for dismissing Allstate's motion for summary judgment. He stated, at para. 66, that even if John Paul's command could be attributed to Carlos, because Carlos had consented to Araujo's possession of the ATV, "pursuant to the authority of

[*Finlayson*], any restrictions on her use of the ATV would not exculpate him from vicarious liability."

ISSUES

[17] Allstate argues that the motion judge erred, both in law and in fact, by dismissing the motion for summary judgment and raises the following issues on appeal:

> 1.Did the motion judge err by concluding that in the absence of an express prohibition against taking the ATV off the farm property, the owner must be taken to have consented to possession at the time of the accident?
>
> 2.Did the motion judge err by failing to follow the decision of this court in *Newman*?

[18] At the request of the panel first assigned to hear this appeal, the Chief Justice directed that the appeal be heard by a panel of five judges, and the parties were directed to address the following issue:

> 3. Should the decision of this court in *Newman* be overruled?

ANALYSIS

The *Highway Traffic Act*, s. 192 (2)

[19] All three issues involve the proper interpretation of s. 192 (2) of the *Highway Traffic Act*, which provides:

> 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.

[20] As explained by Gillese J.A. in *Finlayson*, at para. 21, citing to the decision of this court in *Thompson v. Bourchier*, [1933] O.R. 525, the purpose of this provision is "to protect the public by imposing, on the owner of a motor vehicle, responsibility for the careful management of the vehicle." The provision is an integral element of the *Highway Traffic Act*'s mandatory licencing and insurance scheme to ensure the public safety. The owner has the right to give possession of the vehicle to another person, but this provision "encourages owners to be careful when exercising that right by placing legal responsibility on them for loss to others caused by the negligent operation of the vehicle on a highway."

Absence of the owner's express prohibition against leaving the farm property

[21] I begin with the issue of the motion judge's finding that, because Carlos did not expressly prohibit Araujo from taking the ATV off the farm property, Araujo was in possession of the vehicle with his consent at the time of the accident.

[22] Citing the decision in *Myers-Gordon (Litigation Guardian of) v. Martin*, 2013 ONSC 5441, 117 O.R. (3d) 142, aff'd 2014 ONCA 767, 69 M.V.R. (6th) 1, Allstate argues that the test for consent essentially turns on the subjective belief of the party in possession of the vehicle. Allstate points to evidence given by Araujo on discovery where she admitted that Carlos did not give her permission to leave the farm property and that, in Carlos' presence, John Paul said, "Whatever you do, do not leave the property, stay in the property area." Allstate submits that in the face of those admissions, Araujo could not have believed that she had consent to drive the ATV on the highway, and that it therefore follows that she did not have possession of the vehicle with the owner's consent at the time of the accident.

[23] I am unable to accept this argument for the following reasons.

[24] First, Allstate's argument essentially challenges the factual findings of the motion judge. Araujo did admit that John Paul made the statement quoted above, and that she did not have express permission to take the ATV off the farm property. However, she did not admit that she knew Carlos had forbidden her from driving the ATV on the highway, and the motion judge refused to draw that inference.

There was also evidence that Carlos took no steps to stop Araujo from driving after he knew she and Fernandes had taken the ATV off the farm property to go to the other farm. In my view, it was entirely open to the motion judge to find that, despite the statement made by John Paul in Carlos' presence, Carlos did not forbid Araujo from driving the ATV on the highway.

[25] Second, to accept Allstate's argument and essentially base the test on the subjective belief of the person in possession of the vehicle would be inconsistent with the language and purpose of s. 192(2). It cannot be the case that if the person in possession subjectively believes that he or she has the owner's consent, that alone is sufficient determine the liability of the owner. That would allow anyone with actual possession of the vehicle to fix the owner with liability even where the owner had not consented to that person having possession of the vehicle. The focus of the language and purpose of the provision are on the actions of the owner who is charged with the responsibility of exercising appropriate caution when giving another person possession of the vehicle.

[26] In my view, the decision of this court in *Myers-Gordon* is consistent with that proposition. In that case, the owner left the keys to her vehicle in her bedroom. While she was absent, and without her knowledge, her 17-year-old son took the keys and, while driving the vehicle impaired, was involved in an accident. The son had driven the vehicle on prior occasions, but there was no evidence of any discussion between mother and son on the night in question. The motion judge

found that the son knew that he did not have his mother's consent to take the car on the night of the accident.

[27] As Allstate points out, at para. 33 of his reasons, the motion judge in *Myers-Gordon* described the test as "subjective" and rejected the contention that the mother's consent could be implied from her conduct and her failure to report her son to the police.

[28] However, I do not agree that on appeal, this court endorsed the notion that the test is subjective in nature. The court accepted that there was a subjective component to the test, but observed that the motion judge had properly given careful consideration to *all the evidence*, and noted that *both the son and the mother* stated that the son did not have the mother's consent: para. 12. There was no evidence to challenge the credibility of either the mother or her son. Thus, this court concluded, at para. 13, that the mother "had met the onus and satisfied the court that, on the evening of the accident, [her son] did not have her consent to have her automobile". This does not amount to an endorsement of the view that the son's subjective belief was the determining factor.

[29] Accordingly, I would reject this ground of appeal.

Does *Newman* govern?

[30] This brings me to Allstate's contention that *Newman* governs and to the respondents' submission that, if it does, it should be overruled.

[31] *Newman* involved damages caused by the negligent operation of an automobile driven on a highway by a farm employee. The employee had been told by his employer, the owner of the vehicle, that he could drive the automobile on the farm property but that he was not to take it on the highway. Writing for a unanimous court, MacKay J.A. held that the owner of the vehicle was not vicariously liable for the operator's negligence. The court held, at p. 6, that the words "without the owner's consent" could "only be referable to possession on a highway". The court reasoned, at p. 7, that as "possession can change from rightful possession to wrongful possession, or from possession with consent to possession without consent" without change in physical possession. It followed that as the owner had only consented to the employee using the car on the farm and had expressly forbidden him from using it on the highway, there was no consent to its use at the time of the accident within the meaning of the *Highway Traffic Act*.

[32] I agree with Allstate that if Carlos did forbid Araujo from driving the ATV on the highway, *Newman* is authority for the proposition that Carlos is not vicariously liable as the owner of the ATV pursuant to s. 192(2) of the *Highway Traffic Act* for Araujo's negligence.

[33] Although the motion judge found as a fact that Carlos did not forbid Araujo from driving the ATV on the highway, he added that even if that were the case, he would follow *Finlayson* rather than *Newman*. Since this was offered as an alternate

ground for decision, it is appropriate for us to consider whether *Newman* should be followed or overruled.

[34] I will begin by considering whether *Newman* is consistent with the line of authority represented by *Thompson* and *Finlayson,* and then turn to the factors that are to be considered when this court is asked to overrule one of its own decisions.

Was *Newman* wrongly decided?

[35] *Finlayson* involved a truck owned by GMAC and leased to two individuals. One of those individuals, Simon, was the driver of the truck at the time of the accident, even though he was an excluded driver under the terms of the lease. The central issue was whether Simon was in possession of the vehicle at the time of the accident within the meaning of s. 192(2) so as to make GMAC vicariously liable for his negligence. As I have already observed, *Finalyson* reaffirmed what the 1933 decision in *Thompson* held to be the purpose of s. 192(2), namely the protection of the public by insisting that the owner of a vehicle exercise careful management when giving permission to another person to use it. This purpose is achieved by imposing vicariously liability for damages if the vehicle is operated in a negligent fashion.

[36] It is fundamental to that purpose, and to the operation of s. 192(2), that the owner's vicarious liability is triggered by consenting to possession and that the concepts of possession and operation are distinct: "[C]onsent to possession of a

vehicle is not synonymous with consent to operate it. Public policy considerations reinforce the importance of maintaining that distinction": *Finlayson*, at para. 3.

[37] There is a long line of authority for the proposition that where the owner has consented to possession, the owner will be liable pursuant to s. 192(2) even if the vehicle is operated in a manner forbidden by the owner. As stated in *Finlayson*, at para. 28, "possession and operation are not the same thing, in law." Where the owner gives possession of the vehicle, "[b]reach of conditions placed by the owner on another person's possession of the vehicle…do not alter the fact of the second person's possession," and from possession flows liability.

[38] In *Seegmiller v. Langer* (2008), 301 D.L.R. (4th) 454 (Ont. S.C.), at para. 34, Strathy J. identified and applied the following well-settled propositions relating to the interpretation and application of the owner-liability provisions of s. 192(2):

> If possession is given, the owner will be liable even if there is a breach of a condition attached to that possession, including a condition that the person in possession will not operate the vehicle.
>
> Breach of conditions placed by the owner on a person's possession of the vehicle, including conditions as to who may operate the vehicle, do not alter the fact of possession. [Citations omitted.]

Although the person to whom the owner gave possession of the car drove it contrary to the owner's stipulation that he not do so until he obtained a licence, the owner was held vicariously liable.

[39] In *Henwood v. Coburn*, 2007 ONCA 882, 88 O.R. (3d) 81, at para. 12, Rosenberg J.A. noted that the reasons in *Thompson* "have repeatedly been followed by this court, the Divisional Court and trial courts for over eighty years." At para. 14, he added that those cases make it clear that the fact that "the driver may be operating the vehicle without the consent of the owner, or even contrary to the express wishes of the owner, is irrelevant provided that the person to whom the owner entrusted the vehicle is in possession of the vehicle." See also *Cooper v. Temos* (1956), 3 D.L.R. (2d) 172 (Ont. C.A.), where the owner was held vicariously liable despite the fact that the person in possession operated the vehicle contrary to owner's stipulation of no drinking and driving.

[40] There is a long list of trial decisions to the same effect, including cases where the owner stipulated that the person with possession not drive the vehicle: see, e.g. *Lajeunesse v. Janssens* (1983), 44 O.R. (2d) 94 (H.C.J.) and *McKay v. McEwan* (1999), 43 O.R. (3d) 306 (Gen. Div.) (vehicle driven by another party contrary to owner's stipulation that no one else drive); *Donald v. Huntley Service Centre Ltd.* (1987), 61 O.R. (2d) 257 (H.C.J.) (owner consented to possession but stipulated that the person with possession not drive); *Naccarato v. Quinn* (1994), 18 O.R. (3d) 155 (Gen. Div.) (vehicle driven by another party and for another purpose contrary to owner's stipulation).

[41] The proposition upon which *Newman* rests, namely, that "possession can change from rightful possession to wrongful possession, or from possession with

consent to possession without consent" where the person in possession violates a condition imposed by the owner, is inconsistent with the reasoning of this line of authority.

[42] Allstate argues that *Newman* rests upon a distinct foundation not confronted in any other case, one that it maintains is supportable in principle, namely, that there is no consent within the meaning of s. 192(2) where the person with possession of the vehicle violates the owner's stipulation that the vehicle not be taken off private property and on to the highway. Allstate relies on the language of s. 192(2), which refers to the owner's liability for "negligence in the operation of the motor vehicle...on a highway", and submits that where the owner did not consent to the vehicle being taken on the highway, the consent required by the statue is absent.

[43] I am unable to accept this submission. In my view, the reference to "negligence in the operation of the motor vehicle...*on a highway*" means nothing more than that the owner's liability will only be triggered where the place of the negligence and injury is on a highway. That does not qualify the general proposition that the owner's liability turns on consent to possession, and consent to possession is not vitiated by violation of a condition attached by the owner to his or her consent to possession. If the owner cannot escape liability where the person with possession violates a condition that he or she not drive the car at all, it is difficult to see why the result should be different where the condition is that the car not be

driven on a highway. I see nothing in the language of s. 192(2) capable of justifying treating a stipulation by an owner that his or her vehicle not be taken on the highway differently from any other stipulation restricting the use or operation of the vehicle.

[44] In my view, *Newman* was wrongly decided. It is inconsistent with the reasoning and principle expressed in the long line of cases commencing with *Thompson* that if the owner has consented to possession, the owner will be vicariously liable even if there is a breach of a condition imposed by the owner relating to the use or operation of the vehicle.

Should *Newman* be overruled?

[45] As an intermediate court of appeal, we are ordinarily bound to follow our past decisions, even decisions with which we disagree. It is important that we do so. Our common law legal tradition rests upon the idea that we will adhere to what we decided in the past. As expressed by the Latin phrase *stare decisis*, we stand by things that have been decided. The rule of precedent provides certainly, consistency, clarity and stability in the law. It fosters the orderly and efficient resolution of disputes and allows parties to obtain reliable legal advice and to plan their affairs accordingly.

[46] However, as this court held in *David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.* (2005), 76 O.R. (3d) 161, at para. 127, it is

permissible for this court to overrule one of its prior decisions if it is satisfied that the error should be corrected after considering "the advantages and disadvantages of correcting the error." In making this assessment, this court should focus on the nature of the error and "the effect and future impact of either correcting it or maintaining it," including "the effect and impact on the parties and future litigants" and "on the integrity and administration of our justice system."

[47] The common law has long prided itself in its capacity to evolve and improve with the times. The rule of *stare decisis* is not absolute. There comes a point at which the values of certainty and predictability must yield to allow the law to purge itself of past errors or decisions that no longer serve the interests of justice. Moreover, decisions that rest on an unstable foundation tend to undermine the very values of certainty and predictability that *stare decisis* is meant to foster.

[48] In my view, the advantages of overruling *Newman* and correcting the error it made outweigh the disadvantages. I think it highly unlikely that Carlos or any other vehicle owner would have relied on *Newman* when deciding to grant possession of a vehicle to another party. Nor do I think it likely that insurers such as Allstate, who must provide owners with coverage even where the vehicle is operated in a manner prohibited by the owner, have placed any significant reliance on *Newman* in the management of their affairs.

[49] To leave *Newman* intact would not serve the interests of certainty and predictability in the law. The court's reasoning was inconsistent with the earlier 1933 decision in *Thompson*, and its authority has been severely attenuated by a steady string of subsequent decisions. It creates an anomaly that cannot be supported in principle, one that undermines the coherence of this area of law and that is likely to lead to confusion.

[50] Some trial judges have commented on the inconsistency between the reasoning in *Newman* and *Finlayson* and refused to follow the former: *Cimino v. Dauber*, 2013 ONSC 1609, at paras. 56-7; *Case v. Coseco Insurance Co.,* 2011 ONSC 2499, 106 O.R. (3d) 472, at paras. 28-36. See also *Hefferan v, Hefferan*, 2008 NLTD 18, 60 M.V.R. (5th) 232 (Nfld. S.C.), suggesting that *Newman* was wrongly decided.

[51] Most trial judges have distinguished *Newman*, but some have felt compelled to follow it. In *Widdis (Litigation Guardian of) v. Hall* (1995), 21 O.R. (3d) 238 (Gen. Div.), the trial judge felt constrained by the authority of *Newman* to hold that where the person with possession violated the owner's stipulation that the vehicle not to be driven until a transaction of purchase and sale was completed, the owner was not liable. He stated, at p. 247 that "[w]hile it has been suggested that [*Newman*] must be limited to its own facts…it has never been overruled…and…I am obliged to apply the *rationes* of that judgment". *Newman* was also followed in *Mazur v. Elias*, [2002] O.J. No. 2839, rev'd on other grounds (2005), 75 O.R. (3d) 299 (C.A.),

where the person in possession drove the vehicle contrary to the owner's instruction not to drive without insurance. These cases suggest that *Newman* has sown the seeds of confusion. The interests of certainty and predictability would be better served by overruling the decision and restoring the law on an owner's vicarious liability to a principled, coherent and predictable state.

[52] Another consideration is that this case falls into the category identified in *Polowin*, at para. 143, where the Ontario Court of Appeal is, for all practical purposes, the final court of appeal. Leave to appeal to the Supreme Court of Canada is only granted on questions of national importance, and we cannot safely leave it to our apex court to correct errors such those in *Newman* which involve a question of the interpretation of an Ontario statute, albeit, as in *Polowin*, a statute that may be comparable to statutes in other provinces. It seems to me appropriate that in such a case, we should not shirk responsibility for ensuring that the law of Ontario rests upon a coherent principle.

[53] Refusing to overrule *Newman* would reaffirm our commitment to precedent. However, it would serve no other advantage. The interests of justice would not be served by absolving Carlos and his insurer Allstate from responsibility for the damages suffered by Fernandes. Overruling *Newman* would enhance rather than undermine the interest of clarity, coherence and predictability in the law. Accordingly, it is my view that we should overrule the case and declare that it no longer represents the law of Ontario.

DISPOSITION

[54] For these reasons, I would dismiss the appeal with costs fixed at $15,000 to Fernandes and $7,500 to the Superintendent of Financial Services, both figures inclusive of disbursements and taxes.

Released: RJS AUG 10 2015

RJ Sharpe J.A.

I agree. Juriansland J.A.

I agree Lauwers J.A.

I agree Pardu J.A.