

- [3] I dismiss Traders' motion for summary judgment. The reasons for my decision are outlined below.

The Facts

The Accident

- [4] On June 30, 2012, the plaintiff was travelling westbound on the Parkway in a 2006 Saab 9.3. Justin was travelling eastbound on the Parkway in Nancy's Ford F150 pickup truck. The pickup truck struck the plaintiff's vehicle head on in the westbound lane.
- [5] On the date of the accident, Nancy and her husband Daniel were away in London, Ontario. Justin had been living with his parents (Nancy and Daniel) at the time. Justin took the keys for the pickup truck, though he knew that he was not supposed to. Nancy had left both sets of keys hanging on the hooks by the front door.
- [6] He was drinking and he drove the truck on the highway and the accident ensued. He was arrested and charged with a number of offences including impaired driving.
- [7] Nancy learned about the accident from her daughter, who telephoned her in London. After Nancy and her husband returned home, Nancy contacted the OPP and an OPP officer, Constable David Vogelzang, came to their home. He told Nancy about the charges against Justin and asked her if she wanted to press charges against him for stealing the truck. The officer suggested that she not do so because Justin was already facing enough charges. Nancy followed his advice and did not press charges against Justin.

Ownership/Usage of the Pickup Truck

- [8] At the time of the accident, Nancy was the only licensed driver in the home. Daniel did not possess a license due to medical illness and Justin's license had been suspended since 2005.
- [9] At the relevant time, there were two vehicles in the household: a Dodge van and the subject pickup truck. Both vehicles were parked in the driveway. Nancy would drive both vehicles.
- [10] Justin was the owner of the pickup truck from 2003 to 2009. Nancy became the registered owner of the truck in 2009. Although Nancy was the registered owner of the truck, she never bought the truck from Justin. There was no consideration for the transfer of the pickup truck.
- [11] After Justin's licence was suspended in 2005, the pickup truck sat unused in his parents' driveway for a long period of time, until the ownership was transferred to his mother. Nancy then registered the truck in her name, insured it, had some work done on it to make it roadworthy and began using it. Nancy had the pickup truck insured through a valid Ontario motor vehicle liability policy.
- [12] From the time Justin's licence was suspended (2005) until the date of the accident (June 2012), he never used the pickup truck, or the Dodge van for that matter, and never asked his mother for her permission to do so, since he was not licensed to drive. If he had asked,

she would have refused. It was understood that Justin would only be able to resume driving the pickup truck once his licence was reinstated.

- [13] Nancy never had any conversations with Justin about the use of the pickup truck prior to the accident. Justin had always acted responsibly while living at his parents' house and had never done anything which might have caused Nancy to mistrust him. He had never taken keys or other items without permission and Nancy never imagined that there was any risk that he might decide to steal one of her vehicles.
- [14] Justin confirmed that at the time of the accident he was in possession of the pickup truck *without* his mother's consent. He acknowledged that he should not have taken the truck and he regrets very much having done so. When Nancy visited him in jail a few days after the accident, he apologized to her for what he had done.

Analysis

Surrounding Legal Context

- [15] Automobile insurance is compulsory in Ontario: *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C. 25. The purpose of this legislation is to protect victims of automobile accidents "from having no means of seeking damages from persons who might have caused those damages without having the protection of automobile insurance": *Matheson v. Lewis*, 2014 ONCA 542 (CanLII), 121 O.R. (3d) 641, at para. 36; *Skunk v. Ketash*, 2016 ONCA 841 (CanLII).
- [16] The owner of a motor vehicle is liable for accidents caused by its operation under s. 192 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, except where subsection (2) applies, which provides as follows:

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. [Emphasis added.]

- [17] The purpose of s. 192(2) was noted in *Fernandes v. Araujo*, 2015 ONCA 571 (CanLII), 127 O.R. (3d) 115 (C.A.), at para. 20:

[T]he 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 licensing 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".* [Emphasis added.]

- [18] If the motor vehicle is driven by a person who has the *owner's consent* and is involved in an accident, s. 3.2 of the Ontario Automobile Policy (OAP) provides coverage: "You are covered when you, or anyone else in possession of a described automobile with your consent, uses or operates it. We will consider these other people insured persons." If there is no consent (either express or implied), the vehicle owner is not held liable for the actions of the unauthorized driver. The vehicle is treated as an uninsured vehicle.
- [19] The *Insurance Act* mandates a scheme to provide for limited insurance coverage where the operation of an *uninsured automobile* injures a person. The coverage is provided by the injured person's own insurer, but coverage is limited to the minimum required by s. 251 of the *Insurance Act*, which is \$200,000 for liability claims.
- [20] In order to mitigate the consequences of being injured by an uninsured or underinsured motor vehicle, purchasers of automobile insurance policies in Ontario can buy, for an additional premium, added coverage.

Was there Implied Consent?

- [21] As noted above, a motor vehicle owner is statutorily liable for the losses arising out of another person's negligent operation of his/her vehicle unless that vehicle was in the other person's possession *without the owner's consent at the time the negligent act occurred*. See s. 192(2) of the *Highway Traffic Act*, RSO 1990, c. H.8
- [22] There is no dispute that Nancy was the owner of the truck at all material times. The sole issue raised on this motion is the question of consent. Was Justin driving the pickup truck with the consent of the owner, his mother Nancy Gough (the insured)?
- [23] Consent can be either express or implied. In this case, there was clearly no express consent given by Nancy to her son, Justin. The issue is whether consent should be implied.
- [24] Traders takes that position that consent should be implied. The purpose of s. 192(2) is "to protect the public by imposing, on the owner of a motor vehicle, responsibility for the careful management of the vehicle". *Fernandes v. Araujo*, at para 20. As explained at paras. 36-37 in *Fernandes v. Araujo*:

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: "Consent 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.

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. [Emphasis added.]

- [25] Traders argues that Nancy did nothing to prevent Justin's access or use to the vehicle, and she did not expressly forbid him to drive the vehicle while she was away. According to Traders, Nancy's decision to leave the vehicle in the driveway with the keys on the hook essentially invited Justin to drive the vehicle. Given that Justin was left with "possession" of the vehicle, Traders maintains that Nancy should be liable for his actions while the vehicle was in his possession. According to Traders, consent should be implied in the circumstances, particularly in light of the broader policy issues in play.
- [26] I don't accept Traders' proposed interpretation of consent. In my view, the suggested interpretation is far too broad. Traders' position seems to impose liability on an owner for an accident unless steps are taken to prevent unauthorized use of the vehicle. The approach essentially requires that an owner hide their keys in order to avoid liability. However, in my view, this is hardly what is contemplated by s. 192(2) of the *Highway Traffic Act*. Nor does Traders' suggested interpretation accord with the ordinary meaning of "consent".
- [27] 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. Once permission to use the vehicle is granted, the grantee's non-compliance with the specific terms of use is not a basis for the grantor to escape liability. It is sufficient that the vehicle be entrusted for use. *Henwood v. Coburn*, 2007 ONCA 882 (CanLII), 88 O.R. (3d) 81, at para. 12; See also *Seegmiller v. Langer* (2008), 2008 CanLII 53138 (ON SC), 301 D.L.R. (4th) 454 (Ont. S.C.), at para. 34.¹
- [28] No doubt permission to use the vehicle need not be express. If there is a general understanding that someone is allowed to use the vehicle, there need not be "express" permission to find liability in a particular case. However, 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 Traders' position were accepted, arguably a thief would be found to have the consent of the owner to possess the vehicle.
- [29] The position I have taken appears consistent with the prevailing jurisprudence. The seminal case in this area is *Palsky (Next friend of) v. Humphrey*, 1964 CanLII 96 (SCC), [1964]

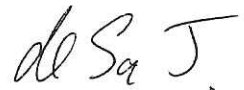
¹ If possession is given, the owner will be liable even if there is a breach of a condition attached to that possession, including a condition that the person in possession will not operate the vehicle. Breach of conditions placed by the owner on a person's possession of the vehicle, including conditions as to who may operate the vehicle, do not alter the fact of possession. *Seegmiller v. Langer* (2008), 2008 CanLII 53138 (ON SC), 301 D.L.R. (4th) 454 (Ont. S.C.), at para. 34.

The specific driver may even be operating the vehicle without the consent of the owner, or even contrary to the express wishes of the owner provided that the person to whom the owner entrusted the vehicle is in possession of the vehicle."; *Henwood v. Coburn*, 2007 ONCA 882 (CanLII), 88 O.R. (3d) 81, at para. 12

S.C.R. 580, a decision of the Supreme Court of Canada. The driver had been killed in the accident giving rise to the action. The trial judge found that the driver had the implied consent of the owner to have the vehicle. The Alberta Court of Appeal allowed the appeal and criticized the test the trial judge used in coming to that finding. The Supreme Court of Canada allowed the appeal and restored the decision of the trial judge. At page 3, the Court agreed with the test applied by the trial judge, and commented as follows:

What the learned trial judge was doing was putting to himself the question 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 that consent. [Emphasis added.]

- [30] There must be an understanding between both the owner and the driver (either express or implied) that the driver is authorized by the owner to use the vehicle.
- [31] In this case, on the evidence before me, there was no consent given to Justin to drive the vehicle. The evidence filed on the motion indicates the exact opposite. Both Justin and Nancy indicated that there was no consent. Traders does not contest their evidence on this point.
- [32] In light of such, the motion for summary judgment is dismissed.
- [33] I will accept written submissions with respect to costs from the parties of no more than 2 pages within 4 weeks of this decision.



Justice C.F. de Sa

Released: August 21, 2018

CITATION: Michaud-Shields v. Gough, 2018 ONSC 4977

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Daniel Michaud-Shields

Plaintiff

– and –

Justin Gough, Nancy Gough and Compagnie
D'Assurance Traders Generale

Defendants

REASONS FOR DECISION

Justice C.F. de Sa

Released: August 21, 2018