BLG Successfully Applies No-Consent Defence in Single-Vehicle Accident Case

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Wagner v. Fellows et al., 2017 ONSC 7309

On December 7, 2017, the Ontario Superior Court released its reasons for decision in *Wagner v. Fellows*, 2017 ONSC 6979. The action arose from a single-vehicle accident that took place early in the morning on April 2, 2011. The defendant, 16-year old Madison Fellows, was operating a van owned by his mother, Melissa Ley, when he lost control of the van and crashed. The plaintiff, 15-year old Tyler Wagner, was a passenger in the van along with another youth, 13-year old "M.F."

The plaintiff commenced an action against Ms. Ley alleging that she had expressly or implicitly consented to her son's possession of her van at the time of the accident, rendering her vicariously liable pursuant to section 192(2) of the *Highway Traffic Act*. The plaintiff further alleged that Ms. Ley was independently negligent in the way she kept and controlled access to the van's keys, following the case of *J.J. v. C.C.*, 2016 ONCA 718, in which the Court of Appeal upheld a 37% liability finding against an auto body shop for failing to exercise due care in the storage of cars and car keys.

In this case, Mr. Fellows attended a party on the evening of April 1, 2015 and met the plaintiff there. A few hours later, Mr. Fellows walked home and took the van while his mother slept. Mr. Fellows picked the plaintiff up at his home and together they picked up two 13-year old girls, N.F. and M.F. The group drove from Keswick to Newmarket and back, then dropped N.F. off at her home. They then drove to Sutton. On their way back to Keswick, Mr. Fellows fell asleep at the wheel and crashed the van in a ditch.

Court Decision

Vicarious liability and independent negligence

The Court found that Mr. Fellows, who had obtained a G-1 learner's permit two or three months before the accident, had taken the van on eight to ten previous occasions while his mother was sleeping. Both Mr. Fellows and his mother independently testified that the keys to the van were always in her purse, and that the purse was always with her. Mr. Fellows and his mother also agreed that she kept the purse either in bed with her or on the floor beside the bed at night. Mr. Fellows testified that he would enter the

bedroom between midnight and 6 a.m., while his mother "slept like the dead," and take the keys from her purse for a nighttime "joyride."

Mr. Fellows further testified that his mother did not give him consent to possess her van, and the Court accepted Mr. Fellows' assessment that his mother was generally unaware of his excursions. Mr. Fellows took steps to avoid getting caught taking the van.

Both Mr. Fellows and his mother independently described one occasion on which she became suspicious after seeing that a booster seat had been moved in the van. She confronted Mr. Fellows, but he lied and was able to partially deflect her suspicions.

Ultimately, the Court accepted that Mr. Fellows knew that his mother did not consent to his possession of the van on the night of the accident and that, therefore, Ms. Ley was not vicariously liable for his negligent operation of the van pursuant to section 192(2) of the *Highway Traffic Act.*

The Court similarly found that Ms. Ley was not independently negligent in controlling the keys to her van. While "Mr. Fellows was no angel" and did not always listen to his mother, who "tried to keep the peace for the sake of the other two children," the Court found that Ms. Ley did confront Mr. Fellows when Ms. Ley suspected that her van had been taken. Ultimately, the Court found that:

A reasonable parent acting reasonably is to be expected to take a graduated approach to discipline and security. The risk adolescents pose is not readily predictable. As it was, Ms. Ley probably exceeded the standards of most by invariably keeping her car keys in her purse and under her nose.

Payment of AB funds not admission

The plaintiff had also made a claim against Ms. Ley's insurer for uninsured motorist coverage. In its defence, the insurer relied upon an exclusion contained in section 1.8.2 of the standard Ontario Automobile Policy (the "OAP 1") which states that a passenger is not entitled to coverage if he willingly becomes an occupant of the vehicle when he knew or ought reasonably have known that it was in the driver's possession without the owner's consent.

At the outset of trial, the plaintiff and the Motor Vehicle Accident Claims Fund (the "Fund") moved for a declaration that the insurer could not rely on this defence because the insurer had paid non-earner statutory accident benefits in settling the accident benefits claim. They argued that the insurer's would not have been required to pay those benefits if the exclusion was found to apply and so the payment and settlement constituted an abuse of process or, alternatively, an admission that the exclusion did not apply. In its decision reported at 2017 ONSC 6979, the Court reviewed the accident benefits ("AB") settlement documents and noted that the Full and Final Release specified that the AB settlement was without admission of liability. The Court further noted that there was no proceeding or decision on the merits of the AB claim and so there was no abuse of process.

Significance of the Decision

This case illustrates that a vehicle owner may successfully defend against a finding of vicarious and independent liability from the unauthorized possession of their vehicle even where they may suspect that a member of their household has previously taken that vehicle. However, in order for the defence counsel to succeed, it is vital to have candid and credible evidence on the core issues of a vehicle owner's measures to control their vehicle and communicate and enforce their rules regarding vehicle use.

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