CITATION: BONTER v. ESTATE OF NATHAN LAIRD et al., 2019 ONSC 2604
COURT FILE NO.: CV-13-0164-00
D**ATE:** July 26, 2018 and March 15, 2019

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DEBORAH BONTER Plaintiff	Chris Clifford, for the Plaintiff
– and –	
THE ESTATE OF NATHAN LAIRD WARD, deceased, RONDA L. BARRETT and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY Defendants	R. Steven Baldwin, for the Defendant State Farm Mutual Insurance Company Pat Peloso, for the Defendant Ronda L. Barrett Christopher Reil, for the statutory Third Party Intact Insurance Company
	HEARD: July 26, 2018 and March 15, 2019

HURLEY, J.

REASONS FOR DECISION

Introduction

[1] The plaintiff, Deborah Bonter, was seriously injured in a motor vehicle accident that occurred September 28, 2012. Nathan Ward, the driver of the vehicle which collided with

her car, was fatally injured in the accident. The vehicle which he was driving was owned by the defendant Ronda L. Barrett. She had given him the keys to it because he wanted to retrieve his cigarettes from it. Instead of doing so, he took the car and drove away.

[2] Ms. Barrett's position is that, at the time of the accident, Mr. Ward was in possession of the vehicle without her consent. Because of this allegation, Ms. Bonter also sued her own insurer, the defendant State Farm Mutual Automobile Insurance Company ("State Farm"). Mr. Ward's insurer, Intact Insurance Company, has been added as a statutory third party under the *Insurance Act*, R. S. O. 1990, c. I.8.

[3] State Farm has brought a motion for summary judgment. It contends that, because Ms. Barrett voluntarily gave the keys to Mr. Ward, the vehicle was in his possession with her consent and therefore, under section 192(2) of the *Highway Traffic Act*, R. S. O. 1990, c. H.8, she is liable for any loss or damage sustained by Ms. Bonter by reason of Mr. Ward's negligent operation of it. If that is the case, there is no genuine issue for trial in respect of the claim against State Farm and the action should be dismissed as against it.

[4] Although Ms. Barrett has not brought a summary judgment motion, she says that, on a proper interpretation of s. 192(2), the vehicle was not in Mr. Ward's possession with her consent and, as a result, not only should State Farm's motion be dismissed but an order should also be made dismissing the action as against her.

[5] Mr. Baldwin and Mr. Peloso agreed that this issue can be determined on the evidentiary record before me and, subject to an appeal, would be binding on the parties at trial.

[6] Neither Mr. Clifford who acts for Ms. Bonter nor Mr. Reil who acts for Intact participated in the motion. I became concerned, after the hearing of the motion, that they could be unaware of the potential dismissal of the action as against Ms. Barrett and sent a letter to all counsel asking for their submissions, if any, about this potential result. Mr. Reil advised me by email that he does not have any submissions and is content that I decide the matter based on the arguments advanced by Mr. Baldwin and Mr. Peloso. Mr. Clifford made written submissions about the interpretation of s. 192(2) to which Mr. Peloso replied by email.

The evidence

[7] The facts as presented by the parties are uncomplicated and largely undisputed. They can be summarized as follows.

[8] Ms. Barrett lives in an apartment at 157 Stanley Street, Trenton. The morning of September 28, 2012, her son Matthew and Mr. Ward came to her apartment at about 10 a.m. The two, who were casual friends from high school, had run into each other at a local bar the night before. They had spent the night at the home of Mr. Ward's parents. In the morning, they took a cab to the apartment building. Matthew and his sister Jennifer also lived there but in a different apartment.

[9] They stopped in at Ms. Barrett's apartment. Later that morning, the three of them went to Tim Hortons and purchased coffee at the drive through. Ms. Barrett drove her car, which

was a 2003 Honda Accord. Matthew, who was 29, had his driver's license but did not own a car. He occasionally drove his mother's car but only with her express consent.

[10] After they returned to the apartment building, all three went to Ms. Barrett's apartment. She thought that her son and Mr. Ward were still under the influence of alcohol from the night before. They remained there for the next few hours socializing and, in Ms. Barrett's view, sobering up. She had met Mr. Ward before but did not know him well. She did not know if he had a history of taking cars without the owner's consent.

[11] At some point in the afternoon, Matthew complained to Mr. Ward that he was smoking too many of his cigarettes and should smoke some of his own. Mr. Ward said that he had left his cigarettes in Ms. Barrett's car which was in the parking lot of the apartment building and locked.

[12] Mr. Ward asked her for the keys so that he could retrieve his cigarettes from the car. She gave them to him and he left the apartment. She did not tell him not to drive the car but said to him "You're just going to get your cigarettes, correct?" At her cross-examination, she acknowledged that Mr. Ward could start the car with the keys but "it never really crossed my mind that he would".

[13] When about ten minutes had gone by and Mr. Ward had not returned to the apartment, Ms. Barrett asked her son to go out to the parking lot and find out what was going on. When he did so, he discovered that his mother's car was missing. He returned to the apartment and told her. She immediately called the police to report that Mr. Ward had taken her car without her consent. She was unsure of the specific time when she made

this call. At her cross-examination, she testified that she phoned the police around 2:00 p.m. but expressed uncertainty about the time both during her cross-examination and at her examination for discovery.

[14] Mr. Ward was driving the vehicle in a northbound direction on Trenton Street when he lost control of it, crossed into Ms. Bonter's lane and collided with her vehicle. As I stated at the outset, she was seriously injured and Mr. Ward was killed.

Evidence in dispute

[15] The affidavit in support of the motion was sworn by a law clerk, Lorraine Thomson, who works for Mr. Baldwin and attached, as exhibits, portions of the police investigative file. In her affidavit, Ms. Thomson made two statements that were based on her interpretation of these documents – one was that Ms. Barrett told a police officer that Mr. Ward had asked for the keys to retrieve beer and cigarettes from her car and the second was that the police did not find any beer or cigarettes in the car after the accident. She also referred to two documents entitled "Occurrence Summary" which indicated that Ms. Barrett first called the police at 3:59 to 4:01 p.m. to report that Mr. Ward had taken her car and the time of the accident was 3:44 p.m.

[16] Mr. Peloso submitted that I should ignore Ms. Thomson's affidavit because, if State Farm intended to rely on any evidence arising from the police investigation, it was obliged to file affidavits from the officers who participated in the investigation, particularly for any contentious facts. He relies on rules 20. 02(1) and 39. 01(5) of the *Rules of Civil*

Procedure and the general principle that, in a motion for summary judgment, the moving party must "put its best foot forward".

[17] Mr. Baldwin argued that I should consider her affidavit because Mr. Peloso chose not to cross-examine her and, if he was going to take issue with anything stated in it, he should have first availed himself of this opportunity. It was too late to raise this objection for the first time at the hearing of the motion. Further, it is not uncommon for evidence of this nature to be filed by way of an exhibit attached to the affidavit of a legal assistant or law clerk.

[18] I agree with Mr. Peloso that I cannot make any findings of fact where the evidence is controverted and depends on an interested party's interpretation of a document. A cross-examination of Ms. Thomson would not have been of any benefit because she would have simply referred to the document and repeated her interpretation of it.

[19] Even if I could rely on his hearsay evidence, I could not find as a fact the two averments made by Ms. Thomson about beer and cigarettes. The officer who took a statement from Ms. Bonter did not refer to either. His typewritten summary is:

> "Reported by owner at 1601 hrs as stolen vehicle a 2003 Honda. Through investigation the owner gave the keys to the driver Nathan Ward to remove items from the vehicle in the parking lot. She did not give him permission to drive the car.
>
> Nathan in turn drove the car a short distance down Trenton St, and was involved in an MVC resulting in the death of Nathan Ward and serious injury to the second driver.
>
> Classified as Take Auto without owners consent."

[20] The documents do not record whether or not the police searched the car after the accident or prepared an inventory of its contents. As a result, I cannot determine, one way or the other, if there was either beer or cigarettes in the car.

[21] With that said, some of the information contained in the documents is sufficiently reliable that I can consider it in this motion without an affidavit from the author of the document. Specifically, the times that are recorded for the accident and Ms. Barrett's call to the police are likely accurate, give or take a few minutes. From this, I can conclude that the accident likely occurred before Ms. Barrett phoned the police to report the vehicle stolen.

The law

[22] Section 192(2) of the *Highway Traffic Act* provides:

> 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 streetcar was without the owner's consent in the possession of some person other than the owner or the owner's chauffeur.

[23] Sharpe, J. A. described the statutory purpose in *Fernandes v. Araujo*, 2015 ONCA 571 (CanLII) at para. 20:

> As explained by Gillese J.A. in *Finlayson*, at para. 21, citing to the decision of this court in *Thompson v. Bourchier*, 1933 CanLII 106 (ON CA), [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."

[24] In the same case, he approved the earlier decision of Strathy, J. (as he then was) in *Seegmiller v. Langer*, 2008 CanLII 53138 (ON SC) who summarized the applicable legal principles at para. 34:

> 1. 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: *Henwood v. Coburn et al*., above, at para. 25; *Thorne v. Prets*, 2003 CanLII 22084 (ON CA), [2003] O.J. No. 5241, 45 M.V.R. (4th) 69 (C.A.); *Barham v. Marsden*, [1960] O.J. No. 60, [1960] O.W.N. 153 at 154 (C.A.); *Newman and Newman v. Terdik*, 1952 CanLII 97 (ON CA), [1953] O.R. 1 (C.A.) at 7.
>
> 2. The meaning of possession is a question of law but the application of that definition to any particular set of facts is not a question of law alone: *Henwood v. Coburn et al.* above.
>
> 3. 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).
>
> 4. Once ownership of a vehicle is established, the onus passes to the owner to establish that the vehicle was, without the consent of the owner, in the possession of some person other than the owner: see *Ross v. Vayda*, (1990), 1990 CanLII 8082 (ON CA), 40 O.A.C. 149, [1990] O.J. No. 1583 (C.A.).
>
> 5. The owner's vicarious liability under s. 192 is based on possession, as opposed to operation of the vehicle: see *Thompson v. Bourchier*, above; *Finlayson v. GMAC Leaseco Ltd.*, above.
>
> 6. "[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 v. GMAC Leaseco Ltd.*, at para. 3.
>
> 7. If possession is given, the owner will be liable even if there is a ch of a condition attached to that possession, including a condition that the

> person in possession will not operate the vehicle: *Finlayson v. GMAC Leaseco Ltd.*; *Donald v. Huntley Service Centre Ltd.* (1987), 1987 CanLII 4199 (ON SC), 61 O.R. (2d) 257, [1987] O.J. No. 829 (Ont. H.C.).
>
> 8. 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: *Thompson v.Bourchier*, above; *Finlayson v. GMAC Leaseco Ltd.*, above.

[25] There is a surfeit of decisions concerning s. 192(2) and comparable provisions in motor vehicle statutes of other provinces. Many can be distinguished on their facts but two recent decisions of the Superior Court of Justice are instructive.

[26] In *Michaud-Shields v. Gough*, 2018 ONSC 4977 (CanLII), the owner left the keys to her pickup truck by the front door of the house. Her son, who lived at home, drove the truck without her knowledge or permission and caused an accident in June 2012. She reported the incident to the police but decided not to proceed with a criminal charge against her son. He had owned the truck from 2003 to 2009. His driver's license had been suspended in 2005 and in 2009 he transferred ownership of the truck to his mother for no consideration. He had never driven it since the suspension of his license and it was understood that he would not be able to do so until his driver's license was reinstated.

[27] The plaintiff's insurer, who was a named defendant, argued that the mother had given implied consent to her son to possess the vehicle because she did nothing to prevent his access to the keys or use of the truck and did not expressly forbid him to drive it when she was away. By leaving the truck in the driveway with the keys easily accessible and

her son at home, she, in effect, left her son in legal possession of the vehicle and was therefore liable under s. 192 (2).

[28] In rejecting this argument and dismissing the insurer's motion for summary judgment, De Sa, J. stated at paras. 26 – 28 and 30:

> 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".
>
> 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.
>
> 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] In *Leigh v Clement*, 2018 ONSC 4508 (CanLII), the owner's son took her van without her knowledge or consent when she was sleeping. He knew where the keys were. She knew he knew. She had permitted him to start the vehicle in the past and make repairs to

it. She had also allowed one of his friends to drive it to take her son places. She brought a motion for summary judgment to dismiss the action as against her and also the crossclaim made by the plaintiff's insurer. After reviewing the jurisprudence, Cornell, J. granted the motion and dismissed the action as against her, finding that her son had taken the vehicle without her consent and she had not "relinquished power, control or dominion of the vehicle" to him (para. 37).

[30] State Farm submits that both cases are distinguishable because the keys were taken without the owner's consent; here, there is no dispute that Ms. Barrett voluntarily handed over the keys to Mr. Ward and did not explicitly tell him not to drive the vehicle. By giving him the keys, she legally transferred possession because he now had power, control or dominion over the car without an express prohibition on driving it.

[31] I disagree. Giving someone the keys to your car to retrieve their personal property from it is not giving possession of your car to them; it is giving them the keys to get something out of it. To conclude otherwise would lead to results that appear at odds with a sensible interpretation of the statute.

[32] The example used during argument of the motion was the owner who picks up supplies for work to be done at their home by a tradesperson. When the tradesperson arrives, the owner gives them the keys to get the supplies from the trunk. Nothing is said about not driving the car. The tradesperson, instead of retrieving the supplies, drives away in the car. The owner reports the theft to the police. There is an accident and the owner is sued. Was the car in the tradesperson's possession with the consent of the owner?

[33] State Farm's answer is yes and it has the virtue of certainty – keys equal possession of the vehicle provided the transfer is consensual. Ms. Barrett says no – possession of the device which allows you to open the car and even drive it does not mean the owner has given you possession of the vehicle itself if the conferral of the keys was for the purpose of obtaining personal property from it.

[34] I return to the statutory purpose and the recognition that, as Strathy,J. states in *Seegmiller,* this issue "is a question of fact to be determined by the evidence in a particular case". This leads me to conclude that State Farm is wrong in its interpretation of s. 192(2) but there could be cases where handing over the keys to another person would constitute an abdication of the owner's responsibility for the careful management of the vehicle and, if so, a court could find the owner liable.

[35] As the moving party, State Farm has the onus of establishing that there is no genuine issue for trial. I have concluded that there is. Based on the evidentiary record before me, a court could find that Ms. Barrett reasonably believed that Mr. Ward would use the keys solely to unlock the vehicle and retrieve his cigarettes. Whether it be cigarettes or some other personal property, a court could view it as such a commonplace occurrence that there was no need for Ms. Barrett to take any additional safeguards to prevent Mr. Ward from stealing her car.

[36] Considering the other side of the coin, as I must because of Ms. Barrett's request for summary judgment dismissing the action as against her, I also find a genuine issue for trial. There is evidence that Mr. Ward was still under the influence of alcohol when he arrived at her apartment and no explicit confirmation that, when she gave him the keys,

he was sober.[1] Her comment to him when she handed over the keys "you're just going to get your cigarettes, correct?" could be interpreted as an implicit acknowledgment of a suspicion that he might use the opportunity to drive the car. Because of this and the fact that Mr. Ward was, essentially, a stranger to her, a court could conclude that prudence should have led her to ask her son to accompany him to the car or go herself. There is also the discrepancy in her evidence about when Mr. Ward left the apartment and her claim to have quickly discovered and reported the theft to the police. I appreciate that the passage of time might have affected her recollection of that day but it is somewhat peculiar that she is off by two hours and reports the theft shortly after the accident has happened nearby. This does not mean she is liable under s. 192(2); only that I cannot resolve this issue on the current evidentiary record.

[37] Having found that there is a genuine issue for trial, I must next decide if I should exercise the expanded fact-finding powers in rule 20.04 (2.1) of the *Rules of Civil Procedure* or order the presentation of oral evidence under rule 20.04 (2.2). I should only do so if their use would not be contrary to the interest of justice and "will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole": *Hryniak v. Maudlin*, 2014 SCC 7 (CanLII) at para. 66.

[38] I do not see any benefit to the parties or the administration of justice in doing so. A resolution of this legal issue would require the testimony of several witnesses who will be

[1] It appears the police considered this a factor in the accident. The author of the collision reconstruction report, Constable Chadwick, checked off a box in it entitled "Alcohol Suspected" but there is no explanation for this conclusion in the body of the report. Although I have ruled that I cannot make findings of fact in favour of State Farm based on the police investigative file, I am not constrained from considering information contained in it when assessing Ms. Barrett's request for summary judgment

testifying in any event at the trial, assuming that both liability and damages remain contested. The evidence on the issue of consent will not take up a significant amount of time at trial. Although there may be cases in which a jury could decide the issue of consent (e.g. where it depended exclusively on the credibility of the witnesses, the driver testifying they had the owner's consent and the owner denying this), it will likely have to be decided by the judge in this case because of the legal nuances and the court will have the benefit of a full evidentiary record.

[39] As I indicated at the outset, Mr. Baldwin and Mr. Peloso agreed that summary judgment was appropriate in this case. I have come to the conclusion that it is not and, if that is my opinion, I should decline to grant it notwithstanding the agreement of the parties: *Gordashevskiy v. Aharon*, 2019 ONCA 297.

Disposition

[40] The motion is dismissed. As the successful party, Ms. Barrett is presumptively entitled to costs. Counsel provided me with their respective costs outlines at the conclusion of argument. If they cannot reach an agreement on costs, Mr. Peloso shall deliver his written submissions, not to exceed two pages, within fifteen days of the release of this decision. Mr. Baldwin has ten days in which to reply with submissions of the same length.

HURLEY, J

Released: April 25, 2019

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