

**CITATION:** Sparks v Cushnie et al., 2021 ONSC 213  
**COURT FILE NO.:** 19-71099  
**DATE:** 20210111

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
TRACEY SPARKS	)	
	)	Not Appearing
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
JEROME L. CUSHNIE	)	Noted in Default
	)	
CAMILLE KAY RAMSINGH	)	Thomas M. Muir and Douglas Green,
	)	counsel for the defendant, Ramsingh
	)	
THE GUARANTEE COMPANY OF	)	
NORTH AMERICA	)	Katherine McKague and Andrew Tam for
	)	the Defendant, Guarantee Company
	)	
Defendants	)	
	)	

**HEARD:** September 22, and 24, 2020

Corrected Decision on February 12, 2021: Paragraph 23 has been amended to delete "Guarantee" and insert "Certas Direct Insurance Company".
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**REASONS FOR JUDGMENT**

**JUSTICE L. SHEARD**

***Overview***

[1] The plaintiff's claims were settled on May 29, 2019. Minutes of Settlement were executed by all parties, except Jerome L. Cushnie ("Cushnie") who had been noted in default. Pursuant to the Minutes of Settlement, the parties agreed to the quantum of damages, costs, and disbursements payable to the plaintiff. As a result, this trial is with respect only to liability as between the defendant, Camille Kay Ramsingh ("Ramsingh"), and the plaintiff's motor vehicle insurer, The Guarantee Company of North America ("Guarantee").

[2] For this trial, the parties filed an Agreed Statement of Facts. The agreed facts include that (a) Ramsingh was the owner of a 2014 Honda Civic, bearing licence plate BVEF259 (the “Honda”), and (b) Cushnie was the operator of the Honda when it was involved in a collision with the plaintiff’s vehicle on October 3, 2014.

[3] The accident was investigated by the Niagara Regional Police Service (“NRPS”). As a result of the collision, Cushnie was hospitalized between October 3 and October 10, 2014. On January 19, 2017, Cushnie was noted in default in this proceeding.

[4] Under s.192(2) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the “HTA”), an owner of a motor vehicle may be held liable for losses or injuries caused by it, unless the vehicle was in the possession of another without the owner’s consent. Section 192 has been interpreted to mean that an owner of a motor vehicle is presumed to have given consent to the person who possessed the vehicle involved in an accident unless the owner rebuts that presumption.

[5] Consent may be express or implied. The parties agree that Ramsingh did not provide her express consent to Cushnie to operate the Honda. Thus, the only issue to be determined at this trial is whether Ramsingh has rebutted the presumption under s. 192 that Cushnie was in possession of the Honda with Ramsingh’s consent.

[6] If Ramsingh fails to rebut the presumption, then, as owner of the Honda, Ramsingh is liable to the plaintiff under s. 192(2) of the HTA.

### **Disposition**

[7] For the reasons set out below, I find that Ramsingh failed to rebut the presumption under s.192(2) of the HTA that Cushnie had her consent to possess the Honda. As a result, the presumption applies and Ramsingh is liable for the losses caused by Cushnie’s negligent operation of the Honda.

### ***The Law***

[8] Section 192(2) of the HTA governs the liability of the owner of a motor vehicle for losses caused by the motor vehicle and reads:

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.

[9] Section 192 of the HTA operates so as “to cast a wide net of vicarious liability on the owners of motor vehicles” and has been interpreted to be a “long arm statute making owners

vicariously liable for the negligence of the driver of the vehicle”: *Connors v. D’Angelo*,<sup>1</sup> at paras. 33, 34.

[10] The vehicle owner has the burden of proving that the vehicle was operated or the possession of another without the owner’s consent. If there is no evidence of express consent, the issue to be determined is “whether the circumstances were such as would show that” the driver was, at the time of the accident, in possession of the vehicle with the owner’s implied consent: *Deakins v. Aarson*, 1970 CanLII 27 (SCC), [1971] SCR 609 at p. 611.<sup>2</sup> It is a question of fact to be decided by the evidence in each particular case.”: *Thorne v. Prets*, 2003 CanLII 22084 (ON CA) at para. 18.

[11] The standard of proof is on a balance of probabilities: *Korody v. Bell*, at para. 17.

[12] As Ramsingh did not give express consent to Cushnie’s possession of the Honda, this court must determine whether the circumstances are such as would show that, at the time of the collision, Cushnie was in possession of the Honda with Ramsingh’s implied consent.

[13] In determining whether a person has an owner’s implied consent to possess the vehicle, the court must ask “whether all the circumstances were such as would show that the person who was driving had the implied consent of the owner and therefore, would have been justified in deeming that he had such consent”: *Palsky, (Next friend of) v. Humphrey*, [1964] SCR 580, at 583.

[14] Whether a driver is justified in deeming that he had the owner’s implied consent is determined by looking at all relevant circumstances, including the relationship between the parties and their course of conduct: *Pinto v. Kaur*, 2014 ONSC 5329, at para. 13, citing *Seegmiller v. Langer*, *Palsky v. Humphrey*, *Fyfe v. Bassett*, 2012 ONSC 5125 (CanLII) and *Edmund v. Reid*, 1993 O.J. No. 1349 (SCJ).

[15] Whether a 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. *Pinto* provides a good illustration of the nature of that task.

[16] On a motion for summary judgment, the court in *Pinto* determined that a mini-trial was required on the issue of consent. Myers J. arrived at that conclusion despite the evidence of the owner of the vehicle that no consent was given and of the driver of the vehicle, who admitted that she had taken the car without consent. Among the unanswered questions on the motion was why, when the car was discovered missing, the car was not reported stolen to the police or to the owner’s insurer.

[17] The driver claimed that she needed the car to take her ill child to a doctor. Myers J. noted that the fact that the driver “had keys and the took the car could support an inference that she thought she would be allowed to do if she explained” to the owner that her daughter was ill. That

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<sup>1</sup> 2017 ONSC 1104 (CanLII).

<sup>2</sup> See also *Seegmiller v. Langer*, 2008 CanLII 53138 (ON SC), at para. 20; *Connors v. D’Angelo*, at para. 56; *Watts v. Dunham*, 2013 ONSC 6848; *Korody v. Bell*, [2009] OJ 1716 [(SCJ), at para. 17.

inference was supported by the fact that the owner declined to press criminal charges and appeared to forgive the driver.<sup>3</sup>

[18] Myers J. identified the relevance of credibility to a determination of the issue of implied consent.<sup>4</sup> He suggested a simple approach to assess credibility would be to ask: “Does the evidentiary story makes sense? Does this story conform to the way we expect people to behave in the circumstances?”<sup>5</sup>

[19] In the matter before this court, Ramsingh’s credibility plays a significant role, particularly as there is no evidence from Cushnie, and Ramsingh’s evidence appears to conflict with Cushnie’s hospital records, filed in evidence.<sup>6</sup> In addition, Ramsingh’s evidence conflicted in parts with the testimony of Detective Chris Lucy, the officer investigating the collision, who was called as a witness on behalf of Guarantee.

[20] The subjective thoughts of the driver of the subject vehicle – whether he was justified in believing he had consent to possess the vehicle – are relevant, but not determinative of whether he had the owner’s implied consent. In this case, as Cushnie did not testify at trial, we do not have benefit of that evidence. “The focus of the language and the purpose of s.192 of the *Highway Traffic Act* are on the conduct of the owner and the court must consider all the circumstances including with the owner of the vehicle thought, said, and did or omitted to do”: *Connors v. D’Angelo*, at para. 49.

### **The Evidence**

[21] The evidence at trial consisted of the facts as set out in the Agreed Statement of Facts, the testimony of Ramsingh and Det. Lucy, and the joint document briefs filed as exhibits, containing certain hospital and Bell Mobility records, and photographs of Ramsingh’s house.

### ***Camille Kay Ramsingh***

[22] In 2014, Ramsingh, had an Honours B.A. and was working full-time as a Marketing and Specialty Leasing Coordinator. She was living at home with her parents and younger siblings. Her father was an engineer and a pastor in a local church. Her mother was a sales associate. Ramsingh’s sister was also a university graduate and her brother was enrolled in university. The family lived in a home in Brampton. Ramsingh and both her parents were licensed drivers, and each had their own vehicle.

[23] In June 2014, Ramsingh purchased the Honda, new. She was the sole named insured on the policy of insurance with Certas Direct Insurance Company. She alone was responsible for the maintenance of the vehicle. The Honda was driven only by Ramsingh. Based on the evidence, I

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<sup>3</sup> *Pinto*, at para. 16.

<sup>4</sup> *Pinto*, at para. 20, referencing *The Trial of an Action* (1981, Toronto Ont; Butterworths) at p.77 and *Faryna v. Chorny*, 1951 Carswell BC 133, [1952] 2 D.L.R. 354, at para 10.

<sup>5</sup> *Pinto*, at para. 20.

<sup>6</sup> Trial Exhibit 2, Joint Document Brief

find that, prior to the subject collision, no one, including Cushnie, had ever asked for or been given Ramsingh's consent to possess or operate the Honda.

[24] The Ramsingh home has a two-car garage. When all three vehicles are at the home, one must be parked in the driveway. The family members typically enter the house through the garage and would hang their car keys on a hook just inside that door.

[25] Ramsingh met Cushnie in October 2013. They began dating in February or March 2014. Cushnie, then aged 27, worked as a chef and lived at home with his mother and brother in Brampton.

[26] In July 2014, Cushnie was involved in an "incident", the details of which were not provided to the court. Prior to the "incident", neither Cushnie nor Ramsingh ever slept over at each other's houses.

[27] In August 2014, Cushnie was granted permission to stay in the basement bedroom of the Ramsingh home one or two days each week, while Cushnie's mother was at work. During Cushnie's stays, either Ramsingh's parents or her siblings were usually at home. On the weekends, Cushnie returned to his family home.

[28] In August 2014, after Cushnie began his mid-week stays at Ramsingh's home, Ramsingh continued her usual routine of getting to work by 9:00 a.m. She would check in with Cushnie throughout the day, by text or telephone, and would spend time with Cushnie in the evenings.

[29] Cushnie was driven between his family home and the Ramsingh home by his mother, by a friend, or by Ramsingh (the latter, in the Honda). When at the Ramsingh home, Cushnie played on his computer, watched movies, or went for walks. He ate meals prepared for him by one of the Ramsinghs and, on occasion, Ramsingh picked up food for Cushnie and her to eat.

[30] Ramsingh never saw Cushnie driving, but she knew that he had owned cars in the past. Ramsingh assumed that Cushnie had a valid driver's licence. Ramsingh's evidence was that she and Cushnie never discussed his driving the Honda, nor did they have any discussion at all about the Honda.

### ***Chronology***

*Thursday, October 2, 2014*

[31] Cushnie was staying overnight at the Ramsingh home on Thursday, October 2, 2014. He was supposed to return to his family home on the Friday. On the Thursday, Ramsingh followed her usual daily routine. She drove to work at 8:30 a.m. and checked in with Cushnie via telephone and text throughout the day. Ramsingh arrived home at 7:30 p.m. that evening, later than usual. The garage was full, so she parked the Honda in the driveway. The other family members were home. Ramsingh hung her car keys on the hook by the entry door. It was common knowledge to all in the house, including Cushnie, that the car keys were kept in this location.

[32] After arriving home, Ramsingh went downstairs to talk with Cushnie. They got into an argument over what to have for dinner. He did not want to eat what had been prepared and Ramsingh was not willing to go out again to purchase something. She went upstairs by herself at approximately 8:00 p.m., ate dinner, and then went upstairs to her bedroom. She did not see Cushnie again that evening although she texted him between 8:00 and 8:30 p.m. Ramsingh fell asleep around 9:00 p.m., woke up a couple of hours later, answered some text messages, and went back to sleep.

*Friday, October 3, 2014,*

[33] Ramsingh followed her usual morning routine on the Friday, but after coming downstairs for breakfast, she noticed the key fob for her car was missing. She went outside and discovered that the Honda was also missing. Ramsingh told her parents and then ran to the basement. Cushnie was not there. She returned to the main floor and told her parents that Cushnie was gone. Ramsingh assumed that Cushnie had taken the Honda.

[34] Ramsingh had a 9:00 a.m. work meeting and asked her father to drive her to work. On route, Ramsingh tried reaching Cushnie on his cell phone. There was no answer. In cross-examination, Ramsingh was asked why she called Cushnie. She answered that she thought he had taken the Honda and that, had she reached Cushnie, she would have asked him to return the Honda or tell her where he was and she would have gone to get it.

[35] Guarantee asks the court to make particular note of what Ramsingh did *not* do that morning. Ramsingh did not call either the police or her motor vehicle insurer to report that her car was stolen. Ramsingh admitted in cross-examination that a car that is taken without consent is “stolen” and a reasonable person would call police and their motor vehicle insurer to report that their car was stolen. Ramsingh explained that she did not call her motor vehicle insurer because she was trying “to figure out what was going on” and that she “could not” call her insurer because she did not know where her car was. She also stated that Cushnie was her priority, not the Honda.

[36] Ramsingh arrived at work and went straight to her meeting. At 10:30 a.m. she received a phone call from Cushnie’s mother, Paulette, who advised that Cushnie had been in a car accident and was in the hospital. Ramsingh continued to assume that Cushnie had taken the Honda and wondered why he had done so.

[37] Paulette picked up Ramsingh from work at 11:00 a.m. and they drove together to the Hamilton General Hospital. They arrived before 1:00 p.m. and stayed until 2:00 or 3:00 a.m. For most of that time, Ramsingh was in the waiting room; she was not permitted to see Cushnie because she was not next-of-kin. From time to time, Paulette provided Ramsingh with an update on Cushnie. Paulette arranged for Ramsingh to see Cushnie about 7:00 p.m. that evening. According to Ramsingh, Cushnie had tubes down his throat, could not speak, was not conscious, and had wires connected to him. Paulette drove Ramsingh back to her office, where she had left her father’s car, and Ramsingh drove herself home.

*Saturday, October 4, 2014*

[38] In the early afternoon of October 4, 2014, Paulette picked up Ramsingh from her home and they again drove together to the hospital. They spent between seven and eight hours at the hospital, during which time Paulette arranged for Ramsingh to see Cushnie. According to Ramsingh, Cushnie still had a tube down his throat and could barely open his eyes. Ramsingh said she could not speak to Cushnie. Ramsingh said she was in Cushnie's room for 10 minutes, at most, and that other family members were there as well: Cushnie's mother, aunt, and cousins. Cushnie's brother, Jamal, had arranged to fly in from Edmonton, and had not yet arrived. Ramsingh testified that she was confused and that "Cushnie was fighting for his life".

[39] Paulette dropped Ramsingh home at approximately 11:00 p.m. that evening.

*Sunday, October 5, 2014.*

[40] Ramsingh did not join her family at church on Sunday morning but she ate breakfast with them when they arrived home at approximately 11:00 a.m. Paulette picked up Ramsingh later that day and the two arrived at the hospital in early afternoon. They stayed for between three and four hours. Ramsingh could not recall if she saw Cushnie that day. However, if she did, she did not speak to him and stayed for 10 or 20 minutes with Paulette's permission. Ramsingh described Cushnie as "still fighting for his life".

*Monday, October 6, 2014*

[41] Ramsingh's father drove Ramsingh to work. She worked her usual day and at 5:00 p.m., Paulette picked up Ramsingh to drive to the hospital. They arrived at between 6:00 and 6:30 p.m. and stayed for two or three hours. As Cushnie was no longer in the ICU, Ramsingh was able to see him. She asked Cushnie how he was doing and he pointed to his throat. Ramsingh said she was in Cushnie's room, along with his family, for perhaps 20 minutes. Paulette drove Ramsingh home at between 10:00 and 11:00 p.m.

*Tuesday, October 7, 2014,*

[42] Before leaving for work on Tuesday morning, Ramsingh's parents told her that a police officer had left her a voicemail message on Monday, asking that Ramsingh call him back. Ramsingh did not listen to the message. Ramsingh's parents gave her Det. Lucy's name and telephone number, taken from the voicemail. Ramsingh's evidence is that she assumed the police officer was calling in relation to both the missing Honda and Cushnie's accident.

[43] Ramsingh drove her father's car to work. After work, Paulette picked up Ramsingh from her office and they drove to the hospital. They stayed from between 6:00 or 7:00 p.m. to around 10:00 p.m. Ramsingh said that Cushnie still looked "droopy". She asked him how he was feeling but, according to Ramsingh, Cushnie still could not speak fully. She asked him if he remembered anything and he shook his head. Ramsingh saw Cushnie for about 20 minutes. Ramsingh arrived home at 11:30 p.m. that evening and went to bed without speaking to anybody at home.

[44] On cross-examination, Ramsingh confirmed that on this Tuesday, she exchanged three text messages with Cushnie between 3:28 and 4:22 p.m.

[45] The Bell Mobility records show numerous text messages between Ramsingh and Paulette throughout all the days that Cushnie was in the hospital. Starting on Sunday, October 5, 2014, Ramsingh also exchanged many text messages with Cushnie's brother, Jamal, who had arrived from Edmonton to visit Cushnie in the hospital.

[46] Guarantee asks the court to again note what Ramsingh had *not* done by Tuesday, October 7, five days after discovering her car was missing and knowing that Cushnie had been in a car accident:

- 1) Ramsingh had not reported the missing or stolen Honda to police or to her motor vehicle insurer;
- 2) Ramsingh had not returned Det. Lucy's voicemail call from the Monday morning; and
- 3) Ramsingh had told no one – no member of her own family nor Paulette – that Cushnie had taken the Honda without Ramsingh's consent.

[47] Det. Lucy made a second call to the Ramsingh home on Tuesday, October 7, 2014. He spoke with Ramsingh's father and told the father that the Honda was impounded. Ramsingh states that this message was not communicated to her by either her father or any other member of her family.

[48] At the outset of trial, Ramsingh advised that her father would be called as a witness. At the completion of Ramsingh's testimony, her counsel advised the court that Ramsingh's father would not be called to give evidence.

*Wednesday, October 8, 2014,*

[49] On Wednesday, Ramsingh drove to work in her father's car. She arrived at 9:00 a.m., attended a meeting, and carried on with her usual work. Early that afternoon, Ramsingh returned Det. Lucy's call from her office. After work that evening, Ramsingh and Paulette again drove together to the hospital. According to Ramsingh, she was allowed to see Cushnie, but still did not have a full conversation with him. Ramsingh described Cushnie as "struggling to move".

[50] Cushnie was discharged from the hospital on October 10, 2014. He did not resume his mid-week overnights at the Ramsingh home. Ramsingh and Cushnie ended their relationship three or four months thereafter.

***Telephone call with Det. Lucy – October 8, 2014***

[51] According to Ramsingh, in her telephone conversation with Det. Lucy on October 8, 2014, he reported that the Honda had been in an accident, the location of the accident, and that the Honda was in an impound lot in Vineland. He provided an incident number and his contact information.



[52] Det. Lucy mentioned Cushnie's name. Ramsingh asked the detective if Cushnie was the driver of the car. He said "yes" and told Ramsingh that at that time of the collision, Cushnie's licence had been suspended. During this call, and for the first time since discovering the Honda had been taken, Ramsingh stated that Cushnie did not have her permission to take the Honda.

[53] After her call with Det. Lucy, Ramsingh contacted her motor vehicle insurer. She reported that her boyfriend, Cushnie, had been the driver of the Honda at the time of the collision, and asserted that he did not have her consent to possess the Honda.

### ***Detective Lucy***

[54] Det. Lucy was called by Guarantee to give evidence at the trial. Det. Lucy has been a police officer with the NRPS for over 18 years. He reached the rank of detective in 2012. In October 2014, he worked in the NRPS collision reconstruction unit.

[55] Det. Lacey testified that he had an independent recollection of the events and was permitted to refer to his notes, which he had reviewed prior to trial.

[56] Det. Lucy's evidence is that he left a voicemail at Ramsingh's home at 10:38 a.m. on Monday, October 6, 2014. At that time, Det. Lucy knew the following:

- (i) Cushnie was the driver of the Honda;
- (ii) Cushnie was not the registered owner of the Honda;
- (iii) the keys to the Honda were found in Cushnie's pocket. For that reason, it did not appear that the Honda was stolen;
- (iv) Cushnie was a suspended driver;
- (v) there was a suspicion that Cushnie was impaired at the time of the collision; and,
- (vi) the Honda and its keys were in the possession of the NRPS and the Honda was in a locked impound lot.

[57] As his initial call was not returned, Det. Lucy called the Ramsingh home again on Tuesday, October 7, 2014. He spoke with Ramsingh's father, advising the father that the Honda was being kept in an impound lot. Det. Lucy asked that Ramsingh call him.

### ***October 8, 2014: Telephone conversation with Ramsingh***

[58] The following is a summary of Det. Lucy's evidence respecting his call with Ramsingh.

[59] Det. Lucy received a call from Ramsingh at 2:30 p.m. on Wednesday, October 8, 2014. He had a memory of his telephone conversation with Ramsingh and acknowledged that his notes do not record either the entire discussion or his reflections on the conversation. When Det. Lucy calls to notify an owner of a vehicle that it has been in a collision and is impounded, it is not his practice

to make detailed notes of the conversation. Det. Lucy stated that the telephone conversation with Ramsingh stands out in his memory, however, because of the odd answers she gave to his questions.

[60] In the telephone call, Det. Lucy introduced himself to Ramsingh. He advised that he was trying to find out who owned the Honda and who was driving it at the time of the collision. Ramsingh confirmed she was the owner. Det. Lucy told her that the Honda had been in a collision in the Niagara Region. Ramsingh appeared to question whether the Honda had been in that Region.

[61] Ramsingh told Det. Lucy that the Honda was at home. He suggested that Ramsingh check her driveway to see if the Honda was there. Det. Lucy's evidence is that there was a pause in the conversation; he concluded that Ramsingh had either put the call on hold or had put down the telephone, so that she could go and check her driveway to see if the Honda was there. When the conversation resumed, Ramsingh confirmed that the Honda was not in her driveway. Det. Lucy assumed that Ramsingh was calling him from her home.

[62] Det. Lucy states that he found his entire telephone conversation with Ramsingh to be "odd": he was calling to tell the owner of a brand-new car that it had been smashed and was in an impound lot and would have expected the owner to be upset but Ramsingh appeared even to doubt that her car was missing. Despite finding the conversation "odd" or "unique", Det. Lucy did not make a note that he had been put on hold or that Ramsingh was checking her driveway to see if the Honda was there.

[63] Det. Lucy asked Ramsingh if she knew who had been driving the vehicle and when she did not provide a name, he asked Ramsingh if she knew who "a Jerome Cushnie was". After Det. Lucy told Ramsingh that Cushnie was driving the vehicle and was a suspended driver, Ramsingh responded that Cushnie did not have her permission to drive the Honda. Ramsingh told Det. Lucy that she did not want to pursue a charge against Cushnie for having taken the Honda without her consent.

### ***Credibility Issues***

[64] I find that Ramsingh's credibility is lacking generally and specifically and on key points.

#### ***(i) Delay in calling her Insurer or Police***

[65] Ramsingh's explanations for not notifying the police or her motor vehicle insurer that her car was missing conflicts with her evidence that a "reasonable" person would do both those things if they had discovered their new vehicle missing, without explanation.

[66] Also, it is difficult to reconcile Ramsingh's assertion that she did not call her insurer or return Det. Lucy's call because Cushnie, not the Honda, was and remained her priority. I note that, except on Friday, October 3, 2014, Ramsingh continued to go to work as usual. Also, Ramsingh offered no evidence that she could not have found time during her work day or even while Paulette was driving them to the hospital, to return Detective Lucy's call.

(ii) *Alleged ignorance about the accident: who was driving and the involvement of the Honda*

[67] Ramsingh's evidence that she did not know where the Honda was or who was driving it is undermined by her admission that the Honda was the subject of discussion amongst Cushnie and his family members, albeit not an "extensive" discussion. Ramsingh's evidence on that point strains credulity given that Cushnie was in Ramsingh's car when he was injured, and that the collision occurred in St. Catharines, hours from Brampton.

[68] Ramsingh's evidence respecting her lack of knowledge about the collision and, as will be seen below, about Cushnie's improving medical condition, is also difficult to accept given the time Ramsingh spent at the hospital, including time in Cushnie's hospital room in the presence of his doctors, the time she spent with Paulette, and the text messages and telephone calls she exchanged with Paulette, Jamal, and Cushnie.

(iii) *Conflicting Evidence respecting Discussion with Detective Lucy*

[69] There are conflicts between the evidence given by Det. Lucy and Ramsingh. For example, Ramsingh denies telling Det. Lucy the Honda was in the driveway. She acknowledges that she asked Det. Lucy if Cushnie was the driver because, she stated, at that time she did not know. Ramsingh acknowledges that after Detective Lucy told her that Cushnie was the driver, she volunteered that Cushnie did not have her permission to drive the Honda.

[70] Separately, and notwithstanding any shortcoming in his notetaking, I prefer the evidence of Det. Lucy to that of Ramsingh as to what was said in the telephone conversation of October 8, 2014. Firstly, Det. Lucy has no interest in the outcome of these proceedings. Secondly, the reason given by Det. Lucy for his recollection of his telephone call with Ramsingh - because he found her reaction to be "odd" - was credible, and consistent with Ramsingh's admission that she claimed ignorance of Cushnie's involvement in taking the Honda, which I find was untrue at the time. Thirdly, Ramsingh's overall credibility is shaken by what she did not do upon discovering her car missing, which, Ramsingh acknowledged, was inconsistent with what a "reasonable" person would have done.

[71] I accept the evidence of Det. Lucy that Ramsingh pretended not to know that Honda was missing or that Cushnie had taken and driven it. I conclude that only after she learned that the police knew that Cushnie was the driver and after being told that he was a suspended driver did Ramsingh state (to anyone) that Cushnie did not have permission to have the Honda.

(iv) *Conflict between Evidence and Medical Records*

[72] It is also difficult to reconcile Ramsingh's evidence with the hospital records.

[73] Among other things, Ramsingh's description of Cushnie's condition and his ability to communicate in the hospital differs materially from his condition as described in the medical records, such that I cannot accept her evidence that she was unable to speak with Cushnie.

- (i) The Hamilton Health Sciences Physician's Progress Notes of Friday, October 3, 2:30 p.m. document a family meeting with father and "fiancé". The notes entitled "Administrative Data"<sup>7</sup> also state that "updates" were given at 2:20 p.m. on October 3 to "mother, father and spouse" (at p. 1236). The Notes state that Cushnie was trying to talk and was able to nod when asked about pain.

While Ramsingh denied that she or anyone else identified her as Cushnie's fiancée, this entry can only be referring to her. This entry also conflicts with Ramsingh's evidence that she was not able to see Cushnie until 7:00 p.m. that day, and then only briefly. Rather, it suggests that Ramsingh was identified as a fiancée or spouse and remained present while all family questions were answered.

- (ii) The Hamilton Health Sciences Anaesthetic Record<sup>8</sup> states that on Saturday, October 4, 2014, prior to undergoing a surgical procedure, Cushnie was able to and provided both his own consent to a medical procedure and his medical history.

This record conflicts with Ramsingh's evidence that Cushnie was unable to speak on that day, was not conscious, and was "fighting for his life".

- (iii) The Physician's Progress Notes for Sunday, October 5<sup>9</sup> note that Cushnie was awake and oriented, anxious, complaining of no pain and was to be extubated.

This record again appears to conflict with Ramsingh's evidence that when she saw Cushnie that day, he had a tube down his throat, was connected to wires and was, again, "fighting for his life".

- (iv) The Physician's Progress Notes for Monday, October 6, 2014<sup>10</sup>, state that Cushnie was given a psychiatric referral for assessment and reference information obtained from "pt" – whom I understand means "the patient", i.e. Cushnie. The Notes go on to state that Cushnie admitted he was the driver and was intoxicated when he hit a parked car in St. Catherines. At page 1368, the notes state that Cushnie had been extubated on the previous day, that he was oriented "x3", that his thought process was logical and there was no cognitive clinical impairment.

The above entry also appears to conflict with Ramsingh's evidence that Cushnie was still unable to communicate as of that date. It also discloses that Cushnie was the driver of the Honda.

[74] Given Ramsingh's extensive involvement with Cushnie and his family at the hospital and through texts and telephone calls, I do not believe Ramsingh's testimony that it was not until she spoke with Det. Lucy on October 8, 2014 that she learned that Cushnie had been driving the Honda and that the accident occurred in the Niagara Region.

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<sup>7</sup> Trial Exhibit 2, Joint Document brief, Tab C, pp. 1234 -1237.

<sup>8</sup> Exhibit 2, Tab F, p.1275.

<sup>9</sup> Exhibit 2, Tab G. p. 1362.

<sup>10</sup> Exhibit 2, Tab G, p. 1364.

[75] It is clear from Ramsingh's testimony that she had a close relationship with Cushnie's mother, Paulette. For example:

- (a) Paulette called Ramsingh on Friday morning, soon after learning of Cushnie's injuries. On Paulette's first visit to the hospital, she stopped to pick up Ramsingh from work, so the two of them could see Cushnie together;
- (b) Ramsingh accompanied Paulette to the hospital daily, where they spent many hours together at the hospital. It was Paulette who arranged for Ramsingh to see Cushnie, even though she was not "next-of-kin"; and
- (c) the medical records support a finding that Cushnie's family was aware of Ramsingh's close relationship with Cushnie, to such an extent that Paulette was prepared to describe Ramsingh as Cushnie's spouse or fiancée.
- (v) *Evidence Concerning Ramsingh Family Members*

[76] I also find it difficult to accept Ramsingh's evidence that neither her father, nor anyone else in her family had told her about Det. Lucy's telephone conversation with her father on Tuesday, October 7, 2014.

[77] Given the circumstances - Ramsingh was living at home with her family; the Honda was a recent, and significant, purchase for Ramsingh; the Honda had been taken by Cushnie, Ramsingh's boyfriend, who had been a guest in the Ramsingh home and was now in hospital due to a car accident; the weekend after the Honda went "missing", it Honda and Jerome's injuries were discussed with Ramsingh and members of her family - it is difficult to believe Ramsingh that no one in her family told her about Det. Lucy's second telephone call and shared information provided by Det. Lucy concerning the whereabouts of the Honda.

[78] Ramsingh's phone records show and she acknowledged that she had a seven-minute telephone call to her home on Tuesday afternoon. She testified that she could not recall whether she had spoken with her mother or her father but that whomever she had spoken with did not tell her about Detective Lucy's second call.

[79] In the absence of evidence from either of her parents, or of Paulette, or any other witness who might have supported or corroborated Ramsingh's version of events, I am left in doubt about the credibility of Ramsingh's evidence concerning the events described above.

[80] When the evidence is considered as a whole, Ramsingh's "evidentiary story" simply does not make sense, nor does it conform to the way we expect people to behave in the circumstances.

### ***Analysis***

[81] The issue to be determined at this trial is whether, on the evidence, Ramsingh has met her onus to rebut the legal presumption under s. 192(2) of the *HTA* that Cushnie had consent to possess the Honda. There is no burden on Guarantee to lead evidence to support a conclusion that Cushnie had consent: consent is presumed by s.192 (2) of the *HTA*.

[82] Guarantee neither asserts, nor does the evidence show, that Ramsingh gave Cushnie her express consent to possess or operate the Honda. Therefore, the only issue is whether the evidence can support a finding that Cushnie had the Honda without Ramsingh's implied consent.

[83] The evidence that I accept which supports the position taken by Ramsingh that Cushnie did not have her implied consent to possess the Honda is that:

- (i) Cushnie had never driven the Honda prior to the date of the accident; and
- (ii) Ramsingh and Cushnie had never discussed his possessing or driving the Honda.

[84] The evidence that I accept which weighs against the position taken by Ramsingh is that:

- (i) for at least seven months prior to the collision and for three to four months afterword, Ramsingh and Cushnie were in a relationship and, at the time of the collision, Cushnie had been living for part of each week in Ramsingh's family home;
- (ii) when Ramsingh discovered the Honda missing, she ran downstairs to check for Cushnie and immediately concluded that he had taken the Honda;
- (iii) Ramsingh attempted to reach Cushnie on the phone on Friday morning and stated that, had he answered, she would have asked Cushnie to bring the Honda back;
- (iv) Ramsingh not only did not call the police to report the Honda missing or stolen, she did not initially tell anyone - including anyone in her or Cushnie's family - that Cushnie had taken the Honda without her consent;
- (v) for five days following the date on which it must have been obvious to her that Cushnie's accident occurred in the Honda, Ramsingh did not call the police or her motor vehicle insurer to report the Honda missing or stolen; For days Ramsingh delayed returning Det. Lucy's call and when she finally called him in the afternoon of Wednesday, October 8, 2014, she pretended not to know that the Honda was missing, that it had been in a collision, and that her boyfriend, Cushnie, was the driver; and
- (vi) Ramsingh knew that Cushnie knew where the key fob was kept and that he had easy access to it.

[85] The onus is on Ramsingh to rebut the presumption under s.192(2) and to establish, on a balance of probabilities, that Cushnie did not have implied consent to possess the Honda. Based on Ramsingh's relationship with Cushnie, her lack of credibility on important evidentiary issues, and her conduct, I find that Ramsingh has failed to meet her onus.

[86] The caselaw put forth by the parties generally falls into two categories. In many of the decisions, the court heard evidence from the driver that he or she did not have the owner's consent to possess or operate the vehicle and/or knew that consent would not have been given if requested.<sup>11</sup> In others, the owner of the vehicle was found to have impliedly consented to possession because they had allowed the driver to operate the vehicle on a prior occasion or had given possession of the vehicle to the driver<sup>12</sup>.

[87] In the matter before this court, we have no evidence from the driver, Cushnie. Without Cushnie's evidence, the court can only speculate as to whether (a) he believed that he had Ramsingh's implied consent to possess or drive the Honda and (b) he would be justified in his belief.

[88] At best, any inferences that may be drawn from Ramsingh's evidence are equivocal on the issue of implied consent; they are not sufficient to assist Ramsingh in rebutting the presumption found in s.192(2) of the *HTA*.

### **Disposition**

[89] On a balance of probabilities, I find that Ramsingh failed to rebut the presumption under s.192(2) of the *HTA*; Ramsingh has failed to establish that Cushnie had possession of the Honda without Ramsingh's (implied) consent. As a result, Ramsingh is liable for the loss and damages sustained by the plaintiff in the amount agreed to by the parties and set out in the Minutes of Settlement dated May 29, 2019.

### ***Costs***

[90] As the successful party, Guarantee is presumptively entitled to its costs. I would urge the parties to attempt to reach an agreement on costs. If they are unable to do so, then costs submissions shall be made as follows:

1. Within 21 days of the date of the release of this decision, Guarantee shall serve and file its written costs submissions, not to exceed three pages, double-spaced, together with its draft bill of costs, and copies of any relevant offers to settle.
2. Within 14 days of the service upon her of Guarantee's costs submissions, Ramsingh shall serve and file her responding submissions of no more than three pages, double-spaced, together with her draft bill of costs, and copies of any relevant offers to settle.

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<sup>11</sup> *Pinto v Kaur*; *Michaud-Shields v Gough*, 2018 ONSC 4977; *Jaffray v Gleadall*, 2009 CanLII 66999 (ON SC); *Korody v Bell*; *Henwood v Coburn*, 2007 ONCA 882 (CanLII); *Fagan v. Martin*, 2013 ONSC 5441 (CanLII); and *Ledger v Sabourin*, 2019 ONSC 1893.

<sup>12</sup> *Deakens*; *Palsky v. Humphrey*; *Thorne*; *Connors*; *Seegmiller v. Langer*, 2008 CanLII 53138 (ON SC); *Prentzas v. Sorto*, 2017 ONSC 247; *Fernandes v. Araujo*, 2015 ONCA 571; and *Ledger v. Sabourin*.

[91] If no submissions are received within 35 days of the date of the release of these reasons, the parties shall be deemed to have resolved the issue of the costs and costs will not be determined by the court.

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Justice L. Sheard

**Released:** January 11, 2021



**CITATION:** Sparks v Cushnie et al., 2021 ONSC 213  
**COURT FILE NO.:** 19-71099  
**DATE:** 20210111

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Tracey Sparks

Plaintiff

- and -

Jerome L. Cushnie

Camille Kay Ramsingh

The Guarantee Company of North America

Defendants

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**REASONS FOR JUDGMENT**

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**Released:** January 11, 2021