CITATION: Conners v. D'Angelo, 2017 ONSC 1104
COURT FILE NO.: CV-11-438419
DATE: 2017-02-17

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
WILLIAM CONNERS	)	*Aliza Karoly* for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
FRANCESCO D'ANGELO, VINCENZA TARTAGLIA a.k.a. ENZA TARTAGLIA and GORE MUTUAL INSURANCE COMPANY	)	*Christopher P. Klinowski* for the Defendant Vincenza Tartaglia
	)	
	)	
Defendants	)	
	)	
	)	**HEARD**: February 1, 2017

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The Plaintiff, William Conners, was a passenger in a Volkswagen Jetta owned by the Defendant, Vincenza Tartaglia. On June 15, 2010, the car was being driven by an unlicenced driver, Ms. Tartaglia's 15-year-old nephew, the Defendant, Francesco D'Angelo. There was a car accident, and Mr. Conners alleges that he suffered significant injuries.

[2] In the action now before the court, Mr. Conners sues Mr. D'Angelo for negligence, and he sues Ms. Tartaglia, and her insurer, Gore Mutual Insurance Company, which has defended the main action. Mr. Conners alleges that Ms. Tartaglia is vicariously liable for the negligence of the driver of the motor vehicle pursuant s. 192 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8.

[3] Ms. Tartaglia brings a motion for a summary judgment to dismiss Mr. Conners' action as against her. Ms. Tartaglia, who was in Paris, France, at the time of the motor vehicle accident, denies vicarious liability under s. 192 of the *Highway Traffic Act*, which states:

> *Liability for loss or damage*
>
> 192. (1) The driver 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.

> *Same*
>
> (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.
>
> *Same*
>
> (3) A lessee 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 lessee's consent in the possession of some person other than the lessee or the lessee's chauffeur.

[4] The question to be decided on this summary judgment motion is whether Ms. Tartaglia's motor vehicle was in the possession of some other person without her consent.

[5] For the reasons that follow, I conclude that the answer to this question is "yes". It follows that Ms. Tartaglia's summary judgment motion should be granted.

B. EVIDENTIARY BACKGROUND

[6] The evidence for this summary judgment motion consisted of:

- the examination for discovery transcript and an affidavit from Ms. Tartaglia, who was cross-examined;
- an affidavit from Lucie Tartaglia, Ms. Tartaglia's sister and Mr. D'Angelo's mother, who was cross-examined;
- the examination for discovery transcript and an affidavit from Mr. Conners, who was cross-examined;
- the examination for discovery transcript of Mr. D'Angelo, which was put into evidence by Mr. Conners; and
- an affidavit from Christopher Parisi, who was cross-examined. Mr. Parisi was another passenger in the vehicle. Mr. Parisi was Mr. D'Angelo's friend and is Mr. Conner's nephew by marriage.

[7] As noted, there was no cross-examination of Mr. D'Angelo in aid of the summary judgment motion, but Mr. Conners filed the transcript of Mr. D'Angelo's examination for discovery in response to Ms. Tartaglia's motion for summary judgment. This, however, is not proper "other evidence" for the purposes of a summary judgment motion against someone other than Mr. D'Angelo. See *Lana International Ltd. v. Menasco Aerospace Ltd*. (2000), 50 O.R. (3d) 97 (Ont. C.A.); *Colautti Construction Ltd. v. Ashcroft Development Inc*., [2003] O.J. No. 1492 (S.C.J.); *Toll v. Marjanovic*, [2001] O.J. No. 1308 (S.C.J.); *Ozerdinc Family Trust v. Gowling Lafleur Henderson LLP*, 2017 ONSC 6; *CIBC v. Deloitte & Touche*, 2015 ONSC 7695, rev'd on other grounds 2016 ONCA 922.

[8] Strictly speaking, Mr. D'Angelo's transcript from his examination for discovery is not proper evidence for or against Ms. Tartaglia or Mr. Conners. However, both Mr. Conners and Ms. Tartaglia relied on or referred to the discovery evidence, and, therefore, I shall admit it for the purposes of her summary judgment motion as evidence that may be used for or against Ms. Tartaglia or Mr. Conners.

C. FACTUAL BACKGROUND

[9] In early June 2010, on the way to the airport for a two-week vacation to Paris, France, Ms. Tartaglia stopped at her sister's house in Woodbridge, Ontario, where she dropped off her pet cat and her Volkswagen Jetta automobile. The Jetta was to be parked in the garage or in the single car driveway while Ms. Tartaglia was on vacation. Ms. Tartaglia gave her sister, Lucie Tartaglia, the car keys so that she could move the car in and out of the garage and driveway. There was no discussion about the use of the car between the sisters; Lucie Tartaglia took the car keys and hung them on a hook in the front closet of her townhouse where spare keys were stored.

[10] Mr. D'Angelo was not at home when the car was dropped off. Ms. Tartaglia had no conversations with her nephew or with her sister about Mr. D'Angelo driving the Jetta.

[11] Lucie Tartaglia parked the Jetta in the garage, but over the course of the next two weeks, she backed it out from the garage from time to time to gain access to her garden tools.

[12] Apart from this small movement of the location of the Jetta, Lucie Tartaglia did not use the car while her sister was away. Lucie Tartaglia drove her own vehicle, a Volvo. The keys to that vehicle were either in her purse or in a bowl at the front of the house.

[13] Mr. D'Angelo, who was 15-years-old and in Grade 9, lived with his mother Lucie Tartaglia. Up until the time of the car accident, they had never had a conversation about his using his mother's Volvo, and they had no conversation about the use of the Jetta that was being parked at their home.

[14] Up until the time of the car accident, Lucie Tartaglia had no knowledge of or reason to think that her son was driving automobiles. The evidence was that Mr. D'Angelo was a bright teenager who was having some difficulties adjusting to high school, but he had no behaviour problems, and colloquially speaking, he was a "good kid."

[15] However, unknown to his mother and his aunt in Paris, France, Mr. D'Angelo retrieved the keys to the Jetta from the closet and began using the automobile to drive to school.

[16] Normally, Mr. D'Angelo went to school by bus, leaving at 7:30 a.m. and returning at 3:15 p.m., while his mother was still at work at the Registrar's Office at York University, but in June 2010, Mr. D'Angelo was writing final exams and he was not following his regular school schedule.

[17] Mr. D'Angelo testified that he never asked permission to drive his mother's Volvo or his aunt's Jetta knowing that they would have refused permission since he did not have a licence and did not know how to drive. The sisters both testified that they would not have given permission to him to drive their vehicles and neither anticipated that he would drive without permission. Mr. D'Angelo stated that he drove the Jetta only once; i.e., on the day of the accident, but that evidence is inconsistent with what he said to Mr. Parisi and inconsistent with the other events and evidence.

[18] Mr. Conners, who lived in the neighbourhood, testified that in 2009, a year before the accident, he had seen Mr. D'Angelo driving the Volvo without any passengers. Mr. Parisi testified that on two occasions, one of which was just an assumption, and both of which occurred in 2009, he had seen Mr. D'Angelo driving the Volvo with his mother as a passenger. This is denied by Lucie Tartaglia. On this point, I believe Mr. Parisi is mistaken, and he has confused seeing Mr. D'Angelo driving with his mother after Mr. D'Angelo had his learner's permit.

[19] To be more precise, I believe that Mr. D'Angelo was driving his mother's Volvo without permission before he had any driver's permit and this was seen by Mr. Conners and Mr. Parisi, but Mr. Parisi is mistaken about the presence of Lucie Tartaglia as a passenger before Mr. D'Angelo had a licence. The significant points here are that by June of 2010, Mr. D'Angelo had some experience driving and would drive without the permission of his mother.

[20] In the afternoon of June 15, 2010, Mr. D'Angelo and Mr. Parisi were together, and Mr. Parisi was told by Mr. D'Angelo that since his aunt's return was imminent, he needed to refuel the Jetta. Mr. Parisi offered to get a gas can and to walk to a gas station to get fuel to refill the car, but Mr. D'Angelo insisted on driving to the gas station. Before embarking, Mr. D'Angelo phoned his mother, who was still at work, and lied to her and told her that he was going out to walk the dog.

[21] Mr. D'Angelo backed the car out of the driveway, and he set out to drive to the gas station with Mr. Parisi as a passenger. Along the way, they saw Mr. Conners. Mr. D'Angelo stopped the vehicle, and he offered to drive Mr. Conners to the pharmacy to which he was walking. He accepted the offer and became another passenger. Mr. Conners did not appreciate that Mr. D'Angelo was an unlicenced driver.

[22] During the trip, Mr. D'Angelo attempted to make a left turn, and the Jetta was struck by an oncoming car. The airbag went off, and Mr. D'Angelo suffered a concussion and a torn tendon in his knee. Mr. Conners suffered serious injuries.

[23] The police arrived, and Mr. D'Angelo spoke to them. Mr. D'Angelo was charged with two *Highway Traffic Act* offences; namely, improper left hand turn and driving without a licence.

[24] From the accident scene, Mr. D'Angelo called his mother who arrived at the scene about 25 minutes later.

[25] The next day, Ms. Tartaglia returned home from Paris. The Jetta was badly damaged, and she submitted a property loss claim to her insurer, Gore Mutual Insurance Company. The adjuster told Ms. Tartaglia that the insurer would not cover the claim unless she charged her nephew with theft, which she did. More precisely, Mr. D'Angelo was charged with "taking motor vehicle or vessel or found therein without consent" contrary to s. 335(1) of the *Criminal Code*, which states:

> *Taking motor vehicle or vessel or found therein without consent*
>
> 335 (1) Subject to subsection (1.1), every one who, without the consent of the owner, takes a motor vehicle or vessel with intent to drive, use, navigate or operate it or cause it to be driven, used, navigated or operated, or is an occupant of a motor vehicle or vessel knowing that it was taken without the consent of the owner, is guilty of an offence punishable on summary conviction.

[26] On June 21, 2010, Mr. D'Angelo and his mother were interviewed by a representative of Gore Mutual Insurance Company, the insurer of the Jetta. They gave a recorded statement.

[27] On July 2, 2010, Mr. D'Angelo was arrested.

[28] Subsequently, Gore Mutual Insurance Company paid Ms. Tartaglia's property loss claim of approximately $20,000, and then it commenced a subrogated claim in Small Claims Court against Mr. D'Angelo.

[29] On November 24, 2010, the charges against Mr. D'Angelo were stayed because he agreed to comply with a Youth Justice Committee Program Agreement. As part of these

arrangements, he admitted that he took his aunt's car without her consent, and he agreed to write an apology, which he did, and which she accepted.

D. DISCUSSION AND ANALYSIS

[30] I begin the discussion and analysis by noting that there is no doubt that the case at bar is an appropriate case to be determined by a summary judgment motion.

[31] In particular, this is an appropriate case to determine summarily whether Ms. Tartaglia is vicariously liable for the negligence, if any, of Mr. D'Angelo, who was the driver of her vehicle that was involved in the motor vehicle accident that injured Mr. Conners. The evidence proffered for the motion was adequate to make the determination of the facts about vicarious liability. The forensic resources of a trial are not required to fairly determine the contested issues. Both the moving party and the responding party pushed hard for a substantive result on the motion. There is no risk of inconsistent findings of fact at the trial on other issues, and it is fair and in the interests of justice that the issue of vicarious liability be decided.

[32] Turning then to the discussion, as noted at the outset of these Reasons for Decision, the question on this summary judgment motion is whether Ms. Tartaglia's motor vehicle was in the possession of some other person without her consent.

[33] This question has been crafted to reflect the requirements of s. 192 of the *Highway Traffic Act* and is different and more complex than the simpler question of whether Mr. D'Angelo was in possession of the Jetta without the consent of his aunt, Ms. Tartaglia, which he obviously was. That simple question, however, is the incorrect question to ask because it does not properly engage the vicarious liability provisions of s. 192 of the *Highway Traffic Act*. Those provisions operate in a special way that is designed to cast a wide net of vicarious liability on the owners of motor vehicles, and the analysis of s. 192 of the *Act* is more complicated than the simple question of whether Mr. D'Angelo's possession was with or without his aunt's consent.

[34] As the review of the case law below reveals, s. 192 of the *Highway Traffic Act* has been interpreted to be a long arm statute making owners vicariously liable for the negligence of the driver of the vehicle. The case law demonstrates a very expansive view of what counts for an owner of a vehicle entrusting possession of the vehicle to some other person, and this expansive view of the statute is also augmented by the common law's elastic notion of what counts for possession with consent, which, as the case law notes, can be conferred both expressly and also impliedly. However, as I shall explain below, Ms. Tartaglia's circumstances do not fall within the expansive vicarious liability reach of the *Act*.

[35] The seminal case about the vicarious liability provisions of the *Highway Traffic Act* is the old case of *Thompson v. Bourchier*, [1933] O.R. 525 (C.A.). In this case, the defendant Bourchier, rented an automobile to Lupson. The rental contract stipulated that the vehicle was not to be operated by anyone other than Lupson. However, Lupson took a man named Brown for a ride, and after a stop to make a purchase, Lupson returned to the car to find Brown behind the steering wheel. Brown insisted that he be allowed to drive. Lupson initially resisted the request, but he gave in, and several hours later, while Brown was driving, there was an accident, and Thompson was injured.

[36] The issue to be determined in *Thompson v. Bourchier* was whether Bourchier, the owner of the vehicle, was vicariously liable for the driver Brown's negligence, which would be the

case, unless the vehicle was in the possession of someone without Bourchier's consent. Justice Fisher reasoned that Bourchier had consented to Lupson's possession of the vehicle and that possession, not operation, was the key to the interpretation of the vicarious liability provisions of the *Highway Traffic Act*. To explain why Bourchier was vicariously liable, Justice Fisher stated at paras. 12-15:

> 12. … but in the present case, Lupson remained in possession while it was being driven by Brown and, therefore, as it seems to me the owner is liable, because the motor vehicle was never out of the actual possession of Lupson, ….
>
> 13. I think a clear distinction can be made between the operation and the possession of an automobile. A car may be operated by a chauffeur whilst driving his master and owner to his office, and I do not think anyone would contend that in such a case the owner was not in possession and the chauffeur not in charge of the operation. ….
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> 14. It would, in my opinion, be placing a too narrow construction on the word "possession," as used in sec. 41(a), to hold that Lupson was not in possession of the motor vehicle when Brown was driving. Brown was, in fact, never in possession as owner but in the occupancy as Lupson's guest to operate, subject to Lupson's possession, which of course was the owner's possession.
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> 15. My conclusion is that Lupson, in all the circumstances of this case, was in possession of the motor vehicle, with the defendant's consent, at the time of the accident and that the defendants are liable.

[37] At para. 5 of his judgment in *Thompson v. Bourchier, supra,* Justice Fisher explained the legislative policy of what is now s. 192 but was then sections 41 and 41(a) of the *Act*. He stated:

> 5. I think it must be conceded that the object of the Legislature in enacting secs. 41 and 41(a) of the *Highway Traffic Act* was to protect the public by imposing upon the owner of a motor vehicle the responsibility of the careful management thereof and of assuming the risk of those to whom he entrusted possession that they would observe the law, and that if they failed in the discharge of that duty the owner -- using the words of the statute -- would be responsible "for all loss and damage sustained in the operation thereof."

[38] Before moving in the discussion, it shall be important to note and keep in mind that in *Thompson v. Bourchier*, the driver of the vehicle, Brown, had a physical relationship with the vehicle owned by Bourchier but not relationship with Bourchier; Brown was driving the vehicle without Bourchier's permission. Justice Fisher described this relationship with the vehicle as Brown being the occupant of Lupson, the person to whom Bourchier had entrusted possession. Justice Fisher concluded that Bourchier had entrusted possession to Lupson and that Brown's occupation of the vehicle was a continuation of Lupson's possession. Since Bourchier had entrusted possession to Lupson, Bourchier was vicariously liable for the driver's negligence.

[39] *Thompson v. Bourchier*, *supra*, was followed in *Finlayson v. GMAC Leaseco Ltd.*, 2007 ONCA 557, which along with *Fernandes v. Araujo*, 2015 ONCA 571, affg. 2014 ONSC 6432, are regarded as the modern governing authorities about the operation of s. 192 of the *Highway Traffic Act*.

[40] In *Finlayson v. GMAC Leaseco Ltd.*, the Court of Appeal held that vicarious liability under s. 192(1) of the *Highway Traffic Act* is based on possession, not operation, of the vehicle. The owner does not escape vicarious liability simply because the person with possession breaches some condition of having possession. At para. 16 of her judgment for the Court, Justice Gillese stated that if an owner gives a person (in that case, a lessee) possession of a vehicle that may be driven on a highway, even if the person is expressly prohibited from operating the vehicle, the owner remains vicariously liable for any damages that are suffered as a result of the

negligent operation of the vehicle.

[41] The facts of *Finlayson v. GMAC Leaseco Ltd.* were that GMAC, the owner of a vehicle, leased it to John Simon. The lease expressly prohibited Mr. Simon from operating the vehicle, but he disobeyed and the vehicle was involved in a collision. The Court held that GMAC was vicariously liable for Mr. Simon's negligence. Justice Gillese stated at para. 28 of her judgment for the Court:

> 28. GMAC entered into the Lease with Mr. Simon. It was the Lease that gave Mr. Simon possession of the vehicle. Therefore, GMAC consented to his possession of the vehicle. It is true that GMAC did not consent to Mr. Simon's operation of the truck and that by the terms of the Lease, Mr. Simon was expressly prohibited from operating the truck. However, as already discussed, possession and operation are not the same thing, in law. GMAC consented to Mr. Simon's possession of the vehicle; it did not consent to his operation of it. Breach of conditions placed by the owner on another person's possession of the vehicle, including those relating to who may operate the vehicle, do not alter the fact of the second person's possession.

[42] *Finlayson v. GMAC Leaseco Ltd., supra*, was applied by the Court of Appeal in *Henwood v. Coburn*, 2007 ONCA 882, where the Court again held 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, if the vehicle is in the possession of a person with the owner's consent. For vicarious liability, the determinative question is whether there was consent to possession that can be attributed to the owner.

[43] The facts of *Henwood v. Coburn* were that Ontario Car and Truck Rental leased a truck to Fitzgerald to be used by his employee Henwood for deliveries. Fitzgerald asked Henwood to train Coburn, who did not have a driver's licence or insurance, by taking him along on a sales trip. After their delivery work was completed, Henwood and Coburn went to a tavern, and when the inebriated Henwood refused to drive the inebriated Coburn to Barrie, Coburn punched Henwood in the face and took the keys to the truck. They both then got into the truck, and despite Henwood's protest, Coburn set off to Barrie. About twenty minutes into the drive, Coburn crashed the truck. Henwood was injured in the accident, and he sued Ontario Car and Truck Rental (the vehicle's owner), Coburn (the driver), and Pembridge Insurance Company, under uninsured motorist coverage.

[44] Reversing the motions judge, Justice Rosenberg of the Court of Appeal dismissed Ontario Car and Truck Rental's motion for summary judgment because there was a genuine issue for trial about whether notwithstanding that Henwood was a passenger, he had possession of the vehicle, in which case the owner, Ontario Car and Truck Rental, would be vicariously liable, or whether Henwood had lost legal possession and, therefore, Coburn was driving the vehicle without the consent of the owner. Justice Rosenberg described the long reach of the vicarious liability provisions of the *Highway Traffic Act* in paras. 12 to 15 and 25 of his judgment, where he stated:

> 12. The appellant submits that the evidence demonstrates without question that Coburn was not in possession with the owner's consent and this fact determines the s. 192(2) issue in its favour, entitling it to summary judgment. In my view, this argument cannot succeed. It is inconsistent with the reasons of the majority in *Thompson v. Bourchier*, [1933] O.R. 525 (C.A.), which have repeatedly been followed by this court, the Divisional Court and trial courts for over eighty years. I can see no basis for not following or applying that decision in this case.
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> 13. It was held in *Thompson* that an owner will be liable under s. 192(2) where the person to whom the owner entrusted possession of the vehicle is in possession of the vehicle at the time of

the collision, even if that person was not actually driving at the time.

14. Cases applying *Thompson* have made 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, albeit as a passenger. Some of these cases include:

- *Lajeunesse v. Janssens* (1983), 44 O.R. (2d) 94 (H.C.J.): The owner allowed her son to use the car on condition that only he drove it. The son allowed his friend to drive while he remained as a passenger. Since the son remained in possession with the consent of the owner, the owner was liable.
- *Berge v. Langlois* (1982), 138 D.L.R. (3d) 119 (Ont. H.C.J.), aff'd (1984) 6 D.L.R. (4th) 766 (Ont. C.A.): The owner lent the car to a friend who in turn allowed another person to drive. The friend was a passenger at the time of the collision. Since the friend was in possession with the consent of the owner at the time, the owner was liable.
- *Gunn v. Birch* (1986), 47 M.V.R. 212 (Ont. Dist. Ct.), aff'd [1987] O.J. No. 645 (Div. Ct.): The owner loaned his car to a friend on condition that only licensed drivers operate the car (the friend was not licensed). At the time of the collision the friend and another unlicensed driver were driving. Since the friend was in possession at the time, the owner was liable.
- *McKay v. McEwen* (1999), 43 O.R. (3d) 306 (Gen. Div.): The owner loaned his car to his son on condition that he let no one else drive. At the time of the accident, a friend of the son was driving the car, but the son was a passenger. Since the son remained in possession at the time, the owner was liable.

15. Another example is the recent decision of this court, *Finlayson v. GMAC Leaseco Ltd.*, [2007] O.J. No. 3020 (C.A.). In that case, the owner leased the vehicle to Simon and Jefferies on condition that Simon not operate it because he was not licensed. Simon was driving at the time of the accident. However, since the owner had consented to Simon's possession, it was liable even though it did not consent to his driving. This court reiterated the point that the issue under s. 192 is possession, not operation. Provided that the vehicle is in the possession of a person with the owner's consent, the owner is liable regardless of whether the person actually operating the vehicle has the owner's consent, and even if that person is operating the vehicle contrary to the owner's express wishes.

...

25. It is a question of fact whether Henwood had regained possession of the vehicle at the time of the accident. As this court has said in a number of decisions, most recently in *Thorne v. Prets* (2003), 45 M.V.R. (4th) 69 (Ont. C.A.) at para. 18, "the question of whether a motor vehicle was in the possession of some other person without the owner's consent is a question of fact to be decided by the evidence in each particular case". I note that in *Finlayson* at para. 23, this court stated that, "Possession is a question of law whereas operation of a vehicle is a question of fact." I think it more correct to say that the meaning of possession is a question of law; the application of that definition to any particular set of facts is not a question of law alone. There is no suggestion in *Finlayson* that the court intended to depart from the line of authority referred to in *Thorne* holding that whether a person is in possession of a vehicle depends on the particular facts.

[45] To add to the cases mentioned by Justice Rosenberg, see also: *Donald v. Huntley Service Centre Limited* (1987), 61 O.R. (2d) 257 (H.C.J.); *Sked v. Henry*, [1991] O.J. No. 339 (Gen. Div.); *Seegmiller v. Langer*, [2008] O.J. No. 4060 (S.C.J.); *Gerl v. Barton*, 2010 ONSC 6022; *Case v. Coseco Insurance Company*, 2011 ONSC 2499; *Baird v. Abouibrahim*, 2012 ONSC 859; *Cimino v. Dauber*, 2013 ONSC 1609; and *Watts v. Boyce*, 2013 ONSC 6848.

[46] Of particular interest are: (a) *Donald v. Huntley Service Centre Limited*, *supra*, where the owner of the vehicle was vicariously liable for his son's negligent driving, because, although the son's driver's licence was suspended and he had been forbidden to drive the vehicle, he had been

given possession of it; (b) *Sked v. Henry*, *supra*, where an unlicenced 15-year-old had been given possession of the keys to his father's car so that a licenced driver could drive it to the auto shop at the his school; the father, the owner of the vehicle, was held to be vicariously liable when the son started up the car in the school's parking lot; and (c) *Seegmiller v. Langer*, *supra*, where the owner of the vehicle was held vicariously liable because she had given control over the keys to the vehicle to her unlicenced daughter, who drove the vehicle notwithstanding instructions that she should not do so until she had obtained her licence.

[47] Pausing here, although the matter of the owner's vicarious liability was not decided in *Henwood v. Coburn*, it is worth noting that the factual pattern of *Henwood v. Coburn*, and of many of the cases referred to by Justice Rosenberg, is similar to the problematic of *Thompson v. Bourchier*, *supra*, and to the problematic of the case at bar. The problematic is that the owner of the vehicle entrusts possession to another person but that other person is not the driver of the vehicle that caused the accident. Thus, in the immediate case, Ms. Tartaglia entrusted her sister, Lucie Tartaglia, with possession of the Jetta, but it was not Lucie, but rather her son, Mr. D'Angelo, that was the driver of the vehicle that was involved in the accident.

[48] Moving on in the discussion of the case law, the analysis of the problematic of the *Thompson v. Bourchier* line of cases so far has assumed, but not discussed, the factor of the owner of the vehicle entrusting possession to someone other than the person who ultimately drives the vehicle involved in the accident. This factor of entrusting possession adds to the complexity of the operation of s. 192 of the *Highway Traffic Act*. The case law reveals that entrusting possession can be done expressly or impliedly.

[49] Little needs to be said about express conferral of possession. The test for determining implied conferral of possession derives from the Supreme Court of Canada's decision in *Palsky (Next friend of) v. Humphrey*, [1964] S.C.R. 580 as that case has been explained by the Court of Appeal in *Fernandes v. Araujo*, 2015 ONCA 571. In the *Palsky* decision, at p. 583, the Supreme Court stated that in determining whether there was implied consent, the question for the Court was whether all the circumstances were such that they showed that the person who was driving had the implied consent of the owner to possess the vehicle and that they showed that the driver was justified in thinking he or she had such consent. As explained by Justice Sharpe in *Fernandes v. Araujo*, *supra*, the subjective thoughts of the driver are relevant but not determinative of whether he or she had the implied consent of the owner to possession. 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 what the owner of the vehicle thought, said, and did or omitted to do.

[50] On the matter of entrusting possession and express and implied consent, see also: *Watts v. Bowman*, 2016 ONSC 3994; *Nemeth v. Yasin*, 2015 ONSC 558; *Myers-Gordon (Litigation guardian of) v. Martin*, 2014 ONCA 767, affg. 2013 ONSC 5441. To determine whether consent to possession can be implied, the court will look at all of the relevant circumstances including the relationship between the parties and their course of conduct: *Pinto v. Kaur*, 2014 ONSC 5329; *Seegmiller v. Langer*, [2008] O.J. No. 4060; *Fyfe v. Bassett*, 2012 ONSC 5125; *Edmond v. Reed*, [1993] O.J. No. 1349 (S.C.J.).

[51] In *Myers-Gordon (Litigation guardian of) v. Martin*, *supra*, at paras. 15-25, Justice Kent provides a very useful summary of some of the case law about the indicia of implied consent, as follows:

Indicia of Implied Consent:

15. Implied consent, or lack of implied consent, is not to be determined solely at the specific time of the accident. See: *Mugford v. Weber*, [2004] A.J. 508 (C.A.). A negative answer to the hypothetical question of whether consent had been given, if made after the accident, may not relieve the owner of liability. See: *Mugford* at para. 44.

16. It is therefore necessary to examine what other courts have found to be indicia of implied consent.

17. See: *Cameron v. Halverson*, [2004] A.J. No. 1786 (Q.B.) in which a daughter was found to have given her implied consent to her unlicensed father to drive her vehicle by leaving it in her parents' driveway when she went away. She knew her father had driven her vehicle in the past and she had only given him a gentle admonishment. By giving him access to the vehicle and the keys, she had given her implied consent to its use.

18. See also: *Korencik v. Hartwell*, 2007 ABQB 459, where parents had left a vehicle with their son to conduct repairs. Instead, he drove to a party and was involved in an accident. The Court determined that a son was given possession and had access to the keys and the son did not believe that he required express permission to operate the vehicle that evening. The evidence did not support that the parents required specific consent to operate the vehicle.

19. In *Traders General Insurance v. McCubbin*, [2009] O.J. No. 4478, Justice Belobaba determined that the son did not have explicit consent to drive the vehicle but he did have implied consent. The evidence demonstrated that the respondent allowed the son to drive the truck on private roads and when he learned the son had been occasionally driving on public roads, simply told the son to be careful. On the day of the accident, the son had another licensed driver with him, but not one with four years' experience, as required by conditions of the son's licence.

20. In the 2008 decision of *Seegmiller v. Langer et al.*, [2008] O.J. No. 4060, the court found that there was consent to possession despite the condition of non-operation. A registered owner's daughter and the daughter's boyfriend were not licensed and were prohibited from driving the vehicle in question until they had their licences. The vehicle was parked in the driveway of the mother's home where she lived with her daughter and the daughter's boyfriend. The keys were left on a hook inside of the door of the house. The keys were not specifically given by the mother to the daughter or her boyfriend and, while the mother was away from the home, the daughter and her boyfriend took the vehicle, drove it on the highway and were involved in an accident. Justice Strathy found that the mother was liable as the owner of the vehicle as she had consented to her daughter and boyfriend having possession and control of the vehicle even though they had been prohibited from operating it. ….

21. Where an owner of a vehicle consents to a situation where she has no control over the physical use or possession of a vehicle, by not requesting that keys be returned or expressly revoking prior consents, then the courts will follow the overriding goal of public protection and find implied consent. See: *Ezzedine v. Dalgard*, [2006] A.J. No. 1431 at para. 88.

22. The Supreme Court of Canada decision of *Deakins v. Aarsen*, 1970 CarswellOnt 209, involved the negligent operation of a motor vehicle by the vehicle owner's son's girlfriend. The court explained that the intimacy of the son and the girlfriend's relationship, the son's carefree attitude in leaving the keys in the ashtray of the unlocked vehicle, taken together with the fact that on a previous occasion he had instructed his girlfriend on how to drive the vehicle and that she had driven it on her own at least one other time, "clearly justified" the learned trial judge's finding that there was implied consent.

23. In *Abstainers' Insurance Co. v. Vavaroutsos*, 1993 CarswellOnt 2909, a girl was involved in an accident after driving an uninsured family vehicle. It was customary for the girl to ask permission if she wanted to drive the other family vehicles, but she was specifically told not to drive the uninsured vehicle. The daughter had driven the uninsured vehicle to and from work on approximately 5 other occasions, which was claimed to be unbeknownst to the owner. On the day of the accident, she took a set of keys that were left unsecured in a bowl near the front door of the

home. The court determined there to be a finding of implied consent.

24. Furthermore, in *Korody v. Bell*, [2009] O.J. No. 1716 (S.C.), the owner's testimony was held to contain numerous shortcomings and inconsistencies, especially with respect to the driver's previous use of the vehicle at issue. On the totality of the evidence therefore, it was ultimately held that the driver assumed that he had the implied consent of the owner and was objectively justified in making that assumption. The issue of implied consent was decided after a trial.

25. Lastly, the case of *Emond v. Reid*, [1993] O.J. No. 1349 (G.D.) was a case where, at trial, one of the issues was whether the driver of the vehicle at issue was driving with the owner's consent. Implied consent was found after the owner admitted that she was fully aware that the driver almost regularly took her car without her express permission by simply taking the keys from her purse. Nonetheless, the owner did not change her habits, change the location of the keys or confront the driver as to his "non-authorized" possession of the vehicle.

[52] Another very useful summary of the case law about express and implied consent to possession is provided by Justice Mulligan in *Fyfe v. Bassett*, *supra*, at paras. 13-25, as follows:

13. The Supreme Court of Canada addressed this issue in *Palsky v. Humphrey*, [1964] S.C.R. 580. The test was summarized in *Crangle v. Kelset* (2003), 41 M.V.R. (4th), 232 (O.S.C.J.) at para. 19:

> The leading decision on the subject is still that of the Supreme Court of Canada in *Palsky v. Humphrey*, [1964] S.C.R. 580, (S.C.C.), upholding the trial judge's judgment that the proper approach was a subjective one from the point of view of the driver, namely, whether the driver, under all the circumstances, would be justified in deeming that he had implied consent to drive. The words "under all the circumstances" import a definite subjective component to the analysis.

14. It is clear in reviewing the cases submitted by counsel that the issue of whether or not there is implied consent is very much a fact-driven based exercise. In *Burwash v. Guerin*, [1994] O.J. 2525, Cusson J. found implied consent. In that case, the driver had driven the vehicle on other occasions, had access to the keys, and had never been refused the right to drive.

15. In *Aarsen v. Deakins*, [1971] S.C.R. 609, the Supreme Court of Canada agreed with the trial judge's finding that there was implied consent in circumstances which indicated that the owner's son was an irresponsible young man, his mother, the owner, could exercise no control over him. He allowed his girlfriend to drive the vehicle, and she had done so on previous occasions.

16. In *Ahmetspacic v. Love*, [2002] O.J. No. 5093, Cavarzan J. determined on a motion that the issue of consent ought to be determined by the trial judge. As Cavarzan J. noted at para. 19:

> Consent or no consent is an issue which is fact-driven. Whether or not consent was given expressly or by implication, involves a finding of fact based on the circumstances of each case.

17. In reviewing this matter prior to the amendments to Rule 20, the court noted, "It is not my role to weigh the evidence and to make findings of fact. That is the function of the trial judge."

18. In *Haynes v. Harnden*, [2002] O.J. No. 1630, Marchand J. found implied consent based on a number of factual findings including that the owner had allowed the driver to drive the car through a carwash and that she allowed him to test drive it on another occasion.

19. In *Korody v. Bell*, [2009] O.J. No. 1716, Quinn J. reviewed the law with respect to implied consent and on the facts before him, found that there was implied consent. In noting that the driver had used the vehicle previously, Quinn J. stated at para. 197:

> Bell was operating the 1990 Chevrolet Astro van with Hunt's implied consent. Had Bell sought Hunt's express consent that night, it would have been granted. Bell's use of the van was consistent with his usage in the previous three months.

20. In *Emond v. Reid*, [1993] O.J. No. 1349, Beaulieu J. found implied consent on the facts of that case. He found that the owner admitted that she was fully aware that the driver almost regularly

took the car without her express permission by simply taking the keys from her purse. As he stated at para. 76, "Even if the alleged refusal to consent had been established as express, her course of conduct revealed otherwise."

21. In *McIntyre v. Gilmar*, [2011] O.J. No. 884, Frank J. refused to grant summary judgment dismissing a claim against the driver. With respect to the onus, the court noted at para. 6, "The onus is on [the owner] as owner of the car, to show that [the driver] did not have her consent to be in possession of her car." The court noted that the driver had a G1 license and that the driver was entitled to drive the car when the owner was in the vehicle, in accordance with the licensing regime. The court noted that the owner did not explain to the police officer that the driver was driving without her consent. The court refused to grant summary judgment dismissing the action against the driver and noted, on the circumstances before her, at para. 24:

> Ms. Watson relied on a number of cases, none of which assist her, in my view. Although summary judgment on the issue of consent was granted in *Oliviera v. Mullings*, it was in very different circumstances. In that case, all of the evidence, including that of the driver, was that he did not have the owner's consent to drive.

22. Bassett Sr. relies on the following cases indicating circumstances where courts have found a lack of implied consent when considering the matter.

23. In *Crangle v. Kelsey*, [2003] O.J. No. 2186, Dilks J. found on the facts before him that the owner would never have permitted the driver to operate the vehicle. As Dilks J. said at para. 20:

> But it is quite unnecessary to rely on a consideration of [the owner's] viewpoint, because [the driver] himself was of the view that she would probably not have allowed him to drive the Jeep had he asked. That is enough to resolve the issue. There was no implied consent to [the driver's] operation.

24. In *Gerl v. Barton*, [2010] O.J. No. 5237, Corrick J. dealt with a facts situation involving a father and his son who did have a G1 driver's license. The court noted that the son took a set of car keys from the kitchen counter. The court noted, "[The son] testified that he knew he would be in trouble with his father if he took the car without permission." The court noted that the father had told the police the car was taken without his consent. The son was not charged with theft or any other offence in that case. As the court noted at para. 29:

> [The father] had no reason to suspect that [the son] would take one of the cars without his permission. He had two sons older than David, who were both licensed to drive. The rules of the house required the children to ask permission before driving the cars. David knew that rule. [The father] testified that before March 29, 2003, he had no concerns about trusting [his son]. [His son] had never been in trouble with the law.

25. In *Oliviera v. Mullings*, [2007] O.J. No. 2119, Lederer J. proceeded on a motion for summary judgment under former Rule 20. On the facts before him, the motions judge determined that the son took his mother's vehicle without her consent, either express or implied. The court noted that the son had stated unequivocally that he did not have his mother's permission when he drove the car on the day of the accident. He took the keys from her bedroom drawer without asking, knowing that if he asked, he would not receive permission. On the facts of that case there was some evidence that the son had disobeyed his mother on earlier occasions, but the court noted that there was no evidence he had taken the car on an earlier occasion and the court stated at para. 21:

> This does not advance the proposition that inferred consent was present. In this case, a genuine issue for trial is not demonstrated by the past conduct of Phillip Mullings, which bears no relationship to the issues at hand.

[53] Returning to the discussion of the *Thompson v. Bourchier* line of cases, here it may be noted that its governing authority was disturbed by the Court of Appeal's decision in 1953 in *Newman and Newman v. Terdik*, [1953] O.R. 1 (C.A.), where the Court had a different interpretation of the operation of s. 192 of the *Highway Traffic Act* than espoused by it previously in *Thompson v. Bourchier*. However, *Newman v. Terdik* was overturned by a five-

member panel of the Court in *Fernandes v. Araujo*, which restored the primacy of the *Thompson v. Bourchier* line of cases, including *Finlayson v. GMAC Leaseco Ltd.*, *supra* and *Henwood v. Coburn, supra*.

[54] *Fernandes v. Araujo, supra*, presented a different factual problematic than the case at bar because the circumstances involved direct communications and contact between the driver of the vehicle and the owner of it. While the case confirms the *Thompson v. Bourchier* line of cases, the focus in that case was on whether or not Carlos Almeida, the owner of an all-terrain vehicle (an ATV), had consented to its possession by Eliana Araujo, who was driving the ATV on the highway with the plaintiff, Sara Fernandes, as her passenger. There was an accident, and Ms. Fernandes was seriously injured, and she alleged that Mr. Almeida was vicariously liable. His insurer, however, brought a summary judgment motion to have the action dismissed on the ground that Ms. Araujo was not driving the ATV with his consent. Ultimately, there was a finding of fact that Mr. Almeida consented to Ms. Araujo's possession of the ATV.

[55] Apart from noting its jurisprudential importance in sustaining the predominance of the *Thompson v. Bourchier* line of cases, and in bringing some clarity to the matter of implied consent to possession, for present purposes, I need say no more about *Fernandes v. Araujo, supra*.

[56] With this background and subject to mentioning several evidentiary points, I am now able to apply the above case law to the circumstances of the immediate case. The evidentiary points to mention are that the question of whether a motor vehicle is in the possession of some person without the consent of the owner of the vehicle is a question of fact to be determined by the evidence in a particular case: *Barham v. Marsden*, [1960] O.J. No. 60 (C.A.); *Thorne v. Prets*, [2003] O.J. No. 5241 (C.A.); *Henwood v. Coburn, supra*, at para. 25. The onus of proving that a vehicle on a highway was in another's possession without the consent of the vehicle's owner is on the owner: *Watts v. Dunham*, 2013 ONSC 6848.

[57] Applying the above case law to the case at bar, it is helpful to begin by comparing and contrasting the case at bar with *Thompson v. Bourchier* and by considering the problematic of the owner of a vehicle entrusting possession to another person but that other person not being the driver of the vehicle involved in the accident. Thus, in the immediate case, Ms. Tartaglia entrusted her sister, Lucie Tartaglia, with possession of the Jetta but it was not Lucie, but her son, Mr. D'Angelo, that was the driver of the vehicle that was involved in the accident.

[58] In comparing and contrasting the case at bar with *Thompson v. Bourchier, supra*, it may be noted that had Lucie Tartaglia also been a passenger in the Jetta, which she was not, then as was the case in *Thompson v. Bourchier*, and in the cases cited by Justice Rosenberg in *Henwood v. Coburn, supra*, she would be in possession with the consent of the owner, and her sister, Ms. Tartaglia, would be vicariously liable.

[59] These cases reveal that when the driver that caused the accident is not the person to whom the owner entrusted possession, the issue to be determined is whether the driver was driving within, so to speak, the possession of the person to whom the owner had entrusted possession. Put differently, the issue becomes whether the person entrusted with possession continues to have possession, which would be the case if he or she was actually in possession or if he or she expressly or impliedly consented to the driver having possession. For vicarious liability, the determinative question is whether there was a consent to possession that can be attributed to the owner.

[60] In the immediate case, Ms. Tartaglia undoubtedly consented to the possession of the Jetta by her sister, Lucie Tartaglia, and it is undoubtedly the situation that Ms. Tartaglia did not expressly or impliedly consent to the possession of the Jetta by her nephew, Mr. D'Angelo. Mr. D'Angelo had no reason to think and in fact did not ever think that he had been given express or implied possession of the Jetta by his aunt or by his mother. He knew that no purpose would even be served by asking for possession because it obviously would not have been granted.

[61] In theory, as revealed by the case law associated with *Thompson v. Bourchier*, Mr. D'Angelo's mother, Lucie Tartaglia, who did have possession of the vehicle, as a sort of surrogate for the owner's possession, could have expressly or impliedly granted possession of the Jetta to her son, by for instance being in the car with him or by actually or impliedly giving possession of the Jetta to her son. There are, however, no facts, apart from the fact that Lucie Tartaglia did not hide the keys to the Jetta (when she had no cause to think that she ought to do so), that support an implied consent to possession of the Jetta. A review of all the circumstances of what Mr. D'Angelo and his mother knew, thought, anticipated, did, or omitted to do, does not support an inference of implied consent for Mr. D'Angelo to possess the Jetta.

[62] In the immediate case, the factual findings are that: (a) Ms. Tartaglia did not expressly consent to her nephew having possession of the Jetta; (b) Lucie Tartaglia, with whom possession of the Jetta was entrusted, did not expressly consent to her son having possession of the Jetta (or any vehicle for that matter); (c) Ms. Tartaglia did not impliedly consent to her nephew having possession of the Jetta; and (d) Lucie Tartaglia, with whom possession of the Jetta was entrusted, did not impliedly consent to her son having possession of the Jetta (or any vehicle for that matter).

[63] The facts of this case are that Ms. Tartaglia entrusted possession of the Jetta to sister, Lucie Tartaglia, and that Lucie's possession, which in law is Ms. Tartaglia's possession, was interrupted or she was dispossessed, by her son taking possession of the vehicle without consent. The result, using the language of s. 192 of the *Highway Traffic Act*, being that the motor vehicle (the Jetta) was in the possession of some person (Mr. D'Angelo) other than the owner (Ms. Tartaglia) without the owner's consent. It follows that Ms. Tartaglia's summary judgment motion should be granted.

[64] Before concluding, I wish to comment that the result of this case would be the same regardless of whether or not criminal proceedings were commenced against Mr. D'Angelo, and it was unnecessary, unseemly, and unfortunate that the insurer pressured Ms. Tartaglia to lay criminal charges against her nephew.

[65] In the immediate case, the circumstances that Mr. D'Angelo was charged with taking a motor vehicle without consent and that he admitted his wrongdoing establishes only that, for the purposes of the *Criminal Code*, he took a motor vehicle without consent, which just begs the question of whether he had possession of the motor vehicle without the consent of the owner for the purposes of the *Highway Traffic Act*, which, as the above discussion reveals, has its own special interpretation.

[66] In some cases, but not the immediate one, the driver's conviction for theft or taking a vehicle without consent under the *Criminal Code* would negate the owner's vicarious liability under the *Highway Traffic Act*. In the immediate case, in my opinion, vicarious liability was negated regardless of the outcome of the criminal proceedings.

E. CONCLUSION

[67] The summary judgment motion should be granted. Order accordingly.

[68] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the submissions of Ms. Tartaglia within 20 days of the release of these Reasons for Decision followed by Mr. Conners' submissions within a further 20 days.

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Perell, J.

Released: February 17, 2017

CITATION: Conners v. D'Angelo, 2017 ONSC 1104
COURT FILE NO.: CV-11-438419
DATE: 2017-02-17

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

WILLIAM CONNERS

Plaintiff

– and –

FRANCESCO D'ANGELO, VINCENZA TARTAGLIA a.k.a. ENZA TARTAGLIA and GORE MUTUAL INSURANCE COMPANY

Defendants

REASONS FOR DECISION

PERELL J.

Released: February 17, 2017