**Implied Consent to Possess Vehicle**

The law of implied consent to possess a motor vehicles deals with situations where a driver, who is not named on the vehicles insurance policy, drives a vehicle and negligently causes injury to another party. Each instance is highly fact specific and it is very difficult to predict how a court will respond to any given fact scenario.

Much of the confusion stems from the fact that two are two types of equities at play here; on the one hand insurers should not be forced to pay out claims where someone has taken a vehicle without permission and caused an accident, while on the other hand the law does not want to punish an innocent victims by allowing insurers to escape their duty to indemnify. Each of these equities seems to be evenly balanced and a rough estimate of the case law suggests that each side wins about 50% of the time.

In Ontario, the automatic vicarious liability of an owner for giving consent, whether express or implied, to drive a vehicle arises from section 192(2) of the *Highway Traffic Act*[***[1]***](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn1).  Section 192(2) states that the owner is liable for negligence resulting from the operation of their vehicle if they consented to the driver *possessing*the vehicle.  The provision reads as follows:

192(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.[[2]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn2)

The only question of law is whether the owner *impliedly consented*to the driver *possessing*the vehicle.  According to the Supreme Court, explicit consent is not necessary[[3]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn3). Nor is consent to *drive*required.  In fact, an explicit prohibition against driving is not sufficient to avoid vicarious liability for the owner, so long as there is implied consent to possess[[4]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn4).

In *Finlayson v. GMAC Leaseco Ltd.*[***[5]***](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn5), the Ontario Court of Appeal confirmed that an owner is vicariously liable in situations where they grant possession to the operator, even if the owner explicitly tells the operator not to drive the vehicle.

16.     … pursuant to s. 192(1), if an owner gives a lessee possession of a vehicle that may be driven on a highway, even if the lessee 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.

The rationale in *Finlayson* has been confirmed by a five-member panel of the Court of Appeal in *Fernandes v. Araujo*[***[6]***](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn6):

4.    … as the vicarious liability of an owner rests on possession rather than operation of the vehicle, the owner will be vicariously liable if the owner consented to possession, even if the driver operated the vehicle in a way prohibited by the owner.

The Court of Appeal has confirmed that the purpose of section 192(2), is to provide protection for the public by forcing owners to be careful about who they give possession of their vehicle to[[7]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn7).  This is an ameliorative purpose that should be given a large and liberal interpretation[[8]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn8).

In *Henwood v. Coburn*[***[9]***](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn9), the Court of Appeal was faced with a situation where an unlicensed driver got drunk, punched the person in possession of the vehicle in the face, took the keys by force, and then drove away with the car.  The person with possession of the vehicle jumped in the front seat and pleaded with the unlicensed drunk driver to stop the vehicle.  The driver then got into an accident.  The owner’s insurer brought a motion and argued that the unlicensed drunk driver was operating the vehicle without the owner’s consent.  The Court of Appeal rejected the insurer’s argument and indicated that if the passenger had possession of the vehicle then the owner was vicariously liable for the actions of the unlicensed drunk driver.  While the Court of Appeal decided that whether the passenger had possession of the vehicle was a genuine issue for trial, the court stated clearly that the owner would be liable for the negligent, drunk driving of the unlicensed driver who took the vehicle by force, if the passenger were found to have remained in possession of the vehicle.

While the preceding passage is written to suggest a broad interpretation of vicarious liability arising from implied consent to possess, there are numerous decisions wherein the Court’s have applied a much more restrictive interpretation, seemingly requiring more active consent than implied. In *Michaud-Shields v. Gough*[***[10]***](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn10),the Court emphasized the importance of being true to the ordinary meaning of “consent” when interpreting section 192(2) of the *Highway Traffic Act*.  On that basis, the Court rejected the position that liability should be imposed on an owner unless they take active steps to prevent unauthorized use of the vehicle, an interpretation which the Court said would essentially require owners to “hide their keys in order to avoid liability” and which does not accord with the plain meaning of the word:

**27**Consent connotes permission, or acquiescence. In my view, in the context of s. 192(2) of the *Highway Traffic Act,*consent means permission or authorization to “possess” the vehicle. It is a positive conferral of the right to possess the vehicle understanding that the vehicle may be driven.

In *Myers-Gordon (Litigation Guardian of) v. Martin*[***[11]***](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn11), the Ontario Court of Appeal comprehensively outlined the scope of the law concerning implied consent. The Court of Appeal approved of the previous lower court decision in *Seegmiller v. Langer*[***[12]***](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn12), which had distilled the area of law down into an 8 item checklist as follows:

**[20]** In the 2008 decision of *Seegmiller v. Langer*, [2008] O.J. No. 4060, 77 M.V.R. (5th) 46 (S.C.J.), 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. Justice Strathy reviewed the case law and distilled from it the following eight principles:

1. The question of whether a motor vehicle is in the possession of some person without the consent of the owner is a question of fact to be determined by the evidence in a particular case.
2. The meaning of possession is a question of law but the application of that definition to any particular set of facts is not a question of law alone.
3. Possession is a concept capable of different meanings and there are different types of possession. The primary definition of possession contemplates power, control or dominion over property.
4. Once ownership of a vehicle is established, the onus passes to the owner to establish that the vehicle was, without the consent of the owner, in the possession of some person other than the owner.
5. The owner's vicarious liability is based on possession, as opposed to operation of the vehicle.
6. Consent to possession of a vehicle is not synonymous with consent to operate it.
7. If possession is given, the owner will be liable even if there is a breach of a condition attached to that possession, including a condition that the person in possession will not operate the vehicle.
8. Breach of conditions placed by the owner on a person's possession of the vehicle, including conditions as to who may operate the vehicle, do not alter the fact of possession.   
     
   While the preceding makes it clear that the test is whether the insured owner provided the driver with implied consent to possess the vehicle, it is anticipated that many courts will continue to interpret the test as whether the insured owned provided the driver with permission to drive. This is especially true when insurance adjusters are tasked with gathering the initial facts and determining the initial denial, thus setting the tone for the entire case.
   1. **Facts Applicable to Motion**

These motions often come down to a factual dispute, in which the plaintiff, or rather the insurer who will have to indemnify the plaintiff if the owner is not vicariously liable, is at a significant disadvantage.

In the past there have been instances of insurance adjusters forcing wives to charge husbands with theft of a vehicle after the husband drove the family car with a suspended licence and got into an accident.  In *Miner v. The General Accident Assurance Company of Canada*[***[13]***](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn13), the insurance company told the wife that she would lose coverage for an accident caused by her husband unless she pressed charges against him.  The wife then had her husband charged with theft and he was convicted under section 295 of the Criminal Code for taking a motor vehicle without consent of the owner.

Forcing spouses to criminally charge each other to obtain insurance coverage is obviously reprehensible. If a lawyer is involved with that decision, it is likely contrary to the *Rules of Professional Conduct*.  However, there are still instances of mistaken insurers who advise their insured owner that if they gave the driver permission to drive their vehicle, that would be a breach of a statutory condition which may void coverage[[14]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftn14). This is incorrect because the question is not whether the insured owner gave permission to the driver to drive the vehicle, the question is whether the insured owner gave implied consent to possess the vehicle, which in and of itself is not a breach of any term of the policy.

Forcing the insured vehicle owner to allege a lack of consent is a simple way for an insurer to totally avoid paying a claim, with a very low chance of getting caught.  Even if the insurer is caught red-handed ‘mistakenly’ stating the law to the insured there are no realistic repercussions.

When the owner is faced with the possible denial of insurance coverage by their own insurance company, the lay person becomes very worried and asks the insurer how they can be assured of coverage.  The insurer then advises the owner that they need to give a statutory declaration confirming that there was *no consent to drive* the vehicle (the wrong question).  The owner’s insurer then tells the plaintiff’s insurer that it will not pay the claim.

When counsel are faced with this situation, it may be prudent to subpoena the other family members in the household and explain how vicarious liability for *implied consent to possess*works.  Once the family understands that coverage for vicarious liability will exist if:

1. the insured owner had the mistaken belief that the driver was licensed and allowed them to drive based on this mistaken belief, or
2. the insured allowed the driver to access the vehicle to get groceries from the trunk, (i.e. gave implied consent to physically possess but not drive),   
     
   then the family members will often tell the truth. They will admit that there was implied consent to possess the vehicle given from one family member to another. As such, in order to properly defend such a scenario it typically makes sense to issue subpoenas to witnesses for the motion to the following individuals:
3. the insurance adjuster and field adjuster;
4. the driver; and,
5. the family members who lived with the insured owner and driver.

[[1]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref1)RSO 1990, c H.8

[[2]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref2) The *Highway Traffic Act* does not applies on private property such as parking lots and the vicarious liability provision of the *Highway Traffic Act*is not applicable to accidents occurring there. However, there are cases where the main thoroughfares of parking lots are considered public roads. There may also be ancient common law that created vicarious liability for accidents on private property, such case law may have been lost to the mists of time when the precursor to section 192(2) of the *Highway Traffic Act* was implement many decades ago.

[[3]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref3)*Palsky (Next friend of) v. Humphrey*, [1964] S.C.R. 580, and *Aarsen v. Deakins*, [1971] S.C.R. 609

[[4]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref4)*Myers-Gordon (Litigation Guardian of) v. Martin*, 2014 ONCA 767; *Seegmiller v. Langer*, [2008] O.J. No. 4060, 77 M.V.R. (5th) 46 (S.C.J.); and *Deakins v. Aarsen*, [1971] S.C.R. 609

[[5]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref5) 2007 ONCA 557, at para. 16

[[6]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref6) 2015 ONCA 571 at 4

[[7]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref7) 2015 ONCA 571 at 20

[[8]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref8)*Chu v. Madill*, 1977 2 S.C.R. 400

[[9]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref9) 2007 ONCA 882

[[10]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref10) 2018 ONSC 4977 at 27

[[11]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref11) 2014 ONCA 767

[[12]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref12) [2008] O.J. No. 4060, 77 M.V.R. (5th) 46 (S.C.J.)

[[13]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref13) 1983 O.J. 2482 at para. 14

[[14]](https://mail.google.com/mail/u/0/#m_-3956297993667087128__ftnref14) In fact that happened in a case I argued: *Misir v. Pereira*, 2018 ONSC 2675.