CITATION: Finlayson v. GMAC Leasco Limited, 2007 ONCA 557
DATE: 20070803
DOCKET: C46126

COURT OF APPEAL FOR ONTARIO

ROSENBERG, CRONK and GILLESE JJ.A.

BETWEEN:

TRACY FINLAYSON, ROBERT O'CONNOR,
LAURENCE O'CONNOR and MARILYN O'CONNOR

(Plaintiffs/respondents)

and

GMAC LEASECO LIMITED/GMAC LOCATION LIMITEE

(Appellant/Defendant)

Rodney D. Dale for the appellant.

Michael J. Winward for the respondents, Finlayson and O'Connor.

Kieran C. Dickson for the Motor Vehicle Accident Claims Fund on behalf of the intervenor, John J. Simon.

Heard: May 25, 2007

On appeal from the order of Justice Joseph W. Quinn of the Superior Court of Justice dated September 25, 2006, reported at (2006), 83 O.R. (3d) 554.

GILLESE J.A.:

OVERVIEW

[1] By order dated September 25, 2006, Quinn J. declared that, pursuant to section 192(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 (the "Act"), GMAC Leaseco Limited, as owner of a truck, is vicariously liable for the negligent operation of the truck by John J. Simon.

[2] GMAC appeals. Under the terms of the lease agreement between it and Mr. Simon, Mr. Simon was expressly prohibited from driving the truck. In light of that provision, GMAC argues that it did not consent to Mr. Simon's possession of the truck and, therefore, s. 192(1) does not apply.

[3] I would dismiss the appeal. Section 192(1) of the Act imposes vicarious liability on a vehicle owner for damage caused by the negligent operation of the vehicle when it is in the possession of another person with the owner's consent. The case law establishes that consent to possession of a vehicle is not synonymous with consent to operate it. Public policy considerations reinforce the importance of maintaining that distinction. In the instant case, GMAC owned the vehicle in question and leased it to Mr. Simon. That is, it gave Mr. Simon control of the vehicle and consented to his possession of it. Consequently, even though Mr. Simon was an excluded driver and expressly agreed not to operate the vehicle, s. 192(1) operates to impose vicarious liability on GMAC.

BACKGROUND

[4] This appeal arises from a single-vehicle accident. On March 3, 2000, Mr. Simon was driving a leased truck when it struck a guardrail and rolled over. The respondents, Tracy Finlayson and Robert O'Connor, were front-seat passengers in the truck; both were injured in the accident.

[5] GMAC owned the truck that Mr. Simon was driving at the time of the accident. It had leased the truck jointly to Mr. Simon and Teresa M. Jefferies pursuant to a lease agreement dated August 29, 1997 (the "Lease"). The truck was insured under a policy of insurance issued by the Economical Mutual Insurance Company (the "Policy").

[6] Section 18 of the Lease prohibited Mr. Simon and Ms. Jefferies from permitting "drivers excluded or restricted under [the Policy]" from driving the leased vehicle. As a condition of the insurer providing coverage, Mr. Simon and Ms. Jefferies signed an excluded driver endorsement which identified Mr. Simon as an excluded driver and expressly excluded insurance coverage if he drove the truck. Both Mr. Simon and Ms. Jefferies signed an acknowledgement to that effect.

[7] The respondents issued a statement of claim in which GMAC, as owner and lessor of the vehicle, was named as the defendant.[1]

[8] GMAC brought a motion under rule 21.01(1)(a) of the *Rules of Civil Procedure* to determine before trial whether, as a question of law, it is vicariously liable for Mr. Simon's negligence in the operation of the vehicle, pursuant to s. 192(1) of the Act.[2]

[9] Section 192(1)[3] reads as follows:

> 192. (1) *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, and the driver of a motor vehicle or a street car not being the owner is liable to the same extent as the owner. [emphasis added]

[10] The motion judge considered two questions when deciding the matter: (1) did GMAC consent to Mr. Simon having possession of the truck; and, (2) could GMAC contract out of s. 192(1).

[11] In respect of the first question, the motion judge began by observing that, on the plain wording of s. 192(1), it is the vehicle owner's consent to another person's possession – not operation – of the vehicle that triggers its application. He stated that while possession and operation are not necessarily synonymous, it is not possible to be in operation of a vehicle without being in possession of it. On that basis, he concluded that in the circumstances of this case, the words "possession" and "operation" in s. 192(1) were synonymous.

[12] The motion judge then noted that in accordance with s. 18 of the Lease, Mr. Simon was not permitted to drive the truck "which is another way of saying that he was not to be in possession" of the truck. Accordingly, he held that GMAC had not consented to Mr. Simon having possession of the truck.

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[1] There is a companion action in which the respondents (plaintiffs) claim against Simon and Jefferies. Both actions have been ordered to be tried together or one following the other.

[2] Mr. Simon was granted intervenor status in the proceedings. Because of the possibility that there may be no insurance coverage for Mr. Simon under the Policy, the Motor Vehicle Accident Claims Fund assumed Mr. Simon's defence in the companion action. It appeared on Mr. Simon's behalf on the motion below and this appeal.

[3] Section 192(1) has since been amended by S.O. 2005, c. 31, Sch. 10, s. 2.

[13] However, on the second issue, the motion judge held that GMAC could not contract out of s. 192(1). Consequently, he declared GMAC to be vicariously liable for Mr. Simon's negligence pursuant to that provision.

[14] GMAC appeals. The essence of its position on appeal is that the motion judge was correct in concluding that it had not consented to Mr. Simon's possession of the vehicle but erred in holding that s. 192(1) applied. GMAC contends that it never consented to Mr. Simon's possession of the truck and that s. 192(1) of the Act does not apply.

THE ISSUES

[15] In deciding this appeal, it is necessary to determine whether:

1. Mr. Simon was in possession of the truck with GMAC's consent,
2. GMAC could contract out of s. 192(1) of the Act.

ANALYSIS

Was Mr. Simon in possession of the truck with GMAC's consent?

[16] In my view, the motion judge erred in holding that GMAC did not consent to Mr. Simon's possession of the truck. As I explain below, 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.

[17] Recall the wording of s. 192(1):

> 192. (1) *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, and the driver of a motor vehicle or a street car not being the owner is liable to the same extent as the owner. [emphasis added]

[18] On a plain reading of s. 192(1), a vehicle owner is liable for the negligent operation of the vehicle on a highway unless the vehicle was in another's possession without the owner's consent. There is no question but that vicarious liability pursuant to s. 192(1) of the Act is based on possession, not operation, of the vehicle. See *Thompson v. Bourchier*, [1933] O.R. 525 (C.A.) and the long line of cases in which it has been followed.

[19] The policy underlying the imposition of vicarious liability through s. 192(1) was articulated by this court in *Thompson v. Bourchier*. In that case, a lease agreement stipulated that the leased automobile was not to be operated by anyone other than the lessee or his employee. The lessee allowed another person to drive the vehicle. As a result of that person's negligent operation of the car, the plaintiff was injured. The owner argued that it was not vicariously liable because, contrary to the terms of the lease, the automobile had been in the possession of someone other than the lessee.

[20] This court rejected that argument. It held that the owner was liable pursuant to s. 41 of the Act, the predecessor provision to s. 192(1). At 527 – 28, Fisher J.A., writing for the court, stated:

> I think it must be conceded that the object of the Legislature in enacting Sections 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 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 losses and damage sustained in the operation thereof".
>
> The question here is, can the owner of an automobile escape the liability imposed by Section 41(a) simply by providing in an agreement of hire that the hirer alone shall retain possession and operate the car? In this case the owner parted with possession and control of his automobile under the higher contract, and left it entirely to Lupson to live up to its terms, and if the owner's contention "that he did not know Brown had possession and was driving and that he did not give his consent to Brown to operate the car" is right and an effective answer to Section 41(a), then the object of the statute - the public – has no protection, because a hirer, as soon as he is away from the owner – having possession and control – can, if he desires, abandon the car, or hand the automobile over to an intoxicated or partially intoxicated driver, or to one who has little or no experience in driving, and that if some person is killed or seriously injured, the owner is immune from liability.

[21] As the above-quoted passage makes clear, s. 192(1) is intended to protect the public by imposing, on the owner of a motor vehicle, responsibility for the careful management of the vehicle. Possession is one of the rights of ownership. An owner has the right to give possession of the vehicle to another. But, s. 192(1) encourages owners to be careful when exercising that right by placing legal responsibility on them for loss to others caused by the negligent operation of the vehicle on a highway.

[22] In explaining why s. 192(1) of the Act applies to fix GMAC with vicarious liability in this case, it is useful to consider first whether Mr. Simon was in possession of the truck and, then, whether GMAC had consented to his possession of it.

Possession

[23] It is important to keep separate the notions of possession and operation. Possession is a question of law whereas operation of a vehicle is a question of fact. One person, such as an owner or lessee, may have possession of a vehicle but another person may operate the vehicle Accordingly, I do not agree with the motion judge when he stated that "it is not possible for a person to be in operation of a vehicle without being in possession" of it.

[24] As a lessee, Mr. Simon had possession of the vehicle because he was permitted to control its use. Thus, even though by the terms of the Lease Mr. Simon was prohibited from driving the vehicle, he remained a lessee of the vehicle and, as such, in possession of the vehicle even when he was operating the vehicle in breach of the lease terms.

[25] There are numerous cases decided under s. 192(1) and its predecessor sections in which a person other than the one to whom the owner gave possession, negligently operated the vehicle and caused damage. The owner has been held vicariously liable because the owner consented to possession of the vehicle. *Donald v. Huntley Service Centre Ltd.* (1987), 61 O.R. (2d) 257 (H.C.J.) serves as a useful example as its facts are similar to those in the present case. In the *Donald* case, parents gave their son possession of a car but forbade him from driving it. The son's licence had been suspended but his parents permitted him to use the vehicle by having his friends drive him. When the son drove the car and, through negligence, caused damage, his parents were held liable. The son had the possession of the car with his parents' consent; accordingly, his parents were held vicariously liable even though he had been forbidden to drive the vehicle.

[26] In cases where the vehicle has been leased, the owner has been held vicariously liable even where the operator was driving the vehicle in contravention of the lease terms. For example, in *Fisher v. Harvey Krotz Ltd.* (1984), 26 M.V.R. 32 (Ont. C.A.), a rental agreement stipulated that the operator of the vehicle was to be twenty-five years of age or older and properly licensed to operate the vehicle. The lessee allowed an under-aged and unlicensed driver to operate the vehicle. In an action against the lessor for the negligence

of the operator, this court held that while the rental agreement might restrict who may operate the vehicle, the agreement did not absolve the lessor of its vicarious liability pursuant to s. 192(1). I see no reason to find otherwise in this case simply because the prohibited driver was also the lessee.

Consent

[27] The second question is whether GMAC consented to Mr. Simon's possession. The answer to that must be "yes".

[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. See, for example, *Thompson v. Bourchier*; *Sked v. Henry* (1991), 28 M.V.R. (2d) 234 (Ont. Gen. Div.) and *Henwood v. Coburn* (2006), 82 O.R. (3d) 295 (S.C.J.)

[29] It will be apparent that I reject GMAC's contention that what occurred was no different than if a third party had stolen the truck and had the accident. In my view, the two situations are very different. An owner cannot be said to have consented to a third party's possession of a vehicle when the third party has stolen it. In the present case, however, GMAC voluntarily gave Mr. Simon possession of the truck. GMAC had the power to decide whether to enter into the Lease and give Mr. Simon possession and control of the truck. To echo the sentiment expressed by Fisher J. A. in *Thompson v. Bourchier*, above, GMAC cannot escape the liability imposed by s. 192(1) simply by providing in the Lease that the lessee was prohibited from operating the vehicle.

Could GMAC contract out of s. 192(1) of the Act?

[30] In relation to the second issue, the Ontario courts have consistently held that an owner's statutory liability, enacted for the protection of the public, cannot be ousted by the terms of an agreement to which the injured person is not a party. In addition to *Thompson v. Bourchier,* see also *Laurentian Motors (Sudbury) Ltd. v. Ford Motor Co. of Canada* (1980), 29 O.R. (2d) 466 (Div. Ct.) and *Fisher v. Harvey Krotz Ltd.,* above.

[31] To the extent that GMAC's argument on this issue rests on its contention that it did not consent to Mr. Simon's possession of the truck, I reject it for the reasons already given.

Conclusion

[32] GMAC consented to Mr. Simon's possession of the leased vehicle and is liable accordingly. If Mr. Simon's operation of the vehicle was in contravention of the terms of the Lease, GMAC may have a breach of contract claim against him. However, GMAC cannot rely on the lease to avoid its statutory obligations in respect of the respondents. The respondents are not to be denied the benefit of s. 192(1) simply because Mr. Simon breached his contractual obligation to GMAC.

DISPOSITION

[33] Accordingly, I would dismiss the appeal with costs of $3,100 to the respondents, Finlayson and O'Connor, and $2,900 to the respondent, Simon. Both such sums are inclusive of disbursements and GST.

RELEASED: August 3, 2007 ("EEG")

"E. E. Gillese J.A."
"I agree M. Rosenberg J.A."
"I agree E. A. Cronk J.A."