CITATION: Henwood v. Coburn, 2007 ONCA 882

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COURT OF APPEAL FOR ONTARIO

ROSENBERG, ARMSTRONG and JURIANSZ JJ.A.

BETWEEN:

PETER HENWOOD

Plaintiff (Respondent)

and

FREDERICK JOHN COBURN, ONTARIO CAR AND TRUCK RENTALS LTD.
and PEMBRIDGE INSURANCE COMPANY

Defendants (Appellant)

Rodney D. Dale and Nawaz A. Tahir for the appellant Ontario Car and Truck Rentals

Sandi J. Smith for the respondent Pembridge Insurance Company

Harold W. Sterling for the respondent Minister of Finance in name of Frederick John Coburn

M. Steven Rastin and Anita Wong for the respondent Peter Henwood

Heard: August 17, 2007

On appeal from the judgment of Justice Barry G. A. MacDougall of the Superior Court of Justice dated August 11, 2006.

ROSENBERG J.A.:

[1] On several occasions over the last few years, this court has been asked to deal with the vicarious liability provisions of s. 192 of the *Highway Traffic Act*, R.S.O. 1990, c. H.8. Section 192(2) makes the owner of a motor vehicle liable for loss or damage

sustained by any person by reason of negligence in the operation of the vehicle "unless the motor vehicle … was without the owner's consent in the possession of some person other than the owner or the owner's chauffeur." The application of this provision has arisen in a number of different circumstances.

[2] In this case, the owner, a rental agency, alleged that the operator effectively stole the vehicle from the person who had consent to possess it, despite the fact that the person with consent to possess it was physically in the vehicle at the time of the accident. Therefore, the owner argued that the exclusion in s. 192(2) applied and it was not liable for the damages caused by the operator's negligence. The owner applied for summary judgment on that basis.

[3] The motion judge not only dismissed the owner's application for summary judgment, but found as a fact that the vehicle was in the possession of the operator with the owner's consent and that the owner was therefore liable. For the reasons that follow, I would allow the appeal, set aside the declaration that the vehicle was in possession with the owner's consent and dismiss the motion for summary judgment.

THE FACTS

[4] The facts of this case were set out in the affidavits and exhibits filed in support of the appellant's motion for summary judgment, and were not objected to by any of the parties. The plaintiff (respondent in this appeal), Peter Henwood, sells frozen meat door-to-door. His supplier of meat products was owned by George Fitzgerald. On June 30, 2000, Fitzgerald rented a truck from the defendant (appellant in this appeal), Ontario Car and Truck Rentals, on behalf of Henwood after Henwood's truck broke down. The rental agreement shows Fitzgerald as the renter and Henwood as the listed driver. Fitzgerald asked Henwood to train the defendant (respondent in this appeal) Frederick Coburn by taking Coburn along on his sales trip. Coburn did not have a driver's licence and did not have car insurance. In his examination for discovery, Henwood recalled that Fitzgerald told him that only he was to drive the truck.

[5] When the day's work was completed, Henwood and Coburn went to a tavern near Henwood's home. According to Henwood, Coburn began drinking and became belligerent. Coburn wanted Henwood to take him to Barrie, several hours from the tavern and Henwood's home. Henwood refused, at which point Coburn punched him in the face and took the keys to the truck. According to Henwood, Coburn got into the truck and began to drive away. Henwood was able to get into the passenger side as the truck began moving. During examination for discovery, Henwood said that he "jumped in the passenger side to talk him [Coburn] out of going [to Barrie]." He said that there was still $5,000 worth of meat in the back of the truck, and he agreed that this was part of the reason he wanted to get into the truck. He said that Coburn was drunk and that he repeatedly told him to stop and to slow down, but Coburn wasn't listening. Henwood

had also been drinking, but he had been planning to leave the truck in the tavern's parking lot and walk home.

[6] About twenty minutes into the drive, Coburn was unable to navigate a turn and the vehicle left the road and crashed into a field. Henwood was injured in the accident, and sought damages from Coburn, Ontario Car, and his insurer, Pembridge Insurance Company, under his uninsured motorist coverage. The Minister of Finance defends the action in the name of Coburn seeking to prevent any claim being paid out of the Motor Vehicle Accident Claims Fund.

[7] Ontario Car and Pembridge brought motions for summary judgment prior to trial. Ontario Car's motion was brought on the basis that the exclusion in s. 192(2) applied, so it was not liable for the damages caused by Coburn's negligence. Pembridge's motion was based on an unrelated issue. It was adjourned for reasons that are not material to this appeal and is not before this court.

THE REASONS OF THE MOTION JUDGE

[8] After carefully reviewing many of the decisions that have interpreted s. 192, the motion judge concluded that those cases "stand for the principle that where the permitted driver remains an occupant in the vehicle and either specifically allows the non-permitted driver to drive the car or acquiesces to the driver using the car, the permitted driver continues to remain *in possession* of the vehicle, and the owner will remain liable" [emphasis in original].

[9] The motion judge stated that he was being "requested to make findings of fact and make a ruling in favour of Henwood." He found as a fact that the reason Henwood entered the vehicle was because he was "asserting his continued right to possession of it." He interpreted the evidence before him as showing that Henwood was giving directions to Coburn and that he "continued to assert possession of the vehicle notwithstanding that he had a disagreement with Coburn about their destination." Accordingly, he found that although Coburn was operating the vehicle at the time of the accident, Henwood was in possession of the vehicle. Since there was no question that Henwood was in possession with the consent of the owner, Ontario Car was liable under s. 192. The motion judge therefore granted judgment in favour of Henwood against Ontario Car.

THE ISSUES

[10] The appellant, Ontario Car, submits that on the undisputed evidence, Coburn was in possession of the vehicle without Henwood's consent. Therefore, the exclusion in s. 192(2) applies and summary judgment should have been granted in its favour. Alternatively, it submits that there are genuine issues for trial and it was not open to the

motion judge to make a finding of fact that it is liable. Accordingly, it asks that the order of the motion judge be set aside and the issue of vicarious liability be sent on for trial.

ANALYSIS

(1) Was the appellant entitled to summary judgment in its favour?

[11] Section 192 provides 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.

[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.

[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.

[16] The appellant urges this court to follow the dissenting reasons of Masten J.A in *Thompson*, rather than the majority decision. Masten J.A. would have held that the person actually operating the vehicle is the only person in possession (barring a chauffeur situation). Whatever the logic of that position, it is now far too late to abandon over eighty years of settled law.

[17] The appellant submits that this court has already issued decisions that are in conflict with the *Thompson* line of cases. For this submission, the appellant relies on *Thorne v. Prets* (2003), 45 M.V.R. (4th) 69 (Ont. C.A.).[1] However, in my opinion,

[1] There is also a line of cases represented by decisions such as *Le Bar v. Barber and Clarke* (1922), 52 O.L.R. 299 (S.C. (A.D.) and *Newman v. Terdik*, [1953] O.R. 1 (C.A.) that turn on other issues, such as whether the owner consented to possession "on a highway". Whether or not these other cases are fully reconcilable, they do not bear on the issues in this case.

Thorne is entirely consistent with the *Thompson* line of cases. In *Thorne*, the owner gave Thorne possession of the car. Thorne was with one MacNeil, who did not have a license. Thorne expressly told MacNeil that he could not drive the car. After drinking at a tavern, Thorne went to sleep in the vehicle, leaving the keys beside him. He awoke to find that MacNeil was driving and heard him shout a warning just before the accident. The court held that although Thorne had been in possession with the owner's consent earlier in the evening, he was not in possession at the time MacNeil was driving. Although Thorne was physically in the car, he was asleep and therefore could not be said to be in possession. Since MacNeil had obtained possession and control of the vehicle from Thorne without the consent of either Thorne or the owner, the owner was not liable.

[18] *Thorne* is thus consistent with the *Thompson* line of cases because although the person in possession with the consent of the owner was physically present in the vehicle, he was not actually in possession of the vehicle.

[19] To summarize, the mere fact that someone, here Coburn, is operating the vehicle without the owner's consent is not determinative of the owner's liability under s. 192. If someone, such as Henwood in this case, is found to be in possession, and that person has the owner's consent, the owner will be liable even if the person in possession is only a passenger. Accordingly, the appellant was not entitled to summary judgment in its favour.

(2) Was Henwood entitled to summary judgment?

[20] Similarly, in my view, Henwood was not entitled to summary judgment. Even though Henwood was physically in the car, that undisputed fact did not determine that he was in possession of the vehicle. While cases where the person who has the owner's consent to possess the vehicle is not in possession although physically present may be rare, they do exist. *Thorne* is one example. There are others.

[21] For example, in *DiFede v. McCarthy* (1984), 27 M.V.R. 170 (Ont. Div. Ct.), the owner's husband, who did not have a driver's licence, grabbed the car keys without her consent. The owner jumped in the car as it began moving and yelled at him to stop driving. The accident occurred a short time later. The court held that at the time of the accident, the owner was not in possession; rather, she was attempting to gain possession. Craig J. held at para. 8 that:

> In my view, the husband commenced to drive off without the owner's consent and at that time, he had possession of the motor vehicle without consent of the owner; she never did regain possession in the true sense although she was attempting to do so, and she never did give consent to possession by her husband.

In those circumstances, the owner, like the owner in *Thorne*, was not liable under s. 192(2).

[22] This case also bears some similarity to *Kuhmo and Laakso v. Helberg*, [1931] O.R. 630 (S.C. A.D.),[2] where the court found that the owner was not liable even though his chauffeur was physically in the vehicle. The owner had leased the car to one Moline on the condition that the owner's chauffeur drove it. During the journey, Moline became drunk and insisted on driving. He was able to wrest control of the vehicle from the chauffeur despite the chauffeur's resistance. As the court said at p. 633, "the change of operators was due to duress and brought about a situation distinctly contrary to the [owner's] express instructions and the bargain made with Moline." The court reasoned that if fraud or force had been used to enable Moline to "oust" the chauffeur, the owner would clearly not be liable. The court saw no difference between the effect of duress and of fraud or force.

[23] These cases demonstrate that it is open to dispute whether Henwood was in possession of the vehicle at the time of the collision. Whether or not Henwood was in possession in turn determines the appellant's liability, regardless of the fact that Coburn was operating the vehicle without Henwood's or the owner's consent. In my view, the motion judge erred in granting summary judgment in favour of Henwood when there were material facts in dispute. The motion judge's error is found in the following passage from para. 46 of his reasons:

> The court finds that Henwood was in possession of the rented vehicle at the time of the accident within the meaning of s. 192 of the *Highway Traffic Act* and Ontario Car is liable as owner of the vehicle. The very reason that Henwood got into the passenger's side of the vehicle was that he was asserting his continued right to possession of it.

[24] Henwood may or may not have been asserting his right to possession, but that did not mean that he was necessarily in possession. Asserting a right to possession and possession are not the same thing. As Kellock J. said in *Marsh v. Kulchar*, [1952] 1 S.C.R. 330 at 335:

> When a motor car is stolen from the owner, the thief takes actual physical possession, and thus takes it out of the

[2] *Kuhmo* was referred to by both the majority and by Masten J.A. in *Thompson.*

> possession of the owner, although the right to possession remains with the latter.[3]

[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* 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.

[26] Some of the evidence showing that there was a genuine issue for trial on the question of Henwood's possession includes the following, tending to weigh against Henwood having possession:

- According to Henwood, Coburn began drinking and became belligerent and when Henwood refused to drive Coburn to Barrie, Coburn punched him in the face and took the keys.

- Henwood was trying to get Coburn to stop and slow down.

- In one of his statements, Henwood stated that "[t]here is no way Fred Coburn could have got the impression he had my consent to drive that truck. He had never driven it in the past and he forcibly took the keys from me."

[27] In purporting to find that Henwood was in possession, the motion judge exceeded his role under Rule 20 by granting summary judgment when there were material facts in dispute. In my view, it is no answer to say that Henwood invited the motion judge to make findings of fact. There is no suggestion that the appellant agreed to the motion judge adopting that role and counsel for the appellant denied before us that his client took any such position before the motion judge.

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[3] At the time *Marsh* was decided, the equivalent provision to s. 192(2) referred to the vehicle having been stolen or wrongfully taken from the owner rather than without the owner's consent.

DISPOSITION

[28] Accordingly, I would allow the appeal and set aside the order of the motion judge holding that Henwood was in possession within the meaning of s. 192 and that the appellant is liable as owner of the vehicle. I would dismiss the appellant's motion for summary judgment and remit this matter to trial. The appellant is entitled to its costs of the appeal fixed at $9,000, inclusive of G.S.T. and disbursements, payable jointly and severally by the respondents Henwood and the Minister.

[29] The costs of the motion before the motion judge are another matter. The motion judge should not have granted summary judgment in favour of Henwood, but the appellant was not entitled to summary judgment since there was a genuine issue for trial. In my view, the Minister and Henwood are entitled to their costs of the motion payable by the appellant, which I would fix at $4,000 each, inclusive of G.S.T and disbursements. As I understand it, Pembridge is not seeking costs on the appeal, nor is any party seeking costs from Pembridge. I also understand that this court need not deal with Pembridge's costs before the motion judge. If I am wrong in these assumptions, Pembridge may make brief written submissions on costs within five days of release of these reasons and any party opposed to its position may respond within five days of receiving Pembridge's submissions.

Signed: "M. Rosenberg J.A."
"I agree Robert P. Armstrong J.A."
"I agree R. G. Juriansz J.A."

RELEASED: "MR" December 14, 2007