

November 16, 2015

## Who do you trust with your car?

A recent decision of the Ontario Court of Appeal makes the question of who you trust with your car more difficult to answer. In *Fernandes v. Araujo*, 2015 ONCA 571, a five-member panel of the Court of Appeal confirmed that if a person gives possession of their vehicle to another, the owner will be vicariously liable for the driver's acts, regardless of whether the owner prohibited the driver from operating the vehicle in the manner that led to liability.

The underlying facts arise from a weekend away with friends and family, and the borrowing of an ATV. The Appellant/Defendant, Carlos Almeida, gave the keys of his ATV to the girlfriend and wife of his cousins, who were visiting Almeida's farm for the weekend. He told the women they could try it out. His cousin, John Paul Almeida told them, in Almeida's presence, not to leave the farm.

The women ignored the direction, and drove to a nearby farm via a highway. On the trip back to Almeida's farm they were involved in a single-vehicle accident. The passenger, Sara Fernandes, was injured. She sued the driver, Almeida and his insurer, Allstate Insurance Company.

Allstate sought summary judgment against Fernandes on behalf of its insured on the ground that the driver did not have Almeida's consent to drive the ATV outside the farm. The motion was dismissed. Allstate appealed, relying on a 1952 decision of the Court of Appeal, *Newman and Newman v. Terdik*, and its interpretation of section 192(2) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 192(2) which provides that the owner is liable unless the vehicle "was without the owner's consent in the possession of some person other than the owner...". In *Newman*, the Court held that where the owner gave the driver to permission to drive on private property but expressly prohibited the driver from operating the vehicle on the highway, the owner is not vicariously liable for damages as a result of a highway accident.

In dismissing Allstate's appeal, the Court of Appeal, and overturned its decision in *Newman*. The Court relied on a second line of authority on the interpretation of s. 192(2), and the other line of authority extending even further back (to 1933) which was affirmed by the Court in its 2007 decision, *Finlayson v. GMAC Leaseco Ltd.*. The Court's preferred interpretation, as articulated in *Finlayson*, is that vicarious liability of an owner

depends on possession, rather than operation of the vehicle. If the owner consented to the driver's possession of the vehicle, vicarious liability attaches.

The result of which is that owners should think twice before lending out their keys.