IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Newell v. Towns, 2008 NSSC 174

Date: 20080605
Docket: S.H. 218811
Registry: Halifax

Between:

Sandra Star Newell

Plaintiff

and

Dearran Towns, David Towns and The Dominion of Canada General Insurance Company Compagnie D'Assurance Generale Dominion Du Canada, a body corporate

Defendants

Judge: The Honourable Justice Duncan R. Beveridge

Heard: April 14 and 15, 2008, in Halifax, Nova Scotia

Counsel: Ronan W. Holland, for the Plaintiff
D. Blair Pritchett, for David Towns
Tyana R. Caplan, Karen Bennett-Clayton and Melanie Petrunia, for Dominion of Canada General Insurance

By the Court:

INTRODUCTION

[1] On April 6th, 2002 Sandra Newell was a passenger in a Chevrolet motor vehicle as it travelled on Mic Mac Boulevard. Her daughter was the driver. The vehicle was owned by her son-in-law.

[2] Mrs. Newell says she was injured when the Chevrolet motor vehicle was struck by a 1990 red Ford Mustang. The Mustang was parked in the Mic Mac Mall. It rolled across the parking lot and out onto Mic Mac Boulevard. She claims that the operator of the Mustang was negligent in how he operated or parked the vehicle. Mrs. Newell brought an action against the operator of the Mustang, Dearran Towns and Dearran's father, David Towns as the registered owner. Mrs. Newell also sued Dominion of Canada General Insurance Company (Dominion), the Section D insurer for the Chevrolet motor vehicle owned by her son-in-law.

[3] By consent of the parties, an order was issued by Smith, A.C.J. that a trial be held to determine the following questions:

1. Whether, at the place and time of the incident alleged to have occurred in the Statement of Claim, the Defendant Dearran Towns had consent from the Defendant David Towns to drive the 1990 Ford Mustang with vehicle Registration CVK 674; and,

2. Whether the incident alleged to have occurred in the Statement of Claim was caused, in whole or in part, by negligence on the part of the Defendant David Towns in maintaining the 1990 Ford Mustang with vehicle Registration CVK 674.

OVERVIEW OF THE PARTIES' POSITIONS

[4] Dominion relies on the provisions of the *Insurance Act* R.S.N.S. 1989, c.231, as amended, and regulations made pursuant to that *Act*. It takes the view that if Dearran Towns had consent to drive the Mustang on April 6th, 2002 then the

insurer for the registered owner must respond to the plaintiff's claim. In particular it relies on s.114 of the *Insurance Act*, which provides:

> 114 (1) Every contract evidenced by an owner's policy insures the person named therein, and every other person who with his consent personally drives an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage
>
> (a) arising from the ownership, use or operation of any such automobile; and
>
> (b) resulting from bodily injury to or the death of any person, and damage to property.

[5] In addition, Dominion relies on the provisions of the *Motor Vehicle Act*, R.S.N.S. 1989, c.293, as amended. It argues that if Dearran Towns had consent to drive the Mustang on April 6th, 2002 then the owner, David Towns is vicariously liable for any negligence by Dearran Towns in his operation or use of the vehicle and hence the insurer for David Towns, and not Dominion must respond. In particular Dominion relies on s.248(4) of the *Motor Vehicle Act*, which provides as follows:

> (4) Where a person operating a motor vehicle is the husband, wife, father, mother, son or daughter of the owner of the motor vehicle, such person shall be deemed to be operating such motor vehicle as a family car within the scope of a general authority from such owner unless and until the contrary is established.

[6] Dominion argues that the *Motor Vehicle Act* plainly places the onus on David Towns to establish the absence of express or implied consent for Dearran Towns to operate the Mustang on April 6th, 2002. Dominion further contends that David Towns has a "heavy burden" in order to prove that Dearran did not have consent to drive the Mustang.

[7] Dominion asserts that there were a variety of mechanical defects found in the Mustang immediately after the accident, and some months later, and that these defects caused or contributed to the accident.

[8] Dominion claims that if it can establish that David Towns was negligent with respect to the mechanical condition of the Mustang; and if his negligence contributed even 1% to causing the accident, then the plaintiff's recovery is against David Towns, rather than by way of a Section D claim against Dominion.

[9] The defendant Dearran Towns did not file a defence. The plaintiff entered default judgment against Dearran Towns on July 5th, 2007.

[10] The defendant David Towns is not an uninsured motorist. He has a third party liability policy with Wawanesa. David Towns argues that Dearran Towns was not his servant or agent, nor was he operating the vehicle with his consent, either express or implied and therefore there is no basis for David Towns to be vicariously liable for the negligence of Dearran Towns.

[11] With respect to the allegation of negligent maintenance, he argues that there is no evidence as to what caused the Mustang to leave the Mic Mac parking lot. Further, even if mechanical deficiencies caused or contributed to the vehicle leaving the parking lot and striking the plaintiff, David Towns was in no way negligent as he was not aware of any such defects, nor would the exercise of reasonable care have discovered the existence of the defects.

[12] The plaintiff took no position in this trial. In essence she says there should be no issue as to liability. This trial, on the stated questions, is simply a dispute between the insurer for David Towns and the Section D insurer of the vehicle in which she was travelling.

EVIDENCE

[13] There was no *viva voce* evidence called by any of the parties with respect to the events that led up to the Ford Mustang leaving the parking lot. Dominion did tender excerpts from the examination for discovery of Dearran Towns. David Towns tendered additional excerpts from his son's discovery examination.

[14] According to the discovery examination transcript, Dearran got his beginner's license when he was 16. As of April 6th, 2002 he did not have a full license. Nonetheless he had training in the operation of motor vehicles while employed in the Reserves. He started driving vehicles in the Military when he was 17. He testified he took a six-week course. At the end of that course he had a 404 license. It was his understanding that this license permitted him to drive "standard pattern" vehicles, which he described as being any regular car, four speed standard transmission, regular jeeps, and trucks up to two and a half tons. It was his further understanding that with this license he could drive a Military vehicle anywhere. He further testified that his parents were aware of his training.

[15] On April 6th, 2002 Dearran was 19 years old and was living with his parents in their home on Krista Drive in Lower Sackville. By that time, his two older sisters had already left home.

[16] His father had a car. The only description Dearran could provide was that it was a green sedan. His mother's car was a red Mustang. He said that he had driven both the green car and the red car, but always when "they were in the car because they were too tired to drive". As he had a beginner's license he just could not go by himself.

[17] While his sister Meghan never had a license and hence did not drive either of the cars, his sister Bronwyn had driven both the red and green cars. Dearran testified that his father was very possessive about his car - he had only driven it a few times. His mother was more generous with him and with Bronwyn with respect to the red Mustang.

[18] His evidence is somewhat unclear about the opportunities he ever actually had to drive the red Mustang without his father or mother present in the vehicle. The uncertainty arises from the following questions and answers given on discovery:

Q.221 But mom was more generous in letting the kids drive the red car?

A. You always drove mom's car. That was the rule. It didn't matter if mom's car, what it was, you drove mom's car.

Q.222 The rule is you –

A. Drove your mother – we drove mom's car. That was our rule. And when she had it, we couldn't drive. If she was busy with her car, we couldn't use it.

Q.223 So you and Bronwyn, if you were going to borrow cars, it was going to be the red Mustang?

A. It was going to be my mother's car.

Q.228 So when you drove your mother's car, she was in the car with you?

A. Usually, yes.

Q.229 Usually?

A. Yes.

[19] With respect to the actual events of April 6th, 2002 the evidence from Dearran's examination for discovery is that he was at home at 9 Krista Drive in Lower Sackville with his friend Kyle Smith. He said they were really bored. They decided to go to the Mic Mac Mall in Dartmouth to the House of Knives. They

took his mother's car, without her permission. He said there was no implied consent at all - he was totally just taking her car. When he parked, he parked it away from other cars because he had just essentially stolen his mother's car and he did not want to get caught. He says he is absolutely 100% sure that he put the transmission into park and put on the emergency brake.

[20] They went into the mall. When they came out an hour later the car was gone. He was upset. Not only had he taken his mother's car without her permission, somebody had stolen it from the parking lot. He went to the mall security office and reported what he thought was the theft of the Mustang. Eventually it was revealed to him that his car was not stolen. It had rolled out of the parking lot and hit another car on Mic Mac Boulevard. He ran to the scene of the accident. The police were present. He estimated the vehicle had rolled some 350 metres across the parking lot without striking anything before popping up over the curb and down the hill and onto the street.

[21] Both of Dearran's parents testified. David Towns is a retired naval officer. His rank on retirement was Lieutenant Commander. He then spent four years running the crossing guard program in HRM. His wife is Linda Towns. They have been married for 37 years and have three children Bronwyn, Meghan and Dearran. In April, 2002 he and Linda lived at Krista Drive in Lower Sackville. Bronwyn was then in Toronto. Meghan was living on her own. Dearran was the only child still living at home.

[22] David Towns testified that when the children were all at home the only one allowed to drive any of their vehicles was Bronwyn as she was the only one who had a license. Bronwyn had taken both the Young Driver's Course and the "Defensive Driving". On occasion they would let her drive Linda's car which is described as the 1990 red Mustang. Meghan had obtained her learner's permit. He had taken her out driving once but she had found it not to her liking. She still does not have a license.

[23] David Towns acknowledged that there were no specific limitations placed on Bronwyn's use of their vehicles. However, with respect to Dearran, he was only allowed to drive David's vehicle, provided he was in the passenger seat. He was

acutely aware that Dearran had only a learner's permit, although he did have exposure to driving in the Reserves. He acknowledged that he believed Dearran to be qualified to drive a five ton truck. He did not know whether such a qualification would permit Dearran to drive a Military vehicle on a public highway, but absolutely not a civilian vehicle.

[24] David Towns explained that Dearran's privileges were different because Bronwyn had done the Young Driver's Course. Dearran, on the other hand, only had a learner's permit and hence was not qualified. He testified that he would have never allowed Dearran to drive one of their vehicles on his own, nor with one of his friends. He had no knowledge of anyone else ever helping Dearran drive a civilian vehicle as part of getting ready to obtain his Nova Scotia Driver's License.

[25] With respect to house rules on teenage or adult children using their vehicles, David testified that Bronwyn would ask, and if it was convenient, she got the use of the car. If it was not convenient, she did not. He testified that Meghan and Dearran did not have permission as they were not licensed. Prior to April, 2002 he was unaware of any of his children ever being in violation of these rules.

[26] David Towns was asked how he knew his children were aware of these rules. He said they were just told. He clarified this by testifying that the rule was no one drove Linda's car but Linda, unless there was explicit permission. Furthermore, unless he gave permission to drive his car, no one did so.

[27] On April 6th, 2002 he and Linda took a day trip to Parrsboro, leaving their home at 9:00 or 9:30 in the morning. When they left, Dearran was still at home asleep. They did not speak with him before leaving.

[28] They took his vehicle to Parrsboro and left the Mustang in the driveway. One set of keys for the Mustang was in Linda's purse, the other on the key rack by the door. When he and Linda returned at 5:00 or 5:30 p.m. the driveway was empty. Linda's first comment was "my car has been stolen". David Towns said that he made a flippant remark "Dearran's got it". He testified that he meant this as a joke as Linda had gone into a panic mode. He said it never occurred to him that that is what actually had happened. When they went inside Dearran was home. He

wanted to speak to his mother first. David Towns speculated this was probably because Dearran knew that he would go through the ceiling when he heard what happened.

[29] David Towns testified that he was furious in hearing the story as to what happened because "you just don't do things like that". Dearran was not authorized to drive. He did not have permission to borrow it from either he nor Linda.

[30] David Towns further testified that prior to April 6th, 2002 Dearran had never asked him if he could take the Mustang out that day, or any other day. If he had asked, the answer would have been no. It would have been no because he was not licensed. David Towns acknowledged that he was unaware if Dearran had asked Linda's permission.

[31] In cross-examination David Towns confirmed that Linda Towns was the principal driver of the 1990 Mustang. It was purchased for her to drive to and from work. It was David Towns' understanding that Dearran had a learner's permit for some three, four, five months prior to April, 2002. He acknowledged he was unsure how long he had it.

[32] David Towns also acknowledged he took Dearran driving in his own vehicle several times. He agreed that he viewed Dearran as cocky and may have described him as being a young adolescent male raging with testosterone. He knew that Dearran had a 404 DND license and was driving Military vehicles.

[33] David Towns further testified that he believed the day of the accident, April 6th, 2002 to be a Sunday. He said normally they did their tours around the province, looking for retirement property, on a Sunday.

[34] Dominion referred Mr. Towns to the details of the telephone conference said to have occurred between he and an adjuster at Wawanesa on April 10th, 2002. Mr. Towns agreed with the details of that conversation set out in Tab 1 of Exhibit 1. However, there is nothing inconsistent between the details of that telephone conference, and what Mr. Towns testified to at trial.

[35] David Towns confirmed that a spare set of keys were hanging on a hook and he assumed that Dearran had taken the keys. He said he was not surprised that Dearran could navigate the 30 kilometres from Krista Drive to the Mic Mac Mall. He felt Dearran had tremendous confidence in his own abilities. Mr. Towns further acknowledged that Dearran was not charged with theft of the Mustang, nor does he think that Dearran stole the Mustang.

[36] Linda Towns gave evidence that was largely consistent, but not identical to the evidence of David Towns. She testified that Bronwyn was their only child that had a driver's license, but even then Bronwyn had to abide by what she referred to as "Young Driver's Regulations". She estimated that Bronwyn would drive her vehicle one, two, or three times a week. In terms of restrictions she said she would need to know from Bronwyn exactly where she was going, who was in the car, and exactly when she would be back. She said Bronwyn was never given free access.

[37] She confirmed that Meghan did not have a license and did not drive - and never drove "despite not having a license".

[38] With respect to Dearran, he had no driving privileges as he had no valid driver's license. She was clear in her direct examination there was never any occasion that Dearran was a driver of any of their vehicles and that she never took any of her children driving.

[39] When asked about rules with respect to using their vehicles she testified there was not a rule. It would just never occur to them that their children would take a vehicle when they did not have a license. Bronwyn, who had a license, always asked. Prior to April 2002 none of her children ever broke the rules or understandings and took vehicles without permission. She acknowledged that as far as she was aware, no one had ever done that.

[40] She testified that the only interaction she had with her children about vehicle use was with Bronwyn who would always ask. The others never asked. She described it as a non-issue. They would not get it, so it never came up.

[41] On April 6th, 2002 she thought they had gone to Parrsboro that day. She and David left while Dearran was still in bed. On their return at 4:00, 5:00 or 5:30 in the afternoon she noticed her Mustang was gone. She said someone stole her car. She does not recall any response by David. She recalled being very angry with Dearran and with Kyle. She was angry because they took the car without her permission.

[42] On April 6th, and the days leading up to it, Dearran had never asked her to use the vehicle. If he had asked permission it would have been definitely not. This is because he had no license.

[43] In cross-examination Ms. Towns adopted portions of her discovery examination about being aware that Dearran drove vehicles on the Military Base. She agreed that her husband had taken Dearran practice driving.

[44] She further acknowledged that it was common to hang keys on a hook by the door. These included vehicle keys, shed keys and house keys. She agreed that Dearran must have taken the keys from the hook in order to take the red Mustang. She was challenged in cross-examination why she had not kept the keys in a secure place. Her answer was she thought it was secure - they were in the house and not in the car. She acknowledged if the keys had been in a more secure place then Dearran could not have accessed the Mustang that day. She further acknowledged that she took no positive steps to prevent Dearran from taking the Mustang.

LIABILITY OF OWNER - CONSENT

[45] Reference has already been made, in a general way, to the position of Dominion. As a Schedule D insurer it is not liable to make any payment to a claimant who is legally entitled to recover money under the Third Party Liability section of any motor vehicle liability policy (see s.3 and 4(1)(d) of the Uninsured and Unidentified Automobile Coverage Regulations N.S. Reg. 94/96).

[46] Dominion contends that the plaintiff is legally entitled to have her claim covered by the Motor Vehicle Liability Policy provided by Wawanesa to David Towns on the basis that Dearran Towns is an insured within the meaning of s.114(1) of the *Insurance Act* as a person driving the 1990 Ford Mustang with the consent of David Towns. Dominion also asks the Court to conclude that Wawanesa must respond on the basis that David Towns is vicariously liable as the owner of the motor vehicle pursuant to the provisions of the *Motor Vehicle Act*.

[47] The *Motor Vehicle Act* sets out a number of duties and responsibilities on the owners of motor vehicles. In addition, it provides for certain presumptions to apply in a variety of circumstances. The provisions that are relevant to the issues in this case are as follows:

> (3) A person operating a motor vehicle, other than the owner thereof, shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent unless and until the contrary is established.
>
> (4) Where a person operating a motor vehicle is the husband, wife, father, mother, son or daughter of the owner of the motor vehicle, such person shall be deemed to be operating such motor vehicle as a family car within the scope of a general authority from such owner unless and until the contrary is established.
>
> (5) Unless and until it is established that such person was not operating such motor vehicle as aforesaid, such person shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent. R.S., c. 293, s. 248.

[48] It is obvious Dearran Towns was not driving the 1990 Ford Mustang when it collided with the vehicle in which Mrs. Newell was travelling. However, Dearran was "the driver" of the Mustang within the meaning of the *Motor Vehicle Act* on April 6th, 2002. Section 2 of the *Motor Vehicle Act* sets out a number of definitions. Of relevance are the following:

(u) "highway" means

(i) a public highway, street, lane, road, alley, park, beach or place including the bridges thereon, and

(ii) private property that is designed to be and is accessible to the general public for the operation of a motor vehicle;

(l) "driver" means a person driving or in charge of a vehicle and includes the operator of a motor vehicle;

...

(aj) "operator" means a person driving a motor vehicle on the highway or who has the care or control of the motor vehicle on a highway whether in motion or not;

[49] The uncontradicted evidence is that Dearran Towns drove the 1990 Ford Mustang to the Mic Mac Mall. He was the person in charge of the vehicle. He had the superintendence and was in care or control of the vehicle in the Mic Mac Mall parking lot. I am satisfied on the evidence that that parking lot is a highway within the meaning of the *Motor Vehicle Act*. I therefore conclude that Dearran Towns was the driver of the Ford Mustang on April 6th, 2002.

[50] If Dearran Towns had the consent from the owner named in the contract of insurance he is an insured by virtue of s.114 of the *Insurance Act* and Wawanesa must deal with claims arising from the ownership, use or operation of the Mustang.

ONUS

[51] The parties are in agreement on a number of points. They agree there was no express consent for Dearran Towns to be operating the 1990 Ford Mustang.

They are also in agreement that the onus is on the defendant David Towns to establish, on a balance of probabilities, that Dearran Towns was neither a servant or agent, nor was operating the motor vehicle within the scope of a general authority of the owner within the meaning of s.248(4) of the *Motor Vehicle Act*. However, Dominion argues that given the purpose or legislative intent of the *Motor Vehicle Act* there is a "strong presumption" of consent and the onus on an owner to displace the presumption is a "heavy one". It relies on *Powers v. Pottie Estate*, (2000) 185 N.S.R. (2d) 111; *Goudey v. Malone* (2003), 220 N.S.R. (2d) 92*;* and *Morash v. Burke* (2006), NSSC 364, [2006] N.S.J. No. 503 as authority for this proposition.

[52] Dominion argues that if the evidence called on behalf of the owner is vague, ambiguous or contradictory it is not sufficient. It says the evidence must be clear and convincing. With all due respect, I am not convinced that the issue of the onus, and what evidence is necessary to satisfy it, should be clouded or made uncertain by suggesting anything more than that the trier of fact must be satisfied, on a balance of probabilities that the close family member operating the motor vehicle did not do so within the scope of a general authority from the owner.

[53] In my opinion there is nothing in the words of the *Motor Vehicle Act*, case law, or general principles of law that would justify a unique approach to the question of the appropriate burden or onus of proof and the evidence needed to satisfy it. In my opinion s.248(4) is a straight forward rebuttable presumption of law. In Sopinka, Lederman & Bryant, *The Law of Evidence in Canada* (2nd ed.) (Toronto: Butterworths, 1999) the authors discuss a number of different types of presumptions. They write as follows

> **A. What is a Rebuttable Presumption of Law?**
>
> **§4.23** This type of presumption is the commonest and most significant of the different types of presumptions. A rebuttable presumption of law is a rule of substantive law that has certain consequences directly annexed to proof of a particular fact(s). Thus, upon proof of the basic fact and in the absence of rebutting evidence the presumption prescribes a certain legal consequence.

> **§4.24** A rebuttable presumption of law differs from a presumption of fact because a presumption of fact does not compel the trier of fact to draw the required inference, albeit the opponent runs a risk of an adverse determination in direct proportion to the strength of the inference. Nonetheless, the party against whom it operates is under no obligation, as a matter of law, to adduce rebutting evidence to meet a presumption of fact. In contrast, a rebuttal presumption of law compels the trier of fact to assume the existence or non-existence of the presumed fact in the absence of contrary evidence.
>
> **§4.25** Both rebuttable presumptions and conclusive presumptions compel the tribunal of fact to draw the required inferences upon proof of the presumed fact. Unlike a conclusive presumption however, a rebuttable presumption of law grants the opponent an opportunity to offer evidence to meet the evidentiary effect of the presumption....
>
> **§4.26** Thus, a rebuttable presumption is a "...rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. No prescribed language or formula is necessary in order to create a statutory rebuttable presumption. Case law has, however, identified certain language as creating such presumptions, for example "in the absence of evidence to the contrary", "*prima facie* proof or evidence", "unless he proves", "until the contrary is proved", "proof of which lies upon him", and "unless he establishes".
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> [emphasis in original]

[54] The authors go on to describe a rebuttable presumption as a "legal shortcut" that is designed to bridge an evidentiary gap or to reverse the normal allocation of the evidential burden, due to perceived problems of proof. If the party against who the presumption is operating, rebuts the presumption, the other party may nonetheless attempt to prove the fact or issue without the benefit of the presumption.

[55] It cannot be gainsaid that the legislature plainly intended that individuals who were injured by the operation of a motor vehicle on a highway look, not just to the operator, but also to the owner of the motor vehicle involved (and just as importantly his or her insurer) in order to be better assured of recovery of any damages that were caused. Vicarious liability may attach to the owner by way of the statutory presumptions that any person operating the owner's motor vehicle

was his servant or agent acting within the course of his employment. The reason for placing the onus on the owner seems obvious. Who was operating a motor vehicle, and for what purpose, is something that should be peculiarly within the knowledge of the owner.

[56] However, the legislature did not make this a conclusive presumption. An owner, and hence the owner's third party liability insurer, can avoid liability if he or she establishes that the person operating the motor vehicle was not his or her servant or agent or, if a close family member, not within the scope of a general authority from the owner.

[57] It is important to note that the presumption appears to have been conclusive for at least a brief period of time. In *MacKay v. Weatherbie* (1966), 60 D.L.R. (2d) 87 (N.S.S.2C.) the plaintiff brought an action against the owner, Kathleen Weatherbie, for damages alleged to have been caused by the negligence of her son in the operation of her motor vehicle. She testified that she bought the car with her own money she had earned herself. She was married with five children, two of whom lived at home. Her son, who had been operating the vehicle at the time of the accident, was 19 years old. He had been away at school, but normally would come home on the weekends. The plaintiff relied on what was then s.201(4) of the *Motor Vehicle Act*, R.S.N.S. 1954, c.184 as amended.

[58] Cowan, C.J.T.D. in the course of giving his reasons for judgment, referred to the history of this statutory provision. He wrote:

> The second question arising under s. 201(4) of the *Motor Vehicle Act* has given me more concern. The section, in its present form, was enacted ... by s.5 of 1938 (N.S.), c. 43. The section in question was then s. 180 and, as enacted by 1936 (N.S.), c. 44, s-s. (4) read as follows:
>
> > (4) Where a person operating a motor vehicle is the husband, wife, father, mother, son or daughter of the owner of the motor vehicle, and is operating it as a family car within the scope of the general authority from the owner, such person shall be conclusively deemed to be operating the motor vehicle as the servant and agent of such owner and to be acting in the course of his employment and within the scope of his authority as such servant and agent.

It will be noted that, as the subsection then read, it would be necessary for any plaintiff to show that a person operating a motor vehicle was the son, etc., of the owner of the motor vehicle and that the son was operating it as a family car within the scope of a general authority from the owner and, on proof of such facts, **the operator was conclusively deemed to be operating the motor vehicle as the servant and agent of such owner and to be acting in the course of his employment and within the scope of his authority as such servant and agent.**

The subsection in question was repealed and a new subsection substituted therefor by s. 5 of 1937 (N.S.), c. 50, and the substituted subsection read as follows:

> (4) Where a person operating a motor vehicle is the husband, wife, father, mother, son or daughter of the owner of the motor vehicle, such person shall be deemed to be operating such motor vehicle as a family car within the scope of a general authority from the owner, unless and until the authority is established.

It will be noted that the new subsection required proof that the person operating the car was, for example, the son of the owner of the motor vehicle and, in that event, **a rebuttable presumption was created to the effect that the operator of the motor vehicle was operating it as a family car, within the scope of a general authority from the owner.**

The amendment in 1938 repealed the entire section, then s. 180, and s-s. (4) was re-enacted, the first paragraph being in similar terms to the 1937 amendment and a new paragraph being added, so that the amended subsection reads as follows:

> (4) Where a person operating a motor vehicle is the husband, wife, father, mother, son or daughter of the owner of the motor vehicle, such person shall be deemed to be operating such motor vehicle as a family car within the scope of a general authority from such owner unless and until the contrary is established.
>
> Unless and until it is established that such person was not operating such motor vehicle as aforesaid, such person shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent.

[59] It is therefore clear that at one time proof of a close family member operating an owner's vehicle created a conclusive presumption of vicarious liability for the owner.

[60] The wording of the amendment created by the legislature in 1938 (s.5 S.N.S. 1938 c.43) is the exact language now found in s.248 of the *Motor Vehicle Act*. (Although split into two subsections by R.S.N.S., 1967 c.192, and is now s.248(4) and (5).)

[61] In *MacKay v. Weatherbie,* Cowan C.J.T.D. referred to the "family purpose doctrine" that existed in some jurisdictions in the United States. He described this doctrine as follows:

> ...In order to warrant the application of the family purpose doctrine and impose liability on the owner for the negligent driving of a member of his family, the member of the family must have been using the car by permission or authority, either express or implied. "...it has been held that the doctrine applies only where the driver has general permission to use the vehicle, and does not apply as to a member of the family who obtains special permission on the occasion of each use".
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> p.92

[62] Cowan C.J.T.D. concluded that Mrs. Weatherbie had successfully rebutted the presumption and dismissed the action against her. His reasoning was as follows:

> I find, however, that, at the relevant time, he was not operating the defendant's motor vehicle as a family car, within the scope of a general authority from the defendant, as owner of the motor vehicle. The evidence is clear that the defendant gave no general authority to anyone in her family to operate the motor vehicle. Her evidence was to the effect that, for many years, she and her husband could not afford to own and operate a motor vehicle and that, when she purchased the motor vehicle in question, she purchased it out of her own moneys which she had earned while working and that she regarded it as her own car and not as a family car and, while she permitted other members of the family to operate the vehicle, express permission was asked and given in each case. That practice was followed when the son, Ronald Earl Weatherbie, wished to use the car on the

> evening of December 4, 1965. There was no general authority to him to operate the car, either as a family car or otherwise, and a specific permission was given for him to operate the car, but for his own purposes.
>
> I find, therefore, that the presumption provided for by the first paragraph of s-s. (4) 201 has been rebutted and the presumption provided for by the second paragraph of the subsection, therefore, does not operate. There was no evidence to the effect that the operator of the defendant's motor vehicle, Ronald Earl Weatherbie, was, in fact, the servant and agent of the defendant or that he was operating the motor vehicle as such servant and agent, or that he was acting in the course of his employment and within the scope of his authority as a servant or agent of the defendant. The evidence was quite to the contrary and clearly established that the operator of the defendant's motor vehicle, Ronald Earl Weatherbie, was operating the motor vehicle at the time in question for his own purposes, and not as servant or agent of the defendant.
>
> p.92-93

[63] As noted earlier Dominion relies on *Powers v. Pottie Estate*; *Goudey v. Malone*; *Morash v. Burke* in support of its submission that there is a "heavy" onus on the owner.

[64] Mr. Pritchard submits that the *Powers* and *Morash* decisions pertain more to the difficulty of establishing a lack of consent in circumstances where there is no evidence from the driver of the vehicle. He says that to the extent that the decision in *Goudey v. Malone* is interpreted as imposing a higher burden, it ought not be followed. In other words, there may be cases it is difficult for the owner, or more typically, the liability insurer for the owner, to rebut the presumption, but that to the extent a label "heavy" is added to describe the burden, it is not an accurate reflection or description of the onus. I agree.

[65] In *Goudey v. Malone*, (*supra*) the plaintiff was seriously injured in a head-on collision. Cathy Malone was the registered owner of the vehicle that caused the accident. The vehicle was a Sunbird. It was the third vehicle in a household that consisted of three persons, Herbert and Cathy Malone and their son Matthew. Matthew became the primary driver of the Sunbird after his mother was finished her work day. Matthew lost his license for speeding. Cathy Malone required

Matthew to only let others to drive who were “responsible”. On the night of the accident the Sunbird was being operated by Matthew’s friend Colby Brannen. Cathy Malone testified that she would not have permitted him to drive her car because of his reputation. The Court found that Matthew had the implied consent of Cathy Malone to use the car and, when it was driven by Colby Brannen, it was in fact operated under the authority control of Matthew Malone who was sitting in the passenger seat. The Court further found that Colby Brannen had the implied consent of Cathy Malone.

[66] The references by the Court to the provisions of the *Motor Vehicle Act* imposing a “heavy onus” are as follows:

> [10] Notwithstanding the onus imposed on an owner under section 248 and 249 of the *Motor Vehicle Act* which have been quoted earlier, **the owner and hence the insurers of the owner could defeat a claim by an injured third party where the owner is able to satisfy the heavy onus imposed by the statute. In this context, I find *Wolfe v. Oliver, Oliver and Co-operative Fire and Casualty Co.* (1974), 8 N.S.R. (2d) 313 (N.S.C.A.), to be helpful.** Cooper J.A., delivering the decision for the court quoted extensively from an earlier case of the Ontario Court of Appeal, *Minister of Transport v. London & Midland General Insurance Co.* (1971), 19 D.L.R. (3rd) 643 (Ont.. C.A.), where Gale, C.J.O., said at page 645:
>
> > We agree with Mr. Holland that if a policy is issued to the owner of a vehicle as a result of his misrepresentation then the fact of the misrepresentation will not provide an insurance company with a defence against third parties who are injured as a result of the operation of the vehicle by the owner ... however ... this policy does not cover this risk not only because it is not an owner's policy but also because it cannot be said that Dolson had Miss Bassert's consent to operate the car at the time the accident occurred. We said that because she was not in a position to be able to give or withhold consent ...
>
> [emphasis added]

[67] With all due respect to the trial judge in *Goudey v. Malone*, the authorities relied upon to suggest there is a heavy onus imposed by the *Motor Vehicle Act* do

not support that conclusion. The trial judge refers to the decision of the Appeal Division of the Nova Scotia Supreme Court in *Wolfe v. Oliver* (1974), 8 N.S.R. (2d) 313. Cooper J. A. wrote the decision for the Court. The case had nothing to do with the onus on an owner under s.248 of the *Motor Vehicle Act*.

[68] The appellant was the insurer for the registered owner Cleophas Oliver. Her son was David Gerard Oliver. David Oliver purchased a 1967 Ford. He had a prior record for impaired driving. His mother added the 1967 Ford to her insurance policy. The trial judge found David Oliver was in fact the owner and that he was a party to the misrepresentations made by his mother, Cleophas Oliver, to the appellant insurer. This disentitled him to indemnity as an unnamed insured under the appellant's insurance policy. Furthermore, he was disentitled, since he was under the influence of liquor, to such an extent as to be, for the time being, incapable of the proper control of the automobile. However, the trial judge found the appellant insurer to be liable on the basis that David Oliver was operating the vehicle with the consent of Cleophas Oliver. Cooper J.A. disagreed. Cooper J. A. wrote:

> [25] I am doubtful whether or not Cleophas Oliver did have an insurable interest sufficient for the purpose of obtaining public liability and property damage coverage, and am also doubtful that she was an owner of the vehicle added for the purpose of effecting insurance coverage under an owner's policy. Assuming, however, that there was such insurable interest and ownership the further question remains as to whether or not David Oliver, the operator of the vehicle, was an insured within the meaning of that term as used in the policy. If so, it could only be because he was operating the vehicle with the consent of Cleophas Oliver. The trial judge found that he had such consent but, with respect, I cannot agree.
>
> [26] I think it clear that David Oliver purchased the 1967 Ford as his own property and was operating it as such. Indeed, the trial judge said when considering whether or not the vehicle was a family car within the meaning of that phrase in s. 221(4) of the *Motor Vehicle Act*, "He was operating it as his own car and as of right."
>
> [27] It seems to me that the circumstances were present that Cleophas Oliver was "not in a position to be able to give or withhold consent" as was said by Gale, C.J.O., in the *Minister of Transport* case, supra. It appears clear from the evidence that, in fact, no such consent was either asked for not given.

...

> [30] In my opinion it cannot be said in the instant case that David Oliver was operating the 1967 Ford with the consent of Cleophas Oliver. There is no evidence of any consent having been given. The effective authority for operating the motor vehicle was in David Oliver, who had bought the 1967 Ford and had title to it. He was operating it not by virtue of any consent from his mother, but as his own car. I do not think that because Cleophas Oliver had signed the chattel mortgage, exhibit 2, as, in effect, a guarantor of the indebtedness thereby secured she was placed in the position of having authority to consent to the use of the car by her son, David Oliver.

[69] At para.11 of *Goudey v. Malone* the following appears:

> Cooper, J.A., went on find that Cleophas Oliver, the "insured owner" in this case and hence the insurer, were not liable to compensate the injured third party because of misrepresentations made when the insurance coverage was placed on the vehicle:
>
> > that she was in fact not the "owner" of the vehicle and therefore could not give consent to its use. David Oliver, the operator of the motor vehicle was in fact its owner and had no insurance coverage. In the result the legislative intent, that of protecting innocent third parties was defeated by the particular circumstances and the misrepresentations made to the insurers for the purpose of obtaining ostensible coverage.

[70] Cooper J.A. did indeed find that the insurer was not liable to compensate the injured third party because of misrepresentations made when the insurance coverage was placed on the vehicle. However, the quotation attributed to Cooper J.A. is not just inaccurate, it did not occur. These words do not appear in the decision by the Appeal Division of the Nova Scotia Supreme Court. Nonetheless the words attributed to Cooper J.A. may well be an accurate reflection of the result in *Wolfe v. Oliver*. [1]

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[1] It is interesting to note that *Wolfe v. Oliver* was overruled in *Dal v. Richards* (1991), 180 N.S.R. (2d) 179, [1999] N.S.J. No.371. Roscoe J.A., writing on behalf of a five member panel, accepted that the predecessor to s.133(5) of the *Insurance Act* R.S.N.S. 1989 c.231 was erroneously interpreted and that a misrepresentation by the insurer does

[71] The trial judge in *Goudey v. Malone* also wrote as follows:

THE RELEVANT PHILOSOPHY

[15] In *Daniels Estate v. Ernst* et al. (1978), 27 N.S.R. (2d) 365; 41 A.P.R. 365; (1978) Carswell NS 342 (C.A.), paragraph 16 Pace, J., wrote:

> With regard to the history of the legislation it is incontrovertible that the purpose of sec. 141 and of the special definition was to prevent people injured by motor cars being left without recompense because the car at the time happened to be operated by some irresponsible man of straw and it was felt that ownership of a car at least indicated some financial responsibility, and therefore made it incumbent on the owner to use care in allowing the use of his motor car.

The legislative intent implicit in the terms of the *Motor Vehicle Act* with respect to insurance coverage on motor vehicles clearly is designed to ensure that all motor vehicles being operated on a public highway are covered by a valid and effective policy of insurance for the protection of third parties. Where an insurer has issued a policy of insurance covering a vehicle therefore, and provided the "pink card" confirming such coverage, the motoring public has the right to expect that, in the event of injury or loss arising from the operation of that motor vehicle, the financial responsibility of the owner/operator is assured. The vast majority of the cases make it clear that the only way the insurer may avoid this obligation to innocent third parties is where the insurance coverage has been obtained by misrepresentation virtually amounting to fraud. The insurer, in most cases, enters into a contract with the "owner" who has a contractual obligation with the insurer to see to it that the terms of the contract are not breached in a manner which would give rise to a risk that the insurer would not have accepted had they been advised. I am not considering here a car which may have been stolen.

[16] **Thus we have the presumptions referred to in the legislative clauses previously cited which place a heavy burden on the insurer or owner to**

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not make the insurance policy *void ab initio*. Furthermore the driver of the motor vehicle would be operating with the consent of the registered owner, since it is inherent in the agreement to participate in the fraud on the insurer, that the actual owner would be driving the vehicle.

> demonstrate that at the time of this particular accident the vehicle was being operated without the consent of the owner.

[72] No quarrel can be had with the proposition that the legislature, both through the *Insurance Act* and the *Motor Vehicle Act* have enacted provisions for the protection of innocent third parties to try to ensure that adequate insurance coverage is in place on all motor vehicles being operated on the public highways in Nova Scotia.

[73] However, neither the philosophy nor the result in *Daniel's Estate v. Ernst* (1978), 27 N.S.R. (2d) 365 (N.S.S.C.A.D.) stand for the proposition that the presumptions referred to in s.248 of the *Motor Vehicle* place a heavy burden on the insurer or owner. Pace J.A. wrote the unanimous decision for the Appeal Division. The existence of the statutory presumption was mentioned in his reasons, but there was no discussion, let alone a suggestion that the onus was a heavy one.

[74] In that case the registered owner was not a party. The trial judge found two joint beneficial owners to be liable. Pace J.A. did not write the words quoted in para.15 in *Goudey v. Malone*. The words are those of Bence D.C.J. in *Yaeger v. Heilman and Heilman*, [1948] 2 W.W.R. 135.

[75] Dominion also relies on the decision of *Powers v. Pottie Estate*; *supra.* Nancy Witherspoon owned a 1999 BMW 325i. She employed Michael Pottie to do general chores around her home including planting, general maintenance and minor carpentry. In November 1996 Ms. Witherspoon travelled to Ontario. She asked Pottie to do a number of household chores during her absence and to look after her pets. A few days later Pottie was driving her car in Cape Breton when he was involved in a very serious motor vehicle accident. Pottie and the driver of the other vehicle were killed. The sole survivor was a passenger in the other vehicle. Richard J., in an oral decision, stated:

> [11] The law places a burden on the owner of a motor vehicle and presumes that the automobile is being driven with the consent of the owner unless there is sufficient evidence to the contrary to find, on a balance of probabilities that there was no such consent. Section 114(1) of the *Insurance Act* states that every owner's policy "*insures the person named therein, and every other person who*

> *with his consent drives the automobile owned by the insured named in the contract*..." The *Motor Vehicle Act* establishes the presumption that the operator of a motor vehicle has the consent of the owner. The burden therefore is on the owner of the vehicle, in this case Witherspoon to establish, on a balance of probabilities, that the driver of that vehicle, Pottie, did not have her consent. As Mr. Norton quite properly pointed out, this is a negative burden and very difficult for the bearer of that burden to prove. It is more difficult in this case because the party to whom the consent was presumed is dead and cannot give evidence respecting that issue. Without the consent of the owner, either express or implied, it is open to conclude that the vehicle in question was taken without the owner's permission which is tantamount to theft. This raises the question of a somewhat higher burden of proof in the face of an allegation of criminal conduct. This principle is canvassed at length in the Supreme Court of Canada case of *Hanes v. Wawanesa Mutual Insurance Company* [1963] S.C.R.154, which was considered and adopted by Cowan, C.J., in *Garrison v. Lively, Delaney, Judgment Recovery (N.S.) Ltd. And Soverign General Insurance Co.* (1977), 27 N.S.R. (2d) 489; 41 A.P.R. 489 (T.D.).

[76] In my opinion, it is not accurate to stipulate that there is a higher burden of proof where there is an allegation of criminal conduct. In *Hanes v. Wawanesa* the insurer brought an action against its insured to recover monies it paid out for damages arising out of a motor vehicle accident. The insurer claimed that the insured was in violation of one of the statutory conditions of the policy, in particular that he was under the influence of intoxicating liquor to such an extent as to be for the time being incapable of the proper control of the automobile. The trial judge dismissed the action although he was satisfied that on a “reasonable balance of probabilities” that the insured was under the influence of intoxicating liquor. He held it was necessary, even though it was a civil action, for the insured to establish a breach of the criminal law, that the evidence must be substantially the same as would secure a conviction in a criminal court. Ritchie J. wrote the majority decision for the Court. He stated:

> Having regard to the above authorities, I am of opinion that the learned trial judge applied the wrong standard of proof in the present case and that the question of whether or not the appellant was in a state of intoxication at the time of the accident is a question which ought to have been determined according to the “balance of probabilities”.

[77] Richard J. also referred to *Garrison v. Lively*. In *Garrison*, the plaintiff was injured when he was rear-ended while operating a motor vehicle on Agricola Street. The vehicle that struck him fled the scene. The plaintiff followed. He never lost sight of the vehicle. When it stopped he saw a number of people get out and walk away. The plaintiff identified Lively as the person who got out of the hit and run vehicle on the driver's side. Lively was the registered owner of this vehicle. One of the other individuals who had walked away from the car returned to it and retrieved items from the car. The plaintiff testified there were lights on nearby and visibility was fairly good. He said he could identify Mr. Lively with reasonable certainty. Lively denied being the driver. He testified that he loaned the car to Gordon Moutlon who had driven it to the Tap Beverage Room. When Moulton left the Beverage Room the car was gone. Cowan C.J.T.D. described the basic defence as being that the vehicle had been stolen from the Tap Beverage Room parking lot and that the operator of the vehicle was the person who had stolen the vehicle or was one of the group that had stolen it.

[78] Cowan C.J.T.D. concluded:

> [30] It is clear, therefore, that the onus of proving that neither Gordon Lively nor any person operating the vehicle with his consent was, in fact, operating the vehicle at the time of the collision with the plaintiff's vehicle, is on the insurance company. True, it is on the owner, but the onus becomes the onus of the insurance company in the circumstances of the present case.
>
> [31] In my view, it is sufficient to dispose of the application to say that the onus has not been satisfied by the insurance company, and/or by Gordon Lively and that neither has satisfied me, by a preponderance of evidence, that the operator of the vehicle was neither Gordon Lively nor anybody operating it with his consent.

[79] This conclusion was sufficient to dispose of the issue between the plaintiff and the insurer for Lively. Cowan C.J.T.D. did make reference to the decision of the Supreme Court of Canada in *Hanes v. Wawanesa*. He wrote:

> [32] I have been referred to *Hanes v. Wawanesa Mutual Insurance Company*, [1963] S.C.R. 154, and to other cases indicating that, where it is alleged that a criminal offence has been committed, the burden of proof is a burden of proving

> by a greater probability or a greater weight of evidence than that applicable in the case of proof of any other fact.
>
> [33] In my opinion, this principle applies in the present case and supports my view that the burden of proof has not been discharged, the insurance company having admitted that the policy was in effect. It must have the burden of proving, with the degree of proof referred to in the *Hanes v. Wawanesa* case, that the operator was not the owner or some person operating the vehicle with the consent of the owner. However, I think it is desirable that I consider the question of the credibility of witnesses, as if the onus or burden of proof was not on the insurance company.

[80] The issue of onus was reviewed again by the Supreme Court of Canada, almost 20 years later in *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164. A temporary driver for Dalton was to drive a loaded truck to a warehouse a scant eight miles. The vehicle was found abandoned, empty and slightly damaged. The driver was arrested and charged with theft, but acquitted. Dalton was required to pay damages to the owner of the goods. Dalton had two insurance policies. It sued both of its insurers to recover. The trial judge found that Continental had failed to establish, upon a balance of probabilities, and by a degree of proof commensurate with the gravity of the allegation, that the driver was a party to the theft of the goods. The Ontario Court of Appeal, and at the Supreme Court of Canada were dismissed. Laskin C.J.C. delivered the unanimous decision for the Court. He wrote as follows:

> Where there is an allegation of conduct that is morally blameworthy or that could have a criminal or penal aspect and the allegation is made in civil litigation, the relevant burden of proof remains proof on a balance of probabilities. So this Court decided in *Hanes v. Wawanesa Mutual Insurance Co.*, [1963] S.C.R. 154...
>
> ...
>
> It is true that apart from his reference to *Bater v. Bater* and to the *Smith and Smedman* case, Ritchie J. did not himself enlarge on what was involved in proof on a balance of probabilities where conduct such as that included in the two policies herein is concerned. In my opinion, Keith J. in dealing with the burden of proof could properly consider the cogency of the evidence offered to support proof on a balance of probabilities and this is what he did when he referred to

> proof commensurate with the gravity of the allegations or of the accusation of theft by the temporary driver. There is necessarily a matter of judgment involved in weighing evidence that goes to the burden of proof, and a trial judge is justified in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered.
>
> p.169-70

[81] It is sometimes said that “clear” and “convincing” proof is required, based on “cogent” evidence. For example the Supreme Court of Canada in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] S.C.J. No. 18, 2003 SCC 19 referred to the practice of requiring “clear and cogent evidence” with respect to allegations of professional misconduct. McLachlin C.J.C. wrote:

> [11] The Committee had three tasks before it in dealing with the allegations levelled against Dr. Q: first, it had to make findings of fact, including assessments of credibility; second, it had to select the appropriate standard of proof; and, third, it had to apply the standard of proof to the facts as found to determine whether the alleged impropriety had been proven. The Committee applied the standard of "clear and cogent evidence", enunciated in Jory v. College of Physicians and Surgeons of British Columbia, [1985] B.C.J. No. 320 (QL) (S.C.), and all parties accepted that this was appropriate. This standard was not challenged in the courts below nor in this Court, and the case law demonstrates that it is routinely used in professional conduct inquiries in the Province of British Columbia. The determination of whether the allegations had been proven to this standard followed irresistibly from the Committee's assessment of the witnesses' evidence, leaving credibility as the main issue before the Committee.

(See also *Dhawan v. College of Physicians and Surgeons of Nova Scotia* (1998), 168 N.S.R. (2d) 201, [1998] N.S.J. No. 170.

[82] The issue of whether a driver was operating a motor vehicle with the consent of the owner does not generally import morally blameworthy conduct. An allegation of driving without, or beyond, the consent of the owner is not one that has any quality of opprobrium. It is not an allegation of sexual assault, deceit, falsehood or other fraudulent conduct. There may well be circumstances where an owner is alleging actual theft by a third party. More typically the issue involves a simple misunderstanding between the owner and the person operating the vehicle.

The situation may even rise to the level of an allegation of an offence sometimes referred to as “joy riding” (see s.335 of the Criminal Code.)

[83] *Morash v. Burke, (supra)* is the last decision relied upon by Dominion on this issue. The facts are unusual. The plaintiff was a security officer for The Bay. He was struck by a van in the mall parking lot. The plaintiff sued Charles Burke who he alleged to be the driver of the van. The plaintiff also brought an action against Jerome Thomas as the owner.

[84] The plaintiff had arrested Burke for shop lifting. The police were called. Burke was charged and then released on a Promise to Appear. Shortly afterwards the plaintiff observed another man steal a pair of jeans and exit the store. As the plaintiff pursued the shoplifter he heard a squeal of tires. He looked over his shoulder and saw a gray van speeding towards him. He put his hands up and the van struck him and knocked him down. He testified that as the van was coming toward him he saw the driver and immediately identified him as the man he had caught and he had arrested for shoplifting some minutes earlier. That man was Charles Burke. Other identifying features of the van were noted. Eventually the van was located. When the police asked who owned the van, a male by the name of Jerome Thomas, said “It’s mine”. Thomas later claimed that he had sold the van to one Laura Marsh. Wright J. emphatically rejected his evidence. He found:

> [48] Here we have a witness whose testimony is rife with inconsistencies, contradictions, and admitted lies at his earlier discovery who would have the court believe that he can selectively identify a date of on or about December 2, 1999, as the date of the sale of the van by the weakest of benchmarks (the birthday of his drug supplier's son who he obviously didn't know). This he purports to be able to do going back to a time period when his memory was clouded under the haze of a powerful cocaine addiction.
>
> [49] For all the reasons I have just recited, I find Mr. Thomas' evidence on the issue of the ownership of the van at the material time to be neither credible nor reliable. The version of events which he gave did not stand up to cross-examination and is highly improbable. Moreover, it is completely uncorroborated. I simply do not accept Mr. Thomas' assertion that he was no longer the owner of the van on December 4, 1999 and indeed, have no hesitation in finding on a balance of probabilities, on the whole of the evidence, that Mr.

> Thomas was in fact the owner of the vehicle when the hit and run incident occurred.

[85] With respect to the identity of the driver, Wright J. accepted the evidence of the plaintiff that it was Charles Burke who ran him down in the parking lot.

[86] On the issue of onus Wright J. observed:

> [67] Counsel for ING has cited three decisions of this court in which it was recognized that the presumptions created by the legislative provisions aforesaid place a considerable burden on the owner (or insurer thereof) to establish that the operator of the vehicle at the time of accident was driving it without the owner's consent. The cases referred to are *Goudey v. Malone* (also reported as *CGU Insurance Co. of Canada v. Noble*) (2003) 220 N.S.R. (2d) 92; *Garrison v. Lively* (1977) 27 N.S.R. (2d) 489; and *Powers v. Pottie Estate* (2000) 185 N.S.R. (2d) 111. As Justice Richard put it in Powers (at para. 11):
>
> > The law places a burden on the owner of a motor vehicle and presumes that the automobile is being driven with the consent of the owner unless there is sufficient evidence to the contrary to find, on a balance of probabilities, that there was no such consent.
>
> [68] Applying that legal principle to the case at bar, the burden hence falls on Mr. Thomas and Allstate to establish, on a preponderance of evidence, that the driver of the van, Charles Burke, did not have Mr. Thomas' consent to operate it. As Justice Richard pointed out in *Powers*, this is a negative burden and very difficult for the bearer of that burden to prove, especially where the driver of the vehicle has not testified. Because the whereabouts of Charles Burke are unknown, the only evidence before the court in rebuttal of the presumption of consent is that of Mr. Thomas himself who maintains that he does not know Charles Burke and that he never authorized Mr. Burke or anyone else (other than Ms. Marsh) to drive his van.

[87] After having considered these authorities I am not at all convinced that the burden on the owner to rebut the presumptions mandated by s.248 of the *Motor Vehicle Act* is anything other than on a simple balance of probabilities. This is a straight forward and well recognized concept. In *The Law of Evidence in Canada*, (*supra*) it is described succinctly as:

> Simply put, the trier of fact must find that "the existence of the contested fact is more probable than its non-existence." Conversely, where a party must prove the negative of an issue, the proponent must prove its absence is more probable than its existence.
>
> p.155

[88] To satisfy this onus there is no general requirement that the evidence amount to clear and convincing proof based on cogent evidence.

[89] To accede to the submissions of Dominion to add the adjective "heavy" to legally describe the onus would be to introduce an unnecessary level of vagueness and uncertainty. There may well be situations where it is difficult for the owner, or the insurer litigating on behalf of the owner, to meet the burden. This was recognized by Richard J. in *Powers v. Pottie Estate* (*supra*) and by Wright J. in *Morash v. Burke*. However, difficulty in meeting the burden should not be confused with a proper description and application of the burden that the owner must meet.

TEST FOR IMPLIED CONSENT - GENERAL AUTHORITY

[90] The parties are in agreement that the starting point to determining the issue of implied consent is the decision by the Supreme Court of Canada in *Palsky v. Humphrey*, [1964] S.C.R. 580. Despite this concurrence there remains some uncertainty with respect to the question of what is the correct approach to determine the presence or absence of implied consent. The uncertainty centres around the question of whether the test is objective, subjective or some combination.

[91] It is well recognized that consent can either be express or implied within the meaning of s.114(1) of the *Insurance Act*. Section 248 (4) of the *Motor Vehicle Act* creates a presumption that an immediate family member shall be deemed to be operating the owner's motor vehicle within the scope of "a general authority" from the owner. None of the parties have suggested that "general authority" means

anything other than an express or implied consent of the owner. But what is implied consent and how and when can it be found to exist?

[92] It can certainly be argued that the presence or absence of implied consent should be determined from a subjective point of view of the owner. Ownership connotes control. With control comes the power to give or withhold permission. Permission can be general or come with limitations or conditions. It is well recognized, at least in Nova Scotia, that what was in the mind of the owner with respect to the appropriate limits or conditions on use can be determinative and sufficient to rebut the presumption of implied consent. (see for example: *Newman v. LaMarche* (1994), 131 NSR (2d) 165, [1994] N.S.J. No. 219 affirmed (1994) 134 N.S.R. (2d) 127, [1994] N.S.J. No. 457 (C.A.); *MacNeil Estate v. Gillis* (1995), 138 N.S.R. 1, [1995] N.S.J. No. 55 (C.A.); *The Citadel General Assurance Co. and Bellefontaine v. Boutilier and ING Halifax* (2005) N.S.S.C. 189, affirmed (2006), 245 N.S.R. (2d) 40, (2006) NSCA 69.

[93] However, the subjective belief of the owner is not the sole determining test. First of all, from a practical point of view, if an owner says that he or she did not consent and would not have consented if asked, but the circumstances are such that make that assertion contrary to other known facts, then the burden on the owner to rebut the presumption of existence of a general authority would not likely be satisfied.

[94] Where an owner claims that he or she did not consent the claim must be assessed in light of all of the circumstances to determine whether it is credible and reliable. Furthermore a court can infer that the owner did in fact consent to the use of the vehicle, taking into account all of the circumstances.

[95] There is also some support for the view that the Court should look at the issue from the point of view of the driver. However, examination of the issue from the point of view of the driver in no way suggests a subjective approach *qua* the driver. It is really nothing more than a tool in assessing whether there was an unsaid permission, a tacit understanding, for the driver to use the vehicle.

[96] If the driver is available and does give evidence, that evidence can shed light on why he or she did not believe they had permission or consent to use the vehicle. It may well constitute valuable evidence about the circumstances including prior use. The evidence of the driver may well differ from that of the owner with respect to the circumstances including past use and practice and other issues relevant to whether or not there was implied consent.

[97] There are no shortage of cases that have been called upon to determine the existence or absence of implied consent. The factual circumstances are diverse.

[98] As noted earlier, *Palsky v. Humphrey* is one of the leading decisions. Vicarious liability was sought to be affixed to the owner of a car by virtue of s.130 of the *Vehicles and Highway Traffic Act* R.S.A. 1955, c.356, which provided:

> **130.** In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle upon a highway, a person driving the motor vehicle and living with and as a member of the family the owner thereof and a person who is driving the motor vehicle and who has acquired possession of it with the consent, express or implied, of the owner thereof shall be deemed to be the agent or servant of the owner of the motor vehicle and to be employed as such, and shall be deemed to be driving the motor vehicle in the course of his employment, but nothing in this section relieves any person deemed to be the agent or servant of the owner and to be driving the motor vehicle in the course of his employment from the liability for the damages.

[99] Harvie was not a member of Humphrey's family. Harvie and Humphrey had a very close and friendly relationship. Harvie had driven Humphrey's car on many occasions with Humphrey present, and on some occasions without him. On a Friday Harvie had repaired Humphrey's car. He drove it without asking permission. Humphrey reprimanded him, telling him he should not have taken the vehicle without letting him know. On Saturday Harvie drove Humphrey to town to get his mail and a spare tire. Harvie proposed to Humphrey that they both go to a dance in Lethbridge that night in Humphrey's car. Humphrey declined telling him that the car had gone far enough for one day and that either he or the car was not going anymore. In the afternoon, Harvie took Humphrey's car without Humphrey's permission or knowledge. Harvie drove the car to a nearby town where the tires were repaired. On Saturday evening Harvie was driving

Humphrey's car when it became involved in a collision. Harvie and some of the other occupants of the other car were killed. Others were injured.

[100] The trial judge found that there was implied consent. The Court of Appeal, by a majority decision concluded that the trial judge erred (Smith C.J.A. and Johnson J.A., Porter J.A. dissented.) On further appeal to the Supreme Court of Canada the unanimous decision by Spence J. preferred the analysis of Porter J.A. and reinstated the trial judge's conclusion.

[101] Smith C.J.A. quoted the decision of the learned trial judge as follows:

> The learned trial judge said:
>
> > Mr. Virtue referred me to a number of cases with which I am reasonably familiar, and I too have made some search, and I have not found any case that specifically deals with the problem I am now about to state, and that the manner in which the terms of the statute pointing to implied consent are to be construed. It is my conception of the meaning of that statue that in dealing with the implied consent it means that one must approach the problem in a somewhat subjective fashion from the point of view of the person who was driving. That is to say whether under all of the circumstances the person who was driving would have been justified in deeming that he had an implied consent to drive.
>
> (1963), 43 W.W.R. 625 at p.627-8

[102] With respect to this test Smith J. A. wrote:

> With every respect to the learned trial judge, my view is that he applied the wrong test in giving consideration to the question of whether the appellant had impliedly consented to Harvie acquiring possession of the vehicle. On behalf of this division in *Stene (an Infant by next friend) and Lakeman Construction v. Evans and Thibault* (1958) 24 WWR 592, at 600, varying (1957) 22 WWR 599 (Alta. App. Div.), McBride, J.A. said:
>
> > The test is not the knowledge or belief of the driver for the time being as to who is the true owner, but lies in the facts and circumstances under which possession was handed over by the true owner, in this case Evans.

> My view is that by analogy the case at bar is not to be approached in a subjective fashion from the point of view of the person who was driving in order to ascertain whether under all the circumstances the person who was driving would have been justified in deeming that he had an implied consent to drive; that the test is whether the plaintiffs have sustained the burden of establishing by the evidence that the driver in fact had acquired possession of it with the implied consent of the owner, irrespective of what the driver "deemed" to have been the situation.
>
> p.628

[103] Smith C.J.A. concluded the trial judge had erred in his conclusion there was implied consent in light of Humphrey's direction to Harvie that the car was not to be used by him again that day. He wrote:

> ...It was for the appellant at all times to grant or withhold consent as he saw fit and the whim of Harvie, if he had this whim, that it might be advisable to take the car and have the tires fixed does not assist in establishing consent in the particular circumstances. The taking was in my view wrongful and without the appellant's implied consent....
>
> p.629

[104] It therefore can be seen that Smith C.J.A. was of the view that what Harvie concluded ("deemed") was not determinative, but it was what the owner subjectively believed or felt that determined the issue of implied consent.

[105] Porter J.A., after referring to the same analysis as quoted by Smith C.J.A. also referred to the following comment by the learned trial judge:

> Now at the moment that he did so I am sure that Harvie would quite properly feel that Mr. Humphrey, regardless of what he may have said in the reprimand, would not object to the car being taken by him, Harvie, so that Harvie, in my view, at the moment that he took the car was entitled to assume that he was doing so with the implied consent of Humphrey.

p.630

[106] Porter J.A. agreed with the proposition that if the learned trial judge meant that the subjective belief by Harvie with respect to the owner's attitude was the determining factor, then the learned trial judge was wrong. Porter J. A. wrote:

> It seems clear that what Harvie thought about what Humphrey thought cannot be the determining factor. Nevertheless, Harvie's conduct may well be available to the court as one of the circumstances to be considered in determining what Humphrey had in his mind about the use of the car by Harvie without Humphrey's express consent. It becomes necessary, therefore, to review the facts and circumstances under which possession of the car was taken by Harvie on the day of the accident.

p.631

[107] Porter J.A. went on to analyse the evidence. He noted the error by the trial judge and relied on by the majority, that Humphrey had refused to lend the car to Harvie that day. Humphrey really only said he was not going out with the car anymore that day. Porter J.A. approached the issue of implied consent on an objective basis. He wrote:

> Contemplate the scene at Humphrey's place on Saturday morning - flat tires, no pump, Humphrey's feet preventing him from walking any distance, Harvie's car gone from the farm, Harvie under a duty to return to work at Darragh's. Looking at the state of Humphrey's mind, the only possible solution to his helpless isolation was to send Harvie to town to get the tires fixed. It seems to me that consent can be implied because it is clear that had it been sought it would have been granted as a matter of course. In my opinion the facts and circumstances surrounding the use by Harvie of Humphrey's car on this and other occasions imply consent by Humphrey.

p. 635

[108] Spence J. wrote the unanimous decision for the Supreme Court. With respect to the above quoted conclusion by Porter J.A., Spence J. wrote:

> I am of the opinion that Porter J.A. drew the proper inferences from the evidence and proceeded upon the proper principles of law.
>
> p.588

[109] With respect to the criticism by Alberta Court of Appeal of the trial judge's approach to the issue of implied consent, Spence J. wrote:

> I am of the view that the learned Justices of Appeal interpreted too narrowly the words of the learned trial judge and when he said:
>
> > That is to say whether under all of the circumstances the person who is driving would have been justified in deeming that he had an implied consent to drive.
>
> What the learned trial judge was doing was putting to himself the question whether all the circumstances were such as would show that the person who was driving had the implied consent of the owner and therefore, of course, whether he would have been justified in deeming that he had such consent. In fact, the learned trial judge did examine with very considerable detail all of the circumstances which go to show whether the driver Harvie had the implied consent of the owner Humphrey to drive the vehicle in question...
>
> p.582-583

[110] In my opinion, the test articulated by the trial judge in *Palsky v. Humphrey* is not a straightforward subjective test at all. What was proposed was not merely a consideration of what the driver subjectively believed, but a consideration from an objective point of view, of whether the driver would have been justified in concluding he had implied consent to drive. The test articulated by the trial judge In *Palsky* is, in my opinion, nothing more than a useful way of testing the existence or absence of implied consent from the owner.

[111] The appropriate approach to the issue of implied consent has been addressed in a number of decisions. In *Canada (Attorney General) v. Mason* (1990), 104 N.B.R. (2d) 130, [1990] N.B.J. No.142 Creaghan J. identified the test and described it as follows:

> [16] The test to be applied by a trial judge to decide this question is whether all the circumstances were such as would show that the driver would have been justified in deeming that he had the implied consent of the owner to have possession of the vehicle at the time the negligent operation took place. The test is not subjective as to whether the driver believed he had consent. The test is objective as to whether it was reasonable in the circumstances that the driver would have been justified in deeming he had consent. *Palsky et al v. Humphrey et al*, [1964] S.C.R. 580.

[112] The description of the test as being solely objective was rejected by Rooke J. in *Jamieson v. Draper,* [1994] A.J. No. 1098 (Q.B.). Rooke J. considered that the Supreme Court of Canada in *Palsky v. Humphrey* was not setting an objective test, nor rejecting a subjective test as the sole test but was rather, applying both tests. He wrote:

> [38] There is one case to the contrary, at least, one that has been brought to my attention -- and that is the case of *Attorney General of Canada v. Mason*. More correctly cited, *Canada (Attorney General) v. Mason*, (1990), 104 N.B.R. (2d) 130, 261 A.P.R. 130 (Q.B.) There, at paragraph 16, Justice Creaghan of the New Brunswick Court of Queen's Bench, in 1990, said that the test was not subjective but that it was objective. I specifically disagree with that view, in favour of the view propounded by Justice Legge.
>
> (Affirmed on appeal (*Ingram v. Draper* [1996] A.J. No. 887 (C.A.) but without reference to the issue of the appropriate test.)

[113] Creaghan J. reaffirmed his analysis in *David R. Gillard Ltd. v. Cormier* (1999) 221 N.B.R. (2d) 155, [1999] N.B.J. No. 548 where he wrote:

> [39] It should be noted that my statement of the test as I take it from *Palsky* has been considered as incorrect. I refer to the decision of the Alberta Court of Queen's Bench in *Jamieson v. Draper*, [1994] A.J. No. 1098, where it is held that

> the test laid down by the Supreme Court of Canada in Palsky is both a subjective and an objective one. I have no doubt that a driver's actual belief that he or she had consent is a relevant consideration, however in the final analysis I maintain that *Palsky* directs that the issue turns on the reasonableness of whether that belief was justified.
>
> (affirmed on appeal, without reference to this issue (2000) 230 N.B.R. (2d) 1, [2000] N.B.J. No. 355)

[114] In *Morrison (Committee of) v. Cormier Vegetation Control Limited et al* [1996] B.C.J. No. 612 Boyd J. considered the question of implied consent and wrote:

> [61] The issue is therefore whether it can be said that VDG had Carter's implied consent to acquire possession of the vehicle. The case authorities establish that implied consent will not arise unless it can be said that if permission had been sought, it would have been granted by the owner as a matter of course. The mere possibility that consent would have been granted is not sufficient. In an effort to determine this issue of fact, the Court regularly examines all the circumstances that existed at the time the driver acquired possession of the vehicle including the relationship between the owner and driver (*Godsman, Palsky, Usher*); the circumstances in which the owner had given or refused consent in the past (*Godsman, Palsky, Besse*); any particular circumstances of the driver or the owner (*Usher*); any relevant and particular characteristics of the vehicle (*Palsky, Jaroszuk v. Quewezance* (1992) 66 B.C.L.R. (2d) 171 (B.C.C.A.)); and the use to which the driver proposed to put the vehicle (*Palsky, Usher*). All of these matters are examined by the Court the relevant time being the time possession of the vehicle was acquired.
>
> [62] While the implied consent test is sometimes described by the Courts as an objective test, it necessarily imports a subjective element into that determination. Put another way, would this particular owner, and all the circumstances, have consented to the driver acquiring possession of the vehicle as a matter of course? If the answer to that question is "yes", then the driver has proven that he or she drove the vehicle with the owner's implied consent.

[115] This decision was overturned on appeal (*Morrison (committee of) v. Cormier Vegetation Control Limited* (1996) 25 C.C.E.L. (2d) 135, [1996] B.C.J. No. 2601,

but only on the basis there was express consent. The British Columbia Court of Appeal did not discuss the issue of implied consent.

[116] The only reported case in Nova Scotia that appears to have directly addressed the subjective/objective dichotomy is that of *Heydeman et al. v. Collicut et al.* (1990) 100 N.S.R. (2d) 237, [1990] N.S.J. No. 573. An application was brought to determine whether the owner's insurer had an obligation to respond to the plaintiff's claims. Collicut was the owner of a Chevrolet motor vehicle which was insured under a valid third party liability policy. McManus had no license and was not a named insured under Collicut's policy. McManus was a fisherman. He was generally home only a few days each month. On the day of the accident he arrived home in the early morning hours. Collicut, who had worked until midnight, was asleep. McManus needed to be back to the fish plant to supervise the off loading of the catch. He unilaterally took the spare key to Collicut's car and drove back to the fish plant. He intended to be back home no later than 10:00 or 10:30 a.m. However the unloading of the fish was delayed. McManus then drove a workmate to a tavern and then to Bridgewater. On his return trip to Lunenburg the accident with the plaintiffs occurred.

[117] There was no issue of any express consent.

[118] The evidence was that Collicut knew that McManus had driven her car, without her permission, on two or three occasions before the accident and once with her permission. Although she did not want to cause a confrontation she did say to McManus that she wanted to be asked before he used the car. McManus acknowledged that he had been instructed never to take the car without her permission. She had told him that many times. She had also bawled him out about it a couple of times and made it very clear that if there was any alcohol involved the car was taboo.

[119] Bateman J.C.C., as she then was, wrote:

> [19] Counsel for the applicant Judgment Recovery argue that, in the above circumstances, consent can be implied. Their position is that Collicutt did not take reasonable steps to prevent McManus from driving the car, in that she left a key

> within access; that McManus had a history of driving the car with permission; that Collicutt had not been emphatic in her prohibition on McManus using the car; and that she did not take reasonable steps to retrieve the car from McManus when she learned that it was gone.
>
> [20] Counsel for the insurer argue that the matter of implied consent turns entirely on the state of mind of the driver and owner. Simply put, since neither the driver nor the owner felt there was any implied consent by Collicutt to McManus driving, that ends the issue. In other words, because McManus knew Collicutt did not want him to drive the vehicle without permission and certainly did not want him to drive while under the influence of alcohol consent cannot be implied.
>
> [21] Upon reading the cases on this issue I am satisfied that the state of mind of the owner and driver are not always absolutely determinative of the issue of implied consent, however, they are strong factors to be considered. If, upon analyzing all of the surrounding circumstances, objectively, it appears to the trier of fact that the reasonable person observing the situation would conclude that the owner was consenting to the vehicle being driven by the driver then the protestations of both owner and driver would have to be scrutinized with extra care to ensure that they were not simply self-serving positions in the circumstances.
>
> [22] The first question, then, is: can it reasonably be said that the circumstances in this case give rise to an inference that Collicutt was consenting to McManus' operation of the vehicle.

[120] More recently the issue of the correct approach was referred to by Stewart J. In *Belefontaine and the Citadel General Assurance Co. v. Boutilier and ING Halifax* (2005), NSSC 189. She wrote:

> [8] The question to be asked is whether upon analysing all the surrounding circumstances objectively, a reasonable person observing the situation would conclude that Randall had the implied consent of Ross to drive the truck. (See *Palsky v Humphrey*, supra; *Heydemen et al v. Collicutt et a1*., 100 N.S.R.(2d) 237 at para 21; *Godsman v. Peck*, 87 B.C.A.C. 53 at para 26-30.) The state of mind of the owner and driver are strong factors in determining the issue of implied consent.

Affirmed (2006) 245 N.S.R. (2d) 40 (C.A.), 2006 NSCA 69.

[121] Based on my review of these authorities it is my opinion that any claimed subjective belief by the driver and the owner are but two of the circumstances that ought to be considered by the trier of fact in deciding whether there was implied consent. The Court must examine all of the circumstances, including the individual characteristics of the owner in coming to a determination on the issue of implied consent.

FINDINGS ON GENERAL AUTHORITY - IMPLIED CONSENT

[122] The necessary facts have been established to trigger the statutory presumption that Dearran Towns was operating the Ford Mustang within the scope of a general authority from the owner. Evidence has been called on behalf of the owner in an attempt to establish, on a balance of probabilities, that there was no implied consent. It is patently a question of fact.

[123] I find as a fact that the operator of the 1990 Ford Mustang, Dearran Towns was not operating that vehicle as a family car within the scope of a general authority from the owner. I accept without reservation the evidence given by the defendant David Towns and by his wife, Linda Towns. They gave their evidence in a forthright and candid manner. They would have no reason to do anything other than tell the truth on the issues before me. Their evidence was credible and I accept it. Any uncertainties or minor inconsistencies had more to do with the lengthy passage of time between the events of 2002 and when the trial was held. Indeed Mr. and Mrs. Towns were not even aware of any dispute about the events surrounding April 6th, 2002 until some years later.

[124] Their description of the household circumstances make it obvious that from any point of view there was no tacit or unsaid permission, or general authority, for Dearran Towns to operate any of the motor vehicles. To their knowledge, he, nor any of his siblings had ever done so before. I find as a fact that had Dearran Towns sought permission from either of his parents it would not have been granted as a matter of course. Quite the contrary, it would have been emphatically refused. The discovery evidence of Dearran Towns is telling. He testified at discovery as follows:

Q. 287 Okay. That morning, are your parents home?

A. No.

Q. 288 So tell me about – yes. I won't interrupt again. Go ahead and I will ask my questions afterwards?

A. No, they weren't home. We decided to go to Dartmouth to the MicMac Mall in my mother's car, without her permission. **There was no implied consent at all. I was totally just taking her car, if you want the truth of it. And drove to MicMac Mall, parked the car, parked it away from other cars, because I had just essentially stolen my mother's car. I didn't want to get caught. It was really stupid.** Well remembering it – that was – it was really stupid. So we parked the car. I parked the car and I put it on e-brake.

Q. 289 Are you sure you did that?

A. Absolutely. 100 percent. I have been driving for – been driving – I was driving a standard for too long. Driving a standard for too long. I put it in park and I put on the e-brake.

Q.290 And when you say e-brake, what do you mean?

A. The emergency brake. The parking brake.

Q.291 Now do you have a specific recollection of putting on the parking brake or is that just your habit from driving –

A No, I remember doing it. I remember putting the car in park and putting on the e-brake. And we went into the mall and came back out an hour later. The car was gone. **I was like oh no, not only did I take my mother's car without her permission somebody stole it from the MicMac Mall parking lot**. So, we went into the mall and talked to the security there and they finally said no, your car is not stolen, it rolled in and hit another car on the highway. At which point I ran the entire length of the parking lot from the doors and – to the site of the accident to see what had happened and at which point the police were already on the

scene. I got a ticket from the police for driving notwithstanding the conditions of my license which was actually quite lenient for their – from them because I only had my learner's permit at the time this happened for civilian vehicles.

Exhibit #3 p.9-10)

[125] In addition Mr. Pritchard tendered the following additional excerpt from Dearran Towns' examination for discovery.

Q. 339 Right. So would your father ever let you, say if you had a licensed friend, someone with you, take his car?

A. No.

Q.340 Would your mother do that?

A. No.

Q.677 Sure. I think I understand you on that. Would it be fair to say that some of the things we are asking you about here today are several years ago and you a little fuzzy on some of the details?

A. Definitely.

Q.678 **Would it be fair to say though that you are certain that you took your parents' car, or your mother's car without permission to do so?**

A. **I did take the car without the permission.**

Q. 679 **And would it be fair to say that you had absolutely no expectation that she ever would have let you do this if you had asked her first?**

A. **No, she probably would have said no. You are absolutely right.**

[126] While it is difficult at the best of times to determine issues of credibility from a discovery transcript, the testimony of Dearran Towns is clear that he did not think for an instant he had consent from either of his parents. His subjective view was that he was plainly nervous. He said that he had essentially stolen his mother's car and he did not want to get caught. His reaction on discovering the red Mustang gone from where he parked it is consistent with the subjective view he expressed that he knew he did not have her consent.

[127] The one and only contradiction is between the discovery examination testimony of Dearran Towns and the *viva voce* testimony of his parents is the reference by Dearran Towns to his mother being in the car "usually" when he drove it. There is no elaboration at discovery as to what Dearran Towns meant by this comment. Counsel for Dominion did not challenge Mr. and Mrs. Towns in cross-examination on this issue. As I noted earlier, I have accepted the evidence of Mr. and Mrs. Towns. In coming to my conclusion I considered the alleged discrepancy between the evidence of Dearran Towns at discovery and the evidence of Mr. and Mrs. Towns before me.

[128] I am more than satisfied, on a balance of probabilities, that the presumptions set out in s.248 had been rebutted. Dearran Towns had no general authority, tacit understanding or implied consent to operate the Mustang; neither was he the servant or agent of the owner.

[129] In coming to this conclusion I have not overlooked the argument by Dominion that either as a determining factor in implied consent, or as an independent route to vicarious liability, there was a failure by the owner to take reasonable steps to prevent Dearran Towns from driving the Ford Mustang.

[130] The argument was expressed in part, as follows:

> In order to escape vicarious liability for the driver's actions, a vehicle owner must take reasonable steps to ensure the driving does not in fact occur. In many cases the issue is whether the owner did enough, aside from refusing permission, to prevent the driver from driving the vehicle.

In the often cited case of *Usher v. Goncalves* (1969), 9 D.L.R. (3d) 15 (B.C.S.C.), the Court found that consent to drive a motor vehicle may be implied, notwithstanding the express refusal of the owner to permit such driving, if the owner is aware that the driving will nonetheless likely take place (**Tab 14).** The Court commented:

> *There is one comment I should make on a suggestion by Mr. MacDonald that "express refusal cannot assist the owner", and I agree,* ***if the owner is aware someone else is going to probably drive the car, the mere fact that the owner expressly refused consent to drive without taking steps to assure such express refusal is carried out****, and with the knowledge that consent, or the actual driving by some third person will probably take place,* ***then the express refusal to allow that or any other act connecting with the driving is no defence (Tab 14) at p. 5). (Emphasis Added]***

[131] Dominion relies on the evidence from Mr. and Mrs. Towns that they did not expressly say to Dearran Towns that he was not permitted to drive and by the fact that a spare set of keys was left hanging on a key rack by the back door. It is argued that these circumstances, coupled with Dearran Towns being a young man, confident in his own abilities, and perhaps even raging with testosterone are sufficient to preclude the rebuttal of the presumption of operating the Mustang as a family car within the scope of a general authority from the owner.

[132] This argument is without merit. General availability of keys to a motor vehicle can certainly be a relevant circumstance, but it could hardly be viewed as determinative. There was no need for Mr. and Mrs. Towns to wake Dearran up to expressly prohibit him from driving the Mustang. To their knowledge, he had never driven the Mustang before. The fact that he was a young male, confident in his own abilities is plainly insufficient to trigger an obligation on Mr. And Mrs. Towns to somehow do more.

[133] The evidence is overwhelming that Dearran knew he was not permitted to drive the Mustang. General availability of keys may well be a relevant circumstance, but in this case it is certainly not a significant one. The failure to expressly prohibit, the keys left hanging on the rack, and the Towns' awareness of Dearran's confidence are matters that I have considered in determining whether or not there was implied consent.

[134] The contention that to escape vicarious liability, an owner must take reasonable steps to ensure that driving does not in fact occur, is also without merit. In support of this proposition Dominion cites *Usher v. Goncalves* (1969), 9 D.L.R. (3d) 15 (B.C.S.C.).

[135] The facts of *Usher v. Goncalves* are not very detailed. However, it appears that the owner of a car freely gave her consent for her son to use the car. Normally the son asked permission. There was no suggestion that permission was ever refused. However, he never asked for permission to let anyone else drive the vehicle. The son gave his consent for Goncalves to drive. Goncalves had an accident. Ruttan J. concluded that there was no implied consent. He wrote:

> In the present case, Goncalves knew very well that he did not have the express consent of the lady and he knew the lady had no knowledge that he might drive. He knew that she would have objected to the use of the car by her son in driving across the boundary line in order to get dates. In fact, the whole transaction was cloaked in a form of conspiracy. All the boys involved carefully kept the information from the parents knowing the parents would not consent. How can it be then stated she would give implied consent to something he would not venture to seek express consent for.
>
> p.19

[136] Ruttan J. acknowledged that an owner of a motor vehicle could be held to impliedly consent if he is aware that the motor vehicle is obtained by the person borrowing it, with the intention of it being driven by another person. It is in this context that Ruttan J. wrote:

> There is one comment I should make on a suggestion by Mr. MacDonald that “express refusal cannot assist the owner,” and I agree, if the owner is aware someone else is going to probably drive the car, the mere fact that the owner expressly refused consent to drive without taking steps to assure such express refusal is carried out , and with the knowledge that consent, or the actual driving by some third person will probably take place, then the express refusal to allow that or any other act connected with the driving is no defence...

[137] Assuming without deciding that the *obiter* comment by Ruttan J. is correct, it has no application to the facts that are before me. This is not a case about delegated consent. Not only that, there is no basis to suggest that Mr. and Mrs. Towns should have foreseen that Dearran would likely drive and take steps to prevent it. In any event I do not accept the proposition that a vehicle owner, in order to escape vicarious liability for a driver's actions must take reasonable steps to ensure that driving does not occur. No authority is cited for this proposition.

NEGLIGENT MAINTENANCE

[138] Considerable evidence was called with respect to the mechanical condition of the 1990 Ford Mustang immediately after the accident, and some months later. The Mustang was not new when David Towns purchased it for his wife. He testified that prior to purchasing it, he took it to a third party who may have been a licensed mechanic at one time, but had since retired. Mr. Towns wanted the vehicle gone over to make sure it was safe for his wife to drive and he did not want to buy a lemon. He recalled that it was reported to him the front brakes were "iffy" so he had those redone. This work was not carried out by the third party but was done at Canadian Tire.

[139] Although the car was purchased for Linda's use, he would on occasion drive it. This was usually when the vehicle needed to be safety inspected or when his wife reported a noise or some other maintenance issue. He testified that during this period of time, he was working in an office at the Spryfield Mall. There was a Canadian Tire in the mall and he would have them do the service work, dropping it off in the morning and picking it up at the end of the day to take home. He also testified that some maintenance work may have been done at the Canadian Tire in Sackville, but those are the two places he used to have mechanical work done on the vehicle. Routine maintenance such as tire changes and oil changes would also be done at the Canadian Tire locations. He acknowledged he may also had an oil change done at Irving if it was convenient.

[140] David Towns was adamant that the Mustang was safety inspected. He testified it had been inspected in August 2001. He explained that he was confident in this as both vehicles were done that month - that's the month the insurance "rotated around" and that was the month they had the safeties done. When he drove the vehicle, he noticed no mechanical problems. If his wife reported a noise, a warning light or other maintenance issues he would look after it.

[141] After the accident he picked the vehicle up from the impound lot and drove it home. When he examined the car, it did not appear to him there to have been much damage - he described it as "there was hardly a scratch". When the vehicle was in his driveway he did pick up a piece of something and put in into the back of the car. He does not know what it was. Arrangements were made by an adjuster for his insurer to have the Mustang inspected at a Ford Dealership, Fairley & Stevens.

[142] After the inspection at Fairley & Stevens he testified the Mustang was disposed of. He said his insurer refused to insure it. It was put on a truck and taken to his home at Krista Drive. It was too expensive to repair, and after any repairs, they would still have an old car. In addition, he did not think it was worth repairing as Linda would not drive it. He does not recall exactly when he got rid of the Mustang. He said it could have been three or five weeks after the incident.

[143] The Mustang was disposed of by being sold for salvage. Mr. Towns did not recall the name of the dealer. It was a name he got from the Yellow Pages. He fully expected that the vehicle was sold by June 2002. He received $200.00 from the scrap dealer. On reflection he realized he made a very bad bargain as the Mustang had brand new tires on it and they were worth $800.00. After being sold to the scrap dealer he had no further dealings with the Mustang.

[144] It is abundantly clear that the Mustang was not scrapped. A young student, Cheryl-Anne Critchley purchased the Mustang in August 2002. She was 18 years old. She purchased it so she could take it with her to UNB and rely on it for transportation for her work as a gymnastics coach.

[145] A certified copy of records from the Registry of Motor Vehicles were produced at trial. David Towns acknowledged that it was his signature on the Transfer of Title Certificate of Sale. It was put to him in cross-examination that he signed this document on the date endorsed on it, of August 8th, 2002. Mr. Towns replied "apparently so".

[146] The evidence of Linda Towns with respect to the maintenance of the Mustang was largely consistent with that of her husband. She testified the Mustang had a valid inspection sticker. It would not be without one. As of April 6th, 2002 she knew of no problems with the vehicle's operation. As far as she was aware, the brakes were fine. She testified that she would drive the vehicle to the Bedford Place Mall every workday. She was totally unaware of any problems. She said it was "safetied". She denied any suggestion that the horn was not working. Although she felt sure that it was, she candidly acknowledged in cross-examination that perhaps she did not know.

[147] She testified that it was not her usual practice to engage the parking or emergency brake when she parked the Mustang - she would simply put it in park. It had never been known to her to slip out of gear when it was put into park.

[148] Mrs. Towns testified that the Mustang was not repaired as it would be too expensive to do so. It was not worth it to repair it. The Mustang sat in her driveway for about three or four weeks before it was towed away. She said it was an eyesore to have it in the driveway. Her husband arranged to have it towed away for junk. She candidly acknowledged it could have been three or four weeks after the vehicle had been inspected at Fairley & Stevens or maybe longer. But it was not months and months. When pressed in cross-examination she said it could have been gone by the end of May but it was certainly gone by the end of June. She added she simply could not recall exactly when it was taken away to be scrapped.

[149] Dominion called a number of witnesses with respect to the inspection shortly after the accident and the condition of the Mustang some months later when it was purchased by Cheryl-Anne Critchley.

[150] Gerald Woodbury has been employed for 22 years by Wawanesa. He is a claims auto appraiser. He described his job as assessing damaged vehicles.

[151] His involvement with the 1990 Ford Mustang was to arrange to have it inspected at Fairley & Stevens. He took pictures at the time of the inspection. One of the pictures is of the emergency brake cable. Another shows the brake line and rear brake cables. He acknowledged it shows some fluid over the shock. He did not know what that indicated.

[152] He asked, on behalf of Wawanesa, for "an assembled mechanical inspection" of the transmission. Either the shop manager or a mechanic took it for a test drive. The only limitation to the inspection, in his view, was that it was limited to the transmission and safety of the vehicle. Mr. Woodbury's report to Wawanesa was introduced as an exhibit (Exhibit #1, Tab 7). The description of the work that he requested was "transmission and safety brake system". In the remarks section of his report he wrote:

> Based on a mechanical assembled inspection to transmission with road testing, there was no evidence to support any defects which may of caused transmission to slip from its park position as suggested.
>
> The under side inspection to drive train revealed front safety brake cable broken and the two cables at rear wheels seized from rust, with this problem safety brake system would not be operational.

[153] Mr. Woodbury was cross-examined with respect to his entry on his report: "Driveable NO Temp feasible". He explained that the vehicle was in fact driveable. His entry simply meant that if they were inspecting it for damage from the accident they could put a taillight in it and it would be driveable thereafter. His entry refers only to the collision damage. Because a taillight was broken and the safety brake cable broken he had the vehicle towed back to Mr. Towns' residence at the expense of Wawanesa.

[154] He described the condition of the 1990 Mustang as “average” for its year. From the three codes of poor, fair and good it was his conclusion the Mustang was in fair condition.

[155] Edwin Naugle is the Service Manager at Fairley & Stevens. Mr. Naugle brought with him the original invoice (Exhibit #2) for the work done by Fairley & Stevens on the Mustang on April 24th, 2002. Mr. Naugle testified that Wawanesa asked Fairly & Stevens to do two things - check to make sure the transmission was functioning properly and to investigate why the front parking brake cable had broken.

[156] The first job involved doing a road test with the Mustang. The second was to examine the parking brake cable. Mr. Naugle speculated that the first job would be carried out by conducting a five to ten minute road test. He confirmed that Exhibit #2 reflected that the transmission was operating normally.

[157] With respect to the parking brake cable he could only speculate as to why it was broken. It was obvious it was broken, but whether it was due to corrosion or some other cause he did not know. Mr. Naugle also confirmed, that the rear brake cables were partially seized. He speculated this could have contributed to the front cable breaking. Exhibit #2 provides: “INSPECTED BRAKE CABLES FOUND BOTH TO BE SOMEWHAT SEIZED”.

[158] As noted earlier Cheryl-Anne Critchley purchased the 1990 Ford Mustang in August 2002. Ms. Critchley was not called as a witness. Her parents testified. Both were involved in the purchase and subsequent experience with the Mustang. Neither Mr. nor Mrs. Critchley claimed that they had any dealings whatsoever with David Towns or anyone from Krista Drive in Lower Sackville.

[159] It is obvious that Mr. and Mrs. Critchley and their daughter Cheryl-Anne were “sold a bill of goods”. The only description they could provide as to the identity of the seller was that his name was Victor. They had no information on his address and his whereabouts were unknown.

[160] Mrs. Critchley said that they were told by Victor that he was selling it for a friend. His friend owned a car lot. The Mustang had been traded in. The Mustang was an older vehicle and Victor's friend did not want to sell it on his lot. The explanation for the damage to the right rear of the Mustang was that the lady who had owned it had backed into a garage or something.

[161] Mrs. Critchley testified that when her daughter purchased the Mustang, it was not roadworthy - it did not have a valid safety inspection sticker. There was one on the vehicle, but it had expired. She did not know the date it had expired. She said it was not like the month before.

[162] She and her daughter took the vehicle to be safety inspected. It did not pass. They were told that it needed a number of different things. These included brake cables, brake lines, the horn was not working and it needed a new ball joint. They took the Mustang home, where her husband, who is a licensed mechanic did the work. They then took the Mustang to a different place to have it safety inspected, where it passed.

[163] At some point after the vehicle was inspected her daughter had a problem trying to start it. They discovered there was a problem with the transmission linkage. Although the vehicle appeared to be in park, it was not. This prevented the car from starting. She elaborated on this by saying that when you put it in park, the key would come out. When you went to start it, it would not. Her daughter eventually got rid of the Mustang in December 2003 as she started having a lot of problems with the engine. Mrs. Critchley acknowledged in cross-examination that she really did not know how long the safety sticker had been invalid. She did know that they had to get it safety inspected in order to get it registered to her daughter.

[164] As noted earlier, Terry Critchley also testified. Mr. Critchley works as a heavy equipment mechanic in Fort McMurray. He acquired his qualifications from the apprenticeship program through the Nova Scotia Community College. He worked as an auto technician at a Chrysler dealership for three years. He then switched to truck and transport and became qualified in that area. In all, he had been employed 13 years as a professional mechanic. At one time he was qualified

in Nova Scotia to conduct safety inspections of motor vehicles but he gave that up when he moved to Alberta.

[165] Mr. Critchley's evidence was largely consistent with that of Mrs. Critchley. Mr. Critchley described his examination of the vehicle before buying it. This included a test drive. He noted there were some safety problems with the vehicle, but they could be fixed. He noticed a new brake cable had been installed. The tires were fairly new. He described it as driving "okay for an older vehicle".

[166] It was his recollection that when he bought the vehicle, it would not have passed inspection and the sticker was not current when they purchased it. He sensed that it had expired two to three to four months previously.

[167] He first noticed a problem with the parking brake was when he test drove it. He knew the parking brake system was part of the safety checklist. He checked it by pulling up on the lever to see how much resistance there was. He then put the vehicle into drive to see whether the emergency break would hold. In this case it did not. He said this was because the rear cables were seized.

[168] He offered the further opinion that if someone pulled the parking brake up it would not feel right if the cables were seized. He said they could seize from rust and that this kind of condition could occur from the emergency brake not being used regularly. Mr. Critchley also replaced the two front brake lines as well. This was because when the vehicle was on the hoist the mechanic doing the inspection noticed the lines had rust on them and were wet.

[169] Mr. Critchley also confirmed getting a call one day after his daughter had the Mustang on the road. She complained to him that it would not start. He said they had to knock the shift linkage into park in order to get it to start. He said that once the vehicle was at home, he adjusted the linkage in the vehicle. He explained that the transmission must be in park to activate the neutral safety switch in order for the vehicle to start. He described this as a safety device in vehicles with automatic transmissions so you do not start the car in gear. Furthermore with the transmission in park, it locks the transmission so the vehicle will not move.

[170] The other unusual thing that he discovered was that you could pull the key out of the ignition without the vehicle being in park. Indeed he described being able to do so when driving down the road. He said the reason for this was the worn condition of the tumblers in the ignition lock.

[171] Mr. Critchley acknowledged that his daughter did not have a problem every time starting the vehicle - he called it a periodic problem. He said it happened to her a couple of times. He then repaired it so it would not happen to her again.

[172] On cross-examination Mr. Critchley said he had no concerns about permitting his daughter to drive the vehicle approximately 400 kilometers to UNB He said he did not have concerns as he just had a motor vehicle inspection done and he relied on the motor vehicle inspection work. Although he had also checked it over as well, he was prepared to rely on a motor vehicle inspection.

TEST FOR NEGLIGENT MAINTENANCE

[173] Dominion submitted no authorities on this issue. It originally took the position that David Towns had the burden to rebut the inference that his poor maintenance of the Mustang contributed at least 1%, to the accident in question. However, Dominion later conceded that it bore the burden of establishing negligence on behalf of David Towns and that such negligence caused or contributed, albeit to as little as 1%, to the accident. I accept that this is the correct approach.

[174] For David Towns to be found negligent for the damages that have been caused to Sandra Newell, the Court must find that (a) he owed a duty to Ms. Newell; (b) that he breached that duty; (c) and lastly that damages flowed from that breach.

[175] No one could contest that an owner of a vehicle owes a duty to his or her passengers and to the public to use reasonable care to ensure that their vehicles are safe to operate. However, an owner is not liable for all consequences that may

flow from an accident that happens as a result of a mechanical defect in a vehicle. Liability only occurs for those defects that went uncorrected, when either the owner knew, or should have known by the exercise of reasonable care, of their existence.

[176] In many respects Mr. Towns is in a position analogous to that of a defendant who is advancing the defence of "inevitable accident" - that the collision occurred without negligence by the defendant. The difference is that the defence of inevitable accident is one that is advanced by the driver. Not only must he or she establish that appropriate reasonable care was used in the maintenance of the motor vehicle but that even after the mechanical defect has occurred, all reasonable care was used to avoid the collision. In this case the person who operated or otherwise had care or control of the motor vehicle is not the defendant David Towns. Mr. Towns is not vicariously liable nor directly liable for the negligence of Dearran Towns. The following cases illustrate.

[177] In *Rintoul v. X-Ray and Radium Industries Limited*, [1956] S.C.R. 674 the facts were unusual. The plaintiff was rear-ended. The car that struck him was a vehicle owned by X-Ray and Radium Industries Limited and operated by one of its employees, Albert Ouellette. Ouellette claimed that on the day before the accident he had work done on the brakes. No evidence was called as to what that work was. He testified that prior to the accident he had applied the brakes five times. On each occasion they worked properly. As he was going uphill at a speed of no more than 12 miles per hour, he applied the brakes and found they did not work. He said the brake pedal went to the floor without any braking action. Believing his brakes had failed he applied his hand brakes. The application of the handbrakes reduced the speed but did not stop the vehicle. He was then travelling at 6 miles per hour when he rear-ended the plaintiff's vehicle. However, the police investigated the mechanical condition of the vehicle a few minutes after the accident. They found there was nothing wrong with the brakes on the car being operated by Ouellette. The police drove the vehicle and had it tested. Cartwright J. wrote the unanimous decision for the Court. He held:

> In my view, in the case at bar the respondents have failed to prove two matters both of which were essential to the establishment of the defence of inevitable accident. These matters are (I) that the alleged failure of the service brakes could not have been prevented by the exercise of reasonable care on their part, and (ii)

that, assuming that such failure occurred without negligence on the part of the respondents, Ouellette could not, by the exercise of reasonable care, have avoided the collision which he claims was the effect of such failure.

As to the first matter, assuming that the service brakes failed suddenly, the onus resting on the respondents was to show that such failure could not have been prevented by the exercise of reasonable care. In Halsbury, 2nd Edition, Volume 23, page 640, section 901, the learned author says: --

> **Driving with defective apparatus if the defect might reasonably have been discovered . . . (and other matters) . . . are negligent acts which render a defendant liable for injuries of which they are the effective cause.**

This passage has been approved by McCardie J. in *Phillips v. Brittania Hygienic Laundry Co.* (4) and by Hogg J.A. in *Grise v. Rankin et al*. (5), and, in my opinion, correctly states the law.

In the case at bar the respondents have made no attempt to prove that the sudden failure could not have been prevented by reasonable care on their part and particularly by adequate inspection...

p.678

[emphasis added]

[178] An owner was assigned liability for negligent maintenance in *Fearon v. Toljander et al.* (1984), 28 M.V.R. 180 (B.C.S.C.). The plaintiffs were passengers in a vehicle owned by Rolanne Marie Haigle. The Haigle vehicle was a 1964 Valiant. Haigle had purchased it in September 1981. The defendant Toljander crossed the centre line and struck the Haigle car. He admitted his liability but claimed Haigle was contributorily negligent. This claim was based on the fact that when Haigle saw the Toljander vehicle cross the centre line she applied her brakes and tried to turn the car to the right. Unfortunately only one brake, the left front one was operative. As a result, the Valiant could not be turned to the right.

[179] Proudfoot J., as she then was, found as a fact that there was no doubt that if all four brakes had been operating the car would have reacted in the manner that Haigle wanted - that is to turn to the right. The trial judge found the accident might not have happened at all or if it had, would have been less serious.

[180] An expert who examined the vehicle confirmed only one brake was operating. The vehicle was in a poor state of repair and unfit for the road. Furthermore the wheels were badly aligned and the steering parts were worn, causing wandering and erratic steering. The expert's evidence was that the car would be noisy, pull to the left and the condition of the brakes would be apparent to any driver with any degree of experience. Haigle admitted on discovery that the wheels needed aligning and the car would shake at 45 miles per hour. That was the speed she was travelling the night of the accident. The trial judge found that Haigle was well aware of the many problems the vehicle had and that she well knew it was not fit. She was in breach of her duty to the other persons on the highway to operate a motor vehicle that was not mechanically fit. Fault was apportioned 75% against Toljander and 25% against Haigle.

[181] In *Shaw v. Martin* (1979), 19 A.R. 45 (Alta. D.Ct.) the defendant struck the rear of the plaintiff's vehicle. He testified that when he tried to apply his brakes, they failed. He then geared down and applied his emergency brake, but was unable to stop before striking the plaintiff's car. He testified that he had purchased the vehicle about six weeks prior to the date of the accident. He took it to his brother's garage to have a wheel alignment. He also decided to have the brake system checked. He had the front brake hoses replaced as they were becoming weather-beaten and showed signs of cracking. He apparently made an appointment with a Firestone garage and instructed them to put on new rubber hosing and brake shoes and to do everything necessary to put the brake system in proper order. Although he did not have documentation, the trial judge accepted his evidence.

[182] The defendant called an expert. This witness checked the defendant's vehicle on the day of the accident and found that there was a problem with the braking system. In particular he found a small hole in the steel brake line. The hole would not have been visible to the naked eye. The trial judge, Crossley, D.C.J. concluded:

> [9] In regard to the matter herein, we do have the question of the brakes failing but, in my opinion, there was no way that the failure could have been prevented by the exercise of reasonable care on the part of the defendant. Moreover, in respect to such failure occurring without negligence on his part, could he have, by the exercise of reasonable care, avoided the collision which he claimed was the effect of such failure? In regard to this matter, the defendant gave evidence as to the brake repairs and checking not too long before the accident which are points in his favor.
>
> p. 49

See also *Avalon Telephone Company v. Bardy*, (1961) 47 M.P.R. 126) (Nfld.S.C.).

[183] These principles have been applied in Nova Scotia. In *Bown v. Rafuse*, (1969) 1 N.S.R. 129, [1969] N.S.J No. 72. the defendant's car swerved to the left of centre and struck the plaintiff's vehicle. The defendant claimed that his car went out of control due to a blow out in one of his rear tires. The defendant purchased the vehicle, a 1963 Chevrolet in March of 1967. The manager of the used car department, who sold the vehicle to the defendant, testified that when the car was brought on the lot it was his opinion the tires were in satisfactory condition. The defendant drove 2000 miles between the time of purchase and the time of the accident. The defendant testified that he checked the tires for proper air pressure every time he had bought gas. He had had it on the hoist for greasing and oil change and inspected the tires. At no time before the accident did the car behave abnormally. There was simply no indication of any problem with the tires by visual inspection or the operation of the vehicle.

[184] After the accident the defendant examined the left rear tire. He found there was a cut on the side of it. All the other tires were still in good condition.

[185] Dubinsky J. was satisfied the defendant had established he was not guilty of a lack of reasonable care insofar as the blow out of the rear tire was concerned. Nonetheless he found him to be 100% at fault on the basis that he did not take the appropriate action after the blow out occurred.

[186] What is the standard of care against which the Court is required to measure conduct of David Towns? It is that of “a reasonable person”. The law does not require perfection. It requires the exercise of reasonable care - the kind of care that would be taken in the circumstances by a reasonable and prudent man. Linden in Canadian Tort Law (8th ed., 2006) at p.143 cites as the most complete and accurate description of a “reasonable individual”, to be that of Laidlaw J.A. in *Arland v. Taylor*, [1955] O.J. No.607, [1955] O.R. 131. It is as follows:

> [22]...The standard of care by which a jury is to judge the conduct of parties in a case of the kind under consideration is the care that would have been taken in the circumstances by "a reasonable and prudent man". I shall not attempt to formulate a comprehensive definition of "a reasonable man" of whom we speak so frequently in negligence cases. I simply say he is a mythical creature of the law whose conduct of all other persons and find it to be proper or improper in particular circumstances as they may exist from time to time. He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything a prudent man would do. He acts in accord with general and approved practice. His conduct is guided by considerations which ordinarily regulate the conduct of human affairs. His conduct is the standard "adopted in the community by persons of ordinary intelligence and prudence.”...

FINDINGS AND ANALYSIS

[187] No *viva voce* evidence was called by any party with respect to what actually happened when Dearran Towns, and his friend Kyle Smith, parked the 1990 Ford Mustang at the Mic Mac Mall. The only evidence before me are the excerpts from the examination for discovery of Dearran Towns and the statement he gave to Wawanesa. There are no significant discrepancies between that statement and the evidence he gave at his examination for discovery.

[188] Pursuant to C.P.R. 18.14 (1)(b), part or all of the evidence given at discovery may be used against any party who was present, or represented at the examination for discovery, or receive due notice thereof, for any purpose by an adverse party.

By the pleadings Dearran Towns is an adverse party to Dominion. David Towns received notice of discovery, and indeed did participate.

[189] The evidence from Dearran Towns is that he put the Mustang in park and engaged the emergency brake. He appeared to be emphatic that he applied the emergency or parking brake, as he was trained on standard transmission vehicles and would do so as a matter of course. In addition, he said he locked the vehicle.

[190] It therefore seems likely, assuming that Dearran Towns was not negligent in how he determined that he actually had the vehicle in park, and used reasonable care in properly engaging the emergency or parking brake, and properly locked the car, that the mechanical condition of the vehicle was such that it was not truly in park and the emergency brake system was either inoperable when he applied it, or was ineffective or failed.

[191] However, even assuming that the mechanical condition of the Mustang caused or contributed to the accident, the claim against the defendant David Towns can only succeed if I am satisfied, on a balance of probabilities, that David Towns was negligent - or in other words that he knew or should have known about the mechanical defects, thereby triggering a duty to repair.

[192] I accept the evidence of David and Linda Towns with respect to their knowledge, and more accurately their lack of knowledge, of any difficulties with the transmission slipping out of park, or not being truly in park, and with respect to any problem with the emergency or hand brake. I found their evidence to be credible and reliable. They both struck me as honest, reasonable and careful individuals who would not knowingly have tolerated an unsafe condition in their vehicles.

[193] Since Linda Towns did not usually use the emergency or hand brake, simply relying on placing the transmission into park, she would be unaware there was anything wrong with the brake.

[194] No expert evidence was called. The only evidence about the condition of the vehicle close in time to April 6 from the inspection done by Fairley & Stevens on April 24th, 2002. At that time the rear cables were not seized. The front brake cable, leading to the rear cables was broken. No one could say when or why it broke.

[195] The evidence of Mrs. Towns that she was unaware of any problem with the vehicle "slipping out of park" is borne out by the rest of the evidence. First of all she testified she had no difficulties with the vehicle. Mr. Towns who drove the vehicle to Fairley & Stevens for inspection had no difficulty starting and driving the vehicle. The mechanics at Fairley & Stevens who specifically inspected the transmission for problems with it slipping out of park made no report of any difficulty starting the vehicle or leaving it in park.

[196] Furthermore Terry Critchley, a licensed professional mechanic inspected the vehicle when his daughter purchased it in August 2002. He test drove it. He had no difficulty with the transmission. Mrs. Critchley, and her daughter drove the vehicle to have it safety inspected. They also had no difficulty. The garage who initially inspected the motor vehicle did not identify any issue with the transmission. When Mrs. Critchley and her daughter drove it home they had no difficulties.

[197] When Mr. Critchley carried out the mechanical work to bring the vehicle up to safety inspection standards, he found no difficulty with the transmission. When Mrs. Critchley and her daughter drove it to the second garage for a motor vehicle inspection they had no difficulty. The second garage who carried out the final safety inspection also found no difficulty. Some time after that, when Cheryl-Anne Critchley tried to start the vehicle, it was discovered that the linkage may have become misaligned, thereby preventing the ignition system from operating. The evidence of Mr. Critchley is that if the vehicle was not truly in park, the transmission would not lock. The vehicle would then be able to be moved if the brakes were not applied. In these circumstances to affix blame to David Towns would be to require him to have unusual or superhuman powers.

[198] I find as a fact that he used all reasonable care that would be exercised by an ordinarily prudent individual.

[199] It is obvious that the problem with the automatic transmission not actually going into park would not be readily discoverable. The problem, if that indeed is what caused or contributed to the accident, seemed to be of an intermittent nature. However, if the emergency brake cable was already broken, prior to April 6th, 2002, this would be something that would be easily observable on even a rudimentary mechanical inspection, let alone the annual motor vehicle inspection mandated by the *Motor Vehicle Act*.

[200] I accept the evidence of Mr. and Mrs. Towns that the Mustang was being operated under a valid motor vehicle inspection sticker as of April 6th, 2002. I have already commented on my conclusions as to their credibility and reliability. In addition, when this motor vehicle was being inspected for mechanical defects, a scant 18 days following the accident I would have expected that someone from Fairley & Stevens or Mr. Woodbury, on behalf of Wawanesa, to have made note if there was not a valid inspection sticker.

[201] The only evidence that might tend to contradict that of Mr. and Mrs. Towns is the evidence from Mr. and Mrs. Critchley. They both testified that the inspection sticker was not current when they purchased it. I am not sure when Mr. and Mrs. Critchley were first made aware that there was any significance as to how stale-dated the inspection sticker was. Although I found both Mr. and Mrs. Critchley to be genuinely trying their best to be helpful and forthright, their evidence raises no doubt in my mind that the Mustang, was in fact operating under a valid safety inspection sticker in April, 2002.

[202] When they purchased the vehicle, they would have no real reason to remember or take note of when the inspection sticker expired. It may well have been due for renewal, just as Mr. Towns testified, in August 2002. Mrs. Critchley was all too right when she said “all she knew is that she had to get it safety inspected in order to get it registered to her daughter”. Mr. Critchley’s evidence was that the inspection sticker was not current when they purchased it. His “sense” of when it expired was two to three to four months previous.

[203] Having found that Mr. Towns did in fact have the motor vehicle inspected, is that sufficient? One can certainly argue that with an older car, more maintenance and safety checks might be prudent. The law in Nova Scotia, as set out in the *Motor Vehicle Act and Regulations* does not mandate more than an annual safety inspection. An inspection can produce safety warnings - rust and wet spots giving tell tale signs of weakening in brake or gas lines, cracked and worn linkages. All would need to be addressed before they fail. So much depends on the condition, mileage, storage and use of a vehicle that in my view, it would be wrong for the courts to suggest more frequent inspections must be carried out.

[204] In this case Mr. Towns had the vehicle inspected. He addressed any maintenance issues that came to his attention. Was he negligent in relying on the annual inspection? In my opinion he was not. The 1990 Ford Mustang did not have excessive mileage. Mr. Critchley, himself a licensed mechanic, was prepared to and did rely on the safety inspection work carried out by a licensed mechanic.

CONCLUSION

[205] The answers to the two questions set for determination are as follows:

1. On April 6, 2002 the defendant Dearran Towns did not have consent from the defendant David Towns to drive the 1990 Ford Mustang; and,

2. The incident alleged to have occurred in the Statement of Claim was not caused, in whole or in part, by negligence on the part of the defendant David Towns in maintaining the 1990 Ford Mustang.

[206] The defendant The Dominion of Canada General Insurance Company shall pay the costs of the plaintiff and of the David Towns.

Beveridge J.