IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Goudey v. Malone*, 2003 NSSC 257

Date: 20031229
Docket: S.Y.6361
Registry: Digby

Between:

CHRISTOPHER GOUDEY and PAULA GOUDEY

PLAINTIFFS

- and -

CATHY MARIE MALONE, COLBY TODD BRANNEN, RED KNIGHT ENTERPRISES (1987) LIMITED and KEYAN NOBLE

DEFENDANTS

- and -

KEYAN NOBLE, MATTHEW DOUGLAS MALONE and CGU INSURANCE COMPANY OF CANADA, a body corporate

THIRD PARTIES

Revised Judgement: The cover page of the decision has been corrected according to two errata released December 29, 2003.

Judge: The Honourable Justice Charles E. Haliburton

Heard: At Digby, Nova Scotia on December 10, 11, 2003

Subject: Insurance; obligation of insurer to defend; owners' implied consent to drive

Attending: Clifford Hood, for the Plaintiffs

D. Kevin Burke, for the Defendant Cathy Marie Malone

Cathy L. Dalziel, for the Defendant Red Knight Enterprises (1987)

Scott C. Norton, for the Third Party Keyan Noble

Sheree Conlon, assisting Scott C. Norton, Q.C.

Mathew Douglas Malone, Third Party, self-represented

Not Present: John Kulik, for the Third Party CGU Insurance Company of Canada

Colby Todd Brannen, Defendant, self-represented

DECISION

[1] This decision deals with a Preliminary Application heard pursuant to Civil Procedure Rule 28.04. The parties are agreed that it is a matter of mutual interest to clarify, in advance of trial, certain questions as to the ownership and operation of one of the motor vehicles involved in the accident which has resulted in this multi-party proceeding.

FACTUAL OVERVIEW

[2] In the "wee hours" of February 2, 2001 Colby Todd Brannen, a "beginning driver", was operating a 1992 Sunbird motor vehicle travelling on Highway 103 from Yarmouth towards Shelburne. He was accompanied by Matthew Malone whose license was then suspended for speeding infractions. Matthew's mother, Cathy Malone, was the registered owner of the Sunbird. Both Colby and Matthew were heavily intoxicated by alcohol. They had been drinking since about six o'clock the evening before and were then returning toward their homes in Shelburne County from the Red Knight lounge, a drinking establishment in Yarmouth.

[3] Christopher Goudey, the Plaintiff, was returning to Yarmouth after working his shift at the Shelburne Boys' School when in the area of Eel Lake and Tusket, his vehicle suffered a head-on collision with the Sunbird. Goudey was unable to remove

himself from his motor vehicle which was left sitting crossways to the highway and was subsequently struck (t-boned) by a third vehicle operated by Keyan Noble. As a result of the impact with one or both vehicles Mr. Goudey suffered significant injuries and was unable to return to work until May of 2003.

[4] Consequently Goudey has sued Cathy Marie Malone, the owner of the Sunbird motor vehicle, Colby Todd Brannen, its operator and Red Knight Enterprises (1987) Limited. Further pleadings in the form of defences, cross-claims and third party proceedings have complicated the procedural aspects of the case and introduced additional parties. Both the Goudey and Malone vehicles were insured by CGU Insurance Company of Canada which has an interest both as the insurer of the Sunbird and as insurers of Mr. Goudey under the Section D provisions of Goudey's policy.

[5] All of which brings me to the purpose of this Preliminary Application. Pursuant to a Consent Order granted by Justice Boudreau on September 4, 2003, this Application is to determine:

(1) Who was the owner of the automobile operated by the defendant, Colby Todd Brannen, at the time of the accident giving rise to this action?

(2) Was the defendant, Colby Todd Brannen, operating the automobile in question with the consent, express or implied, of its owner, at the time of the

accident giving rise to this action?

RELEVANT LAW

STATUTE

[6] The *Insurance Act*, R.S.N.S. 1992, c.231 as amended raises the issue of "consent" in Section 114. Only if the operator has the consent of the owner of an insured vehicle to operate that vehicle is the indemnity offered by the insurer triggered. Section 114 (1) states:

> 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.
>
> (emphasis added)

[7] Under the Motor Vehicle Act, R.S.N.S. 1989, c.293 as amended, the owner of a motor vehicle is presumed to bear responsibility for the operation of their motor vehicle on the highway. The following provisions are relevant:

> (1) s. 248(1) Where any injury, loss or damage is incurred or sustained by any person by reason of the presence of a motor vehicle upon a highway, the **onus of proof**
>
> (a) that such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner of the motor vehicle, or of the servant or agent of such owner acting in the course of his employment and within the scope of his authority as such servant or agent;
>
> (b) that such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner of the motor vehicle

> **shall be upon the owner or operator** of the motor vehicle
>
> (2) (omitted as not relevant)
>
> (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 owners** unless and until the contrary is established.
>
> s.249 Every owner of a motor vehicle causing or knowingly permitting a person **under the age of eighteen years** to operatea motor vehicle upon a highway, and **any person who gives or furnishes a motor vehicle to such person shall be jointly and severally liable** with such person for any injury, loss or damage caused by the negligence of such person in the operation of such motor vehicle, **and the burden of proving that such motor vehicle was operating without his knowledge or consent expressed or implied shall be upon the owner.**

[8] The terms "owner" and "operator" are defined in the *Motor Vehicle Act* in the following terms:

> (2) (ag) "Operator" means a person driving a motor vehicle on the highway or who has the care or control of a motor vehicle on a highway whether in motion or not.
>
> (ak) "Owner" means a person who holds the legal title of a vehicle and includes a transferee or in the event a vehicle is the subject of an agreement....etc.

THE CASES

[9] A number of cases have been cited to me with respect to the issues of **ownership** and **consent to operate**. I have concluded that ownership is established by the facts and will deal later with those facts. I intend to review a number of the

cases dealing with the issue of "consent" which is, in the present circumstances, less evident. In considering the issue of consent I think it important to review the context, that is to say, modern day motor vehicle usage and the concerns which prompted the legislature to regulate responsibility arising from the negligent operation of motor vehicles on the highway. In this regard several of the cases reviewed refer to the decision of Ritchie J. in *Hayduk v. Pidoborozny*, [1972] S.C.R. 879, (1973) 29 D.L.R. (3d) 8 in which he wrote:

> There is a logical reason why the registered owner should be treated as the "owner" within the meaning of the Act because the very purpose of the registration is to give notice to all users of the highway of the identify of an individual to whom they may look as owner in the event of an accident....

In a concurring judgement Laskin J. wrote:

> The issue of ownership where it arises under a claim of statutory vicarious liability of a car owner to an insured third person, is not one to be decided as if it arose in litigation between the father and son, the defendant in the present case. The applicable statute (Alberta) cannot be so construed when regard is had to its provisions for public registration of car ownership and concurrently for proof of financial responsibility.

[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* NSCA (1974) 8 N.S.R. (2d) 313 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 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...

[11] 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.

[12] Still dealing with the philosophy represented by the legislation and its attempt to protect innocent third parties, I found the recent case of the New Brunswick Court of Appeal *Bustin-Galbraith v. Albert*, 2003 NBCA, 224 D.L.R. (4th) 463, 37 M.V.R. (4th) 27 to be interesting and supportive of the view I take. The conclusions of the court are accurately reflected in the headnote in the following quotations:

> Previous Court of Appeal jurisprudence was clear that proof that a driver breached a term or condition of an owner's consent to possession does not amount to proof that consent was not present...to allow the owner of a motor vehicle to effectively "contract out" of a statutory responsibility of this nature would be contrary to any reasoned analysis of the *Motor Vehicle Act*...it is a presumption of law which deems an owner liable for the negligent operation of the owner's motor vehicle unless the owner establishes possession without consent at the time of the negligent operation.

[13] Turnbull, J.A., after considering the law in other jurisdiction at paragraph 23 observed:

> In contrast, the New Brunswick legislative scheme provides a rule of substantive law that, upon proof of ownership and negligent operation, the owner of the vehicle is liable in tort unless the owner, not the injured party, proves, on a balance of probabilities, that at the time of the negligent operation the owner's car was in the possession of someone who did not have either the express or the implied consent of the owner. In other words, s. 267 prescribes a conclusion that a motor vehicle owner is liable in tort for the vehicle's negligent operation unless the owner rebuts the presumption of consent to possession...

This decision goes on to deal specifically with "legislative intent" at paragraphs 31 and following:

> Justice Ernest Drapeau emphasized that, with respect to legislative enactments that alter the common law and impose legal obligations "where none existed before", there has been a "significant evolution in the approach courts have taken in interpreting provisions such as section 267(1)", from "strict" to "a large and liberal interpretation"...one of the reasons Courts have been liberally interpreting legislation like s. 267 is to broaden the vicarious liability of the owner because "it is the owner who is more likely to have assets and insurance to which the innocent victims can look...". Further, Justice Drapeau cited the New Brunswick compulsory automobile insurance regime as an example of not only the legislature's intent that a large and liberal interpretation method be used when interpreting s. 267, but also as underlining support for the Courts (sic) use of such method.
>
> In *Gillard*, Justice Patrick Ryan commented on section 267's legislative intent with respect to conditional or limited consent to possession of a motor vehicle. In paragraph 14, he said:"...but that cannot be permitted to dominate or circumvent the protection against liability for negligence intended by the

> legislation for the benefit of other users of the highway...one cannot make possession conditional so that the conditions negate the protection of the members of the public even thought other avenues of recourse may be open to them. Private or secret arrangements must not prevail in favour of tortfeasors or the vehicle owners against innocent parties when the trust by the person giving possession turns out to have been misplaced."

To all of which Deschênes J.A. concurring made the following observations at paragraph 39:

> If there is a presumption...it is one of law which deems the owner vicariously liable for the negligent operation of his motor vehicle unless he establishes possession without consent at the time of the negligent operation.

[14] It should be observed that s. 267 of the New Brunswick *Motor Vehicle Act* uses the words "owner", "driver" and "possession" while the Nova Scotian Act refers to the "driver" and "operator". In terms of the ill intended to be rectified by the legislation and more particularly in the particular circumstances of the present case, I decline to make any distinction between the law of New Brunswick and the law of Nova Scotia based on the different terminology. To do so, as argued by counsel in submissions, would be to subvert the intent of the legislation. The terms in this context are synonymous.

THE RELEVANT PHILOSOPHY

[15] In *Daniels Estate v. Ernst* 27 N.S.R. (2d) 365 (1978) Carswell N.S. 342. 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 demonstrate that at the time of this particular accident the vehicle was being operated without the consent of the owner.

[17] Undoubtedly the insurer would not have undertaken to indemnify third parties against the negligent **conduct of a friend** of Matthew Malone's operating this motor vehicle at **three o'clock in the morning** while having only a **beginner's license** and while **heavily intoxicated**. On the other hand if a police officer had chanced to stop this motor vehicle at some point before the accident, could the officer have made out a valid charge that Colby Brannen was operating a motor vehicle *without a valid policy of insurance* in place? The policeman would have requested and would have been furnished with valid proof of insurance. Absent the intoxicated state of the occupants the policeman would almost certainly have permitted this vehicle to go on its way in the secure belief that if an accident occurred further down the road innocent third parties would be protected.

[18] It is the position of Cathy Malone that she had not, and "would never" give permission to Colby Todd Brannen to drive the vehicle which was registered in her name; and furthermore that on the night in question her son, Matthew, had no permission to drive the vehicle nor to have it in his possession. She had, on other occasions, permitted Matthew to have possession of the vehicle but upon strict conditions, namely that the vehicle be operated by a "responsible licensed operator".

I have selected a number of cases which I think are relevant to the issues raised.

FACTUALLY SIMILAR CASES

[19] *Daniels Estate v. Ernst* 27 N.S.R. (2d) 365 (1978) Carswell N.S. 342.

[20] William and Daisy were husband and wife and had a joint bank account. William purchased a car to be used primarily by this wife but registered it in his son's name. The car was intended for resale when purchased but, in fact, was used as the family car. After some months Mr. Silver decided to sell the vehicle and when it was being test driven by the prospective purchaser, Mr. Ernst, he, the driver, lost control with resulting injuries and death. Ownership and hence insurance coverage became an issue because, it was argued, Mrs. Silver had not given "consent" that Ernst should drive the car. In these circumstances it was concluded that Mr. and Mrs. Silver were joint owners. There were, in fact, two joint beneficial owners. Pace J.A. observed at paragraph 23:

> ...the car was used by both husband and wife as a family car; the wife did not need permission to use the car and, to all intents and purposes, she treated the car as her own, subject, of course, to the husband doing likewise.

Paragraph 25:

> ...she was aware that her husband would use the motor vehicle as he saw fit, and would permit other persons to drive on various occasions. She was likewise aware of the fact that her husband would demonstrate the motor vehicle to individuals unknown to her and in the process of the demonstration, such individuals would be operating the vehicle.

[21] The learned appeal judge goes on to discuss the concepts of driver and operator in this context. At paragraph 26 he reviewed s. 221 (4) of the *Motor Vehicle Act* now s. 248 (4) (the family car) and quoted from *L'Heureux v. Venator et al.* (1972), 4 N.S.R. (2d) 352:

> It was argued on behalf of the respondent that at the relevant time the 1967 Camaro was being operated by Mr. L'Heureux in the sense that he was the person giving the driver orders and that, as a result, the appellant was liable to the respondent under the family purpose doctrine so-called as expressed in (the section) (and relying on *Patterson v. A.-G. Can.*, (1959), 17 D.L.R. (2d) 30)...At the time of the accident giving rise to the action the motor vehicle was being driven by one Content, a boarder at the home of the appellant, and the owner's wife was a passenger in the vehicle.

Then citing the definition of "operator" as including the person "who has care and control":

> There seems to have been two persons who are included under "operator" – the person driving the car and the person "who gives the driver orders".
>
> In this case the appellant's wife seemed to have been in control of the motor vehicle.

In terms of the New Brunswick statute, she was "in possession".

[22] Mr. Silver was found to be "an operator" of the family car and, at the time of the accident, found to have the care or control of it (paragraph 27) bringing into play the burden imposed by the family car provision.

[23] It may or may not be relevant that Mr. Ernst, who was permitted to drive the Silver vehicle, was both inexperienced and unlicensed. It is, I think, relevant that Pace J.A. observed at paragraph 28 (section 248 (4)):

> ...imposes a burden on the appellant to establish that the husband was not operating the 1970 Chevrolet at the time of the accident as a family car within the scope of a general authority from his wife.

It seems implicit that Mr. Silver was deemed to be "operating" the family car notwithstanding that someone else was driving.

[24] In my view of *Daniels Estates v. Ernst* it is hardly necessary to review later cases except perhaps to consider whether the law has evolved with differing effects.

[25] I have been referred to *King v. Smith* (1988) Carswell NS 106, 38 C.C.L.I. 259, a decision of Kelly J. The facts are strikingly similar to the present case. An application was brought by Judgment Recovery (N.S.) Limited to determine whether the third party motor vehicle liability insurer was obliged to respond to the Plaintiff's claim. The car was purchased in the mother's name, the son had borrowed money to pay for the car, both mother and son used the car. The car was insured in the mother's name with the son identified as an occasional driver on the policy. At the time of the accident the car was being driven by a friend of the son. The insurer denied liability on the basis that the insurance contract had been issued as a result of a "sham" transaction, the son being the true owner.

[26] The court accepted the evidence of the son that, after drinking with his friends at a secluded beach area:

> ...he knew he was too drunk to drive and got into the front passenger seat and told the others that he would not drive anymore...he fell asleep or passed out in the front seat and remembers nothing about the accident. Troy Smith got into the driver's seat and drove the vehicle and was driving it when the accident occurred. Darrell says he didn't "think" he told Mr. Smith or Mr. Kenney to drive, is not sure if he gave them consent to drive, but does not recall telling them not to drive.

[27] At paragraph 45 Kelly J. states a test which appears in a number of cases:

> The question for the Court to determine in each situation is whether all of the circumstances surrounding the situation are such that the driver would be

> justified in determining he had the verbal or implied consent of the owner.

The decision goes on to analyse the facts relevant to that test and concludes at paragraph 49:

> Darrell Symonds was aware during the time that he purchased liquor in Shelburne and went on a drinking spree with his friends that he was breaching the express prohibition of his mother against drinking and driving...(he) advised the others that he was not able to drive and, after doing so, entered the vehicle and sat on the passenger's side with the keys in the ignition. Troy Smith had earlier in that day operated the vehicle and had not been rebuked by Darrell. I find it was not unreasonable for Troy Smith to assume that the actions of Darrell Symonds were an implied request that he...could operate ...If Darrell Symonds had not intended to imply consent, he could simply have sat in the driver's seat, removed the keys from the ignition, advised the other two that they were not to drive, or tell them he was going to rest or sleep for a period of time before operating the vehicle...Troy Smith(had) the implied consent of Darrell Symonds.

[28] In *Warren v. Martin* [1996], N.S.J. No. 438 (N.S.C.A) our Court of Appeal arguably came to a different conclusion. In that case a motorcycle registered and apparently owned by the father was insured naming the son, Richard Martin, as the principal driver. Richard was the only member of the household holding a license to operate a motorcycle. Again, the factual situation is not unlike our own. Richard Martin, with some friends, had been drinking and decided that he could not operate his motorcycle for the purpose of leaving the party to purchase more supplies. Chipman J.A., in giving the decision for the court, accepted as fact that:

> Richard Martin permitted Ashe (his friend) to take the motorcycle but did not tell Ashe that he had been forbidden by his father to lend it to other people.

Moreover:

> The trial judge found that Colin Martin (the father) had a rule that the motorcycle was not to be driven by anyone except Richard. Richard was aware of the rule but ignored it on the night in question.

[29] After discussing various conclusions reached by the trial judge, Chipman J.A. went on:

> Those covered by the policy are the insured and every other person, who, with his consent, personally drives the automobile or personally operates any part thereof.
>
> The unnamed insured must personally drive the automobile or personally operate any part thereof...Such personal operation is an essential element in the description of the unnamed insured.

and quoting the trial judge:

> ...I cannot accept that the insurer can be put in the position of insuring persons the owner prohibited from driving...
> I agree.

[30] This case, however, is readily distinguishable from *King v. Smith* and *Daniels v. Ernst* for two reasons. Firstly, Colin Martin had specifically instructed his son that there were to be **no other** drivers. Secondly, Richard Martin, who was covered by the insurance policy as the principal operator of the motorcycle, delivered it into the hands of his friend Ashe who was then accompanied only by the Plaintiff Warren on his expedition to the store. Effectively Martin temporarily abandoned possession and, if you will, operation of the motorcycle to the negligent driver. He was not present or in a position to direct the driving of the motor vehicle at the time of the accident. In the other two cases I've discussed the insured operator was present and could be said to be "using" the motor vehicle himself. That is to say the operation of the motor vehicle was under their supervision.

CONDITIONAL CONSENT

[31] I will refer briefly to two recent New Brunswick cases which reflect the heavy burden on the owner to displace the concept of implied consent. In *Gillard v. Cormier* (2000-10-25), N.B.C.A. 284/99/CA a family vehicle was operated by a daughter who was unlicensed and who had obtained the vehicle by deceit. She had previously been permitted to have possession of the family van if it was being operated by "other person licensed to drive". It was argued by the insurers that since she was forbidden to drive the van herself the owner had not consented to her acting as the "uninsured operator". Ryan J.A. commented at paragraph 14:

> I do not think that there is a sustainable argument favouring a conditional possession. If an owner authorizes possession then it is possession without conditions. It may well be that,as this case, the authorizing parent was deceived, but that cannot be permitted to dominate or circumvent the protection against liability for negligence intended by the legislation for the benefit of other users of the highway.

[32] A similar conclusion with respect to limiting the purpose for which permission is given was arrived at *Bustin-Galbraith v. Albert* (2003) N.B.C.A. 20, 224 D.L.r. (4th) 463. In that case the owner's boyfriend had occasional "possession" of her vehicle for limited non-driving purposes. The finding was that:

> His possession of the Topaz was with her knowledge and consent but was only for the limited purposes of starting it, checking its fluid levels or just listening to the radio with the motor running.

The owner, being aware that Mr. Albert did not have a driver's license, had testified that she:

> ...wouldn't have given him the car...It's really an unspoken thing...I knew he didn't have a license.

Turnbull J.A., after reviewing Statute and case law, commented at paragraph 23:

> In other words, s. 267 prescribes a conclusion that a motor vehicle owner is liable in tort for the vehicle's negligent operation unless the owner rebuts the presumption of consent to possession.

and at paragraph 28:

> Thus, where the onus is on an owner to prove a negative, "no consent to possession", the judicial analysis requires a review of all the circumstances to determine if the owner granted an express or implied consent to another to possess the owner's vehicle. In New Brunswick that analysis is not limited to the driver, but is focused on the person in possession who may or may not have been the driver at the time of the vehicle's negligent operation.

and later at paragragh 32 quoting from *Gillard v. Cormier* above:

> ...one cannot make possession conditional so that the conditions negate the protection of members of the public even though other avenues of recourse may be open to them. Private or secret arrangements must not prevail in favour of tortfeasors or the vehicle owners against innocent parties when the trust by the person giving possession turns out to have been misplaced."

PRINCIPLES

[33] From a review of the cases and considering the statutory provisions I think the following relevant principles can be extracted and enunciated.

1) Where a contract of insurance had been obtained by misrepresentation or by the deceit of the insured, the insurer may avoid the obligation under the contract. Otherwise, as the New Brunswick cases particularize "private arrangements must not prevail" over the "legislative intent" designed to protect "other users of the highway".

2) The members of a family household are presumed to have consent of the owner to operate the family motor vehicles.

3) Where there is consent to the use of a motor vehicle, liability cannot (as a

rule) be avoided by restricting the purposes for which the vehicle may be used.

4) Insurance protection for the benefit of third parties will not be avoided where the vehicle is operated under the direction or control of one of the parties listed in the policy of the insurance.

[34] I've had some difficulty in formulating this last principle which perhaps supercedes or encompasses some or all of the other three in various factual circumstances. Whether there are distinctions to be drawn between the terms "driver", "operator" and "owner" is a challenge. Who owns a family car? Is it only the wage earner in the family or is it every member of the family? Who has the operation and control of the vehicle at any given time? Is it only the person in the driver's seat or can the operator be located in the back seat, but being the person who has directed the driver as to "route" and "destination" or perhaps has only given a general consent to drive.

[35] It is natural that the cases where a contest arises are dominated by those where an "authorized" user has permitted someone else to occupy the driver's seat. Generally one or both are impaired or incompetent. Impairment, incompetence or dangerous behaviour, however, ought not be permitted to avoid the insurance coverage which is mandated by statute for the benefit of innocent third parties, and in the absence of which a motor vehicle is not permitted to be on the highway. It is

evident from the number of reported cases that the factual circumstances of this accident were not unique.

THE EVIDENCE

[36] Evidence was given by Cathy (Malone) Forward, the registered owner of the motor vehicle, Matthew Malone, her and the occupant of the passenger seat at the time of the accident and Alicia Malone who spoke with both occupants of the vehicle at the Red Knight tavern some three or four hours before the accident. Also called as a witness was Marlene Nickerson, a friend of Cathy Malone who sometimes travelled with her to work in a car pool arrangement; and selected evidence of Colby Brannen as recorded on a discovery was tendered. Also tendered as exhibits was documentary evidence in the form of insurance and motor vehicle records relating to the Malone household and this vehicle in particular.

[37] At the time of the accident the household was made up of Cathy Malone, her husband of twenty-four years, Herbert Malone, and their son Matthew. Herbert is a boat builder and Matthew, at that time, was working with his father. There were three vehicles belonging to the household as of February 2001. The 1992 Sunbird which is the vehicle involved in the accident, a 1986 Chev truck used almost exclusively by Herbert and a 1994 Aurora Oldsmobile. The Sunbird was purchased by the Malones March 31, 1999. The purchase price was $5,800.00 financed with a

loan from Trans Canada Credit Corporation secured by a chattel mortgage executed by both Herbert and Cathy. The vehicle was registered in Cathy's name. As of the date of the accident, the Sunbird and the Aurora were insured under one policy of insurance with three household members listed as household drivers for the Sunbird. Cathy Malone 70%, Herbert Malone 10%, Matthew Malone 20%. The Oldsmobile Aurora was not insured for Matthew's use.

[38] Cathy Malone testified that she was the owner of the Sunbird which was purchased to get her back and forth to work at a fish plant. She and her husband had shopped together for the vehicle and there was only one set of keys for the car. The keys were sometimes kept in her purse but (I find) usually left on a rack on the wall. Matthew had had a minor accident with the Sunbird one and a half years before the accident in question. Cathy does not seem to have held him at fault for that accident in which he "rear ended" another car that, she said, had failed to give a proper signal. She said that Matthew requested permission each time he wanted to use the vehicle, which requests seem not to have been refused unless she was using it herself. Her only condition on its use was that he "not drink" nor "stay out late". When she discovered in November 2000 that Matthew had lost his license for speeding she added the condition that if he was permitting others to drive they must "be responsible".

[39] Matthew did not pay board but made some contribution to the household budget when money was “tight”. She conceded that this money may have been used to assist in paying the monthly payments for the car or for the insurance coverage. Matthew installed a CD player in the car, put fuel in the car when he used it and had paid for at least one repair.

[40] She knew Colby Brannen as a friend of her son when they were younger. She testified that she never “saw him drive my car” and would not have allowed him to do so “because of his reputation - he was always in trouble”. On February 1 she and Herbert were going out after work to visit their “camp” and Matthew said that he was going “four-wheeling”. She saw him getting his clothes ready. When she and her husband returned at roughly nine p.m. the car was missing. She was somewhat surprised but thought that Matthew had perhaps taken it down the road to join his four-wheeler friends. She said that at about 9:45 she and her daughter took the Aurora to see if whether they might find Matthew in his usual haunts without success. At about 2:00 a.m. she went looking again in the Woods Harbour area. Shortly after she returned home, she received a telephone call telling her of the accident, confirming that her son had not been driving. She and Herbert went to the hospital to find “two really drunk boys”.

[41] When cross-examined Cathy Malone confirmed that she had arranged for the

insurance on the family vehicles and provided the details to the agent. She used the Sunbird to travel back and forth to work and car pooled three days out of seven with Marlene Nickerson, among others. She conceded that the insurance coverage indicated the Aurora was her car of choice for travelling to work (car pooling). She said, "I didn't read the papers". She said Herbert didn't want her to drive the Aurora because he didn't want it "full of fish" and because of an incident when she was carrying a "two by four", which had smashed the CD player when she stopped suddenly. She conceded Matthew's money had helped pay for the car but that it belonged to her and she could refuse him the use of it. He was supposed to ask but didn't ask permission every time. She agreed that on the night in question Matthew had not asked permission to use the car and she also conceded that he, contrary to her rules, had the car away from home overnight on at least two occasions. She said he had the use of the car about once a week "other than to go to the local store".

[42] On further questioning, she agreed that the pattern of use of the Sunbird altered after the Oldsmobile Aurora was purchased. Initially she and Herbert shared the use of the Sunbird but with the second car, Herbert used the Sunbird only occasionally and Matthew, she conceded, might have used it two times a week and also on weekends to go to the movie in Yarmouth. She denied that she had told the insurers that the Aurora was used as much as forty percent by her and sixty percent

by Herbert as reflected in the insurance coverage. She could not remember having said on discovery that Matthew spent three or four evenings a week with Colby Brannen after work.

[43] Matthew Malone recalled going with his parents to "pick up" the Sunbird when they purchased it. He had not told his mother of his speeding convictions nor that his license was suspended because "I figured she wouldn't let me use her car anymore". When she learned of it by picking up the mail with the notice of suspension, he said there was "a big uproar" and the rule was imposed that he was "not to use the car unless someone they knew to be responsible was there to drive me." He testified that the night of the accident was only the second time that he had taken the car "without permission". His friend Colby Brannen had driven the car on one previous occasion when he, Matthew, had decided to stay overnight somewhere and he let Brannen drive the car to his home several miles distant. On February 1st he took the car to go and find his four-wheeler "buddies" but when he arrived at Colby's house "we went for a ride to the liquor store in West Pubnico...and eventually to Yarmouth". They both drank heavily during the evening and Matthew claimed no recollection of any relevant information. He had driven the car until arriving at the Red Knight lounge in Yarmouth but had no recall of when and how they left there until "sliding down the highway".

[44] In cross-examination Matthew conceded that he treated the Sunbird as his own while he was using it and that he may have said things like "we'll take **my** car". He agreed that Colby Brannen was a frequent companion. When it was suggested that it didn't matter "whether he had permission or not" his response was he "intended to have it back" before his parents arrived home that evening.

[45] Alicia Malone is Matthew's cousin. She is twenty-three years of age. She was familiar with the Sunbird in February of 2001 and when coming from a movie in Yarmouth she "saw the Sunbird at the Red Knight". She believed the car belonged to Cathy but that "Matthew drove it". She thought it strange to see the car at the lounge on a Thursday night and it seems she investigated. She and a friend went into the Red Knight where she spoke with Matthew and with Colby Brannen. Matthew, she said, was looking "drunk and bored". Brannen "was just drunk". She inquired of Matthew who had the keys to the car. His response had been that he did not have them so she confronted Colby Brannen. While she never did see the keys Brannen insisted that he had money and would get a hotel room, impliedly not attempting to drive home.

[46] While she was at the Red Knight she and Matthew went outside. Matthew sat in the passenger side of the vehicle where he attempted to use a cell phone. She agreed that her understanding from Matthew was that Colby Brannen had the keys to

the car but that he would not give them up because he wanted to use the car to come home the next day.

[47] With respect to the use of the car, she said that most times when she saw it, it was Matthew who was driving although she and Cathy did not frequent the same places so she seldom saw her in any event, but met up with Matthew once or twice a week. She also testified that once the Malones acquired the Aurora, Matthew seemed to have freer access to the Sunbird.

[48] Marlene Nickerson participated in the car pool with Cathy Malone. She knew the 1992 Sunbird as "Cathy's car" which she had travelled in forty times or more. She had also travelled to work in the Aurora perhaps five times. Cathy had two vehicles, she said, and she agreed that some time before June 15, 2000 she no longer worked at the same job as Cathy and was no longer car pooling. The Aurora was acquired only shortly before that date. I accept the contention of the counsel that, at least at that time, it was used by Cathy with some frequency.

[49] The discovery evidence of Colby Brannen, Exhibits 6 and 7, indicate that he was seventeen years old on February 1st. On the evening in question Matthew picked him up at his parents' house. He knew from an earlier conversation that they were "gonna go for a drive; or he was gonna go get liquor". They each bought a twelve pack of Budweiser he said, and drove around and drank it.

[50] He said he didn't know who owned the car but that he had driven with Matthew "hundreds of times". Matthew had the use of it "every day". He was the driver of the vehicle when it left the Red Knight and has no recollection of the collision but he does recall being in the driver's seat when the car came to rest. He had no explanation for how it came about that he was the driver.

> Just probably where I was drunk and some, I got the keys and I was just, young and wanted to drive, I guess is more or less how it happened.

He said that Matthew "let him drive the car" and he remembered Matthew talking on the cell phone.

[51] He denied that there were any plans to go four-wheeling on the night in question. He had driven the Sunbird on one previous occasion when Matthew

> ...stayed down in Clyde and I brung the car home and I went back and got him the next morning.

He was not, he said, aware of any rule that Matthew was not allowed to keep the car away from home overnight. "I thought it was his car". When asked if Cathy Malone ever drove the car, he responded:

> She had a different car to drive, a newer one. That used to be her old car...that's what she used to drive then she got a new car.

He was not aware of any restrictions on Matthew's use of the car. He said:

> When you got the car all the time and he's never ever said anything to me about it so I'd know...if there was (sic)restrictions...

In further discovery evidence of Brannen in Exhibit 7, he said he recalled:

> ...talking to his cousin (Alicia) and her taking the keys from him (Matthew) and giving em (sic) to...the bartender...and before we left I was talking to the

> bartender and he give me the keys to the car...

He said there was no discussion between he and Matthew about who would drive the car but

> ...we just walked out to the car and Matthew jumped in the passenger side...

FINDINGS OF FACT

[52] The testimony of Cathy Malone and Matthew where it differs from the documentary evidence and the evidence of the other witnesses is not believable. I am satisfied that the Sunbird was purchased as a family car for use by Herbert and Cathy Malone. At the time of its purchase Matthew did not have a license. When he subsequently obtained his license he was added to the policy.

[53] There were three motor vehicles in his household consisting of three persons. Matthew was earning four hundred dollars a week in his father's boat shop and had no obligation to make payments for room or board. No financial information has been produced with respect to the total amount of income coming into the home but I am frankly left in some doubt about whether finances were in fact "tight" as Cathy Malone testified.

[54] Matthew was still in school when the Sunbird was purchased. With his leaving school and gaining full time employment and with the purchase of a newer, more upscale car, one would expect a change in the pattern of use of the various motor vehicles to take place. Herbert used the truck to go to work every day and the

Aurora for special occasions. Cathy used the Sunbird to travel to and from work but when the Aurora was acquired it was also used. It may be that her use of the Aurora was more limited after Herbert objected to the smell of the fish plant and the damage to the CD player but I am not persuaded that that interfered greatly with Matthew's use of the Sunbird. I accept the evidence of Alicia and Colby Brannen that Matthew was the primary driver of the Sunbird after the regular work day was over.

[55] Insofar as the ownership of the Sunbird is concerned, there is no question that "title" was taken in the name of Cathy Malone which, by statute, makes her "an owner". The car was purchased with Herbert's credit and payments came out of the household budget which makes Herbert an owner at common law. There is no evidence that Matthew actually contributed to the cost of the purchase or made any direct contributions for payment of insurance or mortgage payments so I am unable to conclude that he was an owner in the same degree as his father. This was, however, a "family car". Whether or not permission was intended to be obtained before Matthew would use the car, it was the intention that all members of the family would have it to use; and the practice was that they did use it when they chose subject to a prior claim by one of the family members.

[56] The evidence could not be more clear that his mother did not always know where Matthew was going with the car or what he was doing or who was driving it. It

is somewhat strange that Matthew did not even confide in her the fact of his speeding convictions and the temporary suspension of driving privileges which he had suffered. Only when she chanced upon the formal notice from the authorities did she attempt to curtail his use of the car, and then it was only to have the car operated by "a responsible licensed driver". In spite of her rule that the car was not to be out late at night, she took no remedial action when the car was absent overnight on two occasions. Despite the fact that his license had been suspended, she did not physically take possession of his license. In spite of her concerns about approval of the use of the car, its keys continued to hang on a hook on the wall accessible to all family members.

[57] I conclude that Matthew had the implied consent of his mother to use the car on the night in question and when it left the Red Knight lounge early the next morning, it was being driven by Colby Brannen but operated under the authority and control of Matthew Malone who was sitting in the passenger seat.

[58] Colby Brannen had operated the vehicle on a previous occasion when Matthew was not present and with Matthew's authority. There is no evidence that he had reason to believe that Matthew could not give that permission. Indeed, Matthew did have the specific authority from his mother to permit other people to drive the car, provided they were licensed and responsible. But having given that authority her

limitation was ineffective and moot. Colby said in fact that he believed it was Matthew's car.

[59] I would therefore answer the specific questions asked of the court in this preliminary application as follows:

> (1) The owner: this was a family car. All members of the family were authorized to drive and to use it. Cathy and Herbert Malone shared a property (ownership interest) in the car.
>
> (2) Colby Brannen was operating the automobile with the consent of Matthew Malone. He had operated/driven it previously with his consent, and had no reason to believe Matthew was not competent to give consent. He had also the implied consent of Cathy Malone who failed to exercise effective control over the use or users of the vehicle.

[60] Furthermore, if I had concluded that Cathy Malone had satisfied the heavy burden of displacing the presumptions, then I would have found that Matthew was an "operator" of the vehicle at the time of the accident, with Brannen driving under Matthew's instruction and control.

[61] I find that the insurer is obligated to respond to the claims made against the owner, driver and operator of the Malone vehicle.

Dated at Digby this 29th of December, 2003

J.