IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Evans v. Clements, 2008 NSSC 225

Date: 20080717
Docket: SH 251315
Registry: Halifax

Between:

Amanda Jean Evans and David Wayne Clark

Plaintiffs

v.

David Norman Clements, Robert Baltzer, Susan Baltzer, and Royal & Sun Alliance Insurance Company of Canada, a body corporate

Defendants

Judge: The Honourable Justice Margaret J. Stewart

Heard: in Halifax, Nova Scotia on February 25 & 26, 2008.

Counsel: Kevin MacDonald, solicitor for the Plaintiff (not present)
Philip M. Chapman, and Andrew Gough, Article Clerk
Solicitor for
Robert Baltzer and Susan Baltzer, Defendants
Jennifer Ross, and Andrew Rankin solicitors for
Royal & Sun Alliance Insurance Co., Defendants
David Clements, unrepresented

By the Court:

[1] By way of a consent order issued April 17, 2007 pursuant to **C.P.R. 28.04**, the parties agreed that the following question or issue be determined before trial:

> "Was David Norman Clements operating the automobile in question with the consent, expressed or implied of its owner, the Defendants, Robert Baltzer and Susan Baltzer, at the time of the accident, giving rise to this proceeding."

[2] The conclusion will result in the release of either the Baltzers or Royal & Sun Alliance, (Royal) the plaintiffs' Section D insurers, as defendants. The matter relates to a motor vehicle accident which occurred in Halifax, Nova Scotia around three o'clock in the afternoon of Sunday, October 5, 2003 in which the plaintiffs, Amanda Evans and David Clark sustained injuries. The defendant, David Clements, (Clements) was the operator of the 1989 Chevy pickup truck owned by his friends/acquaintances of some 10 years, the defendants Robert and Susan Baltzer. After travelling from Dartmouth and dropping off his son and his son's best friend in Fairview, an intoxicated Clements, with a blood alcohol reading of .23 failed to stop at an intersection turning onto Main Street and collided with the Clark vehicle.

[3] By way of a signed document, defining Clements expressed authority to use and operate the truck, the Baltzers claim Clements did not, at the material time of the accident, have their authority. He exceeded his scope of authority by operating it for purposes other than the specific purpose of picking up parts for the repair work he undertook to do on it and by drinking and driving. Accordingly, no liability attaches to them. Clements agrees.

[4] It is Royal's position that the Baltzers consented to Clements operating the vehicle outside of the scope of the terms of the alleged consent document and that the court can look to Baltzers' words and conduct as well as to the prior history of dealings between the parties to determine whether there was a previous pattern of consent given to Clements to run private errands, including driving his son. Therefore, the Baltzers are responsible to answer for the damages occasioned to the plaintiffs.

[5] Royal does not dispute that the document was signed by both Robert Baltzer, the registered owner and Clements; but does dispute the contention that it was signed in advance of Clements taking possession of the truck on October 4, 2003. Rather, it was manufactured and signed after October 5, 2003, the date of the

accident, “because of the circumstances of the accident and because of potential ramifications.” Royal contends even if this document was written and prepared and signed before the accident, given that the owners’ consent to possession of the vehicle, liability cannot be avoided by restricting the purpose for which the vehicle may be used. Particularized private arrangements should not prevail over legislative intent designed to protect other users of the highway like the plaintiffs. Public policy reasons preclude the Baltzers from being able to deny that they had given consent to possession and operation of the vehicle. (**Mayford v. Weber**, 2004 ABCA 145). Royal argues that in circumstances where an owner is acquainted with a person and is familiar with or aware of that person’s habits and proclivities, the owner completely assumes whatever risks may fall upon handing over possession of the vehicle to the other person. Any law to the contrary is “old” authority.

[6] The following briefly capsulizes the Baltzers and Clements trial evidence of events surrounding the Sunday, October 5, 2003 accident.

[7] The Baltzers needed some work done on their 1989 Chevy pickup truck. Clements, a mechanic and acquaintance/friend who, over the years did all the

maintenance work on the truck, agreed to do it at his friends' private garage, during his spare time.

[8] The Baltzers never allowed anyone else to drive their vehicles. When Clements came to pick up the vehicle on Saturday, October 4, 2003, Susan Baltzer asked him to sign a document that she had prepared over the proceeding few days with the help of her daughter and the internet. It outlined the terms under which he was allowed to operate the vehicle as follows:

(address deleted) (numbers deleted)

[9] For Susan Baltzer the document reflected her prudent, careful, untrusting, and cautious approach to potential life issues and was reminiscent of the principle behind a group waiver document she drafted for signature by annual pool party participants at her home, given an earlier incident when a guest had broken a toe. For Robert Baltzer, while appreciating his wife's nature, it was extreme and unnecessary given his experience with Clements. For Clements it was not a surprise. He appreciated the magnitude of potential consequences of the document. He signed, leaving the original with her which she stored in the kitchen cupboard above the stove. He was unable to recall whether he was copied or whether it had been signed by Robert Baltzer.

[10] Clements drove the truck to Hudson's garage a few minutes from the Baltzers' residence. While working on Hudson's vehicle, he checked over the truck to determine what was wrong and what parts were needed. Necessary parts were not acquired. During the afternoon, Robert Baltzer attended at the garage and they had a brief discussion. Later, Clements drove the truck home and parked it outside his apartment building. That evening a party pursued at Clements' apartment. He drank to excess and the next day, Sunday, October 5, 2003

consumed a number of beers between 10:00 a.m. and 2:30 p.m. before driving Baltzer's truck to Fairview to drop off his son and his son's friend at the friend's residence. It was his access weekend with his 17 year-old son whose mother lived in Timberlee.

[11] On his return trip to Dartmouth, he collided with the Clark vehicle at the intersection of Gerhardt Street and Main Street in Fairview. Clements was arrested and charged with failure to stop at a stop sign and with impaired driving. He was released late that evening and made his way home.

[12] Very early the next morning, Monday, October 6, 2003, a remorseful Clements attended at the Baltzers' residence. He referenced it as a "fender bender". The extensive damage viewed later at the salvage yard, requiring a flatbed trailer for retrieval, only served to heighten the Baltzers' wrath. Susan Baltzer reported the accident to their insurer on Tuesday, the following day. Some ten days following the accident, on October 15, 2003, Robert Baltzer was interviewed and a statement was taken by an adjuster. Clements provided a statement to an insurance investigator on November 17, 2003.

[13] Having reviewed and weighed all the evidence, in the context of the amount of time that has pasted and inclusive of, but not limited to, the numerous inconsistencies in statements given to adjusters/investigators shortly after the accident and the evidence at trial as well as between the witnesses themselves, such as who provided Clements with the keys; whether a phone call occurred between Clements' roommate John and Robert Baltzer Sunday night after the accident; whether the truck was ever lent or driven by anyone other than the Baltzers; whether Clements borrowed other people's vehicles; whether Clements was told to take the truck home; whether Clements normally used the truck for the very purpose cited, I conclude and make the following findings of fact.

[14] With respect to the signed document by Robert Baltzer and Clements outlining the terms under which Clements was allowed to operate the truck, I am unable to accept that it was executed prior to the accident on October 5, 2003. To believe otherwise, in the circumstances, strains credulity too far.

[15] A grave weakness in each of the Baltzers' and Clements' evidence, which cast doubt on the veracity of other portions of their testimony and indeed strikes at the heart of their credibility is how they addressed the existence of the written

document. Despite Susan Baltzer's stated prudent and cautious need to address potential liability issues by way of written agreement, she did not raise the existence of the signed document addressing the very issue at hand when she reported the accident on Tuesday October 7, 2003 or for the following four to six weeks thereafter. Neither did Robert Baltzer, who believed it to be an extreme thing to do, nor Clements, who testified to all along wanting to be honest and responsible for his actions advise the insurance investigators of the existence of any such document, on October 15th and November 17th respectively. The very document that was at the forefront of Susan Baltzer's needs if she was to be comfortable in allowing the truck to be driven, that she had spent days thinking about, and hours drafting, did not spring to mind immediately, while she was experiencing the very circumstances that it was meant to address. It is simply not conceivable that the Baltzers, and in particular, Susan, the author and driving force would have been tardy in mentioning the very document meant to address the issue she faced and that Robert Baltzer would not have raised it with the adjuster no matter how pressed for time he felt, given the importance of the document in the circumstances. The uniqueness of what was being asked for the first time and the significant responsibility imposed by the document as well as the purpose behind same demanded more than a mechanic's simple acceptance of same with no

questions asked and more than an author's late recall and reporting of its existence to the insurers and indifference to both its safe storage and preservation as a precedent for future situations. Especially so, when the rational behind the document was the author purporting to be cautious and prudent. The logical conclusion and one supported by the delay and other responses or lack thereof is that it was drafted after the fact.

[16] In 2003, both the Baltzers and Clements were Dartmouth residents, who resided some two kilometres apart. On Saturday morning October 4, 2003, Clements, having at some point received the keys to Baltzer's truck from Robert Baltzer, drove the truck to Don Hudson's private garage, just minutes away from the Baltzers' residence so that he could do repair work on it and in the process, use it to pick up any necessary parts. He "needed some work" and was to be paid cash for it. A roommate to Robert Baltzer's friend and coworker John, an occasional social friend and ten year acquaintance of the Baltzers, Clements, a mechanic by trade, was their mechanic and had been doing repair jobs on the Baltzer's vehicles since the late 1990's. He alone had done all the maintenance work on the 1989 Chevy truck either in their yard or at local garages. He had evenings as well as Saturday afternoon and every second Saturday off from work to do other jobs.

[17] After spending of couple of hours on Saturday working on Don Hudson's vehicle, Clements drove Baltzer's vehicle into the single bay garage and made a list of what needed to be done to meet safety inspection and address Robert Baltzer's concerns. He later locked up the garage with Hudson's vehicle inside. While working on Hudson's truck, Robert Baltzer dropped by for a few minutes around 1:30 or 2:00 o'clock in the afternoon. Baltzer told Clements that after he finished looking at his truck for him to drive it to Clements' place and to return it on Sunday. By finishing time around four o'clock, he had not picked up any parts, received any parts, or commenced work on Baltzer's truck. He drove it home and locked it up, after parking it in front of his apartment building. Clements did not own a motor vehicle.

[18] As Robert Baltzer told the adjuster, "other than the times when" Clements was "working on the truck, he had not driven" it. "If he" was "working on the truck", Baltzer "let him drive it to pick up his boys or parts" with or without permission although "normally" he asked "prior to using the truck". "He did not ask any permission to use the truck on the date in question." By October 5, 2003, Cements had "driven the truck four to five times in the last six months" which

would appear to coordinate with the move of his son's best friend to Fairview, although no specific date of the move was recalled. In any event, the drop off of the boys at the friend's home in Dartmouth, minutes from Clements that was often used as a pick up location by Clements' ex-wife ended with the move and the friendship lasted. It was "normal" for Clements "to use the truck to take his boys back home on Sunday." Baltzer understood that Clements "was coming back from dropping the boys off at the time of the accident."

[19] Their history of employment provided Clements with the ability to engage in this particular use of the vehicle. Although Clements "normally" asked Baltzer's "permission prior to using the truck to pick up his boys or run errands" this was not always the case. It is clear that on occasion Clements used the truck to transport the boys. Baltzer was aware of this and made no objection. In effect, he implied consent to Clements using the truck for his personal purposes. The next day was Sunday, the job was yet to be completed and this time, he had been told to take the truck home. I reject this occurring as the result of some "glitch" existing like Mr. Hudson wanting to do the logical thing and leave his vehicle in his own garage and the Baltzers "not going to be in the evening or something" so as to prevent the truck being returned home and left locked. This is all against an employment

background of the “cash” paid to Clements for his work not being very substantial and there never being an issue with how Clements conducted himself when driving in Baltzers’ employ or otherwise.

[20] Over the years Robert Baltzer never had an issue with Clements drinking to any degree or in any capacity whether it be while working for him as a mechanic on his vehicles or socializing with him. He had no reason to think Clements might be the kind of person who would drink and drive and was surprised to learn that he had been at the time of the accident. He had no reason to tell his 48 year-old employee not to do so. He had no concerns about Clements’ conduct when using his vehicle. On the balance of probabilities, Baltzer’s statement to the adjuster that, “I have told him specifically not to drive the vehicle if he has been drinking,” had more to do with the circumstances that he found himself addressing than with the fact that he actually ever said it to Clements. As pointed out by counsel for Royal, it is common sense that no one would allow another person to operate their vehicle drunk.

[21] For the sake of clarity, as for Clements saying that he “could not knowingly say for sure” if he had any independent recollection of ever having driven one of

Baltzer's vehicles before and as for him then saying to the best of his knowledge, he never occupied Robert Baltzer's vehicle for the purpose of driving the boys back after an access visit and as far as him then saying, although not the normal practice it was possible that it could have happened for that purpose several times, but he did not know whether it was without Robert in the truck, I find as a fact, as noted above, that he did operate the truck in the course of his employment as well as outside same with Robert Baltzer's expressed and implied consent for the purpose of dropping off his son and his best friend in Fairview and, in particular, on the day of the accident, as he had any number of times in the last six months. However, this time he was drunk and the collision occurred. In so finding, I have rejected Robert Baltzer's explanation that his statements to the adjuster some ten days after the accident contradicted his trial evidence of never allowing Clements or anyone to drive his truck because what "comes out of my mouth is not what I meant to come out of my mouth" and that he was "babbling" and had "misinterpreted". It is obvious from the statement that he had the opportunity at the time to correct the content of the statement and he did make corrections. He read and signed to the accuracy of the statement. He did not feel the need to call back the adjuster and clarify the total inaccuracy of his statement.

[22] The Baltzers' liability as owners and not operators of the truck could only arise under s. 248(3) of the **Motor Vehicle Act, R.S.N.S. 1989** and amendments thereto, which reads as follows:

> "S. 248 (3)
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> 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.

[23] This is a rebuttable presumption and a matter of evidence as to whether or not the presumption has been rebutted. (**Sulyok v. Carroll** (1977), 22 N.S.R. (2d) 126 at para. 141). The presumption of vicarious liability contained in s. 248 (3) has been rebutted by the Baltzers.

[24] The evidence conclusively proves that Clements had been employed off and on over the last ten years by the Baltzers, as a mechanic, to repair their vehicles and in particular, had done all the maintenance and repair work on this truck. He was paid for his work. He was considered to be a prudent driver with no conduct issues. "Other than the times when David is working on the truck he had not

driven it." If he was working on the truck, he was allowed to drive it to pick up parts and for his own personal purpose of dropping his son and his son's best friend off at the friend's residence in Fairview or at home in Timberlee, after his access weekend. In these circumstances, it was "normal for him to use the truck to take his boys back home on Sunday". Having worked but not completed the repair work on the vehicle on the Saturday before the collision, he was told by Robert Baltzer to take the truck home. It was on Clements' return trip from dropping the boys off on Sunday afternoon that the collision occurred. There was absolutely no purpose of the Baltzers being served by this trip. Clements was neither under the direction and control of the Baltzers nor was he on Baltzers' business or acting on their instructions (**Nixon v. Robert & O'Brien and Royal Insurance Company of Canada** (1983), 59 N.S.R. (2d) 245).

[25] Hart, J. in **Frizzell & Frizzell v. Crowell and Belmont Motors Limited** [1976] N.S.J. No. 391, reviewed cases addressing the common law relating to principal/servant and agent relationship and the applicability of the then equivalent section of the **Motor Vehicle Act** that imposed labiality on an owner. At paragraph 17, he stated:

17 "The law is settled that the use of a motor vehicle with the permission and consent of the owner is not sufficient to render the owner liable for the negligent acts of the driver. The vehicle must be engaged in the fulfilment of some purpose of the owner before liability attaches. The authority for this proposition has been reviewed by the courts of this Province on J.E Morse & Co. Ltd. v. Hicks and Zink, [1955] 3 D.L.R. 265; and in L'Heureux v. Venator (1973), 33 D.LR. (3d) 467. In the first case, Illsley, C.J. says at p. 269:

> The main ground on which it was contended that Zinck was using the car in the course of his employment at the time of the accident was that his use of the car for his own purposes was expressly authorized by his contract of employment as part of his remuneration. Is this sufficient to make his use of the car a use of it in the course of his employment?
>
> There are many cases which decide that a servant in using a vehicle belonging to his master is not using it in the course of his employment merely because he is using it with consent or permission of his master. A good example is the case of Higbid v. R.C. Hammett Ltd. (1932), 49 T.L.R. 104, where the Court of Appeal held that the negligence of a boy who was employed by the defendants as a roundsman and who knocked the plaintiff down while he was riding his employers' bicycle with his employers' manager's permission in going home to his dinner, was not the negligence of his employers, the court holding the employers were not liable for any negligence committed by an employee during his dinner hour unless he was doing something in the course of the empolyers' business at the time.
>
> Another instance is the case of Britt v. Galmoye v. Nevill (1928), 44 T.L.R. 294, where a single Judge held that the first defendant who had the second defendant in his employ as a van driver and lent him his private motor car after the day's work was finished to take friends to a theatre, was not liable for the van driver's negligent in injuring the plaintiff as the journey was not on the master's business and the master was not in control. The trial judge in that case said the liability of a principal had been expressed in many ways, that the gist of it is that the agent was doing something for his principal, that the journey was not on the master's business, that the master was for the once a stranger, that the servant was in the position of a stranger after his work was finished.

> It be taken as proved (and the jury may have so take it) that at the time of the accident Zinck's work for his employer had been finished for the day, the fact that Zinck, as part of his contract of employment, had the right to use the car for his own purposes would not, in my opinion, make such use by him of the car in the event in question a use of the car in his employer's business or in the course of his own employment - any more than if the contract of employment had not entitled him to use the car for his own purposes and he had obtained express permission from his employer after his day's work was done to take his two passengers on the trip in question.

[26] There is no reason to suggest the law is not settled or that for purely policy-based reasons, not reflected in the legislation, what counsel references as "old authority" like **Nixon v. Robert et al**, supra should no longer be followed. An interpretation of s. 248(3) that focuses on the specific words of the statute is preferred to policy based reasoning that relies upon the words of dissimilar statutes in other jurisdictions.

[27] Subsection 248(3) (then s. 221(3)) was addressed in **Nixon v. Robert et al**, supra at paras. 13 & 14 where Hallett J. emphasized that the language of s. 248(3) differs from the legislative language used in other jurisdictions with respect to vicarious liability for owners, in that these statutes make specific reference to an owner's consent to the possession of the vehicle by the driver:

> 13. The legislation of these other [*page 250] provinces dealing with vicarious liability of owners is very different from ss. 221(1) and (3) of the Nova Scotia Act in which there is no reference whatsoever to "consent". The concept that an owner's consent to the possession of the motor vehicle by the driver as imposing liability on an owner casts a much wider net of vicarious liability than the concept of deemed agency contained in s. 221(3). The provisions of the Nova Scotia legislation do not alter the common law respecting the vicarious liability of a principal for the acts of his agent or servant other than to reverse the standard onus of proof from the plaintiff to the defendant while it would appear that the sections such as contained in the Manitoba Act referred to in Murray v. Faurschou Farms Ltd. have been interpreted in accordance with the words used by the legislators to impose liability on the owner if the [owner] consents to the driver's possession of the motor vehicle.
>
> 14. Likewise, the Ontario legislation dealing with the owner's vicarious liability bases liability of the owner on consent and not on the existence of a deemed agency relationship. Therefore, the cases arising under the Ontario legislation are of no help in Nova Scotia. Similarly, the provisions of the Motor Vehicle Act of New Brunswick relating to vicarious liability of the owner evolve around the concept of consent and are likewise not applicable.

[28] In **Nixon**, supra the facts were that the defendant Robert was the lessee of a motor vehicle owned by the defendant O'Brien. The plaintiff argued that the owner of the motor vehicle should be liable for loss or damages resulting from negligence in the operation of a motor vehicle on a highway, "unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur" (at para 5). On the basis of the aforementioned interpretation of the **Motor Vehicle Act**, Hallett, J. held that "the proposition upon which counsel for the plaintiff argues that I should find Mr. O'Brien vicariously liable is not supported by the legislation in place in this province" (at para. 15).

Edwards, J. followed similar reasoning in **Mader v. Lahey**, [1997] N.S.J. No. 571 (S.C.), where he was required to make a determination as to the liability of an owner. Quoting the case law noted above and referenced by Hallett, J. in **Nixon**, supra, he held at para. 53 that the evidence established that "the Defendant Lahey's driving of the [owner] Nancy Mailman's vehicle was not in any capacity as her servant or agent and that accordingly, the action against her should be dismissed."

[29] Royal in argument, relied upon case law that referred to New Brunswick, Saskatchewan and Alberta legislation. (**Bustin-Galbraith v. Albert** 2003 NBCA 20; **David R. Gillard Ltd. v. Cormier** [2000] N.B.J. No. 355 (NBCA); **Clifford v. Sulgk** (1987), 60 Sask. R. 16 (Q.B.); **Mayford v. Weber**, 2004 ABCA 145). Other provincial legislation and these in particular, impose vicarious liability on vehicle owners when the vehicle is in the possession of another person with the owner's consent. Once an operator is given consent to possession, a breach of operational conditions does not negate the fact that possession was originally given. Any excess authority by the driver in operating the vehicle is irrelevant if indeed possession has been given to the driver by the owner. Where there is consent to possession of a vehicle, the owner's liability cannot be avoided by restricting the purpose for which the vehicle may be used. The words used by

other legislators to impose liability on the owner focuses on the owner's consent to the possession of the vehicle by the driver and not on the operation of the vehicle by a deemed to be servant and agent of the owner acting within the scope of his authority as such, unless and until the contrary is established.

[30] While it is undeniable that consent comprises much of the substance of the general authority created by s. 248, this does not mean that law from other jurisdictions involving statutes that speak of "consent to possession" without any reference to deemed servant and agent relationship can replace or usurp the interpretation of s. 248 afforded by such cases as **Nixon**, supra and **Mader**, supra.

[31] The effect of the valid and common sense proposition that no one would allow another person to operate their vehicle drunk in view of s. 248(3) is not, as argued by Royal's counsel, that an owner incurs absolute liability for any unreasonable, illegal or dangerous conduct of an operator. This would, as argued by Baltzers' counsel, make it practically impossible for an owner to leave a vehicle with a mechanic for servicing. Rather, s. 248(3) sets out a scope of authority, within which the owner will be liable for the actions of the operator. The statute plainly contemplates that it is open to an owner to establish that the operator was

not “acting in the course of his employment and within the scope of his authority as...servant and agent....”. It hardly seems necessary or reasonable for the owner to be required to specify every conceivable alleged or dangerous activity in which the operator is forbidden to engage. Illegal or unreasonable operation of the vehicle will not attach liability to the owner providing the owner establishes that this conduct was outside the scope of the operator’s authority.

[32] The **Motor Vehicle Act** could easily be drafted so as to impose liability more widely, as, for instance, in statutes where all that is required for vicarious liability to arise is that the owner consent to possession of the vehicle by the driver. While the “servant or agent” element of s. 248(3) may provide a narrow scope for the application of vicarious liability to an owner, no other interpretation of s. 248(3) is supportable in view of the case law and the language of the statute.

[33] To the extent that there is a conflict in the analysis applied in **Nixon**, supra or **Mader**, supra and **Goudey v. Malone** 2003 NSSC 257, a case which did not refer to the former cases and required application of s. 248(4) of the **Act**, given that it involved a family car, being operated by a third party novice driver, under the direction or control of a passenger listed as one of the parties on the policy of

insurance and with the main policy holder, his mother and owner's implied consent to use the car, I prefer an interpretation of s. 248(3) that focuses on the specific words of the statute to purely policy based reasoning that relies upon the words of dissimilar statutes in other jurisdictions.

[34] In conclusion, Royal is responsible to answer for the damages occasioned to the Plaintiffs. The claim against Royal under Section D uninsured motorist provision stands and the Baltzers are removed as defendants to the action.

[35] If necessary, I will hear from counsel by written submission on the issue of costs for the special time Chambers matter.

J.