SUPREME COURT OF NOVA SCOTIA
Citation: Barrington v. Dixon, 2011 NSSC 331

Date: 20110829
Registry: Sydney

Docket: Syd. No. 267902

Between:

Erin Deveraux

Plaintiff

v.

Emmerson Dixon, Jocelyn Dixon, AVIVA Canada Inc.

Defendants

Docket: Syd. No. 284659

Between:

David Barrington

Plaintiff

v.

Emmerson Dixon, Jocelyn Dixon, AVIVA Canada Inc.

Defendants

Judge:	The Honourable Justice Arthur J. LeBlanc
Heard:	February 22, 2011, in Halifax, Nova Scotia
Counsel:	J. Scott Barnett, for AVIVA Canada Inc., Selina Bath, for Jocelyn Dixon

By the Court:

[1] The defendant Emerson Dixon, driving a truck owned by his mother, the defendant Jocelyn Dixon, collided with a vehicle occupied by the two plaintiffs on February 10, 2006. Each of the plaintiffs subsequently commenced a proceeding against the Dixons and against their own insurer, Aviva. Pursuant to an order of Edwards, J., dated December 14, 2009, the issue of whether Mr. Dixon had the consent of his mother to drive her truck was ordered to be determined for the purposes of both proceedings. The result of this finding will determine which insurer should respond to the claim: Unifund, Mrs. Dixon's section A (third party liability) insurer, or Aviva, the plaintiffs' section D insurer.

Evidence

[2] The defendant Emerson Dixon struck a vehicle occupied by the two plaintiffs, while driving a 1991 Nissan pickup truck that was unregistered but insured in the name of his mother, the defendant Jocelyn Dixon. The collision occurred on February 10, 2006.

[3] At the time of the accident, Jocelyn Dixon resided at 52 St. Albans Ave. in Sydney. Her son, Emerson Dixon, then 24, was living with her, and had been living with her for about the previous year. He had also lived with his father – from whom Mrs. Dixon was separated – at various times, in Dingwall, Nova Scotia.

[4] Prior to the accident, Mrs. Dixon owned a 1998 Ford Contour and a 2000 Honda Prelude. She used the Honda in the summer and stored it during the winter. She testified that in February 2006 this vehicle was in storage, although she agreed on cross-examination that there was no documentary evidence of the insurance being taken off it that winter, as was her habit. At the time of the accident, the Ford was being repaired. Needing a vehicle, she bought the Nissan truck in December 2005 (according to insurance documentation; Mrs. Dixon was unsure of the exact date). She included the truck on her auto insurance policy for the period January 25, 2006, to October 1, 2006, and had the Ford removed from the policy. She recollected paying $800.00 or $1000.00 cash for the truck. On cross-examination she agreed that her statement to the insurance adjuster, given about five days after the accident, indicated that she had purchased the truck from Ann Marie Lee for $600.00.

[5] Mrs. Dixon agreed that the Nissan truck was not registered at the time of the collision. She said she was unemployed and was receiving a disability payment, and did not have the money to register the truck until the end of the month. She said she had test-driven the truck once, on a dirt road near her house, but was not willing to take it on the road unregistered after that. In February 2006 she was driving a car belonging to her mother-in-law, which she had the use of when she needed it. On cross-examination she was confronted with her statement to the insurance adjuster that she had never driven the truck. She said she must have forgotten. There was some confusion on this point in her statement, where she initially stated that she drove it home herself, then corrected herself by saying that actually her ex-husband drove it home. She did say on discovery that she had test-driven the vehicle.

[6] Mrs. Dixon stated that she intended to be the only driver, because her son did not have a license. She was the only driver listed on the insurance policy. She said she had two sets of keys for the Ford and one set for the Nissan truck. The keys were kept on a key rack next to her kitchen door. Emerson did not have a separate apartment in her house. He used the same entry as she did, and the keys would have been physically accessible to him. In addition to Mrs. Dixon's son

Emerson, her niece Jocelyn Burton was living with her in February 2006. She said Ms. Burton never drove her vehicles, as she had no license, and they never discussed the matter.

[7] Emerson Dixon learned to drive from his father, with whom he said he was living at the time, and obtained a license at the age of 17. He said he learned to drive on his grandmother's vehicle. It appears that he lost his license not long after obtaining it, and has not held a valid license since that time. Mr. Dixon has been convicted of various driving offences, and it is clear that he did not hold a valid license at the time of the collision. He had convictions for driving offences in May 2000 (taking a motor vehicle without consent) and August 2000 (driving without a valid license.) At that time his address was given as 52 St. Albans Ave. Other convictions followed in October 2001 (dangerous driving and driving without a license) and June 2002 (driving without license and insurance). Most recently, he was convicted of driving while disqualified on April 8, 2005, less than a year prior to the accident. At that time, he was living at 52 St. Albans St. He said it was possible that his mother drove him to the courthouse at that time, but he was not certain. He said that in the year prior to February 2006 he did not drive, before being confronted with his record of conviction from April 2005. He testified on

redirect that none of his offences involved the use of his mother's vehicles. He said he never told her about his convictions.

[8] Mrs. Dixon said the only conviction of her son's of which she had been aware was the one in May 2000. She claimed to know nothing about his other convictions, although several of them occurred when he was living with her at St. Albans Ave. She believed that he had been living with his father in August 2000, but agreed it was possible he was living with her at that time. She agreed that he was living with her in April 2005 when he was convicted of driving while disqualified.

[9] Mrs. Dixon confirmed that she knew that her son had no driver's license. She never asked him whether he held a valid driver's license, but assumed that he did not have one. She said she never specifically told him not to drive any of her vehicles, believing this was unnecessary, since he had no license. She said there were no discussions about him driving her vehicles, and he never asked. She said he never drove any of her vehicles, and was never on her insurance policy, because he had no license. Mrs. Dixon said she never saw her son drive a vehicle during this time period, nor did she hear from him or anyone else that he had been driving

someone else's vehicle. Emerson Dixon likewise testified that he was never listed on his mother's vehicle insurance. He said this meant to him that he was not to drive her vehicles. He said that in the year prior the accident, he did not drive his mother's vehicles and did not ask whether he could. There was no conversation between himself and his mother as to whether he could drive. He stated that she knew that he had lost his license and that he knew he would not be allowed to drive her vehicles because he had no license.

[10] On the day of the accident, Mrs. Dixon went to the Legion in the afternoon to have dinner with her ex-husband, driving her mother-in-law's car. She did not take the keys to the truck with her, as no one had touched them in her absence in the past. On her way home that evening, she drove past the accident scene, but did not know until she got home that her son was involved. She did not notice the truck was missing when she arrived home, although she denied the suggestion that she assumed that Emerson had taken it. She agreed that she did not report the truck stolen. Her niece informed her that Emerson was involved in the accident.

[11] The license plate from Mrs. Dixon's Ford Contour was found on the truck after the accident. She denied that she switched the license plate, and denied any

knowledge of how this occurred. She acknowledged that on discovery, she had indicated that her ex-husband had placed the license plate on the truck.

[12] Mr. Dixon said he did not know why his mother bought the truck. He said he was not present when she purchased it, he never test-drove it, never rode in it as a passenger and made no payments towards the purchase. As far as he knew he was not on the insurance policy, as he had no intention of driving the vehicle, and he said he never asked his mother to be put on the insurance policy because he had no license. He said he had no intention of applying for a license at the time when she purchased the truck because he was not eligible for license at the time.

[13] According to Mr. Dixon, on the date of the accident he had been drinking at a friend's house. He did not believe that he went to school that day (he was taking a welding course). He returned home sometime in the evening. His cousin was home. He said he then decided to take the truck. He said he was intoxicated. He did not contact his mother to ask permission, and did not discuss it with anyone else. He said this was the first time he had driven the truck.

[14] Mr. Dixon said he did not have a good memory of his statement to the insurance adjuster or of his discovery examination. In his statement he said his mother was the only one who drove the truck. This seems to contradict his own evidence that his mother did not drive the truck because it needed work. In the statement he also said his cousin Jocelyn drove the truck, but at trial he said he had not seen her drive it. He had no explanation for the inconsistency.

Findings

[15] I will set out certain findings of fact that will ground the following analysis. I first make a comment on credibility. Emerson Dixon was not a particularly credible witness. There were various contradictions between his evidence in Court, his statement to the adjuster and his evidence given on discovery, and he gave the impression of being disinterested in the details or accuracy of his answers. Jocelyn Dixon, while challenged on some points, was not shaken on the essentials of her evidence. With that in mind, I will make certain findings that will be relevant to the determination of the issue of consent:

The defendant Jocelyn Dixon was the owner of the 1991 Nissan pickup truck that was being driven by her son, the defendant Emerson Dixon, when it collided with the plaintiffs' vehicle.

The truck was not registered, but was insured under a policy with Unifund. Mrs. Dixon was the only driver listed in the policy. The plaintiffs' vehicle was insured by Aviva.

Mrs. Dixon owned three vehicles at the time of the accident: the Nissan truck, a 1998 Ford Contour and a 2000 Honda Prelude. The Ford was undergoing repairs at the time. Her practice was to have the Honda stored for the winter. While waiting until she had the money to register the truck, she was driving a car belonging to her mother-in-law.

At the time of the accident, Emerson Dixon was 24 years old. He was living with his mother, and had been living there for approximately the previous year. He had also lived with his father at various times. He learned to drive from his father, while living with him. He obtained his driver's license at the age of 17, but soon lost it, and has not held a valid license since.

The keys to the truck were kept on a key rack in the kitchen of Mrs. Dixon's house and were accessible to Emerson Dixon.

> Emerson Dixon did not have specific permission to drive the truck on the day of the accident.
>
> Emerson Dixon had various convictions for driving offences, including driving while disqualified, and several of these convictions occurred while he lived with his mother. She was aware of at least of these convictions.
>
> Emerson Dixon and Jocelyn Dixon never discussed whether Emerson could use his mother's vehicles. Mrs. Dixon did not consider it necessary to explicitly tell Emerson that he could not drive her vehicles, as he had no license. He was not listed on her auto insurance. To Mrs. Dixon's knowledge, her son had never driven one of her vehicles.

[16] Counsel for Mrs. Dixon argued that Emerson Dixon should not have been cross-examined on his criminal record, and particularly his previous driving offences. I concluded that these convictions were relevant and material to the issue of Mrs. Dixon's state of knowledge respecting whether he had ever driven without a license. I allowed the records of conviction as exhibits under s. 58(1) of the

Evidence Act, R.S.N.S. 1989, c. 154, on the basis that Mr. Dixon's unresponsiveness to questions about his record was akin to a refusal to answer.

Relevant enactments

[17] Section A of the Standard Automobile Policy (S.P.F. No. 1) deals with third-party liability. It provides, *inter alia*:

> The insurer agrees to indemnify the insured and, in the same manner and to the same extent as if named herein as the insured, every other person who with his consent personally drives the automobile, or personally operates any part thereof, against the liability imposed by law upon the insured or upon any such other person for loss or damages arising from the ownership, use or operation of the automobile.

[18] The *Insurance Act*, R.S.N.S. 1989, c. 231, provides, at s. 114(1) and 119:

> 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.
>
> …
>
> 119 Every contract evidenced by a motor vehicle liability policy shall provide that where a person insured by the contract is involved in an accident resulting from the ownership, use or operation of an automobile in respect to which insurance is provided under the contract and resulting in loss or damage to persons or property, the insurer shall
>
> (a) upon receipt of notice of loss or damage caused to persons or property, make such investigations, conduct such negotiations with the claimant, and effect such settlement of any resulting claims, as may be deemed expedient by the insurer;
>
> (b) defend in the name, and on behalf of, the insured and at the cost of the insurer any civil action that is at any time brought against the insured on account of loss or damage to persons or property;
>
> (c) pay all costs taxed against the insured in any civil action defended by the insurer and any interest accruing after entry of judgment upon that part of the judgment that is within the limits of the insurer's liability; and
>
> (d) in case the injury is to a person, reimburse the insured for outlay for such medical aid as is immediately necessary at the time.

[19] The *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, addresses the onus of proof in claims arising out of motor vehicle accidents. It provides, in part, at s. 248:

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 operator of the motor vehicle,

shall be upon the owner or operator of the motor vehicle.

...

(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.

Issue

[20] The issue is whether the defendant, Emerson Dixon was driving his mother's truck with her consent when he collided with the vehicle occupied by the plaintiffs.

Argument

[21] Aviva, the plaintiffs' section D insurer, takes the position that Mr. Dixon had at least implied consent to drive his mother's vehicle at the time of the accident. Aviva relies on the third party liability provisions of the *Insurance Act* (ss. 114(1) and 119) and the Standard Automobile Insurance Policy.

[22] Aviva also says the defendant Mrs. Dixon is vicariously liable pursuant to s. 248 of the *Motor Vehicle Act*. In particular, s. 248(4) provides that where the driver is the son of the owner, he "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." If it is not established that "such

person was not operating such motor vehicle as aforesaid," s. 248(5) provides that the 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." According to Aviva, the significance of s. 248(5) is that an owner who cannot disprove the existence of consent may nevertheless avoid liability by proving that the driver was not acting as his agent or servant at the time of the accident. On the other hand, under the *Insurance Act* regime, a failure by the owner to disprove consent will automatically be fatal to the insurer's denial of coverage.

[23] Mrs. Dixon, not surprisingly, argues that the evidence discloses that Emerson Dixon had no consent, express or implied, to drive the truck on the day of the accident.

Implied consent

[24] In considering the proper analysis for determining whether a driver had implied consent from an owner to drive a vehicle, the Trial Judge in *Palsky et al. v.*

Humphrey et al., [1964] S.C.R. 580, said, with reference to a statutory implied consent provision, “one must approach the problem in 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.” The Alberta Supreme Court (Appeal Division) reversed the trial decision, holding that 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 to the true owner.” On further appeal to the Supreme Court of Canada, which restored the Trial Judge’s decision, Spence, J. said, for the Court, at 582-583:

> 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. He had the great additional advantage that he watched the witnesses as they were giving evidence and was able to appreciate the fine nuances of their testimony which cannot be reflected in any printed record...

[25] The Supreme Court of Canada restored the Trial Judge’s decision, holding that he “did not clearly draw the wrong inferences or act upon an erroneous principle of law” (p. 583).

[26] The test for implied consent has been stated more recently by Stewart, J. of this Court as "whether upon analysing all the surrounding circumstances objectively, a reasonable person observing the situation would conclude that [the driver] had the implied consent of [the owner] to drive the truck... The state of mind of the owner and driver are strong factors in determining the issue of implied consent": *Bellefontaine v. Randall*, 2005 NSSC 189, at para. 8; affirmed at 2006 NSCA 69.

[27] In *Newell v. Towns*, 2008 NSSC 174, the defendant's son had taken his mother's car without permission. While parked and unoccupied, it rolled out of a parking lot and collided with the plaintiff's vehicle. The plaintiff's insurer took the position that the plaintiff was entitled to recover from the defendant's insurer under the third-party liability provisions, claiming that the son was an insured under s. 114(1) of the *Insurance Act*, and that the defendant was vicariously liable under s. 248 of the *Motor Vehicle Act*. Beveridge, J. (as he then was) held that s. 248(4) created "a straight forward rebuttable presumption of law" (para. 53). As to displacing the presumption, he said, "[a]n 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" (para. 56.) Beveridge, J. concluded that the label "heavy" should not be used to describe the onus, which he described as "a simple balance of probabilities (paras. 64, 87-89.)

[28] Moving to the question of implied consent for the purposes of s. 114(1) of the *Insurance Act*, Beveridge, J. equated the "general authority" described in s. 248(4) of the *Motor Vehicle Act* with express or implied consent (para. 91). In considering what is meant by "implied consent," he said:

> [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...
>
> [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.

[29] After an extensive review of authorities on the point, he concluded:

> [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.

[30] Among the cases Beveridge, J. considered were *Powers v. Pottie Estate* (2000), 185 N.S.R. (2d) 111, and *Morash v. Burke*, 2006 NSSC 364, both of which were cases where the evidence of the owner was not found credible by the Trial Judge. In *Morash*, for example, Wright, J. found the owner's evidence to be "replete with inconsistencies, contradictions, admitted poor memory and admitted

lies in his earlier discovery evidence" (*Morash* at para. 36). In those cases, there was insufficient evidence to satisfy the trier of fact that there was a lack of consent.

[31] Aviva cites *New Products Sales Ltd. v. Crosbie Job Insurance Ltd.*, [1997] N.J. No. 277 (Nfld. S.C.T.D.), as a basis upon which the Court should find implied consent. In that case, the 16-year-old unlicensed driver was not told that he could not drive his parents' car until he was licensed, was encouraged by his parents to drive other vehicles and was taught to drive by his mother. In addition, the keys were always available and easily and accessible to him. Easton, J. found that there was implicit consent for him to drive, applying a presumption similar to that relevant in this case. I note that in *Newell*, Beveridge, J. stated that the availability of keys, while a relevant circumstance, is not determinative:

> [132] ... 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...

[32] The defendant, Mrs. Dixon raises the argument that consent can be limited and restricted. For instance, in *MacNeil Estate v. Gillis* (1994), 128 N.S.R. (2d) 305 (S.C.), the Trial Judge held that the owner's son had implied consent to drive the car, but that such consent was limited in scope and was negated by the son drinking before he drove. The Court of Appeal affirmed this conclusion, holding that there was evidence upon which the Trial Judge could conclude that there was no consent in the circumstances: *MacNeil Estate v. Gillis* (1995), 138 N.S.R. (2d) 1, 1995 CarswellNS 69 (C.A.) at paras. 92-103, 138. Similarly, in *Newman (Guardian ad litem of) v. LaMarche* (1994), 131 N.S.R. (2d) 165 (S.C.), affirmed at 134 N.S.R. (2d) 127, the father authorized his son to teach his girlfriend to drive, but added that only the two of them could be in the vehicle. Goodfellow, J. held that there was no consent where the girlfriend drove the car without the son being present.

[33] *Gillis* and *LaMarche* are clearly distinguishable on their facts from the present situation, as is another case cited on behalf of Mrs. Dixon, *Goudey v. Noble* (2003), 220 N.S.R. (2d) 92 (S.C.), where it was held that the owner's son could consent to his friend driving the vehicle. In that case, the son had specific authority from his mother to let other people drive the car, provided they were "licensed and responsible," and the driver had driven it before with the son's authority. Haliburton, J. noted that "[w]here 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" (para. 33). None of these three cases are particularly instructive on the facts of the present case, where the facts do not suggest that a third party was given authority to drive by the son, or that Mrs. Dixon attempted to limit any consent she might have given.

Discussion

[34] With the guidance of *Newell* and the other caselaw, I have considered the question of consent against the statutory and regulatory backdrop of the *Motor Vehicle Act*, the *Insurance Act* and the Standard Automobile Policy. The question is whether a lack of implied consent for Emerson Dixon to drive his mother's truck

has been established on a balance of probabilities. There is no suggestion that there was express consent. The subjective views of the owner and the driver are relevant factors, but must be considered in the context of all the relevant circumstances in order to determine whether there was implied consent.

[35] Mrs. Dixon's evidence was that there was no consent, express or implied, for Emerson to drive her vehicles. She was aware that he did not have a driver's license. As such, she did not find it necessary to explicitly tell him he could not drive her vehicles. He was not listed on her automobile insurance, and, as far as she knew, he had not driven her vehicles in the past. Mr. Dixon's evidence is to a similar effect: it was tacitly understood that he was not permitted to drive his mother's vehicles. I am mindful of my earlier comments about Mr. Dixon's credibility, and on this point I place particular weight on his mother's evidence. Nevertheless, his description of the tacit understanding that existed is consistent with Mrs. Dixon's account. In these circumstances, I am satisfied that an explicit direction is not necessary to establish lack of consent.

[36] I note that Mrs. Dixon was aware to some degree of her son's record of driving offences. It does not follow from this that there was implied consent for

him to drive her vehicles. That is even more the case in view of the fact that the offences did not involve her vehicles. This factor would, if anything, tend to support an absence of consent. It appears that Emerson Dixon was more respectful of his obligation not to drive his mother's vehicles than he was of his obligation not to drive vehicles belonging to others.

[37] The fact that the keys were physically accessible is also not determinative of the consent issue, as Beveridge, J. pointed out in *Newell*; there is no evidence that Mrs. Dixon had reason to be on notice of the possibility that Emerson would take her vehicles. As such, the accessibility of the keys is unremarkable. The suggestion that she could have taken the keys to the truck with her when she went out is of little significance; in the absence of a reason to believe that her son might take the truck, I am not convinced that it was necessary for Mrs. Dixon to take active measures to deny him access to the vehicle.

[38] Counsel for Aviva questions Mrs. Dixon's credibility in respect of her claim to have limited knowledge of her son's driving record. I note that she did not deny limited knowledge of his offences. While Emerson Dixon agreed that it was possible that his mother drove him to Court in 2005, I am not prepared to put much

stock in this answer. As I have noted, my general impression was that Mr. Dixon was not a particularly credible or reliable witness, and this answer gave the impression of a rote response to a question on cross-examination.

[39] Accordingly, having considered the law and evidence, I am satisfied that there was no consent, express or implied, for Mr. Dixon to drive his mother's vehicle. As such, Unifund is relieved of its third-party liability obligation under Mrs. Dixon's insurance contract.

J.