CITATION: Mamo v. Morgan, 2020 ONSC 7829
COURT FILE NO.: CV-17-1332
DATE: 2020 12 15

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Anna Mamo, Olivia Danelle Mamo and Nicolas Dylan Mamo minors by their Litigation Guardian, Anna Mamo	Corey Jonathan Sax, Diamond & Diamond LLP, for the Plaintiffs
Plaintiffs	
- and -	
Chevonie Morgan, 2180571 Ontario Ltd. Her Majesty the Queen in Right of Ontario, Constable Muharem Krdzalic, The Personal Insurance Company, Maurizio Leuzzio, Giovanna Leuzzio, PAFCO Insurance Company and Leeann Jordan	Nadine Nasr, Thomas Gold Pettingill LLP, for the Defendant 2180571 Ontario Ltd. Chad Leddy, Dutton Brock LLP, for the Defendant The Personal Insurance Company Rick Aucoin, Beard Winter LLP, for the Defendants, Maurizio Leuzzio and Giovanna Leuzzio David M. Rogers, Roger Partners LLP, for the Defendants Her Majesty the Queen in Right of Ontario and Contable Muarem Krdzalic Ari Krajden, Kawaguchi Krajden LLP, for the Defendant PAFCO Insurance Company

Defendants)
)
) **HEARD:** December 7, 2020

REASONS FOR JUDGMENT

MANDHANE J.

OVERVIEW

[1] The plaintiff was seriously injured in a motor vehicle collision on January 8, 2016, and sued for damages from various defendants, including the owner of the vehicle, a rental car company, 2180571 Ontario (“Practicar”). The plaintiff says that Practicar is vicariously liable for the negligent actions of the driver.

[2] The plaintiff settled out of court and the remaining defendants now seek to determine their respective liability. In this context, Practicar brings its motion to have the claim against it dismissed. The two co-defendants (respondents to this motion), Personal Insurance Co. (“Personal”) and PAFCO Insurance Co. (“PAFCO”) ask me to dismiss the motion and find Practicar vicariously liable.

[3] The parties agree that my finding on this motion effectively disposes of all outstanding issues in the action. If Practicar is found vicariously liable, the claims against PAFCO and Personal Insurance, both insurers under uninsured/underinsured motorist policies, cannot succeed. On this basis, I invited counsel to make submissions on costs for the entire action.

[4] The parties consented to this matter proceeding by summary judgment, and I agreed that this was an appropriate case for summary judgment based on the factors in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

FACTS

[5] The plaintiff was seriously injured when the car she was travelling in was struck, head-on, by another car (a “Nissan”) travelling the wrong way.

[6] Chevonie Morgan was driving the Nissan and it had Leann Jordan’s two children in the car. He was driving the kids to an overnight visit with Jordan’s mother. Morgan and Jordan had a child and lived together.

[7] At the time of the collision, Morgan was fleeing the police. He was negligent in driving the wrong way.

[8] Jordan rented the Nissan from Practicar two days before the collision. Practicar gave Jordan possession of the Nissan after she fraudulently presented herself as “Sabrina McIntyre,” produced McIntyre’s driver’s licence, and paid cash for a one-week rental. Practicar took no other steps to confirm Jordan’s identity or verify that the driver’s licence presented was valid.

[9] Neither Morgan nor Jordan filed a defence, and they were both noted in default.

ANALYSIS

[10] The only issue before me is whether Practicar, as the owner of the Nissan, is vicariously liable for the damages sustained by the plaintiff.

[11] Section 192 of the *Highway Traffic Act,* R.S.O. 1990, c. H.8. imposes vicarious liability on “owners” and “lessees” of a vehicle:

> 192 (1) The driver of a motor vehicle […] is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle […] on a highway.
>
> (2) The owner of a motor vehicle […] is liable for loss or damage sustained by any person by reason of negligence in the operation of the 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 the owner’s chauffeur.
>
> (3) A lessee of a motor vehicle […] is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle […] on a highway, unless the motor vehicle […] was without the lessee’s consent in the possession of some person other than the lessee or the lessee’s chauffeur.
>
> (4) Where a motor vehicle is leased, the consent of the lessee to the operation or possession of the motor vehicle by some person other than the lessee shall, for the purposes of subsection (2), be deemed to be the consent of the owner of the motor vehicle.

Section 191.9 defines “lessee” as “a person who leases or rents a motor vehicle…for any period of time.”

[12] In *Fernandez v. Araujo*, 2015 ONCA 571 at para. 20, the Court of Appeal for Ontario notes that the vicarious liability provisions mitigate the risk of harm to the public by “imposing on the owner of a motor vehicle, responsibility for the careful management of the vehicle.” While owners have the right to give possession of their vehicles to another person, vicarious liability encourages owners to be careful when exercising that right, by placing legal and financial responsibility on them for losses and harms caused by the negligent operation of their vehicle.

[13] As owner of the Nissan, Practicar conceded that it granted Jordan possession of the car when it handed her the keys in exchange for $300 cash. The Nissan was not stolen and there was no duress on Practicar. Practicar admits that, had Jordan been the negligent driver, it could have been held vicariously liable despite her fraud [*Vancouver*

Motors U-Drive Ltd. v. Walker, [1942] SCR 391; *Castilloux et al. v. Sweezey et al.* 1975 CanLii 510 (ON SC)].

[14] But Practicar argues that it *cannot* be held vicariously liable for *Morgan's* actions. Practicar says that Jordan relinquished possession of the Nissan to Morgan and that he drove it without Practicar's consent. While there is some case law to support this argument, the cases are distinguishable insofar as none of them relate to rental companies like Practicar [see *Leigh v Clement,* 2018 ONSC 4508, *Van Noten v Bulbulia,* 2019 ONSC 5037].

[15] Personal and PAFCO argue that Practicar can still be held vicariously liable under s. 192(4) because Jordan was a "lessee." Practicar argued that Jordan cannot properly be considered a lessee under the *Highway Traffic Act*.

[16] "Lessee" is defined in the legislation as someone who rents a vehicle for any period of time. Here, Jordan paid Practicar $300 to rent the Nissan for one week. On a plain reading of the statute, Jordan was a lessee. Given that the parties admit that a rental transaction took place, the lessee must be Jordan.

[17] The fact that Jordan misrepresented herself as McIntyre does not vitiate the lease agreement between Practicar and Jordan. Practicar made an oral agreement with Jordan when she presented herself in front of them. The name used to sign for the Nissan is irrelevant.

[18] I reject Practicar's nonsensical suggestion that McIntyre was the lessee. There were no authorities cited in support of this position. McIntyre's licence was stolen and there is no indication that she knew or consented to it being used by Jordan to rent

the Nissan. McIntyre was not involved in the rental transaction in any way. And there was no evidence that Practicar specifically intended to rent to McIntyre; she did not have a reservation and did not have previous dealings with Practicar. McIntyre was not the lessee.

[19] Practicar cautions that, in finding Jordan to be a lessee, I risk ignoring her fraud. But there is nothing in the statute or case law to suggest that Jordan's fraud is relevant to a determination of whether she was a lessee. To the contrary, the vicarious liability provisions of the *Highway Traffic Act* protect innocent third-party victims from owners who are not sufficiently diligent in lending or renting their vehicles. Finding that Jordan was a lessee aligns with this underlying policy rationale. It makes sense that the legislature would place a higher burden on commercial rental car companies than individual vehicle owners.

[20] Having found that Jordan was a lessee, Practicar admits that it can be held vicariously liable under s. 192(4). That subsection stipulates that the owner (Practicar) is deemed to consent to the possession of the vehicle by another person (Morgan), so long as that other person obtained the consent of the lessee (Jordan).

[21] It is irrelevant whether Practicar consented to Morgan operating the Nissan. Pursuant to s. 192(4), Jordan's consent to Morgan operating the Nissan is deemed to be the consent of Practicar. Moreover, a prohibition in the lease agreement does not supplant the deemed consent section of 194(4) (*Fireman's Fund Insurance Co. v Dominion of Canada General Insurance,* [1996] 31 O.R. (3d) 724 (ON SC)).

[22] In *Ross v Vayda*, 1990 CanLII 8082 (ON CA), the Court of Appeal considered a similar situation and imposed vicarious liability on the rental car company. Using a California driver's licence, Peter Vayda leased a vehicle from a Florida Auto Rental business. After it was reported stolen, it was discovered that the vehicle had been involved in an accident in Niagara Falls while being operated by a Frank Vayda. There was no evidence about when or how Frank came into possession of the vehicle. The Court of Appeal found that the Florida auto rental business failed to rebut the presumption that Frank had the consent of Peter to possess the vehicle. Florida Auto Rental was deemed to have consented to Peter's use of the vehicle and was vicariously liable.

[23] Morgan and Jordan did not participate in this litigation and there is no direct evidence about how Morgan ended up driving the Nissan. However, applying *Ross v Vayda,* I find that Practicar has not discharged its burden of showing that Jordan did not consent to Morgan driving the Nissan.

[24] Moreover, in this case, I have no trouble finding that Jordan gave Morgan consent to drive the Nissan. This is a logical inference based on the undisputed facts that Morgan and Jordan lived together, and that Morgan was driving Jordan's children to her mother's house for a visit when he struck the plaintiff's car.

[25] Practicar is deemed to have consented to Morgan driving the Nissan and can be held vicariously liable under s. 192(4) of the *Highway Traffic Act.*

DISPOSITION AND COSTS

[26] Practicar is vicariously liable for damages arising from the January 8, 2016 collision.

[27] The claims against Persona and PAFCO are dismissed.

[28] Personal and PAFCO ask for costs on a partial indemnity basis. Practicar notes that the insurers' position on this motion was duplicative. I agree and have discounted the costs payable to Personal and PAFCO for preparation on this motion [*Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, Rule 57.01(g)(ii)].

[29] I also note that Personal's costs were nearly double the amount claimed by PAFCO. I find that PAFCO's costs are more reasonable given the complexity of the issues.

[30] Practicar shall pay Personal's costs on a partial indemnity basis in the amount of $20,000, including all fees, disbursements and HST within 30 days.

[31] Practicar shall pay PAFCO's costs on a partial indemnity basis in the amount of $20,000, including all fees, disbursements and HST within 30 days.

Mandhane J.

Released: December 15, 2020

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Defendants

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