CITATION: Persaud v. Bratanov and Unifund Assurance Co., 2012 ONSC 5232
COURT FILE NO.: 08-CV-349949 PD1
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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
HEERALAL PERSAUD, SHAMIZA BACCHUS-PERSAUD, TREVOR PERSAUD, AND THE ESTATE OF KEVIN PERSAUD	)	No one appearing for the plaintiffs
- and -	)	
ANDREW SUEDAT, ANNAND SUEDAT, JULIET BRATANOV, K.D. AND UNIFUND ASSURANCE COMPANY	)	*David Zarek* for the Moving Party, Defendant, Juliet Bratanov
	)	*John Graham* for the Respondent, Defendant,Unifund Assurance Company
	)	**HEARD:** May 24, 2012

Mr. Justice Kenneth L. Campbell:

I
INTRODUCTION

[1] On March 4, 2006 Andrew Suedat used a van belonging to his grandmother, Juliet Bratanov, to run-down and kill Kevin Persaud in a public park after a drug deal in an adjoining school parking lot went wrong. The surviving members of the Persaud family have launched an action against the defendants, including their own insurance company, Unifund. The plaintiffs claim, among other things, that Ms. Bratanov negligently entrusted her vehicle to her son, Annand Suedat, when she ought to have known that this created a real risk of harm to others. Unifund has cross-claimed against Ms. Bratanov, making this same negligent entrustment

allegation. Unifund also claims that Ms. Bratanov is vicariously liable for the plaintiffs' damages by virtue of her ownership of the van.

[2] Ms. Bratanov now moves for summary judgment on these claims, arguing that there is no genuine issue that requires a trial as neither claim against her has any chance of success.

[3] This motion requires consideration of, essentially, two issues. First, is there any genuine issue requiring a full trial to determine whether Ms. Bratanov is vicariously liable for the plaintiffs' damages simply by virtue of her ownership of the van used in the killing of Mr. Persaud? Second, is there any genuine issue requiring a full trial to determine whether Ms. Bratanov is liable for the plaintiffs' damages as a result of her allegedly negligent entrustment of her van to her son?

[4] Before dealing with each of these issues, however, it will be helpful to provide a more detailed outline of the relevant facts and the litigation to-date, and to articulate, at least briefly, the legal standard to be applied on this motion.

II
FACTUAL OVERVIEW

[5] Ms. Bratanov is a 63-year-old grandmother. She owned a white cargo van that she used primarily to transport firewood to her home in Warkworth. She loaned the van to her son Annand, so that he could use it for his work purposes. Annand lived in Pickering with his 18 year old son, Andrew.

[6] On March 4, 2006 Andrew needed transportation to Brampton. He had planned to go there with K.D.,[1] his slightly younger cousin. The means of transport they had previously arranged fell through at the last minute, and Andrew decided to take his grandmother's van, which had been left parked at his Pickering home. The keys had been left in a glass bowl near the front door.

[7] On their way to Brampton, K.D. told Andrew that they needed to make a stop at the Cardinal Leger Catholic School in Scarborough. It seems that K.D. wanted to sell some marijuana and the school was the arranged location for the drug transaction. The two young men stopped there at around 11:30 p.m.

[8] Unfortunately, the transaction in the parking lot of the school did not go as planned. The anticipated purchasers took the marijuana from K.D. without paying for it and fled. K.D. chased them on foot. This led to a physical confrontation between K.D. and the four drug purchasers elsewhere in the school parking lot. In the result, K.D. sustained a minor injury and lost his cell phone.

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[1] The initials K.D. have been used in the style of cause and throughout this judgment so as not to publish the identity of a "young person" within the meaning of the *Youth Criminal Justice Act*, S.C. 2002, chap. 1 (as amended).

[9] The incident could have ended there. Instead, Andrew came to K.D.'s assistance, chasing the purchasers across the adjoining Canmore Park in the van. More particularly, Andrew proceeded to drive the van from the paved parking lot, between a couple of school portables and onto the snow-covered park. During the course of this over-land pursuit, Andrew *twice* ran over Mr. Persaud, one of the purchasers in the drug rip-off. After running over Mr. Persaud once on his way into the park, Andrew circled the van around, manoeuvred through some trees, and then retraced his same route back through the park and back toward the school, and ran over Mr. Persaud a second time. Andrew and K.D. then fled from the scene together in the van. Mr. Persaud died almost immediately from the crushing head injuries that he suffered from these impacts.

III
THE ENSUING LITIGATION

A. The Criminal Proceedings

[10] Andrew was charged with second degree murder in connection with the killing of Mr. Persaud, but some eight days into his criminal trial, near the conclusion of the Crown's case, he was permitted to plead guilty to manslaughter. Ultimately, he was sentenced by Speyer J. to a six year penitentiary term of imprisonment, less one year credit for the five months he served in pre-trial custody. K.D. pled guilty to being an "accessory after the fact" and was sentenced, as a young offender, to 18 months in custody (served pre-trial) and an additional six months of community supervision.

B. The Civil Proceedings

[11] The plaintiffs commenced an action for $1.1 million against Andrew, his father Annand, his grandmother Ms. Bratanov, his cousin K.D., and Unifund. In their Statement of Claim the plaintiffs allege that Annand and Ms. Bratanov "negligently entrusted" the van to Andrew when they knew or ought to have known that he had an "extensive driving record," was a poor, incompetent, and incapable driver, and was "dangerous" and a "menace to society" and likely to use the van "to the detriment of the public at large."

[12] Unifund has defended this action and has launched a cross-claim against the other defendants. As part of that cross-claim, Unifund has alleged that Annand and Ms. Bratanov are vicariously liable for the damages suffered by the plaintiffs as a result of their ownership of the vehicle. Unifund has also alleged in this cross-claim that Ms. Bratanov "negligently entrusted" her van to her son Annand, by completely abrogating all of her duties regarding her vehicle to her son, when she knew or ought to have known that her grandson Andrew would use the vehicle, and that he had a "criminal record" and fraternized with others with similar criminal records, who engaged in "illicit" activities, and who were a "real risk to other members of society," thereby creating a "risk to the general public that they would be injured or suffer damages."

[13] Subsequently, the action and cross-claim against Annand was dismissed, on the consent of all of the parties (including Unifund), when it was agreed that Annand was not the owner of the van. In the result, the claims of vicarious responsibility and negligent entrustment remain only against the defendant Ms. Bratanov.

[14] As already mentioned, Ms. Bratanov now moves for summary judgment under Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, arguing that the claims against her cannot possibly succeed and that, since there is no genuine issue that requires a full trial in this matter, she is entitled to summary judgment dismissing the claims and cross-claims against her. The plaintiffs have taken no position in response to the motion, neither opposing nor consenting to it. Unifund, on the other hand, contends that there are genuine issues that can only be properly aired at a full trial.

IV
SUMMARY JUDGMENT MOTIONS
THE "FULL APPRECIATION" TEST

[15] The leading decision dealing with summary judgment motions under Rule 20 is the decision of the five-judge panel of the Court of Appeal for Ontario in *Combined Air Mechanical Services Inc. v. Flesch* (2011), 108 O.R. (3d) 1 (C.A.); *Leave granted*: [2012] S.C.C.A. No. 47 and 48. In that judgment the court made the following important points regarding Rule 20 motions:

(1) Rule 20 permits a motions judge to decide the action where he or she is satisfied that there is "no factual or legal issue raised by the parties that requires a trial for its fair and just resolution." [para. 37]

(2) The purpose of Rule 20 is "to eliminate unnecessary trials, not to eliminate all trials." The "guiding consideration" is whether the summary judgment process, in the circumstances of any given case, will provide an appropriate mechanism for "effecting a fair and just resolution" of the dispute before the court. Whether the matter can be adjudicated in the "interests of justice" by way of summary judgment motion must be determined on a case-by-case basis. [para. 4, 38-39]

(3) Apart from cases where the parties agree to resolve the case by summary judgment motion, Rule 20 allows cases to be determined by summary judgment motions where the claim or defence has "no chance of success" or where there is no "genuine issue requiring a trial." Accordingly, Rule 20 motions are properly used to "winnow out plainly unmeritorious litigation" and "dispose of cases on the merits where the trial process is not required in the interest of justice." However, these two types of cases are not to be viewed as "discrete compartments" and a motions judge need not try to "categorize" the type of case in question. [para. 44, 75]

(4) The key question that must be asked by a motions judge on a Rule 20 motion is: can the necessary "full appreciation of the evidence and issues" that is "required to make dispositive findings be achieved by way of summary judgment" or can this full appreciation only be achieved by way of a trial? This "full appreciation test" provides a "useful benchmark" for deciding whether or not a trial is required in the interests of justice. The motions judge must apply the "full appreciation" test before deciding to weigh evidence, evaluate the credibility of witnesses, or draw reasonable inferences from the evidence. [para. 50-51, 73]

(5) Cases that call for "multiple findings of fact" on the basis of "conflicting evidence emanating from a number of witnesses" and found in a "voluminous record" are the kinds of cases where a motions judge simply "cannot achieve the full appreciation of the evidence and issues that is required" and, accordingly, a summary judgment motion cannot serve as an adequate substitute for the trial process in such cases. In these types of cases "the full appreciation test is not met" and the interest of justice "requires a trial." [para. 51]

(6) Cases that are largely "document-driven" with "limited testimonial evidence" and cases where there are "limited contentious factual issues" are, on the other hand, typically the kinds of cases where a motions judge would be able to achieve a "full appreciation of the evidence and issues" required in order to make dispositive findings, and may well be able to proceed by way of summary judgment motion. [para. 52]

(7) Simply being familiar with and knowledgeable about the entire contents of the motion record is not the same as fully appreciating the evidence and issues in a way that permits a fair and just adjudication of the dispute. The "full appreciation test" requires the motions judge to "do more than simply assess if they are capable of reading and interpreting all of the evidence" that has been put before them. The motions judge must also assess whether the "attributes of the trial process" are necessary to enable him or her to fully appreciate the evidence and the issues posed by the case. Unless a full appreciation of the evidence and issues required to make dispositive findings is attainable on the motion record (as potentially supplemented by *viva voce* evidence) the motions judge cannot be "satisfied" that the issues can be appropriately resolved on a summary judgment motion. [para. 53-55]

(8) Under this "full appreciation" test the "established principles regarding the evidentiary obligations" on summary judgment motions continue to apply. For example, on Rule 20 motions each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried." A party is not entitled to "sit back and rely on the possibility that more favourable facts may develop at trial." [para. 56-58]

> (9) On Rule 20 motions the moving party has the legal burden of demonstrating that there is no genuine issue that requires a trial, while the responding party has the evidentiary burden of leading or pointing to evidence setting out specific facts showing that there is a genuine issue requiring a trial. [para. 100]

[16] While this brief summary of the key aspects of the "full appreciation" test under Rule 20 does not do justice to the breadth and nuance of the analysis contained in the lengthy judgment of the Court of Appeal, the principles of the *Combined Air Mechanical* case are what I am obliged to apply, and will endeavor to apply, in the circumstances of this case. See also: *Precious Metal Capital Corp. v. Smith*, 2012 ONCA 298, at para. 8-10.

V
VICARIOUS LIABILITY UNDER THE *HIGHWAY TRAFFIC ACT*

A. The Relevant Statutory Provisions

[17] The vicarious liability of Ms. Bratanov turns on the proper interpretation of the provisions of the *Highway Traffic Act*, R.S.O. 1990, chap. H.8. In Part XI of the Act, dealing with "Civil Proceedings" and under the heading "Liability for loss or damage," s. 192(2) states:

> 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.

[18] In s. 1 of the Act, the following definitions of the terms highway, motor vehicle and vehicle are provided for purposes of the Act:

> "highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;
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> "motor vehicle" includes an automobile, a motorcycle, a motor-assisted bicycle unless otherwise indicated in this Act, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car or other motor vehicle running only upon rails, a power-assisted bicycle, a motorized snow vehicle, a traction engine, a farm tractor, a self-propelled implement of husbandry or a road-building machine;
>
> "vehicle" includes a motor vehicle, trailer, traction engine, farm tractor, road-building machine, bicycle and any vehicle drawn, propelled or driven by any kind of power, including muscular power, but does not include a motorized snow vehicle or a street car;

B. The Positions of the Parties

[19] It is apparent from s. 192(2) of the *Highway Traffic Act* that vicarious liability for a plaintiff's loss or damage is only imposed on an owner of a motor vehicle when the negligence in the operation of the motor vehicle took place on a "highway."

[20] Ms. Bratanov contends that her grandson's negligent operation of her van took place not on any "highway," but in a park. Ms. Bratanov argues that the judicial authorities persuasively support the intuitive notion that a public park cannot properly and realistically be viewed as a "highway." Accordingly, she cannot be held vicariously liable by virtue of s. 192(2) of the Act.

[21] Unifund contends, however, that when the statutory definitions of "highway" and "vehicle" are read together, it is apparent that a "highway" may well include a public park. More specifically, Unifund argues that since the definition of "highway" includes any "place" any part of which is "intended for or used by the general public for the passage of vehicles," and since the term "vehicle" includes a "bicycle" or any other kind of vehicle "drawn, propelled or driven" by even "muscular power," then a "highway" should be viewed as including a public park. This is so because such parks are places generally used by members of the public for riding bicycles and skateboards, pushing baby carriages and similar activities.

C. The "Full Appreciation" Test is Met For Determining Vicarious Liability

[22] I have no hesitation in concluding that the question of whether or not Ms. Bratanov is vicariously liable for the plaintiffs' damages under s. 192(2) of the *Highway Traffic Act* meets the "full appreciation" test from the *Combined Air Mechanical* decision. I have no doubt that the necessary "full appreciation of the evidence and issues" that is required in order to make a dispositive finding in relation to this liability issue can be fairly and justly achieved by way of this summary judgment motion, without the need for a full trial.

[23] There are, essentially, four components of vicarious liability under s. 192(2) of the *Highway Traffic Act* which must be established by a plaintiff, namely: (1) that the defendant was the owner of the vehicle; (2) that the negligent operation of the vehicle by the driver caused the plaintiff's damages; (3) that the incident took place on a "highway;" and (4) that the driver was operating the vehicle with the consent of the owner. See: *Ladouceur v. Zimmerman*, [2009] O.J. No. 4777 (S.C.J.) at para. 21.

[24] There is no dispute with regard to three of these four components. First, there is no dispute that Ms. Bratanov was, in fact, the lawful owner of the van used in connection with the death of the deceased. This fact is admitted by Ms. Bratanov. Second, there is no dispute that Andrew was at least negligent in his operation of the vehicle on the evening in question. Indeed, as noted, Andrew has already pled guilty to manslaughter, been found guilty and sentenced in the criminal proceedings. Third, Ms. Bratanov has agreed that, for purposes of this summary judgment motion, Andrew had her consent to drive her vehicle. While there is evidence to

suggest otherwise, this is not currently a point of dispute between the parties for purposes of this motion.

[25] The sole controversial issue between the parties is whether the incident took place on a "highway." If the incident took place on a highway, then Ms. Bratanov is vicariously liable for the plaintiffs' damages. If the incident took place elsewhere, then s. 192(2) of the *Highway Traffic Act* has no application, and Ms. Bratanov is not vicariously liable for the plaintiffs' damages. To resolve this issue there is no need for a trial.

[26] There is no issue between the parties as to precisely where Andrew struck the deceased (twice) with the van belonging to Ms. Bratanov and the path that Andrew took in accomplishing this result. Given the fatal consequences of Andrew's conduct, there was, predictably, a complete and exhaustive police investigation. The evidence filed on this motion includes the photographs, diagrams and aerial video DVD that were taken during the course of that timely investigation. This evidence clearly reveals the precise path taken by Andrew in the van, in leaving the school parking lot and traveling in and coming back out of the park, as evidenced by the unmistakable set of obvious tire tracks through the snow in the park. This evidence also displays the exact location where the deceased was struck and killed in the park, as there was a single large pooling of red blood stains on the contrasting white snow where the deceased was located. This evidence also provides a full and complete understanding of the entire surrounding area, revealing all physical aspects of the school, the surrounding parking areas, and the geographical details of Canmore Park and the soccer field and baseball diamond within the park.

[27] Whether Ms. Bratanov is vicariously liable turns only on resolution of the legal issue of whether the public park where the incident took place can be properly viewed as a "highway" within the meaning of the *Highway Traffic Act* in the circumstances of this case. There is no need for a full trial in order to determine that question of law. With no facts in dispute, no inferences to draw, and no credibility issues to determine, this legal issue is perfectly suited to being determined by way of summary judgment motion.

D. The Public Park Was Not a "Highway"

1. Introduction

[28] In my view, a public park is not usually included within the definition of "highway" in the *Highway Traffic Act*. Any common sense interpretation of the term "highway," the application of the *ejusdem generis* rule of statutory interpretation, and the governing judicial authorities all confirm that the public park in the present case cannot be considered a "highway."

2. Common Sense and the Ordinary Meaning of the Term "Highway"

[29] The proposition that a public park is not a highway seems well-grounded in natural intuition and common sense, and fuels the term "highway" with its usual, natural and ordinary meaning that is, at the same time, entirely consistent with the statutory definition of the term.

[30] A public park is generally understood as a parcel of green space land, with trees and flowers, usually in or near a city, for public use. Parks often include playgrounds for children and athletic fields for sporting activities. There are often benches and picnic tables. Sometimes parks will include walkways, pathways or boardwalks. In such areas, the operation of motorized vehicles is invariably prohibited.

[31] Highways, on the other hand, are quite different. Highways are generally understood to be roadways, streets or thoroughfares. Usually they are principal transportation routes of some length specifically designed to permit members of the pubic to quickly travel in their motor vehicles from one location to another.

[32] Accordingly, understood in common parlance, a highway is usually the very antithesis of a park. While a highway is purposefully designed for traveling motor vehicles, a public park prohibits such motorized vehicular traffic.

[33] Most reasonable, well-informed parents would be quite puzzled if they were to learn that, in taking their children to the local park for a leisurely walk or a game of catch, they were taking their children to wander or play on a "highway." If the Ontario Legislature wanted to define the term "highway" so as to include a public park, one would expect the Legislature to use the very clearest of terms to accomplish such a startling and counter-intuitive result.

3. The *Ejusdem Generis* Rule

[34] The *ejusdem generis* rule of statutory construction suggests that the term "place" should be interpreted narrowly so as not to include a public park. The *ejusdem generis* rule requires that when a statute provides a list of specific items, and also includes a more general term, the more general term should be restrictively interpreted so as to only include the same genus or type as the specific items listed. See, for example: *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342, at para. 22; *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, [2009] 3 S.C.R. 407, at para. 42-43.

[35] The *Highway Traffic Act* defines the word "highway" as including a number of specific items, namely, a common and public highway, street, avenue, parkway, driveway, square, bridge, viaduct or trestle. Towards the end of that list of specific items, the term "place" is included. The argument advanced by Unifund depends upon the natural breadth of meaning that may be ascribed to the term "place" when that term is divorced of any particular context. It is only when so divorced from context that the term "place" would include a public park. The *ejusdem generis* rule, however, requires a careful examination of the context surrounding the term. According to that rule, the only general term in a list of specific terms, namely the word "place," must be given a contextually restrictive interpretation. For purposes of the Act then, the term "place" should be interpreted so as to encompass only places similar to the other types of travelways specifically listed in the definition. While a public park is a "place" in a general

sense, a public park is certainly not a "place" that is anything like a highway, street, avenue, parkway, driveway, square, bridge, viaduct, or trestle.

4. The Governing Judicial Authorities

[36] The governing judicial authorities provide strong support for the proposition that a public park does not fall within the *Highway Traffic Act* definition of "highway." There are three authorities that are particularly helpful in this regard. In *Gill v. Elwood*, [1970] 2 O.R. 59 (C.A.) at pp. 59-60, the court concluded that a parking lot of a shopping centre was not a highway. In *R. v. Mansour*, [1979] 2 S.C.R. 916, at p. 921, the court held that a private parking lot adjacent to an apartment building was not a highway. In *Shah v. Becamon* (2009), 94 O.R. (3d) 297 (C.A.) at para. 23-35, the court found that a parking lot of a small strip mall was not a highway. More generally, these authorities collectively hold that, in order to determine whether or not a particular area falls within the definition of "highway," the area must be viewed as a whole, and the court must determine the "paramount" or "primary" use of the area.

[37] Despite the fact that parking lots allow the entry and exit of motor vehicles, and permit the movement of motor vehicles within them, these three leading cases all held that parking lots did *not* fall within the statutory definition of "highway" because the paramount or primary use of the parking lots was for the *parking* of vehicles. If parking lots are not properly viewed as a "highway" it is hard to imagine how a public park could be properly viewed as a "highway." Indeed, these three decisions, all of which are binding on me, legally compel the conclusion that the public park in the present case is not a "highway." I was not directed to any cases to the contrary, nor am I aware of any such contrary decision.

E. Conclusion

[38] Ms. Bratanov could only be held vicariously liable for the damages caused by her grandson, pursuant to s. 192(2) of the *Highway Traffic Act*, if Andrew had been operating her van on a "highway" at the time he caused the death of Mr. Persaud. Given that the public park where the plaintiffs' damages were suffered cannot be considered a "highway" for purposes of the Act, Ms. Bratanov cannot be held vicariously liable for those damages. Without the application of s. 192(2) there is no vicarious liability on the owner of a motor vehicle merely by reason of their ownership of the vehicle, when damages are caused by the driver. See: *Vollick v. Sheard* (2005), 75 O.R. (3d) 621 (C.A.) at para. 14-16. As this aspect of the cross-claim by Unifund cannot possibly succeed, and there is no genuine issue that requires a trial, this aspect of the summary judgment motion by Ms. Bratanov must succeed.

VI
NEGLIGENT ENTRUSTMENT

A. Introduction – The Positions of the Parties

[39] In their pleadings, the plaintiffs and Unifund both contend that Ms. Bratanov is liable for the damages suffered by the plaintiffs as she negligently entrusted her van to her son,

Annand. This admitted entrustment was negligent, according to these pleadings, as Ms. Bratanov knew or ought to have known that Andrew would likely use her vehicle, that he was neither capable nor competent to safely drive the vehicle and, given his antecedents and his fraternization with others possessed of criminal records and engaged in illicit activities, this entrustment created a real risk of danger to other members of society.

[40] Ms. Bratanov advances four arguments in response. First, she contends that, as there is no longer any allegation of negligence against her son, Annand, the case against him having been entirely resolved, none of the claims against her can succeed. Second, Ms. Bratanov argues that, there is no evidence that entrusting her vehicle to Annand was negligent, as there is no evidence that her son was incompetent, inexperienced or reckless. Third, Ms. Bratanov argues that she did not owe any duty of care to the plaintiffs (or their insurer). Fourth, Ms. Bratanov argues that any potential negligence on her part was not the proximate cause of the damages suffered by the plaintiff. In these last two related and overlapping arguments, Ms. Bratanov contends, essentially, that it was simply not reasonably foreseeable that Andrew would drive her van through a public park to criminally cause the death of a fleeing pedestrian.

B. Negligent Entrustment

[41] Allegations of negligent entrustment have two broad components, namely: (1) proof that the entruster was negligent in entrusting what later became the instrumentality of the damages to the entrustee; and (2) proof that the entrustee was negligent in his or her use of the instrumentality in causing the damages suffered by the plaintiff. See: *Unger v. Unger* (2003), 68 O.R. (3d) 257 (C.A.) at para. 25-27; *Perkull v. Gilbert*, [1993] B.C.J. No. 1078 (S.C.) at para. 14. The rationale is that when someone supplies a chattel to another, whom the supplier knows or has reason to know is likely, as a result of his or her youth, inexperience or recklessness, to use the chattel in a manner involving an unreasonable risk of harm to others, that supplier should be liable for the harm caused by the negligence of the person entrusted with the chattel. See: *Schulz v. Leeside Developments Ltd.*, [1978] B.C.J. No. 1319 (C.A.) at para. 21.

[42] Cases of negligent entrustment usually arise, as in this case, out of the entrustment of an automobile. In such cases, the judicial authorities suggest that all of the following five elements must be established for liability:

(1) An entrustment of the chattel by its owner to the entrustee;

(2) The entrustee was incompetent, inexperienced or reckless;

(3) The entruster knew or ought to have known of the entrustee's condition or proclivities;

(4) The entrustment created an appreciable risk of harm to the plaintiff and a coincident relational duty of care on the part of the defendant/entruster; and

(5) The entrustee's negligence was the proximate or legal cause of the damages suffered by the plaintiff.

[43] See: *Schulz v. Leeside Developments Ltd.*, at para. 22-23; *Palmquist v. Ziegler*, [2010] A.J. No. 752 (Q.B.) at para. 208; *Larocque v. Lutz*, [1979] B.C.J. No. 53 (S.C.) at para. 5.

[44] As already mentioned, one of the elements of negligent entrustment requires proof that the entrustee was incompetent, inexperienced, or reckless. According to the authorities, incompetency is usually established by proof that, at the time of the entrustment, the entrustee was intoxicated by alcohol or drugs, or was suffering from some physical or mental defect. Inexperience is usually established by proof that, at the time of the entrustment, the entrustee was underage or lacked an appropriate driver's licence. Entrustment of a vehicle to a duly licensed driver, even a youthful driver, is not enough to establish liability in the absence of proof of actual incompetency or a propensity to recklessness on the part of the entrustee. Recklessness is usually established by proof of prior specific acts of negligence on the part of the entrustee. See: *Schulz v. Leeside Developments Ltd.*, at para. 23-26; *Palmquist v. Ziegler*, at para. 208-216.

C. The "Full Appreciation" Test is Met for Determining Negligent Entrustment

[45] In my view the question of whether or not Ms. Bratanov is liable for the plaintiffs' damages for negligently entrusting her van to her son meets the "full appreciation" test from the *Combined Air Mechanical* decision. In other words, I conclude that the necessary "full appreciation of the evidence and issues" required to render a dispositive finding in relation to this issue can be fairly and justly achieved by way of this summary judgment motion, without need of a full trial.

[46] There is no issue between the parties that Ms. Bratanov entrusted her vehicle to her son, Annand. Indeed, she admits this entrustment. There is similarly no issue between the parties as to how the plaintiffs came to suffer their damages. As already mentioned, there was a full police investigation immediately after the death of Mr. Persaud, and a very clear and detailed factual picture has emerged as to the events and circumstances that led to his death. Andrew has already been criminally convicted of manslaughter in relation to this incident. While there is some conflicting evidence surrounding the actual knowledge that Ms. Bratanov may have possessed in relation to the personal history and circumstances of her grandson Andrew and his associates, the issue of liability for negligent entrustment can be resolved without making any factual findings in relation to that conflicting evidence, but by assuming that Ms. Bratanov either knew or ought to have known all of the available facts in relation to those issues.

[47] Accordingly, in my view this issue of liability can be fairly and definitively resolved on a non-contentious factual foundation by determining questions of law in relation to the various components of negligent entrustment.

D. Ms. Bratanov is Not Liable for Negligent Entrustment

1. Introduction

[48] In my view, there is no basis on which to conclude that Ms. Bratanov is liable for the plaintiffs' damages on the theory of an alleged negligent entrustment of her automobile to her son. The element of an entrustment is admitted as Ms. Bratanov clearly entrusted her vehicle to her son Annand. However, the other elements of negligent entrustment cannot be established. First, there is no evidence that Annand was in any way negligent in connection with the motor vehicle. There is no longer even an allegation of negligence on the part of Annand. Nor was there any basis for Ms. Bratanov to have reasonably anticipated that her son might be negligent in connection with the vehicle. Even more importantly, however, focusing only upon her grandson's potential use of the vehicle entrusted to her son, the entrustment did not create any coincident relational duty of care between Ms. Bratanov and the plaintiffs, nor was any potential negligence by Ms. Bratanov the proximate or legal cause of the damages suffered by the plaintiffs. Each of these obstacles to liability is explored in more detail below.

2. The Entrustee Was Not Negligent

[49] I accept the argument that Ms. Bratanov cannot properly be found liable for negligently entrusting her vehicle to her son, Annand, in the absence of any negligence on his part as the person who was actually entrusted with the vehicle.

[50] The decision of the Court of Appeal in *Unger v. Unger*, at para. 24-27, supports the notion that one of the key legal components of any negligent entrustment is proof that the person who was entrusted with the chattel, *the entrustee*, acted in some negligent fashion in relation to the vehicle. The entrustee need not have personally driven the vehicle negligently, but the entrustee must have been, in some way, negligent. Such an allegation of negligence cannot be established in the circumstances of the present case. There is no evidence that could provide any factual support for such an allegation. Indeed, such an allegation is no longer even advanced in the present case. While the plaintiffs and Unifund initially included Annand in their allegations of negligence, these claims have been withdrawn and the proceedings against him dismissed. Accordingly, there is no longer even an allegation that Annand was negligent in relation to the vehicle. More specifically, there is no allegation that Annand was negligent in permitting his son, Andrew, to borrow his grandmothers van.[2]

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[2] To the extent that it may be possible to construe the plaintiff's Statement of Claim to allege that Ms. Bratanov "negligently entrusted" her van directly to her grandson, Andrew, there is simply no evidence in support of such an assertion. The evidence is clear that the only entrustment of Ms. Bratanov's van was to her son, Annand.

3. No Duty of Care Was Owed to the Plaintiffs

[51] In entrusting her motor vehicle to her son, there is no doubt that Ms. Bratanov owed a duty of care to other motorists and pedestrians who might use the highways of Ontario. There exists a sufficiently close relationship between the owner of a motor vehicle and others who might use the highways that it would be within Ms. Bratanov's reasonable contemplation that carelessness or negligence on the part of her son, to whom she entrusted the vehicle, might cause damage to those individuals. Indeed, this duty of care is well recognized. See: *Hill v. Hamilton-Wentworth Regional Police Service*, [2007] 3 S.C.R. 129, at para. 24-25; *Dick v. McLash* (1974), 47 D.L.R. (3d) 242 (Alta.S.C.); *Mills v. Moberg* (1996), 27 B.C.L.R. (3d) 277 (S.C.); *Lloyd v. Rutter*, [2003] O.J. No. 5064 (S.C.J.) at para. 9-29; *Highway Traffic Act*, R.S.O. 1990, chap. H.8, ss. 192 and 193. Mr. Persaud was not, however, either a motorist or a pedestrian using a highway. Rather, he was a pedestrian running through a public park. Accordingly, the relationship between Ms. Bratanov and the plaintiffs does not fall within any previously recognized category of legal duty.

[52] In such circumstances, for there to be a duty of care recognized between the parties, the court must consider two questions. First, does the relationship between the plaintiffs and Ms. Bratanov disclose sufficient foreseeability and proximity to justify and establish a *prima facie* duty of care? Second, if so, are there any residual policy considerations which ought to negate or limit that duty?

[53] The legal nuances of this duty of care inquiry were recently outlined by Doherty J.A., in delivering the judgment of the Court of Appeal for Ontario in *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, at para. 65-74. See also: *Anns v. Merton London Borough Council*, [1977] A.C. 728 (H.L.); *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2; *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, at p. 1151; *Cooper v. Hobart*, [2001] 3 S.C.R. 537, at para. 30-36; *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, at para. 9-10; *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, at para. 45-51; *Childs v. Desormeaux*, [2006] 1 S.C.R. 643, at para. 9-15, 24-31; *Hill v. Hamilton-Wentworth Regional Police Service*, at para. 20-31; *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 S.C.R. 114, at para. 4-6; *R. v. Imperial Tobacco Canada Limited*, [2011] 3 S.C.R. 45, at para. 39-42; A.M. Linden and B. Feldthusen, *Canadian Tort Law* (2011, 9th ed.) at pp. 288-310; G.H.L. Fridman, *The Law of Torts in Canada* (2010, 3rd ed.) at pp. 300-316.

[54] In the circumstances of the present case I need consider only the first question as, in my view, there is simply not a sufficient degree of reasonable foreseeability and proximity between the plaintiffs and Ms. Bratanov to establish a duty of care that would appropriately support a cause of action based upon an allegation of negligent entrustment.

[55] As already mentioned, Mr. Persaud, was killed on March 4, 2006 when a pre-arranged illicit drug transaction between Mr. Persaud and K.D. went wrong. Andrew then drove his grandmother's van off-road, into a snow-covered public park in vehicular pursuit of the fleeing

Mr. Persaud. Andrew then employed Ms. Bratanov's vehicle to criminally cause the death of Mr. Persaud, by running over him, twice, with the vehicle. When this incident took place, Mr. Persaud was a pedestrian in a public park. He was not operating a motor vehicle, nor was he on or near any highway. His sole involvement with K.D. (and Andrew) was in relation to an illegal drug transaction. Their business together had nothing to do with motor vehicles or highways. Moreover, Mr. Persaud was not killed as a result of mere carelessness or civil negligence on the part of Ms. Suedat. Rather, Mr. Persaud was killed as a result of a criminal act committed by Andrew.

[56] In my opinion, in such circumstances, it cannot realistically be said that the relationship between Ms. Bratanov and Mr. Persaud was such that there was any degree of reasonable foreseeability and/or proximity to establish a duty of care on the part of Ms. Bratanov and thus render the imposition of liability for negligent entrustment appropriate.

[57] In entrusting her vehicle to her son, Ms. Bratanov should reasonably have foreseen the possibility that her vehicle might be used by her grandson, and that he might have driven her vehicle carelessly and/or negligently on a highway, and thereby might accidentally have caused harm to other users of the highway – motorists or pedestrians. However, Ms. Bratanov could not reasonably have anticipated that her grandson would use her vehicle as a weapon in a public park to criminally take the life of a fleeing pedestrian.

[58] Motor vehicles are driven on highways. Indeed, that is the very purpose of highways, to permit expeditious vehicular traffic. Highways are used by other motorists and pedestrians. It is certainly reasonably foreseeable that, if a person drives a motor vehicle carelessly or negligently on a highway, the result may well be that one of the others similarly using the highway will suffer personal injury and/or property damage. This provides ample justification for the recognized duty of care between users of our highways. On the other hand, public parks are not places for the use of motor vehicles. Indeed, motorized vehicles of any kind are typically banned from public parks. Public parks are for leisure and recreational activities. It is not reasonably foreseeable that a motor vehicle will be driven through a public park. It is even less foreseeable that a motor vehicle will be deliberately driven through a public park and ultimately used as a weapon to criminally claim the life of an escaping pedestrian.

[59] Equally, there is nothing in the evidence to suggest that there was any degree of proximity between the plaintiffs and Ms. Bratanov that might lead to a *prima facie* duty of care on the part of Ms. Bratanov. There was no close and direct relationship between the parties that would give rise to a legal duty of care. Consideration of the usual factors, including any potential expectations, representations, reliance, and property or other interests, reveals no such relationship. Further, there is nothing about the unique factual circumstances of this case that would suggest such a relationship.

[60] Accordingly, in my view there is not even a *prima facie* duty of care between the plaintiffs and Ms. Bratanov. In the absence of an established *prima facie* duty of care, Ms.

Bratanov cannot be liable for any alleged negligent entrustment on her part. This is fatal to the negligent entrustment claims in this case.

4. Entrustment of Vehicle Was Not Proximate Cause of the Plaintiffs' Damages

[61] In any negligence action, the plaintiff must establish that his or her damage was caused, in fact and in law, by the defendant's negligent breach of a duty of care. The remoteness aspect of this causation requirement asks whether the harm suffered by the plaintiff is too unrelated to the alleged wrongful conduct to fairly hold the defendant liable. In other words, a defendant can only properly be held liable for causing damages to the plaintiff that were reasonably foreseeable. A reasonable person in the defendant's position must have considered that there was a "real risk" that the plaintiff could suffer harm, and not brush aside the risk as being "far-fetched." See: *Mustapha v. Culligan of Canada Ltd.*, at para. 11-18; A.M. Linden and B. Feldthusen, *Canadian Tort Law*, at pp. 361-382.

[62] In my view the death of Mr. Persaud, caused by Andrew's criminal conduct in driving his grandmother's vehicle through Canmore Park, was not, as a matter of law, reasonably foreseeable. While the owner of a motor vehicle ought to reasonably foresee that, if they entrust their vehicle to another, the negligence or carelessness of the entrustee might result in a personal injury or fatal accident on a highway, no vehicle owner in these circumstances could have reasonably foreseen that the entrusted vehicle would be employed as a weapon in a public park to cause the death of a fleeing pedestrian.

[63] Unifund claims that, in entrusting her vehicle to her son, Ms. Bratanov ought to have known it would also be driven by her grandson, Andrew, and his background, circumstances and associates were such that she ought to have known that his anticipated use of her vehicle, without adequate supervision, would create an increased risk of danger to other members of the public. The evidence does not support this claim.

[64] Andrew Suedat was 18 years of age at the time of the incident. He possessed a valid Ontario driver's license, and had no driving record. He was a competent driver and needed no special skills to operate his grandmother's van. Andrew had a high school education. After his parents divorced, he lived with his father and enjoyed a good, supportive family. When he was a young person, 15 or 16 years of age, he was found guilty of theft and assault for forcibly stealing someone's MP3 player, for which he received a probationary sentence. Andrew periodically associated with his cousin, K.D., especially on weekends. K.D. dropped out of high school in grade nine, and supported himself with odd jobs and selling marijuana. K.D. had a more significant criminal record.

[65] This evidence does not establish that Ms. Bratanov ought reasonably to have foreseen that, if she entrusted her vehicle with her son, her grandson would borrow the vehicle and use it as a weapon, following a failed drug transaction, to criminally take the life of a fleeing pedestrian-drug purchaser in a public park. Importantly, contrary to the bare allegations in the

pleadings, there is no evidence Andrew was previously in any way careless, negligent or reckless in relation to the operation of motor vehicles.

[66] Even if it could be said that Ms. Bratanov ought reasonably to have foreseen the possibility that, in the absence of appropriate supervision, Andrew might have driven her vehicle on the highway carelessly or negligently, and thereby caused harm to others, as mentioned above no circumstance reasonably foreshadowed that Andrew might use her vehicle as a weapon in a public park to cause the death of a fleeing pedestrian.

[67] In my view, the killing of Mr. Persaud in Canmore Park, by Andrew twice running over him with his grandmother's vehicle, is simply too disconnected and unrelated to the alleged "negligent entrustment" of the vehicle by Ms. Bratanov to her son Annand. The plaintiffs' damages were not reasonably foreseeable. Those damages were not a "real risk" when Ms. Bratanov entrusted her vehicle to her son. Accordingly, any potential negligence by Ms. Bratanov in entrusting her vehicle to her son cannot be said to be the cause of the plaintiffs' damages. This too is fatal to the negligent entrustment claims.

E. Conclusion

[68] As the claims of negligent entrustment cannot possibly succeed, this aspect of the summary judgment motion must also succeed. First, the entrustee was not in any way negligent in relation to the motor vehicle, and is not even alleged to have been negligent. Second, the relationship between Ms. Bratanov and the plaintiffs does not provide a sufficient degree of reasonable foreseeability and proximity to establish a duty of care on the part of Ms. Bratanov. Third, as the plaintiffs' damages were not reasonably foreseeable, any potential negligence on the part of Ms. Bratanov cannot properly be said to be a proximate cause of the plaintiffs' damages. As this "negligent entrustment" aspect of the claims cannot succeed, and there is no genuine issue that requires a trial, this aspect of the summary judgment motion by Ms. Bratanov must also prevail.

VII
CONCLUSION

[69] In the result, the summary judgment motion by the defendant Juliet Bratanov must be granted, and the claims against her by the plaintiffs and Unifund must be dismissed in their entirety. Judgment shall issue accordingly.

[70] If the parties cannot agree on the issue of costs, they may serve and file their costs outlines, bills of costs and written submissions in accordance with the following timetable.

[71] Counsel for Ms. Bratanov has until September 28, 2012 to file their costs outline, bill of costs and submissions, and counsel for Unifund and the plaintiffs have until October 12, 2012 to file their costs outlines, bills of costs and submissions. These submissions shall be no longer than five pages each, excluding the costs outlines bills of costs and copies of any authorities that the parties may wish to provide.

[72] To the extent that any reply submissions may be necessary, counsel for Ms. Bratanov has until October 19, 2012 to file such reply submissions, which shall be no longer than two pages.

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Kenneth L. Campbell J.

DATE: September 17, 2012

CITATION: Persaud v. Bratanov and Unifund Assurance Co., 2012 ONSC 5232
COURT FILE NO.: 08-CV-349949PD1
DATE: 20120917

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

HEERALAL PERSAUD, SHAMIZA BACCHUS-PERSAUD, TREVOR PERSAUD, AND THE ESTATE OF KEVIN PERSAUD

Plaintiffs

- and -

ANDREW SUEDAT, ANNAND SUEDAT, JULIET BRATANOV, K.D. AND UNIFUND ASSURANCE COMPANY

Defendants

REASONS FOR JUDGMENT

Kenneth L. Campbell J.

Released: September 17, 2012