

**CITATION:** McIntyre v. Gilmar, 2011 ONSC 1301  
**COURT FILE NO.:** No. 05-CV-296608  
**DATE:** 20110225

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Ian McIntyre, minor by his Litigation Guardian, Terry McIntyre, Cheryl McIntyre and Terry McIntyre (Plaintiffs) and Craig Gilmar, Danielle Watson, Bramalea Secondary School, John Chasty, Peel District School Board and The Economical Insurance Group (Defendants)

**BEFORE:** Frank J.

**COUNSEL:** *David Zarek*, for the defendant Danielle Watson, moving party  
*David Jose*, for the defendants Bramalea Secondary School, John Chasty, and Peel District School Board, responding party  
*Jonathan Schwartzman*, for the defendant The Economical Insurance Group, responding party

**HEARD:** February 23, 2011

**ENDORSEMENT**

[1] In 2003, the defendant Craig Gilmar, while driving a car owned by the defendant Danielle Watson, was involved in an accident with a pedestrian. The accident resulted in a claim against Mr. Gilmar and Ms. Watson, amongst others.

[2] Ms. Watson brings this summary judgment motion to dismiss the action against her on the basis of Mr. Gilmar having been driving her car without her consent when the accident happened. The plaintiffs are not participating in the motion. Mr. Gilmar has not defended the action.

[3] I find that the record fails to establish that Ms. Watson is entitled to have the action against her dismissed on this motion.

*A vehicle's owner's obligations*

[4] Section 192 of the *Highway Traffic Act*<sup>1</sup>, in force at the time of the accident, applied to make the owner of a car strictly liable for damages caused by the negligent operation of the car and created a *prima facie* cause of action for damages against the owner.

[5] The Court of Appeal in *Cummings v. Budget Rental Car Rentals Toronto Ltd.*,<sup>2</sup> stated the purpose of this section to be the protection of the public. It is achieved by “imposing upon the owner of the vehicle the responsibility for the careful management of the vehicle, and the responsibility of assuming the risk of those to whom the owner entrusts possession. The owner is thus made liable for all loss and damage sustained by reason of negligence in the operation of the vehicle by a person driving with the owner's consent.”

[6] The onus is on Ms. Watson, as the owner of the car, to show that Mr. Gilmar did not have her consent to be in possession of her car.<sup>3</sup>

### ***Jurisdiction under Rule 20***

[7] The amended Rule 20.04(2) provides for the granting of summary judgment where the court is satisfied that there is no genuine issue requiring a trial. It gives the court enhanced powers to weigh the evidence, evaluate the credibility of a deponent and draw reasonable inferences from the evidence in deciding whether trial is required.

[8] The changes to the summary judgment rule, however, have not altered the underlying principles that apply to summary judgment motions. As before, the moving party has the burden of “providing a level of proof that demonstrates that a trial is unnecessary to truly, fairly, and justly resolve the issues.”<sup>4</sup> If the moving party meets its burden, then the responding party is required to prove that its claim or defence has a real chance of success.<sup>5</sup> Both parties are expected to put their best foot forward and the court may assume that the record on the motion contains all of the evidence on which each party would rely at trial.<sup>6</sup>

[9] If, after considering the evidence and utilizing the tools that are now available to allow for the making of findings of fact, material facts remain in dispute, the claim should be decided by way of trial. Equally, if the evidentiary record is lacking, the claim ought to proceed to be decided at trial.<sup>7</sup>

### ***Summary of Facts***

[10] The only direct evidence with respect to the issue of consent is Ms. Watson's. She insists that Mr. Gilmar was driving without her consent when the accident happened.

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<sup>1</sup> R.S.O. 1990, c. H.8

<sup>2</sup> 20 O.R. (3d) 1 at para. 34

<sup>3</sup> *Korody v. Bell*, 2009 CarsellOnt 2248, at paras. 17-18

<sup>4</sup> *Healey v. Lakeridge Health Corporation*, [2010] O.J. No. 417, at para. 30, affirmed, 2011 ONCA 55

<sup>5</sup> *New Solutions Extrusion Corp. v. Gauthier*, 2010 CarswellOnt 913 at para 12.

<sup>6</sup> *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4<sup>th</sup>) 257 at p. 265

<sup>7</sup> *Dudgeon v. Canadian Career College*, 2010 ONSC 3598 at para. 21.

[11] Her evidence is that in July 2003, Mr. Gilmar obtained his G1 classification licence to drive. A condition of that licence is that its holder cannot drive unless accompanied by a fully licenced driver. At the time, Ms. Watson and Mr. Gilmar were engaged and living together. Ms. Watson told Mr. Gilmar that he could drive her car only if she was in it. Ms. Watson's evidence as to how frequently he did drive her car varies on the record from "lots of times" to "daily".

[12] There was only one set of keys to the car. Ms. Watson kept them on a hook next to the door to their apartment.

[13] Ms. Watson's evidence is that she trusted Mr. Gilmar to comply with her rule that he not drive her car without her being with him and had no reason to doubt his trustworthiness. He had never asked her to allow him to drive the car by himself.

[14] On the day of the accident, according to Ms. Watson, she was at home in bed, having advised her employer the previous afternoon that she would be taking the day off as a result of a cold. Ms. Watson worked as a nanny. The night before, Mr. Gilmar had told her that he would take the bus to work in the morning. She did not awaken when he left for work and did not know that Mr. Gilmar had taken her car.

[15] In mid-afternoon of that day, the police arrived at the apartment asking for Mr. Gilmar. He had returned home before Ms. Watson had awoken, but she did not speak with him before he fell asleep. He was still asleep when the police arrived. It was through the police questioning of Mr. Gilmar regarding the accident that Ms. Watson learned that he had taken her car that morning.

[16] Ms. Watson's evidence is that she was angry with Mr. Gilmar as a result of his taking the car and after the police left complained to him about having lied to her by taking the car. He said that this was the first time he had taken it. She does not say that she raised any other issue with him at the time.

[17] The record includes a copy of the police officer's investigation notes. They record Mr. Gilmar as saying that just before the accident, he had been at school talking to friends when he left in the car to pick up his girlfriend at or near 'Licks'.

### ***Discussion***

[18] Ms. Watson admits that the officer's notes accurately record what Mr. Gilmar said to him. Yet, Ms. Watson gives no explanation for why she did not tell the officer that Mr. Gilmar had been driving without her consent. She gives no explanation for why she did not tell the police that it was not true that Mr. Gilmar was en route to pick her up when the accident happened, as she was at home in bed. Her evidence is that Mr. Gilmar could not have been referring to her when he said he was en route to pick up his girlfriend. But, in order to accept the proposition that Mr. Gilmar was referring to someone other than Ms. Watson, given that Ms. Watson's evidence is that they were engaged and that there is no evidence that she was troubled by the reference to a girlfriend. I would at least require some evidence from Ms. Watson to the effect that there was another girlfriend to whom Mr. Gilmar could have been referring.

[19] The officer's notes are inconsistent with Mr. Gilmar taking the car without consent. Ms. Watson submits that what Mr. Gilmar told the officer was not true. However, in the absence of any explanation from her as to why she did not take issue at the time with what Mr. Gilmar was saying, in my view, she has failed to meet the onus of disproving consent. The result is that this motion must fail.

[20] Ms. Watson submits that the inconsistency between what Mr. Gilmar told the police and her evidence now does not preclude the granting of summary judgment as I can and should accept her evidence. She argues that hers is the only direct evidence and the responding parties have failed to put evidence before me that puts the reliability of her evidence into doubt. This position fails to recognize the presumption created by section 192 of the *Highway Traffic Act* that Mr. Gilmar was driving with Ms. Watson's consent. There is nothing in the amended summary judgment rules that displaces this presumption and the resulting onus. The responding parties have no obligation to put evidence before the court until Ms. Watson overcomes the presumption. She has not done so.

[21] Ms. Watson submits that I should infer from the fact that Mr. Gilmar knew of the restriction on his licence that he would not drive her car without her in it with him. However, without more, a conclusion that Mr. Gilmar would not drive Ms. Watson's car by himself would be based on mere speculation rather than reasonable inference drawn from the evidence. Apart from that, there is a question as to whether it was, in fact, a G1 licence that Mr. Gilmar had at the time. The investigating officer did not record Mr. Gilmar's licence as being restricted and did not charge him with a breach of the restriction. While I accept that the officer would have no recollection of this investigation, he would be expected to be able to provide evidence as to his practice regarding recording restrictions on licences in his report and dealing with drivers in breach of those restrictions. That evidence is not before me.

[22] Even without the doubt cast on Ms. Watson's evidence by the investigating officer's notes, the evidence on which Ms. Watson relies falls short of displacing the presumption that Mr. Gilmar was driving with her consent. Assuming that the evidence of her landlady were admissible on this motion, it does not support Ms. Watson's position. The fact that the landlady did not see Mr. Gilmar drive the car at any time appears inconsistent with his driving it with the frequency admitted to by Ms. Watson. Ms. Watson's own evidence that she was not awake when Mr. Gilmar left on the morning of the accident, took that day off work and did not leave her home before the police arrived, and did not speak to Mr. Gilmar before the police arrived though she was home and awake, is unsupported and suspect. It is possible that through testifying in person, Ms. Watson will be able to demonstrate that in spite of the improbability of her evidence, it is worthy of belief. But, she has not demonstrated this on the record before me.

[23] Consistent with her failure to meet her onus, I reject Ms. Watson's submission that I should draw a negative inference against the responding parties based on their not put before me any evidence from Mr. Gilmar. If any inference is to be drawn, it is that his evidence would not support Ms. Watson's position. Ms. Watson cannot avoid this inference, as she suggests, on the basis of her having had no contact with Mr. Gilmar since 2008. She does know where he lives

and how to contact him. There is no evidence that she made any attempt to contact him and failed.

[24] Ms. Watson relies on a number of cases, none of which assist her, in my view. Although summary judgment on the issue of consent was granted in *Oliviera v. Mullings*,<sup>8</sup> it was in very different circumstances. In that case, all of the evidence, including that of the driver, was that he did not have the owner's consent to drive. While there were inconsistencies in the evidence, none were substantive or probative of the issues before the court.

***Disposition***

[25] Ms. Watson is not entitled to summary judgment dismissing the action against her based on her car having been driven without her consent when Mr. Gilmar was involved in the accident giving rise to this action.

[26] The motion is dismissed.

[27] The parties have agreed to costs of \$7,000 all inclusive to the successful party or parties. Accordingly, the responding parties shall each have costs of \$7,000 all inclusive.

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Frank J.

**DATE:** February 25, 2011

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<sup>8</sup> 2007 CanLII 19621(S.C.J.)