

Court of Queen's Bench of Alberta

Citation: Yellowhorn v Bastien, 2019 ABQB 444

Date: 20190617
Docket: 0906 00067
Registry: Lethbridge

Between:

Anna-Marie Rose Yellowhorn

Plaintiff

- and -

Travis Daryl Bastien and Janet Barbara Jackson

Defendants

**Reasons for Judgment
of the
Honourable Mr. Justice R.J. Hall**

[1] The Plaintiff, Ms. Yellowhorn, was seriously injured in a single vehicle rollover accident. She was the driver of the vehicle at the time. She had consumed alcohol to the point that she had nearly three times the legal limit of alcohol in her blood.

[2] Ms. Yellowhorn has sued Ms. Jackson who was the actual and registered owner of the vehicle, as well as Mr. Bastien who is Ms. Jackson's son. Mr. Bastien had obtained the vehicle with his mother's consent. Mr. Bastien failed to defend the action and was noted in default. Upon notice, the Administrator of the *Motor Vehicle Accident Claims Act* stepped in and filed a defence denying any negligence or responsibility of Mr. Bastien.

[3] Ms. Yellowhorn was rendered paraplegic as a result of the accident. By consent court order granted by Justice K.D. Nixon, this matter came to trial on the issue of liability only.

[4] Ms. Jackson knew who Ms. Yellowhorn was, as they all lived in the small community of Brocket, Alberta. However, she had never personally met Ms. Yellowhorn, nor had she ever spoken to her. Ms. Jackson did not know that Ms. Yellowhorn was involved with Mr. Bastien in a romantic relationship.

[5] Ms. Yellowhorn had neither a driver's license nor a learner's permit at the time of the accident. She was 16 years old.

[6] Mr. Bastien was 24 at the time of the accident. He had borrowed his mother's vehicle to take his niece to an appointment in Lethbridge. He kept the vehicle after the appointment. He lived in a house that was next door to the house occupied by his mother. Mr. Bastien had a valid driver's license.

[7] The practice between Ms. Jackson and Mr. Bastien was that Ms. Jackson owned the vehicle and had the keys. If Mr. Bastien wanted to use the vehicle he had to seek Ms. Jackson's permission, just as happened on this occasion. Ms. Jackson had told Mr. Bastien to drive carefully and not to drink and drive.

[8] Ms. Jackson gave evidence to say that she had never known that Mr. Bastien let anyone else drive the vehicle. She does not recall Mr. Bastien ever asking her if he could allow anyone else to drive the vehicle. The matter had never been discussed between them.

[9] Ms. Jackson did not know that Ms. Yellowhorn had been driving the vehicle until police called her after the accident.

The Accident

[10] The parties filed an Agreed Statement of Facts wherein the facts relating to the accident are set out as follows:

20. On April 26, 2007, Bastien asked Jackson if he could use the vehicle to take his younger brother and his common-law spouse and child to Lethbridge for a medical appointment.
21. On April 25, 2007, Jackson drove the vehicle to Bastien's Residence and gave him the keys.
22. On April 26, 2007, Yellowhorn met up with Bastien between 5:30 p.m. and 9:00 p.m.
23. The first memory Yellowhorn has regarding the events leading up to the Accident is her driving the vehicle to Pincher Creek on April 26, 2007. Bastien was riding as a passenger. They ran into Yellowhorn's friends Valerie North Peigan who was 16 years old and Kaitlyn Yellowhorn, who was 15 years old. Yellowhorn believes they ran into her friends at the 7-11 in Pincher Creek.
24. After leaving 7-11, Yellowhorn drove everyone in the vehicle to the liquor store in Pincher Creek, which was attached to a gas station.
25. Yellowhorn went to the liquor store in Pincher Creek twice on the evening of April 26, 2007. She cannot recall who purchased the liquor on this visit to the liquor store in Pincher Creek.

26. After leaving the liquor store, Yellowhorn drove everyone in the vehicle towards Brocket.
27. Yellowhorn drove the vehicle to the liquor store for a second time on the evening of April 25, 2007 where she purchased Absolut Vodka.
28. After leaving the liquor store for the second time, Yellowhorn drove towards Bastien's Residence.
29. At some point, Yellowhorn picked up Naomi Weasel Bear, who was 16 years old.
30. Prior to reaching Bastien's Residence, Yellowhorn saw Bastien kissing her cousin, Kaitlyn Yellowhorn. This upset Yellowhorn.
31. When they arrived at Bastien's Residence, Yellowhorn, Bastien, Kaitlyn Yellowhorn, North Peigan and Weasel Bear sat around and drank alcohol. Yellowhorn saw Bastien kissing Kaitlyn Yellowhorn and spending time alone with her in his bedroom. Yellowhorn felt betrayed and was shaking a bit. She started drinking more heavily.
32. At one point, Yellowhorn went outside with North Peigan and Weasel Bear. She suspected that something was going on inside between Kaitlyn Yellowhorn and Bastien.
33. At the time of the Accident, Bastien was a passenger in the vehicle being driven by Yellowhorn.

[11] As to the accident itself, it is agreed that Ms. Yellowhorn was driving, lost control and the vehicle entered a ditch and rolled. Neither Ms. Yellowhorn nor Mr. Bastien has a recollection of the accident occurring.

[12] Ms. Yellowhorn gave evidence to say she was in a romantic relationship with Mr. Bastien for "a few weeks". She kept the relationship secret from her family because Mr. Bastien was so much older than she was. She rode in the vehicle several times with Mr. Bastien driving. She herself had driven the vehicle several times before. Her evidence was "I was a decent driver". She believes Mr. Bastien knew she did not have a driver's license or a learner's permit.

[13] Indeed, Ms. Yellowhorn described a previous occasion where she and Mr. Bastien had been drinking alcohol and she drove the vehicle off the road. She said that, at the time, she didn't think she was drunk, but looking back she realized she must have been.

[14] Ms. Yellowhorn testified that on April 26, 2007, Mr. Bastien drove the vehicle and picked her up. She said he was obviously drunk. Ms. Yellowhorn was not.

[15] She testified that she drove to Pincher Creek, meeting and picking up her friends there. She drove to the liquor store then drove back to Brocket and went to Mr. Bastien's house to drink. Then she drove back to Pincher Creek (same 16 kilometres), to purchase more alcohol. She entered the liquor store and purchased the liquor as Mr. Bastien was "extremely intoxicated". Then they drove back to Mr. Bastien's place for more drinking. She described her jealousy watching Mr. Bastien kissing her friend. She then drank more alcohol. As stated above her blood alcohol content was almost 3 times the legal limit when she was in hospital following the accident.

[16] However, Ms. Yellowhorn says that her last memory is that her level of intoxication was "not too bad".

[17] There is no evidence as to where Ms. Yellowhorn was intending to go at the time of the accident nor how it came to be that Ms. Yellowhorn was again driving the vehicle.

The Claim

[18] Ms. Yellowhorn maintains in this Action that Mr. Bastien was negligent in allowing her to drive the vehicle when she was inexperienced, unlicensed and intoxicated. She maintains that he is at least partially to blame for her injuries. She maintains that Ms. Jackson, as owner of the vehicle is also either contributorily negligent, or vicariously liable for the negligence of Mr. Bastien.

[19] Ms. Yellowhorn also sued the liquor vendor for negligence in selling her liquor when she was underage. That defendant has settled with the Plaintiff and is not before the court.

Traffic Safety Act

[20] Much reference has been made in this case to section 187(2) of the *Traffic Safety Act*, set out below:

187 (2) In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle on a highway, a person who, at the time that the loss or damage occurred,

- (a) was driving the motor vehicle, and
- (b) was in possession of the motor vehicle with the consent, expressed or implied, of the owner of the motor vehicle,

is deemed, with respect to that loss or damage,

- (c) to be the agent or employee of the owner of the motor vehicle,
- (d) to be employed as the agent or employee of the owner of the motor vehicle, and
- (e) to be driving the motor vehicle in the course of that person's employment.

[21] The Plaintiff maintains that this section grounds liability against one or both of the defendants. It does not.

[22] This section provides that any person driving the vehicle with the consent of its owner is deemed to be the agent or employee of the owner, driving in the course of that employment.

[23] Here, Mr. Bastien had the consent of Ms. Jackson to drive the vehicle. However, he was not the driver of the vehicle at the time of the accident. Therefore s 187(2) does not apply to him at all.

[24] Here Ms. Yellowhorn was the driver of the vehicle. A great deal of effort has been expended as to whether she was in possession of the vehicle with the consent of Ms. Jackson. In my view, this is really irrelevant. Even if she did have Ms. Jackson's consent, s 187(2) only has the effect of deeming her to be an employee of Ms. Jackson, driving in the course of her employment.

[25] In such a scenario, Ms. Jackson would be vicariously liable for any damage Ms. Yellowhorn caused to others as a result of negligently operating the motor vehicle. Ms. Jackson

would be liable for Ms. Yellowhorn's torts. See the discussion of the Alberta Court of Appeal on this subject in *Garrioch v Sonex Construction Ltd*, 2017 ABCA 105 at paragraph 12, describing vicarious liability of the owner for the driver's torts.

[26] That does not mean that the owner is liable for injuries to the driver caused by the driver's own negligence. An employee who, while in the course of his employment, injures herself as a result of her negligence, cannot claim that the employer is vicariously liable for her injuries.

[27] The issue of whether consent was implicitly given by Ms. Jackson for Ms. Yellowhorn to drive, is therefore, in my view, a red herring.

[28] However, if I am wrong in that conclusion, I find that Ms. Jackson had no knowledge about Ms. Yellowhorn. She did not know she was unlicensed. She did not know that Mr. Bastien had let her drive on previous occasions. She did not know that Mr. Bastien had ever let anyone drive. She was not asked for her permission. She did not give her permission.

[29] Further, in the circumstances, and given her admonition to her son not to drink and drive, I am satisfied that she would not have given her permission to Mr. Bastien to allow Ms. Yellowhorn to drive the vehicle.

[30] The issue of derivative consent was considered at length by the Alberta Court of Appeal in *Garrioch*, supra. The court's conclusions are expressed starting at paragraph 54:

[54] The following principles and guidelines can be extracted from the binding and persuasive authorities just reviewed:

- (a) The only issue is whether the owner expressly or implicitly consented to the third party driver having possession of the vehicle: s. 187(2). The third party's misunderstanding as to the identity of the true owner is not a relevant consideration: *Tran*;
 - (i) other expressions such as "expectation and willingness", "consent would have been given as a matter of course", and "would have consented if asked" are at best analytical tools that might be helpful in examining the facts, but they do not displace the test in the statute. They are methods of analyzing the facts and the possible inferences, not statements of law;
- (b) Implied consent is a question of fact, requiring that an inference be drawn from all of the circumstances, including such things as the knowledge or expectation of the owner about subsequent transfers of possession, the relationship between the parties, any past pattern of conduct, any express prohibition on transferring possession, and any other relevant fact: *Palsky, Godzman, Ireland*, and *Tran*;
 - (i) the subjective belief of the third party driver is not directly relevant, except to the extent that it reflects the view that the informed, objective, reasonable person might have of the circumstances, as that latter view might demonstrate the existence of implied consent in fact: *Palsky*. The driver cannot turn his subjective perceptions into the owner's actual state of mind;

(ii) the question cannot be subjectively resolved by the owner with hindsight, and a negative answer to a hypothetical question put to the owner at trial of whether consent would have been granted at the time of the accident is not conclusive: **Mugford**;

(c) Consent to possession cannot be granted on conditions, such as conditions respecting the manner of driving or the occasions on which driving is consented to: **Mugford**. Such conditions cannot be asserted against an injured plaintiff;

(d) There is an important exception to the **Mugford** principle that consent cannot be granted on conditions. An owner can consent to possession of the vehicle on the condition that possession will not be passed on to third parties, or classes of third parties: **Marcoux**, confirmed by the majority in **Ireland** and **Tran** (Ritter JA's view on this point is in dissent), **Godsman**;

(i) The fact that the person with consensual possession also consented to passing on possession to the third party is a necessary, but not sufficient condition. If the third party acquired possession without consent of the intermediate driver, it would generally be impossible to show implied consent of the owner. The owner's state of mind is, however, distinct from the state of mind of the intermediate possessor;

(ii) The implied consent must be related, at least to some extent, to the third party who was actually driving and involved in the accident: **Godsman**. For example, an owner might be held to implicitly consent to possession being passed on to a licensed driver, but not one without a licence;

(iii) Acknowledgement by the owner that he or she would have consented in a "medical emergency" is only relevant in the case of a true emergency situation requiring the third party to drive, and does not universally negate restrictions on the intermediate possessor passing the vehicle on to third parties: **Ireland** and **Tran**. Recognition of the "common humanity" exception cannot be turned into universal indifference by the owner as to who drives the vehicle;

(iv) Mere foreseeability or "expectation" that unauthorized third party driving might occur is not itself sufficient to negate a general prohibition on allowing that third party driving, contrary to the suggestion in **Enterprise Rent-A-Car**; and

(v) Acknowledgement by the owner that he or she "trusted the judgment" of the driver to whom the vehicle was given is not a conclusive indication that the driver could pass on possession to third parties: **Ireland**.

[55] No party to this appeal applied for permission to reconsider any of the prior, binding decisions of this Court. Nevertheless, one might ask whether there is any policy reason why the *Marcoux* exception to the *Mugford* test should not exist. In other words, since *Mugford* holds that possession cannot be given on conditions, why should an exception for conditions related to third party driving be recognized?

[56] The answer to the question is simple: the third party driver exception recognized in *Marcoux* is permitted because the statute says it should be permitted. The one condition that the statute specifically allows the owner to place on his vicarious liability is “consent”. The owner is allowed to consent to the second party having possession of the vehicle, and limit that consent to the second party. If the third party wants consent to possess the vehicle, he has to get it from the owner. Just because the owner consents to one driver having possession of his vehicle does not mean that the owner consents to the whole world having possession.

[31] I find that Ms. Jackson did not expressly or implicitly consent to Ms. Yellowhorn driving the vehicle.

Negligent Entrustment

[32] The Plaintiff further claims, however, that both Mr. Bastien and Ms. Jackson are liable, or partly liable, for Ms. Yellowhorn’s injuries on the basis of Negligent Entrustment.

[33] In *Schulz v Leaside Development Ltd* (1978) 90 D.L.R.(3d) 98 (BCCA), the British Columbia Court of Appeal provided a five part test for negligent entrustment, as follows:

- (a) the trustee was incompetent, inexperienced or reckless;
- (b) the entrustor “knew or had reasons to know” of the trustee’s condition or proclivities;
- (c) there was an entrustment of the chattel;
- (d) the entrustment created an appreciable risk of harm to the plaintiff and a relational duty on the part of the defendant; and
- (e) the harm to the plaintiff was “proximally” or “legally” caused by the negligence of the defendant.

[34] Here I find that Ms. Yellowhorn was competent as a driver even though she was not licensed. Her own evidence was “I was a decent driver”. She was, however, inexperienced, and given her intoxication, she was reckless to drive.

[35] Mr. Bastien as the “trustee” knew (or should have known) of her intoxicated condition and her inexperience.

[36] Mr. Bastien’s entrustment of the vehicle to Ms. Yellowhorn created an appreciable risk of harm to the plaintiff, to whom, I find, he owed a relational duty.

[37] There is at least some proximal legal cause of the plaintiff’s loss arising from Mr. Bastien’s negligence in allowing Ms. Yellowhorn to drive.

[38] It may be argued that Mr. Bastien was too drunk to be said to have entrusted the vehicle to Ms. Yellowhorn. To that I say that he was, at all times that evening a passenger in the vehicle while it was being driven by Ms. Yellowhorn. He therefore must have entrusted driving the vehicle to her.

[39] Ms. Jackson, however, had none of Mr. Bastien's knowledge. She did not entrust the vehicle to Ms. Yellowhorn. She did nothing to create a risk of harm to Ms. Yellowhorn.

[40] Further, Ms. Jackson is not vicariously liable for Mr. Bastien's negligent entrustment of the vehicle to Ms. Yellowhorn. She is not vicariously liable at common law, nor is she vicariously liable under s 187(2) of the *Traffic Safety Act*.

[41] In *Hall v Hebert*, 1993 2 SCR 159 the drunken owner of a vehicle entrusted it to the drunken passenger who rolled the vehicle. On the basis of negligent entrustment the owner was found to be partially responsible for the passengers. That case is not applicable to Ms. Jackson, who never entrusted the vehicle to Ms. Yellowhorn. It is, however, applicable to Mr. Bastien.

Contributory Negligence

[42] Ms. Jackson is not responsible in any way for Ms. Yellowhorn's injuries. Ms. Yellowhorn's claim against Ms. Jackson is dismissed.

[43] Ms. Yellowhorn is primarily responsible for the accident and her resulting injuries. She chose to drive the vehicle when impaired, when she was unlicensed and inexperienced. She lost control of the vehicle which entered the ditch and rolled. No one made her drive the vehicle. At sixteen years of age, she knew better than to drive while intoxicated.

[44] Mr. Bastien had control of the vehicle, in relation to who, if anyone, could or would drive it. I find he negligently entrusted the vehicle to Ms. Yellowhorn.

[45] I find that Mr. Bastien is 25% contributorily negligent, and therefore liable to Ms. Yellowhorn for 25% of her damages.

[46] If the parties cannot agree with respect to costs, they may speak to me further.

Heard on the 10th day of June, 2019 to the 11th day of June, 2019.

Dated at the City of Calgary, Alberta this 17th day of June, 2019.

R.J. Hall
J.C.Q.B.A.

Appearances:

John B. Stewart
for the Plaintiff

Stephanie D. Whyte
for the Administrator of the *Motor Vehicle Accident Claims Act*
on behalf of the Defendant Travis Bastien

Taryn C. Burnett and Sydni Kind
For the Defendant Janet Jackson