

VICARIOUS LIABILITY: RESTRICTED USE OF VEHICLES WILL NOT SHIELD OWNERS FROM LIABILITY

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The recent decision in *Fernandes v Araujo* ("*Fernandes*") is of interest to Ontario businesses or any person that allows employees or others to use their vehicles. A vehicle owner is liable for damages caused by a driver if the owner gave consent for the driver to possess the vehicle. In the earlier case of *Newman v Terdik* ("*Newman*"), the Court of Appeal for Ontario held that an owner had not consented to possession, and therefore was not liable, where the driver violated a condition of use imposed by the owner (i.e. not to drive the car on public roads). However, in *Fernandes*, the Court overruled its prior decision in *Newman*, finding that an owner who consents to possession is responsible for damages even if the driver breached the conditions imposed by the owner.

The Court's reasons in *Fernandes* also provide insight into when the Court will overrule one of its own decisions. While the Court will typically adhere to precedent, it may overrule a prior decision if it is wrong and the advantages to overruling it outweigh the disadvantages.

Background

The plaintiff was injured in an accident while riding on an All Terrain Vehicle (ATV) driven by the defendant Ms. Araujo. Ms. Araujo's cousin was the owner of the ATV and had obtained third party liability insurance coverage from the defendant insurer, Allstate. On the day of the accident a family member told Ms. Araujo in the presence of the owner not to drive the ATV on public roads. She ignored this instruction and later rolled the ATV on a public highway. The plaintiff was injured in the accident.

The case turned on the proper interpretation of s. 192(2) of the *Highway Traffic Act* (the "Act"), which states:

The owner of a motor vehicle or street car is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or street car on a highway, unless the motor vehicle or street car was without the owner's consent in the possession of some person other than the owner or the owner's chauffer.

The issue was whether Ms. Araujo possessed the ATV with the owner's consent even though she was told not to drive on the highway. If she did, the owner (or in this case, his insurance company) would be liable for the plaintiff's injuries.

Discussion and Decision

Justice Sharpe, writing for a unanimous five member bench, dealt with three issues: whether the plaintiff had the owner's consent as required by the Act, whether the motion judge erred by failing to follow the prior decision of the Court in *Newman*, and, if so, whether *Newman* should be overruled by the Court.

The Court emphasized that section 192(2) of the Act protects the public by imposing on the owner of a motor vehicle responsibility for the careful management of that vehicle. The Court found that although the defendant owner's cousin forbade Ms. Araujo from driving on the highway, the owner himself had not done so. The Court also rejected the insurer's argument that the test for consent was the subjective belief of the third-party borrower. Instead, the Court affirmed that the test is focused on the actions of the owner. As a result, the Court found that Ms. Araujo was in possession of the vehicle with the owner's consent at the time of the accident.

Next the Court considered the test for consent to possession as set out in *Newman*. In *Newman*, the Court held that possession can change from rightful possession to wrongful possession or from possession with consent to possession without consent, if the possessor violated a condition of use or operation of the vehicle imposed by the owner. This conflicts with the test set out by the Court in *Finlayson v GMAC Leaseo Ltd./GMAC Location Ltee* ("*Finlayson*"). In *Finlayson*, the Court held that a breach of conditions for operation did not alter the fact that the third party continued to possess the vehicle and that the possession itself had been consented to by the owner. The owner remained liable despite the breach of conditions. The Court in *Fernandes* held that the more expansive liability imposed by the Court in *Finlayson* is the correct statement of the law.

Further, the Court expressly overruled *Newman*. The Court acknowledged that it is generally bound to follow its past decisions, even if it disagrees with them, as this provides certainty, consistency, clarity and stability in the common law. However, the Court identified its previous error in *Newman* and considered the advantages and disadvantages of correcting it. It was advantageous to overrule *Newman* as it conflicted with other decisions, led to conflicting decisions, and created confusion in law. The Court also concluded that there would be few disadvantages to correcting it as vehicle owners and insurers had likely not relied on the *Newman* test when lending and insuring vehicles. Therefore, the Court declared that *Newman* no longer represents the law of Ontario.

Restrictions on Vehicle Use Will Not Protect Companies from Liability

Fernandes affirms that vehicle owners attract broad liability when allowing others to possess their vehicles.

Placing restrictions on use such as prohibiting borrowers from driving the vehicles themselves, driving on public roads, or driving without a licence will not protect owners from vicarious liability. Owners should take this heightened liability into account when insuring vehicles and should exercise caution when deciding who may possess their vehicles.

Test for Overruling a Prior Decision

Fernandes is also significant because it provides guidance on when the Court of Appeal will overrule its prior decisions. Where a prior decision is incorrect, where it is causing confusion about the law and where there are few or no disadvantages to doing so, the Court will expressly overrule it. While the Court is bound by precedent, it will overrule decisions where doing so would better serve the interests of justice, certainty and predictability of the law.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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