

No Consent: Son Takes Car without Permission

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Overview

Recently, in *Wagner v. Fellows et al*, the Court considered several issues arising from a factual matrix where the teenage driver was found not to have had his mother's consent to possess or operate her motor vehicle at the time of the accident.

On consent of all parties, Justice Mullins bifurcated the trial, agreeing to first decide a number of discrete liability and coverage issues by judge alone, with the issue of the plaintiffs' damages to be determined by a jury at a later date.

Facts

At the time of the accident, the defendant driver was 16 years old and had just obtained his G1 driver's licence, which required that he have a fully licensed driver with him when operating a motor vehicle. He had driven his mother's vehicle, with her consent and with her in the vehicle on a couple of occasions prior to the accident.

The defendant driver wanted more practice driving, so decided to take matters into his own hands and began to regularly take his mother's vehicle for "joyrides" in the late hours of the night, after she had gone to bed and returning before she woke up. He would take the car keys without her knowledge, which were usually in her purse in her bedroom where she

was sleeping. He would also make every effort to return the vehicle to its original parked state as left by his mother, including the gas and the position of the seats and the mirrors.

Negligence

The driver's negligence was not contested at the conclusion of the hearing. He admitted to falling asleep behind the wheel and losing control of the vehicle, causing it to roll and injuring the plaintiff, who was a sleeping passenger in his vehicle at the time.

An issue before the court was whether the mother was negligent for failing to secure her vehicle and whether she was liable as owner, assuming that her son had her consent to possess and operate her vehicle on a highway.

The Court easily concluded that the mother did not know her teenage son was taking her vehicle for "joyrides" so as to amount to her express consent. The crux of the issue was whether her son had her implied consent to possession of the vehicle on a highway at the material time, given all of the circumstances.

The Court rejected these arguments and found that the circumstances under which the defendant driver gained access to the keys and the vehicle did not give rise to implied consent. This finding was despite some evidence that the mother may have had some prior suspicions that her son was taking her vehicle without permission. The Court concluded that the owner was not liable for the driver's negligence pursuant to the provisions of section 192(2) of the *Highway Traffic Act*.

The Court further rejected the argument that the mother was negligent in the manner and extent to which she secured her car keys. In fact, it was commented that she "probably exceeded the standards of most" by keeping the keys in her purse, which she testified was always near her person, even while sleeping.

Turning to the negligence of the injured plaintiff, the Court declined to make any finding of contributory negligence on him for his alleged failure to wear his seatbelt. This was because there was no evidence, expert opinion or otherwise, addressing the causal relationship between the injuries sustained by the plaintiff and his failure to wear a seatbelt.

Nor was the plaintiff found to be responsible in any way for choosing to get, and stay, in the vehicle that night. This was despite his knowledge that the driver had consumed some alcohol at the party they had attended prior to the accident and that he was speeding while driving. The Court found there was no evidence the alcohol had any effect on his driving or alertness, while there was nothing untoward in his driving irrespective of his speeding.

Coverage

The plaintiff's success on the negligence issues was short lived. The Court also considered whether the plaintiff ought reasonably to have known that the driver did not have the owner's/mother's consent to operate/possess the vehicle. The Court concluded that he should have. The driver has consumed alcohol, had little driving experience and could not have yet obtained an unrestricted driver's licence. There was no reasonable basis from which he could have concluded the vehicle was taken for "aimless travel" with consent.

As a result, the Court concluded that he was not eligible for uninsured motorist coverage from the defendant insurer. The plaintiff must instead look to the Motor Vehicle Accident Claims Fund for indemnity for his damages.

Conclusion

The decision is refreshing as the Court looked at all of the factual circumstances surrounding the driver's possession of the vehicle, including what his mother knew or ought to have to known about his nighttime activities. Her prior suspicions were not enough and

the Court quite rightly concluded that consent could not be inferred from the facts at hand. There were simply no facts that supported an implied consent to possession of the vehicle.

While there may be a temptation to find implied consent given the insurance coverage implications for injured plaintiffs, consent, express or implied, should only be found in the clearest of cases. This was not one of them.