

CITATION: DUE v. WATERS, 2014 ONSC 6007
COURT FILE NO.: 07-CV-334158PD2
DATE: 20141016

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: MICHAEL KNUD DUE, a minor by his Litigation Guardian, Anita Jane Due, and the said ANITA JANE DUE, Plaintiffs

AND:

RUSSELL ERIC WATERS, DANIEL E. CURTIN and ING INSURANCE COMPANY OF CANADA, Defendants

AND:

ALLSTATE INSURANCE COMPANY OF CANADA added by Order pursuant to Section 258 (14) of the *Insurance Act*, R.S.O., 1990 c. I8, as amended, Statutory Third Party

BEFORE: Stinson J.

COUNSEL: *Amanda Lennox* and *Rebecca Brown*, for the defendant ING Insurance Company of Canada, moving party

Aaron Murray and *Loretta De Thomasis*, for the third party, Allstate Insurance Company of Canada, responding party

HEARD at Toronto: October 2, 2014

ENDORSEMENT

[1] The dispute in this motion is whether the defendant Daniel Curtin was the owner of the pickup truck that was involved in the motor vehicle accident in which the plaintiff was injured. At the time of the accident, the defendant was registered with government authorities as the owner of the truck. There is an issue, however, whether he had ceased to be the owner for purposes of fixing him with vicarious liability for the plaintiff's injuries, pursuant to s. 192(2) of the *Highway Traffic Act*, R.S.O. 1990 c. H.8 (the "*HTA*"). The case involves applying principles discussed in previous case law to the peculiar facts surrounding this particular dispute.

[2] When this motion was initially presented, the parties filed an agreed statement of facts and a joint document brief. Although the agreed statement of facts contained considerable

information that was undisputed and common to each side, it also contained extracts from witness interviews, examination for discovery transcripts, police notes and other records, that was often contradictory and inconsistent. Given that I was being asked to make a determination that depended upon the application of legal principles to specific facts, I explained to counsel that it would be difficult for me to carry out that function on the basis of a written record containing conflicting evidence. I also raised with counsel the issue of onus of proof, given the state of the record and the applicable legal principles. In the face of the concerns raised by me (and another issue raised by counsel themselves) the matter was adjourned to a new date.

[3] In advance of the return date counsel wrote to me advising that they would not be challenging the credibility of any parties or the agreed facts stated in the agreed statement of facts. They also confirmed that the onus on the motion is on the ING to establish, on a balance of probabilities, that Curtin maintained ownership of the truck for purposes of s. 192(2) of the *HTA* at the time of the accident. The hearing before me on the new date proceeded on this basis.

FACTS

[4] The basic facts surrounding the accident are straightforward. Not so straightforward are the facts surrounding the issue of ownership.

The accident

[5] On June 6, 2005, the defendant Russell Waters was driving a 1988 Chevrolet pickup truck near his home in Lindsay, Ontario. At the time, the plaintiff Michael Due was seated on the tailgate of the moving truck. Due fell from the truck onto the road and sustained significant injuries. Waters was uninsured.

[6] At the time of the accident, the defendant Daniel Curtin was the registered owner of the truck, according to the records of the Ministry of Transportation of Ontario (“MTO”). He had a policy of automobile insurance with Allstate Insurance Company of Canada. For reasons that I will explain, questions arose whether the Allstate policy would cover the injuries suffered by Due in the accident.

[7] Due commenced a tort action at claiming damages arising from the accident against Waters as driver of the truck and Curtin as its owner. In light of the fact that Waters was uninsured, Due also sued his own insurer, ING Insurance Company of Canada, for uninsured coverage. In due course, Curtin’s insurer, Allstate, was added as a statutory third party.

[8] Due’s claim was settled in 2012. The settlement was funded equally as between ING and Allstate, pending the determination of liability between those two respective insurers. ING has brought this motion to obtain a determination from the court with respect to ownership of the truck. Specifically, ING seeks a determination whether Curtin was an “owner” of the truck on the date of the accident for purposes of s. 192(2) of the *HTA*, the section that imposes vicarious liability on the owner of a motor vehicle.

The ownership transaction

- [9] The facts relating to ownership of the truck may be summarized as follows:
- (a) Prior to the events in issue, Curtin was the registered owner of the truck, in that on the records of the MTO he was listed as its owner. Curtin was also the owner of the number plates that were attached to the truck. Curtin had a standard automobile policy issued by Allstate.
 - (b) Some weeks or months prior to the accident, Curtin and Waters agreed to “swap” vehicles: Curtin agreed to exchange his truck for a dune buggy owned by Waters. They carried out the transaction and Waters took possession of the truck at an uncertain date, likely several weeks prior to the accident.
 - (c) Curtin and Waters did not have a written agreement or contract of sale relating to the transaction. It is common ground, however, that Waters was to register the truck in his own name. He failed to do so, and as a result Curtin remained the registered owner at the time of the accident. The parties acknowledge that Curtin intended to transfer ownership of the truck to Waters and, for their part, both Curtin and Waters believed the truck belonged to Waters following the transaction.
 - (d) It is common ground that Curtin informed Waters that he should not drive the truck until Waters had insured it himself, and Waters was aware of this restriction. Despite this requirement, Waters did not place his own insurance on the truck, and drove it on public roads on the day of the accident.
 - (e) Curtin did not drive the truck to Waters’ residence when he completed his part of the transaction. Instead, he towed it there on a trailer. Although he no longer had possession of the truck, Curtin was aware that the Allstate policy remained in effect, and did not expire until the end of June. On June 30, 2005, Allstate received written notice from Curtin asking that the Allstate policy be canceled as the vehicle had been sold. At the time he canceled the policy, Curtin was unaware of the June 6 accident.
 - (f) At the time Curtin delivered the truck to Waters, he turned over both the vehicle permit for the truck and the permit for the number plates affixed to the truck. Curtin also signed the notice of change of ownership on the reverse side of the vehicle portion of the vehicle permit, although he did not fill in the details of the name of the buyer.
 - (g) At the time he delivered the truck to Waters, Curtin left his number plates attached to the truck. Curtin’s number plates remained on the truck at the time of the accident.

ANALYSIS

Onus

[10] As noted previously, this motion is brought by ING. The parties agree that the onus on the motion is on ING to establish, on a balance of probabilities, that Curtin maintained ownership of the truck for the purpose of s. 192(2) of the *HTA* at the time of the accident.

[11] Section 192(2) of the *HTA* provides that:

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.

That parties agree that, regardless whether Curtin was the owner of the truck at the time of the accident, Waters had the consent of the owner to possess it.

[12] There is considerable jurisprudence relating to the issue of ownership of motor vehicles in the context of determining questions of vicarious liability for purposes of the *HTA* and analogous statutes across the country.

[13] The leading case dealing with the effect of registration and determination of ownership for purposes of civil liability of the owner is *Hayduk v. Pidoborozny*, [1972] S.C.R. 879. That case stands for the proposition that registration of ownership is to be treated as proof of ownership, unless the contrary is shown. That case further is authority for the proposition that there can be more than one owner under the provisions of the *HTA*. As considered by subsequent jurisprudence, *Hayduk* has been interpreted to mean that registration gives rise to a "rebuttable presumption" that the registrant is the owner for purposes of liability under s. 192(2) of the *Act*.

[14] In *Mazur v. Elias Estate*, [2002] O.J. No. 2839; reversed on other grounds [2005] 75 O.R. (3d) 299 (C.A.), Haines J. stated as follows (at para. 10)

The purpose of registration is to give notice to all users of the highway of the identity of an individual to whom they may look, as owner, in the event of an accident. Proof of registration, therefore, is treated as proof of ownership unless and until the contrary is shown: *Hayduk et al. v. Pidoborozny et al.* (1972), 29 D.L.R. (3d) 8 (S.C.C.) at 12 and 13. The law relating to this issue is succinctly summarized by Gillese J. in *Dalton (Litigation Guardian of) v. Emerson Estate* [1999] O.J. No. 3508 at para. 20 where she states:

Later cases have refined the first principle laid down in the *Hayduk* case, making it clear that for purposes of imposing liability under s. 192 of the *Act*, registration of ownership is significant but it raises only a rebuttable presumption of ownership. Only in circumstances where a registered owner retains some indicia of

title will that person be deemed to be an owner, even though registration remains in his or her name. Where the registered owner does not retain indicia of title, has no control over the vehicle, and has done everything that could reasonably be expected to be done to transfer ownership, she will not be "an owner" of the vehicle within the meaning of the Highway Traffic Act.

[15] In relation to onus, therefore, the initial burden is on ING, as the moving party who seeks to establish liability on the part of Curtin pursuant to s. 192(2), to show that he was the registered owner at the time of the accident. Since it is undisputed that Curtin remained the registered owner as at the date of the accident, he is presumed to be the owner. The onus then shifts to Curtin (or, in reality, Allstate) to rebut that presumption.

Ownership

[16] Although counsel presented and analyzed numerous cases in which the issue of ownership has been addressed, I do not propose to embark upon a detailed review of the jurisprudence. Suffice to say, as was observed by Harris J. in *Martin v. Zivkovic*, 2010 ONSC 2427, at para. 12: "ownership must be decided on the peculiar facts of each case." I also agree with the observation of Haines J. in *Mazur* (whose approach on this point was approved by the Court of Appeal) that the law relating to this issue is succinctly summarized by Gillese J. in *Dalton*, in the passage quoted above.

[17] In this case, there is no question that there was a transaction by which Curtin parted with possession of the truck to Waters. He did so on the basis of an assurance from Waters that he would not drive the vehicle and on the basis of Waters' understanding that there was no insurance. The parties also agreed that it was Waters' responsibility to complete registration in his own name. Curtin signed over the number plate and vehicle permits and agreed that the truck belonged to Walters at the time of the accident. Based on the foregoing factors, Allstate submits that the presumption is rebutted.

[18] I agree that as a practical matter, once he delivered the truck to Waters, Curtin had no direct control over the vehicle. Significantly, however, he did not remove his number plates from the truck. In so doing, Curtin did not comply with s. 11(1) of the *HTA*. That section provides as follows:

11. (1) upon the holder of the permit ceasing to be the owner or lessee of the motor vehicle or trailer referred to in the permit, he, she or it shall,

- (a) remove his, her or its number plates from the vehicle;
- (b) retain the plate portion of the permit; and
- (c) on delivery of the vehicle,

- (i) to the new owner, complete and sign the transfer application of the vehicle portion of the permit including the date of delivery and give that portion of the permit to the new owner, or
- (ii) a lessor, given the vehicle portion of the permit to the lessor.

[19] In Ontario, number plates for motor vehicles are issued for life to the recipient and ordinarily cannot be transferred. It follows that the number plates are intended to be affixed only to a vehicle owned by or leased to that party.

[20] The removal of the seller's number plates from a vehicle is an important step in transferring vehicle ownership. It is a statutory requirement under s. 11(1)(a). It is an action that is entirely within the control of the seller and one that requires very little effort. In my view, it qualifies as something that "could reasonably be expected to be done to transfer ownership" since, unlike the requirement for the buyer to apply to the MTO to transfer the registration of the vehicle into the buyer's name, ordinarily the removal of the number plates is within the seller's power.

[21] In my view, Curtin's failure to remove his number plates which thus enabled Waters to drive the truck on public roads is a very significant fact in this case. Despite Curtin's statements and the purported understanding that Waters was not to drive the truck, that is precisely what Curtin enabled him to do. By leaving his number plates on the vehicle, Curtin was in effect controlling by facilitation the use of the truck: through his actions, Curtin permitted the truck to continue to be driven on the public roads, a use that would not have otherwise been possible unless Waters had followed the proper registration process, obtained insurance and affixed his own number plates. The continued presence of Curtin's number plates on a truck that remained registered in his name amounted to ongoing indicia of title on his part.

[22] The significance of the failure of the seller of a motor vehicle to comply with the requirement for removal of the number plates was commented on by Martin J. in *Westrop-McKay v. Barrett*, 2001 ABQB 81 at paras. 21 and 22 as follows:

21 Although it is not necessary for me to do so, I would like to make one further observation relative to transactions such as these, which I expect are rather common. I refer to the failure of the vendor of a motor vehicle to comply with the requirements of the *Motor Vehicle Administration Act (M.V.A.A.)* and remove the licence plates from the vehicle at the time of sale. It is my opinion that where the vendor as the previous owner, upon the sale of the vehicle fails to remove the licence plates and insurance card and notify his or her insurance company to cancel the insurance, the presumption that the vendor remains an owner in law should be very difficult to rebut. I say that because in such circumstances the vendor is not only continuing to hold him or herself out as the owner of the vehicle, but the failure to comply with these legal requirements would often induce the purchaser not to bother complying with all the requirements ownership - namely to register and ensure the newly acquired vehicle.

22 Removal of the licence plate is required by section 41 of the *M.V.A.A.* is an important feature of the provincial regulation of motor vehicles, for once licence plates are removed by the vendor, the new owner cannot drive the vehicle without acquiring new plates by registering the vehicle under his or her name. In Alberta the vehicle cannot be registered without proof of valid insurance. Thus, if the vendor fulfills his or her obligations under section 41 of the *M.V.V.A.* [sic], the purchaser is effectively compelled to complete all obligations of ownership, including properly insuring and registering the vehicle in his or her own name, immediately. In this way the Legislature is able to ensure that all vehicles are properly registered and insured.

I respectfully adopt and endorse the foregoing comments.

[23] I would add the following. It seems to me incongruous that, where the owner of a motor vehicle purports to transfer ownership to someone else, yet fails without good reason to remove the number plates from the vehicle and thereby enables the purchaser to operate it on public roads without proper registration and insurance, the so-called “former” owner should nevertheless be excused from responsibility for the very situation that he or she facilitated. Although in this case the contest is between two insurers, that is so only because the plaintiff had the benefit of uninsured motorist protection. Had that not been the case, the plaintiff would have been left with pursuing what might well have been a hollow claim against the uninsured purchaser, Waters. In my respectful view, save in exceptional circumstances (which are not present here) it should not lie in the mouth of the registered owner of a motor vehicle to deny responsibility under s. 192(2) of the *HTA* where he or she has, for no good reason, knowingly failed to comply with s. 11(1) and thereby enabled the purchaser to drive it on public roads with no insurance. To allow the owner to avoid vicarious liability is a case such as this would be contrary to the public policy that underlies both the *HTA* and the *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25.

CONCLUSION AND DISPOSITION

[24] For the foregoing reasons, I hold that Curtin and Allstate have not rebutted the presumption that, as the registered owner at the time of the accident, Curtin remained an owner of the truck for purposes of liability under s. 192(2) of the *HTA*. A declaration shall therefore issue that he did and that he is vicariously liable in the plaintiff’s damages pursuant to that provision.

[25] As agreed by the parties, the successful party ING shall recover costs from Allstate in the all-inclusive sum of \$9,500.

Stinson J.

Date: October 16, 2014