Case Name:

Ladouceur v. Zimmerman

Between
Corey Ladouceur, Plaintiff, and
Teddy Zimmerman, Victor Moreau, Royal & Sunalliance Insurance Company Of Canada, Lafontaine Enterprises Inc./Entreprises Lafontaine Inc. and Maple Valley Club Incorporated, Defendants

[2009] O.J. No. 4777

Court File No. 05-0842

Ontario Superior Court of Justice

C. Gilmore J.

Heard: February 4 and April 14, 2009.
Judgment: June 19, 2009.

(72 paras.)

Civil litigation -- Civil procedure -- Judgments and orders -- Summary judgments -- No triable issue -- To dismiss action -- Motion by defendants Moreau and Lafontaine Enterprises Inc./ Entreprises Lafontaine Inc. seeking to summarily dismiss the claims against them stemming from a single-vehicle motor vehicle accident dismissed -- The plaintiff had shown that there were genuine issues for trial concerning the liability of the moving parties, respectively the owner of the vehicle and the employer of the defendant driver -- There were genuine issues for trial as to whether the driver had consent to operate the vehicle and whether the roadway where the accident occurred was a high-way for the purpose of s. 192(2) of the Highway Traffic Act -- Highway Traffic Act, s. 192(2).

Tort law -- Negligence -- Motor vehicles -- Liability of owner -- Consent to possession -- Motion by defendants Moreau and Lafontaine Enterprises Inc./Entreprises Lafontaine Inc. seeking to summarily dismiss the claims against them stemming from a single-vehicle motor vehicle accident dismissed -- The plaintiff had shown that there were genuine issues for trial concerning the liability of the moving parties, respectively the owner of the vehicle and the employer of the defendant driver -- There were genuine issues for trial as to whether the driver had consent to operate the vehicle and whether the roadway where the accident occurred was a highway for the purpose of s. 192(2) of the Highway Traffic Act -- Highway Traffic Act, s. 192(2).

Transportation law -- Motor vehicles and highway traffic -- Rules of the road -- Highways and roads -- Definition -- Public access -- Motion by defendants Moreau and Lafontaine Enterprises Inc./Entreprises Lafontaine Inc. seeking to summarily dismiss the claims against them stemming from a single-vehicle motor vehicle accident dismissed -- The plaintiff had shown that there were genuine issues for trial concerning the liability of the moving parties, respectively the owner of the vehicle and the employer of the defendant driver -- There were genuine issues for trial as to whether the driver had consent to operate the vehicle and whether the roadway where the accident occurred was a highway for the purpose of s. 192(2) of the Highway Traffic Act -- Highway Traffic Act, s. 192(2).

Motion by defendants Moreau and Lafontaine Enterprises Inc./ Entreprises Lafontaine Inc. for summary judgment dismissing the claims against them. In the underlying action, the plaintiff sought damages for injuries sustained as a passenger in a single vehicle accident. The defendant Zimmerman was the driver, Moreau was the owner of the vehicle, and Zimmerman was employed by Lafontaine at the time as a general labourer and maintenance person at a campground owned by Moreau as the principle of Lafontaine. Zimmerman lost control of the vehicle on an unpaved, unlit roadway owned and maintained by the defendant Maple Valley Club. Zimmerman was charged with driving without a valid licence and failing to report an accident under the Highway Traffic Act, plus dangerous operation of a motor vehicle under s. 249(3) of the Criminal Code. Zimmerman was given the use of the vehicle to drive around the campground in the course of his employment, despite not having a driver's licence, and he had been told not to leave the campground. After the accident, Zimmerman was terminated for using the vehicle in a manner contrary to the employer's conditions. The police refused to charge him with theft. The plaintiff claimed that Moreau and Lafontaine were vicariously liable for Zimmerman's negligence under s. 192 of the Highway Traffic Act. Alternatively, the plaintiff claimed they were directly liable in that the risk of injury was reasonably foreseeable to Moreau and he failed to take steps to prevent the injury. The plaintiff claimed Moreau and Lafontaine negligently entrusted the keys to the vehicle to Zimmerman and failed to supervise the storage and operation of the vehicle. Moreau and Lafontaine argued the claims against them were factually unsupported and there was no genuine issue for trial. The defendant insurer Royal & Sunalliance also sought to dismiss the present motion, arguing there was no coverage as vicarious liability under s. 192 of the HTA required only consent to possession, not to operation. Furthermore, if the vehicle was found to have been stolen, the Ontario Automobile Policy excluded coverage. The plaintiff argued that factual determinations were required as to: (a) the parties' employment relationship; (b) the negligent entrustment of the keys; (c) the training, supervision and monitoring of the use and storage of the vehicle by Zimmerman; and (d) whether the vehicle was stolen by Zimmerman.

HELD: Motion dismissed. There were sufficient factual disputes that a motion for summary judgment could not be granted. The moving parties conceded Moreau owned the vehicle and that its negligent operation caused the plaintiff's injuries. The remaining issues were whether Zimmerman had consent to operate the vehicle and whether the roadway was a highway for the purpose of s. 192(2) of the HTA. Although the road in question was privately owned and maintained, the club itself was open to the public as were the various facilities adjoining the club such as the baseball diamonds. There was a possibility that the road had several purposes. Evidence on usage was to be weighed and a determination made in the context of the case law. There were also significant fac-

tual disputes with respect to the issue of consent to possession of the vehicle. The evidence of Moreau as to when he asked Zimmerman if he had a driver's licence was contradictory. Although Moreau stated Zimmerman was not to use the vehicle on a public highway, he had given Zimmerman permission to drive the truck home at night, and in doing so he had the choice of using a bush or by traveling along Lafontaine Road East, which was both a township road and a public highway. Overall, there was some evidence of inconsistencies as to what Zimmerman was told, and when and who knew of the imposition of driving restrictions. The trial judge was to be given the opportunity to assess Moreau's credibility on the key issue of consent to drive on a highway. There was also some evidence in support of a possible finding of direct negligence on the part of Moreau. The weighing of evidence on these points was to be done by the trial judge.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1986, c. C-46, s. 249(3)

Highway Traffic Act, R.S.O. 1990, c. H.8, s. 1, s. 192(2)

Counsel:

L. Goldstein, for the Plaintiff.

M. Forget, for the Defendants Victor Moreau and Lafontaine Enterprises Inc./Entreprises Lafontaine Inc.

D. Greenside, for the Defendant Royal & Sunalliance Insurance Company of Canada.

RULING ON MOTION FOR SUMMARY JUDGMENT

C. GILMORE J.:--

Overview and Background

1 The moving party defendants Victor Moreau ("Moreau") and Lafontaine Enterprises Inc./Lafontaine Entreprises Inc. ("Lafontaine") bring this motion for summary judgment seeking a dismissal of the claims against them. The defendant Maple Valley Club Incorporated did not participate in the motion.

2 The claims arise from a single vehicle accident that occurred on October 8, 2003. The vehicle was driven by the defendant Teddy Zimmerman ("Zimmerman"). The plaintiff, Corey Ladouceur ("Ladouceur"), was a passenger in the vehicle. He suffered injuries as a result of the accident. The other passenger in the truck was Nicole Leduc ("Leduc").

3 The vehicle driven by Zimmerman was a 1983 GMC truck owned by Moreau ("the Moreau Vehicle"). At the time of the accident, Zimmerman was employed by Lafontaine at a campground owned by Moreau (as the principal of Lafontaine.)

4 The accident took place at approximately 12:30 a.m. on Maple Valley Club Drive after Zimmerman, Ladouceur and Leduc had left the premises of a social club, the Maple Valley Club, which is owned by the defendant Maple Valley Club Incorporated. Zimmerman, Ladouceur and Leduc de-

cided to go to the Maple Valley Club to play pool. Zimmerman, Ladouceur and Leduc left and the accident occurred when Zimmerman lost control of the Moreau vehicle causing it to travel off the roadway and roll. Maple Valley Club Drive was unpaved and without lighting or signage. It is owned and maintained by the Maple Valley Club and runs from the Club to Lafontaine Road East.

5 Zimmerman was charged with two Highway Traffic Act, R.S.O. 1990, c. H.8 ("HTA") offences: driving without a valid licence and failing to report an accident. He was also charged with dangerous operation of a motor vehicle pursuant to s. 249(3) of the Criminal Cade, R.S.C. 1985, c. C-46.

6 Lafontaine operated an eighty-four acre campground located in the Township of Tiny at the relevant time (the "Campground"). Moreau was the sole shareholder of Lafontaine. The property contains 250 camp sites and central facilities for laundry and showers. The Campground has 30 employees.

7 In the spring of 2003, Moreau hired Zimmerman to work as a general labourer and maintenance person for the Campground. Moreau rented Zimmerman the upper level of a home located at 268 Lafontaine Road East (the "Home"), which was located adjacent to the Campground. Zimmerman was living in the Home at the time of the accident. The Home fronted onto a Concession Road in Tiny Township.

8 In the course of his employment with Lafontaine, Zimmerman was given the use of the Moreau vehicle to drive around the Campground. Specifically, the Moreau vehicle was used to haul garbage from camp sites to a dump site on the Campground property. The Moreau vehicle was plated and had valid insurance.

9 Zimmerman used the Moreau vehicle for five months prior to the accident. There was no evidence of any bad driving of the Moreau vehicle by Zimmerman during the time he had the use of the vehicle up to the date of the accident.

10 Zimmerman did not have a driver's licence. Moreau learned this fact a few weeks after he hired Zimmerman. He told Zimmerman to refrain from driving anywhere other than the Campground and the road where the Home was located in order to allow Zimmerman to drive to and from the Home for lunch and in the evenings. The Moreau vehicle was then left overnight at the Home. Zimmerman had control of the Moreau vehicle keys during the week, but returned them to Moreau on weekends. The accident occurred on a weekday.

11 After the accident, Zimmerman was terminated for using the Moreau vehicle in a manner contrary to the conditions imposed by Moreau. Moreau attempted to have Zimmerman charged with theft after he discovered that his insurer would not provide coverage for damages. The police refused to charge Zimmerman with theft.

12 Zimmerman cannot be located. However, the day after the accident he gave a recorded statement to an insurance adjuster. Zimmerman stated that he had driven the truck off the property to buy cigarettes on one other occasion. The bartender from the Maple Valley Club gave evidence at Zimmerman's criminal trial that Zimmerman had been to the bar at the Maple Valley Club on other occasions. Moreau's evidence was that he was not aware that Zimmerman had taken the truck off the Campground at any time prior to the accident.

13 The plaintiff included Royal & Sunalliance Insurance Company of Canada ("Royal & Sunalliance") as a defendant, claiming uninsured and underinsured coverage under Policy R9016814.

The Claim.

14 The plaintiff claims that the defendants Moreau and Lafontaine are vicariously liable for Zimmerman's negligence under s. 192 of the HTA. Alternatively, he claims that the Defendants Moreau and Lafontaine are directly liable in that the risk of injury was reasonably foreseeable to Moreau and he failed to take steps to prevent the injury. The plaintiff claims that Moreau and Lafontaine negligently entrusted the keys to the Moreau vehicle to Zimmerman and failed to supervise the storage and operation of the vehicle.

15 Moreau and Lafontaine deny that they are vicariously liable, that they were negligent, and that their negligence caused the accident.

16 Following examinations for discovery, Moreau and Lafontaine bring this motion for summary judgment on the basis that the claims against them are factually unsupported and, as there is no genuine issue for trial, the claims against them should be dismissed.

17 The defendant Royal & Sunalliance seek to dismiss the motion for summary judgment. It takes the position that there is no coverage as vicarious liability under s. 192 of the HTA requires only consent to possession and not consent to operation. Further, if the vehicle is found to have been stolen, the Ontario Automobile Policy excludes coverage.

18 The plaintiff defends the motion for summary judgment on the basis that factual determinations are required with respect to the following as between Zimmerman and Moreau/Lafontaine:

(a) Their employment relationship;
(b) The negligent entrustment of the keys;
(c) The training, supervision and monitoring of the use and storage of the vehicle by Zimmerman; and
(d) Whether the vehicle was stolen by Zimmerman.

19 The plaintiff submits that, since factual determinations are required on the above issues, summary judgment cannot be granted. The trier of fact must weigh evidence and make findings of credibility. These are not the functions of a judge hearing a motion for summary judgment.

The Legal Issues

1. Vicarious Liability - Subsection 192(2) of the Highway Traffic Act

20 Subsection 192(2) of the HTA reads as follows:

> 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 streetcar 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 chauffeur.

21 Four elements must be established by the plaintiff for s. 192(2) to apply and, accordingly, for Moreau and Lafontaine to be vicariously liable:

(a) Moreau and Lafontaine must be the owner of the vehicle;
(b) The negligent operation of the vehicle caused the plaintiff's damages;

(c) The incident occurred on a highway; and
(d) The person operating the vehicle had the consent of the owner.

22 The moving parties concede that Moreau was the owner of the vehicle and that the negligent operation of the vehicle caused the plaintiff's injuries. The plaintiff does not take issue with these matters either. The remaining issues are therefore whether the plaintiff had consent to operate the vehicle and whether Maple Valley Club Drive was a highway for the purpose of s. 192(2).

23 A highway is defined in s. 1 of the HTA as follows:

> "highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof ...

A. Did the Accident Occur on a Highway?

24 Moreau takes the position that the road on which the accident occurred was a private road for access to the Maple Valley Club and therefore does not fit within the definition of a "highway" under s. 1 of the HTA.

25 He supports his contention by stating that use of a roadway by the public does not make the road a highway. The road in question must be used by the general public for the passage of vehicles. Where the road is privately owned and has a specific purpose (such as access to the Maple Valley Club), it is not a highway and therefore outside of the definition in s. 1.

26 Moreau relies on Gill v. Elwood[1]. In that case an accident occurred in a parking lot at a shopping mall. On appeal, the sole issue was whether the plaza parking lot met the definition of a "highway" under the former provisions of the HTA. Although cars drove through the lot, the court concluded that the parking lot was not intended for the passage of vehicles by the general public. The parking lot was therefore not considered a highway. Similarly, in R. v. Mansour[2], the Supreme Court of Canada determined that a private parking lot adjacent to an apartment building and designated for the use of the tenants was not a highway.

27 Moreau also relies on the B.C. cases of Dechant v, TNL Equipment Ltd.[3] and Galligos v. Louis[4]. In Dechant, an accident occurred on a road owned and maintained by a ski hill. Even with the broader definition of "highway" in the B.C. equivalent of the HTA, the road was found not to be a highway because the private road led to a privately-owned premise. In Galligos, a logging road was not found to be a highway. The court considered the fact that the general public was not invited to use the road. Those that did were specific members of the public invited to use the road for the purpose of the Indian band who owned it.

28 Counsel submits that the law in this area has been significant clarified by the recent release of the Ontario Court of Appeal decision in Shah v. Becamon[5]. In that case, the Appellant insurer relied on the newly added part of the definition of a highway, which refers to "any part of which" and argued that the strip mall parking lot in which the accident occurred was a "highway" because the public used a portion of it as a shortcut from Wilson Street to Bathurst Street in Toronto. The court disagreed and found that, despite the use of the parking lot as a "shortcut" for some drivers, "both the intended use and actual use was overwhelmingly as a parking lot for customers."[6]

29 Since Maple Valley Club Drive was a private road, owned by the Club and maintained by the Club, Moreau begins with the presumption that it is not a highway. With the support of the case law cited, Moreau goes on to submit that only those members of the public going to and from the Club used the road and therefore it was not intended for the passage of vehicles by the general public. The specific purpose of the private road was for access to and from the Maple Valley Club and it therefore cannot be a highway under s. 192.

30 The plaintiff submits that the Maple Valley Club Drive was a public highway. Counsel relied on the case of Sked v. Henry[7]. In that case, the court found that a high school parking lot was a public highway. It held that the new "any part of which" amendment expanded the definition of highway to include places that are only partly used by the general public.[8] The court considered Gill v. Elwood and R. v. Mansour and found that the facts were different.[9] In Sked, the public used the parking lot to access the school, playing fields for soccer and football, tennis courts and night school. It found that at least part of the parking lot was used by the general public for the passage of vehicles.[10]

31 It should be noted that the Sked v. Henry case was rejected by the trial judge in Shah v. Becamon.[11] Counsel for Moreau argued that, since Shah was not overturned by the Ontario Court of Appeal, Sked is not the law. However, it should be noted that Sked was only distinguished on its facts.

32 The plaintiff distinguishes the Dechant v. T.N.L. Equipment[12] and similar cases relied upon by Moreau on the basis that the roads in question were designated for a specific purpose (for example, by employees to get to their housing on a ski hill or on company business, or where use was restricted to residents and invited guests of an Indian Band) and persons other than those designated could be charged with trespassing. In short, the public was not invited to use those roads in the same way as they were invited to use Maple Valley Club Drive. The road was not marked as private nor was the club private in the sense that use of it was restricted to a paying membership. Indeed, there was no evidence that Zimmerman, Ladouceur or Leduc were members of Maple Valley Club.

33 The plaintiff also relies on R. v. Wilson[13], a Manitoba Provincial Court decision in which two accused charged with driving while disqualified attempted to defend the charges by submitting that the road on which they were stopped was not a highway because it was located within an Indian Reserve. The court found that, because the road joined with other municipal roads at each end and that travel on it was unrestricted (other than a sign at the entrance indicating that the driver was entering the Reserve), it was a highway.

34 Although the accident report describes the Maple Valley Club Drive as private, the testimony of Cora Desroches on behalf of Maple Valley did not indicate that access was restricted in any way. The road was used by anyone who wanted to come to the bar and eat, drink or play pool and was also used by snowmobilers in the winter and those who used the baseball diamonds on the Club grounds in the summer. The road was a gravel road that was graded at regular intervals and wide enough for two vehicles.[14] The road began at Lafontaine Road and ended at the club building parking lot. There was no evidence that there were signs restricting access to the public or non-members.

35 Counsel for the defendant Royal & Sunalliance urges the court to consider that, in determining whether Maple Valley Club Drive was a highway under the HTA, one must use the paramount use analysis. This test is why the results in cases such as Sked are different from those is Gill and Shah.

In Sked, the court determined that the school parking lot had multiple uses and could therefore be considered as a highway. Similarly, Maple Valley Club Drive had unrestricted public access for multiple uses and should therefore be considered a common public road in accordance with the definition in s. 1 of the HTA.

B. Did Moreau Consent to the Possession of the Vehicle by Zimmerman on the Highway?

36 Assuming that it is found that Maple Valley Club Drive is a highway, the court may then consider the consent issue.

37 Moreau relies on the case of Newman and Newman v. Terdik[15]. In that case, a tobacco farm worker was given permission to drive the owner's vehicle on farmland to inspect tobacco kilns. He was specifically instructed not to drive the vehicle on a highway. He drove the vehicle on a highway and had an accident. The Court of Appeal upheld the trial decision, [1952] O.J. No. 57, finding that "[p]ossession can only be within the scope of the consent or authority."[16] The plaintiff's argument that giving keys and possession is the same as consent was rejected. There was no dispute in Newman that Terdik was driving on a highway.

38 A line of cases has developed from Newman that confirms that possession with consent can change to possession without consent without any change in the physical possession of the vehicle.[17] This proposition was supported in McLeod et al. v. Morse et al.[18], where an employee was given limited permission to take home a company vehicle on the weekend to clean it. The employee was in an accident while using the car for a personal matter during that weekend. The court found that the consent was for a limited purpose and that the driving for personal use was outside of the scope of the consent.

39 Counsel for the plaintiff relies on Henwood v. Coburn et al.[19] in support of his contention that liability of an owner will be found if a vehicle is in possession of a person with the owner's consent regardless of whether the person has the owner's consent to operate the vehicle. The issue from the plaintiff's point of view is possession and not operation.

40 The plaintiff also relies on Finlayson v. GMAC Leaseco Ltd.[20] for the proposition that possession will result in liability to the owner even if there is a breach of a condition attached to the possession, including a condition that the person in possession not operate the vehicle.

41 As well, in Donald v. Huntley Service Centre Ltd. et al.[21] the principle of the corporate defendant prohibited her son from driving the vehicle. The son's licence was suspended. He drove the vehicle and had an accident. The court found the son to be in possession with the owner's consent and thus the owner was vicariously liable.

42 In contrast, the moving party argues that these cases can be distinguished as the owners in those cases did not specifically prohibit use on a highway and, as such, these decisions do not apply to the case at bar.

43 The plaintiff also submitted that a pattern of use had developed that would support implied consent. The keys were available to Zimmerman and were not taken away by Moreau at times during the week when Zimmerman was not working (i.e. in the evenings and during lunch). In Morad v. Emmanouel[22], the court found implied consent to use of a vehicle by an employee where consent had not been withdrawn and the keys and vehicle were generally available to the employee. The moving party argues that Morad does not apply as there was no prohibition to using the vehicle on a highway in that case.

44 Counsel for Royal & Sunalliance referred to the recent case of Seegmiller v. Langer[23]. In that case, there was a total prohibition on driving imposed by the owner. The court found that there was consent to possession despite the condition of non-operation.

2. Direct Liability - Negligence and Negligent Entrustment

45 The plaintiff submits that there is evidence that the accident and resulting injuries were reasonably foreseeable by Moreau, who entrusted an unlicensed employee with keys and a vehicle. However, evidence must be led at trial to determine issues such as the training of Zimmerman by Moreau, entrustment and storage of the vehicle. A weighing of evidence and finding of fact must be made.

46 In support, the plaintiff relies on Ahmetspasic v. Love.[24] At issue was the manner in which the defendant owner managed her keys and vehicle and whether she negligently entrusted the keys to her son. The court dismissed the motion for summary judgment and found that there was a genuine issue for trial with respect to the weighing of evidence related to the relationship between the defendant and her son. The plaintiff in this case submits that such an investigation and weighing of evidence must also be addressed in the case at bar.

47 The moving party submits that there is no evidence to support that Zimmerman had a propensity to drive recklessly and Moreau was therefore under no obligation to take further steps to safeguard against an injury or accident. The moving party denies that the allegation that Zimmerman had poor driving skills when operating a farm tractor is relevant and in any event there is no evidence that the accident was caused by Zimmerman's poor driving skills. In short, the moving party submits that there is no evidence that Moreau had any knowledge of a propensity on the part of Zimmerman to drive the vehicle in a reckless or incompetent manner and, as such, there can be no negligent entrustment.

The Law on Summary Judgment

48 As set out in Irving Ungerman v. Galanis[25] and confirmed in Esses v. Bank of Montreal[26] the moving party must show that there is no dispute as to a material fact in order to be successful on a motion for summary judgment. Since the judge hearing the motion for summary judgment may not weigh evidence or assess credibility, the existence of conflicting evidence on a material fact will necessitate a trial.

49 The party defending the motion (in this case the plaintiff) bears an evidentiary burden of showing the specific material facts in dispute that would support that a genuine issue for trial exists and must demonstrate that its claim is adequately supported by the evidence.[27] That is, the plaintiff must put its best foot forward and show the case it has against the defendant or risk losing at the summary judgment stage.

50 Finally, the judge hearing the motion for summary judgment must consider the record as complete. That is, the judge may not consider evidence or documents that may be presented at a future time nor may the judge speculate that the responding party's case will be better or different at trial. In short, the record must be considered as if presented on the first day of trial.[28]

Positions of the Parties

51 The moving party submits that are three main issues to consider in this motion. They relate to whether Maple Valley Club Drive was public or private, whether Zimmerman had consent to oper-

ate the vehicle on a highway and whether Moreau had reason to believe Zimmerman would drive the truck recklessly.

52 The moving party takes the position that there is no factual dispute on any of these issues. The law on the highway versus private road issue is clear as a result of Shaw and the road leading to the Maple Valley Club is therefore clearly not a highway. The Newman case makes it clear that giving possession and keys does not always mean that consent is given. And finally, there is no evidence to support that Moreau would have knowledge of a propensity on the part of Zimmerman to drive recklessly. Therefore, the facts and the law are not in dispute on the main points and summary judgment should issue.

53 The plaintiff takes quite a different view. The plaintiff submits that there are factual issues in dispute with respect to whether or not Maple Valley Club Drive is a private or public road. His view is that there is no consensus on this issue. The transcript of Cora Desroches contains references to usage of the road by the public for various purposes, including access to a bar, baseball diamond, snowmobile club, horseshoe pit and the sale of merchandise such as cigarettes.

54 The plaintiff submits there are also disputes with respect to the consent that Moreau gave to Zimmerman and that such disputes would result in a court having to make findings of credibility. One example relates to when Moreau asked Zimmerman if he had a driver's licence. Another relates to how and when Moreau began to allow Zimmerman to take the truck home after work.

55 The plaintiff contends that Moreau did have knowledge that Zimmerman lacked good driving skills as a result of observing him drive a tractor. Moreau was relaxed in his approach to the use of vehicles in that he allowed his young grandson to operate a golf cart on the Campground premises. Finally, there is a lack of evidence or the evidence is contradictory in terms of what prohibitions Moreau put on Zimmerman's driving.

56 For the above reasons, the plaintiff submits that there are factual disputes that cannot be ignored and cannot be resolved by the motion judge as they require findings of credibility or the weighing of evidence.

Analysis and Conclusion

57 I find that there are sufficient factual disputes in this matter that a motion for summary judgment cannot be granted. They may be set out as follows.

A. Public Venus Private Roadway Issue

58 The factual context relating to the use of Maple Valley Club Drive is in dispute.

59 While there is no dispute that the road was privately owned and maintained, the club itself was open to the public as were the various facilities adjoining the club such as the baseball diamonds. Cora Desroches describes the road as one being open to the public. Indeed, her evidence was that there were about fifteen members of the public in the bar on the night of the accident.

60 There were no signs prohibiting general access to the road by the public. There were no signs prohibiting non-members. Cora Desroches' evidence was that the club had been private in the past, but had been public for the last twenty years.

61 Cora Desroches' evidence was that Zimmerman came to the club on his bicycle quite often to buy cigarettes. Therefore, consumable items were available to the public through the club.

62 The Shah case requires that the "actual use and intended use" of the road be considered. In that case, the intended use was as a parking lot. I find that, in this case, there is a possibility that the road had several purposes. While there is evidence that some members of the public used it to access sporting facilities such as snowmobiling and baseball, others simply used it as a social gathering place or to drop in and buy cigarettes (like Zimmerman).

63 Therefore, the evidence on usage must be weighed and a determination made in the context of the case law. I disagree with counsel for the moving party that there is no factual dispute in this regard. While the Shaw case may be of assistance to the trial judge, I do not find that it is conclusive with respect to a determination in this case, given the facts.

B. Consent to Possession Issue

64 I find that there are significant factual disputes in this area as follows:

(a) The evidence of Moreau as to when he asked Zimmerman if he had a driver's licence is contradictory. In his affidavit sworn July 27, 2007, Moreau deposed that he knew Moreau did not have a driver's licence when he commenced employment with him.[29] In his examination on January 3, 2008, Moreau clearly states that when he hired Zimmerman he did not know if he had a driver's licence.[30]

(b) In his examination, Moreau said that he told Zimmerman to "keep off the township road. You can drive inside the property and that's it."[31] In his affidavit of July 27, 2007, Moreau said he told Zimmerman that he could not use the truck on a public highway, only on the campground.[32] In his statement to the police given on October 16, 2003, Moreau said that Zimmerman could only operate the vehicle on his property for work purposes and that Zimmerman did not have permission to operate the truck on the road on the night of the accident.[33] Zimmerman had permission to drive the truck to his home at night. In doing so, he had the choice of using a bush or by traveling along Lafontaine Road East, which is both a township road and a public highway.

(c) Nicole Leduc gave a statement to the insurance adjuster. She advised that she was aware that Zimmerman did not have a driver's licence and did not have permission from Moreau to take the vehicle "off the property." Leduc also said that Ladouceur was aware of these facts.[34]

(d) In Ladouceur's examination for discovery, he said that he did not recall having any conversation with Zimmerman about the fact that Zimmerman did not have a licence nor that he was not allowed to take the truck off the campground. Leduc's statement was put to him and he said it did not trigger any memory of such a conversation.[35]

(e) Zimmerman gave a statement to the insurance adjuster the day following the accident. In that statement, he confirmed that he did not have a driver's licence, that Moreau gave him instructions to drive the vehicle in the

> Campground only and that he was allowed to take the truck to his rental home each day and then bring it back the next morning. Zimmerman said that both Leduc and Ladouceur knew that he was not allowed to drive on a public roadway.[36]

65 In my view, there is evidence of some inconsistencies as to what Zimmerman was told, and when and who knew of the imposition of driving restrictions. While counsel for the moving party submits that Zimmerman and Leduc's statements are uncontradicted, counsel for the plaintiff points out that the statements are unsigned and untested. More important, however, are the inconsistencies in Moreau's evidence regarding the issue of consent to drive on a public highway. Evidence on the nature of the consent and the circumstances of the conditions on the consent are important and need to be weighed by a trial judge. For example, Moreau's evidence on examination was that Zimmerman was not to drive on a township road. His affidavit evidence is different. The trial judge must be given the opportunity to assess Moreau's credibility on the key issue of consent to drive on a highway. A finding must be made that Zimmerman was prohibited from using the truck on a highway before the Newman line of cases will apply.

66 I should add that I found the Moreau transcript somewhat hard to follow. Constant interruptions by counsel for Moreau during the examination resulted in a disjointed transcript. At certain points, it was difficult to determine Mr. Moreau's actual answer since the interruptions between the question and answer were often numerous. A trial judge would have the benefit of uninterrupted evidence from Moreau.

C. Issues Related to Direct Negligence and Negligent Entrustment

67 The moving party submits that, as per Schulz v. Leaside Developments[37], the plaintiff has failed to adduce evidence of the following:

(a) Zimmerman was an incompetent driver of the truck;
(b) Moreau knew of the incompetence;
(c) Moreau entrusted the truck to Zimmerman;
(d) Allowing Zimmerman to use the truck created an appreciable risk of harm to the plaintiff; and
(e) Allowing Zimmerman to use the truck caused the injury.

68 I find that there is evidence that may support some of the above as follows;

(a) During his cross-examination, Moreau confirmed that there were three sets of keys for the Moreau vehicle. Zimmerman had his own set. One set was in Moreau's possession and another was kept in the truck. During the last six weeks of Zimmerman's employment, he kept the truck overnight during the work week.[38] There was no evidence that Zimmerman's use of the truck was supervised during non-working hours while it was in his possession. This evidence goes directly to the issue of enhanced risk.

(b) Moreau gave evidence that he had concerns about Zimmerman's driving skills after watching him drive a tractor.[39] While counsel for the moving party submits that driving a tractor and driving a truck cannot be com-

pared, I do not think that this evidence can be ignored. Although the weight to be given to it may be nominal, that is not for me to decide.

(c) The evidence of Moreau as to the parameters of Zimmerman's increasing usage of the truck are vague. For example, in his January 3, 2008 examination, he cannot remember when Zimmerman began to drive the truck home for lunch. Further, his evidence was "after a while, he started using the vehicle after work to drive home and the next morning to drive back to the - to work."[40] The transcript confirms there was no supervision of Zimmerman's use of the vehicle after working hours by Moreau.[41]

(d) There was evidence that Moreau's approach to the use of vehicles was relaxed. He allowed his five or six year old grandson to operate a golf cart on the camp ground property.[42]

(e) The evidence is contradictory as to whether it was recklessness or a lack of skill which caused the accident.

(f) The vehicle was insured and plated to drive on public roads.

69 Further, as per the Ahmetspasic case, the evidence related to the relationship of Moreau and Zimmerman and past usage of the truck must be examined. For example, Zimmerman says in his statement to the adjuster that he had taken the truck on one previous occasion to the Maple Valley Club to buy cigarettes. Moreau was not aware of this incident, Moreau denies negligent entrustment. This denial, in the face of evidence of keys being left both with Zimmerman and in the truck and the availability of the truck during non-working hours, may not be supportable.

70 Therefore, there is some evidence in support of a possible finding of negligence on the part of Moreau. However, such a finding cannot be made at this stage. The weighing of evidence on these points must be done by the trial judge.

71 The motion is therefore dismissed. The matter will be set down for the next Trial Scheduling Court to set a pre-trial date.

72 Written submissions on costs may be made in the form of no more than a three page summary exclusive of any Offer to Settle or Bill of Costs. The moving party may provide their submissions by June 30, 2009 and the plaintiff and Royal & Sunalliance by July 15, 2009. Any reply by the moving party is to be submitted by July 22, 2009.

C. GILMORE J.

cp/s/qllxr/qljxr/qlaxw/qlltl/qlced

1 [1969] 2 O.R. 49 to 54 (Co. Ct.), aff'd [1970] 2 O.R. 59 (C.A.).

2 [1979] 2 S.C.R. 916.

3 [1998] B.C.J. No. 2219 (S.C.).

4 (1986), 33 D.L.R. (4th) 638 (B.C.C.A.).

5 2009 ONCA 113.

6 Ibid. at para. 31.

7 [1991] O.J. No. 339, 1991 CarswellOnt 13 (Ct. J. (Gen. Div.)).

8 Ibid. at para. 54.

9 Ibid. at para 55.

10 Ibid. at para. 60.

11 2007 CarswellOnt 9747 (S.C.).

12 Supra note 3.

13 [1990] M.J. No. 432, 1990 CarswellMan 6 (Prov. Ct.).

14 Transcript of Cora Desroches dated January 12, 2009, at pp. 60 and 64.

15 [1953] O.R. 1 to 8 (C.A.).

16 Ibid.

17 See also Moore v. Wienecke, [2006] O.J. No. 202 (S.C.), at para. 85, aff'd on other grounds 2008 ONCA 162; Widdis et at. v. Hall et al., [1994] O.J. No. 1723 (Gen. Div.), at para. 36.

18 (1976), 8 O.R. (2nd) 675 (H.C.J.).

19 (2007), 88 O.R. (3d) 81 (C.A.).

20 (2007), 86 O.R. (3d) 481 (C.A.).

21 (1987), 42 D.L.R. (4th) 501 (H.C.J.).

22 (1993), 9 Alta. L.R. (3d) 378 (Q.B.).

23 [2008] O.J. No. 4060 (S.C.)

24 [2002] O.J. No. 5093, 2002 CarswellOnt 4475 (S.C.)

25 (1991), 4 O.R. (3d) 545 (C.A.).

26 (2008), 241 O.A.C. 134 (C.A.), leave to appeal to S.C.C. ref'd, [2008] S.C.C.A. No. 471.

27 Kreutner v. Waterloo Oxford Co-operative Inc. (2000), 50 O.R. (3d) 140 (C.A).

28 Dawson v. Rexcraft Storage and Warehouse Inc. (1995), [1998] O.J. No. 3240, 21 O.R. (3d) 547 (C.A.) at para 17.

29 Affidavit of Victor Moreau sworn July 27, 2007, at para. 15 [Victor Affidavit].

30 Transcript of examination of Victor Moreau dated January 3, 2008, at p. 20 [Victor Transcript].

31 Ibid. at p. 54.

32 Supra, Victor Affidavit.

33 Statement of Victor Moreau to the OPP dated October 16, 2003.

34 Transcript of statement of Nicole Leduc given to Gary South on October 23, 2003.

35 Transcript of the examination for discovery of Corey Wayne Ladouceur dated January 3, 2008. at pp. 29-31.

36 Transcript of statement of Teddy Zimmerman given to Gary South on October 9, 2003.

37 [1978] 5 W.W.R. 620 (B.C.C.A.), at paras. 24-26, leave to appeal to S.C.C., 90 D.L.R. (3d) 98 n, ref'd.

38 Supra, Victor Transcript note 34 at pp. 67-68, 87.

39 Ibid. at p. 55.

40 Ibid at p. 60.

41 Ibid at p. 61.

42 Ibid. at p. 70.