

IMPLIED CONSENT TO DRIVE A MOTOR VEHICLE

By George Somkuti and Bottom Line Researchⁱ

Overview

The *Traffic Safety Act*, R.S.A. 2000, c. T-6, s. 187(2) creates a deemed agency relationship between owner and driver when a person is driving the owner's vehicle with the owner's express or implied consent. Express consent is straightforward, thus the focus of the case law is in determining whether or not there has been implied consent.

Two key principles have emerged in relation to the determination of whether or not there has been implied consent. The first is that the question of implied consent is factual and must be determined upon examination of all the facts and circumstances of the case: *Palsky (Next friend of) v. Humphrey*, [1964] S.C.R. No. 580, *Ireland (Next friend of) v. Perez*, 2007 ABCA 12, [2007] A.J. No. 128, 280 D.L.R. (4th) 118, and *E.T. Estate v. Tran*, 2007 ABCA 13, [2007] A.J. No. 129, 280 D.L.R. (4th) 142.

The second is that consent cannot be conditional: *Mugford v. Weber*, 2004 ABCA 145, [2004] A.J. No. 508, 348 A.R. 332. When a vehicle owner entrusts another person with the vehicle in such a manner that the owner no longer has control over the vehicle, then the owner is deemed to have impliedly consented to the activities carried on by that person (including impaired driving), as well as to have impliedly consented to the decisions made by that individual (including permitting persons unknown to the driver to drive the vehicle). The vehicle owner cannot relieve him or herself from liability by claiming that consent was conditional. These principles apply equally when a third party driver receives consent to possession and use from a person in possession with the owner's consent.

Statutory framework

The *Traffic Safety Act*, R.S.A. 2000, c. T-6, s. 187(2) creates a deemed agency relationship between owner and driver when a person is driving the owner's vehicle with the owner's express or implied consent:

"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." [Emphasis added.]

In *Mugford v. Weber*, 2004 ABCA 145, [2004] A.J. No. 508, 348 A.R. 332, Wittmann J.A. carried out a thorough analysis of the history and interpretation of s. 181(b) of the *Highway Traffic Act* [now s. 187(b) of the *Traffic Safety Act*]. Ritter J.A. summarized the principles enunciated by Wittmann J.A. in *Mugford* in the subsequent appellate decision of *Ireland (Next friend of) v. Perez*, 2007 ABCA 12, [2007] A.J. No. 128, 280 D.L.R. (4th) 118:

"1. The purpose of s. 181 is public protection: para. 29.

2. The object of this statutory provision is to impose upon owners the responsibility for careful management of their vehicles and the assumption of risks for the conduct of those entrusted with possession of their vehicle. Additionally, this provision expands responsibility for

losses to owners, who are more likely to have assets and insurance that innocent victims can look to for compensation: para. 33.

3. Implied consent may be terminated: para. 39.

4. **An owner must impliedly consent to both "driving" and "possession"** of the vehicle in order to be found liable under s. 181(b): para. 41.

5. **Consent may not be conditional**, i.e., placing conditions on the use of the vehicle is not permissible because that could be unfairly used by an owner to avoid liability in a manner contrary to the objectives of s. 181: para. 43.

6. If the owner has not, expressly or impliedly, required specific consent for each possession and use of the vehicle, it is unnecessary to ascertain consent each time the driver uses the vehicle as the owner has relinquished control of the circumstances of its use: para. 44."

[Emphasis added.] (at para. 24)

Consent cannot be conditional

In the leading case of *Mugford v. Weber, supra*, the driver, Weber, was a seasonal employee of Kodiak Construction. He was given a company vehicle to use each season to travel between his residence in Grande Prairie and the worksite in Sexsmith. Weber's use of the vehicle was subject to a number of conditions, agreed to in writing, including that there would be no personal use of the vehicle. On the night of the accident, Weber detoured on his way home from work to have a few drinks with friends. The accident occurred on his way home, after he had been drinking.

After reviewing the legislative history and discussing the purpose and intent of the provision, Wittmann J.A. held that when a driver has been given possession and permission to drive a vehicle by the owner, the owner no longer exercises control and has impliedly consented to whatever decisions the driver makes, regarding when and where to drive, with whom to drive, etc. Although vehicle owners frequently argue that their consent was conditional upon the

driver not drinking or the driver not permitting anyone else to drive, the court concluded that these conditions could not exculpate the owner from liability:

“Section 181, however, **does not permit conditional consent.** Conditional consent would narrowly interpret the provision and its effect would operate contrary to its remedial object. **Interpretation of the section must give effect to its purposes which includes the requirement that owners exercise care when permitting others to use their vehicles. Where a driver has been given complete possession of the vehicle and permission to drive, the owner no longer exercises control over the use of the vehicle.** Placing conditions upon the use of the vehicle or the manner of driving is not sufficient to exculpate the owner from the vicarious liability imposed in s. 181 because, in most cases, another purpose of the section, giving victims of negligent driving recourse to mandatory insurance, would be subverted and could give rise to absurd results. ...” [Emphasis added.] (at para. 43)

Thus, on the facts, the court found that it was not relevant that Weber was not supposed to use the vehicle only for company business. Once the vehicle was in his possession and control, he had authority to make decisions in relation to the vehicle.

The court noted further that consent need not be determined at the specific time of the accident, since this too would operate contrary to the remedial purpose of the legislation. Few owners would consent to an impaired driver, for example:

“Requiring consent at the time of the accident operates to the same effect as conditional consent. ... In virtually every case where the person had been drinking, the owner would not consent to driving at that time. However, **where the owner has consented to a situation or arrangement where the owner has no control over the use and possession of the vehicle**, a negative answer to the hypothetical question of whether consent would have been given at the time of the accident cannot relieve the owner of liability; otherwise, the purpose of s. 181 would be undermined.” [Emphasis added.] (at para. 44)

In conclusion, the court found that Kodiak expressly consented to Weber’s possession of the vehicle and his driving it for the duration of his seasonal employment. The imposition of

conditions could not vitiate that consent, as such, the employer was vicariously liable for the negligence of its employee.

The principles from *Mugford* were applied by Veit J. in *Hoefling v. Driving Force Inc.*, 2005 ABQB 802, [2005] A.J. No. 1464, 388 A.R. 323. The corporate defendant, Veco Construction Ltd., instructed its employee Felsing to return a leased van to Edmonton. Veco did not expressly forbid Felsing from picking up fellow employees and Felsing offered a ride to his fellow employee, Aastrom. Once he reached Edmonton's city limits, Felsing permitted Aastrom to drive, even though Aastrom had been drinking and unknown to Felsing, Aastrom did not have a driver's license. Aastrom was at fault in an accident.

Veit J. stated that whether or not there was consent was a question of fact in each case, looking at all the circumstances (at para. 28). Following *Mugford*, the judge concluded that the fact that the employer controlled who could drive the vehicles and the fact that it had an alcohol policy were not relevant. By giving Felsing complete authority over the van, Veco gave him authority over who could drive it along with its implied consent:

"… At a minimum, **Aastrom was driving with Veco's implied consent**; … Because of the damages which they can inflict, motor vehicles are treated by the law in a special way; unique responsibilities are imposed on owners of vehicles. **Veco's voluntary transfer of the vehicle keys to Felsing in circumstances where Veco expected Felsing not only to have possession of the vehicle but also to drive it, constituted express consent by Veco to Felsing's effective authority over the van.** The **voluntary transfer of the keys to the vehicle by Felsing to Aastrom** establishes that Aastrom was in possession of the vehicle, if not by express authority from Veco, **at the very least by its implied consent.**"
[Emphasis added.] (at para. 5)

The judge held that Veco was vicariously liable for the accident on the basis that Aastrom was driving with its implied consent.

Examining all circumstances of the case

In *Palsky (Next friend of) v. Humphrey*, [1964] S.C.R. No. 580, an appeal from the Alberta Court of Appeal, the Supreme Court of Canada set out the proper test for determining whether or not the vehicle owner had given his or her implied consent. In setting out the test, the Supreme Court adopted the language of the dissenting appellate judge Potter J.A.:

“The test is not the knowledge or belief of the driver for the time being as to who is the true owner ... **but lies in the facts and circumstances under which possession was handed over ...**

...

... whether all the circumstances were such as would show that the person who was driving had the implied consent of the owner..."
[Emphasis added.] (at p. 3 QL)

Palsky has been given various interpretations in Alberta. Veit J. in *Hoefling, supra* summarized the principles from *Palsky* as follows: “...it appears to me that the brief reasons of the Supreme Court emphasize the importance of looking at the facts and circumstances in making a decision about whether implied consent existed. (at para. 39)

More recently, the Alberta Court of Appeal appears to have endorsed this interpretation in the companion cases of *Ireland, supra* and *E.T. Estate v. Tran*, 2007 ABCA 13, [2007] A.J. No. 129, 280 D.L.R. (4th) 142. There appears to be agreement that the question of implied consent requires an examination of all the circumstances surrounding the possession and use of the vehicle and that no one circumstance is conclusive.¹ Romaine J. in *Korencik v. Hartwell*, 2007

¹ It is difficult to extract clear principles from these decisions because of the limited concurrences and dissents in each. Ritter J.A. wrote the majority in both cases, however, O’Leary J.A.’s concurrence in *Tran* was in the result only and not in the reasoning. Similarly, in *Ireland*, Berger J.A. concurred in Ritter J.A.’s result, but not in his reasons. Furthermore, O’Leary J.A. wrote a dissenting opinion in *Ireland*, while Berger J.A. wrote a dissent in *Tran*.

ABQB 459, [2007] A.J. No. 752, 79 Alta. L.R. (4th) 377 at para. 32 concluded that the sum total of these decisions was a consensus around the test for implied consent.

On the facts in *Korencik*, the recently purchased vehicle was registered and insured in the parents' names; however, the vehicle was left with the son so that he could carry out some repairs. The son had limited parking in front of his rental property, so the parents knew that he would be moving the vehicle to make space for his own vehicle and those of his roommates. The son used the vehicle to attend a party and got in an accident. Romaine J. held that the following facts and circumstances created implied consent resulting in the parents' vicarious liability:

- “a) Mr. Hartwell Jr. was **given complete possession of the vehicle and its keys** at his residence;
- b) He was left with the Thunderbird for an **indeterminate period of time with express consent to move it when required to resolve the parking problem, and free rein to repair it in the manner he saw fit**;
- c) **Mr. Hartwell Jr. did not think he needed specific permission to drive the Thunderbird that night.** While he knew his parents would not have permitted him to drive it if he intended to drink, that was not his original intention;
- d) The **senior Hartwells did not expressly require specific consent for each use of the vehicle**, and, despite their pattern of behaviour when Mr. Hartwell Jr. was living at home, **the evidence does not support that they impliedly required such specific consent** when they left the vehicle with Mr. Hartwell Jr.” [Emphasis added.] (at para. 33)

See also *Cameron v. Halverson*, [2004] A.J. No. 1786 (Q.B.) in which the daughter was found to have given her implied consent to her unlicensed father to drive her vehicle by leaving it in her parents' driveway when she went away. She knew her father had driven her vehicle in the past and she had only given him a gentle admonishment. By giving him access to the vehicle and the keys, she had given her implied consent to its use.

In *Ezzedine v. Dalgard*, 2006 ABQB 826, [2006] A.J. No. 1431, [2007] 2 W.W.R. 704, Macklin J. found the registered owner, MacKenzie, liable on the grounds that she had given her implied consent to her common law partner, Dalgard, to drive the vehicle even though it was uninsured. MacKenzie lived in Kitchener, Ontario, and she allowed Dalgard to drive the vehicle to Fort McMurray, Alberta.

The insurance on the vehicle expired on January 1, 2002. MacKenzie was unable to reinsure the vehicle because Dalgard had a prior impaired driving conviction. She asked Dalgard not to drive the vehicle and to leave it parked at his work compound, but she did not ask him to return the keys. Macklin J. found that even if MacKenzie revoked her express consent to Dalgard driving the vehicle, she did not revoke her consent to his exclusive possession. The question, therefore, was whether her consent to Dalgard's ongoing possession implied that she also had consented to his ongoing use of the vehicle.

Macklin J. reviewed the principles underlying the legislation and, relying on *Mugford*, reiterated the overriding objective of public protection:

“The Court in *Mugford* emphasized that the purpose of s. 181 is **to protect the public by holding the owner of a motor vehicle responsible to ensure that those to whom possession is entrusted will observe the law and to impose vicarious liability on the owner for the consequences of its reckless use by the one to whom possession has been given.** To achieve this purpose, the Court emphasized that the wording of s. 181(b) imposes a **conjunctive requirement that the person be driving the vehicle and in possession of it with the consent of the owner.**” [Emphasis added.] (at para. 85)

The judge concluded, on all the facts, that MacKenzie had not taken sufficient action to revoke her consent to Dalgard's ongoing possession and use. She could have asked, for example, that Dalgard return the keys or that Ford Credit repossess the vehicle. She also could have arranged for the return of the vehicle to Ontario. Instead, she consented to a situation where she had absolutely no physical control over the use and possession of the vehicle.

Macklin J. concluded by highlighting the heavy burden on vehicle owners:

"There is a heavy burden on any owner of a vehicle who willingly gives up possession of that vehicle to another person. The burden is imposed to ensure the protection of the public who may be at risk by the use of the vehicle by that person. It is only fair that the owner who has control over the use and possession of the vehicle bear the ultimate responsibility for its operation where the owner has done nothing to control that use and possession. ..." [Emphasis added.] (at para. 90)

The same principles apply to third party drivers obtaining their permission from the borrower

In *Ireland, supra* and *Tran, supra* the registered owners gave their express consent to a friend or a relative to drive the vehicle. In each case, however, the accident occurred while a third party drove the vehicle. The question was whether the registered owner gave implied consent to the third party use of the vehicle. The Alberta Court of Appeal confirmed that the same general principles apply to the situation of a third party driver:

"While both *Palsky* and *Mugford* involved drivers directly involved with the owner, this appeal and its companion involve third party drivers who dealt with a person to whom the owner had lent the vehicle. Nonetheless, the jurisprudence is clear; the same general principles apply even when the third party driver receives consent to possession and use of the vehicle from a person in possession with the owner's consent. ... the test to be met was "whether the circumstances were such as would show that [the third party driver] was, at the time of the accident, in possession of the motor vehicle in question with the implied consent of the [registered owner]." [Emphasis added.] (at para. 26)

The court went on to state that "if the owner provides express consent to an original borrower knowing that the vehicle might be driven by a third party at the will of the original borrower, the owner may be liable". (at paras. 28).

In *Ireland*, the father was the registered owner of a VW Jetta. He gave express consent to his son to drive the vehicle. On the night of the accident, the son became intoxicated and was

unable to drive. He gave the keys to a friend, who did not have a driver's licence. A serious single vehicle accident resulted; one passenger was killed and the others were severely injured.

The father had set conditions upon his son's use of his vehicle, including that there be no drinking and driving and that no friends were permitted to drive the vehicle except in the case of a medical emergency. The father also stated, however, that he trusted his son's judgment.

On all the facts and circumstances, the court concluded that the son had the father's implied authority to allow a third party to drive the vehicle, largely on the grounds that the father trusted his son's judgment and had given the son possession of the vehicle in circumstances that he could not actually control.

Ritter J.A. adopted the reasoning in *Mugford* in relation to conditional consent and rejected the conditions placed by the father upon the son's use of the vehicle:

"...This rejection of conditional consent recognizes that the owner's ultimate protection remains in his or her ability to not lend out the vehicle rather than to impose conditions on its use. To imply consent to foreseeable circumstances does not result in unfairness to the owner, given the owner's ultimate choice to avoid such liability by not lending the vehicle to the borrower. As between the owner and innocent victims of a collision involving the owner's vehicle, risk of failure to abide by conditions rests with the owner and not with innocent members of the travelling public. Thus, rejection of the ability of an owner to avoid liability through the use of conditional consent provides protection to the public highway users. It not only imposes an additional responsibility on the part of car owners to take greater care over the possession and use of their vehicles, but also provides access to the owner's mandatory insurance benefits." [Emphasis added.] (at para. 25)

In *Tran, supra*, the defendant Danny Lam borrowed a vehicle from his brother John Lam. John believed the loan would be for a short time and a short distance, but put no restrictions on who could drive the vehicle - he trusted his brother's judgment. At trial, Park J. held that John consented to a situation where he had no control over the use and possession of his vehicle.

He did not in any way expressly or impliedly terminate Danny's possession of his vehicle or his consent that Danny drive it:

"John Lam consented to a situation **where he had no control over the use and possession of his vehicle. He had imposed no conditions.** ... He provided Danny Lam **with possession of the Toyota and consent to drive** for Danny Lam's personal use. Because Danny Lam kept the Toyota in his possession for a longer time does not in the circumstances vitiate the implied consent of John Lam." [Emphasis added.] (at para. 87)

On appeal, Ritter J.A. noted that implied consent will be found in relation to third party drivers where the owner in some way acquiesced to the vehicle being driven by others:

"In order for implied consent to be found in a case where the original borrower allows a third person to drive, **it must be shown that the owner had in some way acquiesced in the vehicle being driven by others, or expected that others may be driving...**" [Emphasis added.] (at para. 34)

The third party driver issue arose more recently in *Palmquist v. Ziegler*, 2010 ABQB 337, [2010] A.J. No. 752, 31 Alta. L.R. (5th) 23. The father, who was the registered owner of the vehicle, gave his son permission to use it until the son's vehicle was repaired. The father believed the son would be using the vehicle to get to work the next day; however, the son used it to meet friends who were involved in the drug trade. Early the next morning, the son, while half asleep, passed the keys to his friend, Ziegler, who was impaired from drugs; Ziegler drove the vehicle and was responsible for a serious accident causing death.

Read J. found that the father gave his consent to the son's possession and use of the vehicle without any restrictions or conditions. The judge reviewed the Court of Appeal's reasons in *Mugford and Ireland* and reiterated the basic principles: there can be no conditional consent, implied consent must be derived from all the facts and circumstances, and the same principles apply when a third party driver receives consent to possession and use from a person in possession with the owner's consent. In particular, the judge emphasized the principle from

Mugford that when a driver has been given complete possession of a vehicle and permission to drive, the owner no longer exercises control over the use of the vehicle.

On all the facts, Read J. concluded that the father had given his implied consent to the third party driver. The judge identified the following facts to be relevant to the issue of implied consent. These facts provide a good example of the detailed factual analysis undertaken in examining whether or not consent can be implied in the circumstances:

- a. Mother and father were joint registered owners, but mother agreed that father had authority to give express consent to son to drive vehicle.
- b. Father gave son complete possession of vehicle and keys and gave him permission to drive it.
- c. Father did not limit the son's use of the vehicle, rather told him to treat the vehicle as his own.
- d. Father gave son use and possession of vehicle for an indeterminate period of time.
- e. The conditions or 'family rules' placed on the son while he was living at home must be viewed in the context of the events that occurred when the father lent him the vehicle:
 - i. Family rule was that members of the family could not use another's vehicle, but father gave son express permission to use vehicle.
 - ii. Although normally son only used father's vehicle to pick up nieces and nephews, the father's permission clearly went beyond such limited permission in this case.
 - iii. Although there was a general rule that no one else should drive a borrowed family vehicle, there had been no particular discussion of it at the time.
 - iv. Father placed no conditions on son's use of vehicle, simply telling him to treat it as his own.
 - v. Father did not require specific consent for each use of the vehicle; there was no expectation that the son would contact the father prior to using the vehicle each day.

vi. Son did not seek father's permission to drive the vehicle to Sherwood Park to meet friend even though he knew that if he asked, permission would not have been granted.

f. The son used the vehicle to drive Ziegler around to sell drugs. He knew Ziegler was smoking drugs that evening. He then drove to an unfamiliar house where more drugs were consumed and fell asleep in the company of Ziegler and two people he had never before met.

g. When Ziegler woke the son to request permission to use the car, he expected him to loan him the vehicle because of their previous friendship.

h. The son handed the keys to Ziegler, leading Zielger to reasonably believe that he had permission to drive the vehicle.

i. Ziegler knew that the vehicle belonged to the father and not to the son, but nonetheless believed that the son could grant him authority to drive it.

j. The son claimed that he had no memory of giving Ziegler the keys and suggested that he would never have done so.

k. The son, however, did none of the things one would expect a car owner to do on discovering his car had been stolen, nor did he question how Ziegler had obtained possession of the keys when told about the accident.

l. The son admitted his suspicion that he had given Ziegler the keys, even though he could not remember doing so.

m. Zielger was never charged with theft of the vehicle (adapted from para. 201).

Read J. noted that if the son had asked his parents if he could lend the vehicle to a friend who was high on drugs and did not even have a driver's licence the answer would have been no.

The judge then quoted from *Mugford* in stating that this is exactly the mischief the implied consent provision is intended to resolve (see para. 44 from *Mugford*, quote on p. 5 above).

The judge concluded:

“...Murray Adams trusted his son when he gave him the use of the vehicle. That trust was misplaced. However, his option was to prevent his son from driving the vehicle. Instead, he gave the vehicle to his son

to drive. Once he gave the Adams Vehicle to his son, telling him to treat it as his own, he effectively gave him *carte blanche*. In the circumstances, Carlin Ziegler reasonably believed he had permission to possess and to drive the vehicle when he was given the keys by Tarrant Adams and s. 187 of the *Traffic Safety Act* operates to make Murray Adams and June Adams liable as owner.” [Emphasis added.] (at para. 204)

END

ⁱ With thanks to Nicky Brink for the original research and writing on which this article is based.