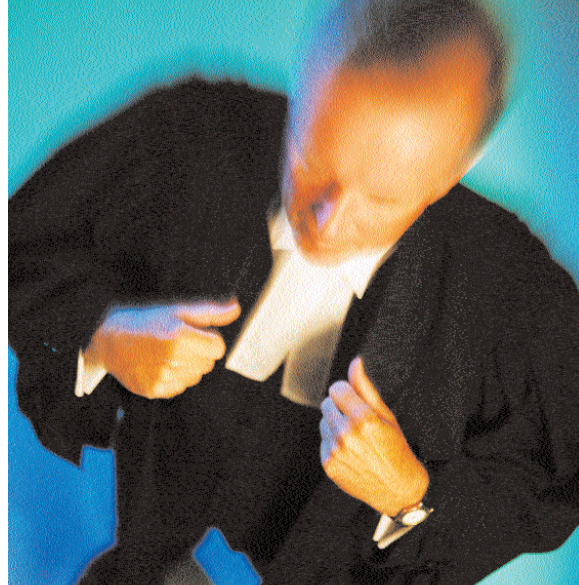


INCREASED VICARIOUS LIABILITY ON VEHICLE OWNERS



INSURANCE LITIGATION LEGAL ALERT SEPTEMBER, 2004

In May 2004, Justice Wittman, writing for a panel of the Alberta Court of Appeal that included Justices Picard and Russell, handed down the decision in *Mugford v. Kodiak*, 2004 ABCA 145, [2004] A.J. No. 508 which shifts considerable responsibility to owners who allow others to possess and drive their vehicles. Owners can no longer avoid vicarious liability under the former *Highway Traffic Act* and current *Traffic Safety Act* by making consent to use subject to certain conditions.

The *Mugford* action concerned a motor vehicle accident that occurred while Myron Weber (“Weber”) was driving a vehicle owned by his employer, Kodiak Construction Ltd. (“Kodiak”). Weber was a seasonal employee and each time he joined Kodiak he was given the use of a company vehicle for the primary purpose of driving from Grande Prairie, where he and other employees resided, to the company shop in Sexsmith or to other job sites. Weber signed an agreement to abide by Kodiak’s policy that prohibited personal use of the vehicle.

On the day of the accident, Weber did not drive the company vehicle directly home after work. Rather, he drove the vehicle to meet his girlfriend for dinner and a few drinks. They had an argument and he drove the vehicle to a co-worker’s home where he drank some beer. He was driving the vehicle home from the co-worker’s house when he rear-ended the Plaintiffs’ vehicle. He plead guilty to impaired driving charges arising from the accident. The Plaintiffs successfully brought an action for personal injury against Weber and then sought to hold Kodiak vicariously liable as owner of the vehicle Weber was driving.

The trial judge held that the existence of consent was to be determined at the time of the accident, and as Weber was acting outside of Kodiak’s policy regarding use of the vehicle he did not have express consent. It was further held that there was no implied consent as Kodiak would not have consented to Weber’s use in the circumstances. Finding there was no consent, the trial judge found Kodiak was not vicariously liable.

The Court of Appeal overturned this finding. After reviewing the evolution of the statutory provisions concerning vicarious liability of owners, the court made a key decision. It held that the purpose of the vicarious liability of owners is public protection from the actions of negligent drivers and to ensure that innocent third parties have access to mandatory insurance.

It was further held that the owner could not escape vicarious liability by entering into a private arrangement with the negligent driver allowing conditional consent as this would undermine the public protection intent of the legislation. It was suggested that the recourse for owners is to exercise more care when entrusting their vehicles to another and to obtain insurance in excess of the statutory minimum limits.

The appeal was allowed and Kodiak was held vicariously liable. The judgment against Weber was extended against Kodiak. Although application has been made for leave to appeal to the Supreme Court of Canada, there is no indication as yet that the Supreme Court of Canada will grant leave to appeal. For the time being, then, owners, including employers, are vicariously liable for the conduct of those who possess and drive vehicles with the owners' consent. In view of the foregoing, you may wish to consider reviewing existing usage policies, identifying risk areas, and amending and communicating usage policies explicitly.

Parlee McLaws LLP is continuing to monitor developments in this case, and future updates will be published as required. Should you have any questions or require any assistance in this regard, please feel free to contact a member of the Parlee McLaws LLP Labour and Employment Services or Litigation and Insurance Services Practice Groups.

For more information on the employment aspects, please contact Practice Group Chair Rob James in our Edmonton office, or Co-Chair Greg Stirling in our Calgary office.

With respect to insurance issues arising out of this legislation, please contact Practice Group Chair Bruce Churchill-Smith in our Calgary office, or Co-Chair James McGinnis in our Edmonton office.

The Fine Print:

This legal alert is intended to provide general information concerning developments in the law and is not intended to provide legal advice in respect of any particular situation.

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