COURT OF APPEAL FOR ONTARIO

CITATION: Graham v. Lemay, 2016 ONCA 55
DATE: 20160127
DOCKET: C59925

Gillese, Pepall and Lauwers JJ.A.

BETWEEN

Jodi Graham and Colin J. Graham, by their litigation guardian, Cheryl Margaret Graham, Cheryl Margaret Graham, Joseph Raymond Graham and Christopher R. Graham

Plaintiffs (Appellants/ Respondents by way of cross-appeal)

and

Karine Lianne Lemay, GMAC Leaseco Corporation, Mario Pietrantonio, West End Tile Ltd., Daimler Chrysler Financial Services Canada Inc., Chevrolet West Inc., Capital Dodge Chrysler Jeep Limited, Luciano Pietrantonio, General Motors Corporation and the City of Ottawa and Chrysler Canada Inc.

Defendants (Respondents/ Appellant by way of cross-appeal)

and

CorePointe Insurance Company, formerly carrying on business as Daimler Chrysler Insurance

Respondent (Respondent)

William J. Sammon, for the appellants/respondents by way of cross-appeal

David A. Zuber, for the respondents Daimler Chrysler Financial Services Canada Inc. and CorePointe Insurance Company

W.S. Chalmers, for the respondent/appellant by way of cross-appeal, Chrysler Canada Inc.

Heard: September 8, 2015

On appeal from the orders of Justice Hugh R. McLean of the Superior Court of Justice, dated January 6, 2015, with reasons reported at 2015 ONSC 6821, and February 5, 2015.

Pepall J.A.:

Introduction

[1] The appellant Jodi Graham was a passenger in a motor vehicle and suffered serious injuries as a result of a collision with a motor vehicle driven by Mario Pietrantonio. The Pietrantonio vehicle had been leased. In the lease, Daimler Financial Services Canada Inc. ("Daimler Financial") was described as the lessor. At the time of the accident, Chrysler Canada Inc. ("Chrysler") was the beneficial owner of the Pietrantonio vehicle.

[2] The appellants commenced an action against various parties, including Daimler Financial and Chrysler, both of whom are respondents on this appeal. Both the respondents and the appellants moved for summary judgment as a result of which the motions judge determined that:

- Chrysler was an owner of the Pietrantonio vehicle within the meaning of s. 192(2) of the *Highway Traffic Act*, R.S.O. 1990, c. H-8.
- Both Chrysler and Daimler Financial were lessors of the Pietrantonio vehicle and therefore entitled to the cap on liability provided by s. 267.12(1) of the *Insurance Act*, R.S.O. 1990, c. I-8.
- Mario was not an unnamed insured under Daimler Financial's excess insurance policy.

- There was no genuine issue requiring a trial in respect of the appellants' claim alleging negligent entrustment of the Pietrantonio vehicle against Daimler Financial and therefore that claim was dismissed.

[3] The appellants challenge the latter three determinations. Chrysler, on cross-appeal, challenges the first. For the reasons that follow, I would dismiss both the appeal and the cross-appeal.

Facts

(1) The Accident and Insurance Coverage

[4] On May 18, 2006, Jodi was in the front passenger seat of a vehicle driven by Karine Lemay. Mario was driving a 2003 leased Dodge Durango. He T-boned the passenger side of Lemay's vehicle. According to the appellants, Mario was speeding and on his cell phone at the time. Jodi suffered a traumatic brain injury as a result of the accident and will be permanently disabled. Lemay carried $1 million in third-party liability insurance.

[5] The lessees of the Pietrantonio vehicle, West End Tile Limited and Luciano Pietrantonio (Mario's father), carried $2 million in third-party liability insurance. West End Tile Limited and Luciano leased the Dodge Durango vehicle pursuant to a lease with Daimler Financial, who was the registered owner of the Pietrantonio vehicle. Daimler Financial carried a standard lessors' contingent automobile policy of insurance and a standard excess insurance policy that provided $10 million of coverage. The policies were issued by the respondent

CorePointe Insurance Company.[1] Both policies stated that coverage extended only to the named insured, Daimler Financial, and excluded coverage for any lessee or employee of a lessee. Furthermore, coverage was available only if the lessee's insurance was not collectible. According to the appellants, Jodi's damages will significantly exceed the limits of the third-party liability insurance carried on the two vehicles.

[6] Although Daimler Financial was the legal owner of the Pietrantonio vehicle, at the time of the accident, Chrysler was the beneficial owner as a result of agreements entered into with Daimler Financial.

(2) The Pietrantonio Vehicle

[7] Luciano incorporated West End Tile Limited in 1969. His son, Mario, was born in 1963 and by the date of the accident in 2006, was a co-owner of the company.

[8] Mario became a licensed driver in 1979 and always drove vehicles that were either owned by, or leased through, West End Tile Limited.

[9] His Ministry of Transportation driving record revealed that in 1981 he had been found speeding on three occasions and had been involved in a collision. He was also charged with careless driving later that year and his license was suspended. In 1985, 1991, and 1995, he was again found to have been speeding

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[1] Formerly carrying on business as Daimler Chrysler Insurance Company.

and later in 1995 he was found to have failed to use, or to have improperly used, a seat belt. In 2001, 2003, and 2006, three additional collisions were identified, although his driving record contains a "driving properly" notation for each of those incidents. Lastly, also in 2006, he was convicted of having an inoperative or modified seat belt assembly.

[10] In November 2002, West End Tile Limited and Mario as co-lessees executed an agreement to lease a 2003 Dodge Durango with the Chrysler dealership, Capital Dodge Chrysler Jeep Limited ("Capital Dodge"). On November 5, 2002, both Luciano and Mario signed an application for credit with Daimler Financial. The application authorized Daimler Financial to collect personal information on both applicants. Mario's application was not approved but no reasons were given for the rejection. Capital Dodge then entered into a lease with West End Tile Limited and Luciano as co-lessees.

[11] During his examination for discovery, Luciano was asked if he knew why Mario had not been approved. Luciano responded that all of his sons, including Mario, could not lease a vehicle on their own and they always needed Luciano to act as a lessee or co-lessee for "financial reasons".

[12] Daimler Financial provided financing and, as provided in the lease, Capital Dodge assigned the lease and the motor vehicle to Daimler Financial. Daimler

Financial became the registered owner of the vehicle along with West End Tile Limited and Luciano.

(3) Corporate Relationships

[13] The Chrysler relationships relevant to this appeal are complex.

[14] Daimler Financial transferred ownership of a number of vehicles to Chrysler pursuant to a contract dated July 1, 1996. By contract dated July 1996, Chrysler and Daimler Financial entered into a Gold Key Administration and Credit Risk Assumption Agreement (the "1996 Gold Key Agreement").[2] It is uncontested that this agreement was structured to allow Chrysler to claim certain tax benefits in its capacity as owner of the vehicles. The 1996 Gold Key Agreement provided that:

- Daimler Financial agreed to purchase vehicles as agent for Chrysler and to hold the related leases on behalf of and for the benefit of Chrysler in accordance with the terms of the 1996 Gold Key Agreement.
- Daimler Financial would retain legal title to the vehicles and would be the registered lessor of the related leases as bare trustee and nominee for and on behalf of Chrysler. All indebtedness and liability due to Daimler Financial under the leases and all other benefits related to the vehicles including insurance were for the benefit of Chrysler.
- Daimler Financial agreed to administer, for the account of Chrysler, the leases beneficially owned by Chrysler in

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[2] The parties to the agreement were Chrysler's predecessor in title, Chrysler Canada Ltd., and Daimler Financial's predecessor in title, Chrysler Credit Canada Ltd. I refer to these parties as Chrysler and Daimler Financial, respectively.

return for which Chrysler would pay Daimler Financial a fee.

- Chrysler's role as beneficial owner of the vehicles and leases would not be disclosed except as required by law or by the 1996 Gold Key Agreement.
- The terms of the 1996 Gold Key Agreement were binding on and enured to the benefit of successors and assigns.

[15] The parties to the 1996 Gold Key Agreement subsequently entered into a Purchase and Sale Agreement and a Bill of Sale, both dated December 31, 2002. The latter two agreements, consistent with the 1996 Gold Key Agreement, effected the sales of the vehicles and leases to Chrysler and the requisite conveyances. It is conceded that the Pietrantonio vehicle was governed by these arrangements.

[16] As such, to repeat, at the time of the accident, Chrysler was the beneficial owner of the Pietrantonio vehicle and the lease and Daimler Financial was the legal owner of the vehicle and the administrator of and named party to the lease with West End Tile Limited and Luciano.

Statutory Regimes

[17] There are two statutory provisions that give rise to this dispute. First, s. 192(2) of the *Highway Traffic Act* 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.

[18] Second, s. 267.12(1) of the *Insurance Act* provides, in essence, that in an action for loss or damage from bodily injury or death arising from the use or operation of a motor vehicle that is leased, the maximum amount for which the lessor or lessors are liable in their capacity as lessors is capped. For the purpose of this appeal, the statutory cap is $1 million subject to certain reductions including damages recovered under third-party liability policies.

[19] Both s. 192(2) of the *Highway Traffic Act* and s. 267.12 of the *Insurance Act* are reproduced in full in Schedule A attached hereto.

Litigation

[20] The appellants commenced an action for damages against numerous parties. Chrysler, Daimler Financial, and Capital Dodge moved for summary judgment dismissing the action against them. The appellants brought a cross-motion seeking summary judgment and a declaration that Mario was an unnamed insured under Daimler Financial's excess insurance policy and that Chrysler and Daimler Financial were not entitled to the cap on liability of lessors as set out in s. 267.12(1) of the *Insurance Act*.

[21] The motions judge heard the motions over two days and granted two orders. The order dated January 6, 2015, provided that Chrysler was an owner of

the vehicle driven by Mario within the meaning of s.192(2) of the *Highway Traffic Act*, and that Chrysler and Daimler Financial were lessors within the meaning of s. 267.12(1) of the *Insurance Act* and as such were entitled to the cap on liability. The appellants' claims of negligent entrustment against Daimler Financial and Capital Dodge were dismissed.

[22] The order dated February 5, 2015, was on consent. It provided that the appellants' motion for summary judgment and a declaration that Mario was an unnamed insured entitled to coverage under Daimler Financial's standard excess policy was dismissed. However, the appellant's consent was without prejudice to the appellants' right to appeal the consent dismissal on the basis that the decision in *Xu v. Mitsui Sumitomo Insurance Company Limited*, 2014 ONSC 167, 119 O.R. (3d) 587, aff'd 2014 ONCA 805, 42 C.C.L.I. (5th) 17, was wrongly decided or, in the alternative, did not apply to Daimler Financial if it was found not to be a lessor within the meaning of s. 267.12(1) of the *Insurance Act*.

Motions Judge's Reasons

[23] The motions judge commenced his analysis by observing that Chrysler admitted that it owned the Pietrantonio vehicle for the purpose of claiming capital cost deductions for income tax purposes. He found that as owner, Chrysler was able to achieve $200 million in tax savings. The motions judge observed that there was no indication that Chrysler was an owner only to the extent necessary

to claim the capital cost deductions. In any event, such a restriction on ownership would not be effective.

[24] The motions judge noted that West End Tile Limited, Luciano, and Daimler Financial were all vicariously liable for the negligence, if any, of Mario. He concluded that Chrysler was too. Chrysler fell within the purview of s. 192(2) of the *Highway Traffic Act* which rendered an owner vicariously liable for loss or damage sustained by any person by reason of negligence. He rejected Chrysler's argument that it did not fall within that provision because it had no control or dominion over the vehicle.

[25] The motions judge then turned to the availability of the cap on liability and who was to be considered a lessor for the purposes of s. 267.12(1) of the *Insurance Act*. He stated that it was obvious that Daimler Financial was a lessor as it was listed on title as such. As for Chrysler, it had "an interest in the remainder of the lease, that is, when the lease ended they would re-achieve complete ownership in the vehicle. However, during the time the lease was effective, the only right [Chrysler] had was as a lessor of the vehicle." He observed that in most situations, an owner would be a lessor "if a prior lease was fixed on the property itself." He noted that there was no indication in s. 267.12(1) of any "bifurcation for the purposes of the limitation of liability between ownership and lessorship". Therefore, Chrysler was also a lessor.

[26] The motions judge then addressed the claim of negligent entrustment. He relied on the case of *Cella (Litigation Guardian of) v. McLean* (1997), 34 O.R. (3d) 327 (C.A.), to conclude that such a tort existed in Ontario and that liability would be imposed "where there is sufficient relationship between the injured party and another person which makes it reasonable to conclude that the other person owed a duty towards the injured party and should have foreseen that he would be injured." He cited *Schulz v. Leeside Developments Ltd.* (1978), 90 D.L.R. (3d) 98 (B.C. C.A.), at p. 105, in support of the tort's requisite elements. He described these as proof that: (i) the entrustee was incompetent, inexperienced, or reckless; (ii) the entrustor "knew or had reason to know" of the entrustee's condition or proclivities; (iii) there was an entrustment of the chattel; (iv) the entrustment created an appreciable risk of harm to the plaintiff and a relational duty on the part of the defendant; and (v) the harm to the plaintiff was '"proximately" or "legally" caused by the negligence of the defendant.

[27] The motions judge was not prepared to draw a negative inference from the failure of Capital Dodge and Daimler Financial to produce the full lease file which potentially contained reasons for the initial rejection of Mario as a co-lessee. He said there was evidence that the rejection had to do with Mario's financial status.

[28] The motions judge also observed that there was no suggestion that there was a concern about Mario's driving record. He summarized Mario's record as consisting of three speeding tickets and a charge of careless driving when he

was 18, and three speeding tickets in the next 25 years, the last being 11 years prior to the accident. While the reasonable inference to be drawn was that the respondents did nothing to inquire about Mario's record, there was nothing in the record that would trigger knowledge that the lease should not have been entered into or that would have alerted Capital Dodge or Daimler Financial to any outstanding problems with Mario. There was no evidence that would trigger a finding that the respondents knew or ought to have known that Mario was an incompetent, inexperienced, or reckless driver.

[29] Furthermore, the motions judge concluded that any duty to inquire would be too remote. West End Tile Limited and Luciano were the lessees, not Mario, who was a driver who worked for West End Tile Limited. It was reasonable for the respondents to rely on insurance obtained by the lessees to satisfy concerns about the competence of the eventual driver. The motions judge accordingly dismissed the claim of negligent entrustment asserted against Daimler Financial and Capital Dodge.

[30] In his endorsement of February 5, 2015, the motions judge dealt with the appellants' motion for summary judgment and a declaration that Mario was an unnamed insured under the standard excess policy issued to Daimler Financial. He noted that the issue was substantially similar to that decided by McEwen J. in *Xu*, which had just been upheld by this court. Given that decision and the motions judge's conclusion that Chrysler and Daimler Financial were lessors, the

parties consented to an order dismissing the motion without prejudice to the appellants' right to appeal on the basis that *Xu* was wrongly decided or was inapplicable if this court were to conclude that Daimler Financial is not a lessor.

Issues

[31] There are four issues to address:

> (i) Was Chrysler correctly found to be an owner and vicariously liable for Mario's alleged negligence pursuant to s. 192(2) of the *Highway Traffic Act*?
>
> (ii) Are Chrysler and Daimler Financial lessors within the meaning of s. 267.12(1) of the *Insurance Act* and entitled to the benefit of the cap on liability?
>
> (iii) Is Mario an unnamed insured under Daimler Financial's standard excess policy?
>
> (iv) Was the claim of negligent entrustment against Daimler Financial properly dismissed?

Analysis

(i) <u>Chrysler's Vicarious Liability</u>

(a) Parties' Positions

[32] Chrysler argues that the motions judge erred in finding that Chrysler, as a non-registered owner of the Pietrantonio vehicle, was vicariously liable for the alleged negligence of Mario pursuant to s. 192(2) of the *Highway Traffic Act*. It submits that a non-registered owner will be vicariously liable for the negligence of the person operating the vehicle only if the non-registered owner exercises

dominion and control over the vehicle. In this regard, it relies on this court's decision in *Wynne v. Dalby* (1913), 16 D.L.R. 710. Chrysler also argues that the motions judge erred in not considering Chrysler's affidavit evidence on the absence of dominion and control.

[33] The appellants respond by stating that the inquiry into whether an entity is an owner of a motor vehicle within the meaning of s. 192(2) of the *Highway Traffic Act* is a factual one that does not merely turn on the dominion and control test. Chrysler admitted it was an owner. Moreover, even if such a test is applicable, in these circumstances it was met. It is also possible to have two owners. Lastly, a finding that Chrysler is not an owner would be inconsistent with its claim for capital cost allowance deductions and contrary to public policy.

(b) Chrysler is an Owner and Vicariously Liable

[34] In support of its position, Chrysler relies on *Wynne*. When discussing the predecessor to s. 192(2) in force at that time, at p. 716, this court stated that:

> ...I do not think that it can have been intended to fix the very serious responsibility which the section imposes upon one who, like the respondent, at the time the accident happened, had neither the possession of nor the dominion over the vehicle, although he may have been technically the owner of it in the sense in which the owner of the legal estate in land is the owner of the land.

[35] Chrysler accepts that subsequent decisions rendered by the Supreme Court have modified the requirements for finding a registered owner vicariously liable.

[36] In *Hayduk v. Pidoborozny*, [1972] S.C.R. 879, the respondent father was the registered owner of the motor vehicle. In the purchase agreement, he was identified as the purchaser for the purpose of guaranteeing the purchase price. However, his son had paid for the vehicle, had exclusive possession and control of the vehicle, and was driving it at the time of the accident.

[37] Ritchie J., delivering the majority judgment, concluded that the father should be considered an owner and was therefore vicariously liable. In part, that conclusion rested on the fact that he was the registered owner of the vehicle. However, at pp. 885-886, Ritchie J. stated that:

> In the present case, however, the contention that the father was the owner within the meaning of s. 130 does not rest upon registration alone. Here the father was the purchaser of the motor vehicle in conformity with the terms of a conditional sales contract which he had signed and the son had not. It is true that the son made all payments under this contract from his own resources, but the contract was obtained on the credit of the father and the payments thereunder were not fully discharged until after the accident had occurred. With all respect to the members of the Appellate Division, I agree with the learned trial judge that a valid sale of this motor vehicle had been made to the [respondent-father] and that he was the owner at common law notwithstanding the fact that his son had made the payments under the conditional sales contract and had

> had exclusive possession of the vehicle from the date of its purchase.

[38] The Supreme Court next addressed the issue in *Honan v. Gerhold*, [1975] 2 S.C.R. 866. In *Honan*, a third party had transferred ownership of a vehicle to the respondent who became the registered owner. However, that third party had exclusive possession of the vehicle and was found to have it under his dominion and control. He continued operating the motor vehicle and injured the appellant in an accident. The issue to be decided was the respondent's liability. The respondent was found to be an owner because his actions were consistent with an assertion of ownership in the vehicle. He had applied for the vehicle registration, the vehicle was under his insurance policy, and he benefitted from the proceeds of disposition of the wrecked vehicle. Spence J. wrote at p. 874:

> I have therefore come to the conclusion that the appeal should succeed on the basis that whether the word "owner" in [s. 192] of *The Highway Traffic Act* should be interpreted to cover registered owner, [the respondent] was the owner in a common law sense of the vehicle which was involved in this accident and therefore [the respondent] is liable under the provisions of [s. 192] of *The Highway Traffic Act*.

The respondent was consequently held to be vicariously liable for the negligence of the third party who was driving the vehicle: *Honan*, p. 874. In *Kerri (Guardian ad litem of) v. Decker*, 2002 NFCA 11, 209 Nfld. & P.E.I.R., at para. 12, the Court of Appeal for Newfoundland summarized the *ratio* from *Honan* as follows:

> Spence J. then concluded that, whether or not the word "owner" in [s. 192 of *The Highway Traffic Act*] should be interpreted to cover registered owners, Gerhold was the owner in a common law sense and, therefore, liable jointly with the driver for the damages that she had caused.

[39] While these cases involved registered owners, the Supreme Court also looked to other factors to reflect ownership. I see no reason to adopt a different approach for non-registered owners. The language of s. 192(2) of the *Highway Traffic Act* speaks of an owner and does not reflect any distinction between non-registered and registered owners. Nor does it impose any dominion and control requirement. Such an approach is also consistent with the public protection purpose of s. 192(2). Dominion and control may result in a finding of ownership in the case of a non-registered owner but other factors may also lead to that conclusion.

[40] In this case, Chrysler admitted that it was the non-registered owner of the Pietrantonio vehicle. Moreover, its conduct was consistent with that admission in that it had claimed significant tax deductions in its capacity as owner. The agreements between Daimler Financial and Chrysler explicitly state that Chrysler is the beneficial owner. In these circumstances, it was unnecessary for the motions judge to engage in any additional analysis on dominion and control. The motions judge did not err in concluding that Chrysler was an owner for the

purposes of s. 192(2) of the *Highway Traffic Act*. Therefore, I would dismiss Chrysler's cross-appeal.

(ii) Lessor's Liability

(a) Parties' Positions

[41] The appellants submit that the motions judge erred in finding that Chrysler and Daimler Financial were both lessors and therefore entitled to the benefit of the cap on liability. Their primary submission is that the motions judge erred by concluding that Chrysler was a lessor. They assert that he failed to examine the intent of the statutory provision and the relevant agreements between Chrysler and Daimler Financial. Here Chrysler did not act in the capacity of lessor; rather, this role was delegated by agreement to Daimler Financial. Chrysler chose to bifurcate ownership and leasing so as to obtain substantial tax benefits and it now should accept the burden of unlimited liability. Furthermore, the appellants argue that the purpose of s. 267.12(1) is satisfied if only Daimler Financial is found to be a lessor.

[42] Alternatively, the appellants argue that if Chrysler is a lessor, then Daimler Financial cannot also be a lessor. They assert that if Chrysler is a lessor, then Daimler Financial is not the lessor but is just an administrator of the lease. The subsection does not apply to an administrator of the lessor.

[43] Chrysler submits that the motions judge properly interpreted and applied s. 267.12(1). While the appellants rely on the agreements between the respondents to support their position that Chrysler is an owner of the Pietrantonio vehicle, under those same agreements, Chrysler is also the owner of the lease and is entitled to the rights and benefits of a lessor.

[44] CorePointe and Daimler Financial take the position that the motions judge correctly concluded that Daimler Financial was a lessor as it was listed as such on the title of the vehicle. Additionally, West End Tile Limited and Luciano agreed to the assignment of the lease by Capital Dodge to Daimler Financial. Moreover, s. 267.12(1) expressly provides that there may be more than one lessor of a vehicle.

[45] No party relied on any provisions of the *Personal Property Security Act*, R.S.O. 1990, c. P-10. The lease in issue on this appeal predated amendments made to the Act that expanded registration requirements for leases of personal property.

(b) Chrysler and Daimler Financial are Lessors

[46] In examining the cap on liability issue, I will first address the interpretation of s. 267.12(1) and then examine the relevant agreements. Next, I will consider the application of the statute and the agreements to the facts of the case.

Legislative Intent

[47] As repeatedly said, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26 citing Elmer A. Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at p.87.

[48] Section 267.12(1) of the *Insurance Act* was enacted in March 2006. It was part of a legislative initiative that included other statutory amendments relevant to the automotive industry.

[49] In *Xu*, McEwen J. considered whether s. 267.12 prevented a lessee from obtaining coverage under a lessor's insurance policy beyond the liability cap. At para. 31, McEwen J. discussed the policy rationale for the statutory cap on liability for lessors:

> The legislative intent behind Bill 18 is clear from Hansard. Lessors were, according to the Government of Ontario, experiencing unfairly high costs of doing business given the fact that awards for personal injury had become exorbitant. This was increasing lessors' insurance rates and affecting their ability to obtain insurance at a reasonable price. The cost of this would be passed on to the consumer. The purpose of the legislation was to protect lessors by reducing their exposures in personal injury lawsuits, thus reducing their insurance rates.

[50] At para. 29, McEwen J. quoted from Hansard:

> This is about fairness. Leasing and rental companies do not have control over the actions of the drivers. Those vehicles are in the hands of the driver for an extended period of time, and there's no direct business relationship, save and except the rental, between the owners of the company and the actual drivers. Continuing to impose uncapped vicarious liability on the basis of ownership may unfairly drive up the cost of doing business for the leasing and rental companies. This would, in turn, drive up the cost of those leased or rented vehicles and thus the cost to the consumer who is choosing that form of auto usage.[3]

[51] Section 267.12 was designed to reduce insurance costs and the cost of doing business for leasing and rental companies in the automotive arena – an industry of significant importance in Ontario – and hence those of the consumer. This was the legislative context. The legislative objective was clearly expressed in s. 267.12 by the introduction of the cap on liability available to a lessor or lessors.

Agreements between Daimler Financial and Chrysler

[52] Turning then to an examination of the agreements in issue, three are relevant. First, the lease agreement respecting the Pietrantonio vehicle was executed on November 7, 2002, by West End Tile Limited and Luciano as co-lessees and Capital Dodge as lessor. This agreement clearly provided that "[t]his Lease is accepted and assigned to [Daimler Financial] according to the terms of

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[3] Wayne Arthurs, the Parliamentary Assistant to the Minister of Finance.

the agreements between Lessor and [Daimler Financial]." It was not disputed that this agreement effected a valid assignment of Capital Dodge's interest to Daimler Financial.

[53] Second, in the 1996 Gold Key Agreement, Daimler Financial agreed to assign to Chrysler beneficial ownership of certain vehicles and related leases but to retain legal title to the vehicles and to be the registered lessor. Daimler Financial agreed to act as agent in administering the leases and related rights in exchange for a fee. Each party also paid the other party one dollar in consideration of the mutual covenants contained in the 1996 Gold Key Agreement.

[54] Third, the Agreement of Purchase and Sale and Bill of Sale effected these commitments. Section 2.1 of the Purchase and Sale Agreement stated that the leases were to be assigned to Chrysler and it would become entitled to all the benefits of, and subject to all the obligations under, the leases. The Agreement provided that Daimler Financial was to retain legal title to the vehicles and remain the registered lessor of the related leases as bare trustee and nominee for and on behalf of Chrysler. Chrysler would become the beneficial owner of the vehicle. Section 2.3 stated:

> [Daimler Financial] acknowledges and declares that it will retain legal title to the Vehicles purchased as provided in Section 2.1 and shall be the registered Lessor of the Related Lease as bare trustee and

> nominee for and on behalf of [Chrysler], [Chrysler] being the beneficial owner of (i) such Vehicles, (ii) the Related Leases, (iii) all indebtedness and liability due and to become due to [Daimler Financial] under or in respect of each Related Lease and (iv) all other rights, claims and benefits of [Daimler Financial] thereunder or otherwise related thereto or to any such Vehicle, including any (a) collateral security, (b) guarantees, (c) insurance and proceeds of such insurance and (d) agreements and other contracts by or pursuant to which any of such rights, claims and benefits are created or arise, all of which shall be for the benefit of [Chrysler] save as otherwise expressly provided herein. [Emphasis added.]

[55] The conveyance was effected by a Bill of Sale which stated that the vehicles and related leases sold were those held by Daimler Financial immediately prior to the end of its fiscal year on December 31, 2002. The Pietrantonio vehicle lease was dated November 7, 2002.

Application to Facts

[56] The appellants argue that the agreements between Chrysler and Daimler Financial effectively divided ownership and leasing between Chrysler and Daimler Financial respectively. I disagree. The effect of the agreements was to divide legal title and beneficial ownership. Canadian law has long recognized a division between legal and equitable property rights: Bruce Ziff, *Principles of Property Law*, 5th ed. (Toronto: Carswell, 2010) at pp. 78 and 211.

[57] A lease is a contract by which the lessee obtains a right to use the property leased in exchange for consideration. The proprietary interest in the property is not changed, but remains in the owner: *Canadian Acceptance Corp. v. Regent*

Park Butcher Shop Ltd. (1969), 3 D.L.R. (3d) 304 (Man. C.A.). Put differently, an owner has the right to lease the vehicle owned.

[58] Daimler Financial assigned to Chrysler beneficial ownership in the Pietrantonio vehicle, the related lease, and all indebtedness and liability due and to become due to Daimler Financial under or in respect of the related lease. It is clear from the agreements that Daimler Financial and Chrysler intended that Chrysler have the benefit of the debt assigned, Daimler Financial would act as agent to administer the leases, and the transfer was made for good consideration. The lease with West End Tile Limited and Luciano permitted a sale or assignment of both the motor vehicle and the lease to a third party – in this case, Chrysler. As such, at all material times, Chrysler was a lessor.

[59] I would also note that the presence of the bare trustee language found in the 1996 Gold Key Agreement and Purchase and Sale Agreement does not detract from the vesting of the beneficial ownership of the vehicle and the lease in Chrysler. The agreements reflected intertwined but separate promises: Chrysler would purchase the beneficial ownership in the vehicles and the related leases and Daimler Financial would retain legal title and remain registered lessor as bare trustee for Chrysler. Both the assignment and the trust served to vest in Chrysler the beneficial ownership of the Pietrantonio vehicle and the related lease.

[60] In conclusion, the language of s. 267.12(1), its legislative purpose, and the agreements between Chrysler and Daimler Financial all supported the motions judge's conclusion that Chrysler was a lessor within the meaning of that subsection and was therefore entitled to the cap on liability. There is nothing that would cause one to conclude that a beneficial owner of the motor vehicle and the lease is not, or should not be considered, a lessor.

[61] It remains to be considered whether Daimler Financial was also a lessor. The appellants submit that s. 267.12(1) does not speak of an administrator of a lease and as such, Daimler Financial was not entitled to benefit from the cap on liability.

[62] I do not agree. Daimler Financial retained legal title to the Pietrantonio vehicle. Section 267.12 (1) speaks of "the maximum amount for which the lessor or lessors of the motor vehicle are liable in respect of the same incident in their capacity as lessors of the motor vehicle". Clearly the statute contemplates multiple lessors.

[63] Furthermore, by virtue of the assignment to Daimler Financial from Capital Dodge, the lease itself described Daimler Financial as lessor.

[64] The appellants have failed to identify any error in the motions judge's analysis on the application of s. 267.12(1) to Daimler Financial. Therefore, I would not give effect to the appellants' first ground of appeal.

(iii) Mario is not an Unnamed Insured under Daimler Financial's Standard Excess Policy

(a) Parties' Positions

[65] The appellants take the position that if this court accepts that Daimler Financial is a lessor for the purposes of the *Insurance Act* (as I have), then the decision of *Xu* should be reconsidered and Mario treated as an unnamed insured under Daimler Financial's standard excess policy.

[66] The respondents submit that an unnamed insured's access to a lessor's insurance coverage was the very issue that was rejected by McEwen J. in *Xu*. The appeal to this court was dismissed. They state that the appellants are attempting to reargue *Xu* and, in any event, it was correctly decided.

(b) *Xu* was not Wrongly Decided

[67] The applicant in *Xu* had been injured in a motor vehicle accident. The defendant had leased the vehicle he had been driving at the time of the accident. The issue before McEwen J. was whether the applicant could access the lessor's insurance policy on the basis that the defendant lessee was an unnamed insured.

[68] Under s. 277(1.1) of the *Insurance Act*, a lessee's policy is required to respond first and if that policy provides coverage of $1 million or more, access to the lessor's policy is precluded if s. 267.12 of the *Insurance Act* is applicable.

McEwen J. determined that s. 267.12 did apply and did not permit an unnamed insured access to the lessor's excess coverage. Section 267.12(1) commenced with the phrase "[Despite] any other provision in this Part". This language reflected both the primacy of the section and legislative intent.

[69] In addition, as mentioned, the purpose of the provision was to "protect lessors by reducing their exposures in personal injury lawsuits, thus reducing their insurance rates" and keeping rental and leasing costs affordable. At para. 31, McEwen J. wrote that if the application were allowed, "and lessors' insurers were exposed to judgments over $1 million via lessees as unnamed insureds, the effect of the legislation would be nullified."

[70] *Xu* was appealed to this court. The appellants before us in this case sought leave to intervene but their request was denied. This court dismissed the appeal in *Xu* and upheld the decision of McEwen J.

[71] *Xu* is dispositive of the issue before us.

[72] This court will not overturn one of its prior decisions unless sitting as a five-judge panel: *R. v. Labrecque*, 2011 ONCA 360, at para. 5. In this case, the appellants' request for a five-judge panel on the basis that *Xu* was wrongly decided was refused.

[73] In spite of the refusal, it is still open to a three-judge panel to request that an appeal be assigned to a five-judge panel if convinced that "an arguable case

can be made for reviewing or overruling" the prior decision at issue: *Ontario (Attorney General) v. Collins*, 2012 ONCA 76, at para. 9.

[74] In requesting a review of *Xu*, the appellants argue that McEwen J. ignored relevant considerations, such as the policy considerations underlying unlimited vicarious liability in the *Highway Traffic Act*, or conflated different issues, such as the limitation of liability in s. 267.12(1) with provisions governing the priority in which various insurance policies will be required to pay.

[75] I would reject all of the appellants' arguments. McEwen J. accurately considered the legislative history and purpose of s. 267.12(1). He correctly concluded that permitting a lessee to access a lessor's insurance, as an unnamed insured, would undermine the animating purpose of that provision. That analysis was upheld by this court, and the appellants have not presented any cogent reasons for revisiting that conclusion. I would not give effect to this ground of appeal.

(iv) Negligent Entrustment

(a) Parties' Positions

[76] The appellants submit that the motions judge erred in dismissing their claim of negligent entrustment against Daimler Financial. No appeal is taken from the dismissal of the claim against Capital Dodge.

[77] The appellants submit that the motions judge erred in his treatment of the evidentiary burden of proof applicable to a motion for summary judgment. In addition, his finding that Mario's lease application was rejected due to his financial status was purely speculative as there was no direct evidence on this issue from Daimler Financial. He also erred by not drawing an adverse inference against Daimler Financial due to its failure to produce the leasing file for Mario, Luciano and West End Tile Limited.

[78] The respondent answers by submitting that the motions judge properly described the law of negligent entrustment and found that the appellants had not made out their claim that Daimler Financial knew or should have known that Mario was an incompetent, inexperienced, or reckless driver. There was nothing in Mario's driving record that would trigger any suggestion that the lease should not have been entered into with West End Tile Limited and Luciano. It was reasonable for Capital Dodge and Daimler Financial to rely on the insurance particulars for the lessees to satisfy any concerns about the liability and competence of the eventual driver. Lastly, there was evidence that supported the finding that Mario's application was rejected due to his financial status.

(b) The Claim was Properly Dismissed

[79] The parties and the motions judge proceeded on the basis that the tort of negligent entrustment exists in Ontario and in that regard relied on *Cella*. While

the tort exists in the United States and arguably in British Columbia (*Schulz*, at p. 105) and has been advanced in Ontario (*Vynckier v. Brown and State Farm*, 2015 ONSC 376; *Persaud v. Bratanov and Unifund Assurance Co.*, 2012 ONSC 5232, 96 C.C.L.T. (3d) 147; *Ladouceur v. Zimmerman*, [2009] O.J. No. 4777; and *Ahmetspasic v. Love*, 2002 CarswellOnt 4475), no definitive statement on the existence of the tort has been enunciated by either the Supreme Court of Canada or by this court. As the appeal was not argued on the basis that the tort does not exist, I propose to address this ground of appeal assuming, without deciding, that such a tort does exist.

[80] In my view, the appellants' argument must be rejected. It was open to the motions judge to find on the record before him that the rejection of Mario as a co-lessee had to do with his financial status. This conclusion was based on Luciano's testimony. More significantly, the appellants' argument fails due to the absence of any duty of care between the appellants and Daimler Financial.

[81] The test for a duty of care is well-established in Canadian law. As noted in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 41, a duty of care requires both foreseeability and "a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other." In particular, when the claim at issue alleges a failure to act, foreseeability alone cannot be enough and the facts must disclose a justification for imposing on a defendant a positive

duty to act: *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643, at para. 31. In *Childs*, at para. 31, the court noted that "[generally], the mere fact that a person faces danger, or has become a danger to others, does not itself impose any kind of duty on those in a position to become involved."

[82] In *Cella*, a decision the appellants rely upon, this court stated, at p. 331, that "[liability] for a negligent act or omission will be imposed in situations where there is a sufficient relationship between the injured party and another person, which makes it reasonable to conclude that the other person owed a duty towards the injured party".

[83] In the case under appeal, the vehicle was leased not to Mario but to West End Tile Limited and Luciano. The motions judge concluded that a duty on Daimler Financial to ascertain the competency of the driver of the vehicle was too remote. It was reasonable for the lessors to rely on the insurance that had been obtained by the lessees. On this basis, the motions judge correctly concluded that there was no genuine issue requiring a trial on the issue of negligent entrustment. He wrote:

> Moreover the vehicle was not leased directly to the driver; it was leased to the company [West End Tile Limited] for whom the driver worked. It would seem, therefore, that a duty to inquire about the eventual driver would be one that would be far too remote. Indeed, the lessors would have no ability to ascertain who the driver was at a particular time even if the driving record of the eventual driver was suspect. It would be entirely

> reasonable for them to be satisfied with regard to the fact that insurance had been granted.

[84] As noted by the motions judge, in the present case, Daimler Financial leased the Pietrantonio vehicle to Luciano and West End Tile Limited. Finding a duty of care in the present case would lead to the conclusion that the lessor had an obligation to inquire into who would be driving it. The relationship between the appellants and Daimler Financial does not disclose proximity sufficient to justify imposing a duty. The motions judge properly concluded that Daimler Financial had met its evidentiary burden and that there was no genuine issue requiring a trial on the claim of negligent entrustment.

Disposition

[85] For these reasons, I would dismiss the appeal and the cross-appeal with costs in the amount of $5,000 payable by the appellants to each of Chrysler and Daimler Financial for a total of $10,000 inclusive of disbursements and HST.

Released: JAN 27 2016

K. Repell JA

I agree. E.E. Gillese JA

I agree P. Lauwers JA

Schedule "A"

(a) *Highway Traffic Act* – s. 192(2)

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 street car 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.

(b) *Insurance Act* – s. 267.12

Liability of lessors

(1) Despite any other provision in this Part, except subsections (4) and (5), in an action in Ontario for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of a motor vehicle that is leased, the maximum amount for which the lessor or lessors of the motor vehicle are liable in respect of the same incident in their capacity as lessors of the motor vehicle is the amount determined under subsection (3) less any amounts,

> (a) that are recovered for loss or damage from bodily injury or death under the third party liability provisions of contracts evidenced by motor vehicle liability policies issued to persons other than a lessor;
>
> (b) that are in respect of the use or operation of the motor vehicle; and
>
> (c) that are in respect of the same incident.

Same

(2) For the purposes of subsection (1), the amounts referred to in clauses (1) (a), (b) and (c) include only amounts recovered under the coverages referred to in subsections 239 (1) and (3) and section 241 and exclude,

> (a) any sum referred to in subsection 265 (1);

(b) any amount payable as damages by the Motor Vehicle Accident Claims Fund under the *Motor Vehicle Accident Claims Act*; and

(c) any other amounts determined in the manner prescribed by the regulations.

Maximum amount

(3) The maximum amount for the purposes of subsection (1) is the greatest of,

(a) $1,000,000;

(b) the amount of third party liability insurance required by law to be carried in respect of the motor vehicle; and

(c) the amount determined in the manner prescribed by the regulations, if regulations are made prescribing the manner for determining an amount for the purposes of this clause.

Exceptions

(4) Subsection (1) does not apply,

(a) in such circumstances as may be prescribed by the regulations or to such persons, classes of persons, motor vehicles or classes of motor vehicles as may be prescribed in the regulations, subject to such terms, conditions, provisions, exclusions and limits as may be prescribed by the regulations;

(b) in respect of amounts payable by a lessor other than by reason of the vicarious liability imposed under section 192 of the *Highway Traffic Act*; or

(c) in respect of a motor vehicle used as a taxicab, livery vehicle or limousine for hire.

Application of subs. (1)

(5) Subsection (1) applies only to proceedings for loss or damage from bodily injury or death arising from the use or operation of a motor vehicle on or after the day this section comes into force.

Definitions

(6) In this section,

> "lessor" means, in respect of a motor vehicle, a person who is leasing or renting the motor vehicle to another person for any period of time, and "leased" has a corresponding meaning; ("bailleur")
>
> "motor vehicle" has the same meaning as in subsection 1 (1) of the Highway Traffic Act ("véhicule automobile").