COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Harris Victoria Chrysler Dodge Jeep Ram Ltd. v. Ward,* 2023 BCCA 478

Date: 20231220
Docket: CA48424

Between:

Harris Victoria Chrysler Dodge Jeep Ram Ltd.

Appellant
(Defendant)

And

Tracey Ann Ward by her Litigation Guardian and Committee Ellen Thelma Ward

Respondent
(Plaintiff)

And

Aggatha Siah

Respondent
(Defendant)

And

Insurance Corporation of British Columbia

Respondent
(Third Party)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated July 7, 2022 (*Ward v. Thomas*, 2022 BCSC 1147, Victoria Docket M185440).

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Place and Date of Hearing:	Victoria, British Columbia November 6, 2023
Place and Date of Judgment:	Vancouver, British Columbia December 20, 2023

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Stromberg-Stein

Summary:

This appeal concerns the applicability of s. 86 of the Motor Vehicle Act to a complicated factual situation. Defendant car dealership ("Owner") allowed a customer ("A") to keep possession of a car for 10 days while Owner tried to find financing acceptable to her in order to purchase the car. On ninth day, while A was napping, her spouse allowed a third party ("B") to use the car to do an errand. Unbeknownst to A or her spouse, B had consumed methamphetamine and another drug earlier in the afternoon. He apparently fell asleep while driving, crossed the median and catastrophically injured the plaintiff and killed her sister.

Trial judge found B had driven negligently and caused plaintiff's injuries; that A had not purchased the car and accordingly, the dealership was the "owner in possession" at the time of the accident; and that Owner had impliedly consented to A's permitting 'friends or family' to use the car. Judge rejected the argument that because Owner was unaware of B's drug consumption, it should not be taken to have consented to his driving the car. Trial judge ruled that if the dealership had been asked to give its consent to B's driving the car, the dealership would have said "Of course". No negligence was found on the part of A or her spouse.

Owner appealed, arguing that A had entered into a binding contract to purchase the car, such that dealership was not an "owner in possession" for purposes of s. 86; and that if dealership had known of B's consumption of drugs, it would never have agreed to his driving the car.

Held: Appeal Dismissed. Even though Owner had signed a "bill of sale" for the car, this was intended merely as a document to be shown to police in the event A was stopped while driving in the ten-day period. Parties had not intended to enter a binding agreement of purchase and sale and the terms of any such agreement were not complete. The fact no agreement was found made it unnecessary to

consider the trial judge's finding that if there were an agreement, it was unconscionable. Dealership was clearly an "owner in possession" at the time of the accident. After a review of the relevant authorities, CA concluded that the purposes of s. 86 were to encourage owners to be careful in lending their cars to others and to broaden the vicarious liability of owners so that innocent injured victims can look to the owners for recovery of damages. Given these remedial purposes, s. 86 should not be construed so as to narrow the circumstances in which implied consent will be found. The facts regarding B's drug use were unknown to both the Owner and A, and knowledge thereof should not be attributed to Owner.

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Reasons for Judgment of the Honourable Madam Justice Newbury:

Introduction

[1] On August 27, 2018, the plaintiff Ms. Ward was walking along Central Saanich Road with her sister, when they were struck without warning from behind by a Jeep driven by the defendant Mr. Thomas. The plaintiff's sister died of her injuries, and the plaintiff herself suffered catastrophic injuries. The quantum of the damage award made in her favour by the court below is not challenged in this court. Ms. Ward is represented by her litigation guardian Mrs. Ward, her mother.

[2] Mr. Thomas did not contest the claim against him, but ICBC filed a third party notice below adding itself to the action. It pleaded that Ms. Ward had been negligent and denied that she had suffered any injuries as a result of the accident. (At para. 7.) It also denied that Mr. Thomas had been negligent.

[3] The chain of events by which Mr. Thomas came to be the driver of the Jeep that struck Ms. Ward and her sister was unusual. The Jeep did not belong to Mr. Thomas, nor was he a lessee of the vehicle. It was being used (to use a neutral expression) temporarily by the defendant Ms. Siah, who was planning to buy it from the defendant dealership, Harris Victoria Chrysler Dodge Jeep Ram Ltd. ("Harris") *if* suitable financing could be arranged. Ms. Siah's common law spouse, Ms. Sylvester, was the daughter of Ms. Jack. On August 27, 2018, Mr. Thomas was at the Jack residence visiting friends. Ms. Siah and Ms. Sylvester were also there, and Ms. Siah was taking a nap. Mr. Thomas was asked by a Mr. Paul to pick up someone at the Sylvester household. Mr. Paul gave him the keys to the Jeep even though his own car was there. Mr. Thomas set off in the Jeep and the accident occurred as he was driving back to the Jack residence.

[4] The trial judge described the positions taken by the parties at trial as follows:

> The plaintiff pleads s. 86 of the *MVA*: that Harris and/or Siah was an owner within that section; had possession of the vehicle as contemplated by that section at the time of the collision; consented to Ms. Siah operating the motor vehicle as part of her potential but uncompleted purchase of the motor vehicle; and consented to the defendant Mr. Thomas operating the vehicle at the time of the collision. The plaintiff says that as such Harris and/or Siah is vicariously liable for the negligence of Mr. Thomas. The

> plaintiff says that the defendants are jointly and severally liable for the plaintiff's damages pursuant to s. 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333.
>
> Ms. Siah pleads Mr. Thomas acquired possession of the vehicle without her consent express or implied. She says that she is not liable to the plaintiff for her injuries.
>
> Harris says that it was no longer an owner of the vehicle at the time of the collision. If it was, it was not in possession of the vehicle at the time of the collision and had no right, power or ability to consent to a third party driving or operating the vehicle. Harris says that pursuant to s. 86(3)(b) of the *MVA* it is exempted from the definition of owner because the contract was in substance and in form a conditional sales contract. Title would be passed to Ms. Siah once she delivered payment for the vehicle.
>
> ...
>
> Harris has filed third party notice against Ms. Siah, pleading that the plaintiff's loss was caused in whole or in part by the negligence, breach of duty or fault of Ms. Siah. It seeks contribution [and] indemnity pursuant to s. 4 of the *Negligence Act*.
>
> Harris has filed third party notice against Thomas seeking contribution or indemnity pursuant to s. 4 of the *Negligence Act*.
>
> At trial Mr. Thomas appeared only as a witness. He made no submissions. [At paras. 4–6, 8–10.]

Trial Judge's Reasons

Mr. Thomas' Negligence

[5] The first section of the trial judge's reasons, indexed as 2022 BCSC 1147, was concerned with the assessment of Ms. Ward's damages. The judge awarded her a total of $4,330,433.57. As mentioned, quantum is not challenged on this appeal.

[6] With respect to the issue of Mr. Thomas' liability, the trial judge recounted that he had no memory of the accident but believed he had fallen asleep while driving. When he awoke, the vehicle had come to a stop on the wrong side of the road on the shoulder against a concrete block. He could not say how the accident had occurred. No other witnesses were called who had observed the accident.

[7] The onus was of course on the plaintiff to establish on the balance of probabilities that Mr. Thomas's negligence had caused or materially contributed to her injuries. The judge noted *Lee v. Chan* (1997) 29 B.C.L.R. (3d) 27 (S.C.), also a case in which the defendant driver had no memory of an accident and could not explain how it could have occurred without negligence on his part. He was found

liable. The judge found in this case that Mr. Thomas had owed Ms. Ward a duty of care, and that he had breached that duty by crossing onto the wrong side of the road and into the opposite shoulder. This in turn caused Ms. Ward's injuries. In the judge's words:

> ... But for the operation of a motor vehicle in this manner, Ms. Ward would not have been struck by the vehicle, and would therefore not have suffered her injuries. On a balance of probabilities, I find that Mr. Thomas was negligent, and therefore liable to Ms. Ward. [At para. 109.]

As I understand it, this finding is also unchallenged on appeal.

MVA Section 86

[8] The next question for the court below was "who, if anyone, [was] vicariously liable for [Mr. Thomas'] negligence pursuant to s. 86 of the [*Motor Vehicle Act*]. Are either or both of Ms. Siah or Harris vicariously liable?" (At para. 110.) There was no employment relationship between Mr. Thomas and Ms. Siah or Harris. However, Section 86 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 ("*MVA*"), provides that:

> (1) In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who
>
> (a) is living with, and as a member of the family of, the owner, or
>
> (b) acquired possession of the motor vehicle with the consent, express or implied, of the owner,
>
> is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner.
>
> . . .
>
> (2) Nothing in this section relieves a person deemed to be the agent or servant of the owner or lessee and to be driving or operating the motor vehicle in the course of his or her employment from the liability for such loss or damage.
>
> (3) In this section:
>
> . . .
>
> "owner"
>
> (a) includes a purchaser of a motor vehicle who is in possession of the motor vehicle under a contract of conditional sale by which title to the motor vehicle remains in the seller, or the seller's

assignee, until the purchaser takes title on full compliance with the contract,

(b) if a purchaser of a motor vehicle is in possession of the motor vehicle, does not include the seller of that motor vehicle under a contract of conditional sale described in paragraph (a) or the assignee of that seller, and

(c) does not include a lessee of a motor vehicle who is in possession of the motor vehicle under an agreement in writing with the owner, whether or not the lessee may become its owner in compliance with the agreement. [Emphasis added.]

[9] For the sake of completeness, I also note s. 45(1), which limits the conditions under which and the time over which a prospective purchaser of a motor vehicle may drive and operate it with the consent of a "demonstration license holder":

(1) A prospective purchaser of a motor vehicle, entrusted with a motor vehicle by a holder of a demonstration licence issued under section 38 for the sole purpose of demonstration, and in possession of a written consent given to him or her by the demonstration licence holder for the operation of the motor vehicle under this section, may, for a period not exceeding 48 hours from the time the written consent is given to him or her, and not occurring more than twice in any year, drive and operate the motor vehicle having displayed on it a demonstration licence plate issued to that demonstration licence holder.

...

(4) A person to whom a consent for the purpose of this section is given by a demonstration licence holder, the Insurance Corporation of British Columbia or an officer or constable of the Royal Canadian Mounted Police must at all times while driving or operating on a highway the motor vehicle for which the consent is given produce the consent for inspection on demand of a peace officer or constable.

This section is not directly applicable to this case: for one thing, Ms. Siah's own licence plate, rather than a demonstration plate of Harris, was transferred from her existing vehicle to the Jeep.

[10] Harris argued that to be liable under s. 86, it would have had to be an "owner in possession" at the time Mr. Thomas received the keys to the Jeep and

the dealership would have had to consent to his driving it, explicitly or implicitly. In Harris' submission, these conditions were not met. (At para. 113.)

The Sale Process

[11] Under the heading "The Normal Car Purchase", the judge described Harris' usual process of selling cars at the relevant time. The process involved several employees, all of whom had very specific tasks. A customer entering the dealership was usually greeted by a salesperson. The salesperson completed a "guest sheet" to gather information about the customer, including what he or she could afford and information about any trade-in vehicle. The sales manager received this information and ran a credit check. The manager directed the salesperson about which vehicles to show to the customer, and if the customer selected a vehicle, the salesperson filled in the client's name, vehicle description and took the form to the sales manager. The manager completed the back of the form, which included the value of the prospective trade-in and "payment options" for the customer. The salesperson and customer then discussed the options and ideally, the salesperson and customer would settle on terms acceptable to the customer.

[12] The salesperson then would take the customer's terms to the sales manager for approval and if that approval was given, the manager compiled a form of worksheet necessary for an offer to purchase, a copy of the customer's driver's licence, the results of the credit check, the guest sheet and a trade-in evaluation form. That file was then given to the finance director, who reviewed it and took it to the finance manager, who obtained the credit information from the customer and returned that information and the file to the finance director. The rest of the process was described by the judge as follows:

> The finance director submits a finance application to banks or lenders through the dealer track system to try and obtain credit approval for the client.
>
> If financing approval is not obtained, the finance director will work with the application to obtain an approval, a process which sometimes takes days. If further information is needed from the customer, the finance manager will typically handle this. If no financing approval can be obtained, the customer may walk away from the deal.
>
> If the customer is approved for financing on terms that fit within what the client agreed to on the worksheet, the file is returned to the finance manager to complete all of the paperwork with the client, including the

> MVPA [standard form Motor Vehicle Purchase Agreement], financing documents, and transfer forms for the new vehicle and for the trade-in. The finance manager is responsible for explaining the documents to the client.
>
> Once the paperwork is completed the customer sees an insurance agent at the dealership to assist them in insuring the new vehicle. After this is done, the salesperson puts the licence plates on the vehicle and the customer leaves.
>
> The dealership submits the financing documentation to the lender so that funds can be paid to the dealership for the vehicle and for the payout of any lien on the trade-in. [At paras. 122–26.]

[13] At paras. 127–33, the judge emphasized Harris' policy (which I suspect is not exclusive to this dealership) of trying to ensure that prospective customers leave the premises in the cars they are intending to purchase while financing is pending. If a customer could not complete the transaction in one day, Harris would normally "make sure that the customer can go home in the car until their financing is approved. The purchaser or proposed purchaser is most likely to purchase a car if they leave the lot with the car the first time they come in." (At para. 128.)

"Misunderstandings and Misinformation"

[14] At some point in early August 2018, the defendant Ms. Siah and her common-law partner, Ms. Sylvester, decided to buy a larger vehicle for family use. Ms. Siah had bought her previous car at Harris and had done so in her name because she had a better credit rating than Ms. Sylvester. Still, it was not a high rating and she was classified as a "sub-prime" borrower. Ms. Siah communicated with a salesperson, Mr. Harrison, who suggested a Jeep Cherokee. He obtained credit information from Ms. Siah so that he could initiate a financing application before she attended at the dealership.

[15] After a few days of inquiries about financing, Mr. Harrison told Ms. Siah she would need a co-signer to obtain financing. Ms. Sylvester's mother, Ms. Jack, agreed to co-sign a loan. (At para. 136.) Ms. Ison, the "sub-prime director" at Harris, prepared a loan application to a finance company ("SDA") on August 17, 2018, that erroneously described Ms. Jack as Ms. Siah's spouse. When the error was noticed, SDA revoked the credit pre-approval and asked the dealership to correct and resubmit the application.

[16] On Saturday, August 18, 2018, Ms. Siah and Ms. Sylvester arrived at the dealership and discussed trading in her existing vehicle for a Jeep. To this end,

they completed the usual worksheet, which Mr. Harrison filled out and took to a sales manager. The dealership proposed a down payment, which Ms. Siah rejected. She was prepared to pay $38,000 for the Jeep and her trade-in allowance would be $15,000. She was not prepared to make a down payment. The document noted “deal okay at 350 BW OAC at 84M”, which meant that “the deal was okay at payments of $350 biweekly on approved credit over 84 months.” Ms. Siah and a sales manager signed the document.

[17] Later in the afternoon, Ms. Fryer, Harris’ finance director, received a second approval from SDA which contemplated more stringent terms than Ms. Siah had hoped for, including a down payment of $20,800. It was now late in the afternoon; Mr. Harrison had told Ms. Fryer that Ms. Siah was in a hurry (she denied this at trial); and Ms. Fryer was “optimistic” the dealership could come with up with a financing option that would meet Ms. Siah’s requirements. Mr. Harrison knew that “nothing was fully signed” but was also confident the dealership would be able to obtain financing approval that Ms. Siah would accept. He decided to wait until Monday, however, for the sub-prime specialist, Ms. Ison, to take over.

[18] The following events, which would normally be mundane but are very significant in this case, took place:

> [Mr. Harris] testified that dealer plates were typically put on cars where financing had not yet been arranged. However, the policy at the dealership at the time was that if there were no dealer plates available, they could ‘swap” a customer's trade-in plates onto the new vehicle to get the person in the car.
>
> Mr. Harris did not recall looking for dealer plates and thought that Mr. Harrison had told him there were no dealer plates available. Mr. Harris directed Ms. Fryer to prepare a “cash bill of sale”. Mr. Harris described the “cash bill of sale” document as an interim measure: “She needed something when she drove off”. There was no financing in place when Ms. Siah left. When financing was eventually arranged, a new bill of sale would be prepared which reflected those terms. If the financing offered was not acceptable to Ms. Siah, the deal would be at an end. This situation did not happen often.
>
> Ms. Fryer then gave the file to the finance manager, Mr. Heslop to prepare the “cash bill of sale” and have Ms. Siah sign it. Mr. Heslop had a very limited recollection of his interaction with Ms. Siah. He testified that Ms. Fryer told him that Ms. Siah was in a hurry to leave so he needed to have everything prepared and ready to go. He understood that Ms. Siah and the dealership had come to an agreement on terms for her purchase and that she was buying the Jeep. Mr. Heslop’s understanding when he reviewed the cash bill of sale with Ms. Siah was that the lender had approved the loan. He would not normally do a bill of sale until the

> customer was approved for financing. He relied on Ms. Fryer who brought the deal to him for his understanding that there was an approval in place which would allow them to sell the customer the car. By approval he meant that the lender had agreed on lending a certain amount of money that fit in or matched the terms on the worksheet. He did not recall Ms. Fryer telling him that they were still working on the loan to obtain financing.
>
> He agreed that the cash bill of sale in this case was an interim document in that there would be information which would change in the final bill of sale, such as Ms. Siah's First Nations status (which would mean that she would not pay PST and GST as indicated on the cash bill of sale), and there would normally be financing terms in a bill of sale. He reviewed the numbers in the cash bill of sale with Ms. Siah. He had her sign the cash bill of sale and he signed on behalf of the dealership. His understanding of the cash bill of sale was that it would be done if the dealership did not have enough time to complete everything but the purchase was "final enough" for transfer and insurance. He said that he would not normally have generated a cash bill of sale and had Ms. Siah sign it if he had known that there was not an approved loan in place. He stated that (in hindsight) it was not the right time to have Ms. Siah sign the cash bill of sale. He agreed with his statement to the Vehicle Sales Authority that he "printed up the bill of sale … went over the numbers with her, explaining that these were the numbers that would be seen on the final bill of sale with the finance information." That was his understanding at the time.
>
> Ms. Siah said that she and Ms. Sylvester waited for a while after signing the worksheet. Ms. Siah testified that she then met briefly with a man, perhaps for two minutes, to go over the paperwork. She saw the numbers on the document and commented to Ms. Sylvester "that's a lot of money". She said to Mr. Heslop "This is what I'll be paying if I'm approved for credit?" He said yes. He did not tell her that this was a binding agreement, that she was agreeing to purchase the vehicle on these terms, even if financing was not available.
>
> She and Ms. Sylvester then returned to the lobby and waited. Ms. Siah said that she understood that she was waiting for the bank to approve her loan. She was not in a hurry and was prepared to wait.
>
> Mr. Harrison appeared and told them that the Jeep was ready. Ms. Siah was surprised. She had not, to her mind, completed the required documents and had not seen an insurance agent. Ms. Siah questioned Mr. Harrison about this and was told "everything is good, you are good to go. You can drive the Jeep for 10 days." ... [At paras. 145–51; emphasis added.]

Ms. Siah's plates were now on the Jeep. She did not meet with an insurance agent to obtain (new) insurance for it.

[19] The trial judge accepted the foregoing description of what occurred and noted in particular the evidence given by Mr. Heslop, the finance manager, that he did not tell Ms. Siah that by signing the document she was committing to purchase

the Jeep regardless of whether financing was obtained. That, the trial judge stated, was not what Mr. Heslop thought was happening. (At para. 153.)

Harris as "Owner"?

[20] As to whether Harris was an "owner" of the Jeep for purposes of s. 86 of the *MVA* at the time of the accident, the dealership argued that Ms. Siah became the owner on the basis that the so-called "MVPA" (motor vehicle purchase agreement) she had signed was a binding agreement under which she was *obliged* to purchase the Jeep for $50,372.89 even if Harris was not able to arrange acceptable financing for her. (At para. 155.)

[21] The judge rejected this argument. She was not persuaded the parties had intended to enter a binding agreement by signing the document. In so concluding, the judge considered the expectations or subjective "understanding" of both Harris' employees and Ms. Siah. The Harris employees who dealt with Ms. Siah, the trial judge found, knew she could not and would not purchase the Jeep unless the dealership was able to arrange financing she could afford. The MVPA, prepared at Mr. Harris' instruction, included no financing terms. Ms. Siah regarded the document as an "interim measure which could be ripped up when financing was obtained." Harris itself, the judge said, had "no intention of enforcing the cash bill of sale, as it acknowledges in its submissions." (At para. 159.) Mr. Harris expected that acceptable financing could eventually be found, at which time "appropriate documents would be prepared including a new MVPA which would reflect the financing, financing documents, a transfer of title to Siah and insurance documentation." Ms. Fryer also knew that financing was still being sought, but did not advise Mr. Heslop of that fact. He was under the impression that financing was in place. He testified that he would not have prepared the MVPA in the form he did unless the dealership knew that the loan would be funded. In summary, the trial judge said, "this combination of misunderstandings and misinformation cannot constitute an intention by Harris to enter a legally binding agreement." (At para. 157.)

[22] The judge went on to find that *if* the MVPA *had* constituted a binding agreement of sale, the agreement was unconscionable and void, both at common law and under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("*BPCPA*"). In particular, she found there was an inequality of bargaining

power between the parties and that Ms. Siah had been "unduly disadvantaged" by contractual terms she did not understand or appreciate. Whereas she understood that she would have to pay a total of $50,372.89 set out in the MVPA *if and only if* she obtained approved financing, Harris took the position at trial that she had agreed to purchase the Jeep "for more than $50,000 regardless of whether financing was obtained by Harris to permit her to complete the transaction." In the judge's words, this flouted "the reasonable expectation of the weaker party" and the transaction would be unconscionable. (At para. 166.)

[23] The same result would flow from ss. 8 and 10 of the *BPCPA*, quoted at para. 10 of the judge's reasons. In particular, s. 8(3)(d) lists as one of the circumstances that must be considered in deciding whether an act or practice is unconscionable, the fact that at the time the contract was entered into, there was "no reasonable probability of full payment of the total price by the consumer". Obviously, Harris knew that Ms. Siah would not purchase unless appropriate financing was found. Accordingly, the judge said, the transaction was unconscionable, and therefore not binding on Ms. Siah. (At paras. 169–70.)

[24] The judge also rejected Harris' contention that financing conditions are not true "conditions precedent" but are "promissory conditions" and that in any event a condition precedent that requires effort on behalf of the parties does not affect the binding nature of a contract. In the judge's analysis:

> Although obtaining the financing approval was unilaterally Harris' [responsibility], it purports [sic] that because it *would* have gone out of its way to secure the financing, Ms. Siah *is* therefore the owner of the Jeep. This speculation ignores the realities of Ms. Siah's financial situation. Harris' additional argument that Ms. Siah did not suffer and would not have suffered any loss because Harris had no intention of enforcing the MVPA is approbating and reprobating at the same time. Their position in this action depends on the court finding that the MVPA is a binding agreement. In doing so, they are enforcing the agreement, even though they may never seek payment of the purchase price from Ms. Siah. There are legal ramifications for Ms. Siah from this position. [At para. 177; emphasis by underlining added.]

[25] The judge then summarized her two basic conclusions in this section of her reasons — that the parties never intended the MVPA to constitute a binding

agreement and that if a binding agreement did come into existence, it would have been unconscionable and invalid. In her words:

> ... I am not persuaded that Harris had any intention of entering a binding agreement when it and Ms. Siah signed the piece of paper that Mr. Harris believed to be necessary to permit her to leave the dealership driving the Jeep. It was in Harris' interest, not Ms. Siah's, to drive the Jeep off the lot that day. As described above, Harris wants people to drive their vehicles. They are more likely to purchase vehicles when they are driving those vehicles. Thus Mr. Harrison and Mr. Harris wanted Ms. Siah to leave driving the Jeep. Because there were no dealer plates available, Mr. Harris understood that an alternative was to have the "cash bill of sale" executed which would permit them to swap the plates from the trade-in to her vehicle and let her drive away for 10 days. That they were prepared to do either suggests that these were alternatives, that there was no intention that the MVPA constituted a binding agreement. Moreover, the MVPA was missing essential terms regarding financing of the purchase. Everyone in the transaction knew that Ms. Siah required financing. Obtaining the financing was in Harris' hands. Only Harris could negotiate to arrange terms for financing that would permit Ms. Siah to conclude the transaction. If there were a binding agreement created by the execution of the MVPA, that agreement, as asserted by Harris, would be an unconscionable transaction and invalid. [At para. 178; emphasis added.]

Contract of Conditional Sale?

[26] Harris' next argument was based on the definition of "owner" in s. 86(3)(a) of the *MVA*. It submitted that Ms. Siah had been "in possession of the motor vehicle" *under a contract of conditional sale*. The trial judge observed that this argument was academic in light of her finding of unconscionability and that conditional sales agreements "do not exist in practice any longer". Harris contended, however, that s. 86 did not limit the meaning of "contract of conditional sale" to conditional sales agreements. It was not clear what the purchaser would have to do to be in "full compliance" with the "contract", assuming one existed. In Harris' submission, it had retained title to the Jeep until financing proceeds were received and were used to pay the purchase price and repay the dealership for the cost of the lien on Ms. Siah's previous vehicle. Once she had signed the loan documents, title would have been transferred to her. In these circumstances, Harris submitted, a contract of conditional sale came into existence and

accordingly, the extended meaning of “owner” in s. 86(3) was engaged such that Ms. Siah was the “owner” of the Jeep.

[27] In response, Ms. Siah contended there were no clear or specific conditions contemplated for “completion” of the sale, including, of course, conditions relating to the financing. Ms. Siah had not been privy to any of the discussions about financing between Harris and SDA and such conditions could not be implied because they would contradict the express terms of the purchase agreement. (At para. 181.)

[28] The judge resolved this issue with reference to what the parties believed when Ms. Siah left with the Jeep on August 18, 2018 — that the Jeep belonged to Harris; that Ms. Siah would purchase it for the agreed price *only if* the dealership was able to arrange financing acceptable to her and that no terms of the kind found in conditional sales agreements (e.g., retention of title until the seller is fully paid) were included in the MVPA. She was not persuaded Harris had had any intention of entering a binding agreement of purchase and sale when it signed the “piece of paper” that Mr. Harrison thought was needed to enable her to leave the lot in the Jeep. (At para. 178.) In short, the dealership remained the “owner” within the meaning of s. 86 of the *MVA* at the time of the accident on August 27, 2018.

[29] Although it was not strictly necessary to consider the common law meaning of “owner”, the judge on went to list the following indicia that in her view demonstrated that Harris was indeed the owner of the Jeep at common law:

1. the Jeep was not registered, but Harris held title documents
2. the vehicle was not registered to Ms. Siah
3. no one applied for registration or insurance
4. the vehicle was not paid for by Siah
5. no one sought payout after the vehicle was damaged
6. both parties held keys
7. Ms. Siah and Ms. Sylvester normally drove the vehicle while they had access to it
8. The car was normally at the Siah/Sylvester residence while they had access to it. [At para. 183.]

Harris "in Possession"?

[30] The next question for the Court was whether Harris had been "in possession" of the Jeep at the time of the accident as required by s. 86(1). Relying on the fact that "possession" includes not only physical possession but the notion of control (see paras. 62–3 below), the trial judge agreed with Harris that if the definition of the phrase was limited to physical possession, the application of s. 86 of the *MVA* would be severely limited: see paras. 191–92. Implied consent "would never arise" where an owner expressly gives consent to driver A, who later consents to driver B's driving a vehicle, because the owner would not have had physical possession at the time B drove the vehicle. Similarly, there would be no need for the limiting definition of "owner" in s. 86(3)(b) because a car in the physical possession of a conditional purchaser under a contract of conditional sale would not be in the seller's physical possession. This led the trial judge to conclude that:

> …Harris was within the wider definition of possession. Harris was in physical possession of the Jeep when it handed the Jeep to Ms. Siah. Harris retained a set of keys for the vehicle and knew where it was normally to be found. Harris could easily have picked up the Jeep if it wanted to. Harris was in communication with Ms. Siah over the days when she and Ms. Sylvester were driving the Jeep. Ms. Siah and Ms. Sylvester believed that Harris owned the Jeep and would follow Harris' direction, for example, returning the Jeep if asked. They would have also followed Harris' directions with respect to who could drive the Jeep. Harris was the owner and had some control over the Jeep.
>
> I find that Harris was in possession within s. 86 of the *MVA*. [At paras. 193–94; emphasis added.]

Harris' Consent?

[31] The next issue was whether s. 86 applied to make Mr. Thomas liable as if he had been an employee of Harris. In other words, had Harris impliedly consented to Mr. Thomas' driving the Jeep? On this point, the trial judge referred to *Godsman v. Peck* (1997) 29 B.C.L.R. (3d) 37 (C.A.). Its facts bore some similarity to those of the case at bar. Mr. Alexander was the owner of a motorcycle and decided he wanted to sell it. A co-worker, Mr. Godsman, expressed an interest, and Mr. Alexander gave him permission to test-drive the motorcycle over the Thanksgiving weekend of 1987. There was no discussion of a purchase price

or of any limitations on what Mr. Godsman could do with the motorcycle, although Mr. Alexander told him that “If you break it, you buy it.”

[32] Mr. Godsman decided to try out the bike on a road trip in the northern part of the province. During the weekend, he arranged to meet an old friend, Mr. Peck. They met for breakfast, during which each consumed a bottle of beer. Later that day, they both attended a Thanksgiving dinner hosted by friends of their families, following which the two men visited a sandpit on the outskirts of Hudson’s Hope. Mr. Peck had expressed the desire to drive the motorcycle, but was not licensed to do so. (Evidently, he did not mention this to Mr. Godsman.) According to the facts recounted by Mr. Justice Braidwood for the Court, later in the evening “Mr. Peck obtained the keys to the bike” and drove it with Mr. Godsman as a passenger. (At para. 13.) They drove out onto a highway and at some point the motorcycle left the highway, injuring Mr. Godsman.

[33] The trial court applied what it called a “subjective” test and found that Mr. Peck’s failure to exercise due care made him 60% responsible for the accident and that Mr. Godsman had been at fault in allowing Mr. Peck to drive the vehicle. Mr. Godsman’s liability was fixed at 40%. At the time, what is now s. 86(1) was found at s. 79(1) of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288. The wording was slightly different but was to substantially the same effect as s. 86 of the present *MVA*.

[34] The trial judgment was appealed. In dealing with the question of implied consent in *Godsman*, this court referred first to *Palsky v. Humphrey* (1964) 48 W.W.R. 38 (S.C.C.), in which the Supreme Court had stated that consent could be implied “because it is clear that had it been sought it would have been granted *as a matter of course*.” (My emphasis.) Braidwood J.A. saw this as the “test” to be applied under (then) s. 79(1) of the *Motor Vehicle Act* (see para. 26), but also suggested that the owner’s “willingness” and “expectations” must be considered among the relevant circumstances. He emphasized that these must be supported by evidence:

> In concluding whether or not the test is met in the circumstances of a case of that sort (where the vehicle was driven by a third party), an important and relevant consideration is whether or not the evidence supports the conclusion that, at the time the motor vehicle was loaned to the original driver, the owner granted possession of it under circumstances that clearly show that it was acquired with both the willingness and the expectation on

> the owner's part that it would be driven by a third person. I agree with Verchere J. in *Hartley v. Saunders, supra*, at 469, where he says:
>
> > On the question of implied consent to some person other than the actual borrower operating a motor vehicle, the owner's expectation and willingness to operation by another are material factors to be considered.
>
> There should be evidence to show, or support the inference, that the owner turned his mind to the likelihood of that further transfer of possession. If there is no such evidence, a court finding liability on the owner's part is not implying consent so much as deeming it. One of the commendable goals of s. 79(1) may be to induce owners of motor vehicles to exercise discretion when transferring control of them to others, but to impose liability in a case where such a transfer was not within the contemplation of the owner would do nothing to further that goal, and simply goes too far.
>
> [At paras. 27–28; emphasis added.]

[35] Braidwood J.A. also noted with apparent approval the reasoning of Madam Justice Boyd in *Morrison (Committee of) v. Cormier Vegetation Control Ltd.* 1996 CanLII 939 (B.C.S.C.), that:

> The case authorities establish that implied consent will not arise unless it can be said that if permission had been sought, it would have been granted by the owner as a matter of course. The mere possibility that consent would have been granted is not sufficient. In an effort to determine this issue of fact, the Court regularly examines all of the circumstances which existed at the time the driver acquired possession of the vehicle including the relationship between the owner and the driver (*Godsman*, *Palsky*, *Usher*); the circumstances in which the owner had given or refused consent in the past (*Godsman*, *Palsky*, *Besse*); any particular circumstances of the driver or the owner (*Usher*); any relevant and particular characteristics of the vehicle (*Palsky*, *Jaroszuk v. Quewezance* (1992) 66 B.C.L.R. (2d) 171 (B.C.C.A.)); and the use to which the driver proposed to put the vehicle (*Palsky*, *Usher*). All of these matters are examined by the Court, the relevant time being the time possession of the vehicle was acquired.
>
> While the implied consent test is sometimes described by the Courts as an objective test, it necessarily imports a subjective element into that determination. Put another way, would this particular owner, in all of the circumstances, have consented to the driver acquiring possession of the vehicle as a matter of course? If the answer to that question is “yes”, then the driver has proven that he or she drove the vehicle with the owner's implied consent. [At p. 19, quoted at para. 31 of *Godsman* (C.A.); emphasis added.]

Morrison was reversed on appeal on the issue of *express* consent. The Court of Appeal did not deal with implied consent: see (1996) 28 B.C.L.R. (3d) 280 (C.A.).

[36] In *Godsman* itself, the Court ruled that the trial judge had erred in failing to address Mr. Alexander's expectation and willingness, and whether it could be said "there was consent for the motorcycle to be lent to Mr. Peck under the circumstances that it was loaned to Mr. Peck." Further, there was no evidence to support a finding that Mr. Alexander had expected that Mr. Godsman would lend the motorcycle to *any* third party. (At para. 43.) In the result, the trial court's judgment was set aside insofar as it related to the liability of the owner, Mr. Alexander.

[37] Returning to the case at bar, after quoting paras. 26–30 of *Godsman* at para. 197 of her reasons, the trial judge considered the evidence relating to Harris' willingness and expectations about Ms. Siah's use of the Jeep. The judge noted that Harris was in the business of selling cars and that part of its business model was to encourage potential customers to get into the car and take it for a test drive. It was in Harris' interest, she said, to permit a prospective customer "to take a car for an extended test drive, leaving the dealership with the vehicle overnight. The dealership places no limits on who may drive the vehicle in these circumstances." (At para. 199.)

[38] The judge also recounted Ms. Ison's discovery evidence, read in at trial, to the effect that Harris expected Ms. Siah would drive the vehicle "as would her family members and acquaintances." Ms. Ison had believed the Jeep was covered by Ms. Siah's insurance when it left the dealership. Whether this was correct or not, the trial judge noted, did not affect *Harris'* expectation that others might be permitted to drive the Jeep. Further, Mr. Shorter, one of the owners of Harris, testified that in circumstances such as Ms. Siah's where a "bill of sale" had been signed but financing not yet finalized, the "dealership [was] OK with whomever driving the car." Although the dealership *could* have asked Ms. Siah not to permit

anyone else to drive the car, it did not do so because again, Harris was “OK with whomever driving the car.” (At para. 201.)

[39] From this evidence, the judge inferred that Harris expected that others such as family members and friends of Ms. Siah would drive the Jeep and was willing for them to do so.

Did Harris’ Expectations Extend to the Circumstances in which Mr. Thomas Drove the Vehicle?

[40] From that finding, it was a fairly short step to the conclusion that “Mr. Thomas driving the vehicle fell within the circumstances contemplated by Harris in which a third party would drive the vehicle.” In other words, if Ms. Siah had asked Harris when she acquired possession of the Jeep or when Mr. Thomas was about to drive it, whether a family member who regularly drove the family vehicles to run errands, and who was a 25-year-old experienced driver with a full driver’s licence could drive the Jeep, Harris would have said “Of course”. (At para. 203.)

Circumstances Unknown to Harris and Ms. Siah

[41] The more difficult question was whether a different result was dictated by the facts that were *unknown* to Harris and indeed to everyone except Mr. Thomas himself — that on August 27, 2018, he was fatigued, had consumed methamphetamine, Xanax and alcohol in the hours before the accident, and had had a near-accident on his way to the Sylvester residence. If these facts (or “circumstances”) had been considered, Harris argued, it would certainly *not* have consented to his driving the Jeep. On the other hand, the judge found *no evidence* to suggest that Mr. Thomas appeared impaired or other otherwise unable to drive. He had transported Ms. Sylvester’s son to and from work every day and regularly drove vehicles of other family members. Nothing in the circumstances, the judge said, would have alerted Ms. Sylvester to a potential problem if he drove the Jeep. (At para. 207.) The judge declined to accept Ms. Siah’s testimony that Mr. Thomas was a “known drug user”; in the Court’s analysis:

> ... Ms. Sylvester and her family would not have permitted Mr. Thomas to drive their vehicles and their family members to ride with him if he were a notorious drug user, such that their vehicles and family members would be at risk. I accept Ms. Sylvester’s evidence that she did not know about his drug use on the day of the accident, or otherwise. There is no evidence

> that Mr. Thomas appeared intoxicated before driving the Jeep. [At para. 208.]

[42] In any event, the judge was not persuaded that it was “apparent to anyone” at the Jack residence, including Mr. Thomas himself, that he should not be driving or that his ability to drive was impaired. Nor was there any evidence before the Court concerning the effect of the drugs he had consumed, or as to what effect they might have in combination. In the judge’s words, “they [the drugs] may have affected him, but I cannot say that Mr. Thomas was impaired by consumption of drugs at the time he received the keys.” (At para. 211.)

Events Leading to the Accident

[43] At para. 187, the trial judge returned to what occurred on the ninth of the ten days for which Ms. Siah had had possession of the Jeep. The judge described Ms. Siah’s family situation at the time of the accident. She and Ms. Sylvester had been together some seven years. Two of Ms. Sylvester’s children lived with them; the other two lived at Ms. Jack’s house. Mr. Thomas was related to the Jack family and often worked with Ms. Sylvester’s son Wayne at the house, “tinkering” on vehicles. He lived elsewhere with his own family, but frequently ran errands for the Jack/Sylvester family because he was one of the few members of the family with a valid driver’s licence. (At para. 215.)

[44] The judge described Mr. Thomas as a “straightforward” witness. Mr. Thomas testified that on the night before the accident he had been at the hospital visiting his father. He had slept in his car for three hours at most and later returned home. He drank four beers between 1:00 and 3:00 am. He did not get any more sleep that night. He worked on Friday, August 27 from 7:00 am to 3:00 pm and afterwards he and a friend each consumed a Xanax pill. He also consumed some methamphetamine, i.e., one “hit” from a pipe, when he arrived at the Jack residence at about 3:15 pm. One of the family members came out of the house shortly thereafter, asking if anyone would go and pick up “Allison” and bring him to the Jack house for dinner. Mr. Paul brought out the keys for the Jeep and said Ms. Sylvester had sent them for him to use, so Mr. Thomas took the Jeep rather than his own car. He believed the Jeep belonged to Ms. Sylvester because Mr. Paul had told him his mother was getting a new car. (At para. 215.) All this

time, Ms. Siah was napping. Obviously, she did not *expressly* consent to his driving the Jeep. (At para. 221.)

[45] En route to pick up Allison, Mr. Thomas had a near-accident that did not result in any damage. He continued on to the Sylvester house, where he felt tired. He considered not driving back to the Jack house. Nevertheless, he testified he was "totally fine" when he left the Sylvester residence. The judge continued:

> ... He was asked whether the drugs and fatigue affected his ability to drive and said it was possible, but he operated a vehicle every day. In cross-examination he was pressed with respect to his level of fatigue and said that he rarely gets much sleep, normally around five hours. From his evidence I am satisfied that Mr. Thomas turned his mind to his ability to drive before leaving the Sylvester residence and concluded that he was able to drive.
>
> In short, there is no evidence that Mr. Thomas appeared impaired and the circumstances did not lead anyone to conclude that Mr. Thomas was not able to drive when he received keys to the Jeep. [At paras. 217–18; emphasis added.]

[46] The judge rejected Harris' submission that for the purpose of deciding whether implied consent existed, "all the circumstances" must include factors not known to an owner in 'lending' a car. Such a rule would in her words "dramatically narrow" implied consent under s. 86. Drivers could have accidents for many reasons that an owner could not anticipate: a driver with a fear of bees, for example, might be startled by a bee in the car and drive into a pedestrian. Should the owner be taken *not* to have consented to the driver's having possession of the car because the owner was unaware of the driver's phobia? The judge answered this question in the negative. She found that if Harris had been asked to give its consent to Mr. Thomas' driving the car, *given the knowledge of Ms. Sylvester when she conveyed the keys to him*, Harris would have said "Of course". The judge concluded that Harris had impliedly consented to Mr. Thomas' driving the Jeep. (At para. 220.)

Ms. Siah's Position

[47] With respect to Ms. Siah's potential liability, given that she was asleep when the keys were given to Mr. Thomas, the judge was satisfied she had not expressly or impliedly consented to Mr. Thomas' driving the Jeep. The fact Ms. Sylvester sometimes let others drive Ms. Siah's vehicles did not, in the judge's analysis,

mean that Ms. Siah expected and was willing that others would drive the Jeep. The fact Ms. Siah did not like others driving her car and might not have consented to Mr. Thomas' doing so did not affect the question of *Harris*' implied consent. Indeed, the judge repeated her finding that if Harris had been asked if Mr. Thomas could drive, it would have said "Of course". (At para. 225.)

[48] As for Ms. Sylvester, the judge rejected Harris' argument that she had been negligent in providing the keys to Mr. Thomas and asking him to drive the Jeep. The judge found no basis in law or on the facts she had found, that would support a finding of negligence on Ms. Sylvester's part.

[49] Finally, although contributory negligence on Ms. Ward's part was pleaded, the judge found no evidence of any failure on her part to take reasonable care.

[50] In the result, Mr. Thomas was found to be liable for the injuries suffered by Ms. Ward, and Harris was vicariously liable under s. 86 of the *MVA* as if Mr. Thomas had been employed by Harris. Mr. Thomas was also liable *to* Harris, which as mentioned was seeking contribution and indemnity pursuant to s. 4(2)(b) of the *Negligence Act*, R.S.B.C. 1996, c. 333.

On Appeal

[51] In this court, no appeal is taken from the findings of no liability on the part of Ms. Siah or Ms. Sylvester, the latter of whom was not a defendant in any event. However, Harris appeals on the grounds that the trial judge erred in law by:

> (a) Concluding that Harris impliedly consented to Thomas driving the Jeep. The test requires consideration of all relevant circumstances. The Trial Judge erred by limiting her consideration to only the circumstances known to the person who gave the car keys to Thomas;
>
> (b) Failing to find that there was an agreement of purchase and sale of the Jeep as between Harris and Siah, due to a misapplication of the appropriate legal test;
>
> (c) Failing to admit into evidence and consider the conviction of Thomas, arising from a misapplication of the appropriate legal test.

I propose to address the first and second alleged errors in reverse order.

Agreement of Sale and Purchase?

[52] As noted by Harris in its factum, the question of whether the dealership was an "owner in possession" is largely dependent on the "circumstances as between Harris and Siah at the time of the accident". I agree that if the MVPA was a valid contract for the sale and purchase of the Jeep, Harris would not have been its owner at the time of the accident. I also agree that the question of whether the parties entered into a binding contract is to be determined not by their subjective intentions or "understanding", but by "whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract." (G.H.L. Fridman, *The Law of Contract in Canada* (6th ed., 2011) at 15; see also *Berthin v. Berthin* 2016 BCCA 104, citing *Salminen v. Garvie* 2011 BCSC 339 at para. 27.) Fridman continues:

> It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms.

[53] As this court acknowledged in *Berthin*, a contract also requires a meeting of the parties' minds, i.e., a "consensus between the parties on all of the essential terms of their agreement". (See *Froelick v. Froelick* 2007 BCSC 84.) Or, as Chief Justice Fraser observed in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co*. (2000) 17 Alta. L.R. (4th) 243 (C.A.):

> The parties will be found to have reached a meeting of the minds, in other words, be *ad idem*, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and essential terms of that contract can be determined with a reasonable degree of certainty. [At 249; emphasis added.]

Fraser C.J.A. noted further that:

> If there is no single document to which reference can be made in order to decide if a contract exists between the parties, but a series of negotiations, then everything that occurs between the parties relevant to the alleged contract must be considered by the court which is faced with the problem of deciding the issue. From what they have said, done, or written, in combination if necessary, there must be established a bargain or an agreement. [At 16; emphasis added.]

[54] Obviously, where a written document exists that appears to be an agreement signed by both parties, that will usually be sufficient for intention to contract to be inferred. Indeed, this is often *presumed* to be so. However, other circumstances may exist that call that inference into question. Here, the trial judge noted that Mr. Harris did not expect the MVPA to be a "binding agreement" and that the MVPA was missing "essential terms" for a sale. Moreover, Harris' employees and representatives acknowledged that Ms. Siah had made it clear she would be purchasing the Jeep only if acceptable financing was arranged. (At para. 162.) It was at this point in her reasons that the trial judge turned to the question of unconscionability and decided that *if* a binding agreement had existed, it would have been unconscionable.

[55] In this court, Harris relies on the standard form agreement, which contained many of the hallmarks of a binding contract of sale and purchase, including a statement at the top that "This is a legal and binding contract", and among the printed conditions, an 'entire agreement' clause. I cannot agree, however, that the parties in fact and in law entered into an *agreement for the sale and purchase of the Jeep*. The circumstances that a reasonable observer would consider include the fact that Harris had been attempting the entire time Ms. Siah was at the dealership to find appropriate financing for her, without which she would not buy. Further, Harris had a clear policy that in order to make a sale, it was desirable that Ms. Siah drive the car off the lot that day. This meant she would need "some documentation". The MVPA was fixed on as an "interim measure" that would be torn up if and when financing was arranged. In the meantime, Ms. Siah could produce it if she were stopped by police and needed to identify herself as being in lawful possession of the Jeep.

[56] The "terms" of the "agreement" were also clearly incomplete, as the trial judge stated. It showed a "down payment" of $50,372.89 and the "amount financed" was left blank. The "total finance charge" and "total deferred balance" were both left empty. As already mentioned, no registration of transfer took place; nor did Ms. Siah meet with an insurance agent. The ten-day period was evidently chosen because s. 3.08 of the *Motor Vehicle Act Regulations*, B.C. Reg. 26/58, allows licence plates to be moved to a vehicle acquired by a person who has removed them from another car, and displayed on the substitute vehicle for ten

days from the time of ‘acquisition’. I do not regard s. 3.08 as having application in this case, but Harris’ employees evidently remembered the ten-day limit.

[57] I see no error in the trial judge’s conclusion at para. 178 of her reasons that there was “no intention that the MVPA constituted a binding agreement”, in the sense of a binding agreement *for the sale and purchase of the Jeep*. The dealership did permit Ms. Siah to use the vehicle and to that extent there may have been a contract — perhaps one of bailment — under which she was allowed to drive it off the lot and retain it for up to ten days. In consideration, she would wait (or so Harris hoped) up to ten days for Harris to obtain financing, rather than simply walking away and visiting another dealership. For the reasons given at paras. 180–82 of the trial judge’s reasons, I also agree with the court below that a conditional sales agreement did not come into existence. As the judge found, it followed that Harris “was indeed the owner of the Jeep at the time of the accident under the common law indicia of ownership” as set out in *Singh v. Brar* (1998) 55 B.C.L.R. (3d) 82 (B.C.S.C.).

[58] The non-existence of an agreement *of sale and purchase* makes it unnecessary to consider the judge’s finding that if a binding contract did come into existence, it was unconscionable.

Section 86

[59] I turn next to the question of whether s. 86 applies in this case. I reproduce again subsection (1) for convenience:

> (1) In the case of a motor vehicle that is in the possession of its owner, in an action to recover for loss or damage to persons or property arising out of the use or operation of the motor vehicle on a highway, a person driving or operating the motor vehicle who
>
> ...
>
> (b) acquired possession of the motor vehicle with the consent, express or implied, of the owner,
>
> is deemed to be the agent or servant of, and employed as such by, that owner and to be driving or operating the motor vehicle in the course of his or her employment with that owner. [Emphasis added.]

[60] Subsection 86(1) is the most recent successor to s. 34 of the *Motor-vehicle Act*, S.B.C. 1920, c. 62. At that time, the licence-holder of a vehicle was liable for *offences under the statute* committed by agents or employees. In 1921, s. 34

extended the licence-holder's liability to include offences committed by persons "entrusted ... with the possession of the vehicle." In 1937, the section was further amended to extend liability to include family members of the licence-owner. The former language identifying those "entrusted" with possession was also amended to cover those who "acquired possession" with the owner's consent. Again, liability was in respect of offences under the *Motor-vehicle Act*, not for negligence generally. That was changed in 1937, at which time the previous wording concerning persons "entrusted" with possession was replaced with terminology referring to persons who "acquired possession with the consent, express or implied" of the owner. The basic effect of s. 74A of the *Motor-vehicle Act* has continued since then, despite minor amendments.

[61] We were not referred to any debates in the Legislature, and I am not aware of any, that assist in revealing the legislative intent of any of the foregoing provisions or amendments. I shall return to that subject below.

"Owner in Possession"

[62] Although in normal parlance, the word "possession" is often taken to refer to physical possession, a wider meaning is given to the term by common law authorities. *Black's Law Dictionary* (8th ed, 2004), for example, defines "possession" thus:

> 1. The fact of having or holding property in one's power; the exercise of dominion over property … 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusion of a material object. 3. (*civil law*) The detention or use of the physical thing with the intent to hold it as one's own… 4. Something that a person owns or controls.

The dictionary lists the various types of possession — actual possession, adverse possession, constructive possession, exclusive possession, indirect possession, etc. — but by itself the term clearly includes the exercise of control over an object, as well as physical possession.

[63] In a similar vein, the *Canadian Law Dictionary* (1980) defines "possession" thus:

> Possession must be considered in every case with reference to the peculiar circumstances, the character and value of the property, the suitable and natural mode of using it. <u>In relation to goods and chattels, the</u>

> same is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons. The term imports manual custody, physical control, coupled with the intention of exercising such control. ... It is also necessary that the possibility and intention of the person having such custody and control must be visible or evidenced by external signs for if the thing shows no signs of being under the control of anyone it is not possessed. ...
>
> Possession may be actual, that is, where the thing possessed is actually under the custody and control of a person; or constructive, that is, where the law, for certain purposes, considers the person to have possession of a thing even though actually he does not. Thus the lessor of a tract of land has constructive possession of the land through his lessee.
>
> A person in possession of land can only be evicted by one whose title is better than his. Hence the adage 'possession is nine parts of the law'. [At 286–87; emphasis added.]

[64] It will be noted that s. 86(1) applies to a motor vehicle that is "in the possession of its owner" but at the same time contemplates that a person driving or operating it may have "acquired possession" with the consent of the owner. Where the vehicle is the subject of a "contract of conditional sale" by which title remains in the seller, subsection (3) applies to extend the term "owner" to the conditional purchaser, and to exclude the seller. (See also *Morrison v. Cormier* (B.C.C.A.), *supra*, at para. 19.) As we have seen, Harris not only retained title but continued during the nine days to keep in touch with Ms. Siah, had a set of keys to the Jeep and knew where it was located.

[65] Based on the foregoing, I see no error in the trial judge's rulings that Harris and Ms. Siah did *not* enter into an agreement for the purchase and sale of the Jeep and that Harris was the "owner in possession" of the Jeep for purposes of s. 86.

Unknown Circumstances

[66] I turn next to the second ground of appeal — whether the trial judge erred in law in concluding that Harris as the owner impliedly consented to Mr. Thomas' driving the Jeep. The issue here is whether in applying cases such as *Godsman* and *Morrison*, the trial judge should have considered "*all* of the circumstances relating to the transfer of physical possession to the driver" (in this case, Mr. Thomas), including circumstances *unknown to the owner and to any reasonable observer* — i.e., the fact that Mr. Harris had slept very little and had

consumed alcohol and methamphetamine in the hours leading up to his agreeing to drive to the Sylvester house. On this point, Harris relies on the following passage from the trial judgment of Boyd J. in *Morrison*:

> The mere possibility that consent would have been granted is not sufficient. In an effort to determine this issue of fact, the Court regularly examines all of the circumstances which existed at the time the driver acquired possession of the vehicle including the relationship between the owner and the driver …; the circumstances in which the owner had given or refused consent in the past…; any particular circumstances of the driver or the owner….
>
> ... Put another way, would this particular owner, in all of the circumstances, have consented to the driver acquiring possession of the vehicle as a matter of course? [At paras. 61–2; emphasis added.]

If it had been aware of *all* of the circumstances, Harris contends, it would not have consented to Mr. Thomas' driving the Jeep.

[67] It is difficult to disagree with this proposition, but the question is whether those factors can properly be considered in determining whether implied consent was given. Harris contends that this court in its analysis in *Godsman* did not exclude relevant circumstances — e.g., the fact that Mr. Peck was not licensed to drive a motorcycle — not known or apparent to the owner of the motorcycle or to Mr. Godsman. In its submission, the relevant circumstances, or "*all* the circumstances" would properly be those relating to safety and would include the critical facts of Mr. Thomas' drug and alcohol consumption on the day of the accident.

[68] The *ratio* of *Godsman*, however, was that there must be evidence of an owner's willingness and expectation for a "borrower" of one's car to allow a third party to drive it. As the Court suggested, it is the owner's status as the driver's employer that is "deemed"; *consent is not deemed*. In the case at bar, of course, there was evidence of the owner's willingness and expectation that Ms. Siah would lend the car to friends or family. As for the facts that were unknown to everyone but Mr. Thomas, none of the authorities to which we were referred have explored the meaning of "all the circumstances" in a context like this one.

[69] Harris points out in its factum that the judge did place some reliance on the Supreme Court of Canada's decision in *Vancouver Motors U-Drive Ltd. v. Walker* [1942] S.C.R. 391, a case not referred to in *Godsman*. In *Vancouver Motors*, one

Walker, a fraudster who had no driver's licence, had rented a car using the name and licence of one "Hindle". Walker then brought the car back to the rental company, complaining of engine trouble. He requested a substitute vehicle. The company's employee then on duty asked him if his name was that shown on the contract, i.e., Hindle. Walker said it was. Being satisfied he was the individual who had rented the original car, the employee permitted him to take a replacement. Walker drove the car negligently and injured the plaintiffs. The issue was whether the "person driving or operating the motor vehicle … acquired possession of it, with the consent, express or implied, of the owner" within the meaning of what was then s. 74A of the *Motor-Vehicle Act*, R.S.B.C. 1936, c. 195.

[70] The majority, *per* Kerwin J., formulated the issue before the Court thus:

> ... Does the fact of Walker's false statement that he was Hindle and the holder of a subsisting driver's licence, accompanied by the forgery of Hindle's name, vitiate the consent that was in fact given? There may be no difficulty in two of the hypothetical cases put in argument, (1) where a motor vehicle is stolen from a garage, and (2) where possession is obtained from the owner by duress. In the first there would be no consent in fact and in the second the owner would not have been at liberty to exercise his free will. On the other hand, the class of owners under subsection 1 of section 74A is not restricted to those who carry on such a business as the appellant and circumstances may be imagined where an owner loaned his automobile to a friend on the latter's statement that he possessed a subsisting driver's licence, which statement might be false …. It is impossible to conceive all the various circumstances that might give rise to the question to be determined here but in my view an express consent is given, within the meaning of the enactment, when possession was acquired as the result of the free exercise of the owner's will. [At 394; emphasis added.]

Kerwin J. concluded:

> The word "consent" may have different meanings in different statutes. In the present case it has, in my opinion, the meaning already indicated and, on that construction, express consent was given by the employees of the appellant to Walker's possession of the motor vehicle even though the action of the employees was induced by Walker's false statements. [At 395; emphasis added.]

I note that the case was decided on the basis of *express*, not *implied* consent.

[71] Relying on *Vancouver Motors*, the trial judge in the case at bar ruled that s. 86 "does not extend to circumstances unknown by those [who gave] the keys to Mr. Thomas." None of those persons had had reason to believe he should not be

driving or that his ability to drive was impaired. To attribute that knowledge to Harris was, in her words, “after the fact reasoning.” (At para. 205.) As we have also seen, she expressed the concern that including the unknown facts among “all the circumstances” would narrow the concept of implied consent for purposes of s. 86. (At para. 219.)

Legislative Purpose

[72] This brings us back to the purpose or purposes of s. 86. On this issue, a case decided by the Alberta Court of Appeal concerning “conditional consents” is of some assistance, although in the case at bar, no conditions (other than the ten-day limit) were attached to Ms. Siah’s use of the Jeep. In *Mugford v. Kodiak Construction Ltd.* 2004 ABCA 145, *lve to app to SCC ref’d* (2005) 371 A.R. 398, Mr. Weber, a seasonal employee of Kodiak Construction, was given the use of a company vehicle after signing a form acknowledging that it was “not to be used for personal use in any manner”. Unfortunately, he rear-ended the vehicle of the plaintiff, Ms. Mugford, after detouring from his route home after work to meet his girlfriend for supper, which included alcohol. After that he went to a co-worker’s house, where he drank some beer. He was driving home from there when he collided with Ms. Mugford’s car. He pleaded guilty to a charge of impaired driving.

[73] The Court of Appeal phrased the question of statutory interpretation before it as follows:

> When an employee has express consent to possession of an employer’s motor vehicle, but does not have express or implied consent to drive the vehicle at the time of the accident and is in breach of the conditions attached to the possession of the vehicle, does s. 181(b) of the Act apply to make the employer vicariously liable for the employee’s negligence? [At para. 7; emphasis added.]

[74] In describing the “legislative evolution” of s. 181, Mr. Justice Wittmann for the Court noted that its immediate predecessor was a section of the *Vehicles and Highway Traffic Act*, R.S.A. 1959, c. 356. The *original* predecessor had been introduced after the Supreme Court of Canada expressed regret at having to find an employer not liable for damages caused by a wayward chauffeur who had

disregarded his instructions to take his employer's car to a specified garage: see *Halparin v. Bulling* (1914) 50 S.C.R. 471 (S.C.C.).

[75] In a series of later amendments, a new section was added such that any person who was driving a vehicle and was living "as a member of the family" with the owner, *or* a person who had acquired possession of the vehicle with the consent of the owner, was deemed to have been the owner's employee and driving in the course of that employment. (See *Mugford* at para. 10.) By the year 2000, the provision, now s. 181, had been amended to its present form. Like s. 86 of the *MVA* of this province, s. 181 of the Alberta legislation deems that a person who was driving a motor vehicle and was in possession of it with the consent, express or implied, of the owner was the agent or servant of the owner and employed as such.

[76] Wittmann J.A. in *Mugford* reasoned that in conjunction with mandatory insurance requirements for owners of motor vehicles, the purpose of s. 181 was "public protection." (At para. 29.) This purpose had been described in *Austin v. Omand* (2002) 316 A.R. 252 (Q.B.) as follows:

> The public policy considerations are related to the creation of mandatory insurance requirements for owners which meant that, under the legislation, injured parties would be able to more readily recover damages for motor vehicle accidents … The legislation was intended to hold owners responsible for the use of their vehicles in order to make owners more careful about who they let use their vehicles. [At 262; emphasis added.]

The Court in *Mugford* went on to describe the purpose of s. 181 as "to prevent owners from avoiding liability by applying the common law which held that a master was not vicariously liable for a servant's action if the servant was on an independent frolic." (My emphasis.) The enactment ensured that an employer would be liable for an employee's negligence even when the employee was not conducting his or her employer's business. This purpose had, Wittmann J.A. observed, not changed since the inception of the provision. (At para. 31.)

[77] The Court noted various Ontario decisions, beginning with *Thompson v. Bourchier* (1933) 3 D.L.R. 119 (Ont. C.A.) enunciating a similar legislative purpose. In *Thompson*, the majority described the object of the Ontario counterpart of s. 181 as "to protect the public by imposing upon the owner of a motor vehicle the responsibility of the careful management thereof and of assuming the risk of those

to whom he entrusted possession that they would observe the law, and that if they failed in the discharge of that duty the owner — using the words of the statute — would be responsible 'for all loss and damage sustained in the operation thereof'." (My emphasis.) More recently in *Re Cummings v. Budget Rentals Toronto Ltd. et al.* (1996) 136 D.L.R. (4th) 33, the Ontario Court of Appeal observed:

> ... [T]the wide interpretation that the courts have given to s. 192 [of the *Ontario Highway Traffic Act*] is for the purpose of broadening the vicarious liability of the owner, since it is the owner who is more likely to have assets and insurance to which the innocent victims can look: see *Naccarato v. Quinn* (1994), 18 O.R. (3d) 155 (Ont. Ct. (Gen. Div.)); *Laurentian Motors (Sudbury) Ltd. v. Ford Motor Co. of Canada Ltd.* (1980), 29 O.R. (2d) 466 (Div. Ct.); *Berge v. Langlois* (1984), 6 D.L.R. (4th) 766 (Ont. C.A.) ...; *Vancouver Motors U-Drive Ltd. v. Walker* ...; *Fisher v. Harvey Krotz Ltd* [(1984) 26 M.V.R. 32 (Ont. C.A.)]. [At para. 33 of *Mugford*; emphasis added.]

[78] Wittmann J.A. in *Mugford* also quoted a passage from this court's reasons in *Morrison v. Cormier*, *supra*, where Goldie J.A. stated:

> It is apparent the legislature has imposed a heavy burden on those who have within their power the control of motor vehicles. In the language of the old authorities the mischief aimed at is the perceived irresponsibility of owners in their control of the possession of motor vehicles. The reason for legislative intervention may be traced, in part at least, to the appalling consequences of reckless use of motor vehicles. Irresponsibility on the part of those who may deny or confer possession of motor vehicles may be seen as the reason for the legislative initiative. The legislation in question must be regarded as remedial. [At para. 24; emphasis added.]

[79] The Court in *Mugford* concluded that s. 181 did not permit "conditional consent", since allowing such restrictions to shield owners from liability would "narrowly interpret the provision and its effect would operate contrary to its remedial object." In the Court's words:

> ... 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. If, for example, the owner imposed the condition that the person could drive as long as the driving was not negligent, then owner liability

would be avoided in almost every accident where s. 181 was intended to make the owner liable.

Requiring consent at the time of the accident operates to the same effect as conditional consent. Where the owner has not, expressly or impliedly, required specific consent for each possession and use of the vehicle, there is no requirement to determine consent for each time the driver uses the vehicle. Only in a rare and unusual occasion could it be conceived that an owner would consent to a person driving while impaired. 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.

Case authorities from other jurisdictions support the interpretation that provisions imposing vicarious liability on the owner of a vehicle do not permit conditional consent. For example, in *Cormier v. David R. Gillard Ltd. et al.* (2000), 191 D.L.R. (4th) 507 (N.B.C.A.), a van was owned by the husband but his wife was the principal driver. She consented to her daughter having possession of the van on the condition that a licenced friend would drive it. Contrary to that condition, the daughter was driving when she collided with another vehicle. The wife was found to be an owner and by consenting to her daughter's possession, she was found liable under s. 267(1) of the *Motor Vehicle Act*, R.S.N.B. 1973, c. M-17 which provided:

> 267(1) The owner of a motor vehicle, or farm tractor is liable as well as the driver thereof to an action for tort as a result of negligence in the operation of the motor vehicle or farm tractor unless the motor vehicle or farm tractor was at the time of the negligent operation thereof in the possession of some person other than the owner without the owner's consent. [At paras. 43–45; emphasis added.]

In *Mugford* itself, then, Kodiak Construction was found liable for Mr. Weber's negligence.

[80] A second decision of the Alberta Court of Appeal, *E.T. (Estate of) v. Tran* 2007 ABCA 13, is of less assistance due to the divergent views taken by the division of the Court. The facts were complicated. John Lam had agreed to lend his Toyota to his brother Danny Lam "to go to the store for a minute". Danny Lam went to the store, but thereafter met some friends, including "E.T.", who was 15 years old. The group went to meet with someone from whom they could buy cocaine, but was approached by a vehicle from which shots were fired at them. A chase ensued and one of the group in the Toyota, La, was hit. He began to bleed profusely and had to be taken to a hospital. Danny Lam told another person

in the car, Tran, to drive. Tran drove and ran a red light. The Toyota was struck by a van, resulting in E.T.'s death and further injuring La.

[81] The trial judge noted that John Lam, the owner, had placed no limitation on his brother's possession and use of the car. Further, Tran had understood Danny Lam to be the owner and therefore believed he was driving with the owner's consent. The trial judge proceeded on the basis that he was required to consider whether the driver believed he had had the owner's consent and whether that belief had been reasonable. According to the Court of Appeal, the trial judge restated this test in two other ways — whether under all the circumstances, the driver would have been justified in "deeming" that he had implied consent to drive; and whether "in the circumstances, consent would have been granted if sought as a matter of course." The trial judge had found evidence to support an inference that if at the time Danny Lam had 'acquired' possession of the Toyota, John Lam had turned his mind to the possibility that Tran would be the person driving the car to the hospital, he would have consented to his doing so. The circumstances were emergent and John Lam had given his brother the car "without restrictions and conditions." Further, Danny Lam had sat beside Tran, directing the driving, and was thus effectively "in charge of the car". (See para. 16 of *E.T.*)

[82] On appeal, Ritter J.A. saw the two alternative "tests" enunciated by the trial judge as essentially a restatement of the same "test". In his analysis, in determining whether consent would have been granted "as a matter of course", a trial judge is required to consider "all the circumstances of the driving. If circumstances are such that consent would not have been granted, it would not meet the 'matter of course' test either." (At para. 17.) It could not be said that the trial judge had erred palpably in his application of the test to the facts, especially given that John Lam had not placed any conditions on his brother's use of the car. It would be unfair, Ritter J.A. stated, "to innocent third parties to deny them insurance coverage because of John's misplaced trust." (My emphasis.) He continued:

> Moreover, conditional consent as to the use or manner of driving a vehicle is contrary to the underlying rationale of the legislative provision in question: *Mugford*, at para. 43. It therefore stands to reason that if consent to permit third party drivers can be implied, that consent also cannot be conditional. Otherwise conditional prohibitions on third party drivers could be used to avoid liability through the use of broad, categorical limitations such as "I only consent to your friend driving if (s)he is not negligent."

> Similarly, implied consent does not lose its validity on the basis that it was conditional on a lack of criminal or other, less than laudatory conduct being a part of the package. [At para. 20.]

[83] Mr. Justice O'Leary concurred in the result, but made it clear in separate reasons that he did not wish to be taken as agreeing with Ritter J.A.'s comments concerning the "*Mugford* principle" — i.e., that "conditions imposed by an owner on a permitted driver are inoperative, in particular specific restrictions on who may be allowed to drive the vehicle." However, he took the view that a medical emergency exception to a general rule prohibiting a permitted borrower from allowing third parties to drive the vehicle did not necessarily nullify the prohibition. (At para. 25.)

[84] Mr. Justice Berger, dissenting, disagreed with Ritter J.A.'s interpretation of *Palsky*. He did not read *Palsky* as having established a "separate subjective test" focussing on the driver, but considered that if all of the circumstances established implied consent, the driver's conclusion that he had consent, *objectively* assessed, would also be made out. (At para. 29.) In this case, however, Berger J.A. reasoned that consent could not be implied because the owner who had agreed to lend the car to his brother to do an errand could not have anticipated that the car would be taken to a pool hall to purchase cocaine and would get involved in an exchange of gunfire, followed by a car chase and trip to the hospital. Applying an objective approach, he found that all of this exceeded what was in the "reasonable contemplation" of the owner for the use of the vehicle when the car was initially lent to Danny Lam. (See para. 35.)

Summary

[85] Although none of the foregoing authorities involved facts "on all fours" with the case at bar, I take from them, with some trepidation, the following propositions relevant to the issue of implied consent for purposes of legislation such as s. 86 of the *MVA*:

1. Implied consent is not "deemed"; nor is it determined from the point of view of the driver. Instead it may be *inferred* from "all the surrounding circumstances": *Palsky*; *Godsman*; *Morrison* (B.C.S.C.).

2. In order to infer implied consent to a third party's driving, the court must be satisfied *by evidence* that the owner had an expectation and willingness that a third party would drive the vehicle: *Godsman*; *Green v. Pelley* 2011 BCSC 841 at para. 39 (citing *Hartley v. Saunders* (1962) 33 D.L.R. (2d) 638 (B.C.S.C.)); *Snow v. Saul* 2010 BCCA 416 at para. 16; *Megaro v. Insurance Corporation of British Columbia* 2020 BCCA 273 at paras. 38–9.

3. Implied consent will be found where the court is satisfied that if the owner had been asked if the driver could drive the vehicle, the answer would have been "Of course": *Palsky*; *Godsman*; *Morrison*. Whether this was intended by the *Palsky* court as a "test" or simply an example of when consent will be inferred, seems never to have been considered.

4. The purpose of s. 86 is remedial — i.e., it is intended to broaden the circumstances in which liability will be imposed on a driver who has given possession of his or her vehicle to another: *Mugford* and cases cited therein; *Morrison v. Cormier*, *supra*. Although *Vancouver Motors* might be read as suggesting that an owner will be liable whenever he or she acted "of his or her own 'free will'" in transferring possession (see *Bareham (Guardian ad litem of) v. Desrochers* (1994) 97 B.C.L.R. (2d) 186 (S.C.); *Barreiro v. Arana* 2003 BCCA 58 at paras. 22–31; Ritter J.A. in *E.T.*), *Vancouver Motors* was decided on the basis of *express* consent, not implied consent. Many courts have declined to find implied consent where the owner had imposed a condition that was breached by the driver in possession. On this point, see the cases cited by Cole J. in *Morriss v. Morriss* 2009 BCSC 1587 at paras. 24–31. It is not necessary to resolve this point for purposes of this case.

5. There are very few cases dealing with the final question raised by the case at bar — i.e., where a vehicle is entrusted by a person (whether the owner or another in possession) who was not aware, and could not reasonably have been aware, of circumstances relating to the driver that led or contributed to the injury of the plaintiff, whether consent will nevertheless be implied. Like the Court of Appeal in *Mugford*, the trial judge in this case reasoned that shielding the owner from liability in these circumstances would unduly narrow the "concept of implied consent" for purposes of s. 86.

[86] I agree with the trial judge on the latter point. The modern reality is that all drivers in this province are now required to be insured with motor vehicle liability policies issued by a public authority. The circumstances in which an owner may be vicariously liable have indeed been broadened in the interests of the protection of injured plaintiffs such as Ms. Ward. In the case at bar, the owner, Harris, was found to have contemplated that friends and family of Ms. Siah would borrow the Jeep. Looking at the matter subjectively, both the owner and the person to whom the owner 'lent' the car were unaware Mr. Thomas had consumed alcohol and illegal drugs earlier in the day of the accident; and objectively speaking, there was nothing that should have led the owner, Ms. Siah or Ms. Sylvester to suspect a heightened risk. Given that the purposes of s. 86 are to encourage owners to take care in lending their vehicles to others and to allow innocent injured parties to be able to look to the owner's insurance, we should not construe s. 86 so as to minimize or unduly "narrow" the circumstances in which implied consent will be found. Put another way, we should not attribute to the owner knowledge of facts that neither the dealership nor Ms. Siah had, or could reasonably have foreseen.

[87] At the end of the day, I find that the trial judge did not err in ruling that Harris, as owner of the Jeep, impliedly consented to Mr. Thomas' driving it within the meaning of s. 86. To the extent that *Vancouver Motors* may be relevant, it also did so as a matter of its own "free will". I would not accede to Harris' second ground of appeal.

Fresh Evidence Application

[88] Harris' third ground of appeal is that the trial judge erred in law in failing to permit Harris after trial to adduce into evidence the certificate of Mr. Thomas' conviction for, among other things, impaired driving causing bodily harm. Applying the criteria in *Palmer v. The Queen* [1980] 1 S.C.R. 759, I am not persuaded this

would have made any difference to the outcome of the civil trial; nor was it necessary for any of the judge's findings. I would not accede to this ground.

Disposition

[89] In the result, I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Madam Justice Stromberg-Stein"