

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Royal & Sun Alliance v. Baltzer, 2009 NSCA 110

**Date:** 20091103

**Docket:** CA 299750

**Registry:** Halifax

**Between:**

Royal & Sun Alliance

Appellant

v.

Robert Baltzer, Susan Baltzer, David Norman Clements,  
Amanda Jean Evans and David Wayne Clark

Respondent

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**Judge:** The Honourable Justice Oland

**Appeal Heard:** September 28, 2009

**Subject:** Insurance Law - Driving with Consent of Owner - *Insurance Act*, R.S.N.S. 1989, c. 231, s. 114(1) - *Motor Vehicle Act*, R.S.N.S. 1989, as amended, s. 248(3)

**Summary:** The parties sought a preliminary determination as to whether, at the time of a motor vehicle accident, the operator of a truck was driving with the expressed or implied consent of its owner. The judge found that he was. After then considering s. 248(3) of the *Motor Vehicle Act*, she concluded that the appellant, the Section D insurer of the vehicle struck by the truck, was responsible for covering any damages arising from the accident. The claim against the owners was dismissed.

**Issue:** Whether the judge erred by not applying s. 114 of the *Insurance Act* to determine that the owners' insurer was responsible to pay any damages.

**Result:** Appeal allowed. The judge's determination that the owner's insurer was not required to respond to any claims for personal injury or

property damage arising from the operation of the truck was an error of law. The issue before the court related strictly to consent.

According to s. 114 of the *Insurance Act* and the jurisprudence, once the judge found that the operator was driving with the owner's consent, the owner's insurance would be called upon to respond to any such claims. S. 248 of the *Motor Vehicle Act* does not deal with consent or insurance coverage, and the issue of the liability of an owner for the negligent acts of an operator was not before the judge.

**This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 7 pages.**

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**Between:**

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Appellant

v.

Robert Baltzer, Susan Baltzer, David Norman Clements,  
Amanda Jean Evans and David Wayne Clark

Respondent

**Judges:** Saunders, Oland, Fichaud, JJ.A.

**Appeal Heard:** September 28, 2009, in Halifax, Nova Scotia

**Held:** Appeal is allowed, with costs per reasons for judgment of Oland, J.A.; Saunders and Fichaud, JJ.A. concurring.

**Counsel:** Jennifer Ross and Andrew Rankin, for the appellant  
Philip M. Chapman, for the respondents Baltzer

**Reasons for judgment:**

[1] David Clements was driving a pickup truck owned by Robert Baltzer and Susan Baltzer when he collided with a vehicle at an intersection. Mr. Clements was intoxicated at the time. The other vehicle was owned and operated by Irving Clark. His son David Clark and Amanda Evans, who were passengers in the Clark vehicle, suffered injuries in the accident. They brought an action against the Baltzers, Mr. Clements and Royal & Sun Alliance Insurance Company of Canada (“Royal”), the Section “D” insurer of the Clark vehicle. Royal responded with a defence and cross claim.

[2] By consent, the parties sought preliminary determination of the following issue before trial:

Was David Norman Clements operating the automobile in question with the consent, expressed or implied of its owner, the Defendants, Robert Baltzer and Susan Baltzer, at the time of the accident, giving rise to this proceeding?

[3] In her decision dated July 17, 2008, Justice Margaret J. Stewart found that Mr. Clements was operating the truck with Mr. Baltzer’s expressed and implied consent. She also determined that Royal was responsible for responding to the claims by David Clark and Ms. Evans, and dismissed the claim against the Baltzers. Her decision is reported in 2008 NSSC 225.

[4] Royal appeals the judge’s order dated January 15, 2009. The Baltzers filed a notice of contention which seeks to affirm her decision.

***Background***

[5] Since the facts are set out in detail in the decision under appeal, I will recount only the more relevant ones. The motor vehicle accident happened on October 5, 2003. Mr. Clements was intoxicated. He failed to stop at a stop sign at an intersection and the Baltzers’ pickup that he was driving collided with the Clark vehicle in which David Clark and Ms. Evans were passengers. Mr. Clements is a mechanic who had been a friend or acquaintance of the Baltzers for some ten years before the accident. Over the years he had done maintenance work on their truck. He did not have a vehicle of his own. On several previous occasions, with Mr.

Baltzer's consent, Mr. Clements had used the truck to drive his son to Fairview following weekend access visits.

[6] Several weeks after the accident, the Baltzers claimed that Mr. Clements did not have their consent to drive their truck at the time of the accident and, as a result, no liability attached to them. They provided their insurance adjuster with a document dated October 4, 2003 (the "Consent Document") which purported to set limits on Mr. Clements' use and operation of their truck. The Consent Document was signed by Mr. Baltzer and by Mr. Clements.

[7] By way of a consent order issued pursuant to *Civil Procedure Rule (1972) 28.04* the parties agreed to have the consent to drive issue determined before trial. The conclusion would release either the Baltzers or Royal, Irving Clark's Section "D" insurers, as defendants.

[8] In her decision, the judge reviewed the Baltzers' and Clements' evidence. In regard to the Consent Document, she found:

[14] With respect to the signed document by Robert Baltzer and Clements outlining the terms under which Clements was allowed to operate the truck, I am unable to accept that it was executed prior to the accident on October 5, 2003. To believe otherwise, in the circumstances, strains credulity too far.

[9] After reviewing all the evidence, the judge stated:

[21] . . . I find as a fact . . . that [Clements] did operate the truck in the course of his employment as well as outside same with Robert Baltzer's expressed and implied consent for the purpose of dropping off his son and his best friend in Fairview and, in particular, on the day of the accident, as he had any number of times in the last six months. However, this time he was drunk and the collision occurred. . . .

[10] The judge went on to consider s. 248(3) of the *Motor Vehicle Act, R.S.N.S. 1989* as amended:

(3) A person operating a motor vehicle, other than the owner thereof, shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent unless and until the contrary is established.

According to the judge, Mr. Clements' trip to Fairview was not being carried out for some purpose of the Baltzers and he was not on their business or acting under their instructions. The presumption of vicarious liability contained in s. 248(3) had been rebutted by the truck's owners, the Baltzers and, accordingly, they were not liable for any damages arising from the collision. Rather, the uninsured motorist provisions in Irving Clarke's policy were engaged. The judge held that it was Royal which was responsible for covering any damages arising from the collision.

[11] In its Notice of Appeal, Royal set out several grounds of appeal. However, in its factum and at the hearing of the appeal, it argued that there was only one issue: did the judge err in not applying s. 114 of the *Insurance Act*, R.S.N.S. 1989, c. 231 to determine that the Baltzers' insurer was responsible to pay any damages occasioned by Mr. Clements' use of the Baltzers' truck? In their notice of contention, the Baltzers set out several bases for affirming the judge's decision. These I consider later in my decision.

### *Standard of Review*

[12] The issue here is one of statutory interpretation, a question of law, for which the standard of review is correctness. See *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at ¶ 8.

### *Analysis*

[13] The parties agree that the question or issue they placed before the court for determination related strictly to consent. Section 114(1) of the *Insurance Act* identifies consent as a requirement for insurance coverage:

Owner's policy

114 (1) Every contract evidenced by an owner's policy insures the person named therein, and every other person who with his consent personally drives an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage

(a) arising from the ownership, use or operation of any such automobile;  
and

(b) resulting from bodily injury to or the death of any person, and damage to property.

[emphasis added]

[14] That when an operator drives an owner's vehicle with the consent of the owner, the owner's insurance will respond to any claim for damages has been affirmed in many cases including *Co-Operative Fire & Casualty Co. v. Ritchie*, 1983 CarswellNS 127 (S.C.C.); *Sun Alliance Insurance Co. v. Judgment Recovery (N.S.) Ltd.*, 1990 CarswellNS 18 (C.A.); *Co-Operative Fire & Casualty Co. v. Judgment Recovery (N.S.) Ltd.*, 1977 CarswellNS 396 (C.A.); *Hirtle v. MacArthur* (1995), 144 N.S.R. (2d) 237 (C.A.); *Newell v. Towns*, 2008 NSSC 174.

[15] In the first paragraph of her decision, the judge accurately set out the question before her. After reviewing the evidence, she answered that question when she found that, when the accident occurred, Mr. Clements was driving the truck with the consent of Mr. Baltzer. According to s. 114 of the *Insurance Act* and the jurisprudence, it would be the Baltzers' insurance which would be called upon to respond to any claims for personal injury or property damage arising from Mr. Clement's operation of the truck.

[16] However, after determining the consent issue, the judge went on to address s. 248 of the *Motor Vehicle Act*. According to the parties, she was not asked to do so. That provision does not deal with consent or insurance coverage for accidents. Rather, it deals with tortious liability for accidents. After considering s. 248 of the *Motor Vehicle Act*, the judge found that the truck's owners, the Baltzers, were not liable for any damages arising from the collision and that Royal, the insurer of Irving Clark's vehicle which was struck by the Baltzer truck driven by Mr. Clements, was responsible for covering any damage.

[17] The issue of the liability of an owner for the negligent acts of an operator was not before the judge. More significantly, since the only prerequisite for insurance coverage of an operator, namely consent of the owner, had been met, her determination that the owner's insurer was not required to respond to the damage claim was an error of law.

[18] The Baltzers agree that the judge erred in applying s. 248 of the *Motor Vehicle Act* when considering Royal's obligation to respond to the claims by David Clark and Amanda Evans. They accept that she misinterpreted what she was asked to decide and veered away from the insurance issue before her.

[19] However, in their Notice of Contention, the Baltzers submit that:

- (a) the Justice erred in finding that there was no [*sic*] express or implied consent of the Defendant Clements to operate the motor vehicle, if that was a finding the Honourable Justice;
- (b) the Justice erred in failing to address the issue which was the subject of the Application, namely, whether there was express or implied consent of the Defendant Clements to operate the motor vehicle;
- (c) the Justice erred in finding that the "Consent Document" which was the subject of her decision was executed subsequent to the motor vehicle accident;
- (d) the Justice erred in finding that there had been prior use of the vehicle by the Defendant Clements in the circumstances described in her decision;

[20] According to the Baltzers, in finding that Mr. Clements had the implied consent of Mr. Baltzer to operate the truck, the judge failed to address or consider Mr. Clements' evidence that he recognized he should not have taken the vehicle. She made no specific reference to that evidence. However, a judge is not required to deal with every detail in her reasons. Here the judge rejected the Consent Document signed by Mr. Clements which purported to refute any consent and, in doing so would have included that in her assessment of his credibility. She also found that Mr. Baltzer knew of Mr. Clement's use of the truck to drive his son. On a finding of fact or mixed law and fact, a palpable and overriding error is required for appellate intervention. In the circumstances, I cannot agree that any failure to deal with Mr. Clement's evidence in that particular regard amounted to such an error.

[21] For similar reasons, I see no merit to the remaining grounds in the Notice of Contention.

### *Disposition*

[22] I would allow the appeal. I would reverse the order requiring Royal to respond to the claim of Amanda Evans and David Clark and dismissing their claim against the Baltzers. I would order that the Baltzers shall respond to their claim and that their claim against Royal shall be dismissed. I would also order the Baltzers to pay costs to Royal of \$750 inclusive of disbursements for the application in Supreme Court Chambers and of the same amount inclusive of disbursements for the appeal.

Oland, J.A.

Concurred in:

Saunders, J.A.

Fichaud, J.A.