

CANADA / JUDGMENT

Bowe v. Bowe

2022 BCCA 35

COURT

British Columbia Court of Appeal

DECIDED

31 January 2022

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2022 BCCA 35 Bowe v. Bowe

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Bowe v. Bowe,

2022 BCCA 35

Date: 20220131

Docket: CA46154

Between:

Tyson Bowe, an infant, by his litigation guardian,

Rosalyn Hina Chalmers

Appellant/

Respondent on Cross Appeal

(Plaintiff)

And

Dale Edward Bowe

Respondent

(Defendant)

And

Roy Boltz

Respondent/

Appellant on Cross Appeal

(Defendant)

Before:

The Honourable Mr. Justice Frankel

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated August 28, 2019 (Bowe v. Bowe, 2019 BCSC 1454, Vancouver Docket M137618).

Counsel for the Appellant on Cross Appeal, Roy Boltz (via videoconference):

A.M. Gunn, Q.C.

K. Ho

Counsel for the Respondent on

Cross Appeal, Tyson Bowe, an infant, by his litigation guardian, Rosalyn Hina Chalmers (via videoconference):

R.D.W. Dalziel, Q.C.

C.W. Ehman

S.N. Collins

N.W. Peterson

Place and Date of Hearing:

Vancouver, British Columbia

June 17, 2021

Place and Date of Judgment:

Vancouver, British Columbia

January 31, 2022

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

Roy Boltz cross appeals from the trial judge's order finding him vicariously liable under s. 86(1)(a) of the MVA for the injuries suffered by his 15-year-old stepson, Tyson Bowe, in a motor vehicle accident. Section 86(1) imposes liability on the owner of a motor vehicle for damages arising out of the use or operation of a motor vehicle when the person driving or operating it is (a) living with, and as a member of the family, of the owner or (b) acquired possession of the motor vehicle with the owner's consent. Tyson took Mr. Boltz's car keys without his permission and, at some point, let his 15-year-old cousin Dale Bowe drive. When Dale was driving the vehicle in a negligent manner, an accident occurred seriously injuring Tyson. Mr. Boltz argues that neither the common law nor the statutory conditions precedent to the imposition of vicarious liability under s. 86(1)(a) were satisfied.

Held: Cross appeal allowed. The judge erred in construing s. 86(1) of the MVA and concluding that Tyson, a front seat passenger, was "operating" the vehicle at the time of the accident. To "operate" a vehicle within the meaning of s. 86(1), the "operator" must generally have physical control over the vehicle. At the time of the accident, Tyson did not have physical control over the vehicle. Tyson's secondary agency theory--that he was "operating" the vehicle as a family member of Mr. Boltz when he allowed Dale to drive (thereby engaging s. 86(1)(a)) and that, as an agent of Mr. Boltz, he consented to Dale driving (thereby engaging s. 86(1)(b)) was rejected. This route to vicarious liability--which relies on the combined operation of ss. 86(1)(a) and (b) of the MVA--is not supported by the structure or language of s. 86(1)(b), or the jurisprudence. Further, adoption of this theory is not necessary to give remedial effect to the legislation.

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Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

[1] On August 31, 2013, 15-year-old Tyson Bowe ("Tyson") sustained life-altering injuries in a motor vehicle accident that was the tragic consequence of an extended joyride he embarked on with his cousin, 15-year-old Dale Bowe ("Dale"). Tyson's stepfather, Roy Boltz ("Mr. Boltz") owned the vehicle. Tyson was living with Mr. Boltz as a member of his family. Dale was not. Tyson took the keys to the vehicle without Mr. Boltz's knowledge or consent. At the time of the accident, Dale was driving. Tyson was a front seat passenger.

[2] Tyson commenced an action in negligence against Dale and Mr. Boltz. He also advanced a claim in vicarious liability against Mr. Boltz, relying on s. 86(1)(a) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 ("MVA"). The subsection provides that in an action to recover damages arising out of the use or operation of a motor vehicle, a person driving or operating the motor vehicle who is: (a) 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 the vehicle's owner, employed as such, and driving or

operating the motor vehicle in the course of his or her employment with that owner.

- [3] The jury allowed Tyson's claims in negligence against Dale but dismissed his claim in negligence against Mr. Boltz. The jury found Dale 60% at fault and Tyson 40% at fault for his damage or loss. In the result, Tyson was awarded slightly more than \$7 million in damages.
- [4] By agreement, the interpretation and application of s. 86(1) of the MVA was reserved to the trial judge. In a judgment indexed as 2019 BCSC 1454, the judge reasoned that the legislature does not speak in vain and that the word "operating", as it is used in s. 86(1), must mean something different than "driving". He concluded that a person is "operating" a motor vehicle within the meaning of s. 86 when that person has the "care, custody or control" of the vehicle. Even though Dale was driving, the judge found that Tyson had the care, custody or control of the vehicle and was, therefore, "operating" it within the meaning of s. 86(1)(a) when the accident occurred. As Tyson was living with Mr. Boltz as a member of his family, the judge concluded that the requirements of s. 86(1)(a) had been met. He held Mr. Boltz vicariously liable for Dale's negligence.
- [5] Tyson appealed. Mr. Boltz cross appealed on grounds that neither the common law nor the statutory conditions precedent to the imposition of vicarious liability under s. 86(1)(a) were satisfied in this case. Tyson discontinued his appeal. Consequently, the only matter before us is the cross appeal of Mr. Boltz. Dale took no position on the cross appeal.
- [6] The central questions before us concern the interpretation and application of s. 86(1) of the MVA to the circumstances of this case, including whether the judge erred in finding that Tyson was "operating" the vehicle even though he was a passenger when the accident occurred.

II. Factual Background

- [7] Very little needs to be added by way of factual background in order to frame the issues that arise on appeal.
- [8] For completeness, Tyson acknowledged taking the keys to the vehicle without Mr. Boltz's consent. Tyson then contacted Dale and the two met up. It appears uncontentionous that the vehicle in issue is one that requires the insertion of a key into the ignition.
- [9] Tyson testified that he tried to start the vehicle but did not know how. Dale said he did and told Tyson to get into the passenger seat. According to Tyson, Dale started the vehicle. Tyson testified that he intended the joyride to consist of a spin around the block in his residential neighbourhood. When Dale started going down a busy thoroughfare, Tyson said he objected but Dale reassuringly responded, "Trust me. Trust me." Tyson said his last memory that evening was sitting in the passenger seat looking at his phone.

- [10] Dale provided a different version of events. He testified that Tyson started the vehicle and drove it for a time before the two of them started taking turns at the wheel. Dale said he did most of the driving over the course of the evening as the pair travelled to visit friends. Dale acknowledged driving when the accident occurred.
- [11] The judge made two significant factual findings: (1) Tyson and Dale drove Mr. Boltz's vehicle at various times throughout the evening; and (2) Tyson had nothing to do with the functioning of the vehicle when the accident occurred.
- [12] There was no evidence Tyson was directing or instructing Dale to drive in an unreasonable manner when the accident occurred.
- [13] Neither Tyson nor Dale acquired possession of the motor vehicle with the consent, express or implied, of Mr. Boltz. He testified that he did not expect Tyson to take his keys, let alone that Dale would end up behind the wheel of his vehicle. For obvious reasons, had either of these 15-year-olds sought Mr. Boltz's permission to drive his vehicle, it would have been refused.

III. The Legislation

- [14] At common law, the owner of a motor vehicle is not, by virtue of ownership alone, liable for injuries caused by another in driving that vehicle with the owner's entrustment or permission: *Co-operators Insurance Association v. Kearney*, [1965] S.C.R. 106 at 26, 48 D.L.R. (2d) 1 (per Spence J.); *Howard v. Henderson* (1929), 4 B.C.R. 441 at 443 (per MacDonald C.J.B.C.); *Ruff v. Sutherland* (1930), [1931] 1 D.L.R. 651 at 652 (per MacDonald C.J.B.C.) and 657 (per MacDonald J.A.); 43 B.C.R. 218. Similarly, parents are not, by virtue of ownership alone, vicariously liable at common law for the negligent acts of their children while operating a motor vehicle: *Causey v. McCarron* (1968), 87 D.L.R. (2d) 707 at 713 (per Bull J.A.); 1986 CanLII 603 (BCCA). At common law, vicarious liability for loss caused by the negligence of another in the operation of the owner's vehicle would only be incurred if the driver was the agent or employee of the owner at the material time and acting in the course of their agency or employment: *Schuster v. Whitehead*, [1960] O.R. 125 at 127-128 [Schuster]; G.H.L. Fridman, *The Law of Torts in Canada*, 3rd ed. (Toronto: Carswell, 2010) at 265-266.
- [15] In British Columbia, the legislature made vehicle owners, qua owners, vicariously liable in prescribed circumstances for the tortious wrongdoing of another person while driving or operating the owner's vehicle.
- [16] In 1926, the British Columbia legislature added to the Motor-vehicle Act a provision that made parents and guardians civilly liable for loss or damage sustained by any person through the negligence or improper conduct of a minor in driving or operating on any highway a motor vehicle entrusted to the minor by the parent or guardian: *Motor-vehicle Act Amendment Act*, 1926-27 (B.C.) c. 44, s. 12. This provision was repealed in 1969.

[17] In 1937, the legislature added s. 74A, the predecessor to s. 86(1) of the MVA, deeming a vehicle owner to be vicariously liable for loss or damage caused by the person driving or operating the owner's vehicle in two circumstances: (1) where the driver is living with, and as a member of the family of, the owner; and (2) where the driver acquired possession of the vehicle with the consent, express or implied of the owner. In both circumstances, the driver was deemed, by statute, to be the agent or servant of the owner and to be employed as such and driving or operating the motor vehicle in the course of that employment. The effect of the provision was to impose liability where, at common law, there was none: *Morrison v. Cormier Vegetation Control Ltd.* (1996), 28 B.C.L.R. (3d) 280 (C.A.) at para. 21; 1996 CanLII 2627 (BCCA) [Morrison].

[18] Subsections 86(1) and (2) of the MVA read as follows:

Responsibility of owner or lessee in certain cases

86(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.

[19] The provisions address an all-too-common occurrence on highways in British Columbia. "A" suffers actionable damage or loss in a motor vehicle accident. The loss is caused by "B" who was, at the time of the accident, negligently driving or operating a vehicle owned by "C". If B was living with, and as a member of the family of C (the "family branch"), or acquired possession of the vehicle with C's express or implied consent (the "consent branch"), the subsection deems B to be C's servant or agent, and driving or operating C's vehicle in the course of B's employment with C. In the result, C is, by operation of the legislation, vicariously liable for B's tortious acts.

[20] Notably, the consent of the vehicle owner is not a condition precedent to the imposition of vicarious liability where the person driving or operating the motor vehicle is living with the owner as a family member.

- [21] The effect of the provision is to make the vehicle owner liable on common law principles of agency. To be clear, the provision does not create a new tort in the owner; rather, it makes the owner vicariously liable in an action to recover loss where the conditions in ss. 86(1)(a) or (b) are met.
- [22] The meaning and operation of what is now s. 86(1) was addressed by Goldie J.A., writing for the Court in *Morrison*:
22. The language of the section is plain and, in my view, requires no aid to resolve an ambiguity nor recourse to an alternative meaning to avoid an absurdity. Liability is imposed upon an "owner", keeping in mind the extended meaning given that word, in two cases. The first is where the wrongdoer is a member of a class - one living with and as a member of the family of the owner. That status alone is sufficient. No question of consent arises. Liability follows from fault in driving or operation. In the second case liability is imposed if the wrongdoer, not a member of any particular class, acquired possession with the consent, express or implied, of the owner. In that case possession alone is sufficient to impose liability from fault arising from subsequent driving or operation.
23. The deeming provisions in the final clause of s-s. (1) are absolute in the sense of dispensing with proof of a state of affairs which at common law would result in vicarious liability.

[Emphasis added.]

- [23] The policy rationale underlying s. 86(1) is that it is appropriate, in the two defined circumstances the provision addresses, to shift the burden of responsibility to those who have within their power the ability to control access to motor vehicles they own. Both the "family branch" and the "consent branch" are premised on this fundamental proposition. As noted in *Morrison*, the legislation imposes a "heavy burden" on vehicle owners. It does so, at least in part, in recognition of the appalling consequences that flow from the reckless use of motor vehicles on highways. For these reasons, and others, the legislation must be regarded as being remedial: *Morrison* at para. 24.
- [24] The purpose of s. 86(1) is twofold. It expands the availability of compensation to injured plaintiffs beyond drivers who may be under-insured or judgment proof. It also incentivizes motor vehicle owners to take care in controlling access by others to their vehicles, including by family members who reside with them: *Morrison* at para. 24; *Barreiro v. Arana*, 2003 BCCA 58 at para. 19 [Barreiro]; *Yeung (Guardian ad litem of) v. Au*, 2006 BCCA 217 at paras. 35-38, *aff'd* 2007 SCC 45 (sub nom. *Transportation Lease Systems Inc. v. Yeung*).

IV. The Pleadings and the Positions of the Parties at Trial

- [25] Tyson pleaded that Mr. Boltz was vicariously liable under s. 86 of the MVA for the negligent driving of Dale. The pleadings do not allege that Dale was living with Mr. Boltz at the time of the accident. Indeed, it was conceded that Dale resided at a different address.

- [26] The pleadings do not allege that Tyson was "operating" the vehicle at the time of the accident, although this submission was made in closing argument. Further, the pleadings do not allege that Mr. Boltz was vicariously liable for Tyson's wrongs.
- [27] There was no pleading that Dale obtained possession of the vehicle with the consent, express or implied, of Mr. Boltz.
- [28] In closing submissions, Tyson disclaimed reliance on s. 86(1)(b), arguing "[i]t's not a section 86(1)(b) case. It's a section 86(1)(a) [case]." He framed the issue at trial as being: "Does section 86 of the MVA hold Mr. Boltz vicariously liable for the negligence of Dale Bowe in the circumstances of this case?" [Emphasis added.]
- [29] Tyson relied on Dale's version of events to assert that he (Tyson) was driving at the outset, and perhaps intermittently, though not at the time of the accident. The act of taking the vehicle for a joyride was described as a "joint effort", with Tyson and Dale acting in concert with one another. The accident was said to occur in the course of a continuing transaction that started with Tyson taking Mr. Boltz's keys to obtain access to the vehicle. Tyson submitted that the words "operation" and "operating", as used in s. 86(1), include exercising care, custody or control over a vehicle. Among other things, Tyson relied on the definition of "operate" in s. 1 of the Insurance (Vehicle) Regulation, B.C. Reg. 447/83 which, in the case of a vehicle, includes having its care, custody or control. Tyson argued that more than one person can operate a motor vehicle at the same time.
- [30] In summary, Tyson argued that s. 86(1)(a) was triggered by virtue of his own "operation" (care, custody or control) of the vehicle and his status as a person living with and as a member of Mr. Boltz's family. Tyson submitted that, by operation of s. 86(1)(a), he was deemed to be Mr. Boltz's servant or agent. From here, Tyson argued that by allowing Dale to drive he implicated Mr. Boltz and made him vicariously liable as owner of the vehicle for the damages Dale caused. This result was said to be necessary to give effect to the remedial nature of the legislation. Again, the argument was made without reliance on s. 86(1)(b).
- [31] The defendants (Mr. Boltz and Dale) argued that s. 86(1) focuses on the identity of the driver or operator of the vehicle at the time of the accident, and that the only person driving or operating the vehicle at the time of the accident was Dale. They argued that Tyson could not be said to be jointly operating the vehicle with Dale given Tyson's evidence that he never drove the vehicle and was an unwilling participant in Dale's operation of it. They submitted that while the familial relationship contemplated by s. 86(1)(a) existed as between Tyson and Mr. Boltz, Mr. Boltz would only be vicariously liable for damages caused by an accident that occurred while Tyson was driving or operating the vehicle. Since Tyson placed no reliance on s. 86(1)(b), Mr. Boltz's vicarious liability turned on whether Dale was living with Mr. Boltz as a member of his family at the time of the accident. It was common ground that he was not. The defendants argued that s. 86(1)(a) does not reach non-family members to whom a family member entrusts the owner's vehicle.

V. Reasons for Judgment

[32] The judge observed at the outset that Tyson relied only on s. 86(1)(a). Tyson argued at trial (correctly, in the judge's view) that subsections (a) and (b) of s. 86(1) establish different requirements that cannot be conflated.

[33] As noted earlier, no question of consent arises under the "family branch". As such, the fact that Tyson took Mr. Boltz's keys without permission was properly found to be irrelevant to the application of s. 86(1)(a).

[34] The judge next observed that s. 86(1)(a) is not limited to individuals who "drive" a motor vehicle owned by a family member with whom they live. Instead, the provision extends to individuals "driving or operating" a motor vehicle owned by a family member.

[35] The judge framed the question for resolution in this case this way:

The narrow question is whether s. 86(1)(a) is engaged in circumstances where Dale was driving, and [Tyson] was a passenger in, Mr. Boltz's vehicle.

[36] The judge noted that the words "driving" and "operating" are not defined in s. 86(1) of the MVA, or in Part I of the MVA where s. 86 is found. The judge agreed that the ordinary meaning of "operate", as it pertains to a vehicle, is to "function or control the functioning of" that vehicle. As noted earlier, he agreed there was no evidence Tyson had anything to do with the functioning of the vehicle at the time of the accident.

[37] The judge reasoned that the words "operating" and "operation", when used in relation to a motor vehicle, could not be narrowly construed to give them a meaning "almost synonymous" with the word "driving". This would be contrary to the presumption of consistent expression, a rule of statutory construction that applies when different terms are used in a single piece of legislation. Where this occurs, the terms must be understood to have different meanings, otherwise the legislature would have employed one or the other only: see, for example, *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 81; *R. v. Barnier*, [1980] 1 S.C.R. 1124 at 1135-1136; 1980 CanLII 184 (SCC). This rule is often reinforced by the presumption against tautology, a related rule of statutory interpretation grounded in the notion that the legislature uses language carefully and that different words in a statutory provision are intended to have a different meaning: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at 8.36 [Sullivan].

[38] The judge considered it useful to survey the way in which "operate" (and words derived from it) have been defined elsewhere in the MVA and in other related enactments, because the presumption of consistent expression applies not only within statutes, but across statutes, particularly those dealing with the same subject matter: Sullivan at 8.33.

- [39] Having thoroughly surveyed the different patterns associated with the use of and meaning statutorily ascribed to the words "drive" and "operate" and "drive" and/or "operate" under the MVA, the Motor Vehicle Act Regulations, B.C. Reg. 26/58 ("MVAR"), the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231 ("IVA"), and the applicable Insurance (Vehicle) Regulation, B.C. Reg. 447/83 ("IVR"), the judge concluded that the words "drive" and "operate" when used together could not be given the same (or essentially the same) meaning, it being presumed that the legislature did not speak in vain. Given the broader legislative and regulatory context in which the provision is situated, the requirements of s. 8 of the Interpretation Act R.S.B.C. 1996, c. 238 ("IA"), and the jurisprudence he considered to be relevant to the issue, the judge concluded that "operating" in s. 86(1) of the MVA means having "care, custody or control" of the vehicle. The judge found that Tyson had at least "custody" and "control" of the vehicle at the time of the accident. In the result, Tyson was "operating" the vehicle when the accident occurred. The conclusion was said to be consistent with attainment of the remedial purposes of the legislation and, more generally, the social goals served by imposing vicarious liability--fair compensation by, and deterrence of, those who introduce risks into the community: *Bazley v. Curry*, [1999] 2 S.C.R. 534; 1999 CanLII 692 (SCC).
- [40] The judge summarized his analysis in the following way:
- [71] In this case, over the course of the evening, the Plaintiff and Dale drove Mr. Boltz's vehicle and were passengers at different times. When they changed roles, one would "drive" and the other would not. This narrow set of activities only addresses the question of who was "driving" at different times.
- [72] When the Plaintiff obtained Mr. Boltz's car keys, he initially sat in the driver seat and he held the car keys in his hand. At that point, though he was not "driving", the vehicle was in his "care, custody or control". I do not consider that that would change when he gave the keys to Dale.
- [73] To be specific, if the Plaintiff no longer held the keys he would likely no longer overtly have "control" of the vehicle. He would, however, still have "care or custody" of the vehicle. It would be open to him to ask for the return of the keys. It would be open to him to require that they return to the Plaintiff's home and that they return Mr. Boltz's vehicle.
- [74] I posit an example that arises in a slightly different context but one that mirrors, on a principled basis, the circumstances of this case. If a father gives his son his vehicle keys and his son, while on a trip, allows a friend to drive, while he sits in the passenger seat, can it be said that the son no longer has "care" or "custody" of his father's vehicle? Can it be said that he is not "using" the vehicle? Based on the common sense meaning of these words, and on the authorities I have referred to, I do not consider that this is so. To determine otherwise would be to make the words "drive" or "operate" virtually synonymous in circumstances where it is clear that the two words are both intended to, and do, have different meanings.

- [75] These conclusions are further informed by the intended remedial purpose of s. 86(1). It is to be recalled that the "only policy reasons underlying s. 86(1) to be considered are those in favour of protecting innocent third parties seeking compensation for injuries suffered at the hands of negligent automobile drivers and, vicariously, owners": Barreiro at para. 28.
- [76] Having regard to the foregoing considerations, I am satisfied the Plaintiff was, at the time of the Accident, "operating" Mr. Boltz's vehicle notwithstanding the fact that he was a passenger in the vehicle.
- [77] This conclusion recognizes and gives effect to each of the words "drive" and "operate". It is consistent with the meaning of the word "operate" in the MVA and the IVR--a related enactment. It is consistent with the object and remedial purposes of s. 86(1). Still further it is consistent with the relevant authorities.
- [78] Based on this conclusion, and on the deeming provision in s. 86(1), Mr. Boltz is vicariously liable for the Accident.
- [41] To give effect to the judgment, the following order was made:

THIS COURT ORDERS that:

1. The defendant, Dale Edward Bowe, is 60 per cent at fault for the plaintiff's damage or loss and the plaintiff is 40% at fault for his damage or loss.
2. The defendant, Roy Boltz, is vicariously liable for the negligence of the defendant, Dale Edward Bowe, and his several liability to make good the plaintiff's damage or loss.
3. The plaintiff is entitled to recover from the defendants, jointly and severally, 60% of his damage or loss
4. The defendants, jointly and severally, pay the plaintiff damages of \$7,003,621.80, being:
 - (a) \$228,421.80 for non-pecuniary loss;
 - (b) \$60,000 for past loss of earning capacity;
 - (c) \$902,400 for future loss of earning capacity; and
 - (d) \$5,812,800 for future care needs and costs.
5. The plaintiff has the right to structure any part of his award.
6. Costs to be agreed or determined by the court.

VI. The Positions of the Parties on Appeal

- [42] On appeal, Mr. Boltz advances three broad grounds of appeal. First, he submits that no claim he was vicariously liable for the wrongs of Tyson was pleaded. The only claim pleaded by Tyson was that Mr. Boltz was vicariously liable for the consequences of Dale's negligent driving. Second, even if it had been pleaded that Mr. Boltz was vicariously liable for Tyson's

wrongs, such a claim could not have satisfied the conditions precedent at common law and under the statute to hold him vicariously liable for Tyson's injuries. Third, Mr. Boltz could not be held vicariously liable for Dale's actions because Dale did not come within the ambit of s. 86(1)(a)--the only branch of s. 86(1) upon which Tyson relied at trial--it being common ground Dale was not living with and as a member of Mr. Boltz's family when the accident occurred.

- [43] It is necessary to unpack Mr. Boltz's second submission as it contains several component parts.
- [44] First, Mr. Boltz submits that a proper understanding of the operation of s. 86(1) requires an appreciation of its relationship to the common law of tort. He submits that what s. 86(1) does is identify certain situations in which a person driving or operating a vehicle is deemed to be the agent or servant of the vehicle's owner, thus making the owner vicariously liable for damages caused by the negligent acts of the driver or operator. What s. 86(1) does not do is determine the circumstances in which the person driving or operating the vehicle is liable in tort. The answer to that question lies exclusively at common law and without liability in tort for the driver or operator, there can be no statutory vicarious liability for the owner. In this sense, vicarious liability under s. 86(1) is "external to" and "parasitic on" the law of tort: see Allan Beever, *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) at 35-36.
- [45] Mr. Boltz submits that the practical significance of this common law underlay to s. 86(1) is that vicarious liability cannot be imposed on an owner in respect of a plaintiff who, while driving or operating the owner's vehicle, causes injury to themselves. A cause of action grounded in a person's self-inflicted injury would be defective in law as a person cannot sue themselves: *Public Trustee v. Guaranty Trust*, [1980] 2 S.C.R. 931 at 936 (per Ritchie J, dissenting in the result) at 943 (per Estey J., for the majority); 1980 CanLII 52 (SCC). As a preliminary step to the attribution of liability to the vehicle owner under s. 86(1), at common law a plaintiff must first identify a defendant tortfeasor who has breached a duty of care owed to the plaintiff that results in loss. Accordingly, even if Tyson could be said to be operating the vehicle at the time of the accident--a proposition Mr. Boltz contests--Tyson's want of care for his own safety (while grounding a contributory negligence claim) could not ground a viable cause of action underpinning a claim of vicarious liability pursuant to s. 86(1) of the MVA.
- [46] Mr. Boltz acknowledges that had Tyson caused injury to another person while driving or operating the vehicle, any breach of the duty of care he owed to the injured party could constitute a tort and underpin a conclusion that Mr. Boltz was vicariously liable for loss or damages caused by Tyson's negligence. But that is not this case.

- [47] On this issue, I note the judge understood Mr. Boltz to concede that if Tyson had been driving at the time of the accident, Mr. Boltz would have been vicariously liable for Tyson's injuries. This understanding is reflected in the following passages taken from the reasons for judgment:
- [9] The parties also agree that if the Plaintiff had been driving Mr. Boltz's vehicle when the Accident occurred, s. 86(1)(a) would be engaged and Mr. Boltz would be liable for the Plaintiff's injuries.
- ...
- [17] In this case, as I have said, the Defendants accept that if the Plaintiff had been "driving" Mr. Boltz's vehicle at the time of the Accident, s. 86(1)(a) would be engaged and Mr. Boltz would be vicariously liable for the Plaintiff's injuries.
- [48] Mr. Boltz submits that this concession was not made. Rather, in response to a hypothetical posed by Tyson, Mr. Boltz conceded (or intended to concede) only that he would have been vicariously liable for injuries caused to a third-party pedestrian while Tyson was driving or operating his vehicle. Because of this misunderstanding, Mr. Boltz says the judge erroneously regarded the question of whether Tyson was operating the vehicle at the time of the accident within the meaning of s. 86(1) as being dispositive of his liability for the loss. In any event, Mr. Boltz's submits that this Court is not bound by a party's erroneous concession on a point of law: *Orphan Well Assn. v. Grant Thornton Ltd.*, 2019 SCC 5 at para. 125.
- [49] If he is wrong on this point, Mr. Boltz submits that the statutory conditions precedent to a finding he was vicariously liable for the loss were not met in this case because Tyson was not "operating" the vehicle at the time of the accident. He submits that "operating" a vehicle relates to physical control over its functioning, and Tyson exercised no such control over the vehicle from the passenger seat when the accident occurred.
- [50] For his part, Tyson pronounced himself content to deal with the appeal on its merits as if no concession was made that Mr. Boltz would be liable for his damages if he (Tyson) was operating the vehicle at the time of the accident.
- [51] Contrary to the position he advanced in the trial court, Tyson submits that the analysis required in this case engages subsections (a) and (b) of s. 86(1). The central building blocks of the argument are as follows. The judge was correct in his interpretation of the legislation and in his conclusion that Tyson was operating Mr. Boltz's vehicle. As Tyson was "operating" the vehicle and living with Mr. Boltz as a member of his family when the accident occurred, he was doing so as Mr. Boltz's agent or servant and was statutorily deemed to be operating the vehicle in the course of his employment with Mr. Boltz. Section 86(1)(a) was thereby engaged. While Tyson was engaged in the operation of the vehicle, he gave the keys to Dale who thereby acquired possession of the car with the consent of the owner's agent. As the act of the agent is, in law, deemed to be the act of the principal, it is said that Dale--by virtue of Tyson's consent--became the agent or servant of Mr. Boltz. The consent given by Tyson for

Dale to drive was, in law, the consent of Mr. Boltz. Section 86(1)(b) was thereby engaged. Mr. Boltz was, therefore, properly found to be vicariously liable for Dale's negligent acts through the combined operation of s. 86(1)(a) and (b).

[52] The analysis Tyson advanced on appeal is said to engage what was referred to in argument as "secondary" or "triangular" agency. These phrases are used to represent the statutory means through which Dale became Mr. Boltz's agent. The analysis is perhaps more easily understood in the visual representation set out below:

[53] Tyson concedes that he did not explicitly invoke s. 86(1)(b) in the trial court. It is, in fact, a bit more than that. As noted earlier, reliance on s. 86(1)(b) was explicitly disclaimed by Tyson in the trial court. There, Tyson argued that the two situations in which the legislature has imposed vicarious liability on a vehicle owner are separate and cannot be the subject of analytical merger. Counsel for Tyson made these submissions in oral argument:

I have no doubt the defendants in this case will be making great strides to try and bring this back to a consent analysis, and that's just not applicable. It's not applicable because it's incorporating a totally new provision onto a family member provision when there's a clear separation

[Emphasis added.]

...

But again, it's a red herring to try and go down a third party transfer implied consent analysis. That is, by no means, engaged in this. It's not a section 86(1)(b) case. It's a section 86(1)(a), and the degree with which Tyson is not at fault, that's addressed and he must answer for that. But that's an apportionment issue. That's quite apart from --

THE COURT: Yeah. No, I think I have that.

COUNSEL FOR THE PLAINTIFF: -- a section 86 issue.

THE COURT: Yes, okay.

...

But more to the point, the two sections are clearly different. Everybody agrees with that. The case law has made that clear. Now, it's anomalous to say that you would go through a family member provision or a consent provision and then, once you get to the deemed stage, you then embark again on a consent analysis. If you had made it to that stage by going through the consent analysis [sic] you would have already had the consent in hand, express or implied, for all parties involved. To then say that you now superimpose a further consent analysis renders meaningless the separation of the express consent and implied consent provisions in sub (b) to that distinct from sub (a). So, ultimately, they are distinct sections, and on a plain reading, that means something

So, to then get to that stage but then do as the defendants now suggest, which is to embark on an analysis of consent, completely renders the deeming nature meaningless. The family law or the consent branch are separate branches, and they both go to the same place, which is if you pass A or if you pass B, you're automatically into the deeming provision.

[Emphasis added.]

- [54] Because of Tyson's concession that s. 86(1)(b) had no application in these circumstances, it was not addressed by the trial judge, nor was the precise argument Tyson advances on appeal. Nevertheless, I understand Tyson to submit that the thrust of the argument he advances on appeal was made below--specifically, that Tyson, as deemed agent of Mr. Boltz under s. 86(1)(a), legally bound and implicated Mr. Boltz, as owner, by allowing Dale to drive.
- [55] To be clear, Tyson does not suggest that Mr. Boltz gave express or implied consent to Dale to drive. Nor does Tyson suggest that Dale could bind and implicate Mr. Boltz by giving his (Dale's) consent to a fourth or subsequent party to drive the vehicle. To trigger the vicarious liability of Mr. Boltz, Tyson submits that any consent given to another party to drive or operate the vehicle would have to come directly from him, as Mr. Boltz's agent. It could not come from Dale.
- [56] If this analysis is accepted as correct, Tyson submits that the appeal turns entirely on whether he was operating Mr. Boltz's vehicle.
- [57] On this issue, and for the limited purpose of his secondary agency theory, Tyson submits that the proper temporal focus of the inquiry is not the time of the accident. Rather, the question is whether Tyson was operating the vehicle when he gave consent to Dale's possession of it. Tyson submits he was. He had control of the keys and was, on his version of events, in the driver's seat in the driveway when he gave his consent, as agent of Mr. Boltz, for Dale to drive.
- [58] In what I understand to be an alternative submission, Tyson says the judge correctly concluded that, despite being a front seat passenger, he was also "operating" the vehicle at the time of the accident by virtue of the vehicle then being in his care, custody or control. He submits that there are problems with limiting the meaning of "operation" or "operating" as used in s. 86(1) to acts of physical control over the vehicle. He notes, as did the trial judge, that the dictionary definition of "operate" as it pertains to a vehicle is to "function or control the functioning of": Catherine Soanes et al, eds, Concise Oxford English Dictionary, 11th ed (New York: Oxford University Press, 2008). Second, he submits that requiring an operator of the vehicle to have physical control over the vehicle--as a "driver" ordinarily would--offends the presumption of consistent expression and the presumption against tautology by making the words "operation" and "operating" all but redundant. Third, he argues that equating "operating" with having physical control of the vehicle is arbitrary. He submits it is not wrong to say that someone who has the care, custody or control of the vehicle exercises an authority over that vehicle that equates to functional control. This result is said to be

required as a matter of statutory interpretation. In addition, it is suggested that this interpretation is responsive to the remedial purposes of the provision, and the goal of imposing on vehicle owners a significant risk mitigation mandate.

- [59] Tyson acknowledges that for this Court to sustain the vicarious liability result on appeal, he must prevail on both issues: (1) that he was correctly found by the judge to be operating Mr. Boltz's vehicle (at least when he transferred possession to Dale) thereby engaging s. 86(1)(a); and (2) as Mr. Boltz's agent, his consent for Dale to drive was, in law, the consent of Mr. Boltz under s. 86(1)(b).
- [60] As none of this was put (or put clearly) to the judge, he understandably regarded the sole issue as being whether Tyson was operating the vehicle at the time of the accident.

VII. Analysis

1. Standard of Review and Preliminary Remarks

- [61] What lies at the core of this appeal is the interpretation and application of s. 86(1) of the MVA. I agree with the parties that the appeal raises questions of law to which a correctness standard of review applies: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25 at para. 23.
- [62] I will say at the outset that resolution of the issues on appeal has been complicated by the extent to which the positions of the parties: (1) were not clearly defined, either for one another or for the judge; and (2) have "evolved" with the progression of the litigation.
- [63] At trial, the sole issue was whether Tyson was operating the vehicle within the meaning of s. 86(1) at the time of the accident. The judge understood it to be common ground that if Tyson was operating the vehicle, Mr. Boltz was vicariously liable for his damages. Mr. Boltz did not argue in the trial court that Tyson's want of care for his own safety could not ground a viable cause of action at common law to underpin a claim of vicarious liability under s. 86(1). To my understanding, that submission was explicitly made for the first time on appeal. Dale's negligence, although pleaded, is not the basis upon which the judge found Mr. Boltz to be vicariously liable for the loss. It is now, however, foundational to Tyson's assertion that Dale became Mr. Boltz's agent by virtue of Tyson giving Dale consent to drive, and that Mr. Boltz is vicariously liable for the loss caused by Dale's tortious acts.
- [64] All of this is to say that the issues on appeal—including the analysis necessary to determine whether Tyson was operating the vehicle—have been significantly recast on appeal in a way that is unfair to the judge. That the parties have invited this Court to be a court of first impression on issues reframed for appellate purposes also risks compromising our traditional reviewing role.

[65] I do not intend to further dwell on the matter or cast blame for this state of affairs on trial or appellate counsel (neither of whom appeared in the court below). I consider it both necessary and possible to do justice in this case by addressing the issues as framed by the parties on appeal. In fairness to the trial judge, I wish to emphasize, however, that he was not asked to address some of the arguments made before us.

2. No Vicarious Liability Claim Pleaded in Respect of

Tyson's Conduct

[66] To reiterate, Mr. Boltz submits there was no pleading that Tyson was operating the vehicle, and no claim that he was vicariously liable for Tyson's wrongs. In essence, Mr. Boltz submits that Tyson should not be permitted to advance a theory of liability that was not pleaded. While there is merit in Mr. Boltz's position, I would not give effect to his principled objection in this case.

[67] Pleadings are, of course, a foundational aspect of the civil litigation process. Before a judge is asked to decide a case, it is necessary for the controversy to be clearly defined. A defendant is entitled to know what the plaintiff alleges against them as much as a plaintiff is entitled to know what defence will be raised in answer to their claim. Pleadings that define the material issue(s) to be decided are essential to securing a fair trial of those issues and a just result: 1076586 Alberta Ltd. v. Stoneset Equities Ltd., 2015 BCCA 182 at paras. 55-57, citing D.B. Casson and I.H. Dennis (eds.), *Odgers' Principles of Pleadings and Practice in Civil Actions in the High Court of Justice*, 21st ed., (London: Stevens & Sons, 1975), at 75-76.

[68] While it is true Tyson did not plead he was operating the vehicle within the meaning of s. 86(1), Mr. Boltz knew Tyson's position on this point before the conclusion of the trial. Tyson argued in his closing written submission that the collision was the result of a continuing transaction in which he acted in concert with Dale. In the result, it was submitted that "[a]s with Dale, Tyson was also operating the vehicle in the collision." The parties joined issue on this point, and I am not satisfied Mr. Boltz has been prejudiced by the way in which the pleadings were framed, or by the irregular way in which this proceeding has evolved.

[69] In answer to Mr. Boltz's second point, Tyson did plead that Mr. Boltz was vicariously liable for Dale's tortious conduct. That is the position Tyson advances on appeal. I appreciate that the judge understood the sole issue in the trial court to be whether Tyson was driving or operating the vehicle at the time of the accident, the parties having agreed that if he was, Mr. Boltz was vicariously liable for injuries Tyson caused to himself. Any confusion at trial as to what was being conceded lies at the feet of the parties, not the trial judge. That confusion may, however, explain why Tyson's trial counsel concluded it was unnecessary to engage s. 86(1)(b) in the analysis. In any event, that Mr. Boltz was vicariously liable for the loss caused by Dale's negligent driving was pleaded.

3. Tyson Not a Tortfeasor in Respect of his Own Injuries

- [70] Mr. Boltz submits that to impose vicarious liability on an owner, a plaintiff must establish the requisite statutory nexus between that owner and a defendant tortfeasor who breached a duty of care owed to the plaintiff. He submits that vicarious liability cannot be imposed on an owner in respect of a plaintiff who, while driving or operating the owner's vehicle, causes injury to themselves because a person's want of care is not itself an actionable wrong.
- [71] While the submission might well gain purchase on the analysis conducted in the court below--that Mr. Boltz was vicariously liable for the injuries Tyson inflicted on himself while operating the vehicle--I do not see that this issue arises on the theory of liability Tyson advances on appeal. On appeal, Tyson submits that Mr. Boltz is vicariously liable for Dale's tortious misconduct. It is, therefore, unnecessary to say more about this point.
4. Was Tyson "Operating" the Vehicle at the Time of the Accident Within the Meaning of s. 86(1)?
- [72] If, as the judge found, the operative question is whether Tyson was operating the vehicle at the time of the accident, the central issue for us to decide is whether the judge correctly concluded the word "operating" in s. 86(1) includes having the care, custody and control of the vehicle such that Tyson could be said to be operating the vehicle from the passenger seat.
- [73] The parties agree that s. 86(1) should be given such fair, large and liberal interpretation as best ensures the attainment of its objects: IA s. 8. The words used in s. 86(1) must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature: see *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27; 1998 CanLII 837 (SCC), adopting the definitive formulation of the modern approach to statutory interpretation set out by E. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983).
- [74] Where a provision is found in an Act that is itself a component of a larger statutory scheme, the application of the governing principle set out above gives rise to a further principle of statutory interpretation described in *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56 at para. 52 as "the principle of interpretation that presumes a harmony, coherence and consistency between statutes dealing with the same subject matter."
- [75] Recognizing these generally applicable principles, this Court nevertheless held in *Jaroszuk v. Quewezance* (1992), 66 B.C.L.R. (2d) 171 (C.A.) at para. 13, 1992 CanLII 5960 (BCCA), that since the consequence of invoking what is now s. 86(1) of the MVA is to impose vicarious liability without fault, "the words which have been used by the legislature should not . . . be given any broader effect than that required by their ordinary meaning." (per Taylor J.A., Southin J.A. concurring). Similar observations were made in *Victoria U Drive Yourself Auto Livery Ltd. v. Wood*, [1930] 2 D.L.R. 811 (B.C.C.A.) by McPhillips J.A. (at 816); 42 B.C.R. 291 [Victoria U Drive], who cautioned that when a statute extends the responsibility that exists at common law, the language used by the legislature "should not be expanded beyond its ordinary meaning", and by Macdonald J.A. (at 818), who observed that "a statute imposing an

onerous liability on a third party should not receive a strained interpretation."

- [76] Similar views have been expressed by other appellate courts. In *Martel v. Dominion Motors Ltd.*, [1935] 2 D.L.R. 187; 1935 CanLII 349 (MBCA) [Martel]. Robson J.A. addressed an analogous provision in what was then s. 58(3) of Manitoba's Highway Traffic Act, 1930, ch. 19. He noted that the provision was "a very strong one enlarging the common law liability of an owner very seriously and should not be extended beyond its reasonable implications": *Martel* at 65.
- [77] To like effect is *Schuster*, where the plaintiff sought to hold the vehicle owner vicariously liable for damages arising out of the conduct of a passenger. The facts may be briefly stated. After the owner parked the vehicle on the left side of a street, the passenger opened his side door obstructing traffic approaching from behind. The plaintiff's motorbike collided with the passenger door. The Court overturned a finding that the passenger was engaged in the "operation" of the vehicle within the meaning of what was then s. 50(1) of the Highway Traffic Act, R.S.O. 1950, c. 167 by opening one of its doors after the vehicle had been parked. With respect to the word "operation", the Court held (at 130) that it "must be construed in its strict and primary sense as not extending beyond the acts or omissions of a person having charge or control of the actual operational driving of a motor car." [Emphasis added.] The Court noted that the provision "went very far" in extending the rule of vicarious responsibility against the owner of the vehicle and should not be enlarged "beyond limits which are reasonable or authorized."
- [78] The judge in this case noted that the words "operate", "operator" and "driver" are defined in the MVA, albeit in different Parts and sections of the Act. He noted, for example, that "operate" in s. 94.1(0.1) is, in relation to a motor vehicle, defined to mean "to drive the motor vehicle or to have care or control of the motor vehicle." As the judge observed, this definition is, however, limited to s. 94.1 and s. 94.6 of the MVA.
- [79] The judge also took note of s. 1(1) of Revised Regulation (1984) B.C. Reg. 447/83 passed under the IVA which defines "operate", in the case of a vehicle, to include having the care, custody or control of the vehicle.
- [80] The judge embarked on an exhaustive review of the context in which the words "drive and/or operate" are used in the MVA and related enactments and regulations. He concluded that "drive or operate" and "drive and operate" do not have the same meaning as "drive". As a matter of statutory interpretation, the two terms could not be given "almost synonymous" meaning. He reasoned that the word "operating" in s. 86(1) of the MVA should be equated with having the care, custody or control of the vehicle, in part because other sections of the MVA and related insurance legislation incorporate a definition of "operate" that specifically includes having care, custody or control. He concluded that Tyson had at least "custody" and "control" of the vehicle at the time of the accident and was, therefore, "operating" the vehicle at the material time.

[81] Mr. Boltz submits on appeal that where the legislature seeks to convey the primary meaning of the word "operating" in relation to a vehicle--to identify a person who has charge or control over the vehicle's actual physical operation--it couples these words with the words "drive" or "driving". Where the legislature seeks to convey an expanded meaning of the word "operate", it creates a specific and expanded definition, or employs these words with other words intended to convey a broader legislative meaning. He gives the following examples to illustrate the point:

- the phrases "drive or operate" and "driving or operating" are commonly employed to regulate conduct pertaining to the actual physical operation of the vehicle including: licensing and insurance requirements (MVA ss. 24, 33, 36(3), 37 and 234(1)) [for example, a person must not "drive or operate" a motor vehicle unless the person holds a subsisting driver's license and is insured]; a person "driving or operating" a motor vehicle commits an offence knowing that their license is suspended; obedience to the rules of the road (MVA ss. 119(1), 140, 141, 146) [for example, a person must not "drive or operate" a vehicle in excess of the posted speed limit or contrary to the directions of the flagger controlling the movements of traffic]; safe vehicle operation (MVA ss. 207, 214.2, 219, 220) [for example, a person must not use an electronic device while "driving or operating" a motor vehicle on a highway.]; and
- the terms "operate" and "operating" and "driver" are given an expanded definition to convey the additional elements of "care" and "control" over the operation of a vehicle where the legislature has imposed prohibitions for motor vehicle related Criminal Code offences (MVA ss. 90.3, 94.1(0.1), 215(1), 215(4.1)) [for example, for the purposes of s. 94.01 and 94.6--driving prohibitions for alcohol-related operation of a motor vehicle--"operate" is defined to mean "to drive the motor vehicle or to have care or control of the motor vehicle."] or,
- the terms "operate" and "operating" are combined with other words like "care", "charge", or "control" to convey legislative intent that the section be given broader application (MVA s. 36(3), MVAR, ss. 27.03(1)(d)(iv), 46.05(2) [for example, a municipally licensed chauffeur must not drive, operate or be in charge of a motor vehicle carrying passengers for hire unless they hold a permit to do so.].

[82] Taken together, Mr. Boltz submits that these provisions evince a legislative intention to limit the meaning of the phrase "driving or operating" to conduct associated with the actual physical operation of the vehicle. When the legislature intends that the words "drive" or "operate" be given an expanded meaning that encompass having the care, custody or control of a vehicle, it expressly says so.

[83] For his part, Tyson endorses the conclusion of the judge that "operating" as it is used in s. 86(1), includes having the care, custody or control of the vehicle. He submits that little is to be gained by closely examining the various usages of the words "drive" and "operate" in the MVA and related legislation. As he put it in his factum, what the analysis of the judge and the different analysis advanced by Mr. Boltz on appeal reveals is this: "toting up the implications of the various usages in the statute books is a labour of Sisypheus: what pushes the boulder in

one direction may be (to some on ascertainable degree) undone by the push from other provisions." He submits that for want of a surer interpretive touchstone, the appropriate focus is the ordinary meaning of the word "operating" as it pertains to a vehicle--to function or control the functioning of that vehicle.

- [84] What Tyson does not clearly explain is how giving the word "operating" its agreed-upon ordinary meaning leads to the result that he was operating the vehicle from the passenger seat without in any way participating in the functioning of the vehicle at the time of the accident.
- [85] In any event, I agree with the position of Mr. Boltz and conclude that the judge erred in determining that, in the context of s. 86(1), the legislature intended the word "operating" to encompass having the care, custody or control of the vehicle. For reasons I will explain, to "operate" a vehicle within the meaning of s. 86(1), the "operator" must generally have physical control over the vehicle. I conclude, therefore, that Tyson, a mere front seat passenger at the time of the accident, was not operating Mr. Boltz's vehicle.
- [86] I have come to this conclusion for several reasons.
- [87] To the extent the judge concluded that because other sections of the MVA and related legislation adopt a definition of "operation" that specifically includes care, custody or control in a particular and limited context, this informs the meaning to be given to the word when used in the context of s. 86(1), I am of the view that he erred. That the legislature defines a term used in a particular context in an expansive way, says very little, if anything at all, about what the word means when it is used, undefined, in another context. Definitional provisions applicable in one context cannot simply be imported into another context in the absence of any evidence of an intention on the part of the legislature to bring about this result. The point was made in *Miln-Bingham Printing Co. Ltd. v. The King*, [1930] S.C.R. 282 at 283; 1930 CanLII 53 (SCC), albeit in the context of importing the statutory definition of a word provided in one statute to another:

No doubt, for the purpose of ascertaining the meaning of any given word in a statute, the usage of that word in other statutes may be looked at, especially if the other statutes happen to be in *pari materia*, but it is altogether a fallacy to suppose that because two statutes are in *pari materia*, a definition clause in one can be bodily transferred to the other.

- [88] More problematic is that the construction adopted by the judge makes unnecessary the legislature's adoption of an expanded definition of the word "operate" in other parts of the MVA. The effect of the judge's conclusion on this point is to bring to the words "operation" and "operating", as they are used in s. 86(1), the same expansive meaning expressly given to those words in other contexts. If the words carried this expansive meaning, the broader definition supplied by the legislature would be superfluous. Put differently, the express inclusion of the terms "care, custody and control" within the definition of "operate" in specific contexts was deemed by the legislature to be necessary precisely because the word "operate" would not, standing on its own, include them. Rather than promoting interpretive

consistency, the conclusion of the judge does the opposite--it effectively eliminates the context-specific distinctions expressly drawn by the legislature when it uses the word "operate" (and its derivatives) throughout the statutory scheme.

- [89] In my view, to conclude that a passenger who neither directs nor counsels the driver to operate the vehicle in a negligent manner is, nevertheless, "operating" the vehicle pursuant to s. 86(1) runs too far afield from the ordinary meaning ascribed to the operation of a motor vehicle. I reject Tyson's position that the judgment below bestows upon the phrase "operating the motor vehicle" its ordinary meaning. As the judge noted, the ordinary meaning of the phrase connotes engagement with the functioning of the vehicle. Respectfully, the result below is the product of a strained interpretation of the provision that, in my view, goes beyond what is necessary to give effect to the remedial purpose of the legislation.
- [90] Further, I consider that application of the "associated words" or *noscitur a sociis* rule of statutory interpretation leads to a different result than that reached by the judge. At the heart of the rule is the notion that a word should not be interpreted without taking surrounding words into account: *Opitz v. Wrzesnewskyj*, 2012 SCC 55 at para. 40. As Professor Sullivan explains at 8.58:

The associated words rule is properly invoked when two or more terms linked by "and" or "or" serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature among the terms. This feature is then relied on to resolve ambiguity or limit the scope of the terms. Often the terms are restricted to the scope of their broadest common denominator.

[Emphasis added.]

- [91] In *R. v. Goulis* (1981), 33 O.R. (2d) 55 at 60-61 (C.A.); 1981 CanLII 1642 Martin J.A. described the application of the rule in similar terms:

It is an ancient rule of statutory construction (commonly expressed by the Latin maxim, *noscitur a sociis*) that the meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it: Broom, *A Selection of Legal Maxims*, 10th ed. (1939), p. 396. When two or more words which are susceptible of analogous meanings are coupled together they are understood to be used in their cognate sense. They take their colour from each other, the meaning of the more general being restricted to a sense analogous to the less general: see Maxwell on the Interpretation of Statutes, 12th ed. (1969), at p. 289.

[Emphasis added.]

- [92] The rule is one of general application and may be offset by other considerations where, for example, restricting the meaning of a more general but analogous word to the more specific word with which it is associated would plainly be contrary to the intention of the statute as a whole: *R. v. Two Young Men and Kootenay* (1979), 101 D.L.R. (3d) 598 at 608 (Alta. C.A.); 1979 ABCA 193 (CanLII); *R. v. McCraw*, [1991] 3 S.C.R. 72; 1991 CanLII 29 (SCC).
- [93] In the case at bar, the words "driving or operating" serve an analogous grammatical and logical function within s. 86(1). As between "driving" and "operating", the latter word is broader in meaning. A person may be said to be operating the vehicle without driving it, but a person driving the vehicle must necessarily be operating it. The words do, however, share this common denominator: physical engagement with the functioning of the vehicle. In my view, application of the rule in this case favours restricting the meaning of "operating" in the way Mr. Boltz suggests.
- [94] This conclusion is also consistent with the way in which s. 86(1)--and similar provisions in other provinces--has been interpreted.
- [95] In *Victoria U Drive*, a 16-year-old rented a car from a company, taking two other teenage boys with him on a driving outing. All three took turns driving the vehicle, the two other boys with the 16-year-old's permission. At the time of the accident, the 16-year-old was not driving. The two other teenage boys were killed. The car company sued the 16-year-old and his father for damages to the car, arguing the father was vicariously liable for the loss under s. 12 of the Motor-Vehicle Act Amendment Act which provided that "[s]o long as a minor is living with or as a member of the family of his parent the parent shall be civilly liable for loss or damage sustained by any person through the negligence of the minor in driving or operating a motor-vehicle on a highway " The trial judge held that the words "driving" and "operating" were synonymous, and that the father would only be liable for the loss if the son was at the wheel of the car (i.e., physically driving it) when the accident occurred.
- [96] The car company's appeal was dismissed by a five-member division of this Court. Four members of the Court determined that the father was not liable for the loss because the son was not driving or operating the car at the time of the accident. McDonald J.A., who delivered one of the three majority judgments, said this:

... the father, is not liable under the section quoted. His liability is purely statutory. He is only liable for the negligent conduct of the minor in "driving or operating" the car. One sitting beside the driver or in the back seat is not operating the machine. To operate in the sense contemplated by the statute is to run it.

...

I prefer the views expressed by the Appellate Division in *O'Reilly v. Canada Accident and Fire Assurance Co. Ltd.* (1929), 63 O.L.R. 413, where a somewhat similar clause in an insurance policy was strictly interpreted, the term "operating" being construed in its strict and primary sense. I think, too, there is internal evidence in the clause itself, viz., "the negligence or improper

conduct of the minor in driving or operating" to indicate that the Legislature intended the words "driving and operating" to be limited to the ordinary and natural meaning usually ascribed to them, viz., a physical or mechanical act.

[Emphasis added.]

- [97] In his dissenting opinion, Martin J.A. expressed the view that the phrase "driving or operating" could not have been intended by the legislature to be understood as synonyms. He concluded (at 814) that the primary meaning of the word "operating", as used in the 1926 Act, "is that it denotes the permission or direction given by someone in control of the car to another person to perform the physical act of driving it " He reasoned that by permitting the other two boys to drive, the son should be regarded as being in the same position as if he was driving the vehicle himself at the time of the accident. In the result, Martin J.A. would have found the father vicariously liable under the statute for the damages caused by the son's "operation" of the vehicle. To be clear, the opinion of Martin J.A., which reflects the position Tyson advances at trial and on appeal, was rejected by the majority.
- [98] *Victoria U Drive* was considered in *Craftchick and Jones* (1994), 91 B.C.L.R. (2d) 100 (S.C.); 1994 CanLII 16649 [Craftchick]. *Esson C.J.S.C.* considered the conclusion in *Victoria U Drive* that the 16-year-old son was neither driving nor operating "a rather obvious" one given that one of his companions was driving at the time of the accident. As he explained at para. 17, the majority in *Victoria U Drive* "were not saying that there was no distinction to be made between the words "driving" and "operating", but rather that they did not accept that "operating" covered an area wholly divorced from physical control, as held by Martin J.A."
- [99] While it is important not to stray from the language used in s. 86(1) by seeking guidance from differently worded legislation, I do note that the majority holding in *Victoria U Drive* is consistent with the approach taken by the Ontario Court of Appeal in *Schuster*, discussed herein at para. 77. It is also consistent with the approach taken in *McEvoy v. McEachnie*, 2008 BCSC 1496, [McEvoy], aff'd 2010 BCCA 67 (sub nom. *Robert v. Foster* [Robert]). At issue in *McEvoy* was whether a passenger who suddenly and deliberately took control of the steering wheel causing the vehicle to crash was "operating" the vehicle within the meaning of s. 86(1). Although the judge in *McEvoy* made no mention of either *Victoria U Drive* or *Schuster*, he concluded that "operating" means having some, but not necessarily exclusive, control over the functioning of a vehicle:
47. The Motor Vehicle Act does not define either verb. The New Oxford Dictionary of English defines "driving" as: The control and operation of a motor vehicle: he was convicted of reckless driving. The dictionary defines "operate" as: Control the functioning of (a machine, process, or system).
48. The concept of "driving" does not necessarily imply that only one person at a time can "drive" an automobile. There is no logical reason why a vehicle can not be driven by two people at the same time. Doing so would be unwise and probably dangerous, but it can be done. Similarly, the concept of "driving" does not necessarily imply good driving. One can

operate a car completely without sense or skill and still "drive" it. In fact, "driving" in this context means nothing more than having a degree of control over the speed and trajectory of a motor vehicle.

49. The same analysis applies to the verb "operating" as it is used in the Act. Ergo: operating simply means having some, but not necessarily exclusive, control over the functioning of an automobile.
50. Although it does not matter in the present case, the difference between the two verbs seems to be that "driving" implies that the vehicle is in motion, while "operating" contemplates controlling the vehicle's function whether it is in motion or at rest. For example, the act of rolling up a door's window would probably be "operating" but not "driving".
51. When Ms. Forster grabbed the steering wheel, she exerted an effort to control the Jeep's trajectory. As such, she was, for a brief period of time, "driving" the Jeep by moving the steering wheel, and she was, for an equally brief period of time, operating the Jeep by inputting some control over its steering function.

[Emphasis added.]

[100] As the judge noted, the meaning given to "operating" in *Victoria U Drive and Schuster* mirrors the approach taken at common law. *O'Reilly v. Canada Accident and Fire Assurance Co. Ltd.* (1929), 63 O.L.R. 413 (C.A.); [1929] 2 D.L.R. 70 is illustrative of that approach. *O'Reilly* dealt with the meaning to be given to the word "operated", albeit in an insurance policy. A clause in the policy provided that the insurer would not be liable if the vehicle was "operated" by the insured's son. The accident occurred while the son was a backseat passenger in the vehicle, giving route directions to his chauffeur. In this context, the Court held that the son was not "operating" the vehicle in its primary, non-figurative sense because "he was not regulating and controlling the management of the machine as a machine" (per Middleton J.A. at 415), nor was he engaged in "the personal working and application of its motive power" (per Hodgins J.A. at paras. at 416).

[101] It is well established that common law terms are presumed to retain their common law meaning, subject to any definitional modification supplied by the legislature: *Amos v. I.C.B.C.*, [1995] 3 S.C.R. 405 at para. 15; 1995 CanLII 66 (SCC) [Amos], citing R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at 301 [Sullivan at 17.14.] It was open to the legislature to redefine the common law meaning of "operation" in relation to a vehicle in enacting s. 86(1). In fact, the legislature expressly did so in other contexts. But it did not define the word "operating" in s. 86(1) to give it an expanded meaning it does not have at common law.

[102] Although never expressly overruled, the judge rejected the continuing authority of *Victoria U Drive*. He regarded the "strict interpretation" of the word "operating" in that case and in *Schuster* to be overtaken by a more liberal approach to the interpretation of the word "operation" in insurance coverage cases such as *Amos*, which dealt with the entitlement to

Part 7 benefits under the IVA. In that case, the Court held that a plaintiff, attacked and shot through the window of his motor vehicle by persons apparently attempting to hijack the vehicle, suffered injuries "caused by an accident that arises out of the ownership, use or operation of a vehicle ". While the Court did not specifically delineate the scope of the words "use or operation" in this context, it has been suggested that the decision in *Amos* enlarged the meaning of these words by endorsing a less technical, more contextual approach that ensures attainment of the objects of the legislature: see *Amos* at para. 17.

- [103] The judge in this case was not the first to characterize as overly "strict" the interpretative approach taken in *Victoria U Drive* and related authorities. A similar point was made in *Strickland v. Miller*, [1998] O.J. No. 2762 (Gen. Div.) at para. 46; 69 O.T.C. 241, and in *Dionne (Guardian ad litem of) v. Desjardins* (1999), 214 N.B.R. (2d) 380, 1999 CanLII 32902 (NBCA). In *Dionne* at para. 25-27, the Court noted that cases adopting a restrictive approach, including *Victoria U Drive*, were decided at a time when automobile insurance was optional, and many vehicle owners were not prepared to incur the cost of this protection. In these circumstances, courts were reluctant to interpret statutory provisions of this kind too generously, fearing they would impose too great a burden on the shoulders of automobile owners.
- [104] I take from this, from s. 8 of the IA, and from the authorities I have noted this middle-ground proposition: s. 86(1) should not be given a technical construction that defeats its remedial purposes, but neither should it be stretched beyond its plain and ordinary meaning.
- [105] I am not persuaded that the approach taken in *Amos* overtakes the holding in *Victoria U Drive*. *Amos* was decided in a different context. The case at bar does not deal with the liability of an insurer, but with the liability of the owner of a motor vehicle for a tort committed by another person. When interpreting ambiguous wording in an insurance policy or insurance act, it might well be appropriate to adopt an interpretive approach which favours the interests of the insured. Such an approach cannot, however, easily be imported to this context involving, as it does, the interpretation of a legislative provision that imposes liability in tort not recognized at common law. As the Court subsequently acknowledged in its post-*Amos* judgment in *Citadel General Assurance Co. v. Vytlingam*, 2007 SCC 46 at para. 9, "*Amos* is not a template to resolve indemnity coverage . . . because the type of insurance and coverage requirements in *Amos* did not require the presence of an at-fault motorist."
- [106] I also agree with Mr. Boltz that interpretative approaches involving entitlement to insurance benefits cannot simply be imported and applied to the interpretation of the MVA considering its broad regulatory scope: see *Robert* at para. 20.
- [107] Further, the analogy to insurance coverage cases is imperfect because insurance concerns damages both caused to and caused by the vehicle, whereas vicarious liability under s. 86(1) only concerns damages caused by the vehicle or, more specifically, "loss or damage to

persons or property arising out of the use or operation of the motor vehicle on a highway ". Damages can be caused to a vehicle in many more ways than damages may be caused by a vehicle. Damages may also be caused to a vehicle at virtually any time, whether the owner is present or not. It is understandable, therefore, that the word "operation" would cover a broader range of circumstances in the insurance context.

- [108] I am similarly unable to accept Tyson's submission that the majority's reasoning in *Victoria U Drive* has been overtaken by this Court's judgments in *Morrison* and *Yeung*. While these cases underscore the remedial nature of s. 86(1), they do not, in my respectful view, call into question the correctness of the result in *Victoria U Drive*. While I appreciate that *Victoria U Drive* was decided under a differently worded provision--one that applied only to minors and made owners directly liable for the negligence of a minor driving or operating a motor vehicle on a highway--I do not consider that the result turned on the different structure of the provision, or that the case cannot be regarded as authoritative on the language used in s. 86(1).
- [109] The judge did cite a number of other authorities in which "operate" or "operator" were given an expanded meaning, but they were decided in circumstances where the term was defined to mean (or include) having the care custody or control of the vehicle: see *Grey v. Insurance Corp. of British Columbia*, [1993] B.C.J. No. 3121 (S.C.); 17 C.C.L.I (2d) 248; *Barsaloux v. Insurance Corp. of British Columbia*, 2010 BCSC 640; *Insurance Corp. of British Columbia v. Vancouver (City)*, 2000 BCCA 12. For this reason, I do not consider these cases to be helpful.
- [110] The judge also took note of *Hudson v. Insurance Corp. of British Columbia* (1991), 57 B.C.L.R. (2d) 183 (C.A.); 1991 CanLII 1916 (BCCA) [Hudson]. In that case, the plaintiff regularly used his vehicle to drive to a parking lot and then carpool to work in another vehicle. The judge found the plaintiff's act of driving to the parking lot to be contrary to a statement he made in the application for insurance that he would only use the vehicle for purposes unrelated to work. On one occasion, and while the plaintiff was at work, the vehicle was damaged while it was parked in the lot. The issue was whether the vehicle was off cover when it was damaged. Section 55(2) of the *Insurance (Motor Vehicle) Regulations* provided at the time that, "an insured shall not operate a vehicle . . . contrary to the statements . . . in the application for insurance." The word "operate" was defined to include having the care, custody or control of the vehicle. The judge concluded that the plaintiff was not operating the vehicle when it was damaged and was entitled to be indemnified for his loss. This Court allowed the appeal, noting the broad non-exhaustive definition of "operate" in the Regulation. In this context, "operate" was found to mean "use" the vehicle. The Court concluded that on any common-sense view, the plaintiff had used the car in breach of his promise. The result in *Hudson* is plainly right given the non-exhaustive way in which "operate" was defined in the Regulation. I do not, however, see that the case informs resolution of the interpretive issue that arises in the different context of this case.

- [111] I do not consider that following *Victoria U Drive* on the issue of what it means to operate a motor vehicle in the context of s. 86(1) fails to bring to the provision a fair, large and liberal interpretation that ensures the attainment of its objects. In my view, the judge's conclusion that Tyson was operating the vehicle from the passenger seat at the time of the accident involves a construction of the provision divorced from the ordinary meaning of the word "operating", which the legislature chose not to define in this context. As noted earlier, where the legislature determined it appropriate to expand the definition of "operate" beyond its ordinary meaning, it did so.
- [112] Nor am I of the opinion that the approach I favour violates the rule of statutory interpretation that the legislature is presumed, by using the phrase "driving or operating", to have intended that these words be given different meaning.
- [113] As a rule, both "driving" and "operating" as used in this context refer to someone who has the physical control of a motor vehicle. In ordinary usage, the words are often used interchangeably, but, as I have noted, "operate" has a slightly broader meaning than "drive". A minor who enters their parent's car and pulls the emergency brake, sending the car down the hill and into the path of an oncoming vehicle is likely "operating" the vehicle, but it is doubtful they were driving it. As in *McEvoy*, a passenger who deliberately grabs control of the steering wheel for the purpose of altering the vehicle's course has momentary physical control over the vehicle and is likely operating it. They may or may not also be driving it; the distinction seemingly turning on whether the act of grabbing the wheel was intentional: see the discussion of the authorities on this point in *Robert* at paras. 12-20. A driver who negligently opens a car door of a vehicle thereby causing a collision may be engaged in the physical operation of the vehicle, but it is unlikely that this person could be said to be "driving" the vehicle. In *Craftchick*, *Esson C.J.B.C* (at para. 21) concluded that a defendant was "operating" a propane delivery truck within the meaning of what is now s. 86(1) when he failed to close a transfer valve after a delivery, leading to a boiling liquid expanding gas explosion when the truck was subsequently involved in a collision. While the driver was found to be operating the truck when he failed to close the valve, he was clearly not driving it. These examples illustrate the different and useful role the word "operating" plays by broadening the reach of the provision where uncertainty arises about whether the same person can be said to be "driving" the vehicle.
- [114] The point is this: tautology is a high standard. It is not met on the finding made by the judge in this case that giving two associated words their ordinary meaning would make the words "almost synonymous". The presumption against tautology is rebutted by positing scenarios that demonstrate the words used by the legislature are not superfluous--that they do serve a function or were "added for greater clarity": *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 at para. 46; *Wormell v. Insurance Corp. of British Columbia*, 2011 BCCA 166 at para. 19. I consider that the words "operation" and "operating" as used in s. 86(1) can serve, and have been found to serve, a function different than that which is served by the word "driving".

- [115] For these reasons, I conclude that the judge erred in holding that Tyson was "operating" the vehicle at the time of the accident.
- [116] I wish to be clear that I have not addressed the question of whether Tyson could be said to be "operating" the vehicle by engaging throughout the evening in a joint enterprise with Dale. While the issue was raised at trial, it was not pursued on appeal, and we have not had the benefit of concerted submissions on this point. Further, I express no view about whether a passenger who directs or counsels the driver to drive the vehicle in a negligent manner can be said to be "operating" that vehicle within the meaning of s. 86(1). The issue does not arise in this case and was not addressed by the parties.
5. Tyson's Secondary Agency Argument and the Operation of s. 86(1) of the MVA
- [117] Mr. Boltz submits he cannot be liable for Dale's actions because Dale was not a family member living with him at the time and was not driving with his consent. The statutory conditions precedent under s. 86(1)(a) and/or (b) were, therefore, never triggered.
- [118] With respect to s. 86(1)(b), Mr. Boltz argues that Tyson's secondary agency theory of liability advanced on appeal--that Dale became the owner's agent when Tyson gave him permission to drive--is not supported by the structure of s. 86(1), the language of s. 86(1)(b), or the governing jurisprudence. On the latter point, he relies, most particularly, on *Godsman v. Peck* (1997), 29 B.C.L.R. (3d) 37 (C.A.); 1997 CanLII 4030 (BC A) [*Godsman*]; *Snow v. Saul* (sub nom. *Snow v. Friesen*), 2010 BCCA 416, leave to appeal ref'd [2011] S.C.C.A. No. 33945 (S.C.C.) [*Snow*]; *L'Heureux v. Eustache*, 2003 BCSC 347 [*L'Heureux*]; *Morris v. Morris*, 2009 BCSC 1567; *Martel*; and *Radawetz v. Erickson* (1996), 180 A.R. 201 (Q.B.); 1996 CanLII 19930 (ABQB) [*Radawetz*]. These cases address the scope of an agent's authority to lend a vehicle to a third party, and the circumstances in which doing so will make the owner vicariously liable for damages caused by the third-party driver or operator.
- [119] While I will not address each of these authorities, they establish that, pursuant to s. 86(1)(b), an owner will only be vicariously liable for the loss or damage when the person driving or operating the motor vehicle acquired it with the consent, express or implied of the owner. An owner will not be liable where the person to whom the owner's consent has been given permits a third party to drive the vehicle, unless it can be said that the third party drove or operated the vehicle with the owner's implied consent.
- [120] In *Godsman*, the vehicle owner (Alexander) entrusted his motorcycle to Godsman to allow it to be test driven. Godsman subsequently allowed Peck to drive it. There was no evidence Alexander gave express consent to Peck to drive the motorcycle. While Peck was driving the motorcycle and Godsman was riding on it as a passenger, an accident occurred. Godsman was injured. He commenced an action against Alexander and Peck, arguing Alexander was vicariously liable for his damages pursuant to s. 79(1) of the MVA--the predecessor to s. 86(1).

[121] The trial judge concluded that Peck acquired possession of the motorcycle with Alexander's implied consent and that Alexander was vicariously liable. An appeal by Alexander was allowed. This Court affirmed the test to be applied in considering the issue of implied consent--whether it is clear consent would have been granted as a matter of course had it been sought: *Palsky v. Humphrey*, [1964] S.C.R. 580; 1964 CanLII 96 (SCC). In determining whether the test had been met, the Court said the judge ought to have asked whether, at the time the motorcycle was loaned to Godsman, Alexander granted him possession of it under circumstances clearly showing that it was acquired with both the willingness and the expectation of Alexander that it would be driven by a third person (at para. 27). To engage in this inquiry, it was necessary for the judge (at para. 30) "to examine the circumstances in which the vehicle was actually passed on to the third party, and relate those circumstances back to the owner's state of mind at the time he gave up possession". [Emphasis added.] In the absence of any evidence that Alexander impliedly consented to Peck operating the motorcycle, Alexander could not be liable for Godsman's loss. Writing for the Court, Braidwood J.A. made this observation:

One of the commendable goals of s. 79(1) [now s. 86(1)] may be to induce owners of motor vehicles to exercise discretion when transferring control of them to others, but to impose liability in the 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.

[122] A similar point was made in *Snow*. There, the Court rejected the notion that whenever an owner permits his or her vehicle to be driven by "A", the owner is deemed to have consented to the vehicle being driven by anyone and is thus liable to an injured plaintiff for damages caused by "B". Writing for the Court, Newbury J.A. said this:

[16] ... The grammatical structure and wording of s. 86(1) are such that it is the "person driving the motor vehicle" who must have acquired possession with the owner's consent. Thus, in cases where B negligently causes damage to the plaintiff, the argument made by the plaintiff depends on proof of implied consent . . .

[Emphasis added.]

...

... s. 86(1) goes only so far: it does not state that whenever a person uses another's car, the owner is vicariously liable. The intention of the legislation is to place liability on a person who permits his car to be used by another, where that other negligently causes injury to a plaintiff.

[Emphasis in original.]

[123] In Martel, the owner of the vehicle (Dominion Motors) loaned it to Ray. It was subsequently driven by Chartier who, through negligent operation of the vehicle, caused catastrophic injuries. The issue, which turned on a provision of the Manitoba Highway Traffic Act like s. 86(1), concerned Dominion Motors' vicarious liability for the loss caused by Chartier. The court held that Dominion Motors could not be held vicariously liable in these circumstances. Trueman J.A. put the issue this way at 62:

Let it be supposed that the evidence established that Chartier acquired possession of the truck by the consent, whether express or implied, of Ray, that would not be the possession referred to by the section. Then in what way can it be said to have been a possession acquired from the owner with the owner's consent, express or implied, with the effect of making Chartier the agent or servant of the owner? By the section the relationship between the owner and the driver who acquires possession from him is an immediate one and does not extend to a possession derived by a third person from the person who acquired the motor vehicle from the owner. Implied consent in the section is the consent that exists by reason of the circumstances at the time possession is acquired from the owner by the driver and is not something that can be transmitted through the driver to another who is the driver at the time of the accident. As express consent can refer only to the person the owner directly deals with, implied consent necessarily bears the same meaning. To hold otherwise would mean that while possession acquired by express consent cannot extend to a secondary person, a possession acquired by implied consent does.

[Emphasis added.]

[124] In concurring reasons, Robson J.A. held (at 65) that even if it could be said Chartier acquired possession of the car with the consent of Ray, it could not be said that he acquired possession of it with the consent, express or implied, of Dominion Motors. As he put it, "Ray could not delegate statutory agency to Chartier."

[125] Mr. Boltz submits that Godsman, Snow and Martel are dispositive and should have foreclosed the finding of vicarious liability made in this case because there was no evidence from which it could be inferred that he gave express or implied consent to Dale to drive the vehicle.

[126] Tyson does not, and could not, take issue with these authorities. He acknowledges that, in an analysis that engages s. 86(1)(b) on its own, consent only goes so far as the owner (expressly or implicitly) gives it. In this case, unlike Godsman, Snow and Martel, Tyson's agency is said to spring from s. 86(1)(a), not 81(1)(b). The consent of the owner is not relevant where the person driving or operating the vehicle is living with, and as a member of the family of, the owner. The distinction is said to be critical for this reason: a borrower's agency relationship with the owner under s. 86(1)(b) terminates once the borrower exceeds the scope of the owner's consent, but an agency relationship under s. 86(1)(a) cannot be terminated in the same way, since the borrower remains a family member of the owner. And so, whereas Godsman lost the owner's consent when he lent it to Peck, Tyson's agency, derived through the "family branch", is enduring and could not be so terminated.

[127] As deemed agent of Mr. Boltz under s. 86(1)(a), Tyson submits that, while operating the vehicle, he could consent to anyone else driving it, and the person to whom his consent was given would thereby become Mr. Boltz's agent, without Mr. Boltz's consent. Tyson says there is no risk that an infinite chain of liability would arise by virtue of his construction of the provision. This is because only Tyson's consent (as a family member) would make Mr. Boltz liable for the conduct of a third-party driver. The third party (as a non-family member) could not bind Mr. Boltz by giving his consent to drive the vehicle to a fourth party, and so on. To work, Tyson acknowledges that the analysis he offers on appeal must flow through the combined operation of subsections (a) and (b) of s. 86(1).

[128] As I see it, there are insurmountable conceptual problems with the secondary agency theory Tyson advances on appeal. Chief among them is that subsections (a) and (b) are disjunctive, not conjunctive. The legislature chose to impose vicarious liability on the owner of the vehicle in two narrowly defined and distinct circumstances. This is reflected in the use of the word "or" between the two subsections. Subsection (a) imposes vicarious liability on the owner where the person driving or operating the vehicle when the loss is occasioned is living with, and as a member of the family of, the owner. Subsection (b) imposes vicarious liability where the owner entrusts his or her vehicle to a person other than a family member living with the owner: *Gonzy v. Lees*, [1941] S.C.R. 262 at 270; 1941 CanLII 28 (SCC) per Hudson J., addressing operation of the statutory predecessor to s. 86(1). The two provisions cannot be cobbled together in the way Tyson suggests without rewriting the legislation.

[129] Alternatively, it seems to me that Tyson's theory of vicarious liability would require us to read into subsection (b) the additional words italicized below:

- (b) acquired possession of the motor vehicle with the consent, express or implied, of the owner, or with the consent, express or implied, of a person deemed to be the agent of the owner by virtue of the application of subsection (a).

We cannot read words into the legislation that are not there.

[130] In addition to the conceptual barrier imposed by the structure of the provision, I consider Tyson's secondary agency to offend the language and intent of the provision because it contemplates a situation where the person deemed to be agent of the owner is not the tortfeasor. Section 86(1) plainly contemplates that the wrongdoer either fall within the family class or acquire possession of the vehicle with the consent, express or implied of the owner: see *Morrison* at para. 22; *Snow* at paras. 16, 20. Under Tyson's secondary agency theory, the wrongdoer could be far removed from the reach of subsections (a) or (b). As Professor Fridman notes in "The Doctrine of the "Family Car": A Study in Contrasts", (1976) 8 *Tex. Tech. L. Rev.* 323 at 340 [The Doctrine of the "Family Car": A Study in Contrasts], where vicarious liability is premised on the "family branch", Canadian courts have been quite insistent that the person driving or operating the vehicle be a member of the owner's family and living with the owner.

- [131] To accede to Tyson's position would also require us to conclude that s. 86(1) creates two different types of agency relationships: (1) the "family branch", which creates an enduring type of agency; and (2) the "consent branch", which is more limited in scope. I see nothing in the legislation to support this. In my view, the provision gives rise to a single type of agency that can arise in one of two ways. The wording of the legislation could not be clearer on this point.
- [132] Adoption of Tyson's approach would also create what I consider to be an arbitrary distinction between family members who give consent to a third party to drive the vehicle while driving or operating it themselves, and family members who give consent while they are not doing so. The vicarious liability of an owner would only be triggered when a family member drove or operated the vehicle for a time before turning it over to a third party who then caused an accident and consequent damage. On Tyson's theory, vicarious liability would not be triggered if the family member told the third party where to find the owner's keys or handed the third party the keys outside the vehicle, while conveying his or her consent to the third party's operation of the owner's vehicle. I can identify no rationale or policy reason that could possibly account for why the legislature would draw such a distinction.
- [133] In my view, Tyson's secondary agency theory also fails on policy grounds. It would make vehicle owners liable for the negligence of anyone given permission by the owner's family member to drive or operate the owner's vehicle, if consent was given while the family member was operating it. In my view, the theory entails a significant expansion of liability that goes beyond achievement of the policy objectives of the provision. As noted in the Law Reform Commission of British Columbia's Report on Vicarious Liability under the Vehicle Act, 1989, Report No. 106 at 10-11:

It is the owner who decides who will or will not operate his motor vehicle. He decides the nature and extent of the insurance that is to cover its operation. He is in a position to set down rules as to where, when and how it will be operated. This analysis, however, breaks down if the owner is not in a position to exercise effective supervision and control over the use of a motor vehicle. It is important, therefore, that the concept of ownership employed in subsection 79(1) [now subsection 86(1)] should embrace in some way the notion of effective supervision and control.

[Emphasis added.]

- [134] I note, as well, that an extension of the "family branch" in the way Tyson's theory would necessarily entail--by making the owner vicariously liable for the negligence of a person given consent to drive the vehicle not by the owner, but by the owner's family member--has been criticized by Professor Fridman in *The Doctrine of the "Family Car": A Study in Contrasts* as "harsh and unreasonable" (at 338-339, 358-359). It would essentially make owners involuntary insurers for drivers neither captured under the "family branch" nor operating the vehicle with the owner's express or implied consent. Tyson justifies this result emphasizing the remedial purposes of the legislation and the observation of Thackary J.A.

in Barreiro at para. 27, that although the provision "might well be at odds with traditional legal concepts of agency . . . that will not deny its validity." But there is nothing in Barreiro that justifies giving a construction to the provision that extends beyond the reasonable implications of the approach taken and language used by the legislature.

- [135] I also agree with the position of Mr. Boltz that, given the "theoretical link" between s. 86 and compulsory vehicle insurance, one would reasonably expect the categories of coverage to "map onto" the categories of vicarious liability to ensure that persons injured in motor vehicle accidents are properly compensated. This symmetry is currently reflected in s. 63(a)--(b) of Revised Regulation (1984) (B.C. Reg. 447/83) made under the IVA. The scope of indemnity for third-party liability is confined to the owner and individuals who, with the consent of the owner or while a member of the owner's household, use or operate the owner's vehicle. There is no additional category of third-party liability coverage in circumstances where a family member who takes possession of an owner's vehicle permits another person to operate the vehicle without the owner's express consent or any expectation on the owner's part that anyone outside their household would do so. As counsel for Mr. Boltz put it in his factum, "to make vehicle owners liable for drivers outside the established categories of risk would disrupt the insurance paradigm, because it would not enable underwriters to assess risk properly": see *Garrioch v. Sonnex Construction Ltd.*, 2017 ABCA 105 at para. 16.
- [136] Finally, we were not taken to any authority supporting Tyson's secondary agency theory of liability, and I have found no case in which s. 86(1)(a) has been interpreted to impose vicarious liability on a vehicle owner where the tortfeasor responsible for the plaintiff's loss was not living with, and as a member of, the vehicle owner's family. Those that have been brought to our attention do not support Tyson's position.
- [137] In *L'Heureux*, the husband took his wife's car without her permission and, after an evening of drinking, asked Eustache, an intoxicated friend, to drive him home. Predictably, an accident occurred while Eustache was driving. A claim the wife was vicariously liable for the loss was premised, as it is in this case, on the "family branch" (what is now s. 86(1)(a)), and on the consent of the husband, given as a family member, that Eustache could drive the vehicle (what is now s. 86(1)(b)). In disposing of the claim, Lamperson J. concluded (at para. 8), "it does not necessarily follow that such a finding [the deemed agency of the husband under the family branch] extends the owner's liability for torts committed by a third person who is driving the car." The judge considered *Godsman* to be dispositive of the point.
- [138] To similar effect is *Radawetz*, although the case is more obviously on all fours with the one at bar. In that case, 17-year-old Shantel, having borrowed her father's vehicle and operated it for a time, turned it over to her friend, Erickson, giving her permission to drive. While Erickson was driving the vehicle, an accident occurred that caused injury to the plaintiff, Radawetz. There was no evidence the father gave consent, express or implied, to Erickson to drive his vehicle. One of the issues was whether the father was vicariously liable for the plaintiff's loss. The case was decided under s. 181 of the Alberta Highway Traffic Act which,

like s. 86(1), tracks the same two ways in which a person driving the vehicle may, by operation of statute, become agent of the owner.

[139] An argument was made in Radawetz that the agency of the daughter (as a family member of the owner) was wide enough to include the authority to give permission to Erickson to drive, and to do so in such a way as to bind the father. That is the same argument Tyson advances in this case. It was rejected by Bielby J. for the following reasons:

25. The Fund does, however, argue that I should distinguish or refuse to follow current case law because of an argument not previously considered. It says that Shantel was Robert Carson's agent, pursuant to the provisions of s. 181(a) of the Act, and that the concept of this agency is wide enough to include the power to give permission to drive, which would bind her father.

...

27. The Fund argues that the use of the term "agent" in s. 181(a) of the Act to describe Shantel Carson must mean that she could therefore affect the registered owner's legal position with respect to strangers. It says that the only way this could happen is that Shantel could give consent to drive to strangers, which consent would then bind the registered owner.

28. The Carsons respond that the use of the term "agent" in this section should be interpreted only to mean that Shantel could affect the legal relationship between her father and his insurer, to the extent that her father and therefore her father's insurer would be bound by her negligence should she personally be involved in an accident. It means only that the father's insurance coverage would extend to Shantel even if she drove without her father's permission. They note that this section has invariably been interpreted in the past in this fashion.

29. I am not driven to conclude that the Fund's interpretation is the only one that can be given to the term "agent" to give it meaning under s. 181(a) of the Act. The traditional interpretation gives it meaning, to the effect that a driver living in a family with the owner of a vehicle can bind the owner and therefore his or her insurer even where driving without the owner's actual consent, i.e. that such a family member has the owner's "deemed" consent to drive at all times.

30. I therefore reject the Fund's argument that the only literal interpretation that may be given to the term "agent" is that Shantel, in giving permission to drive to Ms. Erickson, bound her father and his insurer for Ms. Erickson's negligence.

31. I cannot see that the fact Shantel was driving the vehicle immediately before she turned possession of it over to Ms. Erickson gives her powers to bind the owner which she would not otherwise have, also argued by the Fund. Nothing in the pattern of driving or loaning the vehicle elevates Shantel's "agency" to this level.

[Emphasis added.]

- [140] Tyson does not seek to distinguish Radawetz. Rather, he argues, as he must, that the case was wrongly decided. For the reasons previously given and those advanced by Bielby J., I do not agree.
- [141] Tyson suggests Barreiro is a case that illustrates the application of his secondary agency theory. At issue in Barreiro was whether a rental agency could be said to have given express consent to the operation of one of its vehicles where the agency's employee rented it to someone not yet 21 years of age, knowing this to be a violation of company policy. This Court concluded that the employee was authorized to rent vehicles to the public and execute agreements on the rental agency's behalf, and that the renter was operating the vehicle with the agency's express consent. In Barreiro, the employee was an agent not by virtue of s. 86, but through the application of common law agency principles. Barreiro simply does not engage the complex triangular agency relationship Tyson says arises in this case by virtue of the combined operation of subsections 86(1)(a) and (b). In my view, the case does not assist Tyson in the resolution of this appeal.
- [142] To be clear, I would reject Mr. Boltz's submission that Tyson did not consent to Dale driving as he did. To reiterate, Mr. Boltz says Tyson cannot successfully argue that Dale was his agent on the facts of this case because Dale's conduct exceeded the scope of any consent Tyson gave him to drive. The notion that Tyson's consent to Dale driving was restricted to a brief spin around the sheltered confines of his immediate neighbourhood lacks any air of reality given the duration of the joyride--approximately five hours--and the route the two apparently travelled.
- [143] I conclude, however, for the reasons aforesaid, that the consent given by Tyson for Dale to drive did not make Mr. Boltz vicariously liable for the loss caused by Dale's negligent acts.

VIII. Conclusion

[144] I would allow Mr. Boltz's cross appeal and vary the order as follows:

1. Paragraph 2 of the Order Below is struck out and in its place the following is substituted therefore: "The plaintiff's action against the defendant Roy Boltz be and is hereby dismissed";
2. Paragraph 3 of the Order Below is revised by adding the underlined words: "The plaintiff is entitled to recover from the defendant Dale Edward Bowe 60 per cent of his damage or loss";
3. Paragraph 4 of the Order Below is revised by adding the underlined words: "The defendant Dale Edward Bowe pay the plaintiff damages "; and
4. Paragraph 6 of the Order Below is revised by adding the underlined words: The plaintiff shall pay the defendant Roy Boltz his costs of the action, with costs otherwise to be agreed or determined by the court".

[145] In closing, I wish to express my indebtedness to counsel for the thorough way in which they presented the issues engaged by this appeal.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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