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CASE SUMMARY: BCCA DENIES CLAIM WHERE TEENAGED PLAINTIFF "OUGHT TO HAVE KNOWN" THAT VEHICLE WAS DRIVEN WITHOUT CONSENT

The phrase "knew or ought to have known" under s. 91 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 imports a purely objective standard. A reasonable person in the position of the 17-year-old plaintiff ought to have known that a vehicle driven by a 15-year-old was being driven without consent of the owner at the time of a motor vehicle accident, even if the plaintiff's age and experience were considered.

Insurance law – Automobile insurance – Uninsured motorist; Practice – Appeals

Schoenhalz v. Insurance Corp. of British Columbia, [2017] B.C.J. No. 1512, 2017 BCCA 289, British Columbia Court of Appeal, August 1, 2017, M.V. Newbury, M.E. Saunders and D.F. Tysoe JJ.A.

The 17-year-old plaintiff passenger sustained significant personal injuries as a result of a motor vehicle accident. The registered owner of the vehicle was the mother of the plaintiff's friend. The owner's son allowed another friend to drive the vehicle to a campground. After arrival, the owner's son left with another friend to collect firewood and the keys were handed to the plaintiff to take the vehicle to the store. The plaintiff, who had a driver's licence, allowed a 15-year-old to drive the vehicle because she did not know how to operate a standard transmission. The 15-year-old driver lost control of the vehicle, causing the accident.

In the underlying tort action, the trial judge concluded that the driver's negligence caused the accident. In another underlying proceeding, the plaintiff obtained a declaration that she could recover damages from ICBC pursuant to s. 20 (the uninsured motorist provision) of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 (the "Act"). In granting the declaration, the trial judge held that the stolen vehicle provision under s. 91 of the Act did not apply because ICBC had failed to prove that the plaintiff subjectively knew that the driver did not have permission to drive the vehicle. ICBC appealed.

The relevant portion of s. 91 of the Act read as follows:

91 (1) This section applies to a person who

(a) suffered bodily injury, death or loss of or damage to property that is caused by the use or operation of a vehicle, and

(b) at the time of the accident …was an operator of, or a passenger in or on, a vehicle that the person knew or ought to have known was being operated without the consent of the owner, and, in the case of a leased motor vehicle, the lessee.

At the Court of Appeal, ICBC argued that the trial judge ignored binding and conclusive findings of fact in the tort action which established that the plaintiff knew the driver did not have consent of the owner to drive the vehicle. In the alternative, ICBC argued that the trial judge erred by importing an element of subjectivity into the phrase “knew or ought to have known”. The appeal turned on the alternative question. After reviewing authorities from Canada and the United Kingdom, the court held the phrase imported a purely objective standard. The plaintiff contended that her age should be considered as part of the test. On the objective test, the court held that a reasonable person in the plaintiff’s position ought to have known that the vehicle was being driven without the owner’s consent. Even if one took the plaintiff’s age and experience into account, the court found that the test would still be met. ICBC’s appeal was allowed.

This case was digested by Michael J. Robinson and edited by Steven W. Abramson of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact them directly at mrobinson@harpergrey.com or sabramson@harpergrey.com or review their biographies at http://www.harpergrey.com.