Citation: Gallant v. Piccott & ors.
2001 PESCTD 52

Date: 20010528
Docket: GSC-16149
Registry: Charlottetown

PROVINCE OF PRINCE EDWARD ISLAND
IN THE SUPREME COURT - TRIAL DIVISION

BETWEEN:

JOHN ROBERT GALLANT

Plaintiff

AND:

STEPHEN ARTHUR PICCOTT, WALTER PICCOTT
CHEVROLET OLDSMOBILE CADILLAC LIMITED doing
business
under the firm name and style of CHOICE RENT- A- CAR and
GENERAL MOTORS ACCEPTANCE OF CANADA, LIMITED

Defendants

William F. Dow - Solicitor for Plaintiff
Barry R. Morrison, Q.C. -Solicitor for Defendants Stephen Arthur Piccott and Walter Piccott Chevrolet Oldsmobile Cadillac Limited
Patrick L. Aylward Solicitor for co-Defendant General Motors Acceptance Corporation of Canada

Before: The Honourable Justice David H. Jenkins

Place and date of hearing - Charlottetown, Prince Edward Island
December 18 and 19, 2000

Place and date of judgment - Charlottetown, Prince Edward Island
May 28, 2001

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Prince Edward Island Supreme Court - Trial Division
Before: Jenkins J.
Dates heard: December 18 and 19, 2000
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(15 pages)

NEGLIGENCE: automobiles - owner's liability - consent to possession - commercial relationship.

CONTRACTS: indemnification.

CASES CONSIDERED: ***Vancouver Motors U-Drive Ltd. v. Terry***, [1942] S.C.R. 391; ***Palsky v. Humphrey***, [1964] S.C.R. 580; ***M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.***, [1999] 1 S.C.R. 619; ***Canadian Pacific Hotels Ltd. v. Bank of Montreal***, [1987] 1 S.C.R. 711.

STATUTES CONSIDERED: ***Highway Traffic Act***, R.S.P.E.I. 1988, Cap. H-5, ss. 1(m.1) and 287; ***Insurance Act***, R.S.P.E.I. 1988, Cap. I-4.

TEXTS CONSIDERED: Waddams, ***The Law of Contracts*** (4th ed.).

William F. Dow - Solicitor for Plaintiff

Barry R. Morrison, Q.C. -Solicitor for Defendants Stephen Arthur Piccott and Walter Piccott Chevrolet Oldsmobile Cadillac Limited

Patrick L. Aylward Solicitor for co-Defendant General Motors Acceptance Corporation of Canada

Jenkins J.:

[1] The plaintiff brought an action against the defendants for personal injury damages arising from a single car collision. The motor vehicle involved was driven by Stephen Piccott and owned by General Motors Acceptance of Canada Limited ("GMAC") as legal owner and Walter Piccott Chevrolet Oldsmobile Cadillac Limited ("Piccott Limited") as lessee. The defendants settled with the plaintiff. There are two issues remaining for determination between the insurers for the defendants Piccott Limited and GMAC:

> (i) whether Stephen Piccott was driving the automobile with the consent, express or implied, of GMAC when he was involved in the collision; and
>
> (ii) whether Piccott Limited is required to indemnify GMAC so as to make GMAC whole regarding its obligations and expenses in connection with the plaintiff's claim.

[2] The vehicle operated by Stephen Piccott was part of the rental fleet of Piccott Limited. GMAC supplied all vehicles to Piccott Limited, and Piccott Limited used the product for new car sales, leasing, demonstrators, and rentals. The vehicles designated for rental were covered by the "GMAC Rental Plan Master Lease Agreement". Piccott Limited operated the rental business within the dealership and premises of Piccott Limited under the business name "Choice Rent-A-Car".

[3] At the time of the collision, Stephen Piccott was driving the vehicle with the consent of Piccott Limited.

[4] This case involves an unusual feature. The automobile involved in the accident had two owners. Under the Master Lease Agreement, GMAC was the legal or proprietary owner, and Piccott Limited was the lessee. In accordance with section 1(m.1) of the ***Highway Traffic Act***, R.S.P.E.I. 1988, Cap. H-5, they

were both owners. The registration states that the vehicle is owned by "General Motors Acceptance Co." with additional owner listed as "Choice Rent-A-Car/Walter Piccott".

Consent:

! *The law regarding consent*

[5] Section 287 of the ***Highway Traffic Act*** stipulates that in an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle upon a highway, every person driving the motor vehicle with the consent, express or implied, of the owner thereof shall be deemed to be the agent or servant of the owner of the motor vehicle and to be employed as such and shall be deemed to be driving the motor vehicle in the course of his employment. This enactment imposes liability on the owner of the motor vehicle involved in a collision, even where the owner is not present in the motor vehicle when the loss or damage occurs, in circumstances where another person is driving with the consent, express or implied, of the owner.

[6] In this jurisdiction, the party who asserts consent, in this case Piccott Limited, bears the onus of proving consent. The standard of proof is the balance of probabilities.

[7] Consent may be express or implied.

[8] While the determination of whether there was consent is a legal point, the duty of the Court being to construe a statutory provision: ***Vancouver Motors U-Drive Ltd. v. Terry***, [1942] S.C.R. 391 at p. 393, the determination of consent is mostly a question of fact. Cases on consent are very factually specific, and case precedents are accordingly of little or limited value.

[9] The Supreme Court of Canada has provided direction on the tests for consent. ***Vancouver Motors U-Drive Ltd. v. Terry***, supra, is the authority regarding express consent. The Supreme Court held that express consent was given, in that case within the meaning of the British Columbia legislation, when possession was acquired as a result of the free exercise of the owner's will. It was noted as impossible to conceive all the various circumstances that might give rise to the question to be determined. The Supreme Court also

qualified that the word "consent" may have different meanings in different statutes.

[10] For implied consent, the test has developed around the case of ***Palsky v. Humphrey***, [1964] S.C.R. 580. In that case, the Supreme Court approved a judicial approach which included this statement:

> It is my conception of the meaning of that statute that in dealing with the implied consent it means that one must approach the problem in a somewhat subjective fashion from the point of view of the person who was driving. That is to say whether under all the circumstances the person, who was driving, would have been justified in deeming that he had an implied consent to drive.

[11] The Supreme Court noted with approval the approach of the trial judge in that case of:

> ...putting to himself the question whether all the circumstances were such as would show that the person who was driving had the implied consent of the owner and, therefore, of course, whether he would have been justified in deeming that he had such consent. In fact, the learned trial judge did examine with very considerable detail all of the circumstances which go to show whether the driver, Harvie, had the implied consent of the owner, Humphrey, to drive the vehicle in question.

Further in assessing the trial judge's approach, the Supreme Court restated the conclusion of Porter J.A. as a proper inference drawn from the evidence proceeding on proper principles of law. Porter J.A. had considered the state of the driver's mind and his situation at the time when he borrowed the car, and then concluded that consent could be implied "because it is clear that had it been sought, it would have been granted as a matter of course".

[12] It seems quite clear to me, and I understand counsel agree, that the analysis in ***Palsky*** contemplates both a subjective consideration—of what the driver actually thought; and an objective consideration—of whether the driver was justified in deeming he had an implied consent from the owner to drive the automobile.

! *Background facts*

[13] I will first provide an overview of the scenario, and then deal with specifically relevant circumstances in the discussion consent.

[14] Piccott Limited was a General Motors automobile and light truck dealer since 1985. The business involved selling, leasing, repairing, and renting vehicles. Walter Piccott, the principal of Piccott Limited, acquired the dealership and accumulated ownership thereof with the assistance of General Motors. At the start, General Motors, through its subsidiary General Motors Holdings, held most of the shares of Piccott Limited; and over time Walter Piccott took over the position of Motors Holdings. On the date of the collision, December 19, 1996, Motors Holdings still owned 41% of Piccott Limited, and its nominees occupied two of the three seats on the Board of Directors of Piccott Limited.

[15] On December 19, 1996, Walter Piccott was President and Stephen Piccott was Sales Manager of Piccott Limited. Piccott Limited traded only in General Motors product and ran a comprehensive dealership operation. All new units came into stock under the Wholesale Floor Plan. Units which Piccott Limited would rent through Choice Rent-A-Car would be designated and come under the GMAC Rental Plan Master Lease Agreement. Units that would be designated for use by sales personnel and other staff as demonstrators would come under the GMAC Wholesale Demonstration Plan Agreement.

[16] Stephen Piccott had been sales manager since early 1995. As sales manager, he ran the new car department and was responsible for inventory, ordering, day-to-day supervision, completing all deals, and coordinating everything in the new car department.

[17] According to Walter Piccott, there was not a lot for Walter or Stephen to do regarding the Choice Rent-A-Car operation. Stephen was in charge of inventory, and the Company had a manager in the rent-a-car operation. Walter Piccott stated:

> We really didn’t have a lot to do other than Stephen was involved with the inventory. I was involved also with certain parts of it, but the day-to-day operation, we weren’t directly involved with renting cars, but certainly the selling of them and arranging the rentals, and, just part of the operation that we were always available if we were needed. But we

> sort of oversaw the operations as the day went on.

[18] Stephen Piccott, sales manager, and about 20 other Piccott Limited employees, each had the unrestricted use of a current year model vehicle. Employees would drive these vehicles for business use, and they would enjoy them for their personal use as an employee perk that was subject to income tax treatment. Turnover on demonstrators would occur in a matter of months and on low mileage consistent with the business and with profitability.

[19] Rental vehicles would be rented to the public on daily and short-term rentals (long-term leasing being yet another separate plan). Rental vehicles would be returned to stock for sale as used units sometime between four months and one year, usually at about six months, depending on mileage, profitability and other dealer considerations.

[20] Vehicles were covered by different payment and value write-down plans and different insurance coverage depending on their status as new, used, leased, demo, or rental vehicles.

[21] The GMAC Rental Plan Master Lease Agreement contained a specific provision about vehicle use:

> 1. VEHICLE USE: Vehicles leased will be used by Lessee only for daily rental to third parties under Rental Agreements in such form as GMAC may approve from time to time.

[22] In conjunction with the rental business it was obviously necessary for employees of Piccott Limited to drive rental vehicles, sometimes on public highways, for the purpose of carrying on the rental business. Such incidental use included cleaning, gassing, repairing, delivering, picking up vehicles, picking up customers.

[23] Stephen Piccott testified regarding how he came to be in possession of the vehicle on the occasion when the collision occurred. Piccott Limited had been invited to a customer appreciation function at a local establishment, and Stephen Piccott was contacted to go to it. The Company patronized that establishment two or three times a year for its staff, and so was invited to a customer appreciation night. Stephen Piccott invited the plaintiff, who was his friend, along with two other men who were there representing the dealership,

to accompany him. After working all day, they went out at about 7 p.m. At about 11 p.m., they went to another local establishment for a brief period. About 12:40 a.m., while they were leaving the second establishment to go for bite to eat, the collision occurred in the parking lot.

[24] Stephen Piccott had come into possession of the Chevrolet Lumina vehicle a couple of days prior to the collision. He was driving it because he did not have his own demo available. He testified that he normally always has a demo. He could not remember exactly why he was not driving his demo that particular night, although he contemplated that being the sales manager he was usually the first person who customers with a service problem with a new vehicle would look to, so that usually his was the first vehicle to go. So Stephen Piccott's supposition was that it was either a customer request, or a breakdown, or possibly he might not have had a demo because there were times when his demo would be sold and it would take a week or two to gear up a new one. His practice was to just go to whatever car on the lot had "a plate and gas and some insurance on it". In accordance with past practice of Piccott Limited, Stephen Piccott, and Company sales and other personnel, he took a Choice Rent-A-Car vehicle. In his words, he did this without hesitation, with no worries at all, and with 100% confidence that he was driving it with the full consent of both Piccott Limited and GMAC. Stephen Piccott considered himself fully aware that GMAC was the main owner and Piccott Limited was the lessee. Since he was normally the one who made the pertinent transactions happen, he stated: "I had absolutely no worries at all in my head that there wouldn't have been any insurance. I mean -- none whatsoever".

[25] On cross-examination, Stephen Piccott's use of the vehicle that evening was clarified as personal use, albeit for attendance at a customer appreciation night, and as a substitute for his demo car:

> Q: Mr. Piccott, on the night that this accident occurred, the Chev Lumina was being used for personal use. Correct? Your personal use.
>
> A.: I was using the vehicle for personal use, yes, but I'm a car salesman 24 hours a day whenever I'm away, but yes, I was using it for personal use at that time.
>
> Q.: And in saying that it wasn't to see a specific customer, or to lease it, or to pick it up, or to drop it off, or to service it, or to gas it. You were using it as if it were your demo.

> A.: Well, I don't know if I was using it as if it was my demo, but I was certainly using it. I was at a personal function, the customer appreciation night. I was there representing the company, and was it personal use? Yes, but I could have sold that car that night. I could have rented it that night; I could have done a lot of things with it that night.
>
> Q.: But in the end, had you had your demo you would have been using it. You were using the Choice because you didn't have a demo, or it wasn't available to you.
>
> A.: Yes.

! *Express consent*

[26] In essence, Piccott Limited urges a finding of express consent based on the Master Lease Agreement being capable of two readings and the adoption of the reading in keeping with commercial reality. GMAC urges that the Master Lease Agreement provision is clear, and consideration of parole evidence is precluded.

[27] I find there was no express consent from GMAC to Piccott Limited or to Stephen Piccott for Stephen Piccott to drive the vehicle on the occasion when the collision occurred.

[28] The language of the Master Lease Agreement does not contain a provision which expressly permits that use of the vehicle. The Agreement language regarding vehicle use is opposite to that conclusion. The Agreement stipulates that vehicles leased will be used by the lessee only for daily rental to third parties. The use of the vehicle when it left the Piccott Limited lot on the evening of December 19, 1996 is not an incidental use necessary to the operation of the rental business.

[29] There is no evidence of express consent having been given by GMAC or received by Piccott Limited or Stephen Piccott either for use of the vehicle that evening, or for the kind of use for which the vehicle was employed that evening.

[30] I do not accept the submission of Piccott Limited that the contract be

judicially rewritten to import a term of consent.

[31] As a matter of law, a term of reality or necessity can be judicially imported into a commercial contract, and evidence can be admitted to obtain an appreciation of the genesis and aim of the transaction. In ***M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.***, [1999] 1 S.C.R. 619, at paragraphs 27 and 30, the Supreme Court approved the principle stated in its earlier judgment, ***Canadian Pacific Hotels Ltd. v. Bank of Montreal***, [1987] 1 S.C.R. 711, that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed". The circumstances of this case come closest to the third category. In that regard, the Supreme Court in ***M.J.B. Enterprises***, supra, employed the approach of reviewing the contract documents and the testimony about the commercial circumstances of the transaction and derived an indication based on what the Court held were the "presumed intentions of the parties" to find "an implied obligation" on the contracting party.

[32] Waddams, ***The Law of Contracts*** (4th ed.) at pp. 231-235, reinforces that courts will consider the context in commercial transactions. It obviously serves a useful purpose for the parties, society, that an agreement freely made be enforced in accordance with the purposes of contract law. While the true meaning of words can be determined simply by perusing a document and outside evidence is not admissible or only admissible on a case of ambiguity, it is to be recognized that words do not have immutable or absolute meaning, but take their meaning from their context. Courts will look at the genesis and aim of the transaction. The meaning of words sometimes cannot be determined by studying documents and dictionaries, but only by hearing full evidence of the context in which the words were used and the likely meaning they would have had to the business person who uses them. A court will depart from the literal meaning of words to avoid an absurdity, in light of all the surrounding circumstances. A contract springs naturally from the notion that the law of contracts exists to protect reasonable expectations.

[33] In the present case, the Master Lease Agreement is a standard form contract prepared by GMAC. It is obvious that vehicles must be driven by the

Lessee incidental to the operation of the rental business. Evidence of necessary uses is admissible to determine the presumed intention of the parties. On considering that evidence, I do not find that the impugned use was a necessary use, and I would not import a corresponding term into the Agreement.

[34] Regarding the *contra proferentum* submission, there is no ambiguity.

[35] There was no written agreement, and no oral representation, conferring consent. I find there was no express consent.

! *Implied consent*

[36] It is still necessary to consider whether there was implied consent.

[37] Implied consent could be found, not as an implied term of the contract, but notwithstanding or despite the specific provisions of the contract. It is essential that this distinction be understood and maintained for consideration of this analysis.

[38] Two hurdles must be passed for a finding of implied consent—the subjective consideration and the objective consideration.

[39] I have no difficulty regarding the subjective consideration, of determining what the driver actually thought. I accept Stephen Piccott's evidence. It appears both honest and reliable, and it is corroborated by the evidence of the general understanding of Walter Piccott, which represents the corporate expectation of Piccott Limited. As to the point of view of the person driving, Stephen Piccott thought he had the owners' consent.

[40] The second consideration is an objective consideration of whether Stephen Piccott was justified in deeming that he had an implied consent to drive from the owner GMAC. This consideration becomes the critical and deciding issue in this case.

[41] I have put to myself the question whether all the circumstances were such as would show that the driver Stephen Piccott had the implied consent of the owner GMAC, and therefore whether he would have been justified in deeming that he had such consent. I have examined with considerable detail

all the circumstances which go to show whether there was implied consent.

[42] Following the direction in ***Palsky v. Humphrey***, the finding regarding implied consent is determined primarily from the driver's perspective. ***Palsky v. Humphrey*** does not intend to disregard the owner, and a trial court is directed to consider all of the circumstances, including past practise and the relationship between the parties, in determining objective justification.

[43] I am satisfied on the balance of probabilities that a reasonable person in the position of Stephen Piccott would have believed that he had GMAC's consent when he took the vehicle from the Piccott Limited lot on December 19, 1996. The test lies in the facts and circumstances under which Stephen Piccott obtained and had possession. I have considered and weighed everything that could have impacted on his state of mind—his knowledge, position, beliefs, past practise within the relationship between Piccott Limited and GMAC and its parent General Motors. Acknowledging that the circumstances of this case make the objective consideration of implied consent an arguable issue, in all the circumstances it seems to me that Stephen Piccott's view of the situation and his conclusion that he had the implied consent of the owner GMAC are objectively reasonable.

[44] Operation of the Choice Rent-A-Car business involved commercial realities. Regarding the rental vehicles, GMAC retained ownership, Piccott Limited had possession under the Master Lease Agreement, and rented vehicles to customers under the Rental Agreement; and rental vehicles were legally separate but physically present on the Piccott Limited dealership location, where all phases of the automotive business occurred, including new and used sales, leasing, rental, repairs, and service.

[45] Consideration of the issue of implied consent does not involve the admission of parole evidence to determine the meaning of the language used in section 1 of the Master Lease Agreement. The Agreement says what it says. The evidence of the circumstances is admitted and considered to determine whether there was implied consent. The Agreement is one factor, a highly significant factor, which expressly states: "vehicles leased will be used by lessee only for daily rental to third parties...". The other circumstances need to be evaluated in this context.

[46] GMAC acknowledged that it is necessary for lessees, including Piccott Limited, to use judgment in the operation of the rental business under the Master Lease Agreement. Joel Marshall acknowledged that it is necessary to infer regarding maintenance and read in regarding other incidental uses to accommodate the end use for the customer. According to GMAC, this requires the use of good judgment. Under this perspective, Mr. Joel Marshall acknowledged that rental vehicles would be used by Piccott Limited employees for gassing, cleaning, maintenance, repairs, picking up and dropping off customers. Mr. Marshall acknowledged it as legitimate, though technically not permitted, for the lessee to drive a rental vehicle to an auction in Halifax for sale. He stated that the present case has changed the practice, and his present view is that if a rental vehicle is off the lot except on rental to a customer, that is a violation of the Master Lease Agreement.

[47] Stephen Piccott's intended use of the vehicle on the evening of the collision was outside the scope of these incidental uses. It was not a use necessary to accommodate the needs of an end use rental customer. But neither was such use unrelated to the Piccott Limited car businesses. While the use was relatively personal, and viewed as substantially personal, considering everything it was within the overall mosaic of the Piccott Limited business. First, according to Piccott Limited witnesses, whose viewpoint was corroborated by the owner of an Amherst, Nova Scotia GM dealership and not seriously disputed by GMAC, the rental business is a necessary customer service, and one that is not in and of itself profitable for the dealership. The rental business produces late model used units for the sales lot. It is at the point of sale where the opportunity for profit occurs. The vehicle Stephen Piccott borrowed had been a rental unit for just over seven months, and was then available for transfer from the dealer daily rental plan to into used car sales. Second, car salesmen view themselves as on duty, or at least in the hunt, at all times, "*24/7*" in the industry jargon. Third, according to the evidence the absolute truth of the automotive business is the customers need to see a unit before they will decide to buy it, and so as a corollary there is an advertising advantage and increased potential for sale if a unit available for sale can be seen as readily available. Fourth, as far as Piccott Limited and Stephen Piccott were concerned, the Company was a GM dealer through and through, and the business of the dealership was seamless. It was as well a family business, which was being pursued directly or indirectly most of the time, and the lines were substantially invisible, both as between personal and business, and as

between categories under which the dealership had possession of a vehicle.

[48] In all these circumstances, it made good sense to Stephen Piccott to use a rental car for his stated purpose on the evening of December 19th. To the Piccotts these considerations didn't matter. Piccotts management would take a vehicle that made the most business sense. Both Walter Piccott and Stephen Piccott thought they were always covered with insurance of some kind.

[49] The use of GMAC rental vehicles by Piccott management was commonplace, and open and obvious. Piccott Limited had an excellent relationship with GMAC officials. No complaint was ever heard from anyone at GMAC. While the evidence does not make it conclusive that GMAC was aware of all the Piccott Limited use of the vehicles, such use, and uses appearing more purely personal, was customary, extensive, and open and notorious. Both Walter and Stephen Piccott took rental vehicles to Florida. On one occasion, during an audit Walter Piccott's wife had a rental vehicle home in her driveway and the vehicle was accounted for without GMAC reaction. On occasion, when General Motors' nominees on the Piccott Limited Board of Directors, who were members of GMAC's sister subsidiary General Motors Holdings, would come to town, at least one, Eric Butler, would be provided with a rental car for his local transportation needs. All of these activities occurred without rental agreements, without knowledge by Piccott Limited of it ever being off-side, and openly in the face of GMAC audits which occurred two or three times a year, or more.

[50] It is neither the purpose nor the intention of this judgment to advise what ancillary uses should be permitted as between GMAC and lessees. That is a matter to be determined by them within their commercial relationship. It is noteworthy though that this is not a situation of a lessee abusing or flouting the perceived or anticipated arrangements between manufacturer and dealer. Stephen Piccott usually had a demo. He did not have a rental vehicle instead of a demo. It was his practise to have a demo vehicle; he just did not have it available at that time. It was common occurrence in the Piccott dealership for sales staff to lose their demo vehicles to temporary customer use and to sales.

[51] It is easy to understand why sales staff, especially the sales manager, would need a vehicle from the lot to drive in the interim, and how rental vehicles seemed to them to quite readily fill the bill. It is as well noteworthy

that the complexion of the dealership was very much of GM design. The reasonableness of this viewpoint is corroborated, more or less, by various factors:

! The Piccott Limited use of rental vehicles was employed by another GM dealership, Bordertown Pontiac of Amherst, Nova Scotia. Piccott Limited did not prove it was aware of this practice; however, that is not the point here. The Bordertown evidence demonstrates that at least one other substantial Maritime GM dealership which operated a Choice Rent-A-Car business openly employed the impugned use of a rental vehicle and considered it ordinary practice.

! The GMAC Wholesale Demonstration Plan, like the GMAC Rental Plan Master Lease Agreement, is a GM standard form agreement which dealers are required to sign. The Demonstration Agreement appears as an example of an agreement honoured in the breach. The Demonstration Agreement applies to a new unit that is removed from stock to be a demonstrator assigned to an employee of the dealership. The standard language of this Agreement states: “I (we) request the privilege of unrestricted use **in company business** of the following described motor vehicle, ...”. As a matter of fact, the right of employees to use demo vehicles is unrestricted, period. It is intended that the demo be an employee perk, and include personal use. Indeed, personal use is assessed for income tax purposes. That was the understanding of Piccott Limited as to the way it is set up. That appears to have been the understanding of GMAC too. Joel Marshall of GMAC testified:

> Q: Why is there a demonstrator plan? Yeah, why does GMAC use a demonstrator plan? What’s the benefit to it?
>
> A: Basically it’s a demonstrator agreement for, on your wholesale plan. If you are using vehicles for an extended purpose for a single individual it basically -- because the vehicle is being abnormally depreciated, we code it differently in our internal system, and thus collect monthly reductions on it because you’re actually depreciating the vehicle abnormally. There’s more kilometres going on it, and General Motors is at risk if we do not get these reductions because if a dealer should happen to go into conversion, i.e. start to go out of business, General Motors will only buy back cars on a liquidating dealer

up to 500 km. So we get the demonstrator agreement filled out on demonstrators to get that monthly reduction to hopefully offset the amount of kilometres going on a vehicle over an extended period of time.

Q: If rental vehicles could be used for personal use, unrestricted use, what need would you have for the demonstrator agreement?

A: You wouldn't have one. But the plans are totally different. They're totally different usages; they're totally different insurances. You know, once you put a vehicle into demo service, the actual insurance that you pay on it goes up, I think it's eight times the actual amount of insurance than it's just sitting on your lot. That's one of the reasons why GMAC is so fanatical about getting that form filled out, that our asset is now in jeopardy and being abnormally depreciated.

The Court: Which form?

A: The form 135, the demo agreement -- that if rental vehicles are going to be used for personal use there would be no need for demo agreements.

I infer from this evidence that GMAC was aware that demo vehicles were used for personal use. This is notwithstanding the clear and straightforward language of the Demonstration Agreement that use of a demo vehicle is a privilege to be exercised in company business.

! In the months after the collision, GMAC did or said nothing. Silence is not in this case necessarily an acknowledgment. However, viewed in context with all the incidents, credence is gained for the suggestion that GMAC did not see it as an issue until it became an insurance matter. At least, it was reasonable for Piccott Limited to have that perception. Following the collision, Walter Piccott reported to Bill Primeau, the Branch Manager of GMAC in Halifax. Walter Piccott was left with the impression that both men felt "we" should find out exactly where we stood and what the real problem was and try to get it straightened out as quickly as possible. GMAC made no clarifying directive over the ensuing months. After the collision, Stephen Piccott reported to the Choice Rent-A-Car insurer, Signa. To his recollection, no issue was raised with him either. The first indication to Stephen Piccott of a problem was months later when the Sheriff served legal papers. Later on

> again, and long after the collision, William O'Farrell of Bordertown Pontiac heard about it. In July, 1999, 2-1/2 years after the fact, O'Farrell raised the matter with GMAC. At that time, he was informed informally that the practice was offside. Prior to July, 1999, William O'Farrell was never aware that he would not have been covered by insurance when he used a rental vehicle from his Choice Rent-A-Car agency for uses similar to the use employed by Stephen Piccott on the night of the collision.

[52] One can easily appreciate that from GMAC's perspective, the commercial arrangements between manufacturer and dealer seemed quite clear. The Rental Plan Master Lease Agreement is clear on its terms. Vehicles are put into categories upon which appropriate financial charges are applied. The Demonstration Agreement addresses the need of a sales manager for quasi-personal use. The intended audit practice is that units are either on the lot or rented. Different insurance arrangements are employed based on vehicle category. Express consent was not sought for the impugned kind of use, either generally or on this particular occasion.

[53] The question though, for objective consideration, is whether the driver, Stephen Piccott, was justified in deeming that he had an implied consent to drive from the owner, GMAC. As mentioned, the test lies in the facts and circumstances under which Stephen Piccott obtained possession. Upon considering all the circumstances, including the various agreements limiting use, the inter-relationships within the business enterprises of Piccott Limited's GM dealership, the various practises of GMAC, Piccott Limited, and Stephen Piccott, Stephen Piccott's knowledge that he had the consent of Piccott Limited, the acquiescence or at least tacit tolerance of GM and its subsidiaries including GMAC, and the particular circumstances of Stephen Piccott's impugned use of the rental vehicle both on the evening of the accident and during the preceding couple of days, I am satisfied on a balance of probabilities that a reasonable person in the position of Stephen Piccott would have believed he had GMAC's consent at the time when he took the rental vehicle on the evening of December 19th. Having considered everything that could have impacted on Stephen Piccott's state of mind, I find that his view of the situation is objectively reasonable.

[54] It seems to me that the kind of use to which Stephen Piccott put the rental vehicle may have been something that fell through the cracks. Dealers

obviously knew they could use the vehicles for uses incidental to the end objective of daily rentals. Piccott Limited treated its dealership as one comprehensive business operation. GMAC may well not have realized the specific kind of impugned use was occurring. The test in ***Palsky*** invokes owner responsibility in situations where it is objectively reasonable for the driver of the vehicle to imply consent even in the absence of the owner being aware that the driver is making that implication. It is the driver who makes the decision, to imply that the owner consents. The driver does not address it with the owner, in which event the owner would either expressly grant or deny consent. The statutory definition allows a court to sustain what the driver has implied where the court finds as a fact that the driver subjectively made the implication, and then assesses the implication as being justified or objectively reasonable in the driver's situation upon consideration of all the relevant circumstances.

[55] I do not think this is a case for consideration of an inference like that drawn by Porter J.A. in ***Palsky*** as to whether "because it is clear that had it been sought, it would have been granted as a matter of course". This case shows how that judicial question does not always fit with the overall test. The question of implied consent is asked from the point of view of the driver, as to whether he was justified in all the circumstances in deeming that he had such consent. The owner participated in setting forth the circumstances in which the driver formulated his conclusion. Once the main test in ***Palsky*** is applied on the facts of this present case, the question posed by Porter J.A. in ***Palsky*** is unnecessary and inapplicable in the circumstances.

[56] I find there was implied consent.

Indemnification:

[57] The Master Lease Agreement contains the following indemnification provision:

> 16. <u>INDEMNIFICATION:</u> The Lessee agrees to assume liability for, and does hereby agree to indemnify, protect, save and hold harmless GMAC and its respective successors, assigns, legal employees, agents and servants from and against any and all liabilities, obligations, losses, damages, injuries, demands, fees and operating expenses (as described in Section 6 hereof), penalties (including those described in Section 7 hereof), claims (including, without limitation, claims involving strict or

> absolute liability), actions, suits, costs, expenses and disbursements (including, without limitation, legal fees and claims of any kind and nature whatsoever which may be imposed on, incurred or asserted against GMAC or such persons in any way relating to or arising out of this Master Lease Agreement, or the manufacture, purchase acceptance, rejection, ownership, delivery, lease, possession, use, operation, maintenance, condition, registration, sale, return, storage or other disposition of any Vehicle, provided, however, that no indemnification under this Section 16 shall be payable in connection with a GMAC loss which is covered in part under Continental Insurance Company of Canada (reference Section 4(a) hereof). Any indemnification under this Section 16 (or any payment under Section 6 or Section 7, hereof) shall be in an amount sufficient to make GMAC whole on an after tax basis.

[58] Despite the exhausting length of Section 16, its interpretation and application seem quite straightforward. Section 16 obliges Piccott Limited to indemnify GMAC for losses other than those covered by GMAC's insurance provided under Section 4. Stephen Piccott was driving the vehicle with the implied consent of the owner GMAC. The plaintiff's claim in this action is "a GMAC loss". Counsel stipulated the replacement policy which is in place for the stated policy of insurance has the same terms. The claim being covered by the proviso, no indemnification would be payable under that contractual provision.

[59] Section 254(1) of the ***Insurance Act***, R.S.P.E.I. 1988, Cap. I-4, makes insurance under a contract evidenced by a valid owner's policy respecting liability arising from ownership a first loss insurance, and insurance attaching under any other valid motor vehicle liability policy excess insurance only.

[60] Regarding the Garage Personnel Exclusion, I do not accept GMAC's submission that it applies for the benefit of GMAC in this case. It is contained in the S.P.F. No. 1 Standard Automobile Policy. It does not affect this situation. It would be entertained regarding insurance on Piccott Limited and its employees vis-a-vis customers' insurers, but not regarding the owner GMAC. GMAC was the proprietary or registered owner, and so the exception to the exclusion applies.

[61] Counsel advised that the extent to which the indemnification provision remains in issue depends on the outcome of the foregoing issues. There being no requirement for indemnification, I anticipate that there is no further issue.

Costs:

[62] Counsel requested that costs be left for further submissions. Should counsel wish to address outstanding matters regarding either costs or indemnification, they should advise the Court within the next 30 days.

May 28, 2001 ______________________________
Justice David H. Jenkins