



## Employer liability for the negligent operation of a motor vehicle

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Any employer with a company-owned vehicle will be familiar with the common law notion of “vicarious liability” — the tort doctrine that imposes responsibility upon one person for the failure of another, with whom the person has a special relationship, to exercise such care as a reasonably prudent person would use under similar circumstances. In the case of employee-use of a company vehicle, vicarious liability imposes on the employer liability for the negligent acts of its employee-driver.

What may surprise employers is that under provincial highway traffic legislation, vicarious liability may extend to an employee’s negligent acts inside and outside the course of employment, even when the act of operating the vehicle is contrary to the employer’s express instructions.

The precise statutory language varies among the provinces and territories. However, the purpose of the respective legislation, public protection, remains consistent across Canada, with most statutes imposing liability where an employer has given an employee “consent to possess” the vehicle. It is the concept of consent that might shock employers.

The following two cases, one from Alberta and the other from Ontario, provide examples of scenarios in which, despite an employer’s express instruction the employee not drive a company-vehicle, the employer was held vicariously liable for an accident that ensued as a result of the employee’s negligence. These decisions, and the prevailing law they reflect, should cause employers pause to reconsider when and how possession of a company-owned vehicle is and should be given to an employee.

### ***Mustafi v. All-Pitch Roofing***

On Christmas Eve 2007, at a roofing site in Calgary, Marc Carroll was given the keys to a company-owned vehicle parked at the site. Carroll had been told by his employer, All-Pitch Roofing, not to drive the vehicle, but to use it only as a source of tools and supplies and to keep warm as necessary. All-Pitch even went so far as to tell Carroll if he moved the vehicle it would be considered stolen. Contrary to these instructions, Carroll drove the vehicle on a personal errand and was involved in an accident caused by his negligence.

The issue before the court was whether All-Pitch was vicariously liable for Carroll’s negligence under the Alberta Traffic Safety Act, RSA 2000 c T-6, which imposes liability on an owner/employer where at the time that the loss or damage occurred, [a person] was driving the motor vehicle and was in possession of the motor vehicle with the consent, expressed or implied, of the owner of that motor vehicle.

The trial judge found in favour of All-Pitch, but the decision was overturned by the Alberta Court of Appeal. The key issue was whether Carroll had been given consent to possess the vehicle. All-Pitch denied liability on the basis Carroll had possession for a limited purpose only; and that by driving the vehicle he did so without consent. The majority of the court disagreed with All-Pitch. Reiterating the public interest purpose of the legislation, and applying a strict interpretation of the term possession, the court held that giving Carroll keys to the vehicle for any purpose was tantamount to giving him possession for every purpose.

### ***Case v. Coseco Insurance***

Similar to Alberta's highway traffic legislation, Ontario's Highway Traffic Act imposes liability on the owner/employer for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle, unless the motor vehicle was without the owner's consent in the possession of some person other than the owner.

The employer, McCluskey Transportation Services, provided bus services for children to and from school. One employee, Punch (first name not disclosed), together with other bus drivers employed by McCluskey, was permitted to travel to and from work using her assigned bus, but not for any other purpose. She had even signed an acknowledgement confirming this restriction.

Despite this clear prohibition, Punch drove her bus after hours, ran a stop light and caused an accident. At trial, McCluskey denied liability on the basis the vehicle was being operated without its consent. The court did not agree. Citing numerous decisions in which liability was assigned to the vehicle owner despite restrictions on its use, the Ontario court held that Punch had the consent contemplated under the act:

“The policy underlying the vicarious liability of the owner for the operation of his vehicle ... is that the owner of the vehicle has the obligation to protect the public by managing the risk of the vehicle's operation,” the court said.

### **Tips for employers**

When legislation is remedial, designed to protect innocent members of the public hurt by the negligent acts of others, courts will go to great lengths to assign liability. In the case of an employee who, while in possession of a company-owned vehicle, injures another, liability will almost invariably extend to the employer. Even where the act of operating the vehicle is in direct defiance of the employer's instructions, liability is likely to ensue.

What, then, is an employer to do to minimize the risk of vicarious liability for the negligent and even unlawful acts of its employees in possession of a motor vehicle? The answer will vary depending on the nature of the employer's operations. However, employers are encouraged to consider the following options and best practices:

- Unless absolutely necessary, do not give possession of a vehicle to an employee.
- Where it is necessary that tools or supplies be mobile, consider storing them in a location other than a vehicle requiring a key to access.

- Where it is necessary for an employee to access a vehicle, but not operate the vehicle, employ a protocol by which keys are returned to a supervisor immediately after use.
- Where it is necessary for an employee to operate a vehicle, conduct an appropriate (and regular) background check on the employee's driving record.
- Where it is necessary for an employee to operate a vehicle, any restriction on use should be clear, acknowledged in writing by the employee, and enforced consistently by the employer. Written acknowledgement may not eliminate employer-liability, but it may act to deter employees from engaging in the prohibited behaviour in the first place.
- Ensure the company's liability insurance coverage is sufficient to address an instance in which an employee causes an accident or injury while in possession of a company-owned vehicle.

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