

The Foreseeability of Theft: When Lack of Consent Isn't Sufficient for Motor Vehicle Owners

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Section 192(2) of the *Highway Traffic Act* holds owners of a motor vehicle liable for loss caused by a driver unless the vehicle is taken without the owner's consent. That caveat is responsible for a complex and highly nuanced area of law surrounding what constitutes an owner's consent. A recent decision in [Dove/Cao v. Thomas et al.](#), 2025 ONSC 2802 both expanded the responsibility of owners in Ontario and provides a new warning to any who may be considering summary judgement.

Background

On March 23, 2018, an intoxicated 41-year-old Robert Thomas went into the living room of his brother's house and observed his father, Floyd Thomas, fast asleep on a Chesterfield. Robert grabbed his father's car keys from a hook on the door and took his 2012 Dodge Ram 1500 for a remarkably brief joyride; Robert accelerated in a straight line and crashed into a passing school bus within seconds of leaving the driveway.

Floyd brought a summary judgement motion on the basis that he did not provide any express or implied consent to Robert to possess the vehicle. "Possession" is an operative term here, as it is well-established that consent under s. 192(2) refers to consent to merely possess a vehicle rather than the more restrictive consent to operate a vehicle (see [Seegmiller v. Langer](#), 2008 CanLii 53138 (Sup. Ct.)).

Express consent is easy: did the owner explicitly authorize the possession of the vehicle? Implied consent is where most legal battles are fought. The law underpinning implied consent is, at its core, a reasonableness analysis. The question was set out by the Supreme Court of Canada in [Palsky v. Humphry](#) 1964 CanLii 96 and further contextualized by Justice Perell in [Conners v. D'Angelo](#):

"In determining whether there was implied consent, the question for the Court was whether all the circumstances were such that they showed that the person who was driving had the implied

consent of the owner to possess the vehicle and that they showed that the driver was justified in thinking he or she had such consent.”

If the owner, through permissive action or omission of punishment, gave the driver a reasonable impression that they could possess the vehicle, then implied consent is likely to be found. The connection to fundamental negligence law can be emphasized by phrasing the analysis from the owner’s perspective: where it is reasonably foreseeable to the owner that their behaviour gave an impression of consent, implied consent will likely be established.

Consent Factors in the *Dove/Cao* Decisions

Motor vehicle consent cases typically involve wayward adolescents with ambiguous rules around whether or when they are permitted to use their parents’ vehicles. *Dove/Cao v. Thomas* was unusually unique in the sense that Robert was a mature adult with an unusual relationship with his father. Justice Mirza identified that Robert was somewhat estranged from Floyd and that he had virtually no involvement whatsoever with the truck prior to taking it. The following factors were considered instructive:

- Robert had never been given permission to drive the vehicle before.
- He had never taken the vehicle or its keys ever before.
- He never asked for permission to take the vehicle at any time.
- Robert knew he was not permitted to take the truck but did it anyway.
- Floyd called the police once he saw that the truck was gone.
- For Floyd’s past vehicles, Robert would always ask for permission from Floyd.

However, Justice Mirza also noted that Robert struggled with long-standing addiction issues, that Floyd left his keys accessible to others in the house, and that Floyd’s other son Dean warned Floyd to be careful with his belongings because of concerns about Robert stealing money.

Floyd argued that Robert’s express knowledge that he was stealing the vehicle was a determinative factor. He also argued that there was no past course of conduct that could possibly give Robert the impression that he would have implied consent to take the vehicle. From Floyd’s perspective, it was not reasonably foreseeable that Robert would believe he would have consent.

Justice Mirza agreed, finding that there was no implied consent from Floyd to Robert. However, he declined to dismiss the case against Floyd on the basis that the theft by Robert may have been reasonably foreseeable notwithstanding the lack of implied consent. In other words, the lack of consent was not enough; it may still be possible that Floyd ought to have foreseen the theft.

A Dramatic Shift in Implied Consent Case Law

Where motor vehicle consent law has typically incorporated foreseeability as the underpinning legal principle within the implied consent analysis, Justice Mirza’s decision appears to bifurcate

general negligence from implied consent and mandate a separate analysis of these formerly cohesive and necessarily linked concepts.

Justice Mirza held that to find a breach of a duty in general negligence, there must be some circumstance or evidence to suggest that a person in the position of Floyd ought to have reasonably foreseen the theft. But remarkably, Justice Mirza did not find that any such evidence existed or was presented by the respondents at the summary judgement motion. He appeared satisfied with the possibility that it *may* exist and may possibly be adduced via *viva voce* evidence at a trial.

Meanwhile, some might say paradoxically, he appeared to explicitly find that it was not reasonably foreseeable that Floyd's keys would be stolen:

"[112] ... A parent with a drug or alcohol addicted adult child, that does not live with them, but visits their child occasionally to provide support and supervision on request, cannot be held to an unreasonable standard in having to always secure their car keys from their child, because of the possibility that their child may steal their car. Stated differently, a parent should not be held to an unreasonable standard especially when there is a history of proper supervision. Error by a parent on a single occasion, even if cautioned or reminded by a relative, is not implied consent..."

The decision therefore stands as a marked departure from existing case law. In [*Myers-Gordon v. Martin*](#) 2013 ONSC 5441 for example, another seminal case on MVA consent, the car keys were also left on a hook inside the door of the house. However, Justice Kent granted the summary judgement motion and dismissed the claims against the owner. No analysis of possible non-vicarious liability was undertaken notwithstanding the fact that it was even more foreseeable that the driver would take the vehicle because, unlike in Robert's case, they had already taken it without consent on prior occasions. It is entirely possible Myers-Gordon would have a different result in the post-*Dove/Cao* era.

Dove/Cao v. Thomas serves as a cautionary tale to vehicle owners that definitive success on implied consent is no longer a guarantee of dismissal for a motor vehicle action. A lack of consent may not be enough. MVA litigants will inevitably follow the treatment of this decision closely in the coming years to see the extent to which access to summary judgement for motor vehicle owners is curtailed by this novel distinction between implied consent and negligence *simpliciter*.

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