

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**WAYNE MAURICE ELLEZE**

**Plaintiff**

**-and-**

**BRENT NORN, LESLIE NORN, LESLIE NORN operating as LES NORN  
CONTRACTING, JOHN DOE, XYZ CORPORATION and ROYAL &  
SUNALLIANCE INSURANCE COMPANY OF CANADA**

**Defendants**

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Decision regarding vicarious liability of a vehicle owner pursuant to s. 271(3) of  
the *Motor Vehicles Act*, R.S.N.W.T. 1988, c.M-16

Heard at Hay River: September 23 to 26, 2019

Written Reasons filed: January 20, 2020

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**REASONS FOR JUDGMENT OF THE  
HONOURABLE JUSTICE V.A. SCHULER**

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Leslie Norn and Leslie Norn operating  
as

Les Norn Contracting

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**REASONS FOR JUDGMENT**

**A. Introduction**

[1] Sometime around 4:00 a.m. on October 15, 2006, as he walked home from a house party on the Hay River Reserve, the Plaintiff, Wayne Elleze, was hit by a 1997 Ford F250 truck ("the F250"), as a result of which he suffered life-changing injuries. I will refer to those circumstances as "the accident". There is no dispute that the F250 was driven at the time by Brent Norn ("Brent"), who was intoxicated. There is also no dispute that the F250 was owned by Leslie Norn ("Les"), the father of Brent. I will sometimes refer to the Norns, including David Norn, Brent's brother, by their first names to avoid confusion.

[2] The main issue at trial was whether Brent was driving with the consent of Les and whether Les is accordingly vicariously liable for Brent's negligence pursuant to s. 271 of the *Motor Vehicles Act*, R.S.N.W.T. 1988, c. M-16.

#### B. The Parties and their positions

[3] The Plaintiff is represented by counsel and takes the position that Les consented to Brent driving the F250.

[4] The Defendant Royal & Sun Alliance ("RSA") is represented by counsel and also takes the position that Les consented to Brent driving the F250. RSA is the insurer on a SEF 44 endorsement to a homeowner's policy, from which the Plaintiff seeks recourse if Les Norn is not found to be vicariously liable.

[5] The Defendants Leslie Norn and Leslie Norn operating as Les Norn Contracting are represented by counsel; they take the position that Les did not consent to Brent driving the F250.

[6] The Defendant Brent Norn is not and has not been represented by counsel. He was noted in default in this action. He was examined for discovery by the Plaintiff and was called as a witness at trial by the Defendant Les Norn.

[7] Counsel were able to settle the quantum of damages and so I need not deal with that issue in this decision.

#### C. Summary of background and undisputed facts

[8] Les Norn is married to Edith Norn. They are the parents of David and Brent. In October of 2006, David was living with his parents in a house on the highway at one end of the Hay River Reserve ("the Reserve"). Brent had his own house, some 12 kilometres away, at the other end of the Reserve, where he lived with his girlfriend, Tina Bruha, and their young daughter. David and Brent were adults at the time of the accident.

[9] Les operated a sole proprietorship under the name "Les Norn Contracting". At the time of the accident, Brent was employed by Les in that business. The business engaged mainly in waste and sewage disposal. It performed work on the Reserve and also in the Town of Hay River. The F250 owned by Les was used in that business.

[10] David was not employed with Les Norn Contracting at the time of the accident.

[11] A day or two before the accident occurred, Les had left the Reserve to go to Edmonton to pick up Edith, who had been away. He was contacted by phone after the accident occurred, and was told what had happened and he and Edith returned to the Reserve.

[12] At the time of the accident Brent, the driver of the F250, did not have a driver's licence, only a learner's permit. One of the conditions of his learner's permit was that he drive only when accompanied by a licensed driver. David was a licensed driver, however Tina Bruha was not.

#### D. The issues

[13] The central issue is whether Les Norn, as the owner of the vehicle that caused the accident, is vicariously liable for the damages suffered by the Plaintiff. Because Brent was his employee at the time of the accident, resolution of that issue depends on whether Les has met the burden imposed on him by s. 271(3) of the *Motor Vehicles Act* of proving that he did not consent to Brent driving the F250.

[14] The Plaintiff also submitted that an adverse inference should be drawn because of Les Norn's failure to call Tina Bruha as a witness at trial. A third issue raised by the Plaintiff is whether Les Norn should be found liable pursuant to s. 272 of the *Motor Vehicles Act*.

#### E. Legal Framework

[15] As I have noted, the central issue in this case is whether Les Norn, as the owner of the F250, is vicariously liable for the damages suffered by Mr. Elleze. Section 271 of the *Motor Vehicles Act* governs the issue of vicarious liability and provides as follows:

271(1) Subject to subsection (2), the owner of a vehicle is liable for damages for injury, loss or damage to persons or property caused by the negligence or improper conduct of the driver of the vehicle in the operation of the vehicle on a highway and the driver is liable to the same extent as the owner.

(2) The owner of a vehicle is not liable under subsection (1) if at the time the vehicle caused the damage, the vehicle was being operated by a person without the consent of the owner.

(3) For the purposes of subsection (2), the driver of a vehicle shall be presumed to be operating the vehicle with the consent of the owner of the vehicle where the driver is

- (a) living with and is a member of the family of the owner, or
- (b) an employee or agent of the owner,

unless the owner can prove that the driver was, at the time of the accident, operating the vehicle without his or her consent.

[16] Section 271 does not appear to have been the subject of judicial interpretation. Only Nunavut has a similar statutory provision and counsel were not able to find any jurisprudence relating to it. The relevant statutes in other provinces and the Yukon are quite different and base liability on the consent of the owner of the vehicle to the driver having possession of the vehicle, rather than consent to the driver operating the vehicle (for example, s. 187(2)(b) of Alberta's *Traffic Safety Act*, R.S.A. 2000, c. T-6, referring to a person in possession of a motor vehicle with the consent, express or implied, of the owner).

[17] In this case, because Brent was employed by Les at the time of the accident, s. 271(3) applies such that the onus is on Les to prove that he did not consent to Brent operating the F250 at that time. Normally in a civil trial, the plaintiff bears the onus of proof. A provision that puts the onus on the defendant is sometimes referred to as creating a "reverse onus" or "rebuttable presumption": *Bradford v. Snyder*, 2016 ABCA 94, at para. [17], dealing with s. 186 of the *Traffic Safety Act*, R.S.A. 2000, c. T-6.

[18] In *Bradford*, the Court said of the rebuttable presumption created by s. 186 of Alberta's *Traffic Safety Act*, that it remains until the end of the case and does not shift back to the plaintiff. By analogy, in this case, the presumption in 271(3) of the *Motor Vehicles Act* that Les consented to Brent operating the F250 remains until the end of the case. If, at the end of the case, the evidence shows that Les consented, or the evidence is too meagre or too evenly balanced to determine whether he consented, the presumption will not be rebutted: *Bradford*, para. [21].

[19] A party with the onus of rebutting a statutory presumption must prove the existence or non-existence of the presumed fact to a balance of probabilities: *Humphreys v. Trebilcock*, 2017 ABCA 116.

[20] The credibility of the evidence relied on to rebut the presumption is important, as stated in *Hickman Motors Ltd. v. O'Leary*, 1979 CarswellNfld 85 at para 29, dealing with a statutory presumption that the driver of a motor vehicle is in possession of that vehicle with the owner's consent, where it was said that the presumption remains "... until dislodged by credible evidence to the contrary, such evidence being established either by a preponderance of evidence or on the balance of probabilities. Once the identity of the owner is proved by the Plaintiff the onus shifts to the Defendant owner to establish by credible evidence that he did not consent to the driver operating his vehicle. ..."

[21] Counsel for Les Norn does not dispute that the onus is on his client to prove that he did not consent. However, he submitted that s. 271 should be given a restrictive meaning because of the specific wording of subsections (2) and (3). Subsection (2), which is the general exemption from liability where the owner has not consented, focuses on consent to operation "at the time the vehicle caused the damage" and subsection (3), containing the rebuttable presumption, focuses on consent to operation "at the time of the accident". Les Norn's argument is that the Court must consider whether he consented, either expressly or impliedly, to Brent driving the F250 specifically at the time of the accident and that the plaintiff must show that the facts of the case bear on consent at that time.

[22] The modern approach to statutory interpretation was set out by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 at para. [21]:

Today there is only one principle or approach, namely the words of an act are to 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 Parliament.

[23] *Rizzo & Rizzo* is an Ontario case and in deciding that the statute at issue was remedial legislation, the Supreme Court relied in part on provisions of Ontario's *Interpretation Act*, R.S.O. 1990, c. I.11, that refer to the remedial nature of legislation. Similarly, in *Mugford v. Kodiak Construction Ltd.*, 2004 ABCA 145, Wittmann J.A., in examining the purpose of s. 181 of Alberta's *Highway Traffic Act*, R.S.A. 1980, c. H-7, which dealt with the vicarious liability of motor vehicle owners, found that the modern principle of statutory interpretation set out in *Rizzo* was buttressed by s. 10 of Alberta's *Interpretation Act*, R.S.A. 1980, c. I-7, s. 10, which provides that an enactment is to be construed as being remedial.

[24] Until recently, the *Interpretation Act* of the Northwest Territories also had a provision almost identical to that of Alberta. Section 10 provided as follows (*Interpretation Act*, R.S.N.W.T. 1988, c. I-8):

10. Every enactment shall be construed as being remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[25] That version of s. 10 was replaced and repealed by SI-006-2017, which came into force on October 31, 2017. It provides:

10. An enactment shall be interpreted as applying to circumstances as they arise.

(s. 10, *Interpretation Act*, S.N.W.T. 2017, c. 19)

[26] Although the current version of the Northwest Territories' *Interpretation Act* does not retain the substance of the former s. 10 anywhere, s. 271 of the *Motor Vehicles Act* must be considered remedial legislation. In *Mugford*, at paragraph [29], Wittmann J.A. found that in conjunction with mandatory insurance requirements for owners of motor vehicles, the purpose of s. 181 of Alberta's *Highway Traffic Act*, which then governed owner liability, was public protection. He confirmed the public policy considerations described by Moshansky J. in *Austin v. Omand* (2002), 316 A.R. 252 (Q.B.), at 262:

The public policy considerations are related to the creation of mandatory insurance requirements for owners which meant that, under the legislation, injured parties would be able to more readily recover damages from motor vehicle accidents. ... The legislation was intended to hold owners responsible for the use of their motor vehicles in order to make owners more careful about who they let use their vehicles.

[27] The same goal of public protection and its relevance to the vicarious liability of vehicle owners was stated by the Ontario Court of Appeal in *Finlayson v. GMAC Leasco Ltd.*, 2007 ONCA 557 in dealing with owner liability under what was then s. 192(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8. That section dealt with the owner's consent to possession of a vehicle. The Court said at para. [20]:

... s. 192(1) is intended to protect the public by imposing, on the owner of a motor vehicle, responsibility for the careful management of the vehicle. Possession is one of the rights of ownership. An owner has the right to give possession of the vehicle to another. But, s. 192(1) encourages owners to be careful when

exercising that right by placing legal responsibility on them for loss to others caused by the negligent operation of the vehicle on a highway.

[28] Although the wording of s. 271 of the *Motor Vehicles Act* is unique, it should be obvious that its purpose is the same as described by Wittmann J.A. in relation to s. 181 of Alberta's *Highway Traffic Act* and by Gillese J.A. in *Finlayson* in relation to s. 192(1) of Ontario's *Highway Traffic Act*. Although the Northwest Territories' *Interpretation Act* no longer contains a provision that enactments are to be considered remedial and so we do not have that with which to buttress the *Rizzo* principle of interpretation, there is no reason why such a provision should be necessary. Mandatory insurance requirements exist in the Northwest Territories (s. 36, *Motor Vehicles Act*) and the public policy considerations that were outlined in *Mugford* and in *Finlayson* are every bit as compelling in this jurisdiction as in Alberta and Ontario. I conclude that s. 271 must be considered as remedial and it should be given as wide an interpretation as required to meet that purpose.

[29] Since the general rule is that an owner is liable for the negligent operation of his or her vehicle, the "non-consent" exception in the legislation should be construed narrowly, in keeping with the remedial purpose of the legislation: *Hefferan v. Hefferan*, 2008 NLSCTD 18 at para. [18]. This is particularly so when a presumption of consent applies, as here, under s.271(3) of the *Motor Vehicles Act*.

[30] Les Norn also submits that ss. 144 and 156 of the *Insurance Act*, R.S.N.W.T. 1988, c. I-4, are significant because they create a source of recovery from the mandatory liability insurance imposed by s. 36 on every vehicle registered in the Northwest Territories, regardless of consent, up to the minimum limit of \$200,000.00. Les Norn submits that in considering the purpose and intent of s. 271 of the *Motor Vehicles Act*, one must also consider that an injured plaintiff who may not be able to recover from an owner would have access to that statutory minimum limit, which would be paid by the owner's insurer even if there is no consent by the owner to the driver operating the vehicle. He submits that this reflects a legislative intention to achieve a balance between providing sources of financial recovery for injured persons, and the right of an owner to rebut the presumption that he or she consented to the driver operating the vehicle under the circumstances.

[31] I do not find merit in that argument. In my view, balancing the interests referred to risks watering down the public protection purpose of s. 271. The essence of public protection is to make owners of motor vehicles more careful about allowing others to use their vehicles. The fact that an injured party may seek



a limited recovery in the absence of being able to fully recover from an owner is irrelevant to the goal of making vehicle owners more careful about who they allow to operate their vehicles. I find support for this view in the following statement by Ryan J.A. in *Cormier v. David R. Gillard Ltd. et al.* (2000), 191 D.L.R. (4th) 507 (N.B.C.A.) at [512]:

... one cannot make possession conditional so that the conditions negate the protection of members of the public even though other avenues of recourse may be open to them. Private or secret arrangements must not prevail in favour of tortfeasors or the vehicle owners against innocent parties when trust by the person giving possession turns out to have been misplaced.

[32] The passage from *Cormier* deals with possession and conditions attached to it, however the point is that the principle of public protection is not served by an approach which does not give priority to the responsibility of vehicle owners, even if a plaintiff has other avenues of recourse. An owner's right to show that he or she did not consent to the driver operating the vehicle is a completely separate issue from that of the remedial purpose of the legislation.

[33] The next issue is the "ordinary sense" or ordinary meaning of the words "at the time of the accident" in the phrase, "unless the owner can prove that the driver was, at the time of the accident, operating the vehicle without his or her consent" in ss. 271(3). Les Norn argues that those words are restrictive, requiring that the Court determine whether the consent of the owner existed at the exact time of the accident and whether it was consent to the circumstances of the driver's operation of the vehicle at that time.

[34] In *Pharmascience Inc. v. Binet*, 2006 SCC 48, the Supreme Court of Canada stated that the weight to be given to the ordinary meaning of words varies enormously depending on their context and the purpose of the legislation is relevant. It adopted the principle that, most often, "ordinary meaning" refers "to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context" (para. [30] of *Pharmascience*, referring to R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 21).

[35] In arguing that the ordinary meaning of the words at issue compels a restrictive approach, Les Norn relies on the reasoning in *Canadian Forest Products Ltd. v. British Columbia*, 2009 BCSC 1040. The issue in that case was whether a government policy that allowed for the retroactive application of a redetermined stumpage rate on lumber conflicted with the legislation under which the government was acting. Specifically, the issue was whether the reference in the

applicable statute to "when the lumber is scaled" as the time for application of the rate permitted retroactive application. The Court held, based on a number of factors, that the proper interpretation was that the application of the rate was prospective. A subsequently redetermined stumpage rate did not qualify as a stumpage rate applicable "when the lumber is scaled" as the retroactive application of the rate could not be reconciled with the use of the present tense in the wording of the statute.

[36] Along with the "ordinary sense" principle in *Rizzo* and the "ordinary meaning" definition in *Pharmascience*, the Court in *Canadian Forest Products* considered s. 7(2) of British Columbia's *Interpretation Act*, R.S.B.C. 1996, c. 238. Section 7(2) provides that, "If a provision in an enactment is expressed in the present tense, the provision applies to the circumstances as they arise". The Court found that the statutory provision's reference to "the rate of stumpage applicable to the timber ... when the timber is scaled" was intended to apply to circumstances as they arise, and not retroactively.

[37] It must be noted that s. 10 of the Northwest Territories' *Interpretation Act* is slightly different, in that it provides that an enactment shall be interpreted as applying to circumstances as they arise, but does not tie that to an enactment "expressed in the present tense". Even so, I doubt that s. 10 has any relevance to the issue in this case. The issue is not whether consent operates retroactively or prospectively. It is simply whether the driver, at the time of the accident, was operating the vehicle with the consent of the owner.

[38] Although I agree with the finding in *Canadian Forest Products* that "when" means "at the time that", the case does not really assist on the interpretation of s. 271(3). It seems to me that the reference in s. 271(3) to "at the time of the accident", using the ordinary meaning of those words, can include both a precise moment in time and a wider span of time, depending on the circumstances. The time of the accident is simply the beginning reference point. The question is whether the driver who was operating the vehicle at the time of the accident had the consent of the owner to do so. Consent can be express or implied and in either case it may be given in a general rather than a specific way. For example, the owner of a vehicle may say to another person, "You may drive my vehicle whenever you want", and never withdraw or change that statement. That would be interpreted as consent no matter if the driver operates the vehicle on an occasion that occurs a significant time after the consent is given.

[39] I do not interpret s. 271(3) as meaning that the question to ask is whether Les Norn specifically consented to Brent driving the F250 home from a party while

intoxicated, or whether he consented to him driving while intoxicated. To put the question that way would run afoul of the rule that owner-imposed conditions as to the manner of driving do not vitiate consent as against an injured plaintiff: *Mugford; Garrioch v. Sonex Construction Ltd.*, 2017 ABCA 105. Nor do I agree with the position taken by counsel for Les Norn that if past instances of Les consenting to Brent driving the F250 are to be considered, the circumstances of those past instances must be the same or similar to the circumstances at the time of the accident. While comparison of the circumstances may be a factor to consider, similarity is not necessary. Much will depend on the specific facts of the case.

[40] I bear in mind that the legislation of other jurisdictions is based on the concept of possession, rather than operation, of a motor vehicle. I have reviewed the legislation and the cases referred to by counsel, but will not mention all of them. I take note of the distinction that possession is a question of law, while operation is a question of fact: *Finlayson*. However, on the view I take of the facts in this case, I do not find the distinction between possession and operation to be significant. Section 271(3) is clear that the issue is whether Brent had the consent of Les to operate the F250.

[41] Les Norn concedes that consent may be express or implied. The concept of express consent is clear; it is consent that is expressly given. With regard to implied consent, the following definition appears in the majority definition of *Garrioch*, in relation to consent to possession, but is helpful on the issue of consent to operation (at para. [54]):

(b) Implied consent is a question of fact, requiring that an inference be drawn from all of the circumstances, including such things as the knowledge or expectation of the owner about subsequent transfers of possession, the relationship between the parties, any past pattern of conduct, any express prohibition on transferring possession, and any other relevant fact ...

[42] *Garrioch* emphasizes that all of the circumstances must be considered.

[43] The decision in *Michaud-Shields v. Gough*, 2018 ONSC 4977 (Ont. S.C.J.), an Ontario case referred to by counsel for Les Norn, is also helpful on implied consent. The legislation at issue in that case referred to possession, however the remarks on consent are also relevant to the concept of operation, as distinct from the concept of possession:

27 Consent connotes permission, or acquiescence. In my view, in the context of s. 192(2) of the *Highway Traffic Act*, consent means permission or authorization

to "possess" the vehicle. It is a positive conferral of the right to possess the vehicle understanding that the vehicle may be driven. ...

28 No doubt permission to use the vehicle need not be express. If there is a general understanding that someone is allowed to use the vehicle, there need not be "express" permission to find liability in a particular case. However, to import a notion of liability on the basis of a lack of appropriate diligence to prevent use is to take the meaning of consent much too far. ...

[44] A case discussed in much of the jurisprudence is *Palsky v. Humphrey*, [1964] S.C.R. 580, in which the Supreme Court of Canada upheld the test for implied consent used by the trial judge. In his decision, the trial judge had posed the question, "... whether under all of the circumstances the person, who was driving, would have been justified in deeming that he had an implied consent to drive". The Supreme Court held that the trial judge's statement had been interpreted too narrowly by the appeal court and that, "What the learned trial judge was doing was 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 the circumstances which go to show whether the driver Harvie had the implied consent of the owner Humphrey to drive the vehicle in question".

[45] I conclude from the foregoing that the test is not a subjective one; the circumstances are not to be viewed solely from the point of view of the driver. That was the view of the majority of the Alberta Court of Appeal in *Garrioch*, where it referred to *Palsky* as in large part a case about the deference owed to the findings of fact of the trial judge and at [27] said that the ruling in *Palsky* "... implicitly confirms that the subjective state of mind of the driver is not the test, although if the driver, objectively, might have thought from all of the circumstances that he had consent, that is a relevant part of the overall context".

[46] In *Garrioch*, the majority also said at [54] that the question of the owner's express or implied consent cannot be subjectively resolved by the owner with hindsight, and a negative answer to a hypothetical question put to the owner at trial of whether consent would have been granted at the time of the accident is not conclusive.

[47] I note as well that after reviewing *Palsky* and other cases, the Court in *Newell v. Towns*, 2008 CarswellNS 292 at [121] came to the conclusion that "any

claimed subjective belief by the driver and the owner are but two of the circumstances that ought to be considered by the trier of fact in deciding whether there was implied consent. The Court must examine all of the circumstances, including the individual characteristics of the owner in coming to a determination on the issue of implied consent".

[48] The law is also clear that where there is consent, express or implied, by a vehicle owner for someone to drive that vehicle, that consent cannot be conditional; I have referred to that in paragraph [39] above. There are many cases that deal with that principle, however I will refer only to the decisions of the Alberta Court of Appeal on that point, since those decisions are most persuasive for the Northwest Territories. In *Mugford*, the Court was dealing with an employee driver who was permitted to drive his employer's vehicle at work, but had signed an agreement to the effect that he would not use it for personal use. He breached the agreement and an accident occurred. The Court held that s. 181 of Alberta's *Highway Traffic Act* did not permit conditional consent and that conditional consent would narrowly interpret the provision and its effect would operate contrary to its remedial object.

[49] Section 181 required the vehicle owner's consent to both possession of the vehicle and driving it. By the time *Mustafi v. All-Pitch Roofing Ltd.*, 2014 ABCA 265 was decided, the legislation had changed and s. 187(2) of the *Traffic Safety Act*, R.S.A. 2000, c. T-6 required consent of the vehicle owner only for possession for there to be liability. The majority of the Court of Appeal in *Mustafi* held that to interpret s. 187 so as to enforce against the injured plaintiff any conditions imposed on possession would be contrary to the remedial object of the legislation and would not give effect to its purposes, that is protection of innocent third parties seeking compensation for injuries suffered at the hands of negligent drivers.

[50] Later, in *Garrioch*, the Court made it clear again that consent to possession cannot be granted on conditions, such as conditions respecting the manner of driving or the occasions on which driving is consented to and that such conditions cannot be asserted against an injured plaintiff. The only exception to the principle that consent cannot be granted on conditions is, the Court said, that an owner can consent to someone else having possession of the vehicle on the condition that possession will not be passed on to third parties or classes of third parties.

[51] It bears repeating that the cases referred to deal with possession of a motor vehicle. Section 271 of the Northwest Territories' *Motor Vehicles Act* deals with operation of a motor vehicle. As a general proposition, it seems to me there is no reason why a vehicle owner should be allowed to attach conditions as to the

manner of driving when allowing another driver to operate the owner's vehicle and assert those conditions against a third party injured by that driver. That would not encourage owners to be careful in letting others operate their vehicles. Conditions as to the occasions on which driving is consented to may be another matter, depending on how wide or narrow the consent that is given and the knowledge possessed by the owner.

#### F. Findings of fact and credibility

[52] For purposes of setting out my findings of fact, it is convenient to categorize the evidence according to the main areas referred to by counsel in their submissions.

##### (i) Credibility

[53] I have considered carefully the credibility of all the witnesses, including the reliability of their testimony. I will refer to credibility issues as I make findings on the evidence, but I will first deal with a specific credibility issue.

[54] I have significant concerns about the general credibility of Les Norn. He admitted to having problems with his memory and frequently answered questions about events or circumstances in the past with the response that he does not remember. He attributed his memory problems to a number of factors: the passage of time between the accident in 2006 and the trial in 2019; his age, 67 years old; health problems; he was hit in the head with a baseball bat as a young boy. On several occasions during his testimony, he said that he could not remember if certain things had happened, but that they might have. He presented as a stubborn individual who was reluctant to admit or explain anything that might show him in a bad light. In his evidence, he took the broad position that he never consented to Brent driving the F250, a position which conflicted with the evidence of Brent, his own witness. I take all this into account in assessing his evidence.

[55] I also take into account that all of the witnesses were testifying about events that occurred 13 years ago. Because of that, it is not surprising that witnesses did not always remember precise details of events.

##### (ii) Rules for the use of the F250

[56] The F250 was owned by Les Norn. He, David and Brent all testified that Les had certain rules about others using that truck. Those rules were that whoever wanted to use the truck was to get permission from Les first and they were not to

drink and drive with the truck. Les also testified that if he was not available, permission was to be sought from Edith.

[57] Edith Norn described the rules a little differently. She testified that others were to use the F250 only if Les gave them the keys and that David and Brent were to park the truck if they were drinking.

[58] I accept as a fact that the family members understood that they were to ask Les before using the F250. Since the F250 was his work truck, it makes sense that he would want to be asked so as not to be in a situation where the truck was not available for work. However, how strict Les was about being asked, and to what extent he enforced any rules, is another issue. I will deal with that further on.

[59] Les testified that he had been sober for 31 years and I accept that he was concerned about the fact that his sons drank. He said that in 2006, he was aware that both David and Brent had a drinking problem, although David's was not as bad as Brent's. I accept that he did not want them drinking and driving. Again, however, the evidence raises questions as to whether he did anything to stop them from drinking and driving the F250.

(iii) Who other than Brent used the F250

[60] Les testified that he purchased the F250 about three years before the accident and used it mainly for work. In July of 2006, he purchased another truck for himself, which he used for pleasure, keeping the F250 for work.

[61] Les employed Brent in his business. Les also hired other employees from time to time, particularly drivers for his vehicles, which along with the F250 included a bobcat and a backhoe. He testified that he hired such employees when he could afford it.

[62] Edith Norn testified that she may have driven the F250, but that since she had her own vehicle, it would rarely have happened.

[63] David also used the F250, although he had his own vehicle. He was not, and had never been, employed by Les at the time of the accident. Les testified that David used the F250 to pick up things for Les. He also said that David had to give Les a reason why he wanted to use the F250, which suggests that David also used it for his own personal business, since he did not work for Les. Both Les and David testified that at the time of the accident, David's own truck may not have been available because it was being repaired or, according to David, he may not

have had insurance. However, neither could say how long David's truck was unavailable to him. This is significant because there was evidence that the F250 was observed parked overnight at Brent's home from time to time. I will return to this aspect of the evidence.

(iv) Brent's use of the F250 before the accident

[64] Brent did not have a driver's licence, only a learner's permit. It appears from his evidence that he had tried to obtain a licence, but was unsuccessful. One of the conditions of the learner's permit was that he have a licensed driver with him when operating a vehicle.

[65] April Martel, George Bughhins and Wayne Elleze all testified in the Plaintiff's case and said that they had seen Brent driving the F250 on the Reserve prior to the accident.

[66] At the time of the accident, Ms. Martel was working as a security officer on the Reserve and had held that position since 2004. Her duties included watching for and stopping persons identified to her as unlicensed or who might be impaired, and reporting any instances of concern to the R.C.M.P.

[67] The reports that Ms. Martel and her colleague George Bughhins received from other people are hearsay and I do not use them as evidence of Brent's driving or anything he did. The evidence of those reports just explain why Ms. Martel and Mr. Bughhins paid particular attention to certain individuals.

[68] Ms. Martel testified that both David and Brent Norn were on her list of drivers to watch for. She testified that she saw Brent weekly, sometimes driving the F250 alone and sometimes with a passenger. It was not unusual for her to see the F250 parked at Brent's house overnight. She saw him drive it to or from the Reserve store many times, alone or with his girlfriend Tina; she also saw him drive it in the Town of Hay River and to Sandy Creek. She testified that she sometimes stopped Brent as she understood that he did not have a licence. She discussed Brent's driving with Les, who was on the Band Council. She said his response was that he would speak to the Chief and Council and that she and Mr. Bughhins should mind their own business.

[69] Ms. Martel said that she discussed Brent's driving with Les a week or two before the accident and he became angry that she was raising the issue again. When she voiced her intention to speak with the Band's CEO about it, Les told her to go ahead.



[70] Ms. Martel acknowledged that it has been 13 years since she last saw the logbooks she kept as a security officer in which she would have recorded her observations. She was terminated from her position not long after the accident, after a Band meeting at which, she said, she was blamed for not having prevented the accident. Counsel for Les Norn challenged her memory, and submitted that she may have confused Brent with David, whom she said she also saw driving the F250 on many occasions. Counsel submitted that she confused the two brothers on the night of the accident, when she referred to seeing Brent with the F250 at the Reserve store; he also emphasized the evidence that when Ms. Martel spoke to Corporal Parker shortly after the accident, she told him that David was driving the F250.

[71] As far as Ms. Martel's evidence about seeing Brent at the store on the night of the accident, my understanding of her evidence is that she was likely referring to seeing the F250 on the road passing by the store just before the accident occurred, that is, when Brent was driving it after leaving the party. I also think that Ms. Martel's explanation that she was in shock after coming upon the accident scene is a reasonable explanation for her confusing the brothers that night. She testified that she had known them for many years and could distinguish between them, identifying different builds and other characteristics. Her evidence about seeing Brent driving the F250 on the Reserve is corroborated by other witnesses, including Brent himself.

[72] Counsel for Les Norn also submitted that Ms. Martel has a motive to lie or exaggerate because of the termination of her employment by the Band Council, of which Les Norn was a member. However, I got the impression from Ms. Martel's testimony that she was more frustrated at Les dismissing her reports about Brent's driving, than angry about losing her position. Nor do I find any reason to doubt her credibility on the basis, argued by counsel, that since she had been elected as the Chief of the Band in November 2018, before the trial, she should have been able to produce the logbooks she kept in 2006. There is no evidence before the Court as to whether those logbooks still exist; Ms. Martel testified that she had given them to the Band's CEO when she left her position as a security officer.

[73] George Bughins was also a security officer on the Reserve. He testified that he saw Brent drive the F250 "pretty regularly" and also saw it parked during the day at Brent's house. He said that he also saw David Norn and Tina Bruha drive it. Like Ms. Martel, he testified that he was able to distinguish between Brent and David.

[74] Mr. Bughhins testified that approximately three weeks before the accident, he stopped Brent, who was driving the F250 at the time. He observed Brent to be intoxicated and called Les, who told Mr. Bughhins that he would deal with it. Mr. Bughhins also testified that a couple of weeks before the accident, he saw Brent driving the F250 alone and called the R.C.M.P., however Brent left before the R.C.M.P. would have been able to arrive, so nothing came of it. Mr. Bughhins testified that the R.C.M.P. were a half hour away and I take that to mean that they would have had to travel to the Reserve from the Town of Hay River. There was no evidence of any police detachment or presence on the Reserve itself.

[75] Mr. Bughhins also testified that he regularly saw the F250 parked at night at the Lafferty residence, which was known as a party house on the Reserve, and that he sometimes saw it at a local bootlegger's.

[76] The Plaintiff, Mr. Elleze, testified that before the accident, he knew David and Brent as acquaintances. He testified that he saw both David and Brent drive a brown pick up truck that he thought was owned by Les Norn. He would see each of them drive it on a regular basis as he walked to and from work on the Reserve's main road. Sometimes Brent would be driving alone, and sometimes with a passenger. Sometimes the passenger was Tina Bruha, whom Mr. Elleze recognized.

[77] While Mr. Elleze did not specifically identify the truck he saw as the F250, there was no evidence of any other brown truck that Brent had access to and so I accept that the truck he saw was the F250.

[78] I turn now to Les Norn and his witnesses.

[79] Les testified that prior to the accident, he and Brent may have had discussions about Brent wanting to drive the F250 alone, but Les would not agree to it. Initially Les testified that he was not aware of Brent driving the F250 at work, but then said that he may have driven it in the compound, which he described as a fenced-in property. In cross-examination on this issue, Les said he could not say for sure if Brent drove the F250 in the compound, because he was not with him all the time. However, he also testified that it was he who told his employees what job to do, and that they used his vehicles under his instructions. He subsequently agreed that Brent would drive the F250 from one place to another within the compound, unaccompanied by another driver.

[80] Les also testified that he was not aware of Brent driving the F250 to Sandy Creek, a local camping spot. Later in his testimony, he said that he did not consent to Brent driving the F250 to Sandy Creek, but that it was possible he did so.

[81] Les testified that he was not aware of Brent having been convicted of impaired driving prior to the accident, but also said he was not sure of that. He claimed not to remember the Reserve's security officers, April Martel and George Buggins, contacting him about Brent driving the F250, but acknowledged that it was possible they did so and that he might have told them to mind their own business. Although he said that he did not remember Brent driving the F250 alone to change a tire or gas up, or to go to the store on the Reserve or to Hay River, Les said it was possible Brent did those things. At one point in his testimony, Les said about Brent driving the F250, "I didn't tell him to. For me, it was always no".

[82] In my opinion, Les tried to distance himself from Brent's use of the F250 by claiming that he did not tell Brent to drive it, or that other employees must have let Brent drive it at work, or told him to do so. Les also stated that he did not always know what Brent was doing because Brent lived 12 kilometers away at the other end of the Reserve. However, Les worked with Brent on a daily basis, it was a small operation, and Les supervised and assigned the work. I do not find it credible that Les was not aware of what Brent did at work, and that he was not aware that Brent sometimes used the F250, the work truck.

[83] Les, Edith, David and Brent all testified that prior to the accident, David stayed at Brent's house quite often. In fact, Edith Norn testified that in 2006, David spent more time at Brent's house than he did at her and Les' house, even though he was living with them. David testified that he stayed overnight at Brent's house once or twice a week, because he would fall asleep on the couch or they would be drinking. Both he and Les testified that was the reason the F250 was parked at Brent's house overnight and both, as I have already noted, said that David might have been using the F250 because his own truck was not available, although they could provide any detail as to how long or exactly when his truck was not available. When asked about this, David said he could not remember whether he was unable to use his own truck for a week, a month, or longer.

[84] I find it surprising that if Les was as strict as he claimed about the use of the F250, he would allow David to keep it overnight at Brent's house. David testified that he might use it to drive Brent to work in the morning, but since David worked for a different employer, while the F250 was used in Les' business, it seems like a complicated way of getting Brent to and from work, if that is what happened and there was no explanation as to how David would then get to his own job, since the

F250 would be needed in the work done by Les Norn Contracting. David also testified that his employer, for whom he said he might have been working in the fall of 2006, sometimes had him work out of town at a camp. In any event, the evidence tying observations of the F250 parked at Brent's house with David's use of the F250 is not very strong.

[85] Les also testified that he kept track of his sons, and that he spoke to David by phone daily. However, he said that he did not always know what Brent was doing because Brent lived in his own house at the other end of the Reserve from where Les lived. Since David appears to have spent quite a bit of time at Brent's house, this suggests to me that Les did not keep as close track of either them as he claimed. The conclusion I draw from this is that Les sometimes, perhaps often, allowed the F250 to be at Brent's house, where he did not have control over it. As far as how often this occurred, I accept the evidence of April Martel, one of the Reserve's security officers, who testified that it was "not unusual" to see the F250 parked at Brent's house overnight.

[86] Edith Norn testified that if David had the F250 and was staying at Brent's on a weekend, Les would telephone around to find out where they were; I infer that his concern was that they were drinking. Edith would accompany Les as he went to look for his sons and when he located them, he would take the keys for the F250 from David and return the F250 to their home, where it was normally parked on a road leading to their property. It was not clear from her evidence how often this happened or when in relation to the accident. This evidence confirms that Les was concerned about his sons drinking and driving.

[87] Edith testified that Brent drove the F250 with only Tina as a passenger during family outings to Sandy Creek. She acknowledged that to get to the bush road that led to Sandy Creek, they would have to drive on the public road through the Reserve to the beginning of the bush road. When asked about that, Edith said that maybe she would drive the F250 to the bush road and then Brent would drive it on the bush road. I found that she seemed uncertain and appeared taken aback when asked about Brent having to drive on the public highway, and I am not convinced by her answer. Apart from that, Edith said that she could not recall having seen Brent drive the F250.

[88] David Norn testified that when he wanted to drive the F250, he would ask Les for permission and obtain the keys from him. He said that Les never gave him permission to let Brent use the F250. However, if Brent asked, David would let him drive the F250 alone to the store and back, which was a five minute drive each way. Brent would normally, according to David, be gone for a total of 20 minutes.

David testified that he did not ask Les for permission to let Brent drive on those occasions, because he did not think it was a "big deal". He stated that he did not think he had to ask Les for permission because on the occasions when this happened, Brent was sober and the drive was only five minutes. That suggests to me that David was not concerned about any reaction or consequences from Les if he were to find out that David let Brent drive the F250 alone. The store in question was the only store on the Reserve and so there was a reasonable risk that Les or Edith might be there and observe Brent. David's casual attitude to letting Brent drive alone, casts substantial doubt on how strict Les was about Brent driving the F250.

[89] Brent Norn also testified as a witness for Les. It is convenient to add here excerpts from his examination for discovery, which took place in June 2010, that were read into the record as part of the Plaintiff's case. They include an admission that prior to the accident, Brent had driven the F250 between 50 and 100 times and that he could not recall how many of those times he had driven it alone, but it was more than a few times. Other evidence given by Brent and read in includes the following:

Q: It wasn't a secret that you had driven that vehicle alone prior to this accident?

A: No.

Q: You weren't doing it behind your father's back?

A: Sometimes.

Q: On some occasions you had driven the vehicle alone without your father's knowledge?

A: Yes.

Q: But on most of the occasions that you had driven the vehicle alone your father was aware that you were driving it alone?

A: Yes.

Q: Would your mother provide you the keys when you drove that vehicle alone?

A: If she had them.

Q: Would your father ever provide you the keys if you drove that vehicle alone?

A: Yes.

Q: So generally speaking there was knowledge in your family that you were driving that vehicle alone prior to the accident?

A: Yes.

Q: So then when you were driving the Ford F250, you did do some of it as part of your job when you were working for your dad?

A: Yes, well, when I did, yes.

Q: So when you were driving it that way rather than sort of on personal type errands or business, were you usually driving it with someone or by yourself?

A: It would be with someone or by myself.

Q: Either way?

A: Either way, yes.

[90] Brent agreed that his memory was better in 2010 than at the time of trial in 2019.

[91] At trial, Brent testified that he worked for Les as a labourer and a "swamper", running the hose on the sewage truck, which was driven by Les or one of the other employees. He also did some fencing installation. Les would provide him with instructions as to the daily work he was to do.

[92] Brent testified that it was mainly Les who drove the F250. Brent would ask permission from Les to drive the F250 with someone accompanying him, but he would also take it without asking on occasion. Les would not always know that he had done that, and if Les did find out, he would get upset and "tell me I wasn't allowed to drive a lot of the time". I take the latter response to mean that after learning that Brent had driven the F250 without his permission, Les would often, but not always, refuse permission on later occasions.

[93] Brent acknowledged that he drove the F250 at work, although he was a little vague as to details. He testified that he would probably drive it from Point A to Point B on a work site, for example, to move supplies along a fence he was working on, and to move it within a parking lot if they were putting in a gravel pad. He also admitted driving the F250 to the store on the Reserve when David had the F250 and allowed him to do so.

[94] Brent agreed that he probably drove the F250 to get it gassed up. He testified that he could have driven it in Hay River, accompanied by Tina, who did not have a driver's licence. When asked about that, Brent stated that he was not sure if he had obtained the F250 from Les or from David. He testified that he would not "normally" ask his father to go somewhere with the truck because his father knew that he did not have a driver's licence. He did not go so far as to say that he never asked his father.

[95] Brent also admitted that he would drive the F250 with Tina and their daughter to Sandy Creek, where his grandmother had a cabin. He testified that he might have driven there with Tina and their daughter several times and that he would get the keys if the truck was left at his house or David was at work, or "somehow I would get the keys but it wouldn't be by permission by my dad a lot of the time". Again, this is not the same as saying that he never got the keys by permission of his father. He said that Les might give him permission if Les was also going to Sandy Creek driving a different, older truck, which he sometimes did.

On such occasions, Brent would drive the F250 from his own home, which meant driving on the public highway. Asked to say how many times Les allowed him to drive the F250 with Tina to Sandy Creek, Brent answered that it happened "rarely", probably less than a dozen times and maybe less than six.

[96] In his trial testimony, Brent was vague as to how many times in total he drove the F250 alone without a licensed passenger before the accident, estimating that it was less than 50, but then qualifying that by saying, "I couldn't tell you". He agreed that he had a history of driving the F250 alone before the accident, doing errands for himself, his brother and occasionally his mother.

[97] Brent also testified that he is sure that Les knew, before the accident, about his previous conviction for impaired driving and that he was made aware of it at the time of the court proceedings that resulted in the conviction. He said that the circumstances were that he took David's truck without permission and drove it alone while impaired.

[98] Obviously there are a number of contradictions between the evidence of Brent and Les. The main one is that Les denied ever giving permission to Brent to drive the F250, while at the same time acknowledging that it is possible that Brent drove it, including by himself. In contrast Brent's evidence was that there were times when his father did let him drive the F250. He said there were also times when he took it without permission and Les found out, but only sometimes did that result in consequences, such as Les not giving permission the next time Brent asked to drive it.

[99] It is noteworthy that Brent's discovery evidence read in as part of the Plaintiff's case is very clear that on most occasions when he drove the F250 alone, Les was aware of that and that Les would sometimes provide him with the keys to drive it alone. He was more vague about that in his trial testimony, which leads me to be skeptical about the credibility of his trial testimony. Brent's evidence, both at trial and at discovery, clearly conflicts with and casts doubt on the evidence of Les, which, as I have said, raises credibility issues of its own due mainly to his apparent inability to recall very much.

[100] Brent adamantly denied ever being stopped by Ms. Martel as she claimed, however I accept her evidence in that regard. It was part of her job to take notice of and stop certain individuals, including Brent. On the other hand, there is no evidence of any consequences resulting from her stopping him and so there would be little reason for him to remember that she had done so.

[101] Brent also denied ever being stopped by Mr. Buggins. However, since he admitted that he suffers from blackouts when intoxicated and since Mr. Buggins said that Brent was intoxicated on the occasion when he stopped him, I prefer the evidence of Mr. Buggins.

[102] On all the evidence, I am satisfied that Brent did drive the F250 from time to time before the accident, mostly on the Reserve but sometimes to Hay River. Sometimes he had a licensed driver as his passenger, but he also drove it with Tina, who did not have a licence and sometimes he drove it alone. While the evidence is not precise as to how often he drove it, whether alone or accompanied, based on both his discovery evidence that was read in and his trial testimony, along with the evidence of those who observed him driving the F250, I am satisfied that these were regular occurrences. Ms. Martel, for example, said that she saw him drive it weekly; she was not asked over what period of time that was, but she had been in her job since 2004, therefore while working in that position, she could have observed him weekly over a period of up to two years.

[103] I am also satisfied and find as a fact that Les was aware of Brent's use of the F250 and provided him with the keys to it on some occasions.

[104] That Les was aware of Brent driving the F250 is also supported by Edith's evidence about Brent driving to Sandy Creek on family outings, as well as the evidence of April Martel and George Buggins that they raised with Les the issue of Brent driving. Even apart from their testimony, I note that Les testified that in 2006, the community on the Reserve consisted of just in excess of 200 people. The Reserve had one store and one main road from one end to the other. It is not believable that in a community like that, and with Brent being his employee, that Les could have been unaware that Brent drove the F250 on a regular basis.

(v) Keys to the F250

[105] Corporal Parker testified that when he went to Brent's house after being called to the accident scene, he obtained a set of keys on a key ring from Brent, who produced them from his pocket. From a photograph taken of the keys by Corporal Parker, Les Norn identified his key to the F250 (the "ILCO" key) and his house and mail keys. He and David both said these were the keys Les gave David on leaving for Edmonton before the accident.

[106] Corporal Parker produced a photograph of a single key (the "second key"), which he testified he obtained at Brent's house when he was there after the accident. Corporal Parker was unable to remember anything about the



circumstances in which he obtained that key or where exactly it was located in the house.

[107] Corporal Parker was not at Brent's house for very long. He seized the F250 truck at 5:15 a.m., after seeing it parked outside the house. At 5:39 a.m., Tina Bruha allowed the police into the house. They woke Brent, and spoke with him. He produced the keyring with the ILCO key. They arrested Brent at 6:09 a.m. and arrived at the detachment with him by 6:50 a.m. There is evidence to suggest that from the Reserve to the detachment (which I infer is the detachment in the Town of Hay River) is a 20 to 30 minute drive.

[108] That timeframe would have given Corporal Parker very little time to conduct a search of Brent's house and I think it is a reasonable conclusion that the second key was given to him by Brent or Tina, or its location was identified to Corporal Parker by one of them, or it was readily visible in the house. It is less likely that Corporal Parker found the second key in the F250, given his testimony that he obtained it at the house.

[109] Corporal Parker did not have a recollection of testing the second key in the F250. He noted, and I agree, that the ILCO key and the second key in the photographs look the same. He testified that he believes he would have followed his standard practice in impaired driving cases, which was to ensure that keys taken from a driver actually worked in the vehicle they were alleged to have been driving. He said it was his standard practice to test keys and that he would not have seized the keys in this case if they did not fit "the piece of the puzzle" as he put it. I find that in all likelihood he did test the second key and found it to work in the F250.

[110] Other circumstances support the second key being a key to the F250. Brent had never owned a vehicle and Tina Bruha did not have a driver's licence. It is not clear where David's GMAC truck was at the time of the accident. There is no evidence that it was at Brent's house and there would not appear to be any reason why a key to his truck would be at Brent's house if his truck was not there. Nor did David identify the second key as belonging to him. The logical inference from all the evidence is that the second key was a key to the F250. Les Norn conceded in his testimony that it might be.

[111] Les testified that he could not remember how many keys he was given when he purchased the F250 in 2003. He had the ILCO key cut and that was the key he used all the time. He testified that the second key might be the original key used to cut the ILCO key. Those two keys, the ILCO and the second key, are the only

keys he remembered having. He did not explain who actually had possession of the second key or where it was kept, but made vague references to the possibility of keys being misplaced or a grandchild moving them.

[112] Les testified he does not recall giving a key to Brent for the F250. He denied ever asking Brent to cut a key for him.

[113] Edith Norn testified that she is certain there were at least two keys to the F250, but could not say who had them at the time of the accident. David Norn testified that he did not cut any extra keys for the F250 and does not know if anyone else did or how many keys there were.

[114] Brent Norn testified that he did not have his own key to the F250 and that he had never cut one for himself, nor had Les cut one for him. Brent testified, however, that he had had a key cut for Les, and had returned both the newly cut key, and the original from which it was cut, to Les. He said that Les had neither directed nor asked him to cut that key, but he thought Les would like to have it. His testimony on examination for discovery that he made the key in case of an emergency was put to him, but it was not clear whether he adopted it. Brent said that this was the only time he made a key without Les knowing. From his evidence, it is obvious that he must have had an original key in his possession and it seems unlikely that if he had obtained that original without Les knowing about it, he would then reveal that he had obtained it by making a copy for Les, and giving it to him, when Les had not asked for a copy.

[115] Brent also gave contradictory answers on the subject of keys, saying at first that he was sure that he did not have a copy of the F250 key at the time of the accident, and then that he did not recall it, but might have been in possession of a key to the F250 while at the Lafferty residence.

[116] This uncertainty about the number of keys and who had them is at odds with the position taken by Les Norn that he exercised control over the F250 and who was permitted to drive it. There was no explanation from any of the defence witnesses as to how the second key came to be at Brent's house or where it was normally kept or by whom.

[117] I think it unlikely that the second key was kept by David, since he seems to have had little trouble getting the keys to the F250 from Les when he wanted to drive it. On the other hand, Rina Fabian testified that after Brent left the Lafferty residence prior to the accident, David woke up and said, "I still have a key to that truck". Given that he was intoxicated, that statement may not be reliable, but in

any event it is impossible to know whether he was referring to the second key located at Brent's house or some other key as David did not recall making that statement.

[118] The most likely scenario in my view is that Brent had the second key at his house, but had not taken it with him to the Lafferty residence when he went to the party that night, otherwise he would not have needed to take the key on the keyring that David had with him. It is a reasonable inference from the evidence that Brent kept the key at his house for his own and possibly Tina Bruha's use, as both were seen driving the F250 by witnesses. Whether that second key was the original key from which Les made the ILCO key, or the key Brent claimed he made for Les, but kept for his own use, or some other key to the F250 cannot be said with certainty.

(vi) Events on the weekend of the accident

[119] I now come to the circumstances on the weekend of the accident.

[120] Both Les and David testified that before leaving for Edmonton to pick up Edith, Les gave David the keys on the key ring, which consisted of the ILCO key, a key to Les' house and a key to Les' mailbox. David testified that Les asked him to check on the house while he was in Edmonton. David testified that Les gave him permission to use the F250 and warned him that there was to be no drinking and driving.

[121] Initially, Les stated that before leaving for Edmonton, which he believed was on Friday, he spoke to both David and Brent and told them that there was to be no drinking and driving with the F250, however he then seemed to retract that in the following series of questions and answers in his examination in chief:

Q: Now, before you left for Edmonton, did you speak to your sons or any -- or --

A: Yes, I --

Q: -- either --

A: -- did.

Q: -- Brent --

A: Yes, I did. I spoke to the both of them. I said, No drinking and driving my truck. I said, No.

Q: And were you -- was Brent and David present when you had that discussion?

A: At the time, you see Brent's -- had his own home. So David might -- might have been there at that time. So I might have told him and that -- you know. So if -- if Brent wasn't, you know, there with me, I would have told David. I would have given him strict instructions that, No, you know.

[122] The answer is very unclear. The last part of the answer could mean that Les spoke only to David and that he expected David to pass on his instructions to Brent. If it was the latter, then it appears that the instruction was not to drink and drive, which would indicate that Les was expecting that Brent would or might drive the F250. I have considered whether Les' answers might indicate that Les had no expectation at all that Brent would drive the F250 in his absence, but I conclude that is not likely the case because of Brent's evidence that Les sometimes gave him permission to drive it and even when he drove without express permission from Les, and Les found out, Les would still sometimes allow him to use it.

[123] Brent testified that there was no discussion with his father about using the F250 while Les was in Edmonton. David testified that Les said nothing to him about Brent using the truck.

[124] There is also no evidence of any telephone contact between Les and either of his sons after he left for Edmonton, despite Les having testified that whenever David had the F250, Les was in constant contact with him by phone. This suggests to me that Les was not as strict or concerned about his sons driving the F250 as he purported to be.

[125] David testified that sometime before the accident, which occurred in the early morning hours, he drove the F250 to a residence ("the Lafferty residence") to drink. He planned to park the F250 at the residence until he sobered up the next day. He testified that he remembers drinking there, but he could not recall seeing Brent or having any conversation with him there. He testified that he would not have given Brent permission to drive the F250.

[126] Brent testified that he had been drinking during the daytime hours before the accident and the night before that. After eating supper at home, he went to the Lafferty residence to drink some more. He described his own condition as "heavily intoxicated" and said that he had blackouts. He said he does not remember leaving the Lafferty residence and does not remember anything about the accident. Despite that, he did claim to remember that once he knew that David had passed out, he took the keys to the F250 from David's pocket so that he could drive home because he and Tina had had an argument about him being out drinking. He also said he did not recall anyone telling him that he should not drive and did not recall arguing with Rina Fabian. He did claim to recall that she took the keys from him. As I have noted when reviewing the evidence about keys to the F250, Brent answered at one point in his testimony that he might have been in possession of a key to the F250 at the Lafferty residence. I take this to mean a key

other than the ILCO key, since Brent admitted to taking that key from David's pocket.

[127] Rina Fabian was also drinking at the Lafferty residence. She testified that David was passed out on a couch and Brent was intoxicated and arguing with someone else. At some point, Brent said that he had had an argument with his girlfriend and was going to drive home with the truck. She saw him with keys in his hand. Ms. Fabian and the person Brent had been arguing with told him not to drive and Ms. Fabian grabbed the keys from him. He told her to give them back to him and began to swear at her. When she refused to give him the keys, he came at her to grab them, and she tried to pull them away. His behaviour made her feel nervous and afraid. Ms. Fabian did not remember whether she gave the keys back to Brent or threw them across the room; she seemed to think that she threw them and did not look to see if Brent retrieved them. Brent then drove off. The Plaintiff, Mr. Elleze, was also at the residence and Ms. Fabian estimated he left about 45 minutes before Brent did. The accident, of course, happened sometime after Brent left.

[128] Ms. Fabian was asked in cross-examination whether David had woken up and said, "I still have another key to that truck"; she agreed that David said that. David's testimony was that he does not remember waking up. I have referred to the possible significance of that statement earlier in these reasons.

[129] There is no evidence of any argument or disagreement between David and Brent Norn over the keys to the F250 or use of the F250 while they were at the Lafferty residence or earlier that weekend. The only evidence about how Brent got the keys from David is Brent's testimony. Its reliability has to be questioned because of Brent's intoxication, but even if I accept that he took the keys while David was passed out, that indicates nothing about the interactions between the two brothers that weekend in relation to the F250. It may indicate that Brent anticipated that David, had he been aware of what Brent was doing, would not have allowed him to take the F250 because he had been drinking. The evidence of Ms. Fabian about her interaction with Brent illustrates his anger that she was keeping the keys from him, but it does not reveal anything about the interactions between David and Brent.

[130] During his evidence in chief about the party at the Lafferty residence, David was asked whether he had any recollection of giving Brent permission to drive the F250; his answer was that he would not have done so. In all the circumstances, I do not attach any significance to that response. At most, it indicates that David would not have given Brent permission to drive when he had been drinking. In my

view that is irrelevant since this case revolves around whether Les gave general or ongoing permission to Brent to drive the F250. In any event, an after the fact statement with hindsight by a party to the case about what he would or would not have done is not very helpful.

G. Whether an adverse inference should be drawn because Tina Bruha was not called as a witness by Les Norn

[131] As I stated at the beginning of these reasons, it was submitted on behalf of the Plaintiff that an adverse inference should be drawn because Les Norn failed to call Tina Bruha as a witness.

[132] Tina Bruha was living with the Defendant Brent Norn at the time of the accident; she did not have a driver's licence. There was evidence from other witnesses that she had been seen as a passenger in the Ford F250 while it was being driven by Brent Norn and that she had been seen driving it by herself and parking it at the house she shared with Brent Norn.

[133] The Plaintiff submits that Ms. Bruha could have given evidence about Brent's use of the F250, when and for what purpose he used it and under what circumstances it was sometimes parked at their home overnight prior to the accident. The Plaintiff submits that the failure to call Ms. Bruha as a witness should give rise to an inference that her evidence would have been detrimental to Les Norn's case, or at least that it would not have helped his case. For example, the Plaintiff submits that Ms. Bruha's evidence might have supported the limited use Brent made of the F250, consistent with the evidence of his family members, as opposed to the evidence of April Martel and George Bughhins about how often they saw him driving the F250.

[134] At the trial, Brent testified that he and Tina Bruha had not lived together since 2007 and were on friendly terms. At the time of the trial, Brent and their daughter were living with Les and Edith Norn. He testified that Ms. Bruha was living in Fort Smith.

[135] The court has a discretion to draw an adverse inference in certain circumstances; it is not mandatory that the court do so. The issue was explained by Nash J. in *Simmonds v. Koerni*, [2001] A.J. No. 526:

100. Where counsel has failed to call relevant witnesses, the court will sometimes draw an inference that the evidence that has not been called would not have been helpful or would have been detrimental to their case. The rule is well stated in J.

Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*, (Toronto: Butterworth's, 1999), (2nd ed., at 297:

In civil cases, an unfavourable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and who does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case or at least would not support it.

[136] Les Norn submits that Tina Bruha is not within his exclusive control and that the Plaintiff or RSA could have called her as a witness. He also questions whether her evidence would be likely to have the significant impact the Plaintiff asserts.

[137] I agree that Ms. Bruha was not within the exclusive control of Les Norn. There was no evidence about his relationship with her and by the time of trial she had not lived with his son, Brent, for over 10 years. No reason was put forward why she could not have been subpoenaed by the Plaintiff or RSA. In these circumstances, I do not think it is appropriate to draw an adverse inference and I decline to do so.

[138] That said, the lack of any evidence as to how Ms. Bruha, who was seen driving the F250 by George Buggins, obtained a key to the F250 gives rise to some issues. There is no evidence that she got the key from Les and it seems unlikely that he would have given it to her. It is more likely that she got the key from Brent and if so, the question arises whether it was the key that Les always used and which Brent happened to have in his possession at the time Ms. Bruha wanted to drive the F250, or whether it was the second key seized by Corporal Parker or some other copy of the key. The evidence does not provide an answer to that question. Ms. Bruha's access to the F250 simply casts further doubt on the number of keys and who had them, which in turn is a weakness in Les Norn's case.

#### H. Analysis

[139] As I have said, I am satisfied on the evidence that Brent drove the F250 on a regular basis, sometimes alone or with Tina Bruha and sometimes accompanied by a licensed passenger, mainly his brother David. Sometimes Brent sought and obtained permission from Les to drive it. Sometimes he drove it without permission. However, the only consequence Brent faced when he drove the F250 without first obtaining permission from Les was that Les would get mad and

sometimes, but not always, deny permission when Brent asked to drive it the next time.

[140] I do not accept Les' testimony that he never permitted Brent to drive the F250. It conflicts with the discovery and trial evidence of Brent and with Edith's evidence about the family driving to Sandy Creek. With his memory issues, Les was not a reliable witness, however I also found that he tried to deflect any responsibility for allowing Brent to drive the F250 at work, saying that maybe other employees let him do it, or that he, Les, did not tell Brent to do it.

[141] The fact that David, when he had the F250, occasionally let Brent drive the truck alone to the Reserve store and was of the opinion that he did not need to get permission from Les for that, leads me to infer that he did not expect that there would be any real consequences, either to him or to Brent, if Les found out. That was a reasonable expectation on David's part since Les had never imposed any consequences other than those described by Brent. I also accept the evidence of April Martel and George Buggins that they raised concerns with Les about Brent driving, but Les rebuffed them. There is no evidence that he acted on their information. He did say that he was always telling his sons not to drink and drive, however that was only part of the problem. The other part was Brent driving alone when all he had was a learner's permit. From Brent's evidence, particularly his discovery evidence, it is clear that Les knew that Brent sometimes drove alone, yet there is no evidence that Les did anything to address that.

[142] As Brent said in his evidence, it was not a secret that he drove the F250. I infer that Les turned a blind eye to Brent's use of the F250 and acquiesced in his doing so. Brent's evidence that Les would become angry when he learned that Brent had taken the truck without permission is consistent with Les being inconvenienced by not having access to the truck. His failure to do anything more than get angry and sometimes deny permission for a further use of the truck is not consistent with a hard and fast rule that Brent was not to drive the truck at all, or without permission. One would think that if Les was serious about Brent not driving without his permission, he would at some point refuse to consent to Brent using the truck any longer. There is no credible evidence that he did that. Brent did not say how often it happened that Les refused him permission to drive the F250, but considering the evidence of Ms. Martel, Mr. Buggins and Mr. Elleze about how often they saw him drive it, and since I am satisfied that Les was aware of his use of the truck, I infer there could not have been many occasions when Les refused permission. Otherwise, it is inconsistent that he took no action to stop Brent from having any access to the truck, either by refusing Brent any use of it or



making David's use of it conditional on Brent not driving it. There is no evidence that Les did either of those things.

[143] Brent testified there were specific instances when Les consented to him driving the F250. I have also found that Les acquiesced in Brent driving the F250, both alone and accompanied, including without Les' permission, and that leads me to the inference that Brent had ongoing implied consent from Les to drive it.

[144] Brent was well aware that his father did not want him to drive if he had been drinking. He was asked what he expected Les' reaction would have been if Les had known he was driving after drinking at the Lafferty residence and his answer was that Les would have come and taken the truck. That reinforces my view that Les was concerned about Brent's drinking, but otherwise turned a blind eye to his driving. Les' ongoing implied consent to Brent driving the F250 did not include permission for Brent to drive it when he had been drinking, however that condition on his driving cannot be asserted against Mr. Elleze due to the public policy considerations I have referred to earlier as explained in *Garrioch*.

[145] The uncertainty as to how many keys there were for the F250 and who had possession of them, particularly the lack of any clear explanation from the defence witnesses about the second key, is not consistent with Les Norn requiring consent for every use of the F250. In my view the uncertainty about the keys casts doubt on how much control Les exercised over the F250. On the other hand, it does lend support to the finding that he acquiesced in the use of the F250 by Brent.

[146] The evidence that the F250 was seen parked overnight at Brent's house also tends, in my view, to lend support to the finding that Les acquiesced. As I have noted, the evidence that the truck was parked overnight at Brent's only because David was using it while his own truck was not available, is not strong because David could not say for what period of time his truck was unavailable. So while the F250 may sometimes have been at Brent's overnight because David was using it, there is simply insufficient evidence to establish that was the only reason it was there, especially when considered in light of Brent's admitted use of the truck.

[147] Counsel for Mr. Elleze submitted that the F250 became a "surplus" truck in July 2006, when Les bought a new truck for himself. At that time, Edith had her own vehicle and David had his own truck. Since Brent lived 12 kilometres away from the rest of the family, they looked the other way while he used the F250 as his own. Assuming that David's truck became unavailable in October 2006, before the accident, David started driving the F250 and there was some friction between the two brothers over use of the truck.

[148] The evidence certainly raises the possibility of that having occurred. That scenario would account for the second key being found at Brent's house, i.e. that Brent had that key because he was regularly driving the F250 with Les' knowledge and acquiescence after Les purchased his new truck and while David still had access to his own truck. However, I need not settle on a specific scenario in order to decide whether Les Norn has satisfied the onus of proving that he did not consent.

[149] Counsel for Les Norn submitted that the evidence does not show a long and continuous history of use of the F250. I agree that the evidence is not specific as to how long Brent used the F250, but I infer from all the evidence a regular use of the truck by him over a period of at least months. There is no evidence in this case that Brent's use of the F250 was ever interrupted for any significant length of time and more importantly, no evidence that Les ever cut him off completely from using it.

[150] Section 271(3) requires consent to operation of the vehicle at the time of the accident. In my view, the evidence supports implied consent by Les to Brent driving the F250 and that consent continued through the weekend of the accident. There is no evidence that, in the days before he left for Edmonton, Les told anyone that Brent was not to drive the F250. Both David and Brent said there was no discussion with them about Brent driving it. At most, there is evidence from David and Les that Les told David there was to be no drinking and driving, but the only evidence that there was discussion by Les with Brent about that is Les' own testimony which he was very unclear about, seemingly retracting his initial statement that he spoke to both sons about it.

[151] Les could have communicated to Brent that he did not have permission to drive the F250 on the weekend while Les was away. He could have completely withdrawn what I have found was his continuing permission or canceled it for that weekend while he was away. But he did not; in fact he did nothing. While it is true that before he left for the weekend, Les gave his keys to David, and not Brent, since Les was aware that Brent drove the F250, both with and without asking Les for specific permission, I am satisfied that he would reasonably have expected that Brent would drive the truck on that weekend while Les was away. Les took the risk of that happening. He knew that both sons drank to excess and Edith Norn's testimony about going out looking for them on weekends when David had the F250 supports the inference that Les knew his sons drove to places where they would drink on the weekends. Simply telling David or Brent that there was to be

no drinking and driving with his truck that weekend was not sufficient in the circumstances. Les took a significant risk by handing over the keys.

[152] Trial decisions from other jurisdictions on implied consent are very fact specific and can often be distinguished because of the differences in legislation. A decision that contains some helpful comments for purposes of this case is *Ezzedine v. Dalgard*, [2006] ABQB 826; [2006] A.J. No. 143. In that case, implied consent was found where the vehicle owner consented to a situation where she had no control over the physical use or possession of a vehicle and did not request that keys be returned to her or revoke prior consent. At paragraph [90], Macklin J. made the following comments:

There is a heavy burden on any owner of a vehicle who willingly gives up possession of that vehicle to another person. The burden is imposed to ensure the protection of the public who may be at risk by the use of the vehicle by that person. It is only fair that the owner who has control over the use and possession of the vehicle bear the ultimate responsibility for its operation where the owner has done nothing to control that use and possession.

[153] In *Ezzedine*, the owner had revoked her prior consent to the driver's use of the vehicle while it was uninsured, but did not take steps to control its possession or use. Macklin J. said that the purpose of s. 181 of Alberta's *Highway Traffic Act* would be undermined if the owner was allowed to rely on conditional consent to escape liability when she took no active steps to control the use of the vehicle and eliminate the risk to the public by the driver.

[154] Les knew about his sons' drinking habits and had allowed Brent to drive the F250 and had not revoked his consent for Brent to drive it or imposed any significant consequences on occasions when Brent did not ask his permission prior to driving it. By giving the keys to David without any instructions about Brent's use of the F250, and giving up possession and control of the vehicle, Les made that vehicle available to both David and Brent. It would undermine the purpose of s. 271 to allow Les to escape liability in this case when he took no steps to control the use of the vehicle and eliminate the risk to the public of Brent driving it.

[155] As stated, I am satisfied that Brent did have the implied consent of Les to operate the F250 at the time of the accident. For the reasons given, the evidence put forward by Les Norn to support his contention that he did not consent, is not persuasive and does not rebut the presumption of consent in s. 271(3) of the *Motor Vehicles Act*.

[156] Because of my finding that Brent had implied consent from Les to drive the F250, I need not deal with the third party issues that arose in such cases as *Garrioch*, where the vehicle owner gave possession of the vehicle to one individual, who then allowed another to use it.

#### I. Liability under s. 272 of the *Motor Vehicles Act*

[157] Counsel for the Plaintiff also submitted that the Court should consider s. 272 of the *Motor Vehicles Act*, which provides as follows:

- 272 (1) The burden of proof that damages caused by a vehicle on a highway did not entirely or solely arise through the negligence or improper conduct of the owner or driver is on the owner or driver of the vehicle.
- (2) Subsection (1) does not apply to an action for damages
- (a) arising from a collision between vehicles on a highway; or
  - (b) sustained by a person while that person was a passenger in a vehicle.

[158] Section 272(1) applies where damages are the result of a collision between a vehicle and a pedestrian. The Plaintiff submits that it enlarges the scope of improper conduct by an owner that the Court can consider. The Plaintiff relies on s. 272(1) in saying that with all the information he had about Brent's driving in 2006, Les was recklessly indifferent and ignored the safety of others because his son needed a vehicle; he has not satisfied the burden imposed on him by s. 272(1) to show that the damages suffered by Mr. Elleze did not arise through his improper conduct as the owner of the vehicle: *Bradford v. Snyder*, 2016 ABCA 94.

[159] In response to that argument, Les Norn points out that the negligence of the driver, Brent Norn, was admitted and the only issue for trial was whether Les consented to Brent driving. He submits that the purpose of s. 272 is to create a reverse onus on a driver and an owner to disprove that the driver was negligent in causing the accident when it involves a pedestrian. If the owner does not prove that the driver was not negligent, the owner will be deemed liable under s. 271(1) unless the owner can prove that he or she did not consent to the driver operating the vehicle. Since the negligence of Brent, the driver, is admitted in this case, s. 272 has no relevance and the only issue is consent.

[160] Les Norn relies on *Pollock v. Dyck*, 1999 ABCA 332, however that case dealt with a request by the driver of a vehicle involved in an accident to examine for discovery the owner of the vehicle on the issue of consent. The Court held that consent was not relevant to the driver's position in the action brought against him by the plaintiff in that case. If the driver was negligent and operating with consent, both driver and owner were liable. If the driver was negligent and operating

without consent, the driver was still liable. Therefore, consent did not impact upon the driver's liability in the plaintiff's action. That is quite different from the issue in this case.

[161] The Plaintiff's argument in this case seems to be that Les Norn should be found negligent based on his own behaviour separately from Brent's negligence as the driver. However, it was always made clear by counsel that Brent's negligence was admitted and that the sole issue for trial was whether he had consent from Les to operate the vehicle. The behaviour of Les in relation to Brent's use of the F250 is relevant to whether there was consent and pursuant to s. 271(3), Les has the burden of proving that he did not consent. So Les' behaviour and conduct in relation to Brent driving the F250 must be, and has been, considered. However in the circumstances I will not consider it as a stand alone basis for a finding of negligence on his part, nor do I view s. 272 as increasing or changing the burden on him to prove that he did not consent. Accordingly, I need not deal any further with s. 272.

## J. Conclusion

[162] For the reasons given, I find that Brent Norn had the implied consent of Les Norn to operate the F250 truck at the time of the accident. Les Norn has not rebutted the presumption of consent in s. 271(3) of the *Motor Vehicles Act* and is liable for the damages suffered by Mr. Elleze.

[163] Counsel had indicated that there may be some issues to be addressed after judgment on the trial and if that is the case, I direct that by February 5, 2020, they forward a joint letter to my attention, setting out the issues, the time required to address them, and their available dates or an indication whether the matter can be dealt with by way of written submissions.

[164] I will also leave it to counsel to submit the relevant documentation so that judgment may issue against Brent Norn, as discussed at the trial. If any issues arise from that, counsel may address them in accordance with the preceding paragraph.

[165] Costs normally follow the event but if counsel wish to address them, they may, by February 5, 2020, propose a schedule for written submissions; alternatively, they may indicate in writing whether a costs ruling should await the outcome of any matters referred to in the paragraphs above.

V.A. Schuler  
J.S.C.

Dated at Yellowknife, NT  
this 20<sup>th</sup> day of January, 2020.

Counsel for the Plaintiff:

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A. Locke

Counsel for the Defendant Royal & Sunalliance:

C. Neal

Counsel for the Defendants Leslie Norn and

Leslie Norn operating as Les Norn Contracting:

A.D. Schmit

**IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES**

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**BETWEEN:**

**WAYNE MAURICE ELLEZE**

**Plaintiff**

**-and-**

**BRENT NORN, LESLIE NORN, LESLIE  
NORN operating as LES NORN  
CONTRACTING, JOHN DOE, XYZ  
CORPORATION and ROYAL &  
SUNALLIANCE INSURANCE  
COMPANY OF CANADA**

**Defendants**

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**REASONS FOR JUDGMENT OF  
THE HONOURABLE  
JUSTICE V.A. SCHULER**

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