

KEEPING CURRENT

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Recreational vehicle liability (*Desrochers v. McGinnis*)

By Stephen Thiele

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Vehicles, such as all-terrain vehicles (“ATV”), Skidoos, Jet Skis and SeaDoos, have both practical and recreational purposes. However, they are modes of transportation whose use is unfamiliar to many. Like a car, users require some instruction on how to operate and handle these powerful vehicles. Use of these vehicles without proper instruction can result in serious injury to others and/or the user. Although one might believe that the responsibility for injuries caused by the operation of a recreational vehicle should be the sole responsibility of the user, common law and statutory provisions can transfer the bulk of the liability to the person who authorized the user to drive or ride a recreational vehicle and/or the vehicle's owner.

This was the result in [*Desrochers v. McGinnis*, 2024 ONCA 63](#).

In this case, a young adult woman was seriously injured when the ATV she was driving left a roadway and struck a tree. The woman, who was not wearing a helmet at the time of the accident, suffered serious head injuries.

Moments prior to the accident, the woman had travelled as a passenger on the ATV, which was being driven by her boyfriend, P. P had driven the ATV across his parents' rural property to collect a truck that had been parked in the vicinity of the property. There was sharp S-curve on the route to where the truck was parked. However, to reach the truck, P drove across the property's fields to a point south of the sharp S-curve.

After disembarking the ATV and climbing in the truck, P gave the woman a “thumbs up” signal to drive the ATV back to the property's farmhouse. P followed his girlfriend in the truck behind. Rather than travelling across the fields, the woman travelled along the roadway and crashed when she was unable to navigate the ATV on the sharp S-curve.

The woman and her parents sued P and his parents for damages. The ATV was owned by P's father. At trial, the court held that P and his parents owed the woman a duty of care. However, only P was held liable for his girlfriend's injuries.

Both parties appealed the decision. P contended that the trial judge erred in finding that he owed his girlfriend a duty of care that he breached the applicable standard of care and that his breach caused her injuries.

The woman and her parents contended that the trial judge erred in finding that P's parents did not breach a duty of care and that P's father, G, as owner of the ATV, was not liable for damages under [section 192\(2\)](#) of the [Highway Traffic Act](#) (“HTA”).

The court dismissed P's appeal and ruled that G was also liable under [section 192\(2\)](#).

P's liability was rooted in the trial judge's finding that he had a duty of care to his girlfriend in the circumstances. Although there was no case in which a person authorized to use an ATV owed a duty of care to another person they allowed to drive the ATV, case law established the existence of an analogous duty of care between these persons. While P challenged this ruling, the Court of Appeal for Ontario accepted the trial judge's analysis.

Based on the facts, the woman was a guest at the property of P's parents and P had allowed her to use the ATV. P also knew that his girlfriend had no experience or instruction in operating an ATV. Although the woman had driven the ATV on the property, it was only at a slow speed and under the watchful eye of P and/or his mother. Any instruction that she was given was minimal. She also had never driven the ATV on the road.

Among other things, by allowing his girlfriend to drive the ATV on the road, by failing to tell her to travel across the field, and by following behind her in the truck rather than leading her, P failed to exercise the care of an ordinary, reasonable and prudent person taking into account the likelihood of a known or foreseeable harm to his girlfriend in the circumstances. In assessing

reasonable foreseeability, a court is required to determine “whether the plaintiff has ‘offer[ed] facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged:” see [Rankin v. J.J., 2018 SCC 19](#).

P's parents also owed the woman a duty of care in the circumstances. However, neither of them breached their duty of care for various reasons, including that they neither knew nor could have known that P would allow his girlfriend to use the ATV safely or that P would let his girlfriend operate the ATV on the road. Accordingly, they did not breach their duty of care.

With respect to G's liability under [section 192\(2\)](#) of the HTA, this section provides:

The owner of a motor vehicle or street car is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or street car on a highway, unless the motor vehicle or street car was without the owner's consent in the possession of some person other than the owner or the owner's chauffeur.

The assessment of G's liability under this section was a matter of statutory interpretation.

The Court of Appeal for Ontario found that the trial judge had misinterpreted the provision by failing to give it a wide interpretation.

As determined in [Finlayson v. GMAC Leasco Ltd., 2007 ONCA 557](#), [section 192\(2\)](#) was intended to protect the public by imposing on the owner of a motor vehicle responsibility for the careful management of the vehicle.

Furthermore, the court found that the word “operation” included the negligent transfer by a driver of the care and control of a vehicle to another person.



Accordingly, the appellate court held that G assumed the risk of P, since he had entrusted his son with the use of the ATV, and P had breached his duty in transferring the ATV to his girlfriend and had been negligent.

The key takeaway from this case is that owners of recreational vehicles and those that they entrust to operate those vehicles, should not easily permit others to use their vehicle, especially where the end user has limited instruction or is incapable of using it. While exciting to use, recreational vehicles are powerful machines. They are not toys. As seen in this case, an improperly instructed user can end up in an accident and suffer serious injuries, leaving the owner and/or the person who permitted the use with significant liability. In this case, although the woman was contributorily negligent, the court found that she was only responsible for 10 percent of her loss.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** at 416.865.6651 or by email at sthiele@grllp.com

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