GLEN SILLITO, DONALD WAYNE SILLITO, PATRICIA FAYE SILLITO STREIBEL, by her next friend GLEN SILLITO, BRYCE LAMONT SILLITO, by his next friend GLEN SILLITO, DOROTHY ANN SILLITO, by her next friend GLEN SILLITO, GLEN SILLITO as Administrator of the Estate of RUTH ANN SILLITO, deceased, and GLEN SILLITO as Administrator of the Estate of TERRY MARIE SILLITO, deceased (*Plaintiffs*) .....*Appellants*;

AND

ARCHIBALD ASHTON HUMPHREY and FRANK T. BYRNE, Administrator Ad Litem of the Estate of PETER WILLIAM HARVIE, deceased (*Defendants*)

RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Motor vehicles—Collision—Owner's liability for driver's negligence—Whether possession of vehicle obtained by driver with implied consent of owner—The Vehicles and Highway Traffic Act, R.S.A. 1955, c. 356, s. 130.

An action arose as a result of a collision between two motor vehicles, one of which was owned by the defendant and at the time of the accident was being driven by H, a close friend of the defendant. In the Court of first instance judgment was given in favour of the various plaintiffs; an appeal from that judgment was allowed by the Appellate Division of the Supreme Court, one member of the Court dissenting.

*PRESENT: Cartwright, Abbott, Martland, Judson and Spence JJ.

The only point at issue on the appeal to the Appellate Division and on the subsequent appeal to this Court was whether possession of the defendant's vehicle had been acquired by the driver H with the implied consent of the defendant so as to make him liable for H's negligence pursuant to s. 130 of *The Vehicles and Highway Traffic Act*, R.S.A. 1955, c. 356. The trial judge was of the opinion that the question of implied consent must be approached from the point of view of the driver, that is whether the driver under all the circumstances would be justified in deeming that he had an implied consent to drive. The Appellate Division criticized this test; the test to be applied was whether the driver had in fact acquired possession of the vehicle with the implied consent of the owner, irrespective of what the driver deemed to have been the situation.

Held: The appeal should be allowed and the judgment of the trial judge restored.

A consideration of all the evidence led to the conclusion that the trial judge did not clearly draw the wrong inferences or act upon an erroneous principle of law. Accordingly, the trial judge's finding that the driver H had the implied consent of the owner to drive the vehicle in question should not be reversed.

The Appellate Division placed too narrow an interpretation on the trial judge's test of implied consent. What the trial judge did was put 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 whether he would have been justified in deeming that he had such consent.

APPEAL from a judgment of the Appellate Division of the Supreme Court of Alberta[1], allowing an appeal from a judgment of Milvain J. holding the owner of a motor vehicle liable for the negligence of the driver. Appeal allowed.

B. W. Stringam and *S. Denecky,* for the plaintiffs, appellants.

H. S. Prowse, for the defendant, respondent, Humphrey.

The judgment of the Court was delivered by

SPENCE J.:—This is an appeal from the judgment of the Appellate Division of the Supreme Court of Alberta[1] dated August 27, 1963. By that judgment, the majority of the Court (Porter J.A. dissenting) allowed an appeal from the judgment of the Honourable Mr. Justice Milvain dated January 29, 1963, by which judgment the learned trial judge had given awards in favour of the various plaintiffs in sums totalling $59,686.28. The judgment, however, in favour of the plaintiff Glen Sillito alone exceeded the sum of $10,000.

[1] (1963), 43 W.W.R. 625, 41 D.L.R. (2d) 156.

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An application for leave to appeal to this Court was made on behalf of all the appellants and by the order of the Chief Justice of this Court of December 5, 1963, such application was directed to come on before the Court immediately preceding the hearing of the appeal of Glen Sillito. Upon the said appeal being called for hearing in this Court, leave to appeal was granted to all the applicants. The only appeal to the Appellate Division of the Supreme Court of Alberta was by the defendant Archibald Ashton Humphrey, and the only point at issue upon that appeal or in this Court was whether possession of the appellant's vehicle had been acquired by the driver Harvie, who was killed in the accident which gave rise to the action, with the implied consent of the appellant Humphrey so as to make him liable for Harvie's negligence pursuant to s. 130 of *The Vehicles and Highway Traffic Act,* R.S.A. 1955, c. 356.

In his reasons for judgment, the learned trial judge had said:

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

Both the judgment of the majority of the Court given by the Chief Justice of Alberta and the dissenting judgment of Porter J.A. criticize this test, adopting the language of McBride J.A. in *Stene and Lakeman Construction v. Evans and Thibault*[1], at p. 600:

> The test is not the knowledge or belief of the driver for the time being as to who is the true owner [in that case] but lies in the facts and circumstances under which possession was handed over to the true owner, in this case Evans.

I am of the view that the learned Justices of Appeal interpreted too narrowly the words of the learned trial judge and when he said:

> That is to say whether under all of the circumstances the person who is driving would have been justified in deeming that he had an implied consent to drive.

What the learned trial judge was doing was putting to himself the question whether all the circumstances were such

[1] (1958), 24 W.W.R. 592.

as would show that the person who was driving had the implied consent of the owner and therefore, of course, whether he would have been justified in deeming that he had such consent. In fact, the learned trial judge did examine with very considerable detail all of the circumstances which go to show whether the driver Harvie had the implied consent of the owner Humphrey to drive the vehicle in question. He had the great additional advantage that he watched the witnesses as they were giving evidence and was able to appreciate the fine nuances of their testimony which cannot be reflected in any printed record. I accept the propositions put by counsel for the appellants in this Court that his finding should not be reversed unless the inferences which he drew were clearly wrong or that he acted on some incorrect principle of law. After having carefully considered all of the evidence, I find that I am in agreement with the view of Porter J.A. that the learned trial judge did not clearly draw the wrong inferences or act upon an erroneous principle of law.

The learned trial judge found, as a fact, in these terms:

> Now, the evidence makes it clear that there was a very close and friendly relationship between Humphrey and the deceased Harvie. Harvie was a young man who visited Humphrey on many occasions, and had done so over a number of years. In fact the knowledge one of the other went back into the days of Harvie being but a child, and therefore extended over something in the neighbourhood of 20 years. The evidence makes it clear that on many occasions in the past Harvie had driven Humphrey's car on occasions when Humphrey was with him and on occasions when Harvie was driving it by himself, and in the absence of Humphrey. That comes clear from the evidence of so many people, Cpl. Gingara had seen him driving on at least a couple of occasions, and the O'Hara's, the Darragh's, Netty Harvie, Pete Harvie's father, had all seen Pete Harvie on different occasions driving the car.

I am of the opinion that the learned trial judge was justified in making that finding of fact from the evidence.

The evidence reveals that Harvie, on the day preceding the accident, had come from the home of one Darragh for whom he was working about 200 yards away, to Humphrey's place and had learned that Humphrey's vehicle, which was later involved in the accident, was in bad mechanical condition and that he had worked on Humphrey's car substantially the whole of that day, Friday. This entailed driving into Milk River, a distance of some 25 miles, in his own, Harvie's, car. That Friday evening, Harvie then took Humphrey's car without letting Humphrey know that he

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was doing so and drove into the village of Coutts, a distance of 20 miles. He returned to Humphrey's farm with his sister, Nettie M. Harvie, and another girl with him, and at that time in the presence of these two young ladies there was no reference by Humphrey to the taking of the car. On the other hand, the conversation seemed to be a pleasant one and Humphrey loaned to Harvie for Harvie's automobile so that his sister could return to the village, not only gasoline but a spare tire.

On Humphrey's evidence, after Miss Harvie had left with her friend, he said to the late Peter Harvie:

> I just told him that he shouldn't have taken my car like that, without letting me know.

The learned trial judge comments:

> Now that is a very different thing to saying "You know very well that you have no right to take my car. You were wrong in taking my car. I forbid you from taking my car." "But you were wrong in taking it without telling me." Those are words which carry a natural implication when one views a friendly relationship between these two people that "had you asked me I would have let you have it".

That the remonstrance was mild indeed seems to be demonstrated by the fact that the late Peter Harvie stayed that night in the home of the defendant Humphrey rather than returning the 200 yards to the residence of his employer Darragh, where, of course, all his belongings were. And further, that in the morning when the late Harvie and the defendant Humphrey discovered that two of the tires on Humphrey's automobile were deflated, he, Harvie, walked to Darragh's, borrowed Darragh's car then drove a mile and a half to another friend's to obtain a tire pump, returned, pumped up both tires and then took the pump back to the lender. Thereafter he and the defendant Humphrey drove into the village of Coutts, from there to Milk River and back to the farm. During the time that the two were away, they also stopped to pick up the mail at the post office, pick up a spare tire, go to the bank and to a beverage room. During the whole of this trip, it would appear that the late Harvie drove the automobile and Humphrey rode with him. According to Humphrey's evidence, they returned to his home at about a quarter to one o'clock in the afternoon. Porter J.A., when giving judgment in the Appellate Division, was of the opinion that it must have been some time later than this, an opinion which

seems to have considerable weight under the circumstances. While the two were returning from the village in Humphrey's car, a conversation took place and I quote from the evidence:

Q. Was there any discussion between you and Harvie on the way out from town?

A. Well, Pete wanted to go to Lethbridge to a dance that night.

Q. And why did he tell you about it?

A. Well, the car was in, his car was in Coutts, and it wasn't running, and he wanted me to go with him to the dance in Lethbridge.

Q. He wanted you to go with him?

A. Yes.

Q. To a dance in Lethbridge?

A. Yes.

Q. And you had been to a dance before with him?

A. Yes, a week or two before.

Q. And what did you have to say about going to a dance in Lethbridge on September, on September 16th, 1961?

A. I said I didn't dance anyway, and the car has gone far enough for one day, and I told him I definitely wasn't going out with the car any more that day.

Upon their return to the defendant Humphrey's home, Humphrey went in to get dinner, the late Harvie came in and sat in a chair and said nothing. Humphrey proceeded to get dinner about half ready and at that time the late Harvie stood up and walked out and shut the door. When Humphrey had dinner ready, he went outside to see where the late Harvie was and both Harvie and the car had disappeared.

As I have said, the defendant Humphrey swore this was about 1:00 p.m.

James Dunlop Harvie, the father of the late Peter Harvie, appears to have been the next witness to see the late Peter Harvie and swore that he met him on the road to Coutts between 2:30 and 3:00 o'clock in the afternoon of that day, and at a point of about 5 or 6 miles outside of Coutts. Coutts is 20 miles from the defendant Humphrey's farm and it is 10 miles from Coutts to Milk River.

William Oswold, a garageman in Milk River, swore that the late Peter Harvie brought the Humphrey car into his garage around 4:00 o'clock in the afternoon and there had three tires repaired. There were nails in two of the three

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tires. The late Peter Harvie charged the repair bill to the defendant Humphrey, although Oswold had not, up to the date of the trial, rendered any account.

John Darragh, the then employer of the late Peter Harvie and the neighbour of the defendant Humphrey, saw the late Peter Harvie at 5:00 o'clock in Milk River at the garage where the tires were repaired, and had certain conversation with him. He later saw Harvie leave Milk River headed toward Coutts at 6:35 p.m.

Both the learned trial judge and Porter J.A. in the Court of Appeal considered that the conversation between Darragh and the late Peter Harvie was not evidence against Humphrey. Much of the argument in this Court was devoted to considering that question. I find it unnecessary to decide the question and it is my intention to ignore that conversation in coming to my conclusion.

The accident which gave rise to this action occurred a very few moments after the witness Darragh had seen the late Peter Harvie depart from Milk River. It occurred on the northerly limits of the village of Coutts some 10 miles south of Milk River. Cpl. Gingara of the R.C.M.P. investigated the accident and gave evidence that he arrived at the scene at a few minutes after 6:45 p.m. when the cars were still on the highway and the occupants of the plaintiff Sillito's vehicle were still in it. On those facts, the learned trial judge found in these words:

> This is a fair assumption. Harvie may well have looked out and seen these tires were going flat again, got in the car and drove off. Now at the moment that he did so I am sure that Harvie would quite properly feel that Mr. Humphrey, regardless of what he may have said in the reprimand, would not object to the car being taken by him, Harvie, so that Harvie, in my view, at the moment that he took the car was entitled to assume that he was doing so with the implied consent of Humphrey. I find that was taken under those circumstances, and that therefore Mr. Humphrey as owner of the motor car is rendered liable.

The Chief Justice of Alberta in giving the majority judgment for the Appellate Division said:

> If the owner of a vehicle who has theretofore impliedly consented to a friend acquiring possession of the vehicle revokes the implied consent by reprimanding the friend for having taken the car without his permission and giving what I consider to be a direction to the friend that the car is not to be used by the friend again on a specific day, the owner in my view cannot be taken to have impliedly consented because he did not remove the keys from the car. That he did by his statements on Friday evening

and Saturday morning revoke any implied consent theretofore granted, at least to use the car on the day just referred to, is in my view clear.

On the other hand, Porter J.A., in his dissenting judgment, said:

> It is clear from the quoted evidence of Humphrey that Harvie did not contemplate going to the dance in Humphrey's car unless Humphrey went along because Humphrey's refusal was: "I told him I definitely wasn't going out with the car any more that day".

With all respect, I am of the opinion that Porter J.A. made a more accurate appraisal of the exact words used by the defendant Humphrey in giving his evidence and of the import thereof. It would appear that the late Harvie did not request leave to take from Humphrey the latter's car to go to the dance that Saturday night but rather requested Humphrey to go to the dance with him, Harvie, in Humphrey's car, and that it was not contemplated by either party that Harvie could take the vehicle to go to the dance without Humphrey. It should be noted that the dance was to take place in Lethbridge some 85 miles away from Humphrey's farm. Had Humphrey believed that Harvie had taken the vehicle to go to that dance then Humphrey would not have expected Harvie to return until very late at night. Yet Humphrey swore on examination, and repeated in cross-examination, that he expected Harvie to return to the farm at any time. In cross-examination, Humphrey swore "I thought sure that he would be back. I didn't know just where he went." There may well be significance in the fact that the defendant Humphrey, when he visited the Darragh place, always removed the keys from his car before entering Darragh's home but on arriving back at his own home on the Saturday morning after the conversation in the automobile with the late Harvie in reference to the dance in Lethbridge, he left the keys in the car neither removing them himself nor asking the late Harvie to do so for him.

Upon this evidence, Porter J. A. concluded:

> It seems clear that the sole purpose of Harvie's trip to town that afternoon was to have these tires repaired for Humphrey . . .
>
> It seems clear to me that the course of conduct between these two men was such that there was an implied consent by Humphrey to the use by Harvie of his car. This implied consent, of course, could be terminated or denied in specific instances. The appellant relies on the two instances as having revoked any consent express or implied, namely, the mild

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reprimand for having taken the car on Friday night without asking for it, and the evidence about Humphrey's refusal to go with Harvie to the dance in Lethbridge in Humphrey's car. The latter incident cannot be taken as having anything to do with consent or lack of consent to the use by Harvie of Humphrey's car because Harvie did not then ask for the car, nor, indeed, did Humphrey refuse it to him. Harvie was not using the car on Saturday to go to the dance in Lethbridge, some 80 miles in the opposite direction from that in which he was travelling at the time of the accident. Was the reprimand on the Friday night sufficient to terminate a consent which, in my judgment, had prevailed to that time?

Contemplate the scene at Humphrey's place on Saturday morning—flat tires, no pump, Humphrey's feet preventing him from walking any distance, Harvie's car gone from the farm, Harvie under a duty to return to work at Darragh's. Looking at the state of Humphrey's mind, the only possible solution to his helpless isolation was to send Harvie to town to get the tires fixed. It seems to me that consent can be implied because it is clear that had it been sought it would have been granted as a matter of course. In my opinion the facts and circumstances surrounding the use by Harvie of Humphrey's car on this and other occasions imply consent by Humphrey.

I am of the opinion that Porter J.A. drew the proper inferences from the evidence and proceeded upon the proper principles of law. I am therefore of the opinion that the appeal should be allowed and the judgment of the learned trial judge be restored with costs to the appellants throughout.

Appeal allowed with costs.

Solicitors for the plaintiffs, appellants: Virtue, Russell, Morgan, Virtue & Morrison, Lethbridge; and Stringam, Steele & Denecky, Lethbridge.

Solicitors for the defendant, respondent, Humphrey: Rice, Paterson, Prowse, MacLean, Yanosik & Jacobson, Lethbridge.