COURT OF APPEAL FOR ONTARIO

CITATION: Ivic v. Lakovic, 2017 ONCA 446
DATE: 20170602
DOCKET: C62820

Hoy A.C.J.O., Blair and Hourigan JJ.A.

BETWEEN

Tanja Ivic

Appellant (Plaintiff)

and

Velibor Boro Lakovic, United Taxi Limited a.k.a. United Taxi Transportation Services (K-W) Ltd. and Dusan Tosic

Respondents (Defendants)

Bernard T. Verbanac and Monica Machado, for the appellant

Sebastian Winny, for the respondents

Heard: April 20, 2017

On appeal from the summary judgment order of Justice D.A. Broad of the Superior Court of Justice, dated September 14, 2016.

Hoy A.C.J.O.:

[1] Is a taxi company liable for a sexual assault allegedly committed by one of its drivers, absent any fault on its part? The motion judge in the court below determined, on this record, the answer to this question is “no”. I agree with his conclusion and would dismiss the appeal.

Overview

[2] The appellant was at a party – intoxicated and feeling unwell. It was late in the evening. A friend called the respondent taxi company. It dispatched a taxi. The taxi company's name was on the roof light and in large graphics on the taxi that arrived to drive the appellant. The appellant alleges that she was sexually assaulted in the taxi, by the driver of the taxi.

[3] In addition to suing the driver and the owner and primary operator of the taxi for damages, the appellant sued the taxi company, pleading that it was vicariously liable for the acts of the driver, was negligent, owed her a fiduciary duty and had breached that duty. She did not plead breach of contract.

[4] The motion judge granted summary judgment, dismissing the appellant's claims against the taxi company. On appeal, she challenges the motion judge's dismissal of her claim based on vicarious liability.

[5] The driver had no criminal record. There was no evidence that he had, or that the taxi company had any knowledge that he might have, a propensity for, or history of, sexual or other violence.

[6] The appellant does not challenge the motion judge's conclusion that her claim in negligence failed because she "led no evidence with respect to the applicable standard of care in the circumstances nor any breach on the part of [the taxi company] of such standard of care." Nor does she challenge the motion

judge's conclusion that she did not establish any basis for the existence of a fiduciary duty.

[7] This appeal considers only whether the taxi company should be held liable for the alleged assault, in the absence of any fault on its part.

Vicarious liability

[8] Sometimes, an employer is held liable for a wrong committed by an employee in the absence of any negligence or other fault on the part of the employer. Such liability is referred to as "vicarious liability".

[9] Generally, companies will not be vicariously liable for torts committed by "independent contractors" – as opposed to those committed by "employees": see *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, at paras. 33 – 48. While the Supreme Court suggested in *Sagaz Industries*, at paras. 33 and 57, that "exceptional circumstances" might justify vicarious liability for "independent contractors", what might constitute such exceptional circumstances is not well developed in the jurisprudence.

[10] Most commonly, an employer is found vicariously liable for an employee's acts when, in discharging his or her employment duties, the employee inadvertently causes loss or damage to an innocent third party. For example, the employer of a grocery-store worker who negligently left a mop on the floor of an aisle of the store would normally be found vicariously liable for the damage

suffered by a customer who tripped over the mop, even if the employer were not itself negligent or otherwise at fault.

[11] The more difficult issue is when an employer should be found vicariously liable for an unauthorized, intentional wrong, such as a sexual assault, committed by the employee. The courts are reluctant to impose no-fault liability for abhorrent, intentional acts on the part of an employee such as sexual assault: *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, at para. 44.

[12] In *Bazley v. Curry*, [1999] 2 S.C.R. 534, the Supreme Court articulated the principles that should guide a court in determining whether vicarious liability should be imposed. I will turn to outlining those principles shortly.

The issues on appeal and the disposition of those issues

[13] The appellant argues that the motion judge erred in three respects in concluding that the taxi company was not vicariously liable for the sexual assault allegedly committed by the driver:

> 1. he erred in finding that the driver was employed by the owner of the taxi, and not the taxi company, and this led him to conclude that the taxi company was not vicariously liable;
>
> 2. in doing so, he relied on the evidence of the taxi company's affiant, Ajmer Singh Mandur, without evaluating his credibility or reliability, and without ordering that oral evidence be presented to him, as permitted by r. 20.04(2.2) of the *Rules of Civil Procedure*; and

> 3. he erred in law in his application of the principles in *Bazley*.

[14] The first two arguments fail because the taxi company conceded for the purposes of the summary judgment motion and the appeal that the driver was an employee of the taxi company. The motion judge assumed that the driver was employed by the taxi company. He made no finding about who employed the driver for the purposes of the summary judgment motion, and, therefore, did not need to evaluate Mandur's credibility.

[15] The real issue on this appeal is whether – as the appellant alleges – the motion judge erred in his application of the test in *Bazley* and, consistent with *Bazley*, vicarious liability should not be imposed in this case.

[16] A "finding of vicarious liability is a mixed question of fact and law". However, deference is not owed to the motion judge on the proper application of the law of vicarious liability to the facts: *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia,* 2005 SCC 60, [2005] 3 S.C.R. 45, at para. 23. In my view, on the proper application of the law of vicarious liability, on this record, the motion judge's conclusion is correct. Because adherence to *Bazley* is at issue, I will outline the principles in *Bazley* before discussing its application in this case.

The principles established in *Bazley*

[17] In *Bazley*, a non-profit organization that operated residential care facilities for the treatment of emotionally troubled children was held vicariously liable for the sexual abuse of children in its care by an employee.

[18] Before articulating the principles that should guide the court in deciding whether vicarious liability should be imposed for an employee's unauthorized, intentional wrong, McLachlin J. (as she then was), writing for the court, explained the two major policy rationales for the imposition of vicarious liability, generally.

[19] The first is victim compensation. Vicarious liability improves the chances that the victim can recover from a solvent defendant. But effective compensation must also be fair: "…it is right and just that the person who creates a risk bear the loss when the risk ripens into harm": para. 31.

[20] The second rationale is the deterrence of future harm. McLachlin J. explained, at para. 33, that "Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community."

[21] In a passage, at para. 36, that was key to the motion judge's analysis, McLachlin J. cautioned:

> A wrong that is only coincidentally linked to the activity of the employer and duties of the employee cannot justify the imposition of vicarious liability on the employer. To impose vicarious liability on the employer for such a wrong does not respond to common sense notions of fairness. Nor does it serve to deter future harms. Because the wrong is essentially independent of the employment situation, there is little the employer could have done to prevent it. Where vicarious liability is not closely and materially related to a risk introduced or enhanced by the employer, it serves no deterrent purpose, and relegates the employer to the status of an involuntary insurer.

[22] A "but-for" level of connection – that is, the mere providing of the bare opportunity for the employee to commit the wrong – is not a sufficient link: para. 40.

[23] At para. 41, McLachlin J. directed that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is not conclusive, "the fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability."

[24] She provided a non-exhaustive list of factors that may be relevant in determining the sufficiency of the connection between an employer's creation or enhancement of a risk and an intentional tort committed by an employee:

> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;

> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

[25] At para. 42, McLachlin J. explained that where sexual abuse by an employee is alleged, "there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks."

[26] She cautioned that the test must "not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of liability": para. 46.

[27] In *Bazley*, there was a strong connection: the employee was required to care for the children physically, mentally and emotionally, doing everything a parent would, from general supervision to intimate duties like bathing and tucking in at bedtime. Therefore, the employer was held liable for the sexual abuse of the children.

[28] By way of contrast, “an incidental or random attack by an employee that merely happens to take place on the employer’s premises during working hours will scarcely justify holding the employer liable”: para. 42.

The application of *Bazley* in this case

[29] The motion judge determined *Bazley* disposed of the vicarious liability issue. He referred to paras. 36 and 42 of *Bazley* and held that “the wrongful acts alleged by the plaintiff against [the driver] were only coincidentally linked to United Taxi’s activities as the operator of a taxi dispatching business, in the sense that they are alleged to have taken place in a cab bearing its name and operating within its system. To impose vicarious liability upon United Taxi in these circumstances in the words of McLachlin J. “does not respond to common sense notions of fairness.””

[30] As the appellant argues, the motion judge did not expressly consider the five factors set out at para. 41 of *Bazley* (and in para. 24 above) in concluding that vicarious liability should not be imposed. Because the proper application of *Bazley* is at issue, I will examine the *Bazley* factors to determine whether the motion judge’s conclusion was correct.

[31] In this case, there is no conclusive precedent: the appellant is unable to direct us to any case considering whether a taxi company should be held

vicariously liable for a sexual assault perpetrated by one of its employee-drivers. The appellant's argument is one of first impression.

[32] In considering whether the requisite strong connection between what the taxi company was asking the driver to do (the risk created by the employer's enterprise) and the alleged sexual assault was present in this case, I therefore turn to the "five factors" listed in *Bazley*.

[33] The first factor is the opportunity the taxi company afforded the driver to abuse his power. As noted in *Order of the Oblates of Mary Immaculate*, at para. 48, this will often be a question of degree. In my view, the opportunity was not negligible. Intoxicated people, and their friends, place their trust in taxi drivers to take them home safely. A taxi driver has a form of power over a lone, intoxicated woman – the driver can determine where the taxi will go, and how quickly, and in so doing create opportunities for predatory conduct. But the degree of opportunity was, nonetheless, not as great as that of the child caregiver in *Bazley*. The driver's opportunity for misconduct here was not as intimately connected to his functions, more akin to the groundskeeper in *Jacobi*, discussed in more detail below, where vicarious liability was not imposed.

[34] As to the second and third factors, the alleged sexual assault did not further the taxi company's aims in any respect and was not related to friction, confrontation or intimacy inherent in the employer's aims. While the taxi

company's Rules and Regulations contain provisions intended to minimize any friction or confrontation between a taxi driver and his passengers, I accept that there must occasionally be some friction or confrontation between a taxi driver and his passenger. However, there was no evidence the alleged sexual assault was related to any such friction or confrontation. Unlike the employer in *Bazley*, the taxi company did not require or permit the driver to touch the customer in any intimate body zones. And here the taxi company's Rules and Regulations sought to prevent physical contact and harassment. They provided: "Do not touch any customer if possible" and "Do not ask a customer out for a date".

[35] Turning to the fourth factor, the taxi company did not confer any power on the driver in relation to the appellant. It dispatched the driver to drive the appellant. There was no evidence that the taxi company knew that it was sending the driver to collect a lone, intoxicated woman. The relationship between the driver and the appellant was that of adult driver and adult fee-paying passenger. Arguably, what power the driver had, he arrogated to himself through his own decisions.

[36] The final factor – the vulnerability of potential victims to the wrongful exercise of the employee's powers – is arguably an important factor in this case. Late in the evening, a lone, intoxicated woman is vulnerable. Sadly, however, she is prey not only to taxi drivers. The power the driver allegedly wrongfully exercised was not predicated on his employment. Moreover, as Binnie J. wrote

for the majority in *Jacobi*, “vulnerability does not itself provide the “strong link” between the enterprise and the sexual assault that imposition of no-fault liability would require” (para. 86).

[37] The test in *Bazley* must be applied with serious rigour: *Jacobi*, para. 30.

[38] In my view, it cannot be said that the taxi company significantly or “materially” (the word the Supreme Court instead uses in *Jacobi*, at para. 79) increased the risk of the appellant being sexually assaulted by permitting the driver to drive the taxi and requesting him to drive the appellant. I agree with the motion judge the requisite strong connection between what the taxi company was asking the driver to do (the risk created by the employer’s enterprise) and the alleged sexual assault was not present in this case. As the motion judge concluded, the alleged sexual assault may be characterized as only coincidentally linked to the activities of the taxi company.

[39] Further, the appellant has not demonstrated, in this case, that imposition of vicarious liability would further the broader policy rationales of fair compensation and deterrence used to justify it.

[40] The lack of an effective remedy for survivors of sexual assault is a matter of public concern. But fair compensation is not about ability to pay: it is not a “deep-pockets” rule. As McLachlin J. instructs in *Bazley*, imposing vicarious

liability where the conduct giving rise to the claim is only coincidentally linked to the activities of the taxi company would not be “fair”.

[41] The Supreme Court instructs that deterrence must be assessed in the context, including the nature of the conduct sought to be deterred, the nature of the liability sought to be imposed, and the type of enterprise sought to be rendered liable: *Jacobi*, para. 72.

[42] As to the nature of the conduct, in *Jacobi*, Binnie J. noted that society has already placed a high deterrence factor on sexual assault. He wrote, at para. 73, “[t]here may be little an employer can do in reality to deter such conduct in its employees if the possibility of ten years in jail is not sufficient.”

[43] In oral submissions, counsel for the appellant argued that if vicarious liability were imposed, taxi companies might require cameras in all taxis and cameras would deter taxi drivers from sexually assaulting passengers. Counsel for the taxi company counters that a camera would not deter a driver determined to sexually assault a passenger: he could disconnect the camera, cover its lens, or commit the assault after the passenger exited the taxi.

[44] In this case there was no evidence of the applicable standard of care. In the absence of such evidence, or evidence of what precautions a taxi company could take above and beyond the applicable standard of care to deter drivers

from sexually assaulting passengers, I would be reluctant to conclude that imposing vicarious liability would have a deterrent effect.

[45] Further, the nature of the liability that the appellant asks this court to impose on the taxi company is indirect, no-fault liability. The court should be cautious about imposing indirect, no-fault liability. Here, as noted, the appellant led no evidence as to negligence. As Binnie J. wrote at para. 74 of *Jacobi*, “There is much to be said for developing and refining the paths of potential direct liability against employers…”

[46] In *Jacobi*, the Supreme Court considered whether a non-profit, recreational club for children, many of whom were troubled and vulnerable, should be liable for sexual assaults perpetrated against two children by one of its employees.

[47] Binnie J. observed, at para. 75, that:

> … the imposition of no-fault liability in this case would tell non-profit recreational organizations dealing with children that even if they take all of the precautions that could reasonably be expected of them, and despite the lack of any other direct fault for the tort that occurs, they will still be held financially responsible for what, in the negligence sense of foreseeability, are unforeseen and unforeseeable criminal assaults by their employees. It has to be recognized that the rational response for such organizations may be to exit the children’s recreational field altogether.

[48] In this case, unlike in *Jacobi*, the taxi company is a for-profit enterprise. But the fact that the respondent taxi company is a for-profit enterprise, without more, does not justify imposing vicarious liability.

Disposition

[49] For the reasons above, I would dismiss the appeal. I would award the respondent taxi company its costs of the appeal, fixed in the amount of $6000, inclusive of disbursements and HST.

Released: “AH” “JUN 02 2017”

“Alexandra Hoy A.C.J.O.”
“I agree R.A. Blair J.A.”
“I agree C.W. Hourigan J.A.”