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RE-CAPPING EMPLOYER LIABILITY FOR WRONGFUL ACTS OF THEIR EMPLOYEES

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A. INTRODUCTION

In *KL* v 1163957799 Quebec Inc. c.ob. as Calypso Water Park Inc. and Calypso Theme Waterpark, and Curtis Strudwick ("KL"),¹ the Ontario Superior Court of Justice considered a motion by the corporate defendant ("Calypso") to strike the plaintiff's pleadings regarding Calypso's liability for the alleged sexual assault of KL, the plaintiff, by an employee of Calypso, on the ground that the pleadings disclosed no reasonable cause of action. On April 14, 2015, Justice Smith dismissed Calypso's motion. In his reasons, Justice Smith provided a thorough review of the Supreme Court of Canada's decision in *Bazley v Curry* ("*Bazley*"),² which established the test for vicarious liability of an employer for the acts of an employee. Although this decision represents only a procedural step on the way to a final decision in *KL*, it is useful as a reminder to employer, including charities and not-for-profits, concerning how the courts will determine potential employer liability for the acts of its employees. This *Charity Law Bulletin* reviews the comments by the court in *KL*.

B. FACTS

During the summer of 2013, KL and Curtis Strudwick ("Strudwick") were both employees at Calypso. Strudwick was KL's supervisor. KL was 19 years old and Strudwick was 40 years old. Strudwick had a prior criminal record for domestic assault. KL alleges that throughout the summer Strudwick made

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² [1999] 2 SCR 534, 174 DLR (4th) 45, [1999] 8 WWR 197.

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sexual advances towards her, which she rejected. She further alleges that Strudwick threatened that he would reduce her shifts if she reported his sexual advances.

On September 2, 2013, KL and Strudwick were both present at an end-of-the-season Calypso staff party. Staff were free to use the entire Calypso grounds at the party and were allowed to bring alcohol into the park during the party. KL alleges that during the party Strudwick made sexual advances towards her. She alleges that around 8:00pm, they were swimming together when Strudwick sexually assaulted her by having sexual intercourse with her without her consent. After the assault, KL alleges that Strudwick continued to harass her, demanded that she drive him home, and continued to assault her during the drive. After Strudwick eventually left the car, KL immediately went to the police. Strudwick was charged with two counts of sexual assault and plead guilty to one count of forcible confinement.

KL commenced a civil lawsuit against Calypso and Strudwick, claiming monetary damages for sexual harassment, sexual assault, assault, battery, false imprisonment and intentional and/or negligent infliction of mental suffering. In her Statement of Claim, KL alleges that Calypso is vicariously liable for Strudwick's actions, as well as liable for its own negligence. In her Statement of Claim, the factual allegations that KL pleads to support her claims against Calypso include:

- Calypso allowed an unstructured and unsupervised staff party on its premises where alcohol was permitted to be consumed by staff;
- This type of staff party created and/or enhanced the risk that assault, sexual assault, and battery would occur in the workplace;
- Calypso failed to instruct or train its employees about sexual assault or sexual harassment in the workplace;
- Calypso hired an employee with a violent history and a prior criminal record for domestic assault and placed him in a supervisory role over vulnerable employees; and
- Calypso failed to implement a screening process for employees to ensure that it did not hire individuals with criminal records and/or promote them to supervisory roles.³

C. RULES OF PRACTICE

Rule 21.01(1)(b) of the Ontario Rules of Civil Procedure provides that a party may move before a judge

³ Supra note 1 at para 6.

To strike out a pleading on the ground that it discloses no reasonable cause of action or defence and the judge may make an order or grant judgement accordingly.⁴

The test for striking out a claim because it does not disclose a reasonable cause of action requires that it be "plain and obvious that the pleading discloses no reasonable cause of action."⁵ It is also important to note that the standard for demonstrating a cause of action is very low and, therefore, the threshold that Calypso was required to meet to strike the pleading was very high.

D. ISSUES AND ANALYSIS

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The motion raised three issues:

1. Is the tort of sexual harassment a recognized cause of action in the Province of Ontario?

Justice Smith held that, in Ontario, previous case law has established that there is no civil cause of action for damages as a result of sexual harassment and discrimination on the basis of gender/sex. He underscored that "these matters come under the exclusive jurisdiction of the [Ontario *Human Rights*] *Code*."⁶ Consequently, Justice Smith struck this aspect of KL's Statement of Claim against Calypso.

2. <u>Does the plaintiff's Statement of Claim disclose a reasonable cause of action in vicarious liability</u> <u>against Calypso?</u>

In *Bazley*, the Supreme Court of Canada established the test for vicarious liability for sexual assault. This framework requires that the following two stages be considered:

- i. Courts must determine whether any factually similar precedents establish, unambiguously, whether vicarious liability should be imposed, and
- ii. If the precedents are inconclusive, courts must consider the broad policy rationales behind strict vicarious liability.

⁴ RRO 1990, Reg 194.

⁵ Supra note 1 at para 10, see also Knight v Imperial Tobacco Canada Ltd, 2011 SCC 42, [2011] 3 SCR 45 at para 17.

⁶ *Ibid* at paras 26-27.

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In regards to the first stage, Justice Smith held that the cases submitted by Calypso, as well as the cases submitted by KL, could all be distinguished from the current facts. In particular, Justice Smith pointed to the facts that the cases presented by Calypso involved assaults which took place outside of the workplace,⁷ and the cases presented by KL involved assaults that involved a higher degree of connection between the individual employees who committed the assault and the employer.⁸

Because Justice Smith concluded that none of the case law provided an unambiguous precedent, he then turned to consider the broader policy rationales behind strict vicarious liability. In this regard, the *Bazley* analysis looks to whether the employer provided more than "the locale or the bare opportunity for the employee to commit his or her wrong."⁹ In order to be held vicariously liable, the employer "must materially enhance the risk, in the sense of significantly contributing to it."¹⁰ Further, the analysis emphasizes that courts must consider whether "the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability."¹¹ Justice Smith considered the fact that by hosting a staff party at its large waterpark and by permitting staff to consume alcohol during the party, Calypso increased the chances of creating a situation "where individuals such as KL could easily become isolated and vulnerable."¹² He therefore concluded that "while it may be true that the plaintiff will face obstacles in proving her claim, I do not think that, at this point, it is plain and obvious that the claim has no reasonable prospect of success."¹³

Justice Smith therefore dismissed Calypso's motion to strike KL's pleadings based on Calypso's vicarious liability.

3. Does the plaintiff's Statement of Claim disclose a reasonable cause of action in negligence against <u>Calypso?</u>

Calypso further argued that KL failed to plead the necessary facts to support her claim of negligence against Calypso and, therefore, could not prove that Calypso owed her a duty of care, or that sexual

⁷ *Ibid* at para 36.

⁸ *Ibid* at para 41.

⁹ Supra note 2 at para 40.

¹⁰ Ibid.

¹¹ *Ibid* at para 41.

¹² Supra note 1 at para 53.

¹³ *Ibid* at para 56.

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assault was reasonably foreseeable. In response, Justice Smith agreed with the plaintiff that a duty of care in such a case is grounded in an employer's duty to provide a reasonably safe work environment. Additionally, although he agreed that KL could have more clearly pleaded that Calypso should have known or ought to have known about Strudwick's criminal conviction, he concluded that this point was implied in KL's pleadings. Therefore, Justice Smith held that "it is not plain and obvious to me that here is no reasonable prospect that the plaintiff will prove that the defendant [Calypso] was negligent."¹⁴

E. CONCLUSION

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The decision to allow KL to proceed in her claim alleging that Calypso is vicariously liable and negligent for allowing an employee to commit sexual assault against another employee provides a useful overview of when employers will potentially be found liable for the wrongful acts of their employees. It is important that all employers, including charities and not-for-profits, are aware of potential legal liabilities that can arise when wrongful acts occur on their premises, or during employer organized events, such as staff outings or parties. Organizations working with vulnerable people, including the elderly and children, should be particularly vigilant.

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¹⁴ *Ibid* at para 66.