
EMPLOYER NOT LIABLE FOR SEXUAL ASSAULT

*By Barry W. Kwasniewski **

A. INTRODUCTION

On June 2, 2017 (and as reported in the *Ontario Reports* on April 6, 2018) the Court of Appeal for Ontario released its decision in *Ivic v Lakovic* (“*Ivic*”).¹ This significant decision reviews the principles of vicarious liability of employers for wrongful acts of their employees, which were considered in the leading 1999 Supreme Court of Canada (“SCC”) decision in *Bazley v Curry* (“*Bazley*”).² In *Ivic*, the appellant was a customer seeking damages against a taxi company for the alleged sexual assault perpetrated by one of its employee drivers. The court upheld the decision of the motion judge, which dismissed the claim against the taxi company.³ This case provides a current perspective on the factors that courts will consider when imposing vicarious liability on employers, including charities and not-for-profits, for intentional wrongs committed by their employees.

B. BACKGROUND

In this appeal, the appellant took the position that the motion judge erred in concluding that the taxi company was not vicariously liable for the sexual assault allegedly committed by the employee taxi driver. Neither the motion judge’s decision nor the Court of Appeal’s decision indicate on what date the alleged events took place. The appellant is said to have provided the details of the event in her Statement of Claim,

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¹ 2017 ONCA 446, 139 OR (3d) 58, leave to appeal to SCC dismissed on February 1, 2018, 2018 CarswellOnt 1628.

² [1999] 2 SCR 534.

³ *T.I. v LAKOVIC et al*, 2016 ONSC 5750.

as well as by sworn affidavit in response to the taxi company's motion for summary judgement, but this background is based on the facts summarized by the court.⁴

The appellant claimed that she had been at a party, intoxicated and not feeling well, when a friend called the respondent taxi company and asked for a driver to take the appellant home. She claimed that a taxi bearing the name of the taxi company arrived to pick her up around 11:15 PM,⁵ and that the taxi driver sexually assaulted her after she entered the taxi.⁶

The appellant brought an action against both the taxi driver and the taxi company, alleging with respect to the latter that it "was vicariously liable for the acts of the driver, was negligent, owed her a fiduciary duty and had breached that duty."⁷ In response, the taxi company brought a motion for summary judgment with respect to its liability, which was granted on the basis that the driver, even though he was a secondary driver, had no criminal record and because no evidence had been presented to show that the taxi company had any knowledge of any history of or propensity for violence on the part of the driver.⁸

On appeal, the appellant did not challenge the decision of the motion judge with regard to her lack of evidence to support her claim against the taxi company.⁹ Instead, the appellant argued that the motion judge had erred in finding that the driver was an employee of the owner of the vehicle, as opposed to the taxi company, but the appeal court rejected this argument because the taxi company had conceded this fact for purposes of the motion for summary judgment, and the motion judge had accordingly assumed that the driver was employed by the taxi company.¹⁰ The appellant also alleged that the motion judge had erred in law in his application of the vicarious liability principles in *Bazley*, which the court found to be the "real issue on this appeal."¹¹

⁴ *Ibid* at paras 1 and 12.

⁵ *Idem*.

⁶ *Supra* note 1 at para 2.

⁷ *Ibid* at para 3.

⁸ *Ibid* at paras 4 and 5; also *supra* note 3 at para 20.

⁹ *Ibid* at para 6.

¹⁰ *Ibid* at paras 13-14.

¹¹ *Ibid* at para 15.

C. ANALYSIS BY THE COURT

The court recognized that an employer may be found vicariously liable, without being itself negligent or otherwise at fault, for the acts of an employee who, in discharging his or her duties, causes loss or damage to an innocent third party.¹² However, the court also stated that courts are reluctant to impose vicarious or no-fault liability for the abhorrent, intentional acts of an employee.¹³

In *Bazley*, a case that arose in the context of sexual abuse of children by an employee of an organization that operated a residential care facility, the SCC established the principles to guide courts in imposing vicarious liability in such situations. In this regard, the SCC explained that fair victim compensation as well as deterrence of future harm are the two main policy rationales for imposing this type of vicarious liability on employers in appropriate circumstances. However, the SCC also recognized that the acts of the employee that lead to the imposition of vicarious liability on the employer cannot be only coincidentally linked to the activity of the employer, in that only providing the employee the opportunity to commit the wrong is not sufficient.¹⁴

In this regard, the appeal decision followed the analysis of the SCC noting that, in cases of vicarious liability of an employer for the unauthorized, intentional acts of its employees, “the fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability.”¹⁵ The sufficiency of the connection between the risk caused by the employer and the intentional wrong of the employee was described in *Bazley* through the following factors referenced by the appeal court:¹⁶

- (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.

¹² *Ibid* at para 10.

¹³ *Ibid* at para 11.

¹⁴ *Ibid* at paras 17-22.

¹⁵ *Ibid* at para 23.

¹⁶ *Ibid* at para 24.

The appeal decision also highlighted how *Bazley* articulated that there must be a “strong connection” in cases where sexual assault is alleged and that the test “must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of liability.”¹⁷

Applying the *Bazley* principles, the appeal court found that there was no conclusive precedent dealing with a taxi company being held vicariously liable for a sexual assault perpetrated by one of its drivers.¹⁸ The appeal court then reviewed the five factors from *Bazley* to determine the “strong connection” element in order to determine whether the imposition of vicarious liability was appropriate in the circumstances.¹⁹

The first factor, being the opportunity that the taxi company afforded the driver to abuse his power, was found to be not negligible, as a taxi driver may have a form of power over a lone, intoxicated woman. However, the court found that the driver’s opportunity was not intimately connected to his functions.²⁰

Similarly, regarding the second and third factors, the appeal court found that the alleged conduct of the driver did not further the aims of the taxi company and was not related in any way to friction or intimacy inherent in the business of the taxi company insofar as the taxi company’s Rules and Regulations sought to prevent any physical contact between the drivers and the customers.²¹

In its review of the fourth and fifth factors of the non-exhaustive list from *Bazley*, the appeal decision held there was no evidence that the taxi company had knowingly conferred power on the driver in relation to the appellant, as a lone, intoxicated woman,²² and that this vulnerability did not make the appellant prey only to the taxi driver, meaning that the power that he exercised was not predicated on his employment.²³

Agreeing with the motion judge’s decision to dismiss the claim against the taxi company, and following the principles established in *Bazley*, the appeal court found that there was no strong connection between what the taxi company had asked the driver to do and the alleged sexual assault such that the events were

¹⁷ *Ibid* at paras 25-26.

¹⁸ *Ibid* at para 31.

¹⁹ *Ibid* at para 32.

²⁰ *Ibid* at para 33.

²¹ *Ibid* at para 34.

²² *Ibid* at para 35.

²³ *Ibid* at para 36.

only coincidentally linked.²⁴ The appeal court further stated that the appellant had failed to demonstrate how the imposition of vicarious liability in this case was in accordance with the policy objectives of fair victim compensation and deterrence of future harm, such as the appellant's failure to establish the applicable standard of care that would have a deterrent effect.²⁵

D. CONCLUSION

This case provides a current review of the principles established by the SCC in *Bazley*. Even though the court found the employer to be not vicariously liable, this case is a reminder to all employers, including charities and not-for-profits, that there may be situations in which even the abhorrent, intentional wrongs committed by an employee may lead to the imposition of no-fault vicarious liability on the employer. These types of cases raise complex questions of fact and law, and the outcomes are difficult to predict. Therefore, in order to reduce potential liability risks, charities and not for profits need to consider, prepare and implement appropriate training, supervision and policies with respect to both employees and volunteers. Such policies would anticipate possible risks of harm against innocent third parties and include measures to minimize these risks, and are an important component of organizational risk management.

²⁴ *Ibid* at para 38.

²⁵ *Ibid* at paras 39, 43-44.