Submissions on Civil Liability Reform

The Coalition of British Columbia Businesses

October 2002

Introduction:

The following submissions are made on behalf of the Coalition of British Columbia Businesses. The Coalition was formed in 1992 to represent the views of small and medium-sized businesses in the development of British Columbia's labour and employment policies. The Coalition represents over 50,000 businesses active in all sectors of the province's economy.

The Coalition has focused its submissions on the issue of vicarious liability for intentional wrongs. On the remaining issues under discussion for civil liability review, the Coalition endorses the recommendations of the ICBA and the BCCA in their October 2002 submissions to the Ministry of Attorney General of British Columbia.

Summary of Our Recommendations:

Strict liability should not be imposed on employers for intentional employee misconduct unless the act in question falls within the reasonably foreseeable scope of the employee's job duties.

Vicarious Liability for Intentional Wrongs

What is Vicarious Liability?

Vicarious liability is a common law doctrine that makes an employer liable for certain actions of its employees. The general principle is that an employer is liable for any acts

committed by its employees within the scope of their employment. For example, if a worker operating a crane on a construction site accidentally drops a heavy object and destroys a car, then the employer is vicariously liable for that damage.

Vicarious liability is justified on both economic and public policy grounds. The purpose of vicarious liability is to allocate the risk to the party who benefits from the activity, can best prevent the harm and can most easily insure against the loss.

The employer should be responsible for any damage resulting from the performance of an employee's work because the employee has hired the employee and benefits from the employee's work. Employers are also better able to take steps to reduce the likelihood of harmful conduct and to obtain insurance coverage for such liability. In this way safe work practices are encouraged and the cost of harm to third parties is properly incorporated into the cost of business through insurance premiums.

But what if an employee causes damage that does not result from the performance of the work? For example, what if an employee causes damage while joy-riding, or by deliberately dropping the object? Should the employers still be liable, even though they clearly did not authorize the worker to commit such acts?

Unit recently, the answer would have been no. Under well established legal principles, employers were not responsible for such acts because they do not fall within the scope of the employee's job duties. However, the courts have broadened the scope of the doctrine in a way that could drastically increase the potential liability for employers.

How Courts have Broadened the Scope of the Doctrine

The doctrine of vicarious liability was expanded by the Supreme Court of Canada in *Bazley v. Curry*.[1] In that case, a non-profit childcare agency employed a man who, as it turned out, was a pedophile and assaulted children in the agency's care. There was no evidence that the

[1] [1999] 2 S.C.R. 534.

agency was negligent in hiring or supervising the employee. The victims sued the employee and also the agency. The Supreme Court of Canada held that the agency was vicariously liable for the acts, even though they clearly could not be said to fall within the scope of the job duties. The Court introduced an open-ended test, based on the question of whether the wrongful act was sufficiently related to conduct authorized by the employer to justify imposing vicarious liability. Under the revised test, the court must determine whether there is a significant connection between the creation or enhancement of a risk and the wrong that results from it, even if it was unrelated to the employer's goals or the employee's duties. Although the Court held that there must be more than just an incidental connection between the wrongful act and the work (for example, it is not enough that it occurs at the employer's premises, or during work hours), this new test has potentially far-reaching and unpredictable results.

The consultation paper on civil liability reform published recently by the Attorney General of British Columbia refers to a recent B.C. Court of Appeal case where B.C. Ferries sued a security company for loss resulting from a fire deliberately set by a security guard.[2] The Court held that the question in that case was whether a security guard's arson is a normal risk of the business of providing security services. The Court held that it was, for two reasons: first, the wrongful act was facilitated by the fact that the arsonist was responsible for security and second, since the security company would be vicariously liable if the guard negligently allowed an arsonist to set a fire, it should not be in a better position because the arsonist happened to be the guard.

These and other recent examples indicate that employers face a growing, and unpredictable risk of vicarious liability for intentional wrongs committed by their employees. The problem is compounded by the growing trend of insurers to exclude intentional wrongs from the scope of insurance policies. Even where such losses are covered by insurance, increased liability also means increased insurance premiums.

[2] *B.C. Ferry Corp v. Invicta Security Service Corp* [1998] 58 B.C.L.R. (3d).

Recommendations of the Coalition of BC Businesses

Strict liability should not be imposed on employers for intentional employee misconduct unless the act in question falls within the reasonably foreseeable scope of the employee's job duties.

Reasons for the Recommendations

The recent trend by the courts to broaden the scope of vicarious liability, as discussed above, has had the effect of making it more difficult to predict when the doctrine of vicarious liability will apply. The test set out by the Supreme Court of Canada in the *Bazley* case has created only confusion and unpredictability in this area.

Soon after issuing its decision in the *Bazley* case, the Supreme Court of Canada applied the test it formulated in that case to another case involving vicarious liability for the sexual misconduct of an employee. The facts in *Jacobi v. Griffiths*[3] were similar to those in *Bazley*. Griffiths, the employee in question was a program director for Boys' and Girls' Club of Vernon. The club's objectives included 'behavioral guidance and promotion of health and the social, educational, and character development of boys and girls.' The sexual misconduct in this case occurred both during and after Griffiths' working hours. Ultimately, a divided Supreme Court found that there was not a sufficient connection between the employee's duties and his misconduct. The opposite result was, however, equally consistent with the test propounded by the Supreme Court

Nicholas Rafferty, a legal scholar, commenting on these two cases,[4] notes that:

> These cases propose a new approach to the issue of vicarious liability for sexual assault and, indeed, for other intentional torts. In general, it makes sense to ask whether the tort bears a strong connection to the risk that the employer has placed

[3] [1999] 2 S.C.R. 570.

> in the community. The two cases, however, demonstrate the difficulty in applying the Supreme Court's approach. In *Jacobi v. Griffiths*, the Court was evenly split. One suspects that lower courts will face numerous obstacles in attempting to follow the Supreme Court's direction.

The extension of the doctrine beyond reasonably foreseeable risks also runs counter to both the public policy rationale for the doctrine and the long established legal principles underlying the doctrine. The policy informing the doctrine has been summarized as follows:

> What has emerged as the modern justification for vicarious liability is a rule of policy, a deliberate allocation of risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business. They are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them; and because he is better able to absorb them, and to distribute them, through prices, rates or liability insurance, to the public, and so to shift them to society, to the community at large.[5]

The expanded doctrine, however, is not consistent with the rationale for shifting liability to the employers. Tort scholar Lewis Klar has criticized the trend marked by the *Bazley* case in precisely these terms. He points out that:

> While one would readily concede that it is just for a victim of sexual assault to recover compensation from the wrongdoer, why justice would require that the compensation come from a morally blameless employer is a difficult question to answer. McLachlin J. noted that 'the idea that the person who introduces a risk

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[4] "Developments in Contract and Tort Law: The 1998-1999 Term" *The Supreme Court Law Review* (2000), 11 S.C.L.R. (2d), (Buttersworth, Toronto: 2000) at 183.
[5] W.P. Keeton et al., eds., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul: West Publishing 1984), at 500-501.

> incurs a duty to those who may be injured lies at the heart of tort law.' This, however, is only true with regard to those who are negligent. Tort law does not, as a general rule, subscribe to a theory of strict liability. It is only when a person introduces an *unreasonable* risk that liability attaches. Thus, more explanation would be required to justify vicarious liability for non-negligent behaviour.[6]

In other words, the courts have offered no justification for expanding employer liability beyond situations in which the misconduct in question was reasonably foreseeable. In the absence of a sound principled justification employers should not be subject to uncertain liability for the acts of employees.

Another crucial premise of the standard public policy rationale is that insurance will be available to an employer to enable him to bear this burden. But when the nature of the burden itself becomes unpredictable, insurers become more reluctant to insure the risk, and the argument of spreading the risk through insurance becomes more problematic.

The present expansive definition of vicarious liability in Canada has departed substantially from long established principles. The *Restatement (Second) of Agency*, published by the American Law Institute,[7] states that "a master is subject to liability for the torts of his servants committed while acting in the scope of their employment."[8] The Institute sets out when conduct is and is not within the scope of employment by stating: "the ultimate question is whether or not it is just that the loss resulting from the servant's acts should be considered as one of the normal risks to be borne by the business in which the servant is employed."[9] The *Restatement* also makes clear that while some criminal and tortious acts may still be within the scope of employment, the more serious the crime or tort, the less likely it is to be within the scope of employment. "The master can reasonably anticipate that servants may commit minor

[6] "Judicial Activism in Private Law" *The Canadian Bar Review*. Vol. 18, 2001. Page 215 at 237.
[7] 1957, American Law Institute Publishers, St Paul, Minnesota.
[8] Section 219.
[9] Section 229.

crimes in the prosecution of the business, but serious crimes are not only unexpectable but in general are in nature different from what servants in a lawful occupation are expected to do."[10]

Perhaps the best indication that the law of vicarious liability is in need of reform is the comments of judges. To take just one example, in the British Columbia Court of Appeal case of *Jacobi*, involving the security guard who committed arson (discussed above), Braidwood J.A., wrote in dissent:

> It cannot be said, in the case at bar, that the security guard's actions were in the course of his employment. His job required him to assist in the protection of the property, not to destroy it. [The arsonist's] conduct was not in furtherance of his employer's business and further, his actions were in complete opposition to his job function. How can it be said that in a situation such as this, where the employee engages in conduct so unrelated and in fact in antithesis to his job function, the employer is liable?[11]

In addition to more unpredictable outcomes, we are also concerned that a fundamental distinction is being blurred: the distinction between vicarious liability for risks that are reasonably foreseeable and vicarious liability for risks that are not reasonably foreseeable.

Braidwood J.A. also questioned the blurring of this well-established distinction in *Jacobi*. The majority reasoned that if the security guard had been negligent in his duties and failed to prevent an arsonist from destroying the building, the employer would be liable; and therefore the employer should not 'get off' merely because it happened to employ the arsonist. In expressly rejecting this argument, Braidwood J.A. criticized a line of thinking that is characteristic of the judicial expansion of vicarious liability generally:

> With respect, I do not agree with that analysis. The act of the employee must be done 'in the course of his employment' for the employer to be held vicariously

[10] Section 231.
[11] At 99.

> liable. Thus the distinction is not between intentional acts and negligent acts but between acts in the course of employment and those outside. Where an employer acts in the course of his employment the employer will be liable regardless of whether the act is negligent or intentional. Conversely, where the act is outside the course of employment it will not be attributed to the employer in any case. […] If it were otherwise, the courts would be expanding the concept of vicarious liability to become one of absolute liability. It would be unfortunate if the law were expanded in this manner, as employers would be held liable for unforeseeable acts of their employees and acts which have little or no connection to their employment.[12]
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> (emphasis added)

Conclusion:

We recommend simply that legislation be introduced that has the effect of reversing these recent judgments and restoring Braidwood J.A.'s common sense application of the doctrine of vicarious liability. This will restore a lost measure of clarity and predictability to the law, and will once again set it in line with sound public policy.

[12] At 104.