Raising the Bar

Raising the Bar – Fourth Edition

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"I'm so glad I live in a world where there are Octobers."

L.M. Montgomery

Dear Friends,

We are pleased to provide you with the fourth issue of *Raising the Bar*. Our batteries are recharged following a summer break, and we are ready for autumn!

In this issue, we share with you recent decisions that you need to know about relating to the important issue of costs. These decisions deal with a broad range of costs issues, including the impact of the *Combined Air* decision on the cost consequences of a withdrawn summary judgment motion, the principles that ought to be addressed when making submissions on costs in the context of a class proceeding certification motion and the costs impact of a failure to disclose a settlement agreement to the other parties. In addition to these cases, you will also find a very significant decision from the Ontario Court of Appeal about the importance of adhering to timelines in litigation.

In the second part of this issue, we shine a light on the thorny issue of vicarious liability, an issue that all employers need to be aware of. We share our insights into the all-important policy considerations that drive findings of vicarious liability and how these considerations are potentially broadening the categories of relationships in which vicarious liability will be applied.

Finally, you will find out whether an employee who owns a book of business has to give notice to her employer prior to departing. You may find the answer surprising.

We thank Dianne Jozefacki and Amanda Lawrence, whose hard work and contributions were essential to the publication of this issue.

We hope that you will find this issue of *Raising the Bar* informative and engaging. Look for the next edition of *Raising the Bar* this winter.

Frank Cesario and Elisha Jamieson
Co-Editors

IN THIS ISSUE

PART 1 – CASES YOU NEED TO KNOW ABOUT

1196158 Ontario Inc. v. 6274013 Canada Limited, 2012 ONCA 544 (CanLII)

The Court of Appeal recently sent a strong message to litigants about the importance of adhering to the timelines set out in the *Rules of Civil Procedure* (rule 48.14), or by a court, in moving an action forward. In this case, the plaintiff's delay resulted in dismissal of the action, upheld on appeal, despite the absence of prejudice to the defendant.

In dismissing the plaintiff's appeal, the Court of Appeal adopted Justice D.K. Gray's views about the need to balance the litigant's right to have his or her case heard on its merits with the desire to have public confidence in the legal system: "The Rules reflect a balance. The litigant does not have an untrammelled right to have his or her case heard. In order to be heard, a case must be processed in accordance with the Rules. By the same token, adherence to the Rules must not be slavish in all circumstances. They are, after all, designed to ensure that cases are heard. Throughout the Rules, the principle is reflected that strict compliance may be dispensed with where the interests of justice require it: see, for example, Rules 1.04(1), 2.01, 2.03, 3.02, and 26.01. The difficult issue, in any particular case, is to determine when non-compliance reaches the point that it can no longer be excused. The Court, and society as a whole, have an interest in ensuring that the system remains viable. If the Rules can be ignored with impunity, they might as well not exist." This case reminds parties, as well as their counsel, of the importance of moving the matter forward in a timely manner so not to risk losing the fight due to their own inaction.

Legal Aid Ontario v. Gertler, 2012 ONSC 5000 (CanLII)

In this case, the defendants asked the Ontario Superior Court to dismiss the plaintiff's claim on the basis that the parties had previously settled the matters now being advanced in the action. In support of this motion, the defendants sought full and complete production of the file kept by the plaintiff's former lawyer, including her time dockets for a specified number of months. The defendants argued that the requested production was relevant to the issue in dispute on the motion and also that the plaintiff had waived any privilege that may have attached to the documents. Master Muir disagreed with this argument, finding that it was impossible to conclude that the dockets would be relevant to a finding that the parties were ever *ad idem* with respect to the terms of the settlement and that nothing in the affidavits could be construed as a waiver of privilege. In arriving at this conclusion, Master Muir reiterated that lawyer-client privilege is an essential part of our justice system and is a fundamental civil and legal right that must be scrupulously protected by the courts. He found that the moving parties had fallen far short of meeting their burden to clearly convince the Court that there has been a waiver of that right.

Sirron Systems Inc. v. Insyght Systems Inc., 2012 ONSC 4915 (CanLII)

As mentioned in our previous edition of *Raising the Bar,* the Court of Appeal recently articulated a new "full appreciation" test for granting summary judgments in *Combined Air Mechanical Services v. Flesch.* However, as confirmed by the decision in *Sirron Systems Inc.*, this new approach to granting summary judgments will not alter the ordinary cost consequences of a withdrawn motion.

In *Sirron,* the defendants made a motion for summary judgment but withdrew it based on a comment by the judge that the motion was unlikely to succeed. At this time both parties agreed to make written submissions with regard to costs, with the plaintiff requesting costs on a partial indemnity basis. In response to these submissions, Justice Stinson of the Ontario Superior Court found that an award of costs was appropriate because the withdrawal of a motion that is unlikely to succeed does not entitle the withdrawing party to avoid the obligation to pay costs that it otherwise would have faced. As well, although Justice Stinson noted that some of the effort expended in the summary judgment motion might be useful to the main litigation, considerable time, energy and expense had been swallowed up by the motion. Accordingly, taking into account the

principle of reasonableness, Justice Stinson held that the plaintiff was entitled to an award of costs and refused to defer the quantification of those costs to the trial judge.

Cavanaugh v. Grenville Christian College, 2012 CanLII 47233 (ON SC)

This is another interesting costs decision in which Justice Perell of the Ontario Superior Court provides a brief but comprehensive overview of the principles that ought to be considered when awarding costs in the context of a certification motion. The proposed representative plaintiffs commenced a proposed class action against Grenville Christian College and the Incorporated Synod of the Diocese of Ontario. Justice Perell dismissed the action against the Diocese and the certification motion against Grenville. In response, each of the defendants sought the costs of the motion and their disbursements on a partial indemnity basis. The defendants argued that the ordinary costs rules should apply: this was not a test case, it did not involve a novel point of law or a matter of public interest and there should be no 'access to justice discount'. In response, the proposed representative plaintiffs (as well as the Law Foundation of Ontario) made the expected counterarguments to each of these claims but also argued that the Diocese incurred costs unnecessarily because it should have participated in an earlier pleadings motion.

Justice Perell agreed with the defendants and awarded Grenville their claimed costs. With respect to the Diocese, Justice Perell refused to reduce the costs award on the basis that the Diocese had not participated in an earlier pleadings motion. His Honour held that the proposed representative plaintiffs could not complain that the Diocese chose to defend itself by waiting to challenge the validity of the claim at the certification motion, as this was a viable tactical decision that was available at the discretion of the Diocese. However, Justice Perell did reduce the Diocese's cost award because its claim was excessive and inconsistent with the award given to Grenville.

Moore v. Bertuzzi, 2012 ONSC 4964 (CanLII)

This decision is important because it serves as a strong reminder to litigants that a failure to disclose a settlement agreement will be taken seriously by the Court. Indeed, as this case reveals, a failure to disclose may result in a full indemnity award of costs, even if the party's failure to disclose was inadvertent.

In the case at bar, two defendants failed to disclose a settlement agreement that they had entered into four months prior, thus breaching their obligation to immediately disclose the agreement. Master Dash of the Ontario Superior Court ordered the defendants to pay costs on a full indemnity basis as part of the appropriate "consequences of the most serious nature" arising out of the breach. Importantly however, it was explicitly acknowledged that the parties had not intended to deceive the Court nor was their behaviour "reprehensible, scandalous or outrageous", the usual standard for an award of substantial indemnity costs. In addition, despite clearly condemning the failure to disclose the agreement, Master Dash was nonetheless careful to emphasize that costs, even on a full indemnity basis, must be fair and reasonable in proportion to the complexity and importance of the issues and must also be within the reasonable contemplation of the parties.

PART 2 – SHINE A LIGHT ON…*VICARIOUS LIABILITY*

The concept of vicarious liability can strike fear in the hearts of employers because it raises the spectre of significant liability based on someone else's misconduct. The key to understanding the law of vicarious liability is to understand that it is deeply rooted in policy considerations. In fact, the Supreme Court of Canada has noted that vicarious liability has "its basis in a combination of policy considerations", rather than in "legalistic premises". [1] Accordingly, below we will examine the policy considerations as well as the legal test to help inform a contextual understanding of this sometimes muddy area of law.

OVERVIEW

Vicarious liability is a form of strict, no-fault liability that attaches to a third party for the wrongful acts or omissions of another.

Vicarious liability is most commonly applied to employment relationships, where an employer may be found liable for its employee's misconduct. Vicarious liability depends on the nature of the relationship between the employer and employee. It recognizes that because the employee is acting within a scope of conduct prescribed by the employer, the employer can be held responsible, and accountable, for the employee's wrongful conduct.

THE POLICY CONSIDERATIONS

The Supreme Court of Canada has confirmed that there are two over-arching policy considerations "lying at the heart of vicarious liability": (1) the foremost consideration is, as the Court put it, "the concern to provide a just and practical remedy to people who suffer as a consequence of wrongs perpetrated by an employee"; and (2) deterrence of future harm. [2]

These two considerations – fair compensation and deterrence – are related because they are both driven by the concept of "the employer's introduction or enhancement of a risk." The theory is that when a business introduces risk to the community and those risks materialize and cause injury to members of the public, the organization that created the business and the attendant risks should fairly bear the loss. By contrast, the imposition of vicarious liability on the employer will not be just where the wrong is "only coincidentally linked to the activity of the employer and duties of the employee."

It is this concept of wrongful conduct which is "closely and materially related to a risk introduced or enhanced by the employer" which underlies both policy considerations noted above, and which therefore underlies vicarious liability as a whole.

THE TEST: ARE YOU VICARIOUSLY LIABLE?

The leading cases on vicarious liability are *Bazley v. Curry* [3]and *Jacobi v. Griffiths* [4], which were released together by the Supreme Court of Canada. In *Bazley*, the Court found that a non-profit organization that operated two residential care facilities for emotionally troubled children was vicariously liable for sexual abuse by one of its counsellors. In *Jacobi*, by contrast, the Court did not impose vicarious liability on a non-profit boys' and girls' club for sexual assaults committed by its employee (a program director).

The Court set out a deceptively simple two-part test for determining when vicarious liability should be imposed:

1. Determine whether the case law already recognizes the relationship as **sufficiently close** to attract a finding of vicarious liability.

- If not, an analysis must be undertaken that is based on the policy considerations of fair compensation and deterrence.

2. Determine whether the wrongful act is **sufficiently related** to conduct authorized by the employer.

- An employer creates risk through the conduct it authorizes an employee to engage in: the more materially linked the wrongdoing is to the authorized conduct, the more likely the court will impose vicarious liability.

As is often the case, the real insight is gained from closely analyzing how judges apply this test to the facts on the ground.

In *Bazley*, the Court had little difficulty in finding that the opportunity for "intimate private control and the parental relationship and power" in the counsellor's employment setting "created and fostered the risk that led to the ultimate harm."[5] On the other hand, in *Jacobi,* the Court found that the connection between the employer's enterprise and the risk was not established because, for example, the employee was not required to be alone with the children and the offence occurred off-premises and outside working hours.

As is apparent from the different results in these two cases, the broad considerations identified by the Court are often easier to state than to apply.

USING POLICY TO EXPAND THE SCOPE OF VICARIOUS LIABILITY

The categories of relationships that may attract vicarious liability are not exhaustively defined or closed.[6] Recent decisions suggest that judges are willing to move beyond the employer-employee construct in order to achieve the policy goals underlying vicarious liability.

In *Straus v. Decaire* [7] the defendant, a mutual funds salesperson, engaged in "off-book" activities which resulted in investment losses to the plaintiffs. Decaire did work for two different mutual fund dealers. The dealers claimed that they should not be found vicariously liable for Decaire's misconduct because he was not employed by them. The Ontario Superior Court rejected this argument and imposed vicarious liability on both dealers.

The Court's analysis focused on the "total relationship" between the parties, and was heavily guided by the policy considerations of fair compensation and deterrence, noted above. In examining the total relationship, the Court concluded that whether it was viewed as an employer-employee relationship, or a principle-agent relationship, both were of a sufficiently close nature that the policy rationales for the imposition of vicarious liability were triggered. The Court reasoned that the dealers had directed and empowered Decaire to obtain the trust and confidence of potential clients in order to secure investments. Using this position, he influenced the plaintiffs to purchase inappropriate, "off-the-book" funds. Since the wrong was sufficiently related to his assigned duties, the Court concluded that it was fair and appropriate to hold the dealers liable for Decaire's misconduct.

In *K.T. v. Vranich* [8], a night club was found vicariously liable for the sexual assault committed by its manager. The trial judge looked at the total relationship and even though he could not conclude from the evidence that the night club was the manager's employer, the trial judge noted that the manager was the "ostensible face of the operation", and a "*de facto* manager". The trial judge found that there was a significant connection between the creation and enhancement of a risk and the wrong that accrued. The night club gave Vranich authority over the establishment and its employees, and the trial judge found that this created the risk and context for the assault to happen.

These decisions are important because they demonstrate that the court will examine the full factual context in light of the policy considerations and will not be guided or swayed by a relationship's label.

VICARIOUS LIABILITY FOR BREACH OF STATUTE

Courts are guided by the above policy considerations in finding employers vicariously liable for breaches of common law duties by their employees, and have recently shown a willingness to impose vicarious liability for breaches of statutory duties.

In *Allen v. Aspen Group Resources Corporation* [9], the plaintiff sued a law firm partner under the *Securities Act*[10] for negligent preparation of a prospectus. The plaintiff also sued the lawyer's firm, claiming that the firm was vicariously liable for his actions.

The case focused on the statutory vicarious liability that may attach to a law firm for one of its partner's actions under the *Partnership Act.* [11] The Ontario Superior Court stressed that whether rooted in the *Partnership Act* or in the common law, vicarious liability is imposed to provide a fair source of compensation for those who have suffered a loss, and to control risk. The Court saw no reason why vicarious liability could not attach to the law firm simply because the wrong stemmed from a statute. The law firm selected and placed the defendant on the client's board, and expected him to act not only in his capacity as a director, but as a partner when he made the prospectus.

These factors, according to the Court, were sufficient to impose vicarious liability. The imposition of vicarious liability for breach of a statutory duty in the *Securities Act* would be unprecedented.

CONCLUSION

Understanding the caselaw is of course essential to defending a claim of vicarious liability in litigation. An employer must understand the policy considerations in order to lead the most compelling evidence available to speak to the key issues that drive the imposition of liability.

But there is more to it than that. Understanding the principles that animate the court's use of vicarious liability will help employers to potentially minimize liability by proactively managing the workplace. Employers can evaluate the risks that are associated with their enterprises and the authority given to their employees, and determine whether there are effective ways to minimize the potential for wrongdoing and related liability. In this area of law, the old saying about an "ounce of prevention" definitely holds true. If you have any questions about how this approach can work for your organization, please send us a note or give us a call.

PART 3 – DID YOU KNOW?

Did you know….that an employee who owns a client "book of business" may not have to give notice to the company when departing? The departing employee's obligations may turn on the terms of her employment contract (if any) and/or whether she had an intention to harm the company. For more on this issue, take a look at *Gentech Insurance Ltd. v. Martina*, 2012 ONCA 605 (CanLII), a case argued in front of the Court of Appeal by our colleague, Allyson Fischer.

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[1] *Bazley v. Curry,* [1999] 2 SCR 534 at para. 26.

[2] For the references in this section, see *Bazley, ibid.*, at paras. 26-36.

[3] *supra.*

[4] [1999] 2 SCR 570.

[5] *Bazley, supra,* at para. 57.

[6] *Bazley, supra,* at para 25.

[7] 2011 ONSC 1157 (CanLII).

[8] [1999] 2011 ONSC 683 (CanLII).

[9] 2012 ONSC 3498 (CanLII).

[10] s.131(1) gives a right of action to those deemed to have relied on a prospectus.

[11] s.6 and s.11.