

CANADA / JUDGMENT

Sambuev v. Handley

2021 BCSC 1499

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2021 BCSC 1499 Sambuev v. Handley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sambuev v. Handley,

2021 BCSC 1499

Date: 20210803

Docket: S215923

Registry: New Westminster

Between:

Arkadi Sambuev

Plaintiff

And

Jason Handley, Overland West Freight Lines Ltd. and West Arm Truck Lines Ltd.

Defendants

Before: The Honourable Justice Branch

Reasons for Judgment

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appearing by MS Teams:

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appearing by MS Teams

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Place and Date of Hearing:

New Westminster, B.C.

May 17-18, 2021

Place and Date of Judgment:

New Westminster, B.C.

August 3, 2021

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I. INTRODUCTION

[1] Before the court are dueling summary judgment applications seeking to determine whether the defendant, West Arm Truck Lines Ltd. ("West Arm") can be held civilly responsible for the conduct of its employee, the defendant truck driver, Jason Handley. Mr. Handley is alleged to have assaulted the plaintiff in a "road rage" incident (the "Assault").

II. BACKGROUND

[2] The circumstances of the Assault were summarized by the Workers Compensation Appeal Tribunal ("WCAT") as follows:

The plaintiff Sambuev and the defendant Handley are both truck drivers. In the early morning of May 28, 2011, they were both driving into Kelowna. The plaintiff says that while they were both stopped next to each other at a traffic light in Kelowna Handley exited his truck and came over to the plaintiff's truck. Handley yelled at the plaintiff that he had been blinded by his high beams. According to the plaintiff, Handley then stood on the running board and punched him through the open window. The plaintiff says that Handley pulled him out of the truck and continued to

beat him. The plaintiff says he suffered serious injuries.

[3] The plaintiff reported the Assault to WorkSafeBC ("WorkSafe") on June 8, 2011. WorkSafe confirmed that the plaintiff had personal optional protection in effect. On June 21, 2011, after being advised that he could choose to pursue a civil remedy for the Assault, the plaintiff made the election to commence such a claim. His WorkSafe application was then placed into suspended status.

[4] West Arm's Safety Rules for Employees Manual (the "Manual") includes the following in its "Driver Safety" section:

12.1.3 Avoid situations which could cause "road rage". Do not confront other drivers or intimidate other drivers

12.1.5 Drive courteously and professionally

[5] Mr. Handley left his employment with West Arm around January 2012.

[6] On May 14, 2013, the plaintiff commenced this action (the "Claim") against Mr. Handley and Overland West Freight Lines Ltd. ("Overland"). The claims against Overland initially included both negligence and vicarious liability.

[7] Overland filed a Response to Civil Claim on September 9, 2014, pleading that, if Mr. Handley was employed by them, the Assault was performed outside the course of his employment. Mr. Handley did not file a response. Default judgment was entered against him.

[8] By Application submitted on June 8, 2018, Overland sought a determination from WCAT pursuant to s. 257 of the Workers Compensation Act, R.S.B.C. 1996, c. 492 [1996 WCA] as to the status Mr. Handley, Overland, and the plaintiff in relation to the Assault.

[9] A revised Workers Compensation Act, R.S.B.C. 2019, c. 1 [2019 WCA] came into effect April 6, 2020. The parties agreed that the present motions should be determined pursuant to the 2019 WCA.

[10] On April 22, 2020, WCAT issued its Certificate and Decision (the "WCAT Decision"). In its decision, WCAT concluded that:

- a) the plaintiff was a worker;
- b) any injury the plaintiff suffered from the Assault arose out of and in the course of his employment;
- c) Mr. Handley was also a worker, but his actions or conduct that caused injury to the plaintiff did not arise out of and in the course of his employment;
- d) Overland was an employer (Overland was assumed by WCAT to be Mr. Handley's employer for the purposes of its decision);

- e) any failure of Overland in relation to the hiring and/or management of Mr. Handley arose out of and in the course of his employment; and
 - f) Overland's potential vicarious liability is unrelated to the question as to whether the conduct arises out of and in the course of employment for the purposes of the statute. The application of the principles of vicarious liability is to be determined by the court: WCAT Decision, paras. 46-47.
- [11] On January 6, 2021, West Arm (which is associated with Overland) was added as a defendant to the Claim. An Amended Notice of Civil Claim was filed on January 12, 2021, alleging that, on the date of the Assault, Mr. Handley was employed by Overland or West Arm. Further, the claims against Overland and West Arm were limited to vicarious liability.
- [12] On January 28, 2021, Overland and West Arm filed a joint Amended Response to Civil Claim pleading, inter alia, that:
- a) Mr. Handley was an employee of West Arm, not Overland; and
 - b) the Claim was barred by s. 10 of the 1996 WCA (s. 127 of the 2019 WCA).
- [13] By the time of the hearing, the plaintiff, Overland and West Arm, had agreed to the following material facts, among others:
- a) on the date of the Assault, Mr. Handley was an employee of West Arm.
 - b) Overland was the owner of the commercial vehicle being operated by Mr. Handley at the time of the Assault and Mr. Handley was operating the vehicle on behalf of and with the approval of West Arm as part of his employment.
 - c) the WCAT Decision should be treated as applying to West Arm in the same manner that it applies to Overland.
 - d) as a driver for West Arm, Mr. Handley regularly operated vehicles on public roadways. In the context of a user of those roadways, that could include, at times, stressful conditions and/or dealing with the conduct of other users of the roadways and the possibility of conduct in the nature of "road rage".

III. THE APPLICATIONS

- [14] The plaintiff brings a summary judgment motion seeking a ruling that West Arm is vicariously liable for the conduct of Mr. Handley.
- [15] West Arm and Overland seek a determination that the Claim must be struck as a result of the operation of s. 127 of the 2019 WCA and the WCAT Decision.
- [16] Both parties submitted that the motions can be determined on a summary basis. I agree. There is no material disagreement as to the facts: *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) at para. 53; *Gichuru v. Pallai*, 2013 BCCA 60, at para. 30. Rather, the real question is the application of the law to the facts.

The issues raised by the applications are clean and distinct, such that resolving them apart from any residual issues is efficient. There is a likelihood of significant savings in time and expense: *Burg Properties Ltd. v. Economical Mutual Insurance Co.*, 2013 BCSC 209 at para. 27. As a concrete example, the trial of this matter had previously been set for five days, while consideration of the applications took just over a day.

- [17] I have concluded that West Arm cannot be held vicariously liable for the conduct of Mr. Handley. Hence, the Claim will be dismissed on that ground alone, as vicarious liability is the only basis for the Claim against West Arm. It is unnecessary for me to consider West Arm's request for a determination as to whether the Claim is also barred by operation of s. 127 of the 2019 WCA. Given that both parties agreed that West Arm's motion raised a statutory interpretation question of first impression, I find that its assessment should await a case in which its resolution is necessary to determine the result.[1]

IV. THE LAW OF VICARIOUS LIABILITY

- [18] Vicarious liability imposes strict liability on a party. It holds one person responsible for the misconduct of another because of the relationship between them: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 [Sagaz Industries] at para. 25. Vicarious liability does not require proof of blameworthiness, misconduct or breach of duty on the part of the employer: *British Columbia Ferry Corp. v. Invicta Security Service Corp.* (1998), 58 B.C.L.R. (3d) 80 (C.A.) at paras. 8-10.
- [19] The policy considerations supporting vicarious liability for employers are: (1) the need for a just and practical remedy for people who suffer harm as a consequence of wrongs perpetrated by an employee; and (2) deterrence of future harm: *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 29. With respect to the first point, fairness dictates that an employer who introduces an enterprise that carries risks into the community should bear the loss when those risks materialise: *Bazley* at para. 31. Employers are often in a good position to reduce accidents and intentional wrongs by efficient organisation and supervision: *Sagaz Industries* at para. 31.
- [20] The traditional common law test for imposing vicarious liability on employers is known as the "Salmond" test: *Bazley* at para. 10. Under this test, employers are vicariously liable for (1) employee acts authorized by the employer, and (2) unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act. However, as the Supreme Court of Canada noted in *Bazley*, it is not easy to distinguish between an unauthorized mode of an authorized act that attracts vicarious liability and an entirely independent act that does not (at para. 11). As such, the court restructured the test so that it would be guided more by the policy considerations underlying vicarious liability. This reformulation of the test resulted in the court concluding that the residential care facility employer involved in *Bazley* was vicariously liable for the sexual abuse committed by its employee.

[21] The policy considerations underlying vicarious liability are only served if:

- a) the wrongdoing is sufficiently close to the enterprise such that it can be said the entity has introduced the risk of the wrongdoing into the community and is thereby fairly and usefully charged with its management and minimisation; and
- b) where there is a significant connection between the introduction of the risk and the wrong that accrues from it.

The degree of connection between the entity's introduction of the risk of wrong and the wrong itself must be more than just opportunity. The strength of the causal link between the opportunity to perform the wrongful act and the wrongful act itself matters: *Bazley* at paras. 37-40.

[22] The court went on to note:

[35] Servants may commit acts, even on working premises and during working hours, which are so unconnected with the employment that it would seem unreasonable to fix an employer with responsibility for them. For example, if a man assaults his wife's lover (who coincidentally happens to be a co-worker) in the employees' lounge at work, few would argue that the employer should be held responsible. Similarly, an employer would not be liable for the harm caused by a security guard who decides to commit arson for his or her own amusement

[23] Pursuant to the approach outlined in *Bazley*, a court should first determine whether there are precedents that unambiguously determine on which side of the line the case falls between, vicarious liability and no liability. If prior cases do not clearly suggest a solution, the next step is to determine whether vicarious liability should be imposed in light of the broader policy rationales: *Bazley* at para. 15; *Doe v. Bennett*, 2004 SCC 17 at para. 20.

[24] In terms of the relevant policy considerations, the Court stated:

[41] In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:

- (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

[46] In summary, the test for vicarious liability for an employee's sexual abuse of a client should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm. The test must not be applied mechanically, but with a sensitive view to the policy considerations that justify the imposition of vicarious liability -- fair and efficient compensation for wrong and deterrence. This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

V. ANALYSIS

[25] The defendants say that:

- a) there is a precedent guiding the outcome; and
- b) even if there is no unambiguous precedent, the policy rationales expressed above still weigh against a finding of liability.

A. Precedent

[26] There is a Canadian decision that found no vicarious liability should be applied against a trucking company whose driver assaulted another road user after exiting the driver's vehicle in an apparent episode of road rage: *Sirois v. Gustafson*, 2002 SKQB 452.

[27] The court in *Sirois* found as follows:

[29] The question of when an employer should be vicariously liable for an employee's intentional tort has been considered in many authorities. The essential question in each circumstance was whether the terms of employment contained an implied authority to use force, or whether the nature of the work to be performed by the employee produced an inherent risk of an assault or other intentional tort by the employee during the performance of his or her obligations. Where either condition exists, the courts have held the employer vicariously liable. See *Brezinski v. Schultz*, [1975] 3 W.W.R. 467 (Sask Q. B.); *Evaniuk v. 79846 Manitoba Inc.* (1990), 68 Man. R. (2d) 306 (Q. B.); and *Verbeek v. Stefura and St. Albert Motor Inn* (1972) Ltd. (1981), 26 A.R. 497 (Alta. Q.B.). In these cases the owner of a bar or tavern was found vicariously liable when its employees assaulted a patron while ejecting the patron from the employer's premises. In contrast, courts have refused to impose vicarious liability where the employer did not authorize the employee to use force when ejecting an unruly customer and the intentional tort committed by the employee was not foreseeable...

[30] In this case, the question is whether Gustafson's conduct was directly or implicitly authorized by TransX, or otherwise forms an inherent part of the task of driving a large truck for a truck carrier. The answer is "No" for nothing in the Equipment Agreement or TransX's operating and safety rules directly or implicitly authorized Gustafson to use force

when dealing with unruly users of the public roadways. Nor is the use of force in circumstances akin to those in the instant case permitted by law or an inherent part of the task of a truck driver. Gustafson had a cell phone and could have called the police service for assistance. He did not.

[31] I find no credible evidence for the proposition that drivers of large trucks employed by long haul carriers are subject to stress and other emotional pressure of such magnitude that uncontrolled emotional outbursts should be viewed as forming an inherent part of such business, or that TransX knew or ought to have known that Gustafson might react in the way he did while performing his tasks. In addition, no policy consideration suggests that truck carriers should be liable for intentional torts unnecessarily committed by their drivers, save and except the principle that they might be in a better position to spread the risk. As noted in *Sagaz*, *supra*, at p. 552 (D.L.R.), an employer's deep pockets are not in themselves sufficient to impose vicarious liability. It must also be just to place liability for the wrong on the employer.

[32] Based on the authorities referred to in paras. 27 to 29 and my findings of fact, I dismiss the plaintiffs' claim against TransX, based on the assumption that an employer and employee relationship existed between them.

[Emphasis added.]

[28] Although I find *Sirois* to be well-reasoned, I find that I cannot rely upon it as a precedent in the manner suggested by the test in *Bazley*.

[29] I find that the types of precedent referred to in *Bazley* are properly limited to decisions that are binding upon the court considering the issue or, at a minimum, are subject to the rule in *Hansard Spruce Mills Ltd. (Re)*, [1954] 4 D.L.R. 590 (B.C.S.C.). The *Sirois* case fits into neither slot. It is from another court at the same level, but from another province. Such decisions are persuasive, but not binding: *R. v. Vu*, 2004 BCCA 230 at paras. 26-27.

[30] Further, another judge of this court has criticized and distinguished the *Sirois* decision: *Gill v. Wang*, 2019 BCSC 2319. As such, the force of the *Sirois* decision in BC is, at best, ambiguous.

B. Application of Policy Rationales

[31] That said, to the extent to which the analysis in *Sirois* illuminates the application of the policy rationales, I find that it does contain a useful review of the extent to which those rationales are engaged in this type of scenario.

[32] As noted, *Sirois* was not followed in a more recent B.C. Supreme Court decision in *Gill*. The court in *Gill* found a cellular store vicariously liable for an assault committed by a store employee against a customer, stating:

- [62] Although I found the cases relied on by the parties under the "determinative precedent" stage of the Bazley inquiry did not unambiguously determine whether vicarious liability applies in this case, many of those cases are, nonetheless, helpful in this stage of the analysis. In all but one of the cases relied on by BC Wireless Solutions and where vicarious liability was not imposed, the employee had not been left alone by the employer. That is different from the facts in this case. Wang was left alone and was the keyholder responsible for the Store at the time of the battery.
- [63] The one case relied on by BC Wireless Solutions where an individual tortfeasor was alone, that is the Sirois case, involved an independent contractor, not an employee, and although the contractor was driving the truck, the employer, and I use that simply to identify the party, the employer had leased and assigned to the driver for his use, the case does not indicate that the defendant had actually been working at the time of the assault. Further, although the case postdates Bazley, it makes no reference to the Bazley case or the analysis which is required by Bazley.
- [64] However, the British Columbia Ferry Corp. case relied on by the Plaintiff is analogous to the situation in this case. In that case, the late Mr. Justice Edwards wrote at paras. 32-33:
- [32] In other words, where an employee is given authority which amounts to "total intervention" or control which is then misused through the perpetration of a deliberate wrongful act, the employer will be vicariously liable. Where, as here, a security company gives a security guard exclusive responsibility for security of premises amounting to effective total control of those premises, while the employee is in sole charge of them, it has put any employee who might be criminally inclined in a position to pursue that inclination, and is therefore vicariously liable on the reasoning of the cases culminating with the Photo Production [Ltd. v. Securicor Transport Ltd., [1978] 3 All E.R. 146 (C.A.)] case.
- [65] I find the analysis of the British Columbia Ferry Corp. case to be apposite here. That BC Wireless Solutions does not authorize its employees to engage in violence against customers and has expressly prohibited violence by its employees through its policy is not denied. However, the fact that the wrongful act is prohibited by an employer does not relieve an employer from vicarious liability. The entire second stage of the Bazley analysis focused on the fact that the act is unauthorized. The question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability.
- [66] I find Wang committed the battery as an improper and unlawful response to what BC Wireless Solutions acknowledges was a conversation involving a commercial transaction related to its business. Wang was trained to watch out for attempts by customers to obtain discounts to which they were not entitled and sought verification of the Plaintiff's entitlement to the discount. This caused the Plaintiff to become upset and aggressive towards Wang. It was part of Wang's employment responsibilities to "deal with angry customers". Wang's battery of the Plaintiff was how he chose to deal with an angry customer. I find there is a significant connection between the conversation which created the friction

and risk, and the intentional and wrongful battery of the Plaintiff by Wang.

[67] There is no doubt the application of vicarious liability in this case will serve the objective of victim compensation, since joint and several liability amongst defendants may make it more likely the Plaintiff will be able to recover whatever damages may be awarded. The imposition of vicarious liability in this case also serves the objective of deterring future harm. Where an employer gives an employee responsibility for and control of its operation and while the employee is in charge of the operation, it has put any employee who might be criminally inclined or inclined to commit an intentional wrongful tort in a position to pursue those inclinations. Therefore, the employer is vicarious liable.

[68] When an employee proves unreliable, it seems logical that the employer who controlled their hiring and is responsible for their overall supervision should be the one to bear the legal responsibility for the tortious acts of those employees, whether negligent or deliberate.

[Emphasis added.]

[33] There is a question regarding the extent to which I am bound by Gill's analysis in this respect. Consider the formulation of the circumstances in which a decision of the same court need not be followed from *Hansard Spruce Mills* at 592:

- (a) subsequent decisions have affected the validity of the impugned judgment;
- (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered; and
- (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

[34] Gill was an oral decision issued the same day as the motion was argued. This reduces the extent to which it must be treated as "considered"; see *Mitrunen v. Anthes Equip. Ltd.* (1984), 57 B.C.L.R. 287 (S.C.) at paras. 19-20, *aff'd* 65 B.C.L.R. 291 (C.A.).

[35] Furthermore:

- a) The court in *Gill* presumes that *Sirois* was decided on the basis that the driver was an independent contractor rather than an employee. In fact, the court assumed that the driver was an employee for the purposes of the vicarious liability analysis: *Sirois* at para. 32. The court never reached the stage of deciding whether the driver was an independent contractor or not: *Sirois* at para. 34.
- b) The court in *Gill* faults *Sirois* for its (alleged) failure to consider and apply the Supreme Court of Canada's binding statement of the law in *Bazley*. However, this is incorrect. The court in *Sirois* was well aware of the decision in *Bazley*, citing it repeatedly (see paras. 27-28 and 33).[2]

- [36] For these reasons, I find that I am not bound by Gill's negative treatment of Sirois.
- [37] More importantly, I find that the court in Sirois provides an analysis of the relevant policy considerations which I have found to be both well-reasoned and correct.
- [38] Specifically, I find that the following considerations weigh against a finding of vicarious liability:
- a) West Arm did not authorize Mr. Handley to use force: Sirois, para. 30.
 - b) The nature of the work to be performed by Mr. Handley did not produce an inherent risk of an assault or other intentional tort by Mr. Handley: Sirois, paras. 29-30.
 - c) The Assault was not part of Mr. Handley's job duties.
 - d) West Arm did not "afford Mr. Handley the opportunity" to perform the Assault as (1) there is unlikely to be a need for personal physical interaction with other drivers on the road; and (2) Mr. Handley was entitled to be on the roads in and around Kelowna with or without holding a position with West Arm: Bazley, paras. 41 and 43.
 - e) The Assault did not take place at West Arm's premises, unlike the situation in Gill.
 - f) The plaintiff was not a customer of West Arm, unlike the plaintiff in Gill.
 - g) Mr. Handley was not put in charge by West Arm of the physical area in which the Assault occurred, unlike the situation in Gill.
 - h) Mr. Handley was not trained to audit the driving performance of other drivers on the road, unlike the role assigned to the employee in Gill to "deal with angry customers".
 - i) West Arm did not train its drivers to assault other drivers who did not respect the rules of the road, or how to protect themselves from aggressive or careless drivers.
 - j) The Assault took place outside of the vehicle Mr. Handley was driving.
 - k) Mr. Handley would have been told that he should not exit his vehicle unless it had been made secure.
 - l) Leaving the truck unsecured did not advance West Arm's financial interests, but rather put its assets at risk and delayed their delivery: Bazley, para. 41; Reddemann v. McEachnie, 2005 BCSC 915.
 - m) Mr. Handley was specifically instructed to avoid situations which could cause "road rage", to drive courteously and professionally, and that harassment would be considered employee misconduct.
 - n) There is no evidence that the Assault was related to friction, confrontation, or intimacy inherent in the employer's enterprise. While it is true that you need to be on the road to suffer an episode of "road rage", there is nothing unique about the defendant's operations that makes it more likely that their driver will experience more road rage than any other

driver on the road. There was no "unbroken chain" of events between the employee's duties and the assault: *Mohamud v. WM Morrison Supermarkets*, [2016] UKSC 11 at para.47. West Arm did not significantly increase the risk of harm: *Bazley*, paras. 41-42.

- o) Mr. Handley had no special power over, or intimacy with, the plaintiff, and the plaintiff had no special vulnerability: *Bazley*, paras. 41, 44.
 - p) Mr. Handley did not stand in a position of respect vis a vis the plaintiff: *Bazley*, para. 44.
 - q) West Arm did not encourage Mr. Handley to stand in a position of respect, nor did it encourage the plaintiff to emulate or obey Mr. Handley: *Bazley*, para. 44.
 - r) In the normal course, there would be no reason for Mr. Handley to touch or interfere with other drivers on the road in order to complete his assigned tasks: *Bazley*, para. 45.
 - s) The imposition of vicarious liability in these circumstances is unlikely to have a significant deterrent effect, given that the Assault was a random event, and Mr. Handley had already been warned to avoid situations of "road rage": *Bazley*, para. 42.
- [39] Further, although their assessment is not binding and the test for vicarious liability may be broader than simply whether the worker is acting in the course of their employment, I am nonetheless comforted by WCAT's determination that Mr. Handley was not acting in the course of his employment. The factors considered by WCAT overlap to some extent with the considerations relevant to the vicarious liability question. In particular, I have regard to the following conclusions by WCAT:
- [42] The plaintiff says that the Handley's assault on him was a substantial deviation that took Handley out of the course of his employment. The defendant Overland agrees with this assertion in its rebuttal submission. I too reach that conclusion.
- [43] It is a simple matter for me to conclude that Handley suffered little if any real provocation and that his decision to confront and then attack the plaintiff was disproportionate to the circumstances. I see no evidence to suggest that Handley was in danger or was subject to any other exigencies that might justify his actions. He did not need to exit the cab of his truck. There is simply no rational basis for his conduct.
- [40] On the other side of the ledger, the plaintiff points out that the trigger for the Assault was apparently the plaintiff's use of his high beam lights, which allegedly interfered with Mr. Handley's driving. I find that this is an insufficient basis upon which to base a vicarious liability finding. I cannot find that simply putting a truck on the road where certain drivers may misuse their high beams is creating "an inherent risk of an assault". Applying the approach outlined in *Sirois* to the present facts:

- [31] I find no credible evidence for the proposition that drivers of large trucks employed by long haul carriers are subject to stress and other emotional pressure of such magnitude that uncontrolled emotional outbursts should be viewed as forming an inherent part of such business, or that [West Arm] knew or ought to have known that [Mr. Handley] might react in the way he did while performing his tasks
- [41] The plaintiff indicated that he turned off his high beams "a few seconds" or "five seconds" after Mr. Handley passed him. As such, the reasonable inference is that the high beams had already been turned off for some period by the time Mr. Handley reached the plaintiff's vehicle. Indeed, when Mr. Handley exited his vehicle, the plaintiff and Mr. Handley were no longer in the same lane. As such, it cannot be said to be an active safety situation. Rather, it appears to have been a case of Mr. Handley choosing to take vengeance upon the plaintiff for a perceived transgression that was, by then, in the past. Indeed, as Mr. Handley approached the vehicle, the plaintiff thought Mr. Handley was simply going to ask him a question. He voluntarily rolled down his side window to speak to Mr. Handley.
- [42] The plaintiff also notes that Mr. Handley had certain blemishes on his driving record. While this type of evidence may have supported a negligence plea for wrongful hiring, I find that it does not materially affect the analysis required for a finding of vicarious liability.
- [43] Finally, the plaintiff relies on the fact that the Manual refers to "road rage", suggesting that it was within West Arm's contemplation. However, I find that advising drivers not to engage in road rage is weak support for a finding that the company should be held vicariously responsible for such incidents. From a policy perspective, a finding that discouraging employees from engaging in certain acts means that you will be vicariously liable for those acts, would not be a positive development. It would simply discourage employers from warning employees about the limits on their authority. The more pertinent question with respect to the Manual would be whether it authorizes the use of force. It does not.

VI. CONCLUSION

- [44] The Claim is dismissed. Unless the parties seek to make further submissions on costs, the defendants West Arm and Overland shall have their party and party costs at Scale B.

"Branch J."

- [1] The statutory interpretation question is whether s. 127 can be interpreted as creating a bar against civil action for an employer when (1) its employee has been found to be operating outside the scope of his employment, and (2) the only claim made against the employer is for vicarious liability.
- [2] I note that the court in Gill may have been drawn into error on this point due to the fact that the Sirois judgment refers to the case under an alternate style of cause P.A.B. v. Children's Foundation.

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