NOVA SCOTIA COURT OF APPEAL
Citation: ***Gilbert v. Giffin***, 2010 NSCA 95

Date: 20101125
Docket: CA 319253
Registry: Halifax

Between:

Phyllis Gilbert

Appellant

v.

James Douglas Giffin, Daimler Chrysler Services Canada Inc., and Coseco Insurance Company

Respondents

Docket: CA 319252

Between:

James Douglas Giffin

Appellant

v.

Daimler Chrysler Services Canada Inc., Coseco Insurance Company and Phyllis Gilbert

Respondents

Revised decision: The text of the original decision has been corrected according to the erratum dated January 17, 2011. The text of the erratum is appended to this decision.

Judges: MacDonald, C.J.N.S.; Saunders and Farrar, JJ.A.

Appeal Heard:	October 6, 2010, in Halifax, Nova Scotia
Held:	Appeals dismissed per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Saunders, J.A. concurring.
Counsel:	John P. Barry, Q.C. and Nadia M. MacPhee, for the appellant Phyllis Gilbert W. Augustus Richardson, Q.C., for appellant James Giffin C. Christopher Robinson, Q.C. and Ian Dunbar, for the respondent Daimler Chrysler Services Canada Inc. M. Darlene Willcott, for the respondent Coseco Insurance Company not appearing

Reasons for judgment:

[1] In two appeals, which we heard together, the appellants Phyllis Gilbert and James Giffin appealed from the decision of The Honourable Justice Arthur J. LeBlanc dated October 23, 2009, wherein he granted a motion for summary judgment brought by the respondent Daimler Chrysler Services Canada Inc. ("Chrysler") on the claim brought against it by the appellant Gilbert.

[2] Gilbert and Giffin were involved in a motor vehicle accident on June 12, 2003. Gilbert sued Giffin, her insurer and Chrysler for compensation in respect of injuries she sustained in the accident. Gilbert's claim against Chrysler was that it was vicariously liable for the negligence of Giffin. The insurer was not a participant in the motion or on this appeal.

[3] Gilbert and Giffin both appeal to this Court alleging that the Chambers judge erred in granting Chrysler's motion.

[4] For the reasons which I will now develop, I would dismiss both appeals with costs to Chrysler.

Background

[5] On February 16, 2001, Giffin entered into an agreement to lease a vehicle from Courtesy Chrysler for a three year term. Giffin had an option to purchase the vehicle at the expiry of the lease for the amount of $18,104.00.

[6] The lease was assigned from Courtesy Chrysler to Chrysler.

[7] On June 12, 2003, Giffin and Gilbert were involved in a motor vehicle accident. As a result of that accident, Gilbert suffered personal injuries for which she filed suit against Giffin, her insurer, and Chrysler seeking compensation for the injuries.

[8] The only allegation against Chrysler was that it was responsible in law for the negligence of Giffin.

[9] The motion for summary judgment was heard by the Chambers judge on April 19, 2009. The evidence was by way of affidavit or admissions. None of the parties challenged the others' evidence by way of cross-examination or otherwise.

[10] The learned Chambers judge granted Chrysler's motion for summary judgment.

Issues

[11] Four grounds of appeal are raised in the Giffin factum. The Gilbert factum raises the same four grounds of appeal plus an additional ground of appeal. The issues on appeal may be summarized as follows:

1. whether the Chambers judge properly applied the law with respect to summary judgment;

2. whether Chrysler is a "owner" within the meaning of s. 2(ak) of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 298;

3. whether Chrysler is in the business of renting cars within the meaning of s. 62(1) of the **Motor Vehicle Act**;

4. whether the law of vicarious liability extends to cover leasing companies;

5. whether Chrysler is vicariously liable for any negligence attributed to Giffin.

[12] I will address the alleged errors after discussing the standard of review.

Standard of Review

[13] The parties have correctly identified the proper standard of review. The Chambers judge's decision had a final or terminating effect on the allegations against Chrysler, such that the standard of review is whether there arose an error of law resulting in an injustice. An error of law that affects the result constitutes an

injustice. (**AMCI Export Corp. v. Nova Scotia Power Inc.**, 2010 NSCA 41, ¶ 10; **Turner v. Halifax Municipality**, 2009 NSCA 106, ¶ 14).

Analysis

Issue #1

1. Whether the Chambers judge properly applied the law with respect to summary judgment;

[14] The prerequisites for summary judgment to dismiss an action are – first that the applying defendant shows that there is no genuine issue of material fact requiring trial; and second, that the responding plaintiff fails to show that his claim has a real chance of success (**Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 at ¶ 27).

[15] The Chambers judge correctly cited the test. The question is whether he erred in its application.

[16] The material facts of this matter are not in dispute. Simply put, Giffin entered into a lease agreement to lease a car from Courtesy Chrysler. The lease agreement was assigned to Chrysler. Giffin, while driving the leased vehicle, was, subsequently, involved in an accident which resulted in personal injuries to Gilbert.

[17] There were no issues of credibility and no need to weigh the evidence with respect to the version of events.

[18] On this appeal, Gilbert argues that Chrysler's alleged liability could not be decided without a "full factual record". Giffin argues that "complex legal questions" should not be decided on summary judgment. Both of these arguments run contrary to the decision of this Court in **Holstein v. Eikelenboom**, 2004 NSCA 103 at ¶ 30:

> [30] For reasons that are not clear to me, the learned Chambers judge concluded that only after a full trial where the judge might "examine all the surrounding circumstances" or where "[a]ll, the circumstances both before and during the hearing before the Committee" could be considered would it be possible to decide

> if waiver had occurred. With respect, all of the surrounding circumstances were already well known. The material facts, as found by the Chambers judge, were not in dispute. The record as to what occurred prior to and in the presence of the panel is evident from the transcript of the hearings and the answers to interrogatories of Mr. Kestenberg. This is not a case where the motions judge had to reconcile competing affidavits from opposing sides. The only disagreement between the parties concerned the application of the law of waiver to undisputed facts in order to decide whether waiver had in fact occurred. This is precisely what occurred in **Gordon Capital**, supra, where the only dispute concerned the application of the law, a point with which the Court quickly dispensed in rather terse prose:
>
> > The application of the law as stated to the facts is exactly what is contemplated by the summary judgment proceeding.

[19] If there are no material facts in dispute, as is the case here, a judge in Chambers must apply the law to the undisputed facts before him. The judge must decide issues of law, regardless of how complex they may be. There is no useful purpose in sending a matter to trial where the only question to be decided is one of law.

[20] Gilbert argues that the issue of liability between a lessor and a lessee is "novel and complex" and, therefore, should not be determined on a summary judgment application. In support of her position, she relies upon this Court's decision in **Lienaux v. Campbell**, [1998] N.S.J. No. 142 (Q.L.)(C.A.) where Cromwell, J.A. (as he then was) in writing for the Court held at ¶ 14:

> [14] Summary judgment applications are not the appropriate vehicle for determining disputed facts, difficult questions about the appropriate inferences to be drawn from facts or complex legal questions. <u>This application raised all of these</u>.
>
> (My emphasis)

[21] The last sentence of ¶ 14 is not included in Gilbert's citing of Cromwell, J.A. nor is the paragraph which immediately preceded ¶ 14 which held:

> [13] Virtually every element of the appellants' case is contested by the respondent. Whether there was a personal obligation to contribute, whether the source of funds was required to be as the appellants allege, whether there was dishonesty, whether it induced action and caused deprivation are all in issue. The record before the Chambers judge simply did not meet the very heavy onus on the appellants of clearly demonstrating entitlement to judgment.

Paragraph 13 and the final sentence in ¶ 14 add context to the decision in **Lienaux**. The complex legal issues in that case arose out of disputed facts and the appropriate inferences and legal consequences to be drawn from those facts (To similar effect, see also **AMCI**, **supra**). To suggest that the phrase "complex legal issues" should be read in isolation from the rest of the paragraph and the paragraph which preceded it is too narrow a focus. It was never intended to be read in isolation from the context in which it was written. **Lienaux, supra,** is not authority for the proposition that complex legal issues cannot be determined on a summary judgment motion.

[22] Neither complexity, novelty, controversy nor contentiousness will exclude a case from a summary judgment motion where there are no material facts in dispute.

[23] The Chambers judge did not err in determining there were no material facts in dispute and it was incumbent on him to make the determinations of law arising from those undisputed facts.

[24] The issue before the Chambers judge, and before us, was the second step of the summary judgment test – whether the appellants established that their claim for vicarious liability against Chrysler had a real chance of success. These issues are all questions of law and are addressed under the appellants' other grounds of appeal. I will now turn to those grounds of appeal.

Issues #2 and #3

2. Whether Chrysler is an "owner" within the meaning of s. 2(ak) of the Motor Vehicle Act, R.S.N.S. 1989, c. 298;

3. Whether Chrysler is in the business of renting cars within the meaning of s. 62(1) of the Motor Vehicle Act;

[25] These two grounds of appeal are inter-related and I will address them together.

[26] Giffin argues that this appeal turns on the interpretation of two provisions of the **Motor Vehicle Act**, ss. 2(ak) and 62(1):

> 2. In this Act
>
> ...
>
> (ak) "owner" means a person who holds the legal title of a vehicle and includes a transferee or in the event a vehicle is the subject of an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee or lessee, or in the event a mortgagor of a vehicle is entitled to possession, then the conditional vendee or lessee or mortgagor shall be deemed the owner for the purpose of this Act;
>
> . . .
>
> 62 (1) The owner of a motor vehicle engaged in the business of renting motor vehicles without drivers, who rents a vehicle without a driver to another, otherwise than as a part of a bona fide transaction involving the sale of the motor vehicle, permitting the renter to operate the vehicle upon the highways, shall be jointly and severally liable with the renter for any damages caused by the negligence of the latter in operating the vehicle and for any damages caused by the negligence of any person permitted to operate the vehicle by the person renting the same and with the express or implied permission of the owner.

[27] Giffin raises two arguments with respect to these provisions. They are:

1. Section 62(1) imposes strict liability in its own right; and

2. Section 2(ak), when read together with the “reverse onus” imposed on owners by s. 248, has roughly the same effect of imposing strict liability.

[28] I will deal summarily with the second aspect of Giffin’s argument.

[29] Section 2(ak) when read in light of s. 248 does not impose any liability on the owner of a motor vehicle. It is simply a provision relating to the onus of proof of liability. The applicable provisions of s. 248 provide:

> 248 (1) Where any injury, loss or damage is incurred or sustained by any person by reason of the presence of a motor vehicle upon a highway, the onus of proof
>
> (a) that such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner of the motor vehicle, or of the servant or agent of such owner acting in the course of his employment and within the scope of his authority as such servant or agent;
>
> (b) that such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the operator of the motor vehicle,
>
> shall be upon the owner or operator of the motor vehicle.
>
> 2) Subsection (1) shall not apply where the injury, loss or damage is incurred or sustained by
>
> (a) reason of a collision of a motor vehicle or motor vehicles with another motor vehicle or other motor vehicles, and the action is brought or the counterclaim is made by the person who was at the time of the collision the owner or operator of one of such motor vehicles; [Emphasis added]
>
> ...
>
> (3) A person operating a motor vehicle, other than the owner thereof, shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent unless and until the contrary is established.

[30] As is apparent on its face, s. 248(1) does not apply where the loss or damages occasioned by the collision of motor vehicles, (s. 248(2)(a)) such is the situation in this case.

[31] The only potential application of s. 248 in this case is s. 248(3) which deems a person operating a motor vehicle to be the servant and agent of the owner of the motor vehicle unless the contrary is established.

[32] Counsel, in argument, acknowledged that there was no issue on that point. Giffin was not acting as the servant or agent of Chrysler in the operation of the motor vehicle at the time the accident occurred. As a result, s. 248 has no

application on the facts of this case. The reverse onus provision simply does not apply.

[33] I will now turn to the issue of whether the Chambers judge erred in determining that s. 62(1) of the **Act** did not apply.

[34] The Chambers judge, when addressing this argument, concluded at ¶ 64 of his decision:

> [64] I am satisfied that there is not a real chance of success on the arguments advanced by Mr. Giffin respecting Chrysler's alleged liability by operation of the **Motor Vehicle Act**. Neither the argument that the lease between Chrysler and Mr. Giffin was actually a rental contract pursuant to s. 62 of the **Act**, nor the claim that Chysler is an owner pursuant to s. 2(ak), have a real chance of success on the undisputed facts. The lease plainly falls into the "lease with right of purchase" exception to the definition of "owner."

[35] The Chambers judge continued at ¶ 39-40 of his decision:

> [39] I cannot accept the argument that s. 62 can be applied so as to impose liability in circumstances such as these, where ss. 248(1) and 2(ak), which speak directly to the situation, indicate a different result. The lease contains the characteristics noted in s. 2(ak); it cannot realistically be depicted as a "rental contract" as defined in s. 62. Further support for this conclusion can be found in s. 61, which, along with s. 62, falls under the heading of "For Rent Cars." Subsection 61(1) provides:
>
> > Every person engaged in the business of renting motor vehicles without drivers who rents a vehicle without a driver, otherwise than as part of a bona fide transaction involving the sale of the motor vehicle, shall maintain a record of the identity of the person to whom the vehicle is rented and the exact time the vehicle is the subject of the rental or in possession of the person renting and having the use of the vehicle and every such record shall be open to inspection by the Registrar, an officer of the Royal Canadian Mounted Police, a chief of police, an inspector of motor vehicles, or by any other person upon signed order of any such official, and it shall be an offence for any such owner to fail to make or have in his possession or to refuse an inspection of the record as required in this Section.

> [40] With this record-keeping requirement, the Act is contemplating a situation distinct from a lease with an option to purchase as described in s. 2(ak). I conclude that there is no real chance of success based on the argument under s. 62.

[36] I agree with the Chambers judge. Giffin's argument on this point has no real chance of success.

[37] At the heart of Giffin's argument on this point is that "Gold Key Lease" is not "an agreement for the conditional sale or lease thereof with the right of purchase upon performance of the conditions stated in the agreement" (s. 2(ak)) but is instead a rental agreement "otherwise than as a part of a *bona fide* transaction involving the sale of a motor vehicle" (s. 62(1)). What this argument overlooks, even if you accept that the Gold Key Lease does not fall within s. 2(ak) (which I do not), is that it does not fit within the other subsections of s. 62, in particular, s. 62(3) and 62(5) which provide as follows:

> 62(3) Whenever the owner of a motor vehicle rents the vehicle without a driver to another it shall be an offence for the latter to permit any other person to operate the vehicle without the permission of the owner.
>
> . . .
>
> (5) No owner of a motor vehicle engaged in the business of renting motor vehicles without drivers shall rent any such vehicle under any contract or agreement unless and until the Registrar has approved of a form of agreement to be entered into by the owner and the renter.

[38] The Gold Key Lease does not place any restrictions on Giffin with respect to the use of the motor vehicle. Section 62(3) emphasizes a high level of control that is involved when an owner rents a vehicle to an individual as contemplated by that section. Under s. 62 it is an offence for an individual to drive a rental car without the owner's permission. There is no suggestion, nor is there any evidence that Chrysler exercised the high level of control that is mandated by s. 62.

[39] Section 62(5) also mitigates against Giffin's argument. It provides:

> (5) No owner of a motor vehicle engaged in the business of renting motor vehicles without drivers shall rent any such vehicle under any contract or agreement unless and until the Registrar has approved of a form of agreement to be entered into by the owner and the renter.

[40] There is no evidence, nor any suggestion, that the Gold Key Lease was required to be filed or was filed with the Registrar.

[41] This is further support for the conclusion that the lease agreement does not fit within the type of rental agreement contemplated by s. 62 of the **Motor Vehicle Act**.

[42] Giffin's argument assumes that if the lease agreement does not fall within s. 2(ak) of the **Act** then it must fall within s. 62 of the **Motor Vehicle Act**. That is simply not so. The Gold Key Lease has none of the characteristics of a rental agreement as contemplated by s. 62 (see **Nixon v. Robert**, *infra*, ¶ 58).

[43] For these reasons, Giffin's argument on this point must fail.

Issues #4 and #5

4. Whether the law of vicarious liability extends to cover leasing companies;

5. Whether Chrysler is vicariously liable for any negligence attributed to Giffin.

[44] Both of these issues deal with vicarious liability at common law. As such, I will address them jointly.

[45] This is the primary argument on behalf of the appellant Gilbert. In essence, she argues that the Chambers judge erred in failing to properly apply the law in **Bazley v. Curry**, [1999] 2 S.C.R. 534, S.C.J. No. 35 (Q.L.) and the law that has developed since that case was decided.

[46] She argues that the Chambers judge failed to provide any analysis of the **Bazley** criteria and in failing to do so committed an error of law.

[47] With respect, I disagree.

[48] The Chambers judge cites, at length, from **Bazley** (¶ 45-48). He then outlines the arguments made on behalf of the appellant and the respondent for and against the principles as enunciated in **Bazley**.

[49] Following the recitation of these arguments he concludes at ¶ 65 that the appellants have failed to show that there was any real chance of success based on the law of vicarious liability. Again, I agree with the Chambers judge for the reasons I will explain.

[50] In **Bazley**, **supra**, the Court was addressing whether a non-profit organization, operating two residential care facilities for the treatment of emotionally troubled children was vicariously liable for an employee's tortious conduct in sexually abusing a resident of the facility. After a consideration of the law and policy considerations, the Court concluded:

> 41 Reviewing the jurisprudence, and considering the policy issues involved, I conclude that in determining whether an employer is vicariously liable for an employee's unauthorized, intentional wrong in cases where precedent is inconclusive, courts should be guided by the following principles:
>
> (1) They should openly confront the question of whether liability should lie against the employer, rather than obscuring the decision beneath semantic discussions of "scope of employment" and "mode of conduct".
>
> (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
>
> (3) 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.

42 Applying these general considerations to sexual abuse by employees, there must be a strong connection between what the employer was asking the employee to do (the risk created by the employer's enterprise) and the wrongful act. It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. The policy considerations that justify imposition of vicarious liability for an employee's sexual misconduct are unlikely to be satisfied by incidental considerations of time and place. For example, an incidental or random attack by an employee that merely happens to take place on the employer's premises during working hours will scarcely justify holding the employer liable. Such an attack is unlikely to be related to the business the employer is conducting or what the employee was asked to do and, hence, to any risk that was created. Nor is the imposition of liability likely to have a significant deterrent effect; short of closing the premises or discharging all employees, little can be done to avoid the random wrong. Nor is foreseeability of harm used in negligence law the test. What is required is a material increase in the risk as a consequence of the employer's enterprise and the duties he entrusted to the employee, mindful of the policies behind vicarious liability.

[51] **Bazley** is distinguishable, on its facts, from the present situation. It involved an employee committing an intentional tort on a vulnerable victim during the course of his employment.

[52] However, **Bazley**, *supra*, was considered in a non-employer/employee relationship recently by the Supreme Court in **Fullowka v. Pinkerton's of Canada Ltd.**, 2010 SCC 5. In **Fullowka**, the appellants sought to impose vicarious liability

on the national union for the intentional actions of the members of a local. The Court concluded that the national union was not vicariously liable and held:

> [142] The question of whether vicarious liability should be imposed is approached in three steps. First, the court determines whether the issue is unambiguously determined by the precedents. If not, a further two-part analysis is used to determine if vicarious liability should be imposed in light of its broader policy rationales: *Bazley v. Curry*, [1999] 2 S.C.R. 534, at para. 15; *John Doe v. Bennett*, 2004 SCC 17, [2004] 1 S.C.R. 436, at para. 20. The plaintiff must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close and that the wrongful act is sufficiently connected to the conduct authorized by the party against whom liability is sought: *Bennett*, at para. 20. The object of the analysis is to determine whether imposition of vicarious liability in a particular case will serve the goals of doing so: imposing liability for risks which the enterprise creates or to which it contributes, encouraging reduction of risk and providing fair and effective compensation: *Bennett*, at para. 20.

[53] The three step analysis in **Fullowka** may be summarized as follows:

1. Has the issue of vicarious liability been unambiguously determined by the precedents?

2. If not, has the plaintiff shown that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close?

3. If the relationship is sufficiently close, is the wrongful act sufficiently connected to the conduct authorized by the parties against whom liability is sought?

[54] Turning to the first part of the three step process, as previously explained, Chrysler is not the owner of the motor vehicle for the purposes of the **Motor Vehicle Act**. However, it is still the legal title holder to the vehicle.

[55] Vicarious liability does not exist at common law between the owner of a motor vehicle and its driver. In **Co-operators Insurance Association v. Kearney**, [1965] S.C.R. 106 the Supreme Court of Canada held at p. 115:

> ... There was not, of course, at common law, any liability upon the owner of a motor vehicle for damages caused by the negligent driving of that vehicle when the driving was not that of the owner or of his servant. ...

[56] Similarly, in **Dawson v. Mitchell** (1985), 59 A.R. 325, the Alberta Court of Queen's Bench held:

> [13] At common law there was no liability on the owner of a motor vehicle, merely by reason of ownership, for injuries which the motor vehicle might occasion while being driven by another: ...

[57] The lender of a vehicle is also not liable for the negligent driving of a borrower at common law. In **Fraser v. Ross** (1983), 59 N.S.R. (2d) 254 (S.C.) Justice Burchell remarked as follows at ¶ 10:

> The mere loan of a vehicle for the convenience of the borrower and the giving of consent or permission to operate it were not sufficient to establish an agency or master and servant relationship at common law. Such a relationship only came into existence if the servant or agent was on the business of his principal or master, was carrying out his instructions or was under his direction and control. ...

[58] Similarly, an individual who rents a vehicle to another is not vicariously liable for the negligence of the renter at common law. This is true even when the vehicle is rented for use as a commercial taxi. In **Nixon v. Robert** (1983), 59 N.S.R. (2d) 245 (S.C.). O'Brien rented a vehicle to Robert to use in a taxi service. Robert was involved in an accident with the Plaintiff, and the Plaintiff sued O'Brien and Robert. The Plaintiff claimed O'Brien was vicariously liable for the negligence of Robert. Justice Hallett dismissed the claim against O'Brien, finding that he was not vicariously liable for the negligence of Robert.

[59] I am satisfied that the authorities unambiguously establish that Chrysler is not vicariously liable for the negligence of Giffen. There is no common law of vicarious liability between the owner of a vehicle and its driver. The fact that the vehicle is subject to the lease does not change the basic relationship between Chrysler, the owner of the vehicle at common law and Giffin, the driver.

[60] Although the question of vicarious liability is settled by the first step of the **Fullowka** three-step analysis, it would also fail on the second and third steps.

[61] In **Fullowka** a fired striker evaded security and entered a mine, set an explosive device, and as he intended, it was detonated by a trip wire killing nine miners. Their survivors and another worker sued the national union, inter alia, alleging vicarious liability.

[62] After citing ¶ 142 above, the Court concluded that the relationship between the national union and the union members was not sufficiently close to justify imposing vicarious liability on the national union for their unlawful acts.

[63] Similarly, in the present case, the relationship between Chrysler and Giffin is not sufficiently close to justify imposing vicarious liability for his negligent acts.

[64] Vicarious liability for leasing companies, like Chrysler, does not align with the authorities, the leasing company does not control the use of the leased vehicle, leasing, in and of itself does not create an "enterprise risk" and, Giffin's manner of operating the motor vehicle is in no way furthering Chrysler's interests. Finally, Chrysler did not have any control, or ability to control the manner in which the vehicle is being driven by Giffin.

[65] In short, the policy considerations set out in **Bazley,** *supra*, do not exist for imposing vicarious liability on Chrysler.

[66] Gilbert, in her factum, suggests that to determine vicarious liability we must ask and answer the questions raised by the "**Bazley** tests". With respect, the analysis mandated by **Bazley**, and subsequently **Fullowka**, does not mandate that the questions in the form posed by the plaintiff be invariably answered as a kind of rigid template in the analysis of whether a party is vicariously liable for the wrongful acts of another. **Bazley** was commenting on the relevant factors to be considered when determining vicarious liability related to intentional torts in an employment setting (see **Bazley**, *supra*, p. 41). The relevant factors will vary on a case-by-case analysis. The trial judge committed no error in his determination that Chrysler was not liable for the negligence of Giffin.

[67] For all of these reasons, I would dismiss these grounds of appeal.

Conclusion

[68] I would dismiss both appeals with costs to the respondents in the amount of $1,500.00 plus taxable disbursements; one-half of that amount is to be paid by each appellant.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Saunders, J.A.

NOVA SCOTIA COURT OF APPEAL
Citation: ***Gilbert v. Giffin***, 2010 NSCA 95

Date: 20101125
Docket: CA 319253
Registry: Halifax

Between:

Phyllis Gilbert

Appellant

v.

James Douglas Giffin, Daimler Chrysler Services Canada Inc., and Coseco Insurance Company

Respondents

Docket: CA 319252

Between:

James Douglas Giffin

Appellant

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Daimler Chrysler Services Canada Inc., Coseco Insurance Company and Phyllis Gilbert

Respondents

Revised Judgment: **The text of the original judgment has been corrected according to this erratum dated January 17, 2011**

Judges: MacDonald, C.J.N.S.; Saunders and Farrar, JJ.A.

Appeal Heard: October 6, 2010, in Halifax, Nova Scotia

Held: Appeals dismissed per reasons for judgment of Farrar, J.A.; MacDonald, C.J.N.S. and Saunders, J.A. concurring.

Counsel: John P. Barry, Q.C. and Nadia M. MacPhee, for the appellant Phyllis Gilbert
W. Augustus Richardson, Q.C., for appellant James Giffin
C. Christopher Robinson, Q.C. and Ian Dunbar, for the respondent Daimler Chrysler Services Canada Inc.
M. Darlene Willcott, for the respondent Coseco Insurance Company not appearing

Reasons for judgment:

[69] In paragraph [53], sub-paragraph 3., second line, substitute the word “contact” with the word “conduct”.