Hardisty v. 851791 NWT Ltd. et al 2004 NWTSC 70

Date: 2004 10 06

Docket: CV 07855

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KARI-LYNN HARDISTY

Plaintiff

-and-

851791 N.W.T. LTD., CARMACKS CONSTRUCTION INC. and MR. ARNDT

Defendants

-and-

RUSSELL ANDRE, CLAUDE TRUDEL, TER MAR HOLDINGS LTD., THE COMMISSIONER OF THE NORTHWEST TERRITORIES, JOHN HOPF, JOE COOK, WAYNE ARNDT and CARMACKS ENTERPRISES LTD.

Third Parties

Proceeding between two defendants, each of whom seek contribution or indemnity from the other.
Heard at Yellowknife, NT on July 27, 2004
Reasons filed: October 6th, 2004.

REASONS FOR JUDGMENT BY THE HONOURABLE JUSTICE J.Z. VERTES

Counsel for 851791 N.W.T. Ltd.: Gary J. Draper
Counsel for Carmacks Construction Ltd.: Edward J. Boomer

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REASONS FOR JUDGMENT

[1] This proceeding is between two defendants, each of whom seek contribution or indemnity from the other.

[2] The action arises out of a highway accident in 1996. The plaintiff was a passenger on a motorcycle and she was seriously injured when the motorcycle crashed as the result of hitting a pile of dirt at an excavation site on the roadway. The road was under construction at the time. The plaintiff's claim has been settled. The two defendants in this proceeding, 851791 N.W.T. Ltd. ("851791") and Carmacks Construction Inc. ("Carmacks"), each contributed $161,542.71 to the settlement. These payments were made so as to secure a settlement of the plaintiff's claim but without prejudice to these defendants' claims for contribution or indemnity against each other.

[3] I use the term "contribution or indemnity" as referring to one remedy notwithstanding the use of the disjunctive "or". The difference between "contribution" and "indemnity" is simply the scope of the recovery. As explained by David Cheifetz, in "Allocating Financial Responsibility among Solvent Concurrent Tortfeasors", (2004) 28 *Advocates Quarterly* 137 (at page 143), "contribution" refers to the right of a tortfeasor, who has paid the injured person more than that tortfeasor's share of the damages, to recover from the other tortfeasors, who are or may be liable for the damages, some or all of the excess payment. "Indemnity" is the recovery of all that was paid; "contribution" is recovery of only some portion of what was paid.

[4] There is a third defendant involved in this proceeding, Mr. Wayne Arndt (named simply as "Mr. Arndt" in the style of cause). For purposes of the settlement, and these claims for contribution or indemnity, it was agreed that any liability of 851791 or Carmacks to the plaintiff results from the negligence of Mr. Arndt. The pivotal question in this proceeding is: Which defendant, 851791 or Carmacks, or are both, vicariously liable for such negligence?

Facts:

[5] The factual basis for this proceeding was provided by way of an agreed statement of facts.

[6] The two defendant companies, 851791 and Carmacks, are independent of each other. They are both construction companies that do a lot of highway construction. In 1996, the Government of the Northwest Territories awarded a contract to 851791 for the widening and paving of a stretch of the Mackenzie Highway south of Fort Simpson. Carmacks had submitted, through an associated company, a bid for part of the work as a subcontractor to the bid submitted by 851791. This subcontractor relationship has no bearing on the issues in this proceeding.

[7] The president of 851791, Mr. Jack Rowe, realized that his key management staff were involved in other projects and would not be able to supervise the work on the Mackenzie Highway project. He then contacted a manager of Carmacks, Mr. Keith James, to see if Carmacks had someone or knew of someone who could supervise the work necessary to replace culverts and widen the road. Mr. James thought that Mr. Arndt, an employee of Carmacks, might be appropriate and advised Mr. Rowe that he would be available to work as an onsite supervisor. This was acceptable to Mr. Rowe since he knew Mr. Arndt and Mr. Arndt had worked for one of the businesses owned by the Rowe family for a year approximately ten years earlier. As of 1996, Mr. Arndt had

been employed full-time by Carmacks as a road construction superintendent or foreman since 1977 (except for 1987-88 when he worked for one of the Rowe businesses).

[8] The agreement for the supply of Mr. Arndt as an onsite construction superintendent was an isolated event. Neither 851791 nor Carmacks had supplied a person to work in such capacity to the other before this occasion.

[9] The parties did not reduce to writing their agreement regarding Mr. Arndt's services. It was simply an oral agreement between Mr. Rowe and Mr. James. It was agreed that Mr. Arndt would remain on Carmacks payroll and Carmacks would invoice 851791 for Mr. Arndt's services. Carmacks paid Mr. Arndt's regular employee benefits and workers' compensation premiums during the course of his work on the construction project. Carmacks' charge rate to 851791 for Mr. Arndt's services was higher than the wages paid to Mr. Arndt since it included the cost of benefits paid to Mr. Arndt, the cost of a pickup truck owned by Carmacks and used by Mr. Arndt on the construction project, and a modest profit. It also included charges for Mr. Arndt's food and lodging (where those were not paid directly by 851791). The charges for Mr. Arndt's services were based on an hourly fee differentiated as between "regular" hours and "overtime" hours. Mr. Arndt kept a daily log and time records of his work which he provided to Carmacks which, in turn, gave copies to 851791.

[10] This arrangement was not unique. On prior occasions when Carmacks had supplied the services of employees to other contractors, it was its practice to keep the employee on its payroll and to charge for the employee's services by way of an invoice from the company to the other contractor.

[11] While Mr. Arndt was working on the construction project for 851791, Carmacks retained the right to retrieve him from the project. It also retained the right to dismiss Mr. Arndt from his employment with Carmacks and no one at 851791 had any authority to cause Carmacks to dismiss him.

[12] During the course of the project Mr. Arndt would usually have a brief meeting every day at the site with one of the managers of 851791 who would inquire as to how things were going. Mr. Arndt met daily with the government's project manager to review the progress of the work. One of the specific responsibilities undertaken by Mr. Arndt, as the construction superintendent, was the placement of traffic signage, barricades and lighting. Other than telling Mr. Arndt where he could obtain signs and barricades, the senior managers of 851791 had no further involvement in that aspect of the work. For purposes of this proceeding, it was agreed that any liability of 851791 or Carmacks to the

injured plaintiff arises from Mr. Arndt's negligence in the inadequate placement of signage, barricades and lighting at the area where the accident occurred.

Issues:

[13] The parties framed the issues to be addressed in this proceeding as follows:

(a) Assuming for the purpose of this litigation that Wayne Arndt was negligent for not providing better signing or lighting at the excavation site, is 851791, or Carmacks, or are both, vicariously liable to the plaintiff for such negligence?

(b) If 851791 is vicariously liable, solely or jointly, does 851791 have a right under the *Contributory Negligence Act*, at common law, or under a contract with Carmacks, to recover contribution or indemnity from Carmacks for such vicarious liability?

(c) If 851791 is vicariously liable, solely or jointly, does 851791 have a right to recover indemnity from Wayne Arndt with respect to such liability?

(d) If Carmacks is vicariously liable, solely or jointly, does Carmacks have a right under the *Contributory Negligence Act*, at common law, or under a contract with 851791 to recover contribution or indemnity from 851791?

[14] I should note that, in respect of any claim for indemnification as against Mr. Arndt personally, counsel for Carmacks also addressed that issue on that defendant's behalf.

Analysis:

[15] While the issues have been framed by the parties as set out above, I said previously that the pivotal question is which one of 851791 or Carmacks, or perhaps both, is vicariously liable for Mr. Arndt's negligence. This was the primary question that counsel addressed in their submissions.

[16] In a general sense, both counsel said that the answer to that question should determine the question of who must indemnify whom. If somehow both parties are vicariously liable, then that may mean that both claims for contribution or indemnity fail.

[17] Both counsel emphasized that the issue of contribution as between the two defendants is distinct from the question of the liability of these defendants to an injured plaintiff. The two questions are informed by different considerations. As between the two defendants, there may be contractual provisions, express or implied, that have nothing to do with the factors that determine their respective liability to the plaintiff.

[18] The analysis in this case has to start with the general principles of vicarious liability. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, the Supreme Court of Canada had occasion to review these principles, in particular in the context of employment and independent contractor situations. As Major J., writing on behalf of the Court, noted, vicarious liability is where one person is held liable for the actions of another because of the relationship between them. It is a type of strict liability because it does not require proof of fault on the part of the party held vicariously liable. The most common relationship where vicarious liability is imposed is that of employer and employee.

[19] The foundation for this type of liability rests on policy considerations. Major J. identified two principal policy theories. One is the "enterprise risk" theory which holds that, since an employer employs others to advance its own economic interests, then the employer should bear the losses incurred in the course of the enterprise. Another is the "deterrence" theory which holds that employers are in the best position to manage and minimize the risks associated with their activities. As Major J. wrote (at para. 30), identification of the policy considerations assists in determining whether the doctrine should be applied in a particular case. And this has some significance in this case where the argument addressed the question of who should be considered as the "employer".

[20] In this case, 851791 contracted with Carmacks for the services of Mr. Arndt. It is well-established that subject to certain limited exceptions, the relationship between an employer and an independent contractor does not give rise to vicarious liability. And this is no different whether the independent contractor itself does the work or an employee of the contractor does the work. In *Sagaz*, Major J. also outlined various tests used to differentiate between an employment relationship and that of an independent contractor. There is the "control" test, which examines the degree of control that is exercised over the scope and method of the work. There is the "organization" test, which asks whether the alleged negligent employee was part of the employer's organization. There is the "enterprise" test which looks at whether the employer (a) controls the activities of the worker, (b) is in a position to reduce the risk of loss, (c) benefits from the activities of the employee, and (d) whether the enterprise ought to bear the true cost of its activity. And,

there is the "own account" test which asks whether the person who has been engaged to perform the service is performing it as a person in business on their own account. But, as Major J. concluded (at para. 46), there is no one conclusive test which can be universally applied. What must be examined is the total relationship of the parties.

[21] The question in this case is not the relationship between the two parties, 851791 and Carmacks. That is obviously a contractual one. The question is the relationship of Mr. Arndt to each of 851791 and Carmacks. This is a situation of what has been described by text-book writers and in the case law as that of the "borrowed employee", i.e., a person employed by one employer (called the "general employer") who is, at the time that the tort is committed, working for another employer (called the "temporary employer") under some arrangement between the two employers.

[22] The question of which employer is responsible for the employee is critical because, except in cases of a true partnership or joint venture, there is very little precedent in Canadian law for holding more than one person vicariously liable for the tort of an employee: *W.R.B. v. Plint*, [2003] B.C.J. No. 2783 (C.A.), at para. 40. The tests used to determine whether the general employer or the temporary employer is liable are the same used to distinguish between an employment relationship and one of independent contractor, unless there are some express or implied contractual terms providing otherwise.

[23] Some of the main considerations that apply are: Who controls the way in which the work is to be done? Who pays the employee? Who can dismiss the employee? How long does the temporary arrangement last? Does the work require a particular expertise?

[24] As a general observation, it is fair to say that the law is not receptive to arguments of a transferred employment relationship. Professor P.S. Atiyah, in his text *Vicarious Liability in the Law of Torts* (1967), commented (at page 160) that, unless detailed control as to how the work is to be done has been transferred to the temporary employer, the "almost invariable result" is going to be that the general employer remains liable. And, if one considers the importance of the contractual relationship, Prof. Atiyah wrote (at page 154), "there can be little doubt that in the ordinary way the general employer should be liable, for *prima facie* a person who supplies a service through his servants warrants that the service will be properly performed." These comments were echoed by Professor J.G. Fleming, in *The Law of Torts* (9th ed., 1995), at page 419:

> An employer frequently agrees to make the services of his employee available to a third party. If, in the course of performing the stipulated work, the employee injures someone,

> the general employer retains responsibility, unless he can establish that the effect of the transfer was to constitute his employee pro hac vice the servant of the hirer. In the course of the last 50 years, this burden has become increasingly heavy so that it can be discharged only in quite exceptional circumstances. The principal reason for this bias may well be that the general employer, unlike the hirer, has selected the servant for the task and thereby makes himself responsible for the manner in which the work is carried out.

[25] This extract makes an important point. The burden is on the general employer, in this case Carmacks, to prove that the responsibility for the employee has shifted to the temporary employer. This comes from the judgment of Viscount Simon in *Mersey Docks and Harbour Board v. Coggins,* [1946] 2 All E.R. 345 (H.L.), at page 348:

> It is not disputed that the burden of proof rests upon the general or permanent employer - in this case the board - to shift the *prima facie* responsibility for the negligence of servants engaged and paid by such employer so that this burden in a particular case may come to rest on the hirer who for the time being has the advantage of the service rendered. And, in my opinion, this burden is a heavy one and can only be discharged in quite exceptional circumstances.

This statement of the burden of proof has been applied by the Supreme Court of Canada in *Trans-Canada Forest Products Limited v. Heaps, Waterous Limited et al,* [1954] S.C.R. 240 (at page 255).

[26] In this case there are numerous factors tending to demonstrate that Mr. Arndt remained, throughout his work for 851791, an employee of Carmacks. His services were offered by Carmacks in response to a request from 851791. He was selected by Carmacks for this work. Carmacks paid him and derived a profit from the provision of his services. Carmacks retained the power to remove him from the project and to dismiss him from employment. He submitted his logs and time records directly to Carmacks. There was no evidence that 851791 exercised any control or direction over the activities of Mr. Arndt or the manner in which he carried out his work. He was provided by Carmacks as a skilled and experienced construction superintendent who did not require direction or supervision.

[27] Counsel for Carmacks submitted that 851791 should be considered the employer since Mr. Arndt was provided so as to enable 851791 to fulfill its contractual obligations. Since those obligations involved an inherently dangerous undertaking such as highway excavation and construction, an undertaking that 851791 has a non-delegable duty to carry out safely, then, as a matter of policy, 851791 should be considered to have

ultimate control and thus vicariously liable for Mr. Arndt's negligence. Counsel also noted that Carmacks exercised no control over how Mr. Arndt carried out his work.

[28] I will comment on the issue of non-delegable duty in due course but, for now, suffice it to say that that may be more relevant to the question of liability to the plaintiff as opposed to liability as between these defendants *inter se.*

[29] One thing that is clear from the parties' submissions is that neither 851791 nor Carmacks exercised any direct control or direction as to how Mr. Arndt was to carry out the work. And this is not unusual. In many of these cases, the person provided to do the work is a skilled employee who knows how to carry out the work required. That is the very reason the particular individual is selected and provided by the general employer. The employee is then left on his or her own to do the work as he or she thinks best. Responsibility, in these situations, has been held to remain with the general employer.

[30] In the aforementioned *Mersey Docks* case, the defendant hired from the plaintiff a crane and its driver. The driver was a skilled workman employed and paid by the plaintiff. The defendant directed what should be done but not how it should be done. A third party was injured due to the negligence of the crane driver. The House of Lords held that the plaintiff, the general employer, was vicariously liable for the driver's negligence. The plaintiff had vested in its employee a discretion as to how to carry out the directions given by the temporary employer. The plaintiff chose the driver for this task and the obligation was to provide a driver who was competent.

[31] In the aforementioned *Trans-Canada Forest Products* case, the owner of a diesel engine contacted the company that was the local agent that sold the engine to have some repairs done. The local agent had an established practice with the general agent whereby the latter would send out an experienced mechanic to do the work. The mechanic was employed by the general agent. During the course of repairs a fire started causing damage. The owner brought action against the local agent which in turn took third party proceedings against the general agent. One of the issues was who was responsible for the actions of the mechanic whose negligence was the cause of the fire. The Supreme Court of Canada held that the mechanic was the employee of the general agent (his "general employer") and that party was vicariously liable for his negligence. Therefore the general agent had to indemnify the local agent (who was found liable to the owner in contract). The fact that the owner contracted with the local agent to do the repairs did not alter the situation. The mechanic was in the general employment of the general agent who provided his skilled services to the local agent and billed for them. The responsibility undertaken by the general agent was to supply a workman competent to repair the engine.

[32] In the case of *Earthworm Red River Limited v. Underwood, McLellan & Associates Limited*, [1972] 1 W.W.R. 362 (Man. Q.B.), affirmed [1972] 3 W.W.R. 400 (Man.C.A.), affirmed [1973] 2 W.W.R. 576 (S.C.C.), the plaintiff was a contractor laying a sewer line to a building. The defendant was an engineering firm working as consultants to the building owner. The plaintiff did not have in its employ anyone capable of doing the necessary survey work in order to set the new sewers at the right elevation. The defendant agreed that the plaintiff could use two of its salaried employees as required to do the survey work and the plaintiff paid the defendant for their services. The surveys were done negligently and the plaintiff was required to relay the sewers at its own expense. The plaintiff then sued the defendant. In holding the defendant liable, the court found that the defendant was vicariously liable for its employees' negligence even though at the time they were carrying out work for the plaintiff. The defendant covenanted to provide proper engineering services and it did not do so.

[33] In *McKee v. Dumas* (1976), 12 O.R. (2d) 670 (C.A.), leave to appeal to S.C.C. refused, the employee was operating a tractor-trailer owned by the temporary employer when it was involved in an accident. The general employer, who selected and provided the employee, paid the employee and retained the authority to hire or fire. The temporary employee gave certain instructions to him but he was hired to drive and provided as an experienced driver. Therefore, the general employer remained vicariously liable.

[34] These cases, and numerous others referred to by counsel, reinforce the generally accepted principle that the general employer, in this case Carmacks, is vicariously liable for the negligence of a "borrowed employee" in the absence of an express transfer of authority making the employee an employee of the temporary employer, in this case 851791. In this case, all of the relevant indicia point to the inescapable conclusion that Mr. Arndt remained, at all times, an employee of Carmacks. Therefore, Carmacks is vicariously liable for his negligence.

[35] This conclusion fits generally into the policy consideration of allocating risk. The general employer in this case charged a profit, however modest, to the temporary employer for the provision of the employee's services. Theoretically, therefore, the expense of the enterprise risk undertaken by the general employer has been factored in to the profit required. Thus the general employer should bear the risk. This was the way it was explained by Prof. Atiyah in his text (at page 163):

> The temporary employer who hires the services of the servant in question is, in most cases, paying for the services of the servant. And, if the general employer has properly costed the service he provides, one of the items which will be included in the cost which he charges the temporary employer will be an aliquot portion of the insurance premium attributable to the servant in question. In other words, the temporary employer will, in most cases, have *already paid for* his part of the risks involved, and to hold him vicariously liable for the servant would be to make him pay twice over for the same risk.

[36] Counsel for 851791 argued that, if Carmacks is solely vicariously liable, then that should result in Carmacks being completely liable for the settlement. But I want to return briefly to a point I mentioned earlier in reference to the submissions of Carmacks' counsel.

[37] Both parties referred me to the concept of non-delegable duties. The general principle that a person is not vicariously liable for the negligence of an independent contractor is subject to two important exceptions: (1) where the law imposes a duty personally on the employer of the contractor; and (2) where the activity in which the contractor is engaged is particularly hazardous, such that there is a grave danger of injury or damage to others in the performance of the task entrusted to the contractor: see G.H.L. Fridman, *The Law of Torts in Canada* (2nd ed., 2002), at pages 308-310. An example of the first kind is the duty of a government highway authority which by statute has responsibility for maintenance of highways: as per *Lewis v. British Columbia*, [1997] 3 S.C.R. 1145. An example of the second kind is the excavation of trenches across a busy roadway, that being considered an inherently dangerous activity for which the duty to take adequate care cannot be delegated to a contractor: as per *Canada v. Town of Biggar* (1981), 10 Sask. R. 401 (Q.B.); see also *City of St. John v. Donald*, [1926] 2 D.L.R. 185 (S.C.C.), at page 191.

[38] Assuming that the highway construction work in this case was an inherently dangerous undertaking and therefore the defendant 851791 had a non-delegable duty to take adequate care, the obligation of Carmacks to indemnify remains the same.

[39] Many of the cases that discuss the non-delegable duty of care refer to the liability attaching to the employer of the independent contractor as a form of vicarious liability: see *Savage v Wilby*, [1954] S.C.R. 376. If that is the case, then an obligation to indemnify arises under an implied contract of indemnity. In *McFee v. Jones* (1925), 56 O.L.R. 578 (Ont. C.A.), an automobile owner was held vicariously liable for the negligence of the driver who had rented it from him and collided with another vehicle.

The court held that the driver was obligated to indemnify the owner. The court held (at page 584):

> ...an implied contract of indemnity arises in favour of a person who, without fault on his part, is exposed to liability and compelled to pay damages on account of the negligence or tortious act of another, provided the parties were not joint tort-feasors in such a sense as to prevent recovery; that is, where the act done is not clearly illegal in itself. This right of indemnity is based upon the principle that every one is responsible for his own negligence, and if another is, by a judgment of a court, compelled to pay damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer. I am also of opinion that such right of indemnity exists independently of the statute, and whether or not contractual relations exist between the parties, and whether or not the negligent person owed the other a special or particular legal duty not to be negligent.

[40] Even though both the employer and the independent contractor may be sued by the plaintiff, the employer is still entitled to be indemnified since its liability arises because of vicarious liability for the contractor's negligence: see *Fenn v. City of Peterborough* (1979), 25 O.R. (2d) 399 (C.A.), at pages 444-445. The employer of the contractor has liability imposed through no direct fault of its own.

[41] If the non-delegable duty of care is not a form of vicarious liability, but an independent direct liability to the plaintiff, thus making 851791 a joint tortfeasor, then in my opinion the obligation to indemnify arises from an implied contractual duty of reasonable care. This is a point often repeated in the "borrowed employee" cases. Generally speaking, a person who supplies a service through his employee warrants that the service will be properly performed. In the absence of any special term, there is an implied condition in all contracts for work and labour that the work will be carried out carefully and skillfully. The cases and textbooks that say this are too numerous to mention.

[42] In this case, 851791 sought an individual with the requisite expertise to carry out the work. Carmacks represented to 851791 that Mr. Arndt had the knowledge, skill and experience to perform the work. 851791 relied on that representation and left Mr. Arndt to carry out the work using his discretion. It was therefore an implied term of the contract that Carmacks' employee would carry out the tasks necessary with reasonable care and skill. Therefore Carmacks is liable to indemnify 851791.

[43] I emphasize that this analysis focuses only on the liability relationship as between these two defendants. It is not an analysis of apportionment of fault vis-à-vis the plaintiff.

I do not have all the parties before me. The only issue before me is who, as between these two defendants, is responsible for paying their contribution to the settlement of the plaintiff's claim.

[44] The negligence of concern is the negligence of Mr. Arndt. For that negligence the defendant Carmacks is vicariously liable. For the reasons I have set out, Carmacks is therefore obligated to indemnify the defendant 851791.

Conclusions:

[45] The defendant 851791 will have an order declaring that Carmacks is vicariously liable for the negligence of Mr. Arndt and that Carmacks is obligated to completely indemnify 851791. As a result, 851791 will have judgment against Carmacks for $162,542.71 plus pre-judgment interest on that amount from the date it was paid.

[46] Costs generally follow the event. If counsel are unable to agree, they may make further submissions to me within 30 days of the date of these reasons.

[47] At the hearing I was advised that Carmacks Construction Inc. has amalgamated into Carmacks Enterprises Ltd. An order will therefore issue amending the name of this corporate party in all pleadings so as to reflect the change in corporate structure.

J.Z. Vertes
J.S.C.

Dated this 6th day of October, 2004
at Yellowknife, NT

Counsel for 851791 N.W.T. Ltd.: Gary J. Draper
Counsel for Carmacks Construction Ltd.: Edward J. Boomer