Case Name:

Dempsey v. Bagley

Between
David Dempsey and Rodney Stephenson, Plaintiffs, and
Brendan Allen Bagley, Brink's Canada Limited, PHH Vehicle Management Services Inc., Cambli International Inc., Cambli International Inc. a.k.a. PHH Vehicle Management Services Inc., ABC Corp and John Doe, Defendants
And Between
Leonard Campbell, Plaintiff, and
David F-C Prajoux, PHH Vehicle Management Services Inc., Cambli International Inc., Cambli International Inc. a.k.a. PHH Vehicle Management Services Inc., ABC Corp and John Doe, Defendants

[2016] A.J. No. 230

2016 ABQB 124

30 Alta. L.R. (6th) 237

264 A.C.W.S. (3d) 825

29 C.C.E.L. (4th) 213

2016 CarswellAlta 394

Dockets: 0801 07204, 0801 02907

Registry: Calgary

Alberta Court of Queen's Bench

C.S. Phillips J.

Heard: November 23, 2015.
Judgment: March 4, 2016.

(72 paras.)

Tort law -- Vicarious liability -- Liability of employer for acts of employee -- Trial on whether Workers' Compensation Board could pursue claim against defendant PHH -- Plaintiffs were injured in accident while working for B -- B leased vehicles from PHH -- B protected employer under Workers Compensation Act; PHH was not -- Defendants' agreement that B would fully indemnify PHH did not prevent action, as WCB and plaintiffs not parties to, nor received benefit from it -- Pursuant to s. 23(2) PHH only liable for damages from its own vicarious liability, which was less than B's, given degree of control over vehicles -- WCB could seek 25 per cent of damages from PHH.

Tort law -- Tortfeasors -- Contribution between tortfeasors -- Apportionment of liability -- Trial on whether Workers' Compensation Board could pursue claim against defendant PHH -- Plaintiffs were injured in accident while working for B -- B leased vehicles from PHH -- B protected employer under Workers Compensation Act; PHH was not -- Defendants' agreement that B would fully indemnify PHH did not prevent action, as WCB and plaintiffs not parties to, nor received benefit from it -- Pursuant to s. 23(2) PHH only liable for damages from its own vicarious liability, which was less than B's, given degree of control over vehicles -- WCB could seek 25 per cent of damages from PHH.

Workplace health, safety and compensation law -- Workers' Compensation -- Legislation -- Effect of statute on other causes of action -- Interpretation -- Persons not covered -- Subrogation -- Rights of subrogated party -- Rights against third person where employer also at fault -- Trial on whether Workers' Compensation Board could pursue claim against defendant PHH -- Plaintiffs were injured in accident while working for B -- B leased vehicles from PHH -- B protected employer under Workers Compensation Act; PHH was not -- Defendants' agreement that B would fully indemnify PHH did not prevent action, as WCB and plaintiffs not parties to, nor received benefit from it -- Pursuant to s. 23(2) PHH only liable for damages from its own vicarious liability, which was less than B's, given degree of control over vehicles -- WCB could seek 25 per cent of damages from PHH.

Trial on the issue of whether the Workers' Compensation Board could pursue a claim against the defendant PHH. The plaintiffs were passengers injured in motor vehicle accidents in the course of their employment with the defendant B. The received workers' compensation benefits. Damages had been agreed to as $60,000 plus $16,560 interest and $8,732 costs for the plaintiff RS, $225,000 damages plus $56,000 interest and $31,918 costs for the plaintiff LC, and $450,000 plus $84,000 interest and $39,288 costs for the plaintiff DD. B leased the armored vehicles from PHH, so both were owners under s. 187 of the Traffic Safety Act. B was a protected employer under the Workers' Compensation Act so could not be sued by WCB. PHH was not a protected employer, and liability was not at issue. However, PHH and B had an agreement under which B had to fully indemnify PHH. As such, PHH and B argued it would be inequitable to allow the WCB to sue PHH, as it would be recovering damages from B indirectly when it could not do so directly. They further argued that estoppel applied as WCB had represented to B it would be immune from suit if it paid its premiums. B and PHH acknowledged they would be vicariously liable but for the operation of the WCA. WCB argued the indemnification agreement was irrelevant because it was not a party to it, and was an attempt by PHH to clothe itself in immunity it did not have under the Act. WCB sought to collect 100 per cent of damages from PHH on the basis of vicarious liability. PHH and B argued that s. 23(2) absolved PHH of exposure to any party of the claim that was not its fault, and B was at least 90 per cent liable.

HELD: WCB could pursue PHH for 25 per cent of the damages. This case was not one where commercial reality and common sense required the doctrine of privity to be relaxed. B benefitted from the lease agreement with PHH because it was commercially and financially advantageous to it, and PHH benefitted from the indemnity clause. The agreement was advantageous to both PHH and B, but was not advantageous to WCB or the plaintiffs, none of whom were parties to the agreement. Nothing in the wording of the WCA, specifically s. 22, suggested the Act should be modified by agreement, waiver or estoppel. In to context of the TSA and the intent to protect the public, Canadian authorities were reluctant to enforce conditions that excluded owners from liability while negatively affecting innocent victims. PHH and B's position would circumvent s. 187 of the TSA, which imposed liability on owners in circumstances like this. WCH was entitled to pursue a claim against PHH despite the indemnity agreement. Vicarious liability was included in "own fault or negligence" under s. 23(2), which was the basis upon which WCB could pursue PHH. If B and PHH were solely owners of the vehicles under the TSA and nothing more, liability would be 50/ 50. However, PHH's vicarious liability arose only under the TSA, while B's arose under the TSA as owner and under common law as the employer. While PHH retained some control over the vehicles through the lease, B had greater de facto control over, as it decided who drove them, was a passenger, where the vehicles went, and employee training. Fairness dictated B was more responsible for the plaintiffs' damages. Given the use of the word "Shall" in s. 23(2), the non-protected party PHH, as the

statutory owner under s. 187 TSA, was only liable for the portion of damages occurred by its own vicarious liability. Unlike s. 2(2) of the Contributory Negligence Act, there was no wording in s. 23(2) that made persons at fault jointly and severally liable. The intent and effect of s. 23(2) was to remove joint and several liability and replace it with several liability on the part of the non-protected tortfeasor. PHH's liability was determined to be 25 per cent, so that was the portion of damages WCB could pursue from it.

Statutes, Regulations and Rules Cited:

Contributory Negligence Act, RSA 2000, c. C-27, s. 2(2)

Highway Traffic Act, RSA 2000, c. H-8, s. 18

Tortfeasors Act, RSA 2000, c. T-5,

Traffic Safety Act, RSA 2000, c. T-6, s. 1(1)(ee), s. 187

Workers Compensation Act, RSA 2000, c. W-15, s. 18(2), s. 22(3), s. 23(1), s. 23(2)

Counsel:

James D. Cuming, for the Plaintiffs.

Manoj Gupta, for the Workers' Compensation Board.

David J. Corrigan, Q.C., for the Defendant, PHH Vehicle Management Services Inc. ("PHH").

Scott E. Cozens, for the Defendants, Brinks Canada, David F-C Prajoux and Brendan Allan Bagley.

Reasons for Judgment

C.S. PHILLIPS J.:--

Introduction

1 This matter arose following two motor vehicle accidents which occurred in 2006. Both accidents were single vehicle collisions involving Brinks Canada Limited ("Brinks") armoured vehicles, which were leased from PHH Vehicle Management Services Inc. ("PHH") to Brinks and operated exclusively by Brinks under a long term lease. In each case, the vehicles were driven by Brinks employees David Prajoux and Brendan Bagley. The passengers and Plaintiffs Leonard Campbell, David Dempsey and Rodney Stephenson, who were injured as a result of the accidents, are also Brinks employees. The drivers and employees are workers as defined under the *Workers' Compensation Act*, RSA 2000, c W-15 ("*WCA*") and each of the Plaintiffs have received benefits from the Workers' Compensation Board (the "WCB") for injuries and losses sustained in the accidents. Brinks and PHH are employers under the *WCA*, but PHH is not the drivers' nor the Plaintiffs' employer. Both Brinks and PHH are owners as defined under the *Traffic Safety Act*, RSA 2000, c T-6 ("*TSA*"). As a result of their status of employer or owner, both Brinks and PHH are vicariously liable. However, by the operation of the *WCA*, Brinks is a protected employer, unlike PHH.

2 This case can be distinguished from other *WCA* cases involving unprotected parties in that Brinks and PHH have entered into an indemnity agreement contained in their lease, according to which Brinks is obligated to indemnify and save harmless PHH for any amounts that PHH would be otherwise obligated to pay, provided however, the indemnity shall not apply to claims against PHH due to gross negligence or willful misconduct. The parties acknowledge that PHH can be sued by the WCB on behalf of the Plaintiffs absent the indemnity clause and that the proviso with respect to gross negligence or willful misconduct in the indemnity clause has no application in this case.

3 On February 19, 2015, pursuant to the Consent Order of Justice K.M. Horner, the Court directed a trial of an issue based on the Agreed Statement of Facts, which is reproduced below. The central issue relates to the impact of the indemnity clause and whether the WCB can pursue a claim against PHH, considering that Brinks will be obligated to pay PHH under the indemnity clause contained in the lease as liability for the accidents is not in issue. If so, the Court has been directed to determine whether it can assess the relative vicarious liability of PHH and Brinks.

Facts

4 The parties have entered an Amended Agreed Statement of Facts which provides as follows:

Background Information

Campbell v Prajoux et al.

Dempsey et al v Bagley et al

1. A single vehicle accident occurred on June 29, 2006 near Hanna, Alberta (the "First Accident").

2. A single vehicle accident occurred on August 8, 2006 near Brooks, Alberta (the "Second Accident").

3. As a result of the First Accident, Leonard Campbell ("Campbell") was injured.

4. As a result of the Second Accident, David Dempsey ("Dempsey") and Rodney Stephenson ("Stephenson") were injured.

5. As a result of the First Accident an Action was commenced in the Court of Queen's Bench of Alberta, Judicial Centre of Calgary as Action No.: 0801-02907.

6. As a result of the Second Accident an Action was commenced in the Court of Queen's Bench of Alberta, Judicial Centre of Calgary as Action No.: 0801-07204.

7. The First Accident and the Second Accident are collectively referred to as the "Accidents".

8. Action No.: 0801-02907 and Action No.: 0801-07204 are collectively referred to as the "Actions".

9. The cause of action in the Actions is vested in the Workers Compensation Board ("WCB") created pursuant to the Alberta *Workers Compensation Act*, RSA 2000, c W-15 ("*WCA*").

LIABILITY

10. Liability for the Accidents is not in issue.

DAMAGES

11. Damages resulting from the injuries sustained in the Accidents have been agreed to. The damages are as follows, and shall accrue interest at [4%] per annum until Judgment:

(a) Rodney Stephenson - $60,000.00, plus interest of $16,560.00 and costs of $8,732.44;

(b) Leonard Campbell - $225,000.00, plus interest of $56,000.00 and costs of $31,918.81; and

(c) David Dempsey - $450,000.00, plus interest of $84,000.00 and costs of $39,288.95.

THE LEASE

12. The relevant vehicles involved in the Accidents (the "Vehicles") were owned by PHH Management Service ("PHH").

13. The Vehicles were leased exclusive to Brinks Canada Limited ("Brinks") by PHH pursuant to an Operating Lease Agreement (the "Lease") [Exhibit 1].

14. Under the Lease Agreement, Brinks has an obligation to indemnify and save harmless PHH from any claims arising out of the use or operation of vehicles covered under the Lease, including the Vehicles involved in these Accidents. The Agreement specifically states:

> 9(c) Indemnity. Notwithstanding (i) any other provision of the Lease or (ii) the availability, existence or collectability of any insurance, Lessee shall indemnify and save harmless PHH from and against any and all losses, costs, damages, claims and liabilities of whatever kind or nature, including, without limitation, legal fees and disbursements on a Solicitor and client basis (collectively, "Costs") incurred or suffered by PHH and relating in any way whatsoever to any one or more Leased Vehicles or their lease or use, including, without limitation, all Costs relating to claims made against PHH as owner or lessor of one or more Leased Vehicles and all Costs relating in any way whatsoever to the use of any one or more Leased Vehicles by any Affiliate of Lessee ...".

OWNERSHIP

15. Brinks and PHH both are owners of the Vehicles as defined by the *Traffic Safety Act*, RSA 2000, c T-6.

WORKERS COMPENSATION STATUS

16. At the time of the Accidents, the Defendants Prajoux and Bagley, and the Plaintiffs, Campbell, Dempsey, and Stephenson, were employed by Brinks and were workers as defined by the *WCA*, and each of the Plaintiffs have received benefits from the WCB for injuries and losses sustained in the Accidents.

17. Brinks' is an employer as defined by the *WCA* and paid WCB premiums (the "Premiums").

18. PHH is also an employer as defined by the *WCA*, and paid premiums as such.

19. Campbell, Dempsey, and Stephenson are not prevented by the *WCA* from commencing an action against PHH.

THE PLEADINGS

20. The Parties agree that the Pleadings as provided by prior Counsel are not in order; however, for the purposes of the Hearing of the Issues in this matter, it is agreed that the Pleadings need not be remedied and all appropriate arguments may be made without the necessity of amending the Pleadings.

THE PROPOSED ISSUES

21. Is the WCB entitled to pursue a claim against the Defendant PHH when the Lease Agreement provides that the WCB insured Brinks must indemnify and save harmless PHH?

22. Is it necessary for the Court to assess the relative vicarious liability of PHH and Brinks? If so, how would the Court apportion relative vicarious liability as between PHH and Brinks?

23. The parties further request that the Court address and answer the second question regardless of the answer to the first question.

5 In her affidavit of November 20, 2013, Michelle Gallo, employed by The Brink's Company as a Claims Manager (Brinks Canada Limited is a wholly owned subsidiary of The Brinks Company), states that if PHH is found liable to the Plaintiffs, Brinks will be obligated to pay any damages payable by PHH and are effectively self-insured. Ms. Gallo's evidence is that at all material times:

i. Brinks had absolute and unfettered control of the relevant vehicles involved in the first and second accidents (the "Vehicles), including who would operate the Vehicles and who would travel in the Vehicles.

ii. Brinks was responsible for and provided training to its employees, including the Defendant drivers Prajoux and Bagley, and the Plaintiffs Campbell, Dempsey and Stephenson, such training involving vehicle operation.

iii. Brinks was responsible for vehicle operation guidelines relevant to the Vehicles, including disciplinary action against employees who failed to follow Brinks' policies and guidelines in respect of use and operation of the Vehicles.

iv. Brinks set operation expectations for its employees, including the Defendant drivers Prajoux and Bagley, and the Plaintiffs Campbell, Dempsey and Stephenson, including use and operation of the Vehicles.

v. Brinks exclusively supervised the operation of the vehicles used in its business, including the Vehicles.

6 In paragraph 4 of her affidavit of November 9, 2015, Rose Massel, Senior Vice President of Finance and Administration for Brinks Canada Limited, states that it is the practice of Brinks to lease rather than own vehicles used in the normal course of its business because it is advantageous to the company from both an economic perspective as well as for tax consequences.

Legislation

7 Sections 22(3) of the *WCA* states that:

> Notwithstanding any other *Act*, if an accident happens to a worker entitling a claimant to compensation under this *Act*, any action of the claimant in respect of that accident vests in the Board.

8 In other words it is clear from this section that any action of a claimant in respect of an accident is not subrogated to but vested in the WCB.

9 The relevant section of the *WCA* to consider in this case is section 23:

> 23(1) If an accident happens to a worker entitling the worker or the worker's dependants to compensation under this Act, neither the worker, the worker's legal personal representatives, the worker's dependants nor the worker's employer has any cause of action in respect of or arising out of the personal injury suffered by or the death of the worker as a result of the accident
>
> (a) against any employer, or

(b) against any worker of an employer,

in an industry to which this Act applies when the conduct of that employer or worker that caused or contributed to the injury arose out of and in the course of employment in an industry to which this Act applies.

(2) In an action to which section 22 applies, a defendant may not bring third party or other proceedings against any employer or worker whom the plaintiff may not, by reason of this section bring an action against, but if the court is of the opinion that that employer or worker, by that employer's or worker's fault or negligence, contributed to the damage or loss of the plaintiff, it shall hold the defendant liable only for that portion of the damage or loss occasioned by the defendant's own fault or negligence.

10 Section 1(1)(ee) of the *TSA* defines "owner" as follows:

"owner" means the person who owns a vehicle and includes any person renting a vehicle or having the exclusive use of a vehicle under a lease that has a term of more than 30 days or otherwise having the exclusive use of a vehicle for a period of more than 30 days;

11 Section 187 of the *TSA* as it read in 2006 provides:

187(1) In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle on a highway, a person who, at the time that the loss or damage occurred,

(a) was driving the motor vehicle, and

(b) was living with and as a member of the family of the owner of the motor vehicle,

is deemed, with respect to that loss or damage,

(c) to be the agent or employee of the owner of the motor vehicle,

(d) to be employed as the agent or employee of the owner of the motor vehicle, and

(e) to be driving the motor vehicle in the course of that person's employment.

(2) In an action for the recovery of loss or damage sustained by a person by reason of a motor vehicle on a highway, a person who, at the time that the loss or damage occurred,

(a) was driving the motor vehicle, and

(b) was in possession of the motor vehicle with the consent, expressed or implied, of the owner of the motor vehicle,

is deemed, with respect to that loss or damage,

(c) to be the agent or employee of the owner of the motor vehicle,

(d) to be employed as the agent or employee of the owner of the motor vehicle, and

(e) to be driving the motor vehicle in the course of that person's employment.

(3) Notwithstanding subsections (1) and (2), nothing in this section relieves any person who is deemed to be the agent or employee of the owner and to be driving the motor vehicle in the course of that person's employment from liability for the loss or damage.

Issues

12 The parties have agreed that the following issues are to be decided:

i. Is the WCB entitled to pursue a claim against the Defendant PHH when the Lease Agreement provides that the WCB insured Brinks must indemnify and save harmless PHH?

ii. Is it necessary for the Court to assess the relative vicarious liability of PHH and Brinks? If so, how would the Court apportion relative vicarious lability as between PHH and Brinks?

13 In the Amended Agreed Statement of Facts, the "parties further request that the Court address and answer the second question regardless of the answer to the first question."

PHH's and Brinks' Positions

14 PHH and Brinks submit that it would be inequitable on the facts of this case to allow WCB to pursue PHH when it knows the indemnity agreement in the Lease requires WCB protected employer Brinks to indemnify PHH and thus ultimately pay the Plaintiffs' claims. They argue that such a result would effectively allow the WCB to do indirectly what it cannot do directly, namely, to ultimately recover damages from a protected employer such as Brinks, for injuries suffered by covered workers in the course of their employment.

15 According to PHH and Brinks the promise from the WCB was that if Brinks paid its premiums to the WCB, it and PHH would be immune from any claim for losses suffered by the Plaintiffs and it relied on that understanding. PHH and Brinks argue that it is clearly detrimental because not only did Brinks pay the premiums, but now PHH is faced with this lawsuit. Thus there was a representation that was relied upon to their detriment, which gives rise to a general estoppel. Similarly, regarding PHH and Brinks' waiver argument, they contend that the WCB represented that if Brinks paid the premiums, again it would be immune from suit.

16 PHH and Brinks acknowledge that both PHH and Brinks would be vicariously liable in this case but for the operation of the *WCA*. However, PHH and Brinks submit the distinguishing feature in this case is that Brinks has an obligation under its Lease to indemnify PHH for any amounts that PHH would otherwise be obligated to pay. PHH and Brinks further argue that if the WCB is entitled to pursue these claims, the end result will be that Brinks will be liable for the very type of claim it paid premiums to the WCB to avoid. In the alternative, PHH and Brinks submit that if the Court concludes that the WCB can pursue its claim against PHH, nearly all of the vicarious liability should attach (i.e. at least 90%) to Brinks.

17 According to PHH and Brinks, there are only two possible coherent interpretations of section 23 of the *WCA*. The first one is that vicarious liability is included within the definition of "fault", as clearly found by the Alberta Court of Appeal in *Wadsworth v Hayes* (1996), 178 AR 256 (CA). They say that the other possibility is that vicarious liability is not included in the definition of "fault". In the latter case, the words, "shall hold the defendant liable for only that portion of the damage or loss occasioned by the defendant's own fault or negligence" would, they submit, extinguish vicarious liability when a protected party is the "at fault" tortfeasor. PHH and Brinks argue that the first interpretation is the preferred one. They submit that section 23(2) takes away the right of contribution and indemnity, which would otherwise be available to defendants as against other defendants under the *Tortfeasors Act*, RSA 2000, c T-5 and the *Contributory Negligence Act*, RSA 2000, c C-27. PHH and Brinks submit that a proper reading of section 23(2) is that the liability of unprotected defendants is several as opposed to joint and several. Therefore, they submit that when there are two vicariously liable parties, one covered and protected under the *WCA* such as Brinks and the other unprotected such as PHH, apportionment for vicarious liability needs to occur between those two parties.

WCB's Position

18 The WCB argues that the Lease between Brinks and PHH with respect to the indemnification of PHH is irrelevant as it is a contract made between Brinks and PHH and to which neither the Plaintiffs nor WCB are parties. The WCB argues that in the context of this case, a non-party contract, such as this Lease with the indemnification clause, cannot in any way limit the WCB's rights to pursue a claim on behalf of the Plaintiffs against the non-protected party PHH. The WCB adds that it has no control or say whatsoever in terms of what large sophisticated corporations, such as Brinks and PHH, may agree to in their commercial dealings. In fact, the WCB argues that PHH and Brinks are seeking to do indirectly what they cannot do directly. In other words, PHH is attempting to clothe itself with immunity, which

by law it does not have under the *WCA* as per *Lepine v Fraser*, 1985 ABCA 38 and *Barker v Budget Rent-A-Car of Edmonton Ltd.*, 2011 ABCA 297.

19 The WCB acknowledges that *London Drugs Ltd. v Kuehne & Nagel International Ltd.*, [1992] 3 SCR 299 provides for an exception to the doctrine of privity of contract on the basis that a special employer-employee relationship existed in that case, but adds that the Supreme Court was also clear that privity of contract is a well-established principle in contract law and that it should not be discarded lightly. The WCB argues that in some cases, the parties may have intended for the contract to benefit a third party such that an exception to the doctrine may arise. The WCB submits that in this case however, PHH and Brinks benefitted only themselves by entering into the Lease, without any intention whatsoever of conferring any benefit to any third party, such as the Plaintiffs. The WCB argues that PHH and Brinks cannot contract out of liability to the Plaintiffs by virtue of an indemnity agreement in the Lease, to which the Plaintiffs and the WCB are strangers.

20 Furthermore, the WCB also submits that the Defendants have not established the requirements for waiver and estoppel by WCB and there is no evidence to substantiate waiver and estoppel on WCB's part. In that regard, the WCB points out that pursuant to section 22 of the *WCA*, the WCB is legally obligated to pursue all viable actions that vest with the WCB. Since a claimant, such as the Plaintiffs here, have a vested legal and financial interest in the litigation, the WCB submits that no person, PHH, Brinks or even the WCB may unilaterally deprive the Plaintiffs of those rights to obtain damages. That is what Brinks and PHH are attempting to do by arguing that it would be inequitable on the facts of this case to allow WCB to pursue PHH when the indemnity in the Lease requires Brinks to indemnity PHH for the Plaintiff's damages.

21 The WCB submits that this case centres around the interpretation of section 23(2) of the *WCA* and how to reconcile Alberta appellate case law, namely *Wadsworth* and *Rayani v Yule & Co. (Hong Kong)* (1996), 178 AR 231 (CA), which found 100% liability, on the basis of vicarious liability.

22 The WCB argues that PHH and Brinks are vicariously liable and that their liability is joint and several. The WCB submits that section 23(2) of the *WCA* does not speak to vicarious liability and therefore, cannot apply to the present case. The WCB also argues that the apportionment of vicarious liability is to the detriment of the Plaintiffs and the WCB cannot feasibly apply it to motor vehicle owners without offending section 187 of the *TSA* and the purpose of a motor vehicle insurance scheme. The WCB therefore argues that PHH is vicariously liable to the Plaintiffs for the full (i.e. 100%) loss and damages.

Analysis

Issue 1 -- Equitable Argument

23 Workers' compensation legislation originates from a historic trade-off. The workers' compensation system, which is funded by employers under a mutual accident insurance scheme, is designed to provide guaranteed no-fault benefits and replaces the tort system with respect to work-related injuries. In exchange, the workers lose their right to sue their employers and other workers, although in the current system, non-participants or unprotected parties can be sued. Of note, the workers' compensation system in Alberta covers more than mere wage replacement and includes, for example, cost of living adjustments, non-economic loss payments and homecare: Douglas R Mah, *Workers' Compensation Practice in Alberta*, 2nd ed (Toronto: Carswell, 2005) at 1-1-1-7.

24 In this case, relying on *Lepine* and *Barker*, all parties acknowledge that had there been no indemnity clause in the Lease between PHH and Brinks, it is clear that PHH could not shield itself behind section 23(1) of the *WCA*. Therefore, absent the agreement in the Lease regarding the indemnity, the WCB would clearly be entitled to pursue a claim against PHH. However, here we have an indemnity in the Lease between PHH and Brinks and the Court is being asked whether the WCB is entitled to pursue a claim against the Defendant PHH when the Lease provides that the WCB insured Brinks must indemnify and save harmless PHH.

25 In *Lepine*, Stevenson J.A. (as he then was), writing for the Court, stated that the object of the *WCA* was largely found in section 13, now section 21, which provides that no action lies for the recovery of compensation and specifies that the Act and regulations are passed in lieu of any rights and causes of action that an injured worker may have against his employer. Stevenson J.A. concluded that the *WCA* is directed towards injuries suffered by a worker in the course of employment and added that it removes the tort action against the employer and co-workers. He rejected the submission that the *WCA* protects an employer from claims simply because he enjoys the status of employer under the *WCA*. He was of the opinion that one needs to look at the conduct of the employer or his workers to determine whether in the course of employment in the industry it caused or contributed to the injury. Applying *Lepine* to this case, if the conduct

of the employer was such that it did not contribute to the injuries of the workers, as is clearly the case here with PHH as it is only a lessor under the Lease, then to reiterate in the normal course and absent the indemnity in the Lease, WCB would be entitled to pursue a claim against the Defendant PHH.

26 In *Barker* the applicant asked the Court of Appeal to reconsider *Lepine*. The Court rejected the application and concluded as follows:

> 10 Budget has not persuaded us that any adjustment of the *Act*, or any of the policies promulgated by the Board of Directors under the *Act*, since *Lepine*, has destroyed the basis on which *Lepine* rests. *Lepine* reflects this Court's interpretation of legislative policy. The Legislature has taken no steps to intervene, notwithstanding that there must necessarily have been many overtures to legislatively reverse the *ratio decidendi* in *Lepine* which requires both status and conduct. If the Legislature concludes that *Lepine* has read it all wrong, it can correct the situation easily.

27 In addition, I note that none of the parties in the case at bar challenges the fact that given that the definition of "owner" in the *TSA* may comprise of more than one owner, there can conceivably be two owners who can be vicariously liable at once.

28 PHH and Brinks argue that in this case, this Court should conclude that following *London Drugs*, the doctrine of privity should not impede commercial reality or justice. They argue that in disregarding that the protected insured Brinks is the ultimate payor of the Plaintiffs' damages, the WCB is being disingenuous by ignoring the reality of the situation.

29 To reiterate, and expand on, PHH and Brinks submit that it would be inequitable on the facts of this case to allow the WCB to pursue PHH when the indemnity agreement requires the protected employer Brinks to indemnify PHH and thus ultimately be responsible to pay the Plaintiffs' damages. They argue that Brinks should not be liable for workplace accidents, and that it would be against public policy for Brinks to ultimately pay these claims, even while recognizing that the WCB did not have notice of the indemnity agreement. They add that the WCB never advised Brinks that it should own its vehicles and not lease them. They say that neither PHH nor Brinks is attempting to bind the WCB to the indemnity agreement, but that the WCB cannot pursue PHH when it knows that under the indemnity agreement Brinks will pay any judgment granted against PHH. They submit that allowing the WCB to recover against PHH in the face of the indemnity agreement would deprive Brinks of its statutory right of immunity from suit for workers' injuries, which they say is a right that Brinks paid the WCB premiums specifically to avoid. PHH and Brinks argue that the WCB should be precluded from doing indirectly what it cannot do directly, namely to recover the monies from the protected employer Brinks for a situation covered under the *WCA*.

30 PHH and Brinks clarify that their waiver and estoppel argument should be understood in the context of their broader equity argument. Their understanding was that if Brinks paid the WCB premiums, it would be immune from suit for workers' injuries. Brinks relied on that understanding when it paid its premiums and now finds that is to its detriment because not only did it pay the premiums, but it is now faced with liability for damages arising out of this lawsuit against PHH, which it was supposed to avoid. Thus there was a representation by WCB, which was relied upon to its detriment, which give rise to a general estoppel. Similarly, regarding PHH and Brinks' waiver argument, they contend that by accepting Brinks' WCB premiums, the WCB has waived its right to recover from Brinks for workers' injuries directly or indirectly.

31 PHH and Brinks referred to *Bhasin v Hrynew*, 2014 SCC 71 at para 63 where the Court stated that there is a "general organizing principle of good faith" relating to contractual performance, which generally obliges parties to act honestly and reasonably and not capriciously or arbitrarily. PHH says that through the loophole created by the Lease between it and Brinks, the WCB is acting capriciously and arbitrarily considering that the WCB has in good faith received premiums from Brinks. Brinks and PHH argue that the WCB is making a decision to consciously ignore its historic bargain and is attempting to exploit a loophole in order to get its own insured Brinks to pay twice for the same loss, which they say is inequitable.

32 On the other hand, the WCB argues that it is not the WCB but PHH and Brinks that are seeking to do indirectly what they cannot do directly. To reiterate, WCB submits that PHH is attempting to clothe itself with immunity, which, in light of *Lepine*, it is not entitled to do. The WCB submits that PHH and Brinks cannot contract out of PHH's liability by virtue of an indemnity agreement in the Lease, to which the Plaintiffs and the WCB are strangers. PHH is not protected in this case by the *WCA* and under the *TSA* PHH is liable and should be liable as an owner of the Vehicles. The WCB submits that PHH and Brinks are attempting to circumvent the very purpose of the *TSA*.

33 The WCB argues that promissory estoppel cannot apply in this case considering that it is not a party to the agreement or promise relied upon by Brinks, nor was it even aware of the terms of the Lease that included the indemnity agreement. The WCB similarly adds that it could not waive statutory rights to pursue a claim against PHH when it had no knowledge of the indemnity in the Lease and thus had no intention to abandon those rights.

34 In *London Drugs,* the appellant London Drugs Ltd. delivered a transformer to Kuehne & Nagel International Ltd. ("Kuehne & Nagel") for storage under a contract of storage (the "contract"). That contract contained a limitation of liability clause limiting the warehouseman's liability to $40 or less. London Drugs Ltd. chose not to obtain additional insurance from Kuehne & Nagel and, instead, arranged for its own all-risk coverage. The respondents, employees of Kuehne & Nagel (the "employees"), who owed a duty of care to London Drugs Ltd., were negligent in loading the transformer. London Drugs sued the employees personally for the full amount and argued that the doctrine of privity of contract precluded the employees from relying on the contract. On the issue of whether the respondent employees could obtain the benefit of the limitation of liability clause contained in the contract of storage between their employer and London Drugs Ltd. and to which they were not signing parties, Iacobucci J. writing for the majority of the Court, found that they could. He found that, in the circumstances of the case before the Court, the doctrine of privity should be relaxed as it failed to appreciate the special considerations that arise from the relationships of employer-employee and employer-customer. The circumstances of the case, which led the majority of the Court to conclude that the employees should directly benefit from the limitation of liability clause, included the following: that the employees acted in the course of their employment while they were carrying out the very services for which London Drugs had contracted with their employer Kuehne & Nagel when the damages occurred; that the language of the contract was not restricted to the employer; there was identity of interest between the employer and employees regarding the performance of the employer's contractual obligations; and the fact that London Drugs Ltd. knew that employees would be involved in performing the contractual obligations.

35 On the doctrine of estoppel, the parties submit the case law indicates for estoppel to be triggered, the party relying on it needs to establish that the other party has, by conduct or by word, made a promise or assurance that was intended to alter the legal relationship and to be acted upon by the party who received the assurance. In addition, the recipient, upon receipt of the promise or assurance, must have acted on it in a manner which changed its position: *B&R Development Corp. v Trail South Developments Inc*., 2012 ABCA 351 at paras 22-23, leave to appeal to SCC refused, [2013] S.C.C.A. No. 34, 35192 (June 27, 2013). Regarding waiver, there needs to be evidence that the party who is waiving its rights had full knowledge of the rights as well as an unequivocal and conscious intention to abandon them: CED (4th), Equity 11.6 (a) at para 32.

36 Contrary to the Defendants' submissions, I am of the view that this case is not one where commercial reality and common sense requires that the doctrine of privity be relaxed. In this case, Brinks benefits from the clause because it is commercially and fiscally advantageous for it to deal in a certain manner with PHH. PHH, who owns the Vehicles, but does not deal with Brinks' employees in any other manner, also benefits from the clause because the indemnity agreement requires Brinks to indemnify PHH for any losses, damages, etc. incurred by PHH in respect of the leased Vehicles or the Lease. Therefore, both Defendants benefit from this commercial arrangement. For Brinks, it is both advantageous and part of the cost of doing business. There is no evidence here of any benefit being conferred on the WCB or any of the Plaintiffs unlike in the case of *London Drugs*, where clearly the employees in that case benefitted from the limitation of liability clause. There is no evidence in this case that the WCB or the Plaintiffs knew of or contemplated this Lease with the indemnity therein or that they intended to waive their right to pursue an action against PHH or are somehow estopped from pursuing an action against PHH.

37 In *London Drugs*, the case was not about contracting out of the legislated benefits, but about the rule of privity of contract when applied to employers' contractual limitation of liability clauses and whether to extend the contractual benefits to third parties, such as employees. *London Drugs* is a case with narrow and specific circumstances. The third parties were employees who were involved in performing the contractual obligations of their employer, Kuehne & Nagel. This case is significantly different from *London Drugs* and does not lend itself to another exception to the doctrine of privity.

38 Furthermore, there is nothing in the wording of the *WCA* and more specifically section 22 of the *WCA*, which suggests the *WCA* should be amended or modified by agreement, waiver or estoppel as proposed by PHH and Brinks. In the context of the *TSA* which purports to protect the public and favours the protection of innocent third parties seeking compensation for injuries due to drivers' negligence, I note that the Canadian authorities appear to be reluctant to enforce conditions that would exclude an owner from liability where doing so negatively affects innocent victims. In this case, PHH's and Brinks' positions regarding the effect of the indemnity clause in the Lease would, in fact, if adopted by

the Court, circumvent section 187 of the *TSA* which imposes liability on owners of motor vehicles in circumstances such as this. In that regard, the Alberta Court of Appeal in *Mugford v Weber*, 2004 ABCA 145, leave to appeal to SCC refused 30446 (January 6, 2005) concluded the intention of s. 181 of the *HTA* (now s. 187 of the *TSA*, although the legislation in *Mugford* required consent to both driving and possession) was to benefit the users of highways. Therefore, those benefits "should not be circumvented by conditions imposed by owners [of vehicles] by agreement or otherwise": at para 51.

39 In *Mustafi v All-Pitch Roofing Ltd.*, 2014 ABCA 265, the employee had been told by his employer's principal not to drive the truck. He was permitted to enter the truck to store and retrieve tools and to stay warm while working on a company contract. Contrary to his principal's instructions, he drove the truck and was later involved in an accident with *Mustafi*. The issue was whether *All-Pitch*, the employer and owner of the truck, having given possession of its vehicle to an employee, can enforce conditions of that possession as against innocent third party victims. The majority of the Court held no. The Court also noted that there had been legislative amendments since *Mugford*, but that the rationale and policy which formed the basis of the decision in *Mugford* was sound.

40 In the result, I find that the WCB is entitled to pursue a claim against PHH, despite the indemnity clause in the Lease.

Issue 2 -- Section 23 of the *WCA* and Vicarious Liability

41 The parties disagree on the interpretation of section 23 of the *WCA*, and while they rely on many of the same cases, they disagree on how the case law should be applied to the facts of this case.

42 The WCB submits that section 23(2) of the *WCA* does not speak to vicarious liability and that it cannot apply to the present case. In particular, the WCB submits that in no case of vicarious liability involving the WCB and section 23(2) of the *WCA* has the liability of a vicariously liable defendant been reduced or apportioned to limit the recovery. The WCB takes the position that all vicariously liable defendants bear full responsibility and that it can collect full (i.e. 100%) loss and damages from PHH on the basis of vicarious liability. The WCB says that section 23(2) does not apply to limit vicarious liability. It adds that in any event, it is not feasible to apportion liability between two owners under the *TSA*, as one owner cannot be more or less in control, unlike several employers in the employer-employee relationship.

43 PHH and Brinks disagree with the WCB. They submit that section 23(2) operates to ensure that the unprotected party (in this case PHH) is only liable to the worker for his injuries for that portion of the loss attributable to its own fault or negligence, which they say, includes vicarious liability. This absolves the unprotected tortfeasor from exposure to that part of the claim which was the "fault or negligence" of a party covered and protected under the *WCA*. PHH and Brinks say that this interpretation prevents the inequitable situation where an unprotected party or stranger to the WCB might lose statutory and common law rights of contribution and indemnity through a legislative scheme, such as the *WCA*, that does not benefit them in any way.

44 In *Wadsworth*, the issue was whether the *WCA* barred the vicarious liability of an automobile owner for the driver's negligence, where the *WCA* barred a suit against the driver who was covered by the *WCA*: para 1. In *Wadsworth*, the defendant car owner argued that section 18(2) of the *WCA* (now 23(2)) removed his liability or that it restricted it to personal negligence. Writing for the Court, Côté J.A. concluded that the plaintiffs could maintain an action against the defendant owner and that the liability of the owner was not limited to his personal negligence and did in fact cover his vicarious liability under the *Highway Traffic Act*. Of note, there was only one party that was alleged to be vicariously liable, unlike the case at bar where there are 2 vicariously liable owners under the *TSA*, PHH and Brinks.

45 Côté J.A. concluded at paragraph 24 that the "closing words of section 18(2) restricted the liability of the defendant to a certain portion of the damages or loss". He added that in his view that meant that it "partially reverse[d] the common-law rule that joint tortfeasors are jointly and severally liable to the plaintiff".

46 In *Wadsworth*, Côté J.A. looked at whether vicarious liability was included within the meaning of fault:

> 30 Section 18(2) does not restrict liability to the defendant's personal negligence. Where the Legislature wishes to confine liability to personal negligence and to exclude vicarious liability, it knows how to do so. For generations the *Merchant Shipping Acts* and the *Canada Shipping Act* have used the phrase "actual fault or privity" to mean negligence which is personal and not vicarious. [...]

> 31 Nor does s. 18(2) speak of negligence alone; it says "fault or negligence". The word "fault" is a somewhat vaguer word. It was not a well-known term at common law, but got the key role in the Maritime Conventions Act 1911 (Imp.). It repeated the role in the 1930's in *the Contributory Negligence Acts* [...] [emphasis added]

47 With respect to the wording "fault or negligence" found under section 18(2) (now section 23(2) of the *WCA*), Côté J.A. stated at paragraph 32 that the "word 'fault' without qualification has always been understood to include vicarious liability" and added at paragraph 45 that in light of the case law, "vicarious liability exists even where the negligent driver himself had statutory immunity from suit". I agree with Côté J.A. that if the Legislature meant to exclude vicarious liability from section 23, it would have explicitly done so. The fact that the wording says "own fault or negligence" refers to the fault or negligence of the tortfeasor, which could be vicariously and not restricted only to personal fault or negligence.

48 In *Rayani*, a companion case to *Wadsworth*, Côté J.A., writing for the Court, looked at the interaction of personal liability and vicarious liability of tortfeasors, where the workers' compensation scheme covered the plaintiff and some, but not all, of the tortfeasors. In *Rayani*, the plaintiff had owned a small business that was a tenant in a shopping mall. Shortly before the accident, he sold his business, but agreed to work as an employee for the purchaser for a year. During the winter, the plaintiff slipped on ice and injured his shoulder. The plaintiff originally sued Yule (who owned the mall), Prominence (to which Yule delegated day-to-day operation including the duty of supervising the janitors) and Volcano (hired by Yule to provide janitorial services including removing snow and ice). Later, the plaintiff discontinued against Prominence and Volcano, because of section 18(1) of the *Workers' Compensation Act*, under which they were covered. The action was therefore between the plaintiff and Yule.

49 Justice Côté stated that section 18(2) (now 23(2) of the *WCA*) permits vicarious liability for negligence or other fault: *Rayani* at para 8. He added that he could not see why section 18(2) would not apply to agency and that it encompassed all tort suits: *Rayani* at para 11. The trial judge held that the personal fault of Yule was 50%, the fault of its agent Prominence was 50%, but that Yule was also vicariously liable to the plaintiff for all of his loss. Justice Côté agreed with that conclusion and commented at paragraph 13 that when "one tortfeasor is vicariously liable for all the fault of the other tortfeasor, that division is of theoretical interest only". He concluded that under the *WCA*, the faults must always add up to exactly 100% and, referring to *Wadsworth*, he stated that in that case, he had concluded that a defendant (owner) with no personal fault was 100% liable, which he wrote was based solely on vicarious liability.

50 Again, I note that in both *Wadsworth* and *Rayani* there was only one vicariously liable defendant, which in my opinion justifies concluding that where there was no personal fault attributed to that one unprotected defendant, all (100%) of the liability to the plaintiff for his loss could be attributed to that one vicariously liable defendant. The Defendants in this case have also conceded that where you have one vicariously liable tortfeasor that tortfeasor may be found to be 100% responsible for the personal negligence of another tortfeasor. They have no disagreement with that conclusion. However, that is not the case here, where we have two vicariously liable parties -- one protected (Brinks) and one unprotected (PHH) under the WCA.

51 In *Soblusky v Egan* (1960), 203 CLR 215 (HCA), the High Court of Australia dealt with a motor vehicle accident and held that two owners (one statutory, the other one at common law) were vicariously liable. One owner had the right to claim contribution from the other owner for up to 50% as liability was apportioned equally.

52 Brinks and PHH submit that in light of *Blackwater v Plint*, 2005 SCC 58 read in conjunction with section 23(2) of the *WCA*, the Court needs to assess the relative vicarious liability of Brinks and PHH. They submit that given that Brinks has full custody and control of the Vehicles and the employees who operate the Vehicles, at least 90% of the liability should be attributed to Brinks and the rest (i.e. 10%) to PHH who is a non-protected party and is a bare legal title holder (vicariously) liable only by virtue of the statutory ownership provisions under section 187 of the *TSA*. They acknowledge that PHH's liability cannot be zero as that would defeat the intention of the *TSA*. For as Côté J.A. stated in para 34 of *Wadsworth*: "Our whole scheme of compensation for automobile accidents through compulsory automobile liability insurance would fall down if there was no vicarious liability. The law does not require drivers to insure; it requires owners of vehicles to insure. The *Highway Traffic Act* s. 181 [now s. 187 of *TSA*] imposes liability on vehicle owners for special policy reasons."

53 In *Blackwater*, one of the issues was whether the Government of Canada ("Canada") and the United Church of Canada (the "Church") were liable to aboriginal students, who attended residential schools operated by them in British Columbia in the 1940s, 1950s and 1960s. Another question raised was regarding the apportionment of vicarious liability between Canada and the Church regarding the wrongful actions of an employee. Based on the different degrees of con-

trol and responsibility, McLachlin CJC, writing for the Court, attributed 25% of the vicarious liability to the Church and 75% to Canada, who were found to be jointly and severally liable as employers.

54 At paragraph 19, McLachlin CJC concluded that the trial judge was correct when he found that the Church and Canada were vicariously liable for the wrongful acts of Plint, a dormitory supervisor. She enumerated several factors to be taken into consideration when determining whether vicarious liability should be imposed with respect to unauthorized conduct:

> 20 Vicarious liability may be imposed where there is a significant connection between the conduct authorized by the employer or controlling agent and the wrong. Having created or enhanced the risk of the wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to its desires: *Bazley v. Curry*, [1999] 2 S.C.R. 534. The fact that wrongful acts may occur is a cost of business. The imposition of vicarious liability in such circumstances serves the policy ends of providing an adequate remedy to people harmed by an employee and of promoting deterrence. When determining whether vicarious liability should be imposed, the court bases its decision on several factors, which include: (a) the opportunity afforded by the employer's enterprise for the employee to abuse his power; (b) the extent to which the wrongful act furthered the employer's interests; (c) the extent to which the employment situation created intimacy or other conditions conducive to the wrongful act; (d) the extent of power conferred on the employee in relation to the victim; and (e) the vulnerability of potential victims.

55 At paragraphs 21 to 30, the Chief Justice in *Blackwater* then identified the following 8 factors relied upon by the trial judge to support his conclusion that the Church was an employer and did in fact exert sufficient control to be found vicariously liable with Canada:

> 1) The Church hired the principal who was responsible for hiring and supervising dormitory supervisors subject to Canada's approval;
>
> 2) The Church was the principal's direct supervisor, had hired him and could fire him, and controlled his salary. The principal communicated with both Canada and the Church in the course of his employment;
>
> 3) The Church was involved in all aspects of the operation and management including the ongoing supervision of the principal, the periodic inspection of the school, the hiring of Church workers, the religious education of the students and it was responsible for the "day-to-day atmosphere and activity";
>
> 4) The Church managed a pension plan for lay employees, though the employer's contributions were paid by Canada;
>
> 5) The principal's authority to dismiss employees was subject to the Church review and employees could appeal to the Church Advisory Committee;
>
> 6) The Church made periodic grants to the school's operation (although the budget was funded by Canada), guaranteed the Alberni Indian Residential School overdraft and set a limit to the school's line of credit;
>
> 7) The Church inspected the school annually and provided the Christian education at the school; and
>
> 8) The Church appointed an advisory committee to ensure that Church policies were being carried out at the school.

56 In *Blackwater*, McLachlin CJC acknowledged the discomfort that may exist with the idea that two defendants may be vicariously liable for the same conduct, but commented that this concern was misplaced. She explained:

> 37 [...] There is much to support the view of P.S. Atiyah in *Vicarious Liability in the Law of Torts*, that "[t]here is, of course, no reason why two employers should not jointly employ a servant, and this would normally be the case with the employees of a partnership. Here the servant is the servant of each partner and of all jointly, and they are all jointly and severally liable for the servant's torts": (1967), at p. 149. Thus, joint vicarious liability is acceptable where there is a partnership.
>
> 38 In this case, the trial judge specifically found a partnership between Canada and the Church, as opposed to finding that each acted independently of the other. No compelling jurisprudential reason has been adduced to justify limiting vicarious liability to only one employer, where an employee is employed by a partnership. Indeed, if an employer with *de facto* control over an employee is not liable because of an arbitrary rule requiring only one employer for vicarious liability, this would undermine the principles of fair compensation and deterrence. I conclude that the Church should be found jointly vicariously liable with Canada for the assaults, contrary to the conclusions of the Court of Appeal.

57 Chief Justice McLachlin concluded in *Blackwater* that there could be an unequal apportionment of fault, for contribution purposes, even where liability is entirely vicarious thus without fault in the strict sense: paras 64-73. At paragraphs 69 to 71, McLachlin CJC specifically addressed the issue of unequal apportionment in the context of vicarious liability where the level of supervision, control and direct contact of one employer was significantly less than the other:

> 69 This raises the question of whether unequal apportionment of responsibility is appropriate in cases of vicarious liability. The conflicting views on whether vicarious liability attributes any fault or blame on the wrongdoer are summarized in *Bluebird Cabs Ltd. v. Guardian Insurance Co. of Canada* (1999), 173 D.L.R. (4th) 318 (B.C.C.A.) (para. 13-14). The most compelling view is that while vicarious liability is a no-fault offence in the sense that the employer need not have participated in or even have authorized the employee's particular act of wrongdoing, in another sense it implies fault. As D.N. Husak states, "no defendant who is held vicariously liable is selected randomly; the principles used to identify this defendant are not arbitrary. Vicarious liability is imposed on someone who was in a position to have supervised and thus to have prevented the occurrence of the harm": "Varieties of Strict Liability" (1995), 8 Can. J. L. & Jur. 189, at p. 215. It follows that the degree of fault may vary depending on the level of supervision. Parties may be more or less vicariously liable for an offence, depending on their level of supervision and direct contact.
>
> 70 The trial judge's reasoning suggests that he applied this analysis to conclude that one of the parties, Canada, was "more senior" and had more control (2001 decision, para. 324). He reasoned that when an employee has two or more employers, it is more likely than not that one exercises more control or plays a more important role than the other. The damage award, he concluded, should reflect that. It is true that at various places the trial judge referred to the "partnership" (1998 decision, paras. 99, 119), the "joint enterprise" (para. 107), and "joint control" (para. 114). However, I cannot accept Canada's argument that the trial judge found no hierarchical relationship between Church and Crown. He found the relationship between Canada and the Church was not that of principal-agent or employer-employee. This does not exclude one party to the joint enterprise being more senior or exercising more control. In these circumstances an unequal apportionment of responsibility is appropriate.
>
> 71 Here the trial judge found that Canada was in a better position than the Church to supervise the situation and prevent the loss. That finding was grounded in the evidence and I would not interfere with it.

58 I note that in *Blackwater*, Canada and the Church were found to be jointly and severally liable, thus the parties could recover full damages against either or both of them. However, the Court also looked at whether either of the parties to the joint enterprise that led to the loss was entitled to be completely or partially indemnified by the other: *Black-*

water at para 64. In my view, this case makes it clear that there can be more than one vicariously liable party, with apportionment of that liability to vary depending on the circumstances and that it can be done for contribution purposes.

59 I recognize that the case before this Court can be distinguished from *Blackwater* because Brinks and PHH are not both employers of the Defendant drivers of the Vehicles. Brinks is an employer covered and protected under the *WCA*, and is also an owner as defined by the *TSA*. PHH is however, an unprotected party under the *WCA*, subject to a right of action in this case by the WCB and is a statutory owner under the *TSA* with its liability being purely statutory.

60 In light of the case law and my finding that the WCB is entitled to pursue a claim against PHH, despite the indemnity clause in the Lease, I must determine the apportionment of liability as against the unprotected party PHH. That being the case, I find section 23(2) of the *WCA* is the operative legislation. In that regard, I agree with PHH and Brinks that vicarious liability is included in "own fault or negligence" under section 23(2). Had that not been the case, the WCB would not have been able to recover from the vicariously liable PHH in the first instance at all.

61 As stated earlier, I am of the view, that the Legislature (as Côté J.A. expressed in paragraph 30 of *Wadsworth*) could have expressly excluded "vicarious liability" by saying so in section 23(2) of the *WCA* but chose not to do so and therefore by not doing so, I find that "own fault or negligence" in that section 23(2) of the *WCA* does include "vicarious liability."

62 Generally, vicarious liability can be based on relationships (e.g. employer-employee) or statutory responsibility (e.g. responsibility of the owner derived from the ownership of his/her vehicle) and related risks arising from it, with no regard to fault, blame, intent or maliciousness. Absent the application of section 23(2) of the *WCA* to this case, I would have concluded that *if* Brinks and PHH were solely owners of the Vehicles under the *TSA* and nothing more in regards to their vicarious liability, the apportionment of liability as between the 2 vicariously liable owners would be 50/50.

63 This case differs from that of *Blackwater,* where there were two employers and the emphasis was on the different levels of control. Indeed, PHH's vicarious liability as owner (lessor) arises from the *TSA* and Brinks' vicarious liability exists both under the *TSA* as an owner (lessee) and at common law as a result of being the Defendants' employer. Brinks is protected and immune from suit under the *WCA*, while PPH is not. PHH's liability, which is vicarious, arises from its status as owner (lessor) of the Vehicles and was triggered by the personal fault or negligence of the Defendant drivers. Although PHH's control over the use of these Vehicles is limited, its statutory liability is known to it and it is incumbent on PHH to exercise more care when entrusting their Vehicles to another party such as Brinks, and to arrange its affairs accordingly with Brinks: *Mugford* at para 51. Brinks, on the other hand, in my view exercises greater *de facto* control over these Vehicles and on its employee Defendant drivers. That is not to say PHH did not have the opportunity to control the use of its Vehicles leased to Brinks. Certainly, the Lease between PHH and Brinks provides some clarity regarding the Vehicles used by Brinks and its drivers. The following provisions regarding PHH's control of the Vehicles leased by it to Brinks are set out in the Lease:

- PHH remained the legal owner and retained title to the vehicles (section 1 (b));
- Brinks was prohibited from encumbering the vehicles (section 1(b));
- PHH specifically outlined how the vehicles could be used and prohibited certain uses (section 6);
- There was a requirement that insurance be maintained by Brinks and required PHH and Brinks to be named insureds and loss payees (section 9); and
- In light of the indemnity clause in the Lease, PHH and Brinks were fully aware that losses may occur from which PHH would be liable at law;
- PHH and not Brinks could assign the Lease and any interest to a 3rd party (section 12).

64 On the other hand, Brinks, as an employer of the Defendant drivers, had *de facto* control of the Vehicles, who would drive them, who would be a passenger, and where and when the Vehicles should be driven. Brinks was also responsible for providing training to its employees (which includes vehicle operation). Brinks was responsible for vehicle operation guidelines and disciplining employees when non-compliance occurred, and Brinks exclusively supervised the operation of the Vehicles.

65 If both PHH and Brinks were merely owners of the Vehicles, I acknowledge that that in itself would not be of any assistance in determining which party has more or less control for purposes of determining apportionment of their vicarious liability. However, in the context of this case, considering that Brinks is not only an owner, but also an employer who has direct control over its Defendant employee drivers and their use of leased Vehicles, I find that Brinks' vicarious liability is greater than that of PHH's. The facts of this case and fairness leads me to conclude that Brinks must bear most of the liability for the Plaintiff's damages.

66 To reiterate, Côté J.A. in *Wadsworth*, stated that section 18(2) (now section 23(2) of the *WCA*) partially reverse[d] the common-law rule that joint tortfeasors are jointly and severally liable to the plaintiff. Given that, I find that under section 23(2) of the *WCA*, liability as between PHH and Brinks on the facts of this case is not joint and several, but only several. In *Workers' Compensation Practice in Alberta*, Mah writes at 6-8-6-9:

> Situations will arise in which more than one tortfeasor is responsible for the worker's injuries. One tortfeasor is not covered by workers' compensation and is therefore a suable defendant under s. 23, while another tortfeasor falls under the *WCA* and is granted s. 23(1) immunity. In these cases, section 23(2) prohibits the defendant from bringing third party action or other proceedings against the tortfeasor who is protected. However, if the court finds that the protected person did contribute to the injured workers' loss or damage, it may reduce the defendant's liability accordingly. In *Mitrunen v Anthes Equipment Ltd.* [...] a worker was killed while in the course of employment on a construction site, and the surviving spouse brought an action against the defendant, not an employer under the *WCA*. It was found at trial, and upheld on appeal, that the portion of the loss caused by the employer covered under the *WCA* could not be recovered from the employer who was not covered under the *WCA* as the liability was several, not joint and several.
>
> Counsel acting for the insurer of a third party who is so protected may use the procedure outlined in this chapter to have the court summarily dispose of the third party notice or other proceedings. The Court of Appeal held that section 23(2) does not preclude action against a non-protected party whose liability arises vicariously for the negligence of a party who is protected by s. 23 [...].

67 Section 23(2) of the *WCA* provides that "it shall hold the defendant liable only for that portion of the damage or loss occasioned by the defendant's own fault or negligence". Given the use of the word "shall" in this section 23(2) of the *WCA*, it is clear to me that the non-protected Defendant PHH as a statutory owner under s. 187 of *TSA* is only liable for that portion of the damages or loss occasioned by its own fault or negligence; that is its own vicarious liability. Unlike s. 2(2) of the *Contributory Negligence Act*, there is no wording in section 23(2) of the *WCA* that says where two or more persons are found at fault, they are jointly and severally liable. Section 23(2) of the *WCA* establishes that where a protected party is partially responsible for an accident, the WCB can only recover from the non-protected *WCA* tortfeasor in the proportion to which that non-protected *WCA* tortfeasor is liable. The intent and effect of section 23(2) is to remove joint and several liability and replace it with several liability on the part of the non-protected tortfeasor. In this case, this absolves the non-protected vicariously liable tortfeasor, such as PHH, from exposure to that portion of the claim, which was the "fault" or "negligence" of the protected *WCA* vicariously liable tortfeasor Brinks. Section 23(2) of the *WCA* therefore, provides a balance and fairness in respect of liability between protected tortfeasors and non-protected tortfeasors under the *WCA* scheme. Non-protected tortfeasors under section 23(2) are only liable for their own portion of fault or negligence and nothing more.

68 The cases of *Blackwater* and *Soblusky* confirm that there can be more than one vicariously liable party, and where that is the case as it is here, that vicarious liability needs to be apportioned, just as personal liability is apportioned. Since the *TSA* contains a definition of owner that includes both a lessor and a lessee of a motor vehicle that will result in more than one owner and therefore, more than one vicariously liable party, I have concluded that *Blackwater* in particular is of application with respect to motor vehicle cases, such as this one.

69 Here Brinks and PHH are vicariously liable for the actions of their respective Defendant drivers, Bagley and Prajoux. As noted earlier, PHH's is statutory, on the basis that as a lessor for more than 30 days it is an owner as defined under the *TSA*. Brinks on the other hand is also an owner, as lessee, under the *TSA* and is also vicariously liable at common law as the master/employer of Prajoux and Bagley, respectively. Since section 23(2) of the *WCA* is the governing provision in this case, there must be an apportionment of liability, in particular with respect to the non-protected vicariously liable party PHH. I have concluded based on the facts of this case and the governing case law, PHH's por-

tion is far less than 50% but more than the 10% proposed by PHH. I find PHH's liability to the Plaintiffs in these two court actions is 25%.

70 In the result, that portion of the Plaintiffs' damages caused by the protected party Brinks under the *WCA* (i.e. the 75%) cannot be recovered from PHH, the non-protected party, as the liability is several and not joint and several -- only 25% of the Plaintiffs' damages can be recovered from PHH.

Conclusion

71 In summary, and in light of the foregoing, I find that the WCB is entitled to pursue a claim against the Defendant PHH despite the terms of the Lease, which provides that the WCB insured Brinks must indemnify and save harmless PHH. Pursuant to section 23(2) of the *WCA*, I have concluded that vicarious liability is included in "own fault or negligence" under that section and therefore, I must assess the relative vicarious liability of PHH and Brinks, as there are two vicariously liable tortfeasors. In that regard, I have concluded that the relative vicarious liability of PHH is 25% and that of Brinks is 75%, with only 25% of the Plaintiffs' damages capable of being recovered by the WCB on their behalf from the non-protected party PHH, as the liability is several and not joint and several.

72 The parties may contact my assistant to arrange a time mutually convenient to all to speak to the matter of costs, if necessary.

Dated at the City of Calgary, Alberta this 4th day of March, 2016.

C.S. PHILLIPS J.