Apportionment of liability under the workers' compensation scheme in Alberta

December 7, 2018

McIver v. McIntyre, 2018 ABCA 151 examined the apportionment of liability for damages between multiple defendants where at least one of them is statutorily immune from liability.

The facts

The Defendant, Carlyle McIntyre (McIntyre), took his vehicle into Calgary Propane and Automotive (Calgary Propane) for repairs. A Calgary Propane employee, Lewis Morgan (Morgan), took the vehicle out for a test drive and collided with a vehicle driven by Brent McIver (McIver), causing McIver injuries. Both Morgan and McIver were driving in the course of their employment, but at trial, Morgan's negligence was found to have caused the collision.

McIver obtained benefits from the Workers' Compensation scheme under the Alberta *Workers' Compensation Act* , RSA 2000, c W-15 (WCA), and the Workers' Compensation Board ("WCB") sued McIntyre on the basis that McIntyre was vicariously liable for McIver's loss as owner of the vehicle under s. 187 of the *Traffic Safety Act*, RSA 2000, c. T-6 (TSA).

The provisions of the WCA immunized Calgary Propane from the lawsuit. In essence, the only party with exposure was McIntyre, the owner of the vehicle who did not come under the protection of the WCA.

The decision

The Court of Queen's Bench considered whether an employer could be held vicariously liable for damages caused by its employee's negligence, when the injured party, the employee and the employer are subject to the WCA. If so, could the Court apportion liability for the resulting damages to the employer? At trial, the Honourable Justice G.A. Campbell determined there are two vicariously liable tort-feasors: McIntyre, as an owner under the TSA, and Calgary Propane, as Morgan's employer, pursuant to s. 23(2) of the WCA. The Court found that the effect of Section 23(2) of the WCA is that a defendant who is not immune from a law suit under the WCA can only be held liable for the portion of the plaintiff's loss that was "occasioned" by the defendant's own "fault or negligence".

For reasons discussed below, Campbell, J. apportioned 100 percent of the Plaintiff's damages to Calgary Propane.

The Court of Appeal explored the question "*what is the apportionment of liability between the Defendants pursuant to Section 23(2) of the* [WCA] *Act … when the tort-feasor is immune under the legislation?*" The Court of Appeal re-examined liability for McIver's injuries. More specifically, it addressed the question of whether the court should apportion liability between: (1) Calgary Propane, who would have been vicariously liable for the negligence of its employee, but is immune from the action; and (2) McIntyre, who is vicariously liable under the TSA as the owner of the vehicle, but has no protection under the WCA.

The Court of Appeal returned to the notion that vicarious liability is a no-fault offence in the sense that the employer or owner need not have participated in, or even have authorized the employee's particular act of wrongdoing. However, in another sense, it implies fault. The Court found that the percentage of liability is proportional to the fault, and defendants who are unprotected under the WCA are liable **for only the portion of a plaintiff's loss caused by their own "fault"**. In instances where the fault is only notional, such as vicarious liability situations, a defendant could very well end up being apportioned none of the liability. To determine the percentage of notional fault, the Court will look at various elements, such as the degree of supervision of, and direct contact with the protected employee/defendant.

The Court of Appeal upheld the decision of the trial judge to allocate 0 percent of the fault to the unprotected vehicle owner.

According to the Court of Appeal,

i. Where a stranger to the Workers' Compensation scheme, by his "fault", causes loss to a worker in the course of his employment, the "stranger" should be held liable for only the portion of a plaintiff's loss caused by his own "fault".

ii. At trial, Campbell, J. cut the conceptual knot of apportioning loss according to the contribution made by the parties' "fault," which is an artificial exercise where two parties are vicariously liable for the tort of another by applying *Blackwater v. Plint,* 2005 SCC 58, [2005] 3 S.C.R. 3 (S.C.C.) [*Blackwater*]. *Blackwater* stands for the proposition that when two parties are vicariously liable for a loss, and it is appropriate to allocate the loss between them according to their "fault", the loss may be allocated according to the degree of supervision each party had over the tort-feasor. The Court in *Blackwater* found the unprotected owner had no "control or say" over the employee who drove the vehicle, whereas the protected employer supervised the employee, and had "full custody and control" of the vehicle at the time of the accident. Accordingly, the Court apportioned 100 percent of the loss to the "fault" of the protected.

iii. In applying *Blackwater*, Campbell, J. found the protected employer was in a position to supervise the driver, whereas the unprotected owner was not in a similar position. McIntyre had no "control or say" over who drove his vehicle, whereas Calgary Propane "was responsible for hiring and supervising its mechanics and authorizing test drives". Further, the agreed statement of facts does not indicate the unprotected owner had any direct contact with the protected employee (although direct contact on its own would not be enough).

iv. In apportioning the Plaintiff's losses between the vehicle owner who is vicariously liable, pursuant to section 187 of the TSA, and the employer of the protected employee, which is notionally vicariously liable, the Court noted that:

    i. The liability of the protected driver defendant and the notional liability of the protected employer **is several**, not joint, or joint and several. The Court may hold the owner liable to compensate the Plaintiff's loss only to the extent that owner's "fault" caused it; he is not liable to compensate for loss caused by the protected employer's "fault".

    ii. The criterion for apportioning the Plaintiff's loss between the two parties contemplated in section 23(2) of the WCA is the relative contributions their fault made to the loss coming about. Apportioning liability under section 23(2) requires the court to consider **how much** of the unprotected owner's "fault" and the protected owner's "fault" each contributed to the Plaintiff's loss.

    iii. Since liability under section 23(2) is several and section 23(1) bars an action against the protected employer, any of the Plaintiff's loss allocated to the "fault" of the protected employer and not to the unprotected owner, is

unrecoverable by the Plaintiff.

The Court of Appeal cautioned its decision should not be understood as establishing the precedent that every time a vehicle owner leaves a vehicle at a garage for repairs, and an employee takes the vehicle out for a test drive and negligently injures a plaintiff, the employer's garage is always (notionally) liable for 100 percent of the loss. The trial judge's decision on apportionment was sensitive to the unprotected and protected owners' degrees of supervision, and contact with Morgan.

McIver filed an application for leave to appeal to the Supreme Court of Canada on June 18, 2018.

Conclusion

This case is a good example of the laws of apportioning liability where a statute protects one tort-feasor. If the only remaining Defendant is only notionally liable and has no actual fault as evidenced by a failure to exert expected control over the "actual" tort-feasor, such cases may have the unfortunate result of leaving the Plaintiff with no recourse.

Your Key Contacts

Wendy N. Moody
Partner, Edmonton
D +1 780 423 7277
wendy.moody@dentons.com

Omolara Oladipo
Associate, Edmonton
D +1 780 423 7152
omolara.oladipo@dentons.com