

March 18, 2016

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***Dempsey v. Bagley,***  
**2016 ABQB 124 -**  
**Lessors of Vehicles Still**  
**Vulnerable Under**  
***Workers Compensation Act***



By [Brian Filips](#) and [Tessa Gregson](#)

There were two motor vehicle accidents in the summer of 2006. The plaintiffs and the defendants involved in the accidents were employees of Brinks Canada Limited ("Brinks"). The vehicles in question were owned by PHH Management Service ("PHH") and leased to Brinks for economic/tax advantages. The lease agreement between PHH and Brinks contained an indemnity provision where Brinks indemnified PHH from any claims arising out of the use or operation of the vehicles covered under the lease (the "Indemnity").

Brinks and PHH were both owners of the vehicles as defined by the *Traffic Safety Act* and employers as defined by the *Workers Compensation Act* (the "WCA"). Brinks and PHH both paid premiums to the WCB. The defendants and plaintiffs were employed by Brinks at the time of the accidents and were therefore workers under the WCA. The plaintiffs received benefits from the WCB.

The parties applied to the Court for a decision on two issues:

1. Was the WCB entitled to pursue its claim against PHH given that the lease includes the Indemnity?
2. Was it necessary for the Court to assess the relative vicarious liability of PHH and Brinks? If so, how would the Court apportion such vicarious liability?

On the first issue, Justice Phillips found that the WCB was entitled to pursue its claim against PHH, regardless of the Indemnity. Without the Indemnity, there would have been no issue as to whether the WCB can pursue PHH.[1] However, as the Indemnity had the effect of holding Brinks liable to compensate the plaintiffs for their injuries thereby removing the statutory immunity provided to Brinks under

the WCA. Thus, the Court had to consider whether the Indemnity thwarted the WCB's ability to claim against PHH.

In *Lepine v. Fraser*, the Alberta Court of Appeal determined that an employer is not protected from claims simply because of its status as an employer under the WCA. Instead, a court must look at the employer's conduct to determine whether, in the course of employment, the employer caused or contributed to the injury suffered. In the instant case, PHH did not cause or contribute to the injury as it merely leased the vehicle to Brinks. Following this logic, PHH would be open to the WCB's suit. In the more recent decision of *Barker v. Budget Rent-A-Car of Edmonton Ltd.*, the Court of Appeal upheld the reasoning in *Lepine*. It stated that *Lepine* accurately reflected the court's interpretation of the WCA and given that the Legislature had taken no steps to intervene, the interpretation must persist.

Phillips J. found that the doctrine of privity of contract could not be relaxed to allow the Indemnity to impact the WCB's cause of action against PHH. Furthermore, there is nothing in the wording of the WCA to suggest that the statutory protections may be amended or modified by agreement, waiver or estoppel, as suggested by PHH and Brinks. Ultimately, Phillips J. held that the Indemnity was an attempt to circumvent s.187 of the TSA (which imposes liability on owners of vehicles) through an agreement and should not be permitted.

Having found that the WCB may pursue its claim against the PHH regardless of the Indemnity provision, the Court turned to assessing the availability of vicarious liability and apportioning the liability between Brinks and PHH.

In the case at bar, there were two vicariously liable owners: Brinks under the TSA and at common law as the Defendant's employer and PHH as an owner (lessor) of the vehicle under the TSA. Phillips J. followed the Alberta Court of Appeal's decision in *Wadsworth v. Hayes*[2] and *Rayani v. Yule & Co (Hong Kong)*[3] that s.23(2) of the WCA does not exclude vicarious liability. This interpretation is further supported by the inclusion of "own fault or negligence" in s.23(2) as the word "fault" has been taken to include vicarious liability. Thus, Phillips J. had to determine the apportionment of liability as against the unprotected party, PHH.

Phillips J. found that apportionment of vicarious liability will depend on the circumstances of each case and the party's level of control and supervision. In the instant case, PHH's control over the vehicles was limited. In contrast, Brinks exercised greater control over the vehicles and its employee Defendant drivers given that it was responsible for providing training to its employees, deciding who drove what vehicles, who would be passengers and when and where the vehicles would be driven. On this basis, Phillips J. found that Brinks' vicarious liability was greater than PHH's and would therefore bear most of the responsibility for the plaintiff's damages.

Following the decisions in *Wadsworth*, Phillips J. confirmed that under s.23(2) of the WCA, the liability between Brinks and PHH was several. This meant that the portion of the loss caused by Brinks and covered under the WCA could not be recovered from the non-WCA protected PHH. Brinks' liability was assessed at 75 percent. PHH was therefore only severally liable for its own portion of fault or negligence which was 25 percent.

In summary, an indemnity provision as between the lessor and lessee of vehicles, both insured under the Workers Compensation Legislation, will not bar the WCB from pursuing a claim against the lessor. The lessor does not receive protection under the *Workers Compensation Act*. However, where both the lessor and lessee are vicariously liable to the plaintiff (under the *Traffic Safety Act* and/or at common law as the employer) the liability between the two will be apportioned based on the control and supervision exercised by each party. Furthermore, the liability as between the lessor and lessee is several; thus, the unprotected lessor will only be liable for amount of damages apportioned to it.

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[1] Based on the Alberta Court of Appeal cases of *Lepine v. Fraser*, 1985 ABCA 38 and *Barker v. Budget Rent-A-Car of Edmonton Ltd.*, 2011 ABCA 297

[2] (1996), 178 AR 256 (CA)

[3] (1996), 1996 ABCA 35

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