

671122 Ontario Ltd. v. Sagaz Industries Canada Inc., [2001] 2 S.C.R. 983, 2001 SCC
59

**Sagaz Industries Canada Inc., Sagaz Industries Inc. and
Joseph Kavana**

Appellants

v.

671122 Ontario Limited, formerly Design Dynamics Limited

Respondent

Indexed as: 671122 Ontario Ltd. v. Sagaz Industries Canada Inc.

Neutral citation: 2001 SCC 59.

File No.: 27820.

2001: June 19; 2001: September 28.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour and
LeBel JJ.

on appeal from the court of appeal for ontario

*Torts -- Vicarious liability -- Employee versus independent contractor --
Original supplier suffering substantial losses when it was replaced as supplier because
of bribery scheme in large commercial transaction -- Whether rival supplier
vicariously liable to original supplier for tortious conduct of its consultant.*

*Trial -- Evidence -- Re-opening of trial to admit fresh evidence -- Trial
judge declining to reopen trial to admit fresh evidence on a motion brought after*

release of reasons but before formal judgment entered -- Whether Court of Appeal erred in substituting its discretion for that of trial judge in decision to reopen trial.

The respondent (“Design”) was Canadian Tire’s principal supplier of synthetic sheepskin car seat covers for 30 years. In 1984, Design was advised by S, the head of Canadian Tire’s automotive division, that the corporate appellants (“Sagaz”) would be replacing Design as Canadian Tire’s seat cover supplier. S terminated Canadian Tire’s supply relationship with Design in favour of Sagaz because of bribery in the form of a “kickback” scheme. Sagaz retained American Independent Marketing Inc. (“AIM”), which was owned and controlled by L, to assist in marketing Sagaz’s seat covers. S was to receive two percent of all sales from L and AIM and incorporated a sham corporation to receive this money. S’s wrongdoing was discovered and his employment was terminated. New management at Canadian Tire determined it preferred the seat cover products of Sagaz to those of Design and retained Sagaz as its supplier. Having lost its major customer, Design’s manufacturing business went into a steep decline and, in 1989, Design brought an action alleging that AIM, L, Sagaz and K, Sagaz’s president, had bribed S and, but for the bribes, Design would have continued as supplier to Canadian Tire. At trial, damages were assessed against L and AIM, jointly and severally, including punitive damages. The action was dismissed as against Sagaz and K. After the trial judge’s reasons for judgment were released, but before formal judgement was entered, L, who did not testify at trial, gave Design an affidavit admitting to the conspiracy to bribe S and implicating K in it. On the basis of the affidavit, Design brought a motion to have the trial reopened to hear L’s fresh evidence. The trial judge dismissed the motion. The Court of Appeal reversed the decisions of the trial judge, finding that Sagaz was vicariously liable to Design and therefore jointly and severally liable with L and AIM for the damages awarded, with the exception of punitive damages. A new trial was ordered with

respect to the liability of K on the basis that the trial judge should have reopened the trial to hear L's evidence.

Held: The appeal should be allowed and the order of the trial judge restored.

The Court of Appeal erred in holding Sagaz vicariously liable to Design. Although the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed, the most common one to give rise to vicarious liability is the relationship between master and servant, now more commonly called employer and employee. This is distinguished from the relationship of an employer and independent contractor which, subject to certain limited exceptions, typically does not give rise to a claim for vicarious liability. The main policy concerns justifying vicarious liability are to provide a just and practical remedy for the plaintiff's harm and to encourage the deterrence of future harm. Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself; thus, it does not make sense to anchor liability on an employer for acts of an independent contractor, someone who was in business on his or her own account. In addition, the employer does not have the same control over an independent contractor as over an employee to reduce accidents and intentional wrongs by efficient organization and supervision. There is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. What must always occur is a search for the total relationship of the parties. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own

equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks. Although the contract designated AIM as an "independent contractor", this classification is not always determinative for the purposes of vicarious liability. Looking at the non-exhaustive list of factors set out in *Market Investigations*, it is clear, based on the total relationship of the parties, that AIM was an independent contractor. On the totality of the evidence, AIM was in business on its own account. Absent exceptional circumstances which are not present in this case, it follows that the relationship between Sagaz and AIM, as employer and independent contractor, is not one which attracts vicarious liability.

The Court of Appeal erred in substituting its discretion for that of the trial judge in deciding to reopen the trial. Absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial. Appellate courts should defer to the trial judge, who is in the best position to decide whether fairness dictates that the trial be reopened. The case law dictates that the trial judge must exercise his discretion to reopen the trial "sparingly and with the greatest care" so that "fraud and abuse of the Court's processes" do not result. In this case, the trial judge decided not to exercise his discretion to reopen the trial because neither of the two steps of the test in *Scott* was met to his satisfaction. First, he could not say that the new evidence, if presented at trial, would probably have changed the result, only that it may have changed the result. Second, the trial judge found that L's evidence could have been obtained before trial. L's affidavit evidence contradicts his sworn evidence on discovery, particularly with respect to the existence of the bribery scheme which L avoids acknowledging on discovery. Evidence which is not presumptively credible may fail to probably change the result under the first

branch of the test in *Scott*. This is how the trial judge dealt with the affidavit evidence, and he was correct in so doing.

Cases Cited

Referred to: *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299; *Scott v. Cook*, [1970] 2 O.R. 769; *Mayer v. J. Conrad Lavigne Ltd.* (1979), 27 O.R. (2d) 129; *Co-operators Insurance Association v. Kearney*, [1965] S.C.R. 106; *Bazley v. Curry*, [1999] 2 S.C.R. 534; *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570; *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553; *Regina v. Walker* (1858), 27 L.J.M.C. 207; *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1978] 1 S.C.R. 605; *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161; *Stevenson Jordan and Harrison, Ltd. v. Macdonald*, [1952] 1 *The Times* L.R. 101; *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732; *Lee Ting Sang v. Chung Chi-Keung*, [1990] 2 A.C. 374; *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092; *Clayton v. British American Securities Ltd.*, [1934] 3 W.W.R. 257; *Ladd v. Marshall*, [1954] 1 W.L.R. 1489.

Statutes and Regulations Cited

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 59.06(2)(a).

Authors Cited

Atiyah, P. S. *Vicarious Liability in the Law of Torts*. London: Butterworths, 1967.

Douglas, William O. "Vicarious Liability and Administration of Risk I" (1928-1929), 38 *Yale L.J.* 584.

Flannigan, Robert. “Enterprise control: The servant-independent contractor distinction” (1987), 37 *U.T.L.J.* 25.

Fleming, John G. *The Law of Torts*, 9th ed. Sydney, Australia: LBC Information Services, 1998.

Fridman, Gerald Henry Louis. *The Law of Torts in Canada*, vol. 2. Toronto: Carswell, 1990.

Kidner, Richard. “Vicarious liability: for whom should the ‘employer’ be liable?” (1995), 15 *Legal Stud.* 47.

APPEAL from a judgment of the Ontario Court of Appeal (2000), 46 O.R. (3d) 760, 183 D.L.R. (4th) 488, 128 O.A.C. 46, 2 B.L.R. (3d) 1, 48 C.C.L.T. (2d) 79, 41 C.P.C. (4th) 107, [2000] O.J. No. 121 (QL), reversing the decisions of the Ontario Court (General Division) (1998), 40 O.R. (3d) 229, 42 C.C.L.T. (2d) 50, [1998] O.J. No. 2194 (QL), and [1998] O.J. No. 4018 (QL). Appeal allowed.

H. Lorne Morphy, Q.C., John B. Laskin and M. Paul Michell, for the appellants.

Martin Teplitsky, Q.C., and James M. Wortzman, for the respondent.

The judgment of the Court was delivered by

1 MAJOR J. – This appeal raises two issues: the application of vicarious liability for a bribery scheme in a large commercial transaction and the appellate court’s review of the trial judge’s exercise of discretion not to reopen the trial to admit fresh evidence on a motion brought after the release of his reasons but before formal judgment was entered.

2 Vicarious liability describes the event when the law holds one person responsible for the misconduct of another because of their relationship. In this case, the respondent (the original supplier) suffered substantial losses when it was replaced as Canadian Tire’s synthetic car seat cover supplier. This happened because a bribe was paid by a rival supplier’s consultant to the head of Canadian Tire’s automotive division.

3 The first question is whether the appellant Sagaz (the rival automotive supplier) is vicariously liable for the tortious conduct of its consultant who was hired to assist in securing Canadian Tire’s business. In my opinion the appellant Sagaz, the competitive supplier, is not vicariously liable for the bribery scheme perpetrated by its consultant. The consultant was not an employee of the supplier but an independent contractor. Based on policy considerations, the relationship between an employer and independent contractor does not typically give rise to a claim in vicarious liability.

4 On the second question, the motion to reopen the trial to adduce fresh evidence, I conclude for the reasons that follow that the Court of Appeal erred in substituting its discretion for that of the trial judge.

I. Facts

5 The respondent, 671122 Ontario Limited, formerly Design Dynamics Limited (“Design”), was Canadian Tire Corporation’s principal supplier of synthetic sheepskin car seat covers for 30 years. Canadian Tire was the party in the position of strength in the relationship. This is so as it represented more than 60 percent of the Canadian seat cover market and, by 1983, was Design’s largest customer accounting for over 50 percent of its sales.

6 In June 1984, Design lost Canadian Tire's business. Robert Summers, the head of Canadian Tire's automotive division, advised Design that another company, the appellants Sagaz Industries Canada Inc. and Sagaz Industries Inc. (collectively "Sagaz"), would be replacing Design as Canadian Tire's seat cover supplier. Sagaz is a Florida corporation and the appellant, Joseph Kavana, is its president. Sagaz Industries Inc. continues to supply Canadian Tire and Sagaz Industries Canada Inc. is inactive.

7 Summers terminated Canadian Tire's supply relationship with Design in favour of Sagaz because of bribery in the form of a "kickback" scheme. Sagaz retained American Independent Marketing Inc. ("AIM"), a New York corporation, to assist in marketing Sagaz's seat covers to Canadian Tire. AIM was owned and controlled by Stewart Landow. It was later determined that Summers accepted a bribe from Landow and AIM in relation to the Sagaz seat cover contract. Specifically, Summers incorporated a sham corporation, International Marketing Consultants ("IMC"), to receive the bribery money. Summers employed a surrogate, Anthony Brathwaite, as a token manager of IMC. Brathwaite was the puppet of Summers who received all the profits of IMC. Summers entered into an agreement with Landow whereby Landow (through AIM) would pay Summers (through IMC) two percent of all sales by Sagaz to Canadian Tire of synthetic seat covers in order to ensure the sales occurred. As a result of the bribe, Summers terminated Canadian Tire's relationship with Design.

8 Summers' wrongdoing was discovered in 1985. His employment with Canadian Tire was terminated and he was eventually convicted of corruptly accepting

benefits and went to prison. He later went bankrupt. Brathwaite pleaded guilty to similar charges.

9 Summers was replaced by new management at Canadian Tire which re-evaluated its purchase of synthetic seat covers. Management determined that it preferred the seat cover products of Sagaz to those of Design. Accordingly, Canadian Tire retained its relationship with Sagaz as its supplier.

10 Having lost its major customer, Design's manufacturing business went into a steep decline. It sold its assets in 1988. In 1989, Design brought an action against some 13 defendants, including Canadian Tire, Summers, Brathwaite, Landow, AIM, Sagaz and Kavana. At the trial, only AIM, Landow (who did not testify), Sagaz and Kavana remained as defendants. Canadian Tire paid Design \$750,000 to settle the action against it. The action against Summers was discontinued when he went bankrupt. Design's action alleged that AIM, Landow, Sagaz and Kavana had bribed Summers and, but for those bribes, Design would have continued as supplier to Canadian Tire.

II. Judicial History

A. *Ontario Court (General Division)* (1998), 40 O.R. (3d) 229

11 The trial judge found that the decision of Canadian Tire management to switch suppliers of seat covers had nothing to do with any belief that the Sagaz product was superior to the Design product. Design's business was lost solely because of the bribe.

12 The bribery scheme was profitable to Landow as commissions on the sales from Sagaz to Canadian Tire would be paid to his solely-owned corporation, AIM. Landow could not hide behind the corporate veil of AIM in his use of the corporation as his agent in the commission of an intentional tort. The trial judge found that Landow and AIM conspired with Summers and IMC to engage in the unlawful conduct of taking away Design's business from Canadian Tire.

13 While the tort of civil conspiracy was sufficient to establish liability, the trial judge found that liability was more directly addressed through the tort of unlawful interference with economic relations, for which Landow and AIM were liable.

14 There were suspicious business dealings raised at the trial in an attempt to implicate Kavana, President of Sagaz, in the bribery scheme. For instance, commissions that Landow received in respect of the sale of seat covers from Sagaz to Canadian Tire. Before Sagaz secured the seat cover contract with Canadian Tire, it was paying Landow a five percent commission on sales. Sagaz then raised Landow's commission from five to six percent. At the same time, or close to it, Landow entered into the agreement with Summers whereby Landow paid Summers two percent in the form of the kickback scheme. It was Design's theory at trial that Landow's commission was raised from five to six percent to fund the bribe to Summers. That implied that Kavana and Landow agreed to share or split the payment of the two percent bribe. Kavana denied involvement in the bribery scheme. He testified that he was misled by Landow in agreeing to change the commission from five to six percent because Landow told him that he was required to hire someone to provide in-store service in Canada which would entail additional expense. Another suspicious event was the payment of \$15,000 by Kavana to Landow in March 1985 which eventually found its way to Robin Addie, a senior buyer for Canadian Tire. Again, Kavana

testified and denied any improper conduct. He claimed that Landow told him that this expenditure was tied to the purchase of a car as part of an intended promotion to display the Canadian Tire seat covers. In fact, a car was never purchased.

15 These suspicious circumstances surrounding Kavana were presented at the trial. The trial judge believed Kavana, found him credible and accepted his evidence that he had trusted Landow and had accepted Landow's explanation about the commission and car purchase. As well Summers did not implicate Kavana in his testimony. The trial judge concluded that Kavana was not involved in the bribery scheme. He pointed out that had Kavana known of the bribe by Landow then Kavana and Sagaz would have been held directly liable and obviously vicarious liability would not have been an issue.

16 The trial judge was brief on the issue of whether Sagaz was vicariously liable to Design for the wrongdoing of Landow and AIM. He held that, on the evidence, AIM was an independent contractor to Sagaz. Citing *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299, he held that vicarious liability could not and should not be imposed upon Sagaz for the tortious acts of an independent contractor.

17 Damages were assessed at \$1,807,500 against Landow and AIM, jointly and severally, plus \$50,000 in punitive damages, and pre-judgment interest. The action was dismissed as against Sagaz and Kavana. The trial judge refused to award Sagaz and Kavana their costs against Design, but awarded Sagaz and Kavana their costs against Landow and AIM under a "Sanderson order".

B. *Ontario Court (General Division)*, [1998] O.J. No. 4018 (QL)

18 After the trial judge's reasons for judgment were released, but before formal judgment was entered, Landow, who did not testify at the trial, gave Design an affidavit admitting to the conspiracy to bribe Summers and implicating Kavana in it. On the basis of the affidavit, Design brought a motion before the trial judge pursuant to rule 59.06(2)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to have the trial reopened to hear Landow's fresh evidence. Design claimed that the fresh evidence would show that Kavana was involved in and had knowledge of the tortious activity of Landow, and was also liable to Design.

19 The trial judge dismissed the motion. He found that there was no direct evidence at trial that Kavana was a party to the bribe paid to Summers. Summers dealt directly with Landow. Summers did not implicate Kavana in his testimony. Kavana testified and denied involvement in the bribe. He was subjected to a thorough and rigorous cross-examination and was credible in his testimony. Landow did not testify nor attend the trial. He was represented by counsel throughout the trial. In the cross-examination of Landow on his affidavit given in connection with the fresh evidence motion, Landow acknowledged that he was aware of his right to attend the trial and to testify. He received daily reports about the course of the trial over its duration.

20 In dismissing the motion to reopen the trial, the trial judge applied a two-part test from *Scott v. Cook*, [1970] 2 O.R. 769 (H.C.). First, would the evidence, if presented at trial, probably have changed the result? Second, could the evidence have been obtained before trial by the exercise of reasonable diligence?

21 The trial judge found that neither of the two steps was met. He could not say that the new evidence, if presented at trial, would probably have changed the

result, only that it may have changed the result. As well, if the trial were reopened, Landow's evidence might well not be believed. His credibility would be very much in issue. On the second part of the test, the trial judge found that Landow's evidence could have been obtained before trial. Design could have compelled Landow to testify under oath at trial, although that evidence may not have been helpful to Design. The trial judge concluded that the court would not allow a party to correct what in hindsight was an unsuccessful strategy at trial.

C. *Ontario Court of Appeal* (2000), 183 D.L.R. (4th) 488

22 The Court of Appeal reversed the decisions of the trial judge. The gist of its view was that Sagaz was vicariously liable to Design. Applying the "organization test" (from *Mayer v. J. Conrad Lavigne Ltd.* (1979), 27 O.R. (2d) 129 (C.A.), as previously approved by this Court in *Co-operators Insurance Association v. Kearney*, [1965] S.C.R. 106), the Court of Appeal found that Landow and AIM did their work as part of the "Sagaz sales team". Sagaz was therefore jointly and severally liable with Landow and AIM for the damages awarded, with the exception of punitive damages. For this reason, the Court of Appeal also allowed Landow's and AIM's cross-appeal on the issue of costs and set aside the costs award to Sagaz and Kavana against Landow and AIM. Design was entitled to costs against Sagaz.

23 A new trial was ordered with respect to the liability of Kavana on the basis that the trial judge should have reopened the trial to hear Landow's evidence. The Court of Appeal found that the evidence, if presented at trial and accepted as credible, would implicate Kavana and Sagaz in the bribery scheme. Also, it held that Landow's evidence was not discoverable by reasonable diligence prior to trial as Design made

serious efforts to no avail to persuade Landow to co-operate and to testify against Kavana and Sagaz.

III. Issues

- 24
1. Did the Court of Appeal err in holding Sagaz vicariously liable to Design?
 2. Did the Court of Appeal err by substituting its discretion for that of the trial judge in the decision to reopen the trial?

IV. Analysis

A. *Vicarious Liability*

(1) Policy Rationale Underlying Vicarious Liability

25

Vicarious liability is not a distinct tort. It is a theory that holds one person responsible for the misconduct of another because of the relationship between them. Although the categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed, the most common one to give rise to vicarious liability is the relationship between master and servant, now more commonly called employer and employee.

26

In general, tort law attempts to hold persons accountable for their wrongful acts and omissions and the direct harm that flows from those wrongs. Vicarious liability, by contrast, is considered to be a species of strict liability because it requires no proof of personal wrongdoing on the part of the person who is subject to it. As

such, it is still relatively uncommon in Canadian tort law. What policy considerations govern its discriminate application?

27 As Fleming stated in an oft-quoted passage:

[T]he modern doctrine of vicarious liability cannot parade as a deduction from legalistic premises, but should be frankly recognised as having its basis in a combination of policy considerations....

(*The Law of Torts* (9th ed. 1998), at p. 410, cited in *Bazley v. Curry*, [1999] 2 S.C.R. 534, at para. 26, *per* McLachlin J. (as she then was); see also *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, released concurrently, at para. 29, *per* Binnie J.)

However, McLachlin J. noted in *Bazley*, at para. 27 (cited in *Jacobi*, at para. 29) that “[a] focus on policy is not to diminish the importance of legal principle.”

28 The most recent discussion by this Court of the policy considerations that justify the imposition of vicarious liability was in *Bazley*, at paras. 26-36, where McLachlin J. succinctly reviewed the relevant jurisprudence. She began with La Forest J.’s opinion (dissenting on the cross-appeal) in *London Drugs, supra*, which held that vicarious liability is generally considered to rest on one of two logical bases. The first, known as the “master’s tort theory”, posits that the employer is vicariously liable for the acts of his employee because the acts are regarded as being authorized by him so that in law the acts of the employee are the acts of the employer. The second, known as the “servant’s tort theory”, attributes liability to the employer simply because the employer was the employee’s superior and therefore in charge or command of the employee (G. H. L. Fridman, *The Law of Torts in Canada* (1990), vol. 2, at pp. 314-15, and P. S. Atiyah, *Vicarious Liability in the Law of Torts* (1967), at pp. 6-7).

29 However, La Forest J. acknowledged that neither of the logical bases for vicarious liability succeeds completely in explaining the operation of the doctrine, and he found that the vicarious liability regime is a response to a number of policy considerations, including compensation, deterrence and loss internalization (*London Drugs, supra*, at p. 336). McLachlin J. noted that Fleming identified similar policies to justify the imposition of vicarious liability, including the provision of a just and practical remedy for the harm and the deterrence of future harm, and held that these two ideas “usefully embrace the main policy considerations that have been advanced” (*Bazley, supra*, at para. 29).

30 Identification of the policy considerations underlying the imposition of vicarious liability assists in determining whether the doctrine should be applied in a particular case and it is for that reason that the policy considerations set out by this Court in *Bazley* should be briefly reviewed.

31 First, vicarious liability provides a just and practical remedy to people who suffer harm as a consequence of wrongs perpetrated by an employee. Many commentators are suspicious of vicarious liability in principle because it appears to hold parties responsible for harm simply because they have “deep pockets” or an ability to bear the loss even though they are not personally at fault. The “deep pockets” justification on its own does not accord with an inherent sense of what is fair (see also R. Flannigan, “Enterprise control: The servant-independent contractor distinction” (1987), 37 *U.T.L.J.* 25, at p. 29). Besides an ability to bear the loss, it must also seem just to place liability for the wrong on the employer. McLachlin J. addresses this concern in *Bazley, supra*, at para. 31:

Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those

risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm.

Similarly, Fleming stated that “a person who employs others to advance his own economic interest should in fairness be placed under a corresponding liability for losses incurred in the course of the enterprise” (p. 410). McLachlin J. states that while the fairness of this proposition is capable of standing alone, “it is buttressed by the fact that the employer is often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimizing the dislocative effect of the tort within society” (*Bazley*, at para. 31). Finally on this point, it is noteworthy that vicarious liability does not diminish the personal liability of the direct tortfeasor (Fleming, *supra*, at p. 411; *London Drugs*, *supra*, at p. 460, *per* McLachlin J.).

32 The second policy consideration underlying vicarious liability is deterrence of future harm as employers are often in a position to reduce accidents and intentional wrongs by efficient organization and supervision. This policy ground is related to the first policy ground of fair compensation, as “[t]he introduction of the enterprise into the community with its attendant risk, in turn, implies the possibility of managing the risk to minimize the costs of the harm that may flow from it” (*Bazley*, *supra*, at para. 34).

(2) Employee Versus Independent Contractor

33 The most common relationship that attracts vicarious liability is that between employer and employee, formerly master and servant. This is distinguished from the relationship of an employer and independent contractor which, subject to

certain limited exceptions (see Atiyah, *supra*, at pp. 327-78), typically does not give rise to a claim for vicarious liability. If a worker is determined to be an employee as opposed to an independent contractor such that vicarious liability can attach to the employer, this is not the end of the analysis. The tortious conduct has to be committed by the employee in the course of employment. For the reasons that follow, this second stage of the analysis is not relevant and need not be analysed in the present appeal.

34 What is the difference between an employee and an independent contractor and why should vicarious liability more likely be imposed in the former case than in the latter? This question has been the subject of much debate. The answer lies with the element of control that the employer has over the direct tortfeasor (the worker). If the employer does not control the activities of the worker, the policy justifications underlying vicarious liability will not be satisfied. See Flannigan, *supra*, at pp. 31-32:

This basis for vicarious liability discloses a precise limitation on the scope of the doctrine. If the employer does not control the activities of the worker it is clear that vicarious liability should not be imposed, for then insulated risk-taking [by the employer] does not occur. Only the worker, authorized to complete a task, could have affected the probability of loss, for he alone had control in any respect. Thus, because there is no mischief where employer control is absent, no remedy is required.

35 Explained another way, the main policy concerns justifying vicarious liability are to provide a just and practical remedy for the plaintiff's harm and to encourage the deterrence of future harm (*Bazley, supra*, at para. 29). Vicarious liability is fair in principle because the hazards of the business should be borne by the business itself; thus, it does not make sense to anchor liability on an employer for acts of an independent contractor, someone who was in business on his or her own account. In addition, the employer does not have the same control over an independent contractor as over an employee to reduce accidents and intentional wrongs by efficient

organization and supervision. Each of these policy justifications is relevant to the ability of the employer to control the activities of the employee, justifications which are generally deficient or missing in the case of an independent contractor. As discussed above, the policy justifications for imposing vicarious liability are relevant where the employer is able to control the activities of the employee but may be deficient in the case of an independent contractor over whom the employer has little control. However, control is not the only factor to consider in determining if a worker is an employee or an independent contractor. For the reasons discussed below, reliance on control alone can be misleading, and there are other relevant factors which should be considered in making this determination.

36 Various tests have emerged in the case law to help determine if a worker is an employee or an independent contractor. The distinction between an employee and an independent contractor applies not only in vicarious liability, but also to the application of various forms of employment legislation, the availability of an action for wrongful dismissal, the assessment of business and income taxes, the priority taken upon an employer's insolvency and the application of contractual rights (Flannigan, *supra*, at p. 25). Accordingly, much of the case law on point while not written in the context of vicarious liability is still helpful.

37 The Federal Court of Appeal thoroughly reviewed the relevant case law in *Wiebe Door Services Ltd. v. M.N.R.*, [1986] 3 F.C. 553. As MacGuigan J.A. noted, the original criterion of the employment relationship was the control test set out by Baron Bramwell in *Regina v. Walker* (1858), 27 L.J.M.C. 207, and adopted by this Court in *Hôpital Notre-Dame de l'Espérance v. Laurent*, [1978] 1 S.C.R. 605. It is expressed as follows: "the essential criterion of employer-employee relations is the right to give

orders and instructions to the employee regarding the manner in which to carry out his work” (*Hôpital Notre-Dame de l’Espérance, supra*, at p. 613).

38 This criterion has been criticized as wearing “an air of deceptive simplicity” (Atiyah, *supra*, at p. 41). The main problems are set out by MacGuigan J.A. in *Wiebe Door, supra*, at pp. 558-59:

A principal inadequacy [with the control test] is its apparent dependence on the exact terms in which the task in question is contracted for: where the contract contains detailed specifications and conditions, which would be the normal expectation in a contract with an independent contractor, the control may even be greater than where it is to be exercised by direction on the job, as would be the normal expectation in a contract with a servant, but a literal application of the test might find the actual control to be less. In addition, the test has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct.

39 An early attempt to deal with the problems of the control test was the development of a fourfold test known as the “entrepreneur test”. It was set out by W. O. Douglas (later Justice) in “Vicarious Liability and Administration of Risk I” (1928-1929), 38 *Yale L.J.* 584, and applied by Lord Wright in *Montreal v. Montreal Locomotive Works Ltd.*, [1947] 1 D.L.R. 161 (P.C.), at p. 169:

In earlier cases a single test, such as the presence or absence of control, was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have often to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex involving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive.

40 As MacGuigan J.A. notes, a similar general test, known as the “organization test” or “integration test” was used by Denning L.J. (as he then was) in

Stevenson Jordan and Harrison, Ltd. v. Macdonald, [1952] 1 *The Times* L.R. 101 (C.A.), at p. 111:

One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

41 This decision imported the language “contract of service” (employee) and “contract for services” (independent contractor) into the analysis. The organization test was approved by this Court in *Co-operators Insurance, supra* (followed in *Mayer, supra*), where Spence J. observed that courts had moved away from the control test under the pressure of novel situations, replacing it instead with a type of organization test in which the important question was whether the alleged servant was part of his employer’s organization (from Fleming, *supra*, at p. 416).

42 However, as MacGuigan J.A. noted in *Wiebe Door*, the organization test has had “less vogue in other common-law jurisdictions” (p. 561), including England and Australia. For one, it can be a difficult test to apply. If the question is whether the activity or worker is integral to the employer’s business, this question can usually be answered affirmatively. For example, the person responsible for cleaning the premises is technically integral to sustaining the business, but such services may be properly contracted out to people in business on their own account (see R. Kidner, “Vicarious liability: for whom should the ‘employer’ be liable?” (1995), 15 *Legal Stud.* 47, at p. 60). As MacGuigan J.A. further noted in *Wiebe Door*, if the main test is to demonstrate that, without the work of the alleged employees the employer would be out of business, a factual relationship of mutual dependency would always meet the

organization test of an employee even though this criterion may not accurately reflect the parties' intrinsic relationship (pp. 562-63).

43 Despite these criticisms, MacGuigan J.A. acknowledges, at p. 563, that the organization test can be of assistance:

Of course, the organization test of Lord Denning and others produces entirely acceptable results when properly applied, that is, when the question of organization or integration is approached from the persona of the "employee" and not from that of the "employer," because it is always too easy from the superior perspective of the larger enterprise to assume that every contributing cause is so arranged purely for the convenience of the larger entity. We must keep in mind that it was with respect to the business of the employee that Lord Wright [in *Montreal*] addressed the question "Whose business is it?" [Emphasis added.]

44 According to MacGuigan J.A., the best synthesis found in the authorities is that of Cooke J. in *Market Investigations, Ltd. v. Minister of Social Security*, [1968] 3 All E.R. 732 (Q.B.D.), at pp. 737-38 (followed by the Privy Council in *Lee Ting Sang v. Chung Chi-Keung*, [1990] 2 A.C. 374, *per* Lord Griffiths, at p. 382):

The observations of LORD WRIGHT, of DENNING, L.J., and of the judges of the Supreme Court in the U.S.A. suggest that the fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?" If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no" then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors, which may be of importance, are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task. [Emphasis added.]

45 Finally, there is a test that has emerged that relates to the enterprise itself. Flannigan, *supra*, sets out the “enterprise test” at p. 30 which provides that the employer should be vicariously liable because (1) he controls the activities of the worker; (2) he is in a position to reduce the risk of loss; (3) he benefits from the activities of the worker; (4) the true cost of a product or service ought to be borne by the enterprise offering it. According to Flannigan, each justification deals with regulating the risk-taking of the employer and, as such, control is always the critical element because the ability to control the enterprise is what enables the employer to take risks. An “enterprise risk test” also emerged in La Forest J.’s dissent on cross-appeal in *London Drugs* where he stated at p. 339 that “[v]icarious liability has the broader function of transferring to the enterprise itself the risks created by the activity performed by its agents.”

46 In my opinion, there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. Lord Denning stated in *Stevenson Jordan, supra*, that it may be impossible to give a precise definition of the distinction (p. 111) and, similarly, Fleming observed that “no single test seems to yield an invariably clear and acceptable answer to the many variables of ever changing employment relations . . .” (p. 416). Further, I agree with MacGuigan J.A. in *Wiebe Door*, at p. 563, citing Atiyah, *supra*, at p. 38, that what must always occur is a search for the total relationship of the parties:

[I]t is exceedingly doubtful whether the search for a formula in the nature of a single test for identifying a contract of service any longer serves a useful purpose.... The most that can profitably be done is to examine all the possible factors which have been referred to in these cases as bearing on the nature of the relationship between the parties concerned. Clearly not all of these factors will be relevant in all cases, or have the same weight in all cases. Equally clearly no magic formula can be propounded for determining which factors should, in any given case, be treated as the determining ones.

47 Although there is no universal test to determine whether a person is an employee or an independent contractor, I agree with MacGuigan J.A. that a persuasive approach to the issue is that taken by Cooke J. in *Market Investigations, supra*. The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

48 It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

(3) Application to the Facts

49 According to the agreement between Sagaz and AIM dated January 29, 1985, AIM was hired to "provide assistance to Sagaz in retaining the goodwill of [Canadian Tire]". Although the contract designated AIM as an "independent contractor", this classification is not always determinative for the purposes of vicarious liability. The starting point for this analysis is whether AIM, while engaged to perform such services for Sagaz, was in business on its own account. If so, AIM is an independent contractor as opposed to an employee of Sagaz and vicarious liability likely will not follow. It is helpful to examine the non-exhaustive list of factors from *Montreal* and *Market Investigations* to assist in this determination.

50 There is some evidence to suggest that Landow and AIM were employees of Sagaz. In other words, in response to the query “whose business is it?”, there is some suggestion that Landow worked in what was characterized as a “joint effort” with Sagaz sales managers in order to secure Canadian Tire’s business. Specifically, although it was Landow’s duty under the contract to obtain Canadian Tire’s business and maintain its goodwill, the first letter sent to Canadian Tire on behalf of Sagaz was written by Canadian Tire’s national sales manager, David English, who gave price quotations. The first meeting was attended by Landow, English and Kavana. Following that meeting, revised price quotations were sent by English. Landow’s role was limited to presenting prices that were set and negotiated by Kavana and English and he required instructions with respect to terms and various other aspects of the business that he was conducting on Sagaz’s behalf. Quotations given to Canadian Tire did not disclose Landow as a sales representative. Rather, the space on the invoice for the sales representative was left blank and the account was characterized as a “house account”.

51 There was also some issue made about the fact that in a letter dated June 12, 1984, Landow communicated with Canadian Tire directly using Sagaz’s letterhead. On cross-examination, Kavana admitted that Landow had been supplied with Sagaz letterhead. The courts below speculated that these factors came about because Canadian Tire preferred to deal with its suppliers, like Sagaz, directly and not through external sales agents.

52 On the other hand, there are some compelling points which indicate that AIM and Sagaz were separate legal entities, some of which are that AIM had its own offices, located in New York, while the Sagaz head offices were located in Florida.

According to the agreement between the parties, AIM was to pay all of its own costs of conducting its business, including travel expenses, commissions and other compensation of salespersons employed by it. AIM remained free to carry on other activities and represent other suppliers provided that it did not take on any competing lines of business.

53 With respect to AIM's responsibility for investment and management, Sagaz did not either specify or control how much time AIM was to devote to representing them in maintaining their goodwill with Canadian Tire, or to performing in-store services. Similarly, it was up to AIM and Landow to decide how many, if any, trips Landow would take to Toronto. According to the agreement and Kavana's testimony, AIM had no authority to bind the Sagaz company.

54 In terms of a risk of loss or an opportunity for profit, Landow and AIM worked on commission on sales of Sagaz's products. As such, the risk of loss and the opportunity for profit depended on whether AIM's expenses (such as travel expenses) exceeded its commissions.

55 Central to this inquiry is the extent of control that Sagaz had over AIM. While Sagaz directed the prices, terms and other conditions that AIM was to negotiate on Sagaz's behalf, AIM was ultimately in control of providing assistance to Sagaz in retaining the goodwill of Canadian Tire. Again, AIM decided how much time to devote to Sagaz and how much time to devote to its services for other supply companies. Although Sagaz controlled what was done, AIM controlled how it was done. This indicates that Landow was not controlled by Sagaz.

56 In my opinion, the contravening factors such as the suggestion that the Canadian Tire account was a “house account” and the one letter written by Landow on Sagaz’s letterhead, while of interest, are not sufficient to show that AIM was an employee as part of the Sagaz “sales team”. I agree with the courts below that these factors likely came about because Canadian Tire preferred to deal with its suppliers, like Sagaz, directly and not through external sales agents. Looking at the non-exhaustive list of factors set out in *Market Investigations, supra*, including ownership of tools, hiring its own helpers, the degree of financial risk or opportunity for profit by AIM and the responsibility for investment and management, it is clear to me that, based on the total relationship of the parties, AIM was an independent contractor.

57 On the totality of the evidence, I agree with the trial judge that AIM was in business on its own account. Absent exceptional circumstances which are not present in this case (see Atiyah, *supra*, at pp. 327-49), it follows that the relationship between Sagaz and AIM, as employer and independent contractor, is not one which attracts vicarious liability. In finding that AIM was an independent contractor and not an employee in relation to Sagaz, I need not consider the second stage of the analysis which inquires into whether the tortious conduct of an employee was committed within the scope of employment.

58 Design submitted that if AIM was not an independent contractor, then AIM was an agent of Sagaz and therefore Sagaz was liable for the economic tort committed by AIM in the scope and course of its authority. Absent evidence to the contrary, it cannot be presumed that the scope of AIM’s authority in providing “assistance to Sagaz in retaining the goodwill of [Canadian Tire]” was so broad as to include unlawful means such as bribery. This is confirmed by the finding of the trial judge at p. 241 that “Mr. Kavana was not a party to the conspiracy of Messrs. Summers and

Landow”. As well he also found at p. 245 “that it has not been proven on a balance of probabilities that Mr. Kavana knew of the bribery by Mr. Landow”. In the result, the payment of the bribe by AIM to Summers exceeded the actual and apparent authority of AIM as representative of Sagaz.

B. *Motion to Reopen the Trial*

59 After the trial judge’s reasons were released, but before the formal judgment was entered, Landow, who did not testify at trial, gave Design an affidavit admitting to the conspiracy to bribe and implicating Kavana in the conspiracy. Design brought a motion to have the trial reopened to hear the fresh evidence. The trial judge applied the two-part test from *Scott, supra*, to assist in determining whether to exercise his discretion to reopen the trial. First, he decided that the evidence, if presented at trial, probably would not have changed the result. Second, he found that the evidence could have been obtained before trial by the exercise of reasonable diligence. The Court of Appeal overturned the trial judge’s decision, having found that he erred on both branches of the test and that the trial should have been reopened to hear Landow’s evidence. Was the Court of Appeal in error to reverse the trial judge’s exercise of discretion to refuse to reopen the trial?

60 This Court provided in *Hamstra (Guardian ad litem of) v. British Columbia Rugby Union*, [1997] 1 S.C.R. 1092, at para. 26:

It has long been established that, absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial.

Appellate courts should defer to the trial judge who is in the best position to decide whether, at the expense of finality, fairness dictates that the trial be reopened. See *Clayton v. British American Securities Ltd.*, [1934] 3 W.W.R. 257 (B.C.C.A.), at p. 295:

[The trial judge] would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof.

61 Further, the case law dictates that the trial judge must exercise his discretion to reopen the trial “sparingly and with the greatest care” so that “fraud and abuse of the Court’s processes” do not result (see *Clayton, supra*, at p. 295, cited in *Scott*, at p. 774).

62 In this case, the trial judge decided not to exercise his discretion to reopen the trial because neither of the two steps of the test in *Scott, supra*, was met to his satisfaction. First, he found that he could not say that the new evidence, if presented at trial, would probably have changed the result, only that it may have changed the result. If the trial were to be reopened, Landow’s evidence might well not be believed. His credibility would be in issue. Second, the trial judge found that Landow’s evidence could have been obtained before trial. Design could have compelled Landow to testify under oath at trial. While this carried some risk, the trial judge viewed it as a trial strategy, a conclusion he was entitled to reach.

63 In my opinion, the Court of Appeal erred in substituting its discretion for that of the trial judge in deciding to reopen the trial. On the first branch of the test set out in *Scott*, the trial judge found that Landow’s credibility would be in issue whereas the Court of Appeal found it difficult to see how the trial judge could make this

determination without hearing Landow testify. In the Court of Appeal's determination, it was not sufficiently clear that Landow would be disbelieved. I disagree with the Court of Appeal on this point. Landow's affidavit evidence contradicts his sworn evidence on discovery, particularly with respect to the existence of the bribery scheme which Landow avoids acknowledging on discovery. To this significant extent, Landow is akin to a recanting liar. Lord Denning's comments in *Ladd v. Marshall*, [1954] 1 W.L.R. 1489 (C.A.), at p. 1491, are applicable:

It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

We have to apply those principles to the case where a witness comes and says: "I told a lie but nevertheless I now want to 'tell the truth'". It seems to me that the fresh evidence of such a witness will not as a rule satisfy the third condition. A confessed liar cannot usually be accepted as being credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion. [Emphasis added.]

64

These comments, in my opinion, apply with equal force to the present case. Landow is akin to a "recanting liar" because he failed to tell his "truth" when he had the opportunity to do so on discovery and again when he declined to testify at trial. Although the determination in *Ladd* was made under the third branch of the test applied in that case, a branch that is absent from the two-part test in *Scott*, the application of the *Scott* test to the situation of a "recanting liar" has the same result in this case. Evidence which is not presumptively credible may fail to probably change the result under the first branch of the test in *Scott*. This is how the trial judge dealt

with the affidavit evidence, and in my view he was correct in so doing. Further, it cannot be ignored that the trial decision imposing liability on Landow and AIM provided incentive for Landow to attempt to shift some responsibility to Kavana in order to share the liability of the corresponding damage award. The trial judge had also seen the evidence of Kavana in the first instance, which he found to be credible even in the face of a vigorous cross-examination.

65 The court in *Scott* mandated that both branches of the test to reopen a trial to admit fresh evidence must be met. Having failed to meet the first branch of the test, it is unnecessary to examine whether the precluded evidence in this case could have been obtained by the exercise of reasonable diligence. It is sufficient to say that that too is a matter largely within the discretion of the trial judge and, absent error by him, that finding should not be interfered with.

V. Disposition

66 The appeal is allowed with costs to the appellants in this Court and in the Court of Appeal. The order of the Court of Appeal is set aside. The order of Cumming J., dated December 23, 1998, is restored.

Appeal allowed with costs.

Solicitors for the appellants: Torys, Toronto.

Solicitors for the respondent: Teplitsky, Colson, Toronto.

