Fujiwara v. Osawa

Between
Fujiwara et al., and
Osawa

[1937] B.C.J. No. 71

[1937] 2 D.L.R. 133

British Columbia Supreme Court
Vancouver, British Columbia

Manson J.

Heard: January 16, 1936.
Judgment: January 23, 1936.

Counsel:

Nicholson, and Yule, for the plaintiffs.
Bull, K.C., and Ray, for the defendant.

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1 23rd January, 1937. **MANSON J.**:-- This action arises out of an automobile accident which occurred on Sunday morning, November 10th, 1935, at Port Moody in this Province. The plaintiff Dr. Fujiwara and his wife, two sons and a lady passenger were travelling in the doctor's car eastward at 20 to 25 miles per hour on St. John's Road. The roadway has a hard-surfaced centre strip 18 feet wide and a gravel strip on each side 10 feet 6 inches wide. The defendant with three passengers in his car overtook and passed the doctor's car on a straightaway stretch of the highway. There were no on-coming westbound cars and the passing could have been accomplished without difficulty or danger. [51 BCR Page389]

2 I accept the evidence of the doctor and the witnesses for the plaintiffs that the defendant cut in sharply in front of the doctor's car immediately he passed it. It was alleged that, as the defendant passed, his car caught the front end of the doctor's car. It is not particularly material whether it did so or not (I think it did) because I have no manner of doubt that he cut in altogether too sharply, without excuse - and negligently. The doctor was upset, as he says, by the bump of the defendant's car, or in any event by imminence of a collision as a result of the defendant's negligence. He attempted to step on the footbrake but instead, seemingly, stepped on the accelerator and swerved to the south running over a small bush, over the sidewalk, part way up on a terrace, over the edge of some steps, into the side of an electric-light pole and on farther into collision with a second pole. He thought his brakes must have failed him and pulled on the hand-brake (when it does not appear) but

too late to save the situation. The plaintiff's wife was partially thrown from the car and sustained serious head injuries and other injuries. The plaintiff Miss Sato sustained face cuts - one serious enough to leave a nasty scar for life. The plaintiff Alan Fujiwara sustained a fractured collar-bone. The plaintiff Wesley Fujiwara also sustained some injuries but of a less serious character.

3 It was urged by counsel for the defendant: (1) That the defendant was not negligent. I find he was. (2) Alternatively, that while the defendant's negligence may have been the causa sine qua non it was not the proximate cause or direct cause of the accident - that the proximate cause was the doctor's own negligent driving.

4 The doctor travelled after he swerved some 180 feet. His car was a 1933 Chevrolet sedan with a high-speed motor and a quick pick-up. The question to be determined is, should the doctor have recovered his mental equilibrium after the first disturbance and not pursued the course he did - should he as a driver of a motor-car (he was a driver of 10 years' experience) have immediately sensed that his foot was on the accelerator and not on the brake? Had he realized that his foot was on the accelerator he would, of course, have removed it and put it on [51 BCR Page390] the brake and the accident and its consequences would have been avoided. While the maintenance of his foot upon the accelerator for some 180 feet or for three or four seconds does seem extraordinary and while it seems somewhat harsh to charge the defendant with the damage that ensued as a result of the doctor's error, nevertheless, one or two facts must be borne clearly in mind. A sharp cut in by a passing car on a highway is one of the most disconcerting experiences which even an experienced driver can encounter and such an experience is even more disconcerting when one has the responsibility of a car full of passengers. An experienced driver instantly senses the danger of such a manoeuvre on the part of a passing car and very few drivers can maintain equanimity in such circumstances. One asks how long a defendant is to be held liable for incorrect driving by the driver whom he has upset? In this particular case should the doctor not have recovered his equilibrium in time to avoid, if not the first collision with a pole, at least the second one? Other drivers might have done so but very many drivers might not have done so. What he did was extraordinary and yet I think it unfair to say that it was not understandable and excusable in the circumstances. It can hardly be said of Dr. Fujiwara that he had time to think - the bush, the steps and the first pole all loomed in front of him one after another, giving him no time to regain his poise. The language of Mr. Justice Middleton is apt at p. 108 in Harding v. Edwards and Tatisich (1929), 64 O.L.R. 98 (sustained by the Supreme Court of Canada, [1931] S.C.R. 167). The learned judge used this language:

> The case emphasizes the necessity of charity in judging the conduct of one who is not, it is true, in the actual agony of collision, but upon whom, in the language I have already quoted, "the hand of the original wrongdoer was still heavy," before his conduct can be regarded as the act of a conscious intervening agent. If in truth such a one is "acting on the impulse of personal peril" he may yet be "only a link in a chain of causation extending from the initial negligence to the subsequent injury," to quote again the words of Hamilton, L.J., in Latham v. R. Johnson & Nephew Ltd., [1913] 1 K.B. 398; 82 L.J.K.B. 268.

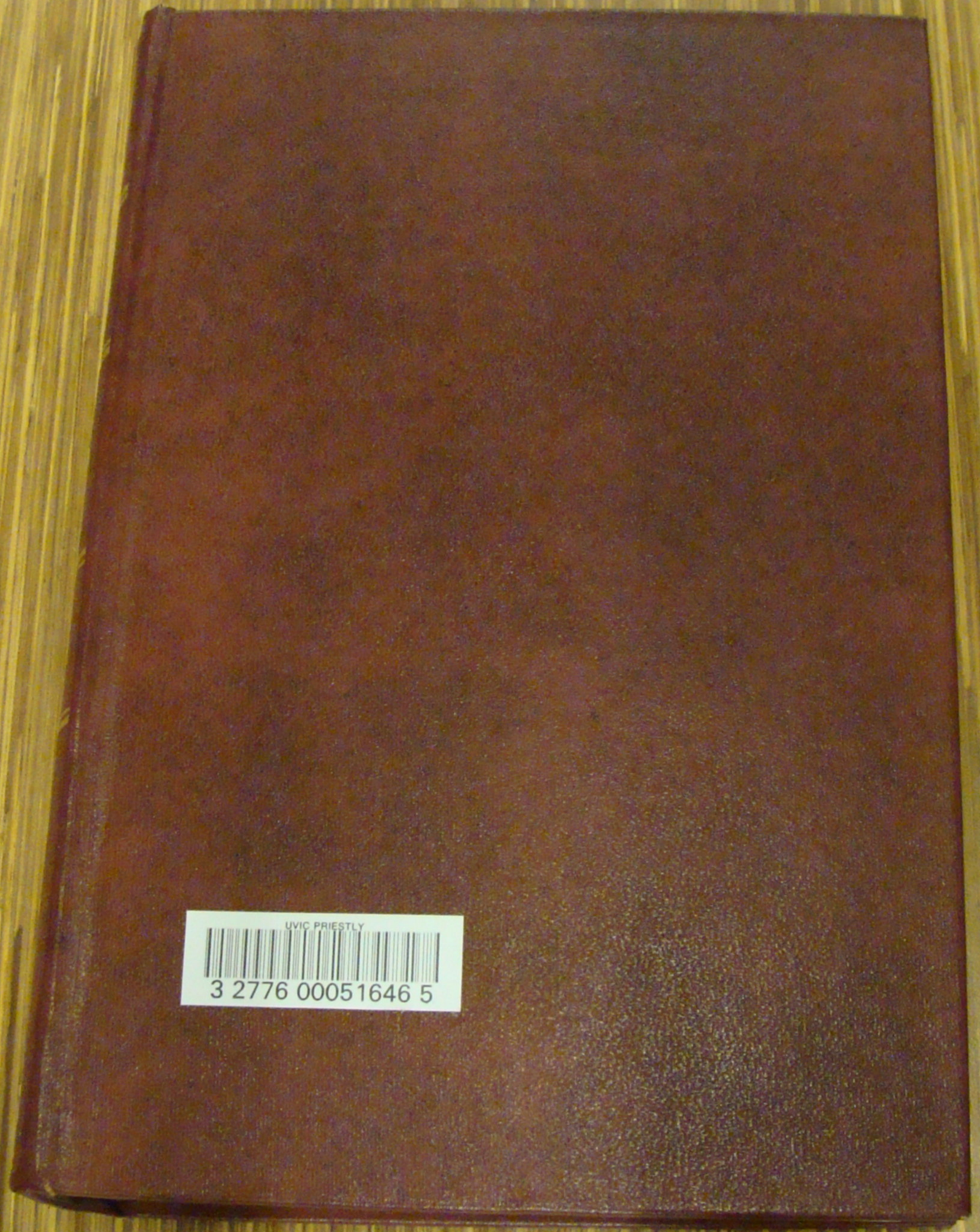
5 As was said by Lord Dunedin in United States Shipping Board v. Laird Line, Lim. (1923), 93 L.J.P.C. 123; [1924] A.C. 286, at 291: [51 BCR Page391]

> It is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger.

6 I hold the defendant liable.

7 I assess damages as follows: Special damages to plaintiff Asa J. Fujiwara, $1,098; special damages to plaintiff Shotaro Sato, $35; general damages to plaintiff Tsurn Fujiwara, $3,000; general damages to plaintiff Wesley Fujiwara, $25; general damages to plaintiff Alan Fujiwara, $150; general damages to plaintiff Asa J. Fujiwara for loss servitium, $500; general damages to plaintiff Asa J. Fujiwara for loss consortium, $500. Costs to follow event.

Judgment for plaintiffs.



DOMINION
LAW REPORTS

CITED [1937] D.L.R.

REPORTS OF ALL REPORTABLE CANADIAN CASES FROM ALL THE COURTS OF CANADA INCLUDING ALL DECISIONS OF THE SUPREME COURT OF CANADA AND ALL CANADIAN DECISIONS OF THE PRIVY COUNCIL.

VOL. 2

[1937]

ANNOTATED

Annotations or briefs, prepared by experts in their respective branches of law, covering the whole law of Canada are included in the D.L.R. to date. For Consolidated Table of Annotations see [1930] 4 D.L.R., pp. XI et seq. and Supplement in current volume, or Canadian Annual Digest.

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Masten, J.A.

breach by the authorities of such duty by reason of the fact that a competent doctor or nurse is guilty of negligence or lack of due care or skill in their treatment of a patient. My Lords, it seems to me that this principle can have no application to the facts of this case.''

I have examined with care all the numerous cases cited to us, and others, and I have failed to find any case in which the hospital has secured immunity from liability for the negligence of its nurse save where she was acting under the supervision and direction of a surgeon or physician.

Applying the rule that the expressions used in the reasons of judgment are to be interpreted as related to the facts of the case in which they are used, I doubt that the specific case of negligence by a nurse who is exercising professional skill but is acting as the servant of the hospital and not under the control, supervision or direction of a surgeon or physician has ever been passed upon.

In *Powell* v. *Streatham Manor Nursing Home*, [1935] A.C. 243, the hospital was at the trial before Horridge, J., held liable for the negligence of a nurse who was acting professionally but not under the supervision of a surgeon or in pursuance of his directions. The judgment of the trial Judge was reversed by the Court of Appeal but was restored by the House of Lords, though I should add that no defence in law appears to have been raised by the hospital on the ground that the nurse was acting in a professional capacity. The question is one of great importance, and if I am right in the view which I first expressed, it is not necessary to the decision of this case and I prefer to reserve it until it becomes essential to deal with it as a separate question by itself.

In my consideration of this case one further point has presented itself. One of the limitations of the general principle under consideration is expressed in the *Hillyer* case ([1909] 2 K.B. 820) by Kennedy, L.J., at p. 829, in these words:—

"The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care, do, I think, undertake that the patient whilst there shall be treated only by experts, whether surgeons, physicians or nurses, *of whose professional competence the governors have taken reasonable care to assure themselves.*''

These words apply even more strongly to an express contract made for consideration.

Can it be said in the present case that the authorities of the defendant hospital exercised reasonable care to insure themselves of the competence of Dr. Hunt to administer diathermy? The question was not argued before us, and I content myself with referring to it without basing any conclusion upon it.

For these reasons I am of opinion that the hospital is responsible for the negligence of Sister Austin as its servant acting in a matter of routine. The appeal should therefore be dismissed with costs.

FISHER, J.A.: I agree.

Appeal dismissed.

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FUJIWARA et al. v. OSAWA.

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British Columbia Supreme Court, Manson, J. January 23, 1937.

Automobiles III B—Negligence of driver—Cutting in resulting in plaintiff's incorrect driving—Chain of causation.

Where due to the defendant's negligent cutting in sharply in front of plaintiff's car, plaintiff on the impulse of peril of collision attempted to step on the foot brake but stepped on the accelerator instead with the result that his car swerved over the sidewalk and collided with a pole, the defendant was held liable.

[*Harding* v. *Edwards & Tatisich*, [1929] 4 D.L.R. 598; *U.S. Shipping Bd.* v. *Laird Line*, [1924] A.C. 286, apld.]

ACTION arising out of an automobile accident.

J. R. Nicholson and *K. Yule*, for plaintiffs.

A. Bull, K.C., and *A. H. Ray*, for defendant.

MANSON, J.:—This action arises out of an automobile accident which occurred on Sunday morning November 10, 1935, at Port Moody in this Province. The plaintiff Dr. Fujiwara and his wife, two sons and a lady passenger were travelling in the doctor's car eastward at 20 to 25 m.p.h. on St. John's road. The roadway has a hard-surfaced centre strip 18 ft. wide and a gravel strip on each side 10 ft. 6 ins. wide. The defendant with three passengers in his car overtook and passed the doctor's car on a straightaway stretch of the highway. There were no oncoming westbound cars and the passing could have been accomplished without difficulty or danger.

I accept the evidence of the doctor and the witnesses for the plaintiffs that the defendant cut in sharply in front of the doctor's car immediately he passed it. It was alleged that, as the defendant passed, his car caught the front end of the doctor's car. It is not particularly material whether it did so or not (I think it did) because I have no manner of doubt that he cut in altogether too sharply, without excuse—and negligently. The doctor was upset, as he says, by the bump of the defendant's car, or in any event by imminence of a collision as a result

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It was urged by counsel for the defendant: (1) That the defendant was not negligent. I find he was. (2) Alternatively, that while the defendant's negligence may have been the *causa sine qua non* it was not the proximate cause or direct cause of the accident—that the proximate cause was the doctor's own negligent driving.

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"It is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger."

I hold the defendant liable.

I assess damages as follows:—

Special damages to plaintiff Asa J. Fujiwara	$1,098
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General damages to plaintiff Tsuru Fujiwara	3,000
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General damages to plaintiff Alan Fujiwara	150
General damages to plaintiff Asa J. Fujiwara for loss *servitium*	500
General damages to plaintiff Asa J. Fujiwara for loss *consortium*	500

Costs to follow event.