Murakami Estate v. Henderson

Between
Itoku Murakami, and
Henderson et al.

[1942] B.C.J. No. 51

[1942] 1 D.L.R. 784

British Columbia Supreme Court
Vancouver, British Columbia

Morrison C.J.S.C.

Heard: February 12, 1942.
Judgment: February 16, 1942.

Counsel:

Denis Murphy, Jr., for the plaintiff.
Bull, A.C., for the defendants.

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1 **MORRISON C.J.S.C.**:-- Itoku Murakami, the father of the little 3-year-old girl, Hideko Murakami, lives with his family at Steveston, an insalubrious location, upon which is an agglomeration of small houses and shops, protected from the waters of the Fraser River by a dyke along which is the dirt road in question. Canneries and other buildings are strewn along. Inside the dyke is a sluggish, rather dead, insanitary looking ribbon of water, really a large ditch or small slough. The inhabitants are mostly Japanese fishermen and labourers. Many of them live along this dyke. It is somewhat congested. The father is a fisherman, at present out of employment owing to extraneous circumstances beyond his control. The child was with her little [57 BCR Page245] brother on their way from kindergarten in mid-afternoon. There were no intervening, distracting conditions existing at the time. The driver's field of vision was in no way obscured. He had full control of his truck. He could have easily proceeded along avoiding the child or have as readily stopped, assuming I accept his evidence, that he was only going at the rate of three miles an hour.

2 The driver of the truck owed the child, who was killed, a duty to take care. The duty, a breach of which gives rise to a cause of action in negligence, is to take care under the circumstances. It is, of course, reciprocal. I find that the driver committed a breach of that duty, which was the sole cause of the fatality. I had a view of the place in the presence of counsel - without which it would be difficult, if not impossible, to visualize from snapshots produced at the trial the situation and to be-

lieve that anyone, having sense enough to be put in control of a motor-vehicle, would be so indifferent to the presence of the two children of whom he had a clear view. He was proceeding along a dirt road towards a plank thoroughfare, 54 feet wide, into which he intended to turn. He saw them on the road and sounded his horn, put variously up to some 40 feet away, whereupon they went off the road on to the wide plank road and stood some few feet in from the road and well to the side, all the time in clear view of the driver. When asked what signal, if any, he gave at the critical juncture, he indicated in the box, by putting up his hand, the usual signal. This with a view of indicating to the infant child his intention - as well do it to warn a little puppy which he had seen standing in the way. Had he instead sounded his horn even then they might not have escaped. He could as well have proceeded easily at least 20 feet along the dirt road before making his turn in that space of 54 feet. This appeared so obvious at the view. He made too short a turn, apparently disregarding the children's presence. With all deference to the young driver, who had only been driving a truck for two weeks, he impressed me as being just plainly stupid. I was not impressed by either the powers or opportunity of observation of the witness Chambers and particularly Larsen. The witness Shirakawa impressed me as being an impartial witness, notwithstanding counsel's submission to the contrary. [57 BCR Page246]

3 As to the quantum of damages to which the plaintiff is entitled I am guided by the last word on that heading by the case of Benham v. Gambling, [1941] A.C. 157 in assessing the damages in this kind of case. I use the headnote, which puts the matter compendiously, supplemented by a few extracts from the case to show the basis of calculation:

> Damages given for the shortening of life should not be calculated, solely, or even mainly, on the basis of the length of life that is lost; they should be fixed at a reasonable figure for the loss of a measure of prospective happiness. If, however, the character or habits of the deceased were calculated to lead him to a future of unhappiness or despondency that would be a circumstance justifying a smaller award. No regard must be had to financial losses or gains during the period of which the victim has been deprived, damages being awarded in respect of loss of life, not of loss of future pecuniary prospects. In the case of a child, as in the case of an adult, the proper sum to be awarded should not be greater because the social position or prospect of worldly possessions is greater in one case than another.
>
> The thing to be valued is not the prospect of length of days but the prospect of predominantly happy life. ...
>
> The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a Court of Law.
>
> Stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead.

The speech of the Lord Chancellor ends by expressing a pious hope:

> I trust that the views of this House expressed in dealing with the present appeal may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy.

4 There will be judgment for the plaintiff for general damages, which I place at $500. The costs will be on the Supreme Court scale.

Judgment for plaintiff.

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[1942] 1 D.L.R.

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It is urged that by pleading the by-law in question the plaintiff would be setting up a new cause of action, and that this is barred by s. 60 of the *Highway Traffic Act*, R.S.O. 1937, c. 288.

It is admitted that more than a year has elapsed since the damages were sustained. But that section has no application because the damages here are not claimed to have been occasioned by a motor vehicle but by reason of the horses being permitted to run at large.

The substantive rights of the parties are not being determined on this motion. It is not necessary to determine what (if any) the effect of the by-law is.

The plaintiff should be permitted to amend in the manner asked, and the defendant should have 10 days thereafter to amend his statement of defence as he may be advised. The disposition of costs in the order appealed from to stand. No costs of this application.

Appeal allowed.

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ITOKU MURAKAMI v. HENDERSON et al.

British Columbia Supreme Court, Morrison C.J.S.C. February 12, 1942.

Damages III F—Loss of expectation of life—Death of infant—Considerations affecting amount of award.

[*Benham* v. *Gambling* (H.L.), [1941] 1 A.C. 157, folld]

ACTION by administrator of estate of deceased infant for damages for death of infant as a result of being struck by a truck operated by a driver in defendants' employ. Judgment for plaintiff for $500.

Denis Murphy, for plaintiff.
Alfred Bull, K.C., for defendants.

MORRISON C.J.S.C.:—Itoku Murakami, the father of the liftle 3 year old girl, Hideko Murakami, lives with his family at Steveston, an insalubrious location, upon which is an agglomeration of small houses and shops, protected from the waters of the Fraser River by a dyke along which is the dirt road in question. Canneries and other buildings are strewn along—Inside the dyke is a sluggish, rather dead, insanitary looking ribbon of water, really a large ditch or small slough. The inhabitants are mostly Japanese fishermen and labourers. Many of them live along this dyke. It is somewhat congested. The father is a fisherman, at present out of employment owing to extraneous circumstances beyond his control. The child was

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The driver of the truck owed the child, who was killed, a duty to take care. The duty, a breach of which gives rise to a cause of action in negligence, is to take care under the circumstances. It is, of course, reciprocal. I find that the driver committed a breach of that duty, which was the sole cause of the fatality. I had a view of the place in the presence of counsel—without which it would be difficult, if not impossible, to visualize from snapshots produced at the trial the situation and to believe that any one, having sense enough to be put in control of a motor-vehicle, would be so indifferent to the presence of the two children of whom he had a clear view. He was proceeding along a dirt road towards a plank thoroughfare, 54 feet wide, into which he intended to turn. He saw them on the road and sounded his horn, put variously up to some 40 feet away, whereupon they went off the road onto the wide plank road and stood some few feet in from the road and well to the side, all the time in clear view of the driver. When asked what signal, if any, he gave at the critical juncture, he indicated in the box, by putting up his hand, the usual signal. This with a view of indicating to the infant child his intention—as well do it to warn a little puppy which he had seen standing in the way. Had he instead sounded his horn even then they might not have escaped. He could as well have proceeded easily at least 20 feet along the dirt road before making his turn in that space of 54 feet. This appeared so obvious at the view. He made too short a turn, apparently disregarding the children's presence. With all deference to the young driver, who had only been driving a truck for two weeks, he impressed me as being just plainly stupid. I was not impressed by either the powers or opportunity of observation of the witness Chambers and particularly Larsen. The witness Shirakawa impressed me as being an impartial witness, notwithstanding counsel's submission to the contrary.

As to the quantum of damages to which the plaintiff is entitled I am guided by the last word on that heading by the case of *Benham* v. *Gambling*, [1941] A.C. 157 in assessing the damages in this kind of case. I use the headnote, which puts the matter compendiously, supplemented by a few extracts from the case

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"The thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life . . .

"The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a Court of law." [p. 166]

"Stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead." [p. 168]

The speech of the Lord Chancellor ends by expressing a pious hope: "I trust that the views of this House, expressed in dealing with the present appeal, may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy." [p. 168]

There will be judgment for the plaintiff for general damages, which I place at $500. The costs will be on the Supreme Court scale.

Judgment for plaintiff.

MEMORANDA DECISIONS.

MEMORANDA OF ORAL JUDGMENTS AND OF LESS IMPORTANT CASES DISPOSED OF IN SUPERIOR AND APPELLATE COURTS AND OF SELECTED CASES DECIDED BY LOCAL OR DISTRICT JUDGES, MASTERS AND REFEREES.

BAILEY AND BAILEY v. SOCIETY OF ENDERBY GENERAL HOSPITAL INCORPORATED.

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British Columbia Supreme Court, Fisher J. December 8, 1941.

Master & Servant V B—Workmen's Compensation Act—Cook-housekeeper in hospital—Not "domestic servant"—Right to damages for personal injuries in course of employment.

[*Workmen's Compensation Act*, R.S.B.C. 1936, c. 312, ss. 2(2), 81(1), consd.]

H. R. Bray and *H. Richmond*, for plaintiff.
Gordon Lindsay, for defendant.

THIS was an action for damages for personal injuries sustained by plaintiff as a result of a fall in defendant's hospital where she was employed as a cook-housekeeper. The facts were that while engaged in her duties plaintiff had occasion to use a stairway, and the step gave way owing to the rotten condition of the nails when she put her foot upon it, the result being a fall and the injuries in question. His Lordship said that he found plaintiff's injuries were caused by reason of a "defect in the condition . . . of the ways . . . buildings, or premises connected with, intended for, or used in the business of [her] employer" within the meaning of such words as used in s. 81(1) of Part II of the *Workmen's Compensation Act*, R.S.B.C. 1936, c. 312. The question then remained whether plaintiff's employment was one to which Part II of the Act applies. By s. 2(2) it is provided that the Act shall not apply to domestic servants or their employers, and defence counsel contended that the nature of plaintiff's employment constituted her a domestic servant. From the following cases cited by counsel for the defendant: *Pearce* v. *Lansdowne* (1893), 62 L.J.Q.B. 441, 69 L.T. 316; *Re Unemployment Insurance Act, 1920, Re Junior Carlton Club*, [1922] 1 K.B. 166; *Savoy Hotel Co.* v. *London County Council*, [1900] 1 Q.B. 665, and *Taylor* v. *Hudson's Bay Co.* (1935), 50 B.C.R. 157, His Lordship drew the conclusion that every case must stand on its own merits, and it was therefore necessary for him to consider the evidence as to the nature of plaintiff's employment. This was to the effect that plaintiff