
CANADA / JUDGMENT

Faircrest v. Buchanan

2015 BCSC 657

COURT

Supreme Court of British Columbia

DECIDED

27 April 2015

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2015 BCSC 657 Faircrest v. Buchanan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Faircrest v. Buchanan,

2015 BCSC 657

Date: 20150427

Docket: S116211

Registry: Vancouver

Between:

Roslin Faircrest

Plaintiff

And

Myrna Buchanan and Fraser Health Authority

operating a public hospital under the name

Connolly Lodge and the said Connolly Lodge

Defendants

Corrected Judgment: The text of this judgment was corrected

at paras. 3 and 67, on August 13, 2015

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for Plaintiff:

M.G. Bolda

Counsel for the Defendants:

R.J. Bailey

T. Young, A/S

Place and Date of Hearing:

Vancouver, B.C.

February 12, 2015

Place and Date of Judgment:

Vancouver, B.C.

April 27, 2015

INTRODUCTION

- [1] The plaintiff, Roslin Faircrest, was a volunteer at Connolly Lodge (the "Lodge"), a residential mental health facility operated by the defendant Fraser Health Authority ("Fraser Health") when, on November 25, 2009, a nurse employed by Fraser Health at the Lodge, Myrna Buchanan, unintentionally bumped into her while leaving her office to attend to a patient (the "Collision"). Roslin Faircrest fell down and suffered a fractured left hip and soft tissue injuries. She commenced an action claiming damages for her injuries.
- [2] Nurse Buchanan was originally a defendant, but the plaintiff has discontinued the action against her, and Fraser Health has agreed that if Nurse Buchanan was negligent, then Fraser Health will not dispute that they are vicariously liable.
- [3] The matter now comes before me on an application by the defendant Fraser Health for summary judgment under Rule 9-7 of the Supreme Court Civil Rules. Both parties agree that the matter is suitable for summary determination. The defendant seeks an order that the action be dismissed. The plaintiff seeks an order for judgment in her favour on the issue of liability. If the plaintiff is successful, then both parties have agreed that the assessment of damages can be determined in a subsequent proceeding.

FACTS

- [4] Following examinations for discovery, the parties were able to agree on a Joint Statement of Agreed Facts, which has been filed as an exhibit to the affidavits of Pat Eskola. Additional evidence filed on this summary trial includes the affidavit of Roslin Faircrest sworn February 5, 2015, the affidavit of Myrna Buchanan sworn September 13, 2013, and the affidavit of Judith Macrae sworn July 29, 2014. Ms. Macrae is the Clinical Director of Fraser Health. Based on this material, the facts may be summarized as follows.
- [5] Connolly Lodge, which opened in March 2002 on the grounds of Riverview Hospital in Coquitlam, is a tertiary residential care home for long-term intensive psychosocial rehabilitation of patients requiring assistance in managing their mental health illness.
- [6] There are two other buildings on the Riverview Hospital grounds for mental health patients, which are called Cottonwood and Cypress.
- [7] Fraser Health usually has one nurse and two rehabilitation workers on staff during the day shift from 7:00 a.m. to 7:00 p.m. (the "Staff"). There is also a contracted cleaner who cleans during the day.
- [8] Connolly Lodge has 20 beds for mental health patients. These patients typically suffer from mental health illnesses such as schizophrenia, schizoaffective disorder and bipolar disorder. Some of the patients can become easily upset and turn violent. Some of the patients over the years have been charged with serious assaults, including murder.
- [9] The Staff need to be constantly aware of the possibility of a patient at the Lodge becoming violent. It is not uncommon for patients to threaten violence or become violent towards other patients and staff. Assaults are a common concern for the Staff. Threats of violence and actual incidences of violence from the patients could occur as little as a few times a month up to as much as several times in one shift.
- [10] Some of the patients are allowed to leave the hospital during the day if they are supervised by staff or volunteers.
- [11] At the time of the incident on November 25, 2009, the volunteer program at Connolly Lodge had only recently been put in place. Volunteers are not staff, nor do they receive the same training as staff.
- [12] All staff and volunteers are given a personal protection alarm, which hangs on a cord around the neck. When they press the alarm, all staff from the Lodge, Cottonwood, and Cypress are warned of someone's urgent need for help and will come to help. If the situation escalates, then the Staff can call on an emergency phone for an outside security company to provide one or two security guards. Staff can also call for the RCMP if necessary.

- [13] Ms. Faircrest had been screened and accepted by an independent contractor, the Fraser North Community Volunteer Connections society, as a volunteer with Fraser Health. She started volunteering with Fraser Health in 2005. Her role at that time was screening kindergarten-aged children for hearing aids. She has also volunteered at a breast-feeding clinic and a flu clinic.
- [14] Ms. Faircrest applied to be a volunteer with Fraser Health in 2009 after seeing an advertisement at the Lodge requesting volunteers. She phoned a volunteer coordinator who was organizing the volunteers on behalf of Fraser Health. She was interviewed by the volunteer coordinator and started volunteering at the Lodge in August 2009.
- [15] Ms. Faircrest's view of her responsibilities as a volunteer at the Lodge was that she talk to patients, listen to them, and otherwise interact with them.
- [16] Ms. Faircrest attended the Lodge once or twice a week from August until the date of the incident. She was given a personal protection alarm in case of any potentially dangerous or violent situations arising with the patients.
- [17] At the time of the Collision, Ms. Faircrest was 60 years old, stood about 5'2" tall and weighed about 95 lbs. She has, and had at that time, rheumatoid arthritis in her kneecaps, ankles and fingers, which caused her to walk more slowly than most people of her age, but she did not use a walker, a cane or any walking aides. She owned a battery powered scooter, but she only used it a few times a year for longer excursions. She did not inform Fraser Health of her scooter, and she never used it at the Lodge.
- [18] Nurse Buchanan had been a psychiatric nurse for 30 years at the time of the Collision and worked at the Lodge since it opened in 2002. She has regular training in non-violent crisis intervention as part of her training with Fraser Health.
- [19] At the time of the incident, Nurse Buchanan was 5'6" and weighed 185 lbs. She does not wear glasses or contact lenses for seeing long distances, but she does wear reading glasses.
- [20] Nurse Buchanan was the head nurse at the Lodge, and all staff reported to her. Her role was to oversee every aspect of activity that took place at the Lodge during her 12-hour shift, including responsibility for what went on at the Lodge while she was there, but her duties did not include supervising or coordinating the volunteers. Safety was a priority.
- [21] Volunteers were not required to report to the head nurse upon arrival or before interacting with patients, but Nurse Buchanan was aware that Ms. Faircrest was at the Lodge the day the Collision occurred. Prior to the Collision, she had safety concerns about Ms. Faircrest being a volunteer at the Lodge, but she did not tell her employers about those concerns.
- [22] The Collision was the first such occurrence involving any injuries that Ms. Buchanan has had with other Staff, volunteers or patients while working.

- [23] Nurse Buchanan started her shift at 7:00 a.m. on the day of the incident, and Ms. Faircrest's shift as a volunteer began around 1:00 or 2:00 p.m. Her husband was also volunteering at the Lodge that day.
- [24] There were two rehabilitation workers on shift that day, Stephanie Kohrs and Christine Balinski.
- [25] At about 3:15 in the afternoon, a patient, Ms. Jaworski, started to become visibly upset. She was crying, yelling and screaming and was becoming increasingly agitated. Ms. Jaworski walked from the main entrance through the middle of the Lodge and turned right towards her room past the nursing office and staffroom.
- [26] Ms. Jaworski was known by staff and Nurse Buchanan to be violent on occasion when she became overly agitated. She had at times flipped tables over, slammed doors shut, and started fights with other patients.
- [27] Ms. Faircrest had been preparing to bake with another patient in the kitchen area. She was walking towards the building entrance when she first heard and saw Ms. Jaworski. Ms. Faircrest asked Ms. Jaworski if everything was okay. Ms. Faircrest was stationary and a few feet outside of the door of the office at this time. Ms. Faircrest watched Ms. Jaworski come in the main entrance, walk by the nursing station and turn towards the section of the Lodge where her room was. Ms. Faircrest continued to watch Ms. Jaworski right up to the point that the Collision occurred.
- [28] Nurse Buchanan was in the nursing office when Ms. Jaworski started to become agitated and yell and scream. Ms. Jaworski would become agitated like this several times during a typical day. Nurse Buchanan quickly got up and left the office in order to calm Ms. Jaworski. She was in a hurry to get to the patient when the Collision occurred.
- [29] Nurse Buchanan was looking straight at Ms. Jaworski as she proceeded out of the office. She observed Ms. Jaworski running and screaming. Nurse Buchanan's pace was a brisk walk.
- [30] Nurse Buchanan had taken about two or three steps out of the office and towards Ms. Jaworski when the Collision occurred. Nurse Buchanan's front and left side collided with the right side of Ms. Faircrest's body. Ms. Faircrest wobbled for a moment, before falling and landing on her left side, causing her injury.
- [31] Nurse Buchanan did not fall over. She apologized to Ms. Faircrest immediately afterwards.
- [32] Neither woman saw each other before the Collision. Both of them were watching Ms. Jaworski.
- [33] Nurse Buchanan was walking straight on a line to intercept Ms. Jaworski, watching Ms. Jaworski.
- [34] There were no independent witnesses to the Collision.

THE POSITIONS OF THE PARTIES

[35] In her amended notice of civil claim, the plaintiff alleges four alternative bases of liability: breach of the Occupiers Liability Act, R.S.B.C. 1996, c. 337 (the "Act"); negligent walking, negligent permission; and trespass to the person.

[36] The defendant denies liability under each of these four heads.

THE OCCUPIERS LIABILITY ACT

[37] It is not disputed that Fraser Health was an occupier within the meaning of the Act.

[38] Pursuant to s. 3(1) of the Act, an occupier of premises owes a duty to take reasonable care to see that a person on its premises will be reasonably safe in using the premises.

[39] That section provides:

3. (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

[40] Section 3(2) stipulates that the duty of care applies in relation to the condition of the premises, activities on the premises, or conduct of third parties on the premises. However, pursuant to s. 3(3), an occupier has no duty of care to a person in respect of risks the person willingly assumed, other than a duty not to create a danger with intent to harm the person or damage property, or to act with reckless disregard to the safety of the person or the integrity of the person's property.

[41] In *Agar v. Weber*, 2014 BCCA 297, the British Columbia Court of Appeal discussed the relationship between liability under the Act and the common law of negligence:

[29] In negligence, the common law requires a plaintiff to establish:

1. a duty of care to conform to a certain standard of care for the protection of others against unreasonable risks. The duty does not extend to the removal of every possible danger, rather the test is one of reasonableness: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28;
2. a breach of that duty by some act or omission by the defendant; and
3. the breach of duty is the proximate cause of a plaintiff's injury, meaning there must be a nexus between the injury sustained by the plaintiff and the defendant's negligent act or omission: see *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 54. [Emphasis in original.]

[30] The standard of care under the OLA and at common law for negligence is the same: it is to protect others from an objectively unreasonable risk of harm. Whether a risk is reasonable or unreasonable is a question of fact.

[31] Under the statutory test for occupiers liability, the Court in *Waldick v. Malcolm*, [1991] 2 S.C.R. 456 described the standard of care at 472:

...the statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe. That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation -- thus the proviso "such care as in all the circumstances of the case is reasonable". [Emphasis in original.]

[32] Similarly, in *Ryan v. Victoria (City)*, the Court described the standard of care for negligence as follows:

[28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of the harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[42] Thus, in the present case, the issue in relation to liability under the Act is whether Fraser Health breached its duty to take such care as in all the circumstances of the case was reasonable to see that Ms. Faircrest would be reasonably safe in using the premises.

[43] Unlike many occupier liability actions, there is no evidence here that Ms. Faircrest's injuries were caused by design flaws, physical hazards or dangers inherent to the property. Rather, the claim appears to be that Fraser Health should have known and taken steps to ameliorate, or otherwise warn volunteers at the Lodge, of the possibility that nurses might move quickly through the Lodge when responding to a patient crisis.

[44] As *Agar v. Weber* and *Waldick v. Malcolm* make clear, the duty under the Act to take reasonable care in the circumstances to make the premises safe, is necessarily very specific to each fact situation. In the present case, the most salient fact is that the Lodge is a mental health care unit intended to provide care to patients who are prone to violence. Thus, the duty of care owed by Fraser Health to volunteers at the Lodge must be understood in light of the everyday reality of the Lodge and its attendant emergency situations.

[45] It is obvious that there will be some risk to those who volunteer at such a mental health facility. Fraser Health took steps to ameliorate the risk by requiring volunteers to wear personal protection alarms and by having a system in place for Staff to assist in emergencies, and by having its employees, such as Nurse Buchanan, take non-violent intervention courses to handle mental health patients.

[46] The incident in the present case was unusual, in that it did not directly involve an interaction between a mental health patient and a volunteer. Rather, it involved unintentional contact between a nurse responding to an emergency and a volunteer. Such an occurrence had never before happened at the Lodge, and in all the circumstances, it is not reasonable to expect that Fraser Health should have foreseen the risk and taken steps to prevent it. There is no liability under the Act.

NEGLIGENT PERMISSION

[47] In the alternative, Ms. Faircrest submits that Fraser Health was negligent in permitting her to work as a volunteer at the Lodge or in failing to warn her that she might get knocked down by a nurse.

[48] Ms. Faircrest concedes in her response to application that this is "admittedly not the plaintiff's strongest argument." I agree with that assessment.

[49] The incident here, involving a collision between a nurse and a volunteer, was not only unforeseen; it was not reasonably foreseeable. Nothing like this had ever happened before. I cannot accept that Fraser Health had a duty of care to Ms. Faircrest either to prevent her from working as a volunteer or to warn her that a nurse might bump into her and cause her to fall.

TRESPASS TO THE PERSON

[50] Next, Ms. Faircrest submits that Nurse Buchanan committed the tort of trespass to the person and that Fraser Health is therefore vicariously liable for damages.

[51] The tort of trespass to the person, which includes battery, was discussed in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24. There, Chief Justice McLachlin, for the majority, wrote at paras. 4-5:

4 This Court has long affirmed this proposition. In *Cook v. Lewis*, [1951] S.C.R. 830, at p. 839, Cartwright J. stated that "where a plaintiff is injured by force applied directly to him by the defendant his case is made by proving this fact and the onus falls upon the defendant to prove 'that such trespass was utterly without his fault'."

5 In *Larin v. Goshen* (1974), 56 D.L.R. (3d) 719 (N.S.C.A.), at p. 722, Macdonald J.A., citing numerous authorities, stated: "The law in Canada at present is this: In an action for damages in trespass where the plaintiff proves that he has been injured by the direct act of the defendant, the onus falls upon the defendant to prove that his act was both unintentional and without negligence on his part, in order for him to be entitled to a dismissal of the action." [Emphasis in original.]

[52] She continued at para. 8:

8 The traditional rule, as noted, is that the plaintiff in an action for trespass to the person (which includes battery) succeeds if she can prove direct interference with her person. Interference is direct if it is the immediate consequence of a force set in motion by an act of the defendant: see *Scott v. Shepherd* (1773), 2 Black. W. 892, 96 E.R. 525 (K.B.); *Leame v. Bray* (1803), 3 East 593, 102 E.R. 724 (K.B.). The burden is then on the defendant to allege and prove his defence. Consent is one such defence.

- [53] In *Scalera*, the primary issue was who bore the onus of proving that the application of force was without consent. The Court reaffirmed the traditional view that for the tort of trespass to the person, the onus is on the defendant to prove any defence, including consent.
- [54] In the present case, it is clear that Nurse Buchanan directly interfered with the plaintiff's person. No issue arises about consent. Nurse Buchanan would have a defence to the tort of trespass to the person if the interference was neither intentional nor negligent.
- [55] The plaintiff does not suggest that Nurse Buchanan intentionally collided with her. The question then, is whether she was negligent. That is a question which, in these circumstances, is best examined under the next heading.

NEGLIGENT WALKING

- [56] Ms. Faircrest submits that Nurse Buchanan was negligent in bumping into her and that Fraser Health is vicariously liable for the injuries she suffered as a result.
- [57] The parties are in agreement that there are four elements to be proved by the plaintiff in an action for negligence, as set out in para. 3 of *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27:
 - [3] A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach. I shall examine each of these elements of negligence in turn. As I will explain, Mr. Mustapha's claim fails because he has failed to establish that his damage was caused in law by the defendant's negligence. In other words, his damage are too remote to allow recovery.
- [58] The first and the third elements are not in issue, since Fraser Health acknowledges that Nurse Buchanan owed the plaintiff a duty of care and that the plaintiff was injured in the Collision. Fraser Health also acknowledges that it is vicariously liable if Nurse Buchanan is found to have been negligent.

[59] As to the fourth element, Fraser Health contends that even if the plaintiff's injuries were in fact caused by the Collision, they were too remote to warrant damages, and therefore, legal causation has not been established. Fraser Health submits that a person of ordinary fortitude would not have fallen as a result of the Collision, or if she did, she would not have sustained injury.

[60] I do not agree. There is no evidence that Ms. Faircrest's arthritis, age, or stature had anything to do with her sustaining injuries in the Collision. Although she may have walked more slowly than others, that was not a relevant factor in the outcome. It was reasonably foreseeable that if Nurse Buchanan, who weighed 185 lbs., while not watching where she was walking, collided with a female volunteer, that volunteer might fall and suffer physical injuries. The injuries are not too remote to warrant damages, if the standard of care was breached.

[61] We come then to the third element, breach of the standard of care. The standard of care in the case of collisions between pedestrians was described in this way by Dhillon J. in *Mills v. Moberg* (1996), 27 B.C.L.R. (3d) 277 (S.C.) at para. 6:

The duty of pedestrians to one another is to act as an ordinary person would in the circumstances, using the degree of care and vigilance which the circumstances and the interests of others using the walkway demand.

[62] In that case, Dhillon J. found a delivery driver liable in negligence for having knocked over another pedestrian as he walked around the corner of his truck in a mall parking lot, causing the 76-year-old plaintiff to fall and break her hip. She wrote at para. 6:

In this case, the defendant, Moberg, failed to consider the possibility of other pedestrians in the parking lot despite the configuration of the lot which necessitated pedestrians to cross the lot to reach the shops. Given the proximity of the mall to long term care and rehabilitation facilities and given Moberg's regular presence at the mall, Moberg should have been alert to the presence of pedestrians including disabled persons in the vicinity. He did not look to his right as he quickly rounded the rear of his delivery van to reach the driver's door. His failure to look for other pedestrians was the cause of the collision.

[63] In the present case, it is, of course, relevant that Connolly Lodge is a residential mental health facility and that Nurse Buchanan had a duty to react quickly to the disturbance caused by one of the patients. Nevertheless, her quick reaction was no reason to be heedless of other persons standing or walking in the Lodge who might be in her path as she proceeded to attend to the patient. Her failure to notice the presence of the plaintiff in her path caused the Collision.

[64] I therefore find that Nurse Buchanan was negligent, and that Fraser Health is vicariously liable for her negligence.

CONTRIBUTORY NEGLIGENCE

[65] Fraser Health has pleaded the provisions of the Negligence Act, R.S.B.C. 1996, c. 333 and submits that the plaintiff was contributorily negligent. As Fraser Health put it in its written submissions:

With respect to the claims under the Act, for negligent walking and for trespass to the person, the plaintiff stopped just outside the nursing station. She ought to have known once she heard Ms. Jaworski start to become agitated that the only nurse in charge at the Lodge would be the first responder. By continuing to stand near the entrance of the nursing station as she did and stare at Ms. Jaworski, she left herself in the way of Nurse Buchanan. It behooved her to recognize the situation and to move out of the way.

[66] I agree with that assessment. The plaintiff was partly responsible for the Collision because she was heedless of Nurse Buchanan, just as Nurse Buchanan was heedless of her. The plaintiff should have realized that when the situation arose with Ms. Jaworski, staff would have to respond quickly, and volunteers should ensure that they do not block their path. I find Ms. Faircrest to be 40% responsible for the Collision.

CONCLUSION

[67] I agree with the parties that this matter is suitable for summary determination under Rule 9-7, and I find, on the issue of liability, that Fraser Health is vicariously liable for the negligence of Nurse Buchanan in causing the injuries to Ms. Faircrest. I find that Fraser Health is 60% responsible, and that Ms. Faircrest is 40% responsible for the Collision.

[68] As agreed by the parties at the outset of this summary trial, the assessment of damages may, if necessary, be determined in a subsequent proceeding.

The Honourable Mr. Justice W.F. Ehrcke

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Prepared on 26 October 2026 · Esheria