

CANADA / JUDGMENT

Finlay et al. v. Auld

[1975] 1 SCR 338

COURT

Supreme Court of Canada

DECIDED

2 October 1973

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

Finlay et al. v. Auld

Collection

Supreme Court Judgments

Date

1973-10-02

Report

[1975] 1 SCR 338

Judges

Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora

On appeal from

Nova Scotia

Subjects

Professional law

Decision Content

Supreme Court of Canada

Finlay et al. v. Auld, [1975] 1 S.C.R. 338

Date: 1973-10-02

William Gordon Finlay and Nancy Jean Finlay (Plaintiffs) Appellants;

and

Benson Auld (Defendant) Respondent.

1973: February 8, 9; 1973: October 2.

Present: Judson, Ritchie, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, APPEAL DIVISION

Physicians & Surgeons—Inference of negligence—Res ipsa loquitur—Sudden onset of condition—Rebuttal—Alternative explanation.

The female plaintiff had a suspected condition known as sarcoidosis and the defendant performed on her an operation known as a scalene node biopsy. This operation was performed within twenty minutes and the biopsy proved negative. After the operation the patient's voice became husky and she had difficulty in swallowing, apparently due to a paralysed vocal chord occasioned by injury to a nerve. At trial Gillis J. found that the plaintiffs had not established sufficiently that the disability was of sudden onset however the Appeal Division felt that the plaintiffs appellants had made out a prima facie case to apply the rule in *Scott v. London and St. Katherine Docks Company* (1865), 3 H & C. 596 and require the respondent to produce a reasonable explanation equally consistent with negligence and no negligence. The Appeal Division was satisfied as was Gillis J. at trial that the respondent had produced such an explanation and the judgment at trial was affirmed.

Held: The appeal should be dismissed.

As the appellants have made out a prima facie case of sudden and serious voice impairment manifested directly after the operation this is a case in which the rule in *Scott v. London and St. Katherine Docks Company* comes into play, whether or not the respondent has rebutted any inference of negligence is the whole case. It was indicated that there could have been a number of causes of the voice impairment, such as tuberculosis or a tumour, but that the condition of sarcoidosis from which the patient was apparently suffering was the likely cause of the damage, and that such damage would manifest itself suddenly or rapidly.

APPEAL from a judgment of the Supreme Court of Nova Scotia, Appeal Division, dismissing an appeal from Gillis J. at trial. Appeal dismissed with costs.

Scott v. London and St. Katherine Docks Company (1865), 3 H & C. 596; *United Motors Services Inc. v. Hatson et al.*, [1937] S.C.R. 294; *Woods v. Duncan*, [1946] A.C. 401 referred to.

Stewart McInnes, for the appellants.

Ian MacKeigan, Q.C., and Roy I. Logan, for the respondent.

The judgment of the Court was delivered by

RITCHIE J.—This is an appeal from a judgment of the Appeal Division of the Supreme Court of Nova Scotia dismissing an appeal from a judgment rendered at trial by Mr. Justice Gillis whereby he had dismissed the appellants' action claiming damages for partial loss of her voice due to the respondent's negligence in the performance of an operation known as a scalene node biopsy, the purpose of which was to confirm a suspected condition of sarcoidosis by extraction and analysis of certain lymph nodes from her neck.

The operation was performed within twenty minutes and although the analysis of the lymph nodes was negative, the appellant's voice, which had formerly been normal, thereafter became husky and she developed difficulty in swallowing. This condition prevailed for several months with gradual improvement.

The evidence of the distinguished doctors who were called for both parties to the action is extensively analyzed in the reasons for judgment of the learned trial judge and I am satisfied to adopt his version of that evidence.

The trial judge has found as a fact that Miss Finlay suffered from a paralyzed vocal cord which was apparently occasioned by injury to the left recurrent laryngeal nerve. This disability manifested itself after the operation but the trial judge concluded that:

Upon consideration of the whole of the evidence on this point I find that the plaintiffs have not established, by a preponderance of evidence, or upon the balance of probabilities, that the disability was of sudden onset. I reject the direct testimony of the plaintiffs, and accept the other facts and opinions, in reaching that conclusion.

The evidence of the female plaintiff and of her father in this regard is summarized in the reasons for judgment of the learned trial judge:

The day following the operation the female plaintiff describes her voice as resembling laryngitis and very husky. On that day she drank some milk and could recall choking twice as she swallowed it. Her father saw her on the evening following the operation, and indicates that she spoke in a whisper, but this did not cause undue alarm because the explanation had been made that anaesthesia by intubation could have been the cause and that these were temporary ill effects of that procedure. The father also says that 'she was like a very severe case of laryngitis.' The defendant saw her only briefly following the operation. At that time, she was walking in the hallway of the hospital and he said 'He was going to come in to see me.' He asked her how she was and she had replied that she was fine. She did not see him again. No complaint was made by the female plaintiff or her parents to nurses or other hospital staff about her throat, voice or any choking difficulty. This was so because they had accepted the explanation of the effect of intubation made by Dr. Nicholas, as they said.

The explanation that intubation was the cause of the voice condition proved to be wrong because the condition persisted for five days while the appellant was in the hospital and for some months thereafter and on February 17, 1968 (three months after the operation) Dr. D.K. Murray, who was an experienced eye, ear, nose and throat specialist, found that her left vocal cord was completely paralyzed. Dr. Nicholas, a specialist in internal medicine who visited the appellant in hospital after the operation, testified that at that time the voice change was noticeable.

The finding of the learned trial judge that the plaintiffs had not established “by a preponderance of evidence or upon a balance of probabilities that the disability was of sudden onset” is based almost exclusively on the answer that the plaintiff gave when Dr. Auld asked of her condition in the hallway of the hospital, and the fact that she did not complain to the hospital staff. In this regard he expressed himself as follows:

To make a finding here I have not only the subjective testimony of the female plaintiff and her parents and the repetition of it in the histories but some other facts and opinions as well. As to the facts, there is the statement, made by the female plaintiff to the defendant, following the operation, that she was fine; there was no complaint, as I would expect, upon the hospital record during five days or upon discharge; there was no complaint of choking attacks to Dr. William Nicholas, although there was complaint of hoarseness; there was the return of the female plaintiff to her work; the delay until December 6, 1967, in seeing Dr. Ian MacPherson, at which time also the female plaintiff complained only of the difficulty of speech and not of choking attacks.

I have discussed this initial finding of the trial judge at some length because I share the difficulty regarding it which was experienced by the members of the Appeal Division. In the course of the reasons for judgment which he delivered on behalf of that Division, Mr. Justice Coffin adopted the following view:

The trial judge found as a fact that Miss Finlay suffered from a paralyzed vocal cord and there is ample medical evidence to support that finding. In considering the source of injury he went on to mention such testimony as that of Dr. D.K. Murray who excluded disease as a cause of injury because Nancy Finlay ‘would not have had a sudden, abrupt onset of vocal disability, as he found or assumed she had here, if that disability were caused by disease.’ This same distinction was made by other witnesses such as Dr. Richard L. Saunders and Dr. Ian MacPherson.

The trial judge found that the plaintiff had not established by a preponderance of evidence or upon the balance of probabilities that the disability was of sudden onset—‘I reject the direct testimony of the plaintiffs, and accept the other facts and opinion, in reaching that conclusion.’

I have some difficulty with this conclusion. The statement made by Nancy Finlay to Dr. Auld that ‘she was fine’ is explained by the fact that her mind had already been put at ease by Dr. Nicholas. It appears to me that there was ample evidence that the hoarseness and difficulty in swallowing occurred immediately after the operation. The statement that the effect of trauma is that a person will have ‘no voice’ must be considered in this context. Dr. Murphy did say that when people suffer from the severing of the recurrent laryngeal nerve—‘their main complaint is that they have

no voice or essentially no voice and that they whisper.’

There is no doubt that the patient here complained of huskiness or hoarseness of her voice, and that this condition was not present prior to the operation.

With deference I do not think that the possibility of traumatic injury to the recurrent laryngeal nerve can be dismissed on this basis. That, however, is not the end of the matter.

The opinion of the Appellate Division in this regard is more clearly stated towards the end of Mr. Justice Coffin’s reasons for judgment where he said, speaking of the learned trial judge:

Did he err in finding the appellants have not established by a preponderance of evidence that the disability was of sudden onslaught? As I said earlier in this opinion I agree with the appellant’s submission on this point.

In this regard I share the view of the Court of Appeal which leads me to the conclusion that the appellants had made out a *prima facie* case to the effect that the sudden and serious voice impairment manifested itself directly after the operation and that having regard to the fact that the operative procedure was under the sole management and control of the defendant, this is a case in which the rule of evidence stated in *Scott v. London and St. Katherine Docks Company*[1], at p. 601, comes into play. The following language used in that case was expressly adopted by Sir Lyman Duff in *United Motors Services Inc., v. Hutson et al.*[2] at p. 297:

There must be reasonable evidence of negligence. But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

Sir Lyman, however, added the following qualification:

Broadly speaking in such cases where the defendant produces an explanation equally consistent with negligence and with no negligence the burden of establishing negligence still remains with the plaintiff.

This interpretation of the rule is consistent with the judgment of the House of Lords in *Woods v. Duncan*[3] at p. 419 which is referred to in the judgment of the Appellate Division, where Viscount Simon pointed out that even where the rule applies the defendant is not to be held liable because he cannot prove exactly how the accident happened.

Like the members of the Appellate Division, I am accordingly of opinion that the present circumstances were such as to require the respondent to produce a reasonable explanation equally consistent with negligence and with no negligence and I agree with Mr. Justice Coffin where he says:

I have already considered the portion of this ground dealing with the maxim *res ipsa loquitur*. Whether or not he has rebutted any inference of negligence appears to me to be the whole case.

Dr. Auld and medical witnesses called on his behalf, testified that in performing the operation which he did, it would have been virtually impossible for him to interfere in any way with the recurrent laryngeal nerve, and although some of the doctors who gave evidence for the plaintiff, and particularly one Dr. Saunders, supported a contrary view, it is nevertheless clear that the learned trial judge was entitled to adopt the former opinion. I would, however, have found more difficulty in reaching a conclusion in this case if the defence had rested solely on the ground that the disability could not have been occasioned by the operation, but Mr. Justice Gillis, basing his view on the evidence of Dr. Gordon, was able to attribute the damage to the nerve to a different cause altogether which afforded an explanation consistent with no negligence. This finding of Mr. Justice Gillis is contained in the following passage of his reasons for judgment:

Dr. Saunders dismissed sarcoidosis as a cause of paralysis because he did not, from x-ray film or reports, have knowledge of enlarged nodes. It is clear that the written x-ray report did not describe such. But, the evidence of Dr. Gordon, which, in the circumstances, upon this fact and on opinion I accept in preference to that of Dr. Saunders, and that opinion of Dr. Gordon, substantiated at least in part by Dr. Scharfe, in my judgment, indicates the disease of sarcoidosis as the probable cause of loss of function of the left recurrent laryngeal nerve. I adopt that opinion and find that sarcoidosis is more likely the cause of Miss Finlay's problem than any other described in the evidence, including any act of the defendant.

Dr. Gordon did not see Miss Finlay until December, 1969, at which time he caused some x-rays to be taken which did not show "enlarged nodes" but his examination of x-rays taken in 1967 disclosed to him that at this time there was marked enlargement although it had not been noted in the reports accompanying these earlier x-rays. Dr. Gordon was asked:

Q. Now, these glands which were enlarged, the glands in question which were shown by the 1967 x-rays, was the enlargement significant in any way to you? A. Yes, they were. They were very large lymph glands and lymph glands are normally very small and on a normal chest they are not visible on the X-ray and when they are visible like this they are then enlarged many, many times.

Q. Now, are there any known consequences on the patient from such enlargement of these glands?

A. Yes. This is one of the commoner causes of the paralysis of the left recurrent laryngeal nerve due to the fact that the left recurrent laryngeal nerve comes off the Vagus nerve and comes down into the mediastinum off the heart and then goes back up to the larynx and so it goes down and up and through and is a quite common disorder to have,... It affects the nerve by stretching the nerve just as one would stretch an electric wire and you may stretch it to a certain point and suddenly the nerve gives out and the nerve functions give out.

Q. You used the word 'suddenly'?

A. Well, from a neurological point of view we know that a nerve can be impaired and still carry on its function up to a certain point and I would say that within a matter of fifteen minutes it will stop functioning.

Dr. Gordon indicated that there could be a number of causes, such as tuberculosis or a tumour which would cause the glandular swelling, but he concluded by giving the following opinion:

Q. There could have been several types of disorder, then, which would have or could have produced the symptoms shown in the X-rays?

A. Yes, yes.

Q. And as far as you know it is not definitely established what the source was?

A. No. It was not proven at all what the source was. I mean that all we know is that the enlarged glands were present and that the most likely thing, in my opinion as a specialist in internalism, is that this girl was suffering from sarcoidosis. However, it could have been other disorders because there are so many things and sarcoidosis is the only thing of which we do not know the cause. It will be noted that Dr. Gordon was of opinion that when the glands are enlarged so as to affect the nerve it “may stretch it to a certain point and suddenly the nerve gives out and the nerve functions give out” and he added that in such cases within a matter of fifteen minutes it will stop functioning and he also indicated the possibility that nerve damage could be created by deterioration of the nerve itself in which event “it would manifest itself suddenly or rapidly.”

The learned trial judge made a painstaking and extensive review of all the evidence and I do not think it can be suggested that anything was overlooked. At the end of this difficult case Mr. Justice Gillis reached the conclusion that the nerve damage had been caused by sarcoidosis and in so doing took into account the evidence of doctors who testified that the nerve in question could not have been reached during the operative procedures performed by Dr. Auld. I would not interfere with this finding and conclusion.

For all these reasons I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellants: Stewart McInnes, Halifax.

Solicitor for the respondent: Ian M. MacKeigan, Halifax.

[1] (1865), 3 H. & C. 596.

[2] [1937] S.C.R. 294.

[3] [1946] A.C. 401.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/5335/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/finlay-et-al-v-auld-1973>

Prepared on 27 October 2026 · Esheria