

CANADA / JUDGMENT

# Horvath v. Thring

2001 BCCA 551

## COURT

British Columbia Court of Appeal

## DECIDED

24 September 2001

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

2001BCCA0551 Citation: Horvath v. Thring Date: 20010924 2001 BCCA 551 Docket: CA026839 CA026840 Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA BETWEEN: YGOLA HORVATH (ALSO KNOWN AS JULES HORVATH) PLAINTIFF (RESPONDENT) AND: DOUGLAS WALTER THRING GENERAL MOTORS OF CANADA LIMITED, REID TATE, AL LUELO, BRUCE ASKEW DEFENDANTS (RESPONDENTS) AND: HER MAJESTY THE QUEEN IN RIGHT OF CANADA DEFENDANT (APPELLANT) Before: The Honourable Mr. Justice Hollinrake The Honourable Mr. Justice Donald The Honourable Madam Justice Newbury Helen J. Roberts Counsel for the Appellant Albert M. Roos Counsel for the Respondent Ygola Horvath Robert C. Brun Counsel for the Respondents Douglas Walter Thring and General Motors of Canada Place and Date of Hearing: Vancouver, British Columbia September 7, 2001 Place and Date of Judgment: Vancouver, British Columbia September 24, 2001 Written Reasons by: The Honourable Madam Justice Newbury Concurring in by: The Honourable Mr. Justice Hollinrake The Honourable Mr. Justice Donald Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] The plaintiff Mr. Horvath, a member of the R.C.M.P., was seriously injured in a motorcycle accident on the Patricia Bay Highway near Victoria in April 1994. The accident took place on a stretch of the highway which the R.C.M.P. had purported to "close off" to regular traffic in preparation for bicycle races that were to take place as part of the 1994 Commonwealth Games. Following a six-day trial on the issue of "liability", Mr. Justice Hardinge apportioned liability for the plaintiff's damages between the defendant Mr. Thring (the driver of a pick-up truck which collided with Mr. Horvath) and General Motors of Canada (the owner of the pick-up truck) as to 50 percent, and Her Majesty the Queen as to 50 percent. The Crown's liability arose as a result of the negligence of certain unidentified R.C.M.P. officers who had permitted Mr. Thring to proceed south along what was normally a northbound lane of the highway. In accordance with s. 4(2) of the Negligence Act, R.S.B.C. 1996, c. 333, the three tortfeasors were said to be jointly and severally liable. The material portion of Hardinge J.'s order provided as follows: THIS COURT ORDERS that liability is apportioned equally between, on the one hand, the Defendant, HER MAJESTY THE QUEEN IN RIGHT OF CANADA, and on the other hand, the Defendants, DOUGLAS WALTER THRING and GENERAL MOTORS OF CANADA LIMITED, with liability resting jointly and severally with these Defendants, and all of them; The Crown does not take issue with the Court's finding

that its agents or employees were 50 percent responsible for Mr. Horvath's injuries.

- [2] The plaintiff's damages were to be determined at a later stage: as Hardinge J. stated at para. 2 of his Reasons, "It was to determine to whom fault for the accident must be attributed that the matter came on for trial. At this stage liability is the only issue." Damages have not yet been assessed. Post-Trial Developments
- [3] Sometime after Hardinge J.'s order was entered and the time to appeal had expired, the Crown changed counsel. In about June 2000, the new counsel became aware that Mr. Horvath had applied for and been approved to receive a pension under the Royal Canadian Mounted Police Superannuation Act, R.S.C. 1985, c. R-11. (Section 32(1) of that Act provides that any person who served in the force after March 31, 1960 as a contributor under Part I and has suffered a disability, shall be granted a pension under the Pension Act, R.S.C. 1985, c. P-6. As well, s. 11(2) entitles any member of the force with more than ten years' credit, to an "immediate annuity" if he or she is compulsorily retired by reason of disability.) This in turn alerted counsel to the potential application of statutory provisions that are said to bar proceedings against the Crown in circumstances where the plaintiff has received or may receive benefits or compensation from the Crown. In particular, s. 111 of the Pension Act states: No action or other proceeding lies against Her Majesty or against any officer, servant or agent of Her Majesty in respect of any injury or disease or aggravation thereof resulting in disability or death in any case where a pension is or may be awarded under this Act or any other act in respect of the disability or death. In a similar vein, s. 9 of the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, states: No proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable out of the Consolidated Revenue Fund or out of any funds administered by an agency of the Crown in respect of the death, injury, damage or loss in respect of which the claim is made.
- [4] Upon becoming aware of Mr. Horvath's entitlement to a pension, counsel for the Crown wrote to counsel for Mr. Horvath in August. She requested that he consent to the amendment of the Crown's Statement of Defence to plead the foregoing and related statutory provisions. When he refused, the Crown applied in Chambers in the Supreme Court to amend its pleadings - even though the Crown also took the position that such amendments were not a necessary precondition for the Court to give effect to the statutory bars. As well, the Crown sought an order dismissing Mr. Horvath's action as against the Crown pursuant to R. 18A.
- [5] At the Chambers hearing, counsel for Mr. Horvath filed an affidavit exhibiting earlier correspondence between counsel. This material included a letter dated April 23, 1996 from Veterans' Affairs Canada to the plaintiff advising him that he qualified for a pension under the Pension Act and under the R.C.M.P. Superannuation Act on discharge from the R.C.M.P. The letter had been provided to counsel for the Crown in response to his request, more than two years before the trial before Hardinge J. Accordingly, Edwards J., the Chambers judge, inferred that "... while trial counsel for HMTQ had the means of knowledge of fact that the

plaintiff had been approved for this pension, he must have overlooked that fact or did not appreciate the possible significance of that fact." (para. 11.)

- [6] Edwards J. refused both applications brought by the Crown, on the basis that he lacked the jurisdiction to vary the entered order of another judge of the Supreme Court. As he noted: I am unaware of any authority, and none was brought to my attention by counsel, which provides a judge of this court with jurisdiction to reverse an entered order made by another judge after a trial, on the basis that order was made without jurisdiction. In the absence of any binding or persuasive authority, I have concluded I cannot confer that jurisdiction on myself by granting amendments to the pleadings which the applicant's counsel acknowledges were not necessary to put the relevant statutory provisions into play during the trial. Even if Hardinge J. erred in finding liability against HMTQ, and I make no finding that he did, I have concluded that it is not open to one judge of the court rectify an alleged jurisdictional error made by another which is reflected in an entered order, except as regards an error covered by Rule 41(24). See *Canada Trust Co. v. Sundist Holdings Ltd.* (1981), 29 B.C.L.R. 1. [paras. 28-30]
- [7] The Crown seeks to appeal both the portion of Hardinge J.'s order quoted earlier in these Reasons, and the order of Edwards J. dismissing the Crown's applications. Leave to appeal Edwards J.'s order was granted on March 31, 2001; and on June 7, 2001, a panel of this court granted leave and extended the time in which to appeal the order of Hardinge J. Arguments On Appeal
- [8] Turning first to the order of Hardinge J., Ms. Roberts on behalf of the Crown submitted that in the context of "split" personal injury actions, although counsel often speak of determining "liability" first and damages later, in fact the term "liability" is a misnomer, and the word "fault" is more accurate. In this regard, she noted the observations of Southin J. A. for the Court in *JJM Construction Ltd. v. Sandspit Harbour Society* (2000) 83 B.C.L.R. (3d) 293: The splitting of issues of liability and damages is common in actions arising from motor vehicle accidents and medical malpractice cases. It is, I think, a matter of common understanding on the part both of bench and bar that in the former the question on the trial of liability is whether the defendant was negligent in the operation of a motor vehicle and, when pleaded, whether the plaintiff was also at fault, and, when appropriate, what is the proper division of fault, and, in the latter, whether the medical man was in breach of his duty of care, both contractual and in tort, to the plaintiff, and, if so, whether that breach caused the loss asserted. [para. 23]
- [9] In the Crown's submission, all that Hardinge J. decided in this case was the factual question of whether and to what extent the respective defendants were responsible for Mr. Horvath's injuries. He did not decide the legal question of whether or to what extent the defendants would ultimately be liable for those injuries. Thus while not contesting that it was 50 percent "at fault" for the accident, the Crown submitted that in light of the statutory bars, it should not have been adjudged "liable" for the resulting damages.

[10] Ms. Roberts acknowledged that Crown counsel had conceded at trial that if officers of the R.C.M.P. were at fault for the accident, the Crown would be vicariously liable therefor. Despite that, she said, the trial judge's order cannot as a matter of law be allowed to stand in the face of the statutory bars, and indeed the interests of justice require this court to give effect to those bars by dismissing Mr. Horvath's action against the Crown. She likened the statutory bars to those created by provincial workers' compensation schemes in respect of damage actions brought by workers against their employers. In this regard, she noted *Dominion Canners Limited v. Costanza* [1923] S.C.R. 46, in which the plaintiffs sued their employer as a result of having contracted typhoid fever from drinking water at work. The Workmen's Compensation Act of Ontario was pleaded by the employer, but the trial and appeal courts held that the plaintiffs had not been injured "by accident" within the meaning of the Act, and that their right of action was therefore not barred. The Supreme Court ruled, however, that it was for the Compensation Board to determine the meaning of "accident" and the applicability of the statutory bar. In the meantime, the Court stayed the judicial proceedings even though a verdict had already been entered for the plaintiff at the end of the trial. Anglin J. for the majority observed: If the defendant does not plead the statutory bar but facts stated in the pleading or adduced in evidence at the trial indicate that the case might fall within s. 3(1) of the statute and that ss. 15(1) and 60(1) might therefore apply, the court would, I think, be if not obliged certainly free proprio motu, to take cognizance of those provisions and stay further proceedings in the action until the question whether the right to maintain it had been taken away by the Act should be determined by the only competent tribunal. [at 62; emphasis added.] and further: The proceedings in the trial court and in the Divisional Court were carried on under the belief and on the assumption that those courts were entitled to take cognizance of, and had jurisdiction to adjudicate upon, the issue raised by the plea based on section 15(1) of the Workmen's Compensation Act. The parties clearly meant to keep themselves in curia; the trial judge and the Divisional Court so understood the position; and both courts and parties thought an appeal was open. This is not a case of mere deviation from the *cursus curiae* in dealing with a subject-matter over which the court had jurisdiction - a case in which the taking of an intermediate appeal without challenging the original jurisdiction might preclude its being questioned on further appeal. . . . On the contrary, it is a case in which the courts have been divested by statute of jurisdiction over the subject-matter, and in which they have assumed the duty of another tribunal. *Pisani v. Attorney General* [52 Can. S.C.R. 466] at p. 522.) The plaintiffs are therefore not entitled to have the judgment which they hold treated as unappealable and conclusive in their favour, *Simpson v. Crowle* [[1921] 3 K.B. 243] at pages 250, 252-3, 255, 257, as they would have been had there been conscious assent to the question whether the action was one which the statute had taken away their right to maintain being dealt with by the trial judge *extra curiam*. The judgment of the Divisional Court is a final judgment appealable to this court under s. 36 of the Supreme Court Act; it is our duty to pronounce the decision at which the Divisional Court should have arrived (s. 51, Sup. Ct. Act); and that court in turn should have dealt with the question now before us as the trial judge should have done. [at 67-8; emphasis added.] [11] Counsel for the Crown also noted the decision of this court in

Hodgkin v. Port Alberni (City) (1996) 74 B.C.A.C. 106, where a police officer had been found 100 percent liable to the plaintiff for injuries suffered in a bicycle accident. The officer appealed and this court affirmed the finding of negligence; but in the course of its judgment, held that the trial judge had erred in ordering that the officer was "liable" when the issue of statutory immunity under s. 21 of the Police Act, R.S.B.C. 1996, c. 367, had yet to be resolved. Mr. Roos for the plaintiff notes that unlike Hardinge J. in this case, the trial judge in Hodgkin had been aware of s. 21 of the Police Act and had left that defence and others, including one under the Limitation Act, to be tried at a later date. (See para. 31 of this court's judgment.)

- [12] The majority per Hollinrake J.A. concluded that because of these outstanding issues, the appeal should be allowed to the extent of setting aside that part of the order apportioning "liability". The Court substituted an order that found the defendant "100 percent at fault for the accident referred to in the amended statement of claim herein." (My emphasis.) Hollinrake J.A. continued: This would leave open the issue of whether the appellant Caron is liable which can only be decided when the trial has been concluded. When the trial resumes on the issues that remain outstanding it should be open to the parties if so advised to seek any amendments to the pleadings they think properly should be made to deal with the issue of who, if anyone, is liable for the negligence of the appellant Caron, be it herself or any other party on a vicarious basis. [para. 33] Southin J.A., dissenting, did not disagree with this part of the majority's conclusion, noting at para. 51 that ". . . when the Legislature says, as it did in s. 21, 'No action . . . lies . . . ' it is the duty of the courts to give effect to the section, pleaded or not, and not to allow technical considerations to defeat the legislative purpose."
- [13] Mr. Roos on behalf of the plaintiff in the case at bar did not strongly oppose the amendment of Hardinge J.'s order to refer to "fault" rather than "liability", but contended that the Court should not dismiss Mr. Horvath's action as against Her Majesty on the analogy of Dominion Cannery and other workers' compensation cases cited by the Crown. (Canadian Pacific Ltd. v. Jones Estate [1989] B.C.J. No. 1241 (QL); Erlandson v. Roufosse (1995) 11 B.C.L.R. (3d) 256; Brzozowski v. Greyhound Canada Trans. Corp. [1998] B.C.J. No. 2400 (QL); and Clack v. Duffus (1995) 5 B.C.L.R. (3d) 120, all decisions of the Supreme Court of British Columbia.) He sought to distinguish these authorities on the basis that the statutory bar contained in the Workers' Compensation Act, R.S.B.C. 1996, c. 492, applies "ab initio" from the moment an employee suffers an accident in the course of employment. In contrast, he argued, the statutory bars at issue in this case required that evidence - presumably, the evidence adduced before Edwards J. that Mr. Horvath had applied for and been approved to receive a pension - be adduced at trial to prove the applicability of the provision. The Crown had not applied to this court for the introduction of such new evidence, and in Mr. Roos's submission, such a motion would have been denied because the evidence could have been obtained at the time of trial through the exercise of reasonable diligence. At the same time, Mr. Roos acknowledged that the criteria normally applied to fresh evidence motions also include the interests of justice: see Cory v. Marsh (1993) 77 B.C.L.R. (2d) 248, per Gibbs J.A.; and S.(E.B.) v. S.(T.K.) (1995) 9 B.C.L.R. (3d) 201 (B.C.C.A.) at para. 10.

- [14] I am not persuaded that the two types of statutory bar are different in principle. Section 10(1) of the Workers' Compensation Act applies to bar any right of action to which a worker or the family of a worker is or may be entitled against an employer for injury arising out of and in the course of employment. Similarly, s. 9 of the Crown Liability and Proceedings Act applies to bar a right of action against the Crown where a pension or compensation has been paid or is payable by the Crown, and s. 111 of the Pension Act bars a right of action against Her Majesty in respect of any injury where a pension is or "may be awarded" under that statute. In each case, it must be shown that the plaintiff 'qualifies' by virtue of his employment, to receive benefits from the statutory scheme. (Under the R.C.M.P. Superannuation Act, it appears the member is not even required to show that his disability is related in any way to his employment.) Once it is shown the plaintiff was or is a member of the R.C.M.P. and has been injured, he is entitled, or "may be entitled" in future to an award, and the statutory bar operates. As Ms. Roberts noted, moreover, there was evidence before Hardinge J. of the fact of Mr. Horvath's occupation and his injury, so that it was not necessary for Her Majesty to prove by additional evidence that he had in fact been granted a pension or the promise of one.
- [15] In the final analysis, I find that as in the workers' compensation cases, the making of an order of liability in the face of the statutory bars was unlawful, even though no one at the time realized it. The evidence necessary for the raising of the issue was before the Court, which could properly have raised it of its own motion. It is unfortunate the bars were not brought to the Court's attention; but the fact that they were not, and that an order was entered, does not in my view validate an otherwise unlawful order. The statutes referred to above and the interests of justice require that the appeal be allowed from Hardinge J.'s order. It is unnecessary, I hope, to add that this is in no way a reflection on the trial judge.
- [16] I would order that the first operative paragraph of Hardinge J.'s order be amended to read as follows: THIS COURT ORDERS AND DECLARES that the defendant, Her Majesty the Queen in Right of Canada, is 50 percent at fault and that the defendants, DOUGLAS WALTER THRING and GENERAL MOTORS OF CANADA LIMITED, are 50 percent at fault for the accident referred to in the amended statement of claim; I would also dismiss the plaintiff's claim against the Crown. In light of the foregoing, it is unnecessary for me to deal with the appeal taken from Edwards J.'s refusal to vary the trial judge's order. I say only that he was correct in ruling he did not have the authority to vary the entered order of another judge of the Supreme Court. Consequences of Allowing the Appeal
- [17] Much of the argument of the respondents on appeal was directed to the issue of what the consequences would be, vis à vis each of the parties to the litigation, of the dismissal of the plaintiff's action against the Crown. Counsel for the Crown took one view of the effect of the dismissal on its co-defendants; Mr. Brun for those defendants took another; and counsel for the plaintiff took another. We advised counsel at the hearing, and I confirm again, that it would be premature for us to make any ruling on these matters in the absence of a judgment, supported by reasons, from the court below. Thus nothing in these Reasons

should be taken as a comment one way or the other on issues of liability (whether joint and several or otherwise), contribution or indemnity as between the Crown and its co-defendants or as between the plaintiff and any defendant. No doubt these issues will be raised when Mr. Horvath's damages are assessed and the final order as to liability for such damages is made.

- [18] Finally, because this is not a case in which the usual rule that costs follow the event should necessarily apply either in this court or the court below, we advised counsel that we would accept written submissions from them regarding costs. Counsel for Her Majesty should file any submissions she wishes to advance no later than 10 days after the release of these Reasons; the submissions of the other defendants should be filed within 14 days thereafter; and the submissions of the plaintiff should be filed within 14 days of that. "The Honourable Madam Justice Newbury" I AGREE: "The Honourable Mr. Justice Hollinrake" I AGREE: "The Honourable Mr. Justice Donald"

---

### 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://www.bccourts.ca/jdb-txt/ca/01/05/2001bccca0551.htm>

**CASE PAGE**              <https://chat.esheria.ai/case-law/canada/horvath-v-thring-2001>

Prepared on 29 October 2026 · Esheria