1938

*April 26, 27.
* Dec. 5.

DAVID SPENCER LIMITED (DEFENDANT) ..... APPELLANT;

AND

EDNA FIELD AND JAMES W. FIELD (PLAINTIFF) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Burns by permanent-wave machine—Onus of proof—Charge to jury—Trial judge laying burden on plaintiffs—No objection taken—Jury finding no negligence—Appellate court ordering new trial—Misdirection of jury—Res ipsa loquitur.

The female respondent claimed damages for injuries alleged to have been suffered by her as the result of burns she said she received while having a permanent wave in the beauty parlour operated and conducted by the appellant in its departmental store in Vancouver. The trial judge instructed the jury that the burden lay upon the respondent to prove negligence against the appellant. The jury found that the burns on the respondent's head were not "the result of negligence, but rather accidental." The trial judge dismissed respondent's action. On appeal, the Court of Appeal ordered a new trial, on the ground that the doctrine of *res ipsa loquitur* was applicable to the facts of this case and, therefore, the jury had been misdirected as to the onus of proof.

Held, reversing the judgment of the Court of Appeal (52 B.C. Rep. 447), that the judgment of the trial judge dismissing respondents' action should be restored.

Per The Chief Justice and Davis and Hudson JJ.—It is unnecessary to consider whether or not the doctrine of *res ipsa loquitur* has any application to this case. It is sufficient to observe that the case for the respondents was formulated in the pleadings and developed at the trial as an action for negligence against the appellant without any reference to that rule. The case went to the jury, without any objection, on the basis of an action for negligence in which the burden lay upon the respondents. That being so, the respondents are not entitled upon an appeal to recast their case and put it upon a basis which had not been suggested at the trial.—*Scott* v. *Fernie* (11 B.C.R. 91) approved.—Comments on section 60 of B.C. *Supreme Court Act,* R.S.B.C., 1936, c. 56.—*Sisters of St. Joseph* v. *Fleming* ([1938] S.C.R. 172) ref.

Per Crocket and Kerwin JJ.—The rule of "*res ipsa liquitur*" was not relied upon at the trial and may not be put forth to assist the respondents before the Court of Appeal or this Court. This being so, there is no ground upon which the verdict of the jury should have been disturbed.

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of D. A. MacDonald J. which had dismissed the respondents' action, after a trial with a jury, and ordering a new trial.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

J. W. de B. Farris K.C. for the appellant.

C. F. H. Carson K.C. for the respondents.

The judgment of the Chief Justice and of Davis and Hudson JJ. was delivered by

DAVIS J.—The respondent Edna Field claimed damages in this action for injuries alleged to have been suffered by her as the result of a burn which she says she received in the appellant's departmental store in Vancouver while having a permanent wave in the beauty parlour operated and conducted by the appellant in its store; and her husband claimed in the same action substantial special damages for hospital and medical attention as well as general damages. The claims were based upon the alleged negligence of the appellant, its servants or agents, and particulars of the negligence were set forth in the statement of claim as follows:

(*a*) The operators in charge at the said defendant's beauty parlour did not take due care in giving the treatment in question.

(*b*) The said operators allowed the apparatus used to become extremely hot, causing the burn in question.

The case was tried with a jury and it was essentially a question of fact. Two totally different stories were presented to the jury. The appellant's evidence went to show that during the giving of the permanent wave in the beauty parlour the woman complained that she was hot at the back of her head and that the operator at once applied a cooling device. The appellant said that the woman had only a blister at the back of her head which probably was caused, as was not unusual, by the pulling effect of the treatment on the hair. To those in charge of the beauty parlour it appeared to be an insignificant thing. That occurred in the morning and in the evening the woman came back to the store with her husband, complaining that

(1) (1937) 52 B.C. Rep. 447; [1938] 2 W.W.R. 385; [1938] 2 D.L.R. 245.

1938
SPENCER
v.
FIELD.
Davis J.

she had been burnt. The nurse in attendance at the store (Miss Walker) said she found a slightly reddened area about the size of a five-cent piece at the back of the head, slightly to the left, and that the skin had evidently been broken. The woman was complaining of severe pain and in order to give her relief and to protect the area from infection, the nurse cleansed the area round about with alcohol and applied a moist boracic compress for a minute or so until it was clean, and then put on a sterile dressing. The husband asked to be reimbursed the $5 his wife had paid for the permanent wave and wanted to be paid for his time in coming down to the store in the evening with his wife. Upon the appellant's evidence there was merely a small blister, not as a result of any excessive application of heat but as one of the incidents of the modern electrical treatments for waving the hair which may occur to certain people by a pulling effect on the hair at some particular point and result in a slight blister.

But the respondents' story was entirely different. It rested largely upon the evidence of a Dr. McEown. He said he was called to examine the woman the same evening and according to his story he found a deep burn on the left scalp about the size of a fifty-cent piece and on the right hand side of the head another burn about the size of a quarter, not as deep as the burn on the left. He proceeds in his story to attribute to this a severe condition of shock together with a heart condition and a hemorrhage and subsequently a very serious physical condition of the thyroid glands and very severe internal trouble which necessitated removal of certain organs of the body, resulting in a very serious condition of health. Several medical witnesses were called on both sides.

Two stories could not be more different. The learned trial judge expressed no view upon the facts but told the jury the facts were entirely for them.

> You have got to decide before you give a verdict in this case whether Dr. McEown is an honest man. There is no side stepping it, because counsel for the defence made it an issue as to Dr. McEown when he was in the box. There is no misunderstanding. It is a clear issue. He said, "Dr. McEown, I think you are trying to mislead this jury, trying to deceive them." Now, maybe he did. It is for you to say. I have no opinion on it at all.

The items of the special damages claimed by the husband which the jury had before them showed a charge of Dr. McEown for services amounting to $580.

It is perfectly plain on the findings of the jury that they did not accept the respondents' story. If they had the damages could not have been anything but a very substantial amount. For the reasons to which we shall refer later, the jury made it abundantly plain that they regarded the occurrence in the beauty parlour as giving rise to a small amount of damages. The husband's claim for special damages for hospital, nursing and medical attendances amounted to $1,410.30. The jury's award of $500 to Mrs. Field, alone, indicated clearly, we think, that the jury concluded that the husband's expenses were in no way attributable to the burn in the beauty parlour.

The learned trial judge put the case to the jury very clearly on three separate issues, though no specific questions were put to the jury.

The first issue was whether the woman was burnt by any act of negligence on the part of Miss Ferguson, the operator in the beauty parlour who administered the treatment for a permanent wave.

> The charge is that Miss Ferguson, no matter how expert she may be, on this occasion did not take the care which a reasonable operator would have taken in order to prevent her customer from being injured; and that is a question of fact for you to decide, and it is the first fact, because if you find that Miss Ferguson was not to blame at all for this accident, then the case ends right there and you need not worry about doctors or anything else.
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> * * *
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> It is not necessary that she intended to injure the woman. She, of course, did not; it is the last thing in the world she wanted; but did she fail to do what a reasonably competent person would do, with the result that this woman's head was burned. That is a question for you.

Now the jury found on that issue:

> It is our opinion that there has been nothing to show that the burns on Mrs. Fields' head was the result of negligence, but rather accidental.

No one could rightfully quarrel with the jury coming to that conclusion upon the evidence. The jury might have stopped at that conclusion, for they had been told by the learned trial judge that if Miss Ferguson was not to blame for the accident that would be the end of the case.

The second issue put to the jury, if they found that negligence caused injury to the woman, was the question of damages. The trial judge divided the claims for damages into three parts. Firstly, he dealt with the husband's claim for special damages. As to that item the trial judge told the jury:

1938

SPENCER v. FIELD.

Davis J.

* * * the amount that was agreed upon was $1,410.30, which may be subject to any deduction that you may make from that if you say, oh, now, a lot of this treatment was the result of the operation and had nothing to do with the burn at all, then you would have to make some deduction there. What it would be you would have to decide.

The second item in the claim for damages dealt with was that of the husband for general damages for loss of consortium. The third item was that of Mrs. Field for general damages. The learned trial judge on this last item told the jury:

She is entitled to compensation for her pain and her suffering and her loss of time, and in this particular case she is entitled, if you find that her present condition is the result of that accident, of that negligence, she is entitled to fair and full compensation for the serious condition in which her health now is.

The other side of the picture is this: If all that happened here, as the defence contends, was a slight burn which broke the skin, and as so often happens when the skin is broken anywhere and by any means blood poisoning set in and she was laid up for a month—you might give her the benefit of the doubt, say two months, but that there was nothing very serious about it, and they got it all healed up, the hair is growing in again, and nobody would ever know the scar was there, now if you take that view you would not allow her very much; and it is a question of the time and the burn suffered there, so you see the very difficult question you have to decide, and all you have to go on is the history of the case, and the doctors' evidence is as to what did cause this present condition; and there is a straight line of cleavage as I pointed out before. If you think that the plaintiff's doctors are right, the damages would be very substantial indeed. If you think the defendant's doctors are right, they would not be very much; but in either case, it would be for you to fix.

A third issue distinctly arose out of the claims for damages. That was, was the condition of the woman at the time of the trial the result of the injury alleged by her to have been sustained in the beauty parlour? There was a great deal of medical testimony on both sides on this question. The learned trial judge told the jury:

I do not wish to influence you in any way and I can tell you perfectly frankly that I have formed no opinion on these facts. It is not the part of my duty to do so, and I have not done it. I knew most of these doctors, and I am very glad that you are here to make the decision as to which of them was mistaken. They are directly at issue, and you will have to take the responsibility of deciding which one of them—which line of doctors has made a mistake. Somebody has made a mistake, as you know, you have got to make the decision.

Now the finding of the jury on this question was:

As to the effect of the shock and infections on Mrs. Field's present condition, we find no connection.

Here again no one could rightfully quarrel with the jury in reaching that conclusion upon the very conflicting testi-

mony. But the jury added: "We award her $500." The learned trial judge said, after hearing the verdict of the jury:

> You cannot award her anything. Mr. Foreman, the action must be dismissed. I made that as clear as language can make, that unless you found the defendant to blame, you could not give the plaintiff any damages. The action will be dismissed.

The jury having expressly found that in their opinion the burns on Mrs. Field's head were not the result of negligence, but rather accidental, the jury had no right, as the trial judge very properly held, to award her anything. Obviously they wanted to give her some solatium.

Upon an appeal to the Court of Appeal for British Columbia from the judgment dismissing the action with costs, the Court of Appeal set aside the judgment and directed a new trial. Mr. Justice McQuarrie said that if the verdict as interpreted by the learned trial judge amounts to a finding that the plaintiffs are not entitled to any damages, it showed in his opinion that the jury disregarded material indisputable facts in evidence, and in that case there should be a new trial. He thought that the appellant's nurse, Miss Walker, having admitted that when she examined the alleged burn she had found a small slightly reddened area on the back of the woman's head, and that the skin was broken as if there had been a blister, together with the fact that there was no fault on the part of the injured woman herself, would entitle the plaintiffs to some damage. But the learned judge in appeal said further that he considered a new trial was also rendered necessary by reason of misdirection by the trial judge inasmuch as he erred in his direction to the jury as to the onus of proof and should have instructed the jury that the doctrine of *res ipsa loquitur* applied to the facts of the case. On that point he agreed with the reasons for judgment of Mr. Justice Sloan.

Mr. Justice Sloan (with whom the Chief Justice of British Columbia concurred) put his judgment upon the ground that the doctrine of *res ipsa loquitur* was applicable to the facts of the case. After reviewing and considering a number of authorities, Mr. Justice Sloan concluded:

> This case falls within that class of case where "the onus is upon the defendant to establish affirmatively inevitable accident, or in other words, absence of negligence on his part."

1938
SPENCER
v.
FIELD.
Davis J.

The learned trial judge had told the jury that the burden throughout lay upon the plaintiffs to prove to the jury that the woman was injured by negligence and that that negligence was the cause of the illness. Mr. Justice Sloan reached the conclusion, in reliance upon the decision of this Court in *United Motor Service* v. *Hutson* (1), amongst other cases, that the learned trial judge misdirected the jury on the law relative to the burden of proof. We had occasion recently in *Sisters of St. Joseph* v. *Fleming* (2), to make some observations which we thought pertinent upon the application of the maxim *res ipsa loquitur*. It is unnecessary for us in this case to consider whether or not that doctrine has any application to this case. It is sufficient in our view to observe that the case for the respondents was formulated in the pleadings and developed at the trial as an action of negligence against the appellant without any reference to the rule of *res ipsa loquitur*. And the case went to the jury, without any objection, on the basis of an action for negligence in which the burden lay upon the respondents. That being so, the respondents are not entitled upon an appeal to recast their case and put it upon a basis which had not been suggested at the trial.

The case of *Scott* v. *Fernie* (3) laid down that rule and held that nothing in then sec. 66 of The (British Columbia) *Supreme Court Act* afforded an escape. The present sec. 60 (R.S.B.C., 1936, chap. 56) is substantially the same as old sec. 66 which was considered in that case. The unanimous judgment of the Court (Hunter C.J., Martin and Duff JJ.) was delivered by the present Chief Justice of this Court. The then sec. 66 of the Act of 1904 (although the first and second provisoes had been introduced into the section after the trial of the action, the Court considered itself governed by them so far as they were applicable) was held not to abrogate the long established rule which holds a litigant to a position deliberately assumed by his counsel at the trial.

In the case before us in this appeal the issues of fact for the jury were settled during the conduct of the trial and the issues submitted to the jury were accepted on both sides as the issues upon which the jury were to pass.

(1) [1937] S.C.R. 294. (2) [1938] S.C.R. 172.
(3) (1904) 11 B.C. Rep. 91.

Counsel for the respondents urged that in any case the finding of the jury that there was nothing to show that the female plaintiff's head had been burnt as a result of negligence was perverse. Mr. Justice McQuarrie in the Court of Appeal thought it clear that the respondents were entitled to some damages, the amount of which should have been fixed by the jury. That learned judge relied upon the fact that there was no fault on the part of the injured woman. In his view if the verdict as interpreted by the trial judge amounts to a finding that the respondents were not entitled to any damages, it showed that the jury had disregarded material undisputed facts in the evidence and that there should be a new trial. It is really another way of applying the *res ipsa loquitur* rule, and Mr. Justice McQuarrie agreed with the other members of the Court of Appeal that the trial judge erred in his direction to the jury as to the onus of proof and should have instructed the jury that the doctrine of *res ipsa loquitur* applied to the facts of the case. The case having been put to the jury as one of negligence, the jury undoubtedly accepted the evidence of Miss Macdonald, the manager of the beauty parlour, when she said that she had never known in her experience as an operator of any head burns occurring before this case.

> It is just one of those things you can't account for—no fault of the operator and no fault of the machine.

Asked if the hair ever gets at times pulled tight, Miss Macdonald answered:

> It is usually what causes what we call a pull blister. It is not a burn. It is the pulling of the scalp tight which causes the blister and it will have the same effect as a burn, because the skin will break and it will blister.

This evidence of Miss Macdonald, I think, explains the language of the jury on the question of negligence:

> It is our opinion there has been nothing to show that the burns on Mrs. Field's head was the result of negligence, but rather accidental.

Dealing with the case as one of negligence, which was the way the case was developed and presented to the jury, their finding cannot in my view be said to be perverse.

The appeal should be allowed and the judgment at the trial restored with costs to the appellant throughout, if asked.

The respondents made a motion to quash the appeal upon the ground that, the appeal being from a judgment

1938

SPENCER v. FIELD.

Davis J.

upon a motion for a new trial, sec. 65 of the *Supreme Court Act* required notice to be given in writing to the opposite party, or his attorney of record, within twenty days after the decision complained of, or within such further time as the Court appealed from, or a judge thereof, allows. The motion was well founded at the time it was launched but before it came on for hearing the necessary extension of time had been granted by a judge of the court appealed from. The motion was therefore not pressed but the respondents are entitled to their costs of the motion.

The judgment of Crocket and Kerwin JJ. was delivered by

KERWIN J.—The rule of *res ipsa loquitur* was not relied upon at the trial and may not be put forth to assist the plaintiffs before the provincial Court of Appeal or this Court. This being so, there is no ground upon which the verdict of the jury may be disturbed. It reads as follows:

> It is our opinion that there has been nothing to show that the burns on Mrs. Field's head was the result of negligence, but rather accidental. As to the effect of the shock and infections on Mrs. Field's present condition, we find no connection. We award her $500.

The finding that there was no negligence and no connection between the female plaintiff's condition at the time of the trial and the shock and infection of which she complained disposes of the matter and the latter part of the answer must be disregarded.

The appeal should be allowed and the judgment at the trial restored, with costs throughout, but the respondents are entitled to the costs of their motion to quash the appeal as the appellant secured an extension of time only after service of the notice of motion.

Appeal allowed with costs.

Solicitors for the appellant: *Farris, Farris, McAlpine, Stultz, Bull & Farris.*

Solicitors for the respondents: *Wismer & Fraser.*