

**Ont. C. A. Overrules Itself**  
**A Commentary on *Fernandes v. Araujo***

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In *Fernandes v. Araujo*, [2015 ONCA 571](#) a five member panel of the Ontario Court of Appeal overruled its earlier decision in *Newman and Newman v. Terdik*, [1953] O.R. 1 (C.A.).

These decisions dealt with the vicarious liability section of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 192 (2) which provides that the owner is liable unless the vehicle “was without the owner’s consent in the possession of some person other than the owner....”

In *Newman*, the Court of Appeal held that where the owner gave the driver permission to drive on private property but expressly prohibited the driver from operating the vehicle on the highway, the owner is not vicariously liable for damages sustained as a result of a highway accident when the person with possession of the vehicle violated the condition and drove the vehicle on a highway.

In *Fernandes*, the court reversed this, holding, “that as the vicarious liability of an owner rests on possession rather than operation of the vehicle, the owner will be vicariously liable if the owner consented to possession, even if the driver operated the vehicle in a way prohibited by the owner.”

What is more interesting than the vicarious liability issue itself, though, is the Court’s statements as to the circumstances in which it will reverse a prior decision.

The Court stated:

[45] As an intermediate court of appeal, we are ordinarily bound to follow our past decisions, even decisions with which we disagree. It is important that we do so. Our common law legal tradition rests upon the idea that we will adhere to what we decided in the past. As expressed by the Latin phrase *stare decisis*, we stand by things that have been decided. The rule of precedent provides certainly, consistency, clarity and stability in the law. It fosters the orderly and efficient resolution of disputes and allows parties to obtain reliable legal advice and to plan their affairs accordingly.

However, in this case, the Court stated:

[46] However, as this court held in [David Polowin Real Estate Ltd. v. Dominion of Canada General Insurance Co.](#) (2005), 76 O.R. (3d) 161, at para. 127, it is permissible for this court to overrule one of its prior decisions if it is satisfied that the error should be corrected after considering “the advantages and disadvantages of

correcting the error.” In making this assessment, this court should focus on the nature of the error and “the effect and future impact of either correcting it or maintaining it,” including “the effect and impact on the parties and future litigants” and “on the integrity and administration of our justice system.”

[47] The common law has long prided itself in its capacity to evolve and improve with the times. The rule of stare decisis is not absolute. There comes a point at which the values of certainty and predictability must yield to allow the law to purge itself of past errors or decisions that no longer serve the interests of justice. Moreover, decisions that rest on an unstable foundation tend to undermine the very values of certainty and predictability that stare decisis is meant to foster.

In this case, the Court held that the advantages of overruling *Newman* outweighed the disadvantages. The court felt that *Newman* was not the sort of case that someone would rely on prospectively in planning a course of action. Further, it was inconsistent with an earlier Court of Appeal decision and was causing confusion and conflicting trial and motions court judgments.

The Court also noted that it was unlikely that his issue was of sufficient national importance to be reviewed and corrected by the Supreme Court of Canada, so the Ontario Court of Appeal was in effect the final court of appeal on this issue:

[52] Another consideration is that this case falls into the category identified in *Polowin*, at para. 143, where the Ontario Court of Appeal is, for all practical purposes, the final court of appeal. Leave to appeal to the Supreme Court of Canada is only granted on questions of national importance, and we cannot safely leave it to our apex court to correct errors such those in *Newman* which involve a question of the interpretation of an Ontario statute, albeit, as in *Polowin*, a statute that may be comparable to statutes in other provinces. It seems to me appropriate that in such a case, we should not shirk responsibility for ensuring that the law of Ontario rests upon a coherent principle.

In short then, the considerations that Court will apply in deciding whether to overrule itself are:

1. Whether the prior decision is wrongly decided.
2. Whether it is likely that persons would plan their actions prospectively in reliance on the law as set out in the case under consideration.
3. What would be the effect on the development of the law of correcting the error rather than letting it stand.
4. The value to stare decisis of letting the matter stand.
5. Whether the issue is one that is likely to be ultimately reviewed by the Supreme Court of Canada.