TAB E

Memo To: Lerners LLP, Michelle LaPorte
File: 116416-00001,ACM21 | ACM21
Research ID: #400094214ae6a3
Jurisdiction: Ontario, Canada
Date: November 22, 2022
Regarding: Apportionment of Negligence

Issue

Are the courts ever prepared to apportion some degree of personal responsibility or contributory negligence to a minor, and if so, is there a cutoff age, below which the child is considered too young to be responsible and instead his care provider or the person supervising the child is the sole responsible party?

Facts

A boy named Dylan was just six years old for a couple of weeks and in grade one at a public school in Thunder Bay when, unsupervised, he fell from the second floor to the first floor, causing a very serious brain injury. He was air lifted from TB to London and underwent a craniotomy. The defence asserts there should be some contributory negligence on Dylan's part for failing to follow prior directions he had been given. We believe that below a certain age, you cannot apportion any contributory negligence to a child as there isn't the requisite age or maturity to establish that kind of personal responsibility, and believe that this is even more so when you are in the care of a supervised professionals such as a school setting. So, for example, you wouldn't make an 18 month old toddler responsible for pulling a boiling kettle off the stove onto himself, but as the child ages, perhaps some blame does get apportioned.

Conclusion

The test to be applied in determining negligence, including contributory negligence, in the case of children is whether a child exercised the care expected from children of like age, intelligence and experience. This is both an objective and subjective standard, which acknowledges the need for individualized treatment along with the need for consistency in the law. (*Saumur v. Antoniak*, 2016 ONCA 851 (CanLII))

In *Mattinson et al. v. Wonnacott et al.*, 1975 CanLII 506 (ON SC), a five year old got off the school bus some distance from home and was struck with the defendants car after running into street with his head turned away from the oncoming vehicle. The defendant was aware that she was driving through the school zone at time of day when children are released from school. The infant plaintiff claimed damages for the injuries sustained. The defendant was held 35% liable and the bus driver was held 65% liable, for allowing the infant plaintiff to exit the bus alone. No contributory negligence was placed on the infant plaintiff, considering his age and the fact he had only been in school for two months meant that it was unlikely he had learned about safety precautions.

In *Sfyras et al. v. Kotsis et al.*, 1975 CanLII 603 (ON SC), a six year old child sustained injuries when she fell from the roof of a bowling alley. The child gained access to the bowling alley by way of a fire escape leading from the apartment in which she resided with her parents. The child had been told on numerous occasions not to play on the roof. On one side of the roof there was no ledge, which was an obvious danger, and which was where the plaintiff fell from. The plaintiff argued that the landlord of the building was responsible for the injuries by reason of having failed to install a fence preventing entry onto the roof. The Court considered whether the landlord was liable in light of the fact that the children suffered injuries off-premises. The Court cited a passage from the English case of *Phipps* where it was held that the responsibility for the safety of little children must rest primarily upon the parents; it is their duty to see that such children are not allowed to wander about by themselves, or at least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go. It would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those of persons who happen to have accessible bits of land. Different considerations may apply to public parks or recognized playing grounds. If children are invited or permitted to come on premises, there is no duty to erect a fence or

otherwise to prevent them from wandering from the land on which they were lawfully playing. While the landlord is responsible for providing and maintaining rented premises in a good state of repair, the law has not yet gone so as to place the onus on him to prevent children who are occupying leased premises from wandering on to adjacent premises where danger may lurk. The plaintiff's action was therefore dismissed. (*Sfyras et al. v. Kotsis et al.*, 1975 CanLII 603 (ON SC))

In McGonegal et al. v. Gray et al., 1950 CanLII 16 (ON CA), a teacher of a rural school had instructed the infant plaintiff, aged 12, to take a stove and gasoline into the yard and light the stove. In doing so, the infant plaintiff received severe burns. The Court held that the teacher had completely failed to exercise the care that her position demanded, and her negligence had been the cause of the injuries. The Court further stated that no contributory negligence should be placed on the infant plaintiff as, among other things, the teacher had control over the plaintiff while he was under her charge, which was sufficient to absolve him from liability for any contribution.

In *Cox (Guardian of) v. Marchen*, 2002 CanLII 36967 (ON SC) the plaintiff was a student who brought an action against the school board and principal for damages for personal injuries. The plaintiff, then 17 years of age, was leaving the school through one door of an emergency exit double door when the other door was opened and the jagged bottom of the door cut her Achilles tendon. The plaintiff was taken to hospital, where she had an operation to repair the damaged tendon. She was in a cast and required a wheelchair and crutches for several months. The doors were never intended for daily use, however the staff knew that the students and some teachers used the doors regularly as an exit from the cafeteria. The principal had conducted monthly inspections and had never noted that the doors were dangerous. Fellow students denied that they had been expressly discouraged from using the door. There were no warning signs posted. The plaintiff's action was allowed and she was awarded $37,500 in non-pecuniary damages. The Court held that the school had failed in its duty to the plaintiff. The standard of care required of it was that of a reasonably prudent parent. The School Board was liable as occupier of the school premises, because it had failed to ensure that the premises were safe for students. The Courts further stated that the plaintiff was not to be held contributorily negligent as she had exited the door in a reasonable manner.

In *Heisler et al. v. Moke et al., 1971*, CanLII 625 (ON SC), the nine-year-old plaintiff claimed damages for personal injuries arising from the defendant's negligence. The plaintiff's injury occurred while he was pressing down with his leg on the clutch of a tractor while holding on to the steering wheel to brace himself. In considering whether the infant plaintiff was guilty of contributory negligence there were two questions to be determined. The first one was whether the child, having regard to his age, intelligence, experience, general knowledge and alertness, was capable of being found negligent. The second question was whether he was negligent at all and, if so, to what degree. The infant plaintiff was fully capable of being found negligent as he was a bright and alert boy. Although an adult might be expected to realize that pressing down on the clutch of the tractor was a dangerous act and the infant plaintiff could not be expected to realize or foresee the consequences of his act. Thus no negligence was attributed to the infant plaintiff. The infant plaintiff's general damages were assessed at $2,500. The male plaintiff, his father, was awarded $3,809 for out-of-pocket expenses.

Saumur v. Antoniak, 2016 ONCA 851 (CanLII) dealt with an appeal by a decision of trial judge finding the defendants liable and the minor plaintiff not contributorily negligent for his injuries. In this case a 10-year old youth was run over in the road when he crossed on his way to school. The Court of Appeal held that the trial judge applied the correct legal standard of care, namely the standard of a reasonably prudent 10-year old of like intelligence and experience. The trial judge made no reversible error of fact or mixed fact and law in arriving at his findings and conclusions on the contributory negligence issue.

Law

In *Mattinson et al. v. Wonnacott et al.*, 1975 CanLII 506 (ON SC), a five year old got off the school bus some distance from home and was struck with the defendants car after running into street with his head turned away from the oncoming vehicle. The defendant was aware that she was driving through the school zone at time of day when children are released from school. The infant plaintiff claimed damages for the injuries sustained. The defendant was held 35% liable and the bus driver was held 65% liable, for allowing the infant plaintiff to exit the bus alone. No contributory negligence was placed on the infant plaintiff, considering his age and the fact he had only been in school for two months meant that it was unlikely he had learned about safety

precautions:

> CONTRIBUTORY NEGLIGENCE OF THE INFANT PLAINTIFF
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> The infant plaintiff did not testify. In view of the severity of the head injury, the lapse of time from the date of the accident to the trial, and his tender age when he was injured, I do not attach any significance to that. Nor do I think his evidence could have been of any great assistance. However, it is difficult to make any assessment as to whether this particular infant could, at the time of the accident, have been guilty of contributory negligence. I trust it is not wrong of me to take into consideration the fact that at five years and eight months, he had only attended kindergarten for two months. The longer a child is at school, the better the safety lessons are learned. Similarly, I trust that I can take into consideration the fact that the accident happened very shortly after he got off the school bus, or, perhaps, I should say escaped from it. At this moment of release from school, a very young child is at its most exuberant and, unfortunately, most careless self. Lastly, the accident happened only two weeks before Christmas. Again I hope it is not unreasonable for me to assume that a child of this age, at this time of year, would be more concerned with thoughts of Christmas than his safety. Taking these factors into account, I would not attach any contributory negligence to the infant.

In *Sfyras et al. v. Kotsis et al.*, 1975 CanLII 603 (ON SC), a six year old child sustained injuries when she fell from the roof of a bowling alley. The child gained access to the bowling alley by way of a fire escape leading from the apartment in which she resided with her parents. The child had been told on numerous occasions not to play on the roof. On one side of the roof there was no ledge, which was an obvious danger, and which was where the plaintiff fell from. The plaintiff argued that the landlord of the building was responsible for the injuries by reason of having failed to install a fence preventing entry onto the roof. The Court considered whether the landlord was liable in light of the fact that the children suffered injuries off-premises. The Court cited a passage from the English case of *Phipps* where it was held that the responsibility for the safety of little children must rest primarily upon the parents; it is their duty to see that such children are not allowed to wander about by themselves, or at least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go. It would not be

socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those of persons who happen to have accessible bits of land. Different considerations may apply to public parks or recognized playing grounds. If children are invited or permitted to come on premises, there is no duty to erect a fence or otherwise to prevent them from wandering from the land on which they were lawfully playing. While the landlord is responsible for providing and maintaining rented premises in a good state of repair, the law has not yet gone so as to place the onus on him to prevent children who are occupying leased premises from wandering on to adjacent premises where danger may lurk. The plaintiff's action was therefore dismissed:

> I am unable to discover anything in the circumstances of this case to warrant the implication of an intention by the parties that there should be superadded to the implied invitation a duty on the part of the appellant company to become a trespasser and repair this hole or in the alternative to warn the respondent of a defect of which she was already fully aware.
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> In an English case, Phipps et al. v. Rochester Corp., [1955] 1 Q.B. 450 at p. 472, Devlin, J., commented:
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> But the responsibility for the safety of little children must rest primarily upon the parents; it is their duty to see that such children are not allowed to wander about by themselves, or at least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go to. It would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those of persons who happen to have accessible bits of land. Different considerations may well apply to public parks or to recognized playing grounds where parents allow their children to go unaccompanied in the reasonable belief that they are safe.
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> Similar views are expressed by Charlesworth in his treatise on the Law of Negligence, 5th ed. (1971), para. 353, p. 232:
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> If children were invited or permitted to come on premises, there was no duty to erect a fence or otherwise to prevent them from wandering from the land on which

> they were lawfully playing. So, where a railway company permitted children to play on a pile of sleepers adjoining a railway line, they were held to be under no liability to a child of two-and-a-half years old who got onto the railway line and was injured by a train. Again, where children were allowed to play in a sand pit and one of them, of less than two years old, wandered from the sand pit onto a level crossing and was injured by a train, the local authority, who occupied the sand pit, were held to be under no liability. When a child of four got through a gap in the fence of a public recreation ground and went onto a railway line where it was injured by a live rail, the defendants, who provided the recreation ground, were held not liable.
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> While the landlord's duty to his tenants has been considerably expanded as a result of s. 96 of the Landlord and Tenant Act, R.S.O. 1970, c. 236, which places the responsibility on the landlord for providing and maintaining the rented premises in a good state of repair, and while this may indeed include the common areas used by other tenants of the same premises, the law has not yet gone so far as to constitute the landlord a pater familias, so as to place the onus on him to prevent children who are occupying the leased premises from wandering on to adjacent premises where danger may lurk.
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> The father of the infant plaintiff was fully aware of all the circumstances, and I find he made not the slightest effort, in spite of warnings from others, to prevent his children from using the flat roof. Very little effort on his part such as the placing of a barricade between the fire stairs and the flat roof would surely have prevented the serious injury to his child for which he now seeks to throw the blame on others.

In McGonegal et al. v. Gray et al., 1950 CanLII 16 (ON CA), a teacher of a rural school had instructed the infant plaintiff, aged 12, to take a stove and gasoline into the yard and light the stove. In doing so, the infant plaintiff received severe burns. The Court held that the teacher had completely failed to exercise the care that her position demanded, and her negligence had been the cause of the injuries. The Court further stated that no contributory negligence should be placed on the infant plaintiff as, among other things, the teacher had control over the plaintiff while he was under her charge, which was sufficient to absolve him from liability for any contribution:

> I do not think the circumstances are such that the respondent Charles Gray can be held to have contributed by negligence on his part to the injuries suffered by him. At the time of the accident the boy was 12 years of age, and apparently of average intelligence for a boy of that age. It is the intelligence of a child that is now the principal factor to be regarded in arriving at a decision whether such child, when a mishap occurs in which he or she has been injured, is subject to the rule with regard to contributory negligence. The relationship of teacher and pupil and the control the teacher had over the boy while he was under her charge is sufficient, in my view, to absolve him from liability for any contribution on his part to the negligence which caused the accident and from the consequences of his act in attempting to light the stove in question, realizing as he did, that he did not know how to use the stove, and knowing, because it had been impressed upon him, that gasoline was a dangerous substance in the presence of fire: Corby v. Foster (1913), 29 O.L.R. 83, 13 D.L.R. 664; Yachuk et al. v. 0liver Blais Co., Ld., 1949 CanLII 325 (UK JCPC), [1949] A.C. 386, [1949] 2 All E.R. 150, [1949] 3 D.L.R. 1, [1949] 2. W.W.R. 764.

In *Cox (Guardian of) v. Marchen*, 2002 CanLII 36967 (ON SC) the plaintiff was a student who brought an action against the school board and principal for damages for personal injuries. The plaintiff, then 17 years of age, was leaving the school through one door of an emergency exit double door when the other door was opened and the jagged bottom of the door cut her Achilles tendon. The plaintiff was taken to hospital, where she had an operation to repair the damaged tendon. She was in a cast and required a wheelchair and crutches for several months. The doors were never intended for daily use, however the staff knew that the students and some teachers used the doors regularly as an exit from the cafeteria. The principal had conducted monthly inspections and had never noted that the doors were dangerous. Fellow students denied that they had been expressly discouraged from using the door. There were no warning signs posted. The plaintiff's action was allowed and she was awarded $37,500 in non-pecuniary damages. The Court held that the school had failed in its duty to the plaintiff. The standard of care required of it was that of a reasonably prudent parent. The School Board was liable as occupier of the school premises, because it had failed to ensure that the premises were safe for students. The Courts further stated that the plaintiff was not to be held contributorily negligent as she had exited the door in a reasonable manner:

Contributory Negligence

> 52 The condition of the door created the environment of danger to students and the Defendants failed to make the premises reasonably safe for students. In all of the circumstances, Crystal exited the door in a reasonable manner and should not be held contributorily negligent even though her foot was in the path of the door.
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> 53 No claim was made against Justin Hawley. He is not an employee of the school board or an occupier under the law. He is just another student. I accept his evidence that he would not have exited the west door had he known Crystal's foot to be in his path and further that he did not know the condition of the bottom of the door. I conclude he was not negligent by not seeing her.

In *Heisler et al. v. Moke et al., 1971*, CanLII 625 (ON SC), the nine-year-old plaintiff claimed damages for personal injuries arising from the defendant's negligence. The plaintiff's injury occurred while he was pressing down with his leg on the clutch of a tractor while holding on to the steering wheel to brace himself. In considering whether the infant plaintiff was guilty of contributory negligence there were two questions to be determined. The first one was whether the child, having regard to his age, intelligence, experience, general knowledge and alertness, was capable of being found negligent. The second question was whether he was negligent at all and, if so, to what degree. The infant plaintiff was fully capable of being found negligent as he was a bright and alert boy. Although an adult might be expected to realize that pressing down on the clutch of the tractor was a dangerous act and the infant plaintiff could not be expected to realize or foresee the consequences of his act. Thus no negligence was attributed to the infant plaintiff. The infant plaintiff's general damages were assessed at $2,500. The male plaintiff, his father, was awarded $3,809 for out-of-pocket expenses:

> 8 In the case of children, however, other consideration enter into play. There are two separate questions to be determined. The first one is whether the child, having regard to his age, his intelligence, his experience, his general knowledge and his alertness is capable of being found negligent at law in the circumstances under investigation. In other words, we consider here the particular child. As has been stated frequently, there is no absolute rule as to age in order to determine this

question. Age is merly one of the factors, although the age of seven is often regarded as the crucial or critical age where normally a child may be expected to begin to assume responsibility for his actions.

9 The test in order to determine this preliminary question is therfore a very subjective one. All of the qualities and defects of the particular child and all of the opportunities or lack of them which he might have had to become aware of any particular peril or duty of care must be considered.

10 In the case at bar I have found the plaintiff child to be fully capable of being found negligent. He is a bright, alert child and was nine years of age at the time of the accident. His recollection of events which occurred over three years ago was very good and he gave his evidence most clearly -- much better as a matter of fact than many adults would.

11 One must next consider the second question, namely, whether he was negligent at all and, if so, to what degree?

12 In the case of infants the law clearly does not assume that full knowledge and responsibility occurs all of a sudden and, that at a given time in a child's development, once that child has attained the age of reason or an age where some degree of negligence can be attributed to him, then the test to be applied is the test of the reasonable man. At the very least, one must ask oneself what a reasonable child of that particular age could reasonably be expected to do and to foresee under those particular circumstances.

13 This test, which is still a very objective one, in the sense that the child's conduct is analysed in the light of that of a reasonable child of that age, seems to have been applied in the English case of Gough v. Thorne, [1966] 3 All E.R. 398 at p. 400. I am reading at p. 400 from the judgment of Lord Justice Salmon:

> The question as to whether the plaintiff can be said to have been guilty of contributory negligence depends on whether any ordinary child of 13 1/2 could be expected to have done any more than this child did. I

> say, "any ordinary child". I do not mean a paragon of prudence; nor do I mean a scatter-brained child; but the ordinary girl of 13 1/2.

14 This fairly objective test was also applied in the Australian case of McHale v. Watson (1966), 39 A.L.J.R. 459, which was quoted in the text of Wright and Linden, Law of Torts, 5th ed. (1970), at p. 199, and I am reading from that text at p. 199 and also at p. 200. At p. 199 the judgment of Mr. Justice Kitto reads as follows:

> I take this to mean that the test to be applied in determining whether the appellant's injury resulted from a breach of duty owed to her by the respondent should be stated not in terms of the reasonable foresight and prudence of an ordinary ... boy of twelve; and that the respondent should succeed because an ordinary boy of twelve would not have appreciated that any risk to the appellant was involved in what he did.

> At p. 200 it clearly states as follows:

> The principle is of course applicable to a child. The standard of care being objective, it is no answer for him, any more than it is for an adult, to say that the harm he caused was due to his being abnormally slow-witted, quick-tempered, absent-minded or inexperienced. But it does not follow that he cannot rely in his defence upon a limitation upon the capacity for foresight or prudence, nor as being personal to himself, but as being characteristic of humanity at his stage of development and in that sense normal.

15 Now if I were not otherwise bound by authority I would think that is the proper test to be applied to negligence on the part of a child. It seems, however, that in Canada, the test is considerably more subjective in determining this question.

16 The question as to whether there was, in fact, negligence on the part of the child and the degree of that negligence was considered in the leading case of McEllistrum v. Etches, [1956] S.C.R. 787, 6 D.L.R. (2d) 1. That case seems to base the test on that of a child of like age, intelligence and experience. I will read from the report at

p. 793 S.C.R., pp. 6-7 D.L.R.; this is a judgment, of course, of the Supreme Court of Canada; it was delivered by Chief Justice Kerwin who, at the time, was delivering judgment behalf of the Court. It reads as follows:

> The present view of the law is summarized by Glanville L. Williams in his work on Joint Torts and Contributory Negligence, 1951, s. 89, p. 355. It should now be laid down that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the care to be expected from a child of like age, intelligence and experience.

17 It is, therefore, seems to be quite clear, on the authority of the Supreme Court of Canada, in our Province the test would be based not only on the age but on the intelligence of that particular child or a child of similar intelligence and also on the question of the experience of the child.

Saumur v. Antoniak, 2016 ONCA 851 (CanLII) dealt with an appeal by a decision of trial judge finding the defendants liable and the minor plaintiff not contributorily negligent for his injuries. In this case a 10-year old youth was run over in the road when he crossed on his way to school. The Court of Appeal held that the trial judge applied the correct legal standard of care, namely the standard of a reasonably prudent 10-year old of like intelligence and experience. The trial judge made no reversible error of fact or mixed fact and law in arriving at his findings and conclusions on the contributory negligence issue:

> Contributory Negligence
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> 22 The trial judge declined to make a finding of contributory negligence against Dean in the circumstances. It may be surmised that he recognized this was a close call because his final conclusion was that "[c]ontributory negligence is not proven on the preponderance of the evidence."
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> 23 The parties agree that the test to be applied in determining negligence, including contributory negligence, in the case of children is that articulated by this Court in Nespolon v. Alford, 1998 CarswellOnt 2654 (C.A.), at para 53:

> In determining the appropriate standard of care for children, the test is whether a child exercised the care expected from children of like age, intelligence and experience (McErlean v. Sarel (1987), 61 O.R. (2d) 396 (Ont. C.A.), at pp. 411-12 and McEllistrum v. Etches, [1956] S.C.R. 787 (S.C.C.); Heisler v. Moke (1971), [1972] 2 O.R. 446 (Ont. H.C.) at p. 448 (per Addy J.), see also Downing v. Grand Trunk Railway (1921), 49 O.L.R. 36 (Ont. H.C.) at p. 40). This is both an objective and subjective standard, which acknowledges the need for individualized treatment along with the need for consistency in the law.

24 The parties also agree that, at an age just shy of his 10th birthday, Dean was old enough for a finding of contributory negligence to be made against him. They disagree, however, on whether such a finding should have been made on the facts of this case.

25 Mr. Boggs points to a number of findings made by the trial judge and submits that, on these findings alone, a finding of contributory negligence should have been made. These included the findings that:

> (a)Dean was a boy of average intelligence;
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> (b)he had walked to school for some months and had been taught to look both ways before crossing and to follow the crossing guard's instructions;
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> (c)his rain hood would not have prevented him from seeing left if he had remembered to look left before he crossed;
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> (d)he did not remember to look left before he crossed; and,
>
> (e)he knew better.

26 However, the trial judge made other findings as well that related to whether Dean

had "exercised the care expected from children of like age, intelligence and experience". He was not satisfied that Dean "had experience with crossing a busy four-lane highway unsupervised". The appellant contests this finding, arguing that there was evidence of Dean having done so before. It does not follow, however, that Dean was "experienced" in crossing busy streets as a result of this, and we are satisfied the trial judge's finding in this regard was open to him on the evidence.

27 The substance of the trial judge's basis for his finding on contributory negligence is found in the concluding paragraph of his reasons on this issue -- keeping in mind that he had already completed his full analysis of the incident and the timing of the incident:

> Based on my assessment of the witnesses and their evidence, I find that Dean walked at a normal pace to the crosswalk, speeding up a bit before he arrived. He was not necessarily walking with his head down at this point. He may have seen the Antoniak vehicle as he walked south, but if he did he was not equipped at his age to judge distance and speed. Or he may not have seen it because he forgot to look left before he crossed. He knew better, but children are notoriously forgetful when they are distracted or confused. I think that Dean was confused because he arrived at the crosswalk and there was no crossing guard to help him. He did not dart into traffic. I accept that Marc Schulze saw him standing in or near the crosswalk, which implies that his action of turning right and stepping into the roadway was interrupted for at least a perceptible moment. Dean stepped into the lane at a quick walk or jog and got a few step[s into the lane when he was struck. I am not satisfied in all this that Dean acted below the standard of a reasonably prudent 10-year old of like intelligence and experience. Contributory negligence is not proven on the preponderance of the evidence.

28 The appellant quarrels with certain aspects of this conclusion, particularly the references to Dean "not [being] equipped at his age to judge distance and speed",

the comment that "children are notoriously forgetful when they are distracted or confused", and the finding that "Dean was confused because he arrived at the crosswalk and there was no crossing guard to help him". The appellant says there was no evidence to support these observations or findings and that being forgetful, distracted or confused is not an excuse for negligence but rather an indicia of it.

29 The trial judge heard all of the evidence, however -- including, importantly, the testimony of Dean and Tori and other witnesses who were children at the time of the accident. He was entitled to draw inferences from what he determined to be the dynamics of the events as they occurred, and to apply his experience and common sense in doing so. On this basis, and given the record, he was entitled to draw the inferences and come to the conclusions referred to above, in our view. That children lack the judgment of adults and that they are notoriously forgetful when they are distracted or confused, and therefore do not follow instructions on the basis of which "they should know better", are concepts that are generally accepted and that have been recognized by the courts as factors distinguishing the conduct of children from that of adults in the negligence liability context: see, for example, Gonzalez (Guardian ad litem of) v. Stewart, 1995 CarswellBC 2403 (B.C.S.C.); Bourne (Guardian ad litem of) v. Anderson, 1997 CarswellBC 667 (B.C.S.C.). As this Court noted, in Nespolon v. Alford, at para. 53, the standard of care for children in situations such as this "is both an objective and subjective standard, which acknowledges the need for individualized treatment along with the need for consistency in the law".

30 As the paragraph cited above demonstrates, the trial judge applied the correct legal standard of care as set out in Nespolon, namely "the standard of a reasonably prudent 10-year old of like intelligence and experience". From the application of that standard his finding that no contributory negligence should be attributed to Dean was factually driven. While another finding may have been available on the evidence, the trial judge made no reversible error of fact or mixed fact and law in arriving at his findings and the conclusions he did on the contributory negligence issue.

Authorities

Saumur v. Antoniak, 2016 ONCA 851 (CanLII)

Heisler et al. v. Moke et al., 1971, CanLII 625 (ON SC)

Cox (Guardian of) v. Marchen, 2002 CanLII 36967 (ON SC)

McGonegal et al. v. Gray et al, 1950 CanLII 16 (ON CA)

Sfyras et al. v. Kotsis et al., 1975 CanLII 603 (ON SC)

Mattinson et al. v. Wonnacott et al., 1975 CanLII 506 (ON SC)