JRSB205 (summer 2010)

Topic 3, Lesson 2, Activity 2: Negligence in Action

Group E

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Conduct a search to find a judgment in a negligence action.

In your answer, demonstrate that you know which test is used for each of the ingredients by naming the relevant test.

Analyze the decision by indicating how the plaintiff established (or failed to establish) each of the four ingredients of the tort. We have referred to the A, B, C, and D of negligence. To demonstrate that you understand each of these ingredients, complete your analysis of the case, addressing each element separately. You may wish to construct your analysis of the outcome by completing the following four statements.

<table>
<thead>
<tr>
<th>Ingredients</th>
<th>Tests used</th>
</tr>
</thead>
<tbody>
<tr>
<td>A duty of care is owed to the plaintiff</td>
<td>Foreseeable plaintiff test (reasonable foreseeability test) Policy considerations – may negate existence of a duty</td>
</tr>
<tr>
<td>Breach of that duty; breach of the standard of care</td>
<td>Reasonable person test</td>
</tr>
</tbody>
</table>
| Causation                    | 1 Physical: “but for” test  
                               | 2 Legal: remoteness test |
| Damage                       | A type recognized by courts as compensable |
The Case

Citation: Wade v. C.N.R., [1978] 1 S.C.R. 1064

Instead of being an appeal from the Supreme Court of Nova Scotia, the case describes and analyzes the four ingredients around negligence.

Summary: Plaintiff appellant (Peter Wade, an infant, by his Guardian ad litem, Ralph Wade (Plaintiff Appellant), an eight year old boy, had been playing with a nine year old companion on piles of sand and crushed stone at the edge of the railway-right-of-way, some fifty feet from the main line. When a slowly moving freight train composed of twenty-seven cars approached the vicinity, and after the locomotive had passed him, appellant ran from the piles towards the tracks and unsuccessfully attempted to jump unto the ladder of a box car. On his second attempt he again fell off and was then injured by a car running over his leg which he lost just below the knee; the car in question was the third or fourth one ahead of the caboose. Both boys had approached the area in question by following the tracks from a boulevard which crossed the railway some eight hundred yards to the north and on which the boys lived in a housing area west of the railway.

A. A duty of care was established (or not established) by showing . . .

The plaintiff succeeded establishing the duty of care by showing that the present case that:
- The child was exposed to an unreasonable risk or harm (children playing in the operation area); and
- The risk was foreseeable that the harm may result unless prevention (the company knew the presence of children playing in the area, and the risk of injury to any children).

The jury has discussed many issues related with the duty of care; some of these discussion agreements or dissenting are:
- The respondent’s contention that it was under no duty to the infant plaintiff appellant was an inadmissible proposition. Duty arises to a person if that person is exposed to an unreasonable risk of harm where it is reasonably foreseeable that the harm may result unless the prospective defendant exercises due care to prevent it. In the circumstances of the present case there was a foreseeable risk of injury to children from the conduct of the respondent’s operations in an area to which children, to the respondent’s knowledge, resorted to play.
- Plaintiff’s submission is founded on the broad duty of care owed by an occupier to children as defined in recent decisions of this Court and other courts of sister jurisdictions (e.g. in Mitchell v. C.N.R.C., 1975 [2])
B. Breach of the duty was established (or not established) by showing... 

The plaintiff succeeded establishing the breach of the duty of care by showing that the present case that:
- in the absence of fencing or of any signs;
- in the make-up of the train as having a bearing on visibility;
- lack of removal of sand or gravel from CN property;
- the making up of the cars originally;
- CN being aware of conditions of property and aware of children playing in this area;
- CN enticed child to play in the sand;
- the reasonable person test determinates that the level of care will not enough according to the standard for the sector;
- the common law has helped to establish the baseline for this reasonable person test through being pronounced in similar cases.

The jury has discussed many issues related with the duty of care; some of these discussion agreements or dissenting are:
- In finding that the respondent knew of the presence of children playing in the area the jury had made a crucial finding to establish a duty of care and it found also a breach of the duty in the absence of fencing or signs, and in the make up of the train as having a bearing on visibility.
- The effect of these findings is not that the curative steps, if taken to correct the faults, would have prevented the injury but that the respondent would have discharged its duty of due care in the circumstances.
- The relevant inquiry then, apart from any statutory duty owing to the boy or to others who might reasonably be expected to be on the railway company’s right of way in the particular area, is as to the nature of the duty owing by the respondent at common law to a person in the position of the injured plaintiff in respect of the condition of the right of way. Germene to this inquiry are, of course, the proximity of the path to the tracks lying below the embankment and the sharp drop from the edge to the ditch below leading to the tracks.
- In determining the scope or extent of the duty, the icy condition of the path and of the embankment is also a material consideration. The classification of the injured plaintiff by the trial judge as a licensee does not, in my opinion, exclude the liability of the railway company as licensor when there is awareness of the use of the path, its proximity to the tracks and the fact that winter freezing would create an icy and slippery condition. This would result in a foreseeable risk of harm, especially to children, beyond any risk that could be said to arise in seasons other than winter.
- It was then contended by the respondent that this case was governed by licensor-licensee considerations, and that the only duty owed to licensees was not to expose them to a concealed danger. From this pivot, counsel for the respondent submitted that the plaintiff was injured as a result of a positive act of his own—attempting to board the train—and not from any trap or non-apparent danger. What this contention
ignores is that the respondent’s duty here arises not simply from its occupancy of the right of way but from its positive activity in carrying on train operations.

C. Causation was established (or not established) by showing. . .
The plaintiff succeeded establishing causation by showing that for present case that:
- the “but for” test; the plaintiff could demonstrate that but for the conduct of the defendant, no injury would have resulted.
- Causative injury was suffered by the infant, for which the Railway should be held liable.

D. Damage was established (or not established) by showing. . .
The plaintiff succeeded establishing damage by showing:
- The child was injured with physical damage;
- Economic damage through the cost of a prosthesis for the child’s leg and replacements during the child’s lifetime; and
- The general damages.

Negligence

...“The overriding consideration in this case is the force and, indeed, the faith that is to be accorded to the verdict of a jury. Involved as well within that larger framework is the ambit of risk by which negligence is defined both in law and in fact. At the trial of this negligence action, arising out of injury, the loss of a leg, sustained by the infant plaintiff while attempting to board a passing train, the jury found causative negligence on the part of the respondent railway, found that the infant plaintiff could not be chargeable with contributory negligence and fixed the general damages at $150,000. The Nova Scotia Supreme Court, Appeal Division, interfered with the finding on contributory negligence, holding that the infant plaintiff was of an age, experience and intelligence to make him capable of negligence and that he was in fact negligent to the degree of 50 per cent. It also interfered with the jury’s assessment of general damages, reducing them to $75,000. However, by a majority, it rejected the railway’s appeal against liability, holding that there was ample evidence of negligence on its part.”

Conclusions

Appellant sued for damages and the jury found negligence on the part of the Railway, that the child was not capable of contributory negligence, and, in the verdict, particularized the negligence of the Railway as the lack of fencing or proper signs, the
failure to remove sand or gravel from the C.N. property, the making up of the cars and C.N.’s awareness of the condition of the property and of children playing in the area. General damages were fixed at $150,000. The Appeal Division agreed by a majority that the Railway had been negligent but was unanimous that on the issue of contributory negligence, the verdict was not a reasonable one being altogether against the evidence and also that the damages awarded were excessive. The Appeal Division fixed the damages at $75,000. On further appeal appellant asked that the jury verdict be restored and respondent cross-appealed for dismissal of the action.

**Works Consulted**


Appendix A

The questions put to the jury by agreement of counsel and their answers were as follows:

**Question 1.(a)** Was there fault or negligence on the part of the Defendant Railway, its servants or agents which caused injury, loss or damage to the Plaintiffs?

Answer: Yes

**Question 1.(b)** If so, in what did such fault or negligence consist?

Answer:  
(1) lack of fence & proper signs  
(2) lack of removal of sand or gravel from CN property  
(3) the making up of the cars originally  
(4) CN being aware of conditions of property and aware of children playing in this area.

**Question 2.** Was the Infant Plaintiff Peter Wade a licensee or a trespasser in relation to the Defendant Railway at the time he was injured?

Answer: Licensee

**Question 3.(a)** Was the Infant Plaintiff Peter Wade enticed or allured to the Defendant’s premises by the presence of sand and gravel piles located thereon?

Answer: Yes

**Question 3.(b)** Was the Defendant’s train an enticement or allurement to the Infant Plaintiff Peter Wade at the time he was injured?

Answer: Yes

**Question 4.** Was Peter Wade, at the time he was injured, a child of such an age, intelligence and experience as to understand and appreciate the risk of injury in attempting to board the Defendant’s train?

Answer: No

**Question 5.** Only if you answer Question 4 “Yes” is this question to be answered. If you find the injury was caused by the fault or negligence of both the Defendant Railway and the Infant Plaintiff Peter Wade then state the degrees of fault:

Answer:  
(a) the Defendant  
(b) the Infant Plaintiff

**Question 6.** What amount of general damages do you award the Infant Plaintiff Peter Wade?

Answer: $150,000.00 One Hundred & Fifty Thousand Dollars.