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Ralph Hadley v. Douglas J. Wood : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED

OCT 12 1959

RALPH HADLEY, a Minor

By REX HADLEY, his guardian Ad Litem, Clerk, Supreme Court, Utah

Plaintiff and Appellant,

vs.

DOUGLAS J. WOOD,

Defendant and Respondent

No. 9007

APPELLANT'S BRIEF

LAVAR E. STARK

Attorney for Plaintiff and Appellant

TABLE OF CONTENTS

	Page
Statement of Facts	1
Statement of Points	2
Argument	2
Conclusion	13

INDEX OF AUTHORITIES CITED

Le Daux et ux v Martinez et al, 254 P2d 685 (New Mexico)	12
Morby v Rogers, 252 P2d 231 (Utah)	12
Nelson et ux v Arrowhead Freight Lines, Limited. Smith et ux v Same 104 P2d 225, 99 Ut. 129	11

IN THE SUPREME COURT
OF THE
STATE OF UTAH

RALPH HADLEY, a Minor,
By REX HADLEY, his Guardian Ad Litem,
Plaintiff and Apellant

vs.

DOUGLAS J. WOOD,
Defendant and Respondent,

No. 9007

STATEMENT OF FACTS

This action was commenced by Ralph Hadley, a minor, through his guardian ad litem, against the defendant to recover damages for personal injuries incurred by him as a result of the defendant's negligent operation of an automobile. (R.1,2) The defendant set up the defenses of unavoidable accident and contributory negligence. (R.6)

The collision occurred in a residential area of Ogden City, Utah, on the west side of Polk Avenue in front of the Wasatch elementary school, shortly before 3 o'clock, Sunday afternoon, on the 9th day of January, 1955. (Tr. 8,13,39) The Hadley boy with a companion, Steven Branz, were sleigh riding down the hill in front of the Wasatch School. (Tr. 130) At that time Ralph Hadley was 6 years and 1 month old (Tr. 142) and Steven Branz was 8 years old. (Tr. 133) Polk Avenue runs north and south. The Wasatch School is on the east side of Polk Avenue. (Tr. 9) Hadley, lying down on the sleight of Steven Branz, slid down the hill in front of the Wasatch School traveling in a westerly direction and across Polk Avenue. The defendant Wood, driving his automobile

alone in a southerly direction along Polk Avenue, collided with the boy and sleigh on the west side of said Polk Avenue. The boy was pinned between the front part of the undercarriage of the car and the snow bank. (Tr. 130) He incurred the following injuries: Fracture of pelvis, fracture of right arm above elbow, fracture of lower left leg, fracture of left femur or thigh, fracture of right femur. (Tr. 84), and as a result thereof is afflicted in the lower left extremity with a 15 per cent permanent partial disability (Tr. 90) Medical expenses incurred amount to \$1,428.25.

At the close of plaintiff's case defendant made a motion for "a judgment of non-suit, dismissing the complaint," (Tr. 155) which was denied. (Tr. 156)

The jury found the issues in favor of the defendant, no cause for action. (Tr. 209)

Plaintiff moved the court for a new trial, (R. 16) which was denied. (R.17)

STATEMENT OF POINTS

I.

THE VERDICT IS AGAINST THE EVIDENCE.

II.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY.

ARGUMENT

I.

THE VERDICT IS AGAINST THE EVIDENCE.

The only issue before the jury other than damages was the negligence of the defendant. The plaintiff being 6 years old at the time is conclusively presumed to be incapable of contributory negligence. This point will be developed at number II hereafter.

The evidence established the following conclusive, un rebutted facts:

1. Sunday, the 9th day of January, 1955, was a cold day with clear visibility. (Tr. 11,18,44,120)
2. There was snow in the area of the Wasatch School by Polk Avenue. (Tr 11,130)
3. Polk Avenue was slick and icy. (Tr.11,22,35,78)
4. The streets were icy in the entire area. Tr.13)
5. There were children sleigh riding in the area. (Tr.59,71,78,124)
6. There were sleigh tracks running east to west in front of the Wasatch School to the curbing of Polk Avenue. (Tr.12,27,45,46)
7. The distance of the sleigh riding hill was 122 feet. Tr.138)
8. The sleigh riding hill was steep. (Tr.10,26,45, 46)
9. The width of Polk Avenue was 35 feet. (Tr.19)
10. There was a clear, unobstructed view from where the defendant entered the shool area on Polk Avenue to where the children were sleigh riding. (Tr.26,27)
11. The distance from where the defendant entered the school area to where the children were sleigh riding was on half block. (Tr.16)
12. The Wasatch School is the only structure on the east side of Polk Avenue. (Tr.18)
13. There were no obstructions to view between defendant and plaintiff when he entered the school area. (Tr.44)
14. The school area is surrounded by play areas. (Tr.9)

15. The approaches to the school area are marked by warning signs. (Tr.10)

16. The defendant could have seen the Hadley boy on the hill. (Tr.26,27,131)

17. The defendant had ample time to stop his vehicle at the speed he testified he was going had he seen the plaintiff on the hill. (Tr.28,131)

18. Traffic conditions were light. (Tr.30)

19. The Hadley boy was struck by the front of the defendant's automobile. (Tr. 44,134)

20. It was the practice of some children to sleigh ride down the hill in front of the Wasatch School and proceed west across Polk Avenue. (Tr.72,73)

21. Immediately after the collision the defendant admitted he had just run over a youngster. (Tr.76,77)
Steven Branz, who was sleigh riding with the plaintiff at the time of the collision, gives this account of the event,

A. "Well, we were going down the hill from the top and there was a little jump at the top so when you went down, you made a jump just dropped a couple of feet and start down the hill. As we went down, we watched for cars at each end of the street and when we were coming up, I was ahead of Ralph, and we were just about to the top and he started down and there was a car and I shouted at him and he kept going and the car tried to stop and it skidded and they both met, more or less, as it hit the snowbank.

Q. When they met, was it the front part of the car that met with Ralph on the sleigh?

A. Yes.

Q. Where was the car when you first saw it, do you remember?

A. Well, it was by the corner before, a little past the corner.

Q. A little past, toward the school?

A. Yes.

Q. Boughton Street, is that the name of the street by the school?

A. Yes." (Tr.130,131)

The defendant testified and admitted the following facts:

1. That he knew roads were slick. (Tr.168)
2. That there were no cars on the street. (Tr.169)
3. That there were a few children around the area of the Wasatch School. (Tr.169)
4. That the visibility was good. (Tr.170)
5. That he was aware he was approaching a school area. (Tr.181)
6. That he saw some children on the side of the hill. (Tr.181)
7. That he did not look at the children again after he had once seen them. (Tr.183)
8. That had he seen the Hadley boy sooner he could have avoided the accident. (Tr.191)
9. That had he seen the boy coming down the hill he would have brought the car under control. (Tr.195)

The following is quoted from the testimony of the defendant:

"Q. Were you aware of the fact that you were approaching a school when you came into this Wasatch School area?

A. Yes.

Q. Did you notice any children in that vicinity?

A. As I recall, there were some few children up on the side of the hill there.

Q. And what side of the hill are you referring to?

A. That would be up on the east side." (Tr.181)

"Q. Did you notice any other on the west side?

A. No, I didn't notice any on the west side.

Q. What were these children doing that were on the east side?

A. They were just there. They were playing. I don't know what they were doing. I was watching the road.

Q. Then you didn't slacken your speed when you got to this area where the school was. Is that correct?

A. I don't recall." (Tr.182)

"Q. And where were you particularly on Polk Avenue when you first saw these children at the Wasatch School?

A. Oh, they were off about like that (indicating).

THE COURT: Will you indicate again?

A. Off on an angle, that is as near as I can remember, it has been four years.

THE COURT: The record may show that he indicates about a thirty degree angle from the front.

* * *

Q. Did you see a child on a sleigh coming down that hill?

A. No, I didn't.

Q. Did you look, did you keep looking in the area where you had seen those children by the Wasatch School, did you keep them in your vision after you passed?

A. There was snowbanks on the side of the road and the road was clear and I was watching the road.

Q. You were not watching these children then?

A. No.

Q. Good visibility, you said, right?

A. Yes.

Q. And the first time you saw young Hadley was when he was just coming over what you call the top of the snowbank?

A. Yes." (Tr.183 and 184)

"Q. Had you driven over that general area before, Mr. Wood?

A. What do you mean, "before," ever?

Q. Yes. ever.

A. Yes.

Q. How many times, do you recall?

A. No, I don't recall." (Tr.190)

"Q. If you had seen him coming down this hill and were aware that he was coming down, could you have avoided the accident. Isn't it possible that you could have?

A. Well, if I had seen him coming down the hill, possibly yes." (Tr.191)

“Q. And once again, isn’t it true that if you had seen the boy come down that hill, you could have avoided that accident? I think you have answered that once before.

A. If I had seen the boy coming down that hill, and had known the boy was going to go across the street, it is possible that I could have avoided the accident.” (Tr.194)

“Q. Mr. Wood, if you had seen that boy coming down the hill, you wouldn’t have slackened your speed or have tried to do anything until you saw him come out of the snowbank. Is that right?

MR. MIDGLEY: I object to that on the ground that it is argumentative.

THE COURT: The objection is overruled. Answer the question if you can.

A. Will you state that question again, please.

Q. In other words, if you had seen that boy coming down the hill, you still would have done nothing with reference to the control of your automobile because you would have assumed that he was not going to come across the street. Is that right? Is that right?

A. Well, you don’t normally jam your car in a snow-bank unless you have an idea that something is going to come in the road, not knowing whether the boy would be going into the road, I don’t know that you would swerve, would you?

Q. You wouldn’t have applied your brakes, you wouldn’t have tried to bring your car under control, under those circumstances?

A. If I had seen the boy coming, yes.

Q. You would?

A. Yes.

Q. So if you had seen him sooner, it is possible that you could have avoided the accident then?

A. It is possible.

Q. That is all." (Tr.195)

"Q. Isn't it true that you, that you didn't keep a lookout for these children, once you knew that they were there. Isn't that true?

A. I was keeping my eyes on the road.

Q. You were not paying any attention to the children, you were keeping your eyes on the road. Right?

A. That is a normal thing to do.

Q. Well, that is what you were doing, is it not?

A. As I remember, I was watching the road.

Q. That is all." (Tr.197 and 198)

The answer sets out two defenses, that of contributory negligence of Ralph Hadley and that of unavoidable accident. The first is without merit as a matter of law. The second is eliminated by the admission of the defendant. The jury must render a verdict on evidence not on bias, sympathy or conjecture. The facts establish as a matter of law the negligence of the defendant in failing to keep a proper lookout and in failing to keep his automobile under control, which negligence was the proximate cause of the injuries of the plaintiff.

II.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY

The trial court instructed the jury as follows:
“No. 10 (R.11) A person who is observing due care for his own safety, has a right to assume that others are possessed of normal facilities of sight and hearing and that they will use them in exercising ordinary care for their own safety and the safety of others; and he has the right to rely on that assumption, unless, in the exercise of due care, he observes or should observe something to warn him to the contrary.”

This imposed in effect the duty of due care on the plaintiff.

“No. 11 (R.11) The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury.

It may operate directly or through intermediate agencies or through conditions created by such agencies.

The law does not necessarily recognize only one proximate cause of an injury, consisting of only one factor, one act, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such a case, each of the participating acts or om-

missions is regarded in law as a proximate cause and both may be held responsible.”

The jury was thus told both may be held responsible.

“No. 13 (R.11) When the negligent acts or omissions of two or more persons, whether committed independently or in the course of jointly directed conduct, contribute concurrently, and as proximate cause, to the injury of another, each of such persons is liable. This is true regardless of the relative degree of the contribution.

Where such concurrent negligence exists, it is no defense for one of such persons that some other person, not joined as a defendant in the action, participated in causing the injury.

Even if it should appear to you that negligence of that other person was greater in either its wrongful nature or its effect.”

The effect of this instruction was that where there is concurring negligence each is liable.

There was no issue of concurrent or contributory negligence raised by this case, nor was the plaintiff under a duty of due care as defined in our law.

Nelson et ux v. Arrowhead Freight Lines, Limited.
Smith et ux v. same, 99Ut 129, 104 P2d 225, in quoted:

“It has been generally recognized that children of tender years are so far undeveloped as to be relieved of the charge of negligence; that during another period in their infancy there is rebuttable presumption against their capacity to understand and avoid danger; and that in the later years of infancy there is rebuttable presumption that they are chargeable with the same degree of

care as are adults. Ordinarily a child under seven years of age is conclusively presumed not guilty of contributory negligence.xxx”

This case quoted with approval.

Jones Commentaries on Evidence, Volume 1, Section 99 (a), as follows:

“xxxThe question as to whether a child’s capacity is such that it may be chargeable with contributory negligence is a question of fact for the jury, unless so young and immature as to require the court to judicially know that it could not contribute to its own injury or be responsible for its acts, xxx. Where the infant is under fourteen years of age, the burden rests upon the defendant to rebut the legal presumption of incapability of contributory negligence.xxx”

The above Arrowhead case was cited with approval in the case of Morby v. Rogers, 252 P2d 231, Ut; and was cited as authority for holding a child 2 years and 8 months is conclusively presumed not guilty of contributory negligence in the case of Le Daux et ux v. Martinez et al, 254 P2d 685, NM.

Where the only issue regarding liability properly before the jury was whether the defendant was negligent the effect of instructions indicating “both may be held responsible” and “each of such persons is liable” is error.

Although the court sought to properly state the law in instruction 14 (R.11) to the effect that, “the law conclusively concludes that the child is incapable of the judgment and attentiveness necessary to bring his own misconduct to the magnitude that would justify an adult

otherwise liable in successfully asserting contributory negligence as a defense.” It is clear that in view of the conclusive state of the evidence and the erroneous instructions, it is clear that the jury based its verdict on the negligence of the plaintiff.

CONCLUSION

Appellant prays that the case be remanded for a new trial with instructions to the trial court to direct a verdict for appellant and submit the case on the question of damages; or, in the alternative, for a new trial.

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and Appellant.