

1959

## Ralph Hadley v. Douglas J. Wood : Brief of Respondent

Utah Supreme Court

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Louis E. Midgley; Attorney for Defendant and Respondent;

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Clark, Supreme Court, Utah

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

RALPH HADLEY, a Minor

By REX HADLEY, his guardian Ad  
Litem,

*Paintiff and Appellant,*

vs.

DOUGLAS J. WOOD,

*Defendant and Respondent.*

No. 9007

RESPONDENT'S BRIEF

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Respondent.*

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**RESPONDENT'S BRIEF**

**STATEMENT OF FACTS**

The Appellant's Statement of Facts is not complete,  
 and we therefore prefer to incorporate our own sum-  
 mary.

This law suit arose out of an accident between the defendant's automobile and a sleigh being ridden by the plaintiff minor, which occurred on Sunday afternoon, January 9, 1955, on Polk avenue in Ogden, Utah, about 3 o'clock PM.

On the day of the accident, the street was snow packed, and icy (T-11, 22, 35) the weather was cold (T-11, 18).

Polk Avenue runs North and South and is about 35 feet wide (T-9, 19). On the day of the accident there were snow banks on both sides of the street approximately three feet high (T-13, 71) which narrowed the travel portion of the road to about 25 feet (T-11, 19). Polk Avenue, at the scene, is level (T-18) and straight (T-17). Residences are located on the West side of the street and located to the east of Polk avenue is the Wasatch School on the top of a rise, which starts just east of the sidewalk (T-9, 10). From the base of the rise to the east edge of the street, the ground is level (T-20, 21). The width of the level area was estimated at about 20 to 25 feet (T-175). On the day of the accident therefore, the top of the snow bank was about 3 feet above the level area east of the east curb. and the investigating officer confirmed the defendant's testimony that the bank would block a motorist's vision of a child lying on a sleigh in the flat area east of the street (T-22).

There was no traffic as the defendant drove his car south on Polk Avenue. His speed was ten to twelve miles per hour (T-169, 15, 25). As the defendant entered the block where the school is located, he saw two or three children standing on the hill (T-181) and about mid way up the hill. When he saw the children, none of them were sleigh riding (T-192). The defendant could not say, and there was no evidence, that plaintiff, Ralph Hadley, was one of those children. Defendant first saw the plaintiff lying prone on the sleigh as it emerged through a slight cut out in the east snow bank, (TR 20, 197) going west "pretty fast," directly into the path of the south bound car (T-170, 184). At that time, the distance that separated the sleigh and the car was 10 to 15 feet (T-184, 15). The defendant immediately swerved his car into the west snow bank where the car stopped with the front end in the bank "a couple of feet" (T-174). The rear wheels were still on the icy travel portion of the road (Diagram). The point where young Hadley's sleigh had entered the street was the only point where the children had "cut through" the snow bank (TR 20).

The defendant felt no impact with the sleigh (T-171) and felt that the accident had been averted. However, when he got out of his car, he found the boy under

the car, pinned between the transmission housing and the snow bank (T-173). The sleigh was not damaged (T-127).

The unanimous verdict of the jury was in favor of the defendant, no cause for action (T-209).

### STATEMENT OF POINTS

The Respondent respectfully submits two points:

#### POINT I

THE VERDICT IS OVERWHELMINGLY SUPPORTED BY THE EVIDENCE.

#### POINT II

THE COURT'S INSTRUCTIONS TO THE JURY WERE NOT ERRONEOUS.

### ARGUMENT

#### POINT I

THE VERDICT IS OVERWHELMINGLY SUPPORTED BY THE EVIDENCE.

It is clear that the question of the contributory negligence of the plaintiff minor is not an issue in this case. Appellant's reference to that subject, in the opening paragraph of his Statement of Facts, and in Point 1 of his Argument, is particularly curious, in light with the fact that defendant's requested instruction Number 11, on the child's contributory negligence, was denied

by the Court, and the jury was instructed in very definite language, as follows:

No. 14.

Even if it should appear to you from the evidence in this case that the parents of plaintiff were negligent in the manner in which they exercised, or failed to exercise, their parental duties for his care, such negligence, if any, may not be imputed to the plaintiff and shall not constitute a bar to recovery by him, if otherwise he is entitled to recover.

Likewise the negligence, if any, of any child dealing with the plaintiff would not be a defense if the defendant is otherwise liable.

In some cases you may have heard of the defense of "contributory negligence," "contributory negligence" as a defense is based on public policy that does not permit the Courts to be used by one wrong doer to recover from another, and that is not for the public good that one guilty himself to sue another; such a public policy encourages careful conduct by all.

This policy has no application in case where a child about six years and one month old brings a suit under circumstances as presented in this case. 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 must be remembered however that regardless of the tender years of a child, no person is liable to a child unless the adult has been negligent as the term is here defined, and that negligence was approximate cause of the child's injury.

Plaintiff's contentions here, therefore, are limited to one proposition, and that is the contention that the defendant was guilty of negligence as a matter of law, which proximately caused the accident and injuries to the plaintiff minor.

Plaintiff made no motion at the close of all the evidence, that a verdict be directed in his favor. The defendant made a Motion for a dismissal of the action, at the close of the Plaintiff's case, and later, a directed verdict at the close of all the evidence, both of which were denied.

The Honorable Court at T-156, stated:

"I believe there are questions of fact raised because of those two matters that can be submitted to the jury. That is, the first upon the testimony of driving too fast under the circumstances, circumstances of the nature coming from the Major's (Riblett) testimony and the circumstances, and also, circumstantial evidence as to failure to keep proper lookout."

The testimony of Major Riblett, plaintiff's witness, and "the circumstantial evidence" concerning defendant's lookout were indeed shaky foundations upon which plaintiff's case rested. We gladly look at the evidence, but not as digested in Appellant's Brief.

"Plaintiff's brief relates facts which most strongly support their own contentions. However, on appeal, we must take the opposite approach and consider those facts that most strongly support the verdict, where there is evidence pointing in different directions" *Morley vs Rodberg*, 7 Utah 2nd, 299, 323 Pac. 2nd, 717.

As indicated by the trial Judge, the only possible evidence concerning a speed of defendant's car at more than 10 to 12 miles per hour, was given by Major Riblett. But his testimony, digested, was:

1. He did not see the accident and did not see the defendant's car as it traveled the entire length of the block to the point of impact (T-40).

2. He had seen a car pass him on 32nd street, going west, at a speed he estimated at 25 miles per hour (T-38), and saw that car turn left on to Polk Avenue. (Defendant testified he had previously approached Polk Avenue, going *East* and had turned *right* on to Polk Avenue (TR 168).)

3. The witness followed the car ahead, at about 75 to 100 yards until it followed a curve and went out of sight. The witness described the car as a light tan or dirty yellow colored, two door (T-51).

(Defendant's car was a green convertible, with a black top, rather faded) (T-168, 200).

4. He lost sight of the car only "momentarily" (T-51) and when he came in view of the street, he saw the defendant's car one half block away, nosed into the snow bank at a 45 degree angle. When the witness stopped, the defendant was under the car attempting to help the boy (T-39, 52, 56). He had not seen Mr. Wood either go to or return from a nearby house (T-56).

(The defendant, immediately after the accident, ran to a house, knocked on the door, told the people to call an ambulance, and returned to the car and crawled under to help the boy (T-172). This was verified by plaintiff's witnesses Sessions (T-69) and Mrs. Sessions (T-76, 77) and obviously consumed more time than "momentarily," and yet the Major testified at (TR 56):

"It was a mystery to me how he got under that car so fast."

The jury was justified in concluding that the wit-

ness was the victim of faulty association of the car he followed and the defendant's car, which could not have been the same vehicle at all.

The physical facts, further, clearly disproved the Major's testimony concerning the alleged speed of 25 miles per hour.

Plaintiff's witness, Officer Rose, testified:

Tr-12.

"The snow bank where the car went through was fairly soft."

Tr-22.

Q. "So that it would not have had too great a slowing action upon an automobile plowing through it?

A. "Not too great, no.

Tr-25.

Q. "Now in your investigation, did you find anything to disprove Mr. Wood's statement to you that he was travelling about 10 to 12 miles per hour?

A. "No, I didn't.

Tr-22.

Q. Now how far did you determine that the car had travelled after impact with this boy?

A. I could not determine just exactly where the impact was with the boy. I couldn't tell you how far it travelled.

Q. Now isn't it correct that on your report

you put three feet?

A. That would be the distance it would be able to travel after impact, was the statement I received from the driver. Approximately that. That is what it was.

Q. Now did you measure the distance from a line directly across . . . from where the children had apparently been sleighing, from that imaginary line down to the point where the car had stopped?

A. No, I did not measure that.

Q. But it wasn't very far, was it?

A. No.

Plaintiff's own expert, Professor Karl Koerner of the Mechanical Engineering Department of the University of Utah, testified that a car, under icy road conditions, at 20 miles per hour would require 180 feet to stop, including reaction time of  $1\frac{1}{2}$  seconds (Tr 107). Presumably 60 feet of that distance would be travelled during the reaction time, or a total sliding distance of 120 feet. There was not one iota of evidence to contradict the defendant's testimony that immediately upon seeing the child, about 15 feet distant, he swerved into the snow bank, and applied his brakes, and yet the rear of the car did not whip around; the car stopped only partly into the soft snow bank, with the rear wheels still on the icy surface; and the car stopped from three

feet to "less than a car length" south of the point where the sleigh had entered the street, facts which would be physically impossible had the car been travelling 20 to 25 miles per hour.

Test, then, the defendant's testimony with the physical facts. This Honorable Court has repeatedly used a reaction time of three-fourths of a second, in testing testimony, the most recent case, we believe to be *Richards vs Anderson*, Case No. 8970. Plaintiff's own expert believes that to be unrealistic.

Tr-112.

"I believe that (tests) seem to bear out . . . in those ideal conditions, the reaction time is roughly three-quarters of a second. However, I think the formula is a little bit more complicated than that and most designers are using two and a half to three seconds reaction time for new highway work and it is based on the fact that there is personality involved, the time of the day when you go to work, your people's feelings, and the fact that there is no warning in a case of an automobile situation and a person has to evaluate the complexity and then make his decision, so this jumps the reaction time up a little bit and I thought that one and a half is more realistic really than three-quarters."

But the Professor does agree that a "simple" reaction of swerving might well be accomplished in three-

fourth's second, while the "complex" reaction of removing the foot from the accelerator to the brake would take materially longer. (Tr-115-116)

Using the three fourths second test, at 10 to 12 miles per hour, the distance would be 11 to 13 feet travelled before the swerve started, and according to the officer, as well as the defendant, the car stopped immediately, the stopping being caused obviously by the snow bank rather than the braking of the car.

The Honorable Trial Court submitted the question of the defendant's lookout to the jury. Hindsight, of course, is a wonderful thing, but we must bear in mind that as the defendant drove into view of the Wasatch School, which was not a designated sleigh riding area, *there was not one child sleigh riding down the school ground slope, or anywhere else in the block.* The defendant proceeded at a speed of 10 to 12 miles per hour, a speed which would be safe and cautious, even if we saddled the defendant with knowledge that the children had previously been sleighing. There was a three foot high snow bank between the hill and the road, against which many of the children previously had stopped, without entering the street. There were no sleigh tracks across the street for a motorist to see and be forewarned. (T-21, Officer Rose) The one spot in the block long snow

bank through which the plaintiff minor and his friend Steven Branz, had gone partly over and partly through the bank (Tr-20) certainly would not be observed and appreciated by the normal driver as a red flag of danger. Indeed, it is doubtful that at a distance, it would be apparent that there was any "cut" in the bank at all.

The plaintiff minor did not testify, although he was in Court. Steven Branz, age 12, and therefore, age 8 years at the time of the accident, was the only witness produced by the plaintiff who claimed to be an eye witness. He testified, (Tr-130)

"... and when we were coming up, I was ahead of Ralph and we were just about to the top and he started down and I shouted to 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 snow bank."

Tr 132

Q. Steven, where were you standing when you yelled at Ralph?

A. About the top of the hill.

Q. About the top of the hill and Ralph was already going down the hill?

A. Yes.

The Honorable Trial Court, on the above vague evidence, ruled that there was a question for the jury as to whether the defendant was negligent for not seeing

the boy on the sleigh (before the sleigh entered the area of no visibility below the snow bank), and of course whether his failure to see the boy was a proximate cause of the accident. With that decision we need not now quarrel. But it is crystal clear, that at best, it was a jury question, upon which the jury has rendered its verdict.

This Court, in *Toomer's Estate v. Union Pac. R.R. Co.*, 239 Pac. 2nd, 163 stated:

"A good statement of the proper approach is made by the Supreme Court of Idaho in *Adkins v. Zalasky*, 59 Idaho 292, 81 Pac. 2nd, 1090, 1093, wherein it was stated: 'One reason for the rule that the existence of negligence, or contributory negligence, is not generally a question for the judge is that a jury is composed of members of various ages, occupations and experiences, and is in a better position to determine what a reasonably prudent person would do, under stated circumstances, than is a trial judge or an appellate court. . . . It is only when there can be but one possible answer, reasonably made, to that question, that a trial judge, or an appellate Court should assume to decide it.'"

## POINT II

THE COURT'S INSTRUCTIONS TO THE JURY WERE NOT ERRONEOUS.

Plaintiff has, in Point II of his Brief, complained of three Instructions taken verbatim from Jury Instruction Forms, Utah. Instruction No. 10 is found at 16.10,

J.I.F.U. under the title "General Rules in Negligence Actions."

Instruction No. 11, combined 15.6 and 15.7, J.I.F.U. and Instruction No. 13 incorporates 15.8, J.I.F.U., the latter three approved instructions being listed under the title "Basic Negligence Concepts Defined."

Obviously, the Trial Court gave the jury the above instructions as a foundation for their deliberations. We believe that the appellant cannot properly complain because the Court defined proximate cause; or explained the obvious proposition that no one is under the legal duty to anticipate an emergency until he observes, or should observe, something to warn him.

Instructions numbers 11 and 13, contrary to appellant's argument, were actually favorable to the plaintiff. There was sufficient evidence before the jury from which they could have found that the mother of the minor was negligent, and while this was not a defense set up, the Court in instruction number 13, and 14 clearly advised the jury that if they found the defendant negligent, and his negligence a proximate cause of the accident, the plaintiff minor must recover, even if they found his mother, another child, or the plaintiff himself also negligent.

It goes without saying that the Instructions attacked by the plaintiff have nothing to do, and say nothing, about the contributory negligence of the plaintiff.

We feel that the Instructions as a whole were pro-plaintiff, and overemphasized plaintiff's case. Permanent disability and loss of future earnings were submitted to the jury (number 22) despite the medical testimony that any such loss was a result of a bicycle accident many months after the automobile accident. Number 27 advised the jury they could disagree if they could not agree on the "Matter of damages." The child's contributory negligence was taken from the jury as a question of fact. In number 2, the jury was advised in effect, that they might find the defendant negligent for not sounding his horn. And in Number 24, the Court advised the jury that . . . "should your determination be that there should be no damage, then you will entirely disregard the instructions given you upon the matter of damages."

We believe it obvious that the Instructions, from the plaintiff's standpoint, were exceptionally fair, and that his contention that they must have been taken to mean something other than what their clear language expressed, is not a proper reason for attack against them.

## SUMMARY

Plaintiff now contends that the defendant, as a matter of law, was negligent and that his negligence was a proximate cause of the accident. He made no such contention during the trial, as no Motion for a directed verdict was made by him.

We feel that plaintiff's evidence proved nothing more than that a very unfortunate accident occurred. The plaintiff's own witnesses corroborated the defendant's testimony that here was a classic example of an unavoidable accident on defendant's part.

The jury has decided the issues of fact, and we feel Appellant has failed to show any reason why plaintiff is entitled to subject defendant to the expense and annoyance of a new trial.

Plaintiff received an eminently fair trial. Over defendant's objections, the jury was permitted to view the scene four years after the accident, and on a day when no snow was on the ground, and where no proper foundation was laid showing the lack of changes in the area (Tr-155 to 165). Over defendant's objections, plaintiff's witnesses were permitted to give their opinions of the safe speed a motorist should travel on the street (Tr-13, to 14 and Tr. 44-45).

We respectfully submit that the verdict and Judgment should be affirmed.

Respectfully submitted,

LOUIS E. MIDGLEY,  
*Attorney for Defendant and  
Respondent.*