Saumur V. Antoniak: A Child's Failure to Look Both Ways Before Crossing the Street

November 30, 2016

In a recent decision, *Saumur v. Antoniak*, 2016 ONCA 851, the Ontario Court of Appeal found the City liable for damages where a plaintiff was struck by a motor vehicle in a crosswalk normally staffed with a crossing guard. Of particular note, the Court of Appeal upheld the trial judge's decision not to make a finding of contributory negligence against the plaintiff who forgot to look both ways before crossing the street.

Around 8:30 a.m. on the morning of May 14, 2002, the plaintiff, who was almost 10 years old, began his walk to school. He proceeded to cross four lanes of traffic at the intersection of Gray Road and Collegiate Avenue forgetting to look both ways before crossing the street. When the plaintiff stepped into the first lane of traffic he was struck by an oncoming vehicle.

The City had committed to staffing the crosswalk at issue with a crossing guard between 8:20 a.m. and 8:40 a.m. on school days. It was not contested that the crossing guard was not on site when the plaintiff crossed the road, and that, if he were crossing the road during the time when the crossing guard was to have been on site, the City was liable.

The trial focused on two issues relevant to the appeal: (i) whether the accident occurred during the period of time when the crossing guard was to have been present; and (ii) whether the plaintiff was contributorily negligent.

The trial judge found that although there was conflicting evidence regarding when the accident occurred, the majority of the evidence supported that the plaintiff was struck before 8:40 a.m. when the crossing guard should have been present. The trial judge also emphasized that the crossing guard was obliged to remain on site even after 8:40 a.m. if she saw a child within sight of the crosswalk. The Court of Appeal found that the trial judge's findings were amply supported by the record.

On the second issue, the parties agreed that the appropriate standard of care for children is the care expected from children of like age, intelligence and experience as articulated by the Court of Appeal in *Nespolon v. Alford*, 1998 CarswellOnt 2654.

The City raised several findings made by the trial judge that they argued should have led to a finding of contributory negligence. These findings included that:

a) the plaintiff was a boy of average intelligence;

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;

c) his rain hood would not have prevented him from seeing left if he had remembered to look left before he crossed;

d) he did not remember to look left before he crossed; and,

e) he knew better.

The Court of Appeal focused on the other findings that the trial judge had made including that the plaintiff did not have "experience with crossing a busy four-lane highway unsupervised". The Court of Appeal agreed that although he had crossed the intersection and others like it before that did not mean that the plaintiff was "experienced" in crossing busy streets.

The City also took issue with the trial judge's finding that the plaintiff was "not equipped at his age to judge distance and speed", "[he] was confused because he arrived at the crosswalk and there was no crossing guard to help him", and that "children are notoriously forgetful when they are distracted or confused". The City argued that being forgetful, distracted or confused is not an excuse for negligence, but rather an *indicia* of it.

The Court accepted that children lack the judgment of adults and can be notoriously forgetful when they are distracted or confused, leading to their failure to follow instructions despite knowing better. While another finding may have been available on the evidence, the Court of Appeal found that the trial judge made no reversible error.

This decision highlights the discretion available to the courts when making findings on the objective and subjective standard for children's negligence. Even where a child's conduct does not align with one of the first principles of safety – look both ways before crossing the street — and the child has walked the route before, there is no guarantee that a court will apportion any liability against the child.

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