Case and Comment

SHEASGREEN v. MORGAN, (1952) 1 D.L.R. 48

Contributory Negligence of a Child – Negligence of Parent.

This case, recently decided by Mason J. in the Supreme Court of British Columbia, is of interest for two reasons. The first is because it deals exhaustively with the question of contributory negligence of a child. The second is because it does not deal with the question of the contributory negligence of a parent.

In this case a father conveniently provided his son, who was only five years and three months old, with a bicycle, and the child to ride the bicycle upon the main highway. The child, oblivious to possible danger, peddled through a stop street intersection onto the main highway. The defendant driving through the intersection was operating his car in a somewhat negligent manner and as a result the child was seriously injured and hospitalized for a considerable time. Action was brought by the child for personal damages which were allowed at $10,000.00 and by the father for expenses incurred by and during the hospitalization of his son. These were allowed at $7,853.71. The jury found the child 70% negligent and the defendant 30% negligent. Mason J., after an exhaustive review of the cases relating to the question, found that contributory negligence could not be imputed to the child. Judgment was granted to both plaintiffs.

There have been attempts to set an arbitrary age limit under which no child could be held guilty of contributory negligence. (2) However Mason J. concluded that the question of contributory negligence in children is governed not by their age, but by the "capacity, intelligence and understanding." It is submitted that such is the proper principle to apply and the conclusion of the learned judge is amply supported by the authorities.

With respect to the question of negligence of the parent in cases where a child has been injured, both bench and bar have made sporadic attempts to fix some responsibility upon the person having the child in his charge. The writer submits that this matter could be more fully developed and appreciated by future litigants. For instance in the

(1) [1952] 1 D.L.R. 48

(2) See Anglin C.J.C., **Bouvier v. Fee** [1932] 2 D.L.R. 424 at p. 428: "As to contributory negligence or common fault, it is, in our opinion, almost out of the question to raise such an issue as a ground of appeal in the case of a child under 8 years of age, i.e., barely above the age under which all responsibility must be denied." To the contrary is Idington J. in **Winnipeg Electric v. Wald**, 41 S.C.R. 431, at p. 437. Though the law fixes an age limit for responsibility in some cases, none for the application of the doctrine of contributory negligence has yet been so definitely fixed as to furnish a uniform rule of law to guide us in all possible emergencies that may arise in the conduct of children.

Sheasgreen case, if the question of the father's negligence in allowing his son to travel upon the main highway, while the child was not of sufficient age or understanding to appreciate the dangers involved upon such a course, had been properly raised, and if the father was found guilty of negligence, the defendant would doubtless have been relieved of payment of a considerable portion of the damages assessed against him.

The first judicial comment upon the matter of parents' liability was made by Alderson B. in the case of **Lygo v. Newbold.** (3) There the plaintiff child stole a ride upon a cart and was subsequently injured. His claim failed and in the course of judgment Alderson B. stated:

> "The negligence in truth is attributable to the parent who permits the child to be at large."

This idea received support years later in the Canadian case of **Hargrave v. Hart.** (4) Mathers CJKB (Manitoba) stated that parents should take more care of their children and not allow them to run and play on the streets in the indiscriminate manner in which some parents allow their children to do.

Sangster v. T. Eaton & Co. (5) was one of the first Canadian cases where the question of parents' negligence was indirectly raised. The court held that regardless of any negligence of a mother who was taking care of a child, the child could still recover full damages. With this principle we are in entire agreement. It should not be necessary to emphasize that the question of identification of the child with the parent does not arise and is not considered in this comment. (6)

In **Hudson Bay Co. v. Wyrzkowski** (7) the court was faced with a similar problem and the case was decided upon the same principle as was the **Sangster** case. It is perhaps unfortunate that the question of parents' negligence was not directly raised in these two actions.

The only case the writer has discovered in which the question of parents' liability for negligence was directly raised, is that of **Gargotch v. Cohen.** (8) This was an action by a six year old child and his father for damages sustained by the child while returning from school. It was contended that the father was negligent in not taking reasonable and proper care of the child at the time of the accident. However, on the facts the court held that there was no negligence on the part of the father.

The case of **Mercer v. Gray** (9) shows, however that a parent can be found guilty of negligence. There a jury found the child 15%

(3) 9 Ex. 302; 156 E.R. 129
(4) 9 D.L.R. 521
(5) 25 O.R. 78; on appeal 21 O.A.R. 624; on appeal 24 S.C.R. 708
(6) See **Oliver v. Birmingham & Midland Omnibus** [1933] 1 K. B. 35 which held that the doctrine of identification does not apply to an infant as opposed to **Waite v. North Eastern Railway Co.,** El. Bl. El. 719, where it was held the negligence of the person in actual custody of the child at the time of its injury which contributed to the injury may be imputable to the child.
(7) [1938] 3 D.L.R. 1
(8) [1940] 4 D.L.R. 810
(9) [1941] 3 D.L.R. 564

negligent, the defendant 80% negligent and the parent 5% negligent. Unfortunately for the defendant, the matter of the parent's negligence was not properly pleaded and the court had to deliver judgment for full damage against the defendant.

Similarly in **Oliver v. Birmingham Omnibus** (10) the defendant was found guilty of negligence and the plaintiff's grandfather found guilty of contributory negligence. Again the matter of the contributory negligence was not properly pleaded and the plaintiff was awarded full damages against the defendant.

It is submitted that these cases indicate that the question of the contributory negligence of a parent can be properly brought before the court and that such claims will in all probability be favourably received. In this modern age of haste and hurry, John Public should not have to be confronted with swarms of negligent and unattended infants darting hither and yon over highways and byways to the utter disregard of the rights of others. Especially is this so where the very media which carries them to their destination is conveniently provided by the infants' parents. Bearing in mind the comments of Alderson B. and Mathers CJKB it would be well for parents to make stricter supervision over the actions of their children or stand the possibility of being held liable for injuries sustained by them.

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(10) Supra (6).
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BADDELEY v. INLAND REVENUE COMMISSIONERS (1953) 1 A.E.R. 63.

Trust – Charity – Moral, Social and Physical Training and Recreation – Whether For Relief of Poverty or Beneficial to the Community – Whether Religious Nexus Between Individuals Constitutes Them a Section of the Public.

This case raises several problems in the well-ploughed field of charitable trusts, including the question of trusts for the relief of poverty, for recreational facilities and a consideration of whether a class of people, determined by their affiliation with a particular religious group, is a part of the community for the purpose of a trust beneficial to the community.

Two conveyances, both dated the same day, transferred several pieces of land to trustees who were directed to allow the property in each case "to be appropriated and used by the leaders for the time being of the Stratford Newton Methodist Mission under the name of the 'Newton Trust' " for certain purposes, inter alia, for the moral, social and physical training and recreation of persons resident in the county boroughs of West Ham and Leyton in the county of Essex who were members of the Methodist Church or were likely to become members of that church and lacked the means otherwise to enjoy the