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COURT OF APPEAL AFFIRMS CITY'S LIABILITY IN CROSSING GUARD CASE

By Barry W. Kwasniewski[*]

A. INTRODUCTION

On November 14, 2016, the Court of Appeal for Ontario (the "Court") released its decision in *Saumur v Antoniak*[1] *("Saumur")*. Affirming the decision of the Ontario Superior Court of Justice, the Court addressed the subject of contributory negligence by a minor who was hit by a car when crossing an intersection with the crossing guard absent. The minor, Dean Saumur ("Dean"), and his litigation guardian were the Respondents in the appeal by the City of Hamilton (the "City"). At trial, negligence was apportioned equally as between the City and Luba Antoniak, who was the driver of the vehicle which struck Dean, with no contributory negligence being found as against Dean. On appeal, the City argued that Dean was contributorily negligent in that he failed to look both ways before crossing the intersection. The Court disagreed and dismissed the appeal, affirming the trial court decision.[2] For charities and not-for-profits that deal with children, the *Saumur* decision is an important reminder that negligent acts or omissions resulting in injury to children could result in substantial liability, and that courts may be reluctant to reduce such liability even in cases where the child arguably contributed to his or her own harm.

B. APPEAL ISSUE: THE TIMING OF THE ACCIDENT

On May 14, 2002, while nine-year-old Dean was on his way to school, a car struck and badly injured him when he was crossing a busy four lane highway in Hamilton, Ontario. The City had committed to staffing the intersection with a crossing guard between 8:20 a.m. and 8:40 a.m. on school days.[3] It was not contested that there was no crossing guard on duty at the time of the accident, but the City did contest the

[*] Barry W. Kwasniewski, B.B.A., LL.B., a partner, practices employment and risk management law with Carters' Ottawa office. The author would like to thank Tessa Woodland, B.Soc.Sci. (Hons), J.D., student-at-law, for her assistance in preparing this Bulletin.
[1] *Saumur v Antoniak*, 2016 ONCA 851 (CanLII), http://canlii.ca/t/gvp9j.
[2] *Ibid*; *Saumur v. Antoniak*, 2015 ONSC 2380 (CanLII), http://canlii.ca/t/gh5kz.
[3] *Supra* note 1 at paras 1-2.

time of the accident, arguing that the accident in fact occurred after 8:40 a.m.[4] The trial judge determined that the accident occurred between 8:20 a.m. and 8:40 a.m.[5] Having to determine the timing of the accident on the basis of conflicting testimony, which largely consisted of estimates and approximations, the trial judge weighed the evidence before him and made a finding of fact. The Court found that there was ample evidence for the trial judge to make the finding of fact as to the time of the accident, and that the Court would not re-weigh the evidence on appeal.[6]

C. APPEAL ISSUE: CONTRIBUTORY NEGLIGENCE

The legal test for determining contributory negligence in the case of children was articulated by the Court in the 1998 decision in *Nespolon v Alford*. The test is "whether a child exercised the care expected from children of like age, intelligence and experience."[7] The test is designed to be "both an objective and subjective standard, which acknowledges the need for individualized treatment along with the need for consistency in the law."[8]

Findings of the trial judge that the City argued should have led to a finding of contributory negligence against Dean include (i) he was a boy of average intelligence, (ii) he had been walking to school for some months and had been taught to look both ways before crossing, and (iii) that he did not remember to look left before he crossed on the day of the accident.[9] However, the Court noted that the trial judge determined that Dean had "exercised the care expected from children of like age, intelligence and experience" and that "[h]e was not satisfied that Dean "had experience with crossing a busy four-lane highway unsupervised"".[10] The Court determined that "[the trial judge] was entitled to draw inferences from what he determined to be the dynamics of the events as they occurred, and to apply his experience and common sense in doing so" and that "he was entitled to draw the inferences and come to the conclusions referred to above".[11] The trial judge applied the correct legal standard.[12] The appeal was primarily with respect to findings of fact, and the Court held that the trial judge did not make a reversible error in making his determinations.[13]

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[4] *Ibid* at para 3.
[5] *Ibid* at para 4.
[6] *Ibid* at paras 17 and 20.
[7] *Ibid* at para 23, citing *Nespolon v. Alford* [1998], 40 OR (3d) 355; 161 DLR (4th) 646 (CA), at para 53.
[8] *Ibid*.
[9] *Supra* note 1 at para 25.
[10] *Ibid* at para 26.
[11] *Ibid* at para 29.
[12] *Ibid* at para 30.
[13] *Ibid*.

D. COURT'S DECISION

In the result, the Court dismissed the appeal, finding that "the trial judge made no palpable and overriding error of fact or of mixed fact and law, nor did he err in law, in finding that the accident occurred within the relevant time period or in failing to hold that Dean was contributorily negligent."[14] The Respondents were awarded costs of the appeal in the amount of $25,000 plus appeal disbursements and HST. The appeal did not involve the quantum of damages awarded to the Respondents, as the damages were agreed by the parties at trial. While the trial decision did not state the agreed quantum of damages, it has been reported in media articles that the award was almost $8 million.

E. APPLICATION TO CHARITIES AND NOT-FOR-PROFITS

This case is of interest to charities and not-for-profits that deal with children. As *Saumur* demonstrates, if a child is injured while he or she is, or is supposed to, be under the care of adults, legal liabilities may result. Further, successfully defending claims on the basis that the child was contributorily negligent, and therefore legally responsible for their own injuries, will be difficult. This is particularly true for younger children who do not yet have the capacity to protect themselves from danger, but similar principles will apply to older children, as in *Saumur*. Dean was almost ten years of age when he was injured. Decisions such as *Saumur* highlight the need for appropriate supervision and monitoring of children's activities and programs, and the training of staff and volunteers engaged in program delivery. Child protection policies which deal with safety measures specific to the programs are also important to reduce the risk of injuries occurring, and resulting claims.

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[14] *Ibid* at para 5.