Case Name:

Hampel v. Giroux

Between
Chantal Hampel, Plaintiff (Appellant), and
Carmen Giroux, Rejean Giroux, Marc Hampel, John Doe and Jane Doe, Defendants (Respondents)

[2010] O.J. No. 2419

2010 ONCA 419

Docket: C48525

Ontario Court of Appeal
Toronto, Ontario

K.M. Weiler, R.A. Blair and P.S. Rouleau JJ.A.

Heard: June 3, 2010.
Oral judgment: June 3, 2010.
Released: June 8, 2010.

Civil litigation -- Civil procedure -- Trials -- Jury trials -- Charge to jury -- Appeal by plaintiff from trial judgment dismissing her action for personal injuries suffered in a motor vehicle accident when she was nine years old dismissed -- Appellant argued that trial judge's correcting instruction telling jury to give no weight to respondent's alleged improper cross-examination on appellant's hospital record was insufficient and that instructions as to special precautions required of respondent in particular area of accident were insufficient -- Instructions were adequate -- Jury would have appreciated necessity of taking into account respondent's conduct in context of driving in that particular area.

Tort law -- Negligence -- Motor vehicles -- Pedestrians -- Appeal by plaintiff from trial judgment dismissing her action for personal injuries suffered in a motor vehicle accident when she was nine years old dismissed -- Appellant argued that trial judge's correcting instruction telling jury to give no weight to respondent's alleged improper cross-examination on appellant's hospital record was insufficient and that instructions as to special precautions required of respondent in particular area of accident were insufficient -- Instructions were adequate -- Jury would have appreciated necessity of taking into account respondent's conduct in context of driving in that particular area.

Appeal by the plaintiff from trial judgment dismissing her action for personal injuries suffered in a motor vehicle accident when she was nine years old. The appellant was struck by the respondent's motor vehicle as she crossed the street. The appellant argued that the trial judge's correcting instruction telling the jury to give no weight to a portion of the cross-examination did not cure the respondent's alleged improper cross-examination on the hospital record. The appellant argued that in initially permitting cross-examination of the appellant on the hospital record when she was admitted to the hospital the impression left with the jury was that the appellant was recorded as saying she ran across the road. The appellant argued that the trial judge also erred in the instructions as to special precautions required of the respondent in the particular area of the accident.

HELD: Appeal dismissed. The limiting instruction given mid-trial and in the charge was sufficient to cure any prejudice to the appellant. The trial judge did not err in not specifically charging the jury as to the special precautions required of drivers in the particular area where the accident took place. Although the charge could have been more fulsome, the jury would have appreciated the necessity of taking into account the respondent's conduct in the context of driving in that particular area. The trial judge adequately pointed out the duty on the driver to keep a proper lookout in the context of this case and there was no error in the trial judge's refusal to specifically charge on this point.

Appeal From:

On appeal and cross-appeal from the judgment of Justice Louise L. Gauthier of the Superior Court of Justice, dated February 14, 2008. (17 paras.)

Counsel:

John B. Gorman, Q.C., for the appellant.

John J. Adair and Mark Greg **Abogado,** for the respondents.

ENDORSEMENT

The following judgment was delivered by

THE COURT (orally):--

Background

1 On May 3, 1983, the plaintiff, Chantal Hampel, was struck by a vehicle as she crossed Chippewa Street in North Bay on foot. She did not cross at a cross-walk.

2 The appellant was nine years old at the time and under four feet tall. She and her older brother, Marc Hampel, had been at Memorial Gardens and were walking back to their grandmother's home, going westbound on the north side of Chippewa Street.

3 The respondent, Carmen Giroux, was the driver of the vehicle. Her children had also been at the Gardens that day, and so she was travelling eastbound on Chippewa Street to pick them up. At the time of the accident, the respondent was employed as a school bus driver.

4 According to the appellant, her brother crossed the street first. Before she followed, she saw a line-up of cars that had stopped and when the driver of the first car waved to her to pass, she crossed, "walking briskly". She recalled there being parked cars on either side of the road. She admitted that she did not stop once she had begun to traverse the street and also acknowledged that she did not "look left and right" before crossing past the car that waved her along. The next thing she remembers is lying on a front lawn.

5 Following a trial by judge and jury the appellant's action was dismissed. In essence, the jury found the respondent had discharged the reverse onus on her of proving that she was not negligent.

6 Of the several grounds of appeal raised in the appellant's factum, we need address only the three discussed below.

Issue 1. Did the trial judge's correcting instruction cure the respondent's alleged improper cross-examination on the hospital record?

7 At trial, defence counsel used a hospital note in order to cross-examine the appellant on her claim that she was "walking briskly" but was neither "rushing" nor "running" at the time of the accident. It stated, in part:

> This nine year old girl ran out between some parked cars and was struck by an oncoming vehicle.

8 Prior to cross-examination of the appellant on this portion of the note, her counsel objected on several grounds. After the cross-examination, the trial judge agreed to provide a limiting instruction to the jury.

9 The appellant submits that in initially permitting cross-examination of the appellant on the hospital record when she was admitted to the hospital the impression left with the jury was that the appellant was recorded as saying she ran across the road.

10 Although the appellant's counsel submitted in his factum that the mid trial correcting instruction telling the jury to give no weight to this portion of the cross-examination and the instruction in the charge were inadequate, this was not the argument advanced before us. Rather, counsel submitted that the error was incurable. He agrees that, with the benefit of hindsight, he should have moved for a mistrial or moved to have the judge dismiss the jury and did not. He says that at the time it was not evident that the statement went to the seminal issue.

11 Assuming that cross-examination of the appellant on the hospital record was not appropriate, we do not agree that the limiting instruction given mid trial and in the charge was insufficient to cure any prejudice to the appellant. Accordingly we would dismiss this ground of appeal

Issue 2. Did the trial judge err in not specifically charging the jury as to the special precautions required of drivers in the particular area where the accident took place?

12 The real issue concerning the adequacy of a jury charge is whether the trial judge charged the jury in a fashion that they appreciated their duty and were equipped to carry it out.

13 In this case, the liability issue was straightforward. The trial judge told the jury that they should consider whether the plaintiff exercised the care expected of a person of similar age intelli-

gence and experience. It was clear that at this point she was instructing them on the law. Following this, the trial judge gave an impeccable instruction on the reverse onus on a driver who strikes a pedestrian. She then reviewed the positions of the plaintiff and defendant. There would have been no question in the jury's mind by this point that, in assessing whether the defendant was negligent, the circumstances ought to be taken into account. The trial judge directed the jury to the defendant's evidence that she was not rushing, that she was aware she was driving in a residential area, in a neighbourhood containing a YMCA and the Memorial Gardens where there was a circus going on. Although the charge could have been more fulsome, the jury would have appreciated the necessity of taking into account the defendant's conduct in the context of driving in that particular area. Accordingly this ground of appeal is dismissed.

Issue 3. Did the trial judge err in not directing the jury respecting the negligence arising from a driver not seeing what was "plainly in view"?

14 The trial judge adequately pointed out the duty on the driver to keep a proper lookout in the context of this case and we see no error in the trial judge's refusal to specifically charge on this point.

Overall

15 We see no error in the charge to the jury in respect of the other arguments raised by counsel in his factum.

Disposition and Costs

16 The appeal is dismissed.

17 The respondents do not seek costs and, accordingly there will be no award as to costs.

K.M. WEILER J.A.
R.A. BLAIR J.A.
P.S. ROULEAU J.A.

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---- End of Request ----
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