

CANADA / JUDGMENT

Wade v. C.N.R.

[1978] 1 SCR 1064

COURT

Supreme Court of Canada

DECIDED

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Wade v. C.N.R.

Collection

Supreme Court Judgments

Date

1977-09-30

Report

[1978] 1 SCR 1064

Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Nova Scotia

Subjects

Torts

Decision Content

Supreme Court of Canada

Wade v. C.N.R., [1978] 1 S.C.R. 1064

Date: 1977-09-30

Peter Wade, an infant, by his Guardian ad litem, Ralph Wade (Plaintiff) Appellant;

and

Canadian National Railway Company, a body corporate (Defendant) Respondent.

1977: June 1; 1977: September 30.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA, APPEAL DIVISION

Negligence—Occupier's liability—Railways—Child injured while attempting to board a moving freight train—Whether special circumstances imposed duty on Railway to take additional precautions—Foreseeability of risk—Findings of jury—Circumstances in which appellate Court should interfere—Whether findings of jury were acts of negligence, causative of the injury.

Plaintiff appellant, an eight year old boy, had been playing with a nine year old companion on piles of sand and crushed stone at the edge of the railway-right-of way, some fifty feet from the main line. When a slowly moving freight train composed of twenty-seven cars approached the vicinity, and after the locomotive had passed him, appellant ran from the piles towards the tracks and unsuccessfully attempted to jump unto the ladder of a box car. On his second attempt he again fell off and was then injured by a car running over his leg which he lost just below the knee; the car in question was the third or fourth one ahead of the caboose. Both boys had approached the area in question by following the tracks from a boulevard which crossed the railway some eight hundred yards to the north and on which the boys lived in a housing area west of the railway.

Appellant sued for damages and the jury found negligence on the part of the Railway, that the child was not capable of contributory negligence, and, in the verdict, particularized the negligence of the Railway as the lack of fencing or proper signs, the failure to remove sand or gravel from the C.N. property, the making up of the cars and C.N.'s awareness of the condition of the property and of children playing in the area. General damages were fixed at \$150,000. The Appeal Division agreed by a majority that the Railway had been negligent but was unanimous that on the issue of contributory negligence, the verdict was not a reasonable one being

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altogether against the evidence and also that the damages awarded were excessive. The Appeal Division fixed the damages at \$75,000. On further appeal appellant asked that the jury verdict be restored and respondent cross-appealed for dismissal of the action.

Held (Laskin C.J. and Spence and Dickson JJ. dissenting): The cross-appeal should be allowed and the action dismissed.

Per Martland, Judson, Ritchie, Pigeon, Beetz and de Grandpré JJ.: As findings of fact the answers by the jury were unimpeachable and amply supported by the evidence. The issue was whether these findings amounted to negligence, causative of the injury suffered by the infant for which the Railway should be held liable. While there was a lack of fencing in the vicinity of the accident

any duty that the Railway had, including its statutory duty, to fence did not extend to erecting a fence across the track at each public crossing so as to stop all persons from walking along the right-of-way. The jury's finding of negligence in the making up of the cars assumed an obligation on the Railway to make up its train to give the crew in the caboose perfect visibility at all times, an obligation which does not exist. The jury's answers taken together asserted that a common law duty arose out of the piles of sand on the right-of-way, piles on which children had been known by the Railway to play. No such duty existed and even if the presence of the sand piles constituted a playground of a sort the Railway would still have been under no duty to stop its train or post sentries. The licence found to exist by the jury could not amount to a leave to all children to attempt to board moving trains, a legal situation in no way modified by the answers that the train constituted an allurement, an answer which should not stand as there was nothing to differentiate this from any other freight train unless all railways be characterized as allurements at all times. However, even if the answer was well-founded it is not clear what reasonable and practical measures could have been taken by the Railway, particularly when the record does not disclose any other similar accident in the area. No reasonable occupier could have foreseen the type of accident which occurred. The Railway had no liability, the accident occurred on a private right-of-way, between crossings. The train was being run properly at low speed with bell ringing and headlight lit. There was no dangerous condi-

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tion on the property and the injury resulted from the positive and deliberate act of the child.

Per Laskin C.J. and Spence and Dickson JJ. dissenting: There was no suggestion by the respondent at the trial, and on the record there could not be, that there was no case to go to the jury. The respondent's contention that it was under no duty to the infant plaintiff appellant was an inadmissible proposition. Duty arises to a person if that person is exposed to an unreasonable risk of harm where it is reasonably foreseeable that the harm may result unless the prospective defendant exercises due care to prevent it. In the circumstances of the present case there was a foreseeable risk of injury to children from the conduct of the respondent's operations in an area to which children, to the respondent's knowledge, resorted to play. In finding that the respondent knew of the presence of children playing in the area the jury had made a crucial finding to establish a duty of care and it found also a breach of the duty in the absence of fencing or signs, and in the make up of the train as having a bearing on visibility. The effect of the findings was not that had these faults been corrected the jury would necessarily have been prevented but that the respondent would have discharged its duty of care. There was no basis for interfering with the finding by the jury on the respondent's liability.

On the matter of contributory negligence the Appeal Division had no justification for substituting its own view of the matter for that of the jury. There was evidence on which the jury could find the plaintiff appellant boy capable of contributory negligence and the trial judge correctly instructed the jury that the decision on that issue was one of fact for them. The jury had the advantage of seeing and hearing the boy and it was the jury alone that was in a position to act on that very important advantage in coming to a conclusion on the question of capacity. The

capability of a particular child should not be considered only on a normal basis of age if the evidence shows that the child's intelligence and education point to a capacity below that of other children of his age.

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While the award of damages by the jury presses to the outward limit of what an award in the circumstances should be, it should not have been interfered with. It is not appropriate to apply as the test standards which the appellate Courts have laid down in reference to damages fixed by a judge alone. To justify correction by a court of appeal of a figure arrived at by a jury "the figure must be wholly out of all proportion".

[*Mitchell v. Canadian National Railway Company*, [1975] 1 S.C.R. 592; *Jenkins v. Great Western Railway*, [1912] 1 K.B. 525; *Paskivski v. Canadian Pacific Limited*, [1976] 1 S.C.R. 687; *Amos v. New Brunswick Electric Power Commission*, [1977] 1 S.C.R. 500; *Ouellet v. Cloutier*, [1947] S.C.R. 521; *University Hospital Board v. Lepine*, [1966] S.C.R. 561; *British Railways Board v. Herrington*, [1972] A.C. 877; *Veinot v. Kerr-Addison Mines Limited*, [1975] 2 S.C.R. 311; *The Acadia Coal Company, Limited v. MacNeil*, [1927] S.C.R. 497; *Pinkas v. Canadian Pacific Railway Company*, [1928] 1 W.W.R. 321; *Brisson et al. v. Canadian Pacific Railway Company et al.* (1969), 69 W.W.R. aff'd 70 W.W.R. 479 referred to.]

APPEAL and CROSS-APPEAL from a judgment of the Supreme Court of Nova Scotia[1], Appeal Division, allowing an appeal from a judgment of Dubinsky J. sitting with a jury at trial. Cross-appeal allowed, action dismissed with costs throughout, Laskin C.J. and Spence and Dickson JJ. dissenting.

Harry E. Warthall, Q.C., for the plaintiff appellant.

John J. Robinette, Q.C., T. Winton Toward and M. Koenigsberg, for the defendant respondent.

The judgment of Laskin C.J. and Spence and Dickson JJ. was delivered by

THE CHIEF JUSTICE (dissenting)—The overriding consideration in this case is the force and, indeed, the faith that is to be accorded to the verdict of a jury. Involved as well within that larger framework is the ambit of risk by which negligence is defined both in law and in fact. At the trial of this negligence action, arising out of injury, the loss of a leg, sustained by the infant plaintiff while attempting to board a passing train,

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the jury found causative negligence on the part of the respondent railway, found that the infant plaintiff could not be chargeable with contributory negligence and fixed the general damages at \$150,000. The Nova Scotia Supreme Court, Appeal Division, interfered with the finding on contributory negligence, holding that the infant plaintiff was of an age, experience and intelligence to make him capable of negligence and that he was in fact negligent to the degree of 50 per cent. It also interfered with the jury's assessment of general damages, reducing them to

\$75,000. However, by a majority, it rejected the railway's appeal against liability, holding that there was ample evidence of negligence on its part. Macdonald J.A., in dissent on this point, would have ordered a new trial on liability.

In this Court, the plaintiff sought to have the finding of contributory negligence made by the Appeal Division set aside and the jury's finding thereon restored; and similarly with respect to the general damages. The railway cross-appealed and has asked this Court, not for a new trial on liability but for dismissal of the action.

The issues in this case were all issues of fact, and I include in this assertion the assessment of damages because there is no suggestion that extraneous factors were considered or that there were any other defects connected with the award of damages so as to indicate what has been conveniently called an error of principle. The dispute as to damages, on which the trial judge admittedly gave a proper direction, was simply that they were inordinately high and so excessive as to call for interference by an appellate Court. The Appeal Division's interference with the jury's finding that the boy was not capable of being negligent (so that whether he was in fact negligent did not have to be decided) was an interference with the jury's appraisal not only of the evidence but of the boy, who was a witness and was seen and heard by the jury. On the cross-appeal on liability, counsel for

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the respondent sought to raise the factual underpinning of the finding of negligence into a question of law by urging that there was no causal relation between the alleged negligence (which he denied existed in fact) and the injury that was suffered.

There are, in my view, two very important considerations that should dominate the determination of this appeal. The first is that the questions put to the jury (and I shall mention them and the jury's answers in due course) were questions to which counsel for the respective parties agreed. This is not then a case in which it can be said by either party that one or more of the questions put to the jury by the trial judge were improper or imprecise or misleading or ambiguous. The second matter that I think important is that the jury's answers were responsive to the questions.

Appeal Courts do not fine-comb jury answers but accord them the respect of a common sense interpretation even where there may be some ambiguity in the answers. There was none here. The Appeal Division of the Nova Scotia Supreme Court found ambiguity not in any answer of the jury but in the formulation of question 4, going to the issue of contributory negligence, and, consequently, felt that the answer itself was of uncertain effect. Since the respondent agreed to question 4 as to all the other questions, I do not think it is open to it to allege ambiguity unless the question is incapable of a rational meaning and, in my view, that is not so in this case. It is always timely to be reminded that juries do not write reasons for judgment, and their answers must be taken against the background of the evidence from which they are entitled to select, without manifesting their selection, what is credible, what is significant, what is persuasive to them. It is very often easy for an appellate Court, in the leisurely scrutiny of the transcript, to find

significance in pieces of evidence to contradict jury findings, and in so doing to usurp the jury's function. What an appellate Court may believe from a reading of the transcript may be the very things which a jury disbelieved or believed in part only. It is one thing to interfere

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with a jury's verdict where there is simply no evidence to support its findings or to support a critical one; it is a different thing, and not to be encouraged, to interfere with its findings where there is evidence, however slight, on which they may be based, but where because of offsetting evidence a question of credit and weight arises. These are matters for the jury alone. The present case falls in this last-mentioned class.

With this back-up, I turn to the issues raised by the appeal and cross-appeal and begin, of course, with a consideration of the respondent's attack on the finding of liability against the railway. The minutiae of the evidence are not for this Court to detail; it does not retry cases on the basis of the transcript. It is enough to present the broad outlines of the case which was put to the jury. In the first place, the accident to the plaintiff, then an 8-year old boy, took place within city limits, through which the respondent had a right of way on which it carried on main line train operations. They passed through a residential and industrial area in the vicinity of the accident. The right of way extended about 50 feet from the tracks easterly to the back of a concrete block plant, the Shaw plant. There were piles of sand and gravel, used by the Shaw plant in its operations, within this 50-foot area, and there was a spur line between the main line and the back of the Shaw plant which the railway used to dump gravel for the Shaw plant, but this spur line or siding was not much used at the time. A hopper and a ramp were at the back of the plant, and they were used to supply the sand and stones used in the plant.

Second, the area was unfenced and was a place where children played. The plaintiff had played there on previous occasions and had never been warned away, either by Shaw employees or those of the railway. Indeed, there was no evidence that any child playing in the area had been warned off, although the respondent's employees were aware

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of their presence. Moreover, there was no sign prohibiting access to the area. A jury would be justified in regarding the area as a playground to which children were permitted to come.

Third, the proximity of the piles of sand and of gravel to the main line tracks over which trains passed from time to time during the day when children could be found in the area, would justify a jury in regarding the train operations as exposing the children to the risk of injury from such operations no less than they were exposed to injury from falling off the piles of sand and gravel.

Fourth, the evidence did not show that any railway employee was detailed to keep a watch for children when trains passed by on the main line. The general responsibility for keeping a watch was assigned to the train crew but this was in the ordinary course and did not take account of particular situations of hazard such as that created by the sand and gravel playground.

On the day of the accident, the plaintiff was playing with a 9-year old friend on the sand and gravel piles and they ran toward the track as the train, a freight train consisting of a locomotive and twenty-seven cars, approached from the north. There is evidence that the plaintiffs companion dared him (bet him a nickel) "to get a little ride" and the plaintiff failed in his first attempt to get on to the ladder of a boxcar. On his second attempt, he fell under the wheels and his right leg was severed and lying where he fell he waved goodbye to the train. None of the train crew observed the accident or knew of it until the train pulled into the next (Dartmouth) station. There was evidence that the conductor, who was in the caboose, had his visibility obscured because the caboose was being pulled backwards (so that the cupola in which he sat was not in its proper position towards the rear) and a large box-car immediately preceding it blocked forward visibility.

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The questions put to the jury by agreement of counsel and their answers were as follows:

Question 1. (a) Was there fault or negligence on the part of the Defendant Railway, its servants or agents which caused injury, loss or damage to the Plaintiffs?

Answer: Yes (7)

Question 1. (b) If so, in what did such fault or negligence consist?

Answer: (7) (1) lack of fence & proper signs

(2) lack of removal of sand or gravel from CN property

(3) the making up of the cars originally

(4) CN being aware of conditions of property and aware of children playing in this area.

Question 2. Was the Infant Plaintiff Peter Wade a licensee or a trespasser in relation to the Defendant Railway at the time he was injured?

Answer: (7) Licensee

Question 3. (a) Was the Infant Plaintiff Peter Wade enticed or allured to the Defendant's premises by the presence of sand and gravel piles located thereon?

Answer: (7) Yes

Question 3. (b) Was the Defendant's train an enticement or allurement to the Infant Plaintiff Peter Wade at the time he was injured?

Answer: (7) Yes

Question 4. Was Peter Wade, at the time he was injured, a child of such an age, intelligence and experience as to understand and appreciate the risk of injury in attempting to board the Defendant's train?

Answer: (7) No

Question 5. Only if you answer Question 4 “Yes” is this question to be answered. If you find the injury was caused by the fault or negligence of both the Defendant Railway and the Infant Plaintiff Peter Wade then state the

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degrees of fault:

Answer: (a) the Defendant—

(b) the Infant Plaintiff—

Question 6. What amount of general damages do you award the Infant Plaintiff Peter Wade?

Answer: \$150,000.00(7) One Hundred & Fifty Thousand Dollars.

(The figure 7 appearing in the answers refers to the number of jurors who must agree on a verdict; the jury in civil cases in Nova Scotia consists of nine jurors).

I address myself, first, to the jury’s findings of negligence. There was no suggestion by the respondent at the trial and, indeed, there could not be on the record, that there was no case to go to the jury. Nonetheless, in this Court, counsel for the respondent contended that the respondent was under no duty to the infant plaintiff. That, in my view, is an inadmissible proposition in this case. Duty arises to a person if that person, in the circumstances in which he or she is brought into relation with another, is exposed to an unreasonable risk of harm, if it is reasonably foreseeable that harm may result to him or her unless the prospective defendant exercises due care to prevent it. In the present case, there was a foreseeable risk of injury to children from the conduct of the respondent’s train operations in an area to which children, to the respondent’s knowledge, resorted for play.

It was then contended by the respondent that this case was governed by licensor-licensee considerations, and that the only duty owed to licensees was not to expose them to a concealed danger. From this pivot, counsel for the respondent submitted that the plaintiff was injured as a result of a positive act of his own—attempting to board the train—and not from any trap or non-apparent danger. What this contention ignores is that the respondent’s duty here arises not simply from its occupancy of the right of way but from its positive activity in carrying on train operations. This is not a case in which the injury arose from the condition of the property but rather from an activity carried on by the respondent on its property. In this

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respect, as was the case in *Mitchell v. C.N.R.*[2], there is every reason to measure the respondent’s liability by ordinary principles of negligence: see *Fleming, Law of Torts* (4th ed. 1971), at p. 376.

The respondent's theory, if correct, would require this Court to say that the trial judge should not have submitted the case to the jury. The contention made by the respondent is on the footing that the respondent was an occupier and nothing more. That is not this case; and having regard to the respondent's knowledge of the presence of children in proximity to its train operations, it would have been reversible error to withdraw the case from the jury.

The jury's answer to the question of the respondent's causative negligence specified four faults. In finding that the respondent knew of the presence of children playing in the area, the jury made a crucial finding to establish a duty of care, and it found a breach of the duty in the absence of fencing or of any signs, and in the make-up of the train as having a bearing on visibility. The effect of these findings is not that the curative steps, if taken to correct the faults, would have prevented the injury but that the respondent would have discharged its duty of due care in the circumstances. I can find no basis in the question and answer on the respondent's liability to interfere with the finding against it. That was also the view of the majority of the Appeal Division.

I come now to the question of the infant plaintiff's contributory negligence. His counsel conceded that if the plaintiff was capable of being contributory negligent, capable of having a responsibility for his own safety in respect of the particular unreasonable and foreseeable risk of harm to which the respondent exposed him, there would be no doubt of his negligence in fact. Question 4 to the jury was based on the issue of his capability; it used the language of this Court in *McEllistrum v. Etches*[3], at p. 793. I do not understand why there should have been any difficulty in the Appeal Division in accepting this view of the question, especially when it was posed by

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experienced counsel who would know that a "yes" answer would not require any further question as to negligence in fact. Certainly, Question 5 which, in the circumstances, was not answered, imported that because it was directed to apportionment.

The capability question was particularly one for the jury because only in the case where it is clear beyond peradventure that a child is incapable will the matter be withdrawn from them: see *Fleming, Law of Torts* (4th ed. 1971) at p. 232. Correctively, in my view, only where the jury's finding that a child is incapable is an absurd finding should it be interfered with on appeal. In the present case, the trial judge gave it as his opinion that it would not be absurd to bring the issue of the plaintiffs contributory negligence to the jury—in short, there was evidence on which the jury could find the plaintiff capable thereof—but he correctly told them that the decision on that issue was one of fact for them. On what basis, then, could the answer to Question 4 be set aside?

McKeigan C.J. in his reasons on this issue indicated that the language of the *McEllistrum* case went to the question of whether a child was in fact negligent but, although that can be so, it does not rule out the use of the *McEllistrum* formula to determine the prior question of capability of being negligent. The formula fixes a standard upon which this prior question can be determined.

The learned Chief Justice appreciated this by saying that “the jury’s answer to the question asked was probably intended as a finding that the boy was not capable of negligence”. Following this observation he went on, however, to say that the jury’s verdict “was not one that a jury of reasonable men acting judicially could find, one altogether against the evidence”. He shifted, however, to another test, an objective one, by saying that “I cannot imagine that a normal eight year old boy would not know that it was highly dangerous to try to jump on a train ...”. As Fleming, *op. cit.*, points out at p. 232, this test is “independent of the degree of intelligence, emotional stability and edu-

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cation of the particular child”. In my opinion, it is a faulty test if invariably applied.

I do not see how an issue of a particular child’s capability of negligence can be considered on a so-called normal basis of age only, if the evidence shows that the child’s intelligence and education point to a capacity below that of other children of his age. The American Law Institute Restatement of Torts, 1st ed. vol. 2, s. 283 puts the matter this way: “In so far as concerns a child’s capacity to realize the existence of a risk, the individual qualities of the child are taken into account”. Although not using this exact language the Restatement of Torts, second, s. 283A, states that “if the child is of sufficient age, intelligence and experience to understand the risks of a given situation, he is required to exercise such prudence in protecting himself and such caution for the safety of others, as is common to children similarly qualified”, [but] “it is impossible to lay down definite rules as to whether any child, or any class of children, should be able to appreciate and cope with the dangers of many situations”. Where there is a jury, this is eminently for them to decide. In the present case the jury had before them evidence that the infant plaintiff at age 8 was repeating grade 2; they had evidence that he did not know his birth date, and they had the evidence of his waving goodbye to the train after it severed his leg. They saw him and heard him. What, in the main, is put against the jury’s finding is the infant plaintiff’s statement that he “kind of” knew that “it was dangerous to jump on” the train.

I find no basis in this record for the Appeal Division’s substitution of its own view of the matter, a view based on an objective test and, moreover, a view not informed by the opportunity and advantage of seeing and hearing the boy. It was the jury that had this very important opportunity and advantage, and it was the jury alone that was in a position to take it into account in coming to a conclusion on the question of capacity.

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There remains for consideration the Appeal Division’s interference with the jury’s assessment of damages. It is common ground that included in the amount of \$150,000 fixed by the jury was \$25,000 for the cost of a prosthesis for the plaintiff’s leg and replacements during the plaintiff’s lifetime. The general damages in question in the appeal were thus \$125,000 and these were reduced to \$50,000. In making this reduction, McKeigan C.J. applied as the only available test (there having been no misdirection by the trial judge) whether the sum awarded was “either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the

damage”. The authorities cited for this standard of measurement by an appellate Court were Viscount Simon in *Nance v. British Columbia Electric Ry.*[4], at p. 613 and Ritchie J. in *Sparks and Fairfax v. Thompson*[5], at pp. 628-9.

Unfortunately, the test applied by Chief Justice McKeigan through the use of the quoted words from the judgment in the *Nance* case was that assigned by the Privy Council when an appellate Court is considering damages fixed by a judge alone. The *Sparks and Fairfax* case was of that kind, and my brother Ritchie (I too was a member of that Court) quoted and applied the words of Viscount Simon in the *Nance* case only in so far as they expressed the test that an appellate Court should follow in reviewing damages fixed by a judge. Where the review relates to damages fixed by a jury, it was the view of Viscount Simon that (to quote his words, at p. 614 of [1951] A.C) “The disparity between the figure at which they [the jury] have arrived and any figure at which they could properly have arrived must, to justify correction by a court of appeal, be even wider than when the figure has been assessed by a judge sitting alone. The figure must be wholly out of all proportion”.

Having applied the wrong test for appellate Court interference with damages, the learned Chief Justice of Nova Scotia then wrongly found comparisons to support his reduction of the jury’s

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assessment in this case by invoking cases in which the trials were held before a judge alone, namely, *Mitchell v. C.N.R.*, supra; *Sparks and Fairfax v. Thompson*, supra; and *Paskivski v. Canadian Pacific Ltd.*[6] His proposed reduction of the general damages to \$50,000 (leaving the prosthetic costs of \$25,000 aside) cannot therefore be allowed to stand. This Court is in no worse position than the Appeal Division in reviewing damages and, accepting as I do the test propounded in the *Nance* case, the simple and yet difficult question is whether an award of \$125,000 by a jury for the loss of a leg by an 8-year old boy, with all that this imports over his life expectancy in respect of mode and condition of life, career and activities, is an award that is out of all proportion to that at which a jury could properly have arrived. It undoubtedly presses to the outward limit of what an award for such an injury should be, but I am not prepared to interfere with it.

In the result, I would allow the appeal and dismiss the cross-appeal with costs to the appellant throughout.

The judgment of Martland, Judson, Ritchie, Pigeon, Beetz and de Grandpré JJ. was delivered by

DE GRANDPRE J.—The infant plaintiff, 8 years of age, lost a leg when attempting to get a ride on a freight train in motion by jumping onto the ladder of a box-car. He sued the Railway and the jury came to the conclusion:

- (1) that there was negligence on the part of the Railway;

- (2) that the child was not capable of contributory negligence;
- (3) that the general damages amounted to \$150,000.

The negligence of the Railway was thus particularized in the verdict:

- (1) lack of fence or proper signs;

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- (2) lack of removal of sand or gravel from C.N. property;
- (3) the making up of the cars originally;
- (4) C.N. being aware of conditions of property and aware of children playing in this area.

In the Appeal Division of the Supreme Court of Nova Scotia[7], the majority agreed with the first conclusion that the Railway had been negligent; Macdonald J.A. dissented on this point and would have ordered a new trial. On the issue of contributory negligence, all three judges agreed that the “verdict was not one that a jury of reasonable men acting judicially could find, one altogether against the evidence” (in the reasons of MacKeigan, C.J., at p. 575). Similarly, they all agreed that the damages “are much too high, inordinately high, and ‘so large that the jury ... could not reasonably have given them’” (as per C.J. MacKeigan, at p. 578); the damages were accordingly assessed at \$75,000.

By his appeal, plaintiff asks that the jury’s findings be restored in their entirety. Defendant has filed a cross-appeal, praying for the dismissal of the action. I now turn to the relevant facts:

- (1) In the City of Dartmouth, the Railway is the owner of a right-of-way generally running north-south at the location of the accident; from the centre of the tracks to the eastern limits of the right-of-way, there is a distance of 50 feet; on that side of the railway line, there does not exist an uninterrupted fence.
- (2) Just outside of the right-of-way to the east lies the concrete block plant of L.E. Shaw Limited, at the rear of which there is a hopper and a ramp used to supply the plant with sand and small stones; an industrial railway siding leads to the area behind the block plant; this siding was seldom

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used and at the relevant time was partly covered by sand and small stones.

- (3) The Shaw plant is located slightly more than one-quarter of a mile from the public crossing at Nootka Avenue, also known as Princess Margaret Boulevard.
- (4) On July 17, 1974, around 3 p.m., the infant appellant, together with a companion, John Carter (then 9 years old), approached the Shaw plant from the railway crossing at Nootka Avenue; the two boys played for about half an hour in the sand piles near the hopper, piles situated some 50 feet from the tracks.

- (6) The forward brakeman was seated on the left side of the locomotive, that is the east side, and as the train passed by the Shaw plant, he noticed a boy playing near a sand or rock pile close to the plant.
- (7) After the locomotive had passed the Shaw plant, the infant plaintiff and his friend Carter picked up their shirts and ran from the hopper to the edge of the railway track; Carter climbed to the top of a mound of stones and the infant plaintiff stood on a flat area near the track.
- (5) The train approached the vicinity of the Shaw plant from the north, at a speed of approximately 7 miles per hour; it was constituted of a locomotive and of 27 cars for a length in excess of 1,000 feet; the caboose was being pulled backward and the car immediately preceding it was a large box-car.
- (8) As Carter puts it, "I bet him (Wade) to jump on it"; Wade then tried to jump on one of the cars but fell off; he picked himself up, ran a short distance in the same direction as the train, made a second attempt, fell off again and was injured.
- (9) While the evidence is not perfectly clear as to which of the cars was the instrument of the injury, appellant's counsel before us took the posi-

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tion that the car that rolled over the leg of the child was the third or fourth one ahead of the caboose.

- (10) The crew was unaware of the occurrence of the accident until it was reported after the train had arrived at the Dartmouth yard; the conductor was seated on the left side of the cupola of the caboose and did not see the child; in his evidence, he explained that from that position, there is no line of sight to the right-of-way immediately adjacent to the train; for a distance of approximately 12 feet out from the side of the train, the area is obscure unless one leans out of the window; this, the conductor had done approximately 450 feet from the Shaw plant.

On these facts, the jury made its finding of negligence. I will quote again its answers to question 1(b):

- (1) Lack of fence or proper signs
- (2) Lack of removal of sand or gravel from C.N. property
- (3) The making up of the cars originally
- (4) C.N. being aware of conditions of property and aware of children playing in this area.

As findings of fact, these answers are unimpeachable being amply supported by the evidence. That, however, is not the line of the Railway attack. Rather the issue is whether these findings were acts of negligence, causative of the injury suffered by the infant, for which the Railway should be held liable.

That issue is not to be decided in favour of plaintiff simply because the jury answered 'yes' to question 1(a) "Was there any fault or negligence on the part of the Defendant Railway, ...?". The respect due to verdicts reached by juries does not go beyond the area of their competence, namely the determination of facts. If the reproaches made to defendant do not amount to breaches of duty towards the plaintiff, they do not in law constitute negligence and the verdict must be set aside.

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We are not here in the field of liability without fault. As stated by Chief Justice MacKeigan, "liability still rests upon causative fault" (p. 566). But the trial judge went much further and clearly erred in law when, at the request of plaintiffs counsel, he recalled the jury and recharged them in the following words:

Mr. Foreman, Gentlemen, thank you for coming back. I'm only going to keep you about one minute. I feel that I have adequately covered the points that it was incumbent upon me to deal with in the course of my charge. However, it has been mentioned to me by counsel for the plaintiff that I should have pointed out to you, Gentlemen, that the sand piles and rocks and the train itself constituted an allurement to small children and that it was ... there was a duty on the defendant to make sure that children who were allured to the piles and to the train would be prevented from going there, either through fences or signs or what have you, and therefore, the plaintiffs say that the company is in breach of its duty, common law duty, to the plaintiff for not having taken the proper steps to make sure that this allurement which they knew was there would not result in any harm to the small children and the plaintiffs say that the defendant didn't do that. That, of course, is denied by the defence, but at any rate I thought perhaps I should just bring you back. I think I've covered the situation pretty fully, but I feel that it's not unfair for me to comply with a request to bring back the jury and just point this out, that the plaintiffs feel that I should have touched upon the so-called 'allurement' of these children.

At best for plaintiff, this direction is at least unfortunate as pointed out by Chief Justice MacKeigan (p. 572):

This direction given to the jury as a final word on being called back, was at least unfortunate, since it can be interpreted as wrongly suggesting an absolute duty on the Railway to insure the safety of the children. If the Railway was an insurer, did the child then have no responsibility at all for his own safety?

In the eyes of the majority, however, this error in the charge was not enough to justify a new trial. This view was not shared by Macdonald J.A., who would have ordered a new trial for, amongst other reasons, this unfortunate direction. Although I look upon this error of the trial judge as a serious

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one, I prefer to rest my conclusions on an examination of the legal consequences to be attached to the findings of fact made by the jury.

Whether these facts are examined in the light of the classic rules governing the liability of an occupier toward a licensee (the status of the child as found by the jury) or in that of the so-called new occupier law requiring the occupier to act with reasonable humanity, plaintiff cannot succeed unless defendant, as a reasonable person, was under a duty to act differently due regard being given to the requirements of tort law as to foreseeability.

Did a duty exist? Of the four answers given by the jury to question 1(b), only the first one might raise the issue of a statutory duty because of s. 214 of The Railway Act, R.S.C. 1970, c. R-2. The exact meaning of that section was examined by two judges of this Court in *Mitchell v. Canadian National Railway Company*[8]. In the case at bar, I do not intend to decide that point because however strict is seen the duty to fence imposed by the statute upon the Railway, it certainly does not extend to erecting a fence across the track at each public crossing so as to stop all persons from walking along the right-of-way. I am in complete agreement with Chief Justice MacKeigan when he writes (at p. 546):

Any fencing or lack of fencing of the right-of-way would not in any event have affected Peter Wade or his friend who came to the site by following the tracks from Princess Margaret Boulevard, which crosses the railway about eight hundred yards north of the Shaw plant, and on which the boys lived in a large Armed Forces housing area west of the railway.

Thus, there was no breach of a statutory duty.

The third answer assumes an obligation on the Railway to make up its trains so as to give the

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crew in the caboose a perfect visibility at all times. This obligation, in my view, does not exist. When the train is in motion forward, the visibility must belong to the occupants of the locomotive, that of the occupants of the caboose being of relatively minor importance. In my view, this answer must be read with the others and has no distinct existence apart from the others. What those answers taken together assert is the existence of a common law duty arising out of the presence of piles of sand on the right-of-way, piles on which children had been seen to play in the past to the knowledge of the Railway. I am unable to accept the existence of such a duty. Even if I were ready to consider that the presence of the piles of sand on the right-of-way constituted a playground of sort, I would still be unable to impose upon the Railway the duty to stop its trains or to post sentries.

The licence found to exist by the jury could not amount to a leave granted to all children to attempt to board moving trains. In *Jenkins v. Great Western Railway*[9], the England Court of Appeal so held and I share its view:

The plaintiff, a child two and a half years old, lived with his parents in one of a row of houses in front of which was a highway. On the other side of the highway there was a fence of posts and rails belonging to and repairable by a railway company. Inside the fence, on the company's premises there were a siding, a pile of wooden railway sleepers (distant two and a half inches from the fence), and, beyond them and about thirty-five yards in a direct line from the plaintiffs parents' house, the main line of the company's railway. The plaintiff got or was assisted over or through the fence and when on the main line was run over by an express train of the company, sustaining serious injury. In an action against the company for damages the jury found that the plaintiff got on to the line over or through the fence; that the company's servants knew that children were in the habit of playing on the pile of sleepers, but not that they were in the habit of getting on the main line, and that the evidence did not bring home knowledge to any particular servant, but that there must have been knowledge on the part of some of the company's servants; that the

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fence was not a reasonably fit fence for the purpose of separating the railway from the high road, having regard to the proximity of the houses on the other side of it; that children were in the habit of getting on to the pile of sleepers over or through the fence by the leave or licence of the company, but not elsewhere, and that the defendants, having regard to all the circumstances, were guilty of negligence in not taking some sufficient means of preventing children from getting on to the line:—

Held, that the leave and licence (if any) to play on the pile of sleepers was confined to that spot, and did not extend to the main line; that there was no duty on the company to fence off the sleepers from the rest of their land, and that they were not liable.

Nor is the legal situation modified by the answer given by the jury to question 3(b) that the train itself constituted an allurement. Quite apart from the fact that this answer is the direct result of the misdirection given by the trial judge to which I have referred earlier, I am satisfied that, in law, this answer cannot stand. This train had no particular features differentiating it from all other freight trains; if the answer were to be accepted, the operations of all railways would have to be characterized as creating allurements automatically and at all times. Further, assuming that this answer is well-founded, I do not see that, by the exercise of reasonable foresight, there were reasonable and practical measures to be taken by the Railway; the more so when the record does not disclose any other accident of the same nature in the area.

The duty of a railway on its right-of-way between public level crossings is not as high as its duty at level crossings proper. The Court of Appeal and the parties have mentioned the case of *Paskivski v. Canadian Pacific Limited*[10]. As I read this case, it is favourable to the defence. The accident in that case had involved a young child waiting with many other children at a public crossing while a slowly moving freight train was engaged in a switching operation. As in the case at bar, there had been no breach of statutory duty on the part of the Railway and the Court had to

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determine whether the exceptional or special circumstances of the case extended the field of liability. A minority of three thought that no such extension was justifiable. Two of the members of the Court constituting the majority, namely Martland and Ritchie JJ., were careful to restrict their finding of liability to the “unusual” circumstances of the case. The rule was thus expressed by Martland J. (at p. 690):

In brief, if the operations of the railway are carried on in such a way, or are of such a character that the public using the crossing is exposed to exceptional danger, or if there are exceptional circumstances that render the prescribed precautions ineffective or insufficient, the railway may be held to be negligent for failure to adopt other precautions to protect the public.

On his part, Dickson J., speaking for himself as well as for the Chief Justice and Spence and Beetz JJ., stated the question in the following words (at p. 696):

There was no breach of statutory duty on the part of Canadian Pacific; the claim, if it is to succeed, must be for breach of a common law duty, as such duty has been delimited by earlier decisions of this Court, to take all reasonable precautions to protect members of the public lawfully using the crossing.

And he went on (at p. 700):

We are not here concerned with occupier’s liability nor with trespassers. The roadway was not railway property for the exclusive use of the railway company. It was public property which the railway company could use in common with all members of the public, including the appellant. The appellant, as a pedestrian, had an undoubted right to be where he was at the time and place of the accident.

As I read it, this recent judgment clearly establishes the distinction that I am attempting to make between the duty resting upon the Railway at a railway crossing and its duty on its own right-of-way between such public crossings. And this distinction is made clearer when the alleged duty is examined from the angle of foreseeability. The

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rule is clear: the defendant in this case can only be found liable if the injury was a reasonably foreseeable result of the situation created by it. When applied to cases involving children, the rule was recently examined by this Court in *Amos v. New Brunswick Electric Power Commission*[11]. The rule was repeated many times by this Court but it may be useful to refer to two judgments. Although these cases were dealing with other factual situations, the principle is clearly stated and equally applicable here. In *Ouellet v. Cloutier*[12], the head-note reads:

The fact that it was possible that an accident might occur is not the criterion which should be used to determine whether there has been negligence or not. The law does not require a prudent man to foresee everything possible that might happen. Caution must be exercised against a danger if such danger is sufficiently probable so that it would be included in the category of contingencies normally to be foreseen. To require more and contend that a prudent man must foresee any possibility, however vague it may be, would render impossible any practical activity.

In *The University Hospital Board v. Lepine; Monckton v. Lepine*[13], Hall J., speaking for the Court, stated (at p. 579):

The question of whether there was or was not negligence in a given situation has been dealt with in many judgments and by writers at great length. One principle emerges upon which there is universal agreement, namely, that whether or not an act or omission is negligent must be judged not by its consequences alone but also by considering whether a reasonable person should have anticipated that what happened might be a natural result of that act or omission.

Applying the principle to the facts found in the case at bar, I conclude that no reasonable occupier could have reasonably foreseen that a child playing on a pile of sand some fifty feet from the track when the engine went by, would leave this place of safety, run towards the track and attempt to jump on the ladder of a box-car. To find fault on the part of the Railway in those circumstances if really

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to say that, in law, the Railway is the insurer of all persons coming onto its land, a proposition I cannot accept.

Plaintiff's submission is founded on the broad duty of care owed by an occupier to children as defined in recent decisions of this Court and other courts of sister jurisdictions. A brief examination of two of these judgments should now be made.

In *Mitchell* (supra), where a boy of 9 years of age had decided to toboggan at a place accessible from a well trod path along a railway embankment and was injured when he slid down into the way of a train because he had tripped on a shrub protruding above the surface of the icy embankment, an actionable breach of a duty of care was found for reasons thus expressed by Laskin J., as he then was, (at p. 614):

The relevant inquiry then, apart from any statutory duty owing to the boy or to others who might reasonably be expected to be on the railway company's right of way in the particular area, is as to the nature of the duty owing by the respondent at common law to a person in the position of the injured plaintiff in respect of the condition of the right of way. Germane to this inquiry are, of course, the proximity of the path to the tracks lying below the embankment and the sharp drop from the edge to the ditch below leading to the tracks.

In determining the scope or extent of the duty, the icy condition of the path and of the embankment is also a material consideration. The classification of the injured plaintiff by the trial judge as a licensee does not, in my opinion, exclude the liability of the railway company as licensor when there is awareness of the use of the path, its proximity to the tracks and the fact that winter freezing would create an icy and slippery condition. This would result in a foreseeable risk of harm, especially to children, beyond any risk that could be said to arise in seasons other than winter.

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Thus, the question of foreseeability was foremost in the mind of the majority. In addition, the land itself was dangerous, being in an icy and slippery condition; the cause of the injury was therefore in the land itself without any positive act on the part of the victim other than being on the land at the time.

British Railways Board v. Herrington[14], was decided on very different facts. In the words of Ritchie J., in Mitchell above, (at p. 596):

The facts in Herrington's case alone serve to distinguish it from the present one. There an electrified railway line ran between two stretches of meadow and park land which were open to the public as property of the National Trust. The highly charged line was dangerous in itself and in the view of at least some members of the Court, it was a concealed danger in the sense that it might well not have been apparent to children.

[The underlining is mine]

See also the comments of Martland J. in Veinot v. Kerr-Addison Mines Limited[15], starting at p. 330, particularly at p. 341.

I cannot see any liability on the Railway in the present case. The accident did not occur at a public crossing but on a private right-of-way between crossings. The train thus being run on the railways on its property was proceeding in accordance with the statutory standards: at a speed of seven miles per hour, with bell ringing and headlight lit. The child was not near the tracks and much less on the tracks as in the case of The Acadia Coal Company, Limited v. MacNeil[16], but on a pile of sand fifty feet therefrom. As noted earlier, he only left that position of safety after the locomotive had passed; the occupants of the locomotive had therefore no reasons to take any step as they went by. As to the railway employees occupying the caboose, they were not called upon to do anything until it became clear that the child would take a foolish step, at which time it was impossible to stop the train before the happening

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of the accident. There was no dangerous condition in existence on this property, concealed or otherwise, and the injury was the result of the positive and deliberate act of the child. That act could not reasonably be foreseen, much less prevented, unless in the words of Kilgour J. in *Pinkas v. Canadian Pacific Railway Company*[17], at p. 323:

to escape liability for negligence railway operations must be held to be subject to the necessity of posting sentries in every railway yard and by every crossing, and at every other point to which mischievous or venturesome children could lawfully or unlawfully gain access to rolling stock.

I am entirely in accord with what Hunt J. wrote in *Brisson et al. v. Canadian Pacific Railway Company et al.*[18], at p. 186:

In this case, I find that the absence of fencing, even if it was required, was not the cause of the injuries to the infant plaintiff. He and his friends had come on to railway property, had walked along it for some distance, had stood aside as the freight train was passing, and then deliberately and purposely attempted to board the moving freight train. The cause of the accident was clearly their attempt to board the train, and not the absence of fencing. If there was a breach of duty on the part of the railway it did not cause the injuries, and the railway is not liable for them.

This paragraph was adopted by the Court of Appeal in that case, that judgment being reported at 70 W.W.R. 479.

I would allow the cross-appeal and dismiss the action with costs throughout.

Had I held another view and been obliged to decide the issues raised by the main appeal, I would have confirmed the conclusion of the Appeal Division of the Supreme Court of Nova

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Scotia, both as to the capacity of the child and as to the assessment of damages.

Cross-appeal allowed, action dismissed with costs, LASKIN C.J. and SPENCE and DICKSON JJ. dissenting.

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[1] (1976), 14 N.S.R. (2d) 541.

[2] [1975] 1 S.C.R. 592.

[3] [1956] S.C.R. 787.

[4] [1951] A.C. 601.

[5] [1975] 1 S.C.R. 618,

[6] [1976] 1 S.C.R. 687.

- [7] (1976), 14 N.S.R. (2d) 541.
- [8] [1975] 1 S.C.R. 592.
- [9] [1912] 1 K.B. 525.
- [10] [1976] 1 S.C.R. 687.
- [11] [1977] 1 S.C.R. 500.
- [12] [1947] S.C.R. 521.
- [13] [1966] S.C.R. 561.
- [14] [1972] A.C. 877.
- [15] [1975] 2 S.C.R. 311.
- [16] [1927] S.C.R. 497.
- [17] [1928] 1 W.W.R. 321.
- [18] (1969), 69 W.W.R. 176 affd. 70 W.W.R. 479.
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