
Leadbetter (*Suppliant*) *v.* **The Queen** (*Respondent*)

Sheppard D.J.—Vancouver, January 12, 13, February 9, 1970.

Crown—Post office—Negligence—Allurement to children—Post Office box placed near public highway—Injuries to small child playing on box—Liability of Crown—Crown Liability Act, S. of C. 1952-53, c. 30, s. 4(2).

A post office employee in the course of his employment placed a heavy mail box at the side of a public highway in British Columbia near a trailer court. A three year old child who lived in the trailer court suffered personal injury when the mail box upon which she was playing fell on top of her.

Held, the Crown was liable for the child's injury. In placing the mail box where he did, where it constituted an allurement to young children, the post office employee was negligent.

Cooke v. Midland G. W. Ry of Ireland [1909] A.C. 229, applied.

PETITION of right.

R. Robinson for the suppliant.

N. D. Mullins, Q.C., for the respondent.

SHEPPARD D.J.—The petition raises a claim for damages arising out of injuries suffered by the infant suppliant, Laura Lee Leadbetter, by a group mailbox falling upon her, allegedly through negligence, so as to create a liability within the *Crown Liability Act,* S. of C. 1952-53, C. 30, S. 4(2).

In May 1967, Wallis of the postal department with the help of one Elder, decided on the location of two group mailboxes. Accordingly, one mailbox was placed on the side of Ord Road at the junction of a side road from the north about 5 miles from Kamloops, B.C. In November 1967, Wallis took out a second box which he left near the other box until March 1968, when he put it alongside the first box. It was the second box which caused the injuries complained of. These group mailboxes have each 10 compartments and the first box has one compartment used for posting outgoing mail, and each of the other compartments in these boxes was assigned to a patron or customer for delivery of mail, in place of an individual mailbox on a rural route. Each compartment is locked by a padlock supplied by the patron or customer. Each box weights 200 pounds as shipped in cardboard containers and therefore weighs a net amount of about 189 to 190 pounds; is of a height of 58¾ inches, depth 18 inches and width 23 inches and stands upon four legs and two legs on each side stand on a metal strap projecting 6 inches from the back and from the front.

In 1968 there resided at 1440 Ord Road in a trailer court the male suppliant Laurie William Leadbetter, his wife and three children, including Vicki, then aged about 8 years, weighing about 40 to 45 pounds, and Laura, the infant suppliant, then aged about 3. Their trailer was about 150 feet north of the mailboxes and in a trailer court about 100 feet north of the property line on Ord Road; nevertheless, the address of the trailer court was 1440 Ord Rd. About noon, Nov. 23, 1968, the suppliant Laura, and a small friend of Vicki's weighing about 35 to 40 lbs., were playing at the mail box and Vicki put her foot on the lower hinge and her friend was going to put her foot on top of Vicki's foot and thereupon they would climb on top of the mailbox. In their efforts, the mailbox then fell forward; they escaped, but the mailbox fell on Laura causing her a fractured right femur and fracturing the left side of her skull above and behind the left ear, and penetrating the lining of the brain. Kreiger, an employee working nearby then going home for lunch, saw the child Laura under the upturned mailbox and thinking it was too heavy to be lying on a child he stopped his automobile, lifted up the mailbox and the two girls helped the child from underneath. Kreiger then sent Vicki home to her mother and carried Laura to her home in the trailer about 150 feet distant. The parents then took Laura to the hospital where she remained for 61 days. Meanwhile, her leg was set and she was operated on for a fractured skull. The wound healed and she is completely recovered and there are no consequential disabilities to be expected, other than the scar above and behind the left ear which is in a horseshoe shape of about 3 inches; that scar is hidden by the hair and is seen only by pushing back the hair. Under the *Crown Liability Act*, S.C. 1952-53,

c. 30, the Crown is liable in tort for the torts of the servants to the same extent as a private person (s. 3(1)(*a*)). But the Crown is liable only if the servant be liable, s. 4(2), which reads as follows:

> No proceedings lie against the Crown by virtue of paragraph (a) of subsection (1) of section 3 in respect of any act or omission of the servant of the Crown unless the act or omission, apart from the provisions of this Act, have given rise to the cause of action in tort against that servant or his personal representative.

Contrary to the contention of counsel, the suppliant Laura Lee, was not at the group mailbox an invitee within *Indermaur v. Dames*[1] and *Heaven v. Pender*[2], as she was not invited on a matter of business which concerned the occupant. Nor was she there as a licensee within *Gautret v. Egerton*[3]. The *Highway Act,* R.S.B.C. 1960, c. 172, s. 4 reads:

> All roads, other than private roads, shall be deemed common and public highways.

Section 5 reads:

> Unless otherwise provided for the soil and freehold of every public highway is vested in Her Majesty, Her Heirs and Successors.

Section 6(1) provides that a travelled road on which public money has been expended shall be deemed and is declared to be a public highway. That would no doubt vest the Ord Road, on which is situate the mailboxes, in the Crown in the right of the Province. However, assuming that Laura Lee were a trespasser against the Crown in the right of the Province, that would not make her a trespasser as against Wallis as the defence of her being a trespasser would be available only to the owner and occupier of the premises trespassed upon, *Coburn v. Saskatoon*[4], and we are here primarily concerned with the duty on Wallis. Moreover, it is not to be assumed that the right of a person on a road in British Columbia is restricted as in *Harrison v. Duke of Rutland*[5] where the right of the public was held to be restricted to the right of passing and re-passing. Under s. 4 of the *Highway Act* the land may deem to be vested in Her Majesty but subject to the statutory right of the public to enter on it as a public right. However, as the relation of trespasser does not afford any defence to Wallis, that need not be decided, as the statutory liability of the Crown in the right of Canada depends upon the liability of Wallis. (*Crown Liability Act,* s. 4(2), *M.S. Procyon v. National Harbours Board*[6], *Belanger v. The King*[7]. In the delivery and placing of the box, Wallis was acting in the scope of his employment and in the course of the Crown's business. Moreover, the boxes were delivered to Wallis by the

[1] (1866) L.R. 1 C.P. 274.
[2] (1883) 11 Q.B.D. 503.
[3] (1867) L.R. 2 C.P. 371.
[4] [1935] 1 W.W.R. 392.
[5] [1893] 1 Q.B. 142 (C.A.)
[6] [1968] 2 Ex.C.R. 330.
[7] (1916) 54 S.C.R. 265.

Postal Department for the purpose of placing them at that point chosen by Wallis and since then mail has been delivered to Wallis for distribution through such group mailboxes. It follows that the mailbox was placed at and by Wallis, at the place on Ord Road pursuant to his employment by the Crown in the right of Canada.

The liability in this instance turns upon the question of whether or not Wallis is under any duty to the suppliant plaintiff and that depends upon whether or not the group mailbox was an allurement (or trap) to children.

The mailbox was not inherently dangerous like the wiring and transformers in *Lengyel v. Manitoba Power Commission*[8]. There is some difficulty in reconciling the cases dealing with the liability of children (*Lengyel v. Manitoba Power Commission* (supra) per Tritschler J.A. at page 507). However, the proper test as to what is an allurement is contained in *Cooke v. Midland Great Western Railway of Ireland*[9] where Lord Atkinson at page 237 states:

> The authorities from *Lynch v. Nurdin*, [1 Q.B. 29] downwards establish, it would appear to me, first, that every person must be taken to know that young children and boys are of a very inquisitive and frequently mischievous disposition, and are likely to meddle with whatever happens to come within their reach; secondly, that public streets, roads, and public places may not unlikely be frequented by children of tender years and boys of this character; and, thirdly, that if vehicles or machines are left by their owners, or by the agents of the owners, in any place which children and boys of this kind are rightfully entitled to frequent, and are not unlikely actually to frequent, unattended or unguarded and in such a state or position as to be calculated to attract or allure these boys or children to intermeddle with them, and to be dangerous if intermeddled with, then the owners of those machines or vehicles will be responsible in damages for injuries sustained by these juvenile intermeddlers through the negligence of the former in leaving their machines or vehicles in such places under such conditions, even though the accident causing the injury be itself brought about by the intervention of a third party, or the injured person, in any particular case, be a trespasser on the vehicle or machine at the moment the accident occurred.
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> I omit the words "public place or thoroughfare" from the immediately preceding sentence, because I think the principle of these decisions applies to any place to which boys or children have a legal right to go and may reasonably be expected to be not unlikely to frequent.
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> The origin of the legal right to be in the particular place in which the boy or child comes in contact with the vehicle or machine, or the mode in which that legal right has been acquired, is, in my view, irrelevant.

Hence, Wallis must be charged with (1) a knowledge of the inquisitive and mischievous disposition of children and their likelihood to meddle with anything within reach, (2) that public streets such as Ord Road may not unlikely be frequented with children of tender years.

What has been held to be an allurement is seen in the following cases. In *Ricketts v. Markdale,*[10] a pile of timber on the street causing injury to a

[8] (1957-58) 23 W.W.R. 497.
[9] [1909] A.C. 229.
[10] (1900) 31 O.R. 610.

child of 7 years playing thereon was held to impose liability, and *Sangster v. T. Eaton Co.*[11]. A movable mirror, insecurely fastened by being merely leaned against the wall of a shop was held to impose liability on the occupant. In *Burtch v. C.P.R.*[12], a child of 10 years playing in the street by coasting down a hill across the defendant's railway crossing was injured by a moving handcar and the defendant was held to be liable because of the absence of warning. In *Brignull v. Grimsby*[13], an infant child of five and a half accompanied by a slightly older brother playing on the street had his finger crushed by a stationary road grader having a defective brake left unattended on the street.

Under the circumstances Wallis must be charged with having placed an allurement upon the public road in question. In this instance the imputed knowledge that children would frequently be present must have been within the actual knowledge of Wallis in that he has delivered mail in that district for some time and would have known that the trailer court began 150 feet north of the road on which the mailboxes were situate, that a school was within one-half mile of the trailer court.

Assuming the duty, the next question is whether or not there was negligence in fact by Wallis failing to exercise the care of a reasonable and prudent man under the circumstances. It would appear that the manner in which the box in question fell indicates that it had not been properly levelled. The mailbox fell forward, on top of Laura and, Kreiger, having stopped after the accident, learned that the two children, Vicki and her friend, were unable to lift the box off Laura because of the box's weight. In trying to lift the box off Laura, Vicki and her friend would have to lift only a part of the weight, that is, the top portion of the box with the bottom resting upon the ground and the weight not increased by the weight of the two children. If the box had been properly levelled these two children could not have pulled it over. The box had on each side under the legs a strap projecting about 6 inches to the rear and 6 inches beyond the front of the box. If the ground were level under the straps, the box could not fall forward unless the whole weight of the box were lifted to a height and brought forward so that all the weight of the box would rest on the extreme forward extension of the straps, otherwise the weight of the box and the extension of the straps would have prevented the box falling forward. The two girls (Vicki and her friend) had not the strength to have so lifted the box. They, standing with two feet on the ground, could not lift the upper portion of the box so as to release Laura and they had a lesser chance to lift the box prior to the accident. Then each of the two girls intended to climb up on the box by placing a hand or hands on top, and each putting a foot on the lower hinge, therefore at the time of the accident each had only one foot on the ground. In that position they could lift less than when trying to raise the box off Laura.

[11] (1895) 25 O.R. 78; 21 O.A.R. 624; 24 S.C.R. 708.
[12] (1907) 13 O.L.R. 632.
[13] (1925) 56 O.L.R. 525.

Again their weight, (for Vicki 40 to 45 pounds, for the other girl 35 to 40 pounds) to the extent placed on the hinge must be lifted together with the weight of the box, that lifting they could not do.

The accident occurred by the box falling forward hence over the end of the extension of the straps and towards the downslope of the incline. Those circumstances indicate that the extension of the straps could not have been pressing on the ground. When Wallis placed the box at the site, he found that after making a groove for the strap one corner of the box was low, thereupon he put a stone under that corner to level it. Wallis did not put the stone into the ground but on the ground. Photographs taken after the accident show a depression by that stone as the stone sank into the ground to such extent the corner would sink and the box incline forward. The accident indicates that the box was not properly levelled but on the contrary was so placed on a decline that the straps could not prevent the box falling forward as the straps would otherwise have prevented.

Also the nature of this accident indicates that it was caused by the negligent placing of the box so as not to be properly levelled. Therefore the inference of negligence follows from the doctrine of *res ipsa loquitur*. *Lawrie v. Woodward Stores (Oakridge) Ltd.*[14], at p. 560. The doctrine is not a question of law but an inference of fact legitimately arising from the facts established. *Shawinigan Carbide Company v. Doucet*[15] per Duff, J. at page 304. It was contended for the respondent that Wallis could not be deemed to have foreseen the fact that the children, Vicki and her friend, and the suppliant Laura Lee would have intermeddled with the box as such an accident had not previously occurred in the experience of Wallis. Unfortunately, Wallis must be charged with the knowledge of allurement as indicated in *Cooke v. Midland Railway* (*supra*) as he knew that the boxes were placed on a public highway and he must be taken to know that children were likely to intermeddle therewith and that Ord Road being a public street may not unlikely be frequented by children of tender years. As Laura was then at the age of 3 years, there can be no inference of negligence on her part. There is no evidence that Vicki, then aged 8, or Vicki's friend, were of an age to appreciate the danger. In the result the following statements in *Lengyel v. Manitoba Power Commission* (*supra*) are applicable from the judgment of Tritschler, J.A. at pages 504-5:

> Defendant submits that on the authorities plaintiff must show that the chattel complained of was placed in an area frequented by children; that this area was not frequented by children and that defendant would have no reason to expect children to be in the area. That argument is quite untenable in a case like this where the place in question is on a public highway near the outskirts of a town and within a few hundred yards of farm dwellings. That witnesses in this case had not seen children in the area is not evidence that the area was one not frequented by children. It was inevitable that children would use this highway. That children would be attracted to the strange apparatus was foreseeable.

[14] (1966) 56 W.W.R. 557.
[15] (1909) 42 S.C.R. 281.

Shilson v. Nor. Ont. Light & Power Co. [1920] 1 W.W.R. 422; 59 S.C.R. 443, which defendant relies on under this head of argument is readily distinguishable and does not support defendant's submission.

In *Winfield's Law of Torts*, 5th ed., at p. 587, it is stated:

'The disposition of children of tender years to mischief has given their elders nearly as much trouble in the law Courts as outside them, and the law about dangerous structures has been modified with respect to them in a way which may be thus formulated:

An occupier must take reasonable care to see that children, of whose presence he knows or ought to know or to anticipate and who are too young to appreciate the danger of some attractive object (often called a "trap" or "allurement") under his control and within his knowledge, are protected against injury from that danger either by warning which is intelligible to them or by some other means.'

If the duty of the occupier is to take care toward children of whose presence he knows or ought to know or to anticipate, then the duty of one who is not an occupier and who places a fascinating and fatal object on a public way is not less."

And at page 506:

"Knowledge of wrongdoing is not always an obstacle to a child's success." *Gough v. National Coal Board* [1953] 1 Q.B. 191, [1953] 3 W.L.R. 900, is an example and I should like to adopt the reasoning of Birkett, L.J. at p. 909:

" 'The boy . . . was not, in my opinion, of a sufficient age to appreciate the *real* danger of what he was doing . . .' "

It therefore follows that there was negligence of Wallis which has caused the accident.

It was further contended the accident was caused by the intervening actions of Vicki and her friend. However, this contention cannot prevail. Wallis should have anticipated the actions of the children and, under the circumstances of this case, the persons creating the danger are not to be released by arguing about the intervening act of a third person. (*Geall & Adams v. Dominion Creosoting Co.*[16]). Moreover, there is no evidence that Vicki and her friend, the children here in question, were of an age to appreciate the danger. (*Lengyel v. Manitoba Power Commission, supra* at p. 506).

The suppliants will recover accordingly, the infant suppliant in the amount of $2,200.00 and the male suppliant $234.87. The suppliants will have the costs of the action. The amount recoverable by the infant suppliant may be paid to the male suppliant, Laurie William Leadbetter.

[16] (1916-17) 55 S.C.R. 587 at p. 589.