NOVA SCOTIA COURT OF APPEAL

Citation: ***Marshall v. Annapolis County District School Board***, 2011 NSCA 13

Date: 20110204
Docket: CA 323155
Registry: Halifax

Between:

Johnathan Lee Marshall, represented by
his Guardian, Vaughan Caldwell

Appellant

v.

Annapolis County District School Board
and Douglas Ernest Feener and Betty Acker

Respondents

Judges:	MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A.
Appeal Heard:	December 1, 2010, in Halifax, Nova Scotia
Held:	Appeal allowed and a new trial ordered, per reasons for judgment of MacDonald, C.J.N.S.; Saunders and Beveridge, JJ.A. concurring.
Counsel:	Malcolm R. MacLeod, Q.C. and Robert K. Dickson Q.C., for the appellant Scott C. Norton, Q.C., G. Grant Machum and Sara L. Scott, for the respondents Annapolis County District School Board and Douglas Ernest Feener Betty Acker, respondent self-represented, not appearing

Reasons for judgment:

[1] At the age of four, the appellant was seriously injured when struck by a school bus. He sued the bus driver but a Nova Scotia Supreme Court jury found no negligence. He now appeals to this court.

[2] For the reasons which follow, I would allow the appeal. Simply put, a misdirection in the judge's charge to the jury is serious enough to warrant a new trial.

BACKGROUND

[3] The afternoon of April 12, 1994 was warm and sunny in Annapolis County. Around 3:30 p.m., young Johnathan Marshall was playing with his two older brothers outside their home located along Highway 201 near the village of Paradise. At the same time, the respondent Douglas Feener was driving his empty school bus west along Highway 201 heading for the nearby high school. As Mr. Feener approached the Marshall home, Johnathan ran onto the highway and into the path of the bus. Immediately upon seeing the young boy, Mr. Feener braked but could not stop in time. Johnathan was struck, suffering serious injuries.

[4] Johnathan, through his litigation guardian, commenced an action against Mr. Feener and his employer, the respondent School Board. These respondents, in turn, commenced a third party claim against Johnathan's parents. While the claim against the father has been dismissed, the claim against his mother, the respondent Betty Acker, remains outstanding.

[5] The matter was heard before Supreme Court of Nova Scotia Justice Arthur W.D. Pickup with a jury. Following a trial that spanned ten weeks, the jury answered "no" to this question:

> Was there negligence on the part of the defendant, Douglas Feener, that caused or contributed to the damages suffered by the plaintiff, Jonathan Marshall?

ISSUES

[6] Central to this appeal is the judge's legal ruling in the absence of the jury that Johnathan was too young to be contributorily negligent. The judge concluded:

> ¶ 8 I am satisfied that he would have neither sufficient experience nor maturity to understand any warnings that he may have received. A child, such as Johnathan Marshall, of four years, four months old at the time of the April 12, 1994 accident would lack understanding and knowledge because of his young age and would not be capable of being negligent as he would be unaware of the risks associated with his actions.

[7] Then the judge explained his ruling to the jury in his preliminary remarks:

> I will assess the law relating to assessment of damages, how you go about assessing damages and I will mention the special defence of mitigation which may affect your assessment of the damages. I would normally mention the special defence of contributory negligence which arises from the evidence you heard.
>
> In other words, the allegation that the plaintiff Johnathan Marshall was partly negligent for running in front of the school bus, however as a matter of law, I have determined that the age of the plaintiff at the time of the accident, four years, four months, and experience at the time of the accident was such as to render him incapable of having any legal liability for the accident. Therefore I will not instruct you on the special defence of contributory negligence, and direct that you not impute any liability to the plaintiff on the basis of contributory negligence.
>
> This is not to say that you cannot consider the actions of Johnathan Marshall on the date of the accident in your deliberations as to whether or not Mr. Feener was negligent.

[8] In other words, the judge concluded that Johnathan was too young to be legally responsible for this accident. Yet in the heart of his charge (when dealing with Mr. Feener's potential negligence), the judge invited the jury to consider Johnathan's responsibility to comply with the provisions of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293 (*Motor Vehicle Act*) as though he were an adult. This represents the appellant's main ground of appeal which he describes this way:

(1) THAT the learned Trial Judge made errors in law in that he misdirected the Jury or failed to adequately instruct the Jury or both, whereby the Appellant did not receive a fair trial. Specifically, the learned Trial Judge misdirected the Jury by:

> (a) referencing the provisions of Section 125 of the *Motor Vehicle Act*, R.S.N.S. 1989, chapter 293 in respect to the duty of pedestrians to yield the right of way to vehicles upon the roadway, when he had already decided that the Appellant was incapable of negligence because of his age and that consideration of negligence and circumstances would be "absurd", and as a result misled the Jury as to negligence and breach of duty of care by the Appellant when he was at law incapable of such negligence, such that the Appellant was denied a fair trial;

[9] The appellant's remaining grounds are:

(1) THAT the learned Trial Judge made errors in law in that he misdirected the Jury or failed to adequately instruct the Jury or both, whereby the Appellant did not receive a fair trial. Specifically, the learned Trial Judge misdirected the Jury by:

> (b) failing to adequately instruct the Jury on the application of section 248 of the *Motor Vehicle Act*, R.S.N.S. 1989, chapter 293 and failed to properly and adequately explain the reverse onus provisions and how that should apply to the evidence, and failed to provide a better explanation of the application of the section when specifically asked by Jury for such better explanation, such that the Appellant was denied a fair trial;
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> (c) failing to properly, or at all, instruct the jury regarding the special duty of care owed by operators of motor vehicles when operating their vehicles in the presence of children on or near a roadway, such that the Appellant was denied a fair trial;
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> (d) failing to correct or provide the jury with a copy of the transcript of evidence, regarding the incorrect and misleading statement by Respondent Counsel in closing submissions alleging that Appellant's Counsel had misstated the evidence of Sgt. Robert G. Forbes on the issue of the speed of the Respondent's vehicle, when in fact Appellant's Counsel had properly presented the evidence of Sgt. Forbes; and
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> (e) failing to require the Jury to assess damages regardless of its finding on the issue of liability, which gave the Jury an incentive to

> answer the first question in the negative and thereby avoid the difficult and time consuming task of assessing the Appellant's damages;
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> (2) THAT the learned Trial Judge made errors at law during the course of the trial, whereby the Appellant did not receive a fair trial. Specifically, the learned Trial Judge erred when he:
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> (a) permitted inadmissible hearsay evidence, on a vital and controversial issue, of a witness who was not called at trial to be read to the jury by the Respondents, Annapolis County District School Board and Douglas Ernest Feener;
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> (b) permitted the Respondents, Annapolis County District School Board and Douglas Ernest Feener, to qualify a witness, Sgt. Robert G. Forbes, as an expert and permit his Report to be entered into evidence by those Respondents, when the Respondents had not proffered Sgt Forbes as their expert prior to trial or complied with the Civil Procedure Rules regarding expert testimony;
>
> (c) decided not to redact the opinion, contained in the Report of Sgt. Robert G. Forbes to his opinions that there was "no evidence of excessive speed, reckless driving or alcohol" on the part of the Respondent, Douglas Feener, when in fact there was evidence of excessive speed and reckless driving, when in fact these were not proper matters of opinion for a witness at this trial but questions of mixed law and fact for the Jury to answer;
>
> (d) refused to admit a S.P.E.C.T. Scan Test Report in as evidence, which report provided important objective evidence that the Appellant had suffered lasting brain damage.

[10] In his oral argument, the appellant concentrated on the grounds he felt to be most persuasive. They are: 1(a) the main ground described above; 1(b) the judge's handling of the reverse onus provisions contained in s. 248 of the *Motor Vehicle Act*; 1(c) the special duty of care owed when children are present; and 2(c) the admission of an RCMP investigation report.

[11] As I will come to explain, my concerns about ground 1(a) above are alone enough to warrant a new trial. Therefore, I will consider the other grounds only to the extent that they may be relevant in my effort to provide guidance for a second jury trial.

[12] One final issue involves the appellant's special plea should the verdict be quashed. Specifically, he seeks to have this court resolve the issue of liability as opposed to remitting it for a new trial. Therefore, in my analysis that follows, I will: (a) elaborate upon this first ground of appeal and explain why it constitutes reversible error; (b) address the appellant's plea to have this court decide the liability issue instead of remitting it for a new hearing; and (c) offer guidance for the second trial.

ANALYSIS

Ground 1(a): Johnathan's Duty Under the *Motor Vehicle Act*

Standard of Review

[13] I will first address the standard upon which we should review this aspect of the judge's charge to the jury.

[14] Appeal court judges must be ever mindful of the context within which trial judges must craft and deliver their jury charges. Time is very much of the essence with great pressure to complete the task. For example, the charge cannot be finalized until all the evidence is in and counsel have completed their closing submissions. At the same time, the jury cannot be kept waiting. So often, within a period of hours, the judge must craft the product that arguably represents the most important aspect of the trial. We, as appeal court judges, must keep this in mind when, months later and in the comfort of our chambers, we comb through the charge.

[15] Therefore, our role is to consider the charge not in a piecemeal fashion but as a whole. Furthermore, not every error should result in a new trial. Instead, we should interfere only if there exists a misdirection capable of affecting the verdict. See **Bevis v. Burns**, 2006 NSCA 56 at para. 19 and **March v. Hyndman**, 2010 NSCA 100 at paras. 20-22.

The Concern with this Aspect of the Judge's Charge

[16] Recognizing the unique challenges facing trial judges in crafting jury charges in the midst of difficult and complex litigation, I am respectfully driven to the conclusion that a significant part of the judge's charge to the jury amounted to a serious misdirection. Specifically, after having found Johnathan too young to be responsible for the accident, the judge essentially told the jury to treat him like an adult when it came to assessing Mr. Feener's potential negligence. Specifically, in referring to the relevant provisions of the *Motor Vehicle Act*, the judge said:

> Now, I'm going to mention another section of the *Motor Vehicle Act*. This is the *Motor Vehicle Act* of 1989 which was in effect at the time, it's RSNS is 1989, Chapter 293 in particular Section 125(3) and (4). And that says, 125 (3), "Every pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk, shall yield the right of way to vehicles upon the highway." The next, Sub 4, 125(4) says, "This section shall not relieve the driver of the vehicle or the pedestrian form the duty to exercise care."
>
> So a pedestrian has the right to cross the highway at a point which is not a regular crossing for pedestrians, but in such a case, a duty is cast upon him to take special care to use greater vigilance and to yield the right of way to vehicles upon the highway. So in a crosswalk, cars stop. If you're not in a crosswalk, then what I just told you applies.
>
> This reason - this is for the obvious reason that drivers of motor vehicles know that there're safety zones and crosswalks for the use of pedestrians where they are normally expected to cross. This is not to say however, that if a pedestrian crosses between intersections, a motorist can run him down with impunity. The question is could or should the driver have seen the pedestrian in time to avoid the collision?
>
> *The pedestrian on the other hand has a duty to look out for his own safety, and to keep a lookout for approaching vehicles. Did he do what a reasonable person would be expected to do? Did he step from a place to a place of danger and fail to use reasonable care as required by the circumstances? These are the questions you must put to yourself.*
>
> Now standard of care owed to children crossing the highway. Johnathan was four years, four months old. So the standard of care owed to children on a highway is the same as that owed to adults, but there may be circumstances which should put motorists on their guard.

[Emphasis added.]

[17] Three paragraphs later the judge added:

> He [the driver] has the right to expect that a pedestrian will not act without care. *The duty of a pedestrian when using the public street or highway is to use reasonable care at all times for his own safety, and to avoid placing himself in a position from which injury might result.* However, he's entitled to assume that motorists will drive according to the law.
>
> [Emphasis added.]

[18] In my view, an invitation to the jury to consider whether Johnathan did what a reasonable *person* would do or whether he *failed to use reasonable care* is, in effect, an invitation to find Johnathan legally responsible for the accident; something that had already been ruled out because of his young age. This, respectfully, constitutes an error of law.

[19] Furthermore, this error is serious enough to force our intervention. I say this because it was clear to all involved that Johnathan did not comply with the relevant provisions of the *Motor Vehicle Act*. After all, at his age, he could not be expected to comply. Therefore, by asking the jury to consider these questions, the answers would have been obvious. In the circumstances of this case, Johnathan did not act like a “reasonable person”. He acted like a four year old. He did not keep a lookout for his own safety. He did not keep a lookout for approaching vehicles. He indeed did step from a place of danger and he did fail to use reasonable care by adult standards. This, I fear, would leave the jury with little choice but to find Johnathan responsible for this accident.

[20] Furthermore, in reviewing the charge as a whole, I can find no references that would counterbalance this error. The only potential reference is the one cited above where, at the outset of the charge, the judge as a matter of law took contributory negligence from the jury. I repeat it here for ease of reference:

> I will assess the law relating to assessment of damages, how you go about assessing damages and I will mention the special defence of mitigation which may affect your assessment of the damages. I would normally mention the special defence of contributory negligence which arises from the evidence you heard.

> In other words, the allegation that the plaintiff Johnathan Marshall was partly negligent for running in front of the school bus, however as a matter of law, I have determined that the age of the plaintiff at the time of the accident, four years, four months, and experience at the time of the accident was such as to render him incapable of having any legal liability for the accident. Therefore I will not instruct you on the special defence of contributory negligence, and direct that you not impute any liability to the plaintiff on the basis of contributory negligence.
>
> This is not to say that you cannot consider the actions of Johnathan Marshall on the date of the accident in your deliberations as to whether or not Mr. Feener was negligent.

[21] This brief reference was given early in the charge during the judge's preliminary remarks. It did no more than confirm that, because of his age, Johnathan could not be legally liable. In other words, this was something that they would not have to worry about. In my respectful view, this cannot counter the troublesome invitation (to treat him like an adult) that was placed in the heart of the charge.

[22] In reaching this conclusion, I am mindful of the respondents' submission that the reference to "pedestrian" in the impugned passage could be simply to a hypothetical pedestrian and not young Johnathan. Respectfully, as I will now detail, the record cannot support this contention.

[23] This aspect of the charge was not an accidental slip by the judge. Quite the opposite. It was a hotly contested issue fully "aired out" in the absence of the jury. In fact, the judge gave counsel a copy of his proposed charge and sought their feedback. Appellant's counsel objected, albeit not until the next day. At that time, the judge was careful to consider and weigh both sides of the argument. Specifically, the respondent Feener asserted that he had the right to assume that pedestrians, whatever their age, would follow the rules of the road. Yet, the appellant asserted that if he was too young to have the rules of the road apply to him when considering contributory negligence, then he would have been too young to have the rules of the road apply to him in any context.

[24] Thus, it is clear from the following exchange with Mr. MacLeod for the appellant that the judge considered his concerns:

MR. MACLEOD: ... And we say that if the child is not capable of being found negligent then any discussion of duty or fault as pertaining to that child is just not relevant, it's just not on.

THE COURT: This is not a discussion of duty or fault though, Mr. MacLeod.

MR. MACLEOD: Well My Lord, you say...

THE COURT: It's just saying that under the Motor Vehicle Act a pedestrian has to yield the right of way and in this case I'm just asking the jury to consider that, not point fingers at anyone.

MR. MACLEOD: With respect, you're telling them that Johnathan has a duty to look out for his own safety.

THE COURT: Yes.

MR. MACLEOD: You're telling them that Johnathan has a duty to keep a look out for approaching vehicles.

THE COURT: Yes.

MR. MACLEOD: You're telling them that Johnathan must do what a reasonable person would be expected to do.

THE COURT: That's what Section 125 says.

MR. MACLEOD: You're asking them to consider whether he stepped from a place of danger.

THE COURT: Yes.

MR. MACLEOD: And failed to use reasonable care.

THE COURT: Yes.

MR. MACLEOD: That's what you're asking them.

THE COURT: In determining whether Mr. - in answering the question – was there negligence on the part of the defendant, Douglas Feener, that caused or

contributed to the damages suffered by the Plaintiff, Johnathan Marshall? If it was a 19 year old you wouldn't be objecting. You're objecting because it's a four year-old and you haven't told me anything yet that would persuade me otherwise. Because everything that you've quoted to me has to do with contributory negligence and that issue which I've already agreed with you and ruled in your favour.

MR. MACLEOD: My Lord I submit it's not confined to that at all. Once you determine that this child in incapable of negligence then it follows that you can't impose these standards on him. You can't impose a standard of a reasonable person on him. He's not a reasonable person; he's a four year-old child. He's incapable of reasoning in that way.

THE COURT: Yeah but you can't have it both ways Mr. MacLeod you spent a lot of time with the handbook, going through the handbook with the witness and saying, "You've got to follow this rule, you've got to follow that rule, you" – isn't that true? Now we've got a rule that says, the pedestrian has to yield, if it's not in a crosswalk, has to yield to the driver. Then it says you know that the driver has to take, that it doesn't relieve the driver of a vehicle or the pedestrian from the duty to exercise a duty of care and I think I have to put that to them, that's the law at the time.

MR. MACLEOD: My Lord, with the greatest of respect...

THE COURT: I know.

MR. MACLEOD: We can have it both ways. There are two standards here. There's a standard for Mr. Feener, the adult. There's a standard, a different standard, a very different standard for a four year-old and there are two standards. And so we...

THE COURT: You're saying there's two standards when you determine Mr. Feener's negligence?

MR. MACLEOD: I'm saying that there's a standard for Johnathan and a standard for Mr. Feener and they're different. Johnathan's too little to be negligent and Mr. Feener is an adult.

THE COURT: I agree.

MR. MACLEOD: Okay, so when you have that you cannot tell the jury to look at him as a reasonable person and judge Johnathan's actions in the light of what a reasonable person should do.

THE COURT: All right, I hear you loud and clear.

MR. MACLEOD: Okay.

[25] Then the judge called on Mr. Norton for the respondents:

THE COURT: So can we just have Mr. Norton deal with this section and I'll give you what I think. And we'll keep going from this issue.

MR. NORTON: My Lord I won't belabour the point but as I said yesterday, and as I think Your Lordship articulated yesterday and again this morning, what Johnathan did informs the foreseeability issue in Mr. Feener. What he did informs whether or not the jury decides whether Mr. Feener's actions were those of a reasonable driver.

THE COURT: ‘Cause we're talking about Mr. Feener's negligence there.

MR. NORTON: Yes.

THE COURT: Not Johnathan's negligence.

MR. NORTON: This is a rule of the road, this is in the driver's handbook of course, and it's in the Motor Vehicle Act. It talks about the right of way, not negligence but the right of way. The entire Motor Vehicle Act and the rules of the road are structured so that drivers have certain reasonable expectations as they're driving down the road. For example, a driver driving down a through street has a reasonable expectation that drivers approaching from the side faced with stop signs are going to stop at the stop signs. They have a reasonable expectation that pedestrians are not going to cross the road other than at intersections or marked crosswalks. That is the rule of the road that we're talking about and it informs whether or not the jury considers Mr. Feener to have been prudent in the way he was driving at the time because he could reasonably anticipate that a four year-old or a 19 year-old or a 40 year-old wouldn't run out across the street. So with the instruction to the jury that Johnathan is incapable of being held contributorily negligent as Your Lordship has stated, this section tells them what the law is. That's your responsibility, to tell them what the law is. The law is that the driver has a right of way, that the pedestrian has a duty to yield the right of way to the driver other than at a crosswalk.

THE COURT: Even if you're four years old?

MR. NORTON: Even if it's four years old. And there's no law that says otherwise. And it would be in my submission chaos and anarchy if – there'd be no point to having rules of the road if they don't apply to anyone under the age of seven or eight. And you wouldn't be able to drive anywhere because there might be a four year-old running out from behind a parked car or a wood pile. That is not the way that the Motor Vehicle Act is set up. Whether that four year-old can be held contributorily negligent is a separate issue. But whether a driver can reasonable anticipate that a four year-old won't come running out because of the law unless there's some warning, and that's a question of fact for the jury to decide, whether in these particular circumstances Mr. Feener had some forewarning to change what his right to drive along that highway at 80 kilometres an hour is.

THE COURT: Precisely.

MR. NORTON: Now that's a question of fact.

THE COURT: Because what I said just before this section that's in dispute, questions could should the driver had seen the pedestrian in time to avoid the collision. That's exactly what you're saying there.

MR. NORTON: So my friend's submission would in effect create a condition of absolute liability on the driver. If it's a four year-old and they run out what can you do? You don't have any, you don't have any right to argue that the law says that I have the right of way at this location?

THE COURT: Well what he's saying is a little different. He's saying qualify this by saying after you say this say look it's a four year old, and I'm just paraphrasing, four year-olds do it and therefore I don't know what.

MR. NORTON: Therefore it doesn't apply. Well I mean his first submission was it should be out.

THE COURT: Yeah.

MR. NORTON: Let's not sugar coat that. His primary submission this morning was that it shouldn't be in there, period. Anyway you have my response.

[26] Mr. MacLeod then had the final say:

> THE COURT: Mr. MacLeod?
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> MR. MACLEOD: I think you've heard me My Lord. I can't say it any better or any more forcefully than I said it the last time. I think this is inappropriate where you've got a four year-old who's been found incapable of negligence.

[27] Then came the ruling under review:

> THE COURT: Starting on Page 6 I am going to leave in Section 125(3) and (4) which is the law at the time regarding motor vehicles and pedestrians. In the section in dispute I'm going to leave in the pedestrian and on the other hand has a duty to look out for his own safety and to keep a lookout for approaching vehicles. Did he do what a reasonable, I'm changing man to person, would be expected to do. Did he step from a place to a place of danger? Did he use reasonable care as required by the circumstances? These are the questions you must put to yourself. Now you've got to remember that I've already said really what the driver, what the driver's responsibilities are. Then I go on in the next paragraph, *Standard of Care Owed to Children* and I'm saying I'm heightening his responsibility or standard of care if there's children present. That's a point you made. So I'm going to leave it in except for the change to – from man to person. Next?

[28] Therefore, while this was a hotly debated issue, it is clear that when the judge charged the jury in this way, he was clearly talking about Johnathan and not some hypothetical pedestrian.

[29] Let me, as well, address Mr. Norton's assertion (in this exchange) that without this instruction, the result would be to "create a condition of absolute liability on the driver". I cannot accept this proposition for several reasons.

[30] Firstly, I am not suggesting that Johnathan's actions were irrelevant. In fact, the jury was properly invited to consider Johnathan's actions when considering Mr. Feener's potential negligence. I repeat what the judge said early on:

> This is not to say that you cannot consider the actions of Johnathan Marshall on the date of the accident in your deliberations as to whether or not Mr. Feener was negligent.

[31] Therefore, instead of the spectre of absolute liability, the defence of pure and simple accident would be readily available for consideration in these circumstances. In fact, this was pleaded by the respondents and relied upon in their factum:

> ¶ 61 In *Munroe v. McCarron*, Moir, J. considered a claim and counterclaim that involved a motor vehicle accident where the driver struck a steer on a dark highway. Moir, J. considered the presumption in s.248(1), but the facts did not allow him to find that the accident resulted from any negligence on the part of the driver and that she could not have been prepared for "a steer racing forward in the blackness between her car and the truck with its flashers". Moir, J. was satisfied on the balance of probabilities that the driver could not have done anything to avoid the accident or the loss of the steer as a result of the "sudden appearance of the danger and the instantaneous result".
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> ¶ 62 Like the situation in *Munroe v. McCarron*, the facts indicate that Appellant sustained his injuries as a result of an unavoidable and inevitable collision and that the properly instructed jury acting judicially could make the finding that the Respondents had rebutted the presumption found in s.248(1) of the *MVA*.

[32] In short, Johnathan's actions were relevant when considering Mr. Feener's potential negligence. However, in this context, they remained the actions of a child and not those of an adult. Ignoring this reality constitutes, in these circumstances, reversible error.

Is a New Trial Necessary?

[33] In an impassioned plea, the appellant asks us to decide the liability issue. He highlights the years that have transpired since the accident and the exorbitant costs of litigation that must again be advanced by an impecunious plaintiff. This is a tempting invitation, but one that for the following reasons I feel compelled to decline.

[34] At the outset, let me say that I agree with the appellant that we do have jurisdiction to decide this issue ourselves. However, primarily for three reasons, a new trial is necessary. Firstly, as noted, Mr. Feener and the Board have an outstanding claim against Johnathan's mother in the event they were found to have been liable. Therefore, we would be in no position to fully settle liability even had

we wanted to. Secondly, a trial is still required to settle the question of damages. Thirdly, the respondents called the jury in this case. They have a fundamental right to have this issue resolved by a jury. Therefore, despite the delay and added costs, this right should be preserved.

[35] I would therefore direct a new hearing on the issue of liability. With this direction, I will now also take the opportunity to offer some guidance, should the parties not be able to resolve this matter short of a second trial.

Guidance for the Potential Re-Trial

[36] As noted, I need not consider the appellant's remaining grounds of appeal on their merits in light of my decision to grant a new trial, solely on the basis of ground 1(a). However, I will now refer to the other three grounds highlighted by the appellant in oral argument solely to offer guidance to the trial judge should a second jury trial become a reality.

[37] Of course, by offering guidance, I hasten to add that whatever might be ultimately said to a future jury will be for that judge at that time. After all, the crafting of a jury charge is an art and not a science. Further, the dynamics of the second trial will no doubt be different from those of the first. So my comments should be viewed in that context so as to avoid any unintended consequences.

[38] My first recommendation would be to expunge the entire passage dealing with s. 125 (reproduced at paras. 16 and 17 above). In its place, I would simply remind the jury of what was said in the judge's preliminary remarks about Johnathan not being contributorily negligent. Perhaps the following would suffice:

> You will recall that I have determined that the age of the plaintiff at the time of the accident, four years, four months, and experience at the time of the accident was such as to render him incapable of having any legal liability for the accident. Therefore I will not instruct you on the special defence of contributory negligence, and direct that you not impute any liability to the plaintiff on the basis of contributory negligence.
>
> As will become clear to you, the burden in this case is upon Mr. Feener to satisfy you on the balance of probabilities that his negligence did not cause

> Johnathan's injuries. In deciding this question as to whether or not Mr. Feener was negligent, you will want to consider Johnathan's actions based on your findings from the evidence.

[39] My second recommendation involves the appellant's ground 1(b) involving the judge's explanation of s. 248 of the *Motor Vehicle Act*, which presumes owners and operators to be liable for motor vehicle accidents. The appellant explains his concerns with this aspect of the charge in his factum:

> ¶ 32 In this case, it was incumbent upon the Learned Trial Judge to explain this [burden] to the Jury in clear terms and advise the Jury that Feener could not discharge the burden by simply showing that he was not the sole cause of the accident. The burden stays on the Respondent Feener throughout the trial and is only satisfied if he has proved that "he did not in fact cause the accident by his negligence."
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> ¶ 33 The Learned Trial Judge instructed the Jury as follows:
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> > In this case the defendants have the burden of proving on a balance of probabilities all of the facts needed to establish the following assertions. Now under Section 248(1) of the Motor Vehicle Act, which I will go into in more of detail, that section places the burden of proof on the defendant, owner operator of the motor vehicle to show that the accident did not entirely arise through his negligence and improper conduct. (*Transcript Volume VIII, pg 5573*)
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> ¶ 34 Later, at *pages 5606-5609*, the Trial Judge read Section 248(1) and said:
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> > I want to explain this to you. So, I'm satisfied first that as a matter of law, the plaintiffs have established a sufficient case to demonstrate that the loss or damage was incurred by the plaintiff by reason of the presence of a motor vehicle, operated by the defendant Douglas Feener such as to engage the rebuttable presumption in Section 248(1) of the Motor Vehicle Act. Now it's the law of our province that where a motorist collides with a pedestrian on a highway or where his automobile causes injury, that motorist is presumed to be at fault and must satisfy you the jury, by a reasonable preponderance of evidence that he was not at fault or negligent.
> >
> > It is for you, the trier of fact, to determine whether Mr. Feener has proven by a preponderance of evidence that he did not in fact entirely or solely cause the accident by his negligence or improper conduct.

> How do you go about this? You must consider all the evidence…
>
> . . .

¶ 35 This charge, as worded by the Learned Trial Judge, would likely have left the Jury with the impression that if the Respondent Douglas Feener simply established the collision was not solely or entirely his fault, they were to answer question # 1 with no. At a later point after the Jury had retired for deliberations, the Jury sent a written question requesting further clarification and better explanation of the onus provisions contained in Section 248(1). At *page 5707-08*, the question posed by the Jury was described by the Trial Judge as follows:

> we would appreciate if you could give further clarification to the following quote in your charge, 'Not at fault or,'" it looks like neglect, but it was negligence I think. Negligent was what I said, "did not entirely or solely cause the accident by improper conduct.

¶ 36 The Trial Judge determined that, notwithstanding the apparent confusion of the Jury in respect to understanding the reverse onus section of Section 248(1), he would simply reread his original Jury Charge and he refused to provide any additional or better explanation, and simply reread the original charge.

. . .

¶ 38 The confusion of the jury was evident by it returning and requesting clarification of the meaning of Section 248(1). Given the ultimate verdict rendered, it is probable that the Jury was confused and under the mistaken impression that once the Defendant Feener established that he was "not entirely or solely" liable, then the onus is satisfied and the Defendant should not be found liable. It is respectfully submitted that simply re-reading a Jury charge that the Jury did not understand was insufficient in the circumstances and resulted in injustice to the Appellant.

¶ 39 The Learned Trial Judge, upon being made aware of the Jury's apparent confusion over Section 248, ought to have specifically elaborated in his Charge to the Jury and emphasized that the onus on the Defendant Feener did not shift and it was insufficient for him to merely show some evidence that he was not negligent or that someone else was negligent in some way, to exonerate him completely from liability.

[40] I agree that, if considered in isolation, the verbatim reading of s. 248 may have lulled the jury into thinking that Mr. Feener would have to have been entirely at fault in order to answer question 1: “yes”. I say this especially in light of the jury’s question. On this point, however, when I read the entire charge, I believe that they properly understood their role. Therefore, I would not interfere on this basis alone. That said, I believe that any concern could be remedied simply by amending question 1 to read:

> Has the defendant Feener satisfied you that the accident was not caused by negligence on his part?

[41] I so recommend.

[42] My third recommendation involves the appellant’s ground 1(c) dealing with a potential special duty of care owed by Mr. Feener because of the presence of children near the highway. In his factum, the appellant articulates his concerns this way:

> ¶ 57 ... A driver in the position of Mr. Feener does not have the right to expect that a 4-year-old child will act carefully. The law is to the contrary. The standard of care expected of a driver in such a situation increases significantly because of the child's presence. The Learned Trial Judge's charge tells the jury that it was reasonable for Mr. Feener to assume that a 4-year-old child would not run across the street unexpectedly. This misdirection made it impossible for the jury to make a proper assessment and evaluation of the issue of whether Mr. Feener breached the standard of care.
>
> ¶ 58 The Trial Judge's charge also failed to discuss the evidence and allegation to the effect that Feener did not take sufficient care as he approached the accident scene, in that he took his eyes off the roadway to wave at Jessica Faye. The Jury should have been instructed, with factual examples, of Feener's duty to slow down and keep a vigilant look out in an area he knew to be frequented by children. Instead the Learned Trial Judge stressed the duty on a pedestrian and told the jury that a driver has a right to expect a pedestrian will not act without care.
>
> ¶ 59 There is a heavy burden on motorists where children are present. The law recognizes two obvious truths. Children may act carelessly and the consequences of a collision between a motor vehicle and a child are usually catastrophic for the child. The law therefore requires motorists to take extraordinary care in the presence of children. The Learned Trial Judge failed to appreciate this and

> therefore failed to properly explain it to the Jury. His instruction on this point was cursory and he did not attempt to relate it to the evidence. Despite requests from counsel, the Learned Trial Judge used no examples from other cases, which would have illustrated the legal principles and given the Jury a picture of how they should be applied in this case. The Learned Trial Judge did the opposite. He incorrectly restricted the motorists' duty to take extra care around children and said that the duty of care owed to children is the same as owed to adults. He also stressed that a driver has the right to expect all pedestrians, even small children, to obey the law and take reasonable care.
>
> ¶ 60 The Learned Trial Judge's instruction on this issue would have also reinforced the misdirection of the Jury that it should focus on Johnathan's duty to take reasonable care and, by necessary inference, his obvious failure to do so.

[43] These arguments are intertwined with the appellant's submissions on his ground 1(a) above. I have already recommended that the offending passages be expunged.

[44] Furthermore, I agree with the respondents that, by these submissions, the appellant implies that Mr. Feener was in an area that required special precaution because the children were present. Yet this was never acknowledged by the respondents. Instead, the respondents counter in their factum:

> ¶ 68 In setting out this position, the Appellant ignores the conflicting evidence with respect to whether such a "special" duty would even arise in these circumstances and, if it did arise, whether it was breached. The Trial Judge did indeed set out the Appellant's theory, that Mr. Feener knew that children were present at or near the roadway, particularly after school. However, this theory was not shared by the Respondents, as the Respondents took a different view of the evidence, namely, that children were not ordinarily present along the highway and that, on the date of the accident, neither Jessica Fay nor the Appellant's brothers were playing on the highway. Consequently, there was no reason for Mr. Feener to have taken additional precautions beyond his usual prudent and careful driving and the exercise of due care as such could not have prevented the accident that occurred when the Appellant, suddenly and without prior warning, darted out from behind the wood pile into the path of the oncoming bus.
>
> ¶ 69 The Trial Judge did not commit any error of law in the description of the "special" duty of care where a vehicle was allegedly being operated on a roadway where children were present. The Trial Judge indicated to the jury the content of the "special" duty and when it arose and left it up to the jury as to answer the

> following questions: a) was there a special duty based on the facts; and, if so b) had that duty been breached?
>
> ¶ 70 The Appellant argued there was and it had, while the Respondents argued there was no special duty in these circumstances. It was up to the jury, and not to the Trial Judge, to arrive at conclusions based on the evidence and the application of the applicable law after the Trial Judge properly charged the jury on the law and how the law was to be applied to the facts as the jury found them.
>
> ¶ 71 The Appellant wanted the Trial Judge to argue the Appellant's theory of the case. However, the Trial Judge did not err in formulating the Jury Charge which correctly canvassed the law but did not make findings of fact, such findings being solely for the jury to decide. In making closing submissions, counsel for the Appellant assumed that Mr. Feener was "in an area where he knew or ought to have known there were children" in asking the jury to consider whether Mr. Feener exercised "proper care" rather than asking whether the circumstances were such that Mr. Feener knew or ought to know that children were present. In so doing, the Appellant was asking the Trial Judge to usurp the fact-finding function of the jury; however, the Trial Judge appropriately left that question in the jury's hands after explaining the applicable, or potentially applicable, law.

[45] I agree with the respondents that the issues here were therefore two-fold: (a) was there a special duty in these circumstances; and (b) if so, was this duty breached?

[46] Here, the judge properly invited the jury to consider these two questions. However, he did so in the context of a school area, playground or residential area which would be inapplicable in this case. Here is what he said:

> In a school or playground area or in a built up residential district, a motorist should drive more slowly and carefully and keep a lookout for the possibility of children running out into the street. *Here you must decide whether the circumstances were such as to put the defendant motorist on notice that he was approaching an area where children were likely to be, and therefore should exercise greater care in the operation of his motor vehicle.*
>
> An operator of a motor vehicle must at all times – I'm sorry. An operator of a motor vehicle must exercise at all times the same manner of care and caution as might be expected in like circumstances of a reasonably careful driver. He must take proper precautions to guard against risks which might reasonably be anticipated to arise from time to time as he proceeds on his way. This degree of care and nothing more is expected of him. He is not asked to maintain a standard

> of care of perfection, or to take extravagant precautions. The driver's only problem is to anticipate what is reasonably likely to happen.
>
> [Emphasis added.]

[47] Therefore, again to remedy any concerns, I would recommend replacing these two paragraphs with something like:

> In a school or playground area or in a built-up residential district, a motorist should drive more slowly and carefully and keep a lookout for the possibility of children running out into the street. These are some of the situations where a heightened level of care is required of motorists. In this case, it will be entirely for you to decide whether the circumstances were such as to put the defendant motorist on notice that he was approaching an area where children were likely to be and, therefore, should exercise greater care in the operation of his motor vehicle.
>
> An operator of a motor vehicle must exercise at all times the same manner of care and caution as might be expected in like circumstances of a reasonably careful driver. He must take proper precautions to guard against risks which might reasonably be anticipated to arise from time to time as he proceeds on his way. This degree of care and nothing more is expected of him. He is not asked to maintain a standard of care of perfection, or to take extravagant precautions. The driver's only problem is to anticipate what is reasonably likely to happen.

[48] I would also recommend that this be followed by a review of the parties' conflicting positions on this issue together with a summary of the corresponding evidence relied on by each.

[49] My fourth and final recommendation involves the appellant's ground 2(c) and the judge's admission of a redacted version of an investigation report by RCMP Sgt. Robert Forbes. The appellant describes his concerns this way in his factum:

> ¶ 89 During the Trial, after Sgt. Forbes was qualified, the Appellants made a further motion to redact parts of Sgt. Forbes' report (except for the factual information and the opinion that had just been ruled admissible). The Appellant relied upon his September 14 submissions. The Learned Trial Judge redacted parts of Sgt. Forbes' report but left the following passages and permitted Sgt. Forbes to be examined on them:
>
> > The pedestrian had run across the highway from the southside towards the north where the two other children were standing. The area the youth was in before crossing the roadway was blocked from the view of the bus driver due to several trees and a wood pile on the southside of the highway. The youth came to the highway from an access road for a woodlot area and ran across the highway. (pg. 2427-8)
> >
> > There was no evidence of reckless driving, high speed or alcohol on the part of the school bus driver.
>
> ¶ 90 The Report of Sgt. Forbes is reproduced in the Appeal Book Volume V, Tab 44. The first passage about where the Appellant came from and the view of the bus driver is pure speculation and is not related to the measurements, testing and opinion of Sgt Forbes. The prejudicial effect on the Appellant is obvious. The second passage – that there was no evidence of reckless driving, high speed or alcohol on the part of the driver – is not proper opinion evidence either. Sgt. Forbes did not see the driver at any time and did not review his statement. Further, the observations that there was no evidence of reckless driving or high speed are conclusions of mixed fact and law and are therefore beyond the scope of expert evidence.

[50] I tend to agree with the appellant in this one limited respect. In my view, whether there was “reckless driving” or “high speed” would be best left for the jury to decide. I say this because (a) the concept of reckless driving is too close to the ultimate issue of negligence; and (b) the concept of high speed is a subjective one that can vary depending on the circumstances. Further, the author may have been simply referring to these terms in the context of *Motor Vehicle Act* breaches which, in the circumstances of this case, would be out of context. Again, this alone does not represent reversible error. However, I would expunge these two references so that the sentence would simply read:

> There was no evidence of alcohol on the part of the school bus driver.

DISPOSITION

[51] I would allow the appeal and order a new trial. I would strike the award for costs at trial and order them to be in the cause of the next trial. Finally, I would give the appellant costs on appeal of $25,000, together with reasonable disbursements to be agreed upon or taxed.

MacDonald, C.J.N.S.

Concurred in:

Saunders, J.A.

Beveridge, J.A.