SUPREME COURT OF NOVA SCOTIA
Citation: Marshall v. Annapolis County District School Board, 2009 NSSC 378

Date: 20091208
Docket: Hfx. 123323
Registry: Halifax

Between:

Jonathan Marshall, an infant, represented by his Litigation Guardian, Gladys Hardwick

Plaintiff

v.

Annapolis County District School Board and Douglas Feeners

Defendants

v.

Betty Acker and Vaughn Caldwell

Third Parties

Judge:	The Honourable Justice Arthur W.D. Pickup
Heard by way of Written Submissions:	August 21, 2009 from the plaintiff No written submissions from the defendants
Written Decision:	December 8, 2009
Counsel:	Robert K. Dickson, Q.C., R. Malcolm Macleod, Q.C. and Cynthia Scott for the plaintiff Scott C. Norton, Q.C., G. Grant Machum and Sara L. Scott, for the defendants Betty Acker and Vaughn Caldwell, for the third parties/self represented - No submissions made on issue.

By the Court:

Issue

[1] This jury trial is in respect of a automobile/pedestrian accident that took place on April 12, 1994 on route 201 near Paradise, Annapolis County, Nova Scotia.

[2] The plaintiff says that the issue of contributory negligence of Jonathan Marshall who was four years, four months old at the time of the accident should be withdrawn from the jury because he was not capable in law of being contributorily negligent.

Decision

[3] There is authority to the effect that "the doctrine of contributory negligence does not apply to a child of tender years". The current (8th, 2006) edition of Linden and Feldthusen's *Canadian Tort Law* includes the following comments about children of tender age:

> [I]t is clear that children of "tender age" are totally immune from tort liability. Moreover, "the doctrine of contributory negligence does not apply to an infant of tender age." Thus, children of two and one-half years, three years, four years, or five years of age cannot be held guilty of contributory negligence. No definite line has been drawn below which this total immunity operates, but it seems to cut off at a point "where the age is not such as to make a discussion of contributory negligence absurd." The complete exemption probably does not extend beyond five years of age for, according to the Supreme Court of Canada, it was wrong to say that a child of six could not be guilty of contributory negligence.

[4] The question of absurdity was raised in *Clayton v. Skrobotz* (1990), 99 N.S.R. (2d) 319, where Glube C.J.T.C. (as she then was) said:

> [46] The case of McEllistrum v. Etches, [1956] S.C.R. 787 deals with negligence and young children. At p. 793 it states:
>
> > "It should now be laid down that where the age is not such as to make a discussion of contributory negligence absurd, it is a question for the jury in each case whether the infant exercised the

> care to be expected from a child of like age, intelligence and experience." (p. 793)
>
> [47] In spite of the fact that Mekco had been in school for approximately eight months in the four plus program and considering his age of 4 years and nine months, I find that his age borders on the "absurd" when discussing contributory negligence. However, based on the fact that he was in school and had received training both in school and from his mother, I conclude it might well be a question of fact to be decided based upon his age, intelligence and experience. I find that he was of normal intelligence and experience for a child of four and one half years and he had received some instruction, but as a child of such young age I accept that he would have a tendency to forget or ignore instructions based on the circumstances of the particular moment. In addition, the experience of a child of that age would not allow him to appreciate the danger which he was facing if he ran out onto the road. He may understand the words said to him about the danger involved, but at that age, I find that he had neither sufficient experience nor maturity to conceptualize what those words actually meant.

[5] The Appeal Division affirmed, without reference to the issue of contributory negligence: 110 N.S.R. (2d) 320.

[6] In *Sheasgreen et al. v. Morgan et al*., [1951] B.C.J. No. 136 (B.C.S.C.), Manson J. said:

> ... [I]t seems to me it is futile to submit the question of contributory negligence on the part of an infant to a jury, if the trial Judge is entirely satisfied that the child is of so little capacity that he could not in the view of an Appellate Court be held guilty of contributory negligence. While mere age is not in itself the test, but rather the capacity of the infant to understand and appreciate, certainly it may, and often is, obvious to the trial Judge that by no stretch of the imagination could contributory negligence be imputed to the infant. As I read the decisions of the Supreme Court of Canada and the English cases that is so and the Supreme Court of Canada in the Wald case, supra, specifically refrained from finding that the trial Judge was wrong in refusing to put the question of contributory negligence to the jury. Idington J., as pointed out, thought the trial Judge was right. A trial Judge is, from time to time, called upon to find as a matter of law whether there is any evidence, and, if he is satisfied there is not, he may take the case from the jury or, leaving it to the jury, instruct the jury that in law there is no evidence to support the plaintiff's case. In my view, by parity of reasoning, the trial Judge may say that there was such a want of capacity, intelligence and understanding on the part of an infant plaintiff as to render it impossible to impute to him contributory negligence.

[7] I am satisfied that the issue of Mr. Marshall's contributory negligence should not be put to the jury.

[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 Jonathan 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.

[9] As a result, I will withdraw the issue of contributory negligence of Jonathan Marshall from the jury.

Pickup, J.