

**SUPREME COURT OF CANADA**

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| **Citation:** Annapolis County District School Board *v.* Marshall, 2012 SCC 27, [2012] 2 S.C.R. 84 | **Date:** 20120607  **Docket:** 34189 |

**Between:**

**Annapolis County District School Board and Douglas Ernest Feener**

Appellants / Respondents on cross-appeal

and

**Johnathan Lee Marshall, represented by his Guardian, Vaughan Caldwell**

Respondent / Appellant on cross-appeal

**Coram:** McLachlin C.J. and Deschamps, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 13)  **Dissenting Reasons:**  (paras. 14 to 15) | Deschamps J. (McLachlin C.J. and Abella, Rothstein, Moldaver and Karakatsanis JJ. concurring)  Cromwell J. |

Annapolis County District School Board *v.* Marshall, 2012 SCC 27, [2012] 2 S.C.R. 84

Annapolis County District School Board and

Douglas Ernest Feener *Appellants/Respondents on cross‑appeal*

v.

Johnathan Lee Marshall, represented by his Guardian,

Vaughan Caldwell *Respondent/Appellant on cross‑appeal*

**Indexed as: Annapolis County District School Board *v.* Marshall**

2012 SCC 27

File No.: 34189.

2012:  May 8; 2012:  June 7.

Present: McLachlin C.J. and Deschamps, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for nova scotia

*Torts — Negligence — Standard of care — Contributory negligence — Child running into path of oncoming bus suffering severe injuries — Whether trial judge erred in improperly inviting jury to find child responsible for accident — Motor Vehicle Act, R.S.N.S. 1989, c. 293, s. 248*.

J, a four‑year‑old boy, suffered catastrophic injuries when he ran onto a highway and into the path of an oncoming empty school bus driven by F. A jury decided that there was no negligence by F that caused or contributed to J’s damages. The Court of Appeal ordered a new trial finding that, in referring to statutory right‑of‑way provisions, the trial judge improperly invited the jury to treat J like an adult and therefore find him responsible for the accident.

*Held* (Cromwell J. dissenting): The appeal should be allowed and the cross‑appeal dismissed.

*Per* McLachlin C.J. and Deschamps, Abella, Rothstein, Moldaver and Karakatsanis JJ.: There were no errors in the trial judge’s instructions to the jury. Rather, the Court of Appeal failed to appreciate the dual function of the statutory right‑of‑way provisions, which inform the assessment of whether a pedestrian was contributorily negligent and also help determine whether a driver breached the applicable standard of care. When the instructions on those provisions are read in light of the entire charge, it is clear they served only to delineate the standard of care applicable to F. The jury was invited to consider the conduct of a reasonable pedestrian in assessing whether F had demonstrated the requisite degree of precaution. The trial judge made it clear that, as a child, J’s liability was not at issue, and in no part of the charge did he instruct the jury to adjudicate on J’s negligence.

*Per* Cromwell J. (dissenting): As held by the Court of Appeal, there was a real risk that the charge, viewed as a whole, left the jury with the understanding that it was to consider whether the child was responsible for the accident. The critical point, which was not made clearly in the charge, was that the jury had to consider whether the circumstances were such as to put the defendant on notice that children might be present and that he should exercise greater care. The misdirection may have given rise to an injustice. The cross‑appeal should be dismissed.  The evidence is not of such a character that only one view can reasonably be taken of its effect.

**Cases Cited**

By Cromwell J. (dissenting)

*Byrne v. Hodgins* (1972), 30 D.L.R. (3d) 128, rev’g (1972), 27 D.L.R. (3d) 617 (*sub nom.* *Bryne v. Hodgins*); *Petijevich v. Law*, [1969] S.C.R. 257; *Jardine v. Northern Co‑operative Timber and Mill Association*, [1945] 1 W.W.R. 533.

**Statutes and Regulations Cited**

*Motor Vehicle Act*, R.S.N.S. 1989, c. 293, s. 248.

APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Saunders and Beveridge JJ.A.), 2011 NSCA 13, 298 N.S.R. (2d) 373, 945 A.P.R. 373, 6 M.V.R. (6th) 1, [2011] N.S.J. No. 54 (QL), 2011 CarswellNS 54, reversing the dismissal of the plaintiff’s action and ordering a new trial.  Appeal allowed and cross‑appeal dismissed, Cromwell J. dissenting.

*Scott C. Norton*, *Q.C.*, *G. Grant Machum*, *Sara Scott* and *Scott R. Campbell*, for the appellants/respondents on cross‑appeal.

*R. Malcolm Macleod*, *Q.C.*, and *Robert K. Dickson*, *Q.C.*, for the respondent/appellant on cross‑appeal.

The judgment of McLachlin C.J. and Deschamps, Abella, Rothstein, Moldaver and Karakatsanis JJ. was delivered by

1. Deschamps J. — On the afternoon of April 12, 1994, the respondent, four-year-old Johnathan Lee Marshall, was playing with his brothers in front of the family home, located along Highway 201. At the same time, the appellant Douglas Ernest Feener was driving his empty school bus along Highway 201 after having dropped off a load of elementary school children. As Mr. Feener approached the Marshall home, Johnathan ran onto the highway and into the path of the oncoming bus. Mr. Feener could not stop in time and Johnathan was struck. He suffered catastrophic injuries.
2. Through his litigation guardian, Johnathan brought an action against Mr. Feener and his employer, the Annapolis County District School Board. The matter was heard in the Supreme Court of Nova Scotia before Pickup J. and a jury. After a ten-week trial, the jury answered “no” to the following question:

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

1. The resulting order was appealed to the Nova Scotia Court of Appeal on four principal grounds: (1) the trial judge’s reference in his charge to the provisions of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, concerning the duty of pedestrians to yield the right of way to vehicles; (2) his handling of the reverse onus provisions contained in s. 248 of the *Motor Vehicle Act*; (3) his explanation of the special duty of care owed by motorists where children are present; and (4) his admission of an RCMP investigation report. The Court of Appeal ordered a new trial on the basis of the first ground alone. With respect to the other grounds of appeal, MacDonald C.J.N.S., writing for the Court of Appeal, did not find that the trial judge had committed reversible errors, but simply made suggestions to improve the instructions to be given to the jury in the event of a new trial (2011 NSCA 13, 298 N.S.R. (2d) 373, at paras. 36, 40, 47 and 50).
2. At issue in this appeal is whether the Court of Appeal erred in finding that the trial judge had misdirected the jury in referring to the right-of-way provisions of the *Motor Vehicle Act*. For the reasons that follow, I conclude that it did and that the appeal should be allowed. No other elements of the trial judge’s charge warrant intervention.
3. The portion of the charge to the jury which the Court of Appeal found to constitute reversible error is reproduced below:

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 RSN 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 from 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 impu[nity]. 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 [of safety] to a place of danger and fail to use reasonable care as required by the circumstance? 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.

. . .

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. [A.R., vol. I, at pp. 100-103]

1. MacDonald C.J.N.S. concluded that, in referring to the right-of-way provisions of the *Motor Vehicle Act*, the trial judge improperly invited the jury to treat Johnathan “like an adult” (para. 16). This, according to MacDonald C.J.N.S., would have left the jury “with little choice but to find Johnathan responsible for this accident” (para. 19) even though the trial judge had already concluded that Johnathan could not be contributorily negligent because of his young age. In offering guidance for a possible retrial, MacDonald C.J.N.S. recommended expunging the entire passage dealing with the right-of-way provisions of the *Motor Vehicle Act* (para. 38).
2. I agree with the appellants that the Court of Appeal failed to appreciate the dual function of statutory right-of-way provisions. Not only do such provisions inform the assessment of whether a pedestrian was contributorily negligent by failing to yield a right of way, they can also help determine whether a driver breached the applicable standard of care in the circumstances. In this case, even though Johnathan’s contributory negligence had been ruled out as a matter of law, the statutory right-of-way provisions continued to inform the standard of care that Mr. Feener owed to all pedestrians. The jury needed to be told that, absent special circumstances, where the driver has the right of way, he or she can reasonably proceed on the assumption that others will follow the rules of the road and yield the right of way to drivers.
3. I respectfully disagree with the Court of Appeal’s conclusion that, in referring to the right-of-way provisions, the trial judge effectively invited the jury to find Johnathan legally responsible for the accident. At the outset of his charge, Pickup J. made it clear that Johnathan’s liability was not at issue because of his young age (A.R., vol. I, at p. 44). In no part of the charge did the trial judge instruct the jury to adjudicate on the child’s negligence. When the trial judge’s instructions on the right-of-way provisions are read in light of the entire charge, it is clear that they served only to delineate the standard of care applicable to Mr. Feener. The jury was invited to consider the conduct of a reasonable pedestrian in assessing whether Mr. Feener had demonstrated the requisite degree of precaution.
4. A further factor that had to inform the jury’s ruling on Mr. Feener’s negligence was whether there were special circumstances that would indicate to the driver that he was in an area where children were likely to be present. In this respect, the trial judge made the following comment to the jury:

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. [A.R., vol. I, at p. 102]

1. The respondent argues that the jury would have inferred from the trial judge’s instructions that a motorist need only take precautions in the three specific circumstances cited, and therefore that Mr. Feener would not have had to take precautions in this case. I cannot accept this submission. The accident clearly did not take place in a school or playground area or in a built-up residential district. The trial judge was asking the jury whether the situation was one in which Mr. Feener should have expected children to be present. In this context, I see no error in the trial judge’s instruction.
2. In this Court, as in the Court of Appeal, the respondent maintains that the trial judge also erred in explaining the burden of proof on motorists under s. 248 of the *Motor Vehicle Act* and in admitting an RCMP report. For the reasons given by the Court of Appeal, I am of the view that there is no reversible error.
3. The respondent has cross-appealed, seeking a finding of liability against the appellants in the event that the Court dismissed the appeal. As I would allow the appeal, the merits of the cross-appeal do not need to be considered.
4. For these reasons, I would allow the appeal with costs throughout, including costs of the application for leave to appeal in this Court, dismiss the cross-appeal without costs and restore the order after trial with jury of the Supreme Court of Nova Scotia.

The following are the reasons delivered by

1. Cromwell J. (dissenting) — With respect to my colleagues who have taken the opposite view, I would uphold the decision of the Court of Appeal. Although I make no comment on the Court of Appeal’s suggestions for the conduct of a second trial, I would adopt as my own paras. 16 to 18 of the Court of Appeal’s reasons: 2011 NSCA 13, 298 N.S.R. (2d) 373. Much like in *Byrne v. Hodgins* (1972), 30 D.L.R. (3d) 128 (S.C.C.), affirming the dissent in (1972), 27 D.L.R. (3d) 617 (B.C.C.A.) (*sub nom. Bryne v. Hodgins*), there was a real risk in this case that the charge left the jury with the understanding that it was to consider whether the plaintiff was responsible for the accident. The critical instruction was that the jury had to consider 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 should therefore exercise greater care. This instruction was given almost in passing and in the midst of confusing instructions about the duty of pedestrians and self-contradictory instructions about the burden of proof. The plaintiff was entitled to have the key liability issue in the case put to the jury in clear terms. Looking at the charge as a whole, this, in my respectful view, did not occur. The misdirection may have given rise to an injustice. I would therefore dismiss the appeal.
2. I would also dismiss the cross-appeal from the Court of Appeal’s decision to send the matter back for a second trial. It cannot be said in this case that “the evidence is of such a character that only one view can reasonably be taken of its effect”: *Petijevich v. Law*, [1969] S.C.R. 257, at p. 265, quoting from *Jardine v. Northern Co-operative Timber and Mill Association*, [1945] 1 W.W.R. 533 (B.C.C.A.), at p. 535. This Court is not in a position to make a determination on liability.

*Appeal allowed with costs,* Cromwell J. *dissenting. Cross‑appeal dismissed.*

Solicitors for the appellants/respondents on cross‑appeal:  Stewart McKelvey, Halifax.

Solicitors for the respondent/appellant on cross‑appeal:  Boyne Clarke, Dartmouth.