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ANNAPOLIS COUNTY DISTRICT SCHOOL BOARD V. MARSHALL, 2012 SCC 27

WHAT IS 'REASONABLE' DRIVING INCLUDES THE RIGHT TO EXPECT OTHERS ON THE ROAD TO FOLLOW THE RULES.

Peter Gibson

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In this decision handed down last week, the Supreme Court of Canada overturned the Nova Scotia Court of Appeal and restored the Jury verdict dismissing the action against the bus driver who hit a four year old who ran out into the highway in front of him.

The Court of Appeal had found fault with the charge to the jury and, in particular, with what it saw as a contradiction between telling the Jury that the four year old was too young to be capable of being negligent, but still inviting the jury to consider whether he had acted as a reasonable pedestrian would, including the rules of the road for right of way, when it came to deciding whether the bus driver was negligent. Justice Deschamps, writing for a 7 to 1 majority, found no such contradiction:

" I agree with the appellant 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."

This decision is the latest in a welcome line of cases putting renewed vigour into the standard of care element in tort cases. All too often, many plaintiff's counsel and more than a few judges assume that if there is a recognized duty of care, such as the one a driver owes to a

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pedestrian, and an injury, then there will be some award and the only real issues are apportioning liability and assessing damages.

However, in the last few years the Supreme Court of Canada, in three decisions by three different members of the Court, have reminded us all that there have to be good reasons to find a defendant negligent and that trial courts can be too quick to find liability without solid evidence, or any evidence at all, of the appropriate standard of care or of how it was breached (see also *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* 2011 SCC 23 at ¶¶ 124 – 126 and *Fallowka v. Royal Oak Ventures Inc.*, 2010 SCC 5 at ¶¶ 76 – 90).

Beyond all the academic labels, this meets the common sense test too. It would hardly be fair to expect people to consistently follow a standard of reasonable conduct for their own actions, and then also ask them guard against and protect others who are acting unreasonably.

So remember, unreasonable conduct by the plaintiff is not only or always an issue of contributory negligence, it may be why the plaintiff got injured when others were acting reasonably, and why the plaintiff's claim for damages should be dismissed entirely.

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