

Negligence and the Parental Duty to Supervise Children

By Elizabeth Tatchyn and Bottom Line Researchⁱ

Introduction

The plaintiffs' bar may frequently face the situation where a young child is seriously injured in a motor vehicle when, for example, the child ran into the street and was struck by a vehicle. The defence will argue that the child's parent – who was supervising the child at the time – was negligent. This raises the issues of parental negligence in the circumstances, and how negligence is likely to be apportioned between the child and the driver.

A Parent's Duty of Supervision-General Principles

The law imposes a duty upon parents to supervise and control the activities of their children and, in doing so, to use reasonable care to prevent foreseeable damage to others. As the age of the child increases, the extent of the duty tends to diminish.

With respect to the nature and extent of this parental duty of care:

- (a) mere errors of judgment will not amount to negligence;
- (b) unless made expressly liable by statute, parents will not be vicariously liable merely because of the parental relationship;
- (c) the test to be applied in determining whether that duty has been discharged is an "objective" one (in the sense that the parent is expected to do, or not to do, that which, according to community standards of the time, the ordinary reasonably careful parent would do, or not do, in the same circumstances) containing a subjective element (in that the reasonable parent must be put in

the position in which (and with the knowledge which) the defendant parent found him/herself); and,

- (d) in order to find negligence on the part of a parent, there must be “substantial evidence.” A parent cannot be held to a standard of 100% supervision and immediate proximate control of a young child.ⁱⁱ

Certain of the indicia of proper parental care, control and supervision, where young children are involved, include (but are not limited to) providing children with suitable traffic safety instructions and rules, and with proper accompaniment or supervision, if necessary, when using or crossing the roadways and sidewalks.

In the early case of *Lelarge v. Blakney*, [1978] N.B.J. No. 267; 92 D.L.R. (3d) 440 (C.A.), Hughes C.J.N.B., on behalf of the Court, described the parental duty of care in the following terms:

“The parental duty of care is a duty personally imposed upon the parent irrespective of the wrongdoing or the liability of a child. The duty is to supervise and control the activities of the child and, in doing so, to use reasonable care to prevent foreseeable damage to others. The extent of the duty varies with the age of the child. The degree of supervision and control required of a young child may be very different from that required of a child approaching the age of majority. As the age of the child increases and the expectation that he will conform to adult standards of behaviour also increases, the parental duty to supervise and control his activities tends to diminish. ...” (QL, at para. 13)

These basic principles were later echoed by Burnyeat J., in *Newton v. Newton*, [2002] B.C.J. No. 1220; 2 B.C.L.R. (4th) 375 (S.C.); rev’d (without disturbing this summary of the law), [2003] B.C.J. No. 1546; 17 B.C.L.R. (4th) 1 (C.A.):

“Parents are required to supervise their children but will not be vicariously liable merely because of the parental relationship: *Arnold v. Teno* [1978] 2 S.C.R. 287; *Hatfield v. Pearson* (1956), 6 D.L.R. (2d) 593 (B.C.C.A.); *Moon v. Towers* (1860) 151 E.R. 1306; *Segstro v. McLean*,

[1990] B.C.J. No. 2477 (B.C.S.C.). The potential liability is personal and not vicarious. Parents have a parental duty of care to supervise and control the activities of a child and, if they do so to an acceptable standard, then they are also using reasonable care to prevent foreseeable damage to others.” (QL, at para. 20 (B.C.S.C.))

Significantly, the authorities confirm that mere errors of judgment will not amount to negligence. In *LaPlante (Guardian ad litem of) v. LaPlante*, [1995] B.C.J. No. 1303; 8 B.C.L.R. (3d) 119 (C.A.), Taylor, J.A. on behalf of the Court stated:

“... “[E]rror of judgment” alone will not amount to negligence. That must, of course, be right, in the sense that there may be several courses of conduct any of which a reasonably careful parent might follow in a given situation, and it will be enough to answer a claim in negligence that the course adopted by the defendant parent was one of those which the reasonable careful parent might have taken, even though events may, of course, have shown the choice to have been unfortunate.” (QL, at para. 14)

The *LaPlante* decision also indicates that the test to be applied in determining whether that duty has been discharged is an “objective” one in the sense that the parent is expected to do, or not to do, that which, according to community standards of the time, the ordinary reasonably careful parent would do, or not do, in the same circumstances. The test does, however, have a subjective element in that the reasonable parent must be put in the position in which (and with the knowledge which) the defendant parent found him/herself. (QL, at para. 14)

Selected Cases

Smoliak (Guardian ad litem of) v. Lawrence, [1997] B.C.J. No. 100 (S.C.) involved a determination of liability in an action for damages by the infant plaintiff Smoliak resulting from a motor vehicle accident.

The child Smoliak was struck by a car driven by Janiewicz when he ran out from between two parked cars into the street. He was three years old at the time of the accident.

The child had crossed the street without the defendant mother's knowledge. When she realized where he was she called out to him to stay there but he proceeded to sprint across the street into the path of the oncoming car.

The driver Janiewicz was a 17-year-old high school student proceeding home from school when she ended up hitting the child. The accident occurred in a playground zone.

In finding the driver Janiewicz liable for damages as a result of the accident, Justice Smith opined that while it was not possible for Janiewicz to see the child Smoliak as he ran out onto the street, she was, unfortunately, not keeping a proper lookout as she approached the scene and she was driving at an unsafe speed. Janiewicz's unsafe driving speed and lack of a proper lookout were thus negligent and contributed to the accident.

With respect to the mother, Justice Smith concluded that she could not have anticipated that Smoliak would run across the street in the two or three seconds she was not watching him. The mother thus did not fail in her duty to exercise reasonable care for the child's safety and was not liable for the damages incurred.

In this regard, Smith J. reasoned:

"The defendant Janiewicz pled that Ms. Lawrence negligently allowed Michael to leave her care and custody and enter the roadway without adequate supervision.

Ms. Lawrence testified that she began to instruct Michael about traffic safety when he was about two years old. Initially, she kept him on a leash as she walked with him on city streets. She stopped using the leash

about a year before the accident, but she said she always held his hand as they crossed the street. I am satisfied that she is normally a prudent and careful parent. The question is whether she had a momentary lapse from that standard at the material time.

When Ms. Lawrence took Michael out of the car there was no traffic on Sherbrooke Street that presented any danger to him. She knew he was excited about getting to the park to play. She placed him against the car immediately to her right and told him not to move. She diverted her attention from him for no more than about three seconds as she placed his pop on the floor. She testified that on one occasion he had run across a street ahead of her but no details of that incident were elicited and, in my view, his running across the street here during the few seconds Ms. Lawrence was occupied with the pop was something she could not reasonably anticipate.

In any event, it was not his running across the street that was the proximate cause of the collision, but his running back toward her. He was not in a position of danger on the boulevard on the south side of the street and Ms. Lawrence told him to stay there. Given the circumstances, there was nothing else she could do to prevent his running into the street.

I am satisfied that Ms. Lawrence did not fail in her duty to exercise reasonable care for Michael's safety." (QL, at para. 44-48)

In *Ibrahim (Guardian ad litem of) v. McLenahan*, [1996] B.C.J. No. 3128 (S.C.) the Defendant driver was approaching an intersection controlled by a flashing green traffic signal when the Plaintiff, aged 5, ran into the crosswalk in front of him without warning.

The Defendant had been going the speed limit, and had seen the flashing green light. He was focusing on the corner when the Plaintiff ran in front of him, having emerged from behind a shrub and rock wall. She was four to five feet from the curb when the Defendant first saw her. Although he slammed on his brakes and tried to steer to the right, he was not able to avoid the collision.

The Plaintiff argued that, under British Columbia's *Motor Vehicle Act*, specifically the section dealing with green flashing lights at an intersection, the Defendant had a

duty to approach the intersection in such a manner as to be able to stop without hitting someone who entered the intersection without warning. The Defendant third partyed the Plaintiff's parents, alleging they had failed to properly instruct her on traffic safety.

The Court dismissed both the main action and the third party proceedings against the parents finding that the standard of care imposed on a motorist under the legislation was not as alleged by the Plaintiff, and that "a motorist's duty of care with respect to a child on the streets is high, but not so high as to require perfection".

According to Warren J., the Defendant was exercising due care under the circumstances. He was aware of the flashing light and appreciated its significance. There was no one in the crosswalk as he approached it. When the Defendant saw the Plaintiff, she was within a few feet of the curb and running toward the street. He thus had only two to four seconds to respond, and stopped as quickly as he was able. Given this, it held the Plaintiff solely responsible for the accident.

In relation to the proceedings against the parents, the Court found that the Plaintiff's parents had performed all of their responsibilities and so had not been negligent. They did not allow her to leave her yard unaccompanied and when she went to school, she was accompanied by her older brothers and mother. The Plaintiff's parents had provided suitable traffic safety instructions to her and she had also received lessons at school on how to cross a street.

As Justice Warren stressed,

"... Parents cannot ensure that a child is safe from every peril. All any parent can do is inform and instruct, shelter and sustain. I am satisfied on the evidence of the plaintiff's father that her parents performed all of these responsibilities. Suitable traffic safety instruction was given to this little girl; she was not allowed to leave her yard unaccompanied; and when she went to school, she was accompanied by her older brothers and her mother. She had received lessons at school from her teacher and

traffic advisers on how to cross streets. Under these circumstances, there can be no liability on her parents.” (QL, at para. 18)

In *Bourne (Guardian ad litem of) v. Anderson*, [1997] B.C.J. No. 915; 27 M.V.R. (3d) 63 (S.C.), a 7-year-old boy was struck by a car when he ran out from between two parked cars in a residential area. The evidence before the Court was that the boy’s parents had instructed him on safety issues, and allowed him to ride his bike in certain areas or to visit a friend, believing that he knew and understood the safety rules.

Based on this, the trial judge found, at paragraph 28 that:

“... there is no evidence before me of negligence on the part of either parent as alleged, particularly in the instructing and training of Geordie as to street safety. The third party proceedings against them are therefore dismissed with costs.” (QL, at para. 28)

More recently, in *Bartosek (Litigation guardian of) v. Turret Realties Inc.*, [2001] O.J. No. 4735 (S.C.); aff’d, [2004] O.J. No. 1088; 23 C.C.L.T. (3d) 161 (C.A.); application for leave to appeal dismissed, [2004] S.C.C.A. No. 202 (S.C.C.), a six-year-old boy rode his bike down a ramp and into the path of the Defendant’s vehicle, sustaining severe injuries, including a brain injury. The child’s mother sued his father, in whose care he was at the time of the collision, the owner of the apartment complex on whose ramp the child had been riding (based on the occupier’s liability legislation), and the driver of the vehicle – amongst others.

The trial judge dismissed the action against the boy’s father whose evidence was that he had at least cautioned the child to be careful on the ramp and had also spent “significant time” with the child teaching him to ride and providing safety instructions (QL, para. 16).

Further, the evidence indicated that the boy's father could watch and supervise his child's play from his apartment residence; and he had had direct communication with him shortly before the collision.

On this point, the trial judge noted:

"... A parent cannot be held to a standard of 100 per cent supervision and immediate proximate control of a six and one half year old boy. Even if Andrew Bartosek had been physically closer and actually watching when Kirk was about to start his ride down the ramp, it is unlikely that what occurred could have been prevented by him." (QL, at para. 17)

Based on this, the trial judge found no negligence in the father's instruction, training or supervision of his son on the day of the collision. This finding was not disturbed on appeal.

Mitchell (Guardian ad litem of) v. James, [2007] B.C.J. No. 1337; 47 M.V.R. (5th) 237 (S.C.), involved an action for personal injuries suffered by six-year-old Plaintiff when she was struck by the Defendant's vehicle.

The facts indicated that the infant Plaintiff attempted to cross the street in front of her house when she was struck by the Defendants' vehicle. The Defendant was not speeding but did not see the child until she was one foot in front of his vehicle.

With respect to the liability of the Defendant, Hinkson J. found that the Defendant knew that the street in area of the accident was an area in which children played and crossed the street. As such, he was required to exercise special precautions for the safety of those children whose entrance onto roadway was reasonably foreseeable.

According to Justice Hinkson, the Defendant did not exercise such special precautions. His liability for the accident was thus assessed at 75%.

Turning to the liability of the young child, Justice Hinkson opined that, based on her age, intelligence and experience, the Plaintiff was capable of contributory negligence for the accident:

“Although Kelsey Mitchell was only 15 days from her sixth birthday at the time of the accident, I find that she was, by her age, intelligence and experience, capable of contributory negligence for the accident which injured her.

I find that Kelsey was an intelligent, obedient and respectful girl. I accept the evidence of her parents, her grandmother, and Mrs. Harley that Kelsey had been taught and understood about road safety, and knew better than to try to cross the road if there were any cars approaching.

Absent any evidence as to how she reached the portion of Harrier Drive where she was struck by Mr. James’ vehicle as that vehicle proceeded down Harrier Drive, I conclude that Kelsey failed to follow the safety rules that she had been taught, and that she understood.

I do not consider that her entry onto Harrier Drive is what could be expected of a reasonable girl of her age, intelligence and experience.” (QL, at para. 69-72)

The infant Plaintiff was thus found 25% liable for the accident.

Finally, Hinkson J. concluded that the infant Plaintiff’s parents were not negligent in supervising or instructing their child on road safety: “It is my conclusion that the standard established for parental supervision in the community where the Mitchells resided at the material time set by *Arnold v. Teno (Next friend of)*, *supra*, was met by the Mitchells.” (QL, at para. 78)

In *Chiasson (Litigation guardian of) v. Baird*, [2005] N.B.J. No. 232; 20 M.V.R. (5th) 44 (Q.B.) the six-year-old Chiasson was struck by a vehicle while riding his bicycle, without a helmet, in front of his home. He suffered a traumatic brain injury.

The evidence indicated that the child and his brothers had been riding their bikes across ramps constructed in the backyard. The view of the family's property from the road was very obscured by heavy foliage. The child was a good biker, but his family swore that he was forbidden and had consequently never biked on the road. Conversely, neighbours claimed that the child frequently biked on the road.

The defendant driver lived down the road, and was aware that there were children playing in the area. He claimed to have been driving carefully at approximately the speed limit of 50 kph, and no charges were laid in connection with the accident. The driver testified that the child darted across the road in front of him, giving him no time to react.

Glennie J. allowed the action ruling that the driver and the child were equally responsible for the accident. The child disobeyed his family's prohibition from biking on the road and without a helmet, and was attempting to cross the road in front of the truck. Moreover, according to Justice Glennie, the child was of sufficient age, experience and intelligence to appreciate the risk of crossing the road on his bike without first looking for oncoming traffic, and therefore failed to exercise the degree of care to be expected from a child of like age, intelligence and experience.

With respect to the driver, Glennie J. found that he had a duty to drive at a speed significantly below the posted limit, given his knowledge that the road was curvy, visibility was poor, and children played in the area. Driving at the posted speed limit was thus excessive in the circumstances. Moreover, the driver failed to keep a proper lookout given that the possibility of a child driving a bicycle out on the road in the area was reasonably foreseeable. Had he been driving slower and maintaining a proper lookout, odds were he could have taken evasive action.

In addressing the potential liability of the child's parents, Justice Glennie provided the following reasons for concluding that they were not liable:

“I am satisfied on the evidence that Mr. and Mrs. Chiasson at all material times properly supervised and instructed their infant son with respect to the proper way to safely ride his bicycle and on many occasions had instructed him with respect to the highway and how dangerous it was. To their knowledge, Francois was not in the habit of crossing the highway without the supervision of his parents or other adults. In my view, Mr. and Mrs. Chiasson properly supervised and instructed and educated Francois in the use of his bicycle at all material times. Mrs. Chiasson in particular is a strict parent. They were not in breach of any standard of duty of care of parents with respect to this accident.” (QL, at para. 159)

In the end result therefore, upon measuring relative blameworthiness in the sense of the magnitude of the deviation from the standard of care reasonably expected of the infant Plaintiff and the Defendant driver, Justice Glennie apportioned blame for the accident at 50% against the child, and 50% against the Defendant driver.

Apportionment of Liability

The general principle is that the standard of care expected of a child depends upon the age, intelligence and experience of the particular child.

This principle was set out in the Supreme Court of Canada’s judgment in *McEllistrum Estate v. Etches*, [1956] S.C.J. No. 55; [1956] S.C.R. 787 (S.C.C.). There, Chief Justice Kerwin (for the Court) said this:

“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.” (QL, at para. 10)

That point was later elaborated on by Justice Walsh in *Wessell et al. v. Kinsmen Club of Sault Ste. Marie Ontario Inc.*, [1982] O.J. No. 3342; 137 D.L.R. (3d) 96 (H.C.J.). At paragraph 38, Walsh J. said this:

“In determining whether a child was contributorily negligent, it must first be decided whether the child was capable of having a responsibility for his own safety in respect of the not reasonably foreseeable risk of injury to which he was exposed by the defendant and if such capability is found, then whether there was, in fact, negligence on the part of the child and the degree of that negligence: ...” (QL, at para. 38)

The application of these principles was considered by Hood, J., in the above-noted case of *Bourne (Guardian ad litem of) v. Anderson, supra*. At para. 55, Hood J., wrote:

“In my opinion, once the presence of a child or children on a road is known, or should have been known, to the driver of a vehicle proceeding through a residential area where children live, that driver must take special precautions for the safety of the child or children seen, and any other child or children yet unseen whose possible appearance or entrance onto the road is reasonably foreseeable. The precautions include keeping a sharp look out, perhaps sounding the horn, but more importantly, immediately reducing the speed of the vehicle so as to be able to take evasive actions if required.” (QL, at para. 55)

At paragraphs 59 to 61, he went on to detail the approach to the standard of care:

“It would appear from the cases referred to by counsel, and others which I have read, that the law in this area, as to the test to be applied by the court when deciding the liability of a child for negligence, and the application of that test, is certainly not always clear. Mr. Justice Addy wrestled with the problem admirably in *Heisler*, and it is not my wish to question his views generally, or to add to the seemingly unsettled state of the law. However, it seems to me that in referring to the care to be expected “from a child of like age, intelligence and experience” the Supreme Court of Canada in *McEllistrum* was referring to the reasonable or prudent child, and to an objective standard of care. The subjective factors, of the particular child’s age, intelligence, and experience, are only relevant to the fixing of that standard of care.

In my opinion then the standard of care in the case at bar is the conduct to be expected of a 7 year and 4 month old child having the same intelligence and experience as Geordie. And the test is whether Geordie exercised the care to be expected of that reasonable child in the particular circumstances. This view is not new. It reflects what has been said and done in a number of cases which I have considered. ...

The question is not an easy one. What causes me much concern is the well-known fact that generally speaking young children are forgetful and easily distracted, and often the need to take care for their own safety, and safety lessons drilled into them, fail them or are forgotten when crossing or attempting to cross a street. And this is particularly so if they are involved in some sort of a game with an older child or children; for example, a child chasing a ball, or another child, onto a street. Given the propensities of young children, I find it difficult to postulate the care to be expected from the reasonable child in such circumstances.” (QL, at para. 59-61)

A key threshold question, therefore, particularly where a young child is involved, is whether the child is even capable of being negligent and can be expected to take precautions for his/her own safety.ⁱⁱⁱ

In *Chiasson (Litigation guardian of) v. Baird, supra*, Justice Glennie reviews numerous decisions regarding the assessment of liability, as follows:

“In ***Connell v. Dyck*, [1998] B.C.J. No. 1792, 1998 CarswellBC 1656**, an eight year old cyclist moved into the path of a motorcycle while making a left turn from the right side of the road. The plaintiff cyclist was an intelligent child who had training on bicycle safety. The Court found that the plaintiff was negligent for breaching safety rules by failing to look before attempting to cross the road. His conduct was blameworthy in that he did not exercise the degree of care expected of a child of similar age, intelligence and experience. His actions did not constitute a momentary lapse of attention or error of judgment. The defendant was familiar with the area and knew the neighbourhood children used the road for walking and bicycling. He was aware of the need for greater than normal caution. **The Court apportioned the blame for the accident, 35% to the infant plaintiff and 65% to the defendant.** Justice Meiklem writes at para. 12:

12 The plaintiff referred me to the basic statement of the standard of care to be applied in the cases of young children set out in *McEllistrum v. Etches*, [1956] S.C.R. 787 (S.C.C.). The question is whether the child exercised the care to be expected from a child of similar age, intelligence and experience. This test has been employed in many cases and was re-affirmed as correct in *Carson v. Pruden* (May 14, 1990), Doc. CA010744 (B.C.C.A.). It must of course be borne in mind that one of the acknowledged characteristics of children is that they will be more prone to distraction than the

reasonably prudent adult. Children commit more and greater errors of judgment than adults and a momentary lapse in awareness is to be tolerated and does not result in a finding of legal responsibility (see *Gonzalez (Guardian ad litem of) v. Stewart* (1997) Vancouver CA021250 (B.C. C.A.) [reported (1997), 99 B.C.A.C. 17 (B.C.C.A.)].

And at para. 14:

14 It is significant that Tyler's parents considered him sufficiently trained and safety-conscious that he was permitted to ride on busy Sintich Road without adult supervision. It is my assessment of his parents that they are diligent caring, responsible parents of reasonable judgment. They trusted Tyler to comply with the rules that he had been taught. His conduct in riding his bicycle across the road from the right shoulder and in proceeding across the road without stopping and looking both ways was obviously a breach of the standard of care they expected of him. This is of course not determinative of the objective components of the standard of care question for this experience, and has been so considered in other cases. (See *Lee v. Barker* (1992) Vancouver CA013747 (B.C.C.A.) at page 5 [reported (1992), 68 B.C.L.R. (2d) 138 (B.C.C.A.)], and *Reynolds v. Kadlec*, [1976] B.C.J. No. 364, Vancouver Registry 29563-74 (S.C.S.C.) p. 13-14).

And at para. 21:

21 In my view Tyler's failure on June 4, 1989 to adhere to the basic safety rules that he had been taught and had been trusted by his parents to follow cannot be described as characteristic generally of an 8-year old child with Tyler's intelligence and experience. This case is not, on the evidence, one of a momentary lapse of attention or error of judgment in the context of substantial compliance with instructions, or because of distraction, that one would expect of the applicable reasonable child. I find the conduct of the plaintiff child was legally blameworthy and I hold that he was contributorily negligent.

In *McDowell v. Barry* (1985), 31 M.V.R. 17 (B.C.S.C.), a six year, nine month old plaintiff was held 20% to blame and the defendant motorist that struck him 40% to blame. A second defendant, a contractor whose work truck was parked in such a manner as to obstruct the intersection was also found 40% to blame. The plaintiff's negligence was failing to keep a proper lookout and thereby see warning signs, barricades and traffic cones and in approaching the

intersection too quickly in the circumstances.” (QL, at para. 88-91)(emphasis added)

And further,

“In *Chohan v. Wayenberg*, [1990] B.C.J. No. 320, 1990 CarswellBC 863, a nine year old plaintiff was struck by the defendant’s car as he tried to ride his bicycle across a busy five lane highway in a suburban shopping district at a spot 30 feet from an intersection with traffic lights and crosswalks. **A jury found the infant plaintiff 90% to blame for the collision that resulted when he drove his bicycle into the path of the car driven by the defendant. The British Columbia Court of Appeal held that the apportionment of fault was grossly disproportionate and apportioned liability equally.** The Court based its decision on the necessity to keep a close watch for children in residential areas and the standard of care to expect from a nine year old child. Taylor, J.A. writes at para. 6:

There is, of course, a need for constant vigilance for children on the roads, especially in suburban areas, for the very reason that they can not be expected always to act with the same care that is expected of adults.

In *Wilkins v. Allaby*, [1988] N.B.J. No. 111, 1988 CarswellNB 7 (N.B.C.A.), the infant plaintiff, who was almost six years old at the time, was injured when he darted from a crosswalk into the traffic and was struck by a van driven by the defendant. **The trial judge found the plaintiff was contributorily negligent and assessed the fault of the parties at 50% each.** The plaintiff appealed and the defendant cross-appealed. Both the appeal and the cross appeal were dismissed. The Court of Appeal held that the evidence fully supported the trial judge’s finding. The Court of Appeal noted that the plaintiff’s age, five years and 10 months, has been described as the “marginal” age for a youngster to be charged with contributory negligence. Hoyt, J.A. writes at para. 8:

The trial Judge cited the case of *McEllistrum v. Etches*, [1956] S.C.R. 787, 6 D.L.R. (2d) 1 (S.C.C.), and went on to say that Donald “did not exercise the care to be expected of a child of like age, intelligence and experience under the circumstances”. The above quotation, taken from *McEllistrum* sets forth a subjective test, because it is the particular child’s age, experience and intelligence which must be considered. As Richard J.A., as he then was, said in *Boucher v. N.B. School District No. 4 Bd. of Trustees* (1980), 29 N.B.R. (2d) 416, 66 A.P.R. 416 (N.B. C.A.), at p. 419.

In *Boucher v. N.B. School District No. 4*, 29 N.B.R. (2d) 416, 1980 CarswellNB 176, a grade two pupil, aged seven years, nine months, was struck by a school bus when he suddenly jumped out from behind a parked truck. The bus was entirely on the wrong side of the road at the time of the accident. **At trial, [1979] N.B.J. No. 185, the defendant was held 100% blameworthy. The question on appeal was whether there was contributory negligence on the part of the infant. The appeal was allowed since there was evidence that the child jumped onto the highway without looking and that the child was above average intelligence. The Court of Appeal concluded that the trial judge had erred in absolving the plaintiff of contributory negligence. The Court of Appeal determined that the infant child should be held one-third at fault. ...** (QL, at para. 95-97)(emphasis added)

And the final case reviewed by Glennie J., that of *Augustine v. Francis*:

“In *Augustine v. Francis*, [1992] N.B.J. No. 365, 1999 CarswellNB 3 (N.B.C.A.), a six year and two month old child was playing in the yard of a community centre where her mother was playing bingo when she decided to cross the road to go to her grandmother's house. She ran into the side of the defendant's motor vehicle. The trial judge, [1991] N.B.J. No. 140, apportioned liability 75% to the defendant driver and 25% to the child. **On appeal, liability was reapportioned 75% to the child and 25% to the defendant driver.** The posted speed limit in the area where the collision occurred in that case was 40 km/hr. The driver said he “just drove like normal” at 20 or 30 km/hr. The trial judge, McLellan, J. held that the driver should have driven slowly and carefully and he should have expected the possibility that a child could dart on to the roadway, then if a child did dart out he could have stopped safely. He found the driver drove too fast and was careless. He accordingly held the driver was negligent and that his negligence was the cause of the collision. ...

...

[In the Court of Appeal decision] Chief Justice Stratton noted that in finding liability against the driver and apportioning fault 75% against him, the trial judge cited and relied upon the decision of the New Brunswick Court of Appeal in *Wilkens v. Allaby*, *supra*. Chief Justice Stratton noted two distinguishing features between *Wilkens v. Allaby* and *Augustine v. Francis*. First, he observed, the driver in the *Wilkens* case had actually seen the group of children on the side of the road and thus

had actual knowledge of their presence. Despite this, the driver did not look toward them again as she proceeded down the road. Her view of the children was not blocked. The second distinction noted by Chief Justice Stratton was that the child in the *Wilkins* case approached the motor vehicle, a van, from the left crossing three lanes of traffic before striking the van. Thus, the driver of the van had an opportunity to see the child for a considerable period of time as the child ran toward her vehicle. In the *Augustine* case, the Defendant argued that he did not see and could not have seen the child until he was five or six feet from his vehicle and running toward it. He thus did not have the opportunity to avoid the accident, as was the case in *Wilkins*.

Chief Justice Stratton writes at para. 19 [and 20]:

19 Notwithstanding my comments with respect to the distinctions between the *Wilkins* case and the present one, there was evidence at the trial that Mr. Francis knew that “occasionally” or “sometimes” children played in the area of the Community Hall during bingo games. Moreover, because vehicles were parked on both sides of the Big Cove Road when he approached the Community Hall, Mr. Francis knew he was proceeding in the one single lane open for traffic on the Road. In these circumstances, there was some evidence to support the trial Judge’s finding that Mr. Francis should have been keeping a more watchful look-out. Thus, while I may not have come to the same conclusion on the question of liability as did the trial Judge had I tried the case, I am unable to conclude that the trial Judge was clearly or palpably wrong in finding that Mr. Francis was negligent.

[... Having reviewed the record and the submissions of counsel in the present case, I am persuaded that the greater degree of responsibility for this collision must be attributed to the child Farrah Augustine. As the trial Judge found, she started to cross the road without first looking for traffic and did not exercise the care expected of a child of like age, intelligence and experience in like circumstances. It was she who ran into the side of the Francis van. I have therefore concluded that this is one of those strong and exceptional cases in which I should substitute an apportionment of fault different than that fixed by the trial Judge. On the facts of this case, I would apportion fault 75% against the child and 25% against Mr. Francis.]” (QL, at para. 103-106)(emphasis added)

To summarize, the foregoing decisions indicate that the apportionment of liability as between a young child and the driver of a motor vehicle in a situation such as the present one will be dependent on the following non-exhaustive list of factors:

- (a) whether the driver was driving responsibly, at a reasonable speed, maintaining a proper lookout;
- (b) whether the driver was familiar with the area/neighbourhood and was aware of the need for greater than normal caution because of the presence of children;
- (c) whether the driver had actually seen the child on the side of, nearing or crossing the road and thus had actual knowledge of his/her presence; and
- (d) whether the child exercised the care expected of a child of like age, intelligence and experience in like circumstances (ie. Is the child of such an age that s/he can be expected to take precautions for his or her own safety? Is the child even capable of being negligent? Did the child start to cross the road without first looking for traffic or unexpectedly dart out into traffic? Did the child adhere to the basic safety rules that he had been taught and had been trusted by his parents to follow? Did the child have a momentary lapse of attention or error of judgment in the context of substantial compliance with instructions?)

END

ⁱ With thanks to Andrea Manning-Kroon for her original research and writing of the memorandum behind this article.

ⁱⁱ Reference: *Arnold v. Teno*, [1978] S.C.J. No. 8; 2 S.C.R. 287 (S.C.C.); *LaPlante (Guardian ad litem of) v. LaPlante*, [1995] B.C.J. No. 1303; 8 B.C.L.R. (3d) 119 (C.A.); *Herrell v. Nickerson*, [1979] N.B.J. No. 125; 26 N.B.R. (2d) 42 (Q.B.); *Bartosek (Litigation guardian of) v. Turret Realties Inc.*, [2001] O.J. No. 4735 (S.C.J.)

iii Reference: *Hixon (Guardian ad litem of) v. Roberts*, [2004] B.C.J. No. 1201; 29 B.C.L.R. (4th) 226 (C.A.); *Mitchell (Guardian ad litem of) v. James*, *supra*