NOVA SCOTIA COURT OF APPEAL
Citation: ***Young v. Meery***, 2009 NSCA 47

Date: 20090513
Docket: CA 301038
Registry: Halifax

Between:

Lindsay Alexandra Young, by her Litigation Guardian, Richard Young

Appellant

v.

Joseph E. Meery

Respondent

Judges:	Bateman, Saunders & Oland, JJ.A.
Appeal Heard:	April 7, 2009, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Saunders, J.A.; Bateman and Oland, JJ.A. concurring.
Counsel:	Raymond Wagner and Michael Dull, for the appellant Darlene Willcott and Selina Bath, for the respondent

Reasons for judgment:

[1] This is an appeal from the interlocutory judgment and order of Nova Scotia Supreme Court Justice Robert W. Wright where he granted the respondent Joseph Meery summary judgment, effectively dismissing the appellant's right of action against Mr. Meery.

[2] The appellant, Lindsay Alexandra Young (Ms. Young) sustained a serious brain injury and was left permanently disabled in a motor vehicle accident on the Grand Lake Road in Sydney, Nova Scotia on February 22, 2004. Ms. Young was a passenger in a car operated by her friend Ms. Erin Ward. They were travelling east when suddenly their car spun out of control on a patch of ice and slid across the centre line where it collided with Mr. Meery's truck, coming in the opposite direction.

[3] On June 8, 2005 Ms. Young, by her litigation guardian, sued the defendants Erin Ward and Joseph Meery as joint tortfeasors. Also joined as defendants were the parents of Erin Ward as the owners of the car she was driving. The appellant alleged that their various acts of negligence caused her permanent injury and substantial damages. Both defendants Erin Ward and Joseph Meery then cross-claimed against each other, with mirrored claims of fault for the accident.

[4] Discoveries were held in January 2007.

[5] On February 20, 2008 Mr. Meery applied for summary judgment pursuant to **Civil Procedure Rule** (1972) 13.01(a), as amended. The application was heard in Chambers on April 30, 2008.

[6] In a written decision dated May 23, 2008, now reported as 2008 NSSC 151, Wright, J. allowed the application, granting Mr. Meery summary judgment both in respect to the plaintiff's claim, as well as the cross-claim brought against him by the defendant Ward.

[7] The order confirming his decision and directing the plaintiff to pay Mr. Meery costs of $800.00 was taken out September 2, 2008.

[8] In a notice of appeal filed September 11, 2008 the appellant asked that the decision and order be reversed so "that her Action shall be allowed to proceed to Trial." She alleges five discrete errors of law on the part of the Chambers judge:

> 1. Assessing the credibility of the evidence of Erin Ward and determining that her evidence was speculative and inaccurate, thereby making findings of fact and credibility.
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> 2. Preferring the evidence of Joseph Meery to that of Erin Ward, thereby making findings of fact and credibility.
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> 3. Finding the evidence of Carol Milne, an eyewitness, was compelling and credible without fully hearing all the circumstances of her evidence, including the degree of obstruction the Meery vehicle caused to her view.
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> 4. Drawing an adverse inference or discounting and ignoring, the evidence of Erin Ward from the failure of Counsel to ask her opinion on Mr. Meery's ability to avoid the motor vehicle collision, a question that could be asked at trial.
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> 5. Interpreting and assessing the evidence of the witnesses, Erin Ward, Joseph Merry, and Carol Milne and making findings of fact and credibility that should properly be left to the trier of fact.

[9] It will not be necessary for me to address each of the appellant's grounds of appeal. Largely for the reasons expressed by Mr. Wagner in his able submissions on behalf of the appellant I have concluded, with respect, that the Chambers judge erred in law and that his decision and confirmatory order ought to be overturned.

[10] I will begin my analysis with a brief consideration of the proper standard of review.

Standard of Review

[11] There is no issue as to the standard of review in this case. The parties are in agreement that since the order under appeal had a final, terminating effect on litigation commenced by Ms. Young, the usual rule of this Court applicable to interlocutory orders does not apply. Rather, the test is whether there was an error of law resulting in an injustice. See for example **Canada (Attorney General) v. Foundation Co. of Canada Ltd. et al.** (1990), 99 N.S.R. (2d) 327 (C.A.); **Frank**

v. Purdy Estate (1995), 142 N.S.R. (2d) 50 (C.A.); **Werry v. van de Wiel**. 2005 NSCA 131; and **MacNeil v. Bethune** 2006 NSCA 21.

[12] For the reasons that follow I have concluded that by granting summary judgment to Mr. Meery, the Chambers judge erred in law resulting in an injustice.

Analysis

[13] Mr. Meery, Ms. Ward, and an eyewitness to the mishap, Ms. Carol Milne, were discovered under oath on January 3-4, 2007. In support of his application for summary judgment Mr. Meery filed the transcripts of their discovery examinations, as well as their earlier written statements given to the accident investigators. The appellant did not present any other evidence at the Chambers hearing. Obviously Ms. Young is unable to testify and offer her own account of the mishap because of the serious brain trauma and permanent injuries she sustained.

[14] In the mind of the Chambers judge no controversy arose over any material facts. In introducing his summary of the events leading up to the collision, he said:

> [5] There is no dispute as to how this accident happened. The defendant Ward, with the plaintiff as her passenger, was travelling eastwardly in the right-hand lane at a reduced speed of between 50-60 kph. (the posted speed limit on that stretch of highway being 80 kph). The highway was slushy and very wet. As she was nearing the local Tim Horton's outlet, her right front tire struck a chunk of ice lying on the highway which caused her car to start sliding sideways. She reacted by gearing down to second gear but her car continued to rotate in a counter-clockwise direction so that she completely lost control of it. As it slid rotationally, the car crossed over the centre line into the oncoming left-hand lane. Tragically, the car then collided with the defendant Meery's truck who happened to be the first oncoming vehicle in that lane travelling westwardly. When the impact occurred, the car had rotated almost 180 degrees so that the front of Mr. Meery's truck collided with the right rear quarter section of the Ward car. Although there was a lot of traffic on the highway at the time, no other vehicles were involved in the mishap.
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> [6] Mr. Meery had only driven approximately one kilometer on Grand Lake Road from his home when the accident occurred. He was on his way to Tim Horton's on a Sunday afternoon to buy coffee to take home for his wife and himself. He was travelling at a speed of approximately 60-70 kph and stayed in the left-hand lane after passing a couple of vehicles so as to be in a position to

> make a left turn into the Tim Horton's entrance. He was an estimated 100 yards short of that entrance when the collision occurred in his lane of travel.
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> . . .
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> [18] Also examined at length on discovery was Carol Milne, an eyewitness to the accident. Ms. Milne, a teacher, was travelling westwardly two vehicles behind Mr. Meery's truck which had just passed her. She testified that she was travelling at a reduced speed of about 60 kph because she was nervous over the driving conditions, the roads being snow covered and slushy.
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> [19] Ms. Milne testified that the first time she noticed the Ward vehicle was when it veered or swerved across the centre line into the westbound lane. She recalled a feeling of panic and had only a chance to ask herself "what are they doing?" before the impact occurred. She said that from the first time she noticed the Ward car crossing the lane, "it all seemed very, very fast, seconds". She herself was driving far enough back of the Meery vehicle to be able to stop in time.
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> [20] When asked if she thought that there was not enough time for the operator of the truck to avoid the collision, Ms. Milne answered "oh, absolutely, yeah. It was horrible." When next asked the question, "so there was nothing he could have done in your opinion to avoid the accident?", Ms. Milne answered, "oh no, it was horrible."
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> [21] Ms. Milne then went on to say that the basis of her opinion was that the accident seemed to happen so very quickly from her noticing the vehicle veer across the lane. . . . (Underling mine)

[15] Similarly, Wright, J. described the thrust of Mr. Meery's application as:

> [7] Based on this set of facts, which are uncontradicted in the evidence filed in support of this application, counsel for the defendant Meery submits that there is no arguable issue to be tried as against her client, either in respect of the plaintiff's action or the defendant Ward's cross-claim. Counsel's submission is that liability for this accident rests entirely with the defendant Ward and that Mr. Meery is therefore entitled to an order for summary judgment. (Underlining mine)

[16] The law concerning entitlement to summary judgment in Nova Scotia is well settled. **CPR** (1972) 13.01(a), in effect at the time of the application before Wright, J., permits a defendant to apply for summary judgment on the basis that there is no arguable issue to be tried with respect to the claim. It reads:

> After the close of pleadings, any party may apply to the court for judgment on the ground that:
>
> (a) there is no arguable issue to be tried with respect to the claim or any part thereof;

[17] The Chambers judge recognized that his analysis required two steps. First, he must be satisfied that Mr. Meery, as applicant, had established there was no genuine issue to be determined at trial. Then, if Mr. Meery were successful in meeting that requirement, Ms. Young was required to show, on the facts not in dispute, that her claim had a real chance for success. See for example **Selig v. Cook's Oil Company Ltd.**, 2005 NSCA 36 and **Huntley v. Hogeterp**, 2007 NSCA 75.

[18] Applying those principles to the facts as he saw them, the Chambers judge observed:

> [10] Under the first part of the test, it is decidedly up to the applicant to show that there is no genuine issue of material fact to be determined at trial. Counsel for the applicant Meery contends that this part of the test has been met where the evidentiary record before the court clearly establishes that Mr. Meery was travelling on his own side of the centre line, at a lawful and prudent rate of speed, when suddenly the oncoming Ward vehicle spun out of control and crossed into his lane, leaving him with no time to react and no way to avoid being struck by the Ward vehicle.
>
> [11] Counsel for the plaintiff takes a different view of the evidentiary record. His main argument is that it does leave open a genuine issue of material fact that should be left for determination at trial, namely, whether or not Mr. Meery was keeping a proper lookout such that he ought to have been able to see the Ward vehicle in distress in time to take some evasive action to avoid, or at least lessen, the collision. He therefore argues that the applicant has not satisfied the first part of the test and that there is a reasonable chance that the trier of fact could determine that Mr. Meery was partly at fault for the accident. He has so pleaded in the Statement of Claim.
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> [12] Before addressing this argument, it should be mentioned that the Statement of Claim, amongst the usual recitation of particulars of negligence in motor vehicle cases, also alleges that the defendant Meery was not driving in his proper lane of travel and was driving at an imprudent rate of speed in the circumstances. These allegations were also raised in the plaintiff's written

> submissions as issues of material fact that should be left for determination at trial although they were not seriously argued on the hearing of this application.

[19] The Chambers judge rejected the appellant's submissions, finding that there were ". . . no genuine issues of material fact, either in respect of the defendant Meery's speed or proper lane of travel, that should be left for determination at trial" such that the respondent Meery was found to have satisfied the first part of the test to obtain summary judgment. Moving to the second step, the Chambers judge concluded:

> [34] . . . the second part of the test requires the plaintiff to establish her claim as being one with a real chance of success, based on the facts that are beyond dispute. Based on the foregoing analysis, the plaintiff is unable to demonstrate that her claim has any real chance of success as against the defendant Meery. There is simply no factual basis, beyond mere speculation, upon which a court could conclude that Mr. Meery failed to take proper avoiding action by reason of not keeping a proper lookout and is therefore liable as a joint tortfeasor.

[20] In my respectful view and for reasons I will now develop, the Chambers judge erred in law by missing, ignoring or misapprehending material evidence, and by drawing inferences and conclusions from the evidence which rightfully fall within the preserve of the trier of fact, at a trial.

[21] Regarding the judge's restricted role in the fact-finding process on a motion for summary judgment the starting point is the decision of the Supreme Court of Canada in **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423. In that case, the Court confirmed that where there are disputes of fact, the disputes should be determined at trial. (See ¶ 27 - 30). This Court has consistently taken this approach on summary judgment applications. See for example **Oceanus Marine Inc. v. Saunders**, [1996] N.S.J. No. 301 (Q.L.)(C.A.); **Campbell v. Lienaux**, [1998] N.S.J. No. 142 (Q.L.)(C.A.); and **United Gulf Developments Ltd. v. Iskandar**, 2004 NSCA 35.

[22] In **Oceanus**, **supra**, Justice Pugsley discussed the role of the Chambers judge in the face of conflicting evidence in a summary judgment application. He stated that a Chambers judge is not entitled to make findings of fact or determinations of credibility when confronted with conflicting evidence in an application for summary judgment; those are exercises left to a trial judge or a jury. That is, the presence of conflicting evidence will likely be enough to meet the low

threshold of raising an arguable issue, and will thereby be enough to dismiss an application for summary judgment.

[23] Further elaboration concerning the limited role of a Chambers judge on a summary judgment application was provided by Justice Roscoe in **Huntley**, **supra** where she observed at ¶ 37 - 39:

> [37] However, there was sufficient information before the chambers judge to indicate that there will be conflicting evidence at trial. . . .
>
> [38] In addition, the plaintiffs will have the opportunity to test the credibility of . . . As well . . . the quality of his observation will be questioned. The trier of fact will be asked to draw inferences from all the evidence.
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> [39] A summary judgment application is not the time for evaluating credibility, weighing evidence and drawing inferences. In **Dawson v. Rexcraft Storage**, [1998] O.J. No. 3240 (C.A.) Borins, J.A. explained:
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> > 19 In **Aguonie**, [1998] O.J. No. 459 this court discussed the role of a motions judge in determining whether a genuine issue exists with respect to a material fact. It is helpful to repeat what the court said at pp. 235-36:
> >
> > > In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.
> >
> > ...
> >
> > 28 ... However, at the end of the day, it is clear that the courts accord significant deference to the trial process as the final arbiter of the dispute which has brought the parties to litigation. If there is a genuine issue with respect to material facts then, no matter how weak, or how strong, may appear the claim, or the defence, which has been attacked by the moving party, the case must be sent to trial. It is not for the motions judge to resolve the issue. [emphasis added]

> See also: **Campbell v. Lienaux** (1998), 167 N.S.R. (2d) 196 at paras. 15-16 and **Oceanus Marine Inc. v. Saunders** (1996), 153 N.S.R. (2d) 267 at paras. 19-20.

[24] I will now address the judge's reasons and treatment of the evidence at the hearing.

[25] Mr. Wagner acknowledged in oral argument that his submissions regarding "credibility" should be seen in the broadest sense, intending to capture the reliability, the inherent trustworthiness of the evidence. He was not in any way challenging the honesty of Mr. Meery or Ms. Milne.

[26] In the case at Bar the Chambers judge canvassed certain answers given by Mr. Meery, Ms. Milne, and Ms. Ward at their discovery examinations before satisfying himself that there was "no evidence" that there was any "genuine issue of material fact to be tried in respect of Mr. Meery's actions of keeping a proper lookout and taking proper avoiding action." In coming to his conclusion the judge obviously accepted the evidence Mr. Merry had given at this discovery examination, and was satisfied that Mr. Meery's evidence was consistent with a statement Mr. Meery had given in September 2005, as well as being consistent with the evidence of the eyewitness Carol Milne. For example, the Chambers judge said:

> [16] . . . The evidence of Mr. Meery at discovery is that he first saw the Ward car when it was just about ready to cross the centre line about six to eight feet away, and that it was coming straight across the road towards him at about a 90 degree angle to the highway. He said that he came onto his brakes as hard as he could but that the Ward car just about disappeared under the front of his much higher truck.
>
> [17] This evidence is generally consistent with a written statement which Mr. Meery gave in September of 2005. . . .
>
> [28] The evidence of both the defendant Meery and the eyewitness Milne is generally consistent, both internally and with one another, in support of the conclusion that there was no evasive action which Mr. Meery could reasonably have been expected to take to avoid or lessen the impact. . . . Mr. Meery said that all he had time to do was jam on his brakes. Ms. Milne could not recall seeing Mr. Meery's brake lights come on but the focus of her attention, as she said, was on the Ward vehicle. Her evidence with respect to the brake lights is therefore of no significance. . . .

> [29] It appears that the only evidence which might call this issue into question is Ms. Ward's estimates of the time lapse from the point when her vehicle spun out of control until the collision with Mr. Meery's truck. If that evidence could be found to be reliable, it might be inferred that Mr. Meery did not take proper evasive action from his failure to keep a proper lookout.
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> [30] Ms. Ward's evidence by her own admission, however, is pure guesswork. She admits that she can't say how long it was that her vehicle was sliding out of control before impact. One could hardly expect an accurate answer from someone in the agony of collision. Ms. Ward nonetheless ventures into guesswork where she vacillates in her estimates from about a minute to maybe 15-20 seconds (after earlier guessing that it might have been between 30-40 seconds after she encountered the ice).
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> [31] Not only are these guesses internally inconsistent, they are obviously haphazard and unreliable, especially in light of her opening answer that she cannot say how long that time lapse was. . . .
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> [35] . . . Here, Mr. Meery did try to take some evasive action by jamming on his brakes. (Underlining mine)

[27] Included within the materials filed on the application was a statement Mr. Meery gave to the Cape Breton Regional Police Service on February 27, 2004, which was only five days after the accident. In answer to a general question asking him to describe the incident Mr. Meery told Constable Joseph Farrell, in part:

> A. This little red car whistled right across in front of me, sideways, she had lost control . . .
>
> Q. Ok?
>
> A. And she had absolutely no control of her own vehicle and come right across in front of me. I, I'm I'm racked as to whether or not I even had time to touch my foot on the brake . . .
>
> A. And I think that's where she lost control, she was, she was coming from Sydney and, and I really don't know Joe if she was in the far lane or if she was in the inside lane, like in the passing lane
>
> Q. Um hum?
>
> A. It's no longer a passing lane now as you know, there are about, if you're traveling, if you're turning left, it's left and if it's right, it's right, you know

Q Yes?

A. So I don't know exactly, when I spotted her she was practically in front of my truck

Q. Ok?

A. You know

Q. So you didn't have enough time?

A. No, no time

Q. To?

A. All I did was to put, stiffen my arms out on the steering wheel, that was (inaudible)

Q. So, there was no time for you to take any evasive action?

A. No,

Q. To brake or?

A. Couldn't, <u>if I had to swear on a bible whether or not I hit the brake, I'd have to say I don't know</u>.

]Q. Ok?

A. <u>I honestly don't know if I touched the brake</u> . . . (Underlining mine)

[28] Here, in a statement taken just days after the mishap, the respondent informed the investigating police officer that he did not know whether he had braked at all prior to impact. This disclosure is completely at odds with the respondent's assertion in a statement he gave on September 2, 2005 "I slammed on my brakes" or a similar description in his discovery testimony on January 4, 2007:

"And I come onto them brakes as hard as I could, and it stayed straight. (AB 249, Q. 1114)

[29] This significant conflict in the evidence is neither mentioned, nor explained by the Chambers judge in his decision. I can only assume, respectfully, that this material point was missed, or ignored. Having missed or ignored this plain contradiction, the Chambers judge then went on to discount Ms. Milne's testimony that she could not recall seeing Mr. Meery's brake lights come on, as being of "no significance" because - in the judge's mind - Ms. Milne's "attention . . . was on the Ward vehicle." Further, at para. 28 of his decision the Chambers judge states: "(t)he evidence of both the defendant Meery and the eyewitness Milne is generally consistent, both internally and with one another ..." . This is plainly wrong.

[30] The significance of this error is seen in the Chambers judge's own cautionary admonition:

> [29] . . . the only evidence which might call this issue into question is Ms. Ward's estimates of the time lapse from the point when her vehicle spun out of control until the collision with Mr. Meery's truck. If that evidence could be found to be reliable, it might be inferred that Mr. Meery did not take proper evasive action from his failure to keep a proper lookout.

[31] The clear contradiction in Mr. Meery's own accounts as to whether he braked or not would constitute *other* evidence which might well call into question "this issue"; that being whether or not there was any negligence on the part of Mr. Meery that contributed to this accident.

[32] It may well be – depending on the way the evidence is presented and challenged at trial – that in all of the circumstances there was in fact nothing Mr. Meery could have done to avoid the collision. If that ultimately were to be the conclusion, then of course it would not matter whether Mr. Meery "slammed" on his brakes, or did nothing to decelerate. But these are matters so inextricably tied to whatever weight might be attached to the evidence of all three motorists, or to whatever expert opinion might be offered by an accident reconstructionist, as to necessitate an adversarial contest of the merits at a trial.

[33] On the subject of the respondent's own acts and attention it may also turn out to be significant that Mr. Meery described the Ward vehicle as being "red". We were advised at the hearing that all other witnesses described the car as being blue or green.

[34] From my review of the record I am satisfied that there are serious, genuine material facts to be tried in respect of Mr. Meery's actions in keeping a proper look out and in taking proper avoiding action. These will include: the varying descriptions of Mr. Meery's speed in the moments leading up to the crash; the lanes of the highway in which the vehicles were travelling; the distance which separated the two vehicles, both initially and in the seconds prior to impact; the accuracy of the accounts given by Mr. Meery, Ms. Ward, and Ms. Milne as to when and what they saw; Mr. Meery's awareness of his surroundings; his perception; his reaction time; and his attempts to avoid or lessen the collision – in other words whether his actions met a reasonable standard of care in all of the circumstances – are all questions to be explored at trial.

[35] The Chambers judge's failure to deal with the obvious contradictions in Mr. Meery's various accounts amounts to an error on a significant matter which affected the result. It is palpable and overriding, thus requiring our intervention. See for example: **Housen v. Nickolaison**, [2002] 2 S.C.R. 235; **Dalgamuukw et al. v. British Columbia et al.**, [1997] 3 S.C.R. 1010; **2703203 Manitoba Inc. v. Parks**, 2007 NSCA 36; and **R. v. Clark**, [2005] 1 S.C.R. 6.

[36] I also agree with Mr. Wagner's submissions on behalf of the appellant that the Chambers judge erred in rejecting Erin Ward's discovery testimony as nothing more than "pure guess work" or "haphazard and unreliable." As I read the transcript, nothing in her evidence appears so preposterous or so inherently untrustworthy as to be worthless and summarily rejected. While it is true that she sometimes uses the word "guess" in responding to questions, this may well be little more than a habit or style of speaking. To completely reject her evidence as being incapable of belief and to then prefer the accounts given by Mr. Meery and Ms. Milne was, respectfully, to assume the mantle of a trial judge, and stray beyond a judge's limited role in a summary judgment application.

[37] For all of these reasons I would find that the appellant had satisfied the first stage of the test by showing that there *were* genuine issues of fact to be determined at trial. The application should have been decided on that basis. It follows then that Ms. Young was not required to meet the second stage of the test, that being that on the facts not in dispute, her claim had a real chance of success.

Conclusion

[38] As the leading jurisprudence makes clear, any applicant seeking summary judgment has a heavy burden to meet. Here, the judge was required to assess the

record in order to determine whether the respondent had satisfied the first stage of the test by showing there were no material issues of fact in dispute. However, in doing that it seems to me that the judge dissected the evidence - especially that relied upon by the appellant - subjecting it to a rigorous analysis in order to assess its reliability, its value, its consistency both within itself, and in contrast to the weight the judge felt ought to be ascribed to other evidence. Such a comprehensive analysis of the whole of the evidence must always be the preserve of the trial judge (or jury) after every witness' account has been tested by the kind of vigorous questioning under oath one expects at a trial.

[39] I respectfully conclude that the Chambers judge erred in law when he found there was no evidence to support a trial of a genuine issue of material fact surrounding the respondent's actions in keeping a proper look out and taking proper avoiding action. The judge's error led to an injustice.

[40] I would allow the appeal, reverse the decision and order of the Chambers judge thereby enabling the appellant's action against Joseph E. Meery to proceed to trial. I would also direct that any costs paid by the appellant to the respondent pursuant to the Chambers judge's order be returned, and that the appellant be awarded costs of $2,500.00 plus disbursements as agreed or taxed, to represent costs in the court below and on appeal.

Saunders, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.