**C.A.C. No. 125656**

**Cite as: R. v. Meister, 1997 NSCA 48**

# NOVA SCOTIA COURT OF APPEAL

**Hallett, Chipman and Pugsley, JJ.A.**

BETWEEN:

| | | |
|---|---|---|
| **CHARLES BENJAMIN MEISTER**<br><br>Appellant<br><br>- and -<br><br>**HER MAJESTY THE QUEEN**<br><br>Respondent | ) | Robert Murrant, Esq., Q.C.<br>for the Appellant<br><br>Denise Smith<br>for the Respondent<br><br>Appeal Heard:<br>January 28, 1997<br><br>Judgment Delivered:<br>February 27, 1997 |

**THE COURT:** The appeal is allowed, the jury verdict set aside, and a new trial ordered, per reasons of Pugsley, J.A., Hallett and Chipman, JJ.A. concurring.

**Pugsley, J.A.:**

Charles Meister appeals from his conviction by a jury on September 8, 1995, of operating a motor vehicle on a highway in a manner that was dangerous to the public, thereby resulting in the death of two persons. Sentence was suspended. Mr. Meister was placed on probation for three years and required to perform three hundred (300) hours of community service and, as well, was prohibited from driving a motor vehicle for two years.

A number of grounds of appeal have been advanced. In view of my proposed disposition of the appeal, it is only necessary to consider the following two grounds:

- the trial judge erred in allowing the Crown to introduce into evidence a video taped re-enactment of the accident and related still photographs;
- the trial judge erred, in allowing in evidence, the opinion of a RCMP traffic analyst, Cst. Joseph Thivierge, called by the Crown when there was no "foundation evidence for the assumptions made by Cst. Thivierge", or alternatively the trial judge failed to direct the jury on what weight, if any, they could place on Cst. Thivierge's opinion evidence.

**Background**

The accident occurred on Tuesday, March 1, 1994 on Highway No. 103, the main artery leading from Halifax to Bridgewater, at approximately 6:10 a.m. It was a cold morning. The sun did not rise until 6:54 a.m.

Kenneth Zwicker, an accident reconstructionist, whose qualifications were admitted, was called by the defence. He testified that, at the time of the accident, there

would have been sufficient light "to see the general form of things . . . you could [i.e. would have been able to] see a tree, see the form of it, but it's not enough light where you could actually identify the details of the tree".

This opinion reflected the evidence of those present at the scene who testified that it was just "becoming daybreak" but wasn't quite light.

The paved portion of the highway at the accident scene was approximately sixty-six feet (66') in width. The highway, and the three-foot paved shoulders on either side, were all bare. Road conditions were described as "very good".

A plan prepared by Cst. Thivierge, illustrating the resting place of the six vehicles involved to some degree in this tragic occurrence, assists in understanding the sequence of events (See page 2A).

Douglas Jackman, operator of vehicle #1 (the Atlantic Wholesaler truck) left Halifax about 5:20 a.m. driving westerly toward Chester. At about 6:05 a.m. he noticed smoke and fire coming from "under the dash". He pulled his vehicle completely onto the north shoulder of the road and stopped, leaving his 4-way flasher illuminated. He could not access his fire extinguisher because of the smoke. He left his vehicle to cross to the south side of the highway to use a cellular phone offered by Douglas Tanner, a truck operator who had been proceeding toward Halifax with a load of sauerkraut. Mr. Tanner had first noticed smoke and flames rising vertically in the air coming from vehicle #1 when he was approximately five hundred (500) feet from the stationary Atlantic Wholesalers vehicle. Mr. Tanner stopped on the south shoulder abreast of Mr. Jackman. After Jackman crossed the highway and entered the vehicle, Tanner drove easterly along the shoulder approximate one hundred and fifty feet (150) in case the fire in Jackman's vehicle caused it to explode. While Jackman was calling the fire department, the operator of vehicle #2, proceeding toward Chester, drove into the left hand side of the Atlantic

Wholesalers truck. Vehicle #2 came to rest still in contact with vehicle #1, but entirely on the right hand, or northerly lane of the highway.

The operator of vehicle #2, Ron Ewing, was not called by either party to give evidence.

Tanner and Jackman exited Tanner's vehicle to render assistance to Mr. Ewing. At that time Tanner noticed two other vehicles (one of which was vehicle #3) had stopped behind Tanner's truck. Tanner, Jackman, and the operators of the two stopped vehicles then proceeded on the south shoulder of the road toward the collision site. Tanner's attention was directed to the south side of the highway in front of him where he noticed a truck (vehicle #4) followed by a school bus (vehicle #6 operated by Meister) proceeding toward Halifax.

Noticing the truck was slowing down, but the bus was not, Tanner shouted to his three companions

"The bus is not stopping, everybody move".

The four men on the south side of the highway then ran for the ditch. Tanner describes hearing a "loud crash". Upon regaining the highway, Tanner observed "mangled metal . . . like it was compacted" immediately in front of the bus, now stopped. The metal was all that remained of a 1985 brown Chrysler New Yorker (vehicle #5) which

had contained three occupants, one of whom miraculously survived the impact with the bus.

Tanner did not see the brown Chrysler before it was struck by the bus. This failure suggested to him that the Chrysler was "probably following pretty close to the truck" (i.e. vehicle #4). Tanner testified that all vehicles, including the bus, had their headlights illuminated.

The operator of vehicle #3, while walking with Tanner westerly, saw the bus when it was a couple of hundred yards away, proceeding at a speed of 80-90 kms.

per hour in the right-hand or southerly lane of the roadway. He did not see the Chrysler until after it had been rear ended by the bus and both vehicles were at a stop.

Mr. Meister did not give evidence. Witnesses testified they saw him exit the bus after it stopped and heard him say that he was "looking at the truck" on fire and asked "where the car came from".

The survivor confirmed the brown Chrysler had been proceeding toward Halifax but could not shed any light on the cause of the accident as he fell asleep sometime before impact.

Evidence from Crown witnesses disclosed that the school bus had the capacity to carry sixty-six passengers, and that Meister:

- had been operating a school bus for at least five years;
- was proceeding at well below the speed limit at all relevant times;
- was operating the bus in its proper lane immediately prior to the collision.

There is no evidence to suggest that Meister was impaired by alcohol or drugs.

Counsel in this appeal did not act for the parties at trial.

**The Crown Theory**

Crown counsel outlined a theory of the case in his opening remarks to the jury in these words:

> The driving of Mr. Meister was dangerous because in all the circumstances, he should have taken some action to avoid the collision . . . You will see at some point, the video tape which was taken, showing that portion of the highway, showing the range of visibility as you approach the location. You come along from Exit 8, you go down into a little dip, and you come up the hill, and approach the top of the hill where the collision took place. You will see that on the tape. You will

> be able to see for yourself what the Crown's position is with respect to the amount of visibility Mr. Meister would have had. You will then hear from Cst. Thivierge, who is a, or works for the RCMP, in this field and his opinion as to stopping distances which were available to that bus. As to the, that he could see the, see at least 300 metres away, how long it would take him to stop the bus, had he seen what was going on. The Crown's position is he didn't see what was going on, because he was not paying attention. And the Crown's position is that the failure to pay attention to that situation constitutes dangerous driving, and that dangerous driving caused the death of the two gentlemen. That, that will be the issue, as I understand it, at the end of the trial for you to consider. Was Mr. Meister's action, in failing to pay attention to the highway ahead of him, at that time, in those circumstances, dangerous?

It would not have been clear to the jury from these opening remarks whether the Crown's theory of the case was that Meister should have brought the bus to a stop:

(a) once he could have seen the smoke and flames from vehicle #1, 300 metres away, or

(b) once he could have seen scenario (a) and the results of the collision between vehicle #1 and vehicle #2, 300 metres away, or

(c) once he could have seen scenarios (a) and (b), as well as the location of the brown Chrysler, stationary on the highway in Meister's lane of travel, some 300 metres away.

It is to be remembered that vehicle #1 was stationary on the north shoulder, and that vehicle #2 was stopped partly on the same shoulder, and partly on the right-hand lane of the northern half of Highway No. 103. Neither of these vehicles presented a hazard to Meister, who was travelling in the right-hand, or southern, lane of Highway No. 103 proceeding toward Halifax.

**The Evidence of Cst. Thivierge and the Video Tape**

Cst. Thivierge's qualifications as a traffic analyst, qualified to "interpret traffic collisions and the causes" was accepted by defence counsel.

He arrived at the scene of the accident at approximately 8:25 a.m. on March 1, 1994. The conditions were sunny. None of the vehicles had been moved prior to his arrival. He video taped the scene with a camcorder, took 25 still photos, and prepared the rough notes which were the basis for the sketch found on page 2A of these reasons.

Between March 1 and April 12, 1994, Cst. Thivierge asked himself:

> How did this happen? What was the dynamics of the whole thing? . . . My understanding of the accident is a fairly big accident on the left-hand side of the road, which is not related to the vehicles on the right. So what I figured is, if something happened on the left, people driving may not be looking in front of them . . . well when was that thing visible? Was there enough time to stop a vehicle?

On April 12, 1994 at approximately 3:15 in the afternoon he attempted to reconstruct the scene by:

- locating an Atlantic Wholesalers truck on the northern side of the road in the same position as Jackman stopped vehicle #1 at about 6:05 a.m. on March 1;
- locating a police vehicle on the south shoulder of the highway (for safety reasons) immediately abreast of that area where he calculated the impact between the bus and the Chrysler occurred.

Cst. Thivierge arranged for an experienced bus driver to operate a bus similar to that operated by Mr. Meister, commencing at a point 2.6 kms. on the Chester side, or west of the accident scene. A video camera was held next to the left ear of the bus driver. The bus proceeded in an easterly direction towards Halifax

at a speed of 90 kms. per hour. Six still photos taken along this 2.6 km. route purported to portray the distance from which an operator of a motor vehicle proceeding easterly toward Halifax could first see the Atlantic Wholesalers truck, and the police car.

The reconstruction was recorded on video tape and played before the jury. No objection was taken by defence counsel.

Cst. Thivierge calculated the braking ability of the bus operated by Meister as determined from an investigation carried out by a person whose credentials were acceptable to both counsel.

Cst. Thivierge then employed a formula from a manual used in the Traffic Accident/Traffic Analyst course at the Canadian Police College in Ottawa, and concluded that Mr. Meister should have been able to bring the bus, travelling at 90 kms. per hour, to a stop within 8.6 seconds. His calculations involved issues concerning the drag factor of the pavement, the skid marks of the bus, the braking capacity of each of the wheels of the bus, Meister's theoretical reaction time, etc. The formula employed and the calculations performed are relevant to the issues in this appeal in only one respect - the evidence is extremely complex and must have been very difficult, if not impossible, for the jury to follow, prompting the trial judge at one point to exclaim:

> Do you need all this detail? . . . It seems to me that you're going into a lot of detail that might not be necessary.

It became apparent from the subsequent questions directed by Crown counsel, that the re-enactment was based entirely on the theory that the Chrysler was in a stopped position in the southern travel lane of the roadway at all material times as Meister approached the accident scene.

The following questions by Crown counsel, framed as if he were examining a hostile witness, illustrate the point:

> Q: So if the Chrysler were in, in the lane, it would have been 300 metres ahead when the driver of the bus could see it?
> A: That's correct.
> Q: By your calculation
> A: Now there's, I worked with this theory that I'm putting down, laying down here. Now that's assuming that the brown Chrysler was there stopped. Okay. But it's possible that it was behind and driving slowly, but that's a variable that I cannot account for. . .
> Q: So now you have arrived at the situation where the school bus driver can see this car on the road 300 metres ahead. The question we ask is, does it have time to stop?
> A: That's correct.
> Q: My question was if the bus driver can see that car 300 metres ahead, does he have time to stop his vehicle?
> A: Yeah. Okay...at 90 kms. per hour it takes 84 metres to come to a stop and the Chrysler was visible from 300... The answer is there was enough time and enough distance to bring that vehicle to a stop, yes. . .
> Q. All right. I can travel for 8.6 seconds, apply the brake and stop without causing a collision. Is that correct? . . . I can stop without hitting the Chrysler?
> A. That's correct because you have 84 metres left. . . .
> Q. The bus has to travel 300 metres before it hits the Chrysler?
> A. Yes.
> Q. What is the latest point at which he can apply the brake and not hit the Chrysler in time?
> A. 216 metres. (emphasis added)

No objection was taken by defence counsel to the introduction of this theory, the tendering of the video, or the leading nature of counsel's questions.

Defence counsel pointed out the obvious flaw in the Crown's theory:

> Q. This way, all the rest of your calculations relate to that 300 metre point, right?
> A. Yes.
> Q. Where, in your view, the driver of the bus should have been able to see the brown Chrysler stationary on the road?

A. Yes..I assumed it was there, but it could have been slowing down towards there but that varies every metre or second.
Q. The point is you don't know, do you?
A. No, I don't.
Q. Okay, and it's all based on the idea that that Chrysler was sitting there for however long it took that bus to catch up to that point didn't it?
A. Yes.
Q. That's what the whole thing's all about, isn't it?
A. Yes.
Q. Okay, now let me, let me take this, take you through this, you know, I suggest, you know that none of the eye witnesses say that they saw the Chrysler?
A. I didn't hear it myself but I overheard it, people talking about it, yes.
Q. Well Constable, it's almost a year ago I told you myself at the preliminary inquiry.
A. Yes, that's what I can my overhearing, like hearsay type thing.
Q. Okay now as a result of getting that information, did you conduct any further investigation?
A. No I didn't. (emphasis added)

Neither counsel made a direct reference to the video in summation.

Crown counsel did, however, make the following comments respecting the theory:

> Cst. Thivierge began his calculations, his development of a theory, on the basis that the Chrysler was stopped at that point across from two big trucks when he was struck from behind by the bus at this point, that he had been stopped there. The way I look at that is that gives the maximum benefit, time wise, to Mr. Meister, because, as Mr. Zwicker agreed with me this morning, if the car were moving then it was further west, towards Bridgewater, before the impact and it would have been seen earlier in time by Mr. Meister, and he would have been further west, coming up behind that. So that's where Cst. Thivierge began his development of the theory, and that was his theory, that the car was stopped. That is, I would suggest to you, giving the maximum benefit to Mr. Meister that Cst. Thivierge could do in the circumstances . . . The Crown's position is, and has been, as I said at the outset, that the Chrysler was at or near the scene throughout, and that the bus came up behind it because Mr. Meister said when he got out, "Where did that car come from?". Had he been travelling along behind the car he would have known where the car came from. So, based on that, Cst. Thivierge did what I consider to be a reasonable calculation that the visibility at that point, the point at which

> the truck - the bus driver would have seen the truck was 300 metres. And if he'd been travelling at 90 kph with - and again you will have these figures, and I don't have them right at my fingertips - with whole braking capacity he would have had eight seconds, eight point something seconds, to react before he needed to apply the brake and would have been able to stop safely. . . . At the other end of the spectrum, with the variables of lower speed or different braking, Cst. Thivierge came up with a figure of 15 seconds. Again, 15 seconds in which to decide to do something. Not to physically do it, but to decide to do it. And that, in my submission, is what constitutes the dangerous driving of Mr. Meister. (emphasis added)

The trial judge gave the standard warning respecting the weight to be given to an expert's opinion, saying in part:

> You may use a 3-step process. First, consider the qualifications and impartiality of each expert. Second, consider whether the assumptions of fact upon which his or her opinion is based are supported by the evidence you heard. And, third, consider the opinion itself . . . Once you have considered this 3-stage process, you will be in a position to decide how much weight you will attach to the expert's opinions. Remember that you are not obliged to accept any expert's opinion as conclusive. You may reject an opinion entirely if you find it unreasonable. . . .

The trial judge then conducted a general review of the evidence given by Cst. Thivierge.

Although he did not mention the video, the trial judge failed to instruct the jury that there was no evidence to support the theory advanced by Cst. Thivierge.

**Analysis**

It is a reasonable inference that the jury would have been more than happy to abandon any attempt to understand the formula, and the mathematical calculations, introduced through Cst. Thivierge, and to concentrate on the "stopped Chrysler" theory of the Crown as detailed by Cst. Thivierge and as graphically illustrated in the video.

The video was prepared on April 12, 1994. It was the wellspring of the Crown theory.

If not readily apparent to Crown counsel at the commencement of trial on September 5, 1995, that the Crown theory did not reflect the evidence he proposed adducing, it should have been patently obvious that at the conclusion of the evidence, there was no foundation for the theory.

Cst. Thivierge was the last witness called by the Crown. None of the witnesses who preceded him suggested the Chrysler was stationary on the road. In fact, no witness had seen the Chrysler until after the collision with the school bus had occurred.

The Crown's theory was simply not responsive to the facts developed by the Crown. The theory, and the demonstrative evidence supporting it, were misleading. It must have distracted the jury from the real issues in the case.

The evidence should not have been introduced by the Crown, nor should counsel have referred to the theory in summation.

Defence counsel should have raised a timely objection.

With respect, the trial judge erred when he failed to strike the offending evidence, and further erred when he failed to direct the jury to ignore the evidence completely.

The comments of Justice Finlayson, on behalf of the Ontario Court of Appeal, in **Regina v. Kelly** (1991), 59 C.C.C. (3d) 497 at 503 are particularly relevant to this case:

> I am dealing with Dr. MacArthur's testimony in some detail because of the emphasis that counsel for the appellants placed upon it. In my opinion, the testimony is fatally flawed in respect of both form and content. Starting off with form, when an expert witness does not observe the events at trial, counsel must solicit his opinion in the form of a hypothetical (*Wigmore on Evidence,* 3rd ed., vol. 2, s.676 at 797). The rationale behind the rule, originally articulated by the House of Lords in *M'Naghten's Case*

> (1843), 10 Cl. & Fin. 200, 8 E.R. 718, is that an expert who failed to witness the event cannot usurp the function of the jury by making factual determinations. It is feared that the jury will erroneously accept the opinion as conclusive.
>
> The Supreme Court of Canada expressed this view in *R. v. Bleta*, [1965] 1 C.C.C. 1, 48 D.L.R. (2d) 139, [1964] S.C.R. 561. Ritchie J., writing for the court, stated at p. 3:
>
> > In cases where the expert has been present throughout the trial and there is conflict between the witnesses, it is obviously unsatisfactory to ask him to express an opinion based upon the evidence which he has heard because the answer to such a question involves the expert in having to resolve the conflict in accordance with his own view of the credibility of the witnesses and the jury has no way of knowing upon what evidence he based his opinion.
>
> The use of the hypothetical question leaves the court in a position to reject an opinion if it rejects the premises on which the opinion was based. In fact, the court must do so: *R. v. Fisher* (1961), 130 C.C.c. 1, [1961] S.C.R. 535, 35 C.R. 107; Wigmore, *ibid*., § 680 at 799. At his discretion, the trial judge may dispense, however, with the requirement of a hypothetical, if the facts upon which the opinion is based are undisputed (*Bleta, supra)*.

The manner in which this issue was left to the jury was an "invitation to the jury to act on the opinion of an expert that had no factual basis in the evidence." (**R. v. C (F)** (1996), 104 C.C.C. (3d) 461 per Brooke, J.A. on behalf of the majority (Ont. C.A. p. 474).

Without any factual basis the trial judge erred when he permitted the theory, and the video, to be placed before the jury.

I wish, however, to add a few comments respecting the use of the video reconstruction, as it was inaccurately labelled.

The video tape was described by Cst. Thivierge as a reconstruction, so that, as he testified "You can reconstruct the scene <u>which I did"</u>. (emphasis added)

This case illustrates some of the dangers that may arise when video taped re-enactments are introduced before a jury. Although only two minutes in length, the video distorted the actual events, as disclosed by the evidence, so dramatically that it should not have been accepted in evidence. I come to this conclusion quite apart from the Crown's failure to establish the Chrysler was stationary on the highway.

Visual images, for many people, are more easily retained and recalled, than *viva voce* evidence. It is, therefore, critical that a video re-enactment accurately represent the facts, and fairly portray the scene, without any intention to mislead. (See comments of this Court respecting the admission of photographs in evidence, in **R. v. Creemer** (1968), 1 C.C.C. 1 at 22 and **R. v. Smith** (1986), 71 N.S.R.(2d) 229 at 237).

This re-enactment fails that test for a number of reasons:

- The incident occurred on March 1, 1994, at approximately 6:10 a.m., just before day break, but still three-quarters of an hour before sunrise. The reconstruction was filmed at 2:50 p.m. on April 12, 1994, in brilliant sunshine, when visibility was markedly improved;
- The re-enactment reduces a complex scenario of vehicles (some stationary, some moving, two in collision providing smoke and fire) together with pedestrians (some walking, some running) on both the northern and southern traffic lanes and adjacent shoulders, to one of deceptive simplicity involving one truck on the northern shoulder, and one car on the southern shoulder.

**Conclusions**

I am of the opinion that the trial judge erred in failing to strike the evidence of Cst. Thivierge respecting the stationary Chrysler theory, in failing to direct the jury that no weight should be placed on Cst. Thivierge's opinion evidence, and failing to disallow the video taped re-enactment and related still photographs.

I would allow the appeal, set aside the jury verdict and order a new trial.

Pugsley, J.A.

Consented to:

Hallett, J.A.

Chipman, J.A.

C.A.C. No. 125656

**NOVA SCOTIA COURT OF APPEAL**

**BETWEEN:**

| | | |
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| **CHARLES BENJAMIN MEISTER**<br><br>Appellant | ) | |
| - and - | ) | REASONS FOR JUDGMENT |
| BY: | ) | |
| | ) | PUGSLEY, J.A. |
| **HER MAJESTY THE QUEEN**<br>Respondent | ) | |