C.A. No. 104870

NOVA SCOTIA COURT OF APPEAL
Cite as: MacNeil v. Gillis, 1995 NSCA 14

Hallett, Matthews and Chipman, JJ.A.

BETWEEN:

DONALD CARTER GILLIS	John Kulik William P. Burchell for the Appellant
Appellant	
- and -	Harvey M. McPhee for the respondent Rosita MacNeil
ROSITA MacNEIL, as Administratrix of the Estate of George William MacNeil, deceased and in her own right, THE ESTATE OF GEORGE WILLIAM MacNEIL, HAZEL MELROSE GILLIS and ZURICH INSURANCE COMPANY	M. Ray Wortman for the respondent the Estate of George William MacNeil
	R. Malcolm MacLeod for the respondents Hazel Melrose Gillis and Zurich Insurance Co.
Respondents	Appeal Heard: November 9, 1994
	Judgment Delivered: February 9th, 1995

THE COURT: Appeal allowed.

MATTHEWS, J.A.:

This appeal arises out of a motor vehicle accident which occurred near Bras d'Or, Cape Breton County at about 7:40 p.m. on June 29, 1987. The locus is a four-way

intersection of the Trans Canada Highway (T.C.H.) and a provincial highway. There the T.C.H. runs north, northwest towards Baddeck and, south, southeast towards Sydney. The eastern side of the provincial highway is called the Alder Point Road and that on the west, Church Road.

The intersection was controlled by a flashing yellow light facing vehicles travelling in both directions on the T.C.H. and a flashing red light and stop signs for those on the provincial highway intending to proceed onto the T.C.H.

The appellant, Donald Carter Gillis (Gillis) was operating a 1979 Pontiac owned by his mother, the respondent, Hazel Melrose Gillis (Mrs. Gillis). Gillis had taken his mother's vehicle, while she was asleep. He was proceeding on the T.C.H. in a northerly direction towards Baddeck. Prior to the intersection he passed a vehicle operated by Mary C. Peck (Peck) and earlier, one of Russell Gordon which were travelling in the same direction.

A vehicle operated by Kenneth LeBlanc (LeBlanc) was stopped at the stop sign on the Church Road. Passengers in that vehicle were LeBlanc's wife, seated in the front passenger seat and behind her was Patricia Lawless (Lawless). It was the intention of LeBlanc to cross the T.C.H. onto the Alder Point Road.

At that time, George William MacNeil, operating a 1982 Camaro approached the intersection on the Alder Point Road. His intention was to turn to his left, that is southerly, on the T.C.H.

The weather was sunny and clear. The pavement was dry. The speed limit on the T.C.H. at the intersection was 70 k.p.h.

The MacNeil vehicle proceeded into the intersection, there to be struck on its left hand side at about the driver's door by the front of the Gillis vehicle. MacNeil was killed and Gillis seriously injured.

Testimony at trial established that at the time of the accident Gillis had a high blood alcohol level. He was unable to recall the events leading up to, and at the time of, the accident.

MacNeil was, at the time of the accident, married to the respondent, Rosita MacNeil. Living with them was a son of Mrs. MacNeil, Jason, by a previous relationship. MacNeil was unemployed but gained some income from a vehicle repair and maintenance business which he operated from his home. At the time of his death he was 28, Mrs. MacNeil 29, and Jason 9 years of age. At all relevant times Mrs. MacNeil was employed as a nursing assistant, earning approximately $20,000 per year.

The issues raised on this appeal are whether the judge of the Supreme Court erred in deciding:

1. that Gillis was solely responsible for the accident;

2. that Gillis did not have the consent of his mother to operate her vehicle; and

3. in his assessment of damages for the loss of financial support suffered by Mrs. MacNeil and Jason.

ISSUE 1:

The duty of an appellate court when consideration is given to varying an apportionment of fault was discussed by Ritchie, J. speaking for the court in **Sparks v. Thompson** (1974), 6 N.S.R. (2d) 481 (S.C.C.). There he commented at p. 488-9:

> With all respect it appears to me that in varying the apportionment of fault awarded by the learned trial judge, the members of the Appeal Division failed to give due weight to the series of cases in the English courts and in this Court which subscribed to the proposition stated by Lord Wright in the House of Lords in **The 'Umtali'** (1939), 160 T.L.R. 114, where he said:

> I ought to add that it would require a very strong and exceptional case to induce an Appellate Court to vary the apportionment of the different degrees of blame which the judge has made when the Appellate Court accepts the findings of the judge. I doubt that there ever could be a case where the Appellate Court would take that course, but certainly this is not such a case.

The matter was put in similar language by Scrutton, L.J. in the Court of Appeal in England in **The Karamea** (1921), 90 L.J.P. 81, where he said:

> The only other point that I desire to mention is that I entirely agree with my brethren in this, that if you agree with the findings of fact and law of the learned Judge below, and the only difference is that the Court of Appeal attaches more importance to a particular fact than he did, it would require an extremely strong case to alter the proportions of blame which the learned Judge below has attributed to the ships.

17 In this Court in the case of **Prudential Trust Co. Ltd. v. Forseth**, [1960] S.C.R. 210, Mr. Justice Martland, speaking for the Court, adopted a passage from the reasons for judgment of Lord Sumner in **S.S.Hontestroom v. S.S. Sagaporack**, [1927] A.C. 37, in which he said:

> None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case.

In allowing the appeal Justice Ritchie continued at p. 489:

> I cannot find in the present case that the judges of the Appeal Division differed as to the fact or law from the learned trial judge, and the record before this Court does not disclose to me any very strong and exceptional circumstances such as would justify an appellate court in varying the apportionment of the different degrees of blame which the judge has made.

Are those principles applicable here which would lead this Court to vary the apportionment of blame?

We are, as well, constrained by the rule enunciated in **Stein v. The Ship 'Kathy K',** [1976] 2 S.C.R. 802, that an appellate court should not reverse the trial judge in the absence of palpable and overriding error in his findings and conclusions of fact.

As remarked by Gonthier, J. in **Bank of Montreal v. Bail Ltée**., [1992] 2 S.C.R. 554 at 572:

> This Court has often had occasion in recent years to rule on the role of an appellate court, particularly with respect to findings of fact by the trial judge. These issues were very recently discussed in **M.(M.E.) v. L.(P.),** [1992] 1 S.C.R. 183, and **Lapointe v. Hôpital Le Gardeur,** [1992] 1 S.C.R. 351. I shall only quote the following passage from **Beaudoin-Daigneault v. Richard**, [1984] 1 S.C.R. 2, at pp. 9-10, which provides a good summary of the approach that should be taken in decisions of appellate courts:
>
> > ...an appellate court should not intervene unless it is certain that its difference of opinion with the trial judge is the result of an error by the latter. As he had the benefit of seeing and hearing the witnesses, such certainty will only be possible if the appellate court can identify the reason for this difference of opinion, in order to be certain that it results from an error and not from his privileged position as the trier of fact. If the appellate court cannot thus identify the

> critical error it must refrain from intervening, unless of course the finding of fact cannot be attributed to this advantage enjoyed by the trial judge, because nothing could have justified the judge's conclusion whatever he saw or heard; this latter category will be identified by the unreasonableness of the trial judge's finding ... .

The trial judge found that Gillis was operating his mother's vehicle "...improperly, partly over the centre line of the highway, at an excessive rate of speed, and did not brake as it approached the intersection".

He also found that Gillis

> had consumed alcohol some time before the collision, and the quantity of alcohol consumed, as indicated by his blood alcohol concentration 3 or 4 hours after the collision, was doubtless such that his ability to drive immediately before and at the time of the collision was impaired. I take judicial notice of the fact that the blood alcohol concentration disclosed in evidence was substantially in excess of the limit prescribed in s. 253 of the **Criminal Code**.

After discussing some of the evidence, the trial judge stated his conclusion as to liability in this fashion:

> I hold that the defendant operator was solely liable for the collision. The deceased husband had stopped before entering the intersection as required by s. 93(2)(f), s. 122(2) and s. 133(1) of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293. The defendant operator failed to drive in a careful or prudent manner as required by s. 100(1) and s. 101, failed to proceed with caution and yield the right of way to the plaintiff's vehicle in the intersection in the face of a flashing yellow light as required by s. 93(2)(g), and failed contrary to s. 122(1) to yield the right of way to the plaintiff's vehicle which had entered the intersection.

Other than mentioning the stop sign and flashing red light facing MacNeil when

reciting the facts, the trial judge did not consider those important facts when assessing liability. Neither did the trial judge consider that Gillis was on the T.C.H. and MacNeil on a road of secondary importance, intending to cross the path of vehicles on the T.C.H. to his left. Although operators of both vehicles must proceed with caution, the greater care must be exercised by MacNeil who was faced with both a stop sign and a red flashing light. Conversely the trial judge stressed the flashing yellow light and the stated sections of the **Motor Vehicle Act** (the **Act**) in determining that Gillis was solely liable.

He failed to take all of the relevant sections of the **Act** into consideration when analyzing the respective duties of MacNeil and Gillis. Although he found fault on the part of Gillis because he "failed, contrary to s. 122(1), to yield the right of way to (MacNeil's) vehicle which had entered the intersection", he did not put the critical question to himself: was the Gillis vehicle then so close to the intersection as to constitute an immediate hazard.

For these reasons, in my respectful opinion, the trial judge erred. Those errors were such that they permeated his appreciation of the testimony and his final conclusion as to liability.

Because of these and other errors, it is necessary to review and analyze the evidence in some detail.

It is also necessary to consider certain sections of the **Act**:

> **Instruction by traffic signal**
>
> 93(2) The drivers of vehicles, pedestrians, and all other traffic approaching or at an intersection or on a part of the highway controlled by any of the traffic signals mentioned in subsection (1) shall act in obedience to the traffic signals in accordance with the following instructions:
>
> ...
>
> (f) *flashing red light* - all traffic facing this signal shall stop before

> entering the intersection at the place marked or the nearest side of the crosswalk but not past the signal and shall yield the right of way to pedestrians lawfully in a crosswalk and to other vehicles within an intersection or approaching so closely on an intersecting highway as to constitute an immediate hazard, and having so yielded may proceed;
>
> (g) *flashing yellow or amber light* - all traffic facing this signal shall proceed with caution and shall yield the right of way to all other traffic within an intersection or approaching so closely on an intersecting highway as to constitute an immediate hazard;

Section 93(2)(f) governs MacNeil; (g), Gillis.

Section 122(2) affects both:

> **Through highway**
>
> 122(2) The driver of a vehicle who has stopped as required by law at the entrance to a through highway shall yield to other vehicles within the intersection or approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed, and other vehicles approaching the intersection on the through highway shall yield to the vehicle so proceeding into or across the through highway.

The trial judge's mention of s. 133(1) appears to be in error. The reference undoubtedly should be to s. 123(1):

> **Entering highway**
>
> 123(1) The driver of a vehicle entering a highway shall yield the right of way to all vehicles approaching on the highway.

In declaring Gillis to be solely responsible, the trial judge also incorrectly relied upon the provisions of s. 122(1):

> **Right of way at intersection**

> 122(1) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection, and when two vehicles enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield to the driver on the right.

In my opinion that section is to be applied where the intersection is not governed by signs or signals or when, for example, all intersecting roads are governed by stop signs or signals.

The applicable section here is 122(2) not 122(1).

The most pertinent provisions are those in s. 93(2), (f) and (g).

Russell Gordon testified on behalf of Mrs. MacNeil. In direct-examination he testified that the Gillis vehicle had passed his vehicle, both travelling in the same direction. He came upon the accident scene about two to three minutes later and there saw the Gillis vehicle. When asked, in direct, if he could estimate the speed of the Gillis vehicle when passing, he first replied "No". Later, in direct, he estimated its speed at 60-65 k.p.h. In cross-examination, he agreed that it was "going a little fast but nothing out of the ordinary" ... "No, not to pass a vehicle, no. He had to increase his speed a bit." He also testified that when Gillis passed another car ahead of Gordon's that Gillis went over to the shoulder.

As earlier mentioned, Kenneth LeBlanc stopped his vehicle at the entrance to the T.C.H. from Church Road. On looking to his right (that is, in the direction from which Peck and Gillis were approaching) he saw a dark coloured car approaching in what appeared to him to be a normal manner. He did not see a second car. He waited. He noticed the MacNeil vehicle approach the intersection on the Alder Point Road. He testified that the collision occurred near the middle of the intersection. The testimony of his passengers was, generally speaking, to the same effect. The trial judge commented that LeBlanc "was not paying much attention". He gave "little weight" to the testimony of the three persons in that vehicle "...who, in my opinion were not paying much attention prior to the moment of the

collision, and then jumped to the conclusion that the gray car (MacNeil) had inappropriately entered the intersection, believing as they did that the defendants' vehicle (Gillis) was approaching the intersection at a normal speed and in a normal manner".

An examination of their testimony does not bear out the reason for the trial judge placing "little weight to their testimony". Indeed it does demonstrate that they were paying attention to the pertinent details. Mr. LeBlanc had a duty to do so. He testified in direct-examination in part:

> A. And I was waiting for the intersection to clear when the accident took place.
>
> Q. And what, if anything, sir, did you see when you looked to the right?
>
> A. I seen a vehicle approaching.
>
> Q. I'm going to show you Exhibit 2, Mr. LeBlanc. Where was the vehicle you say was approaching you when you looked to your right? Where would it be on this?
>
> A. I can't honestly say exactly where it was at. All I know is I looked over and seen a vehicle coming. I can't remember exactly where on the highway it was.
>
> Q. You can't indicate ---
>
> A. No. No. Just exactly where it was at.
>
> Q. Can you describe this vehicle, Mr. LeBlanc?
>
> A. **No, I can't. Because under normal circumstances when you look in a direction and see a car coming you don't even think of what kind of car it is or what colour it is or whatever. There's a vehicle coming and you wait until it goes through. There was no reason for me to try to look and see what colour that car was. Everything seemed normal to me so I never really paid attention until the moment of the accident.** (Emphasis added)
>
> Q. What if anything, sir, can you say about the way

that this car that you observed was approaching?

A. **Like I said, everything seemed normal to me so I never really paid any attention to it.** (Emphasis added)

Q. Did you notice or see any other cars at that time?

A. I noticed the car across the intersection from me but just as him being parked over there. But I never really paid any attention to him either.

Q. Can you describe for the Court that car that you say was on the other side of the intersection?

A. No. Because, like I say, I never really -- I could describe it now because I see the car in the accident. **But at the time I couldn't really tell -- when I was parked over on the other side I never really took into account what kind of a car it was or whatever because there was really no reason to right then.** (Emphasis added)

Q. What if anything, sir, can you say happened with this car that you saw coming from the right?

A. What happened to it?

Q. What happened to it?

A. Well, it was involved in the accident. I seen the car coming from the right. I just turned to the left to see if anything else was coming that way and the next thing I knew -- while I was turning back I just caught, in the corner of my eye, the accident ... .

He was cross-examined as to a statement he gave to the R.C.M.P. on July 1, 1987.

There he said in part:

A. There was no vehicles going east on the highway at the moment. **I did not notice any great amount of speed. It appeared he was doing nothing wrong.** I did not see any signal lights on in this car. Out of the corner of my eye I saw the dark car hit the grey car right in the intersection. (Emphasis added)

...

Q. When the dark coloured car was coming down the highway did you notice anything wrong with its driving such as driving too fast, weaving in his lane or any erratic driving?

A. Nothing at all. Everything was normal until it hit the grey car.

He was further cross-examined on these points:

Q. Okay. Now, is it fair to say as well when you glanced up and saw this vehicle coming you then had to glance away.

A. Correct.

Q. Okay. So, you didn't keep your eye on the vehicle that you saw initially?

A. No.

Q. Okay. Did you see any other vehicles approaching in that direction, other than that one vehicle?

A. No, nothing that comes to my mind.

Q. Is it possible there was another vehicle coming along that you didn't notice?

A. I seen the vehicle approaching and that's what I waited to go by.

Q. If I told you there was another vehicle approaching at a normal speed, in fact that there were two vehicles coming towards that intersection, are you able to tell me whether you disagree with that or not?

A. **You could tell me that there was three vehicles coming. All I know is I turned and saw a vehicle. I didn't even take account to see if there was a dozen vehicles coming because it didn't matter. When there was a vehicle coming I was waiting for it to go through the intersection. At that moment, if it would have went through the intersection I would have had to look again to see if there was another vehicle coming, until it was clear.** (Emphasis added)

Q. Okay. So, there could have been other vehicles

behind this vehicle?

A. **When there's traffic approaching I just wait until the traffic is clear. I don't take into account ---** (Emphasis added)

Q. And all you took notice of was the first vehicle. You didn't take notice of any vehicles behind it.

A. **I knew there was a vehicle approaching so I was waiting until it went by. That's all I can say.** (Emphasis added)

Q. I want you to think back to looking and seeing that vehicle and tell me whether you can recall now, at this point in time, whether there were other vehicles behind that vehicle.

A. I've already told you that.

Q. You can't recall?

A. All I can recall is there was a vehicle approaching. I turned away from it to see if there was anything approaching the other way ---

Q. And you don't know what colour this vehicle was. It could have been white, it could have been black, it could have been any colour?

A. **That's right. At that time there was no reason to ---** (Emphasis added)

Q. And you can't say for sure whether this was the vehicle that impacted with the other one because you looked away? You're assuming or you think that it might have been but you can't say for sure because you looked away?

A. **All I say is there was a vehicle approaching. I turned away to see if there was anything coming the other way.** (Emphasis added)

Q. The next thing you saw was the explosion?

A. **I was waiting for that vehicle to go through before I proceeded through the intersection.** (Emphasis added)

Q. Okay. The next thing you saw was the explosion? You looked away -- looked to the left and the next thing you saw was the explosion.

A. Yes.

Q. Okay. This vehicle that was coming. Can you tell me how many people were in it?

A. **Could you tell how many people where in a vehicle coming along the Trans Canada that you were waiting to go by six years ago or whatever if it was just normal circumstances?** (Emphasis added)

Q. I suppose it would depend on if I was paying attention to it.

A. **Would you have any reason to? It's the same thing you're asking me. That would be impossible, I can tell you that.** (Emphasis added)

Q. All I want you to do is answer the question.

A. No, I can't ---

Q. You can't tell?

A. No.

Q. Okay. And could you tell whether it was a man or a woman driving it?

A. No.

Q. And you say that the vehicle that came from the Alder Point Road stopped because if it didn't stop that would have been unusual and you would have noticed it?

A. That would be my recollection of it. Yes.

The comment of the trial judge to the effect that the people in the LeBlanc vehicle "were not paying much attention prior to the moment of the collision" arose, in my opinion, not from his privileged position having had the benefit of seeing and hearing LeBlanc but from seizing upon LeBlanc's statements that he was not paying attention to some details and

thus disregarded that LeBlanc was paying attention to that which law required him to do: yielding the right of way to the vehicle on the T.C.H. which was approaching so closely as to constitute an immediate hazard. He made no comment as to the veracity of the people in the LeBlanc vehicle.

The effect of the testimony of Mr. LeBlanc is that he stopped as required by the stop sign and flashing red light before entering the T.C.H. He saw a vehicle on the T.C.H. to his right. Neither the description of that vehicle, its exact location nor whether there was more than one vehicle concerned him. The conclusion which must be drawn from his testimony is that the vehicle was so close that he decided to let the intersection clear before proceeding across the T.C.H., that is the approaching vehicle was so close "as to constitute an immediate hazard". As LeBlanc said in cross-examination: "...it was close enough that I waited for it to go by." Had MacNeil similarly obeyed the law, he would, as did LeBlanc, wait for the intersection to clear before entering the T.C.H. If it could be said that LeBlanc was too cautious, (a proposition with which I cannot agree, considering the shortness of time between LeBlanc's stopping and the accident occurring) then certainly MacNeil was too precipitous. MacNeil came to the intersection after LeBlanc.

Some 6 1/2 years intervened between the date of the accident and trial. That fact understandably affected the memory of all of the witnesses. While not recalling (or not paying attention) to facts which mattered little to Mr. LeBlanc, he recalled the most important: that car was so positioned that he decided that he must let it pass before proceeding. LeBlanc avoided any accident by doing what the law required of him, the exercise of prudence and care.

Faced with not only a stop sign, but a flashing red light MacNeil entered the intersection. The accident occurred in the intersection with the front of the Gillis vehicle striking the driver's door of MacNeil's. Those two factors add credence to the testimony of

LeBlanc.

The intersection is not insignificant. It is in the midst of a somewhat built up area. A school is nearby. The place of impact upon the highway is of importance. The T.C.H. to the south of, and leading into, the intersection is divided into three lanes. Proceeding northerly, as was Gillis, to the right is the lane marked with arrows indicating that it is to be used by vehicles proceeding northerly and as well by vehicles intending to turn easterly into the Alder Point road. The center lane is for the use of vehicles intending to turn westerly onto Church Road. Those lanes are divided by a solid white line. The third lane is for vehicles proceeding in the opposite direction, that is, southerly. Dividing the second and third lane is a solid yellow line.

Counsel agree that the place of impact is as depicted by an "X" on one of the photographs. That "X" is directly opposite the Alder Point Road slightly to the east of the solid white line dividing the two lanes for traffic proceeding in a northerly direction. The "X" was placed on the photograph by Ms. Peck after detailed direct-examination. She was not asked to mark the sketch, nor did she do so.

Unfortunately, no expert evidence was adduced to demonstrate the forces at work on the two vehicles at the moment of impact and what might be said as to their speed at that time. It is agreed that anything said now would be speculation.

The only clear observation is that MacNeil's vehicle was in the lane marked for vehicles proceeding in a northerly direction and he was one full lane distant from the lane for vehicles proceeding in a southerly direction. According to Mrs. Peck (from both her verbal testimony and her marking of the "X") the front of MacNeil's vehicle at moment of impact had not reached the white line, that is the line separating the lanes to be used for vehicles proceeding in a northerly direction.

It will be recalled that the trial judge found that Gillis was operating his mother's

vehicle "...improperly, partly over the centre line of the highway..." In so doing, he erred. There is no centre line at the place where the accident occurred. This is one more incorrect finding which probably affected the trial judge's assessment of liability. If the Gillis vehicle were partly over a line at moment of impact it would have to be the line dividing the lines for vehicles proceeding in a northerly direction.

The evidence discloses that MacNeil was operating his 1982 Camaro at the time of the accident. On one side there was printed "Indianapolis 500". The constable and other witnesses, described it as a sports car. As the trial judge commented:

> " He rebuilt motors, and was particularly adept at working on the engines of racing cars. He considered the possibility of acquiring a garage. He was considered to be a very good mechanic. He was a proficient racing car driver."

There is evidence to the effect that MacNeil only stopped momentarily at the stop sign and came into the intersection quickly. The trial judge made no findings in this respect. How finely tuned MacNeil had the Camaro is speculation, however with his background and knowledge, it would be strange if that vehicle were not able to accelerate from a stop, quickly. However, I do not base my reasons for judgment on this latter comment.

It is clear from all of the evidence that MacNeil had proceeded such a short distance from the intersection of the Alder Point Road and the T.C.H. at moment of impact that I am able to come to no other conclusion than that when his vehicle emerged into the intersection, the Gillis vehicle was then so close "as to constitute an immediate hazard".

Mrs. Peck was definite in stating that the front of the MacNeil vehicle was at "X", that is, slightly to the east of the white line at moment of impact. The three people in the LeBlanc vehicle are, generally speaking, in agreement. No counsel took objection to that fact. It is impossible to say how far the MacNeil vehicle progressed from the stop sign until it reached the eastern side line of the T.C.H. because unfortunately, the stop sign is not

marked either on the sketch or photos; it cannot be discerned in the photos; and no one gave evidence as to its position. It can be stated with certainty that the eastern lane of the T.C.H. is much less in width (about 10 feet) than the length of an American made motor vehicle such as MacNeil was operating. That is, the distance the front of the MacNeil vehicle progressed on the T.C.H. from its point of entrance to the place of impact is less than a car length. The inescapable conclusion from all of this evidence is that when the front of the MacNeil vehicle emerged onto the T.C.H. the Gillis vehicle was so close thereto "as to constitute an immediate hazard". Little wonder that those in the LeBlanc vehicle expressed amazement that MacNeil entered the T.C.H. and Mrs. Peck said that Gillis "looked like he was trying to avoid the other car but had nowhere to go".

Although Ms. Peck testified as to the excessive speed and erratic operation of the Gillis vehicle at locations prior to the intersection, each of the occupants of the LeBlanc vehicle noted nothing unusual about that vehicle at and near the intersection. The trial judge made no finding of credibility in relation to any of that testimony.

The testimony of all of the witnesses must be viewed with some care; some 6 1/2 years passed from date of accident to trial. In that respect, Mrs. Peck, was adamant in denying on cross-examination that when she saw MacNeil pull out from the Alder Point Road it gave her a fright. Her testimony at a preliminary inquiry on December 8, 1987 that is just some five months after the accident was put to her. She admitted that her recollection of the events would have been "quite a bit fresher" in December of 1987. At the preliminary she said:

> A. I got such a fright when I seen the car coming out -- I seen him come out and he had lots of time to cross the highway and then this other car passed me.

That testimony does not make sense. If that vehicle gave her "such a fright" then it could not have "had lots of time to cross the highway".

At first in her direct-examination Ms. Peck testified that MacNeil had crossed over the yellow line and had begun to make his turn southerly towards Sydney when impact occurred. That is, the MacNeil vehicle would then be in the third lane for traffic. As questioning continued, counsel was cautioned by the trial judge not to lead. Then, as previously mentioned, after careful and detailed examination, Ms. Peck explained where the front of the MacNeil vehicle was at the moment of collision and then placed the "X" on the photo. That place was accepted by all counsel appearing before this Court.

Her two versions as to where the MacNeil vehicle was at the moment of impact stand in contradiction. Her first version, on examination, must be rejected as wrong. Her testimony is not logically consistent.

When considering her evidence the trial judge, in his decision, referred to her testimony that the MacNeil vehicle "was in the process of turning into the western lane of the Trans Canada Highway and was starting to move in the direction of North Sydney" and also: "the car that had passed her struck the side of the (MacNeil) car as it was turning". He gave "great weight" to her testimony. Based upon those quoted portions of her testimony, then it becomes more understandable why the trial judge decided liability as he did. Accepting those as facts would mean that Gillis has proceeded over to his far left lane at the moment of collision and importantly that MacNeil had proceeded so far into the intersection that he had crossed over two lanes and was turning in the third one at impact. However, it is clear, that is not what occurred. I repeat: all counsel agree that at impact, the front of the MacNeil vehicle was at point "X", that is, slightly to the east of the white line separating the lanes for vehicles proceeding in a northerly direction. The trial judge accepted Ms. Peck's early direct-examination. His quotes refer to that part of her testimony. He apparently overlooked, for he did not mention, her later direct examination, which was careful and detailed: at the moment of impact the front of the MacNeil vehicle was at point "X". It is

important to emphasize that the trial judge did not refer to this latter evidence. Critical to the determination of liability is the location of the vehicles at the moment of impact. In accepting Ms. Peck's early testimony as to the fact that MacNeil "was in the process of turning into the western lane of the Trans Canada Highway and was starting to move in the direction of North Sydney" at moment of impact demonstrates that he ignored her later corrected testimony.

I would reject any suggestion that Ms. Peck simply meant that MacNeil had begun his turn early, that is, while still in the easterly lane. When her testimony is read that could not have been her meaning. She did say, at that early stage of her testimony, that MacNeil had crossed the yellow line.

Ms. Peck's testimony in that respect is simply wrong. Yet the trial judge relied upon it. In so doing he committed critical error.

Ms. Peck also testified that as she neared the intersection there was a vehicle proceeding southerly on the other side of the intersection. Undoubtedly that is the reason for her important remark that it "looked like he (Gillis) was trying to avoid the other car (MacNeil) but had no where to go". This testimony, considered with that above adds credence to "X" being the point of impact; that MacNeil had proceeded but a very short distance into the intersection; the reason why Gillis may have been partly over the white line; and that the events all happened quickly, leading inescapably to the conclusion that MacNeil entered that intersection at a time when Gillis was so close as to constitute an immediate hazard.

MacNeil's duty to proceed onto the Trans Canada Highway with care and not to do so if there was a vehicle on the Trans Canada Highway so close as to constitute an immediate hazard did not end at the stop sign. There remained the flashing red light and his common law duty to exercise reasonable care, factors totally ignorned by the trial judge.

That continuing duty extended to and beyond the time his vehicle entered the Trans Canada Highway. At that time, if not before, there was nothing to obstruct his vision. As has been said in many cases, where there is nothing to obstruct the vision and there is a duty to look, it is negligence not to see what is clearly visible. See **McLeary v. Eldridge** (1952), 30 M.P.R. 241 (N.S.S.C., **in banco**) and the cases cited therein.

We do not know the distance from the stop sign to the eastern white line of the Trans Canada Highway. However, from viewing the photos it would have to be such a distance to enable MacNeil to easily have reached a speed of 30 m.p.h. on reaching that white line. Assuming a most conservative speed of 20 m.p.h. at that line it would take MacNeil about 1/3 of a second for the front of his vehicle to proceed from that white line to the place of impact (about 10 feet). If Gillis were travelling at 70 m.p.h. when the front of MacNeil's vehicle was at that white line, how far would the Gillis vehicle be from the place of impact at that time? In 1/3 of a second at 70 m.p.h. Gillis would travel 33 feet. That is Gillis' vehicle would be about 33 feet from the point of impact when MacNeil was at that white line. Again, we reach the inescapable conclusion: when the front of the MacNeil vehicle entered the T.C.H. that is, the eastern white line, the Gillis vehicle was so close to the intersection as to constitute an immediate hazard.

If the speed of the MacNeil vehicle were 30 m.p.h. on reaching that white line that would result in the Gillis vehicle being closer to the point of impact at that time. Conversely, if MacNeil's speed were only 10 m.p.h. at that time that would put Gillis further from the point of impact, but the difference is such that it would not vary the principle: with any of these computations, when the MacNeil vehicle was at the white line, the Gillis vehicle was so close to the intersection as to constitute an immediate hazard.

Because MacNeil was killed there is no evidence from him whether he only momentarily stopped at the stop sign and looked but did not see the approaching vehicle on

the T.C.H. to his left or did not look at all. Whatever the fact, the undeniable evidence is that there was that approaching vehicle on the T.C.H. which caused LeBlanc to wait until it cleared the intersection.

As Mrs. LeBlanc so graphically described it:

> A. And MacNeil pulled up and stopped. And then he just -- he pulled out. But I know when we pulled up to the stop sign on the George's River side there was a black car coming down the highway. **And we stopped at the intersection for this car to go through and MacNeil just pulled out. It was just unusual for him to do that. Like, he just stopped and then proceeded.** (Emphasis added)

She noticed nothing "unusual or abnormal about the travelling pattern" of the Gillis vehicle.

> Q. What, if anything, did you notice as far as being abnormal about the car on the other side of the road?
>
> A. **I know we were stopped at the stop sign. And I know that if we had had time to go across the intersection we would have.** (Emphasis added)
>
> Q. Yes.
>
> A. **But we were stopped there long enough -- but this guy, he came up after we were already stopped and waiting to go through. He pulls up on the other side and just stopped like for a second or so and pulled out. It was so unnatural because we knew he wouldn't have enough time to make it.** (Emphasis added)
>
> Q. Because you knew the other car was coming?
>
> A. Yes.
>
> Q. And you felt he should know the other car was coming?
>
> A. Yes.
>
> Q. And you saw the collision also, I take it?

A. Yes.

She also testified that "**It just happened so fast**". (Emphasis added).

Ms. Lawless testified:

Q. And what was your reaction?

A. In the car?

Q. When you saw the impact.

A. **Well, I remember shock. Saying, "oh my God. Why did he pull out?"** (Emphasis added)

THE COURT:

I'm sorry?

MISS LAWLESS:

My reaction was, "Oh my God. Why did he pull out?"

Ms. Lawless saw nothing unusual about the driving of the Gillis car - it seemed normal. She noticed nothing "unusual or abnormal about the travelling pattern" of the Gillis vehicle.

It may be that the comments by the three persons in the LeBlanc vehicle to the normal speed of the Gillis vehicle, was simply a reference to the normal speed of vehicles travelling on the Trans Canada Highway.

Neither Mr. LeBlanc, Mrs. LeBlanc nor Miss Lawless were shaken in the least in their evidence as quoted.

At the request of counsel the trial judge, at the conclusion of trial, viewed the scene of the accident. It does appear that he considered Gillis to be negligent because of the highway conditions:

> "The negligence of the defendant (Gillis) operator in the operation of the defendant's vehicle was exacerbated by highway conditions existing at the time. The ability of the deceased husband to observe

> and perceive the speed of oncoming traffic from his left was reduced by reason of the obstruction of view which existed for drivers stopped at the stop sign at the entrance to the intersection from the Alder Point Road. It is noteworthy that, some time subsequent to the date of the collision, the Province effected changes to the roadway and installed traffic lights in replacement of the existing stop signs.

There was speculation by counsel for Mrs. MacNeil and the estate that a dip in the T.C.H. may have been such as to hide the approaching vehicle at the critical time. However a police constable testified that if a driver in the position of MacNeil "eased out" but a short distance from the stop sign, then he would have full view of the T.C.H. MacNeil had the duty, clearly expressed in both the statute and common law, not to proceed out onto the T.C.H. unless he could do so in safety. It appears that MacNeil paid no attention to either the vehicle on his opposite side of the intersection, LeBlanc, or the approaching Gillis vehicle, or the vehicle which Mrs. Peck saw approaching the intersection from the north. Rather than considering this evidence and its effect upon the duty of MacNeil, the trial judge considered it adversely to Gillis.

From a study of the evidence concerning the many questions asked of LeBlanc respecting the position of the sun at the timing of the accident, including several asked by the trial judge, it may be that the trial judge was, to a degree, prejudiced against LeBlanc's testimony because of LeBlanc's speculation or assumption.

LeBlanc said:

> A. My thoughts were that this vehicle pulled up on the Alder Point side of the road, on the Alder Point intersection, looked to the right to see if anything was coming, looking into the sun, looked to the left directly after looking into the sun, had sun spots in his eyes or whatever and didn't see something coming and just pulled out normally like as if there wasn't even a car in sight.

Q. Thank you, Mr. LeBlanc.

A. That was my assumption.

This led the trial judge to remark that LeBlanc's comment that MacNeil:

> "was blinded by the sun shining directly along the Trans Canada Highway from the north northwest cannot be accepted. I take judicial notice of the fact that the sun always sets in the west, never in the north northwest".

Because of the trial judge's misconception, he remarked that Mr. LeBlanc was suggesting that the sketch was wrong. Again, it is with deference that I comment, that anyone who has perceived the setting of the sun knows that it sets in differing locations extending from southwest to northwest depending upon the time of year and in June the setting is more to the northwest than west.

Dr. Malik was one of the medical doctors who examined Gillis the night of the accident. There is no doubt from his testimony and the hospital records that Gillis was severely injured and irrational for several days. Among other things Dr. Malik, in his report written that night, noted "Apparently he was drinking". "He smells strongly of an alcoholic beverage. He is quite irrational and is very restless". Gillis suffered a concussion and head injury. "He states that he was able to get out of the car and stand. (pt. states he was unconscious for two hours). He admits to having drunk a quart of rum today".

The hospital records were entered into evidence by agreement. No reference was made to the above comments at trial or in argument at trial or by counsel on appeal. Keeping in mind the conflicting statements made by Gillis to the doctor, his statement respecting the amount of his consumption of alcohol is questionable, which may account for the fact that counsel did not refer to it as relevant. Also there can be no doubt however, that his blood alcohol reading at 2230 hours on June 29, 1987 was 46 mmol/L. There can be no

doubt from those who testified on point that Gillis, at the scene of the accident, was unconscious as a result of injuries he received and was incoherent and bleeding profusely. No one testified that he could, or did, stand up at the scene of the accident.

It is, of course, trite to say that Gillis' blood/alcohol reading, by itself, cannot be considered negligence, it must be causative of the accident. That is not to condone driving while the ability to do so is impaired; that is a separate and distinct matter: it must be deprecated. The issue is: did that impairment cause or contribute to the accident? In my opinion, upon consideration of all of the evidence, it alone did not cause the accident, but it was a contributing factor. That does not excuse MacNeil from proceeding into the intersection, when the Gillis vehicle was so close thereto as to constitute an immediate hazard.

Although doubt has been cast upon it, I would not interfere with the trial judge's finding that Gillis was operating his mother's vehicle at "an excessive rate of speed, if by definition that means in excess of the posted limit of 70 k.m.p. Peck's evidence is testimony to that fact, although those in the LeBlanc vehicle may be considered to the contrary. Ms. Peck estimated Gillis' speed at 70 to 75 m.p.h. She admitted in cross-examination that her estimate was "Just a rough guess" and agreed "that the accuracy of that guess would be highly questionable". Neither can issue be taken with the finding that Gillis' ability to drive was impaired. These factors diminished his ability to exercise due care and attention. To these facts there must be added that Gillis was approaching that intersection faced with a flashing yellow light. In accord with s. 93(2)(g) of the **Motor Vehicle Act** at the least, he must proceed with caution. It is apparent that he did not. With deference, that does not end the matter. Did these acts, taken singly or together, cause or contribute to the accident? In my opinion they did. To what degree? Neither Gillis nor MacNeil's acts of omission or commission can be considered in isolation. Both must be examined when determining

liability. In my opinion the trial judge considered Gillis' negligent acts to the virtual exclusion of those of MacNeil. In that he committed critical error. Trial took place in Sydney on October 26-29, 1993 and concluded in Halifax on November 19, 1993. It may be that the passage of time to the date of the decision, January 25, 1994, caused the several errors to be made.

The inescapable conclusion is that this unfortunate accident occurred by reason of the negligence of both Gillis and MacNeil.

MacNeil's negligent conduct need not be repeated. Briefly put, he entered the intersection faced with not only a stop sign but a flashing red light. In my opinion the preponderance of evidence leads to the conclusion that MacNeil only stopped briefly, proceeded into the intersection and the Gillis vehicle was then so close to the intersection "as to constitute an immediate hazard."

An alert driver would not have proceeded into the intersection in those circumstances.

I have read the cases to which counsel has referred, and others. Other than for general principles of law, each can be distinguished. It is trite to say that every case of this nature must stand on its own particular facts.

I cannot help but comment that had this matter been tried earlier, with the assistance of expert witnesses, and the position of various features accurately delineated, then the assessment of degrees of liability, without doubt, would have been easier to achieve.

Although counsel introduced into evidence before the trial judge a sketch of the site of the accident, no plan properly prepared by a surveyor was produced. The sketch is virtually useless. It is not to scale. Pertinent features are not depicted. A plan would have assisted immeasurably. The position of the stop signs and the flashing lights would have been indicated. The distances between relevant points would have been easily calculated.

Ms. Peck testified that Gillis passed her at about the white house with the red roof depicted in the photos. She also referred to the school sign. Where that sign is in the photos is not clear. No counsel bothered to have the distance from the white house or school sign to the intersection measured and properly introduced into evidence. The primary duty rests with MacNeil's counsel; Ms. Peck was his witness.

Without such a plan the court is unable to make findings which would be important to the ultimate conclusion. The comments of Justice MacDonald, sitting on appeal, in **Baird v. Millard**, 33 M.P.R. 291 at pages 319-20 are apt:

> These circumstances prompt me to make the following observations as to the assistance which trial and appellate courts are entitled to receive from the Bar in traffic cases.
>
> As is well known, there are many sources of error in the judicial task of reconstructing events leading to traffic accidents and determining the legal responsibility therefor, particularly where motor vehicles are involved. Accordingly it should be abundantly clear to the Bar that no amount of concern with evidence as to the conduct of the parties, and the circumstances of traffic, can dispense with the utter necessity of proving with the greatest possible precision all the facts of terrain and topography which constituted the background against which the events in question proceeded, and with reference to which their legal significance must be scrutinized. In my view, no highway traffic cases should be allowed to proceed to trial without the production of a plan -- drawn by a competent witness-- showing all relevant physical circumstances of the locus of the accident with appropriate measurements, as to distances, angles, curves, elevations, the relation between significant landmarks etc. Further I think such a plan should be prepared and submitted as the result of agreement, thus saving expense and providing a common basis to which the testimony of witnesses as to the movements and conduct of the parties can be related. Until such a requirement is made one of law it should, I think, be rigorously observed by all counsel as a matter of uniform practice as a vital aid to the courts in coming to correct conclusions of fact

> and thereby promoting the proper administration of justice in this difficult and enlarging area of litigation.

The burden of producing such a plan is primarily upon a plaintiff (here MacNeil).

Weighing all of the evidence and the applicable law, and because of the unsatisfactory nature of some of the pertinent evidence, it is my opinion that liability should be apportioned equally between MacNeil and Gillis.

It is only after carefully analyzing the available evidence that I came to this apportionment of fault. Had I not done so, because of the lack of pertinent information readily available to, but not introduced by, counsel, I would have invoked the provisions of s. 3 of the **Contributory Negligence Act**, R.S.N.S., 1967, c. 54 and come to the same conclusion: liability should be apportioned equally.

The primary burden of adducing the missing pertinent information is upon a plaintiff, here the respondents.

I would allow the appeal on this issue.

ISSUE 2:

Did the trial judge err in law in finding that Gillis did not have the consent of his mother to operate the motor vehicle at the time of the accident?

Determination of this issue relates to whether Judgment Recovery or Mrs. Gillis' insurance must respond to any assessment of fault on the part of Gillis. It is not determinative of liability as between MacNeil and Gillis.

Mrs. Gillis testified that her son had recently returned home and had been staying with her for two or three weeks prior to the accident. The trial judge found that "Her practice was that her children, including her son, were allowed to use her car freely when she was not using it." A set of keys were located on a hook in the kitchen. Although normally her son would ask if the car were available, he was not required to ask, and sometimes did not do so.

The trial judge found that:

> She did not approve of drinking, and had told her son not to use the car if he was drinking. He was not drinking on the day of the accident. She was sleeping in her bedroom, and was not upset upon awaking to find her car gone. He used the car frequently.

He also commented:

> The defendant operator testified that he did not recall the accident or the events preceding it. He could not account for hospital records which show a high level of alcohol in his blood. He did not know if he was intoxicated on the day of the accident; if he was, his mother would not permit him to drive. He was aware of her dislike of drinking; she did not allow him to drink at home. He knew that if she did not want him to drive, she would say so. He respected her wishes and did not drive her car if she did not want him to drive. Her permission was qualified if he was drinking, but that did not apply if he was merely drinking beer while working on the car in the yard or needed to go to the store. He was not driving without her permission on the day of the accident. With respect to a statement which he had given to the insurance adjuster to the effect that he took the car without her permission, he testified that he gave that answer in response to a question as to whether he had asked for permission. He had not asked for permission. He was in the habit of using his mother's car if he needed it and if it was available. He used it to go to work, for shopping and to work on it. He might keep it all evening or all night. He never asked permission, and his mother never complained.

Here, as the trial judge found, there is no question of express consent. Mrs. Gillis was asleep when her son took the vehicle. He had not obtained her express prior consent to use it at that time.

The trial judge stated:

> There is no question of express consent. Therefore the question to be answered concerns implied consent. I find that the weight of the evidence is that the defendant operator had the implied consent of his mother to operate the vehicle. I also find the weight of the evidence to be that her implied consent to

> operate was limited in scope. The defendant owner testified that she had told her son not to use the car if he was drinking. He testified that her permission was qualified if he was drinking. But he then went on to say that the qualification did not apply if he was merely drinking beer while working on the car in the yard or used it to go to the store. Clearly, there is a problem in regard to the exact scope of the implied consent.

He explained his difficulty in reaching his conclusion in this fashion:

> In the present case, the scope of the implied consent of the defendant owner was limited to any usage of the vehicle where the defendant operator had not been consuming alcohol. Since I have found as a fact that the defendant operator had been drinking prior to the occurrence of the collision, it follows that the scope of the implied consent of his mother was exceeded and, therefore, the consent was negatived. Although I am bothered by the testimony of the defendant operator that the limitation of the scope of permission did not apply if he was merely drinking beer while working on the car in the yard or needed to go to the store, that testimony was not corroborated or supported by the testimony of the defendant owner. I find that the scope of consent was limited absolutely with respect to the consumption of alcohol. Since he breached that limitation, the consent was negatived. I find that the defendant operator did not have the consent of the defendant owner to operate the defendants' vehicle.

Mrs. Gillis specifically testified that she told her son "That he wasn't to use my car if he was drinking". That testimony was confirmed by Gillis.

Counsel agree that case law may be cited in favour of each position taken on this issue.

The trial judge found as a fact that Gillis did not have the consent of Mrs. Gillis to operate the vehicle at the time of the accident. There was evidence upon which the trial judge could rely in order to come to that conclusion. See the comments of Spence, J. in **Polsky et all v. Humphrey et al**, [1946] S.C.R. 580 and those of Ritchie, J. in **Minister of**

Transport for Ontario v. Canadian General Ins. Co. (1971), 18 D.L.R. (2d) 617 at 619 (S.C.C.).

We should not disturb such a finding of fact unless the trial judge made some palpable and overriding error in determining that fact. Such error has not been demonstrated.

I would dismiss the appeal concerning this issue.

I concur with Justice Hallett's assessment of the damages for loss of financial support suffered by Mrs. MacNeil and Jason.

Matthews, J.A.

CHIPMAN, J.A.:

I am unable to reach the same conclusions respecting the trial judge's determination of fault of the drivers as did my colleague Matthews, J.A.

Matthews, J.A. has set out the duty of an appellant court when reviewing findings of a trial judge and in particular an apportionment of fault. He has also set out the relevant provisions of the **Motor Vehicle Act**.

The issue here is whether the trial judge erred in his conclusion that Gillis was solely liable for the collision. In so deciding he found that Gillis failed to drive in a careful or prudent manner as required by s. 100(1) and s. 101 of the **Motor Vehicle Act**. This strong condemnation of his driving arises from the finding that Gillis was impaired by alcohol, drove at an excessive rate of speed partly over the centre line of the highway, and did not brake on approaching the intersection. These findings are amply supported by the evidence.

Was the trial judge palpably wrong in his finding that Gillis failed to yield the right of way to the MacNeil vehicle "which had entered the intersection"? While the trial judge's mention of s. 122(1) of the **Motor Vehicle Act** in this context is clearly erroneous, it does not follow that his conclusion that MacNeil had already entered the intersection was in error, nor that his conclusion that Gillis failed to establish negligence on MacNeil's part was in error.

The duty of MacNeil, having stopped at the intersection, was to have yielded to other vehicles "within the intersection or approaching so closely on the through highway as to constitute an immediate hazard" (s. 93(2)(f) and s. 122(2) of the **Motor Vehicle Act**). The trial judge did not put in his written decision the specific question whether the Gillis vehicle was such a hazard when MacNeil made his entry into the intersection. The legal analysis carried out by him was less than precise. The correct analysis can be carried out on the basis of his findings of fact and the evidence which he accepted as credible.

Neither the trial judge nor we have the benefit of an account of this collision from either driver. MacNeil died in the collision. Gillis claimed to have no recollection of the collision or the events prior thereto, because of the injuries he sustained. It is necessary to address the issue of whether MacNeil was negligent in the context of the findings of the trial judge based on the available evidence, having regard to the burden of proof that rested on Gillis to show negligence on the MacNeil's part.

There is no doubt that a very heavy onus rests upon a motorist governed by a stop sign. It is tempting to conclude that whenever a collision occurs in such a controlled intersection that that very fact establishes that the driver on the through highway must have been approaching so closely as to constitute an immediate hazard. To so conclude on the basis merely of a collision happening would, however, be wrong. In many cases courts have found the motorist on the through highway entirely at fault. See for example **Hamm Estate v. JeBailley et al** (1975), 12 N.S.R. (2d) 27 (N.S.S.C.A.D.). It would also be wrong to conclude that Gillis was such a hazard merely because LeBlanc did not venture into the intersection when he saw an approaching vehicle, the location of which at that time and any meaningful description of which appears to have totally escaped his memory.

In my opinion the approach of the Gillis vehicle must be judged in the context of the manner of its operation.

My colleague Matthews, J.A. gives insufficient weight to the critical evidence of Mary Peck, the only witness who saw the collision develop and happen. The trial judge made the following vital credibility findings.

> "My review of the testimony of the various witnesses leads me to give great weight to the testimony of Russell Gordon, Mary Carmelita Peck and Constable Richard Burns. I give little weight to the testimony of Kenneth LeBlanc, Susan LeBlanc and Patricia Lawless who, in my opinion, were not paying much attention prior to the moment of the collision, and then jumped to the conclusion that the gray car had inappropriately entered the intersection, believing as they

> did that the defendants' vehicle was approaching the intersection at a normal speed and in a normal manner."
>
> (emphasis added)

Russell Gordon noticed erratic driving by the Gillis vehicle as it overtook him on the Halfway Road towards the Trans Canada Highway. The Gillis vehicle swayed on the road. It overtook Gordon on a turn on a solid line. It then overtook another vehicle on the right hand dirt shoulder. Then it overtook a 1/2 ton truck and went off on the shoulder again. The car fishtailed and then proceeded towards the Trans Canada Highway overpass. This was all some two or three minutes before Gordon came upon the accident scene.

Mary Peck approached the intersection in a northerly direction, the same direction as did Gillis. She was maintaining the posted speed limit - 70 kilometres per hour. This intersection was in a built up area and was controlled by the flashing amber light facing all traffic on the Trans Canada Highway. As she approached, she first observed the MacNeil vehicle coming into the intersection. She emphasized both on direct examination and on cross-examination that this vehicle had plenty of time to go through the intersection before she entered it. Then all of a sudden the Gillis car passed her. All she could hear was a "loud swoosh". As the Gillis vehicle overtook her it made her car vibrate. She estimated its speed at 70 to 75 miles per hour. She conceded on cross-examination that it was not possible to estimate this speed with precision, but she was adamant that the MacNeil car had plenty of time to get through the intersection ahead of her. At one point in the cross-examination she was driven to say that her estimate of speed of the Gillis vehicle was "just a rough guess". Indeed, the speed may well have been in excess of her estimate, having regard to the "loud swoosh" and the resulting vibration of the Peck vehicle.

In addition to the usual disadvantages that this court has compared to that of the trial judge in assessing testimony, we are faced with a poor quality transcript. Many critical answers of this witness and others are missing and if anything, this requires greater deference

to the trial judge on factual matters. That said, however, it appears from Mrs. Peck's evidence that the overtaking occurred some distance back from the intersection. She said it was at a school sign which was opposite a white house with a red roof which can be seen in the air photos. This is a substantial distance back from the intersection. It is not possible to make an accurate measurement of the distance from this point to the intersection but the trial judge's finding of 450 feet is reasonable in the face of the evidence. It is clear that the MacNeil vehicle was already in the intersection when Gillis was at about this point. It could have easily cleared traffic proceeding in any kind of a normal fashion. Mrs. Peck said the overtaking car was "like to the centre of the white line" going back and forth. It seemed like it was out of control. She kept waiting for the driver to apply his brakes but his brake lights never came on. Mrs. Peck continued, referring to the Gillis vehicle as the green car and the MacNeil vehicle as the gray car:

"Q. Okay. Now what happened next?

A, Like then as he made the turn, the car just kept going towards him and he came right into the . . .

Q. Okay as who made the turn?

A. The gray car made the turn.

Q. Yes.

A. The green car kept going.

Q. Yes.

A. And it went right into the side of the gray car.

Q. Okay. So the green car went into the side of the gray car.

A. Right.

Q. Okay. Now, are you able to say how far through his turn the gray car was when the impact occurred?

A. Well, the front of the car was making the turn to go back to Sydney.

Q. Okay.

A. So he was over the yellow line."

Between the spot where the overtaking of Peck by Gillis occurred and the intersection, the road divides into three lanes. Facing north as did Peck and Gillis, the two lanes to the right of the yellow line are for north bound traffic and are separated by a white line. The lane to the left is for north bound traffic turning west or left. The lane to the right is for traffic continuing north or turning to the right or east. The white line between them is about in the centre of the intersection, the yellow line being about three-quarters of the way to the left or west. The police found no skid marks on that part of the road traversed by the Gillis vehicle. The point of impact was never established with precision. Mrs. Peck first placed the MacNeil car over the yellow line, that is, over three-quarters of the way into the intersection. She said he was "heading to go back towards Sydney. He was making the turn". She then said the MacNeil vehicle was coming across the white line. She placed a red "x" on the air photo, in the intersection on the prolongation of the white line. This puts the impact approximately in the centre of the intersection. There is thus inconsistency between some of Peck's evidence and the position of the "x" placed by her on the photo. Witnesses are often at a considerable disadvantage in attempting to locate the exact point of a collision on a plan or photograph.

In my opinion, this relatively small difference in the point of impact and thus the precise extent to which MacNeil had entered the intersection is not material to the outcome. Whatever the exact position of the MacNeil vehicle it is obvious from Mrs. Peck's testimony that it could have cleared the intersection ahead of her. She was approaching in a proper manner and within the speed limit.

The trial judge accepted Mrs. Peck's testimony. Her vehicle was not an immediate hazard at the critical time that MacNeil entered the intersection. The Gillis

vehicle had not then overtaken Peck. It is a proper inference that it too was not then an immediate hazard in the view of a reasonable motorist in MacNeil's position.

I am not prepared to retry this case by engaging in speculation regarding MacNeil's entry into the intersection which is contrary to the evidence of Mrs. Peck. Her vehicle was not a hazard when MacNeil entered. After MacNeil entered, Gillis overtook her vehicle at a high rate of speed and drove into the MacNeil vehicle without making any attempt to avoid it. I am only prepared to resolve this issue on the basis of the evidence which the trial judge found to be credible. If that is not possible, a new trial would be the only alternative. Fortunately, it is not necessary to resort to that. The acceptance of Mrs. Peck's testimony over that of the LeBlanc's in the finding that the overtaking of Peck was 450 feet from the intersection are key findings of fact. MacNeil was by then in the intersection and no threat to Peck. Add to this the gross impairment of Gillis and his high speed, the only conclusion to be reached is that he caused the accident. He was also in breach of his duty under s. 93(2)(g) of the **Motor Vehicle Act**.

The sketch prepared by Constable Burns contains no measurements but the locations of the vehicles after the impact far to the north of the intersection indicate that the Gillis vehicle drove the MacNeil vehicle a substantial distance following this impact. This further supports the evidence of high speed by Gillis. On cross-examination Peck said that it looked like he was trying to avoid the MacNeil car but had nowhere to go. This is not surprising as Gillis, by his speed and impaired condition, had foreclosed the options that would be otherwise open to him.

In deciding whether a vehicle is approaching so closely so as to constitute an immediate hazard, a motorist is entitled to conclude that other motorists are more or less observing the rules of the road and good common sense. Much emphasis was made on the fact that it is difficult to estimate the speeds of vehicles. An operator in the position of

MacNeil would, until the overtaking of Peck by Gillis took place, see the Peck vehicle as the first approaching vehicle. It was approaching in a normal manner within the speed limit. It was a substantial distance away. The overtaking vehicle was moving at a very high speed. If it were in the area of the white house as it overtook, it cannot be said that the trial judge was wrong in concluding, as I am satisfied that he did, that Gillis had not established that his vehicle was approaching so closely as to constitute an immediate hazard. At this point the road is marked with a cross hatching which indicates that passing is prohibited.

Merely because the trial judge made no specific comment on the veracity of the occupants of the LeBlanc vehicle is not a sufficient reason to elevate their testimony to the status of credibility from an analysis of the transcript thereof. Indeed, a reading of their evidence confirms rather than weakens the trial judge's conclusion about the lack of attention that they were paying as this event unfolded. LeBlanc did see a vehicle on the Trans Canada Highway. He cannot say what it looked like, how far away it was or at what speed it was proceeding. He simply made the judgment call to wait, as might be consistent with extraordinary prudence or perhaps a misconception as to its proximity to the intersection. He simply said "there's a vehicle coming and you wait until it goes through". Then he turned to look to his left and the next thing he knew he just caught the accident in the corner of his eye. Similarly, he paid no attention to the MacNeil vehicle which he saw stopped across the intersection from him:

". . . But I never really paid any attention to him either."

LeBlanc's fuzzy evidence does not support a conclusion that this oncoming vehicle - whichever one it was - constituted an immediate hazard. The vehicle was probably the Peck vehicle because that was the vehicle that was in the lead until shortly before the collision. The Gillis vehicle at this time was proceeding so fast that it may have been some distance behind Peck when LeBlanc saw a vehicle. LeBlanc then took his attention away

from the Trans Canada Highway and could say little about the collision "until the moment of the accident". Had LeBlanc been paying attention, he would have seen two vehicles because that was what was there to be seen. When he stated on cross-examination that everything was normal with respect to the car that hit the MacNeil car, he demonstrates a complete lack of awareness of what was going on. Peck's evidence was accepted by the trial judge. He placed great weight upon it. It is no wonder that he gave little weight to that of LeBlanc and his passengers.

Mrs. LeBlanc must have been equally inattentive. She noticed nothing wrong with the vehicle on the Trans Canada Highway that struck the MacNeil vehicle. On cross-examination she was confronted with previous inconsistent testimony. Her evidence of seeing any car to the right on the Trans Canada Highway was weakened.

Mrs. Lawless, the passenger in the back right seat, also noticed nothing unusual about the oncoming vehicle on the Trans Canada. She did not know what was going on and jumped to the conclusion that MacNeil precipitately entered the intersection. Neither passenger saw more than one vehicle.

LeBlanc's evidence and that of his passengers, does not warrant reversing the trial judge's finding of fault, based principally on Mrs. Peck's evidence. I cannot accept that simply because the trial judge made no adverse comment about the credibility of these people, that such great reliance should be placed upon the printed record of their testimony. Lest it be argued that additional weight should be given to LeBlanc's testimony because it is supported by that of other occupants of the vehicle, this court cannot play such a numbers game. A credibility issue is not resolved on the basis of the mere number of witnesses who testify to an event. The trial judge was there to see and hear the witnesses. He judged quality not quantity. He found these witnesses to be wanting. I am not prepared to second guess him.

A trial judge need not comment on every aspect of the witnesses' testimony which leads him or her to conclude that it is not reliable. A trial judge's assessment of credibility arises from the opportunity to see and hear the witness firsthand. The impression thus gained comes not only from an assessment based on veracity as such, but reliability, which arises not only from veracity but from a witness's powers of observation, the use of those powers and intelligence. A trial judge need not spell out in detail all of the considerations that enter into his judgment on these key elements. Nor is he or she to judge credibility on the basis of a number of witnesses on one side or the other. The fact that the trial judge singled out that the LeBlanc witnesses were inattentive and judgmental is no reason to think highly of their evidence in other respects.

Indeed, another example of the lack of attention of LeBlanc - or his lack of able or honest recall - is his failure to notice any evidence of intoxication on the part of Gillis. After the collision, he was assisting Gillis. He held his head up and yet he did not smell anything. In contrast to this is the evidence of Dr. Malik respecting this man's intoxication.

Dr. Malik saw Gillis at about 10:15 p.m. on June 29, 1987 at the Sydney City Hospital. He had been transferred there from the North Side General Hospital. It was now about two and one-half hours after the accident. Gillis had had no opportunity to do any drinking during that intervening period. Dr. Malik noted that he smelled of alcoholic beverage. Gillis was uncooperative and required restraints. Dr. Malik was requested to determine whether his behaviour was due to a head injury or due to alcohol. He concluded that it was the latter. The odour of alcohol was "a strong odour" on his breath. While it was possible that he had a head injury, it was also quite clear that alcohol was involved. A blood alcohol test was taken. The reading was 46 millimoles per litre. Expressed in terms of milligrams per 100 cc's, his blood alcohol count was 211, which is close to three times the upper limit permitted by the **Criminal Code**. The patient was observed. As the alcohol

level went down he became brighter. Dr. Malik concluded that the alcohol contributed to his disability to a greater extent than the head injury, perhaps to the extent of 70 or 80 percent. The bottom line was that on admission his major problem was intoxication by alcohol.

The history given was that he had been drinking with a friend. He admitted to having drunk a quart of rum that day. He was able to give Dr. Malik details about the accident that he was not able or willing to give at the trial. He spoke about being able to get out of the car and stand. Indeed, as late as September 25, 1987 Gillis gave Dr. Malik further details about the accident. He told him that he was travelling at about 60 kilometres, that he had the right of way and that the MacNeil vehicle went through a stop sign resulting in the collision.

From all of this, one can conclude that Gillis was grossly impaired at the time of the accident. LeBlanc's failure to detect or testify to these facts reflects seriously on his reliability.

I do not accept the evidence of the LeBlanc people to support the inference that Gillis was so close as to constitute an immediate hazard and that the trial judge thus erred in failing to find that he had discharged the burden of proving that MacNeil was negligent. I would not retry a case on the basis of witnesses who found such little favour with the trial judge.

I am unable to draw any inference of negligence on MacNeil's part from the fact that his vehicle bore the words "Indianapolis 500", or from the fact that it was described as a sports car.

The exact position of the sun need not concern us. While at 7:15 at that time of the year it would be generally in the northwest, we have only speculation from LeBlanc that it <u>may</u> have blinded Mr. MacNeil when he looked to his right. Such gratuitous speculation

is consistent with the trial judge's view that these witnesses "jumped to" conclusions. LeBlanc himself did not remember if he himself was blinded when he looked in that same direction. If one were to make guesses, the best one would be that the sun was affecting Gillis's visibility as he drove in northwesterly direction on the Trans Canada Highway.

In summary, only the negligence of Gillis caused this collision. He was driving in a manner totally oblivious to his surroundings. He was on the Trans Canada Highway but he was not on a desert flat upon which he could travel without regard to other traffic. He was approaching a built up intersection at which a school was located. The intersection was governed by an amber caution light facing him. There was a sign warning him of the presence of an intersection ahead and there were school signs. The speed limit was 70 kilometres per hour. He was speeding. He was grossly impaired. He engaged in an imprudent passing maneuver and made no meaningful effort to avoid a collision as he raced towards one. He struck a vehicle which had entered the intersection long before he did. These conclusions are supported by the evidence and the findings of the trial judge and amply warrant the overall conclusion that Gillis was solely at fault.

I concur with Matthews, J.A. that the comments of MacDonald, J. in **Baird v. Millard** 33 M.P.R. 291 at pp. 319-20 are apt.

I would dismiss the appeal on the first issue.

I concur with Matthews, J.A.'s proposed disposition of the second issue and

I concur with Hallett, J.A.'s proposed disposition with respect to the assessment of damages for loss of financial support suffered by Mrs. MacNeil and Jason.

Chipman, J.A.

HALLETT, J.A.:

I have read the reasons of my colleagues on the question of liability. I agree with Justice Matthews that the learned trial judge made several errors. First his apparent failure to realize that Mrs. Peck had changed her testimony as to the position of the vehicles at impact. Early in her testimony she stated in response to questions under direct examination as follows:

> " Q. Okay. Now, are you able to say how far through his turn the grey car was when the impact occurred?
>
> A. Well, the front of the car was making the turn to go back to Sydney.
>
> Q. Okay.
>
> A. So, he was over the yellow line."

Then there was lengthy questioning on this issue. The transcript is of poor quality; answers to some questions are not reproduced. The transcript does reveal that she was then asked to locate the point of impact on a photograph of the intersection. She answered as follows:

> " Well, this here line here. He was over -- the front of the car was over here and he was heading back to Sydney. He was making the turn."

After detailed but disjointed questioning about the traffic lanes on the highway in the area of the intersection she was asked to put an X on the photo of the intersection to indicate the point of impact. She did. That X is located as Justice Matthews has described in his reasons being well to the east of the yellow line. She confirmed this under cross-examination as follows:

> " Q. The front of the grey car was where

> that "X" is, wasn't it? Wasn't that your evidence on direct?
>
> A. Yes."

These answers corrected her earlier evidence that the MacNeil car was over the yellow line at the time of impact.

In his decision, when reviewing the evidence of Mrs. Peck, the learned trial judge stated:

> " Mary Carmelita Peck was on her way to work at a restaurant in Bras D'Or when she witnessed the collision. She was travelling on the Half Way Road and then on the Trans Canada Highway. About 450 feet before the intersection, she saw a gray car entering the intersection and, at that time, a green car passed her vehicle, she heard a "swoosh" sound, and her vehicle vibrated. She stated that her vehicle was then travelling about 70 kph. and the passing vehicle was passing at a speed of about 70 - 75 mph. After it passed, it travelled on the center of the highway, seemed out of control and, because the tail lights did not go on, she believed that it did not brake. She noted that the gray car in the intersection was in the process of turning into the western lane of the Trans Canada Highway and was starting to move in the direction of North Sydney. There was plenty of time for the gray car to get out of the way. The car that had passed her struck the side of the gray car as it was turning. She acknowledged that she was not experienced in making estimates of speed so that her estimate was only a rough guess, but believed that the car which had passed her was going too fast. She has been a licensed driver for over twenty years. In her opinion, the car which passed her was being operated strangely; it was trying to avoid the gray car in the intersection but had nowhere to go." [Emphasis added]

The evidence does not support a finding that MacNeil was in the process of turning into the western lane when struck.

However, Mrs. Peck's evidence was that the MacNeil car had lots of time to cross

in front of her as it came into the intersection. She confirmed this while under cross-examination:

" Q. Just tell us what happened. And what I'm suggesting to you happened is this; that when you saw this grey come out, the first thing you did was check your rear-view mirror to see if there was anyone coming behind. Do you agree with that suggestion?

A. Yes.

Q. Okay. I'm also going to suggest to you that before the impact you were close enough to the grey car to see the driver's eyes watching the traffic. Would you agree with that suggestion?

A. Yes.

Q. I'm going to suggest to you that it follows from that that that grey car pulled into the intersection when you were too close.

A. No.

Q. You still say that you think there was plenty of time.

A. Lots of time. Plenty of time what?

BY MR. MACLEOD

Q. Plenty of time for that car to get out of your way?

A. Right."

After having reviewed the evidence of the various witnesses the learned trial judge stated:

" My review of the testimony of the various witnesses leads me to give great weight to the testimony of Gordon Russell, Mary Carmelita Peck and Constable

> Richard Burns. I give little weight to the testimony of Kenneth LeBlanc, Susan LeBlanc and Patricia Lawless who, in my opinion, were not paying much attention prior to the moment of the collision...."

In his decision the learned trial judge never actually made a finding as to where the point of impact was, however, it appears he had focused on Mrs. Peck's initial evidence that the MacNeil vehicle was in the process of turning into the western lane and was starting to move in the direction of Sydney. This would put the point of impact further to the west than the point where she eventually marked the X as the point where the front of the MacNeil car was located at the time it was hit in the side by the Gillis vehicle.

I also agree with Justice Matthews that the learned trial judge failed to ask himself whether the Gillis vehicle was so close to the intersection as to cause an immediate hazard which would have required Mr. MacNeil to yield to the Gillis vehicle. The learned trial judge simply focused on the fact that MacNeil had stopped before entering the intersection. As Justice Matthews points out it was Mr. MacNeil's duty under the **Motor Vehicle Act** to, not only stop, but to yield if the Gillis vehicle was an immediate hazard. The learned trial judge does not appear to have considered this issue.

Therefore, there is both a palpable error in fact finding and an error of the law that allows this Court to consider if the learned trial judge erred in his apportionment of fault. I have concluded that despite these errors the learned trial judge did not err in his conclusion on the fault issue. He found the testimony of Mrs. Peck deserving more weight than that of the occupants of the LeBlanc vehicle. He had an opportunity to assess the evidence of these witnesses. I have reviewed the evidence. In my opinion, the learned trial judge was justified in attaching little weight to the evidence of Mr. and Mrs. LeBlanc and Ms. Lawless. There is sufficient evidence to warrant his conclusion that they were not paying full attention to the traffic proceeding from the south.

Mrs. Peck had testified she was proceeding within the 70 kilometre speed limit when the Gillis vehicle passed her at a speed of 70 - 75 miles per hour. She testified that Mr. MacNeil had lots of time to cross in front of her. From the trial judge's summary of Mrs. Peck's evidence it is clear that he was conscious of her testimony on this point. The learned trial judge found Mr. Gillis solely at fault. I am satisfied that Mrs. Peck's evidence, that the MacNeil vehicle had lots of time to cross in front of her, is sufficient to support the learned trial judge's conclusion. The trial judge accepted her evidence. Based on her evidence there was not an immediate hazard to which Mr. MacNeil had to yield when he pulled out from the stop sign. The excessive speed and recklessness of Mr. Gillis as testified to by Ms. Peck and Gordon Russell supports the trial judge's finding that Mr. Gillis was the sole cause of the accident. I would not vary the apportionment of fault. I agree with Justice Matthews on the consent issue.

Judgment Recovery N.S. Limited has appealed the award of damages for loss of financial support to the widow and child of the deceased. The court reached a consensus on the issue of damages and it was agreed that I would write on this issue.

The award was made pursuant to the **Fatal Injuries Act**, R.S.N.S. 1989, Chapter 163. **Section 5** of the **Act** is relevant; it provides as follows:

> " 5 (1) Every action brought under this Act shall be for the benefit of the wife, husband, parent or child of such deceased person and the jury may give such damages as they think proportioned to the injury resulting from such death to the persons respectively for whose benefit such action was brought, and the amount so recovered, after deducting the costs not recovered, if any, from the defendant, shall be divided among such persons in such shares as the jury by their verdict find and direct.
>
> (2) In subsection (1), "damages" means pecuniary and non-pecuniary damages and, without restricting the generality of this definition, includes

> (a) out-of-pocket expenses reasonably incurred for the benefit of the deceased;
>
> (b) a reasonable allowance for travel expenses incurred in visiting the deceased between the time of the injury and the death;
>
> (c) where, as a result of the injury, a person for whose benefit the action is brought provided nursing, housekeeping or other services for the deceased between the time of the injury and the death, a reasonable allowance for loss of income or the value of the services; and
>
> (d) an amount to compensate for the loss of guidance, care and companionship that a person for whose benefit the action is brought might reasonably have expected to receive from the deceased if the death had not occurred.
>
> (3) In assessing the damage in any action there shall not be taken into account any sum paid or payable on the death of the deceased, whether by way of pension or proceeds of insurance, or any future premiums payable under any contract of assurance or insurance.
>
> (4) In an action brought under this Act where funeral expenses have been incurred by the parties for whose benefit the action is brought, damages may be awarded for reasonable necessary expenses of the burial of the deceased, including transportation and things supplied and services rendered in connection therewith."

The deceased husband was a 28 year old self-employed mechanic at the date of his death on June 29, 1987. His wife was about two years older and her son was 9 years of age. The trial judge found that the deceased had been employed until 1981 as a heavy duty mechanic earning $250 a week; the company for which he worked went bankrupt. He then

drew unemployment insurance for approximately one year. He was unable to find steady employment. Since then he operated a business of repairing and maintaining cars from his home. Mrs. MacNeil made a guesstimate that he earned approximately $200 to $250 per week net after paying expenses. Mrs. MacNeil was, at the date of her husband's death and still is, a nursing assistant. She earns $20,000 a year. She testified that they did not go out very much and that her deceased husband spent a lot of time on home maintenance, making meals, cleaning the house and shopping for groceries, etc. Her son Jason had a very close relationship with the deceased. At the time of the trial he was 16 years of age and in Grade 9. The trial judge found that the deceased did not keep any records of his business or his income; he did not file income tax returns.

In his decision the learned trial judge, after making the aforesaid findings of fact, made reference to the cases of **Morrell-Curry v. Burke** (1989), 92 N.S.R. (2d) 402 and **Campbell et al. v. Varanese** (1991), 102 N.S.R. (2d) 104. Counsel for both parties had cited these cases to him; he concluded "the two cases are very helpful in furnishing appropriate guidance for setting the amounts of awards in the present case." The learned trial judge went on to award the widow Rosita MacNeil $22,000 as compensation for loss of guidance, care and companionship and Jason $20,000 under the same head of damages. These awards have not been appealed.

The learned trial judge also made an award of $10,000 to Mrs. MacNeil for loss of her husband's services in maintaining the house and caring for Jason. This award is not under appeal nor is the award for special damages of $4,882.

In dealing with the award for loss of financial support the learned trial judge made reference to an actuary's report that had been filed by counsel for Mrs. MacNeil. The trial judge then stated:

> " This report contains useful information and

> calculations. However, as Ms. Gmeiner did not testify at trial, its contents are not fully explained."

I would note that certain aspects of the report are difficult to follow without explanation. There was no other actuarial evidence tendered at the trial. The parties had agreed that it would not be necessary for the plaintiff (Mrs. MacNeil) to call, Ms. Gmeiner. Accordingly, the formula for calculating loss of support as put forward by Ms. Gmeiner was opinion evidence upon which Mrs. MacNeil was asking the court to act. Apparently the appellant's counsel took no objection to use of that formula at trial; on this appeal he adopted it.

In his decision the learned trial judge reviewed the part of Ms. Gmeiner's report in which she made two different estimates of the income levels each of the MacNeils might have reached in each of the years 1987 to 1992. The learned trial judge then made reference to the formula Ms. Gmeiner used to determine the annual loss of financial support resulting from the death of Mr. MacNeil. That formula was set out in the decision, having been taken from the report, as follows:

> " For Rosita - 70% of net family income, less her own income;
> For Jason - 4% of the net family income."

The learned trial judge then stated:

> " In scenario 1, the loss of income calculated for Rosita would rise from $4,403 in 1987 to $5,151 in 1992; and for Jason, from $1,109 in 1987 to $1,393 in 1992. In scenario 2, the loss of income calculated for Rosita would fluctuate from $591 in 1987 to $594 in 1992; for Jason, it would rise from $891 in 1987 to $1,133 in 1992.
>
> In scenario 1, the actuary then makes three sets of calculations, each based upon an assumed possibility of marriage and divorce. Assuming no possibility of remarriage and divorce after the death of her husband, the total family loss is calculated to be $187,083; assuming a 50% possibility of remarriage and divorce, the figure is $123,714. Similarly, in

scenario 2, assuming no possibility of remarriage and divorce, the actuary calculated the total family loss to be $32,994; assuming a 50% possibility of remarriage and divorce, the calculated figure is $20,838; and assuming 100% possibility of remarriage and divorce, the figure is $25,920.

The actuarial report concludes that there could be a further contingency for the possibility that Billy might have become disabled if he had not died. That contingency could reduce the values otherwise calculated by approximately 4%.

The contents of the actuarial report represent an interesting and insightful review of the problems facing the Court. Unfortunately, the calculations are based upon assumptions which are not reflected in the evidence. The evidence discloses that Billy must have earned income prior to his death in order for his family to live in the manner which it did, but does not disclose the amount of his earnings.

The only concrete evidence is a single cheque stub showing payment of unemployment insurance benefits of $152 per week. But that cheque stub was for benefits paid in 1982, which is five years before the date of death. There is no evidence of earnings during that 5-year period when, for the most part, Billy was self-employed.

The only other evidence is the estimate of Rosita MacNeil that her husband earned approximately $200 to $250 per week during the period prior to his death. This estimate is unconfirmed.

But the evidence discloses that Billy contributed to the support of the household. The earnings of Rosita from her job as a nursing assistant were probably insufficient to enable the family to reside in its own home in the center of the City of Sydney. While it is true that the home was mortgaged, it is also true that it was necessary to make mortgage payments from the family income. The house had to be maintained, the family had to be fed and clothed, and as many as four cars owned by Billy were kept going. There is nothing in evidence to indicate the quantum of the family's expenses with respect to these items.

> It would not be fair to make no award, because that would indicate that Billy had no income. That is contrary to the evidence. It would be equally unfair to make an award based upon an assumption that he earned the highest possible estimated income or the same income he had earned from employment five years before his death or an estimated income based upon an assumption that he was earning only the minimum annual income while, in reality, he was a highly qualified mechanic.
>
> The best that the Court can do in the circumstances is to chose an arbitrary figure based upon what little evidence there is, while bringing to bear the Court's accumulated experience with respect to incomes and living expenses. The Court sets Billy's annual average income at $10,000 per year.
>
> From that figure must be deducted income tax at an estimated rate of 12.6%. Thus, his net after-tax income would be $8,740. I accept that 70% of this figure or $6,125 would be attributable to the support of his wife, and 4% of the gross family income or $950 would be attributable to the support of Jason.
>
> Both Billy and Rosita were quite young at the time of Billy's death. There exists a high probability that they would have divorced and remarried. Indeed, Rosita testified that she has now formed a new relationship but does not contemplate marrying again. One must also consider the possibility that Billy might have died at an earlier than normal age. In the actuarial report, the total joint life expectancy of both was stated to be 30 years. There is also the consideration that Billy, in the line of work which he followed, might have been injured before death or retirement. All of these contingencies must be taken into account by setting a negative contingency rate. That rate is hereby set at 50%.
>
> Based upon the foregoing factors and guided by the cases cited, the total loss of income applicable to Rosita is rounded and set at $117,000. The total loss of income applicable to Jason MacNeil is $9,100."

It is impossible to ascertain from the decision how the learned trial judge arrived at the amounts of $117,000 and $9,100 as appropriate awards for loss of financial support.

The appellant's position

The appellant submits that the learned trial judge made serious errors of law in calculating the loss of financial support. It is asserted that the learned trial judge failed to distinguish between loss of past financial support (up to the trial date) and loss of future financial support. As counsel points out, this must be done in order: (i) to calculate the amount of pre-judgment interest on loss of past financial support; and (ii) to capitalize an award for future loss of financial support. The learned trial judge simply made lump sum awards to each of the surviving wife and Jason. It is to be noted that the trial was held some seven years after the accident. Secondly, the appellant asserts that the learned trial judge did not apply the appropriate formula for calculating loss of future financial support.

In its notice of appeal the appellant stated that the trial judge erred in finding Mr. MacNeil earned $10,000 per year. However, in its factum counsel took the position that in light of the trial judge's finding of a 50% negative contingency factor the $10,000 figure would not be contested.

Counsel for the appellant takes the view that the trial judge accepted the formula set out in the actuary's report for the calculation of the loss of future financial support arising out of Mr. MacNeil's death but failed to apply it correctly.

There is not an express statement in the decision that the learned trial judge accepted this as the proper formula to apply in this case. However, it was the only formula before him. It was the same formula that was presented to the court in **Morrell-Curry v. Burke**, supra and applied by the court in that case. However, in **Campbell v. Varanese** the trial judge calculated the loss of future support as 70% of the deceased's net income. The trial judge did state that the two cases cited to him provided appropriate guidance in determining an award. He also stated that Ms. Gmeiner's Report contained "useful information and calculations". After calculating Mr. MacNeil's net after tax income he then

stated that he accepted that "70% of this figure or $6,125 would be attributable to the support of his wife." The actuary's report did not state that 70% of his net income would be available to support his wife. The actuary's Report stated that 70% of the net family income less the surviving wife's net income is the measure of the loss of support arising out of the death of the spouse. Expressed another way the loss of support is arrived at by deducting from the deceased's net income - 30% of the net family income. Presumably, this opinion evidence was put forward by the respondent as being credible. Nowhere in the decision does the trial judge indicate that he rejected this approach in favour of the approach taken by the trial judge in **Campbell v. Varanese**.

The appellant's counsel, based on information in the actuary's report as to the appropriate income tax rates to be applied to the approximate income of $10,000 per year for Mr. MacNeil and $20,000 per year for Mrs. MacNeil, as found by the trial judge, calculates their net (after tax) income as follows:

	MacNEIL	R O S I T A	M a c N E I L	TOTAL
GROSS INCOME	$10,000.00	$20,000.00		$30,000.00
LESS TAX	(1,260.00)	(4,820.00)	(6,0800)	
NET INCOME	$8,740.00	$15,180.00		$23,920.00

By applying the actuary's formula to calculate Mrs. MacNeil's annual loss of financial support arising from her husband's death the appellant's counsel comes up with the following:

" 70% of net family income, less Rosita MacNeil's own net income equals

her annual loss of support

70% X $23,920.00 - $15,180.00 = **$1,564.00 per year**"

Counsel argues that an annual loss of support in the amount of $1,564 given Mr. MacNeil's income is a more reasonable figure than the $6,125 the trial judge came up with in his decision. Applying the same formula to the loss of support by Jason MacNeil the appellant's counsel comes up with a figure of $956.80 per year.

The essence of counsel's argument is that the learned trial judge erred by simply taking 70% of Mr. MacNeil's net after tax income as being the loss of support by Rosita MacNeil. Counsel argues that the learned trial judge "forgot that the proper method of calculation as he had earlier set out in his decision was to (i) add the net incomes of MacNeil and Rosita MacNeil; (ii) calculate 70% of that figure; and (iii) then deduct Rosita MacNeil's net income."

Counsel's argument is persuasive. It would appear from the decision (although it is not conclusive) that the trial judge intended to apply the formula but did not. However, the method he used (70% of the net income of Mr. MacNeil) as the annual loss of support would not be inconsistent with the approach taken in **Campbell v. Varanese** and by the Ontario Court of Appeal in **Nielsen et al. v. Kaufmann**, (1986) 13 O.A.C. 32, although there is no reference to the latter decision by the learned trial judge. A similar approach has been taken in cases in England and in Superior Courts in Canada (See **Cookson v. Knowles**, [1978] 2 W.L.R. 978(H.L.); **Harris v. Empress Motors Ltd.**, [1984] 1 W.L.R. 212 (C.A.); **Braun v. Roy** (1957), 22 W.W.R. 609 (Man. Q.B.); and **Davies v. Robertson** (1984), 5 O.A.C. 393 (C.A.)).

It is a matter of considerable speculation as to exactly what the trial judge did even if one uses 70% of the deceased's net income as the measure of Mrs. MacNeil's loss of support. I have not been able to ascertain how the trial judge arrived at the figure of

$117,000 for the widow's loss of financial support nor have any of the counsel who appeared in this case been able to assist the court in this respect other than the respondent's counsel's submissions that the learned trial judge apparently looked at awards in other cases and came up with an award that the trial judge considered reasonable. There is no indication in the decision that the trial judge took the accepted steps taken by courts in calculating an award for loss of support in fatal injuries cases. For example, there is no indication in the decision as to how the learned trial judge arrived at a capitalized sum that would provide the annual payment of $6,125 nor if he grossed up the award to look after the increased taxes that Mrs. MacNeil would have to pay because of the award.

I have done some rough calculations using an annual loss of dependency of $6,125 for a period of 30 years and applying appropriate actuarial tables at a discount rate of 2.5% to arrive at a capitalized sum as the basis for an award. I have grossed up that sum by 23% to look after the increased income tax that would result from the award and applied a 50% negative contingency factor as decided on by the trial judge. I assume Mr. MacNeil would not have a pension nor other income after age 65; there was no evidence to support such a conclusion. In short, even applying the method apparently used by the trial judge I cannot get the award to Mrs. MacNeil up to $80,000 let alone $117,000.

Rather than send the case back to the Supreme Court for reassessment of the damages, counsel for the appellant submits that this Court should make the necessary calculations by applying the formula proposed in the actuarial report. As noted, by applying this formula one comes up with an annual loss of support for Mrs. MacNeil in the amount of $1,564. Counsel points out that by the time of the hearing of this appeal seven and a half years will have passed since the death of Mr. MacNeil on June 29, 1987. Therefore, he calculates the award for loss of <u>past</u> financial support at $11,730 to which would be applied pre-judgment interest which the trial judge fixed at 8% and as the loss occurred over a period

of time the interest must be multiplied by a factor of one-half. Similarly, counsel calculates the annual loss of past financial support for Jason at $956, and on the same basis, calculates the award for this part of the claim at $7,176 plus pre-judgment interest.

With respect to the assessment of loss of future financial support, based on the learned trial judge's finding that the total joint life expectancy of the MacNeils during which the deceased would be earning income was 30 years and that since one year has passed since trial, that period should now be considered to be 29 years.

Counsel for the appellant points out that with respect to Jason MacNeil the learned trial judge did not set out any period of dependency; counsel submits that it would be reasonable to assume that Jason's dependency would cease at age 20.

I would note that the actuary had used age 22 being the date one might expect Jason to finish university. The Supreme Court of Canada in **Lewis v. Todd**, [1980] 2 S.C.R. 694 in dealing with a dependency claim for a child approved at p. 702 the termination of dependency for a child in that case at 18 years of age.

In capitalizing the loss of future support, that is putting it in present dollar terms, counsel would apply a discount rate of 2.5% per annum as required by **Civil Procedure Rule 31.10(2)**. Using current present value annuity tables and a discount rate of 2.5% the annual payment of $1564 per year for a period of 29 years must be multiplied by a factor of 20.4535 to determine the present or, as it is sometimes expressed, the capitalized value of the annual loss of support. The resulting sum if prudently invested would replace her annual loss of $1,564 for a period of 29 years. This results in a figure of $31,989.27 as the capitalized value of Mrs. MacNeil's future loss of support. Similar calculation with respect to Jason MacNeil's loss of future support results in a capitalized figure of $5,270.15. Counsel then uses the actuary's report to determine the necessary tax gross up figure which must be applied to look after the increased income tax that will be payable by Mrs. MacNeil by reason of the income

earned on the award. He estimates her tax rate would be 23%. This would increase the award to $39,346.80. He then takes the final step and reduces the award by 50% for contingencies as found by the trial judge and comes up with the following proposed awards for loss of financial support:

" Jason MacNeil

Past Loss $7,176.00 x 50% = **$3,588.00**

Future Loss $5,270.15 x 50% = **$2,635.08**

Rosita MacNeil

Past Loss $11,730.00 x 50% = **$5,865.00**

Future Loss $39,346.80 x 50% = **$19,673.40**"

These proposed awards are a far cry from the trial judge's awards of $9,100 and $117,000 to Jason and Mrs. MacNeil respectively.

Mrs. MacNeil's Position

Counsel for Mrs. MacNeil, while agreeing that the learned trial judge did not apply the actuarial formula set forth in Miss Gmeiner's Report, argues that the courts are not bound to slavishly follow actuarial calculations in determining an appropriate award for loss of financial support pursuant to the **Fatal Injuries Act** and that on the facts of this case it was reasonable for the trial judge to conclude that 70% of the deceased's net after tax income was applied to the support of Mrs. MacNeil and thus lost to her on his death.

Although it does not appear to be the position he took at trial where the formula of Ms. Gmeiner's Report was advanced as the proper method of determining the award for lost support, on this appeal he relies on the decision of the Ontario Court of Appeal in **Nielsen et al. v. Kaufmann**, supra. In that case the court was dealing with a two income family; the Court found that 60% of the deceased's income was used for the support of his wife as the

proper approach to determining the level of dependency.

He therefore argues that it was appropriate for the trial judge to consider the loss of annual support as a percentage of Mr. MacNeil's net income. In support of his argument that a high percentage (70%) of the deceased's income went to support Mrs. MacNeil he relies on the following findings of the trial judge at page 13:

> " Their relationship was very good. They had many friends, but did not go out often. He did a great deal of work around the house and carried out home maintenance and repairs, fixed the furnace, made meals, cleaned the house, and shopped for groceries. He stayed home a great deal with Jason, especially when Rosita went to work. She was devastated by Billy's death."

And at page 15:

> " Billy made a substantial contribution to the household from his income and from his expenditure of personal time and effort."

Counsel for Mrs. MacNeil submits that the learned trial judge considered awards in other cases with somewhat similar facts and arrived at awards which we should not disturb.

I would note that in **Campbell et al. v. Varanese**, supra, a judge of the Supreme Court of Nova Scotia awarded the sum of $149,000 for loss of financial support to a 28 year old widow arising out of the death of her husband. In **Campbell et al. v. Varanese** there was really only one wage earner and his level of wages was extremely low. In such circumstances it was not unreasonable that 70% of the net income would go to the support of the family and hence lost by the death of the income producer. In that case the actuary, Mr. Paul Conrad, assumed that slightly less than a quarter of the family income was devoted exclusively to the use of the deceased. On appeal this Court concluded that the award was so manifestly high as to warrant a reduction to $115,000 as the proper measure of Mrs. Campbell's loss of future support.

In **Frank v. Cox** (1988), 84 N.S.R. (2d) 370 the widow of a 42 year old taxi driver

who had contributed about $250 per week to family expenses was awarded $197,000 for dependency loss arising out of his death. In my opinion the award in **Frank v. Cox** was on the high side. This was due to the trial judge's failure to recognize that part of the $250 per week the deceased had provided to his wife was spent on the deceased for food, shelter, etc. The award was high because such a large sum ($13,000) in relation to the deceased's income was determined to be the widow's annual loss of support. The deceased was the principal income earner; the widow's annual income was in the $3,000 to $4,000 range. The award was generous but it was not appealed.

In **Morrell-Curry** a sum $60,000 was awarded for loss of the benefit of future financial support for the widow applying the same formula as used by the actuary in the case we have under consideration. I would note in **Morrell-Curry** that the income of the deceased was substantially less than that of his surviving spouse.

Disposition of Appeal

In **Campbell et al. v. Varanese** the issue on appeal was the quantum of damages; the same issue that is before us. The law is straight forward and was expressed by Chipman J.A. in **Campbell et al. v. Varanese** as follows:

> " Since most of the issues turn on the quantum of damages, I address the principles governing appeals from such awards. In **Sparks v. Thompson** (1974), 1 N.R. 387; 6 N.S.R 481, Ritchie, J., for the Supreme Court of Canada referred at p. 490 to the following statement of Viscount Simon in **Nance v. British Columbia Electric Railway Company Limited**, [1951] A.C. 601, at 613:
>
> > '...before the appellate court can properly interfere, it must be satisfied either that the judge, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one); or, short of this, that the amount awarded is either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.'
>
> As well, findings of fact by the trial judge stand unless there was a palpable or overriding error on his part; **Stein Estate v. Ship "Kathy**

> **K"**, [1976] 2 S.C.R. 802; 6 N.R. 359; 62 D.L.R. (3d) 1. Further, a conclusion of law on the part of the trial judge must be shown to be erroneous; **Ward v. Beauchamp** (1988), 87 N.S.R. (2d) 263; 222 A.P.R. 263, at 265."

The learned trial judge made an overriding error in his interpretation and application of the expert actuarial evidence presented to him. Therefore we can either send the matter back to the Supreme Court for re-assessment or assess damages based on the record. This Court has the power to assess damages in these circumstances. (**Smith v. Stubbard** (1993), 117 N.S.R. (2d) 118 at paragraph 67). In my opinion we ought to assess the damages given the long delays in this proceeding.

In **Keizer v. Hanna and Buch**, [1978] 2 S.C.R. 342 Dickson J. at p. 351 stated that assessment of damages to be paid to a surviving spouse is largely an exercise of business judgment. The surviving spouse is entitled to an award of such an amount as will ensure the comforts and station in life which would have been enjoyed but for the untimely death of the spouse. A court must determine what amount of capital will provide a monthly sum "at least equal to that which might reasonably have been expected during the continued life of the deceased". Dickson J. went on to state at p. 352:

> " The proper method of calculating the amount of a damage award under *The Fatal Accidents Act* is similar to that used in calculating the amount of an award for loss of future earnings, or for future care, in cases of serious personal injury. In each, the Court is faced with the task of determining the present value of a lump sum which, if invested, would provide payments of the appropriate size over a given number of years in the future, extinguishing the fund in the process. This matter has been discussed in detail in the decisions of this Court in *Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 229; Thornton v. The Board of School Trustees of School District No. 57 (Prince George), [1978] 2 S.C.R. 267;* and *Arnold v. Teno*, [1978] 2 S.C.R. 289 which are being delivered with the decision in the present case."

These are the principles to be applied in our assessment.

There was evidence that Mr. MacNeil was earning about $200 to $250 a week. The trial judge stated that this evidence was not confirmed. There were no income tax returns available as Mr. MacNeil apparently did not file income tax returns. However, the trial judge's finding that he earned $10,000 per year is sustainable given the evidence of his surviving spouse that this was his level of earnings just prior to his death. That he had income is supported by the lifestyle of the family, the absence of significant debt and the fact that Mrs. MacNeil was earning only $20,000 per year. Obviously there was a substantial amount of money coming from some source other than Mrs. MacNeil's employment. I would not disturb this finding of the trial judge as he had an opportunity to evaluate Mrs. MacNeil's credibility. He obviously accepted her evidence despite his statement that the estimate of Mr. MacNeil's income was not confirmed.

A review of the decision indicates that the learned trial judge did not disagree with Ms. Gmeiner's methodology, only her assumption as to the level the MacNeils' family income would have reached in the five year period subsequent to his death.

In the absence of other expert actuarial evidence Ms. Gmeiner's method of calculating the loss of support is a reasonable basis upon which to start the process of determining what might be an appropriate award; this is not to say that this method is the only method upon which such awards should be calculated. As noted in other jurisdictions courts have held that the loss of support can be calculated simply as a percentage of the deceased's net income. However, when one considers that Mr. MacNeil only earned $10,000 per year it is totally unrealistic to assume his living expenses were less than $2,700 which is the result if one takes 70% of his after tax income as having been exclusively available to support Mrs. MacNeil. On the other hand the formula used by Ms. Gmeiner has an air of reality to it. In families where there are two bread winners and incomes are pooled, as in this case, it is a reasonable assumption that each spouse benefits equally from the total net family income.

Spouses in such relationships do not maintain different standards of living commensurate with their respective incomes. It is not realistic to think that the spouse who earns $20,000 a year eats chicken while the lower paid spouse at the same table eats Kraft Dinner. Nor is it reasonable that the higher income earner goes to a movie or sports event while his or her spouse sits on a park bench in shabby clothing feeding the pigeons. The reality is that two spouses pooling their incomes likely maintain a comparable standard of living. This is reflected in the approach taken by Ms. Gmeiner.

The spouse earning the greater income is, in effect, subsidizing the lower income earner and thus if the lower income earner dies the surviving spouse does not have that expense. In cases such as this where the surviving spouse earned the greater income of the two spouses awards are going to be lower than in cases such as **Frank v. Cox** where the deceased earned by far the greater income. This case is more like the situation in **Morrell-Curry** where the deceased earned the lower income. Consequently awards for loss of financial support will vary even if the ages of the parties in the cases are somewhat similar.

In **Nielsen v. Kaufmann**, supra, the Ontario Court of Appeal calculated that 60% of the deceased wife's net income was the appropriate measure for the loss of annual support. The trial judge had used a conventional figure of 70%. Accordingly, the Court reduced the award. In the **Kaufmann** case the court stated:

> " The trial judge opened his discussion of "dependency" by stating that conventional wisdom is to take the net income and allot 70% to the surviving spouse and 4% to each child. He concluded that the deceased was a thrifty, intelligent manager of the household finances and spent little on herself and he allotted 70% to her spouse. ...
>
> The fact that there are two "breadwinners" in the family skews the applicability of the "conventional" principle and figures somewhat. Those figures are based on a male breadwinner as the sole support of the family. The trial judge does not appear to have considered how the "conventional" figures might be affected when there is a two-wage earner family. It must be assumed that in such families some portion of the husband's income goes to the wife or vice versa. That portion remains

> with the survivor. The appellant's expert, Dr. Segal, was of the view that in a two-wage earner family the deceased would consume 30% of the total family income of husband and wife. The deceased would be partially dependent on the income that the surviving spouse is receiving and, therefore, there is an offset of that amount which the surviving spouse is no longer paying and for which "credit" should be given. Counsel for the appellant submits that in such families the appropriate dependency percentage should be 50% rather than 70%."

The opinion of Dr. Segal, that in a family with two income earners, the deceased would consume 30% of the family net income is consistent with the assumptions and methodology of the actuary Paul Conrad who gave evidence in the **Morrell-Curry** case. Mr. Conrad stated in his report, as quoted in **Morrell-Curry** at p. 404:

> " Many families do not maintain detailed records of family expenditures, particularly with respect to individual family members. Thus, in determining what proportion of the Curry's family income was used for Mr. Curry's personal expenses, we have made use of broad statistics relating to the total population.
>
> In using average family expenditure statistics to assess the distribution of family income, we have first determined that the average family consisting of two adults spends about 34.3% of their net income on shelter, household operations, and household furniture and equipment. This figure is derived from the Statistics Canada publication, **Family Expenditure in Canada 1982**.
>
> After accounting for shelter, household operations, and household furniture and equipment, 65.7% of net family income remains for the personal use of family members. In the absence of information to the contrary, we have assumed that each of Mr. & Mrs. Curry would have used 50% of the 'personal use' funds, or 32.85% of net family income.
>
> Therefore, Mrs. Curry's loss of financial support would total 67.15% (i.e. 34.3 + 32.85) of net family income, less her own after tax income. Alternatively, and perhaps more clearly this can be expressed as Mr. Curry's net income less his personal expenses of 32.85% of total net family income."{emphasis mine}

This is the formula used by Ms. Gmeiner in the case we have under appeal. I would also note that in **Campbell v. Varanese**, supra, the trial judge found that the actuary's assumption that slightly less than one quarter of the net family income was devoted exclusively to Mr.

Campbell's use reflected the same concept as to loss of dependency. In my opinion where both spouses have income the assumptions as to how net family income is expended by the family and the methodology as used by Mr. Conrad in **Morrell-Curry** and Ms. Gmeiner in the case we have under consideration is likely to produce more realistic and therefore more reasonable results than the approach taken in **Nielsen v. Kaufmann**, supra, and in the other cases I have referred to earlier in this decision.

As a general rule, and in the absence of evidence to the contrary, in two income families where the incomes are pooled each spouse would spend approximately 30% of net family income for their respective personal usage. Therefore, it is reasonable that in most cases such a sum be deducted from the deceased spouse's net income as a start to determining the amount of support lost to the surviving spouse.

I am of the opinion that the learned trial judge erred by failing to properly consider and apply the only relevant opinion evidence before him. He also erred in law by failing to make an award for loss of past support up to the date of trial distinct and separate from the award for loss of future support as dictated by the decision in **Cookson v. Knowles**, supra, and applied by the courts in Canada since the decision of the Ontario Court of Appeal in **Fenn v. City of Peterborough**, [1981] 2 S.C.R. 613.

With two exceptions, I agree with the approach and calculations of the appellant's counsel with respect to the assessment of damages for loss of future support. First, while the statistical approach taken by Ms. Gmeiner is the proper approach to calculation of loss of support in a two family income, the judge hearing the case must make a business judgment upon a consideration of all the facts as to whether the loss of annual support as calculated by the actuarial formulas put forward produces a reasonable result in a given case. I say this because if one of the income earners dies in a two income family his or her income has been lost in its entirety. It is a matter of long accepted common sense that two can live more

cheaply and maintain a better standard of living than if each was living alone. This proposition takes on even more significance in lower income families.

In this case the reduction in the standard of living of Mrs. MacNeil will be significantly greater than is reflected by an annual expenditure of $1,564 even though Mr. MacNeil was, in effect, being subsidized by Mrs. MacNeil's greater income. His after tax income was estimated at $8,740. As noted, other courts have simply applied a percentage of the deceased's after tax income as determinative of the measure of the loss of support rather than using the more complex formula set forth by the actuary in this case and as referred to by the actuary in **Morrell-Curry** and by Dr. Segal in **Nielsen v. Kaufmann**. In my opinion it would not be reasonable in this case to consider anything in the 60 to 70 percent range as a proper measure of the loss of support to Mrs. MacNeil arising out of her husband's death. However, it seems to me that in a family that has a total gross income of $30,000 a loss of $10,000 of gross income has significantly greater impact on the family's standard of living than say a loss of $20,000 to a family that had a total family income of say $60,000. Although the percentage of lost gross income is the same in both examples, when one is dealing with lower income levels the loss of income has a greater impact on the surviving family than in the case of higher income families.

As noted by Dickson J., writing for the Court in **Lewis v. Todd**, supra, the award of damages is more than simply an exercise in mathematics. He stated at p. 708:

> " The award of damages is not simply an exercise in mathematics which a judge indulges in, leading to a "correct" global figure. The evidence of actuaries and economists is of value in arriving at a fair and just result. That evidence is of increasing importance as the niggardly approach sometimes noted in the past is abandoned, and greater amounts are awarded, in my view properly, in cases of severe personal injury or death. If the Courts are to apply basic principles of the law of damages and seek to achieve a reasonable approximation to pecuniary *restitutio in integrum* expert assistance is vital. But the trial judge, who is required to make the decision, must be accorded a large measure of freedom in dealing with the evidence presented by the experts. If the figures lead to

> an award which in all the circumstances seems to be inordinately high it is his duty, as I conceive it, to adjust those figures downward; and in like manner to adjust them upward if they lead to what seems to be an unusually low award."

Considering that Mr. MacNeil's income was only half that of Mrs. MacNeil she will have some savings from not having to subsidize his life-style. However, I do not feel that she lost as little as $1,564 annual support as a result of his death; that is inordinately low. I would fix the net loss of annual support at $2,500 income given that the MacNeils did not go out much and the deceased, in particular, stayed at home a great deal of the time. His personal expenses would be lower than normal for a family with a gross income of $30,000. In most lower two income families the death of one spouse and the consequential loss of that source of income will likely have a greater negative impact on the survivor's standard of living than would appear to be the case by strict application of the actuarial formula adduced in evidence in the Gmeiner Report.

I think it is at this point of determining what the annual loss of future support is that the court should exercise its judgment as to the reasonableness of the results arrived at from applying the actuarial calculations because once that sum is determined, apart from consideration of contingencies the resulting award is determined by somewhat inflexible actuarial and tax calculations.

I would calculate the present value of Mrs. MacNeil's future loss of annual support of $2500 by applying the discount rate of 2.5% for a period of 29 years by application of the present value tables set forth in **Litigation Accounting.. The Quantification of Economic Damages**, Barron Bolt & Rosen. Therefore, the present value is the annual loss of support ($2500) x 20.4535 resulting in the sum of $51,134. Grossed up by 23% to cover liability for income tax resulting from the increased annual income of Mrs. MacNeil by reason of the award results in a capitalized sum of $62,895 as the present dollar value of her loss of future

support.

I would calculate her award for past support as follows: $2500 x 7.5 (being the number of years since the date of death) = $18,750.

With respect to Jason I would calculate his loss of future support on the basis of 4% of net family income as set out in Ms. Gmeiner's report using the same present value tables and a discount rate of 2.5%. The calculations are as follows: 4% of $23,920 = $956.80 x 5.5081 = $5,270.15 as his loss of future support to age 20. There is no need to gross this up to take account of income tax.

I would calculate the amount of Jason's loss of past support from the date of death, June 29th, 1987, to December 1994 - 7 1/2 years by multiplying $956.80 x 7.5. This results in a sum of $7,176.

The second exception I take to the calculations made by the appellant's counsel respects the trial judge's finding that the grossed up capitalized sum required to provide Mrs. MacNeil with replacement of the annual support she would have received from Mr. MacNeil had he not died should be reduced by 50% to recognize contingencies, including the probability of divorce and Mrs. MacNeil's remarriage. In my opinion the learned trial judge appears to have misinterpreted the statistical evidence as contained in Ms. Gmeiner's Report on this issue. At p. 6 of her Report she stated:

> " Contingencies of Marriage Breakdown and Remarriage
>
> Presumably, financial support for the MacNeil family deriving from Mr. MacNeil's income as outlined in the following section would have continued only in the event that Mr. and Mrs. MacNeil remained married. Therefore, one should make some allowance for the possibility that the MacNeils may have divorced, had Mr. MacNeil survived. However, the use of Canadian divorce statistics may not be entirely appropriate, since the probability of divorce depends upon many individual factors; for example, the strength of the marriage, duration of the marriage, presence of dependent children, religion and cultural background, to name a few of these factors.
>
> Therefore, in our report, we show present value calculated with mortality

> and interest only, and also with 50% of the most recent Statistics Canada divorce rates as well as 100% of these rates (plus applicable remarriage rates; see following paragraphs).
>
> Similarly, the possibility exists that Mrs. MacNeil may remarry and that her new husband may provide financial support at the same or greater level than her late husband. Here again, the use of Canadian remarriage statistics may not be entirely appropriate to use to make allowance for this contingency, since the probability of remarriage depends on the age of the widow, the presence of dependent children and so forth. In addition, Mrs. MacNeil may have no intention of remarrying.
>
> Therefore in our report, we show present value calculated with interest and mortality only, with 50% of the most recent Statistics Canada remarriage rates, as well as 100% of these rates (plus applicable divorce rates; see preceding paragraphs).
>
> Remarriage and divorce rates have not been used in calculating the present value of the financial loss for the dependent child."

In her report, after application of her formula to determine the annual loss of support based on certain assumptions respecting the anticipated earnings of Mr. and Mrs. MacNeil in 1992, Ms. Gmeiner stated at p. 15:

> " Please note that all the aforementioned schedules were calculated with no probabilities of remarriage or divorce. Present values including the contingencies of remarriage and divorce at 50% of the Statistics Canada aggregate rates would reduce the present values otherwise calculated by 23.8%. The corresponding reduction with inclusion of 100% of the Statistics Canada rates would be 41.0%."

In scenario 1 Ms. Gmeiner calculated the loss of annual support for Mrs. MacNeil in 1992 at $5,151 and in scenario 2 at $594. These widespread results are caused by application of an overly optimistic set of assumptions respecting anticipated income levels in scenario 1 and a too modest set of assumptions of income levels in scenario 2.

In his decision the learned trial judge stated at p. 17:

> " In scenario 1, the loss of income calculated for Rosita would rise from $4,403 in 1987 to $5,151 in 1992; and for Jason, from $1,109 in 1987 to $1,393 in 1992. In scenario 2, the loss of income calculated for Rosita would fluctuate from $591 in 1987 to $594 in 1992; for Jason, it would rise from $891 in 1987 to $1,133 in 1992.

> In scenario 1, the actuary then makes three sets of calculations, each based upon an assumed possibility of marriage and divorce. Assuming no possibility of remarriage and divorce after the death of her husband, the total family loss is calculated to be $187,083; assuming a 50% possibility of remarriage and divorce, the figure is $123,714. Similarly, in scenario 2, assuming no possibility of remarriage and divorce, the actuary calculated the total family loss to be $32,994; assuming a 50% possibility of remarriage and divorce, the calculated figure is $20,838; and assuming 100% possibility of remarriage and divorce, the figure is $25,920."

A review of the schedules to her report shows that by application of 50% of Statistics Canada percentage rates respecting divorce and remarriage results in a reduction of the present value of the loss of support by 23.8%. If 100% of Statistics Canada's percentage rates respecting divorce and remarriage are considered the reduction for this contingency results in a reduction of the award by 41%. Ms. Gmeiner was not referring in her Report to a "50% possibility of remarriage and divorce" as stated by the trial judge but 50% or one-half of the percentage rate as found by Statistics Canada for divorce and remarriage in Canada and an alternative calculation using 100% or full Statistics Canada percentage rates for divorce and remarriage. In giving an example that applied 50% of the Statistics Canada percentage rates for divorces in Canada, Ms. Gmeiner was, no doubt, trying to assist the court in showing to what extent an award would be reduced if the court came to the conclusion there was less of a chance for divorce and remarriage with respect to the MacNeils than the national statistics would show as the percentage of marriages that end up in divorce and the spouses remarry.

In dealing with the issue of contingencies the operative part of the decision the learned trial judge stated:

> " Both Billy and Rosita were quite young at the time of Billy's death. There exists a high probability that they would have divorced and remarried. Indeed, Rosita testified that she has now formed a new relationship but does not contemplate marrying again. One must also consider the possibility that Billy might have died at an earlier than normal age. In the actuarial report, the total joint life expectancy of both was stated to be 30 years. There is also the consideration that Billy, in the line of work which he followed, might have injured before death or

> retirement. All of these contingencies must be taken into account by setting a negative contingency rate. That rate is hereby set at 50%."

The fact that the MacNeils were young when married is generally recognized as a factor that increases the possibility of divorce. On the other hand, the evidence indicated that they had a stable union. The fact that Mrs. MacNeil has formed a new relationship since the death of her husband does not indicate it was more likely that the MacNeils would have divorced had he not been killed. Her evidence that she does not intend to remarry is relevant and a factor which would bring the probability of remarrying well below the statistical average. While there is the possibility that Mr. MacNeil might have died earlier than the date of his statistically calculated death there is nothing in the evidence respecting the state of his health that would dictate a life expectancy that would be outside the norm as determined by Statistics Canada. The actuarial report did state that the joint life expectancy of the spouses was 30 years. However, Ms. Gmeiner subsequently forwarded a letter which was introduced in evidence at trial that the report was in error and that it should have stated that the joint life expectancy of the spouses was 36 years rather than 30 years. This fact does not appear to be of any great significance as all the calculations are based on the expected duration of the parties' working life; that is to age 65. I am sure many of the problems the trial judge had with the actuarial evidence could have been avoided if Ms. Gmeiner had been in court to explain her calculations rather than leave it to the trial judge to try to fill in the blanks. This is particularly so with respect to the statistical evidence respecting divorce and remarriage in Canada. Without an explanation this aspect of the report is difficult, if not impossible, to interpret.

In stating that Mr. MacNeil might have been injured in his line of work before death or retirement I assume the learned trial judge was not speaking of his car repair business but the fact that he was involved in racing cars. In my mind this is an insignificant factor as his

involvement in drag racing was more in the nature of a hobby.

Is the 50% reduction for contingencies a finding of fact by the trial judge that cannot be disturbed by this court unless palpably wrong? In my opinion it is not in the nature of a finding by a trial judge that a car was travelling at a speed of 75 miles per hour based on testimony of witnesses who observed the car. The fixing of a percentage for the contingency reduction is a matter of judgment based to a considerable extent on what has to be categorized as speculation although the courts tend to make statements that in establishing a contingency percentage to be applied to an award courts must act on evidence and probabilities (**Lewis v. Todd**, supra, at p. 714).

In determining what might be a reasonable percentage this court is not at a disadvantage, vis-a-vis, its position with that of the trial judge as on this issue little turns on the assessment of witnesses' credibility. In reducing the award by 50% the trial judge may have been influenced by his apparent misinterpretation of Ms. Gmeiner's Report dealing with the statistical probabilities of divorce and remarriage and how this contingency would affect any award made. The trial judge indicated that because of their age there was a high probability of divorce and remarriage but this would result in a reduction based on full application of the Canadian statistics of 41%. There is no indication that the trial judge gave consideration to the fact that the MacNeils appeared to have a stable marriage.

The appellant did not appeal the trial judge's specific finding of a 50% reduction of the present value of the loss of support for obvious reasons; it is an extremely high reduction of the present value of the loss of support. Nor did Mrs. MacNeil for an equally obvious reason; she obtained an award that was substantially greater than an award calculated on the basis of the actuarial evidence tendered on her behalf. However, the appellant invited this court to properly assess the damages as the trial judge, in his opinion, failed to do so. I have concluded that this court, having embarked on the reassessment course, must consider all

relevant issues including what might be an appropriate reduction for contingencies. In my opinion the evidence on the contingency issue does not support the trial judge's decision to reduce the award by 50%. I would note that the appellant's counsel stated that he had dropped his appeal point that the trial judge erred in finding Mr. MacNeil's income was $10,000 per year because the trial judge had set a contingency reduction of 50%. I would only state that even had the appellant pursued this point the result would have been the same as in my opinion there was sufficient evidence to support the trial judge's finding that Mr. MacNeil did have an income of $10,000 per annum.

The statistics as to the probability of divorce by Canadian couples at some point in their marriage are of some, but limited, use in trying to determine what percentage reduction should be made for contingencies in an award arising out of a fatal accident were a spouse is killed. The statistics, at least as presented in this case, do not assist in determining when, for instance, the MacNeils might have divorced. Would it have been in 1990, 1993, 1997, 2006 or 2010 or what the effect of such a divorce on Mrs. MacNeil's standard of living might be. Nor do the statistics assist in determining when Mrs. MacNeil might remarry. Therefore it is impossible to ascertain when a divorce might possibly have put an end to the level of support the surviving spouse benefited from by being married to the deceased nor do the statistics help to any extent in determining when by remarrying she might again be supported and whether to a lesser or greater extent than she was supported by the deceased. We do not know if the statistics cover all persons married in Canada over the past 20, 30, 40 or 50 years or if they apply to Canadians in a particular age group. We simply do not know enough to fully assess the value of the information in the Report. Therefore, the averages for divorce and remarriage of married couples as presented to the court are of little assistance in determining an appropriate reduction for contingencies in this case.

I am not aware of any decision in which a court has considered whether the plaintiff

or the defendant has the onus of proof on the issue of contingencies. Clearly the plaintiff has the onus of establishing by evidence the capital sum that will be necessary to provide the surviving spouse with an income stream to replace the support the surviving spouse would have received from her deceased spouse but for his or her untimely death. Insofar as contingencies must be considered the plaintiff has a burden to establish that the award should not be reduced for contingencies or that the reduction should be in the low range. But if a defendant asserts that the award be significantly reduced for the "contingencies of life" it would seem to me that the persuasive burden on this issue would be on the defendant.

In virtually all cases awards are reduced rather than increased for contingencies. However, little is ever stated in the decisions as to how a particular percentage reduction was determined by the trial judge.

A review of the numerous awards made by Canadian courts in fatal injuries cases over the past decades as set out in **Goldsmith's Damages for Personal Injuries and Death in Canada**, 1935-1994, Volume 4 discloses that only one case was a reduction of 50% for negative contingencies made by a court. This was in **Haines v. Bellissimo** (1977), 18 O.R. (2d) 177 (Ont. H.C.). In that case the deceased was a 43 year old with suicidal tendencies. The learned trial judge reduced the award by 50% because of his continuing chronic illness and the possibility of it affecting his work and/or life.

In **Personal Injury Damages in Canada**, 1981, Cooper Stephenson and Saunders, the authors state at p. 449 that the acceptable range of reduction in Canadian cases is between 10% and 25% although, as the authors point out, some cases exceed this. The authors also state that most judges give little weight to the contingency of family breakdown including divorce (p. 451). With respect to the contingency of remarriage for the surviving spouse as a mitigating factor the courts are equally imprecise as to how this is factored into the determination to reduce the award by a particular percentage. In England remarriage is no

longer a factor to consider in a claim by a widow but it is in a claim by a widower. The amendment to the fatal injuries legislation in England was in response to the plea of Phillimore J. in **Buckley v. John Allen & Ford (Oxford) Ltd.**, [1967] 1 All E.R. 539 that the courts be "relieved of the need to enter into this particular guessing game".

I endorse the view that determining an appropriate percentage for the reduction of an award for contingencies as a result of the possibilities or probabilities of divorce and remarriage is little more than a guessing game. I have come to the view that courts should, in the absence of clear evidence, be slow to reduce an award beyond the conventional levels.

There are situations, of course, where remarriage becomes a very positive contingency which could reduce an award significantly; this would turn on the evidence in a particular case. In the case we have under consideration Mrs. MacNeil was cross-examined on the issue of remarriage and she stated very emphatically that she did not intend to remarry notwithstanding that she has had a romantic involvement with a man for several years. Whether or not, under the circumstances, a court should treat that evidence with a degree of scepticism is a question for the court in any particular case. The trial judge did not make a finding whether he believed or disbelieved Mrs. MacNeil on this issue. However, he obviously found her a credible witness with respect to the level of her husband's earnings.

In my opinion the likelihood of the MacNeils divorcing would be well below the statistical average in Canada given their stable relationship. The mere fact that they were young when married and the trial judge's view that therefore divorce and remarriage were highly probable, seems to be negated by the evidence of Mrs. MacNeil that she does not intend to remarry. However, she and her friend have been romantically involved for several years. They are of the same age; he is a school teacher. Although she testified she does not intend to remarry she may change her mind. If she does remarry her new spouse's income would likely be greater than that which Mr. MacNeil would have earned had he lived. On

the other hand Mr. MacNeil may very well have increased his earnings over the years if he established the garage that he intended prior to his untimely death. There are, of course, other contingencies but they tend to off-set one another. For instance, Mr. MacNeil might have become sick or ceased to earn income through injury, loss of business or unemployment. On the other hand, he might have enjoyed good health as there was no indication he was in poor health and with his good reputation as a mechanic his business might have flourished.

A reading of Ms. Gmeiner's Report indicates that based on full application of statistical information collected by Statistics Canada respecting the rates divorce and remarriage of married couples the award should be reduced for this contingency by 41%. How this figure was calculated was not explained. Without an explanation it is virtually impossible to attach any weight to the evidence. However, Ms. Gmeiner was careful to point out that her calculations did not take into account positive contingencies and that with respect to the MacNeils it might not be appropriate to give full application to the statistics. No doubt that is why she selected an arbitrary figure of applying only a 50% rate of divorce and remarriage which would result in a reduction of the award by 23.8%. She noted in her Report under the title "Other Contingencies" as follows:

> " Please note that there are certain negative contingencies which we have not taken into consideration in these calculations relating to the loss of future income. These are negative in the sense that they would tend to reduce the present value of future pecuniary loss.
>
> For example, we have not taken into consideration the possibility that Mr. MacNeil may have become disabled in the future had he not died. Based on "normal" rates of disability, this contingency could reduce the present values otherwise calculated by approximately 4%.
>
> On the other hand, there are also certain positive contingencies which we have not included in our calculations. These are positive in the sense that they would increase the present value of future pecuniary loss.
>
> For example, we have made no allowance for the possibility that Mr. MacNeil could have continued working after age 65 or that his earnings

may have been considerably higher, had he survived."

In my opinion the learned trial judge erred in failing to consider positive contingencies; he focused only on the negative. And erred in interpretation of that part of Ms. Gmeiner's Report dealing with the contingency of divorce and remarriage. These errors led him to make an inordinantly high reduction for contingencies that this court must vary as to do otherwise would produce an inordinantly low award that is not warranted on the evidence. What is an appropriate reduction for contingencies?

In **Lewis v. Todd**, supra, the spouse killed was a police officer; he was 32 years of age. His wife was 27. Dickson J. reviewed the findings of the trial judge at p. 704 as follows:

> " The global award had to be adjusted to account for two further factors: (a) contingencies and (b) collateral benefits which the family received as a result of the death. Henry J. referred to a number of contingencies. He held:
>
> > I consider it realistic to take into account the risk of premature death in Constable Lewis's occupation as a police constable and to make some adjustment for it.
>
> He made no adjustment, however, to the average life expectancy, for the surviving wife and children. Certain contingencies affecting the deceased's employment were relevant - "dismissal, lay-off, reduction in the wage level . . . accident or unforeseen illness". The remarriage of the appellant was not a relevant contingency. His conclusion as to the appropriate contingency factor was, as follows:
>
> > This factor [contingencies] must be assessed according to the evidence and circumstances in each case and it must also be borne in mind that all contingencies do not necessarily work against the interest of the Plaintiff.
> >
> > Making allowance for these factors, I conclude that the global amount . . . should be reduced to $190,000.00.
>
> The judge deducted approximately $18,000 or less than 10 per cent for adverse contingencies."

Dickson J. dealt with the issue of contingencies at p. 714. He stated:

> " In principle, there is no reason why a court should not recognize, and give effect to, those contingencies, good or bad, which may

reasonably be foreseen. This is not to say that the courts are justified in imposing an automatic contingency deduction. Not all contingencies are adverse. The court must attempt to evaluate the probability of the occurrence of the stated contingency. It is here that actuarial evidence may be of aid. I merely repeat what was aid in *Andrews*:

> . . .actuarial evidence would be of great help here. Contingencies are susceptible to more exact calculation than is usually apparent in the cases. . . [at p. 253]

In this case the actuarial tables projected a joint life expectancy but not a working expectancy for the deceased; thus it was not inappropriate to take into account general contingencies such as those mentioned by the trial judge.

A trial judge should consider whether there is any evidence which takes the deceased's situation outside the 'average'; whether there are any features of which no account was taken in the actuarial tables, either because the factor is entirely personal to the individual or, because the 'average' is not adapted for the category or class to which the person belongs, *e.g.* police officers.

At trial, actuarial evidence on the probable life expectancy of Constable Lewis and his wife was adduced. There was no evidence with respect to any of the other contingencies considered by the trial judge. The trial judge resisted the temptation to use a "conventional figure of 20 per cent" and explicitly noted that "all contingencies do not necessarily work against the interest of the Plaintiff". In his judgment, less than 10 per cent should be deducted for adverse contingencies.

The Court of Appeal held that 10 per cent was an appropriate contingency deduction. This conclusion is stated without any reason as to why the determination of the trial judge was inappropriate. It may be that the Court was simply "rounding off" the deduction made by the trial judge. In the result, I would restore the finding of the trial judge."

Courts are recognizing that to a considerable extent the positive contingencies often off-set the negative contingencies. In **Vahey v. Farrell**, (1994) O.J. No. 459, a decision of McWilliam J. of the Ontario Court of Justice - General Division rendered on March 8th, 1994, the court stated:

> " I also accept Mr. McNeely's submission that the positive and negative contingencies cancel each other out."

Trying to determine an appropriate percentage reduction for contingencies is a very

frustrating exercise. The espoused reason for so reducing awards is to avoid over compensating the surviving spouse. While we can calculate with some precision by use of actuarial evidence the loss of future support arising out of the death of a spouse one cannot say the same with respect to determining a proper reduction for contingencies. Courts should not make high percentage reductions on what is in reality mere speculation.

The evidence in this case respecting contingencies in general and the probability of divorce and remarriage in particular without Ms. Gmeiner's testimony was scant. It is to be contrasted with the evidence on those issues in **Lapointe v. Arsenault Estate**, (1985) 60 N.B.R. (2d) 211. In that case actuaries were called by both sides. Jones, J. gave some indication as to the extent of the evidence by the following comments in paragraphs 18 and 19 of his decision:

> " A major consideration in calculating the present capital value of future loss is the extent to which the possibility of remarriage is to be taken into consideration. We are dealing here with a plaintiff who was 23 years of age at the time of her husband's death. The marriage had unfortunately subsisted for approximately two months. There would be every expectation that at some period in the future the plaintiff will remarry. Mr. Turrel dealt with this fact by applying statistics with respect to the remarriage of widows and taking the calculations on an annual basis. See exhibit #3, pages 19 and 19:
>
> > '...However, with respect to the probability of remarriage, there is no question that such probability is substantially higher in the case of a young widow without children than it would be in the case of an older widow or a widow with children. In view of this, I have allowed for the contingency of remarriage using rates of remarriage according to age from standard remarriage tables used for purposes of costing of pension plan benefits and similar items. The rates I have used are rates for duration since marriage of four years and over, since the discovery transcript indicates that Mrs. LaPointe has no intention of remarrying, at least in the short term future. The

> actual rates are summarized in Appendix 4 and compare closely with rates derived by Mr. Burnell from 1982 vital statistics dates for Canada.'
>
> Mr. Burnell on the other hand took essentially the same statistics and calculated them to arrive at a probability of the plaintiff remarrying in the future. Mr. Burnell did further calculations to demonstrate a period of time from the loss when the plaintiff might on balance remarry and a further period by which time it would become probable that the plaintiff would remarry."

After dealing with the impact of taxation on an award the learned trial judge again returned to the subject of contingencies and stated as follows:

> " This leaves the issue of contingency deductions. Mr. Tarrel considered a negative contingency of possible loss of income by the deceased had he survived, which loss of income would have been attributable to either illness, long term disability, early retirement or long term unemployment. He lumped these together and assessed a negative contingency of 10%. The other negative contingency which Mr. Tarrel considered was that of the possibility of marriage breakdown had Mr. LaPointe survived which he assessed at 10%.
>
> In addition to this Mr. Tarrel considered a positive contingency of 6% to reflect what he considered to be the possible effect of rates of increase in earnings in excess of the rates allowed to follow implicitly from the discount figure of 3%. He thus arrived at a combined negative contingency of 14%.
>
> It is noted that Mr. Tarrel in his assessment of contingencies did not take into consideration at this point the possibility of Mrs. LaPointe's remarriage following her husband's death, but rather calculated this within his original calculation of the capital sum for future loss.
>
> Actuarial evidence is helpful in assessing contingencies, although generally speaking actuarial evidence relates to the general populace or a significant sector of it as opposed to the individual circumstance. In his evidence Mr. Tarrel undoubtedly testified from a background of considerable experience but did not have available statistical data to relate to the specific assessment in question."

On the issue of contingencies Jones, J. concluded as follows:

> " Mr. Burnell has testified with respect to the likelihood of marriage breakdown as reflected by divorces between couples who are marrying at the present time. It appears that over a lifetime the possibility of marriage breakdown and divorce is considerably higher than 10%. On the other hand any contingency factor is applied over the lifetime of the marriage and consideration would have to be given to reflect that. With that in mind I would think that the 10% contingency factor used in this case appears to be a bit low.
>
> Taking all of these matters into consideration I would apply an overall negative contingency dealing with long term unemployment , disability, illness, early retirement, as well as the possibility of marriage breakdown and divorce had Mr. LaPointe survived and assess this negative contingency factor at 25%."

In the case we have under consideration the learned trial judge had before him nothing other than the bald statements which I have quoted from Ms. Gmeiner's Report. He did not have the benefit of any explanations as to how Ms. Gmeiner came to her conclusions. He was given little or no help by the manner in which this aspect of the evidence was brought forward at trial.

In **LaPointe v. Arsenault Estate**, supra, Jones, J. made a reduction of 25% to recognize negative contingencies. In **Mahoney and Workers' Compensation Board (N.B.) v. Arsenault, Raven and Kent General Insurance Corporation**, (1985) 58 N.B.R. (2d) 15 Jones, J. reduced an award by 20% for negative contingencies broken down as follows: for unemployment 10%, for illness and injury which would reduce earning capacity had the spouse not been killed 5%, and for marriage breakdown and remarriage 5%. In **Daigle and Workers' Compensation Board (N.B.) v. Cape Breton Crane Rentals Limited, Canadian Indemnity Company and Frechette; Potash Company of America v. Cape Breton Crane Rentals Limited, et al., and Opron Maritimes Construction Ltd., v. Frechette et al.**, (1985) 60 N.B.R. (2d) 91 Higgins, J. had before him evidence of competing actuaries on the issue of remarriage. Their testimony and the trial judge's decision is

reflected in paragraphs 166 and 167 of his decision where he states on the subject of remarriage:

> " Tarrel suggests 5% probability and Burnell suggests 13%. Both point to tables to support their positions, but both also agree it is essentially a matter for the court to make a judgment call.
>
> As stated earlier, Mrs. Daigle is attractive, pert, quick and articulate. She has stated that remarriage is "unlikely". She wants now to rear her children and ensure they advance in their education. Only one of five hundred W.C.B. widows has remarried. I believe that Mrs. Daigle may be taken at her word when she says remarriage is "unlikely". I translate that into Mr. Tarrel's 5%."

He made a contingency reduction of 5%.

In summary, reductions for negative contingencies seems to cover a fairly wide range but in the opinion of Cooper Stephenson most fall within the 10%-25% range. In my opinion the appellant did not establish that a 50% reduction would be an appropriate rate of reduction with respect to contingencies. Apart from the contingencies of divorce and remarriage for Mrs. MacNeil the other contingencies both positive and negative more or less cancel one another out. In my opinion the learned trial judge made a palpable error in reducing the award by 50% for contingencies. Considering the evidence that was adduced in the appeal we have under consideration I would reduce the award by 20% to take account of the contingencies, both positive and negative.

By applying a 20% negative contingency to the calculations results in the following assessments:

Jason MacNeil

Loss of Past Support from date of death - June 29, 1987, to December 1994 - 7.5 years - ($956.80 x 7.5) = $7,176

Loss of Future Support - I established the capitalized value of this loss at

$5,270.15 to age 20; he is now 16 years of age.

I would not make any reduction in the awards to Jason for contingencies as they are not a relevant consideration for this short period.

Mrs. MacNeil

Loss of Past Support from June 29, 1987 to December 1994, - 7.5 years ($2,500 x 7.5) = $18,750. (no reduction for contingencies)

Loss of Future Support - I had calculated the grossed up capitalized sum to replace her annual loss of support of $2,500 at $62,895. Deducting a contingency of 20% results in an award for future support of $50,316.

The above awards, of course, will have to be adjusted for Schedule "B" payments received.

Although an assessment of damages in fatal injuries cases is not a mathematical exercise, nevertheless the application of reasonable assumptions and the use of actuarial calculations is clearly necessary as a base in order to determine what would be reasonable compensation for loss of future financial support arising from the death of a spouse in any given case.

Despite its shortcomings the actuarial approach with a dash of business judgment is better than the alternative of pulling a figure out of the air.

Accordingly the appeal from the assessment of damages ought to be allowed and the awards for loss of financial support varied in accordance with this decision.

If the parties cannot agree on the form of an order within two weeks from the filing of this decision the Court wishes to be so advised and in such event we will arrange to allow the parties to make submissions on the matter of costs and pre-judgment interest.

Hallett, J.A.

C.A. No. 104870

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DONALD CARTER GILLIS	)	REASONS FOR
	)	JUDGMENT
appellant	)	BY:
	)	MATTHEWS,
- and -	)	J.A.
	)	
ROSITA MacNEIL, et al		
)		
	)	
respondent)		