

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Jones, Hart and Freeman, JJ.A.

BETWEEN:

TERRY LEE NAUGLER	)	Edmund R. Saunders
	)	for the appellant
Appellant	)	
	)	Clarence A. Beckett, Q.C.
- and -	)	for the respondent
	)	
	)	Appeal Heard:
	)	December 6, 1990
IVAN LLEWELLYN	)	
	)	Judgment Delivered:
Defendant	)	December 6, 1990
	)	

THE COURT: Appeal dismissed with costs per oral reasons for judgment of Jones, J.A.; Hart and Freeman, JJ.A. concurring

The reasons for judgment were delivered orally by:

JONES, J.A.:

This is an appeal from a decision of Mr. Justice Nunn dismissing the appellant's action for damages for injuries received in a motor vehicle accident.

The appellant was struck by the respondent's motor vehicle as he crossed highway 103 near Hebb's Cross, Lunenburg County, on October 27, 1987. The weather was clear and there was an unobstructed view for some 2,000 feet to the point of impact. The speed limit was 90 kilometers per hour. The appellant was 16 years of age and was crossing the road with a school friend when struck. The appellant claimed that he looked both ways before crossing and did not see any traffic. In a statement following the accident to an adjuster the appellant stated that he was running. The respondent testified that he was travelling at approximately 50 m.p.h. and observed the two boys on the opposite side of the road at a distance of 600 feet. When his vehicle was 50 or 100 feet away the boys "shot across the road". The trial judge found that there was no negligence on the part of the respondent which caused or contributed to the accident. Under s. 248 of the Motor Vehicle Act the

onus of proof was on the respondent to show that the injuries did not arise entirely or solely through his negligence. The sole issue on the appeal is whether the respondent had rebutted the presumption. Counsel argued that the respondent was negligent in failing to sound his horn. The trial judge in his decision stated:

"In this case, I am satisfied that the defendant has rebutted the presumption. I accept his evidence that he saw the plaintiff and Whynot on the opposite side of the road and that he continued to watch them. I also accept that the plaintiff ran across the street directly into the path of the defendant's vehicle.

It is unreasonable to accept that the plaintiff and Whynot had merely been walking across the street after checking in both directions and saw no traffic approaching when, in a straight line of clear visibility of considerable distance, the defendant's vehicle was there as well as, at least, a pulp truck following quite closely behind. Without considering the statement of the plaintiff referred to earlier, it is apparent that the plaintiff and Whynot did not check for oncoming traffic in the direction the defendant was travelling, or perhaps were paying no attention, as they should have seen and/or heard the approaching vehicles, and the plaintiff ran out across the highway. The only other conclusion possible is that the plaintiff did not see the defendant's vehicle, which he denies, and felt that he could safely run across the road. In either case, fault would not rest upon the defendant.

I find no negligence on the part of the defendant and that he has met the statutory burden referred to earlier. The sole negligence resulting in the plaintiff's injuries is attributable to him. His careless action of running across the road, directly

into the path of the defendant's vehicle, was the sole cause of the accident and subsequent injuries. The defendant, in these circumstances could not have done anything to avoid striking the plaintiff."

He accepted the evidence that the respondent did not have time to sound his horn. We find no error on the part of the learned trial judge in applying s. 248 of the Motor Vehicle Act or in assessing the evidence. The appeal is dismissed with costs.

*McJones J. A.*  
J.A.

Concurred in:

Hart, J.A. *[Signature]*

Freeman, J.A. *[Signature]*

131

1987

S.BW. No. 1341

IN THE SUPREME COURT OF NOVA SCOTIA  
TRIAL DIVISION

BETWEEN:

TERRY LEE NAUGLER,

PLAINTIFF

- and -

IVAN LLEWELLYN,

DEFENDANT

HEARD: At Bridgewater, Nova Scotia, before the  
Honourable Mr. Justice D. Merlin Nunn, on  
May 14th, 1990.

DECISION: June 8, 1990

COUNSEL: Wayne K. Allen, Q.C., for the Plaintiff  
Clarence A. Beckett, Q.C., for the Defendant