

NOVA SCOTIA COURT OF APPEAL

**Cite as: Fraser v. MacEachern, 1995 NSCA 113
Freeman, Hart and Jones, JJ.A.**

BETWEEN:

DERRICK FRASER AND IRENE MARCOUX)	Anna Marie Butler
Appellant)	for the Appellant
- and -)	
)	Nancy Murray
)	for the Respondent
ROBERT KEVIN MACEACHERN)	
Respondent)	
)	Appeal Heard:
)	May 19, 1995
)	Judgment Delivered:
)	May 19, 1995
)	
)	

THE COURT: The appeal is dismissed per reasons given orally by Freeman, J.A., Hart and Jones, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

Freeman, J.A.:

When the flow of traffic from Dartmouth to Halifax across the Angus L.

Macdonald Bridge unexpectedly halted about seven o'clock in the morning of October 1, 1989, the appellant Derrick Fraser stopped the car in which he was driving the appellant Irene Marcoux to work, but they were struck from behind by a vehicle driven by the respondent Robert Kevin MacEachern. Both appellants suffered whiplash type injuries.

The respondent testified that he had succeeded in stopping his own vehicle but was in turn struck from behind by another car and driven into the appellants' vehicle. He said the three drivers spoke briefly on the bridge and agreed to move their vehicles to North Street where there was further conversation. Damage appeared to be minimal and the third driver, who had struck the respondent, left the scene unidentified. Mr. Fraser indicated the involvement of the third vehicle in a brief description of the facts when he visited Dartmouth General Hospital within about an hour of the accident.

At trial Justice Grant of the Supreme Court of Nova Scotia accepted the evidence of the respondent "of the chain of events involving the three cars. . . . I found MacEachern credible and I believe his evidence."

He found the sole cause of the damages suffered by the appellants to be the negligence of the third car driver; he found neither Fraser nor MacEachern to be negligent.

He noted that the appellants had settled their claim against the Registrar of Motor Vehicles, whom they had included as a defendant representing the unidentified third car driver under the provisions of the **Motor Vehicle Act**. He assessed the non-pecuniary general damages of Ms. Marcoux at \$23,500 and of Mr. Fraser at \$10,000 plus lost wages of \$3,791.06. Damage to the car was \$249.20.

The appellants' principal grounds of appeal are that the trial judge failed to apply the presumption of negligence against a driver who strikes a vehicle from behind

(see **Beaumont v. Ruddy**, [1932] O.R. 441); failed to impose a sufficiently heavy onus on the respondent, and did not demand corroborative evidence.

The test is that the driver who strikes another from behind must "satisfy the court that the collision did not occur because of negligence." Clearly, the court must be satisfied by credible evidence to a balance of probabilities. The trial judge not only stated the test but made appropriate findings of fact in support of his conclusion that the respondent had rebutted the presumption of negligence. Those findings were supported by evidence before the court. If corroboration were needed as to the involvement of the third car it was provided, as the respondent points out, by the judge's reference to Mr. Fraser's statement to the Dartmouth Hospital.

The arguments made in support of the grounds of appeal invite this court to retry the case, which is not our function. The respondent correctly states the issue for this court:

"Whether the findings of the learned trial judge are supported by the evidence, and whether the trial judge made any palpable overriding error which affected his assessment of the facts."

The respondent cited reviews of the position of a court of appeal in civil actions conducted by this court in **Coughlan v. Westminster Canada Ltd.** (1994), 127 N.S.R. (2d) 241 and **Parks v. Atlantic Provinces Special Education Authority** (1992), 109 N.S.,R. (2d) 113 (C.A.).

After reviewing the evidence and the submissions of counsel we have not been satisfied that the trial judge made any palpable or overriding error which affected his assessment of the facts. The appeal is dismissed with costs which we fix at \$1,200 plus disbursements.

Freeman, J.A.

Concurred in:

Hart, J.A.

Jones, J.A.

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

DERRECK FRASER AND
IRENE MARCOUX

Appellant

- and -

ROBERT KEVIN MACEACHERN
Respondent

REASONS FOR
JUDGMENT BY:

FREEMAN, J.A.