N O V A S C O T I A
COUNTY OF HALIFAX C.H. 40322

I N T H E C O U N T Y C O U R T
OF DISTRICT NUMBER ONE

BETWEEN:

ANNE MARIE CARTER,

Plaintiff

- and -

GARY MORGAN,

Defendant

Timothy J. Lemay, Esq., solicitor for the plaintiff.
Glen V. Dexter, Esq., solicitor for the defendant.

1984, January 20, Anderson, J.C.C.:- This is an action for damages sustained by the plaintiff as a result of a motor vehicle accident which occurred on Smith's Road, Bedford, County of Halifax, on August 2, 1982. The accident involved the collision of a 1981 Plymouth Horizon, owned and driven by the plaintiff Anne Marie Carter, and a 1972 Ford Van, owned and driven by the defendant Gary Richard Morgan. The plaintiff is 35 years old, resides at 24 Smith Road, Bedford and is a lab technician at the Victoria General Hospital. The defendant is 18 years old, resides at 721 Hammond Plains Road, County of Lunenburg, and is employed as a stock worker with Walker's Exhaust. Both liability and the quantum of damages are at issue in this dispute. There is no counterclaim.

The facts may be briefly stated as follows:- At approximately 7:45 a.m. on the aforementioned date the plaintiff drove her car out of the Carter household's driveway on Smith's Road, in an anticipation of driving down that road to the Hammond Plains Highway. In the vehicle with her was her son Christopher Carter. As was her normal practice, she put the car in reverse gear and backed it out of the driveway with the result being that the back of the car pointed away from the Hammond Plains Road. Shortly thereafter it collided with the defendant's van. In her testimony, she indicated that the road was clear of any approaching traffic,

stating that she made a point of looking "both ways". There is no evidence to suggest that she was in a hurry or rushed while backing the car out. In addition, she stated that prior to the collision she put the car in gear and it began to move forward, thereby placing the vehicle in a parallel position to Smith's Road. She said "I got in my car, backed out of the driveway and just started to go ahead when I was hit." This version of the incident was corroborated by the testimony of her son Christopher. As a result of the collision the rear left corner of the plaintiff's car was damaged, as was the area immediately behind the front passenger's door of the defendant's car.

The defendant's account of the events of that morning is quite different. It is his contention that while he was proceeding along Smith's Road toward the Hammond Plains Highway, at a speed of approximately 10-15 m.p.h., the plaintiff backed her car out (of the driveway) and while backing it out hit his vehicle. He testified that half of the car was on the road when he saw it and that its backup lights were on when the two vehicles collided. Furthermore, he implies that it was impossible for him to avoid the collision by either applying his brakes or, as he unsuccessfully attempted, swerving the van to the left and missing her. This version was supported by witnesses James Tanner and George Edward Kuhn. Kuhn testified that immediately prior to the collision, while standing some 60-70 feet from the area of impact, he said to Tanner: "She's going to back right out in front of him."

The road itself is not paved, it is narrow in places and the shrubbery and brush have not been adequately cleared from its sides. The weather was clear and did not affect the visibility of either driver, yet the evidence indicates that the plaintiff never saw the defendant until after the crash and the defendant only saw her mere seconds before it. The failure of both parties to see one another earlier has not been fully explained notwithstanding the further evidence presented at trial. While I accept that all the evidence was presented honestly, representing the

series of events as the witnesses perceived them, yet it was often contradictory and therefore requires additional analysis and interpretation. Where there is a contradiction, I accept the plaintiff's evidence.

I do not accept James Tanner's evidence as to the relative positions of the two vehicles leading up to and including the moment of impact. The distances and time periods implied by him vary greatly. For example, in his testimony at trial he suggested the defendant's van was five to six, then five to ten feet from the plaintiff's car when it began to swerve. At discovery he suggested the distance was twenty-five to thirty feet. I do not believe, however, that his testimony was motivated by any consideration other than the presentation of events as he thought they occurred. It is probable though that his version is often unclear because he simply is unsure of what happened. As is likely the case with George E. Kuhn and Tina Louise Clarke, Tanner's testimony was largely formulated on a consideration of the collision, after conversation with others, subsequent to the incident.

The position or vantage points of the defendant's vehicle, as evidenced by photograph exhibits one and two and as confirmed by testimony (in court), indicate that Gary Morgan should have seen the plaintiff's car much sooner than he did. It is very likely that he was distracted and not aware of exactly what was in front of him. His statement "I wasn't really looking at her (the plaintiff's) driveway). I was looking more or less to the next turn going towards Hammond Plains" is evidence of this probability. At trial he indicated he saw her when he was twenty feet from her car; at discovery he said it was fifty feet. As well, he implied that one-half of her car was exposed at this time and he had time to think that she saw him and consequently would move her car. This precludes the possibility that she suddenly and quickly backed out of her yard. Had he been paying proper attention and maintaining a proper lookout it is likely that the

accident would not have occurred. While he had the right-of-way he did not take reasonable care and consequently is substantially responsible for the accident. (*Walker v. Brownlee and Harman* [1952] 2 D.L.R. 450.

Much was made of the position of the plaintiff's car relative to the defendant's van at the time of impact. The nature of the damage per se does not necessarily exclude either version of the events. Had the plaintiff backed into the van or had the van veered back to the right side of the road after swerving to the left the results would have been much the same. It is probable though that the plaintiff was commencing to move forward at the time of impact. Regardless of this probability, the defendant bears primary responsibility for the collision because of his failure to take earlier evasive action such as decelerating, for example. Nevertheless, the plaintiff's conduct, (pursuant to s.109(1) and s.111(1) of Chapter 191 R.S.N.S. 1967, the Motor Vehicle Act) was such as to give rise to a finding of contributory negligence. She could not fully explain her failure to see the defendant's vehicle. On the issue of the plaintiff not wearing a seatbelt, there was no evidence adduced at trial to establish that its usage would reduce her injuries. Therefore, on the blance of probabilities, I apportion liability against the defendant at 85% and against the plaintiff at 15%.

DAMAGES

Evidence of the collision indicates that at the moment of impact the plaintiff's knees struck the gear shift and her body moved forward into the steering wheel. Later that night she experienced bad headaches, "splitting headaches" she called them, and tingling sensations through her right arm. That same evening she went to see her family physician, Dr. P.S. Seetharamdoo, M.D., who referred her to Dr. Hugh N.A. MacDonald. Dr. MacDonald recommended a physiotherapy program and the plaintiff agreed to undertake the treatment. However, after two weeks she discontinued the program, finding it too uncomfortable and of no relief. During

that time and for six weeks thereafter she wore a neck collar on a periodic basis. For that same two month period she took the analgesic, or painkiller, Fiorinal, and stated that it made her feel dizzy. Three or four weeks after the accident she felt some pain in the area of her right shoulder. The pain, she states, has persisted and is quite bothersome. The plaintiff complains of her right arm going numb if she lies on her right side or when she raises it; when reaching backwards she notices a clicking sensation. Up to and including the time of trial she was taking one 292 painkiller per night. These medical problems caused her to miss the better part of her work for two weeks after the collision.

Medical evidence indicates that she had no problem with her upper extremities prior to the accident. Other than a tubal ligation and treatment for an ulcer on her cervix ten years ago her medical record is clear. Prior to recommending physiotherapy Dr. MacDonald made the following observations concerning her health in a letter to Dr. Seetharamdoo (Exhibit No.3):

> The only abnormality I find is with her right shoulder. She has a marked clicking in the right shoulder joint when it is moved in certain directions and she is very tender at the acromio-clavicular joint region. She is also tender on the extensor tendons at the lateral epicondyle at the right elbow. Pressure here causes severe discomfort.

Further examination by Dr. John L. Sapp, M.D. revealed that she had tenderness over her posterior spine at the level of the fourth and seventh cervical vertebrae. In examining her musculoskeletal system he noted a slight tenderness in her right shoulder over the posterior glenobumerul joint and further tenderness over the lateral or side aspect in the region of the greater tuberosity. Other than experiencing a slight pain when fully elevating it her right arm had a full range of movement. He found her right shoulder to be slightly depressed when compared

to her left one, noted that she felt pain in the lumbar region on extension and that there was some tightness of her hamstring muscles. His examination revealed the remainder of her musculoskeletal system all within normal limits, as was the case with her respiratory, cardiovascular, abdominal and neurological examinations. In a letter to the plaintiff's counsel, Mr. Timothy Lemay, on 30 March, 1983, Dr. Sapp reported the following (Exhibit No.4):

> It was my impression that she received a ligamentous sprain of her cervical spine. I classified this as a mild to moderate ligamentous sprain. However, she also has developed associated tendonitis in the right shoulder causing pain in the shoulder. However, she seemed to be showing spontaneous recovery and I would expect that she will continue to recover further. It was my impression at that time that she did not require any further formal physiotherapy, but I felt that she should continue with exercises and gave her a set of exercises for her to do for her neck and shoulders. In addition, she had significant tenderness and I felt that there was some joint inflammation going on and thus I gave her naprosyn 375 mg. to take twice a day for about a week or so and then to continue with Entrophen.
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> It was my impression that her headaches were decreasing in frequency and severity and I felt that before too long she would no longer require the Tylenol #2 or analgesic that she was taking for her headaches.
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> Overall, I would expect that she would continue to improve and would have less and less discomfort over the next ent to twelve months. I would expect that most of her discomfort will disappear by that time and above and beyond that time I do not feel that she will have any pain or discomfort in her neck or arms as a result of the injuries she received in this accident. The injuries were localized to the soft tissues or ligamentous and muscular structures in the neck region and these will heal with further time. I thus do not feel that she needs any further therapy as it will not have any affect on her. In addition, I do not feel that she will have any permanent pain or disability as a result of these injuries either.

In response to Mr. Lemay's question concerning the three or four week period between the accident and the pain experienced by the plaintiff in her shoulder area, Dr. Sapp responded (as found in Exhibit No.5):

> I do feel that her injury was primarily in the cervical spine region and I do not have any evidence that she had a direct injury to the shoulder area. However, with a soft tissue injury and a subsequent soft tissue swelling and pain, there is associated spasm of muscles which can lead to increased strain on the attachments of these muscles. The muscles in the cervicular the neck region are intimately and closely related to the shoulder. Thus, an injury in the neck region can lead to a peri-arthritis or associated inflammation in the shoulder girdle region. This may develop at varying times after the injury, and thus a delay of three or four weeks is not uncommon.

This explanation represents the probable way the plaintiff's injuries occurred.

Counsel have referred directly to the following cases:

> *Isnor and Custom Heat v. Casey, Isnor v. Slack and Wilson* (1983), 54 N.S.R. (2d) 509, 112 A.P.R.
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> *Jenkins v. Finigan* (1982), 50 N.S.R. (2d) 671, 98 A.P.R.
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> *Lucas v. Selig and Selig* (1979), 33 N.S.R. (2d) 620, 57 A.P.R. 621
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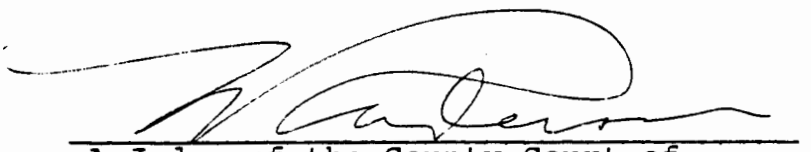
> *Hirsch v. Leviten* (1982), 49 N.S.R. (2d) 286, 96 A.P.R.
>
> *Walfield v. Snyder* (1979) 31 N.S.R. (2d) 284, 52 A.P.R.
>
> *Romuno v. Smith and Amleco Leasing Ltd.* (1982), 41 N.B.R. (2d) 360, 197 A.P.R.

Isnor was a consolidated action wherein the plaintiff received $8,000 in general damages after it was held that she would continue to suffer from pain and discomfort as a result of neck and shoulder

injuries; she received $10,000 in general damages when the evidence indicated she was very nearly a knee cripple. In both instances the injuries were more serious than those suffered by the plaintiff in this case. In *Jenkins* the plaintiff received a blow to his shoulder, causing aggravation of pre-existing osteoarthritis of the shoulder. It was established that there would be residual pain and limitation of movement rendering it impossible for the plaintiff to do heavy work. General damges were assessed at $10,000. Again, the injuries considered were more serious than those in the present case. In *Lucas* the plaintiff suffered from a moderate ligamentous sprain of the cervical spine with no evidence of permanent disability. General damages totalled $3500.00. In *Hirsch*, Burchell, J. classified the plaintiff's injuries as a low range mild whiplash and awarded $2,500 in general damages. *Nyiti v. LeBlanc and LeBlanc* (1983), 53 N.S.R. (2d) 520, 109 A.P.R. (upheld in an unreported decision of the Nova Scotia Court of Appeal on 24 May, 1983) affirmed the factors relevant to the assessment of awards considered in the aforementioned cases. While these cases are helpful in considering the nature and form of damage awards, the most important consideration remains the particular facts of each case. Here, on a balance of probabilities, it is established that the collision caused the plaintiff's injuries. My conclusion is that those injuries fall within what has been deemed the moderate range. Therefore I have arrived at an assessment of $5,000 general damages for pain and suffering. Adding the special damages of some $510.00 brings the total to $5510.00.

The plaintiff shall received 85% of that amount and the same applies for her costs to be taxed. The plaintiff will have pre-judgment interest at the rate of 11%.



A Judge of the County Court of
District Number One