

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Berrigan v. Halifax (Regional Municipality) 2005NSSC48

Date: 20050303

Docket: S. H. No. 146796

Registry: Halifax

Between:

Patricia Dawn Berrigan, represented by her Litigation
Guardian, Laurie Decoff

Plaintiff

v.

Halifax Regional Municipality, Enso B. Macorig, Darrell
Blair Viner and Earle Oliver

Defendants

Judge: The Honourable Justice D. Merlin Nunn

Heard: February 14, 15, 16 and 17, 2005, in Halifax, Nova
Scotia

Counsel: Mary Ellen Donovan, for the defendant, Halifax Regional
Municipality and Enso B. Macorig

Nancy Rubin, for the defendants, Darrell Viner and
Earle Oliver

By the Court:

- [1] In the original action on this matter the plaintiff, who had been seriously injured in an automobile accident, was seeking damages against the defendants. The defendants HRM (Halifax Regional Municipality) and Macorig cross-claimed against Viner and Oliver who also cross-claimed against HRM and Macorig. The plaintiff settled her damage claim and by Order dated 19 July 2004, her claim was dismissed by consent while it left the cross-claims for further determination and it is those cross-claims which form the subject matter of this trial.
- [2] The only issue to be determined is upon whom does fault lie for the accident.
- [3] The accident occurred on April 18, 1997 at or near 1:00 a.m. on Novalea Drive in Halifax. Only two vehicles were involved, a large street sweeper owned by HRM and operated by Macorig, and a 1988 Oldsmobile Cutlass owned by Oliver and driven by Viner.
- [4] Mr. Macorig was an experienced street sweeper operator with eight years experience prior to the accident. His regular shift was midnight to 8:00 a.m. At the start of his shift on April 18, he did a visual check around the sweeper, as was his usual practice. Then he set out to sweep his assigned area. Around, or shortly before, 1:00 a.m. he approached the intersection of Dartmouth Avenue, which he had just swept, and Novalea Drive.

- [5] This particular intersection is not the regular right 90° angle type. Rather, Dartmouth Avenue came to Novalea Drive at a significant angle facing to the southwest. This is of some significance in relation to the turns that the street sweeper made.
- [6] Before continuing several other important points must be made to give a better understanding of the events that took place. First, the street sweeper has dual controls and can be operated from the right or the left side. For the operator to change from driving from one side to the other he would have to make other changes to the sweeping equipment. As a result, up to the time of the accident the practice which Macorig followed was to do all driving from the right side, thereby always sweeping at a right hand curb. Second, that meant that on a one way street he would be driving the wrong way in order to sweep the right hand side. Third, this street sweeper is a very large machine which, while sweeping, travels at a slow speed of 5 to 7 km per hour. Fourth, with regard to the street sweeper the only vision the operator has to the rear is through the large mirrors on either side of the cab.
- [7] Finally, when turning left to go down a street Macorig's practice was to go a little beyond the intersection so that his brushes would get the corner, or even a little before the corner of the street he was entering to sweep.

- [8] Novalea Drive is a straight two lane road from Young Street to and beyond the location of this accident, in a residential district and the distance from Young Street to the point of impact of the vehicles is approximately 1400 feet. There are a number of other streets that enter the west side of Novalea Drive between Young Street and the area of the collision and each of the intersections are about 200 feet apart.
- [9] All the foregoing is found in the evidence presented at trial and is not contested.
- [10] Mr. Macorig testified that he had swept the northwest side of Dartmouth Avenue and approached the intersection of Dartmouth Avenue and Novalea Drive. He stopped at the stop sign but was unable to see to his right and not well to his left. He then moved ahead beyond the crosswalk and stopped again. At this point he saw lights coming from the Young Street direction at a crest in the road which he said began around Hennessy Place. There was no other traffic. He felt he could make the turn safely and moved out onto Novalea Drive.
- [11] His intention, however, was not to continue north on Novalea Drive, but rather to sweep Columbus Place, a street on the left. Columbus Place has two streets separated by a grassed median with the southern street being one

way out to Novalea and the northern street one way in from Novalea. It was the southern street that Macorig planned to enter, i.e. down the one-way street the wrong way. As well, his intention was not to turn directly into the street, but rather turn a short distance beyond the street towards the median so that his sweeper would get the corner of Columbus Place and perhaps a few feet of Novalea Drive. The entrance to this part of Columbus Place is approximately 100 feet from the northern corner of Dartmouth Avenue.

- [12] In accordance with his intended route Macorig testified he moved out onto Novalea moving at an angle towards the centre line so as to make his left turn to sweep Columbus Place. He said that as soon as he started up Novalea he put on his left turn signal lights and at the point of his turn he stopped a second or so and began his turn. His vehicle was in the southbound lane of Novalea, totally blocking the lane, when he felt a jolt, which was the collision. He says, most significantly, that other than seeing the oncoming lights before he started the turn he saw no approaching vehicle or lights before the collision, and testified he did check his left mirror before making the turn. I am satisfied from the total evidence that Macorig could not have checked to his rear for traffic as the Viner vehicle was approaching and would have been clearly evident. While there may have been a time

when, because of the very nature of the vehicle and his right hand drive position, he would be unable to see any oncoming vehicles from the Young Street direction, that would only be as he started his turn onto Novalea and once there his mirrors would give a clear view of the situation to his rear on Novalea.

[13] The only other actual witnesses to the accident were Viner, the driver of the Oldsmobile and his passengers. Only Viner testified although a statement given under oath to the police by one Tyrone Oliver (not the named defendant) who is now deceased was admitted in evidence.

[14] Viner, who was 17 years old at the time of the accident, testified that he was driving the Oliver vehicle, that he had not been drinking and his reason for being on Novalea at the time was to drop off one of his passengers, the plaintiff, who lived on Novalea just a short distance beyond the accident scene. He did not know the location of the plaintiff's house and was being directed by her from the back seat.

[15] He testified that he first took notice of the street sweeper when he was at Livingstone Place, approximately 600 feet from Columbus Place, and presumed it was going north on Novalea Drive whereupon he started to cross over to the left lane to pass. Just as he did so the street sweeper began

to make its left turn. Neither he nor Tyrone Oliver saw left turning signals from the street sweeper though they both saw the flashing lights at the rear of the sweeper. Viner immediately applied his brakes which locked and his vehicle skidded towards the right lane as if to pass on the right, but collided with the very back end of the street sweeper. As to the left turning signal, I am satisfied that it was not on when the vehicle was first seen by Viner and only came on, if at all, too late to avoid the collision.

[16] I accept this part of Viner's evidence as his perceptions were those of a prudent driver. He could reasonably believe the street sweeper was going to sweep the right side of Novalea Drive as that was where it was when he first saw it, and he could not be expected to realize first, the street sweeper would turn to go the wrong way down a one-way street and, second that it would make such a turn beyond the intersection where it would appear to be turning onto the divider between Columbus Place streets or to be making a U-turn. His decision to pass was based upon reasonable perceptions of the unfolding situation.

[17] However, I cannot accept Viner's estimate as to speed. The police and expert testimony, based upon the length of the skid marks and the "crush" damage to the vehicle Viner was driving indicate a higher speed than the 50-

55 km per hour he indicated. The evidence is that though he slowed to go through a flashing amber light at Young Street he did speed up and increased his speed when he decided to pass.

[18] Constable Falkenham who performed skid tests indicated that the average of the skid marks indicate a speed of 84 km per hour. Also, several days later, Constable Falkenham suggested to Viner that he was driving at 90 km per hour. Viner's reply was "maximum 70 but not 90". Viner was charged with "exceeding 50 km per hour in a residence district" on an Information laid by Constable Falkenham. He did not appear on the appointed day and was found guilty. There was no appeal.

[19] I might add here that no charges were laid against Macorig.

[20] Mr. Tyner, qualified as an expert regarding the "crush" factor in a collision, attended on the vehicle and determined that, by virtue of the crush damage to the vehicle, it was travelling at 53.4 km per hour at the time of impact though, to be more certain of accuracy, taking into account numerous vagaries, his predicted range of speed at impact was 42-64 km per hour.

[21] Dr. Russell, another qualified expert, took Tyner's speed and adjusted it for five persons in the vehicle rather than one as Tyner had used and determined a speed at collision of 48 km per hour. Adding to this the speed of 89 km

per hour and using the appropriate formula his result was the Viner vehicle was travelling possibly 103.8 km per hour which he later refined to 101.3 km per hour.

[22] There was a great deal of examination and cross-examination of these expert witnesses, as well as, of Constable Falkenham, which I need not incorporate here.

[23] I am satisfied that with regard to speed Viner was travelling significantly above the speed limit of 50 km per hour and this speed did contribute to the collision which took place.

[24] Despite this indication of speed, I am satisfied that the major cause of the collision was the actions of Macorig with the street sweeper. The greater negligence was his as he had a heavy duty to see that the movement that he intended could be made in safety. Though he was aware of oncoming lights, he did not check again as to where this vehicle was, and the evidence is abundantly clear he should have seen it in ample time to not make a turn. He should not have been turning left to go down a one-way street, again without determining he could do so safely, nor should he be turning beyond the intersection itself similarly without determining he could do so safely. I find that Macorig was aware of an oncoming vehicle and, believing he could

make his intended maneuvers, proceeded to do so without any further checks as to whether he could continue safely. Therein lies his negligence. He has not discharged the heavy duty of showing that his movements could have been done safely.

[25] Macorig was in breach of Section 119 of the *Motor Vehicle Act*.

[26] So also was Viner in breach of the *Act* as he was driving significantly above the limit. The best estimate from the evidence as to his speed is that he probably was travelling at 70 km per hour, but increased his speed when he started to attempt to pass. I do not accept that he was travelling along Novalea at over 100 km per hour and my best estimate on the evidence is that in the last 600 feet before the accident his speed was approximately 90 km per hour which is sufficiently above the limit to also be a contributing factor as I have earlier indicated.

[27] As to the division of liability the apportionment calls for a higher degree of responsibility on the party with the heavy burden, i.e. Macorig.

[28] This particular view has been well accepted in our courts. See *Eaton v. O'Neil and Strong* 33 D.L.R. (2d) 45; *Stewart v. Berwick Bakery Limited* (1972), 3 N.S.R. (2d) 62; and *Lutz v. Judgment Recovery (N.S.) Ltd.* (1993),

124 N.S.R. (2d) 234. The factual situation of each of these cases are quite comparable to the present case and each assessed liability at 80% for the turning vehicle and 20% for the vehicle following.

[29] Upon my determination of the situation in the present case, I would assess liability as 80% on Macorig and 20% on Viner.

[30] This same division will apply with respect to costs. The costs should be determined under Tariff A on the basis of the amount involved, being the amount of the settlement with the plaintiff, according to Scale 2, plus the regular allowance for four days of trial.

J.