1998

Date: 010202
Docket: S.AR. 01540

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Grant v. Dempsey 2001NSSC20]

BETWEEN:

ADRIAN VICTOR GRANT, GLEN ELWOOD GRANT & GLENDA MILLETT

PLAINTIFFS

- and -

GARTH DEMPSEY

DEFENDANT

D E C I S I O N

HEARD: At Annapolis Royal on November 1, 2 and 3, 2000.

BEFORE: The Honourable Justice Allan P. Boudreau.

DECISION: February 2, 2001

COUNSEL: W. Bruce Gillis, Q.C.,
Counsel for the plaintiffs.

James L. Chipman, Esq.,
Counsel for the defendant.

Boudreau, J.

INTRODUCTION:

[1] The plaintiff, Adrian Victor Grant, was run over at night by a van operated by the defendant, Garth Dempsey. It appears that Mr. Grant, who was eighteen years old at the time of the accident, was lying in the lane traveled by Mr. Dempsey. Mr. Grant suffered serious or life threatening injuries as a result of being apparently struck by the undercarriage of Mr. Dempsey's van. Mr. Grant and his father and mother have sued Mr. Dempsey for the personal injuries of Mr. Grant as well as other resulting damages, being costs of care, etc. The trial proceeded on the question of liability only because damages have apparently been agreed upon, subject to the court's ruling on the liability question.

FACTS:

[2] The accident occurred at approximately 1:30 a.m. on the morning of October 14, 1995. Mr. Dempsey is a contractor who was working on renovations at Wade's Grocery Store in Middleton during this period. He had worked late on the evening of October 13 and he was driving his 1988 GMC van on his way home on the Morden Road. He was being followed by John Janes who also lives on the Morden Road and who also had been working with Mr. Dempsey on the Wade's renovation job. Mr. Janes was several car lengths behind Mr. Dempsey. There is no evidence that alcohol was a factor in the accident as far as Mr. Dempsey is concerned, although he had had one or two small glasses of draught beer with his supper. Mr. Dempsey and Mr. Janes had worked until close to 1:00 a.m. that morning. The two had taken Route 221 east until they reached a stop sign and the Morden Road. They then turned left on the Morden Road. It was a dark but dry night. There are no street lights in the area.

[3] The two vehicles then proceeded up the Morden Road at a moderate rate of speed. At trial Mr. Janes estimated his speed at between 45 and 50 kilometers per hour but he had given a statement to the police shortly after the accident estimating his speed at “30 to 40 kilometers per hour or so.” At trial Mr. Dempsey estimated his speed at between 40 and 50 kilometers per hour; however shortly after the accident he had given a statement to the police saying he did not know how fast he was going because he was not looking at his speedometer, but that he could not disagree with Mr. Janes’ estimate of 30 to 40 kilometers per hour or so. Mr. Dempsey testified he was accelerating at the time. The driver of the oncoming pick-up truck, in his statement to police, estimated Mr. Dempsey’s speed at 60 or 70 kilometers per hour. Based on all of the evidence, it is unlikely that the speed was less than 40 kilometers per hour and most probably somewhere between 40 and 50.

[4] Shortly before the accident, Mr. Dempsey met a pick-up truck coming down the Morden Road. Mr. Dempsey said he had put his van’s lights on low beam before meeting the oncoming vehicle. He testified he believed the oncoming vehicle also had its lights on low beam, but he could not be sure because they were “fairly bright”. Mr. Dempsey stated that when the two vehicles met he “glanced sideways to see who it was”. He stated that when he looked ahead again he had no time to put his headlights back on high beam because he immediately “saw an object right there in front of him”. He testified he thought it was a duffle or garbage bag and he “straddled” it, meaning he did not run over it with the van’s wheels and the object passed underneath his vehicle. He testified he does not believe he would have been able to stop. In his statement dated October 25, 1995, Mr.

Dempsey said he had no time to brake before going over the object. He said he heard the object tumble under the van. He then stopped to go see what it was and heard Mr. Janes "hollering" to call 911. He soon realized that the object he had run over was a person. It was a teenaged boy with dark hooded clothing. It appears Mr. Grant was lying "length wise" in the lane traveled by Mr. Dempsey. Mr. Dempsey testified the object did not look very big and it did not occur to him that it could be a body.

[5] Mr. Janes testified that he was following Mr. Dempsey up the Morden Road, some three car lengths behind. He said that he saw an object coming from underneath Mr. Dempsey's vehicle which he at first thought was a dummy. Mr. Janes then swerved to the left just in time to avoid striking the object. He was unable to stop his vehicle until he was partly passed it. Mr. Janes testified that "if the oncoming vehicle had not passed already he would have hit the object himself".

[6] Jeffrey Gerald Rawding was the person driving the pick-up truck which Mr. Dempsey met just before the accident. Mr. Rawding was killed in an accident before the trial and the only evidence from him is his statement to the police. This statement is Tab 4 of Exhibit # 1 and it was admitted into evidence by agreement of the parties. Mr. Rawding had seen the object on the road just prior to meeting Mr. Dempsey. He told the police he "was right up by him when he noticed it was a person", lying on the road. He had no time to stop and warn the oncoming vehicles.

[7] Mr. Grant testified he has no recollection of how he came to be in a prone position on the Morden Road. He has no recollection of events during the time leading up to the

accident or the days before. The injuries have obviously caused him to lose some memory of events days or even weeks before the accident. Mr. Grant testified that he drank alcohol on occasion prior to the accident. He would sometimes drink a case of beer in a couple of hours and he would also drink rum and coke or Chipman's Golden Glow at times. He said he used to hitchhike frequently, almost daily. He does not remember passing out on previous occasions when he was drinking.

[8] Page 5 of Tab 5 of Exhibit # 1 was admitted into evidence by agreement. This is the Valley Health Services Association Hospital records containing the results of the blood alcohol content of Mr. Grant on the morning of October 14, 1995. Joanne Mailman is the senior technologist in the Hematology Department at the Valley Regional Hospital. She testified having drawn blood from Mr. Grant around 3:00 a.m. on October 14, 1995. Page 4 of Tab 5 indicates specimen number 3053 was drawn at 3:12 a.m., but it does not appear to deal with blood alcohol levels. Specimen number 3055 which is page 5 of Tab 5 appears to have been drawn at 6:00 a.m. It indicates a blood alcohol level of 42 milimoles per litre of blood. Seventeen milimoles is just about the equivalent of .08 in breathalyzer terms. Therefore, 42 milimoles is the equivalent of .193 in breathalyzer terms. This is two and one-half times the legal limit for driving. It is readily accepted that the body disposes of blood alcohol over time. If sample 3055 was indeed taken some four and one-half hours after the accident, then it would appear Mr. Grant's blood alcohol could have been considerably higher at the time of the accident.

[9] It was hypothesized that Mr. Grant may have been struck previously by another vehicle, perhaps while he was hitchhiking, causing him to be prone in the road when Mr.

Dempsey struck him. There is not a shred of evidence to support this speculation. Mr. Rawding in his statement contradicts any such possibility, as does Corporal Fitzgerald. In the final analysis, I am satisfied, on a balance of probabilities, that Mr. Grant was lying prone in the middle of the lane traveled by Mr. Dempsey most probably as a result of and in a severely intoxicated state.

THE EXPERT EVIDENCE:

[10] Clifford Tyner provided opinion evidence at trial in the form of accident reconstruction evidence. Mr. Tyner is a professional engineer with some considerable experience in the field and he has testified in courts throughout Atlantic Canada. His written report can be found at Tab 15 of Exhibit # 1. Mr. Tyner also testified at trial. His evidence is by no means determinative of the liability issue. The primary evidence on that issue is that of Mr. Dempsey, Mr. Janes and Mr. Rawding. Mr. tyner's opinion is simply corroborative of that primary evidence.

[11] Mr. Tyner made several visits to the scene of the accident, during the day and at night. He attempted to recreate the conditions the night of the accident by dressing a mannequin in dark clothing and placing it on the shoulder of the road where the accident had occurred in similar night conditions as those at the time of the accident. He then used his own car to try to ascertain the maximum distance at night at which the mannequin would become visible. He did this using his own car and not Mr. Dempsey's van. Mr. Tyner testified that all vehicle head lights on low beam are aimed to illuminate the road in the same way because of Motor Vehicle Regulations. He said a vehicle's lights would have to be severely out of line for there to be a significant variation in his conclusion. He found

that the mannequin became visible at a distance of 85 feet and that this would be reduced by some 15 feet, to 70 feet, in the face of oncoming head lights.

[12] Mr. Tyner then applied normal perception and reaction and braking times to conclude that if Mr. Dempsey had been traveling at 35 kilometers per hour or more, he could not have stopped under 86 feet and that it would have been a very aggressive stop. He also testified that, according to Mr. Dempsey's evidence, it appears that a great deal of the perception/reaction time would have been consumed with attempting to recognize the object on the road. This would have further consumed reaction time. He states that minor steering to avoid the wheels going over the object appear to have been the only reasonable possibility in the circumstances.

[13] Mr. Tyner admitted on cross-examination that to give a definite opinion he would need the exact speed of Mr. Dempsey's vehicle, the exact characteristics of Mr. Dempsey's vehicle, such as lights and braking capacity as well as Mr. Dempsey's personal reaction times. Mr. Tyner explained that it is not possible to accurately test a driver's perception and reaction times on an accident recreation because the driver anticipates the occurrence and, that for that reason, averages have to be used in accident reconstruction. Mr. Tyner admitted he did not perform any comparisons between his own vehicle, which he used in the reconstruction, and that of Mr. Dempsey; however, it appears that, except for the head lights, the other calculations were based on perception, reaction and braking averages for the geography of the road way and the type of road surface.

[14] Corporal Christopher Fitzgerald of the RCMP was the investigating officer and he also answered the call to the scene of the accident. He testified he inspected Mr. Dempsey's vehicle the night of the accident and that it was in good working order, including lights, tires, etc. Cpl. Fitzgerald also testified that a few hours after the accident, he had Constable Bugler stand on the side of the road where the collision had occurred and he then drove in the same direction as Mr. Dempsey. He said that, "even knowing that Cst. Bugler was there, he was right upon him before seeing him".

BASIC LAW:

[15] The applicable law as far as the onus imposed by s. 248(1) of the **Motor Vehicle Act** is not disputed. That section provides as follows:

> 248(1) Where any injury, loss or damage is incurred or sustained by any person by reason of the presence of a motor vehicle on a highway, the onus of proof
>
> > (a) that such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner of the motor vehicle, or of the servant or agent or such owner acting in the course of his employment and within the scope of his authority as such servant or agent;
> >
> > (b) that such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the operator of the motor vehicle,
>
> shall be upon the owner or operator of the motor vehicle.

Mr. Dempsey acknowledges that the onus is on him to prove, on a balance of probabilities, that the injury (accident) to the plaintiff did not entirely or solely arise through his negligence.

CONCLUSION ON BASIC LAW;

[16] On the facts of this case, there can be no question that the injury to Mr. Grant was not caused entirely or solely through the actions of Mr. Dempsey. Mr. Grant, by positioning himself on the traveled portion of the roadway on a dark night, with dark clothing and in a prone position, was negligent and was the primary cause of the accident. The question then remains; was Mr. Dempsey negligent at all; i.e., contributory negligence?

ACTIONS OF MR. DEMPSEY:

[17] The position of Mr. Grant on the traveled portion of the roadway in the circumstances of this case created an emergency situation for Mr. Dempsey. One cannot apply hindsight to judge Mr. Dempsey's actions when faced with such a situation. I find that Mr. Dempsey did not have sufficient time to stop before driving over the unidentified object he saw on the road. Can Mr. Dempsey be faulted for straddling the object in lieu of some other possible action such as a radical swerve or perhaps attempting to apply the brakes? I find that he cannot. He had just met a vehicle and he was being followed closely by another vehicle. The expectations on a driver in emergency circumstances are explained in Segal's Manual of Motor Vehicle Law, 3d Ed., at page 222-5 as follows::

> . . . a driver acting in an emergency created by another vehicle or by some extraneous fact cannot be expected to exercise nice judgment and prompt decision, and mere errors of judgment in such circumstances may often be excusable. . . . and his failure to act as an ordinary person in an emergency is not held to be negligence. He is not necessarily required to adopt the most prudent course and is entitled to a reasonable time, depending on the circumstances, to exercise his judgment as to what steps should be taken to avoid a collision.

[18] This approach was adopted by this Court in **Baker v. Pleasant** (1989), 89 N.S.R.(2d) 301 in adopting the following passage from **Hogan v. McEwan**, 10 O.R.(2d) 551 at page 566:

> In reaching this conclusion I find that the emergency and resulting accident were created by the dogs running onto the highway: the emergency was not created or contributed to by

> McEwan. In the circumstances he owed a duty to extricate himself and his passengers from the situation with safety if he could. Acting in such a situation not created by himself, his conduct is not to be judged by the standards involving deliberation and the opportunity for careful and conscious decision. He is not negligent in such circumstances if he fails to adopt the best course in the light of hindsight.

[19] In this case, as I have already stated, the emergency was clearly created by the actions of Mr. Grant. Was Mr. Dempsey negligent by casting a glance sideways at Mr. Rawding's vehicle as he wondered who may be about at that late hour? I find that this was not negligent in the circumstances; i.e., the time of night and the relatively slow speed of the vehicles. Moreover, there is no evidence that this momentary glance had any causal relation to the accident. Mr. Tyner testified that visibility past the oncoming vehicle would be obscured in any event until it had passed.

[20] Our courts have consistently ruled against liability in similar circumstances. Jones, J., in **Basque et al v. Peck et al**, 28 N.S.R.(2d) 185 said the following at paragraph 15:

> Having regard to the evidence as a whole, I am satisfied that there was no fault on the part of the defendant Joseph Peck which caused the accident. While I cannot accept the defendant's evidence that the deceased was lying on the road when she was struck, I find that he was driving in a reasonable manner and could not avoid the deceased. As the accident happened quickly he may have been mistaken as to how she got in front of his car. In my view the accident was due entirely to the negligence of the deceased in stepping out onto the highway when it was not safe to do so. This, unfortunately, may have been due to her condition. There is also evidence of vehicles proceeding towards the defendant's car which may have added to the difficulty in observing the deceased. The defendant has discharged the onus and the action must be dismissed.

[21] The same reasoning was applied in **Harnish v. Hatt**, (1982), 52 N.S.R.(2d) 12 where Rogers, J., found the pedestrian wholly at fault. He stated at paragraphs 32 and 37:

> After looking at the evidence as a whole and examining the exhibits, I find the plaintiff, Wayne Harnish was negligent as he walked along the dark Blandford Highway on December 24th, 1978, on the wrong side of the road, contrary to the requirements of the

Motor Vehicle Act, wearing dark clothing, and in an intoxicated state. It was this negligence that brought about the accident and the injuries to the plaintiff.

Hatt said he had no warning of the presence of Harnish upon the highway. He only had an instant to react, which instant was not sufficient in which to even apply his brakes and, therefore, he took no avoiding action whatsoever.

[22] Chief Justice Glube (T.D.), as she then was, came to similar conclusions in **O'Dea v. Brickland** (1985), 72 N.S.R.(2d) 49 at paragraphs 19, 20, 21 and 22:

The plaintiff was unable to recall the events surrounding the accident but I have found he was in the traveled portion of the highway when he was struck. Clearly, he failed to yield the right-of-way to the defendant and he failed to walk upon the sidewalk which was available in that area, and if he was hitchhiking, as he said he was trying to do earlier, he was clearly violating s. 116(1) of the **Motor Vehicle Act**. There was no evidence that he was attempting to cross the highway but if he was he failed to yield the right-of-way to the defendant on the night in question. Although visibility was poor, no-one suggested it was so bad that car headlights could not be seen. If he was just walking he was walking on the wrong side of the highway. Did the plaintiff act as a reasonable man would in these circumstances? I think not. Considering the weather and visibility, his dark clothing and his location on the highway he showed a total lack of responsibility or concern for his own safety. I have no doubt he was where he was either because of his intoxication or from a blackout which he said could occur when he had been drinking. I find that the facts lead to the conclusion that the plaintiff was the author of his own misfortune.

The defendant was driving below the speed limit because of the weather conditions.

Although it was suggested he was tired I am unable to draw that inference from the evidence. He acknowledged drinking that evening but, at his own request, he took a breathalyser which did not result in any charges being laid against him. I find that the appearance of a person on a highway is not a risk which a driver might reasonably anticipate.

The plaintiff argued that the defendant should have seen the plaintiff before he actually did, and thereby would have had time to avoid the accident. There was no evidence that alcohol affected his vision; there was no evidence that the defendant was in any way distracted and there was his own evidence, and none to the contrary, that his car was in good working order, including the lights and brakes. An ordinary reasonable man operating a motor vehicle on a rainy night, with basically only the car's headlights to light up the roadway, with wet, black pavement and poor visibility, as described by all the police witnesses, would not be able to see a man wearing a black jacket and blue jeans standing in the traveled lane, nor would he expect to see him. I find he could not see him in time to avoid the accident. I find the street light was diffused and not of assistance. I find the defendant applied his brakes just before striking the plaintiff. He was able to stop his car and pull off the road in a very short distance.

I do not accept that the collision occurred closer to the light pole. In spite of being able to see 100 to 150 ft. and even with the defendant's and Mr. Dilney's evidence that when they

> saw the plaintiff he was ten to fifteen feet in front of the defendant's car, I find that the defendant took every appropriate action to avoid hitting the plaintiff. The defendant said that, at most, he saw the plaintiff a second or two before the collision. It can be inferred that one or other of those estimates is wrong - either the "second or two" or the "ten to fifteen feet". However, I find that he saw him when it was reasonable to see him. He took all avoiding actions and the accident was the result of the plaintiff's own negligence. The plaintiff placed himself in the position of extreme peril and he failed to react when he should have been able to see the headlights of the defendant's car. The defendant acted prudently in everything that he did.

CONCLUSION:

[23] On the facts of this case, I find that Mr. Grant was the sole cause of this unfortunate accident. I find no fault on the part of Mr. Dempsey. In hindsight, one could no doubt think of alternate actions Mr. Dempsey might have been able to attempt; however, I find that the actions of Mr. Dempsey were reasonable in the circumstances in which he found himself. Those circumstances, i.e., Mr. Grant lying in dark clothing in the middle of the lane traveled by Mr. Dempsey at 1:30 in the morning created an emergency which Mr. Dempsey could not expect. Mr. Dempsey was at all times driving reasonably and his actions upon seeing the unexpected object were reasonable. In fact he, in all probability, had no time to do anything else. Therefore, I can find no liability on the part of Mr. Dempsey.

[24] The action of the plaintiffs is therefore dismissed. I will entertain written submissions on the issue of costs if the parties cannot agree on costs. Otherwise, I would issue an order prepared by counsel for the defendant and consented as to form and as to costs by counsel for the plaintiffs.

Boudreau, J.