IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Hawes v. Yorston, 2006 NSSC 26

Date: 20060126
Docket: S. H. 213739
Registry: Halifax

Between: Cathy Hawes & Aulden Pottie

Plaintiffs

v.

Peter Yorston and Her Majesty the Queen in Right of Canada and Cathy Hawes

Defendants

DECISION

Judge: The Honourable Justice John M. Davison

Heard: September 14, 15, 16, 20, &23, 2005 and October 13, 2005 at Halifax, NS

Last Written Submission: November 8, 2005

Counsel: Mark T. Knox, Counsel for Plaintiff, Aulden Pottie
Nancy M. Peers, Counsel for the Plaintiff, Cathy Hawes
C. Patricia Mitchell and Clare Bilek, Counsel for the Defendant, Cathy Hawes
Michael Owen, Counsel for the Defendants, Peter Yorston and Her Majesty the Queen in Right of Canada

Davison, J.

[1] This is an action by the plaintiffs, Cathy Hawes and Aulden Pottie, for damages suffered as a result of a motor vehicle accident which occurred on November 23, 1998 at the intersections of Forrest Hills Drive and Main Street in the Dartmouth area of Halifax Regional Municipality. The plaintiffs allege that the accident occurred as a result of the negligence of the defendant, Peter Yorston, in the operation of a Royal Canadian Mounted Police motor vehicle referred to herein as the "police vehicle".

[2] At the time of the accident the plaintiffs were living in a common law relationship and they had spent the evening hours visiting various bars and pubs in celebration of birthdays of relatives. Aulden Pottie, Raymond Stevens and his girlfriend, Tara Dunn, were passengers in the motor vehicle owned and operated by Cathy Hawes. They were accompanied by persons in two other motor vehicles. One vehicle was operated by Robert Leckie and his wife, Rhonda, and Gerald and Barbara Forward were passengers. The other vehicle was operated by Craig Borgal. The plaintiff Pottie states that he had six or seven beer that evening and that Cathy Hawes had two White Russians during the course of the whole evening.

[3] Following the motor vehicle accident the plaintiff, Cathy Hawes, was requested by attending police officers to undergo a breathalyser. She consented and the results were produced in court with the consent of counsel in the form of a document which would indicate a 0/0 alcohol content. Cathy Hawes testified that she had a White Russian and took a few sips but the glass in which the liquor was contained was knocked over. I find that the plaintiff, Cathy Hawes, consumed a very small amount of alcohol and that consumption was not a causative factor leading to the motor vehicle accident.

Liability for Motor Vehicle Accident

[4] Cathy Hawes was operating her motor vehicle which was a 1987 Honda Accord and will be referred to as "the Hawes Vehicle." To operate the headlights of this motor vehicle one would manually move a switch in the vehicle. Ms. Hawes was returning to her home and the homes of her passengers in Lake Echo.

[5] Vehicles approaching and in the intersection were controlled by traffic control lights. In proceeding to Lake Echo the plaintiff was driving directly through the intersection on a green light. The defendant, Peter Yorston, was an

officer in the Royal Canadian Mounted Police and he was operating the police vehicle. He had completed a police call in Cherry Brook and approached the intersection travelling in a direction opposite to the direction the Hawes vehicle was travelling. There is no dispute the police vehicle turned left in front of the Hawes vehicle before the vehicles collided.

[6] The plaintiffs claim the accident was caused solely through the negligence of Mr. Yorston for turning left in front of the Hawes vehicle. There are two issues with respect to liability for the accident. First, the defendants claim the headlights of the Hawes vehicle were not in operation when it approached the intersection and that Ms. Hawes is contributory negligent for driving at 2:00 a.m. on a Sunday morning without turning on the headlights of the vehicle.

[7] The second issue on liability relates to the claim of Aulden Pottie. He testified he was not wearing a seat belt at the time of the accident and the defendants claim Mr. Pottie is contributory negligent in that the failure to wear a seat belt contributed to his injuries. If the plaintiff Hawes is found to be contributory negligent the plaintiff Pottie can recover damages from the named

defendants and Ms. Hawes. In the absence of a finding of negligence on Ms. Hawes the plaintiff Pottie can only recover damages from the named defendants.

[8] Cathy Hawes testified that she had been living in a common-law relationship with Aulden Pottie but they had separated about four months before trial. She was pregnant at the time of the accident but the accident did not interfere with her pregnancy and the baby was born with no complications.

[9] After visiting a number of nightspots the plaintiffs and their friends, in three vehicles, started to drive to Lake Echo. Ms. Hawes testified that it would take about ten minutes to travel from their last point of departure to the accident scene. She says she was travelling at about sixty-five kilometres per hour.

[10] Ms. Hawes stated she turned on her headlights before starting the return trip. A vehicle operated by Robert Leckie followed Ms. Hawes, and the vehicle being operated by Mr. Borgal was the last to depart. Ms. Hawes stated that the Leckie and the Borgal motor vehicle passed her at a dark section on the highway. She said she had no problem with the headlights. She testified that she was about seven

or eight car lengths from the intersection when she saw the police vehicle approaching the intersection.

[11] Ms. Hawes said the police vehicle turned left “in front of me.” She said it was about a car length away from her when it turned and she braked but the vehicles collided.

[12] After the accident six or eight Royal Canadian Mounted Police Officers attended on the scene. Ms. Hawes was placed in a police motor vehicle and then taken to the Cole Harbour detachment of the Royal Canadian Mounted Police where the breathalyser test was administered.

[13] Aulden Pottie is thirty-three years of age and was unemployed at the time of the accident. He was brief in his description of the accident. He said they were proceeding at a speed of about sixty-five kilometres an hour and when they reached the intersection the police vehicle turned, without a signal light in operation, in front of the Hawes motor vehicle and the collision occurred.

[14] Mr. Pottie said the police vehicle was eight to ten car lengths away when he noticed it. He was asked whether the headlights of the Hawes motor vehicle were on at the time of the accident and he said “absolutely.” He was asked how he knew that and he stated that when Ms. Hawes was backing out of her parking spot at their last stop she “blinded” the people in the vehicle operated by Mr. Leckie. He alluded to Ms. Hawes flashing lights at the Leckie vehicle as a joke. He also said he remembered the lights shining on the police car at the accident scene. Mr. Pottie remembered the dash lights in the Hawes vehicle being in operation and also mentioned the switch for the lights was “flicked up” which was the position when the lights were in operation. He said no person who occupied a vehicle which passed the Hawes vehicle in the opposite direction gave indication the lights were not in operation.

[15] Raymond Stevens was a passenger in the Hawes vehicle. His girlfriend, Tara, was also a passenger. Mr. Stevens said they were proceeding about sixty-five kilometres per hour along route seven highway. He could add little with respect to the accident because he said he had too much to drink and was not paying attention to the operation of the Hawes vehicle.

[16] Robert Leckie was driving his vehicle and he had consumed no alcohol that evening. He testified that Ms. Hawes was the first to leave the parking lot and that he was second and Craig Borgal was third. He remembered the headlights of the Hawes vehicle were in operation when they left the parking lot. Leckie passed the Hawes vehicle and he remembered looking in the rearview mirror and Ms. Hawes' headlights were on. He made reference to it being "pretty dark" near Bens Bakery. He and Craig Borgal were in and out of lanes but he also remembered the tail lights of the Hawes vehicle were in operation. Mr. Leckie stopped for gas beyond the intersection where the accident took place and when Ms. Hawes did not pass he returned to the accident scene.

[17] Donald Laidlaw was a witness who was not acquainted with the plaintiffs. He was going home after driving his cousin and his wife to their home. He was going down Main Street about fifty feet behind the Hawes vehicle. When they came to the intersection he noticed a police vehicle. He believed it was stopped. Then the police car moved directly in front of the Hawes vehicle and he said he "could not believe that action." Ms. Hawes braked but could not avoid the accident.

[18] Mr. Laidlaw was asked whether he noticed anything to suggest that Ms. Hawes' headlights were not on and he replied in the negative. He said that he did not notice the tail lights being on or being off but if the headlights were off Mr. Laidlaw said he would have flipped his lights at her because he had been following her for some time. He mentioned that it was pretty dark and it was near Bens Bakery which was a woodshed area where there are a lot of trees. This was consistent with the evidence of Mr. Leckie. Mr. Laidlaw stated, "I would have noticed if the lights were not on."

[19] Krista Leigh Gallant was calling for her husband who was at a party in a lounge in the strip mall adjacent to the highway. She parked and got out of her vehicle and went to the door of the lounge. She heard the screech of tires. She saw a Royal Canadian Mounted Police car stationary at the intersection. Ms. Gallant believed the driver had lost control of his car because she did not see any other person or any other vehicle in the vicinity.

[20] Ms. Gallant was unable to enter the lounge, she banged on the window and was admitted to the lounge. She asked the persons in the lounge to phone the police because of the vehicle on the highway. She walked to the police vehicle.

She said three to five minutes expired from the time she heard the screech of the brakes until she reached the police vehicle.

[21] When she reached the police vehicle she saw another vehicle off the road which was facing the number 7 highway. She said there were no lights in operation on the vehicle. She stayed at the police vehicle as she saw people around the other vehicle which was the Hawes vehicle. She saw pieces of material around the front of that car.

[22] Ms. Gallant said the police officer was in a great deal of pain and she asked a person to call for help. She tried to calm the defendant.

[23] The witness was asked if she went to the other car. She said she could remember going over but "not right away." There were a lot of people around the other vehicle together with ambulances and police cars. She said there was a lapse of time, about one half hour or forty-five minutes before she proceeded towards the Hawes vehicle. She was asked twice whether she went to the Hawes vehicle and she answered both by stating she remembered being "by there." I have difficulty determining from her evidence how close she came to the Hawes vehicle

and the extent of attention she gave to it. The witness agreed her concern was focussed on the police officer.

[24] On cross-examination she confirmed she did not see the collision of vehicles and she pointed out the location of the lounge (referred to as Dooley's) is shown on photograph 7 of Exhibit five.

[25] Corporal Ferguson has been an officer in the Royal Canadian Mounted Police for over twenty-seven years. After the motor vehicle accident in this proceeding Cole Harbour Detachment was responsible for the exhibits which included the headlights or portions of headlights of the Hawes motor vehicle.

[26] The witness sent a message to the exhibit custodian of the detachment to have the exhibits including the headlights destroyed. The officer said at this time he was aware that this civil proceeding was "going on but I was not aware there was to be a trial in this matter." He said he was not aware of the amounts that were being claimed in the action by the plaintiffs.

[27] Corporal Ferguson said he was advised by another officer it would be wise to preserve the exhibits but when Corporal Ferguson contacted the custodian officer in charge of the exhibits he was told that officer had already destroyed the exhibits. Corporal Ferguson said they had the report of Constable Zildjan and he did not believe, at the time he gave this direction to destroy the exhibits, that the exhibits would be necessary for the civil proceeding. He said if he knew the matter was going to trial the exhibits would not have been destroyed.

[28] The explanation given by Corporal Ferguson is difficult to understand. The circumstances involved a motor vehicle accident which involved a Royal Canadian Mounted Police vehicle. The destruction prevented the plaintiffs from examining the headlights. Notwithstanding these circumstances, I do not find the destruction of the exhibits was an action involving bad faith on the part of Corporal Ferguson. It could be described as an erroneous act or even a negligent act but I accept that which Corporal Ferguson stated in his evidence and conclude he made a mistake but not for the purpose of permitting the defendants to gain advantage over the plaintiffs in this proceeding.

[29] Corporal Peter Yorston stated he was coming from Cherry Brook and going to the Cole Harbour Detachment of the RCMP. He was driving a Chevrolet Lumina which was a marked police car. Before the accident at the intersection of Forrest Hills Drive and Main Street in Dartmouth, Nova Scotia he was proceeding in a westerly direction. The defendant described the sky as overcast and the lighting at the intersection as "dull". He did not suggest there was fog. He said the intersection was "not well lit."

[30] As the defendant approached the intersection he put on his directional light and pulled into the left hand turn area. When he performed that manoeuver he saw headlights go into operation on a vehicle in a parking lot away from the intersection and to the right side of the police vehicle. He saw the vehicle move and he turned back to look at the highway in front of the police vehicle. He saw a motor vehicle by the western entrance to the Irving Station which, he said, was 200 metres from the intersection. He commenced his left hand turn and the vehicle he was operating was struck in the intersection by the Hawes vehicle.

[31] Corporal Yorston did not see the plaintiff's motor vehicle before impact and was unable to say whether the plaintiff's headlights were in operation before the

accident. The defendant did not see a vehicle which was following the plaintiff's vehicle and which was the vehicle operated by Mr. Laidlaw who testified he was about fifty feet behind the Hawes vehicle. Mr. Laidlaw also stated he noticed the police car move directly in front of the Hawes vehicle. The only vehicle observed by Corporal Yorston was 200 metres away at the Irving station.

[32] During cross-examination the defendant gave detailed evidence of where he was on the highway and finite details as to his speed at those locations. I found that evidence unrealistic. I cannot accept the witness could remember the detail of location and speed that he gave in some of his evidence. I can accept the testimony he was looking "about" ninety degrees to his right when he observed the vehicle in the parking lot.

[33] Gordon Jewers is a twenty-nine year old person who was called to the stand by counsel for the defendants. He was asked if he recalled the motor vehicle accident which is the subject of these proceedings and he replied - "I recall it - mind you it has been a long time." Mr. Jewers said he saw a white car, which he later identified as a police vehicle, pull out and turn towards Dartmouth and he observed the white car "get hit." He stopped and "tried to assist" the police officer.

He identified the other vehicle involved in the accident as a Honda Accord. In his examination-in-chief he was asked what he observed about the Honda. He replied as follow:

> "After the accident I asked if they could put four way flashers on. I wasn't sure if the car had lights on or not - I - part of me thinks the car didn't have lights on - but at the same time - from the direction I was coming from I really couldn't observe one hundred percent if the car had lights on or if it was going too fast."

He was asked if the Honda's lights were on after the accident and he replied in the negative.

[34] At the beginning of his evidence on examination-in-chief Mr. Jewers volunteered that he was unemployed but on Social Assistance for a "mental disorder." This is relevant because the plaintiffs' counsel on cross-examination asked if a motor vehicle accident in 2001 caused memory problems for him. He answered, "I don't think so but I cannot remember."

[35] He confirmed on cross-examination that he could not say one hundred percent if the lights on the Honda were on or off. He was asked whether he saw

the headlights illuminated or not illuminated and he said he reviewed his statement to the police and went on to state:

> "I did see flashing on the side - now that I think about it - I did see flashing on the police car but I thought that was when it was coming into the intersection."

[36] I can find no facts based on the evidence of Mr. Jewers.

[37] Constable Fredy Michael Zildjan was called to the stand by counsel for the defendants. He was advanced to give opinion evidence on his examination of lamps on the Hawes vehicle.

[38] Constable Zildjan received his early education outside of Canada to the same extent as a grade 12 education in Canada. I have examined his curriculum vitae which is attached to his report filed as Exhibit 10. He took night courses at the University of New Brunswick but they were not courses for accident investigation. In 1999 he took the basic recruit training for new officers of the Royal Canadian Mounted Police at Regina, Saskatchewan.

[39] The curriculum vitae indicates Constable Zildjan took courses in the RCMP concerning accident investigation. The names of the courses and the times the witness attended are as follows:

1. Traffic Accident Investigation Level II from September 25th, 1994 to September 29th, 1994 in Debert, N.S.

2. Advance collision Analyst Level III from September 9th, 1997 to September 26th, 1997 at Canadian Police College, Ottawa, Ontario.

3. Collision Reconstruction Level IV from October 25th, 1998 to November 13th, 1998 at Canadian Police College, Ottawa, Ontario.

[40] With respect to these three courses there is one subject in the Level III course entitled “tires and lamp examination.” There were other courses set out in the curriculum vitae but it was my impression lamp examination was an area quite distinct from the other subjects in the courses Constable Zildjan attended.

[41] The witness was asked the amount of time that was occupied on lamp examination in the course. He replied possibly one-half day and admitted it could have been less than three hours and could not recall if that time included the tire examinations. He took the course eight years ago and has not testified on the subject until called upon in this proceeding.

[42] To take the Level III course it was not necessary to take any preliminary courses. He was not required to work under a senior analyst. He performed no reading or study on written material on lamp examination except the document entitled The Traffic-Accident Investigation Manual which was filed as Exhibit 11. He said all he needed to read was that which was in the manual which was filed as an exhibit.

[43] In *R. v. Mohan* [1994] 2 S.C.R. 9 Justice Sopinka reviewed the rules on the admissibility of expert evidence setting out as factors relevance, necessity in assisting the trier of fact, absence of any exclusionary rule and a properly qualified expert. With respect to the fourth requirement, that of qualifications, Sopinka J. at page 25 said:

> "....the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify."

[44] In Sopinka and Lederman, *The Law of Evidence in Civil Cases* (1974 ed.) at page 309 the authors say:

> "An expert is usually called for two reasons. He provides basic information to the court necessary for its understanding of the scientific or technical issues involved in the case. In addition, because the court alone is incapable of drawing the necessary inferences from the technical facts presented, an expert is allowed to state his opinion and conclusions. His usefulness in this respect is circumscribed by the limits of his own knowledge. Before the court will receive his testimony on matters of substance, it must be demonstrated that the witness possesses sufficient background in the area so as to be able to appreciably assist the court. The test of expertness so far as the law of evidence is concerned is still in the field in which it is sought to have the witness' opinion."

[45] Constable Zildjan has preformed minimal study on lamp examination and has had no experience in examination of lamps. It is not sufficient to submit that he has had experience in various subjects of collision analysis because lamp examination is quite distinct from the other subjects referred to in the curriculum vitae.

[46] When counsel for the plaintiffs, Ms. Mitchell, moved for a finding the that witness was not qualified to express opinions on the operation or non-operation of

the lamps of the plaintiff's motor vehicle I reserved on the motion. I needed to hear further evidence from the witness to determine if he was qualified to express his opinion. I permitted further evidence from the witness but I can now state there was not presented evidence which establishes Constable Zildjan was qualified to express the opinion he gave in his testimony.

[47] When I consider the evidence of the lay witnesses and the evidence of Constable Zildjan, if it had been admissible, I find that up to the time of the motor vehicle collision the headlights were in operation on the plaintiff Hawes' motor vehicle. I make this finding for the following reasons:

1. Krista Gallant did not see the Hawes motor vehicle before the accident and did not see it until after she was admitted to the lounge, sought help and walked to the police vehicle.

2. Ms. Gallant remained with the defendant Yorston who was in pain. She admitted she was focussed on the police officer. She saw people around the other car and pieces of material in front of that car.

3. Ms. Gallant said she did not proceed toward the Hawes vehicle “right away.” She said there was a lapse of time between one-half hour and forty-five minutes before she ventured forth.

4. As stated I cannot determine how close she came to the Hawes vehicle or the extent of attention she paid to it. Twice she said she went “by there” when asked if she went to the Hawes vehicle.

5. Both plaintiffs stated the lights of the plaintiffs’ motor vehicle were on during the trip to the accident scene. I accept Ms. Hawes’ evidence on this point.

6. Robert Leckie passed the Hawes vehicle and he remembers seeing the headlights in operation. He commented it was “pretty dark” at one stretch of the highway.

7. Donald Laidlow did not know the plaintiffs. He gave his evidence in a forthright manner and I accept his evidence. He confirmed Mr. Leckie’s evidence that the road was pretty dark in a particular spot. He was behind the Hawes vehicle

a short distance and could not directly look at the headlights but said, “I would have noticed if the lights were not on.”

8. In my view one could draw the inference that Ms. Hawes would be aware, particularly at the dark places on the highway, if the headlights were not in operation.

9. Nothing can be drawn from the fact that the defendant Yorston did not notice the plaintiff Hawes’ motor vehicle. He did not notice the Laidlaw’s motor vehicle which was fifty feet behind the Hawes’ motor vehicle.

[48] The evidence given by Constable Zildjan convinced me he was not qualified to express an opinion. Constable Zildjan attended on the two vehicles involved in the accident on November 22, 1998. The vehicles were in a towing compound. He said a visual observation of the bulbs which he removed from the Hawes’ motor vehicle showed no signs of “hot shock”.

[49] On the following day, at the request of Corporal Ferguson, he attended at the R.C.M.P. detachment and received a sealed beam headlight which he took to a

service station. A mechanic broke open the sealed lamp and Constable Zildjan checked the bulb and he indicated it showed no sign of “hot shock”. Except for two side marker lamps the other lamps showed no signs of “hot shock”.

[50] The witness concluded the two small bulbs removed from the side markers were burned out. He said in his report the smaller bulbs showed more darkening than the larger ones. In finding the lights of the Hawes’ vehicle were not in working condition prior to impact the report stated:

> In order for a lamp to produce ‘white heat’ also known as ‘light’, the tungsten filament reaches approximately 2200 degrees Celsius. At that point the filament is extremely flexible and ready to stretch, break or distort as a result of impact. The filaments I examined were all in near perfect condition. It’s my opinion that based on the appearance of one of the filaments in the dual filament bulb, this lamp only shows signs of an older filament typical of ‘age sag’ and not ‘hot shock’.

[51] The witness indicated in his evidence that he relied almost completely on the document filed as Exhibit 11 which was entitled the Traffic - Accident Investigation Manual. It was my understanding from his evidence that this was the only document he referred to in order to reach his opinion and yet he was referred by Ms. Mitchell to a number of important sections of the manual in cross-

examination and it was clear to me he didn't follow some of the directions and recommendations in the manual.

[52] In the manual at Page 23-7 burnout is discussed in the following words:

> Burnout occurs when tungsten leaving the filament by evaporation produces pitting to such an extent that the filament is thinner and weaker at certain places. These narrower spots have greater electrical resistance and current through the filament makes them hotter. The increased heat accentuates the loss of material and still further increases heating at these weakened points. When the filament temperature at the narrowest point reaches the melting point of tungsten, the filament parts at that point. An electric arc forms across the gap further increasing the heat and loss of material on either side of the gap. The arc flares up brightly for an instant until the gap widens the mouth to interrupt the current flow. Then the lamp is burned out.

[53] The conclusion reached by the witness speaks of filaments which were in "near perfect condition" which would seem not to include filaments which were thinner and weaker as expressed in the definition of burnout in the manual.

[54] The manual contained a number of cautions concerning the arrival at a conclusion that the lamps were not in operation. On cross-examination Constable Zildjan was referred to a number of statements from the manual. At page 23-18 the following was set out:

> Absence of hot shock does not mean that the lamp was off; the shock may not have been great enough to stretch the filament.

[55] The witness says he agreed with that statement.

[56] Again at Page 23-18 the following is set out:

> Severity of impact (sudden change in motion) that a lamp receives in a collision depends not only on the speed at which the vehicle is moving when the crash occurs but also how close the lamp is to the contact damage area.

[57] The witness agreed with that statement.

[58] To suggest in the report that the Hawes vehicle "may have had an electrical problem" without examination of the electrical system of the vehicle does not permit me to make the finding there was such an electrical problem.

[59] In conclusion, even if I found the witness qualified to express an opinion on the condition of the lamps prior to the accident, his evidence is not probative and lacks consistency to the point where I could not accept his opinion. It conflicts

with the clear evidence advanced by persons at the scene prior to and at the time of impact.

[60] I find the headlights of the Hawes vehicle were in operation from the time the vehicle left the last pub attended by the plaintiffs up to the time of the motor vehicle accident. In my view the evidence establishes the defendant Yorston was distracted as he approached and entered the intersection to the point he did not see two vehicles which were in front of him. The defendant did not keep a proper lookout to see that which was there to be seen. He was negligent and that negligence was the sole cause of the accident.

Damages - Cathy Hawes

[61] Ms. Hawes was 27 years of age at the time of the motor vehicle accident. She had completed grade 12 and obtained a secretarial certificate from the Nova Scotia Community College. At the time of the accident she worked as a cheque distribution clerk at C.F.B. Halifax.

[62] There was an agreement among counsel with respect to the special damages suffered by the plaintiff, Cathy Hawes, as a result of the accident. These damages are as follows:

Damage to motor vehicle (incl. Tax)	$1380.00
Loss of sick leave pay	121.96
Loss of sick leave vacation pay	894.16
Total	$2396.12

[63] On the claim for non-pecuniary general damages it was agreed by counsel the report of Dr. Cooper-Rosen dated June 13, 2000 be entered in evidence without the need to call the doctor as a witness. Ms. Hawes stated in her testimony that she agreed with the contents of the report. The report stated she was seen by an associate of Dr. Cooper-Rosen on November 25, 1998 who stated Ms. Hawes "complained of a sore chest in the area of her seat belt and pain in her knees, neck, mid and low back." There were also complaints of right wrist and arm discomfort. It was said she had decreased forward flexion and rotation of the cervical spine. There was bruising on her knees and right hand.

[64] Dr. Cooper-Rosen first saw Ms. Hawes on December 7, 1998. The plaintiff was taking physiotherapy three times a week and continued that treatment for three months. Ms. Hawes lost one week from her employment and when she returned to work she could not do any lifting for a period of time.

[65] Dr. Cooper-Rosen stated that at the time of Ms. Hawes first visit to her on December 7, 1998 there were complaints of a sore neck and pain in the thoracic area of her back and sharp pain in her knees. In her testimony Ms. Hawes stated she has muscle spasms in her upper back once or twice a year which last two or three days.

[66] Dr. Cooper-Rosen concluded her report of June 13, 2000 stating the following:

> "I saw Ms. Hawes regularly from January to August of 1999, as I followed her through her pregnancy. She did complain of some low back pain on January 14, 1999, but other than that she progressed through a normal pregnancy and delivery with no complaints related to the MVA. I have also seen Ms. Hawes on numerous occasions since her delivery and she has not complained of any neck, back or knee pain."
>
> Ms. Hawes has been a patient of mine since 1998. She has been in good health and has never had any prior complaints of any neck, back, or knee pain; that is, she had no pre-existing difficulties in these areas.

> In summary, Ms. Hawes suffered a soft tissue injury to her neck, mid back and lower back regions, blunt trauma to both knees and bruising of her right hand. These injuries were mild and limited Ms. Hawes activities for about three months. However, with physiotherapy and a work hardening program, she has regained function in all these areas and seems to have completely recovered from her injuries. I do not anticipate any long term problems as a result of the motor vehicle accident."

[67] Ms. Hawes stated she has completely recovered except for the flare ups in the upper back.

[68] There were complaints in her testimony of stress caused by the accident and she made reference to losing her motor vehicle and the charges she fought in provincial court. She believes she has developed depression from this accident but there was no medical evidence advanced with respect to this complaint. It is true a number of police officers attended the accident scene and she was taken to the detachment and given a breathalyser test.

[69] In the course of argument, counsel for Ms. Hawes submitted that an appropriate figure for non-pecuniary general damages was $22,000. Counsel for the defendants put forth a figure between $6000 and $8000.

[70] Counsel for Ms. Hawes refers to the decision of the Court of Appeal of Nova Scotia, *Smith v. Stubbert* [1992] 117 N.S.R. (2) 118. The court established a range of $18,000 to $40,000 for a prolonged physical disability with substantial emotional impact. The evidence of Ms. Hawes' disability does not fit the description given by Justice Chipman which was a problem "persistently troubling but not totally disabling."

[71] My impression of Ms. Hawes is that she was attempting to be truthful in her evidence. She was modest in her complaints. She agreed with the comments of Dr. Cooper-Rosen that her injuries "were mild and limited" to a period of three months. The only continuing problem is the infrequent muscle problem in the lower back. I would award $12,000 general damages with interest thereon at the rate of 2.5 percent thereon for five years. She should also recover 5 percent interest on her special damages for five years.

Damages - Aulden Michael Pottie

[72] Aulden Michael Pottie is 33 years of age and he finished his academic courses to the extent of grade ten. He was unemployed at the time of the motor vehicle accident.

[73] Mr. Pottie has been interested in automotive body work and mechanic work since he was thirteen years of age. In 1988 he started a course in auto body work. He remained on the course for almost two years.

[74] Mr. Pottie said that following this accident he had pain in his neck, back, leg and shoulders. He attended the Dartmouth General Hospital the day after the accident. The record of the hospital indicates the patient complained of increasing neck stiffness, bilateral shoulder pain and bruising to a leg and an arm. The hospital record stated Mr. Pottie “hit windshield with head”.

[75] Mr. Pottie attended upon his family doctor (Dr. John D. Smith) on December lst, 1998. Dr. Smith’s report states he complained of stiffness at the back of his neck and upper back. It was noted the patient continued to work as a car painter

(which seems to conflict with Mr. Pottie's evidence he was not working at the time of the accident) and stiffness seemed to bother him. Dr. Smith recommended that he see a physiotherapist. Dr. Smith's clinical notes stated Mr. Pottie struck the windshield with his face and the windshield broke.

[76] Dr. Smith examined Mr. Pottie on March 9th, 1999 and the notes state "not missing any work. Problem with both shoulders." There was surgery on both shoulders in 2001. The reports of Dr. LeGay, the operating surgeon, state Mr. Pottie had tendinitis of both shoulders. By letter dated January 24th, 2002 from Dr. LeGay to Dr. Smith there was reference with respect to the left shoulder with continual soreness which was expected but he had good range of motion, minimal crepitus and good strength. The operation on the right shoulder took place three months before the operation on the left shoulder. The patient had full range of motion in the right shoulder "with minimal tenderness."

[77] By March of 2002 Mr. Pottie had full range of motion in both shoulders with minimal crepitus. The medical documents in Exhibit 1 speak of pain in the neck and shoulders. With physiotherapy the neck improved. Mr. Pottie testified that after the operations on the shoulders in 2001 the problems with the shoulders

improved “a lot” and he estimated an improvement of 80 to 85 percent. Before the surgery he could not lift his arms over 90 degrees and had trouble sleeping. He said his shoulders ache on occasion at this time.

[78] Mr. Pottie testified that prior to the accident he worked almost full time in auto body shops. During off hours he worked painting vehicles and he described a few of these jobs including work on a 1971 Chevelle owned by Bruce Riley. He did special art work on vehicles and stated a job may take twenty hours or as much as one hundred to two hundred hours. He mentioned the tools he used and the weight of the tools and the fact his problems arising from the accident render it difficult to use some of the tools.

[79] Mr. Pottie testified his off hours work on motor vehicles and motorcycles included painting to the point it was special art work on the vehicles. A few of these jobs were referred to by Mr. Pottie and pictures of several vehicles were made exhibits. The witness said that more jobs were done for which pictures were not available. He said he earned between $25,000 and $30,000 a year conducting this off hours work.

[80] Income tax returns were entered in evidence and indicated declared income of Mr. Pottie as follows:

Year	Earnings	E.I. Benefits
1991	$4500.00	
1992	$5407.00	$1785.00
1993	$ 787.00	$2261.00
1994	$9097.00	
1995	$8885.00	$8372.00
1996	$4177.00	
1997	$24,784.00	
1998	$3276.00	$11,904.00
1999	$19,427.00	$2807.00
2000	$1,637.00	$3546.00
2001	$0	
2002	$38,556.00	
2003	$41,542.00	
2004	$36,480.00	$4543.00

[81] From these records Mr. Pottie only declared earnings of $3276.00 for the year 1998 with the accident occurring near the end of that year. He received $11,904.00 in unemployment benefits during that year. He started work at the Dockyard on March 19th, 1999 and obtained a full time job at the Dockyard in January 2002 and earns approximately $44,000 each year. This work does not exacerbate his shoulder pain.

[82] Mr. Pottie did not declare to Revenue Canada income earned on the work performed painting vehicles. He said he did not know how to do that. This failure

is not before me. A failure to set out income in income tax returns is not a bar against a claim for loss of income. (See *Hachey v. Dakin, Kempt and Canadian Provincial Insurance Co.* [1983] 57 N.S.R. (2d) 441 (T.D.) and *Parsons v. Packer* [1997] 160 N.S.R. (2d) 321 at 336 (C.A.) I do, however, find incredible his reason for not reporting full income. The absence of any evidence from customers or production of documents to support additional income requires me to find there was no proof of a substantial loss of income.

[83] I refer to *Bush v. Air Canada* [1992] 109 N.S.R. (2d) 90 at 96:

> Loss of earnings incurred down to the date of trial are special damages which must be pleaded and proved. In some cases, this is very simple but in a case such as this, the circumstances are such that it is not so easy. In *Paulse v. Neville, et al* (1997), 12 Nfld. & P.E.I.R. 223 Gushue, J.A. speaking for the Newfoundland Court of Appeal said at p. 227:
>
> > There is not much in the way of authorities available to indicate the particularity with which special damages are to be proved, but this is understandable because it obviously will vary with different types of cases and the availability of evidence. In my view, however, a correct interpretation of the strict proof required in the assessment of spcial damages is that they must be proved to as great an extent, or a fully, as possible in the circumstances of a particular case.

As set out in *Halsbury Laws of England* 3rd Volume II, P. 218:

> "In contrast to general damages, special damages must be claimed specifically and proved strictly."

[84] Dr. John Smith was Mr. Pottie's family physician. He testified and his clinical notes were entered into evidence. There is a reference in the notes, bearing the date March 30th, 1995, to "pain in both shoulders" and the fact the patient could not lift his arm above his shoulder. Dr. Smith sent Mr. Pottie to the hospital for x-rays of his shoulder. Mr. Pottie attended at the hospital but left when a substantial time passed without his name being called. Mr. Pottie did not see Dr. Smith for the period from March 30th, 1995 to December lst, 1998.

[85] It is my view that based on the evidence before me, including that of Mr. Pottie, Dr. Smith and Dr. LeGay and the notes and reports of the doctors, that if the accident did not cause the plaintiff's shoulder complaints it certainly aggravated difficulties in that area and rendered greater discomfort in the shoulders. Dr. LeGay indicated it was an important factor Mr. Pottie performed work after the 1995 complaint. He earned $24,784.00 in 1997.

[86] Dr. Smith referred Mr. Pottie to Dr. Venugopal and in the referral letter dated March 10th, 1999 he advised the patient had bilateral shoulder pain and that

he was to see Dr. Venugopal in 1995 but that he left the doctor's office before he could be seen. Dr. Smith stated in the letter that Mr. Pottie's "shoulders seem to be relatively fine until a recent motor vehicle accident..." Undoubtedly, Dr. Smith based that comment on that which was told to him by Mr. Pottie but the statement suggests aggravation of the shoulder problem did take place. Furthermore, I found Mr. Pottie credible when he testified as to the nature of his injuries referring to 80 to 85 percent recovery. As indicated he impressed me in this portion of his evidence despite my finding he was less credible in his evidence on lost income.

[87] Dr. Venugopal saw Mr. Pottie on April 14th, 1999 and in his letter to Dr. Smith that same date stated:

> "He has had shoulder problems for quite awhile. About two years ago he started having shoulder problems, but this sort of settled down. About four months ago he was involved in a motor vehicle accident as a front seat passenger without a seat belt on. They t-boned another car, and he put his arms up to protect himself. Basically he smashed his face against the windshield and cracked it. He also took some force on his hand and arms. He has been having shoulder problems since then. He has an aching pain and difficulty with abduction especially above 90 degrees. Passively he can move it through a full range of motion, but when he tries to move it himself he has a lot of pain and discomfort, etc."

[88] The plaintiff's symptoms continued and he was sent to Dr. LeGay, an orthopaedic surgeon, who performed the two operations on the shoulders in 2001.

With respect to Mr. Pottie's complaints of pain in May 1995 Dr. LeGay said he did not believe there was ongoing chronic pain before the accident.

[89] On the issue of failure to wear the seat belt Dr. LeGay could not be certain this failure may have contributed to his injuries.

[90] The defendants retained Dr. Michael Gross, an orthopaedic surgeon, who allowed that the accident may have "exacerbated pre-existing changes in his shoulders to a minor degree". More fully the opinion of Dr. Gross is set forth in the last two paragraphs of his report dated May 19th, 2003 which states:

> I think that Mr. Pottie's lack of wearing a seatbelt undoubtedly contributed to him taking most of the injuries to his head and neck. There is no real explanation of how he injured his shoulders in the motor vehicle accident but it is possible that he exacerbated pre-existing changes in his shoulders to a minor degree. It is more likely that his period of deconditioning following the motor vehicle accident resulted in increased play in the rotator cuff and Doctor LeGay does make note of this in his documentation. He stresses the importance of getting a full return of strength of the rotator cuff to control the shoulders.
>
> If Mr. Pottie had been wearing his seatbelt, it is very unlikely that he would have hit his head and injured his neck at all. I think he would have avoided any injury to his shoulder because the seatbelt would have prevented him from going forward and would prevent the shoulders from impacting with any part of the front of the car.

Dr. Gross is expressing the view that Mr. Pottie would have avoided the injury to his shoulders if he had worn his seat belt.

[91] Dr. LeGay had extensive connection to the medical problems of Mr. Pottie and I accept his opinion that the patient did not have chronic pain to the shoulders before the accident and I find that Mr. Pottie's difficulties with respect to the injuries be recounted including the shoulder problems and the surgery required to the shoulders was caused by the accident.

[92] I find Mr. Pottie suffered damages to his neck and shoulders as a result of the motor vehicle accident. He had considerable pain and discomfort to his shoulders and underwent two operations which would have been stressful. He has almost completely recovered from these injuries. With respect I do not consider this is a case which warrants the size of damages sought by counsel for Mr. Pottie and I believe that $25,000.00 would be a proper sum for non-pecuniary damages.

[93] On the issue of pecuniary damages for loss of income, as expressed, I do not find the plaintiff has proved that he has suffered a substantial loss of income. The

accident occurred in November 1998 and the plaintiff, during that calendar year, only earned declared income of $3276.00 and collected Employment Insurance Benefits of $11,904.00. In the absence of evidence confirming the sum Mr. Pottie stated he lost by way of income and I am not prepared to find the defendants should pay the sums referred to by Mr. Pottie. I accept there was evidence of a loss of earnings but I will not award more than $12,000 for that loss.

[94] Should the loss occasioned by the accident in the amount of $37,000.00 be reduced by reason of the failure to wear a seat belt? In answering this question I was greatly assisted by the judgment in *Fowler v. Schneider National Carriers Ltd.* [2001] 193 N.S.R. (2d) 206. Freeman, J.A. referred to a case before the Supreme Court of Canada where Cory, J. referred to and approved the words of Lord Denning in *Froom v. Butcher* [1975] 3 All E.R. 520 (Eng. L. A.). Justice Freeman stated at paragraphs 41 and 42:

> In a case from British Columbia involving responsibility for making a child passenger wear a seat belt, *Galaske v. O'Donnell*, [1994] 1 S.C.R. 670 (S.C.C.), Cory, J. writing for the majority, quoted Lord Denning's reasons and said they were "as sensible and compelling in 1994 as they were in 1975, and should have been in 1985."
>
> Lord Denning discussed apportionment of responsibility as follows:

Whenever there is an accident, the negligent driver must bear by far the greater share of responsibility. It was his negligence which caused the accident. It also was a prime cause of the whole of the damage. But insofar as the damage might have been avoided or lessened by wearing a seat belt, the injured person must bear some share. But how much should this be? Is it proper to enquire whether the driver was grossly negligent or only slightly negligent? Or whether the failure to wear a seat belt was entirely inexcusable or almost forgivable? If such an enquiry could easily be undertaken, it might be as well do it. In **Davies v. Swan Motor Co** ([1949] 1 All E. R. at 632) we said that consideration should be given not only to the causative potency of a particular factor, but also its blameworthiness. But we live in a practical world. In most of these cases the liability of the driver is admitted; the failure to wear a seat belt is admitted; the only question is: what damages should be payable? The question should not be prolonged by an expensive enquiry into the degree of blameworthiness on either side, which would be hotly disputed. Suffice it to assess a share of responsibility which will be just and equitable in the great majority of cases.

Sometimes the evidence will show that the failure made no difference. The damage would have been the same, even if a seat belt had been worn. In such cases the damages should not be reduced at all. At other times the evidence will show that the failure made all the difference. The damage would have been prevented altogether if a seat belt had been worn. In such cases I would suggest that the damages should be reduced by 25 per cent. But often enough the evidence will only show that the failure made a considerable difference. Some injuries to the head, for instance, would have been a good deal less severe if a seat belt had been worn, but there would still have been some injury to the head. In such case I would suggest that the damages attributable to the failure to wear a seat belt should be reduced by 15 per cent.

...In the present case *the injuries to the head and chest would have been prevented by the wearing of a seat belt and the damages on that account might be reduced by 25 per cent.* The finger would have been broken anyway and the damages for it not reduced at all. Overall the judge suggested 20 per cent and Mr. Froom made no objection to it. So I would not interfere. (Emphasis added)

[95] It is probable that the injuries to Mr. Pottie's shoulders would not have happened if he was wearing a seat belt. I would reduce damages by 20 per cent.

Conclusion

[96] The plaintiff, Cathy Hawes, shall recover from the defendants special damages in the amount of $2396.12 with 5% interest on that sum annually for a period of five years. She should also recover from the defendants general non-pecuniary damages of $12,000.00 with prejudgment interest thereon at the rate of 2.5% annually in accordance with the decision of the Nova Scotia Court of Appeal in *Bush v. Air Canada* (supra) for a period of five years which I find was a reasonable time to bring the matter to trial.

[97] The plaintiff, Aulden Pottie, shall recover from the defendants $20,000.00 representing 80% of the non-pecuniary award of $25,000.00 and prejudgment interest thereon at the rate of 2.5% annually for five years.

[98] Mr. Pottie shall also recover from the defendants a loss of earning capacity of $9600.00 representing 80% of the $12,000.00 previously assessed. There will be no prejudgment interest on the award of $10,000.00.

[99] The plaintiff, Cathy Hawes, will recover her costs from the defendants. The plaintiff, Aulden Pottie, will recover 80% of his costs from the defendants. The defendants will recover 20% of their costs in one bill from the plaintiff, Aulden Pottie.

[100] I will accept written submissions on the amount of costs from counsel.

John M. Davison
Justice
Supreme Court of Nova Scotia