

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Ocean v. Economical Mutual Insurance Company,
2011 NSSC 202

Date: 20110531
Docket: Hfx No. 190673
Registry: Halifax

Between

MAY OCEAN, of White's Lake, in the Province of Nova Scotia

Plaintiff

-and-

THE ECONOMICAL MUTUAL INSURANCE COMPANY, a
body corporate, registered to carry on business in the Province
of Nova Scotia and **RAYMOND PATRICK SULLIVAN** of Lantz,
in the Province of Nova Scotia.

Defendants

Judge: Deborah K. Smith, Associate Chief Justice

Heard: September 14, 20, 21, 22, 23, October 4, 5, 6, 7, 13, 14, 15, 20, 25,
26, 27, November 22, 23, December 13, 14, 15, 16, 17, 2010,
January 4 and 5, 2011

Written Decision: May 31, 2011

Counsel: May Ocean for the Plaintiff (Self-represented)

D. Geoffrey Machum, Q.C. & C. Patricia Mitchell for the
Defendant, Economical Mutual Insurance Company

Megan M. Roberts for the Defendant, Raymond Patrick
Sullivan

By the Court:

[1] This action arises as a result of a motor vehicle accident that occurred on the Prospect Bay Road, Prospect Bay, Nova Scotia on December 13th, 2000. The collision involved the Plaintiff, May Ocean, who was driving a 2000 Volkswagen Golf and the Defendant, Raymond Patrick Sullivan, who was driving a 1988 Honda Civic CRX. Ms. Ocean has brought an action against Mr. Sullivan alleging that he was driving in a negligent manner at the time of the accident and that his negligence caused her to suffer personal injury and damages. Mr. Sullivan denies that he was operating his vehicle in a negligent manner at the time of the accident and suggests that he was in the agony of collision. Alternatively, he submits that Ms. Ocean was contributorily negligent.

[2] Mr. Sullivan was uninsured at the time of the accident. As a result, Ms. Ocean has also brought an action against her own insurer, the Economical Mutual Insurance Company (hereinafter referred to as “Economical”), pursuant to the uninsured motorist provisions of her own automobile insurance policy.

[3] In July of 2008, Ms. Ocean applied to amend her pleadings to also bring a negligence and bad faith action against Economical. Leave was granted to amend her pleadings but the new claims brought against Economical were bifurcated from the original claims advanced by the Plaintiff and are to be heard by way of a separate trial.

[4] In July of 2010, the proceedings were trifurcated so that the issue of damages will be dealt with after the motor vehicle accident trial and the negligence/bad faith claim against Economical (see 2010 NSSC 314). As a result, the issues before me in this proceeding are limited to liability for the motor vehicle accident and whether Economical is liable to Ms. Ocean pursuant to the uninsured motorist provisions of her own automobile policy.

FACTS

MS. OCEAN’S VERSION OF EVENTS

[5] Ms. Ocean has a limited memory about the day of the accident. She says that she recalls being at a local convenience store (hereinafter referred to as “Peter’s”) just prior to the accident. Peter’s is located very close to the accident scene. She testified

that she picked up a few grocery items at Peter's, exited the store and returned to her vehicle. She says that her car was parked close to the door of the store with the front of her vehicle being up against building. She says that she got into her vehicle, put on her seat belt as well as the lights of her car and then swung the vehicle around in order to exit. She was driving a standard. She says that it was "pitch black out" and recalls it being approximately 6:30 p.m. at the time of the collision.

[6] Ms. Ocean testified that as she pulled out of Peter's store onto the Prospect Bay Road there were blind turns on both her left and her right. There was also a playground directly across the street from the store as well as the Pinedale Park Road which exits onto the Prospect Bay Road in the area near the store. As a result, a driver exiting the store has to be cautious when entering the Prospect Bay Road.

[7] Ms. Ocean believes that she exited the store in the area around the middle of the parking lot. She says that she recalls looking in both directions twice and did not see any headlights or anything else coming from either direction. She started pulling out onto the road going left in a southerly direction. She says that she pulled out without delay after checking both ways. She says that nothing was coming when she pulled out. She says that she got about a quarter of the way through the northbound lane when she saw lights coming around a turn in the road. She says that she "instinctly [*sic*] and instantly knew that the situation was not good". She testified that the oncoming vehicle was travelling at a tremendous rate of speed.

[8] Ms. Ocean decided that she had to immediately get over to her side of the road. She says that as she did that, through her left driver's side window, she saw a glimpse of what appeared to be a large grey vehicle similar to a town car. She made it into the southbound lane and says that she saw headlights coming towards her. The head lights were in her lane. She says that the situation was dire and she did the only thing that she could do and aimed for the ditch. Unfortunately, she did not make it. Her vehicle was hit by Mr. Sullivan's vehicle. Ms. Ocean says that Mr. Sullivan was fully in her southbound lane when he hit her. The collision was significant with both vehicles incurring substantial damage.

[9] Ms. Ocean is of the view that there were two vehicles coming from her left – a large grey vehicle (that has never been identified) and Mr. Sullivan's vehicle which was a smaller red vehicle. She testified at trial that Mr. Sullivan's vehicle was "on the tail of this [grey] car and was passing the car". Ms. Ocean believes that Mr. Sullivan may have been racing with this grey car just prior to the collision.

MR. SULLIVAN'S VERSION OF EVENTS

[10] Raymond Sullivan was 22 years old at the time of the collision. He had worked on December 13th, 2000 and at the time of the accident was on his way to meet a friend for the evening.

[11] Mr. Sullivan testified that he lived on the Prospect Road 2 to 3 minutes from Peter's store. He said that on the evening of the collision he was on the Prospect Bay Road travelling in a northerly direction towards Peter's store. Mr. Sullivan described the road as "windy" and said that it didn't seem to him that he was speeding prior to the collision. In a statement that Mr. Sullivan signed after the accident he said that he was travelling 70 to 71 kilometers per hour on the evening of the collision and that the weather that night was clear and visibility was good.

[12] As one travels in a northerly direction from Prospect Village towards White's Lake there is a dip and a curve in the road just before Peter's store. Mr. Sullivan testified that he was travelling in his northbound lane, came around that curve, and saw Ms. Ocean's vehicle a quarter of the way into his northbound lane. He testified that Ms. Ocean's vehicle hesitated and he thought that she was going to stop. He decided to go around her vehicle.

[13] Mr. Sullivan concluded that he couldn't go to the right of Ms. Ocean's car as the back of her vehicle was still in the parking lot of Peter's store and there were other cars parked in the parking lot that he thought would prevent such a manoeuvre. He also expressed concern about the fact that there was a daycare centre located to the right. Mr. Sullivan therefore braked and veered to the left in an attempt to avoid hitting Ms. Ocean.

[14] According to Mr. Sullivan, Ms. Ocean then pulled into the southbound lane. As a result, both vehicles ended up in Ms. Ocean's lane of travel. Mr. Sullivan attempted to turn back to the right but it was too late and the vehicles collided. The left front corner of Mr. Sullivan's vehicle hit the left side of Ms. Ocean's vehicle. Mr. Sullivan testified that his left front tire then buckled, he lost his steering, and his vehicle swerved back to the left and ended up in the ditch.

[15] Mr. Sullivan testified that everything happened very quickly. He said that he veered to the left as he felt it was the only option available to him in the

circumstances. He did not expect Ms. Ocean to continue to travel into the southbound lane that he had veered into.

[16] Mr. Sullivan confirmed that the speed limit in the area of the accident was 70 kilometres per hour. He testified that his vehicle was equipped with a performance or “cherry bomb” exhaust which was very loud. He said that he was not racing anyone at the time of the collision and did not see a grey vehicle around the time of the accident.

[17] Mr. Sullivan also testified that he had not consumed any alcohol in the 24 hours prior to the collision, nor had he consumed any drugs (prescription or otherwise).

OTHER WITNESSES

[18] Ms. Ocean called numerous other witnesses to testify at the time of trial. None of these witnesses saw the accident. It is not necessary for me to refer to all of these witnesses or their evidence in this decision. I will indicate, however, that I have reviewed and considered the evidence of all of the witnesses in coming to my decision.

[19] Ms. Sherri Crowe was called to testify by the Plaintiff. Ms. Crowe resides near the accident scene and heard the collision. She testified that on the evening of December 13th, 2000 she was in the bathtub reading a book. Ms. Crowe’s home is located on a hill approximately 150 feet off of the Prospect Bay Road. The bathroom that she was located in is at the back of her home, away from the road. She had her bathroom window open approximately 3 inches so that she could smoke. The bathroom window is located right above the bathtub.

[20] Ms. Crowe testified that she heard a car speed by her house. She estimated that it was travelling about 80 to 90 kilometers an hour. She was not certain how fast the car was travelling but said that it sounded like it was travelling at a high rate of speed. She thought to herself “That’s an accident looking for a place to happen”. Within seconds she heard a crash.

[21] Ms. Crowe testified that she thought that the speed limit in the area of the accident was 50 kilometers per hour.

[22] Constable Angela MacEachern also testified at trial. Cst. MacEachern is an RCMP officer who was called to the accident scene. According to the police file relating to this collision, the RCMP received a report of the accident at 6:10 p.m. on the evening of the collision. Cst. MacEachern believes that it took her at least half an hour to arrive at the accident scene. Mr. Sullivan had already been taken to the hospital by ambulance by the time she arrived.

[23] The Constable's investigation indicated that there were two vehicles involved in the collision. Her notes incorrectly suggest that Ms. Ocean's vehicle struck Mr. Sullivan's vehicle. She was uncertain who had provided her with this information. The Constable testified that she had no recollection of Ms. Ocean suggesting that a third vehicle (a grey car) may have been involved in the accident.

[24] Constable MacEachern testified that she did not see any evidence that would suggest that either the Plaintiff or the Defendant were drinking or under the influence of drugs on the evening of the accident.

[25] The Constable testified that the speed limit in the area of the accident was 70 kilometers per hour. She confirmed that she did not call an accident reconstructionist to the accident scene and did not have evidence concerning the speed that Mr. Sullivan was travelling prior to the collision. She did not charge Mr. Sullivan with speeding or with driving too fast for the conditions that existed at the time of the collision. However, she did charge Mr. Sullivan for operating a motor vehicle without insurance contrary to s. 230 (1) of the *Motor Vehicle Act* as well as operating an unregistered vehicle contrary to s. 37(1) (a) of the said *Act*. Mr. Sullivan voluntarily paid the fines for both of these offences.

[26] Ms. Ocean was not charged with any offences as a result of the collision.

[27] Constable MacEachern took a number of photographs at the accident scene. These photographs were tendered into evidence and were reviewed in detail with the Constable and with other witnesses at trial.

[28] Ms. Ocean also called Dr. Stuart Smith to testify at trial. Dr. Smith is a professional engineer who was qualified to give expert opinion evidence on accident reconstruction.

[29] In April of 2001, Dr. Smith was retained by Mr. Raymond Blakeney of Fastfair Claims Service to reconstruct the accident and, in particular, to provide opinions on the speed of Mr. Sullivan's vehicle and on the issue of whether Mr. Sullivan was wearing a seatbelt at the time of the collision (Mr. Sullivan had retained counsel and was intending to bring an action in relation to this accident.) Mr. Blakeney had been instructed by Economical to retain Dr. Smith.

[30] Dr. Smith prepared two reports. The first report is dated July 16th, 2001 in which he analyzed, *inter alia*, the issues of speed, visibility and the opportunity of each driver to avoid the accident. His second report was prepared at the request of Ms. Ocean and is dated October 4th, 2010. There were some differences in the conclusions reached in each report. In Dr. Smith's final report he concluded:

- (1) At impact the Sullivan vehicle was entirely in the opposing southbound lane.
- (2) At impact all but approximately 0.8 metres of the left rear corner of the Ocean vehicle had cleared the northbound lane and was in the southbound lane.
- (3) Had the Sullivan vehicle remained in its own (northbound) lane there would have been either no collision at all or else a less severe collision involving only the left rear corner of the Ocean vehicle.
- (4) The calculated speed of the Sullivan vehicle at impact, 82 – 100 KPH, is significantly higher than the posted 70 KPH speed limit. The most likely speed at impact is near the middle of the range, approximately 91 KPH. According to Mr. Sullivan the approach speed of his vehicle was higher than its speed at impact.
- (5) The line-of-sight distance between the vehicles was at least 110 metres. At an approach speed of 82 – 100 KPH a line of sight existed for at least 4.0 – 4.8 seconds before impact.
- (6) Mr. Sullivan had an opportunity to come to a full stop at least 22 metres before reaching the point of impact, and had he done so there would have been no collision.
- (7) The Sullivan vehicle did not necessarily need to brake to a full stop since the collision could also have been avoided by braking to delay arrival by a fraction of a second, giving the Ocean vehicle time to move west by an additional 0.8 metres.
- (8) The paved width of the northbound lane was 3.0 metres and the overall width of the Sullivan vehicle was 1.67 metres, leaving an available clearance of 1.3 metres in the lane. The collision could have been avoided by the Sullivan

vehicle steering toward the right hand side of the northbound lane, thereby clearing the centre line by 0.8 metres or more.

- (9) The driver's seat belt of the Sullivan vehicle was probably not worn at the time of the accident. Since the driver's footwell area was crushed in the accident it is difficult to say whether or not seatbelt usage might have mitigated Mr. Sullivan's injuries.
- (10) The right front tire of the Sullivan vehicle very probably left a mark indicating that it was steering to the right and/or braking for several car lengths prior to impact, presumably in an attempt to avoid the accident.

[31] During his testimony, Dr. Smith referred to the National Research Council of Canada Sunrise/Sunset calculator and confirmed that it would have been fully dark at the time of the collision.

[32] Dr. Smith confirmed that during his investigation he did not find any physical evidence that supported the involvement of a third (grey) vehicle in the collision. He also acknowledged that at the time of the accident (mid-December) there may have been less foliage or "roadside vegetation" with the result that the line-of-sight distance between the two vehicles may have been slightly longer than 110 meters.

[33] Ms. Roberts (on behalf of Mr. Sullivan) cross-examined Dr. Smith extensively on his reports and managed to obtain a number of concessions from him including, *inter alia*:

- (a) Dr. Smith relocated the resting positions of the vehicles from the RCMP photographs. While he was of the view that the relocated resting positions were "very nearly" the same as in the RCMP photos he could not be certain that they were in the exact same positions.
- (b) One of the methods that Dr. Smith used to determine Mr. Sullivan's post-impact speed was called a yaw-speed analysis. Dr. Smith was not 100% certain that Mr. Sullivan's vehicle was swerving in "yaw" motion at the time of the accident. He noted, however, that he had used a second testing method which produced the same results.
- (c) In conducting his speed calculations, Dr. Smith measured the fluid trail left by Mr. Sullivan's vehicle. Dr. Smith acknowledged that when he conducted his investigation the fluid trail was no longer present so he had to measure it off of the RCMP photographs. As a result, he could not say that these measurements were 100% accurate. During his

testimony he indicated, however, that this would not have a significant effect on his speed calculations.

- (d) During his testing, Dr. Smith measured the friction of the pavement in the area of the accident using a 1997 Toyota Camry with four inflated tires. Mr. Sullivan had testified that during the accident his front left tire "buckled in". Dr. Smith confirmed that his speed calculations could have been affected if the Sullivan vehicle only had three inflated tires. He was not asked how much his calculations could have been affected by this.
- (e) Dr. Smith measured the friction of the pavement in June. The accident happened in December. Dr. Smith confirmed that differences in temperature can affect friction values to a very slight degree. He also confirmed that at the time of the accident it is likely that Mr. Sullivan's tires were colder than the tires that Dr. Smith used in his testing and that this could possibly impact friction values by a very small amount. A lower friction value could lead to a lower speed calculation.
- (f) One of the methods that Dr. Smith used to determine the speed of the Sullivan vehicle was to measure the average frontal crush of that vehicle. Dr. Smith confirmed that frontal crush is affected by the rigidity of a vehicle and that if some portion of the frame of a vehicle is very heavily rusted that can impact the rigidity of the vehicle and, ultimately, his speed calculations.
- (g) Dr. Smith also confirmed that there is some uncertainty in calculating "speed from crush" which he estimated to be plus or minus 10%.
- (h) Dr. Smith acknowledged that he changed some of his opinions (from his first report) after being asked by Ms. Ocean to take a closer look at some of the evidence that had been available to him at the time that he had prepared his initial report.

THE PLAINTIFF'S POSITION

[34] The Plaintiff's submissions (in both her pretrial brief and at the conclusion of the hearing) were extensive and detailed. It is not necessary to repeat the details of her arguments here. In essence, the Plaintiff alleges that Mr. Sullivan was speeding and racing (with a grey car) prior to the accident and suggests that Mr. Sullivan's vehicle was fully in her southbound lane prior to and at the time of impact. She also suggests that Mr. Sullivan failed to maintain his vehicle in a safe working condition.

[35] In the expert's report prepared by Dr. Smith the suggestion is also made that Mr. Sullivan could have avoided or reduced the extent of the collision by taking alternate action at the time of the accident.

[36] The Plaintiff has referred the Court to numerous sections of the *Motor Vehicle Act* including:

s. 100(1)(2) and (3);

s. 101;

s. 102(1) and (2)(e)(f)(g) and (h);

s. 106(1) and (2);

s. 106(A)(a)(b) and (c);

s. 110(1);

s. 111(a) and (b);

s. 112(1);

s. 115(1)(a)(b) and (c);

s. 115(2)(a);

s. 115(3);

s. 175(2) and (9);

s. 181(1);

s. 21(1) and (3).

[37] It is the Plaintiff's position that Mr. Sullivan is fully responsible for the accident and that she bears no responsibility for the collision.

MR. SULLIVAN'S POSITION

[38] In the pre-trial brief filed on behalf of Mr. Sullivan it is submitted that a "large majority" of the liability for this accident must fall upon Ms. Ocean. By the conclusion of the trial, Ms. Roberts submitted that it is open to the Court to find Ms. Ocean fully responsible for the collision.

[39] Mr. Sullivan submits that as the driver of a vehicle entering the highway, Ms. Ocean had a statutory duty to yield to Mr. Sullivan's vehicle. He also submits that Ms. Ocean had a duty to refrain from entering the highway when an immediate hazard (Mr. Sullivan's vehicle) existed. Mr. Sullivan alleges that Ms. Ocean failed to act in accordance with these obligations and, accordingly, she was negligent.

[40] Mr. Sullivan also submits that Ms. Ocean failed to maintain a proper lookout prior to pulling onto the highway. At trial, it was submitted that Ms. Ocean was momentarily inattentive at the time of the accident and that this inattentiveness significantly contributed to the collision.

[41] Additionally, Mr. Sullivan is critical of Ms. Ocean's responses at the time of the accident. In Mr. Sullivan's pre-trial brief it is suggested there was sufficient time for Ms. Ocean to back her vehicle into the parking lot in order to avoid the collision. Further, it is submitted that Ms. Ocean should have stopped her vehicle rather than continue on into the southbound lane. It is Mr. Sullivan's position that as a result of Ms. Ocean continuing into the road – he was placed in the agony of collision.

[42] Finally, Mr. Sullivan submits that the evidence supports a finding that Ms. Ocean exited onto the highway at the south end of the parking lot in question, rather than the middle of the parking lot, and that this contributed to the collision.

[43] Counsel for Mr. Sullivan has referred me to a number of cases in support of Mr. Sullivan's position, all of which I have considered in coming to my decision.

ECONOMICAL'S POSITION

[44] In Economical's initial Defence (filed on November 13th, 2003) Economical denied that Ms. Ocean had a valid insurance policy in place at the time of the accident and stated, *inter alia*, that if Ms. Ocean suffered any injury, loss or damage then such was caused or contributed to by the negligence of Ms. Ocean. It also brought a crossclaim against Mr. Sullivan. This Defence was amended on April 13th, 2004 to correct an error which indicated that the Defence had been filed on behalf of both Economical and Mr. Sullivan.

[45] On July 9th, 2008, Economical filed a further amended Defence by consent. In this amended Defence the paragraph that denied that Ms. Ocean had a valid insurance policy at the time of the accident was removed as was the crossclaim against Mr. Sullivan.

[46] In correspondence forwarded to the Court on June 12th, 2008, Economical advised that it was withdrawing its defence of contributory negligence. In August of 2010, Economical sent Ms. Ocean a further amended Defence removing, *inter alia*, the allegation that if Ms. Ocean suffered any injury, loss or damage then such was caused or contributed to by the negligence of Ms. Ocean. Ms. Ocean refused to consent to the filing of this document.

[47] At trial, Economical indicated that it was not taking any position on liability for the collision. It admitted that Mr. Sullivan was uninsured at the time of the accident and that Ms. Ocean had a valid automobile insurance policy with Economical at the time of the collision. It submitted that any liability that it may have to Ms. Ocean under the uninsured motorist provisions of her policy is limited to the amount that she may be entitled to recover from Mr. Sullivan up to a maximum of two hundred thousand dollars (\$200,000.00). In other words, if I find that the accident was caused or contributed to by Ms. Ocean, her recovery under the uninsured motorist provisions of her policy would not include that portion of the accident for which she is found to be responsible.

[48] Economical has also called into question the reliability of Ms. Ocean's suggestion that a third (grey) vehicle was involved in the collision.

ANALYSIS AND CONCLUSIONS

LIABILITY FOR THE MOTOR VEHICLE ACCIDENT

[49] I must begin my analysis by determining whether there was a third car involved in this accident. As indicated previously, Ms. Ocean believes that Mr. Sullivan may have been racing with a large grey vehicle just prior to the collision. Mr. Sullivan denies that he was racing anyone at the time of the accident and testified that he did not see a grey car around the time of the collision.

[50] I am not satisfied, after considering the evidence, that there was a grey car involved in any way with this accident or that Mr. Sullivan was racing a grey car (or any other car) just prior to the collision.

[51] At the time of trial, Ms. Ocean testified that she was certain that just prior to the accident she caught a “glimpse” of what appeared to her to be a large grey vehicle coming from her left. However, at trial she also acknowledged that immediately after the accident she was not certain about what she had seen the night of the collision.

[52] Ms. Ocean spoke with Cst. MacEachern on the night of the accident. At trial, Ms. Ocean testified that she remembered telling Cst. MacEachern “everything” about the collision. There is no indication in the RCMP file relating to this matter that a third vehicle was involved in this accident. In addition, Cst. MacEachern testified at trial that she has no recollection of Ms. Ocean suggesting that a third (grey) car had been involved in the collision.

[53] Significantly, in Ms. Ocean’s Statement of Claim (filed with the Court on December 5th, 2002) there is no mention of a third vehicle being involved in any way in the accident. While there is an allegation that Mr. Sullivan was travelling at an excessive rate of speed at the time of the accident, there is no suggestion that he was racing a third vehicle prior to or at the time of the collision.

[54] At Ms. Ocean’s discovery examination, which took place on September 23rd, 2004, she testified that she saw a grey vehicle coming towards her just prior to the accident. Her discovery evidence provides interesting insight into the issue of the grey car and bears repeating here:

MS. OCEAN:And I saw a grey car coming towards me. Now, I don’t know if it was the illusion of the light on the vehicle or what but his car is red.

MS. MITCHELL: So you saw a grey car, that's what you recall?

MS. OCEAN: That's what I recall. That instant that I saw a vehicle, it was a grey car. Now I don't know - - -

MS MITCHELL: What instant, as it came into the light out of the dip?

MS. OCEAN: Yeah.

MS. MITCHELL: And what are you - - I guess I'm not really sure why you're telling me now.

MS. OCEAN: Well, I'm like - - to me - - and at the time I thought each time, "Well, why would I remember a grey car? Why does that keep coming into my head when his car is red." *And, I always thought, well, you know, it was an optical illusion* from the light you know, glaring. It was dark out and that's what I saw, you know. It couldn't have been grey because his car's red. *And then it occurred to me when I was reading your report the other day that it said that his friend came and helped him get out [of] the car, it occurred to me that "I wonder if there was two cars." If there was - - if they were both racing down the road, maybe that's why he couldn't get into the other lane.* And I mean you see all these - - this - - -

MS. MITCHELL: Just a second, so the - - so what you're saying is perhaps there was one car in the right lane and one car in the left lane?

MS. OCEAN: Yeah. *Perhaps that could be a possibility* and I'm not - - it just seems to - - everything seems totally strange about why he could not get back into his own lane. I don't know.

[Emphasis added]

[55] I accept that Ms. Ocean believes that she saw a grey car coming towards her on the night of the accident. It is clear, however, that Ms. Ocean's suggestion at trial that Mr. Sullivan may have been racing with a grey car is a theory that she has developed since the accident and, in my view, is unsupported by the evidence.

[56] I find that there were only two vehicles involved in this collision and that these vehicles were being driven by Ms. Ocean and Mr. Sullivan.

[57] That takes me to the issue of liability for the collision.

[58] Before I begin my analysis on this issue, I must comment on a suggestion raised by Ms. Ocean a number of times during the trial that some of the evidence given by her own expert engineer, Dr. Smith, is unreliable.

[59] It is perhaps useful at this stage to mention that throughout this proceeding Ms. Ocean has alleged that Economical is involved in monopolistic and “conglomerate” activity. She speaks of a “golden handshake” which exists between affiliates within the “Insurance System” and suggests that this “golden handshake” exists between Economical, Mr. Blakeney (an adjustor involved in the file) and Dr. Smith. She suggests that Dr. Smith gets a regular income from insurance companies such as Economical and alleges that he is biased as a result.

[60] Ms. Ocean notes that Dr. Smith was originally hired by Economical and suggests that this affects the reliability of his evidence.

[61] Readers of this decision will likely have difficulty understanding why the Plaintiff (a self-represented litigant) would attempt to undermine the credibility of her own expert witness – particularly when that witness’ conclusions are overwhelmingly in favour of the Plaintiff. I must admit that I have difficulty with the concept myself. Nevertheless – that is the position that the Plaintiff took at trial.

[62] In my view, there is no basis for Ms. Ocean’s allegations against Dr. Smith. I reject the suggestion that this witness was biased when giving his evidence. I found his evidence to be both credible and reliable.

[63] During the trial, Ms. Ocean also attempted to call into question the line-of-sight calculations given by Dr. Smith by calling a lay witness by the name of Patricia Sampson.

[64] In Dr. Smith’s report of July 16th, 2001 he indicated that he observed the line-of-sight distance from the northbound lane (where Mr. Sullivan was travelling) to the area where Ms. Ocean’s vehicle entered the road to be approximately 110 meters which at trial he estimated to be 350 feet “give or take 10 feet”. Using a line-of-sight distance of 110 meters he then calculated various visibility times based on a variety of possible speeds.

[65] Ms. Patricia Sampson testified that in November of 2010 she went on two occasions to the parking lot of Peter's store (she referred to it as Prospect Foods) and took certain measurements. A large blue truck was parked near the south end of the parking lot. Ms. Sampson testified that from the northbound lane (walking towards the store) she was unable to see the blue truck until she was 275 feet from the parking lot. Ms. Ocean submits that this evidence calls into question Dr. Smith's line-of-sight calculations (which were approximately 110 meters or 350 feet "give or take 10 feet".)

[66] Ms. Sampson's evidence does not alter my opinion on the reliability of Dr. Smith's calculations. Dr. Smith testified that he measured the 110 meters from the point of impact. I am not satisfied that Ms. Sampson's calculations began at the same specific point.

[67] Further, Ms. Sampson took her measurements a decade after this accident occurred. Dr. Smith acknowledged that foliage and roadside vegetation could affect his line-of-sight calculations. It is hard to image that the foliage and roadside vegetation in the area where this accident occurred would not have changed during the last ten years.

[68] Ms. Sampson's evidence does not alter my conclusions on the reliability of Dr. Smith's calculations.

[69] I return now to the issue of liability.

[70] I am satisfied that at the time of impact, Mr. Sullivan's vehicle was entirely in Ms. Ocean's southbound lane of travel. I am further satisfied from the totality of the evidence that prior to and at the time of the collision, Mr. Sullivan was travelling well in excess of the posted speed limit of 70 kilometers per hour and that his speed contributed significantly to the cause of the accident.

[71] As indicated previously, in a statement that Mr. Sullivan signed after the accident (the actual date that the statement was signed is unknown) it is suggested that Mr. Sullivan was travelling at a speed of 70 to 71 kilometers per hour [at the time of the collision.] At trial, Mr. Sullivan appeared uncertain about the speed of his vehicle on the night of the accident. He acknowledged that he did not look at his speedometer that evening but said that it didn't seem to him that he was speeding. He based this, at least in part, on the fact that "stuff wasn't zipping by" him and the fact that the

roads were windy so it would be difficult to speed. At one point in Mr. Sullivan's testimony he stated that he did not know his speed on the night of the accident.

[72] Dr. Smith estimated the speed of Mr. Sullivan's vehicle at impact to be between 80 and 100 kilometers per hour. He concluded that the most likely speed at impact was near the middle of this range — approximately 91 kilometers per hour. Dr. Smith used a variety of test methods to reach his conclusions. While Ms. Roberts conducted an effective cross-examination of Dr. Smith, and attempted to call into question a number of his conclusions, I am satisfied that overall Dr. Smith's opinions remained intact and that Mr. Sullivan was speeding prior to and at the time of the collision.

[73] I reject the suggestion that Dr. Smith's speed calculations are unreliable due to the condition of Mr. Sullivan's vehicle. Dr. Smith confirmed that if some portion of the frame of a vehicle is very heavily rusted that could impact his measurements concerning the frontal crush of the vehicle and, ultimately, his speed calculations. The evidence from both Mr. Sullivan and Darrell Whitman (the gentleman that appraised Mr. Sullivan's vehicle after the collision) satisfies me that Mr. Sullivan's vehicle was in very good condition at the time of the accident, and that rust would not have impacted Dr. Smith's speed calculations.

[74] In addition, I am not satisfied that the other issues raised in Ms. Robert's cross-examination of Dr. Smith significantly affected his conclusions.

[75] The driver of a motor vehicle has a duty to operate that vehicle at a careful and prudent rate of speed. Section 101 of the *Motor Vehicle Act* provides:

Careful and prudent speed

101 A person operating or driving a vehicle on a highway shall operate or drive the same at a careful and prudent rate of speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of all other conditions at the time existing, and a person shall not operate or drive a vehicle upon a highway at such a speed or in such a manner as to endanger the life, limb or property of any person.

[76] I find that Mr. Sullivan was in breach of this duty at the time of the collision.

[77] I am not satisfied that Mr. Sullivan was negligent in the manner in which he responded once he saw Ms. Ocean's vehicle in the road. I accept Mr. Sullivan's evidence that the Ocean vehicle hesitated prior to the collision and he thought that Ms.

Ocean was going to stop. In my view, his decision to go to the left (into the southbound lane) was reasonable in light of his belief that Ms. Ocean was going to remain in the northbound lane.

[78] Dr. Smith suggested a number of options that Mr. Sullivan could have exercised at the time of the accident rather than veering to the left. For example, he stated that if Mr. Sullivan had remained in his northbound lane there either would have been no collision at all or at least a less severe collision. He also calculated (based on certain assumptions) that Mr. Sullivan had the ability to stop before reaching the point of impact or could have braked sooner giving Ms. Ocean additional time to get into the southbound lane.

[79] Dr. Smith's opinions in this regard are given with the benefit of hindsight knowing that Ms. Ocean actually moved into the southbound lane. Mr. Sullivan did not have the benefit of that knowledge at the time of the accident.

[80] It was not, in my view, unreasonable for Mr. Sullivan, faced with an impending accident, to decide to swerve to the left in an attempt to avoid the collision rather than continue driving towards Ms. Ocean's car in the hope that he could stop in time. While there were other options that were available to him (including staying in the northbound lane and attempting to stop or veering to the right in the hope that he would miss Ms. Ocean's vehicle as well as the cars that were in the parking lot) the choice that he made was, in my view, a reasonable choice in the circumstances.

[81] Mr. Sullivan has submitted that he was in the agony of collision at the time of the accident. In my view, he cannot be absolved from liability based on the doctrine of agony of collision due to his own negligence in speeding on the night of the collision.

[82] I conclude that Mr. Sullivan was negligent on the night of the accident as a result of driving on the Prospect Bay Road at an excessive rate of speed but I am not satisfied that he was negligent in veering to the left and attempting to go around the Ocean vehicle in order to avoid the collision.

[83] I am also not satisfied that Mr. Sullivan failed to maintain his vehicle in a safe working condition at the time of the accident.

[84] That takes me to the issue of whether Ms. Ocean bears any responsibility for this accident. Counsel for Mr. Sullivan submits that Ms. Ocean failed to maintain a proper lookout prior to pulling out onto the highway and that, based on Dr. Smith's calculations, Mr. Sullivan was there to be seen as Ms. Ocean pulled out of the parking lot.

[85] At trial, Ms. Ocean testified that she had already entered the northbound lane when she first saw vehicle lights to her left. She estimated that she was probably three feet into the road when she saw the lights (At discovery she estimated that she was a full car length into the road.)

[86] Mr. Sullivan testified that Ms. Ocean was a quarter of the way out into the road when he first saw her.

[87] I accept that both parties saw the other *after* Ms. Ocean had pulled out onto the road. The issue is whether Mr. Sullivan was there to be seen prior to Ms. Ocean pulling out.

[88] I have carefully reviewed Dr. Smith's evidence on this issue. A number of questions were put to this expert based on an assumption that Mr. Sullivan was travelling at a speed of 91 kilometers per hour prior to the collision.

[89] Dr. Smith's opinion was that Mr. Sullivan's most likely speed *at impact* was approximately 91 kilometers per hour. He did not testify that Mr. Sullivan's most likely speed *prior to impact* was 91 kilometers per hour.

[90] I do not accept the suggestion that Ms. Ocean failed to maintain a proper lookout prior to pulling onto the highway or that she was momentarily inattentive at the time of the accident. I am satisfied, on a balance of possibilities, that Mr. Sullivan was not there to be seen at the time that Ms. Ocean first began to pull out from the parking lot.

[91] In the pre-trial brief filed on behalf of Mr. Sullivan reference is made to s. 122(2) of the *Motor Vehicle Act* which provides:

Right of way or left turn at intersection

.....

122(2) The driver of a vehicle who has stopped as required by law at the entrance to a through highway shall yield to other vehicles within the intersection or approaching so closely on the through highway as to constitute an immediate hazard, but said driver having so yielded may proceed, and other vehicles approaching the intersection on the through highway shall yield to the vehicle so proceeding into or across the through highway.

.....

[92] Reference was also made to s. 123(1) of the said *Act* which provides:

Entering a highway and emergency vehicles

123(1) The driver of a vehicle entering a highway shall yield the right of way to all vehicles approaching on the highway.

.....

[93] Section 122(2) of the *Motor Vehicle Act* refers to a driver of any vehicle who has stopped *as required by law* at the entrance to a *through highway*. The *Motor Vehicle Act* does not provide a definition of a “through highway”. Pursuant to s. 133 of the said *Act* a “through highway” can be created by a traffic authority erecting stop signs at the entrance to a highway.

[94] In *Eisenhauer v. Rice*, (1952) 33 M.P.R. 63, the Nova Scotia Supreme Court, *In Banco*, noted that s. 122(2) of the *Motor Vehicle Act* (formerly s. 100(2)) deals specifically with intersections at which stop signs have been erected. There was no evidence of any stop signs in the area of this collision. I am not satisfied that s. 122(2) applies to the circumstances of this case.

[95] If I am in error in this regard, I am satisfied that at the time that Ms. Ocean commenced her manoeuvre onto the highway, Mr. Sullivan was not approaching so closely as to constitute an immediate hazard. As indicated previously, I have found that Mr. Sullivan was not available to be seen when Ms. Ocean first pulled out from the parking lot. If he was not there to be seen, Ms. Ocean could not possibly recognize him as an immediate hazard.

[96] Ms. Ocean did have a duty pursuant to s. 123(1) of the *Motor Vehicle Act* to yield the right-of-way to any vehicles that were approaching on the highway. Counsel for Mr. Sullivan has referred me to the decision in *Tantramar Holding & Leasing Ltd. v. Beyer* (1991), 104 N.S.R. (2d) 1 (N.S.S.C. T.D.), where Saunders, J. (as he then was) was considering s. 123(1) of the *Motor Vehicle Act* and stated at ¶ 121:

Accordingly, the onus on the defendant Beyer to yield the right-of-way to the plaintiffs was a heavy one. He was obliged to yield the right-of-way to all vehicles approaching on the Sunrise Trail. The courts have long affirmed the heavy onus to yield the right-of-way on a driver entering a public highway from a private driveway
.....

[97] In the case before me, Ms. Ocean was not exiting from a private driveway¹. Nevertheless, I am satisfied that s. 123(1) of the *Motor Vehicle Act* placed a burden upon her to yield the right-of-way to any vehicles that were approaching on the highway². I have found, however, that Mr. Sullivan was not there to be seen when Ms. Ocean first began to pull out from the parking lot. In my view, Ms. Ocean cannot be found to have breached s. 123(1) of the *Motor Vehicle Act* in circumstances where Mr. Sullivan was not there to be seen at the time that Ms. Ocean entered the highway.

[98] In addition, I am not satisfied that Ms. Ocean was negligent in failing to back her vehicle into the parking lot to avoid the collision or in deciding to proceed into the southbound lane rather than stop in the northbound lane. Ms. Ocean was faced with an emergency situation. In my view, there was no time for her to back into the parking lot. In the circumstances, there was very little time for her to weigh the various options available to her. With the benefit of hindsight – it is easy to suggest that Ms. Ocean should have stayed in the northbound lane and Mr. Sullivan would have gone around her. Ms. Ocean, however, had only seconds to decide how to deal with the situation that she found herself in. I am not prepared to fault her for her decision to proceed across the highway rather than remain in the northbound lane.

[99] That takes me to the issue of where Ms. Ocean exited the parking lot and whether she was contributorily negligent in exiting where she did.

[100] At trial, Ms. Ocean gave the following testimony:

I came into approximately midway of the parking lot, I would say, pretty close to that. That's where I generally exit because I feel that that is that that is the safest place to exit, because at that point, you have two blind turns. You have a blind turn

to your left, you have a blind turn to your right, and they're pretty equal distance. In other words, that they're both touchy areas, so you have to be cautious.

[101] I am not satisfied that Ms. Ocean specifically recollects where she exited the store parking lot on the evening of the collision. During her testimony she often appeared to be referring to what she usually does when parking and exiting at Peter's store rather than what she actually recollects doing on the evening of the collision.

[102] In Dr. Smith's accident reconstruction report he identified the point of impact on the highway as Gouge "A". Gouge "A" is located on the road across from the far south end of the parking lot in question.

[103] Ms. Ocean had just started to pull out from the parking lot when she saw the lights of Mr. Sullivan's vehicle coming from her left. The accident happened seconds later. Ms. Ocean did not have an opportunity to travel any significant distance before the collision occurred. This, along with the location of the point of impact, leads to the conclusion that Ms. Ocean pulled out of the south end of the parking lot.

[104] Mr. Sullivan indicated that Ms. Ocean exited from the south end of the parking lot. In addition, during Dr. Smith's cross-examination by Ms. Roberts he agreed that it would be "very near impossible" for Ms. Ocean to have ended at the impact point at the angle that she did had she exited from the midway point of the parking lot. He also agreed that the evidence suggests that it is more likely than not that Ms. Ocean exited closer to the southern end of the parking lot.

[105] I find that Ms. Ocean exited at the south end of the parking lot in question on the evening of the accident rather than in the middle of the parking lot.

[106] Ms. Ocean was familiar with the area where the accident occurred and stated that due to the two blind turns it is safest to exit from the middle of the parking lot. Her decision to exit from the south end of the parking lot contributed to the accident as it gave her less time to see any vehicles that were coming around the corner on her left and it deprived both parties of time to respond to the situation. I find that Ms. Ocean was contributorily negligent.

[107] Both Mr. Sullivan and Ms. Ocean had a duty to operate their vehicles in a careful and prudent manner having regard to all of the circumstances (see s. 100(1) of the *Motor Vehicle Act*.) I am satisfied that both Mr. Sullivan and Ms. Ocean failed

to meet this burden on the night of the accident. However, Mr. Sullivan's speed was the primary cause of the collision. I apportion liability 80% against Mr. Sullivan and 20% against Ms. Ocean.

THE CLAIM AGAINST ECONOMICAL

[108] Since July of 1996 every Nova Scotia motor vehicle liability policy has been required to provide coverage with respect to damages caused by the driver of an uninsured or unidentified automobile. Subsection 139(2) of the *Insurance Act* provides:

Required contents of certain contracts

.....

139(2) Every contract evidenced by a motor vehicle liability policy shall provide for payment by the insurer of all sums that

(a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;

(b) a person is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injury to or the death of a person insured under the contract resulting from an accident involving an automobile; and

(c) a person insured under the contract is legally entitled to recover from the identified owner or driver of an uninsured automobile as damages for accidental damage to the insured automobile or its contents, or to both the insured automobile and its contents, resulting from an accident involving an automobile,

subject to the terms, conditions, provisions, exclusions and limits prescribed by regulation.

[109] Section D of the Standard Automobile Policy for Nova Scotia provides for this uninsured and unidentified automobile coverage.

[110] At the time of this accident s. 139(1)(d) of the *Insurance Act* defined "uninsured automobile" as follows:

139(1)(d) “uninsured automobile” means an automobile with respect to which neither the owner nor driver of it has applicable and collectable bodily injury liability and property damage liability insurance for its ownership, use or operation, but does not include an automobile owned by or registered in the name of the insured or the insured’s spouse.³

[111] This definition of “uninsured automobile” is also found in s. 2(5) of the *Uninsured Automobile and Unidentified Automobile Coverage Regulations*.

[112] As indicated previously, Economical admits that Mr. Sullivan was driving an uninsured automobile at the time of the collision.

[113] Section 4(1) of the said *Regulations* places limits on the coverage that an insurer is obliged to provide when dealing with an uninsured or unidentified automobile claim. Sections 4(1)(a) and (d) provide:

Limits and Exclusions

4(1) The insurer is not liable under subsection 3(1) of these regulations

(a) in any event, to pay in respect of any one accident a total amount in excess of the minimum limit for a contract evidenced by a motor vehicle liability policy established under subsection 125(1) of the Act;

.....

(d) to make any payment to a claimant who is legally entitled to recover a sum of money under the third party liability section of any motor vehicle liability policy;

.....

[114] I have found that there were only two vehicles involved in this collision (Ms. Ocean’s vehicle and Mr. Sullivan’s vehicle.) Ms. Ocean is not entitled to recover under the third party liability section of a motor vehicle liability policy. Therefore, s. 4(1)(d) of the *Regulations* does not preclude recovery in these circumstances.

[115] As indicated previously, this accident occurred on December 13th, 2000. At that time s. 125(1) of the *Insurance Act* provided:

Minimum liability under policy

125(1) Every contract evidenced by a motor vehicle liability policy insures, in respect of any one accident, to the limit of at least two hundred thousand dollars, exclusive of interest and costs, against liability resulting from bodily injury to or the death of one or more persons and loss of or damage to property. ⁴

[116] Economical is liable to Ms. Ocean pursuant to the uninsured motorist provisions of the automobile insurance policy that she had in place with Economical at the time of the accident. Their liability is limited to the amount that she is entitled to recover from Mr. Sullivan as damages for bodily injuries resulting from this collision up to a maximum of two hundred thousand dollars (\$200,000.00).

ADDITIONAL MATTERS

ALLEGATIONS OF THREATS AND DURESS

[117] As indicated previously, Ms. Ocean alleges that Economical is involved in monopolistic and “conglomerate” activity. On the first day of trial, Ms. Ocean suggested that she intended to bring forward evidence of this activity so that her witnesses could “relax and come on the stand and not feel intimidated or pressured to lie in their interest and to thwart [her] case”. She went on to suggest that her witnesses were under duress and under threat from both of the Defendants.

[118] In a ruling that I gave that day, I indicated that I was not going to permit a general inquiry into conglomerate or monopolistic activity by the insurance industry. However, I indicated that if Ms. Ocean had specific evidence that a witness had been threatened by either of the Defendants then I would hear that evidence. Various witnesses were questioned about this issue.

[119] Having heard the evidence and viewed the demeanor of the witnesses that testified in this proceeding, I conclude that there is no evidence whatsoever that either of the Defendants threatened the Plaintiff or any of the Plaintiff’s witnesses in any way nor did these witnesses testify under duress. I have no doubt that the Plaintiff believes that she and some of her witnesses have been threatened by one or both of the Defendants but the evidence simply does not support such a view.

ALCOHOL

[120] During the trial, Ms. Ocean suggested that Mr. Sullivan may have been under the influence of alcohol on the night of the collision. There was no evidence to support this allegation. I find that alcohol was not a factor in this collision.

MR. SULLIVAN'S CREDIBILITY

[121] Mr. Sullivan has a criminal record. During the trial Ms. Ocean asked Mr. Sullivan about his criminal record.⁵ She invited the Court to draw a negative conclusion concerning Mr. Sullivan's credibility in light of his criminal record. I am not prepared to do so.

[122] While I have not accepted some of Mr. Sullivan's evidence (particularly concerning his speed on the night of the collision) in my view, at the time of trial he was attempting to provide his evidence honestly and made no attempt to mislead Ms. Ocean or the Court. I found him to be a credible witness when testifying at trial.

DURATION OF THE TRIAL

[123] Counsel for both of the Defendants have expressed concern about the length of time that it took to hear this trial and the significant costs that have been incurred as a result. A trial which, in my view, would have taken no more than 5 days to hear with experienced counsel ended up being heard over approximately 25 days.

[124] As a self-represented litigant, Ms. Ocean cannot be expected to conduct her case as effectively as an experienced lawyer. The difficulty in this case, however, went far beyond inexperience. Ms. Ocean appeared to be unable or unwilling to focus effectively on the matters that were in issue and seemed intent on subpoenaing witnesses and introducing evidence that was not relevant to this proceeding. In addition, she made serious allegations against both of the Defendants (such as allegations of threats) that were not supported by the evidence.

[125] In my view, this issue is best dealt with at the conclusion of the entire action when considering the issue of costs.

CONCLUSION

[126] Both Mr. Sullivan and Ms. Ocean bear some responsibility for this collision. Mr. Sullivan is primarily responsible for the accident in light of his speed. Liability is apportioned 80% against Mr. Sullivan and 20% against Ms. Ocean.

[127] Economical is liable to pay Ms. Ocean the amount that she is entitled to recover from Mr. Sullivan as damages for bodily injuries resulting from the accident up to a maximum of two hundred thousand dollars (\$200,000.00).

[128] Costs will be dealt with at the conclusion of the entire action.

Deborah K. Smith
Associate Chief Justice

Notes

¹ Section 2(a) of the *Motor Vehicle Act* defines “private road or driveway” as a road or driveway not open to the use of the public for purposes of vehicular traffic. The parking lot that Ms. Ocean was exiting from was open to the use of the public.

² Section 123(1) of the *Motor Vehicle Act* traditionally applied only to vehicles entering a highway from a private road or drive (see s. 101(1) of the *Motor Vehicle Act*, S.N.S. 1932, c. 6 and s. 111(1) of the *Motor Vehicle Act*, R.S.N.S. 1967, c. 191.) In 1972 s. 111(1) of the said *Act* was amended to remove the words “private road or drive” (see s. 12 of *An Act to Amend Chapter 191 of the Revised Statutes, 1967, the Motor Vehicle Act*, S.N.S. 1970, c. 53.)

³ This definition was amended by adding the words “or common-law partner” immediately after the word “spouse” at the end of the definition (see s.24 of the *Law Reform (2000) Act*). The amended definition came into effect on and after June 4th, 2001 and has no effect on the case at bar.

⁴ As of April 1st, 2004 this section was amended to increase the minimum liability under a motor vehicle liability policy to five hundred thousand dollars (see ss. 14 and 36(3) of the *Automobile Insurance Reform Act*, S.N.S. 2003 (2d Sess), c. 1. This amendment was not in effect at the time of this collision and is not applicable to the case at bar.

⁵ See s. 58 of the Nova Scotia *Evidence Act*.