

1991

S.H. No. 91-81240
102794

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

**WENDELL H. MacKINNON, HARVIE MacKINNON and
LAURA MacKINNON**

Plaintiffs

- and -

**PHILIP WELCH and GRACE WELCH, JONATHAN WELCH,
DAY & ROSS INC., a body corporate and EDWARD JACKSON**

Defendants

D E C I S I O N

HEARD: Before the Honourable Justice D.W. Gruchy at Halifax, Nova Scotia, on
June 5 and 6, 1995.

DECISION: July 10, 1995

COUNSEL: R. Malcolm MacLeod, Esq., and Jeffrey R. Hunt, Esq., Counsel for
the Defendants Philip Welch, Grace Welch and Jonathan Welch
Scott C. Norton, Esq., and Ms. Deborah K. Smith, Counsel for the
Defendants Day & Ross Inc. and Edward Jackson

GRUCHY, J.

Shortly after midnight on the morning of Saturday, July 1, 1989, a collision occurred between a vehicle operated by Jonathan Welch, owned by his parents, and a tractor trailer vehicle owned by Day & Ross Inc. and operated by Edward Jackson. Wendell MacKinnon was a passenger in the Welch vehicle and was injured in the accident. The defendants collectively have admitted liability to the plaintiffs and have settled quantum of damages. It is therefore necessary only to apportion liability between them.

Jonathan Welch was 17 years old at the time of the accident. He was a student at high school in Whycomagh, Nova Scotia, where the accident occurred. On the night of the accident, he had picked up a friend, met other young people and partied at a campsite near the village of Whycomagh. There is no suggestion that Jonathan Welch was drinking.

By midnight most of the group of young people had left the campsite. As Jonathan and his friends stood near his car they heard some sort of an alarm coming from the village and decided they would check it out. They left the campsite with Jonathan driving, Grant MacIvor in the front passenger seat, Cheryl MacLean in the left rear seat and Wendell MacKinnon in the right rear seat. Each of the occupants of the vehicle wore a seatbelt. They drove through the village of Whycomagh looking for the source of the sounding alarm. They then thought it was possible that the alarm was coming from a small convenience store, Ralph's Dairy, which is located on the Trans Canada Highway, and which was owned by Wendell MacKinnon's father. Jonathan therefore drove his vehicle onto the Trans Canada and proceeded in an easterly direction toward the convenience store which is located on the north side of the highway, or to their left as they approached it. As Jonathan Welch was about to make his left turn into the parking lot in front of the store, or had actually commenced his turn, their vehicle was struck violently from the rear, on its left rear quarter, by the Day & Ross vehicle operated by Edward Jackson.

Mr. Jackson is a professional driver and was then employed by Day & Ross Inc. He had received some training in his occupation. On Friday, June 30, 1989, Mr. Jackson was what he called a "shunt driver"; that is, he was performing short hauls. He went to work that afternoon at 4:30 and picked up his rig, a 1986 or 1987 Freightliner. He helped load the vehicle, did a pre-trip inspection of it and proceeded to New Glasgow, arriving there at about 9:45 p.m. At New Glasgow he deposited his trailer, picked up another which was loaded with 55,000 to 65,000 lbs. of soda pop and, having once again inspected the vehicle, headed back to North Sydney. That was a fairly heavy load and he therefore made use of the third axle of the trailer, which is an axle which may be dropped in place, about half way between the back tandem axles and the hitch.

Mr. Jackson's progress from New Glasgow toward Whycomagh was uneventful. He said the traffic was the usual Friday night traffic between New Glasgow and Port Hawkesbury, but after leaving Port Hawkesbury, the traffic was light.

The accounts of the accident given by Mr. Welch and Mr. Jackson differ in very material aspects.

Mr. Welch testified that as they approached Ralph's Dairy he, and presumably his other passengers, were listening for the origin of the alarm. They were driving in a 70 km. per hour zone, but were driving more slowly than that. As they approached the convenience store, Mr. Welch says the vehicle's speed was about 50-55 km. per hour. He intended to turn left into the convenience store parking lot. He says he signalled for a left turn. He denies that he pulled his vehicle to the right before turning left. He says he checked the rear view mirror and observed nothing coming from behind. He started to make a "shoulder check" but then was struck almost immediately from behind by the Day & Ross truck. He only had time to see the lights of the truck for an instant before the collision. He says that at the time of the collision he was travelling 15-20 km. per hour, although he did not check the speedometer. He had merely slowed down in order to make a safe turn to the left for which he had given his signal. Mr. Welch says that the point of

collision was to his right (or south) of the center line of the highway. The front part of his vehicle had passed over the center line when the collision occurred. Upon impact, the Welch vehicle was spun around at least a couple of times, eventually ending up in the parking lot of the convenience store, facing in the direction from which it had come.

Jonathan Welch was not seriously hurt. Cheryl MacLean was screaming in the back seat and as Welch could not open the door he pulled her out of the vehicle through the window. His friend Grant MacIvor was unconscious in the front seat and Wendell MacKinnon was unconscious in the back seat. The Day & Ross truck had proceeded further along the highway, had stopped and then backed up towards the accident scene.

Jonathan Welch ran to the truck and asked Mr. Jackson to call an ambulance. Mr. Jackson told Mr. Welch that he did not have a radio in the truck, and then said that the accident was Welch's fault as he had not given a signal. Mr. Welch made no response to that accusation at that time. In a statement given to the Royal Canadian Mounted Police, however, about an hour later, Jonathan said, "I checked in my rear mirror and didn't see anything. That's when I got hit. I'm pretty sure I signalled." On July 21, 1989, he gave a statement to an insurance adjuster when he said, "When I got to the gift shop on the right (or even before that), I signalled to turn left at Ralph's Dairy. At this point, I looked in my rear view mirror and there was nothing behind." In his testimony before me, Jonathan was quite certain he had signalled for a left turn.

Mr. Jackson testified before me that he was just east of the intersection of Whycocomagh's main street with the Trans Canada Highway (from which Jonathan had just entered the highway) when he first caught sight of the car ahead of him. The car was then between 500 to 700 feet ahead of him. Mr. Jackson continued to travel at 70 kph, having lost sight of the car. When he had travelled about 800 feet, or was beside a Shell Service Station, he again saw the vehicle about 500 feet ahead of him. He realized he was closing the distance between the vehicles. When he travelled a further 500 feet the gap between the vehicles had closed to about 300 feet. After the car had travelled another 300 feet, Mr.

Jackson said it started toward the right shoulder of the road. There is a somewhat commercialized area at that section of the highway, especially on their right or south side. When the car started toward the right, it was about 200-300 feet ahead of the truck. Mr. Jackson said he slowed the truck to about 40 kph and when the car went to its right, Mr. Jackson put his left signal on, accelerated the truck again to 70 kph, put his headlights on high beam and pulled to his left so that the truck straddled the center line, and proceeded to pass the car. When they were about opposite the convenience store parking lot, the car pulled to its left and started to cross the highway. When Mr. Jackson realized what the car was doing, he pulled his vehicle hard to the right and applied the trailer and tractor air brakes. He did not sound his horn. He was unable to avoid colliding with the car and the left front corner of the truck struck the left back corner of the car. Mr. Jackson continued to drive the truck 600-700 feet down the highway and then backed up about 400 feet where he parked the vehicle in front of a co-op store.

Mr. Jackson and Jonathan Welch testified that the point of collision was to the right of the center line. Mr. Jackson said there were skid marks, apparently from the truck, which commenced astraddle of the center line and proceeded easterly to a point 20-25 feet beyond the point of collision, terminating where the left skid mark was about on the center line. Mr. Jackson was the only witness who noted the skid mark.

When Mr. Jackson started to pass the car he had clear visibility for several hundreds of feet and there was no oncoming traffic. He said the vehicle ahead made no left signal.

There are some major differences between Mr. Jackson's trial and discovery evidence, as well as differences between his statements and his evidence. On discovery, Mr. Jackson had put his position where he had first seen the other vehicle about 1,000 feet east of where he placed it at trial; that placed him about 450 feet from the other vehicle when he first caught sight of it. That discrepancy was but the first of major differences in the distances between the vehicles as he testified on the two occasions. The magnitude of the

differences, while relevant, is not as important as the fact that his testimony had changed. The evidence given by Mr. Jackson at discovery appeared to be clear and precise and, according to him, was based on a review of the site and the survey plan shortly before testifying. His evidence before me was apparently clear and precise; yet, the major differences exist.

Mr. Jackson gave a statement to the Royal Canadian Mounted Police on the night of the accident. He said:

I was heading east bound small car in front of me was almost heading east. The car started braking suddenly going to the right hand side of the road. I couldn't get it stopped so I went to the left to go around them - then they cut back to the left to go to a side road directly across the path in front of me. I was still trying to brake and struck them on the left rear corner almost broadside.

Q. How far were you behind them?

A. I was travelling the speed limit and when I came to the top of a hill they were in front of me.

Q. Did they have any signal lights on?

A. No.

In that statement Mr. Jackson made no mention of slowing below 70 kph. He made no mention of having observed the car at various times before the collision while he travelled approximately 2,000 feet.

On July 4, 1989, Mr. Jackson gave a statement to insurance adjusters. On

September 6, 1989, Mr. Jackson gave another statement to insurance adjusters. There are differences between the statements and the evidence given before me as well as differences between the statements and the evidence given at discovery. There are differences between the statements themselves. For example, in the statement of July 4, 1989, Mr. Jackson said that he first observed the car ahead of him as he came over a blind crest of the road and that "...when I first came in contact (visually) with the car, he was about 6-7 lengths of my vehicle, 300-350 feet away." In that statement he also said that his headlights had been on low beam. In the statement of September 6, 1989, he said that he had had his headlights on bright and as he approached the other vehicle he dimmed his headlights. In testimony before me, he said he had flashed his lights on bright, signalling his intention to pass.

Mr. Jackson did not mention in any of the statements that he had observed the skid marks of the truck after the accident.

Jonathan Welch's evidence was somewhat more consistent within itself and with his discovery evidence and statements than was Mr. Jackson's. I am concerned, however, about his failure to assert immediately after the accident that he had signalled his intention to turn left. He gave an explanation for his failure to do so, but which was not entirely satisfying.

Each of the two major witnesses therefore has credibility problems.

If I accept Mr. Jackson's version of the accident, then the collision was the classic, "left turn/overtaking" accident. I would, of course, refer specifically to the decision of Davison, J. of this Court in *Faulkner v. Inglis and Barkhouse* (1990), 94 N.S.R. (2d) 411, at p.415. There would undoubtedly be a heavy burden on Jonathan Welch to show that his movement in the left turn across the highway was made in safety. There was unquestionably negligence on the part of Jonathan Welch. He said in evidence, and I accept, that he did in fact look in his rear view mirror before turning left. I do not make any finding as to whether Jonathan turned on his left signal. He did not look in his side view mirror and his

"shoulder check" was not timely. He did not see the oncoming truck as he ought to have done.

On the other hand, Mr. Jackson was driving a heavily laden truck and he really had no idea what stopping distance would be required for that particular truck with that load. He was driving through a somewhat commercialized area in a 70 kph zone and was under an obligation to keep his vehicle under reasonable control at all times. The damage to the Welch vehicle appears to me to be consistent equally with a rear end collision as with a left turn overtaking accident. Mr. Jackson's evidence concerning the collision is sufficiently contradictory within itself and with other statements that I cannot rely on his version of the collision. If I were to find that this collision was a typical rear end, then the law as found in **Thompson v. Compton and Island Advertising (1983)**, 59 N.S.R. (2d) 79 at p.80 is applicable.

In attempting to resolve the apparent impasse between the conflicting versions of the accident I have looked to other witnesses. Cheryl MacLean, the passenger in the Welch vehicle, gave evidence. Her recollection of the accident is somewhat hazy. She did say, however, that she did not think Mr. Welch had driven his car to the right shoulder of the road. She did not, however, know the vehicle's speed, or if he had put his signal light on or if he was talking to his friend Greg. She did not hear the sound of the truck or see the lights of the truck prior to the accident. In fact, she probably was not paying much attention.

Mr. John E. Norton of Applied Accident Technology Limited prepared a report and gave evidence.

I had considerable doubt whether I should permit Mr. Norton to give expert testimony and express opinions. I was concerned that his qualifications fell somewhat short of those which the Court should expect of a witness purporting to be an expert to the degree that Mr. Norton purported. I did, however, permit the evidence to be given with the

question of his qualifications going to weight of the evidence as opposed to the admissibility of it.

I decline to accept Mr. Norton's so-called expert evidence or his report.

On reflection, his qualifications appear to me to be lacking. He has no academic qualifications in his particular fields. While he has taken courses and apparently has written papers, there is no evidence of objective or peer review of his works. He tended to overstate his measure of acceptance in that in one particular case he put forth that he had been permitted to give expert evidence, but in fact, his evidence had been essentially rejected. Some of the qualifications he put forward in his curriculum vitae were totally unrelated to the expertise claimed.

The report itself left a great deal to be desired. In his summary of conclusions Mr. Norton clearly made implicit findings of credibility, a function which must obviously be left to the Court. He set forth the data he had considered, but without sufficient specificity to allow me to judge precisely what data he had considered. For example, he said he had reviewed portions of transcripts of discovery, various statements and referred to texts. He did not say what portions of the transcripts he had referred to. He did not specify what various statements he had read and he did not specify the qualifications of the authors or acceptability of the texts to which he had referred. At one point in his report he referred to an inquiry made, but which in fact was merely a telephone call made to a manufacturer in which he had left a message and received no return call.

In Mr. Norton's description of the events of the collision he appears to have unquestioningly accepted Mr. Jackson's version of the facts. He implicitly rejected Jonathan Welch's version of the facts.

Mr. Norton explored the "driver's perception-response interval". In doing so, he clearly chose the most favourable of the various ranges available. He did not identify

for my benefit the authors of the texts to which he referred or of their qualifications. He gave no reason for his choice of perception-response interval selected.

Mr. Norton described the accident scene. In his report he calculated the stopping times of Jackson based on an uphill grade, whereas in fact he was dealing with a downhill grade. Mr. Jackson posed friction as a factor and indeed referred to the coefficient friction and its possible relevance in accident reconstruction. Having referred to the coefficient of friction, however, Mr. Jackson does not appear to have applied the concept in any sense whatsoever. He makes certain assumptions about the shape and condition of the Day & Ross vehicle, but without any supporting evidence. He spoke of the velocity of the truck, but did not mention or calculate momentum, which would have involved an analysis of the braking capacity of the truck and trailer in relation to the weight of them.

Mr. Norton examined the lights of the vehicle in an attempt to show that the left signal light of the Welch vehicle was not working. That evidence failed to convince me of anything except that Mr. Norton did not perform an acceptable examination. For example, he made no mention of attempting to put a battery to the vehicle and actually trying the light - a rather obvious course of action. Instead, he thought there was evidence that someone had been tampering with the lights of the vehicle. He mangled the bulb in question when he removed it.

Mr. Norton's evidence was simply not acceptable.

In forming my conclusions, therefore, I am left with severely conflicting versions of an accident in which there are problems of credibility for both major witnesses. Other evidence is not helpful.

Each of the driver defendants was at fault. Jonathan Welch did not take sufficient care in executing his left turn. He did not check his left rear view mirror and he

may not have signalled. Mr. Jackson failed to sound his horn when about to pass the Welch vehicle and did not keep his vehicle under proper care and control. In these circumstances the **Contributory Negligence Act, R.S.N.S. c95**, has application. Sections 3 and 4 of that Act read:

3(1) Where by the fault of two or more persons damage or loss is caused to one or more of them, the liability to make good the damage or loss is in proportion to the degree in which each person was at fault but if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally.

(2) Nothing in this section operates so as to render any person liable for any damage or loss to which his fault has not contributed.

4. Where damage or loss has been caused by the fault of two or more persons, the court shall determine the degree to which each person was at fault.

There was fault on the part of each of the drivers of the vehicles. Each has been caused loss by virtue of their liability to one another and to the plaintiff. Having regard to the circumstance of the case, it is not possible to establish different degrees of fault. Liability shall be apportioned equally between the defendants Jonathan Welch and Edward Jackson and vicariously to the owners of their respective vehicle, the other defendants.

After consideration of the **Contributory Negligence Act**, I would attribute equal division of liability between the two sets of defendants.

The findings of fact upon which I base my decision are set forth below.

Jonathan Welch:

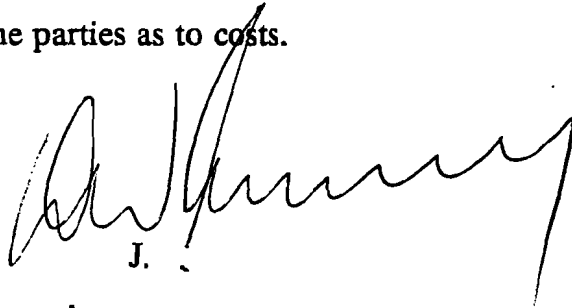
1. Did not check his rear view mirror at an appropriate time before turning left;
2. Did not shoulder check appropriately before turning left;
3. Did not look in his left sideview mirror.

Edward Jackson:

1. Did not maintain proper control of his vehicle;
2. Did not sound his horn to signal his intention to pass;
3. Did not make any other suitable signal, whether audible or visible, of his intention to pass.

On the facts as I have found them I apportion the fault of the defendants equally.

If necessary I will hear the parties as to costs.



J.

Halifax, N.S.