SUPREME COURT OF NOVA SCOTIA
Citation: Gottwald v. MacLean, 2022 NSSC 361

Date: 20220704
Docket: Syd. No. 483585
Registry: Sydney

Between:

Kimberly Ann Gottwald

Plaintiff

v.

Robert MacLean, The Personal Insurance Company, Cape Breton Regional Municipality, Kristopher Planetta and Russell Baker

Defendants

and

Cape Breton Regional Municipality

Third Party

Judge:	The Honourable Justice Patrick Murray
Heard:	August 3, 4, 5, 2021, in Sydney, Nova Scotia
Final Submission:	November 10, 2021
Decision:	July 4, 2022
Counsel:	Ian Parker for the Plaintiff Michelle Chai for the Personal Insurance Company Joseph Wall for Cape Breton Regional Municipality Sheldon Nathanson for Sgt. Baker Darlene MacRury for Cst. Planetta

By the Court:

Introduction

[1] This is a summary judgment motion made by the Defendants, Kristopher Planetta, Russell Baker and the Cape Breton Regional Municipality (CBRM) (Defendant and Third Party).

[2] In these motions the Defendants seek summary judgment on the evidence, pursuant to Rule 13.04 of the Nova Scotia Civil Procedure Rules.

[3] The affidavits filed in support of the motions are that of: 1) Kristopher Planetta filed on October 21, 2020; 2) Russell Baker filed on September 8, 2020; 3) Wayne H. MacDonald, P. Eng. filed January 15, 2021; 4) Keith Stothart filed August 25, 2020; and 5) Angela Thompson filed August 25, 2020; 6) Brian Harris filed July 29, 2020; 7) Kenneth O'Neil filed July 20, 2020; 8) Stephen Roach filed June 11, 2020; and 9) Kevin Richard Spencer filed July 27, 2020.

[4] The Affidavits filed by the Defendant the Personal Insurance Company (Personal) are those of: 1) Dylan MacDonald filed January 29, 2021; and 2) Steven Robinson filed February 4, 2021.

Background

[5] This matter involved a collision (MVA) on Lingan Road on August 26, 2017 in which the Plaintiff's vehicle was hit by the Defendant, Robert MacLean's vehicle. MacLean was an uninsured driver. The Plaintiff, Kimberly Gottwald was insured by the Personal Insurance Company. The Plaintiff has made a claim to Personal under Section D.

[6] Prior to the accident Mr. MacLean was being pursued by Cape Breton Regional Police. The police were responding to a complaint that Mr. MacLean had unlawfully attended a residence on MacAulay's Lane in Sydney. The occupant of that residence informed the police of the name, vehicle and Mr. MacLean's place of residence at 152 Bison Street in Whitney Pier. Mr. MacLean was seen running a stop sign on a residential street. Cst. Planetta responded to this report stating a vehicle which matched that description was directly in front of him on Victoria Road. Police activated their emergency equipment and followed Mr. MacLean through residential areas and onto Lingan Road. Mr. MacLean did not stop. The police officers continued to pursue Mr. MacLean on Lingan Road.

[7] During this time Mr. MacLean and the police picked up speed. The police were in contact via radio with Sgt. R. Baker. Sgt. Baker, not long into the pursuit, directed Cst. Planetta to stop the pursuit when the speed of 80 km/hr was reached. Both Cst. Planetta and Cst. Spencer confirmed they discontinued the pursuit.

[8] The MacLean vehicle continued on Lingan Road and ultimately collided with the Plaintiff's vehicle at a point approximately 1.2 km from where the Cape Breton Regional Police vehicle had stopped the pursuit at or near the Radar Base on Lingan Road.

[9] The Cape Breton Regional Police (CBRPS) Defendants, Sgt. Baker, Cst. Planetta and their employer, CBRM state the pursuit of the MacLean vehicle, did not result in the collision and that their actions prior to the MVA were prudent.

[10] Accordingly, the Cape Breton Regional Police Defendants seek summary judgment, submitting the pursuit of the Defendant MacLean's vehicle had discontinued prior to the accident, and they bear no responsibility.

[11] The Defendant Personal submits there are material facts in dispute and a major issue is whether the CBRPS Defendants bear some liability for the accident. Even a finding that the police were 1% responsible will dramatically affect the outcome, as a result off the Section D of the Plaintiff's insurance policy.

[12] Personal further submits that evidence relied upon by the CBRPS Defendants is inadmissible. There are the reports of the Serious Injury Response Team (SIRT) and the Accident Reconstructionist Report prepared by David Vokey. (Vokey Report)

Pleadings

[13] The Plaintiff commenced a proceeding against the Defendant MacLean, and Personal, pursuant to Section D of the policy issued by Personal, on December 20, 2018. (Affidavit of Dylan MacDonald sworn January 29, 2021 (MacDonald Affidavit), Exhibit "A")

[14] Personal filed a notice of Defence and Crossclaim, Statement of Defence, and Statement of Crossclaim on June 4, 2019. (MacDonald Affidavit, Exhibit "B")

[15] After serving the CBRM with a Notice of Intended Action Against Third Party on April 26, 2019, Personal filed a Notice of Claim Against Third Party (CBRM) on June 4, 2019. (MacDonald Affidavit, Exhibit "C")

[16] On August 12, 2019, the Plaintiff filed an Amended Notice of Action and Statement of Claim which added the CBRM, Cst. Planetta and Sgt. Baker as Defendants. (MacDonald Affidavit, Exhibit "D")

[17] On December 2, 2019, the Defendant Baker filed an Amended Notice of Defence and Amended Statement of Defence, and on January 7, 2020, the Defendant Planetta filed a Notice of Defence and Statement of Defence. (MacDonald Affidavit, Exhibit "F" and "G")

[18] On January 9, 2020, CBRM filed its Notice of Defence and Statement of Defence to the Plaintiff's Amended Notice of Action and Statement of Claim. Also on January 9, 2020, CBRM filed its Notice of Defence to Third Party Claim and Statement of Defence.

Summary Judgment Motions

[19] The Defendant Planetta filed a motion for Summary Judgment on the evidence on August 25, 2020.

[20] The Defendant Baker filed a motion for Summary Judgment on the evidence on October 21, 2020.

[21] The Defendant and Third Party, CBRM, filed its motion for Summary Judgment (with amended pleadings) on October 22, 2020.

Issues

1. Does the Defendant Bakers's motion satisfy the test for Summary Judgment on the evidence as set out in Rule 13.04?

2. Does the Defendant Planetta's motion satisfy the test for Summary Judgment on the evidence as set out in Rule 13.04?

3. Does the Defendant and Third Party, CBRM's motion satisfy the test on its motion for Summary Judgment on the evidence as set out in Rule 13.04?

The Law

[22] The Nova Scotia Civil Procedure Rule on Summary Judgment states:

> **13.04 Summary judgment on evidence in an action**
>
> (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

> (a) determine a question of law, if there is no genuine issue of material fact for trial;
> (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

CBRP Reports – Admissibility

[23] Several affidavits have been filed in support of the three (3) motions. Sgt. Baker filed an extensive affidavit of his own, sworn on August 5, 2020. CBRM in its motion relies on these same affidavits and information including that of Wayne MacDonald, P. Eng., filed on January 15, 2021. Cst. Planetta in his motion relies on the affidavit and information submitted in the motion of the Defendant Baker.

[24] In particular, Personal objects to what they refer to as the CBRPS Reports. Personal has made further objections to the admissibility of the affidavit evidence.

SIRT Report

[25] In his affidavit, Mr. Stothart stated that the pursuit policy of CBRPS was followed and that the MVA was as a result of the actions of Mr. MacLean, and not as a result of the officers actions. (Paragraph 10)

[26] Mr. Stothart was employed as Team Leader and Primary Investigator with SIRT, which investigated the August 27, 2017 accident beginning on that date and extending to November 21, 2017.

[27] The SIRT Report is attached to the affidavit of its Team Leader and Investigator, M. Keith Stothart. Mr. Stothart is the primary investigator during the investigation into this incident, which extended over a period of three months from August 27, 2017 to November 21, 2017.

[28] Personal objected to the admission of this report stating the author was not put forward as an affiant on the motion, and accordingly, its contents are hearsay. In addition, Personal argues its findings and opinions cannot be relied upon as foregone conclusions on liability.

[29] In his affidavit, Mr. Stothart quotes from Summary of Investigation, which is authored by Interim Director John L. Scott. (Exhibit "C") In paragraphs 10 and 11 Mr. Stothart states the conclusion of the investigation which opines on the cause of the accident, and whether there were any grounds to consider charges against the officers.

[30] Significantly, in paragraph 9, Mr. Stothart states the conclusion that the "accident… was in no way connected to the pursuit by police".

[31] The Defendants Baker, Planetta and CBRM submit this report is admissible under both the business records exception under the *Nova Scotia Evidence Act* and the common law exception to the hearsay rule. (See ***Ares v. Venner***, 1970 SCR 608)

[32] The Defendant Baker submits at page 7 of his post trial brief:

> 7. The Defendant Baker would submit that the SIRT Report should be found admissible, given that the SIRT Investigator, M. Keith Stothart who compiled the Report was present for cross-examination purposes at the Summary Judgment proceeding. The Court had the opportunity to hear from the SIRT investigator with respect to how he reached his conclusions based on the information that had been provided to him through the business records of the CBRPS.

[33] Further, the Defendant Planetta submits in his brief filed September 27, 2022.

> 16. The Defendant The Personal Insurance Company also asks this court to disregard the evidence of Brian Harris and Keith Stothart as "hearsay". The evidence from these parties at trial clearly indicated that any "findings" they made were based upon their personal investigations. They did receive third party information, however the conclusions they made based upon this information is not hearsay. In fact, Brian Stothart testified of his "personal" involvement in speaking to witnesses and gathering necessary information.

[34] I have read and considered Personal's submission that the admissibility of affidavit evidence is a "threshold issue" for the Court to determine. Further, referring to ***Layes v. Bowes***, 2020 NSSC 345, affirmed 2021 NSCA 50, and that notwithstanding cross-examination, opinion evidence is still inadmissible.

[35] Personal submits further (citing ***Layes***) that ***White Burgess Langille Inman v. Abbott and Haliburton Co.***, 2015 SCC 23, applies to expert evidence in the context of a motion for summary judgement. In this case, Personal submits Mr. Stothart was not qualified as an expert witness under Rule 55 nor does the report meet the requirements for admission in Rule 55.04.

[36] Personal submits that contrary to the CBRPS Defendants' submissions, inadmissible evidence, (such as hearsay and opinion evidence) does not become admissible simply because the witness was cross-examined.

[37] In the post trial brief, Personal submits at paragraph 35:

> 35. This Courts decision in ***Layes*** is clear that affidavits should not contain, among other things "…irrelevant information, be argumentative, contain scandalous material, speculation, oath-helping or unsourced hearsay".

[38] The Defendants CBRPS/CBRM submit the SIRT report is a business record, and based in large part on the notes of CBRPS officers, which he says, are admissible as a business records.

[39] In response, Personal submits that the SIRT report was not prepared contemporaneous with the subject event, the MVA. It makes the same argument for the Vokey Report. This, they argue, fails to meet the business record exception on this basis alone. Simply because the notes were made contemporaneous does not mean the report falls within the business records exception.

[40] Finally, Personal states the business record exception does not apply to opinion evidence such as is contained in the SIRT report (and also the Vokey Report). In support of its argument, Personal cites Justice Boudreau's decision in ***Bezanson v. Sun Life Assurance Company***, 2015 NSSC 1. (Paragraphs 33 and 34)

[41] With respect to admissibility, hearsay by definition is inadmissible for the truth of its contents. Often the reason is that the evidence of the declarant cannot be challenged on it, simultaneously at least, at the time it is said.

[42] When the author is available to be asked about the report, it can sometimes alleviate the concern as the opposing party does have an opportunity to cross-examine. In this case, the author (Mr. Scott) did not testify, but the chief investigator did. The report is entitled "Summary of Investigation" and the complete file of the CBRPS was disclosed at Tab B of Mr. Stothart's affidavit.

[43] In my respectful view, there are several difficulties with the admissibility of the report for the truth of its contents in this proceeding.

[44] First, it is a report made by a separate tribunal, which is governed by legislation, being *The Police Act*. Aside from that jurisdiction issue, the evidence before it, while it may be similar in some respects, is not the same evidence as is before this Court. Although the author did not provide an affidavit, I am satisfied that the report was made in circumstances that were independent and neutral. That is the mandate under the *Police Act of Nova Scotia.* (ss.26A-26J)

[45] More to the point, the report addresses the issue of causation, the very issue that will be before this Court at trial in determining whether there was negligence on the part of the individual officers and/or the CBRM. In that sense the conclusion in the SIRT report ursurps the role of the trial judge and this Court.

[46] It is not presented as an expert report, and contains none of the representations or undertakings required for same.

[47] Primarily, the role of SIRT is to determine whether charges should go forward in relation to the conduct or actions of the officers involved.

[48] The criminal standard of proof is much different from that employed in civil cases. That is, proof beyond a reasonable doubt, versus proof on a balance of probabilities..

[49] I am prepared to admit the SIRT report for its factual conclusion that following an investigation, there were no grounds to consider any charges against the subject officer. (Cst. Kristopher Planetta).

[50] To do otherwise would be to accept a collateral opinion on the issue of liability, which is before the Court, albeit in the context of a summary judgment motion. I will also admit paragraph 5 of the Stothart affidavit which confirms that it was CBRPS who brought the matter forward as was required of them.

The Reconstructionist Report (Vokey Report)

[51] Attached as Exhibit "I" to Sgt. Baker's affidavit is the report authored by Cst. David Vokey in regard to Incident 2017041266, at Lingan Road, on August 26, 2017, entitled "Reconstructionist Report". (Vokey Report)

[52] Cst. Vokey had the assistance of Cst. Michael Byrne in measuring the scene. This included "yaw" and skid marks, the position of the vehicles, the area of impact, and other points of reference.

[53] Cst. Vokey listed the officers involved as Kris Planetta (Investigating Officer), himself (as Reconstructionist), and Cst. Kyle Dicks (Photographs).

[54] The basis for the analysis, and the contents of the report are listed (at page 5). These included the following documents:

- The occurrent report 2017041266 can be found on the Niche Record Management System (RMS) of the C.B.R.P.S.
- General and Supplementary Reports and notes completed by PC Kris Planetta first officer on scene and Cst. Ed Hall, patrol traffic officer (reconstructionist) who arrived on scene.
- Scene sketch and Scale Diagram completed by Cst. Michael Byrne.

[55] The grounds for the objection by Personal to this report are similar to those made in relation to the SIRT report. Personal has described these two reports collectively in its submissions as "the CBRPS reports".

[56] Cst. Vokey is not an affiant on this motion for the CBRPS Defendants, and Cst. Vokey's report does not comply with Rule 55. It therefore does not constitute valid expert opinion.

[57] Personal also points to other deficiencies in the report, stating the author's CV is not included,(contrary to what it states), that certain photographs have not been appended, and those that are, are small, grainy and in black and white. Further, Cst. Dicks did not provide an affidavit. Among other objections, are: 1) General Occurrence Reports are authored by officers who were not affiants; and 2) officer statements as to injuries.

[58] Personal, therefore, says that the Vokey Report is hearsay which is inadmissible on the within motion. Citing ***R v. Khelowan***, 2006 SCC 57, Personal submits the trier of fact is prevented from assessing what amount of weight, if any, can be attributed, as the report is merely attached to Sgt. Baker's affidavit. Sgt. Baker cannot attest to something he did not prepare or author.

[59] Once again, Defendants Baker and Planetta, and CBRM submit the Vokey Report is a business record, as defined under s. 23 of *The Evidence Act*, and under the common law.

[60] The CBRPS Defendants submit that Cst. Vokey is employed by CBRPS as a reconstructionist who has training to complete the report. In addition, the bulk of the report is based on police reports that are routinely prepared and required to be prepared.

[61] Issuing and signing General Occurrence Reports and Supplementary Reports are part of responsible policing, and required as part of an officer's regular duties.

[62] Cst. Baker's counsel relies on the decision of the NSCA in ***R v. Keats***, 2016 NSCA 94, wherein Beveridge, JA, stated with respect to the admissibility of police reports, notes taken by officers:

> [110] Mr. Ewart summarized the common law rule following *Ares v. Venner* as follows:
>
> ...the modern rule can be said to make admissible a record containing (i) an original entry (ii) made contemporaneously (iii) in the routine (iv) of business (v) by a recorder with personal knowledge of the thing recorded as a result of having done or observed or formulated it (vi) who had a duty to make the record and (vii) who had no motive to misrepresent. Read in this way, the rule after *Ares* does reflect a more modern, realistic approach for the common law to take towards business duty records.

[63] Having considered the pre-trial and post-trial submissions of the parties, I am satisfied that the Vokey Report should be admitted as a business record, but (obviously) not as an expert opinion.

[64] This is an internal report, prepared by the officers involved in investigating the incident on the evening in question. Cst. Vokey, in fact, attended the scene just after the events occurred. He was contacted by Sgt. Baker that evening to attend the scene.

[65] Cst. Baker has thirty(30) years of experience in the patrol section and in patrol aspects of policing. This was clearly a report prepared in the ordinary course of the policing profession.

[66] The Defendant Baker stated in his affidavit:

> 48. Officers had arrived at the scene to complete an investigation in order to prepare a Reconstructionist Report.
>
> 49. I departed the scene of the accident.
>
> 50. Attached hereto as Exhibit "C" is a transcript of all the Radio Transmissions from the police communications system recorded in relation to the above-noted pursuit and motor vehicle accident.
>
> 51. Attached hereto as Exhibit "D" is a copy of the Supplementary Occurrence Reports which I prepared in relation to the above-noted pursuit and motor vehicle accident.
>
> 52. On July 15, 2020, I retraced the route from MacLean Street to the point of impact between the Defendant, Robert MacLean's vehicle and the Plaintiff, Kimberly Gottwald's vehicle at or near 780 Lingan Road.
>
> 53. I made notes on July 15, 2020 while retracing the route, and a copy of my notes are attached hereto as Exhibit "E".

[67] I am satisfied on a balance of probabilities that the writings and records made of the occurrence, events and actions on the evening in question, were made in the usual and ordinary course of occupations and operations of the CBRPS as a police service, and as an organized activity to enforce the laws of the Province of Nova Scotia. (See. s. 23 of *The Nova Scotia Evidence Act*)

[68] The same concern exists here with respect to the opinion expressed by Cst. Vokey on liability for the accident. Clearly, it should not be accepted as an expert opinion, because it does not meet all the usual criteria, including being qualified by the Court. It is not an objective or impartial opinion being from the same police service that is named in these proceedings.

[69] Finally, there is the fact that liability for the accident will ultimately be the issue for the trier of fact, if these motions fail.

[70] Typically, a Court would reject evidence which purported to answer the very issue that is before the Court. Therefore, the Vokey Report cannot be admitted for its conclusion on liability.

[71] In this case, the Court is alive to the fact that this is not a trial, and that the test on a summary judgment motion is first whether there is a dispute in relation to a material fact.

[72] As stated, in the governing principles enumerated in ***Coady v. Burton***, 2013 NSCA 95:

> 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.
>
> 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.
>
> 12. Where, however, there are no material facts in dispute, and the only question to be decided is a matter of law, then neither complexity, novelty, nor disagreement surrounding the interpretation and application of the law will exclude a case from summary judgment.

[73] In short, except for its conclusion as to the cause of the accident, the Vokey Report is admitted, subject to the weight, if any, to be accorded.

[74] It very likely also meets the common law business record exception for admissibility.

[75] In the affidavit of Brian Harris, he attaches (as Exhibit "A") an email from himself as a Senior Claims Pro Adjuster from 2008 to 2019, and prior to that a Claims Adjuster from 1998 to 2008, with Cunningham Lindsay Canada Ltd. A portion of the email dated January 24, 2018 from himself to CBRM re: CBRP was as a result of his discussion with Counsel for the Plaintiff:

> I advised the lawyer as I have previously that based on all of the information that had been generated to date it is clear there is no liability attaching to the Municipality for any injuries that his client may have suffered. I advised the lawyer that the SIRT report clearly backs up our initial position that the driver of the vehicle (the ex-boyfriend) is clearly and solely responsible for the accident as the police pursuit was not going on at the time of the accident and had been clearly terminated.

[76] Paragraph 4 and Exhibit "E" of the Affidavit of Mr. Harris is inadmissible. Mr. Harris is a senior claims adjuster with many years of experience. However, for reasons similar to those earlier expressed, an opinion on liability is for the Court alone to consider at trial.

Objections by Personal to Affidavit Evidence

[77] In paragraphs 88 - 93 of its prehearing submissions Personal objects to the admissibility of the affidavits of Cst. Planetta, Sgt. Baker and Mr. Stothart. By way of context, I have accepted the Stothart Affidavit for the limited purpose outlined earlier in this decision. (at paragraph 49)

[78] In addition, I have made a ruling on the Vokey Report noting some deficiencies, but importantly excluding its conclusion as to liability, as I did with respect to the SIRT Report.

[79] This will inform the basis for my ruling on these affidavits of which the major objection by Personal is that they constitute inadmissible hearsay evidence.

[80] In addition, Cst. Planetta and Sgt. Baker were directly involved in the incident on the evening in question. Accordingly, they have personal knowledge which when combined with their duty to report must be considered by the Court in ruling upon what is admissible and what is not. To the extent that paragraphs in these affidavits, as well as the exhibits attached to them, are records completed in the ordinary course of police business, they will generally be admissible.

Cst. Planetta

[81] In paragraph 23 the affiant summarizes witness statements taken by Cst. Micheal Byrne of Ms. Gottwald and Angela Thompson. The objection is that Ms. Gottwald did not swear an affidavit and that Ms. Thompson swore an affidavit in this proceeding. These paragraphs are admissible as summaries of statements taken by Cst. Byrne in the course of his duties. The particular summaries at paragraph 23 are brief and also accord with the witness statements taken by him, attached to the affidavit of Ken O'Neil to which there is also an objection. Handwritten notes of officers or reports completed as part of police business need not be appended to an affiant's affidavit in order to be admissible.

[82] I have read and considered the objection to paragraph 22 and find it to be admissible.

[83] I have read and considered the objection to paragraph 24 and find it to be inadmissible.

[84] Paragraphs 21 and 25 are clearly in the nature of plea and submission and are therefore inadmissible.

Sgt. Baker

[85] Personal has objected to paragraphs 61, 62 and Exhibit "F" of the Baker Affidavit. Paragraph 61 pertains to without prejudice correspondence from Plaintiff's Counsel to Personal.

Paragraph 69, 70 and Exhibit "H" refers to correspondence between Mr. Brian Harris of Claims Pro and CBRM.

[86] Having considered the "without prejudice" nature of the correspondence and taking into consideration my ruling pertaining to Mr. Harris, these four(4) paragraphs and Exhibits are inadmissible.

[87] Personal has further objected to paragraphs 66, 72, 77 and 80-85 of the Baker Affidavit. The basis for the objections are listed in paragraph 95 of Personal's prehearing submissions, which are also referenced at paragraph 39 of its post trial brief, I shall deal with them in order, as follows:

a) Paragraph 66;

[88] Sgt. Baker's statement about the Plaintiff knowing there was no evidence attributing liability to CBRM, Planetta or himself is very likely in the nature of the plea or submission. It is also based on the pleadings made by the Plaintiff and when they were made. Sgt. Baker drawing this inference from the pleadings however, about what the Plaintiff knew is inadmissible.

b) Paragraph 72;

[89] Paragraph 72 is admissible for reasons associated with the admissibility of the Vokey Report.

c) Paragraph 77;

[90] Stating what the Plaintiff did without proof or evidence to the contrary and that it is without merit is clearly in the nature of a plea or submission and is therefore inadmissible.

d) Paragraph 79;

[91] Similarly, a statement that allegations are completely unfounded and without any basis in the evidence is submission and therefore inadmissible based on the well known case of ***Waverley (Village) v. Nova Scotia (Minister of Municipal Affairs)***, 1993 NSSC 71.

e) Paragraph 80;

[92] The statement that there is "no evidence whatsoever to support this allegation" is submission and therefore inadmissible in an affidavit.

f) Paragraph 81;

[93] Alleging the Plaintiff made allegations she knew were false is similar to paragraph a) above (paragraph 66). I am satisfied it is a submission and therefore inadmissible.

g) Paragraph 82;

[94] Is clearly a submission and inadmissible.

h) Paragraph 83;

[95] This paragraph is the affiant's interpretation of the SIRT Report. While it may be consistent with the report's factual conclusion, it is inadmissible as an opinion on the cause of the accident.

i) Paragraph 84;

[96] Paragraph 84 states, in part: " The Plaintiff could not, and in fact, did not observe first hand the pursuit": and "Therefore, the Plaintiff has no evidence herself to offer to attribute liability to me". A statement by the affiant of what the Plaintiff observed first hand and what she was capable of observing is not admissible.

[97] In respect to the second statement, the affiant is speaking from personal knowledge in stating the Plaintiff had no evidence to attribute liability to him. While this is in the nature of a submission, I will admit it as a factual statement from the affiant based on his direct knowledge and on the notion of fairness in assessing these objections.

j) Paragraph 85;

[98] Paragraph 85 is entirely submission and therefore, entirely inadmissible.

Keith M. Stothart

[99] Personal objects to paragraph 5 and Exhibit "B" of this affidavit.

Paragraph 5

[100] With respect to paragraph 5 regarding the injuries of Ms. Gottwald and Mr. MacLean, the Defendant states this is not being admitted for its truth of its contents and are therefore not hearsay.

[101] As earlier stated I am prepared to admit that on August 27, 2017 SIRT was contacted by the CBRPS about a motor vehicle accident that occurred late the previous evening, August 26, 2017 at approximately 10:20 p.m. on Lingan Road in Sydney, NS. Police officers investigating an accident should be able to give a general summary of the injuries sustained. The summary of the injuries is not given as medical opinion. This paragraph is admissible.

Exhibit "B"

[102] Personal makes a number of objections to Exhibit "B" which I shall rule upon as follows:

i) Can Say Statements

[103] The "can say" statements of Stephen Roach and Angela Thompson. Although they have given sworn affidavits, these statements appear to be part of the SIRT investigation, and given my earlier ruling on the report I find them to be inadmissible.

ii) Hand Written Notes of Cst. Planetta

[104] Although not appended to his affidavit, are admissible.

iii) File synopsis, General Occurrence, Arrest Report

[105] Personal objects to the case file synopsis, General Occurrence Report and Arrest Report authored by Cst. Planetta. These are admitted as police records, although not appended to the Planetta affidavit.

iv) Hand Written Notes of Cst. Spencer

[106] The handwritten notes of Cst. Spencer are admissible, but not the "can say" statement prepared as part of the SIRT investigation, as per i) above.

v) Conversation with Mr. Nathanson

[107] References to conversations with Mr. Nathanson, counsel for Sgt. Baker, prior to issuance of SIRT Report. This objection is vague and not entirely clear to the Court.

vi) Email of Sgt. Baker to Jodie Wilson

[108] Email of Sgt. Baker to Jodie Wilson dated August 27, 2018 summarizing the accident and events leading up to it. I find this to be admissible as it is a brief summary of events sent the day after the MVA.

vii) Email of Lorne Allen

[109] Email of Lorne Allen dated August 28, 2017 regarding Mr. MacLean, I find to be inadmissible. It is clearly hearsay, speculation and part of the SIRT investigation.

viii) News Articles and Media Briefs

[110] News articles and media briefs, summarizing investigation by SIRT, I find to be inadmissible.

ix) Supplementary Occurrence Report

[111] The Supplementary Occurrent Report, and Measurement Log Report of Cst. D. Vokey is admissible as part of the CBRPS internal investigation and required under the Operational Policy in evidence as Exhibit "B" to the Cst. Baker Affidavit.

x) Paragraphs 9, 10, 11 and Exhibit "C"

[112] For the sake of clarity and given my ruling in relation to the SIRT report, paragraphs 9 and 10 of Mr. Stothart's affidavit are inadmissible, as is Exhibit "C".

Inspector Ken O'Neil

[113] Inspector Ken O'Neil in response to Plaintiff's counsel's FOIPOP Application provided access to Thirsty - four (34) documents by letter dated February 1, 2018 as referenced in Mr. O'Neil's affidavit at paragraph 6. I am going to deal with these objections in a summary way.

a) Email from Brian Harris – Inadmissible;

b) Notes from Cst. R. Spencer – Admissible;

c) General and Supplemental Occurrence Reports authored by Cst. K. Planetta– Admissible;

d) Supplementary Occurrent Report, Measurement Log Report; and YAW Speed Calculations of Cst. D. Vokey – Admissible;

e) Handwritten Notes of Unknown Officer – Inadmissible;

f) Witness Statements taken by Cst. Michael Byrne of Ms. Gottwald and Ms. Thompson – Admissible;

The Law on Summary Judgment

[114] The leading cases of the Nova Scotia Court of Appeal in this area are ***Coady v. Burton***, and ***Shannex Inc. V. Dora Construction Ltd.***, 2016 NSCA 89. In ***Shannex***, Fichaud, JA, provided guidance in terms of the appropriate questions to be addressed.

> [34] I interpret the amended Rule 13.04 to pose five sequential questions:
>
> • **First Question:** Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law? [Rules 13.04(1), (2) and (4)]
>
> If Yes, it should not be determined by summary judgment. It should either be considered for conversion to an application under Rules 13.08(1)(b) and 6 as discussed below [paras. 37-42], or go to trial.
>
> The analysis of this question follows *Burton*'s first step.

A "material fact" is one that would affect the result. A dispute about an incidental fact - *i.e.* one that would not affect the outcome - will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011

NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8).

The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes. [Rules 13.04(4) and (5)]

Burton, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

- **Second Question:** If the answer to #1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

If the answers to #1 and #2 are both No, summary judgment "must" issue: Rules 13.04(1) and (2). This would be a nuisance claim with no genuine issue of any kind – whether material fact, law, or mixed fact and law.

- **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: "Does the challenged pleading have a real chance of success?"

Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.

It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

- **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): Should the judge exercise the "discretion" to finally determine the issue of law?

If the judge does not exercise this discretion, then: (1) the judge dismisses the motion for summary judgment, and (2) the matter with a "real chance of success" goes onward either to a converted application under Rules 13.08(1)(b) and 6, as discussed below [paras. 37-42], or to trial. If the judge exercises the discretion, he or she determines the full merits of the legal issue once and for all. Then the judge's conclusion generates issue estoppel, subject to any appeal.

This is not the case to catalogue the principles that will govern the judge's discretion under Rule 13.04(6)(a). Those principles will develop over time. Proportionality criteria, such as those discussed in *Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, will play a role.

A party who wishes the judge to exercise discretion under Rule 13.04(6)(a) should state that request, with notice to the other party. The judge who, on his or her own motion, intends to exercise the discretion under Rule 13.04(6)(a) should notify the parties that the point is under consideration. Then, after the hearing, the judge's decision should state whether and why the

> discretion was exercised. The reasons for this process are obvious: (1) fairness requires that both parties know the ground rules and whether the ruling will generate issue estoppel; (2) the judge's standard differs between summary mode ("real chance of success") and full-merits mode; (3) the judge's choice may affect the standard of review on appeal.

Summary Judgment – CBRM as Defendant and Third Party

[115] In determining whether summary judgment should issue, the Court's assessment is based on all of the evidence from any source.

[116] The purpose of summary judgement is to allow cases with a real chance of success to proceed to a full trial on their merits and to "weed out" those that do not.

Best Foot Forward

[117] The responding party Personal has submitted these motions are premature in that the Defendant Baker has not yet provided an affidavit of disclosing documents, nor have discoveries been completed. (MacDonald Affidavit, paragraphs 40, 41)

[118] In the ***Shannex*** decision, Fichaud, JA, pointed out with respect to the first question:

> *Burton*, paras. 85-86, said that, if the responding party reasonably requires time to marshal his evidence, the judge should adjourn the motion for summary judgment. Summary judgment isn't an ambush. Neither is the adjournment permission to procrastinate. The amended Rule 13.04(6)(b) allows the judge to balance these factors.

[119] In its post trial brief Personal has argued:

> 23. The Personal submits the evidence demonstrates there remains an incomplete picture as to the parties' respective apportionment of liability, and it cannot be said, on the evidence before this Court at a summary Judgment motion that there are no material facts in dispute.

[120] In response the Defendant Baker has stated that extensive evidence has been provided in the form of the various police reports, including the numerous documents disclosed to the Plaintiff, by letter from CBRPS dated February 1, 2018, which is appended to Inspector Ken O'Neil's affidavit filed August 25, 2020.

[121] Further, Defendant Baker submits that there has been extensive evidence given by the witnesses for the moving parties, and the responding party has had a full opportunity to cross-examine the witnesses on their affidavits.

[122] Sgt. Baker submits that his affidavit alone contained nine (9) substantial exhibits.

[123] I note further that the Defendant and third party, CBRM provided its (unsworn) affidavit of disclosing documents on August 6, 2020, which is one (1) year prior the motions being heard.

I note there were no limits placed on cross-examination, and no motion for production was made by Personal.

[124] Personal is correct, however, that the onus to provide disclosure is on the individual party, under Rule 15 and to provide an affidavit of disclosing documents in a timely fashion.

[125] Rule 15.03(1) states that an affidavit of disclosing documents is to be filed within 45 days of the pleadings closing. (Rule 15.03(1))

[126] The pleadings in this matter appear to have closed on January 9, 2020 when Mr. Wall filed its Notice of Defence to the third party claim. (MacDonald Affidavit, paragraph 14)

[127] Personal has argued the CBRPS Defendants have failed to put their best foot forward by failing to disclose the information sought by Mr. Robinson, as well as various "multi media" files and audio files of witness interview. The transcript of those have been disclosed. In addition, discoveries have not been held. I am satisfied that Personal made diligent efforts to arrange discoveries, in spite of the difficulties related to the pandemic.

[128] On the other hand, the Civil Procedure Rules state that a motion for summary judgment on the evidence "may be made any time after the pleadings close and before a date assignment conference is requested".

[129] I have reviewed and considered the affidavit of Stephen R. Robinson, P. Eng. In it he states that more information is needed to prepare a proper expert report. In particular, he states at paragraph 15 and 16:

> 15. In investigating the Collision, I would seek to determine, amongst other things, at what location a vehicle is traveling in the same direction as the Defendant MacLean, would no longer be able to view either emergency equipment (e.g. lights), or headlights generally due to the visual obstruction of foliage, and of the hill located just before the scene of the Collision.
>
> 16. Identifying the point at which Mr. MacLean lost sight of emergency vehicles would require attending the site in person. I would attend the location of the Collision to view the road topography (i.e. hills or curves), doing so at roughly the same time of year to account for foliage, and to determine sightlines.

[130] Mr. Robinson further opines that in his experience, in Nova Scotia, data from the Crash Data Report, referenced in the Vokey Report "is often scrutinized as being unreliable evidence in a reconstruction without being validated by some other means,…".

[131] In paragraph 27 he states:

> 27. In preparing a collision reconstruction opinion, I would ordinarily review the transcripts arising from discovery examinations of the parties and all disclosure of the parties. I understand that discoveries of the parties in the within litigation have not yet occurred and are not scheduled.

[132] In his concluding paragraph Mr. Robinson stated:

> 30. Importantly, much of the above-requested information would be used to determine the speed and relative location of the CBRP officers, as well as the speed and relative location of Mr. MacLean, at various data points throughout the chase, including the point at which the CBRP say they called off the chase, and in the moments leading up to the collision with the Plaintiff.

[133] I find there has been sufficient evidence placed before the Court to permit Personal to put its best foot forward. In these circumstances, nearly three (3) years have passed since the original claim (December 22, 2018) until the hearings in August, 2021.

[134] Having considered the matter of whether the parties have put their best foot forward, it seems to me while there has not been discoveries, there has been extensive disclosure from the moving parties. Given this and the passage of time, it seems that Personal has to accept some responsibility for having not placed more evidence before the Court in support of their position. The Court is well aware of where the burdens lie.

Position of the Defendant Personal

[135] In this case Personal submits there is a material fact in dispute, at what point Mr. MacLean ought to have reasonably understood he was no longer being pursued by the CBRPS.

[136] Personal submits the following are also material facts in dispute:

> (a) At what point Mr. MacLean would have been no longer able to view the lights or headlights of the pursuing CBRP vehicles;
>
> (b) Whether Ms. Gottwald saw or heard any emergency lights or sirens prior to the Accident;
>
> (c) The location and speed of the pursuing CBRP vehicles at various points before the Accident;
>
> (d) The location and speed of Mr. MacLean's vehicle at various points, including how quickly he travelled between the point at which he would have been no longer able to view the lights or headlights of pursuing CBRP vehicles and the site of the Accident;
>
> (e) The distance of the pursuing CBRP vehicles from Mr. MacLean's vehicle at various points;
>
> (f) The exact location at which the pursuing CBRP vehicles parked their vehicles when they allege they discontinued the pursuit, including the positioning of their vehicles prior to pulling over; and
>
> (g) The time the pursuing CBRP vehicles turned off their emergency equipment, relative to their location and positioning.

[137] In its brief Personal submits whether the CBRM Defendants bear any liability which, in turn, affects whether it is required to respond to Ms. Gottwald's claim, are material facts in dispute. (***Totino v. St. James Mullen Estate 2020 NSSC 281***)

Affidavit Evidence

[138] Several affidavits have been filed in support of the three (3) motions. Sgt. Baker filed an extensive affidavit of his own. Cst. Planetta also filed an affidavit outlining his involvement.

[139] space

[140] In her affidavit Angela Thomson stated that "minutes had passed", between the three (3) events she witnessed, described by her in paragraphs 14 and 18:

> 14. I proceeded on Lingan Road for a distance and came upon a motor vehicle accident in front of me involving a grey minivan and a car.
>
> 18. Minutes had passed between the time that the grey minivan pulled out in front of me on Lingan Road, the time that I witnessed the police vehicles with no lights on, and the time that I arrived at the accident scene.

[141] Mr. Stephen Roach was at a nearby residence on Lingan Road between 10:00 p.m. and 10:30 p.m. on August 26, 2017. After hearing "a collision" he, along with others, ran to the scene. In his affidavit he states at paragraphs 7 and 8:

> 7. Within a minute or two of my arrival on the scene of the accident, I observed multiple police vehicles arriving at the scene;
>
> 8. There were no police at the scene of the motor vehicle collision at the time that I arrived at the scene;

[142] In his affidavit Cst. Planetta stated that the Plaintiff's vehicle was operating "well below the posted speed limit of 50 km's", as it refused to stop and continued throughout the various intersections. (Paragraph 10)

[143] Cst. Planetta stated he had engaged his vehicle's emergency equipment, lights and siren, after he "observed the Uplander fail to stop at the stop sign at the intersection of MacLean Street and Bison Drive, Sydney".

[144] Cst. Planetta further stated at paragraphs 10 - 15:

> 10. Police lights and siren remained engaged as I traveled, at an approximate speed of 10 – 15 kms, behind the Uplander as it entered on Lingan Road;
>
> 11. The Uplander was traveling at a significantly higher rate of speed on Lingan Road and was traveling toward the New Waterford.
>
> 12. I had been in contact with Sgt. Russell Baker and advised him of the significant rate of speed of the Uplander and he instructed me to deactivate my light and siren and discontinue following the Uplander.

> 13. Pursuant to the instruction of Sgt. Baker I deactivated the emergency lights and siren pulled the police vehicle over hear the radar base on Lingan Road. I lost site of the Uplander as it continued along Lingan Road.
>
> 14. I state very clearly that all police pursuit of the Uplander ended near the radar base on Lingan Road, Sydney.
>
> 15. Shortly after I pulled the police vehicle over I received notice from Dispatch of 911 calls confirming a motor vehicle accident on Lingan Road, and the description of one of the involved vehicles matched that of the Uplander.

[145] Cst. Planetta denies any allegations of negligence made by the Plaintiff and Third Party indicating his response was immediate when he received the dispatch call and located the collision in front of 780 Lingan Road, Sydney. (Paragraphs 15 and 16)

[146] In his affidavit Sergeant Baker stated :

> 22. Cst. Planetta then advised that the gray minivan had turned left onto Lingan Road and that the suspect driver was picking up speed, probably over the posted speed limit of 80 kilometers per hour.
>
> 23. I immediately responded "Gotcha, when you reach, when you reach 80 there we're done".
>
> 24. Cst. Planetta misunderstood me when he stated, "Sorry, when we reach where?"
>
> 25. I stated, "Reach 80, we're done".
>
> 26. It was my decision to immediately discontinue the police pursuit of the suspect vehicle, pursuant to police policy as highlighted in the Cape Breton Regional Police Service Operational Policy for High Risk / Dangerous Pursuits, which is attached hereto as Exhibit "B".
>
> …
>
> 29. At 10:22:38 p.m., I advised Officers that dispatch received a number of 911 calls advising that there was a motor vehicle accident on Lingan Road, approximately 1.2 kilometers from the location of the police vehicles which were stopped at *the Radar Base* on Lingan Road.

Summary Judgment – Defendants Russell, Baker and Kristopher Planetta

[147] The Plaintiff is the only party that named the individual officers in their personal capacity. Counsel for Ms. Gottwald provided a letter to the Court dated July 9, 2021. The Plaintiff amended her pleadings to include the named Defendants, Sgt. Baker and Cst. Planetta, following the Third Party Claim filed by Personal against CBRM.

[148] The Plaintiff takes no position on the motions and Ms. Gottwald did not participate in the hearing of the motions or file any evidence other than the correspondence mentioned and a second letter dated October 1, 2021 as to costs. The Plaintiff's counsel stated:

> As to the merits of whether or not the police, including Sgt. Baker and Cst. Planetta, are liable for the accident in question, the Plaintiff takes no position.

[149] For its part, Personal has in its submissions, addressed whether these officers should remain as Defendants. Personal in its post-trial brief suggested partial summary judgment should be granted, referring to paragraphs 133-137 of its pre-hearing submissions.

[150] As stated, Personal did not name the Defendants Baker and Planetta as Third Parties. It stated also that if at an eventual trial there is any finding of negligence by Cst. Planetta and Sgt. Baker, their employer CBRM would be found vicariously liable. (Paragraph 136 of pre-trial submissions) In short, Personal has stated it "has no position on whether the two officers ought to remain as individually named Defendants in the within proceeding".

[151] That said, Personal maintains the Defendant CBRM ought to remain as Defendant and Third Party in the proceeding.

[152] Turning to the appropriate questions to be posed in respect of the individual Defendants:

Is there a genuine issue of material fact with respect to the personal liability of the Defendants Baker and Planetta?

[153] The evidence clearly indicates these Defendants were employed as members of the CBRPS and were acting within the scope of their employment as servants of the Municipality.

[154] The answer to this question is therefore, "No".

Does the claim by the Plaintiff require a determination on a question of law?

[155] There are legislative provisions that determine liability in such circumstances.

[156] The answer to the second question is therefore, "Yes". Turning to the next question.

Does the challenged pleading have a real chance of success?

[157] Pursuant to s. 43 of *The Police Act,* the CBRM is liable for any negligence of members of its police department.

[158] Section 43 of *The Police Act* states:

> Tort liability of municipality
>
> 43 (1) A municipality maintaining a police department established pursuant to clause 36(1)(a) or Section 84 or 85 is liable in respect of a tort committed by a member of the police department in the performance of that person's duties.
>
> (2) A municipality shall pay any damages or costs awarded against a member of a police department of that municipality in respect of a tort committed by the member in the performance of the member's duties, any costs incurred and not recovered by the member in any such proceedings and any sum required in connection with the settlement of any claim that has or might have given rise to such proceedings.

> (3) A municipality that may be liable under this Section has the right to defend in the name and on behalf of the member of the police department any claim or civil action that may be brought against the member and that may result in such liability, and the municipality has the right to make such investigation, negotiation or settlement of the claim or action as may be deemed expedient by the municipality.
>
> (4) The member of the police department against whom such claim or action is made or taken shall co-operate fully with the municipality in the settlement or defence of the claim or action.

[159] In this case the challenged pleading is not being contested by the party who made (or plead) it, that being the Plaintiff, who takes no position.

[160] It is for the responding party, which in this case is Personal, to show it has a real chance of success. Once again, Personal takes no position on whether these Defendants should remain as such. I am satisfied the answer to the third question is "No".

[161] Summary Judgment is granted (in part) dismissing the action against the individually named Defendants Baker and Planetta.

Summary Judgment – CBRM, claim based on condition of Lingan Road

[162] In paragraph 12 of the Third Party Claim and paragraph 22 of the Amended Statement of Claim, Personal and Ms. Gottwald claim negligence by the Defendant and Third Party (CBRM). Both of these allegations are the same and are repeated below:

> 12/22. Additionally, the Municipality owed a duty of care to motorists, including the Plaintiff, to ensure their safety when travelling on the municipality's roads and highways. The particulars of the Municipality's negligence include:
>
> (a) failing to ensure the yellow centreline was visible;
>
> (b) failing to ensure traffic signals and signs were appropriately places; and
>
> (c) such other negligence which caused or contributed to the Defendant MacLean's collision with the Plaintiff's vehicle.

[163] In its brief, Counsel for CBRM made the following submission:

> The Affidavit of Wayne MacDonald, Director of Engineering and Public Works for the CBRM confirms that the roadway in the area where the accident took place is owned and maintained by the Nova Scotia Department of Transportation and Infrastructure Renewal and not the CBRM. This material fact is not disputed by the Plaintiff or the Personal and on its own is sufficient to defeat the allegation contained in Section 12 of the Third Party writ and 22 of the Amended Statement of Claim.

[164] I will not belabour my reasons for granting summary judgment to CBRM on this portion of the claims against it.

[165] I am satisfied that CBRM has shown there is no genuine issue of material fact with regard to the claims at paragraphs 12 and 22 respectively, and further that the claims do not require a determination on a question of law.

[166] The CBRM does not and did not own, manage or maintain the relevant portion of Lingan Road. Given the unchallenged affidavit of Mr. MacDonald, this claim should be dismissed.

[167] Summary Judgment is therefore granted in part to CBRM. The subject paragraphs are therefore struck.

[168] The actions of the Defendant officers will be assessed in their capacity as employees of CBRM.

Summary Judgement - CBRM as remaining Defendant and Third Party

[169] The recurring theme in the evidence on these motions is that Cst. Planetta discontinued the pursuit immediately after he was directed by Sgt. Baker to do so, once he reached 80 km/hr in speed.

[170] Not only is this evidence uncontradicted, but it is corroborated by the evidence of Cst. Spencer, and the transcript of the radio transmission in evidence as Exhibit "C" of Sgt. Baker's affidavit, as well as Sgt. Baker's own reports. In addition, this evidence is corroborated by other officers who "listened" to the recorded transmissions, as outlined in their Occurrent Reports, which are attached to Cst. O'Neill's affidavit. Examples are the reports of Cst. Bursey, Cst. Dawson and Cst. Spencer. (See paragraphs 19- 25 of Cst. Spencer's affidavit)

[171] In addition, it is not in serious dispute that Sgt. Baker gave the direction to Cst. Planetta "when you reach 80 there we're done", immediately after Cst. Planetta informed him that the grey van was proceeding "at a significantly high rate of speed". Cst. Planetta was seeking direction, and he got it, immediately.

[172] In terms of further corroboration, there is the independent and objective evidence given by Angela Thompson, who was travelling home that evening, from work at Shopper's Drug Mart in Sydney. She resides on Lingan Road.

[173] Ms. Thompson confirmed the evidence of the officers that their emergency lights were activated when she first saw them turning onto Lingan Road from Columbus Street, stating the grey van "cut " or pulled out in front of her, causing her to stop. She stated the police vehicles were behind the grey minivan.

[174] They were not going fast at the time she said, in answer to questions in cross-examination. She further stated that the police vehicles were travelling at a "moderate" rate of speed. Much like her own, she said, driving "regular".

[175] Ms. Thompson also confirmed she lost sight of the vehicles due to a turn, but clearly saw the police vehicles at the top of the hill, near the radar base when she was at the bottom. It was a long distance, she said.

[176] Finally, she confirmed the location of the police vehicles, when they were stopped with emergency equipment (lights and siren) turn off, just past the radar base.

[177] This was essentially the evidence of the two officers, Cst. Planetta and Cst. Spencer. Cst. Planetta was asked in cross-examination about the distance between his vehicle and the MacLean vehicle. His evidence was he could not recall the exact distance, but typically he would maintain a safe distance, which he described as allowing sufficient time to stop.

[178] Sgt. Baker's evidence indicated that during the pursuit through the residential streets, such as Catherine Street, Gibbons Street (Tank Road) and Columbus Street, it was not a dangerous pursuit, as the speed of the vehicles at that point was approximately 15 km/hr. Cst. Spencer's evidence was it was between 15-20 km/hr. The evidence in this regard indicates that the police were taking a cautious approach in terms of their speed. In his affidavit Sgt. Baker stated that "Cst. Planetta continued to provide his location and advised that the gray minivan was travelling about 15 kilometers per hour, but was still refusing to stop."

[179] I accept the evidence of Sgt. Baker that the pursuit became or started to become dangerous when the vehicles entered Lingan Road as the MacLean vehicle was picking up speed. The operational policy's purpose is to set guidelines. (Section 1.)

[180] Personal's position on these motions has focused on Mr. MacLean's perception of the events, what he would have been able to see, hear, do or not do in the circumstances. In Mr. Planetta's brief his counsel argues this information could only come from the Defendant MacLean himself and it is not for the Defendants to provide this information. There is no evidence from Mr. MacLean before the Court.

[181] In addition, as noted, Mr. Robinson's affidavit indicates that speed and relative location of the vehicles at various points is important information to be determined. Counsel for the Defendants have submitted that Mr. Robinson has not attended the site.

[182] I find that Personal has raised a lot of questions, but has not put its best foot forward. In particular, I find principles such as proportionality criteria, and access to civil justice are relevant here. As discussed in ***Hryniak v. Mauldin***, [2014] 1 S.C.R. 87, these can play a significant role in summary judgement.

[183] The evidence provided from all sources including that given by the CBRPS Defendants, Personal, as well as independent witnesses is, in my view, sufficient for the Court to address the issues and decide the motions.

[184] I have read and considered the thorough decision of Justice Brothers in ***Totino***. I find this case to be distinguishable from the one before me on its facts. At issue there was whether there was a second vehicle involved in the accident.There was also a separate but related action.

Decision on Summary Judgement on CBRM Motion

[185] For all of the above reasons, I shall answer the questions posed by Rule 13.04 as follows:

Is there is a genuine issue of material fact?

[186] The Court finds there is no genuine issue. CBRM has satisfied their onus to show by evidence there is no genuine issue of material fact. Turning to the second question.

Does the challenged pleading require a determination on a question of law, whether pure or mixed with a question of fact?

[187] The Court finds the answer to this question is "Yes". Pursuant to Rule 13.04 the Court finds the claim requires a determination only on a question of law. Turning to the third question.

The answers to question 1 and 2 being no and yes respectively, leaving only an issue of law, a judge "may" grant or deny summary judgment.

[188] Civil Procedure Rule 13.04(6) states:

> (6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:
>
> (a) determine a question of law, if there is no genuine issue of material fact for trial;
>
> (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[189] In this regard it is important to repeat the direction of Fichaud, JA in ***Shannex***:

> Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trail or application hearing, would be a patently unjust exercise of discretion.

[190] In answer to the third question, I find the responding party, Personal, has failed to show its claim has a real chance of success. The answer to the third question is "No".

[191] Summary judgment is therefore granted to CBRM and the other moving parties.

Murray, J.