IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Munroe v. MacNutt, 2008 NSSM 74

2008 Claim No. 298867

BETWEEN:

Name: **Stephanie Munroe** **Claimant**

- and -

Name: **Primmum Insurance Company** **Claimant**

- and -

Name: **Shelly MacNutt and Kenneth Murphy** **Defendants**

Editorial Notice

Addresses and phone numbers have been removed from this unofficial electronic version of the judgment.

Appearances:
Claimant: Maggie A. Stewart
Defendants: Bryna D. Fraser

Hearing Date: September 4, 2008

D E C I S I O N

[1] This claim arises from a motor vehicle collision which occurred on February 26, 2008, at approximately 5:00 p.m. on Highway 111, near the MacKay Bridge, in Halifax Regional Municipality.

[2] The Claimant, Stephanie Munroe, was the owner and operator of a 1999 Volkswagon Golf motor vehicle. She works in Burnside Industrial Park in Dartmouth and lives on the Halifax Peninsula and, at the time in question, was driving home from work.

[3] The Defendants, Shelly MacNutt and Kenneth Murphy, both work for the same company in Burnside Industrial Park and, like the Claimant Munroe, were also on their way home from work. The Defendant, MacNutt, was and is the owner of a 2008 Nissan Sentra motor vehicle. At the time in question, the Defendant Murphy, was operating the vehicle. The Defendants MacNutt and Murphy live together in what would be characterized as a "common law relationship" which had commenced in or about October 2007. Prior to that they had both lived in the New Glasgow area and although were in a relationship, they did not live together prior to the move to Halifax in or about October 2007.

[4] This claim is brought as a subrogated claim by the Claimant Primmum Insurance Company. Its counsel has referenced Section 149(1) of the Nova Scotia *Insurance Act*, R.S.N.S. 1989, c. 231, in this regard:

> *149(1) An insurer who makes any payment or assumes liability therefore under a contract is subrogated to all rights of recovery of the insured against any person and* ***may bring action in the name of the insured to enforce those rights****.* [Emphasis Supplied]

[5] The evidence indicates that Primmum made a payment to its insured Munroe, in respect of the incident of February 26, 2008, and is therefore bringing this action in the name of Munroe (as well as its own name).

[6] In this case there appear to be two major issues: first, whether the Defendant Murphy, who was the operator of the Nissan Sentra, bears legal liability for the collision; and secondly, if so, is the Defendant MacNutt, thereby also liable by virtue of being the owner of the vehicle. This latter issue is a significant legal issue and, as a result, I requested post-hearing submissions on this issue which both counsel have provided.

Liability for the Collision - Murphy

[7] The evidence indicates that the Claimant Munroe was traveling at approximately 50-60 kilometers in the left lane as she approached the MacKay Bridge. The traffic in front and behind of her was not bumper to bumper and she was not overtaking any vehicle. She indicated that she was driving at approximately the speed of the flow around her. The collision took place near the area where Route 111 connects with the entry and exit ramps to Victoria Road. The Claimant Munroe testified that without any warning at all the Defendant vehicle came into her lane, hit her vehicle, and forced her up on to the median. This caused the drive axle on the left-front wheel to break away and the car was rendered undriveable. Photographs were taken depicting the condition of her vehicle. According to Ms. Munroe, the other vehicle did not immediately stop but did stop at a point down the hill and then reversed back up to where her car rested. Bridge Commission staff were apparently on site and put orange pylons around the site and traffic was diverted around the lane where Ms. Munroe's vehicle was sitting. She gave a statement to the Bridge Commission staff but not to the police as they did not ask her to do an interview. She exchanged the information with the other driver as would normally be the case. Her vehicle was towed away.

[8] The result of the collision was that her vehicle was a complete constructive loss. As it turned out that the other vehicle did not have valid insurance, Ms. Munroe made a claim through her own insurance which indemnified her and she purchased a replacement vehicle - a 2004 Mazda 3. As noted above, her insurer, the Claimant Primmum Insurance, therefore brings this claim by way of subrogation.

[9] Both Defendants testified. Their evidence was that they were in the right lane and that there was a vehicle that came from the Victoria Road ramp and pulled in front of the vehicle in front of them. This caused the vehicle in front of them to slam on the brakes and as a result Mr. Murphy contends that he had no alternative but to change into the left lane to avoid a collision with the vehicle in front of him. He stated that he believed he was going 65 to 70 kilometers per hour but could have been doing as much as 80 kilometers

per hour. He stated that he did not have time to stop because he would have hit the car in front of him. He stated that he did not put the blinker on because there was not sufficient time but that he did do a shoulder check and did not see any vehicles in the left lane constituting a hazard for his lane change. He said that he got fully in the lane and got hit in the back left.

[10] Mr. Murphy stated that it was his view that Ms. Munroe came off the median and hit him and that is what he put in the statement to the police. He stated that he had no idea how she got on the median.

[11] On this evidence it appears clear to me that liability rests with the Defendant Murphy.

[12] The Defendants would, it seems, attempt to say that the real fault for this accident lies with the unknown driver that pulled in to traffic and caused the other vehicle to come to a complete stop. Even accepting that is accurate, the difficulty I have is that the Defendant Murphy should still have been traveling at such a rate of speed and keeping a sufficient outlook to be able to avoid the rear end collision. To put this another way, had Mr. Murphy not made the lane change and rear ended the vehicle in front of him, he would almost certainly have been found to been liable in law based on the general principle that the rear vehicle bears liability.

[13] It seems to me that what has occurred here is that the risk (and liability) of that collision was, in effect, transferred into the other lane by the lane change.

[14] I would further find that the lane change was not made in a safe manner. I refer to Section 111 of the *Motor Vehicle Act* which reads:

> *111 Whenever a street or highway has been divided into clearly marked lanes for traffic, drivers of vehicles shall obey the following regulations:*

> *(b) a vehicle shall be driven as nearly as is practicable entirely within a single lane and shall not be moved from such lane* ***until the driver has first ascertained that the movement can be made with safety****.* [Emphasis Supplied]

[15] While Mr. Murphy states that he did look over his shoulder and that he did not see any vehicles, I have difficulty in accepting that evidence. I am left with the question, never satisfactorily answered at the hearing, of why he would not then have seen Ms. Munroe's vehicle if indeed he had looked. I am therefore left with no alternative but to reject his evidence on this point.

[16] I further would note that there was no evidence indicating any negligence on the part of Ms. Munroe. I accept her evidence that she was simply traveling in the left lane and doing so in the "flow of the traffic" as she put it.

[17] For these reasons I find that Kenneth Murphy bears 100% liability for the collision. I accept the amount of damages claimed of $5,863.31, and in so doing I note that I prefer the valuation evidence submitted on behalf of the Claimant over the Defendant's evidence which was an on-line trade-in value only. I do not think such an amount would properly compensate the Claimant.

Liability as Owner - MacNutt

[18] I turn then to the second major issue of whether or not at law the owner of the vehicle, Shelly MacNutt is also liable.

[19] The Claimant submits that the Defendant, Shelly MacNutt, should also be found liable. Three arguments are advanced in support of this conclusion. All of these submissions engage Section 248 of the Nova Scotia *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, and subsections (3), (4), and (5) which read as follows:

> *(3) A person operating a motor vehicle, other than the owner thereof, shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent unless and until the contrary is established.*
>
> *(4) Where a person operating a motor vehicle is the husband, wife, father, mother, son or daughter of the owner of the motor vehicle, such person shall be deemed to be operating such motor vehicle as a family car within the scope of a general authority from such owner unless and until the contrary is established.*
>
> *(5) Unless and until it is established that such person was not operating such motor vehicle as aforesaid, such person shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent.*

Liability Under Section 248 Based on Consent

[20] Counsel for the Claimant argues that a strict and narrow approach to Section 248 has in recent years yielded to a more large and liberal interpretation which, it is asserted, broadens the vicarious liability of owner so as to better protect the interests of innocent victims. It is stated that the strict application of the tests for agents and servants is restated to a test of whether or not there is consent.

[21] The Claimant states that the most recent jurisprudence in this area has established that the appropriate test to apply is that the owner of a vehicle is deemed to be liable for the negligence of the driver if they have consented to the driver's use of the vehicle.

[22] With respect, I do not accept that the case law supports that proposition.

[23] In ***Nixon v. Robert et al*** (1983), 59 N.S.R. (2d) 245 (T.D.), Hallett J. (as he then was), considered the issue of the vicarious liability of the owner of a motor vehicle. The

provisions of the *Motor Vehicle Act* were identical to the provisions under consideration here although, at that time they were numbered as 221(3) and (4). In that case the Plaintiff had made a similar argument as to what is advanced here and relied on case law from other jurisdictions interpreting the legislation from the other jurisdictions. Hallett J. states (para 13):

> *The legislation of these other provinces dealing with vicarious liability of owners is very different from ss. 221(1) and (3) of the Nova Scotia Act in which there is no reference whatsoever to "consent". The concept that an owner's consent to the possession of the motor vehicle by the driver as imposing liability on an owner casts a much wider net of vicarious liability than the concept of any agency contained in Section 221(3).* ***The provisions of the Nova Scotia legislation do not alter the common law respecting the vicarious liability of a principal for the acts of his agent or servant other than to reverse the standard onus of proof from the plaintiff to the defendant****. While it would appear that the section such as contained in the Manitoba Act referred to* ***Murray v. Faurschou Farms Limited*** *have been interpreted in accordance with the words used by the legislators to impose liability on the owner if the owner consents to the driver's possession of the motor vehicle.*
> [Emphasis Supplied]

[24] To similar effect is the statement of Justice Burchell in ***Fraser v. Ross***(1983), 59 N.S.R. (2d) 254, (at paras 10 and 11):

> *10 On that uncontradicted evidence my finding is that Ian Ross has rebutted the presumption of agency set forth in Section 221(3) of the Motor Vehicle Act.* ***It is to be noted in the first place that the presumption in Section 221(3) is rebuttable and that, in the deeming provision, nothing is added to or taken away from the common law definitions of agency or master and servant relationships****. The mere loan of a vehicle for the convenience of the borrower and the giving of consent or permission to operate it were not sufficient to establish an agency or master and servant relationship at common law. Such a relationship only came into existence if the servant or agent was on the business of his principal or master, was carrying out his instructions or was under his direction and control. None of those factors has been established in the present case.*

> *11 Dealing with the same issues in Nixon v. O'Brien (S.H. No. 37805 - unreported) Hallett, J. has arrived at essentially the same conclusions as to Section 221 of the Motor Vehicle Act. I note as well in that decision a comprehensive analysis of distinguishable cases decided under other provincial enactments containing provisions that differ from Section 221 of the Nova Scotia statute. Counsel for the defendant, Ian Ross, has also cited a number of cases in support of his submission that the presumption of agency has been rebutted in the present case. It is sufficient to quote the following comments on Sections 221(1) and (3) of the Motor Vehicle Act which are extracted from the decision of Cooper, J.A., in L'Heureux v. Venator, (1973) 33 D.L.R. 33 D.L.R. (3d) 467 at page 471.*
>
> > *The fact that the owner of a motor vehicle consents to its use by another does not of itself establish that the other person is the servant or agent of the owner acting in the course of his authority as such servant or agent.*
>
> [Emphasis Supplied]

[25] In ***L'Heureux v. Venator***, (1972), 4 N.S.R. (2d) 352 (para. 13), the Appeal Division of the Supreme Court stated:

> *13 There is, in my respectful opinion, no liability upon the appellant arising under s. 221(3).* ***The fact that the owner of a motor vehicle consents to its use by another does not of itself establish that the other person is the servant or agent of the owner acting in the course of his authority as such servant and agent****: see J.E. Morse & Company Limited v. Hicks and Zinck (1955), 36 M.P.R. 317. The evidence here in my view negates any servant and agent relationship between the appellant and her husband. He was not employed by her. He used the car not for her purposes but for his own. The essence of the relationship of master and servant is the rendering of services by the servant to, or for the use of, or on behalf of the master. There is no evidence that Mr. L'Heureux in his use of the 1967 Camaro was rendering services to the appellant either for reward or gratuitously so that he was in the relationship of servant to his wife on June 12, 1970, or indeed on behalf of his wife, the appellant. Indeed, Doull, J. said in the Morse case, supra, at p. 332:*
>
> > *I perhaps should not leave the matter without stating my opinion that in this and in most cases, no reference to an 'agent' as*

> *distinguished from a 'servant' is necessary. The wide liability of the master for the negligence of a servant when acting in the course of his employment, covers the present case and, I think, most cases except where the agent is an independent contractor authorized by the principal to do a certain job. See Halsbury, 2nd ed., p. 98.*
>
> [Emphasis Supplied]

[26] And in ***Frizzel v. Crowell*** (1976), 16 N.S.R. (2d) 30 (T.D.), Hart J. (as he then was) states:

> ***The law is settled that the use of a motor vehicle with the permission and consent of the owner is not sufficient to render the owner liable for the negligent acts of the driver****. The vehicle must be engaged in the fulfillment of some purpose of the owner before liability attaches. The authority for this proposition has been reviewed by the courts of this province in* ***J.E. Morris & Co. Ltd. v. Hicks & Zinc****, [1955] 3 D.L.R. 265, and in* ***L'Heureax v. Venator*** *(1973), 33 D.L.R. (3d) 467.*
>
> [Emphasis Supplied]

[27] Notwithstanding such comments of the Supreme Court that the "law is settled" on this point, the Claimant characterizes this as the strict and narrow approach and suggests that there is a trend to move away from this approach. Reference is made to the case of ***Goudey v. Malone*** (2003), 220 N.S.R. (2d) 92 (S.C.), and it is suggested that that case supports the proposition that the test of whether there is an agency or a relationship of master servant is replaced with a test of consent. With respect, I do not read ***Goudey*** as going that far. This case was actually a preliminary application pursuant to Civil Procedure Rule 28.04 and the questions put to the Court were firstly, who was the owner of the automobile operated by the Defendant, Colby Todd Brannen; secondly, was Colby Todd Brannen operating the automobile in question with the consent, expressed or implied, the owner. Justice Haliburton's finding was that the driver of the automobile, Colby Brannen, had the consent of both Matthew Malone, who was in the passenger seat and was the son of the owner, Cathy Malone, and that Colby Brannen also had the implied consent of Cathy Malone. He further found that even if he had concluded that Cathy Malone had satisfied the heavy burden displacing the presumption that he would have found that

Matthew was a "operator of the vehicle" and that Colby Brannen was driving under Matthew's instruction and control. Given this finding I cannot conclude that the ratio is nearly as broad as asserted.

[28] ***Morash v. Burke*** (2006), N.S.S.C. 364 is also referred to. As I read that case, it is a case dealing with the issue of who is the owner and whether the owner gave the driver consent to drive.

[29] The case of ***Powers v. Pottie Estate*** (2000), 185 N.S.R. (2d) 111 (S.C.), is also referenced. Again, I do not read this case supporting the broad proposition advanced. Rather, I understand the ruling in this case to deal with whether or not there was consent of the owner.

[30] Counsel for the Claimant quotes paragraph 11 from the ***Powers***; the full paragraph 11 reads:

> *11 The law places a burden on the owner of a motor vehicle and presumes that the automobile is being driven with the consent of the owner unless there is sufficient evidence to the contrary to find, on a balance of probabilities that there was no such consent. Section 114(1) of the Insurance Act states that every owner's policy "insures the person named therein, and every other person who with his consent drives the automobile owned by the insured named in the contract..." The Motor Vehicle Act establishes the presumption that the operator of a motor vehicle has the consent of the owner. The burden therefore is on the owner of the vehicle, in this case Witherspoon to establish, on a balance of probabilities, that the driver of that vehicle, Pottie, did not have her consent. As Mr. Norton quite properly pointed out, this is a negative burden and very difficult for the bearer of that burden to prove. It is more difficult in this case because the party to whom the consent waspresumed is dead and cannot give evidence respecting that issue. Without the consent of the owner, either express or implied, it is open to conclude that the vehicle in question was taken without the owner's permission which is tantamount to theft. This raises the question of a somewhat higher burden of proof in the face of an allegation of criminal conduct. This principle is canvassed at length in the Supreme Court of*

> *Canada case of Hanes v. Wawanesa Mutual Insurance Co., [1963] S.C.R. 154 (S.C.C.) which was considered and adopted by Cowan C.J. in Garrison v. Lively (1977), 27 N.S.R. (2d) 489 (N.S.T.D.).*

[31] I note at this juncture that Section 114 of the *Insurance Act* mandates that the standard insurance policy insures anyone who drives with the owner's consent. Of course, in most cases the vehicles that are operated on the highways of Nova Scotia hold insurance and thus the only practical issue is whether or not there is consent. There is no question that in this present case there was consent from the Defendant Shelly MacNutt to the Defendant Kenneth Murphy to operate the vehicle. The only reason the liability issue arises here is because there was no insurance and thus we need to look to the question of vicarious liability to find whether Ms. MacNutt is liable as owner in addition to the driver, Kenneth Murphy.

[32] To conclude on this issue, I reject the argument that merely by consenting to the use of her vehicle results in liability to the owner for the negligent acts of the driver. The reported case law, including case law from the Nova Scotia Appeal Division is to the contrary and, I do not read the more recent case law as altering this law.

Liability Pursuant to Section 248(3) of the Motor Vehicle Act - Servant or Agent

[33] For convenience I again cite Section 248(3):

> *(3) A person operating a motor vehicle, other than the owner thereof, shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent unless and until the contrary is established.*

[34] As noted by Hallett J. (as he then was) in ***Nixon v. Robert*** , supra:

> *...The provisions of the Nova Scotia legislation do not alter the common law respecting the vicarious liability of a principal for the acts of its agent or servant other than to reverse the standard onus of proof from the plaintiff to the defendant.*

[35] In ***L'Heureux v. Venator***, supra, Cooper, J.A. states (para 13):

> *...The fact that the owner of a motor vehicle consents to its use by another does not of itself establish that the other person is a servant or agent of the owner acting in the course of authority as such servant and agent: see* ***J.E. Morris & Co. Ltd. v. Hicks & Zinck*** *(1955), 36 N.P.R. 317.* ***The evidence here in my view negates any servant and agent relationship between the appellant and her husband. He was not employed by her. He used the car not for her purposes but for his own. The essence of the relationship of master and servant is the rendering of services by the servant to, or for the use of, or on behalf of a master****. There is no evidence that Mr. L'Heureux in his use of the 1967 Camero was rendering services to the appellant either for award or gratuitously so that he was in the relationship as servant to his wife on June 12, 1970, or indeed on any other occasion. The evidence also overcomes the presumption as to agency. Mr. L'Heureux was doing nothing on behalf of his wife, the appellant.* [Emphasis Supplied]

[36] It would seem, based on these authorities and particularly the ***L'Heureux*** case that to fall under subsection (3) of 248, either the relationship of principal/agent or master/servant must be established. Either is sufficient.

[37] The facts here establish that Ms. MacNutt and Mr. Murphy were in a common law relationship and both worked at the same place of business. According to their evidence they shared the driving between home and work although the vehicle was registered only in Ms. MacNutt's name. They are a relatively young couple and had been living together since approximately October 2007, some four months at the time of the incident in question. In these circumstances, is Mr. Murphy to be considered the agent of Ms. MacNutt by virtue of operating the motor vehicle with her in the passenger seat. I refer to the following definition of "agent" found in Black's Law Dictionary:

> ***Agent***. *A person authorized by another to act for him, one intrusted with another's business. Humphries v. Going, D.C.N.C. 59 F.R.D. 583, 587. One who represents and acts for another under the contract or relation of agency (q.v.). A business representative, whose function is to bring about, modify, affect, accept performance of, or terminate contractual obligations between principal and third persons. One who undertakes to transact some business, or to manage some affair, for another, by the authority and on account of the latter, and to render an account of it. One who acts for or in place of another by authority from him; a substitute, a deputy, appointed by principal with power to do the things which principal may do. One who deals not only with things, as does a servant, but with persons, using his own discretion as to means, and frequently establishing contractual relations between his principal and third persons.*
>
> *One authorized to transact all business of principal, or all of principal's business of some particular kind, or all business at some particular place. Farm Bureau Mut. Ins. Co. v. Coffin, 136 Ind. App. 12, 186 N.E. 2d 180, 182.*

[38] It would appear that the essence of the definition is that an agent has authority to engage in business relations on behalf of the principal. That is a very different thing than driving a person in a motor vehicle and I conclude that, Mr. Murphy was not, as a matter of law, acting as agent at the time of the collision.

[39] I turn then to the relationship of master/servant. The Claimant argues that by providing this gratuitous service of driving Ms. MacNutt home from work, he was acting as a servant of Ms. MacNutt. Reference is made to the quotation from the ***L'Heureux*** case and as I understand it, the suggestion is made that because a gratuitous service is offered that that constitutes a master/servant relationship. I do not accept that argument. One can easily think of many and varied situations where gratuitous services are provided and in which there could be no suggestion that the relationship of master and servant is thereby created. I would understand in normal parlance that the phrase "master/servant" would connote a relationship whereby the servant is subordinate to the directions and control of the master. It would seem to be the very essence of the relationship and, with all respect, it would be a

tortured interpretation to conclude that the relationship between Ms. MacNutt and Mr. Murphy is that of master and servant when he drove the car to drive the two of them home from work.

[40] In my opinion the evidence here rebuts the presumption in Section 248(3).

[41] I would add that in reaching this conclusion I have referred to the recent case of ***Newell v. Towns*** (2008), 266 N.S.R. (2d) 202, where Beveridge, J., in considering Section 248(4) of the *Motor Vehicle Act* found that the presumption could be rebutted on a balance of probabilities and that there was no higher standard than that applicable. As I have stated, I find that the evidence here rebuts the presumption that Mr. Murphy was a servant or agent of Ms. MacNutt by operating her motor vehicle.

Liability Pursuant to Section 248(4) and (5) of the Motor Vehicle Act - Family Purpose Doctrine

[43] These provisions read:

> *(4) Where a person operating a motor vehicle is the husband, wife, father, mother, son or daughter of the owner of the motor vehicle, such person shall be deemed to be operating such motor vehicle as a family car within the scope of a general authority from such owner unless and until the contrary is established.*
>
> *(5) Unless and until it is established that such person was not operating such motor vehicle as aforesaid, such person shall be deemed to be the servant and agent of the owner of the motor vehicle and to be operating the motor vehicle as such servant and agent acting in the course of his employment and within the scope of his authority as such servant and agent.*

[42] These provisions were reviewed by Cowan J. (as he then was) in ***MacKay v. Weatherby*** (1966), 60 D.L.R. (2d) (87). At that time the section numbering was different but the

provision was identical. The Section embodies what is referred to as the "family purpose doctrine". Cowan J. states (paras 40-41):

> *40 The "Family Purpose Doctrine" which is applied in some jurisdictions in the United States of America, but rejected in others, is dealt with in vol. 60, Corpus Juris Secundum, commencing at p. 1065. Under that doctrine "where the head of the family maintains a motor vehicle for the general use, pleasure and convenience of the family, he is liable for the negligence of a member of the family having general authority to drive it while the vehicle is being so used". As a general rule, the Family Purpose Doctrine applies only to motor vehicles maintained for the general use, pleasure and convenience of the owner's family. The Family Purpose Doctrine applies where the car is used for a family purpose, but does not apply where, at the time of the injury, the vehicle was not being operated for a family purpose.*
>
> *41 It seems, however, that the courts are not in accord as to what will constitute a family purpose. In some jurisdictions, the doctrine is held to impose liability on the father or head of the family who has supplied the vehicle, notwithstanding it is being used at the time of the injury by a member of the family exclusively for his own individual use or pleasure. In other jurisdictions, courts have refused to impose liability where the car is bine used by a member of the family solely for his own purposes or pleasure. In order to warrant the application of the Family Purpose Doctrine and impose liability on the owner for the negligent driving of a member of his family, the member of the family must have been using the car by permission or authority, either express or implied. "It has been held that the Doctrine applies only where the driver has general permission to sue the vehicle and does not apply as to a member of the family who obtains special permission on the occasion of each use." (See vol. 60, Corpus Juris Secundum, p. 1075).*

[43] In order for these provisions to apply under the *Motor Vehicle Act*, the driver of the vehicle must be in one of the enumerated relationships to the owner. That is the driver must either be the husband, wife, father, mother, son, or daughter, of the owner of the motor vehicle. Ms. MacNutt and Mr. Murphy were not in February 2008, legally married. There is no definition of either "husband" or "wife" in the *Motor Vehicle Act*.

[44] The Claimant argues that it is appropriate in these present circumstances to interpret "husband" and "wife" as including common-law spouses, as the purpose of the legislation is to attach liability to the owner of a vehicle for the negligent driving of their immediate family member. Reference is made to two Supreme Court of Canada cases - ***Walsh v. Bona***, [2002] 4 S.C.R. 325 and ***Miron v. Trudel***, [1995] 2 S.C.R. 418. Both of those cases involved challenges to legislation on the basis of the equality rights in Section 15 of the *Canadian Charter of Rights and Freedoms* on the basis that the legislation in question treated common law spouses differently than legally married spouses. In ***Walsh v. Bona*** the legislation was upheld but in ***Miron v. Trudel*** the legislation was struck down. The Claimant submits that the present case is similar to ***Maron v. Trudeau***.

[45] I have not been shown any authority nor am I aware of any authority where the Small Claims Court has engaged in an analysis of a statute involving a Charter of Rights dimension. It is questionable whether this Court has such a jurisdiction. Further, I would understand that notice would have to go to the Attorney General. It is a significant step for this Court to make and, I do not think it appropriate in this case to venture in that direction without full argument on the jurisdictional issue and notice to the Attorney General.

[46] Having said that, certainly the Court can consider the appropriate meaning to give to "husband" and "wife" in the *Motor Vehicle Act*. The terms themselves are not defined in that *Act*. Nor are they defined in the Nova Scotia *Interpretation Act*, R.S.N.S. 1989, c. 235.

[47] I have been provided with no authority interpreting the words "husband" and "wife" under the *Motor Vehicle*. However, I have found one case in which the word "wife" is used in a statute and has been considered by the Supreme Court of this Province. In ***McGuire v. Fermini*** (1984), 62 N.S.R. (2d) 104 (T.D.), Burchell J., considered the case where the deceased's common law wife and illegitimate son claimed under the *Fatal Injuries Act*.

The Court ruled that the word "wife" as used in the *Fatal Injuries Act*, R.S.N.S. 1967, c. 100, did not include a common law wife. The Court states (para. 4):

> *[4] In the case of Maureen P. McGuire* [the common law wife], *the defence submits that where the word "wife" is used in a statute, it must be taken to refer only to a woman who has gone through a legally recognized form of marriage, unless a contrary intention appears from the language of the enactment. That, I must say, is the view that has been taken by the courts in this province and counsel for the applicants was unable to point to any manifestation of a contrary intention in the Fatal Injuries Act* ***or in any other relevant legislation****. If I had any doubt on this question, I think it would be finally extinguished by reference to the reasons given by Chief Justice McEachern of the British Columbia Supreme Court, in Louis v. Esslinger, 15 S.C. L.T. 137, upon dismissing a submission that the word "wife", as used in the Family Compensation Act of British Columbia, should be taken to include a so-called common-law wife. It is convenient for present purposes not only to adopt the finding in that case as to the meaning of the word "wife" but also to endorse and recommend the excellent review of the institution of marriage under English Law set forth in the judgment. I think it may also be appropriate to echo the comment of the learned Chief Justice that, if a restricted interpretation of the word "wife" seems harsh, it must be recognized that an enlarged construction fo the word would have unwanted consequences for those who have elected to form unions outside the institution of legal marriage precisely so as to avoid its implications under the law. Having made the determination already indicated, it follows that Maureen P. McGuire has no right to maintain the present action under the Fatal Injuries Act and, accordingly, the present application, as it relates to her, is dismissed.*
>
> [Emphasis Supplied]

[48] Based on this, it seems to me that in Section 248(4) of the Nova Scotia *Motor Vehicle Act*, the term "husband" and "wife" refer to a legally recognized form of marriage. To rule otherwise would, it seems to me, to be an unwarranted expansion of the words of the legislation.

[49] Accordingly, I find that Shelley MacNutt is not liable under this provision and more generally, I conclude that there is not basis in law to find Shelley MacNutt liable to the Claimants.

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Conclusion and Order

[50] The claim is allowed against the Defendant Kenneth Murphy in the amount of $5,863.31, plus costs. The claim is dismissed against Shelley MacNutt for the reasons outlined above.

[51] It is hereby ordered that the Defendant, Kenneth Murphy, pay to the Claimants Stephanie Munroe and Primmum Insurance Company as follows:

Debt:	$ 5,863.31
Costs:	253.23
Total:	$ 6,116.54

[52] It is further ordered that the claim against the Defendant, Shelley MacNutt, be and is hereby dismissed.

DATED at Halifax, Nova Scotia, this 4th day of November, 2008.

Michael J. O'Hara
Adjudicator

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