SUPREME COURT OF NOVA SCOTIA

Citation: White v. MacDonald, 2011 NSSC 323

Date: 19/08/2011
Docket: Syd. No. 330181
Registry: Sydney

Between:

Brent White and Cheryl Curry

Appellants

v.

Vincent MacDonald

Respondents

DECISION ON APPEAL

Judge: The Honourable Justice Patrick J. Murray

Heard: April 26, 2011 at Sydney, Nova Scotia

Written Decision: August 19, 2011

Counsel: David V. MacIsaac for the Appellants
Hugh R. McLeod for the Respondents

By the Court:

INTRODUCTION:

[1] This is an appeal made pursuant to Section 32 of the ***Small Claims Court Act***, RSNS 1989, c. 430. The matter arises out of a motor vehicle accident that occurred on the 18th day of July, 2009, at the intersection of Grand Lake Road, Spar Road, and Highway 125 in Sydney, Nova Scotia.

[2] The Appellant, Brent White, was travelling west on Grand Lake Road as he approached the intersection, intending to continue in a westward direction. The Respondent, Vincent MacDonald, was travelling east on Grand Lake Road as he approached the intersection. Mr. MacDonald, on entering the intersection, proceeded to turn left across the westbound lane of traffic intending to continue north on Spar Road. The vehicles driven by the respective parties collided in the intersection.

[3] Both parties claim to have suffered injuries. Mr. White was taken from the scene to the Cape Breton Regional Hospital by ambulance. There were a number

of witnesses to the collision but only the drivers in the accident testified at the hearing held before the Small Claims Court.

[4] In the Small Claims Court decision, the learned Adjudicator found the Appellant and Respondent equally at fault (50/50) for the motor vehicle accident.

[5] The Appellant Brent White was the Defendant in the Small Claims Court action while the Respondent Vincent MacDonald was the Claimant. The amount involved is significant, in the range of $15,000.00 to $17,000, including loss of income and damage to the vehicle of $4,200.00.

BACKGROUND:

[6] The Claimant, Vincent MacDonald, according to his evidence was travelling east towards Glace Bay. He activated his signal to turn left onto the Spar Road and waited for the green arrow to start flashing. When it did, he began his left-hand turn onto Spar Road.

[7] As Mr. MacDonald was executing his turn, or attempting to, he was struck by the vehicle driven by the Defendant, Brent White, and owned by the Defendant, Cheryl Curry. He did not see the Defendant's vehicle coming as he was focussed on the lights. The Claimant, MacDonald, further stated that the Defendant White was "flying through" the intersection as though he was attempting to "beat the light".

[8] According to the evidence of the Defendant White, he saw a white truck cross over in front of him as he approached the intersection. He said he noticed the light turn from green to orange and he estimated he was going 50 kms/hour. Like the Claimant, the Defendant stated there were many people around but could not recall speaking to any of them post-accident. The Defendant felt pain on impact and he was unable to breath. Fluids were leaking from his vehicle and the fire department was called.

[9] The Claimant, MacDonald, stated it was a clear sunny day when the accident happened, which was between 5 and 6 p.m. He also claimed the Defendant White attempted to "veer away" from him, but hit his car. He says that it was too late for him to take evasive action. The Claimant broke his hand and the front of his truck

was damaged. He did not go to the hospital but a nurse came to the scene with "lots" of other people.

ISSUES:

[10] The grounds of appeal as contained in the Notice of Appeal are as follows:

1. Did the Learned Adjudicator err by failing to consider and apply Section 122 of the *Motor Vehicle Act (The MVA);* thereby denying the Appellants the benefit of that statutory provision?

2. Did the Learned Adjudicator err in relying on Section 3(1) of the *Contributory Negligence Act (The CNA)*without first determining that damage or loss was caused by the fault of two or more persons?

3. Did the Learned Adjudicator make findings of fact that were not supportable by the evidence?

LAW AND ANALYSIS:

[11] The case on appeal turns in large measure on the concluding clause in the Learned Adjudicator's Stated Case, that clause contained in paragraph 26 which reads as follows:

> "26. As there was no evidence entered by either party for me to find fault for greater with one than the other ,then pursuant to the Contributory Negligence Act I find default equally between the two parties."

[12] The decision itself must be read as a whole to obtain a complete understanding of the Adjudicator's analysis. Two of the key clauses are paragraphs 23 and 24 as follows:

> "23. Neither party provided evidence other than their own as to the event.
>
> 24. I do not find either party more credible than the other to make a finding for one in favour of the other."

[13] These clauses are definitive in that they set the parameters for the conclusion reached by the Adjudicator in clause 26, that he found "no evidence to find fault for greater with one than the other". What was meant by this is that

there was no evidence to find the Claimant, Vincent MacDonald, more at fault than the Defendant, Brent White, and there was no evidence to find the Defendant Brent White more at fault than the Claimant Vincent MacDonald. Implicit in this is that they were equally at fault for the collision. Neither party was found more credible than the other and their testimony was found to be in direct contradiction. As motor vehicle cases are civil actions the onus is on the Plaintiff (the Claimant MacDonald in Small Claims Court) to prove his case on the balance of probabilities for the Defendant White to be found responsible in whole or in part for the accident and the resulting damages.

Ground #1 - Whether the Adjudicator erred in failing to consider and apply Section 122 of the MVA?

[14] The Appellant has cited Section 122 of the *Motor Vehicle Act* as a ground of appeal in arguing that the Adjudicator did not properly consider it thereby denying the benefit of it to the Appellant.

[15] Section 122 of the *MVA* reads as follows:

122 (1) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection, and when two vehicles enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield to the driver on the right.

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

(3) The driver of a vehicle within an intersection intending to turn to the left shall yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but said driver having so yielded and having given a signal when and as required by law may make the left turn, and other vehicles approaching the intersection from the opposite direction shall yield to the driver making the left turn.

(4) The driver of a vehicle on a highway intending to turn to the left, other than within an intersection, shall yield to any vehicle approaching from the opposite direction which is so close to his vehicle as to constitute an immediate hazard, but, said driver having so yielded and having given a signal when and as required by law may make the left turn, and the drivers of other vehicles approaching the turning vehicle from the opposite direction shall yield to the driver making the left turn.

(5) Subject to subsection (3), no driver shall enter an intersection or a marked crosswalk except to make a left or a right turn unless there is sufficient space on the other side of the

> intersection or crosswalk to accommodate the vehicle he is operating without obstructing the passage of other vehicles or pedestrians, notwithstanding any traffic-control signal indication to proceed. R.S., c. 293, s. 122.

[16] On the other hand, the Respondent, MacDonald cites Section 93 of the *Motor Vehicle Act* and argues that it ought to have been considered by the Adjudicator. The Respondent argues that had he considered it , he would have found that the Appellant was solely responsible for the accident.

[17] Section 93 of the *MVA* reads as follows:

> "93 (1) When traffic at an intersection or on a highway is controlled by traffic signals that are illuminated devices, the traffic signals shall be one or a combination of the following:
>
> (a) green light or flashing green light;
>
> (b) green arrow light;
>
> (c) yellow or amber light;
>
> (d) yellow or amber arrow light;
>
> (e) red light;

(f) flashing red light;

(g) flashing yellow or amber light;

(2) The drivers of vehicles, pedestrians, and all other traffic approaching or at an intersection or on a part of the highway controlled by any of the traffic signals mentioned in subsection (1) shall act in obedience to the traffic signals in accordance with the following instructions:

(a) green light or flashing green light - all vehicular traffic facing this signal may proceed unless otherwise directed by a traffic sign or a peace officer but shall yield the right of way to pedestrians lawfully in the crosswalk and other vehicles lawfully in an intersection and, unless otherwise directed by a traffic sign or signal, pedestrians may proceed on a green light only in a crosswalk towards the sign or signal and shall not proceed on a flashing green light;

(b) green arrow light - all vehicular traffic facing this signal may proceed but only in a direction indicated by an arrow unless otherwise directed by a peace officer but shall yield the right of way to pedestrians lawfully in a crosswalk and other vehicles lawfully in an intersection, and pedestrians may proceed only in a crosswalk towards the signal unless otherwise directed by a traffic sign or signal;

(c) yellow or amber light - all traffic facing this signal shall stop before entering an intersection at the place marked or the nearest side of the crosswalk but not past the signal unless the stop cannot be made in safety;

(d) yellow or amber arrow light - all traffic facing this signal shall stop before entering an intersection at the place marked or the nearest side of the crosswalk, but not past the signal, unless the stop cannot be made in safety and then proceed, but only in the direction indicated by the arrow, unless otherwise directed by a peace officer;

(e) red light - all traffic facing this signal shall stop at the place marked or the nearest side of the crosswalk but not past the signal and shall remain stopped while facing this signal, provided that vehicular traffic may

(i) if a green arrow light is also exhibited, proceed in the direction indicated by an arrow,

(ii) if a stop is first made and the movement can be made in safety and is not prohibited by sign, proceed to make a right turn,

(iii) if a stop is first made and the movement can be made in safety and is not prohibited by sign, proceed to make a left turn from a one-way highway into a one-way highway, or

(iv) if a transit priority signal is also exhibited and if the vehicle is a transit bus, the vehicle is permitted to proceed and make turns through the intersection,

but, in each case, vehicular traffic shall yield the right of way to pedestrians lawfully in a crosswalk and all other traffic lawfully proceeding through an intersection or on a highway;

(4) The drivers of vehicles and all other traffic on a highway controlled by the traffic signals mentioned in subsection (1) shall act in obedience to the traffic signals in accordance with the following instructions:

(a) green arrow light - subject to Section 111, drivers of vehicles facing this signal may proceed in the lane to which the signal relates unless otherwise directed by a traffic sign or another traffic signal;

[18] As stated, the Adjudicator found that the evidence of both parties was in direct contradiction and did not find one party more credible than the other. As an appeal court, it would not be proper to infer or disturb those findings unless there is clearly an error in them. (**Brett Motors Leasing Ltd. v Welsford** 1999 NSJ No. 466 (NSSC))

[19] Both sections 122(3) and 93(2)(b) have as critical elements whether certain of the vehicles are lawfully in the intersection.

[20] The Appellants cite Section 122(3) of the *MVA* and the common law in support of his position that the Respondent faces a heavy onus to show that he, being the driver of the vehicle turning left at the intersection, was not negligent. In other words, they argue it is a presumption that the collision was the Respondent's fault, such presumption being rebuttable by him showing he was not negligent.

[21] Section 122(3) states clearly that the turning vehicle must yield to the through vehicle who is within the intersection or so close as to constitute a

hazard. Having so yielded, however, and after giving a signal to turn left, he may proceed to turn left and the other driver (of the through vehicle) must then yield to the turning vehicle. The problem here is that there was conflicting evidence as to whether the Respondent had a green arrow light. If he did, there is still an "imperative duty" on him to see that the turn can be made safely. (**Lever v. Cashen** (1979) 31 N.S.R. (2d) 463)

[22] The Respondent stated he had a "flashing green arrow". If he did, he is entitled to take some comfort that others will abide by the rules of the road but he cannot do so without regard to his own safety or the safety of others. (**Enright v. Marwick** (2004) BCCA 259)

[23] This brings into play the notion that he must yield to any vehicles approaching so closely to constitute an immediate hazard. In a flashing green arrow situation, this is most unlikely if the other drivers are abiding by the traffic lights. In this scenario, the Appellant would have been facing a red light, although no finding to that effect was made.

[24] What the Adjudicator stated in Clause 8 about the Claimant was:

“ He waited until the green arrow started flashing, when the green arrow started to flash, he began his left hand turn”

[25] What the Adjudicator stated in Clause 18 about the Defendant was:
” He said he noticed the light turn from green to orange. It was his estimate he was going 50km/hr.” No finding was made as to the posted speed limit.

[26] The Appellant argues , citing **Tripp v. Peck** (2000) 190 NSR (2d) p. that Section 122 of the MVA applies to drivers in intersections controlled by lights. In **Trip**p, MacAdam, J. held that the driver of the “through vehicle” in an intersection was not negligent, even though she owed a duty of care to other motorists and even though there was a lack of attention on her part. The Court concluded that no amount of attention could have prepared her for the sudden turn by the Peck vehicle into her path, without any prior warning.

[27] In **Tripp**, the light sequence was known. This enables the Court to more easily discern who has the right-of-way, who must yield and so on. In the present case, there was no independent evidence as to the phase, pattern, or

sequence of the lights in the controlled intersection. Thus, who had the right of way and who was required to yield is open to question.

[28] The Respondent cited the case of **Pierce v. ING Insurnace** (2006) NSSC 31, as well as Section 93 of the Motor Vehicle Act , both of which he says should relieve him from any liability for the accident.

[29] In **Pierce**, the Plaintiff was turning left from Bell Road onto Sackville Street in Halifax. The Defendant, Williams, was travelling straight from South Park to Bell Road. The Court discussed the onus on a vehicle turning left to ensure the turn can be made safely.

[30] It also discussed the division of liability relating to a flashing green arrow. There is a shifting onus from the turning vehicle to the through vehicle to ensure that the intersection is clear before entering.

[31] In **Pierce,** the Court made a finding of 60/40 liability with Mr. Pierce who was turning left being 60 percent at fault and Mr. Williams, who was going straight, being 40 percent at fault. In **Pierce**, the Court relied upon the well

known and often cited authority of **MacDougall v. Riedel** (1980) 98 NSR (2d) 164 where Richard, J. found the Defendant had proceeded:

> "blithely through the intersection at ... an excessive speed and paid little or no heed to the possibility that a vehicle may be in the intersection."

[32] In the present case, had the Adjudicator accepted the evidence of the Claimant MacDonald, he may have found or been able to apportion liability between MacDonald and the Defendant White on a basis similar to **Pierce**. Also in **Pierce** like in **Tripp** the evidence was clear as to what what the light sequence was for each driver, down to the seconds.

[33] In response to the **Pierce** case, the Appellant submitted the case of **Knott v. Hall** (2003) Carswell 72. In that case, the Plaintiff Knott was travelling east on Reeves Street, and the Defendant Hall was making a left-hand turn into the intersection onto Pitt Street in the Town of Port Hawkesbury.

[34] The Court found the Plaintiff was keeping a proper lookout and found the Defendant had made a sudden last-second manoeuver. The **MacDougall** case was considered but the Court found material differences on the facts. Those

material differences pertained to the light sequence and the rate of speed. In **Knott**, at paragraph 11 Edwards, J. stated as follows:

> "11 I have carefully considered the McDougall case and I have concluded that there are important differences between it and the present case. In McDougall, the traffic light was amber when the through vehicle collided with the turning vehicle. In addition, there was independent evidence that the through vehicle was travelling at "70 mph or more" in a 50 kph zone. Justice Richard found that the driver of the through vehicle entered the intersection "at an excessive rate of speed and inattentive to any peril which may be before him. (Par.7)"

[35] Once again in **Knott**, the light sequence was known and a finding was made that Mr. Knott was not travelling at an excessive speed. In addition an independent witness testified. Edwards, J. relied on the evidence of the independent witness in stating:

> "13. Further, I am satisfied that Mr. Knott was keeping a proper lookout even though he did not "see" the defendant's vehicle until it was sideways in front of him. Prior to the collision, there was nothing unusual about the defendant's vehicle which would have caused Mr. Knott to have made an after the fact mental note of it. **In this respect, the evidence of Captain Grant is crucial.** What Captain Grant described was a sudden last second manoeuvre by the defendant's vehicle. He said the defendant's vehicle had stopped and "then took off...". I am satisfied that Mr. Knott had no chance to avoid the collision." (Emphasis added.)

[36] Section 93(2)(b) allows the turning vehicle to proceed in the direction of the arrow but it must yield to "pedestrians lawfully in a cross-walk and other

vehicles lawfully in an intersection". This would suggest that if the "through vehicle" was not lawfully in the intersection (which would be the case if the turning vehicle had a flashing green arrow light) then the turning vehicle need not yield, and has the right of way.

[37] This would also suggest that if the through vehicle "sped" into the intersection, then it would not lawfully be in the intersection. In that instance, the turning vehicle is not required to yield and has the right of way.

[38] The Respondent's evidence is that the Appellant White "sped" into the intersection although no such finding was made here by the Adjudicator. Instead he said, he could not find one party more credible than the other.

[39] Had he, for example, been able to accept that the Appellant/ White was speeding, then the Appellant could have been found to have contributed to the accident or possibly been the sole cause of it, depending on other factors. Even if the Appellant was not speeding ,the case law is clear that abiding by the speed limit alone does not absolve a "dominant driver"of fault if the circumstances

otherwise suggest proceeding with caution and at a lower rate of speed. (**Tripp v Peck** 190 N.S.R. (2d) 1)

[40] In determining liability for a collision, there are numerous factors to be taken into account in any given situation. These include the rate of speed, the phase of the traffic lights in a controlled intersection, the degree of attention or lack thereof, attempts to avoid the collision, weather conditions, the position of the vehicles, whether there was any warning, distances, activation of turning signals, so on and so forth. The list is presumably exhaustive at some point.

[41] In the present case, two of the key factors were the sequence of the traffic lights, in particular whether the Respondent, MacDonald had a flashing green arrow or simply a green arrow and secondly, whether the Appellant White came "flying through" the intersection as alleged by the Respondent MacDonald. With respect to White, he claims to have had a green light entering the intersection when MacDonald came across in front of him and that it later turned to orange after the impact.

[42] As to the position of the vehicles, the MacDonald vehicle, according to the Respondent, was pushed 30 feet into the intersection following the collision (See paragraph 14). On these matters or key points, the evidence is in contradiction. The Adjudicator found that one witness was no more credible than the other to make a finding of one in favour of the other. As an example, in the Appellant's brief at page 6, he stated that the following facts were established in evidence:

1. The claimant was turning left at an intersection;
2. The claimant did not see the defendant's car approaching;
3. The claimant did not take any evasive action;
4. The claimant observed the defendant's car taking evasive action;
5. The vehicle of the claimant was damaged in the front;

[43] However, if you accept these, you must also accept items 12 and 13 of the Stated Case which state as follows:

> "12. The Claimant indicated that it was too late for him to take any evasive action.
>
> 13. The Claimant indicated that he thought "the guy was flying through the light like he was trying to beat it".

[44] In order to apply and give consideration to Section 122 of the *MVA*, the Adjudicator would have had to make certain findings of fact so as to interpret and apply these provisions to those facts. He was unable to do so for the reasons he stated. He must at least had to have been able to draw inferences as to who was doing what as between the two drivers in order to give one or the other the benefit of these provisions. As he said, the only evidence called was from the parties themselves who he found equally credible and in contradiction to one another. Unlike **Knott**, there were no independent witnesses who testified. Consequently, I find no error of law was made by the Adjudicator in not addressing Section 122 or Section 93 of the ***Motor Vehicle Act*** in his decision, for the foregoing reasons.

Ground #2 - Whether the Adjudicator erred in relying on Section 3(1) of Contributory Negligence Act of NS ?

[45] The Appellant argues that the Adjudicator erred in that he was required to find both parties at fault for the accident before invoking Section 3(1) of the *Contributory Negligence Act*, which Act enables a finding of fault equally between the two parties. Section 3(1) of the ***CNA*** states as follows:

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

[46] The opening words in the section that "trigger" the provisions are "where by the fault of two or more persons". The Appellant says that the Adjudicator made no such finding and therefore should not have applied it thereby committing an error in law. The Respondent says it is evident that the Adjudicator did make such a finding because that is what he said in clause 26. The Respondent therefore suggests that a literal interpretation be given with respect to clause 26 of the Stated Case.

[47] For ease of reference clause 26 of the stated case is repeated below.

> 26. "As there was no evidence entered by either party for me to find fault for greater with one than the other, then pursuant to the Contributory Negligence Act I find default (sic) equally between the two parties."

[48] The Respondent MacDonald was the successful litigant as Claimant in the Small Claims Court hearing. Once again he states it is implied in Clause 26 that

the Adjudicator found both parties at fault for the damage or loss caused in the accident.

[49] There are certain findings in the Stated Case which are instructive but not conclusive on this issue. One is clause 21 which is also repeated below for ease of reference.

> "21. The testimony of both the Claimant and Defendant is in direct contradiction."

[50] Under this clause, the Adjudicator found that both parties contradicted each other. Their testimony was in "direct contradiction", he found. As an example, the Claimant states he was stopped at the intersection and waited for the green light to start flashing before he proceeded to turn left. The Appellant/Defendant states that the light was green when he entered the intersection and then, after the accident noticed it had changed to amber. Depending on which version is accepted, it is entirely possible that one or the other party could have been found solely at fault.

[51] Another key finding is contained in Clause 23 which reads as follows:

> "23. Neither party provided evidence other than their own as to the event."

[52] Neither party provided evidence other than their own at the hearing. Had they, the Adjudicator may have been able to apportion liability in favour of one or the other or point to evidence "establishing different degrees of fault" as required by s.3(1). He may have been able to accept one version as more credible, instead of accepting both versions as credible, which was the case.

[53] Clause 24 confirms that both parties were equally credible and thus the Adjudicator could not "make a finding for one in favour of the other".

[54] The key question is did the Adjudicator base his findings of equal fault between the parties on the evidence presented or did he rely solely on the statute to make that finding, without first making a finding of negligence of the part of both parties . It is finding both parties at fault first which s. 3(1) of the *CNA* appears to require.

[55] If he concluded that both parties were at fault and then applied the statute, to arrive at equal blame, this is permissible so long as he is unable to apportion a degree of liability which the Adjudicator said he was unable to do, due to the

lack of evidence. If however he relied upon the statute to find equal liability between the parties, that is only permissible if he finds first that both parties were at fault, and then only if he was unable to apportion different degrees of liability between the two, having regard to all of the circumstances. Without a finding that both were at fault, then s. 3(1) of the *CNA* would be improperly applied.

[56] In this regard, it is useful to look closely at what the Learned Adjudicator said. A summary is as follows:

1. The evidence of the parties was in direct contradiction. From this I infer each said the other was at fault.

2. Neither party provided evidence other than their own as to the event. Unlike many of the cases submitted, there were no witnesses that testified other than the plaintiff and defendant.

3. He did not find one more credible than the other to make a finding for one in favour of the other. I infer from this that he was unable to decide which version of the events was accurate as both were credible.

[57] From these findings if one version or the other was accepted, it is entirely possible that there would be a finding of fault by one party against the other and not necessarily a finding of fault against both. Clearly however the Adjudicator was not comfortable accepting one party's version over the other.

[58] Let us look then to determine whether there is any evidence which there could have been a finding of fault against both. There are two examples of evidence in the summary that might suggest a 50/50 division of liability. In paragraph 10 of the Adjudicator's summary, he stated as follows:

> "10 In cross-examination, the Claimant indicated he did not see the car coming at him as he was focused on the lights, waiting for them to turn green."

[59] In paragraph 18 of the Adjudicator's summary, he stated in part as follows:

> "18 The Defendant White, in his testimony, indicated that as he approached the intersection he saw a white truck cross over in front of his approach. Upon impact...."

[60] Once again, if you accept what they both said as true, there was a degree of inattention on the part of the Claimant MacDonald and a degree of warning to the Defendant White of the Plaintiff's white truck he saw coming over in front of his "approach". Although the Defendent attempted to "veer away", there was no express finding as to inattention or warning. Neither of these findings were made. Instead the learned Adjudicator made the following finding: "I do not

find either party more credible than the other to make a finding for one in favour of the other".

[61] Of the cases submitted, I have found **Wotta v. Haliburton Oil Well Cementing Co.** [1955] S.C.R. 377, [1955] 2 D.L.R. 785, and **Gallant v. Abbey Landry Limited and Lunn,** 54 N.B.R. (2d) 373, to be the most helpful, based on the facts as alleged by each party in the present case.

[62] In **Wotta**, two trucks collided while travelling in opposite directions. Each driver insisted he was struck on his own side by the other. There was no evidence of marks or debris in the findings to assist in determining the point of impact. The Supreme Court upheld the lower court's finding that it could not on the evidence find negligence against either driver.

[63] In **Gallant**, the facts of the collision were similar to those in **Wotta**. In **Gallant**, the Court stated it would have been helpful to have had reliable evidence, especially as to distance. The Court was satisfied neither vehicle was completely on their respective right-hand side of the road. The Court could

therefore infer there was negligence which caused the collision. However, the Court at paragraph 39 made the following statement:

> “39 But there is no evidence produced by either party by which I can find or infer that the other party was guilty of negligence. In blunt and precise terms Lunn did not produce evidence by which I can find or infer that Gallant was negligent; Gallant did not produce evidence by which I can find or infer that Lunn was negligent.”

[64] In **Gallant**, the trial judge made a number of findings stating there was no evidence to support a finding that either driver was driving at an excessive speed. Also, neither driver presented evidence from which the Court could find or infer negligence on the part of the other driver.

[65] At paragraph 20, the Court in **Gallant** stated:

> “20 Unless I can find evidence of negligence on the part of both drivers there can be no application of the provisions of the Contributory Negligence Act.”

[66] The wording of the *Contributor Negligence Act* in New Brunswick is identical to that of Section 3(1) of the Nova Scotia Act. In the present case, neither party submitted authority from Nova Scotia where Section 3(1) had been interpreted or considered in this Province.

[67] While neither **Gallant** nor **Wotta** involved a “left-hand turn collision”, the principles enunciated are relevant to this appeal in terms of the trial judge’s function in matters of responsibility. The fact that the wording of both Acts is identical, in New Brunswick and Nova Scotia, cannot be over emphasized.

[68] At paragraph 22 of **Gallant**, Miller, J. directed his mind to what Section 3(1) of the *Contributory Negligence Act* of New Brunswick meant when he stated:

> “22 It is the responsibility of the trial judge to do the best one can on the evidence before him to determine the issues between the parties. In negligence actions it may be a natural tendency to seek the comfort of the provisions of the Contributory Negligence Act and divide responsibility equally where it is not possible to establish different degrees of fault. But I think it is an abdication of responsibility to rely on the Contributory Negligence Act and divide responsibility unless the court can find or infer negligence by both parties.”

[69] In the present case, the evidence as to the phase of the traffic lights was conflicting as was whether the Defendant was travelling at an excessive speed through the intersection. The position of the vehicles was of no help in determining the apparent cause. The Defendant veering away and the Claimant focusing on the lights favours the Defendant but that evidence was not

conclusive as to enable a finding by the Adjudicator. Further the evidence was not conclusive as to enable a finding by the Adjudicator as to fault, mainly because he found both parties credible.

[70] The real issue on this appeal is therefore twofold, (1) whether he first found both parties at fault for the accident and (2) if so whether he was then unable to apportion liability between them. If the answer to the both of these questions is in the affirmative, based on the wording of Section 3(1), (as interpreted in **Gallant**), the Adjudicator would be entitled to use the statute to apportion fault, equally.

[71] From the wording of Clause 26 of the Adjudicator's Stated Case, it appears that the Learned Adjudicator did not specifically make **both of** these findings. The words "for greater with one than the other" suggests a finding of fault by both, albeit implicitly. A closer examination however of the entire clause leads me to conclude that both parties were found at fault by default, as there was no evidence to suggest otherwise. There needs to be an evidentiary basis to make a finding of fault "for one in favour of the other" but also to make a finding that both were negligent , be it equally or at fault to varying degrees.

[72] The Adjudicator stated that neither party presented evidence other than their own. He said also that he did not find one more credible than the other. Lastly he said the evidence was in direct contradiction. All of these findings suggest he did not and could not, apart from using the statute, find that both parties were at fault. He may have concluded they were, but if he did he did not point to the evidence which made both parties at fault, nor was it expressly stated in his decision or the Stated Case.

[73] On the other hand ,Clause 26 could be interpreted implicitly to mean that the Adjudicator had concluded on the basis of the evidence submitted, that one was no more at fault than the other, thus meaning they were found equally at fault.

[74] However, even if clause 26 of the Stated Case were interpreted to arrive at a finding of fault by both parties, the adjudicator must still then expressly find that it was not possible to establish different degrees of fault on the basis of the evidence. A finding that there was no evidence to allow a finding for one in favour of the other suggests that there was evidence to enable of finding of equal

fault. What that evidence was or what findings it was based on is not known from the Stated Case. As well the basis for being unable to establish different degrees of fault is not explained. In the absence of such evidence, the Claimant's claim would normally be dismissed, as he would be required to prove its case on the balance of probabilities against the Defendant.

[75] In deciding this Appeal, I am mindful of the well accepted and explained test as set out in **Brett Motors,** such case being previously referred to herein. That test requires that the benefit of statutory provisions must not be denied and that a statute be properly interpreted. Otherwise, an error of law will result.

[76] In the end, I find there is sufficient uncertainty as to the wording of Clause 26 in the Stated Case to determine exactly what the Adjudicator found and in particular, whether or not he found both parties at fault without relying solely on the statute to do so. Consequently, I believe the most prudent course of action and the one that would provide the most just result would be that the matter be remitted back to the Small Claims Court for a new hearing on these issues and I so Order.

[77] Having allowed the Appeal on Ground #2 it is unnecessary for me to consider the Appeal on Ground #3 as to whether the findings were supported by the evidence.

Appeal allowed .

J.