IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Morash v. Burke, 2006 NSSC 364

Date: 20061214
Docket: SH. No. 175525
Registry: Halifax

Between:

Lawrence Bradley Morash

Plaintiff

-and-

Charles D. Burke, **Jerome Anthony Thomas**, **Laura Marsh and ING Halifax**, a body corporate

Defendants

-and-

Allstate Insurance Company of Canada, a body corporate

Third Party

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: November 27, 28, and 29, 2006 in Halifax, Nova Scotia

Written Decision: December 14, 2006

Counsel: Plaintiff's Counsel - Anna Marie Butler and Denise Mentis-Smith
Defendant's Counsel (for ING Halifax) - Jocelyn Campbell
Defendant/Third Party Counsel (for Jerome Thomas and Allstate Insurance Company of Canada) - David Farrar, Q.C. and Kendrick Douglas

Wright J.

INTRODUCTION

[1] On December 4, 1999 the plaintiff Brad Morash, while working as a security officer for The Bay store in MicMac mall, was run down in a crosswalk in the mall parking lot as he was pursuing a shoplifter. The van that struck him was being used as the getaway vehicle in the shoplifting heist and was being driven by a second individual. As a result of the impact, the plaintiff suffered serious personal injuries, mainly to his right knee.

[2] The plaintiff has sued Charles Burke (the alleged driver of the van), Jerome Thomas (the alleged owner of the van) and Laura Marsh (alternatively as alleged owner of the van). The plaintiff has also joined in the action his own insurer, ING Halifax ("ING"), under his Section D (uninsured motorist) coverage.

[3] Allstate Insurance Company of Canada ("Allstate") joined the proceeding as a third party under the provisions of Section 133(14) of the *Insurance Act*, R.S.N.S. (1989) ch. 231 whereby it is defending the action against its insured Jerome Thomas under a reservation of rights.

[4] The defendants Charles Burke and Laura Marsh were absent from this trial and indeed, counsel have not been able to locate either of them.

[5] Prior to trial, counsel for the plaintiff, ING and Allstate reached an agreement on the quantum of damages to be paid to Mr. Morash which shortened the trial considerably. The figure agreed upon was the all inclusive sum of

$162,500. What remains for the court to decide in this unusual fact situation is whether that sum is to be paid by Allstate or by ING.

EVIDENCE AND FINDINGS OF FACT

[6] The facts in this case are very much in dispute which necessitates a number of credibility findings to be made. The factual disputes essentially pertain to the issues of the identity of the vehicle which struck the plaintiff, the identity of the owner of that vehicle, the identity of the driver of that vehicle and whether the driver had the owner's consent to operate it when the incident occurred.

[7] The events of December 4, 1999 began to unfold around 3 p.m. when the plaintiff and another security officer observed a man acting suspiciously in The Bay store. They followed him out to a corridor in the mall where they observed him making a fraudulent return of merchandise at another store (which he had just picked up and wanted to "exchange"). As the man left the store, the plaintiff alerted the store personnel as to what had happened and with their concurrence, thereupon apprehended the man as he walked away, arrested him for shoplifting, and took him to The Bay security office. The man was extremely irate and even threatened to kill the plaintiff. The police were called to the scene and arrived shortly thereafter.

[8] The plaintiff testified at trial that he only stayed five to ten minutes in the security office with the police during which time he said that he heard the man identify himself to police as Charles Burke. Because the man continued to be so agitated, however, the plaintiff decided to leave the office and complete his report in another room nearby.

[9] According to information he later received from the police, Mr. Burke was charged and released on a Promise to Appear. He assumed that Mr. Burke was then personally escorted out of the store by his co-worker where it is standard company policy to do so in such a situation. He did not himself see Mr. Burke leave the store.

[10] The plaintiff went on to testify that after spending a few minutes completing his report, he went downstairs into the retail area, positioned himself beside the employee entrance door, and from there noticed another suspicious looking man entering the store through the east doors. As he continued to watch, he saw the man grab a rack of jeans and head slowly but deliberately to the doors. The plaintiff said he then looked outside the employee door window for a possible getaway vehicle and saw a grey van parked outside. He thought the van looked suspicious because it was parked in a driving area (and not in a parking stall) which was adjacent to a handicap parking zone.

[11] Once the shoplifter exited through the doors, the plaintiff immediately pursued him outside and identified himself as a security officer. The shoplifter then ran across the parking lot towards the van with the plaintiff in hot pursuit. At that moment, the plaintiff heard the squeal of tires and looked over his shoulder to see the grey van barrelling towards him. His defensive reaction was to put his hands up in front of the van which then struck him and spun him around to the ground. He testified that as he saw the van coming at him, he was looking directly through the windshield and immediately identified the driver as the man he had caught in the first shoplifting incident minutes earlier, namely, Charles Burke.

[12] The plaintiff further testified that as the van sped away, he looked for some distinguishing features. He noted that the van was an older model with grey paint in shabby condition, that its rear windows were tinted black, and that there was a small round after market light mounted just above the left rear bumper. He said the two back doors of the van were flapping open which perhaps explains why he was unable to discern the license plate identification or even whether a license plate was on the vehicle at all.

[13] The shoplifter who had snatched the rack of jeans had apparently tried to enter the van through its rear doors on the run but fell out when the van took off. That person was then arrested in the parking lot and identified himself as Peter Brown with an address of 27 Prince Albert Road in Dartmouth.

[14] The plaintiff himself was then taken by ambulance to hospital. While being driven home the next day by his boss, they took a route which took them past a small apartment building at 27 Prince Albert Road. Parked in front of that building was a van which the plaintiff identified as the van which had struck him the day before. He took down the license plate number which he immediately passed on to the police, along with the location of the vehicle. His next contact in the matter was with Cst. Jim Devine of the Halifax Regional Police whose evidence will be highlighted later in this decision.

[15] On cross-examination, the plaintiff was confronted with a handwritten statement which he gave to an ING representative on July 18, 2000. In that statement, the plaintiff gave a slightly different version of how the incident

unfolded. He wrote that after leaving Mr. Burke with the police officers in the security office, and going to another room to write his statement, he went back downstairs to the employee entrance of the store and met his girlfriend there to be shown where she had parked his car. He noted that he then looked outside and saw a grey van about 30-40 feet away and that he could see Charles Burke sitting in the driver's seat with the motor running. He recorded that he then saw a man, later identified as Peter Brown, get out of the passenger side of the van and walk into the store. The plaintiff then re-entered the store and observed Mr. Brown walk over to the ladies wear section, select several pairs of jeans, and proceed to walk directly back through the east doors he had entered. The plaintiff then pursued him outside and ended up being struck by the grey van as he had previously described.

[16] There were a few other inconsistencies in the plaintiff's evidence drawn out on cross-examination. On discovery, he said that he had first observed the van parked in a handicap parking zone whereas at trial he said the van was parked in a driving area adjacent to a handicap zone but not in a stall. He also testified on discovery that he did not recall the security alarm going off when Mr. Brown exited the store whereas at trial, he said that he recalled the alarm being sounded. He also acknowledged that he testified at discovery that at the time of the incident, he did not know Charles Burke by name but only by his face and may have only learned his name from the police afterwards. He was steadfast in his evidence, however, that the driver of the van which struck him and the man he had apprehended in the mall for shoplifting only a few short minutes before were one and the same person. The plaintiff has never again seen Charles Burke since this incident.

[17] The only other witness called for the plaintiff was Cst. Jim Devine who had been called to the scene after Mr. Burke was initially apprehended by the plaintiff for shoplifting. Mr. Burke properly identified himself to Cst. Devine in The Bay security office but gave him an old former address. Cst. Devine then released Mr. Burke on a Promise to Appear in respect of the shoplifting charge (to which he ultimately pled guilty).

[18] While he was completing his paperwork in the security office, Cst. Devine then heard someone from downstairs scream for the police. Cst. Devine quickly ran downstairs and out the exit doors to find the plaintiff lying on the parking lot in great pain. By that time, the van had already disappeared. As Cst. Devine put it, "within five minutes we had two shoplifting offences and a hit and run".

[19] Either the next day or the day after, Cst. Devine went to the 27 Prince Albert Road address that had been given to him by Peter Brown. When he got there, he observed a van parked outside that fit the description that had been given to him by the plaintiff. Cst. Devine entered the building and found an open apartment door with two men sitting inside. He asked if either one of them knew who owned the van parked outside. One of the men answered, "its mine". That person was Jerome Thomas.

[20] Cst. Devine went on to testify that he then clearly told Mr. Thomas that he was investigating a hit and run incident which the van may have been involved in. He recounted that Mr. Thomas said nothing to him at the time about having sold the van or otherwise disclaiming his ownership of it. Mr. Thomas simply told Cst.

Devine that he was there that day helping a lady move. He was then asked by Cst. Devine if he would bring his van to the police station to be photographed as part of the hit and run investigation. Mr. Thomas agreed to do so and took the van in for photographing on December 7, 1999. Again, Mr. Thomas made no mention to the police on that occasion of having sold the van or otherwise disclaiming its ownership.

[21] Meanwhile, Cst. Devine was trying to locate Charles Burke after he learned that a false address had been given. He continued to keep a close watch on the 27 Prince Albert Road address and sure enough, he soon spotted Mr. Burke directly in front of the building. He was then arrested and taken to the police station for purposes of preparing a photo line up as part of the hit and run investigation. At that time Mr. Burke gave his current address as 27 Prince Albert Road.

[22] The photo line up which Cst. Devine ultimately compiled was later shown to the plaintiff Brad Morash. After having been asked in neutral fashion if he could identify the driver of the van who hit him, Mr. Morash immediately identified photo #5 (of the six presented). Cst. Devine confirmed that photo #5 was a photograph of Charles Burke.

[23] Cst. Devine also showed the plaintiff the photographs of the van that had been taken on December 7th, which the plaintiff identified as the van that had hit him.

[24] Following that identification, Mr. Burke was charged with several offences under the *Motor Vehicle Act*. His failure to appear in court on one or more occasions resulted in the issuance of an Arrest Warrant. Eventually, the case came before the court but it was dismissed when for some unexplained reason, the plaintiff was not there to testify.

[25] I turn now to a review of the evidence of the defendant Jerome Thomas. Mr. Thomas was 30 years old at the time of this incident and was a resident of Dartmouth. He did some carpentry work for a living for purposes of which he had earlier acquired a grey 1984 Dodge cargo van.

[26] Mr. Thomas acknowledged that the van shown in the police photographs was his van. He testified, however, that he sold it sometime in early December of 1999 to the defendant Laura Marsh who lived at the 27 Prince Albert Road address. He said he could not be precise about the exact date but believed that it was "somewhere around the 2nd". The benchmark that he used to arrive at that date of sale was that December 4th (the same date as the hit and run incident) was Ms. Marsh's son's birthday and the sale took place shortly before that. He said he knew this because Ms. Marsh was glad to have the van for her son's birthday.

[27] Mr. Thomas testified at trial that he had only known Ms. Marsh since about mid-November of that year but that he helped her move to a new apartment at the 27 Prince Albert Road address. He initially testified that he removed his license plate from the van on the date of the sale but reinstalled it periodically after that for

purposes of helping with the move (which he says took place over two or three days).

[28] Although he could not remember the date, Mr. Thomas did recall being questioned by Cst. Devine at the 27 Prince Albert Road address about the ownership of the van. He acknowledged that he told Cst. Devine that the van was his. He said at trial that he gave that answer because he knew it was not legal for him to have replaced his license plate on the van after he had sold it and that he didn't want to get in any trouble. He gave the same explanation for not having informed the police of the sale of the van to Ms. Marsh when he took it in to the police station to be photographed a day or two later, despite being taken to have known that the police were then investigating a hit and run incident.

[29] Mr. Thomas went on to describe two further steps he later took with respect to the transfer of the vehicle. He said that shortly after the sale (which he guessed was about two weeks later) he called a man named Harvey at his insurance agency to cancel his insurance coverage with Allstate. He also said that he completed the Notice of Sale form with respect to the transfer of the vehicle for Registry of Motor Vehicle purposes and dropped it in a mailbox but without an envelope or a stamp.

[30] Sometime in 2000, after Mr. Thomas had returned to live in the Annapolis Valley area, he sought to register ownership of another vehicle with the Registry of Motor Vehicles. His attempt to do this was refused because the public record still showed that he was the registered owner of a motor vehicle that had been involved in a hit and run incident. Mr. Thomas testified that he was first made aware of this

when his lawyer looked into it.

[31] To get around the problem, his lawyer prepared, and Mr. Thomas deposed to, a Statutory Declaration on August 22, 2000 in which he attests to having sold the vehicle to Laura Marsh on or about December 2, 1999 in exchange for her cheque in the amount of $500. He also recited in that declaration the mailing of the Notice of Sale without an envelope or a stamp and certain details pertaining to the cancellation of his insurance coverage (of which more will be said later).

[32] Mr. Thomas also deposed in the declaration that after December 2, 1999 he had no contact with Laura Marsh (which he later contradicted), no keys or control over the vehicle, nor authorized any person other than Laura Marsh to operate it. He also stated that “In early February 2000, I learned that the vehicle had been involved in a motor vehicle accident on or about December 4, 2000" (sic).

[33] This Statutory Declaration was later referred to in a certificate from the Registrar of Motor Vehicles dated December 19, 2002 entered in evidence by consent of counsel. In that certificate, it is certified that Jerome Thomas was the registered owner of the subject vehicle on December 4, 1999 and that on August 29, 2000 the Registrar received a Notice of Sale in the form of an affidavit from Jerome Thomas indicating that he had sold the vehicle to Laura Marsh on December 2, 1999.

[34] Mr. Thomas acknowledged at trial that he had no documentation whatsoever in proof of the sale of the van to Ms. Marsh. Hence, he retained a lawyer to

prepare this Statutory Declaration to enable him to register the ownership of another vehicle in August, 2000.

[35] Mr. Thomas concluded his direct examination by maintaining that he does not know a Charles Burke, that he did not recognize him from the police photo line up entered in evidence as part of the police investigation file and that he did not ever allow or authorize a person named Charles Burke (or any other person besides Ms. Marsh) to drive his van.

[36] Under a withering cross-examination by counsel for ING, Mr. Thomas' version of the events began to unravel. His evidence was replete with inconsistencies, contradictions, admitted poor memory and admitted lies in his earlier discovery evidence.

[37] First of all, Mr. Thomas acknowledged that during the relevant time frame of late November to late December, 1999, Laura Marsh was a drug dealer who supplied his then cocaine drug addiction. He admitted the falsity of his earlier evidence that he had sold her the van for $500 and that in fact, he traded the van for drugs. He also admitted his earlier lie of having either lost or deciding not to cash Ms. Marsh's $500 cheque, as an explanation for having no record of it.

[38] He also said under cross-examination that he was still the owner of the van at the time he helped with Ms. Marsh's move to 27 Prince Albert Road which contradicted his earlier evidence that he drove the van periodically after the sale to help with that move and to that end, reinstalled his license plate on the van. That

evidence seriously detracts from his explanation that he acknowledged ownership of the van to Cst. Devine because he didn't want to get into trouble for illegal use of the license plate on a van he no longer owned.

[39] Another significant flaw in Mr. Thomas' evidence is his version of the cancellation of his insurance coverage with Allstate. At first he said that he cancelled his coverage altogether a short time after the sale. When later confronted with the Statutory Declaration he had provided to the Registry of Motor Vehicles in August of 2000, he then adopted its contents which stated that on the advice of his insurance agent, he would be well-advised to cancel his liability coverage on the van but not his comprehensive coverage and that he accordingly did so. When pressed on this, he gave a garbled understanding that it would be easier for him to obtain new insurance in the future on another vehicle if he still maintained some form of coverage on a current basis.

[40] This explanation is totally implausible. If Mr. Thomas had sold the van on December 2nd as he said, he would no longer have any insurable interest in the vehicle upon which to maintain any form of coverage. That is so fundamental that I do not accept Mr. Thomas' evidence that he was given any such advice by his agent who, incidentally, was not called as a witness. If indeed Mr. Thomas did maintain his comprehensive insurance coverage after December 2, 1999, the inference is far more easily drawn that he still then owned the van but that it was not in a driveable condition.

[41] Mr. Thomas also acknowledged that he lied on discovery when asked who it

was that introduced him to Laura Marsh. He then said that he didn't know who it was, only to acknowledge at trial he knew all along that it was a mutual friend Roy Conrad who had introduced them to each other at a bar. Mr. Thomas said that he lied at discovery in this respect because he didn't want his past spread around.

[42] He also testified at discovery that he could not recall the date when he first met Ms. Marsh. At trial, however, he said that he knows he met her about mid-November; yet when later asked how long he knew her before the sale of the van, he said "I can't answer that".

[43] I also note that in a recorded interview with Allstate on March 15, 2000 Mr. Thomas stated that the van had broken down with a blown motor and that Ms. Marsh had offered to buy it. At trial, however, he said that the engine was smoking and burning oil at the time but that the van was still then driveable.

[44] These are not the only inconsistencies revealed in Mr. Thomas' evidence but they are the main ones which relate to the issues in this case to be decided.

[45] Another significant detractor from the credibility of Mr. Thomas' evidence is his admitted poor memory of the events which occurred within the general time frame of late November until late December, 1999. As earlier alluded to, Mr. Thomas acknowledged that he was doing both alcohol and drugs in that time period and had a cocaine addiction. He admitted in cross-examination that he was then in bad shape and made the following acknowledgments:

- that his memory in that time period was not good and that there are times he has no memory about some things;

- that he is missing some of his memory in that time period spent at Ms. Marsh's apartment where he often hung out and became intoxicated;

- that he doesn't remember a lot of things during that period and that bits and pieces come and go;

- that there were "tons of other people" coming and going at Ms. Marsh's apartment, he being one of them;

- that he possibly met or hung out there with people whose names he doesn't remember and that Charles Burke could have been one of them;

- that he was intoxicated on the day of the sale although he says he only became so afterwards in the evening.

[46] Throughout his testimony, Mr. Thomas was unable to remember dates, with one exception, and he admitted that his memory was poor on dates. That one exception was his steadfast assertion that he sold the van to Laura Marsh in early December of 1999 and that he knows it was before December 4th because that was her son's birthday. At the same time, he cannot remember the son's name, or his age, or why Ms. Marsh was glad to have the van by that date. Indeed, he said that Ms. Marsh was a person who he did not want to associate with outside of her supplying him with drugs; that he rubbed her the wrong way and was "off her tree".

[47] As one final illustration reflecting on Mr. Thomas' credibility, when asked at discovery what mailbox he used to purportedly send the Notice of Sale to the Registry of Motor Vehicles, he answered that he had no idea because he was drinking at the time; yet at trial he said that he could now recall, some seven years later, that he used the mailbox located at the corner of Portland Street and Prince

Albert Road. That defies belief.

[48] Here we have a witness whose testimony is rife with inconsistencies, contradictions, and admitted lies at his earlier discovery who would have the court believe that he can selectively identify a date of on or about December 2, 1999 as the date of the sale of the van by the weakest of benchmarks (the birthday of his drug supplier's son who he obviously didn't know). This he purports to be able to do going back to a time period when his memory was clouded under the haze of a powerful cocaine addiction.

[49] For all the reasons I have just recited, I find Mr. Thomas' evidence on the issue of the ownership of the van at the material time to be neither credible nor reliable. The version of events which he gave did not stand up to cross-examination and is highly improbable. Moreover, it is completely uncorroborated. I simply do not accept Mr. Thomas' assertion that he was no longer the owner of the van on December 4, 1999 and indeed, have no hesitation in finding on a balance of probabilities, on the whole of the evidence, that Mr. Thomas was in fact the owner of the vehicle when the hit and run incident occurred.

[50] The only other witness called on behalf of Allstate was Cody Hutchins, an eyewitness to the hit and run incident. Cody Hutchins was then 12 years of age and was returning from the mall to the family car where his father was parked in the same row as the van. As he walked by himself past the van about 10 feet away, he noticed the driver sitting with his hands on the wheel looking ahead and

appearing focused or mad. He said that he was past the van about 15 feet when things started to happen with the squeal of tires. He looked back to see a man already on the ground and another man jump out the back of the van which quickly took off. Frightened, he then ran to his father's car.

[51] In his direct examination, Mr. Hutchins adopted the contents of a written statement he had signed immediately after the incident. In that statement, he described the driver of the van as a white male with black short hair like a buzz cut and wearing oval shaped glasses. When asked what the driver was wearing, Mr. Hutchins said he thought it was a black sweatshirt but he was not positive. He described the vehicle itself as a large black van, possibly a work van.

[52] On cross-examination, Mr. Hutchins acknowledged that when he first walked past the van, he was just casually looking around and had no particular reason then to look at the driver of the van. He also acknowledged that he only got a fleeting glimpse of the driver, perhaps one or two seconds long. He again recalled the driver looking focused but didn't think anything of it at the time.

[53] Although Mr. Hutchins initially said he was certain the van was black, he acknowledged that it was a possibility that it could be described as a grey van and agreed that the van shown in the police photos accorded with the van he saw. When asked if he could remember the distinguishing features of the blacked out rear windows and the rear mounted post light, he said he was not sure because he

did not get a good look at the van.

[54] Mr. Hutchins was obviously called as a witness to cast doubt on the identity of the vehicle which struck the plaintiff and the identity of its driver. Although I have no doubt but that Mr. Hutchins was doing his best to truthfully recall the details of the events he saw, I can ascribe little weight to his evidence on either of these identity issues. That is essentially because he saw the incident through the eyes of a frightened 12 year old and what he did see was only a fleeting glimpse of the driver and perhaps a five to ten second look at the van once he was alerted to it by the squeal of tires.

[55] Since Cst. Devine did not reach the parking lot until after the van had sped away, the only clear evidence before the court on the identity of the van is that of the plaintiff himself. As earlier referred to, the plaintiff testified that immediately after being struck and falling to the pavement, his first instinct was to look at the rear of the escaping van for any distinguishing features. What he saw was a grey cargo van with a shabby paint job, heavily tinted rear windows and a post light mounted just above the left rear bumper.

[56] Whether it was from information he learned from the police or pure chance, it was only the next day that the plaintiff was driven by the 27 Prince Albert Road address and immediately recognized the van parked out front as the van that had struck him the day before. He recognized it by the distinguishing features earlier

mentioned and promptly called the police to pass on its location and license number. Cst. Devine similarly recognized the vehicle parked in front of that address as fitting the description which the plaintiff had given him the day before. He ran a check on the license plate and confirmed its owner to be Jerome Thomas.

[57] Although there were a few inconsistencies in the plaintiff's evidence overall, they related more to the details of how the incident unfolded and not to the identity of the van or, for that matter, the identity of its driver (of which more will be said later). The plaintiff was consistent throughout in his evidence pertaining to the distinguishing features and identity of the van and I am satisfied on a balance of probabilities that it was the van owned by Jerome Thomas which struck him.

[58] In coming to this conclusion, I again refer to the statement of Mr. Thomas in his Statutory Declaration of August 22, 2000 that it was only later that he learned that his vehicle had been involved in a motor vehicle accident on or about December 4, 2000 (sic). While I am not prepared to treat this statement as a formal admission of fact pertaining to the identity of the van, given the purpose and circumstances under which the Statutory Declaration was prepared, it certainly reinforces the conclusion that it was in fact Mr. Thomas' van which struck the plaintiff.

[59] The remaining finding of fact to be made is the identity of the driver. Again, the critical evidence on this issue emanates from the plaintiff where I have reached the conclusion that little weight can be attached to the testimony of Cody Hutchins.

[60] The court is well aware of the frailties of eyewitness identification evidence, particularly in a situation where the identity of the perpetrator is previously unknown to the victim. In the case at bar, however, we have a situation where the plaintiff first zeroed in on Mr. Burke as a suspected shoplifter in The Bay store, followed him out of the store into the mall where the plaintiff then observed him shoplift from another store, arrested him and escorted him to The Bay security office (amidst death threats) before calling the police. Once the police arrived, he remained there with them in the security office for another five to ten minutes. The plaintiff testified that these events spanned 30 to 40 minutes overall so that he had a good opportunity to observe the man who turned out to be Charles Burke.

[61] It was then only a very few minutes later, when the plaintiff turned to look through the windshield of the van speeding towards him while trying to apprehend another shoplifter, that he saw Mr. Burke behind the wheel. The plaintiff was adamant that he had no doubt but that the driver of the van which struck him was the same man he had apprehended for shoplifting minutes beforehand. Regardless of when the plaintiff first learned the man's name, we know from Cst. Devine that he accurately identified himself in The Bay security office as Charles Burke.

[62] Sometime later in December, Cst. Devine compiled a police photo line up to show to the plaintiff. Cst. Devine said that he followed proper police procedures in doing so. He confirmed that the plaintiff identified Charles Burke as the driver of the van that struck him with no problem. The plaintiff again so identified Mr.

Burke unequivocally at trial from the same police photo line up that was part of the police file entered in evidence.

[63] Considering the span of time over which the plaintiff closely observed Mr. Burke as a shoplifter, including his arrest of Mr. Burke amidst death threats and holding him until the police arrived, coupled with the close proximity in time within which he next saw Mr. Burke behind the wheel of the van that struck him, all seen through the eyes of a security officer with several years experience, I am satisfied that the plaintiff's identification evidence is credible and reliable and that it was Charles Burke who ran him down in the parking lot.

RELEVANT STATUTORY PROVISIONS AND LEGAL PRINCIPLES

[64] There are two legislative provisions which must now be applied in deciding the ultimate question of whether the plaintiff's damages claim must be paid by Allstate or by ING. I refer, of course, to s. 114(1) of the *Insurance Act*, R.S.N.S. 1989, c. 231 and s. 248 of the *Motor Vehicle Act*, R.S.N.S. 1989, c. 293. The first of those provisions reads as follows:

> **Owner's Policy**
>
> 114(1) Every contract evidenced by an owner's policy insures the person named therein, and every other person who with his consent personally drives an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage
>
> > (a) arising from the ownership, use or operation of any such automobile; and
> > (b) resulting from bodily injury to or the death of any person, and damage to property.

[65] The key subsection of s.248 of the *Motor Vehicle Act* reads:

> **Liability of Owner**
>
> 248(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.

[66] The latter provision is preceded by s. 248(1) which imposes an onus of proof on the owner and/or the operator of the motor vehicle to establish that the plaintiff's injury did not entirely or solely arise through negligence or improper conduct in the operation of the vehicle. It is beyond dispute in the present case that the plaintiff's injuries were suffered as a result of the negligence or improper conduct of the operator of the van which struck him. The issue here is one of consent.

[67] Counsel for ING has cited three decisions of this court in which it was recognized that the presumptions created by the legislative provisions aforesaid place a considerable burden on the owner (or insurer thereof) to establish that the operator of the vehicle at the time of accident was driving it without the owner's consent. The cases referred to are **Goudey v. Malone** (also reported as **CGU Insurance Co. of Canada v. Noble**) (2003) 220 N.S.R. (2d) 92; **Garrison v. Lively** (1977) 27 N.S.R. (2d) 489; and **Powers v. Pottie Estate** (2000) 185 N.S.R. (2d) 111. As Justice Richard put it in **Powers** (at para. 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.

[68] Applying that legal principle to the case at bar, the burden hence falls on Mr. Thomas and Allstate to establish, on a preponderance of evidence, that the driver of the van, Charles Burke, did not have Mr. Thomas' consent to operate it. As Justice Richard pointed out in **Powers**, this is a negative burden and very difficult for the bearer of that burden to prove, especially where the driver of the vehicle has not testified. Because the whereabouts of Charles Burke are unknown, the only evidence before the court in rebuttal of the presumption of consent is that of Mr. Thomas himself who maintains that he does not know Charles Burke and that he never authorized Mr. Burke or anyone else (other than Ms. Marsh) to drive his van.

[69] For the reasons recited at length earlier in this decision, I do not find the evidence given by Mr. Thomas to be credible or reliable. I have already found as a fact that he was still the owner of the van when the hit and run incident occurred. The only evidence available to then rebut the presumption of consent is the uncorroborated evidence of Mr. Thomas by itself. Having rejected his evidence in all other material respects, neither do I attach any weight to his evidence of non-consent. It is simply not reliable for all the reasons earlier given and is insufficient to rebut the statutory presumption of consent found in s.248(3).

[70] Counsel for Mr. Thomas and Allstate invited the court to draw an inference of non-consent from the evidence in its totality. There are no proven facts from which such an inference can be properly drawn, given the unreliability of Mr. Thomas' evidence as a whole.

CONCLUSION

[71] In the result, I find that Mr. Thomas and Allstate have failed to rebut the statutory presumption that Charles Burke was operating the van at the time of the hit and run incident with the consent of its owner, Mr. Thomas. It follows from the statutory provisions aforesaid that it is Allstate who must pay the plaintiff's damages claim as the issuer of the motor vehicle liability policy to Mr. Thomas in effect at the time. The action against ING is accordingly dismissed.

[72] The only other matter of which brief mention should be made is the pleading on behalf of Allstate, and repeated in its pre-trial brief, that the plaintiff should be held contributorily negligent for his injuries. This defence was not argued at trial, however, presumably because there was no evidence before the court whatsoever that would sustain such a finding.

[73] Lastly, I will leave it to the parties to try to reach an agreement on costs, failing which I would ask that written submissions be filed by counsel within 30 days.

J.