IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Simpson Estate v. Cox, 2006 NSSC 84

Date: 20060317
Docket: SN 202431
Registry: Sydney

Between:

Walter Simpson, representative of the
Estate of Sayde Simpson

Plaintiff

v.

Carolyn Cox

Defendant

Judge:	The Honourable Justice Frank Edwards
Heard:	February 20, 21, and March 10, 2006 in Sydney, Nova Scotia; and March 3, 2006 in Halifax, Nova Scotia
Counsel:	Hugh R. McLeod, Counsel for the Plaintiff Dennise Mack, Counsel for the Defendant

By the Court:

[1] **INTRODUCTION**: In this car/pedestrian fatality, I have determined the deceased pedestrian to be 60% responsible for the accident and the Defendant driver 40% responsible. The deceased's son and granddaughter have made a claim pursuant to section (5) (2)(d) of the ***Fatal Injuries Act***. I have allowed each $10,000.00 reduced by 60% because of the deceased's liability. I have also allowed the special damage claim less 60%.

[2] ***Facts:*** This matter arises out of a tragic accident which occurred on November 19, 2002, at approximately 9:30 p.m. near civic address 59 Fraser Avenue, Sydney Mines. The Defendant, Carolyn Cox ("Ms. Cox") was driving a 1993 Dodge Shadow in a northbound direction on Fraser Avenue. As Ms. Cox approached 59 Fraser Avenue, her vehicle struck the deceased, Sadye Simpson ("Mrs. Simpson"), who was in the process of crossing Fraser Avenue from west to east towards her home at 59 Fraser Avenue. Mrs. Simpson died as result of her injuries.

[3] Fraser Avenue is a residential street with double line pavement markings separating the opposite lanes of travel. The posted speed limit is 50 kph. At the time of the accident, Fraser Avenue was dark, but there were street lights mounted on every second utility pole. The pavement was dry and the weather was clear.

[4] At the time of her death, Mrs. Simpson was 81 years old. She was 5'1" to 5'2", approximately 120 pounds and dressed in dark clothing. She was crossing the road in an area other than a marked crosswalk.

[5] Ms. Cox denies any negligence with respect to this accident and takes the position that Mrs. Simpson stepped out into the street, without first looking to ensure that there were no oncoming vehicles, while wearing dark clothing, during a dark night.

[6] Mrs. Simpson was returning from a church meeting. She had been a passenger in a Ford Taurus vehicle driven by her sister in law, Verna Simpson

("Verna") whose date of birth is November 27, 1919. Verna drove Mrs. Simpson home, driving south on Fraser Street, and stopped her vehicle with the motor running across the street from Mrs. Simpson's home.

[7] Verna let Mrs. Simpson exit the vehicle and "she was standing there". Verna then proceeded to pull ahead towards Queen Street, approximately two houses down from the spot where Verna had stopped her vehicle. Verna intended to turn left onto Queen Street, and back into her driveway on the left of Queen Street. By the time Verna got to her house, the collision had already occurred.

[8] Verna testified that as she pulled her vehicle forward toward Queen Street, she noticed a shadow in her rear view mirror on the left side of her rear window. Counsel submitted that this shadow was Mrs. Simpson as she commenced crossing the road. I am not satisfied that that is in fact the case. Verna's evidence on this point is too vague for me to make that inference.

[9] Two police officers, Constable John Farrell and Constable Harry Halliday, investigated this accident. Their evidence shows that Mrs. Simpson was struck inside the northbound lane on Fraser Avenue. Sgt. James MacLean also attended the scene. Sgt. MacLean took photographs and testified that on the night in question the lighting from the street lights was good to fair.

[10] Constable Farrell also testified that Ms. Cox's vehicle was checked by William Hussey, mechanic, and was found to have nothing mechanically wrong with it that could have caused the accident.

[11] There was one witness, Beverly Jessome (Ms. Jessome"), who was travelling behind Ms. Cox in another vehicle. Ms. Jessome testified that Fraser Avenue is a fairly long street which was dark on that night. Ms. Jessome was maintaining a distance of one or two car lengths behind the Cox vehicle and was travelling at a speed of between 40 and 50 kph.

[12] Ms. Jessome testified that she caught a glimpse of Mrs. Simpson immediately prior to the impact and thought her to be a dog or garbage bag blowing across the road. Ms. Jessome felt that Ms. Cox had no opportunity to stop her vehicle once Mrs. Simpson became visible. Jessome's view was obstructed by the Cox vehicle and Ms. Cox would have been in a better position to observe Mrs. Simpson sooner than Ms. Jessome.

[13] Both the Plaintiff and the Defendant called accident reconstructionists to give expert opinion evidence on the cause of the accident and the visibility of Mrs. Simpson. Both experts were in substantial agreement on the location of the point of impact, the mechanism of the collision, and the speed of the Defendant's vehicle. They do not agree upon when Mrs. Simpson should have become visible to the Defendant driver, Ms. Cox.

[14] The Defendant's expert, Allison Tupper, opined that Mrs. Simpson would only have become discernible to Ms. Cox at or near the point of impact. Ms. Cox

therefore would have had no reasonable opportunity to avoid the collision with Mrs. Simpson.

[15] The Plaintiff's expert, Ken Zwicker, states that Ms. Cox would have been 47.5 metres south of the impact location when a view of Mrs. Simpson became available. Mr. Zwicker concluded that Ms. Cox probably could have stopped her car before she reached the impact area with about 17 metres to spare.

[16] The main reason for the difference between the experts regarding the visibility issue is that Mr. Zwicker places greater emphasis on the effect of street lights than does Mr. Tupper. Mr. Tupper appears to concentrate on when Mrs. Simpson would have been illuminated by the headlight plume of the Cox vehicle.

[17] On the other hand, Mr. Zwicker feels that the street light would have illuminated Mrs. Simpson well before Ms. Cox's headlamps. Mr. Zwicker testified that Mrs. Simpson was walking in the area that was illuminated by the street light

in front of her residence when she was struck. He further observed that the light from the street light would have fallen on the southern surface of Mrs. Simpson, the portion that would have been presented to Ms. Cox. Despite her dark clothing, Mrs. Simpson should have been seen by Ms. Cox.

[18] Mr. Zwicker included a time exposure photograph, taken at night, of the area in question (Ex. 1, Tab 5, p.154). Because of the time exposure, the photo is not an accurate depiction of illumination brightness. It does however, give some indication of the extent of the lighting relative to the area where Mrs. Simpson crossed the road.

[19] I agree with Mr. Zwicker and prefer his evidence to that of Mr. Tupper on the visibility issue. I am satisfied that, had Ms. Cox been exercising due care, she could have avoided the collision with Mrs. Simpson. Undoubtedly, Ms. Cox did not expect to see a pedestrian on the road in that location. She was, however, driving at a time (9:30 p.m.) when pedestrians in a residential neighbourhood were not a remote possibility. Had she been alert to the scene in front of her, Ms. Cox

would have seen Mrs. Simpson in time. Because she would not expect to see a pedestrian in Mrs. Simpson's position, I doubt that Ms. Cox could have been expected to stop with 17 metres to spare. I can only say that she should have been able to avoid the collision.

[20] This is not a situation where a pedestrian unexpectedly steps off the curb into the path of oncoming traffic. The evidence is clear and uncontradicted that Mrs. Simpson was 70 % across Fraser Avenue when she was struck. Ms. Cox's view was clear and unobstructed. The vehicle driven by Verna Simpson did not obstruct Ms. Cox's view of Mrs. Simpson. Verna's vehicle was probably stopped at the Queen Street intersection when she was passed by the Cox vehicle. Verna Simpson had her headlights set at low beam. The glare from those lights had no effect on Ms. Cox's ability to see.

[21] Beverly Jessome's evidence does not assist Ms. Cox. Ms. Jessome did not have the same opportunity to see Mrs. Simpson that Ms. Cox had. Ms. Jessome's view ahead was obviously obstructed by the Cox vehicle. It is not surprising that

Ms. Jessome did not see Mrs. Simpson prior to impact. It is significant that Ms. Jessome did see some movement in front of the Cox vehicle before the collision. That movement should have been apparent to Ms. Cox well before it was to Ms. Jessome.

[22] Mrs. Simpson shares responsibility for the collision. The Defendant's expert, Mr. Tupper, states at page 19 of his report: "...If at any point before reaching the centre of the street Mrs. Simpson had looked to her right and seen and recognized the approaching lights, she could have stopped to let the car go by." He continues:

> "Accordingly, it is my opinion that it can be said with the highest degree of probability that:
>
> > 'Sayde Simpson could easily have avoided the collision by keeping a proper lookout and stopping to let the car go by as she walked across the street at a considerable distance from a crosswalk.'

[23] Similarly, the Plaintiff's expert, Mr. Zwicker, states at page 17 of his report:

> "Once Mrs. Simpson had stepped out behind (Verna Simpson's vehicle), it is my opinion that she could have had a clear view of the approaching (Cox vehicle) from the south. Therefore, she could have avoided the collision by simply waiting for the oncoming vehicle to pass before continuing to cross the street."

[24] In this case, it would have been easier for Mrs. Simpson to have avoided the collision than it would have been for Ms. Cox. All Mrs. Simpson had to do was pause before she crossed the centre line into the northbound lane. Ms. Cox, on the other hand, had to brake a vehicle travelling at between 40 - 50 kph.

[25] ***Law:*** Section 125 of the ***Motor Vehicle Act***, R.S. c. 293 reads:

> "125(1) The driver of a motor vehicle shall yield the right of way to a pedestrian lawfully within a crosswalk.
>
> (2) Whenever a vehicle has stopped at a crosswalk or at an intersection to yield to a pedestrian pursuant to subsection (1), it shall be an offence for the driver of any other vehicle approaching from the rear to overtake and pass the stopped vehicle.

> (3) Every pedestrian crossing a roadway at any point other than within a crosswalk shall yield the right of way to vehicles upon the highway.
>
> (4) This Section shall not relieve the driver of a vehicle or the pedestrian from the duty to exercise due care. R.S., c. 293, s. 125; 1990, c. 36, s. 1; 2001, c.12, s.4."

[26] Not being in a crosswalk, Mrs. Simpson was obliged by Section 125(3) of the ***Act***, to yield the right of way to Ms. Cox. By Section 125(4) Ms. Cox is not relieved from the duty to exercise due care.

[27] The effect of Section 248 of the ***Act*** is to place the onus of proof on the Defendant. Section 248(1)(b) reads:

> "(1) Where an injury, loss or damage is incurred or sustained by any person by reason of the presence of a motor vehicle upon a highway, the onus of proof
> (b) that such injury, loss or damage did not entirely or solely arise through the negligence or improper conduct of the operator of the motor vehicle;
>
> shall be upon the owner or operator of the motor vehicle."

[28] The effect of s. 248 (1) was discussed by Mr. Justice Pace in ***Battiste v. Phelan and Briand*** (1985), 66 N.S.R. (2d) 99 (S.C.A.D.) at pp. 104-105 and quoted with approval by MacIntosh J., in ***Arab v. Demestihas*** [1989] 93 N.S.R. (2d) at page 3:

> "In my opinion the ***effect of s. 248(1)(b) of the Motor Vehicle Act*** in the trial of an action where damages are claimed for an injury sustained by any person by reason of the presence of a motor vehicle upon a highway, ***is to create a rebuttable presumption that such injury arose "entirely or solely" through the negligence or improper conduct of the operator of the motor vehicle. This presumption against the operator remains until the very end of the case, but it is a presumption which can be rebutted either in whole or in part, and if after all the evidence has been heard the jury is satisfied that the operator was only partly to blame, then the fault is to be divided in accordance with the provisions of the Contributory Negligence Act***. If, on the other hand, the jury is satisfied on the whole of the evidence that there was no fault on the part of the operator which caused the accident, the plaintiff's action must be dismissed. The question of whether, and to what extent, the presumption has been rebutted is one which can only be determined at the conclusion of the case." (Emphasis mine)

[29] Counsel referred to a number of cases on the liability issue. In ***Keating v Dorey***, [1987] N.S.J. No. 327 (NSSC), Hallett J. found that the plaintiff

pedestrian's negligence was the sole cause of the accident. The plaintiff was hurrying across an intersection against a red light on a dark, drizzly morning.

[30] On the other hand, in ***MacAskill v. Martell*** [1984] 66 N.S.R. (2d) 1 (N.S.S.C.) the Defendant driver was found wholly at fault. But, unlike the present case, the Defendant was impaired by alcohol and the Plaintiff was in a crosswalk.

[31] In ***Baines v. Chabot***, [1984] B.C.J. No. 310 (B.C.S.C.) liability was apportioned at 70% against the Plaintiff and 30% against the Defendant. There the court found that the Plaintiff was intoxicated, wandering in the middle of the road away from an intersection in less than optimum conditions. The driver, had he been paying proper attention, should have been able to avoid the collision.

[32] In ***Petis v Hamilton***, [1971] O.J. No. 758 (Ont. S.C.), liability was apportioned at 60% against the Plaintiff and 40 % against the Defendant. The Defendant gave no explanation why he did not see the Plaintiff pedestrian and his

speed was in excess of the posted speed limit. The Plaintiff failed to take the "elementary precaution" of taking a second look for oncoming traffic. Had he done so he could have avoided the collision. The Plaintiff's alertness was reduced by alcohol consumption.

[33] In ***Arab v Demestihas*** [1989] N.S.J. No. 457 (N.S.S.C.) liability was apportioned 30% to the Plaintiff and 70 % to the Defendant. That case is distinguishable from the case at bar because the plaintiff pedestrian was in a crosswalk.

[34] In ***Downey v Jamine*** (1985) 68 NSR (2d) 275 (N.S.S.C.) liability was equally apportioned. MacIntosh J. found that the Defendant's failure to exercise due care and the Plaintiff's failure to keep a proper look out for her own safety made it impossible for him to establish the respective degrees of liability. But the evidence did show that the driver was travelling in excess of the posted speed (68 kph in a 50 kph zone) and that the Plaintiff may have been in a crosswalk.

[35] In ***Guymer v. N.S. (Registrar of Motor vehicles)*** [1984] 61 N.S.R. (2d) 325 (N.S.S.C.), the Court found the Plaintiff pedestrian 70 % contributorily negligent. Grant J. appears to have laid considerable emphasis on the fact that the Plaintiff did not use an available crosswalk. Counsel argued that the same reasoning applies to the present case. With respect, I disagree.

[36] Photograph # 26 (Exhibit 1, Tab 2, page 82) shows that there is a sidewalk on the west side of Fraser Avenue but no sidewalk on the east side. Mrs. Simpson's house (on the east side) is some distance from the crosswalk at the Queen Street intersection. Mrs. Simpson had to cross from west to east. Had she gone to the crosswalk she would likely had to have walked on the street to her house with her back to traffic. In these particular circumstances, I cannot fault her for attempting to cross the street where she did.

[37] The foregoing cases demonstrate the various factors considered by Courts in assessing and apportioning liability. No two cases are the same and each case must be judged on its particular facts. I have already noted that Mrs. Simpson could easily have avoided the accident by checking for oncoming traffic. Further she

was obliged to yield the right of way. Ms. Cox, the Defendant driver, could have avoided the collision if she had been driving with due care. There is no reason why she could not have seen Mrs. Simpson.

[38] The Defendant has rebutted the presumption that she is "entirely or solely" to blame for the accident. I find that the Plaintiff, Mrs. Simpson, was 60 % responsible for the accident and the Defendant, Ms. Cox, was 40 % responsible.

[39] ***Damages:*** Mrs. Simpson was just two months shy of her 82nd birthday at the time of her death. Her father had died at age 80 and her mother in her mid 70's. Two brothers had died at 74 and 83 respectively. Her sister, still living, is 73 years old.

[40] Mrs. Simpson did have some health concerns which would not be exceptional for someone her age. She was hospitalized in 2001 mainly because of a fall at home. She was discharged on June 2, 2001 and for a very brief time used a

walker. She took medication for high blood pressure and had some concerns re osteoarthritis. At the time of her death (November 19, 2002) she had resumed her volunteer work with her church and at the hospital. She cleaned and maintained her own home. She was mentally alert. Her family should have been able to enjoy a few more years with her.

[41] Walter Simpson was 46 years old at the time of his mother's death. He is an only child. Mr. Simpson is married with one child Emma (D.O.B. July 23, 1996). His home is about six miles from his mother's. Mr. Simpson and his mother had a very strong bond and loving relationship. Mr. Simpson spent every weekend with his mother and testified that on Saturdays he was the cook. He visited her one to three times during the week and spoke to her frequently on the phone. They watched movies and sports together and, on Saturdays, he took her shopping. I have no doubt but that his mother's sudden death was a very painful loss for Mr. Simpson.

[42] Emma, Mrs. Simpson's only grandchild, was six years old when she lost her grandmother. In Mr. Simpson's words, "they worshipped one another." I do not doubt that. They read to one another. Mrs. Simpson was teaching Emma to knit, bake cookies and do the dishes. Mrs. Simpson sometimes baby-sat Emma. I am satisfied that a very close and loving bond existed between Emma and her grandmother.

[43] Section 5(2)(d) of the ***Fatal Injuries Act*****,** R.S., c.163 reads:

> "In subsection (1), 'damages' means pecuniary and non-pecuniary damages and, without restricting the generality of this definition, includes;
>
> (d) an amount to compensate for the loss of guidance, care and companionship that a person for whose benefit the action is brought might reasonably have expected to receive from the deceased if the death had not occurred."

[44] Claims in these circumstances (excluding special damages) are therefore limited to monetary compensation for the loss of care, guidance and companionship. Obviously, Mr. Simpson's claim, given his age, is for loss of

companionship. Emma, on the other hand, lost the care, guidance and companionship of her grandmother.

[45] Mr. Simpson also claimed for loss of his mother as babysitter for Emma. I have very little evidence against which to measure that loss. I will keep it in mind when assessing the general claim.

[46] Counsel for the Plaintiff relies upon ***Murray Estate et al v. Advocate Contracting Ltd. Et al***, (2001), 195 N.S.R. (2d) 313 (N.S.S.C.). That case involved the death of a 39 year old mother of two young children. With respect, that case is not at all useful here. Mr. Simpson and Emma had a very special relationship with Mrs. Simpson. I do not believe however, that their loss can be usefully compared to the loss suffered by the husband and children in ***Murray.***

[47] In ***Riggs v. Toronto Hospital*** [1993] O.J. No. 1884 (O.C.J.) each child received $10,000.00 and each grandchild $5,000.00 (in 1993 dollars). But, Mrs.

Riggs, who was 71 years old when she died, had a life expectancy of 15 years. On the other hand, there were multiple children and grandchildren. In the present case, it seems reasonable to emphasize that Mr. Simpson was an only child and Emma, an only grandchild. That emphasis may not be warranted in every case, but I am satisfied that it was an integral part of the bonds which existed here.

[48] Each case has to be assessed on its own merits. ***Riggs*** is helpful, but obviously not the same. I have considered all of the evidence in this case and determined that Walter Simpson and Emma are each entitled to $10,000.00. Because I have found Mrs. Simpson 60% responsible for the accident, I must reduce each award accordingly. Walter Simpson and Emma shall therefore each receive $4,000.00, plus pre-judgment interest of 2.5% per year for three years.

[49] I am unclear whether counsel have agreed on the payment of special damages or simply the *quantum*. If *quantum* only, then specials must also be reduced by 60% ($8696 - $5217=$3479.00). I would allow 5% prejudgment interest on the specials for 3 years.

[50] Counsel may make brief written submissions on costs within 7 days of receipt of this decision.

Order accordingly.

J.