Link v. Nett, 2000 ABQB 195

Date: 20000403
Action No. 9601-01397

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

KENNETH CARL LINK

Plaintiff

- and -

JACOB P. NETT, TAMMY LORRAINE SELF and
CHRISTOPHER SELF

Defendants

[Note: An Erratum has been filed on April 3, 2000; the correction has been made to the text and the Erratum is appended to this Judgment.]

REASONS FOR JUDGMENT
of the
HONOURABLE MR. JUSTICE R. T. G. McBAIN

APPEARANCES:

Walter W. Kubitz, Esq. and
Ms. J. Goh
for the Plaintiff

Michael E. Mestinsek, Esq.
for the Defendant Jacob Nett

David M. Pick, Esq.
for the Defendants Tammy Lorraine Self and Christopher Self

[1] The Plaintiff, Kenneth Link, whom I may simply call Link, claims as a result of an automobile accident against Jacob Nett and also against Tammy Loraine Self and Christopher Self. The collision occurred when a van driven by Jacob Nett collided with the rear of the Self vehicle when it was stationary and parked on the paved shoulder of the highway facing south at the time of the collision. The collision of the Nett vehicle with the rear of the parked

Chrysler (the Self vehicle) drove the Self vehicle into the front of the pick-up truck owned by the Plaintiff Link, who had parked facing north on the paved shoulder of the highway and facing the front of the Self vehicle.

[2] Link alleges negligence against Nett, the driver of the van, and against Christopher Self and Tammy Self. Jacob Nett claims contribution or indemnity against the Selfs. I will not particularize the pleadings. I am only concerned in this judgment with a determination of liability. Damages have been determined by Judicial Dispute Resolution.

[3] Christopher Self lives at Ranier, which is south of the Town of Brooks, Alberta and he lives there with his wife Tammy. The Plaintiff Link is the father-in-law of Christopher and the father of Tammy Self. On the 15th day of January, 1995, Christopher Self was driving his wife's automobile, a Chrysler New Yorker, when he left his employment at Lakeside Packers at approximately 4:00 p.m. and proceeded to drive southerly on Highway #36. At approximately 4:05 p.m., he noticed the temperature gauge of the car rising and he pulled over and stopped "half in the ditch." Highway #36 has a paved shoulder. He said that when he parked the car the passenger side wheels were in the grass and the other side of the car was on the shoulder.

[4] A witness, Cam Gruninger, a truck driver, first saw this vehicle parked as he was travelling north before the accident and he observed that no part of the car was in the south driving lane and that the right side was off the pavement. Christopher Self left the vehicle to get assistance and before leaving he did not turn on any lights and he did not activate the hazard flashers on the vehicle. He said that he did not do so because he felt it was far enough off the road and it was a clear day. All lights on the vehicle apparently were in working order. He said that where he broke down there was a long, flat stretch of highway and he described the highway, being Highway #36, as containing two lanes with a yellow dotted line down the middle to separate these travel lanes and he said there was a white line separating the shoulders. The shoulders slope down to a shallow ditch. All of this is quite apparent in photographs filed as exhibits in this trial. There is a lane of traffic on this Highway for travelling north and a lane for travelling south and a paved shoulder on each side of these travel lanes. Mr. Acteson, the expert in accident reconstruction, gave measurements of 11.5 feet or 3.5 metres for the travel lane and 6.6 feet or 2 metres for the paved shoulder.

[5] Tammy Self recalled that she got a telephone call at about 4:30 in the afternoon from her husband and he informed her that the car had overheated. She in turn called her father, the Plaintiff Link, and then Tammy Self and Christopher Self proceeded in Mr. Link's vehicle, which was a pick-up truck, to the scene where the Chrysler New Yorker was stopped on Highway #36. Mr. Link apparently had some forewarning or anticipation of what the trouble might be with the Chrysler New Yorker for he took anti-freeze with him. Link recalled that he had received a telephone call from his daughter Tammy about 5:00 p.m. telling him that Chris had broken down and needed help. Link and the Selfs drove north on Highway #36 in Link's pick-up truck. Link said the road was flat, dry and clear. Link said that when they got to the

Chrysler New Yorker he turned on his flashers. Tammy Self said it was a nice, bright day and the road was clear and dry.

[6] Christopher Self testified that they got to the Chrysler New Yorker at about 5:20 p.m. and this was also Tammy Self's estimate of the time. Christopher Self testified that when Link parked his truck, it had on driving lights, four-way flashers and park lights. Link had pulled over the southbound driving lane to park in front of and facing the Chrysler New Yorker.

[7] Christopher Self testified that Link's truck was pulled up and parked on the shoulder and that the fender of the Self car on the driver's side would have lined up with the middle of the Link truck. Tammy Self said the driver's side of the car would have been "to the centre of dad's truck." Christopher Self said that when he exited the Link vehicle, he stepped on the white line and he knew that they were on the shoulder. Tammy Self said that when she got out she also stepped on the white line. They exited from the passenger side. The photographs in exhibit clearly show the white line that separates the paved shoulder from the travel portion of the northbound lane of Highway #36. I find that the Link vehicle did not in any way protrude into the southbound lane of the highway. It was parked wholly within the paved shoulder.

[8] Kenneth Link testified that as he approached the Self vehicle he could see traffic on Highway #1, some seven kilometres away. Link described the position of the parked Chrysler New Yorker as half way in the ditch and half way up in the park lane. He stopped his pick-up truck nose to nose with the Chrysler New Yorker and he said his truck was off-set about one half of the car. Link said the Self car was half in the parking lane and one-half in the grass and the vehicles met about half way. "I drove up and parked offset so traffic could see my lights." He said the road was bare and dry and the weather was clear. He said his left lights would have been obscured by the front of the car and that as he approached the car, the topography was flat, the road was straight and the day was clear. Link said there were no lights on the Chrysler New Yorker and that he pulled up some four to six feet in front of the car and when he left his pick-up truck, he had or left on his driving lights, his four way flasher (hazard) lights and his parking lights. Christopher Self testified that as they pulled up to the car it was daylight. Link said he had parked his vehicle facing north and stopped entirely on the shoulder, "nose to nose but offset."

[9] The estimate of the arrival time of the Selfs and Mr. Link back to where the Chrysler New Yorker had been parked on the highway was about 5:20 p.m. Tammy Self said the sun was starting to go down. Christopher Self estimated that the accident occurred about five minutes after they had returned to the Chrysler car.

[10] Both the Selfs exited from the pick-up truck and of course Mr. Link exited from the pick-up. The hood of the car was opened and Mr. Link got his tools. He noticed that the radiator hose was broken and he disconnected that hose and he was going to fill the radiator with the anti-freeze he had brought. Tammy Self had brought Link a trouble light from Link's vehicle. Christopher Self said, "we were working under the hood." Tammy Self said that she felt safe because everything was off the road and she said that Ken's lights were on, meaning

the lights on the Plaintiff Link's vehicle. She felt it was safe because it was daylight. Tammy Self said she was standing beside her father in front of the Chrysler New Yorker and Christopher Self said that Tammy was on his left.

[11] Christopher Self testified that he looked up when he first saw the van and "it was some distance away, there was time to stop." "It seemed to be going at a fairly good speed." "At first glance it was not slowing down, it was going into the lane." He did not notice any difference in speed between his first and second look. He said that at the second glance the vehicle was only some 20 feet away and "by that time it was too late" and he said "Oh shit". He said "Tammy was behind me, Ken was to my left." Tammy Self apparently did not see the van approaching or hear any sound of tires. She said she woke up after the accident to find herself in the ditch. Christopher Self said his first memory after the accident that vehicles were "all over". Link said he woke up under the hood of the Chrysler New Yorker, down in the ditch, face down in the snow in front of the car. He said his pick-up truck was facing the ditch.

Jacob and Geraldine Nett

[12] Jacob Nett and his wife at the time of this accident lived in Castor, Alberta. They were going to Arizona and they planned on stopping at Taber, Alberta. They were travelling south on Highway #36. Castor and Taber are both on Highway 36. Mr. Nett was driving the van. He said that after passing over Highway 1, he was on cruise control and driving about 100 kph (the speed limit). Jacob Nett said it started to snow when he was on Highway #36 and he testified that he slowed down to approximately 75 to 80 kph from 100 kph. He had his low beam headlights on and also said that he had fog lights on prior to the accident.

[13] Mr. and Mrs. Nett both saw a white light and it appeared and disappeared at least twice. Mr. Nett said it was a large light and it looked like a train. He testified that the road was flat and straight in their lane ahead. Mrs. Nett said she saw "a car coming towards us with one light on in our lane". Mrs. Nett thought that it looked like, "a one-eyed car." Mrs. Nett remembered her saying, "there was a car in our lane and it was going to hit us." She said it was confusing. When she first saw the light it was about one kilometre away and it went away and reappeared a second time and it was then closer. Nett said he became cautious after he first saw the light and edged his vehicle over to the right. He said he did not see a flashing yellow light.

[14] Nett next saw a car and it was on the shoulder and he saw a lady waving her hands to stop. Mr. Nett said when he first saw the car it was about 50 or 60 feet away and it appeared to be parked on the shoulder, that he saw the car and the girl at the same time and that he did not see any reflectors. He put on the brakes immediately and he did not try to go around the vehicle, "because there was a lady running." (Mrs. Nett recalled "a figure coming around the back of the vehicle".) Mrs. Nett said her husband did not try to move their vehicle into the northbound lane. Mr. Nett said that when he put on the brakes this vehicle did not appear to be in their lane of travel and that when he saw the vehicle it was on the shoulder. He did not see any reflectors on the vehicle.

[15] Mr. Nett said that the van went into a skid and skidded straight and edged over to the right. An examination of the Exhibited photographs shows severe damage to the left rear of the New Yorker. Mr. Acteson, expert in accident reconstruction, estimated “the width of the overlap damage ... approximately 50 cm”. The impact of the Nett vehicle on the rear of the New Yorker propelled the New Yorker into the front of Mr. Link’s pick-up truck.

Cam Gruninger

[16] Cam Gruninger, the truck driver, was now, later in the day, driving south on Highway #36 and he said he came over a knoll and he saw lights in the middle of the road and that there was a knoll about 100 yards north of the accident scene and he could not see the accident until he came over the knoll. Tammy Self said there was a slight knoll four kilometres to the north. Gruninger, when he came upon the accident scene, stopped his truck and put on his flashers. He said he saw a white van sideways, a pick-up with lights and flashers on, and a car in the ditch. Gruninger thought that he had arrived at the accident scene “right after it happened - I think it was a short period of time.” He thought it was about 45 minutes after the time he first say the parked car. Gruninger called for an ambulance.

Visibility and Weather

[17] I was provided with a definition of sunset which is the definition used by Environment Canada as follows:

1) The phenomenon of the sun’s daily disappearance below the western horizon the result of the earth’s rotation

2) Contraction for the time of sunset. This is defined in U.S. weather bureau practise as the instant when the upper limb of the sun just disappears below the sea level horizon.

3) Again provided by Environment Canada, the official tables of sunset for January 1995 show that on the date of the 15th of January the sun “officially” set at 1651 (that is to say 4:51 p.m.)

[18] I must now consider the question of visibility as I am faced with widely disparate assessments of visibility from various witnesses. I must determine what the conditions were at the time of the accident. This is necessary, I believe, so that I can determine liability having regard to all circumstances including visibility/light.

[19] It is clear that the pick-up truck containing Link and the Selfs arrived at the stationary Chrysler New Yorker car owned by Tammy Self at about 5:20 p.m. It is also indicated that the collision was about five minutes later, that is to say at about 5:25 p.m.

[20] Christopher Self left work at 4:00 p.m. He said it was a clear day and the sun was out and the road was clear and bare and that when he left work, the sun had not set so he did not have to have the headlights on. When he arrived at the Chrysler New Yorker, later in Link's truck, he said you could see the centre line and shoulder line, the road was clear and bare and that there had not been any change in the weather. "It was daylight when we pulled up to the New Yorker."

[21] Tammy Self testified that they got to the Chrysler New Yorker at 5:20 and it was a nice, bright day and the road was clear and dry and that it was still daylight and the sun was starting to set. She felt safe because it was daylight; she felt safe because Link's lights were on.

[22] Link said the weather was clear and the roads were bare and dry and that when they approached the car, "we could see traffic on Number 1 Highway, some seven kilometres to the north. I saw the vehicles, not their lights." On cross-examination, Link testified that he arrived at 5:20 p.m., that it was not full daylight and it was getting dark but that there was good visibility and he had not noticed if the sun had set.

[23] Cam Gruninger testified that when he was driving south on Highway #36 and came on the accident scene, that the road was bare and dry, the visibility was clear and it was dark and cool and that after the accident. He testified "it started snowing." He said it was, "dark when I got there." This was some 45 minutes after driving his truck north. He thought that he had arrived at the accident scene, "right after it happened. I think it was a short period of time." He apparently based his time estimate on what he observed when he arrived at the scene.

[24] Geraldine Nett remembered that just prior to the accident it was snowing. The road surface was covered with snow. She said she did not see any road markers. "The sun was down, it was getting dark but not pitch dark." She did not see any reflectors on the vehicle (the Chrysler New Yorker). She said it was snowing after crossing Highway #1 and the snow did not stop before the accident. She said that when she saw the light of Link's truck, it was "possibly one kilometre away."

[25] Jacob Nett remembered that shortly after crossing Highway #1, it was snowing. He said at the time of the accident it was near dark and it was about 20 minutes before 6:00 p.m. and that shortly before the accident, the snow "lightened up" and the road was all white and that it was nearly dark immediately prior to the accident and getting there, it was very dark.

[26] Jacob Nett testified that "shortly before the accident the snow lightened up." In his testimony he gave no indication that snow was interfering with his vision. He described the snow as a "snow squall." He could not remember if his windshield wipers were on or not. Mrs.

Nett saw the light from Link's truck at possibly one kilometre. Mr. Nett was questioned with respect to his examination for discovery: "Was it more than one kilometre?" He answered, "I would think so." He then added at trial that he did not really know. Both Mr. and Mrs. Nett testified as to seeing only one light. Mrs. Nett specifically said she did not see any flashing yellow light.

[27] I am satisfied that the Netts saw this one light which they perceived to be in their lane from a distance of approximately one kilometre. I do not believe Mr. Nett's visibility immediately prior to the accident was interfered with by snow. He did not so testify. Indeed, he testified rather that the snow had lightened up.

[28] I am faced with widely differing assessments of visibility. The Selfs say daylight, Cam Gruninger says it was dark when he arrived at the accident scene, Jacob Nett says "near dark" at the time of the accident and Geraldine Nett says it was getting dark but not "pitch dark."

[29] The sun set at 4:51 p.m., they arrived at the parked Chrysler New Yorker at 5:20 p.m. and the collision appears to have happened at about 5:25 p.m., therefore, the accident occurred some 34 minutes after official sunset. It is a fact that after the sun sets the light would be progressively diminishing. It would get progressively darker.

[30] At the time of the accident, it was not bright sunlight and it was not yet pitch dark. Had it been significantly lighter, the Netts would have been able to see the stationary Chrysler New Yorker even past the glare from the truck headlight sooner than they did. Mr. Nett could not see the car until he was immediately upon it and this would be so because of the glare of the truck's headlight in the darker sky. Mr. and Mrs. Nett said they were looking at a bright light when it was fairly dark.

[31] It was 34 minutes after sunset and I find at the time of the accident it was not pitch dark but was "nearly dark."

NEGLIGENCE

Kenneth Link

[32] Mr. Link, deliberately parked his pick-up truck offset to the stationary Chrysler New Yorker. As parked, his vehicle had activated the running lights, parking lights and hazard flasher lights and I find that as fact. There is a light assembly on the left front of the pick-up truck which is duplicated on the right front of the truck. The upper portion is comprised of the headlight and running light and underneath that a park light. Vertical to these lights is the hazard light with an orange lens which curves into the fenders. the exhibited photographs make this clear. Link deliberately offset his vehicle so that the running light facing north would be clear of the Chrysler New Yorker and shining north into the southbound traffic lane and to warn oncoming traffic. He believed it would be prudent to do so. With the pick-up truck offset

to the east at the front of the car, the left side assembly of lights at the front of the pick-up truck would be obscured by the parked Chrysler New Yorker and, in fact, it was only the daytime running light, that is to say the right hand side running light, which was seen by Mr. Nett. It was this one light that caused confusion and alarm to Mr. Nett and indeed also to Mrs. Nett.

Jacob Nett

[33] Mr. Nett was proceeding southerly in the west lane of Highway #36 at 100 kph and his wife was in the passenger seat. He was so driving with his low beam headlights and fog lights on. He saw only one light that we now know would be the right hand front light of Link's pick-up truck. I have determined that at the time when Nett saw the light that it was nearly dark. There was confusion; Mr. Nett thought it might be a train, Mrs. Nett observed it to be one light in their lane and said this was a car that had only one light on in their lane and she said something to the effect that it was going to hit them. I say again that both the Netts observed only this one light on the right-hand side of the pick-up truck. The comments exchanged are of some importance as apparently there was some time for those exclamations to be made by Mr. Nett and Mrs. Nett before the collision with the rear of the Chrysler New Yorker. The light appeared and then it disappeared and reappeared and then it disappeared again. Mr. Nett "edged over to the right side." This sequence of lights appearing to be facing them in their lane of travel would have been ample reason to cause consternation and discombobulation to the Netts and in particular, of course, to Mr. Nett who was driving. Both Mr. and Mrs. Nett testified that it was confusing.

[34] The shining of the light when it was nearly dark into the eyes of drivers of vehicles travelling south in the west lane of the highway was likely to cause alarm and confusion for the driver of such a vehicle and that is precisely what occurred. The shining of the one headlight into the eyes of drivers of oncoming traffic, in the west lane, when nearly dark, constituted negligence on the part of Mr. Link.

[35] Mr. Nett thought the light was in their lane and that it appeared stationary: "It may have been stopped. It could have been coming towards me. I wasn't sure what was up ahead.". He said he became cautious and moved further over onto the shoulder. He reduced speed from 100 kph to 75 to 80 kph. He testified that when he first saw the light, it was very dark and he was not sure what was ahead. The light was observed at approximately one kilometre.

[36] When Nett was only some 50 to 60 feet away from the Chrysler New Yorker, he saw a woman running towards him, waving her arms and "yes, it was near dark. But not pitch dark." Assuming Mr. Nett's observations were accurate that only could have been Tammy Self but she testified she did not see the van before the accident. At the same time he observed the parked Chrysler New Yorker which was unlit. He did not observe any reflectors. When he observed the woman and the car he was still proceeding at approximately 75 to 80 kph. He slammed on his brakes. He testified the road was snowy and it did not appear to be slippery and that his van skidded into the parked car. He said his van skidded basically straight. When

he slammed on the brakes he observed, “the car was squarely on the shoulder.” He said he did not try to turn to the left. The van skidded into the rear of the Chrysler New Yorker.

[37] What then would be the position of the vehicles at the time impact? There was some four to six feet between the front of the pick-up truck and the front of the Chrysler. Mr. Link testified, “My truck was fully on the shoulder. The vehicles met about half way - the car was half in the lane, half in the grass. My truck was fully on the shoulder.” When the Selfs exited the pick-up truck, they did so from the passenger side and they stepped on the line marking the shoulder from the travel lane. Christopher Self testified that when Link pulled up in front of the car, that the truck was on the shoulder and the Selfs’ car driver’s side fenders would have lined up with the middle of the Link truck. The truck driver Cam Gruninger observed that the right side of the Chrysler was off the pavement (that would be somewhat into the ditch). Chris Self did not activate flashers on the car because he felt the Chrysler was far enough off the road. Chris Self said he parked the Chrysler, “with the tires in the grass and the driver’s side tires on the pavement.” Mr. Nett testified that the first time he saw the vehicle it appeared to be parked on the shoulder of the road.

[38] It is clear, I believe, and I find that Mr. Link’s pick-up truck was stopped so that it was wholly on the paved shoulder and that no part of it protruded into the southbound travel lane and I also find that the Chrysler was parked with some portion of it off the paved shoulder to the west. The van had travelled onto the shoulder and was substantially over the white line dividing the paved shoulder from the travel lane when it struck the car.

[39] Mr. Acteson, the Accident Reconstructionist, in his figure 3 shows the position of the three vehicles and gives measurements. The shoulder is 2 metres wide, the southbound travel lane is 3.5 metres wide. The van is 6.6 feet in width and his diagram shows 4.4 feet of the van over the line demarking the shoulder from the travel lane. That is to say, 4.4 feet of the van was over onto the shoulder. It is useful in confirming the overlap of those two vehicles on impact to look at the photographs in evidence. Photograph 8 shows significant damage to the right rear of the Chrysler as do photographs 12 and 13. Photographs 18 and 19 show damage to the front of the van. I am satisfied that on impact Mr. Link’s vehicle was about 4 ½ feet over onto the shoulder and that the Chrysler was parked about halfway onto the shoulder and the other half off the paved portion, that is to say, off the park lane and to the west of it, and therefore somewhat into the ditch.

[40] I find therefore that Mr. Acteson’s Figure 3 is reasonably accurate. The broad conclusions to be drawn are that the Chrysler was parked so far over from the paved shoulder as to be partly in the ditch and the Nett van was substantially off the travel lane and into the parking lane on impact.

[41] Before proceeding further with questions on negligence, I must say that it is obvious where automobile accidents involve moving vehicles, or even a moving vehicle and a stationary vehicle, that things happen so quickly indeed. A vehicle travelling at 75 to 80 kph will travel 60 feet in something like .88 of a second.

[42] Mr. Nett, on seeing the light of the pick-up truck, was confused. He should have been alarmed, and he was alarmed. There was time for a brief exchange of comments between Mr. and Mrs. Nett. In my opinion, he did not react reasonably after first observing the headlight of the pick-up truck. He continued on at a speed of 75 to 80 kph. He edged over onto the shoulder. I believe he should have reduced his speed significantly below 75 to 80 kph. He should have done this immediately upon observing the light appear, disappear and reappear. When he first saw the light, it was possibly as far away as one kilometre. Mrs. Nett testified that it was possibly one kilometre away. There was a period of time when Mr. Nett should have further reduced his speed significantly but he did not do so prior to suddenly seeing the woman and the Chrysler New Yorker. He had seen what appeared as a light in his lane and, of course, from a distance the right front headlight of the Link truck may very well have appeared to be in his lane. As he proceeded it would have become clearer to him that the light was not in his lane but was on the shoulder. He certainly observed that at the last moment. When he first saw the car he testified that it was 50 to 60 feet away. When he slammed on his brakes, he saw the car squarely on the shoulder. He did not see any lights on the Chrysler, and indeed there were none to see, before impact. Mr. Nett never did observe any lights on the Link vehicle other than the headlight on the Link vehicle. The left side lights would of course be obscured by the Chrysler. Other lights on the right side may have been difficult to see past the glare of the right side headlight of Mr. Link's pick-up truck.

[43] Would a reasonable reaction under these circumstances, that is to say upon first seeing the light, be to drive into the northbound lane? Perhaps not on first seeing the light but later on observing the light was stationary, perhaps so. Could he have driven into the ditch? It was a shallow ditch. Mr. Nett said the highway was covered by snow and if that be so he would have been reluctant, I suppose, to drive into the ditch and over the boundary between the ditch and the shoulder. He did not give evidence of considering either of these possibilities. He had said that he could not see any lines. He testified that just before the accident "the road was all white." In any event, he proceeded at 75 to 80 kph and he also edged further over to his right, that is to say, onto the shoulder. The Chrysler New Yorker was parked on the paved shoulder and no part of the car protruded into the southbound travel lane of Highway #36.

[44] Mr. Nett only saw the lady and the car at some 50 to 60 feet away. This, of course, proved to be at the very last moment having regard to the speed at which he was driving. Tammy Self testified that she did not see the van before the accident. I am not sure exactly what Mr. Nett did see in the way of a person. Be that as it may, the van then collided with the stationary vehicle which was not in the travel portion of the Highway.

[45] Mr. William Acteson appeared at the trial as an expert in Accident Reconstruction. He testified that after having examined the vehicles, that the collision of the van with the Chrysler New Yorker imparted some 30 to 40 kilometres of speed to the parked car. Mr. Nett was proceeding at 75 to 80 kph when he applied the brakes and it therefore appears that Mr. Nett's last minute application of the brakes was of limited effectiveness in reducing the speed of the van at impact with the Chrysler.

[46] I must say that the snow or snow squall, in my opinion had little or no effect in contributing to this accident. He did not testify that just before the accident the snow was interfering with his vision. It did not interfere with Mr. Nett's visibility. He testified that shortly before the accident, the snow lightened up. I am also satisfied that the knoll, located as it was, may have been a cause of the disappearance and reappearance of the light which the Netts saw but in any event, that being so, there was still, in my view, time after the reappearance of the light for Mr. Nett to have reduced speed.

[47] Had Mr. Nett significantly reduced his speed upon first seeing the light, he would have had some more time to assess the situation and as he got closer to the Chrysler, he would probably have been able to observe that the light was not in his lane and he may also have been able to observe that the light was stationary and the vehicle was not in his travel lane. He would also have had time to stop and it would have been prudent had he done so, or he would have had time to steer into the southbound lane to avoid the vehicle. He did not do either.

[48] I find negligence on the part of Mr. Nett in maintaining the speed he did when faced with a very alarming situation. The speed that he maintained after seeing the light was excessive. He should have slowed down and he should have slowed down significantly and had he done so, in my view, then he may have been able to avoid the collision with the stationary Chrysler. In maintaining the speed that he did, he deprived himself of any opportunity to avoid an accident.

[49] Having now reviewed the evidence respecting the effect of the light from the Link vehicle, I can now confirm my finding that Mr. Link was negligent and I find that Mr. Nett was negligent.

Christopher and Tammy Self

[50] I turn now to Tammy and Christopher Self. When Christopher Self left the vehicle for assistance, it was daylight and he thought it safe to leave the Chrysler without lights on positioned as it was, far over on the paved shoulder so that the right wheels were on the grass.

[51] The Chrysler New Yorker was left unlit, facing Link's pick-up truck and offset. Hazard lights on the Chrysler, if turned on, would have flashed a different colour and they would have identified the left rear and right rear of the Chrysler. Hazard lights can act as a clear warning of a parked vehicle. I appreciate that the hazard light on the left rear of the Chrysler would perhaps have been more difficult to see for some period of time after the first appearance of the lights because of the glare from the headlight that Mr. Link had left on the right front side of his truck. Visibility of the right rear hazard light on the Chrysler, however, would not so much be affected by the glare of the pick-up truck's light.

[52] As Mr. Nett got closer, he may well have been able earlier to see the right rear hazard light on the Chrysler New Yorker, and indeed, as he got closer still, both hazard lights

(flashers) would be apparent. Even if one or both hazard lights had not been seen in such time as to help to avoid the accident, the lighting of both those hazard lights on the Chrysler would have made it difficult to find negligence on the part of the Selfs.

[53] I find that there was negligence in the Selfs accepting that the one visible shining light of the Link vehicle was an adequate forewarning of their parked vehicle. Indeed, it constituted a hazard in itself by shining into the eyes of any driver southbound on the highway. I find the Selfs were negligent in not activating the hazard lights on the Chrysler upon their return to the vehicle at 5:20 pm, when it was as I have found "nearly dark."

[54] Section 180(1) of the ***Highway Traffic Act***, RSA 1980, c. H-7, reads:

> 180(1) If a person sustains loss or damage by reason of a motor vehicle in motion, the onus of proof in any civil proceeding that the loss of damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle is on that owner or driver.
>
> (2) This section does not apply in the case of a collision between motor vehicles on a highway.
>
> (3) In this section "motor vehicle" includes a tractor and a self- propelled implement of husbandry.

Section 1(g) of this ***Act*** defines highway:

> (g) "highway" means any thoroughfare, street, road, trail, avenue, parkway, driveway, viaduct, lane, alley, square, bridge, causeway, trestleway or other place, whether publicly or privately owned, any part of which the public is ordinarily entitled or permitted to use for the passage or parking of vehicles, ...

This section has been considered by Alberta Courts.

- ***White et al. (Plaintiffs) Appellants v. Henton (Defendant) Respondent***, a decision of the Appelate division of the Supreme Court of Alberta, [1930] Vol 1 WWR 685 at 687-688:

  Sec. 66 of *The Vehicles and H*ighway Traffic Act, 1924:

  > "66-(1) When any loss or damage is sustained or incurred by any person by reason of a motor vehicle in motion, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of the motor vehicle."

> "(2) This section shall not apply in the case of a collision between motor vehicles upon a highway."

In my opinion, subsec. (2) must be read along with subsec. (1) and considered in the light of subsec. (1), which refers to "a motor vehicle in motion," and accordingly under subsec. (2) only one of the cars, that of the defendant, came within this category. In so far as the other car is concerned, it was not in motion, according to the statement of claim, and hence could not be actively in collision with the car of defendant. There was no possibility of avoidance of the accident by the plaintiff's car, as it was stationary on the highway.

In my opinion, the application of subsec. (2) must be confined to two or more motor cars "in motion" as the avoidance of an accident might then be possible by either or any of the cars. when one of the motor cars is stationary, on the side of the highway, it is in the same class as any other stationary object.

Although the plaintiff has pleaded negligence, which is the basis of this action, yet, since under the statute the onus of proof that any loss or damage did not arise through the negligence of the defendant, shall be upon the owner or driver of the motor vehicle, in other words, that negligence is imputed to the defendant, then it follows the particulars of negligence are not required from the plaintiff.

- ***Halase v. Sharpe*** (1957), 21 WWR 424, a decision of Edmundson D.C.J. at 426:

The sole remaining question is, was the plaintiff guilty of contributory negligence, as alleged by the defendants?

First, it should be observed that at the time of the collision, the plaintiff's truck was not in motion, and as a consequence, by virtue of sec. 94 of *The Vehicles and Highway Traffic Act*, RSA, 1942, ch. 275, "the onus of proof that the loss or damage did not entirely or solely arise through the negligence or improper conduct [of Wilkie is on him]."

> "Where a car stationary on the highway is alleged to have been run into by another car the onus of disproving negligence rests on the owner or driver of the latter car:" (Headnote to *White v. Henton* [1930] 1 WWR 685.)

In an attempt to prove contributory negligence, the defendants submitted that the plaintiff's truck blocked the highway, and the driver of the Dodge sedan was unable to pass the truck.

- ***Lengauer v. Bate***, a decision of the Supreme Court of Canada, (1972), 2 N.R. 585, which confirmed that the decision of the Alberta Court of Appeal "correctly decided that there was negligence on the part of the appellant as well as on the part of the respondent Bate, both of which contributed to the accident."

Cullen J. of the Supreme Court of Alberta, decided this case, 2 N.R. 587 at 592-3:

> On the question of onus we have had discussions about Section 211 and 212. Section 211 says:
>
> > Where a vehicle is operated upon a highway in contravention of any provision of this Act and loss or damage is sustained by any person thereby, the onus of proof that the loss or damage did not arise by reason of the contravention of this Act is upon the owner or driver thereof.
>
> This would seem to place a certain onus on the plaintiff. Section 212 says:
>
> > when any loss or damage is sustained or incurred by any person by reason of a motor vehicle in motion, the onus of proof that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle is upon the owner or driver of the motor vehicle.
>
> Sub-section 2 says:
>
> > This section does not apply in the case of a collision between motor vehicles upon a highway.
>
> That was interpreted for us by a judgment which has been binding upon these courts since the date of its pronouncement. It is the case of *White v. Henton*, [1930] 1 W.W.R. 685. The headnote says:
>
> > Sec. 66 of *The Vehicles and Highway Traffic Act*, 1924, provides that when loss or damage is sustained 'by reason of a motor vehicle in motion' the onus of proof that it did not arise through the negligence of the owner or driver of such vehicle shall be upon the owner or driver and further provides by subsec. (2) that the section 'shall not apply in

> the case of a collision between motor vehicles upon a highway.'
>
> Held that the application of subsec. (2) must be confined to the case where two or more motor cars are 'in motion;' and, therefore, where a car stationary on the highway is alleged to have been run into by another car the onus of disproving negligence rests on the owner or driver of the latter vehicle.

This, then, places on the defendant the onus of establishing that the loss or damage was not caused by him in operating a vehicle which was in motion at the time that it struck a vehicle which had not come to a sudden halt but which had been halted for a period of approximately five minutes.

- ***Hilderman v. Rattray*** (1988), 93 A.R. 217 at 219, a decision of Conrad J., as she then was:

> [8] Dealing firstly with the question of liability. The plaintiff argued that the presumptions under ss. 179 and 180 of the Highway Traffic Act applied. Dealing firstly with s. 180, it states as follows:
>
> > "180(1) if a person sustains loss or damage by reason of a motor vehicle in motion, the onus or proof in any civil proceeding that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle is on that owner or driver."
>
> Section 180(2) states:
>
> > "This section does not apply in the case of the collision between motor vehicles on a highway."
>
> The question that arose was whether the presumption applied. In fact the one van that had been in motion hit a stationary van on the highway which in turn was pushed into the plaintiff.
>
> [9] The plaintiff refers me to the decisions *White v. Henton*, [1931] W.W.R. 685, and *Halase v. Sharpe*, 21 W.W.R.(N.S.) 424. The essence of those cases is that for s.180(2) to be applicable, there must be two or more motor vehicles in motion. I accept that as being the proper interpretation and that the section puts an onus on the motor vehicle in

> motion. Indeed, the injury here was sustained by the plaintiff by reason of the defendant's motor vehicle in motion which pushed a nonmoving object (a van) into her legs. I, therefore, find that the onus set out in s.180(1) does apply in this case.

[59] Counsel for Jacob Nett draws my attention to a decision of this court by Lefsrud J., January 1995, ***Poirier v. Wood and Wood***, AJN No.79, who stated at page 4:

> ¶ 13 As to liability, the Plaintiff invokes the reverse onus provisions of s.180 of the Highway Traffic Act and asserts that the Defendant is totally responsible for the loss or damage sustained by the plaintiff.
>
> ¶ 14 The Defendant, on the other hand, challenges the reverse onus allegation and alleges that what occurred was an unfortunate and inevitable accident due to unexpected road conditions or, alternatively, that the Plaintiff was contributorily negligent.... Accordingly, he moved to the back of the vehicle where he opened the trunk and virtually simultaneously was crushed in the area of his knees against the back bumper of his vehicle with the resulting severe injuries.

at pages 5 and 6:

> ¶ 27 I accept the Defendant's testimony that her vehicle was almost stationary when the accident occurred and that what basically happened is that there was contact with what she felt was a solid object and an immediate rebound.
> ...
> ¶ 29 Having regard to the reverse onus provision contained in s.180 of the Highway Traffic Act, I am completely satisfied that it is not applicable in the circumstances and as a result the onus remains upon the Plaintiff to establish the Defendant's liability for the loss and damage sustained.
>
> ¶ 30 In that reference, it is firstly clear, pursuant to the definition contained in s.1(g), that a highway includes a ditch if it lies adjacent to and parallel with the roadway.
>
> ¶ 31 Section 180 itself states as follows:
>
> > 180(1) If a person sustains loss or damage by reason of a motor vehicle in motion, the onus of proof in any civil proceeding that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle is on that owner or driver.
> >
> > (2) This section does not apply in the case of a collision between motor vehicles on a highway.

> (3) In this section "motor vehicle" includes a tractor and a self-propelled implement of husbandry.

¶ 32 As set out in s.s.(2), the section does not apply in the case of a collision between motor vehicles on a highway. In these particular circumstance, I am satisfied that even though the Plaintiff's legs were between the two vehicles and that the accident took place in the ditch, this collision did in fact take place between motor vehicles on a highway, thus making the section inapplicable. In addition, having regard to the various authorities cited and the facts hereinbefore outlined, I am satisfied and adopt the comments of Henry, J. in *DeGurse et al v. Henry et al*, 47 O.R.(2d) p.172 at p.175 where, in considering a comparable provision of the Ontario Highway Traffic Act and similar circumstances, namely a driver having descended from his vehicle to survey a situation, he stated:

> In my opinion the plaintiff in the case at bar, who had just descended from his vehicle and was taking stock of the situation, is to be equated with the term "occupant".
>
> That is to say, he was not in the same position as a stranger to the accident such as a pedestrian walking alrong the highway.

¶ 33 I also agree that it is impossible to define or specify the elements which bring a case within s.180 or to formulate any general rule to determine in what case or class the statutory onus rests on the owner or driver of a motor vehicle. Obviously, the decisions in such cases must be made upon the particular evidence adduced at the trial and in this particular case I am satisfied that altough the Plaintiff was in the predicament of having driven his car into the ditch, he intended to take the staps necessary to extricate the behicle and to continue its operation. He certainly showed no indication that it was his intention to become a pedestrian and walk away from the situation.

The decision makes no reference to ***White et al. v Henton, Halase v. Sharpe, Lenauer v. Bate*** or ***Hilderman v. Rattray***, (all supra).

[60] Mr. Mestinsek also refers me to ***Simpson v. Bender*** (1995), 176 A.R. 34, a decision of Murray J. of this Court in October of 1995, at pp. 13 - 14:

> ¶ 51 The Plaintiff relies on s. 180(1) insofar as Paterson is concerned. That section reads:
>
> > "180(1) If a person sustains loss or damage by reason of a motor vehicle in motion, the onus of proof in any civil proceeding that the loss or damage did not entirely or solely arise through the negligence or

> improper conduct of the owner or driver of the motor vehicle is on that owner or driver."
>
> The answer is simply that I am satisfied, based on the evidence in this case that the loss or damage suffered by the Plaintiff did not entirely or solely arise through the negligence or improper conduct of Paterson.

[61] I am satisfied that "subsection 2" must be confined to two or more motor cars in motion" (***White v. Henton, supra***, a decision of the Appellate Division of the Supreme Court of this Province. I would follow that decision. Indeed, I believe it is binding on me. Accordingly, s-s (2) is not applicable and there is "an onus or proof" ..."that the loss or damage did not entirely or solely arise through the negligence or improper conduct of the owner or driver of the motor vehicle."

[62] I am satisfied that this onus would fall upon Mr. Nett. However, I have found negligence on the part of Mr. Link and on the part of the Selfs. Each such negligence, I am satisfied, contributed to the accident. Accordingly, Mr. Nett was not solely or entirely responsible for the accident and the burden or onus is discharged.

[63] I have found Jacob Nett to be negligent and Kenneth Link to be negligent and the Selfs also to be negligent. Automobile accidents are often caused by a merging or a confluence of the negligent actions of parties and it being that no one party could or should be held solely responsible for the accident that occurred. That is my view in this matter. I believe the negligence of each of the parties contributed to the accident and, of course, to the damages that resulted. It is now necessary to consider, therefore, contributory negligence and the degree to which each was at fault. Before doing so, I have reviewed and considered the circumstances of the accident and the actions of the parties. I am satisfied that the vast majority of the negligence must come to rest on Mr. Nett for colliding with a vehicle that was parked wholly on the shoulder, and a vehicle some warning of which was provided by the headlight of Mr. Link's pick-up truck. I find that the negligence should be apportioned as follows:

1) To the Defendant Jacob Nett: 80%

2) To the Defendants Tammy and Christopher Self: 10%

3) To the Plaintiff Link: 10%

[64] I request counsel to make an appointment to see me for the purpose of hearing representations on the matter of costs.

DATED at Calgary, Alberta, this 3rd day of April 2000.

_____

J.C.Q.B.A.

A correction has been issued for the above noted judgment as follows:

CORRIGENDA OF THE REASONS FOR JUDGMENT DATED APRIL 3, 2000
OF THE HONOURABLE MR. JUSTICE R.T.G. McBAIN

The name of plaintiff's counsel Ms. J. Gow has been changed to Ms. J. Goh.

Please replace the attached page 1 in your copy of the judgment.