

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
TYSON UDO DAVID, DIANE)	Peter M. White, for the Plaintiffs
ELIZABETH, UDO DAVID, and DIANA)	
LYNN DAVID,)	
)	Plaintiffs
- and -)	
)	
BILL CHIVERS-WILSON,)	Gregory R. Birston. for the
Respondent)	
)	
)	Defendant
)	
)	HEARD: November 1 st - 4 th & December
)	9 th , 1999, at Thunder Bay, Ontario

McCartney, J.

[1] This is a negligence action in which the Plaintiff, Tyson Udo David, claims damages for personal injury suffered when the snow machine he was operating struck a parked truck/trailer unit owned by the Defendant. The Plaintiffs mother, Diane Elizabeth David, her father, Udo, David, and her sister, Diana Lynn David, claim damages pursuant to the Family Law Act and at common law. I am advised by counsel that the question of the quantum of damages has been settled and the Court is only being asked to determine liability. I will divide my decision into the following headings:

- (a) evidence of the Plaintiffs;
- (b) evidence of the Defendant;
- (c) evidence of the experts for the Plaintiff and the Defendant;
- (d) the law;

(e) a discussion of the facts and the law; and,

(f) the conclusion.

EVIDENCE OF THE PLAINTIFFS:

[2] Tyson Udo David, the only Plaintiff who gave evidence herein, recited the following: he left Thunder Bay during the afternoon of March 8th, 1996, intending to go to a lodge (Pine Point Lodge) on Lac Des Milles Lac for a weekend of socializing, skidooing and ice fishing. He was driving his mother's half-ton truck with his snow machine (a 1995 Arctic Cat 580) on a trailer attached to the truck. He was with his friends, Richard Tonkin and Robert Eves. This group was to meet two other friends at Pine Point Lodge. The trip to the lodge, which is accessed from the Lac Des Milles Lac or Pine Point Road (which I will refer to hereinafter as the Road) involves traveling west from the city of Thunder Bay along the Trans-Canada Highway, and then turning south onto the Road for about ½ hour.

[3] The Plaintiff indicated he left work at 2:30 in the afternoon of March 8th, picked up his friends, and then about 4:30 or 5:00 o'clock went to his grandmother's house to pick up his snow machine. From there he left for Pine Point Lodge, stopping only to buy bait. He says it takes 1 ½ to 2 hours to get to the turn off and then another ½ hour to the Lodge. He thinks he got to the turn off about 6:30 p.m. He insisted, however, that he had phoned his mother in Thunder Bay, collect from Pine Point Lodge at 6:00 o'clock, which, if true, would indicate he was there considerably earlier than he at first thought. The Road, according to the Plaintiff, was hard packed, plowed snow with large snow banks, and it was dark by the time he got there. Visibility was clear. He noticed no parked vehicle on the Road, but noticed there were camps along the roadway.

(4) After the arrival at Pine Point Lodge, the Plaintiff and his friends met up with their friends in the cabin they had rented for the weekend. Each person had brought a case of beer with them. They socialized in the cabin, drank some beer, and went out onto the lake to check the state of the fishing with some ice fishermen.

[5] At about 9:30 p.m. the Plaintiff and Richard Token, both of whom had had two to three bottles of beer by that time, decided to go for a ride on the Plaintiff's snow machine.

[6] The Plaintiff, it should be noted, was a very experienced snow machine operator, having started driving these machines when he was six or seven years old, and having owned his own machine since 1994. The odometer on that machine on March 8th, 1998, showed a reading of 2,167 miles travelled. The Plaintiff indicated he often used his machine every weekend and was familiar with riding in camping areas, since his parents had a camp on Arrow Lake near Thunder Bay.

[7] After suiting up the Plaintiff, with Tonkin sitting behind him, left for their ride. Both had helmets with visors on. There was no visibility problems. The Plaintiff indicated he was driving with his visor up.

[8] It should be noted at this point that the Plaintiff's machine was a 1-up machine, i.e. intended for use by one person only. The difference between a 1-up and a 2-up machine is the following:

- i.) a 2-up machine has a larger seat and a backrest;

- ii.) a 2-up machine has handles for the passenger to hang on to; and,
- iii.) a 2-up machine has footrests for the passenger to place his feet on.

[9] The Plaintiff and Tonkin proceeded northerly back up the Road. He describes the ride during cross-examination as follows "I was zigzagging in a northerly direction going up the bank and down to the center of the right side of the road". He indicated he believed the speed limit to be 50 miles an hour and he believed he was travelling - at top speed - 50 kilometers per hour (30 m.p.h), because he remembers seeing "50" on his speedometer. It should be noted here that the only "50" on the speedometer on this machine which measures both miles per hour and kilometers per hour is 50 miles per hour.

[10] As far as lighting is concerned, the Plaintiff testified that this Road is not illuminated, but that he remembers having the high beams of his snow machine on. He remembers going up and down the right snow bank 6 to 10 times. He described what they were doing as "joyriding - sort of".

[11] As the moment of impact neared, the Plaintiff says he remembers coming around a curve - perhaps a curve to the left - and then observed a black thing on the Road. He says he saw the black thing about 60 feet back of it, just as he came down from the right snow bank. He remembers braking and turning his handle bars to the left to avoid the dark object - and that is all he remembers until he woke up in the hospital in Thunder Bay. Tragically, he lost the lower portion of his right leg as a result of the collision.

[12] The passenger on the snow machine, Richard Tonkin, gave evidence for the Plaintiff. He, like the Plaintiff, cannot remember anything from the time he observed the objects in front of them until he woke up in the hospital. His evidence is similar to the Plaintiff, but there are certain material differences:

- 1) he says he distinctly remembers the Plaintiff's visor being down during the ride;
- 2) he is certain they did not stop for bait on the way to the Lodge; and,
- 3) he insists that as their snow machine proceeded along the Road, it was at all times on the right hand side (on the travelled portion) maybe 2 feet from the snow bank, and "never strayed from that position". In cross-examination he confirmed he understood the difference between the travel portion of the highway as distinct from the snow bank. When asked about the Plaintiff's evidence of going up and down the snow bank, he replied "I cannot remember that".

[13] Ontario Provincial Police Constable Bernie Cowan also testified for the Plaintiff. The material points of his testimony are as follows:

- 1) the speed limit on the Road was 80 kilometers per hour;
- 2) it was a gravel Road - 2 lanes - each one measuring about 1.5 meters (an estimate);
- 3) the Road is 22 to 24 kilometers long;
- 4) there are 6 or 8 resorts, many cottages and a couple of full time homes along the Road;
- 5) he drove past the scene to Pine Point to interview the parties (and can't remember whether he stopped on the way in or the way out);

- 6) the Plaintiff did not appear to be intoxicated but admitted to drinking a couple of beers pre-accident;
- 7) the accident happened 1.2 kilometers from Pine Point Lodge;
- 8) he observed damage to the snow machine, the trailer and the trailer hitch;
- 9) he recalls seeing no skid marks from the snow machine;
- 10) he felt the truck/trailer unit was partly on the travelled portion of the Road;
- 11) he laid no charges;
- 12) as he returned to the accident scene he observed no visibility problems;
- 13) with the trailer empty the rear lights on the truck were visible;
- 14) he doesn't know if the vehicles were moved after the accident; and,
- 15) he couldn't recall questioning the owner of the truck/trailer unit.

[14] The Plaintiff called reply evidence in connection with the telephone bill relating to the call Mr. David made from Pine Point Lodge after he arrived. John David Francis is responsible for Bell Customer Service in Upsala Exchange area and Pine Point Lodge is in that exchange. He stated that the Upsala Exchange is in the Central Time Zone and so is an hour earlier than in Thunder Bay (Eastern Time Zone). He indicated, however, that the telephone call, Exhibit 3 (Pine Point Lodge's March 1996 telephone bill) at 5:47 p.m. on March 8th to Mr. David's home in Thunder Bay was a collect call - and so the time recorded would be the time in Thunder Bay. The call was recorded at 5:47 p.m. Eastern Standard Time.

EVIDENCE FOR THE DEFENDANT:

[15] The Defendant called 3 witnesses other than his expert, those being John Davis, the snowplow operator on the Road, Danielle Chivers-Wilson, the Defendant's wife, the Defendant himself, Bill Chivers-Wilson.

[16] John Davis has been grading the Road in summer and plowing it in winter for over 20 years. He uses a "Champion" grader, which has a main blade that hangs below the grader (called a mo board) as well as a wing blade. The mo board is angled to push the snow from the Road off to the right side and the wing blade pushes the snow further into the ditch. The Road is 17.5 miles long, it has a gravel base, it varies in width from 20 to 30 feet ie. wider at the corners. There are 5 commercial resorts on the Road and about 40 camp lots. The speed limit, while not posted is the usual speed for a secondary Road ie. 80 kilometers per hour. Mr. Davis remembers the winter of 1995/96 as being a winter of very heavy snow, and can remember plowing the Road once or twice a week at times. It is also a practice to do a "step back" if required ie. to push the bank further back to prevent it from sliding down onto the Roadway. Mr. Davis also indicated that it had been arranged with some cottagers, the Chivers-Wilsons being one of those, that an indent in the snow bank would be made by the plow to facilitate parking in front of their property along the Road. This indent would be about 6 or 7 feet deep and 20 or 30 feet long according to Davis. However, he indicated that as the season progressed, the indent got narrower and this was the case in March 1996. He confirmed that the roadway in front of the Chivers-Wilson cottage is some 20 to 22 feet wide.

[17] Danielle Chivers-Wilson testified that she and her then fiancé, the Defendant, left Thunder Bay on March 8th, 1996, to spend the weekend at the Chivers-Wilson cottage. She

left the school where she works about 4 o'clock, drove home in about 15 minutes, where the Defendant was waiting with his truck and skidoo trailer all loaded and ready to go. She changed her clothes, and they proceeded to drive nonstop to Pine Point Lodge, which takes about 1 ½ to 1 ¾ hours. They did not stop - just turned around there and came back and parked on the Road in front of the Chivers-Wilson property. She remembers it was not dark enough to require headlights on the Road at this point, and remembers the Defendant parking the truck/trailer unit against the snow bank - putting it partially off the Road. She indicates the weather was dry, and there was no snow splashing up on the back lights of the truck/trailer unit so there appeared to be no reason to clean them off after parking.

[18] The Defendant, Bill Chivers-Wilson, who is the owner of the truck/trailer unit involved in the accident, testified that Thunder Bay is on Eastern time and Lac Des Milles Lac is on Central time, the time there, then, being an hour earlier than in Thunder Bay. He recalled leaving Thunder Bay when Ms. Chivers-Wilson finished work on March 8th, at about 4 o'clock, with a ride of 1 ½ hours depending on conditions. On this date conditions were excellent and the Road itself was snow covered, bard packed and freshly plowed. He drove non-stop to Pine Point Lodge, turned around in the parking lot and arrived at his cottage driveway about 6:00 p.m. (Eastern time). The sun was still up, it was daylight, there was no need for headlights. He confirmed John Davis' evidence concerning the indent or push out at his driveway. He mentioned that some cottagers plow their driveway, some have push outs, and others do nothing in connection with winter parking.

[19] The Defendant testified that his vehicle was a Ford 250 ¾ ton truck, gray in color, open box with a trailer hitch mounted under the vehicle. Attached thereto was 1990 Ultra

Loader trailer with a flat deck for his skidoo - the deck sitting about 15 inches above the surface of the roadway. The truck has the usual tail lights, as does the trailer. The top of the trailer is lower than the bumper of the truck, and thus lower than the truck's tail lights. The trailer license plate was affixed to the fender on the driver's side.

[20] Mr. Chivers-Wilson pulled his truck up tight against the snow bank. He mentioned in cross-examination that he would usually have the passenger side tire of the trailer in the snow bank to make sure it was off the roadway - since it was wider than the truck (about 8 feet fender to fender). His practice, upon unloading, was to sweep the trailer deck free of ice, and then clean the truck and trailer tail lights if it were necessary - but it was not necessary on this occasion because the lights would be clean under the prevailing weather conditions.

[21] About 9:30 p.m. a neighbor came to the Chivers-Wilson residence to say that there had been an accident on the Road. The neighbor had Mr. Tonkin with her. The neighbor and Mr. Chivers-Wilson went out to the Road and found the Plaintiff pinned between the right side of the snowmobile and the back of the trailer (the snow machine was facing westerly towards the center of the roadway). He pulled the snow machine away from the trailer to give the Plaintiff some relief, went back to the cabin for Mr. Tonkin and then took Tonkin to Pine Point Lodge in his truck. He made sure that the police and ambulance were called and then he went back to get the Plaintiff who was being attended to at the scene by other cottagers. These other cottagers, in fact, took Mr. Davis in their truck to Pine Point Lodge, and Chivers-Wilson returned to his camp. Later that night two policemen came to speak to him about the matter.

[22] The Defendant, Bill Chivers-Wilson, testified that when he first arrived at the accident scene, and there being only a flashlight for illumination, he could see the snowmobile track for a good 100 feet back and further than this under his truck headlights at a later point. He said the snow machine did not leave skid marks, which are just scrape marks, as opposed to normal operating tracks which have notches in the Road surface made by the protrusion of the studs in the snow machine belt. He said that by following the snow machine tracks backwards from the trailer they indicated the snow machine had been travelling (in a northerly direction) up on the west snow bank, had come back down to the Road, about 50 feet from the trailer then angled across the Road and under the back of the trailer (which was parked on the east side of the Road).

[23] Tab 4, Exhibit 1 is a series of 14 photographs taken of the Road in the area of the Chivers-Wilson driveway on March 17th, 1996. The Defendant was with the photographer at this time and confirmed the conditions depicted in the photographs as resembling the situation on March 8th, 1996.

[24] In reviewing the photos in Exhibit 1, Tab 4, and from his experience over the years, it was pointed out by the Defendant that traffic along the Road seems to proceed along the center of the roadway, and moves to the right as approaching vehicles come on the scene. He is adamant that on March 8th, 1996, the position of his parked vehicle would not have prevented 2 vehicles from passing at that spot in any event.

THE EVIDENCE OF THE EXPERTS:

[25] The Plaintiff called on Bert Sissons as an expert witness. Mr. Sissons is a retired mechanical engineer, who also holds a masters degree in automotive engineering from the Chrysler Institute of Engineering. He also holds a masters degree in business administration. He is an enthusiast in the recreational vehicle field ie. A.T.V.s, snow machines and motorcycles. He is a certified safety instructor in relation to these machines. He belongs to associations concerned with these vehicles, and has published about 20 "semi-technical" magazine articles on recreational vehicles. He has taken courses on motor vehicle accident reconstruction, particularly at Northwestern University in 1992.

[26] Because of his extensive background in mechanical engineering and of his great interest in all things related to recreational vehicles, and his specific training in accident reconstruction, I allowed Mr. Sissons to testify as an expert in accident reconstruction as it pertains to snow machines. I declined, however, to allow him to testify as an expert in the area of safety regarding snow machines.

[27] **The Defendant called Richard Hermance** as an expert in accident reconstruction and safety as it pertains to snow machines. Mr. Hermance started his career in the field as a police officer, and after 10 years moved into the field on a full time basis. He is one of the first to be certified as an expert in traffic accident reconstruction by the international accreditation agency, The National Commission For Traffic Accident Reconstruction. He has been enlisted to set up safety and accident reconstruction programs for snow machines in New York State. He has lectured widely in Canada and the United States in the field of accident reconstruction and safety. He is presently on the Governor's Snowmobile Advisory Council for New York

State in the safety area. His major publication (Exhibit 6) entitled Snowmobile Accident Reconstruction A Technical & Legal Guide appears to be the major and only full text on the specific topic of snow machine accident reconstruction, and deals with the safe use of snow machines as well. He has done accident reconstruction in over 2,000 accident cases in his career. As a result of the above Richard Hermance was found to qualify as an expert witness in the area of accident reconstruction and safety and in particular in the area of snow machines.

[28] In attempting to come to a conclusion on the cause of the accident the experts, working with testimony from the parties, photos (both winter and summer) of the accident scene, and the video (Tab 9, Exhibit 1), attempted to determine the speed of the vehicle prior to the accident, as well as the distance the operator of a snow machine under the existing conditions should have been able to see the truck/trailer unit in front of him.

(29) The video would seem to indicate that, due to the curvature of the Road, 450 feet would be the minimum distance one could have a straight line view of the truck/trailer unit under perfect conditions. Taking that figure as a given, each of the experts conducted a visibility test. Mr. Sissons did his test on an unlit gravel Road on September 1st, 1999. He used a 1997 Arctic

Cat ZR580 SM and a 1991 Cameo Utility Trailer. As far as a motor vehicle, he used his own 1998 Dodge Dakota pickup truck. He taped over the right rear lights of both units, since he understood that the truck/trailer unit was parked so that these lights were not visible from behind. He then proceeded to approach the unit from behind on the snow machine and found as follows:

- (1) **low beams** - trailer faintly visible at 100 feet
truck - faintly visible at 300 feet and clearly visible at 100 feet
- (2) **high beams** - trailer faintly visible at 300 feet clearly visible at 100 feet
truck - faintly visible at 400 feet, faintly visible at 300 feet

[30] Mr. Hermance, on the other hand, did his tests in March, 1999, using a gray Ford 150 pickup truck which is very similar to the Chivers-Wilson truck, and a 1995 Arctic Cat EXT580 CC snow machine, which is the exact machine that the Plaintiff was driving on the night in question but a newer model. Furthermore, he went out onto a snowy field in darkness, which would much better approximate the winter conditions at the time of the accident. He did not cover any of the rear reflectors. In approaching the unit on the snow machine he found as follows:

- (1) **low beams** - 400 feet he could see the reflectors, 275 feet he could see everything
- (2) **high beams** - 600 feet he could see the reflectors, 300 feet he could see pretty much everything ie. license plate, trailer and truck and at 450 feet he could see the outline of the truck

[31] Next each of the experts testified as to the speed of the vehicle prior to the accident or any evasive action being taken. In his report, but prior to actually observing the damaged machine, Mr. Sissons estimated that the speed at impact to be 30 to 45 miles per hour. After seeing the damaged machine, he has revised his estimate downwards, determining that the impact speed was more like 15 to 20 miles per hour, and this would then bring his estimate of pre-impact speed to something under 50 miles an hour. Mr. Hermance, in reviewing the material supplied, including pictures of the damaged snow machine, estimated that based

mostly on the damage that the impact speed was somewhere between 25 to 30 miles per hour. However, he felt that if one had a 450 foot line of sight and had his snow machine under control then the operator should be able to either stop before impact or have no problem avoiding the collision by steering around the obstacle, even if the speed was as high as 50 miles an hour.

[32] Finally the experts testified to and disagreed on the effect on the operation of the snow machine of having 2 people on a 1-up machine as opposed to 1 person. Mr. Sissons explained that adding a second person does not change the center of gravity so there is very little difference in the operation in the machine. Further, the extra weight does not effect the stopping distance.

[33] Mr. Hermance disagreed on this point, claiming the extra person effects the handling of the machine as follows:

- (1) the driver is pushed towards the front of the machine making it harder to steer;
- (2) as you turn the passenger and driver swing to the opposite side making it easier to lose control;
- (3) when you add weight, then upon acceleration the weight moves towards the front tending to lighten the back and allowing it to slide more easily;
- (4) there is no place for the passenger to put their feet other than the tunnel or hold onto the machine other than to hold the driver's waist; and,
- (5) if you were riding up and down a snow bank and relying on centrifugal to hold you on, you have to go faster to keep 2 people from falling off.

THE LAW:

[34] In this case, the Plaintiffs claim that it was the negligence of the Defendant which caused their damages.

[35] Negligence, simply put, is the doing of something which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under circumstances similar to the evidence in the case. In other words, it establishes a standard of care against which the Defendant's conduct is judged in determining whether he or she is or is not liable to the Plaintiffs for their damages.

[36] If it is found that two or more persons negligence contributed to the damages suffered by the plaintiff, then the liability for damages will be apportioned according to the degree of responsibility, even if one of those contributors is the plaintiff himself

[37] Causation is also an important consideration when considering liability for negligence. Mere negligence does not establish liability. To do this, the negligence must be a direct contributing cause of the accident, i.e. the proximate cause.

[38] Causation can play into the determination of liability for negligence in another way, that being the concept of ultimate negligence. This concept is succinctly set out in the judgment of Addy J. in *Seniunas v. Lou's Transport et al.*:

It seems abundantly clear from these cases that notwithstanding the negligence of a plaintiff, a defendant will be held fully and solely liable under the doctrine of ultimate negligence, where a clear line can be drawn between the negligence of the plaintiff and that of the defendant where the negligence of the plaintiff is merely a *causa sine qua non* and is not in any way a *causa causans*. Where a defendant either saw the plaintiff's car and from that distance could have easily avoided the accident with any ordinary care or where, being in a position to clearly see the plaintiff's car in front of him, a defendant could have easily, and without any difficulty or special skill, have avoided hitting it, then in either case the doctrine of ultimate negligence applies. The principles establishing whether ultimate negligence or contributory negligence should apply are relatively simple, when considered in the abstract. Yet, their application to concrete factual situations often creates some difficulty.

DISCUSSION:

[39] The Plaintiffs' position is that the sole cause of the accident was that the Defendant chose to leave his truck/trailer unit parked on the side of the Road, perhaps on the highway and perhaps on the roadway itself, in contravention of the Highway Traffic Act and in particular s. 62. S. 62 requires a vehicle to have specified lights and have them lit one-half hour before sunset to one half hour after sunrise. By leaving his vehicle parked without its lights lit, this, says the Plaintiff, indicates negligence. Furthermore, the Plaintiff points out that there are other things the Defendant could have done to avoid the accident, i.e. he could have cleared out his driveway so his vehicle was not left on the Road, he could have had a lighted lamp at the end of his driveway to assist others in seeing his parked vehicle, or he could have parked at the Lac Des Milles Lac Lodge and used a snow machine to come down to his cottage.

[40] The Defendant takes issue with the Plaintiffs' interpretation of s. 62 of *the Highway Traffic Act*. He says this section is not intended to cover parked vehicles, otherwise it would mean all parked vehicles would have to leave all their lights on, which defies common sense.

He points out that s. 170 of the *Highway Traffic Act*, dealing with parking on roadways, sets out that there should be no parking on roadways where it is practicable to park elsewhere, and also says that there should be no parking on a highway where it would interfere with snow removal or the movement of traffic.

[41] The Defendant points out that:

- (1) he did take precautions by having the snowplow make an indent in the snow bank in order that he could park his vehicles off the roadway; and,
- (2) he parked his vehicle tight against the snow bank with the trailer partially up onto the snow bank.

[42] The real issue here is not so much how the conduct of the Defendant contributed to the accident as the conduct of the Plaintiff. It is not clear to me whether or not the Defendant's truck/trailer unit was in position at the end of his driveway when the Plaintiff drove by on his way to Lac Des Milles Lac Lodge, the evidence is too contradictory to come to any conclusion. Consequently I am not considering this situation in coming to my conclusion. But what is clear is this:

- (1) the truck/trailer unit, according to the experts, could have been easily seen between 300 and 450 hundred feet back. At 30 mph. (50 kph.), which the Plaintiff insists was his speed, he could have stopped easily in those distances. Even up to 40 mph. (65 kph.) he should have been able to stop safely. And at 50 mph. (80 kph.) he should have been able to slow down sufficiently to safely maneuver around the truck/trailer unit

and avoid the accident. (See Experts Reports – Exhibit 1 - Tabs 11 and 12) It should also be noted in passing that s.14 of the Motorized Snow Vehicles Act would set the maximum speed on a snow machine on the Road at 30 mph. (50kph).

- (2) the Plaintiff, Tyson Udo David, likely had three bottles of beer before going for his ride, as did his passenger, and alcohol increases the perception/reaction time when an object is sighted;
- (3) he was riding with a passenger on a 1-up machine, and as the expert, Richard Hermance testified, this can be dangerous for the reasons mentioned above;
- (4) the Plaintiff, when all the evidence is considered, was probably going down the Road and up and down the banks. Just prior to the accident, he came down the bank on the West side of the Road heading for the East bank and that is why he did not notice the truck/trailer unit until he was about 60 feet away from it The light on his snow machine would not have illuminated the truck/trailer unit until he was heading down the bank and in its direction. If he had merely been travelling down the roadway, at a safe speed, the lights on his snow machine would surely have picked up the truck/trailer unit, and he would have noticed it, long before it became a danger since, as I indicated before, he could have either stopped or steered around it.

CONCLUSION:

[43] So the point of the matter is this. The Defendant parked his truck/trailer unit on the side of a fairly remote Road with several reflectors and plenty of distance in either direction

for other traffic to observe it. Pictures taken a few days later (Exhibit 1, Tab 4) and described as approximately the condition on the date of the accident, lead one to conclude that the unit was partially on the highway, and perhaps slightly on the roadway, but with lots of room for traffic to pass, and in all likelihood with lots of room for two vehicles to pass at that point. In any event, the truck/trailer unit was the *causa sine qua non* of the accident. The experts say that the Plaintiff should have easily seen this unit some 300 to 450 feet back. The reason why he did not avoid the collision was because of the manner in which he was driving - this was the *causa causans* of the accident. Additional reasons could have been his speed, alcoholic consumption, or the effect of two riders on a 1-up machine. If I were to find the Defendant negligent, and so responsible or partially responsible for the Plaintiffs damages, I would have to conclude that the Defendant had a legal duty to protect the Plaintiff from his unreasonable use of the highway. This is not the law.

[44] This is clearly a case where there is a clear line which can be drawn between the negligence of the Plaintiff and of the Defendant. As was said by the Supreme Court of Canada in *Brooks v. Ward And The Queen*² :

I do not believe that the-appellant can be charged with negligence which contributed to the accident. In a case of *McKee & Taylor v. Malenfant*, [19541, 4 D.L.P, 785 at p. 788, S.C.R. 651 at p. 655, it was held by the majority of the Court that where a clear line can be drawn between the negligence of the plaintiff and defendant, it is not a case of contributory negligence at all. When a driver sees a car in his path, and has plenty of opportunity to avoid it but fails to do so, there is no contributory negligence and he must bear the fall responsibility. Or if, by his own negligence, he disables himself from becoming aware of a danger and cannot therefore avoid the accident, he is the only party to blame.

[45] All considered therefore, the Plaintiffs case is dismissed.

[46) The parties may speak to me regarding costs within the next 30 days if they cannot agree on the cost disposition.

Mr. Justice J.F. McCartney

Released: December 21st, 1999