

**IN THE SUPREME COURT OF CANADA**

FINAL DRAFT

(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

**DONNA LAWRENCE**

Applicant  
(Defendant)

-and-

**HER MAJESTY THE QUEEN**

Respondent  
(Crown)

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**APPLICATION FOR LEAVE TO APPEAL**

Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended

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**PART I - STATEMENT OF FACTS**

**(a) Test Case: Effect of Police Losing Evidence, Right to Counsel, Juror Bias and Duplicitous/Duplicative Charges**

1. This test case is about:

- key evidence lost by police
- the right to counsel
- juror bias
- whether a person can be charged and convicted twice for the same delict.

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**(b) Brief Chronology of Facts**

2. A brief chronology of the facts are as follows:

- On Wednesday, May 28, 1997, Donna Lawrence, a 47 year-old married working mother of two woke at 5:00 a.m. to prepare for her day. As a business development officer with the Economic Development Department for the Province of Nova Scotia she was to give a presentation, at 3:30 p.m. that day, on economic development to 100 women at the Gaelic College, St. Ann's Bay, Cape Breton. Donna gave herself at least 2 1/2 hours to make the trip as she had never been to St. Ann's before.

20

*Ref.:* Trial Transcript, pp. 1114 -1118, paras 42-62 [Tab 2A]

- Donna is very good at her job, very seldom has a drink, and is highly thought of and respected by supervisors, colleagues and others, as noted below.
- Donna's supervisor in the Nova Scotia Department of Economic Development is Mr. Ron Kennedy, and of the 14 years he knew Donna was her supervisor for the last 9. He says he "is not aware of any alcohol use by [Donna], either during or after work hours, other than on one occasion in fourteen years when she had one glass of wine with a meal."

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*Ref.:* Presentence Report, p. 4 [Tab 2B]

- Mr. Chris Pelham of the Acadia Centre for Small Business worked with Donna for 7 years, and with her put together a professional certification program for small business counsellors. He described Donna as "talented, competent, dedicated, hard working and honest." And though Donna suffers from a knee injury causing her considerable pain at times, she still tries to bicycle, swim, cross-country ski, go dancing with her husband, and has even tried sky-diving.

*Ref.:* Presentence Report, p. 5 [Tab 2B]

- Prof. Wayne King of the Business Administration Faculty of Memorial University in St. John's has known Donna for 6 years, working with her in developing regional programs for small business in the Atlantic Region for 5 years and has also come to know her family. He says Donna "will sometimes have a glass of wine with dinner", that Donna "has been the sole-supporter of her family since her husband's illness", that the accident is "totally outside of [Donna's] character and behaviour", and most importantly describes Donna as "one of the finest people he's ever met in his life [and] is of exemplary character".

10 *Ref.:* Presentence Report, p. 6 [Tab 2B]

- Donna's only previous contact with the police was as a volunteer for her community. Constable Brad Parks of the RCMP says Donna "was a big supporter of community initiatives particularly for youth...She was a role model in the community, particularly for young ladies."

*Ref.:* Presentence Report, p. 6 [Tab 2B]

- It was as a business development officer with Nova Scotia Economic Development that Donna was going to St. Ann's to give that talk to 100 women. As noted, she'd never been to St. Ann's before, never driven there, and gave herself 2 1/2 hours to make the 85 mile trip. She took with her snack food and a bottle of mouthwash to use before her talk. Mouthwash contains from

20 25% to 60% alcohol.

*Ref.:* Trial Transcript, pp. 1114 - 1118 [Tab 2A]

- Prior to driving to St. Ann's, Donna had gotten up early to work on her computer at home in the morning on a paper due next day for a correspondence course she was enrolled in at the University of Waterloo, and worked through the morning. She left at 12:30 p.m. as planned and drove to her office to pick up material for the presentation and proceeded on to the Gaelic College right after. She had a provincial map of Nova Scotia spread out on the front seat beside her to follow.

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- On arriving in the St. Ann's area, Donna recalls being frustrated by not being able to locate the Gaelic College, and wanted to get there early for her talk. On the way to the college, her vehicle and another were involved in an accident. She is blank about the accident itself, even though the point of collision with the other car was on Donna's own side of the road. Her recollection

after the accident are of being in the ambulance for what seemed like a long time, seeing brown stains on her clothes and thinking they were her blood, and arriving at the hospital. Donna wanted to know how the people in the other vehicle were, and does recall being frustrated that no one could give her any information about the people in the other car.

*Ref.:* Trial Transcript, pp. 1119-1121, paras 68-80 [Tab 2A]

3. From the evidence of the witnesses called at trial the following occurred just prior to and immediately after the accident:

- 10 • Donna drove past the turnoff to the Gaelic College and, having missed the turnoff, turned her vehicle around, stopped it on the highway, and looked at the road map spread out on the seat. She again missed the turnoff while reaching to retrieve the road map or cell phone and started to drift over into the next lane.

*Ref.:* Trial Transcript, p. 603, para 49 [Tab 2A]

- 20 • The driver of the other vehicle, Barb MacRae, saw Donna drifting, and pulled over into Donna's lane. At the same time, Donna pulled her vehicle back into her own lane. The result was a head-on collision in Donna's lane. The passenger in the other vehicle was killed. The expert testimony was that once each driver had committed to change lanes, there was no time for further reaction on the part of either driver.

*Ref.:* Trial Transcript, pp. 917-918, p. 921, para 102; pp. 1041-1042 [Tab 2A]

- Donna's vehicle was a 1995 Chrysler Sebring, was insured, safety inspected and had proper air pressure in all its tires. There was no alcohol found in Donna's vehicle. There was a bottle with mouthwash which police seized then later lost.

*Ref.:* Trial Transcript, p. 784, para 49-50, p. 778, paras 25-26 [Tab 2A]

- 30 • The evidence was that the other vehicle was not insured, and was badly rusted. The mechanic who inspected the vehicle said the back tires were "half flat", and this would have negatively affected stability and handling. Expert evidence indicated that the car would not have passed a safety inspection. It was a 1987 Ford Tempo. There was an unexplained "bottle of rum and several empty beer bottles" located in the other vehicle which were not seized by the police.

*Ref.:* Trial Transcript, pp. 389, paras 35-38, p. 395, paras 82-87; pp. 781- 787, paras 32-71, pp. 788-789; p. 792, para 95; p. 793, paras 96-99 [Tab 2A]

- The accident scene was wet all over, from wind-shield wiper fluid (which contains alcohol), gasoline, and yes blood, in both cars.  
*Ref.:* Trial Transcript, p. 786, para 61, pp. 790-791, p. 792, paras 90-94 [Tab 2A]
- Donna's foot was injured in the accident and she had difficulty walking.  
*Ref.:* Trial Transcript, pp. 564, 569 - 570, 933, 934 [Tab 2A]
- 10 • The accident happened at 3:00 - 3:15 PM in the middle of the afternoon.  
*Ref.:* Trial Transcript, pp. 400 - 401 [Tab 2A]
- The police officer at the scene said he saw a map of Nova Scotia spread out on the front seat of Donna's vehicle.  
*Ref.:* Trial Transcript, pp. 402, 405 [Tab 2A]
- 4. As to smelling alcohol, from mouthwash or otherwise:
  - Barbara MacRae (driver of the other car), Ronald Bonnar (electrician and Volunteer Fireman) Janet MacCuspic, R.N., Frank MacRae (son of the deceased) and Osborne Burke (Auxiliary R.C.M.P. Officer) all testified that they could not smell alcohol coming from Donna. And when Paramedic Travis MacNeil conducted his face-to-face initial assessment of Donna, he testified he also could not smell alcohol from Donna.  
*Ref.:* Trial Transcript, p. 521, para. 31; p. 526, paras. 43-44 [pp. 605-606, para. 57; p. 611, paras. 86-90; p. 612, paras. 91-93; p. 740, para. 33; p. 378, paras. 120-123; p. 455, para 49; p. 473, paras. 133-138; pp. 648-49, para. 47-48; pp. 687-88; p. 689, para. 201; pp. 690-692 [Tab 2A]
  - 20 • Sally MacDonald (Licenced Practical Nurse) said she wasn't sure, but that she thought she detected a moderate smell of alcohol. Crown witness Shane MacFarlane said that he smelled alcohol coming from Donna's vehicle but did not describe the smell as either moderate or strong. Lynn Dunlop, R.N., Patricia Nicholson, R.N., Officer Michael Towle (who was suffering from a bad head cold on the date of the accident) said they could. Though neither Sergeant MacKenzie nor ambulance attendant Duncan MacLean had noted any smell of alcohol in their notes compiled at the time of the accident, at the trial they said they did.  
*Ref.:* Trial Transcript, p. 486, paras. 24-25; p. 750, paras. 15-17; p. 758; p. 759, para. 64, p. 718, paras. 21-22; p. 763, paras. 14-16; p. 814, para. 58; p. 833, paras. 114-115; p. 417-418, para. 25; p. 418, para. 27, p. 428, paras. 72-75; p. 538, para. 92; p. 588, paras. 51-54; p. 589, para. 55; p. 565-66, para. 12 [Tab 2A]
  - 30

- At the local hospital, Dr. Genge described Donna as coherent but walking. He failed to take either x-rays or bodily fluid samples. In both direct and cross-examination the doctor said that Donna both spoke and answered his questions coherently, that there was nothing unusual in her conversation.

*Ref.:* Trial Transcript, p. 563-64, para. 7; pp. 565-566, paras.11-12; p. 566, paras. 13-18, p.567, para 20; pp. 569-570, paras 33-35, p. 571, paras 45-46 [Tab 2A]

5. As to difficulty walking/staggering:

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- Three days after the accident Donna went to emergency because she still had difficulty walking. Dr. MacLean said she had a painful foot, sore knees and a bruise on her head. X-rays confirmed that Donna's foot was broken in two places and that the particular nature of the breaks would have made walking difficult. The doctor also testified that Donna, still three days later, had a positive neurological sign called the Dabinsky sign indicating an injury to the central nervous system - in layperson's terms, that Donna had suffered a concussion. Dr. MacLean also testified that the doctor who saw her right after the accident may not have been able to diagnose the concussion because that diagnosis is often formed after the fact.

*Ref.:* Trial Transcript, p. 933, paras. 7-8, p. 934, paras. 11-12, p. 935, paras. 19-21; p. 941, para. 49, p. 948, paras. 92-94 [Tab 2A]

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6. In summary:

| <u>Who Testified Confused/Disoriented</u> | <u>Who Testified Difficulty Walking</u> | <u>Who Testified No Smell of Alcohol</u> | <u>Who Testified Smell of Alcohol</u> |
|---|---|--|---------------------------------------|
| Osborne Burke                             | Osborne Burke                           | Osborne Burke                            | -                                     |
| -   | -                                       | Ronald Bonnar                            | Austin MacKenzie                      |
| Shane MacFarlane                          | -                                       | Janet MacCuspic                          | Shane MacFarlane                      |
| Roland Genge                              | Roland Genge                            | Frank MacRae                             | Roland Genge                          |
| Duncan MacLean                            | -                                       | -  | Duncan MacLean                        |
| -   | -                                       | -  | -                                     |
| -   | Lynn Dunlop                             | -  | Travis MacNeil                        |
| -   | Sally MacDonald                         | -  | Lynn Dunlop                           |
| -   | -                                       | -  | Sally MacDonald                       |
| Michael Towle                             | Michael Towle                           | -  | Patricia Nicholson                    |
| -   | Travis MacNeil                          | Travis MacNeil (initially)               | Michael Towle                         |

7. Donna took the stand in her own defence, and testified:

- She drank no alcohol that day.
- She was not impaired.

*Ref.:* Trial Transcript, pp. 1130-31, para. 125; p.1131, paras. 126-127 [Tab 2A]

8. Donna was convicted on all four counts:
- Criminal negligence causing death.
  - Causing death in the operation of a motor vehicle.
  - Criminal negligence causing bodily harm.
  - Causing bodily harm in the operation of a motor vehicle.
9. The day after the trial, Donna's lawyer happened to be in Baddeck near where the trial was, and was approached by a man he happened to know who'd been told what one juror said to another juror in court before the trial started. As a result of that conversation, Donna's lawyer hired an investigator to take statements from persons concerned. Those statements - involving Juror No. 12 - were used as a basis for the Donna's Application under s. 24(1) of the *Charter*. In that Application, Donna's lawyer raised the issue of juror bias and its impact on the *Lawrence* trial.

*Ref.:* Notice of Motion for Stay of Proceedings re: Jury Bias [Tab 2 C];

Trial Transcript at pp. 1374-1382 [Tab 2A]

10. What happened was that before the trial, Juror No.12 told another prospective juror, while both were sitting in the courtroom waiting for the judge to enter: "**I don't know why they would be having a trial over this**, the woman was drunk and on the wrong side of the road". The Court of Appeal said this comment did not give rise to any reasonable apprehension of bias.

*Ref.:* Reasons of Court of Appeal, at par.97-131 [Tab 3B].

11. Donna said she "feels awful and wishes she had died rather than the victim".

*Ref.:* Presentence Report, p. 7 [Tab 2B]

12. Donna now lives at home with her (retired) husband. They live on Canada Pension (\$800 her, \$465 him; their total family income). Their two boys attend local universities (Chris 3<sup>rd</sup> year, Acadia; Jessie 2<sup>nd</sup> year U. N. B.). They have a house worth \$120,000, and debts of \$125,000). Donna now sees a psychiatrist for depression; and long term disability payments of 70% of her previous income from a previous accident have been cancelled because of this accident. Her husband says "He loves his wife and family very much and the complete family is very close."

*Ref.:* Presentence Report, pp. 3-5, 7 [Tab 2B]

**PART II – POINTS IN ISSUE**

13. This case raises the following issues of public importance that warrant the consideration of and guidance of this Honourable Court:

**(a) Where Juror Bias at the Very Beginning of the Trial Makes the Trial Unfair**

- Is the test for partiality applicable to cases where it is argued that trial fairness has been compromised by juror bias at the outset of the trial?

10 **(b) Jurisdiction of the Superior Court**

- Does the judge presiding over an accused's trial before a judge sitting with a jury have the jurisdiction to declare a mistrial, on the basis of juror bias, once the jury has rendered a guilty verdict but before the judge has given sentence?

**(c) Key Evidence Lost**

- Where the evidence (here mouthwash containing alcohol) is seized by police then lost by police (absolutely critical evidence because the officer at the scene used the apparent smell of alcohol to both arrest and charge) such evidence is pertinent and crucial.

20 **(d) Breach of Right to Counsel is Never of "No Affect"**

- A breach of a person's right to counsel at the time of arrest on the basis that the person did not know the full extent of her legal jeopardy, is never of "no affect" as claimed by the Court of Appeal.

**(e) Duplicitous/Multiplicity of Charges**

- Where on the basis of one motor vehicle accident the indictment charges two death-causing charges to one individual (criminal negligence causing death and causing death in the operation of a motor vehicle), and two bodily-harm causing charges to another individual (criminal negligence causing bodily harm, causing bodily harm in the operation of a motor vehicle), is this duplicitous/multiplicitous in that one person has in law been charged (and here, convicted) of killing one person twice, and causing bodily harm to another one person twice?

**PART III - STATEMENT OF ARGUMENT**

**(a) WHERE JUROR BIAS AT THE VERY BEGINNING MAKES THE TRIAL UNFAIR**

14. Is the test for partiality applicable to cases where it is argued that trial fairness has been compromised by juror bias at the outset of the trial?