

(EXTRACT)

MIDDLE DRAFT

PART I—STATEMENT OF FACTS

(a) Test Case

1. This test case is about juror bias and whether the presumption of juror impartiality is rebuttable at law under the current test for determining judicial bias. It is also about lost evidence and the right to counsel; and whether an accused person can be convicted twice for the same delict.

(b) Brief Chronology of Facts

2. A brief chronology of facts are as follows:

- On Wednesday, May 28, 1997, Donna Lawrence, the Applicant herein, a 47 year-old working mother of two arose at 5:00 a.m. to prepare for her day. As a business development officer with the Economic Department and Tourism Department for the Province of Nova Scotia she was scheduled to give a presentation, at 3:30 p.m., on economic development to more than 100 women at the Gaelic College, St. Ann's Bay, Cape Breton, Nova Scotia. Mrs. Lawrence gave herself at least two hours to make the trip as she had not been to St. Ann's before. Her presentation along with the networking session and dinner to follow meant that she would not return home until 10 p.m. that evening.

Ref.: Trial Transcript, pp. 1114-1118, paras 42-62 [Tab E.26]

- As part of her employment, Mrs. Lawrence was enrolled in a correspondence course with the University of Waterloo and her final paper was due the following day. She worked on her paper at home throughout the morning as her office computer was not functioning. Mrs. Lawrence made several calls to her office to collect messages. She left home around 12:30 p.m. and drove to her office to pick up material for the presentation and proceeded on to the Gaelic College at about

1:00 p.m. Mrs. Lawrence's memory of what happened after leaving her office is limited. She is unsure if her recollections are her own or generated by what she had heard since the accident.

Ref.: Trial Transcript, pp. 1118-1119, paras 62-70 [Tab E.26]

- **Donna Lawrence recalls being frustrated by not being able to locate the Gaelic College. She recalls nothing of the accident itself. Her recollections after the accident are of seeing Osborne Burke while still in her vehicle, being in the ambulance for what seemed like a long time, seeing brown stains on her clothes and thinking they were blood, and arriving at the hospital. Mrs. Lawrence recalls being frustrated that no one would give her any information about the people in the MacRae vehicle.**

Ref.: Trial Transcript, pp. 1119-1121, paras 68-80 [Tab E.26]

3. The evidence of the various witnesses called at trial suggests that the following occurred just prior to and immediately after the accident:

- **Mrs. Lawrence drove past the turnoff to the Gaelic College and, having missed the turnoff, she turned her vehicle around, stopped it on the highway, and consulted her road map. She again missed the turnoff and momentarily wandered into the left lane of traffic while reaching to retrieve the road map or cell phone.**

Ref.: Trial Transcript, p. 603, para 49 [Tab E.15]

- **Barbara MacRae, the driver of the other vehicle, pulled immediately into her left lane of traffic. At approximately the same time, Donna Lawrence pulled her vehicle back into her own lane of traffic. The result was a head-on collision in the lane of the Lawrence vehicle. 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 [Tab E.23];
pp. 1041-1042 [Tab E.25]**

- **The Lawrence vehicle was a 1995 Chrysler Sebring and was in perfect working order at the time of the accident. It was insured, safety inspected and had proper air pressure in all its tires. There was no alcohol found in the Lawrence vehicle.**

Ref.: Trial Transcript, p. 784, para 49-50, p. 778, paras 25-26 [Tab E.21]

- **The MacRae vehicle was a 1987 Ford Tempo, badly rusted, uninsured, with the rear tires under-inflated which would have affected the stability and handling of the vehicle. Expert evidence indicated that the tempo would not have passed a safety inspection at the time of the accident. There was a full bottle of rum and several empty bottles located in the MacRae Ford Tempo which had not been seized by the investigating R.C.M.P. officer.**

Ref.: Trial Transcript, pp. 389, paras 35-38, p. 395, paras 82-87 [Tab E.7]; pp. 781-787, paras 32-71, pp. 788-789; para 95; p. 793, paras 96-99 [Tab E.21]

- **Fluids from the vehicles permeated the scene.**

Ref.: Trial Transcript, p. 786, para 61, pp. 790-791, p. 792, paras 90-94 [Tab E.21]

4. On the issue of whether or not Donna Lawrence was impaired at the time of the accident there was conflicting evidence

- **Ronald Bonnar, electrician and veteran Volunteer Fireman, Janet MacCuspik, R.N., Frank MacRae, son of the deceased, Barbara MacRae, driver of the 1987 Ford Tempo, and veteran Auxiliary R.C.M.P. Officer Osborne Burke testified that they could not smell alcohol coming from the Appellant. Paramedic Travis MacNeil testified that he did not smell alcohol off the Appellant when he conducted his face-to-face initial assessment of the Appellant while she was sitting in her vehicle.**

Ref.: Trial Transcript, p. 521, para 31; p. 526, paras 43-44 [Tab E.11]; pp. 605-606, para 57; p. 611, paras 86-90; p. 612, paras 91-93 [Tab E.15]; p. 740, para 33 [Tab E.18]; p. 378, paras 120-123 [Tab E.6]; p. 455, para 49; p. 473, paras 133-138 [Tab E.9]; pp. 648-49, para 47-48; pp. 678-88; p. 689,

para 201; pp. 690-692 [Tab E.16]

- Sally MacDonald, L.P.N. testified that she thought she detected a moderate smell of alcohol emanating from the Appellant but was not sure. Crown witness Shane MacFarlane testified that he smelled alcohol coming from the Appellant's vehicle but did not describe the smell as either moderate or strong.

Ref.: Trial Transcript, p. 486, paras 24-25 [Tab E.10]; p. 750, paras 15-17; p. 758; p. 759, para 64 [Tab E.19]

- 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, and Sergeant Austin MacKenzie testified that the smell of alcohol from the accused was strong. Duncan MacLean testified that he put his head in the Appellant's car and smelled a strong smell of alcohol. Neither the Sergeant nor Duncan MacLean had noted the smell of alcohol in their notes compiled at the time of the incident. Crown witness Dr. Genge also testified that the Appellant smelled of alcohol.

Ref.: Trial Transcript, p. 718, paras 21-22 [Tab E.17]; p. 763, paras 14-16 [Tab E.20]; p. 814, para 58; p. 833, paras 114-115 [Tab E.22]; p.417-418, para 25; p. 418, para 27, p. 428, paras 72-75 [Tab E.8]; p. 538, para 92 [Tab E.12]; p. 588, paras 51-54; p. 589, para 55 [Tab E.14]; p. 565-66, para 12 [Tab E.13]

- Dr. Roland Genge, described the Appellant as coherent but smelling of alcohol. He indicated that she walked with a stagger. However, he failed to take either x-rays or bodily fluid samples. In both direct and cross-examination the doctor testified that the Appellant both spoke and answered his questions coherently, that there was nothing unusual in her conversation.

Ref.: Trial Transcript, p. 563-64, para 7; pp. 565-66, paras 11-12; p. 566, paras 13-18, p. 567, para 20; pp. 569-70, paras 33-35, p. 571, paras 45-46 [Tab E.13]

- Dr. Bernie MacLean testified that he saw the Appellant on May 31, 1997, three days following the accident, in the Emergency Department. The Appellant complained of a painful foot, sore knees and a bruise on her head.

X-rays confirmed that the Appellant's foot was fractured in two places and that the nature of the fractures would have made walking difficult. He further testified that the Appellant had a positive neurological sign, the Dabinsky sign, indicating an injury to the central nervous system; in layman's terms, the Appellant suffered a concussion. He testified that with respect to concussion, the physician who saw her on May 27, 1997, may not have been able to diagnose the condition as such given that the diagnosis often is 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 E.24]

- The Appellant testified that she had not been impaired by alcohol on the day of the accident, that she had not been drinking that day.

Ref.: Trial Transcript, pp. 1130-31, para 125; p. 1131, paras 126-27 [Tab E.25]

5. After jury deliberations, the Applicant was convicted on all four counts in the indictment. On July 2, 1999, the day following the convictions, defence counsel for the Applicant had been in Baddeck, Nova Scotia, and was approached by Mr. Henry Fuller who engaged Mr. Nicholson in conversation about the *Lawrence* trial. As a result of that conversation, counsel for the Applicant dispatched a private investigator to the Baddeck area to take statements from the persons concerned. Those statements dated July 7, 1999, were used as a basis for the Applicant's application under s.24(1) of the *Charter* filed in the Supreme Court of Nova Scotia on August 13, 1999. In that Application, counsel for the Applicant raised the issue of juror bias and its impact on the *Lawrence* trial.

Ref.: Notice of Motion for Stay of Proceedings re: Lost Evidence and Breach of the Right to Counsel, issued on August 13, 1999 [Tab C.1];
Trial Transcript at pp. 1374-1382 [Tab E.29]

6. The Learned Trial Judge heard the Application in Chambers on September 7, 1999, but held, on September 9, 1999, that he did not have the jurisdiction to hear the application. The Nova Scotia Court of Appeal agreed with the trial judge that a

verdict having been rendered and the jury having been discharged, he had no jurisdiction to consider the motion of a mistrial.

**Ref.: Trial Transcript, pp. 13-83-1429 [Tab E.29];
Reasons of Court of Appeal, para 100 [Tab B.2]**

7. The Nova Scotia Court of Appeal heard oral argument on October 3, 2000 and dismissed all 12 grounds of appeal on February 27, 2001.

Ref.: Reasons of Court of Appeal, paras 140-141 [Tab B.2]