JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 72/91

COR: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE WOLFE, J.A. (AG.)

BETWEEN	**ROY MYERS**	**1ST DEFENDANT/APPELLANT**
AND	**LOXLEY BARRETT**	**PLAINTIFF/RESPONDENT**
AND	**PAUL BIERSAY**	**2ND DEFENDANT/RESPONDENT**

Miss Ingrid Mangatal for Appellant

Clifton Daley and **Miss Carol Vassell** for 2nd Defendant/Respondent

Plaintiff/Respondent unrepresented

June 29, 30 & July 16, 1992

WOLFE, J.A. (AG.)

At the trial of this action Cooke, J., found the first defendant/appellant 80% to be blamed for the accident and the second defendant/respondent 20% to be blamed. On appeal against the apportionment of liability, by the first defendant/appellant, Roy Myers, we allowed the appeal, set aside the order of apportionment made below and apportioned liability as follows:

> 20% as against first defendant/appellant and 80% as against the second defendant/respondent. Costs of the appeal to the appellant to be taxed if not agreed.

At the time we promised to reduce our reasons into writing. We now do so.

A summary of the evidence is necessary to understand the basis of our decision. The plaintiff was injured by the first defendant's car colliding with him, as he stood on the paved area in front of a shop owned by the second named defendant/respondent.

This shop is situate at York in the parish of St. Thomas. The accident occurred at about 10.00 p.m. on the 15th day of May, 1988. The Plaintiff, when he testified, was unable to say how the accident was caused or what was the manner of driving which occasioned the accident. Mr. Tonsingh who represented the plaintiff in the Court below initiated a move which can only be referred to as that of a Chess Master. He called the first defendant/appellant to testify on behalf of the plaintiff.

The first defendant/appellant testified that at the material time he was travelling from Yallahs to Seaforth along the York main road. On reaching York he observed a vehicle travelling ahead of him. The driver of that vehicle signalled his intention to turn right by putting on his right indicator light. Upon observing this, he reduced his speed to allow the vehicle to complete its right turn as indicated. The vehicle began to turn right, then suddenly it swung to its left, that is onto the first defendant/appellant's side of the road. The appellant's vehicle was then a car length behind and positioned to pass on the left of the vehicle which was turning right. In order to avoid colliding with the second defendant's vehicle when it swung to the left the appellant swung to the right when suddenly the second defendant swung back to his right causing both vehicles to collide. The appellant's vehicle ended up on the pavement where it collided with and injured the plaintiff.

The second defendant/respondent's account as to how the collision occurred is as follows: He is travelling along and some two chains away from his gate he signalled by his indicator light his intention to turn right. As he was about to turn right into his driveway he suddenly observes a light and an impact follows. Under cross-examination he stated, unashamedly, that he was unaware of the presence of the other vehicle on the roadway before the impact. Had he been aware of

the presence of the other vehicle he would not have made the turn. He denied that he had swung to the left before turning right.

The learned trial judge against this background of evidence, in his oral judgment, concluded:

> "My task is to apportion liability, if apportionment there should be."

In approaching the task which he identified, as his, he mentioned five factors which he "classified as objective or not in dispute," although only four were set out in the oral judgment viz -

> "1. There was a straight road covering some 3 chains leading up to the point of impact. This was a straight which both vehicles traversed before the collision.
>
> 2. The entrance to the gate which the Second Defendant was turning into is at right angles to the road.
>
> 3. This gate was normally closed and was so closed on the date of the accident.
>
> 4. The driver of the First Defendant's vehicle hit the shop wall and ended up on the left of the road coming from Morant Bay."

He identified as a disputed issue the question of speed. He articulated this issue thus:

> "One contested issue pertained to the speed of the first defendant. The second defendant would have the first defendant going in headlong haste. The first defendant claims that he was going at about 20-25 mph."

I will return to deal with this issue of speed later on in this judgment, as it is the foundation stone upon which the learned trial judge adjudged the liability of the appellant.

One ground of appeal was argued before us namely -

> "That the learned trial judge erred in finding the First Defendant liable in negligence to a greater degree than the Second Defendant having regard to his finding that the Second Defendant failed to ensure that his signal was appreciated by the First Defendant before attempting to make the turn and that the Second Defendant having put on his right hand indicator went right, then left and then right again."

It is incontrovertible that the learned trial judge did find that the second defendant failed to ensure that his signal was appreciated by the first defendant before attempting to make the turn and further that the second defendant having put on his right hand indicator went right then left and then right again. How then in such circumstances, one may properly inquire, did the learned trial judge ascribe liability to the first defendant at all? However, this appeal has been argued on the basis that it was properly a matter for apportionment of liability.

What was the major contributing factor to the collision which occurred? The evidence before the Court below, which the trial judge accepted, was that the second defendant/respondent indicated that he intended to turn right, that he began turning right then suddenly swerved out left and then swerved back right again.

The appellant's evidence is that when he saw the indication by the second defendant/respondent that he intended to turn right he, the appellant, positioned his vehicle to pass on the left, as he is permitted to do under the rules of the road. The second respondent then suddenly swung to the left. The appellant in order to avoid colliding with the second respondent's vehicle as he swung to the left, swung to the right. The second defendant again swung right. The result was that both vehicles collided. The manoeuvre described must surely have severely embarrassed the appellant requiring him to take evasive action, which resulted in the collision. The appellant was called upon to act in the

agony of the moment. Prior to this manoeuvre there was nothing in the second respondent's manner of driving which would have placed the appellant on alert that this unlawful manoeuvre was about to be made. In the face of this evidence the learned trial judge, nevertheless, found as follows:

> "The First Defendant was at all material times warned in ample time by the indicator of the Second Defendant that he intended to turn right. The First Defendant having seen this and being warned in adequate time, he must exercise due care and caution. Firstly he must bring his vehicle down to a rate of speed to meet the circumstances confronting him. He did not do this. He should have reduced his speed so that he could meet the circumstances. Under cross-examination he was asked why he could not stop and he was unable to say why. The best that can be said was that the swing to the left and right was so sudden that he could not stop. This swing was of no significance because if the first defendant had been driving at a speed which was consonant with due care and attention he should have been able to stop."

It is clear from the passage quoted that the learned trial judge concluded that the appellant's speed was the primary cause of the collision, yet no where in his oral judgment did he make any finding as to what speed the appellant was driving at before or at the time of the collision. Certainly to decide whether or not the appellant's speed was consonant with due care and attention, the speed at which the appellant's vehicle was travelling in terms of miles per hour would first have to be ascertained. This the learned trial judge declined to do. He said:

> "In my view I do not believe it is necessary to make any finding as to whether or not the extensive damage was caused by excessive speed or that the fact of careening into the wall must have been indicative of excessive speed. To me the crux of the matter was whether the First Defendant was driving at such a rate of speed that the circumstances dictated, which rate of speed would be in harmony with exercising due care and attention in the circumstances."

What was the speed? Regrettably the learned trial judge failed to determine that issue.

Returning to the question of the manoeuvre made by the second defendant/respondent the learned trial judge's finding that -

> "This swing was of no significance because if the First Defendant had been driving at a speed which was consonant with due care and attention he should have been able to stop."

is a grave error in law. The driver of a motor vehicle owes a duty of care to other users of the road. This proposition in law is enshrined in antiquity and needs no authority to support its correctness. That duty of care includes the manner of driving. To say that a driver who has indicated that he intends to turn right and actually begins so to do and then suddenly swings to his left and then right again, resulting in a collision is not significantly responsible for the resultant collision is indeed an unreasonable finding.

We are further of the view that the judge's finding set out below is not in harmony with his ultimate apportionment of liability. He found as follows:

> "As regards the Second Defendant this stretch of road is 3 chains. It is 3 chains of unimpaired visibility. In my view the Second Defendant ought to have been aware of the vehicle behind him. He was about to enter into a gate at right angles to the direction in which he was driving. There is a duty not only to signal but also to be aware that his signal was appreciated. He is going into a gate that is normally closed and was so closed. He must have known that to enter into that gate it would have to be opened and that for some time a part of his car would have blocked the right hand lane. It was his responsibility to ensure that the road was clear. Yet his evidence was that he was not aware of the Volks wagen on the road at that time. He was completely oblivious to its presence."

The manner of driving evidenced in the above extract coupled with the finding of the learned trial judge that the second defendant/respondent did begin to turn right then suddenly swerved left and then right again leads one to conclude that the second defendant/respondent's manner of driving was, at the least, dangerous. He was doing exactly that which section 51 (1) of the Road Traffic Act enjoins the operators of motor vehicles not to do viz -

> "A motor vehicle shall not be driven so as to cross or commence to cross or be turned in a road if by so doing it obstructs any traffic."

Whereas, on the contrary, the appellant's manner of driving was an attempt to observe the injunction of Section 51 (2) of the Road Traffic Act which states:

> "Notwithstanding anything contained in this section it shall be the duty of a driver of a motor vehicle to take such action as may be necessary to avoid an accident; and the breach by a driver of any motor vehicle of any of the provisions of this Section shall not exonerate the driver of any other motor vehicle from the duty imposed on him by this subsection."

The appellant swung to the right in an effort to avoid colliding with the second defendant/respondent's vehicle. In so doing he was taking what he deemed to be the necessary action to avoid the accident, when the second defendant/respondent swung back to the right and collided with the appellant's vehicle.

We are of the view that the findings of the learned trial judge demonstrably indicate that the second defendant/respondent's manner of driving was the major contributory factor in the collision which occurred. In the light of his findings he clearly erred when he apportioned liability as he did.

In coming to our decision we were ever mindful of the hallowed principle laid down in **British Fame (Owners) v. McGregor (Owners)** [1943] A.C. 197 at page 198 per Viscount Simon, L.C.:

> "It seems to me, my Lords, that the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial judge. I do not say that there may not be such cases. I apprehend that, if a number of different reasons were given why one ship is to blame, but the Court of Appeal, on examination, found some of those reasons not to be valid, that might have the effect of altering the distribution of the burden. If the trial judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that, I think, would be a reason for considering whether a change in the distribution should be made on appeal. But, subject to rare exceptions, I submit to the House that, when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare."

What we have said clearly demonstrates that we are of the view that the instant case falls within the principle enunciated by Viscount Simon, L.C. For these reasons we felt constrained to allow the appeal, set aside the order of apportionment made below and order as we have indicated earlier in this judgment.