JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 90/91

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE WOLFE, J.A.

BETWEEN	NORMAN BECKFORD	PLAINTIFF/APPELLANT
AND	JASMINE BARRETT	
AND	MAURICE DAVIS	DEFENDANTS/RESPONDENTS

Ainsworth W. Campbell for appellant

John Givans for respondents

September 21 and November 8, 1993

WRIGHT, J.A.:

In this appeal the plaintiff challenges the findings and award made in his favour by Harrison, J. in his resolution of the plaintiff's claim for damages resulting from a motor vehicle accident on January 9, 1987. The first challenge is to the finding that the plaintiff was contributorily responsible for the accident to the extent of 30% and an award of damages on that basis. Ground 1 of the grounds of appeal issues that challenge as follows:

> "That there was no reliable evidence on which the learned trial judge could have held that the plaintiff/appellant was liable to thirty percent (30%) of the damages or any percentage at all.
>
> The second defendant/respondent himself had stated that he did not see the plaintiff/appellant until he had reached within half chain of the plaintiff/appellant on a straight road ten chains long. Further that he did not see the plaintiff/appellant move suddenly to his right or at all.

> "And that where he collided with the plaintiff/appellant showed only a 6" to 9" variation of the plaintiff/appellant's position when he saw him initially and when the collision took place on a road accepted on both sides to be between 18-20 feet wide."

The answer to that complaint must be sought in an examination of the evidence.

The accident took place between 10:30 and 11:00 a.m. on Friday January 1, 1987, on the main road leading from Morant Bay to Seaforth in the parish of St. Thomas. Apart from the plaintiff, two other persons present at the scene testified on his behalf as to what transpired. The plaintiff's evidence was that he was riding a C50 motor cycle in the direction of York along the aforesaid main road at about 25 - 30 m.p.h. but when he was nearing a shop on his left side of the road where he had intended to stop he reduced his speed to about 10 - 15 m.p.h. Approaching that point he said:

> "I had my left hand across my chest point to right. Reason I doing that was that I showing I intend to stop."

Regarding this the judge's notes record that the plaintiff demonstrated a slowing down signal.

The plaintiff became aware of the presence of defendant's vehicle (a chevrolet van) coming behind him when he heard the horn once and observed the van in the rear-view mirror of his motor cycle. He said it was coming fast, "By the time I see van it reach me and hit me off bike on same left hand side of road." The road, on the evidence of Corporal Dean Johnson, measured 19 feet wide, had been recently paved - loose gravel being on the road, and was dry. Ahead of the plaintiff at the point of impact the road was straight for three chains and behind him there was a straight stretch for seven chains. Accordingly, the defendant had a straight stretch of 10 chains of roadway with no traffic moving in the opposite direction. The only traffic on the road was a parked taxi which the plaintiff had passed for about 1½ chains before he was hit and another motor cycle which was ahead of the plaintiff's cycle.

Yet the defendant testified that he did not see the motor cycle until he was half chain away from it.

The plaintiff was thrown some 15 feet through the air while the motor cycle came to rest on the left side of the road 44 feet from the point of impact which Corporal Dean Johnson said was pointed out to him by the defendant Davis, the driver and lone occupant of the van at the time of the accident, within a circle of broken glass which began four inches from the left side of the asphalt and spread out for about four feet. The plaintiff was not there at the time because he had been taken off to the Princess Margaret's Hospital in an unconscious state and it was his evidence that he did not regain consciousness until the following Wednesday, that is five days later.

In considering the question of contributory negligence, the evidence of the two eyewitnesses features strongly because they saw what the plaintiff was in no position to see.

Fitzroy Nugent was standing by the side of the road when he saw the van pass at what must have been a frightening speed - he put it at about 90 m.p.h. - travelling in the direction of Seaforth. So furious was the speed he said it caused "all paper on the road to blow up." After a short while he saw the van returning at a faster speed so much so that for safety he jumped on to the bank. The van hit the motor cycle throwing the plaintiff into the air, then the van swerved across the road where a Cortina motor car was parked on a slip road which the police evidence showed was angled at about 45% to the main road, threw the car into the air severely damaging it and then partially uprooted a guinep tree with a girth of about 14 inches. Nugent denied that the plaintiff was turning across the road at the point of the collision. Measurements by the police show that the Cortina motor car was 66 feet from the point of impact indicated by Davis and in this regard it is important to note that the defendant Davis agreed that the plaintiff was riding about three feet from the left edge of the road. The Cortina motor car was 112 feet from the point of impact while the

guinep tree was about 100 feet from the edge of the asphalt where the slip road begins. There were no drag marks.

Leabert Young corroborated Nugent's testimony as to the manner of the driving of the van. He viewed the accident from behind. He said because of the speed of the van when it passed the car in which he was sitting the car was shaken. On his viewing the van hit the licence plate of the motor cycle and chipped the muffler before swerving out of control across the road. He had observed the motor cycle slowing down and the plaintiff giving a slowing down signal but he said the signal was given with the right hand contrary to the testimony of the plaintiff, Nugent and Corporal Dean Johnson who all mentioned the use of the left hand. This witness, in agreement with Nugent, said he fetched cold water and threw it in the plaintiff's face. He had witnessed the plaintiff being thrown through the air and landing on his back.

To counter the plaintiff's evidence on the issue of liability, the defendant testified that he was travelling at 30 - 35 m.p.h. and as he was about to pass the plaintiff the latter suddenly turned right and hit his left fender. He then swerved right and collided with the Cortina and the guinep tree. At time of collision he was travelling five feet from the left edge of the road while the plaintiff was about three feet from his left. Contrary to the plaintiff and his two witnesses, he said there were some six to seven vehicles on the road at the time moving in opposite directions. Of very critical importance to the issue at hand is his testimony that when he first saw the motor cycle it was half chain away from the van although he admitted that the stretch of road is, as the plaintiff claims, 10 chains straight and that there was no obstruction to his vision on that stretch of road. Significantly, too, while contending that his speed was 30 - 35 m.p.h. he conceded that at the time of the collision the plaintiff's speed was 10 - 12 m.p.h. - down from a previous 15 - 20 m.p.h. That concession was made in cross-examination. He contended that at the time

of collision the plaintiff was about 3ft. 9 ins. to 4ft. from the left edge of the asphalt. However, in a mysterious reverse of testimony he said, in answer to a question by the court, that at the time of collision the left hand side of his van was nine feet from the left edge of the asphalt. Accordingly, there could be no accident involving his vehicle and the plaintiff because, on his evidence, the left side of his vehicle would be 5ft. to 5ft. 3ins. from the motor cycle. The road is 19 feet wide, the van 6ft. 6ins. wide; so on his account there would only be 3½ feet of roadway left to the six to seven vehicles which he said were present on the road at the time. Hence the correctness of the trial judge's decision:

> "The Court rejects the evidence of the 2nd defendant that he was travelling at 30-35 mph when he saw plaintiff's motor cycle and it then turned suddenly into his van without giving any signal to turn left or right."

But the second defendant's damnation for which there is no redemption issued from his own mouth when he said he did not know the reason why he did not see the plaintiff earlier than he did, viz. half chain away.

The crucial findings of fact on the question of liability are recorded at pages 54 to 55 of the record thus:

> "The Court finds that the plaintiff having moved to his right slowed his speed by one half, indicated, although not clearly, should have alerted the defendant and defendant as a prudent driver should have appreciated a change in the plaintiff's manner of driving at its lowest or that the plaintiff was turning to the right; what the witness Young saw as a right hand signal was probably a protruding left arm to the right. The defendant, the Court finds, was travelling faster than 30 - 35 m.p.h., did not reduce his speed, as he admits, failed to notice the plaintiff, at any time on that straight until he was ½ chain from the plaintiff, failed to notice the plaintiff's hand signal - albeit not a clear one, and was therefore not keeping a proper lookout. The defendant's excessive speed contributed to his inability to control his vehicle after the collision and in addition he was overtaking when it was unsafe to do so.

> "The plaintiff himself probably misjudged the speed of the van, did not give a clear signal to traffic behind him that he was turning to his right and thereby contributed to the cause of the accident.
>
> This Court therefore finds that the plaintiff is 30% to blame for the collision."

Where the findings of fact are consistent with the evidence but the deductions are not, then this court is in as good a position as the trial judge to make deductions from the facts found. What the plaintiff said in cross-examination as to his manouevre at the time of the collision was, "When I heard van blow horn I held my position." So that on a consideration of the evidence most favourable to the defendants there would be 15 feet of roadway available for free passage to the van. The question that demands an answer is why was the van being driven so close to the plaintiff with so much roadway to spare? But there is none. The driver might even have continued without reducing his speed and yet avoid the plaintiff by several feet. Indeed, it is not too farfetched to conclude that had the plaintiff not made the slight change in his direction, that is 9" to 12", to the point when he "held his position" the defendant Davis might have run him over since he saw him so late. For this view I find support in the evidence of Fitzroy Nugent who testified that at the time of the collision both the plaintiff and the van were travelling about three feet from the left edge of the road. The late and sudden swing of the van is responsible for what happened after the collision with the motor cycle. I can find no basis for attributing contributory negligence to the plaintiff but even if I am wrong I would maintain that any degree of such negligence was so negligible an element in the causation as to be de minimis. To qualify as contributory negligence there must be "negligence materially contributing to the injury" (See per Lord Porter in **Caswell v. Powell Duffryn Associated Collieries Ltd.** [1940] A.C. 152 at 186). In my view the dominant or effective cause of the collision is the negligence of the defendant Davis. There is merit in this ground of appeal. The defendants will bear full responsibility for the accident.

Ground 2 is as follows:

> "That the learned trial judge erred in rejecting the evidence of the Doctor as to the neurological deficits of the plaintiff/appellant and in finding that those deficits were not caused by the head injuries the plaintiff/appellant had sustained."

The treatment of this ground is better facilitated by setting out the injuries pleaded which are as follows:

"

PARTICULARS OF INJURIES

a) Shock and concussion.

b) Comminuted compound fracture of the right femur.

c) Fracture of the right collar bone with deformity.

d) Fracture of the 5th rib.

e) Multiple bruises of the left lower limb and the left upper limb with keloid scars on left shoulder and right axilla.

f) Multiple fractures of the ribs, right chest and right clavicle.

g) Extensive surgical emphysema involving right side of chest wall and the neck.

h) Richt haemopnuemothorax.

i) Development of infected haemotoma.

j) Plaintiff's condition secondary to injury is serious.

k) Twenty five percent (25%) permanent partial disability of the right lower limb.

l) Serious recurrent abscesses requiring surgery including cuttage of the bones and removal of bits of dead bones.

m) Up to the 9th day of June 1989 there was a continuing sinus at fracture site from which small bits of bones came from time to time.

n) Development of chronic osteomylitis.

o) Defective memory with short term memory most affected.

p) Intellectual deficit due to brain damage.

"q) Probability of the following developments:

1) Changed personality.

2) Post traumatic epilepsy.

3) Parkinson's disease.

4) Alzheimer's disease.

5) Amyloid disease."

The evidence claimed to have been wrongly rejected was given by Dr. John Hall, one of the four doctors who examined and/or treated the plaintiff. The gravamen of the complaint in this ground is that an injustice has been done to the plaintiff because the trial judge rejected the evidence of Dr. Hall as a factor in assessing compensation. Relevant factors to be considered in this regard are:

(a) Date of the accident - 9.1.87

(b) Date of Dr. Hall's examination - 14.7.89

(c) Background evidence available to Dr. Hall

(d) Any other evidence tending to support Dr. Hall's conclusion.

One is immediately confronted with the fact that Dr. Hall was seeing the plaintiff for the first time more than two years after the accident. Although item (a) of the Particulars of Injuries is "Shock and concussion" no medical evidence was adduced from the Princess Margaret Hospital to which the plaintiff was admitted immediately after the accident with respect thereto. Dr. Ronald Lampart, from that hospital, testified that he first treated the plaintiff in September 1987 and that was for "septic condition of his right thigh - copious pus exuding." He made no reference to the plaintiff's earlier condition. What he found was a healed fracture with dead bone in the depth of the wound. Prior to that the plaintiff had been treated by Dr. Emerald Ali and Dr. Fraser at the Kingston Public Hospital.

When Dr. Hall examined the plaintiff he had the benefit of certificates from Dr. Lampart and Dr. Fraser neither of whom

could tell whether the plaintiff had suffered from concussion. Those certificates would constitute the background evidence which should give some relevance to Dr. Hall's evidence. But neither Dr. Lampart nor Dr. Fraser could certify concussion because neither of them had seen the plaintiff on his admission to hospital on the day of the accident nor during the period when he said he was unconscious. Accordingly, neither certificate was of any relevance in that regard. Indeed, whereas Dr Hall's observations and conclusions are based on neurological tests done by him he stated that the reports he had from the referring doctors are orthopaedic observations. Notwithstanding it is contended that the trial judge ought not to have rejected his evidence. It is best, then, to set out Dr. Hall's evidence so that it may speak for itself:

> "Neurological abnormalities
>
> (a) unable to reproduce 5 minutes later a street address given to him by me
>
> (b) Poor performance in the serials sevens test - serial subtraction of 7 from 100, in conjunction to his inability to recite the 9 times table and to write a simple sentence - dictation.
>
> These deficits unequivocally gave me a conclusion.
>
> From the previous observations recited - my conclusion is - discalculia and disgrephia i.e. the inability to handle mathematical symbols and written symbols of language - all indicative of left cerebral hemisphere damage in a right handed man.
>
> Further observations:
>
> Constitutional apraxia - an inability to reproduce complex geometrical drawings of figures as opposed to simple ones.
>
> He also demonstrated poor proverb comprehension i.e. an inability to philosophically dissect and put into his own words simple well known proverbs i.e. people who live in glass houses should not throw stones - this is another indicator of intellectual deficit due to brain damage.
>
> My observations and conclusions are based on my neurological tests done by me - the medical reports from the

"referring doctors are orthopaedic observations.

My conclusion based in neurological - the referring doctors contributed nothing to it.

Conclusion - plaintiff suffering from the effect of damage to the brain in particular the left hemisphere - following road accident on 19.1.87 consequent on which he unaware of his surroundings for some 4 - 5 days.

Memory defect - ordinary conversation - difficulty to go shopping and difficulty in business matters generally.

These intellect malfunction - serials test etc. will affect him adversely.

Projected adverse - anticipates development of anti-social behaviour - irritability - aggressiveness, inability to relate harmoniously with family and community - and may progress to be beligerence and criminal behaviour. In addition - may develop post traumatic epilepsy - as a consequence of this type of head injury. Epilepsy - a neurological disorder - defect of transmission of neurological to cells - resulting in manifold abnormality in movement, behaviour and sensation.

Epilepsy is a life threatening condition - may suffocate to death during an attack - falling from height etc.

Injury sometimes leads to Parkinson's disease - degenerative disease of brain in which the centres for maintaining stability of limbs lose control and patient observed to be shaking - trembling.

No pain - Socially Parkinson patient unable to handle crockery and buttoning his own clothing and walking.

Alzheimer's - global failing of brain function resulting in decaying of memory.

Presence of memory deficit means the probability of further decay - lack of memory - feature of Alzheimers.

Sinus to right thigh 2 years after accident - conclusion - persistence of underlying infection of thigh bone - femur - chronic osteomyelitis - harmful to patient - persisting infection from which other organs may be affected e.g. brain - amyloid - cellular tissue of brain turns into hardened porridge.

It can also affect the head and the brain.

> "Infection in leg can go to brain - body connected by arteries and veins - circulating blood and so infection can be transferred to brain.
>
> Anti-social behaviour is what is called changed personality.
>
> Deformed right clavicle - means fracture of collar bone - that had most properly united - not properly healed.
>
> I thought patient had good attention span."

Regarding the cross-examination of this witness, it is sufficient to record the following:

> "I have not seen the plaintiff since 1989. I could not say what is his present condition. I did not know the plaintiff before July 1989. I do not know how intelligent the plaintiff was - no information whatsoever. I do not know how good he was in maths - I enquired about his school background. Unlikely that before plaintiff could not recite his 9 times table - any child 8 to 9 could do so. I could not say what was the state of his memory before I examined him."

There was, undoubtedly, abundant justification for rejecting this evidence as lacking relevance the moreso having regard to the evidence of the plaintiff's brother John Beckford who was obviously called to supply background evidence. However, with regard to this aspect of the plaintiff's claim he can be said to have delivered a coup de grace. His evidence occupied twelve lines:

> "He is a graduate of CAST and teaches general electricity. The plaintiff was in an accident. He has not observed any difference between now and time of accident only that he was fractured."

Nothing further need be said on this ground of appeal other than that it fails.

Ground 3 is as follows:

> "That the learned trial judge erred in the award he made for Loss of earnings and Future Loss of Earnings in that he used an incorrect multiplicand in the case of Loss of earnings and an incorrect multiplicand and multiplier in the case of Future Loss of earnings."

Although the ground of appeal is so framed the contention resolved itself into being an objection to a deduction by one third for tax purposes since the award in the plaintiff's hand is liable to withholding tax on the interest. Mr. Givans conceded the justice of the complaint. Accordingly the award of $138,320 for future loss of earnings was adjusted to read $208,000.

Ground 4 complains that the trial judge erred in awarding costs to the defendants/respondents and what is remarkable about this award is that both counsel confessed to not being able to understand it. The confusion stems from the fact that the defence had counter-claimed for the amount of $12,500 being costs of repair to the vehicle. In evidence the defendant Davis stated the damage to his vehicle to be as follows:

> "Left front fender bent, windscreen smashed, 1 headlamp (left) broken, indicator lamp on right side broken, grill smashed, chassis slightly bent."

He paid $2,000 for work to the fender at one garage but he had to take the vehicle to another because the work had not been done satisfactorily. He also had the chassis straightened. The trial judge disposed of the counter-claim in this manner:

> "The 2nd defendant's vehicle sustained damage to the left front fender windscreen, left headlamp, right indicator lamp grill and chassis. His counter-claim for $2,000 was not supported by any evidence."

In the assessment of damages he recorded this:

> "On counter-claim - Judgment for defendant with costs to be agreed or taxed."

It is clear that he had dismissed the counter-claim and accordingly there was no basis on which he could award costs to the defendant on his failed counter-claim. The award of costs obviously goes to the plaintiff who is the defendant on the counter-claim. This ground of appeal accordingly succeeds. The appeal is allowed and the judgment of the court below is **set aside.**

Special Damages had been assessed at $151,348. In the result, therefore, there will be judgment for the plaintiff for $619,348 being -

Special Damages	$151,348
with interest at 3% from 9.1.87	
to the date of the judgment	
General Damages:	
Pain & Suffering & Loss of Amenities	$260,000
with interest at 3% from 5.5.87	
to date of judgment	
Future Loss of Earnings	$208,000
	$619,348

The plaintiff is to recover the costs of appeal and costs in the court below to be agreed or taxed.

That disposes of the appeal but I must call attention to one aspect of the case that I find most distressing. It was evident at the time of the trial, more than four years after the accident, that the plaintiff was still suffering from the injuries sustained and that his pain and suffering would continue for some time yet. He fell ill during the trial and Dr. Ali who examined him within the precincts of the court testified that the fracture site was swollen, red and shiny and had an abscess. Further, he said that such flare-ups known as osteo-myelitis were prone to occur and that the infection was difficult to cure. In addition, Dr. Lampart testified of operations to remove bits of dead bone from the wound which oozes pus. He said the flare-ups were occurring at intervals of six months but he expected the frequency to diminish. In the face of such evidence it must, indeed, be a most unfortunate oversight which resulted in no provision being made for future medical care - no claim was made. The result is that the plaintiff, because his case cannot be re-opened, is left to bear the costs of such operations out of his own pocket. This is a most regrettable outcome which sounds the alarm for greater diligence in pleading.

DOWNER J A

At the trial of this matter in the Supreme Court, Harrison J gave judgment in favour of the appellant by finding the respondent 70% responsible for liability and awarding damages on that basis. The issue which gave rise to this award was a collision between a Chevrolet motor car driven by the second respondent, Maurice Davis and a motor cycle on which the appellant, Norman Beckford was the rider.

The appellant's contention before this Court was that on the facts of the case, the correct award ought to have been that the respondents should bear full liability for the accident. The basis of the appeal on this issue is stated in ground 1 of the Notice of Appeal and it reads as follows:

> "1) That there was no reliable evidence on which the Learned Trial Judge could have held that the Plaintiff/Appellant was liable to thirty percent (30%) of the damages or any percentage at all."

For this to be a valid ground, the appellant must show that the judge's finding on contributory negligence, was unreasonable having regard to the evidence.

One critical passage in the judgment reads as follows:

> " The Court finds that the plaintiff having moved to his right slowed his speed by one half, indicated, although not clearly, should have alerted the defendant and defendant as a prudent driver should have appreciated a change in the plaintiff's manner of driving at its lowest or that the plaintiff was turning to the right; what the witness Young saw as a right hand signal was probably a protruding left

> arm to the right. The defendant, the Court finds, was travelling faster than 30 - 35 m.p.h., did not reduce his speed, as he admits, failed to notice the plaintiff, at any time on that straight until he was ½ chain from the plaintiff, failed to notice plaintiff's hand signal - albeit not a clear one, and was therefore not keeping a proper lookout. The defendant's excessive speed contributed to his inability to control his vehicle after the collision and in addition he was overtaking when it was unsafe to do so.
>
> The plaintiff himself probably misjudged the speed of the van, did not give a clear signal to traffic behind him that he was turning to his right and thereby contributed to the cause of the accident.
>
> This Court therefore finds that the plaintiff is 30% to blame for the collision."

The only issue on which the appellant was found to be at fault was covered by the phrase "indicated although not clearly." Yet when the learned judge continued, he found that the second respondent as a prudent driver and at its lowest, should have seen that the appellant was turning to his right. Earlier the learned judge found that the appellant "moved to his right," which ought to have been the correct finding having regard to the nature of the damage to the motor cycle. Further findings in this crucial paragraph supports the appellant's case, as the finding was that the second respondent failed to notice the hand signal and was therefore not keeping a proper lookout.

Then again the learned judge failed to make a finding from uncontested facts which emerged under cross-examination. The appellant said that he gave a hand signal that he was about to stop, and that he also used his left indicator to show the direction in which he intended to stop. This is consistent with his earlier evidence that he intended to stop at a bar on the left hand side of the road. As will be seen, the second respondent's evidence was that he did not see a signal.

Even more fundamental was the finding that the hand signal was not clear. The appropriate finding in that regard required an evaluation of the evidence on that aspect of the matter. The first occasion when this evidence was given was under cross-examination of the appellant. It ran thus:

> " I indicated I going to stop and with my left indicator and hand (indicate) left arm out-stretched and moving up and down. I gave indication about ½ chain from where I intended to stop - at same time looked into rear view mirror."

At a later stage in the cross-examination, the following answer emerged from the appellant:

> " True just before collision I had my left hand across my chest point to right.
>
> Reason I doing that was that I showing that I intended to stop. [Court notes plaintiff demonstrates with left hand yesterday - moving up and down.]"

Then the evidence of Fitzroy Nugent under cross-examination bears out the appellant's case on this aspect of the matter. It reads thus:

> " Plaintiff giving his left hand signal this way - on the shop side. (Left palm outstretched moving up and down - indicating slowing down.)
>
> I then about 1½ chain from the plaintiff when he started waving with his left hand - van then behind bike - a couple of yards away - about 10 yards."

The third eyewitness, Leabert Young confirms that the appellant gave a signal by his right hand to slow down. In marked contrast to this preponderance of evidence, the second respondent's response was:

> " Not see any left hand indication by plaintiff that he intended to stop.
>
> I not see plaintiff give any indication that morning either to turn right or left."

The learned judge rejected the second respondent's evidence and a very important finding was that the point of impact was on the straight road. Here is how he made this important finding:

> " The Court rejects the evidence of the 2nd defendant that he travelling at 30 - 35 m.p.h. when he saw plaintiff's motor cycle and it then turned suddenly into his van without giving any signal to turn left or right. The defendant admits that he first saw plaintiff's motor cycle when he was ½ chain from it, that the accident occurred on a straight section of the road 10 chains long 3 chains visibility towards Morant Bay and 7 chains towards Seaforth. The defendant admitted also that before the accident the plaintiff was riding about 3 feet from the left edge of asphalt and that at the time of the collision he the plaintiff was about 3 feet 9 inches or 4 feet."

Also the damage to the motor cycle bears out the evidence of the appellant that the motor car collided with the motor cycle from the rear. Here is the evidence under cross-examination from Corporal Dean Johnson who visited the scene in the presence of the second respondent. The officer also examined the vehicles. As regards the motor cycle, he found:

> " Damage to bike - right side of bike - frame bent. Indicators right - front and back broken and headlamp broken.
>
> Rear brake light broken."

Against this background Mr. Campbell's submission that the respondent was wholly to blame for the collision was well founded. Moreover, on the second respondent's own account, the appellant was riding three feet from the left edge of the asphalt and at the time of the collision, was at the most four feet from the edge. The inference therefore was that the second respondent had fifteen feet of roadway to overtake the appellant and if he had not been guilty of negligent driving, as averred and proved, there would have been no accident.

In the light of all this, since the respondents ought to bear full liability for the collision, I would allow the appeal on this issue and set aside the order made below. I would agree with the damages as determined by Wright J.A.

WOLFE, J.A.: (Dissenting)

The appellant was seriously injured as a result of a collision between a motor cycle licenced 4234A ridden by him and a motor van licenced CC 106E owned by the first named respondent and driven by the second named respondent.

The collision occurred along the York main road in the parish of Saint Thomas on January 9, 1987. The appellant's version as to how the collision occurred may be summarised as follows: He was riding along the York main road intending to stop at a shop on the left hand side of the road, the very side of the road on which he was riding his motor cycle. He looked into his rearview mirror and observed a van approaching him from behind and the next thing to happen in the sequence of events is that he was hit from his motor cycle by the van. He later found himself in the Princess Margaret Hospital some three days after the collision. He was subsequently transferred to the Kingston Public Hospital where he remained for approximately six to seven weeks. Upon discharge from the Kingston Public Hospital he was re-admitted to the Princess Margaret Hospital where he spent a further three weeks until March 1987. Upon his discharge, the nature of his injuries required him to attend the hospital daily for treatment as an outpatient. In October 1987 he returned to the Princess Margaret Hospital where he underwent surgery on his leg. There is no doubt that the plaintiff was seriously injured.

The respondent's version as to how the accident occurred is diametrically opposed to the appellant's version. Not surprisingly so. He averred that he was driving along the main road leading from Seaforth towards Morant Bay when upon reaching York he observed two motor cyclists proceeding towards Morant Bay. He overtook the first of the two cyclists and just as he was about to overtake the second cyclist the cyclist turned right and collided with the left fender of the respondent's motor vehicle. In an attempt to avoid the collision the respondent swerved to his right, collided with a parked Cortina

motor car and eventually ended up colliding with a guinep tree. He contended that immediately prior to the accident his vehicle was travelling at a speed of 30 - 35 m.p.h. A witness for the plaintiff testified that the respondent's vehicle was being driven at a speed of 95 m.p.h. The learned trial judge found as a fact that at the time of the collision the respondent's vehicle was travelling at a speed in excess of 30 - 35 m.p.h.

Four grounds of appeal were argued before us.

Ground 1

> "That there was no reliable evidence on which the learned trial judge could have held that the plaintiff/appellant was liable to thirty percent (30%) of the damages or any percentage at all."

Simply put, this ground contends that the learned trial judge erred in finding the appellant 30% to be blamed for the accident.

In addressing the question of liability, the learned trial judge found as follows:

> "The Court finds that from the real evidence, the damage to the motor cycle, i.e. the front fork, wheel and spokes bent and twisted, as also the back wheel and fender as well as the handle bent, that the plaintiff probably was turning to the right."

This finding clearly indicated that on a balance of probabilities the tribunal of fact has accepted that the appellant was turning right at the time of the collision. This finding is in my view unimpeachable. Why? Because it is supported by the evidence. The appellant testified that he put his left hand across his chest pointing to the right. He, however, contends that he had intended to stop at a shop on his left. What, then, one may legitimately enquire, was the purpose of that signal? The learned trial judge was entitled to infer from that signal that the appellant was, indeed, intending to turn right and coupled with the physical damage to the motor cycle, as he quite properly pointed out, he was justified in finding that the appellant was turning right at the

time of the collision. Further support for the judge's finding can be found in the evidence of the respondent who testified that just as he was about to pass, the appellant suddenly turned to the right and collided in the left fender of the respondent's vehicle. How then, in the face of this evidence, can it be rationally argued that there was no basis for the judge's apportionment of liability.

Furthermore, the judge found that the appellant turned right at a time when it was unsafe so to do. Mr. Campbell for the appellant did not attempt in any way to challenge these findings. His arguments were posited on the basis that the negligence of the appellant was minimal and that the maxim "de minimis non lex curat" ought to have been prayed in his aid.

Was his contribution to the accident really minimal? What does the Road Traffic Act require of a motorist wishing to turn right on a public road? Section 57(1) of the Road Traffic Act stipulates:

> "The driver of a motor vehicle constructed to be steered on the right or off side shall before commencing to turn to or change direction towards the right extend his right arm and hand horizontally straight out from the right or off side of the vehicle with the palm turned to the front so as to be visible to drivers of all vehicles concerned."

Motor vehicle is defined in section 2(1) of the Act as "any mechanically propelled vehicle intended or adopted for use on roads." The section, therefore, applies to the driver of a motor cycle. Having given the required signal he must then claim the centre of the road, thus enabling vehicles travelling behind him to pass him on the left. In any event, the mere giving of a signal does not entitle a motorist to change direction on the road, without more. He must satisfy himself that his signal has been received before he ventures to turn. As the learned trial judge so aptly puts it, he must turn only when it is safe so to do. The burden in this regard is on the motorist who is turning. He must satisfy

the court that he turned at a time when it was safe so to do.

Did the appellant give a proper signal that he intended to turn right? Certainly not. The left hand across his chest pointing right is not the proper signal. Any motorist travelling behind the appellant is entitled to expect that he would have given a proper signal if he was turning right. So it is understandable when the respondent said that he did not observe what was no more than a substitute signal. Had the appellant given the proper signal in due time, the respondent would have had the opportunity to overtake him on the left and the accident would have been averted. The fact that the respondent was overtaking the appellant at a distance of 9 - 12 inches laterally cannot exonerate the appellant. Had they continued to travel in a parallel line 9 - 12 inches apart even on the 19ft wide road there would have been no accident, if one accepts the well-established principle that parallel lines never meet. The effective cause of the accident was that the motor cyclist changed course, by turning right when it was not safe so to do. Had a respondent's notice been filed I would have found that the appellant's manner of riding the motor cycle was the substantial cause of the accident, having failed to give the proper signal of his intention to turn right and having turned right at a time when it was unsafe so to do, and adjust the apportionment of liability accordingly. For my part, I find this ground of appeal void of merit. It, therefore, fails.

Ground 2

The complaint herein is that:

> "...the learned trial judge erred in rejecting the evidence of the Doctor as to the neurological deficits of the plaintiff/appellant and in finding that those deficits were not caused by the head injuries the plaintiff/appellant had sustained."

Dr. John Hall FRCP (Edin) FACP, a renowned neurologist, examined the appellant on the 14th July, 1989, some two and one half years after the accident. At the time of the examination

Dr. Hall had the benefit of seeing two medical reports issued by Dr. Lampart of Morant Bay and Dr. Fraser of Kingston Public Hospital. Both certificates were dated June 19, 1989. The contents of those certificates have not been disclosed. In any event, Dr. Lampart first examined the appellant in September, 1987, some eight months after the accident and his evidence makes no mention whatsoever of any injury other than that to the appellant's leg. Dr. Hall testified to performing certain neurological tests on the appellant as a result of which he concluded that the appellant had sustained brain damage. With the utmost of deference to this very well qualified neurologist his evidence discloses no rational basis for this conclusion. In the end his evidence amounted to no more than a treatise in the subject area of neurology. Interestingly, the brother of the appellant, John Beckford, a teacher, testified that since the accident and up to the time of trial he observed no change in the personality of the appellant. The learned trial judge, having assessed the evidence, concluded that the appellant had not satisfied him that he had sustained brain damage.

The appellant contests this finding on the basis that in the absence of any evidence to the contrary the learned trial judge was bound to accept the evidence of Dr. Hall. This argument is fallacious. It is a well established principle of law that an expert witness is like any other witness and while the tribunal of fact in assessing his evidence must have regard to his expertise, yet the tribunal of fact is not bound to act upon the evidence of an expert if it is of the view that the evidence is unreliable.

In my view, the learned trial judge's rejection of Dr. Hall's evidence was inevitable. The evidence lacked the type of particularity which would lead a tribunal to conclude on a balance of probabilities that it was reliable.

Worthy of note is the fact that the appellant, apart from mentioning that he lost consciousness after the collision, gave no evidence to support any conclusion that he was having

any neurological problems. This ground of appeal, therefore, fails.

Ground 3:

> "That the learned trial judge erred in the award he made for Loss of earnings and Future Loss of Earnings in that he used an incorrect multiplicant(sic) in the case of Loss of earnings and an incorrect multiplicant and multiplier in the case of Future Loss of earnings."

The respondent conceded that the learned trial judge used the wrong multiplicand in assessing the loss of future earnings and ought to have used the amount of four hundred dollars per week. With a multiplicand of ten this would amount to $208,000. Consequently, the award of $138,320 for loss of future earnings is set aside and the amount of $208,000 substituted.

Ground 4:

> "That the learned trial judge erred in awarding costs to the defendants/ respondents."

Mr. Campbell urged that the respondents had failed to adduce any evidence as to the damages sustained in respect of the claim on the counter-claim. This, however, is not an accurate recollection of the evidence. The second respondent testified that the vehicle was repaired at Mr. Howell's garage at a cost of $2,000.

The learned trial judge in dealing with the counter-claim is recorded as saying, ""His counterclaim for $2,100 was not supported by any evidence." He is further recorded as saying:

> "On counterclaim - Judgment for Defendant with costs to be agreed or taxed."

It is abundantly clear to me that there are errors in what has been recorded.

In the first place the respondent's counter-claim was for the amount of $12,500. Secondly, the judge could not have properly found that there was no evidence to support the counter-claim. As already pointed out, the respondent categorically testified that the vehicle cost $2,000 to repair. Any such

finding would be an error in law. It is clear to my mind that what the learned trial judge intended to say was that there was no documentary evidence to support the respondent's counter-claim. Nevertheless he accepted the viva voce evidence of the respondent, unsupported as it is. Consequently, he entered judgment for the defendants/respondents on the counter-claim for the amount which was proved. The endorsement "On the counter-claim: Judgment for the Defendant with costs to be agreed or taxed" must be so interpreted. This I respectfully hold is the only rational interpretation. Of course, the defendants would receive only 30% of the amount proved they having been adjudged 70% to be blamed for the accident. The awarded costs would be on the amount of 30% of $2,000.

To contend that the reference to <u>defendant</u> in respect of the counter-claim is a reference to the <u>plaintiff</u> is, in my view, untenable. The parties in an action and counter-claim never change their identity and are always referred to in respect of the counterclaim in the same way that they are referred to in respect of the claim.

I am satisfied that the learned trial judge intended to make an award to the defendants/respondents on the counter-claim and did in fact do so. There was evidence on which he could properly have done so. The defendants/respondents are, therefore, entitled to their costs in respect of the award. The ground of appeal, therefore, fails.

I would, therefore, order that the appeal be allowed to increase the loss of future earnings to the amount of $208,000.

On the question of liability, I would affirm the apportionment by the court below and dismiss the appeal in that regard. There will therefore be judgment for the plaintiff as follows:

> <u>Special damages</u> (70% $151,348)= $105,943.60
> with interest at 3% from 9/1/87 to 15/5/91.
> <u>General damages</u> (70% $468,000) = $327,600.00
> with interest at 3% on $182,000.00 from
> 5/5/87 to 15/5/91 and costs to be taxed if
> not agreed.

On the counter-claim:

Judgment for the defendant for
(30% of $2,000) = $600.00
with costs to be taxed if not
agreed on the Resident Magistrate's
Court scale.

Cases referred to

① Caswell v Powell Duffryn Associated Collieries Ltd (1940) AC 152.