

IN THE COURT OF APPEAL

CIVIL APPEAL No. 21 of 1975

BEFORE: The Hon. Mr. Justice Luckhoo, J.A. (Presiding)
The Hon. Mr. Justice Swaby, J.A.
The Hon. Mr. Justice Watkins, J.A.

HERMAN CLARE
HAROLD SIMPSON - DEFENDANTS/APPELLANTS

v.

JOSEPH BROTHERTON - PLAINTIFF/RESPONDENT

R.N.A. Henriques for the appellants.

H.G. Edwards, Q.C. for the respondent.

October 6, 7; November 26, 1976

LUCKHOO, J.A.:

At about 8.30 p.m. on February 18, 1972, an Anglia station wagon owned and driven by the respondent Joseph Brotherton and a motor truck owned by the first named appellant Herman Clare and driven by his servant the second named appellant Harold Simpson were involved in an accident while being driven in opposite directions along the Port Maria to Highgate road in the vicinity of Ballard's Valley in the parish of St. Mary. As a result of the accident the respondent suffered personal injuries and his station wagon was damaged.

In an action brought by the respondent in the Supreme Court, D.W. Marsh, J., sitting without a jury, found that the accident was due solely to the negligent driving of the second named appellant. Marsh, J., awarded the respondent the sums of \$506.50 special damages with interest thereon \$22.50 and \$6,000 general damages with interest thereon \$135, with costs to be agreed or taxed. From this judgment the appellants have appealed on a number of grounds which require that the evidence adduced at the trial other than that relating to the quantum of damages should be recounted.

The respondent testified that he was driving his vehicle, a right hand drive, at about 30 m.p.h. in the direction of Highgate along the Port Maria to Highgate road. One Williams was sitting on his left in the front seat. As he approached the vicinity of Ballard's Valley his vehicle was close to its left side. The roadway at that point was about 30' wide and was unlighted. He saw the light of a vehicle and the sound of its engine indicated that it was a truck. The truck was then on its correct side of the road. He pulled closer to his left side, slowed down to about 5 m.p.h. and dipped his lights. He was then about 3' from the left embankment which was some 3' or 4' high. The truck was negotiating a slight bend in an otherwise straight road. At that point the roadway was about 25' wide. The truck was about 7' wide and the car about 4'6" wide. There was no other vehicle on the road. The truck approached at a "sufficiently fast rate" heading for his (the respondent's) side. It then suddenly and for no explicable reason careened across the road in a zig zag fashion and struck the right side of the respondent's vehicle. The respondent who was injured as a result of the collision blacked out. When he recovered consciousness he found himself in a hospital.

Williams who was unhurt testified that the respondent's car was about 2' from a curb wall or embankment, on its left when the impact took place. When he first saw the lights of the truck those lights were moving from one direction to the other and they continued to do so until the time of impact. On impact the car was swung around and then it overturned on its right side on the truck's side of the road. **The respondent** had to be extricated from his position behind the steering wheel by the car being lifted and put back onto its wheels. The car was then facing the direction of Port Maria. The truck after the impact had continued its course across the roadway and finally came to rest in a banana walk on the car's side of the road some three chains down the road from the point

standstill about a foot from the embankment on the right facing Port Maria. The car was then lying on its side on the opposite side of the road. The respondent was extricated from under the car. Several other cars came to the scene. Broken glass and dirt lay in the road right under the respondent's car. On examining the truck it was discovered that the steering was cut. The truck driver was unable to say whether he could by application of his brakes have stopped before the collision took place. His truck was some 18' in length and the distance from the truck's rear wheels to the engine was about 14'. He said that there were two drag marks across the white centre line of the road the one on the right being a little over a foot across the centre line. He disagreed with Constable Spencer's testimony that there was but one drag mark to be seen on the roadway.

The learned trial judge found that on the evidence the truck was being driven at an excessive speed and added "Plaintiff said he heard sound of truck engine which indicated high "revs". And defendant driver admits that he did not know if he could have stopped before collision. Applied brakes twice, second time very hard. Drag mark 15 feet before the impact and 39 feet altogether." The learned trial judge concluded that the position of the plaintiff's car and the damage thereto were consistent with excessive speed of the truck. The learned trial judge said that Spencer's evidence relating to the point of impact was unreliable as he went to the scene on the day following the accident and the road being a main road there was the possibility of disturbance of the dirt and glass thrown onto the roadway when the vehicles came into contact. He found that the defendant truck driver was solely liable for the collision and gave judgment accordingly.

Mr. Henriques for the appellant has submitted that the judgment is unreasonable and cannot be supported having regard to the evidence. He has contended that the evidence of Constable Spencer relating to the drag mark and the position on the road of the dirt and broken glass as seen by that witness clearly indicates

that the collision occurred in a manner more consistent with the defendants' version of the accident and is inconsistent with that of the respondent and his witness Williams.

He has further contended that the beginning of the drag mark made by the appellant's truck was an indication of the time at which the driver of that vehicle apprehended danger from the oncoming car. The driver of the truck said that his vehicle was proceeding at about 30 m.p.h. when he first applied his brakes. At that speed on a road surface of this kind the thinking distance would be approximately 30 feet and the braking distance some 45 feet. The driver of the truck having apprehended danger at some considerable distance away from the eventual point of impact it was a clear indication that the motor car was travelling towards the centre line of the roadway before impact as testified to by the driver of the truck and that it could not have been close to the left side of the road at the time of impact as respondent and Williams had testified.

In finding the truck driver was solely liable for the collision the learned trial judge appears to have accepted substantially the account given by the respondent and his companion Williams as to the position of the car on the road when the impact took place. He considered that the position of the car (presumably after impact) and the damage thereto was consistent with excessive speed on the part of the truck. It seems to us that Mr. Henriques' contention as to the significance of the commencement of the drag mark made by the truck is well founded. Further, we are of the view that it is more likely that a truck driven at high speed striking the right headlamp and bonnet of a car travelling at about 5 m.p.h. only some 2' or 3' from the left embankment would cause the car to be driven violently against the left embankment rather than to be swung around as Williams asserted and then overturned on the opposite side of the road. Again, it is significant that no sign of dirt or broken glass was seen on the left side of the

road facing Highgate the direction in which the car was proceeding. There was no evidence of scattering of dirt or broken glass as might be expected from the passage of other vehicles at the scene after the occurrence of the accident. What Spencer observed was dirt and broken glass "about the middle of the white line". He did not recall seeing any other dirt or glass. Further, the drag mark made by the left back wheel of the truck ran for some 15 feet on the truck's side of the road before crossing the white centre line near to the dirt and broken glass in the position observed by Spencer and continuing in a curve from left to right on the car's side of the road for another 24 feet.

All these matters rather indicate that the collision occurred when the vehicles were both being driven with their off sides on or about the centre line of the roadway. Each vehicle had a clear passage on its proper side of the road and each could by simply manoeuvring to its left have avoided the accident. We would hold the drivers equally to blame for the accident and would apportion liability in that degree.

Mr. Henriques has not pursued that ground of appeal which relates to the assessment of damages.

In the result the respondent should get one half of the amounts awarded him by the learned trial judge with costs of the trial to be agreed or taxed.

We would allow the appeal and vary the judgment accordingly. The appellant should get his costs of this appeal to be agreed or taxed.

of impact.

Constable L.G. Spencer of Port Maria Police Station who went to the scene on the following day testified that on his arrival there he saw the respondent's car on the left side of the road facing Port Maria. Its bonnet and right front fender were torn and the windscreen glass broken. A truck was standing diagonally across the right side of the road facing Port Maria and its front wheel was on the right ^{hand} embankment facing Port Maria. He observed a drag mark 39 feet in length. The drag mark started on the left side of the road facing Port Maria and continued diagonally across the road to the right ending at the left rear wheel of the truck. Broken glass and dirt were seen about the middle of the white centre line of the roadway which at that point was 25' wide. The drag mark was on the left side of the road (facing Port Maria) at point of impact then it went over onto the right side of the road. From his observations Spencer was of the opinion that the point of impact was about 1' left of the white centre line of the roadway facing Port Maria, that is, about 1' from the centre line on the truck's side of the road. The start of the drag mark was about 15' from the point of impact as determined by him. Spencer did not recall seeing any other dirt or broken glass on the road.

The case for the defendants was to the effect that the truck driver saw the lights of the respondent's car when the vehicles were some 20 chains apart. The car began to come across into the middle of the road. At that time the truck was on its left. The truck driver dipped his lights twice without similar action on the part of the driver of the car. The truck was travelling at a speed of about 23-30 m.p.h. while the car's speed was about 35 m.p.h. He (the truck driver) reduced his speed and then applied his brakes hard. The car came gradually in the direction of the truck's side of the road. The truck's brakes were applied with greater force. By then the car was in the middle of the road almost on the truck's side. The car struck the truck's right front wheel. The truck went across the road swerving to the right facing Port Maria. The truck came to a