JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 21 OF 1983

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A. (AG.)

BETWEEN	COCA COLA BOTTLING CO. OF JAMAICA LTD. ERROL FRANCIS	DEFENDANTS/APPELLANTS
AND	DANIEL HURD & URSULA HURD (Executors Est. Neville Hurd (deceased))	PLAINTIFFS/RESPONDENTS

Mr. Gordon Robinson for the Defendants/Appellants.
Mr. Horace Edwards, Q.C., for the Plaintiffs/Respondents.

21st February, 1985

CAREY, J.A.:

This is an appeal against a judgment of McKain, J., given on the 3rd of December, 1984, whereby she entered judgment for the plaintiffs, suing on behalf of the Estate of Neville Hurd, against the Coca Cola Bottling Company of Jamaica Limited and their driver Errol Francis but found, and I quote: "plaintiff's driver three-quarters to blame; second defendant one quarter."

The writ was filed against the Coca Cola Bottling Company of Jamaica Limited and Errol Francis, the driver of the vehicle owned by the bottling company (the first and second defendants in the action) and Etta Robinson as Administratrix of the estate of Vivian Robinson (the third defendant) in whose vehicle the deceased Neville Hurd was a passenger at the time of the accident. In the course of the hearing, on some technical point which need not concern us, Etta Robinson as Administratrix of the estate of Vivian Robinson was dismissed from the suit. As the action then stood before the learned judge, there really could not be any such apportionment as we have indicated, namely, that "the plaintiff's driver was three-quarters to blame and the second defendant a quarter to blame." The issue then was really whether there was any negligence in the driver of the vehicle owned by the Coca Cola Bottling Company, to wit, Errol Francis and how / it affected the estate of the deceased passenger.

In order to make an order as to apportionment in the terms of the judge's note, the "plaintiff's driver (sic) would need to be a plaintiff so that the question of his contributory negligence could be considered. See section 3 (1) Law Reform (Contributory Negligence) Act. But the plaintiff's driver" in this case was a defendant and his estate was sued jointly with the appellants and their driver. The liability between these defendants was therefore joint and several, and the judge could apportion if there was a claim for contribution. See sec. 3 (2) of the Law Reform (Tort Feasors) Act. But, as indicated, the third defendant whom the learned judge described as the plaintiff's driver, had been dismissed from the suit early in the proceedings.

The facts of this case are fairly common-place, and, if we may say so, straightforward. On the 24th of July, 1977, the driver of what I call the minibus, that is the vehicle in which the deceased Neville Hurd was a passenger, was approaching Spanish Town along the main highway intending to turn right into William Street. The appellant's driver Francis was proceeding on his left, his correct side, and approaching the minibus. The evidence shows that the driver of the minibus had put on his right indicator to show that he meant and intended to turn into William Street. The sole eye-witness stated that the minibus was much closer to the intersection with William Street than the driver of the appellant's van, that the driver of the minibus turned as he had indicated but a collision resulted before he had completed that manoeuvre. The witness stated that when the accident occurred, the greater portion of the minibus was already in William Street while a part still remained on the highway. He also stated that the Coca Cola vehicle was along the highway when the impact took place, and that the collision actually occurred on the soft shoulder of the highway on the left-hand side; left-hand side there meant left-hand side from point of view of the driver of the Coca Cola van.

The appellants called no witness and the findings of the learned judge are based on the evidence of the sole eye-witness, one Mr. Goffe Thompson. Evidence was also given by a police officer who came on the scene some two days after the occurrence, but the learned trial judge paid no regard to his evidence of what he said he found on the scene, as she concluded it afforded her no help "in apportioning blame.

Before us this morning, Mr. Gordon Robinson who argued with his customary economy which we find commendable, submitted that there really was no

no evidence of any negligent manoeuvre on the part of the driver of the Coca Cola vehicle and / in those circumstances it was not open to the learned judge to make any finding of negligence against him.

Mr. Edwards in reply, endeavoured to show that there was such evidence but we confess we are unable to see any evidence of negligence on the part of the driver of the Coca Cola vehicle. It was clear on the evidence that the driver of the minibus had a duty to ensure that before he made that right-hand turn across the path of oncoming traffic, i.e., the Coca Cola vehicle, it was safe to do so. From the fact that the accident occurred before the minibus had completed its manouevre, it must show a great error of judgment on the part of the driver of the minibus; he was negligent. There is no suggestion whatever on the evidence of the sole eye-witness, which could show in any way that the driver of the Coca Cola vehicle contributed at all to this accident, which, as we say, was due entirely to the negligence of the driver of the minibus.

Mr. Edwards suggested that because there was evidence of damage to the left side of the Coca Cola vehicle, this meant that the accident took place on William Street. In the first place that would be inconsistent with the pleadings in the statement of claim of the plaintiff where it said:

> "Just as the said vehicle FP-7387 entered into William Street as aforesaid motor vehicle lettered and numbered FN-2681 left the said highway crashed into motor vehicle lettered and numbered FP-7387 pushing the latter vehicle some distance below the said intersection partly on a portion of the soft shoulder of the said bypass road and partly into bushes adjoining the soft shoulder as aforesaid."

And in the second place it would hardly matter because whether the driver of the Coca Cola vehicle / intended to go left or to go straight it would nonetheless remain a primary obligation on the driver of the minibus to ensure that it was safe to cross, and by the occurrence of the accident he demonstrated that it was not safe.

The learned judge made a finding that the driver of this Coca Cola vehicle intended to go left, but that was never pleaded, and there is no evidence whatever to support such finding. There was also a statement by the learned judge in these words:-

> "Duty on all users of road to use road with care for other users, present or might be expected. Second defendant' (that would be the driver of the Coca Cola Vehicle) 'aware plaintiff's car cutting right and under duty to approach left turn into minor road with caution and indicate intention to plaintiff's driver. Did not do so."

It seems to us that because she misapprehended the effect of the evidence, it led her into error and may have been the basis for this three-quarters/one-quarter "apportionment" which, as has been shown, was not permissible in the circumstances of the case.

For these reasons we must allow the appeal and reverse the judgment of the court below. Judgment is entered for the appellants with costs here and in the court below to be agreed or taxed.

There was a cross appeal on the part of the respondents dealing with the question of "apportionment of blameworthiness" and the quantum of damages awarded was also challenged. The respondents abandoned the first ground and the second ground did not, in the event, arise for consideration. In the result, the cross appeal was dismissed.