C.A. Negligence – motor vehicle accident – plaintiff by motor car – Judge's decision based wholly on physical evidence which was not challenged – no reason to interfere with award which was eminently reasonable and logical.

JAMAICA

(Appeal dismissed)

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 91/87

✓ comp

BEFORE: THE HON. MR. JUSTICE CAREY, P (Ag.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

b/(as referred to)

BETWEEN	CALVIN GRANT	PLAINTIFF/APPELLANT
AND	DAVID PAREEDON	1ST DEFENDANT/RESPONDENT
AND	AUGUSTUS PAREEDON	2ND DEFENDANT/RESPONDENT

Mrs. Ursula Khan for Appellant

O.G. Dale for Respondents

October 4, 1988

CAREY, P. (Ag.):

This is an appeal against a judgment of Theobalds, J., given on the 15th of October, 1987. It concerned an action which he heard on the 17th - 18th of April, 1986 and 5th February, 1987. Judgment was reserved. This was an ordinary running down action in which the plaintiff claimed that he received injury when he was hit by a motor car driven by the first defendant and hardly seemed worthy of such protracted treatment.

The facts may be shortly summarised in this way. On the 27th day of July, 1977, at about 7:00 a.m., the plaintiff said he was riding his bicycle on a road called the Font Hill Road approaching its intersection with the main road between Seaforth and Trinityville in the parish of St. Thomas.

At the material time, he related, he was stationary on his pedal bicycle when a motor car driven by the 1st defendant came from his right,

which is the direction of Seaforth, swerved into the Font Hill Road, collided with him and caused him severe injury. The medical evidence disclosed the following injuries:

> "(1) Scar on face extending from left medical canthos up over forehead and frontal area of scalp to temporal side of skull.
>
> (2) Scar about 2 inches long just above upper lip.
>
> (3) Scar about 1 inch laterally to angle of mouth in a vertical direction.
>
> (4) Deformed left wrist.
>
> (5) Eyes - swelling in medical canthos area, when pressed it discharge pus.
>
> (6) Lowering of upper lid slightly below pupil line."

It is right to point out that the injuries which this plaintiff received were all to his left side, or substantially on his left side.

The defendant's story was quite at variance with that of the plaintiff. He said that he was driving his motor car from Seaforth towards Trinityville approaching this T-junction which the road makes with the Font Hill Road, when he was suddenly confronted with what he called a 'shadow', to his left. That shadow was the plaintiff who crashed into the left side of his motor car, scraping it and damaging it.

The evidence of that damage to the motor car which was as follows, and was given by the father, the 2nd defendant, who is the owner of the motor vehicle: He said that there was damage on the front fender on the left side between the bumper and the wheel was dented. The whole left hand side along the door was scratched and the back pivot window also was smashed. He said that there were flesh and hair on the dented portion and the glass was broken out. The car repair he put at $390.00.

The learned trial judge on those simple facts took a deal of time to come to his decision, and that decision has been the basis of a great deal of criticism by Mrs. Khan who argued with great pertinacity before us this morning.

The main thrust of her argument was that the learned trial judge did not use the advantage given him to observe the demeanour and to analyse the evidence which was placed before him, because he remarked in his judgment that he was not happy with some aspects of the evidence given by the police officer called on behalf of the defendant, which she said only meant that he regarded the police officer's evidence as unreliable. In sum, she really was saying that the verdict was unreasonable and could not be supported.

As I remarked before, there were two mutually inconsistent stories and plainly both could not be believed.

The learned judge did not rest his decision on the fact that he saw and heard these witnesses. He was very careful to point out at page 53 of the record that he considered very carefully the physical facts which I have already set out in this judgment and this is what the learned judge said and which I propose to repeat. He said this:

> "Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of crucial importance in assisting a tribunal of fact in determining which side is speaking the truth. The plaintiff's version of this accident, in my view, entirely inconsistent with the damage or injury to his person. It is clear from the medical evidence that the bulk of this damage is concentrated to the left side of his body. His left arm was broken, his left eye was damaged and the left jaw and left side of his face. If he was indeed seated on his bicycle as he described and was hit in that position by a car coming from his right and making a sudden swing left up the Font Hill road then it would follow that the impact would have been to his right (not left) side. The concentration of injury to the plaintiff's left side is far more consistent with his having ridden out from the minor Font Hill road into the major road and having made

> "a right turn in the direction of Seaforth. In this situation, the left side of his body would have been exposed to the car coming from the Seaforth side and a glancing blow to the left front of the vehicle would have resulted in the scrape along the vehicle's left. It is after the hit and the scrape along the left side of the motor car that the plaintiff's head (now lowered by the falling bicycle would have come into contact with the left rear pivot window of the motor car.

In my view, with all respect to the argument put forward by learned counsel that was the ratio of the case. It did not depend on the judge being unhappy with the evidence given by the police officer who investigated the accident. He rested his decision wholly on the physical evidence which was not challenged in the case.

I do not see how this Court could interfere with that approach which in my view was eminently reasonable and logical. Nothing has been shown this morning which convinces me that the learned judge fell into error in his consideration of the issues before him and of the facts or that he failed to appreciate the facts which he had before him and I would therefore dismiss the appeal with costs. There is one minor amendment which must be made to correct the record which was pointed out by Mrs. Khan.

The learned judge in his judgment said that there would be judgment for the defendants on the counter-claim. There was in fact a counter-claim filed by the 2nd defendant and accordingly the judgment must be amended to correct that error. In all other respects, the judgment of the Court below should be affirmed.

FORTE, J.A.:

The case before the learned trial judge was, in my opinion, one essentially related to questions of fact. In the detailed and reasoned judgment the learned trial judge found that the plaintiff had failed to prove any negligence on the part of the first-named defendant and by contrast found that the plaintiff's negligence was the sole cause of the accident.

He relied significantly on what he described as the independent physical evidence which in particular related to the fact that the plaintiff's injuries were all to his left side and the fact that the damage to the car was along its left side, i.e., the left front fender and door, duco scrapes along the left side and damage to the left back pivot window.

These matters he found were more consistent with the defendant's case and accordingly found for the defendants. With this reasoning I cannot find fault.

I therefore concur with the conclusions arrived at by My Lord President, Acting, and I too would dismiss the appeal.

DOWNER, J.A.:

Before this Court Mrs. Khan argued that as this appeal was by way of re-hearing, we were at liberty to upset the trial judge's findings. I think this is a misunderstanding of the term re-hearing. The re-hearing in the Court of Appeal is a re-hearing by way of the documents speaking, and we are bound by the judge's findings unless they can be upset as being unreasonable.

Consequently, the judge's findings which were based on the physical injuries to the plaintiff and the damage to the car must stand, as it was on this basis that the learned trial judge decided that the plaintiff had not satisfied the onus of proof and also it was this very finding that enabled the trial judge to find for the defendant on the counter-claim. To upset these findings would mean that we would be usurping the trial judge's function and he had the benefit of seeing and hearing the witnesses.

Therefore this appeal was hopeless from the very beginning and I too concur in dismissing the appeal of the plaintiff and affirming the finding for the defendant on the counter-claim.

CAREY, P. (Ag.):

The order of the Court, therefore, is that the appeal is dismissed. The judgment of the Court below is affirmed, except that judgment should be entered for the second defendant on the counter-claim and the respondent is entitled to the costs of this appeal to be taxed if not agreed.