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IN THE COURT OF APPEAL

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RESIDENT MAGISTRATE'S CIVIL APPEAL No. 66/1971

BEFORE: The Hon. Mr. Justice Fox, Presiding.
The Hon. Mr. Justice Edun, J.A.
The Hon. Mr. Justice Hercules, J.A. (Ag.).

PLAINT No. 1881/1970 - CYRIL JAMES v. DAVID SEIVWRIGHT

PLAINT No. 2525/1970 - DAVID SEIVWRIGHT v. CYRIL JAMES

Dennis Daley for Seivwright

No appearance by or on behalf of James.

October 28th, 29th and
December 10th, 1971

HERCULES, J.A. (Ag.):

In this Judgment Seivwright is referred to as the defendant, and James as the plaintiff.

This appeal derives from two plaints which were heard together by one of the learned Resident Magistrates for St. Andrew on 19th April, 1971. In Plaint No. 1881/1970 there was judgment for the Plaintiff in the sum of $168.49 with costs to be agreed or taxed and in Plaint No. 2525/1970 judgment was again entered in favour of the Plaintiff with costs to be agreed or taxed. In both cases the Defendant herein has appealed.

Both parties were agreed that the accident took place when Plaintiff was driving a car up Shortwood Road and when the Defendant was also driving a car down Shortwood Road. The Plaintiff said that he intended to turn right into premises No. 56A Shortwood Road and for that purpose he put on his right blinker light and stopped about the middle of the road. He formed the impression that Defendant's car, approaching about 100 yards away, was travelling pretty

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fast. He heard a touching and releasing of the brakes of Defendant's car, and after what he described as a "substantial touching" of the brakes, with the tyres then dragging, Defendant's car washed into collision with Plaintiff's car. With a distance of 6' 4" from his right front wheel to his right bank, Plaintiff insisted that large American cars passed on his right, so could Defendant's M.G. Magnette. Plaintiff denied swinging across the road and stopping in the path of Defendant's car when Defendant's car was only 20 to 25 yards away.

The Defendant claimed however that he was driving about 30 miles per hour and observed the lights of Plaintiff's vehicle coming from the opposite direction. Plaintiff's car suddenly swung across the road when approximately 20 yards from Defendant's car. Defendant said he did not touch and release his brakes - he applied his brakes and swerved right but there was a collision. He agreed that Plaintiff's car was stationary immediately before the collision and that his car made a drag mark of 15 feet. He contended however that he could not pass on Plaintiff's left since another car was approaching from the opposite direction, he said nothing about his inability or failure to pass on Plaintiff's right, and he did not agree that the effective cause of the accident was that he was driving too fast.

In his findings, the learned Resident Magistrate:

(1) accepted James' account of how the accident happened,

(2) believed that James had stopped in the position he described when Seivwright's car was at a distance away sufficient for him to apply his brakes or take other evasive action,

/(3) found that.....

(3) found that the measurements indicated that there was ample space for Seivwright's car to have passed in front of James' car without colliding with it.

He held that the accident was due solely to the negligence of Seivwright.

Several grounds of appeal were filed but they can be summarised by stating that Mr. Daley contended that the Defendant was not negligent and if it could be held that the Defendant was negligent at all, then the Plaintiff was guilty of contributory negligence.

The legal positions as set out in the Road Traffic Law, Chapter 346, Section 44 (1)(f) reads as follows:-

> "The driver of a motor vehicle shall observe the following rules - A motor vehicle proceeding from a place which is not a road or <u>from a road into a place which is not a road,</u> shall not be driven so as to obstruct any traffic on the road."

Then Section 44 (4)(a) ibid provides that "a motor vehicle obstructs other traffic if it causes risk of accidents thereto."

But Section 44(3) provides as follows:-

> "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 motor vehicle from the duty imposed on him by this sub-section."

Assuming that the Plaintiff, as contended, was in breach of Section 44(1)(f), the critical question is:- could

/the Defendant...

the Defendant be exonerated? In my view there was ample evidence before the learned Resident Magistrate to support his findings that the Defendant could not be exonerated and that the accident was due solely to his negligence since he could have avoided the accident if he had been driving as a reasonably prudent driver, and he did not avoid it. I would dismiss the appeal.

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EDUN, J.A.:

I agree with my brother Hercules that this appeal be dismissed. I wish, however, to add my reasons.

At the trial, James was saying that he stopped in the middle of the road, put on his blinker lights indicating his intention to turn right. He said he saw when Seivwright was "coming from the direction a good distance away - about 100 yards away ..... coming pretty fast ... I heard that car touching its brakes and let go. It was touching and releasing and there was a sustained touching .... The car washed and came into mine. The tyres of car were dragging before the car collided with mine ..."

On the other hand Seivwright claimed that he observed James's vehicle coming from the opposite direction but that vehicle suddenly swung across his side of the road when he was approximately 20 yards from it. He applied his brakes and swerved to his right. The two cars collided. He did not touch and release his

/brakes.....

brakes.

The learned resident magistrates said he accepted James's evidence as to how the accident happened and that in any event, the measurements indicated to him that there was ample space for Seivwright to have passed in front of James's car without colliding. The fact of James stopping in some part of the right of way of Seivwright, would lend the inference that he was at fault, but whether that fault was an operative and effective cause of the collision, was a question of fact for the learned resident magistrate to adjudicate upon. In his findings, he states -

> " 2. I believed that James had stopped in the position he described when Seivwright's car was at a distance away sufficient for him to apply his brakes or take other avasive action."

In Br. Columbia Elec. Rly. Co. Ltd. v. Loach (1916)1 A.C. 719, the question put to the jury was: "If both the company and the deceased were guilty of negligence could the company then have done anything which would have prevented the accident?" The jury answered: "Yes, the motorman could have stopped the car if the brake had been in effective condition." The trial judge dismissed the plaintiff's action on the ground that as Sands and the defendants were both negligent there was No further negligence on the part of the defendants. On appeal, a majority reversed that decision and gave judgment for the plaintiff. The defendants appealed and the Privy Council dismissed their appeal.

> Lord Sumner said: "In the present case their Lordships are clearly of opinion that, under proper direction, it was for the jury to find the facts and to determine the responsibility, and that upon the answers which they returned, reasonably

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> construed, the responsibility for the accident was upon the appellants solely, because, whether Sands got in the way of the car with or without negligence on his part, the appellants ought to have avoided the consequences of that negligence, and failed to do so, not by any combination of negligence on the part of Sands with their own, but solely by the negligence of their servants in sending out the car with a brake whose inefficiency operated to cause the collision at the last moment, and in running the car at an excessive speed, which required a perfectly efficient brake to arrest it."

It may be said that that case was decided before "contributory legislation" was enacted in Canada." However, in Marvin Sigurdson v. Br. Columbia Elec. Rly. (1953) A.C. 291 (after such legislation was enacted) a situation occurred where the plaintiff's car stopped in the tracks of an oncoming street car which, in an unobstructive view, was about 200 to 250 feet away. Nevertheless, the defendant's street car came on and struck the plaintiff's car and demolished it completely. The trial judge in his summing-up to the jury referred to the rule in Davies v. Mann on the "last opportunity rule" as a test in applying the facts of that case. The jury found the plaintiff not guilty of contributory negligence and found the defendant 100% responsible. The British Columbia Court of Appeal reduced the judgment by 50% holding that both the plaintiff and defendant were negligent. On appeal to the Privy Council, their Lordships allowed the appeal and considered that the judge's reference to Davies v. Mann was a perfectly correct summary of the facts and statement of the effect of that decision and could find nothing wrong in the

context to suggest that it amounted to a direction that as a matter of law if they accepted the plaintiff's evidence the action must necessarily result in the defendant being solely responsible.

I am of the view, that where the facts in a collision case can, reasonably construed, warrant a finding which would result in the defendant being 100% liable, if the tribunal accepted the plaintiff's evidence, a court of appeal should not interfere, unless there is some justification. In considering the facts of the instant case the learned resident magistrate has had the advantage of seeing, hearing and assessing the credibility of the witnesses. He accepted James's evidence and in finding Seivwright 100% responsible, he must have determined that the collision would never have accourred but for; (1) the distance Seivwright was from James's car when it stopped, (2) Seivwright's driving at an excessive rate of speed and (3) Seivwright had inefficiently operated his brakes by the indecisive way of touching and releasing his brakes - Seivwright, had himself wholly to blame.

Edmund Davies L.J. in Breen v. A.E.U (1971) 1 A.E.R. at p. 1148, reiterated how difficult it is for an appellate court to disturb the findings of a trial judge which were dependent upon the credibility of witnesses. Thus:-

> "But in this Court we are in a position of quite exceptional difficulty in dealing with them. Not only have we (unlike the learned judge) seen and heard none of the witnesses, but (and this I stress) we do not have even a transcript of their evidence. But, assuming we had, the House of Lords decision in Onassis v. Vergottis affords a recent and striking illustration of how difficult it is for an appellate Court to disturb findings depend nt on the credibility of witnesses. In Steamship Hontes[illegible]room

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(Owners) v. Steamship Sagaporack (Owners) Lord Sumner said:

"What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses .... It is not, however, a matter of diseretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge , and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case... If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone.' "

In this case I would let alone the decision of the Magistrate because I cannot see where the learned resident magistrate in the instant case failed to use or palpably misused his advantage; and there is ample evidence, reasonably construed, to justify his conclusions.

R.M. CIVIL APPEAL NO. 66/71

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CYRIL JAMES v. DAVID SEIVWRIGHT

FOX, J.A. :

THE FACTS

At about 7.10 p.m. on 12th August, 1969, Mr. Cyril James, an electrician was driving his motor car up Shortwood Road in Saint Andrew when it collided with another car being driven down that road by Mr.David Seivwright, a Solicitor. According to James, the headlights of his car were on at the time. He intended to turn into the gateway of 56A Shortwood Road which was on his right side of the road. There came the stage when James decided to turn his car into the gateway, but before he so decided, he saw "a good distance away - about 100 yards away", the oncoming lights of Seivwright's car on its left side of the road. James said that he "came to the middle of the road" and put on his blinker lights to indicate his intention of turning to the right. He "gained the impression" that the oncoming vehicle "was coming pretty fast". He stopped where he was, but not suddenly. He heard the oncoming car "touching and releasing" its brakes and then there was a sustained application of brakes. The oncoming car "washed" and its front collided with the left front of his car. The oncoming car was driven by Seivwright. After the collision James asked him why he did not stop. According to James, Seivwright said that he could not stop because his wife was in a state of pregnancy. This was denied by Seivwright. The cars remained in contact with each other until the police arrived and made measurements. These were as follows:-

Width of road at point of impact ..	23' 6"
Width of James' car ..	5' 5"
From right front wheel of James' car to his right bank ..	6' 4"
From right rear wheel of James' car to his right bank ..	7' 1"
Length of drag mark made by Seivwright's car	15'

In his account of the accident, Seivwright said that he was driving at about 30 m.p.h. and about 3 - 4 feet from his left bank when he observed James' vehicle approaching. He was about 20 yards away from it when it suddenly swung across the road. He applied his brakes and swung to his right but was unable to avoid the collision.

THE MAGISTRATE'S DECISION

Actions claiming damages for negligence were filed in the Resident Magistrate's Court, Saint Andrew by both James and Seivwright. The actions were consolidated and tried together. The Magistrate accepted James' account of the accident and decided the issue of liability in his favour. Seivwright appealed. His counsel contended before us that on the facts accepted by the Magistrate, James was entirely at fault. In his reasons for judgment, the Magistrate summarized the evidence of James and Seivwright - they were the only witnesses - and then stated his findings. These have been set out by my learned brothers. They need not be stated again.

THE LAW

By virtue of the provisions of Section 44(1) of the Road Traffic Law, Cap, 346 the driver of a motor vehicle is required to observe the eight rules of the road laid down in the sub-section. Of these eight rules, three are relevant in considering the question of negligence in this case. These three rules direct that a motor vehicle:-

"(a) meeting or being overtaken by other traffic shall be kept to the near side of the road. When overtaking other traffic the vehicle shall be kept on the right or off-side of such other traffic;

(d) 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; and

(f) proceeding from a place which is not a road into a road or from a road into a place which is not a road,

shall not be driven so as to obstruct any traffic on the road;"

For the purposes of the section it is further provided in subsection (4)(a) -

"a motor vehicle obstructs other traffic if it causes risk of accidents thereto."

The effect of the provisions of S 44(1) is to describe the special statutory duty which the driver of a motor vehicle owes to other traffic in the particular circumstances envisaged in each rule. For all practical as well as legal purposes, section 44(1)(a) divides the roadway into two halves, and identifies the particular half in which a motor vehicle shall have the right of way, depending upon whether it is meeting, or is being overtaken by, or is overtaking other traffic. As a result, in the event of an accident between two vehicles on a road, the point of collision becomes an important fact in determining fault. Proof that this point is located within a particular half of a road is capable of giving rise to an inference that the driver who should have kept his vehicle within the other half is to be blamed forthe accident. The further away from the centre line this point is,the stronger may be the inference of negligence. The legal consequence of the inference is to put an evidential burden upon the driver of the vehicle which has encroached to show that the accident was not caused through his fault. In any action for damages resulting from the collision, the extent of his liability would be largely dependent upon the degree of his success in discharging this burden. By reference to other facts proved by his opponent, as well as by adducing proof of additional facts himself, he may be in a position to invoke the assistance of section 44(3) of the Road Traffic Law. He may be able to establish that notwithstanding his encroachment, the accident was caused either wholly or partly through the fault of the other driver. He may also be able to prove that the accident was unavoidable. But if he should fail to discharge the evidential burden which is initially upon him, and there was proof only of the fact that the point of collision was on a

particular half of a road, a court would be entitled to conclude the issue of liability on the basis of the inference described above.

Section 44(1)(f) and Section 44(4)(a) direct, in effect, that when a motor vehicle is proceeding from a road into a place which is not a road, such as a gateway on its right, as in this case, it must leave its left half of the road and cross over that other half within which oncoming traffic has the right of way without causing the risk of an accident. Consequently, in performing this manoeuvre, the driver of that motor vehicle is under a duty to ascertain whether there is any traffic approaching him which is near enough to cause the danger of an accident. To do this safely, he must make his judgments before he allows the motor vehicle to cross the centre line, and to enter his right half of the road. The obligation requires him to determine:-

(i) the distance any oncoming traffic is away from the line of the proposed turn into the gateway,

(ii) the speed at which this traffic is approaching, and

(iii) on the basis of his calculations in (i) and (ii), whether the oncoming traffic is near enough to cause the risk of an accident.

If, as in this case, the road is wide enough, and if other circumstances permit him safely to do so, the driver may bring the motor vehicle into the extreme right of his left half of the road so that his right wheels are alongside but not over the centre line, and give indication of his intention to turn to the right. If necessary, he must stop and wait until he has ensured that it is safe for him to proceed. Once he has decided to cross, and has actually allowed his motor vehicle to obtrude upon his right half of the road, then consonant with his duty not to create the risk of an accident, he must proceed into the gateway and out of the right of way of oncoming traffic as quickly as possible.

THE ISSUES IN THE CASE

At the time of the collision, James' car was stationery. He did not stop his car twice. He had brought it into the middle of the road and put on his blinker lights to indicate his intention of turning to his right, but on the evidence he did not then halt in a safe position on his left half of the road, and after that move forward and stop again. He "gained the impression" that Seivwright's car was "coming pretty fast", and stopped where he was. He stopped once only. This must have been when he had already moved over to Seivwright's half of the road. This is so because having regard to the swing of Seivwright's car to the right to avoid the collision, the impact could not have had the effect of moving James' car to the right. To the contrary, the force and direction of the blow must have tended to push James' car backwards and to its left. In the light of the measurements made, at the time of the collision the left front wheel of James' car must have been either on or to its right of the centre line, and its left back wheel 9" or closer to its left of that line. At the time of the collision, therefore, James' car was at a slant, and almost wholly within Seivwright's half of the road. Consequently, the first question which presented itself for the Magistrate's consideration was whether James had discharged the evidential burden which was upon him to show that in stopping in that position he was not negligent. This question was antecedent to questions as to how far away Seivwright's car was when James' car stopped, and whether Seivwright could have avoided the collision by applying his brakes, or by passing to the right or to the left of James' car. The Magistrate did not appreciate this position. Nowhere in his reasons for judgment is there any recognition of the statutory duty of care owed by James to Seivwright as described in the provisions of S.44(1)(a) and (f) of the Road Traffic Law. As a consequence, the Magistrate did not analyse the evidence in terms of those duties. The question whether James had discharged the evidential burden of showing that the collision had occurred without his fault was neither asked nor discussed. In the result, the Magistrate remained oblivious to clear

breaches of the duty of care owed by James to Seivwright. Under cross-examination James admitted that he had seen the lights of Seivwright's car before he decided to make the turn. From his evidence in chief, Seivwright's car was then "a good distance away - about 100 yards away". When he reached the point of the actual turn, James should by then have made the calculations on the basis of the speed of Seivwright's car, and the distance away it was from him, which would have enabled him to determine that it was safe for his car to be turned across the right of way of Seivwright's car. The burden was upon him to show that at that stage of the actual turn to the right there was no risk of a collision. No evidence was given by James for this purpose. The explanation for this omission is obvious. The evidence was not forthcoming because none was available. The unmistakable position disclosed in the record is that James proceeded to cross the road without making sure that it was safe for him to do so. As he admitted further under cross-examination, when he was almost entirely on Seivwright's half of the road, he realized, apparently for the first time, that he could not make the turn and stopped. Seivwright's car was moving towards him, and this prevented him from being able to say how far away it was from him when he stopped. The Magistrate found that the distance was "sufficient" for Seivwright "to apply his brakes or take evasive action". In his evidence Seivwright said that James had suddenly swung across the road when the distance between the two vehicles was approximately 20 yards. In rejecting Seivwright's contention of having been put into a dilemma by this sudden action on the part of James, the Magistrate must have been satisfied that the "sufficient" distance which separated the two cars when James stopped was appreciably more than 20 yards. How much more is suggested by the circumstance that Seivwright was found wholly at fault. The Magistrate must have considered that when he was very far away, Seivwright had seen James' car obstructing his half of the road and had purposely and recklessly run into it. This is the only position in which Seivwright could have been found entirely to blame. If he had been

merely negligent in not taking proper steps to avoid James' car, then, as Denning L.J. (as he then was) said in Harvey v. Haulage Executive /1952/ 1 K.B. 120 at 126, "the damage is the result partly of his own fault in not avoiding the obstruction, but also partly of the fault of the other person who left the obstruction on the road".

It seems not to have occurred to the Magistrate to consider that James' car was not a "static" obstruction on the road - it was not a 'hobbled donkey' - and that by not travelling the 15 feet or so which would have taken him into the safety of the gateway whilst the oncoming car was still so very far away, and in allowing his car to remain as an obstruction on Seivwright's half of the road, it was possible to regard James as having been more at fault than Seivwright.

CONCLUSION

In my view, the indications are overwhelming that by turning across the road at the time he did, James was in breach of his duty of care to Seivwright to ensure that the manoeuvre could be executed without danger to oncoming traffic. Whatever the distance Seivwright might have been from James at the time James stopped, the latter cannot avoid further blame for intensifying the risk of an accident by allowing his car to become an obstruction on Seivwright's right of way when it was his duty to proceed as quickly as possible into the safety of the gateway. In my view, further, it is impossible to disassociate the cause of the accident from these breaches of James' duty of care to Seivwright.

The only questions left to be determined are whether the accident was contributed to by any negligence on Seivwright's part, and if so to what extent. For a proper consideration of these questions, account must be taken of the right of a driver in Seivwright's position to assume that other users of the road will observe traffic rules. This right is of respectable antiquity. It was recognized by the Privy Council over 60 years ago in Toronto Railway Co. v. King /1908/ A.C. 260. In that case the driver of a horse drawn delivery van was driving it from west to east along

Adelaide Street in Toronto. The van was struck at the intersection of Adelaide and Yonge Streets by a tram car of the Company which was proceeding from south to north on Yonge Street. The tram car was being driven in breach of rules which regulated the manner of its approach, and required reduction of its speed at crossings. The driver of the van was killed. In an action by his representatives alleging negligent management of the tram car, the Board rejected the contention that in attempting to cross in front of the tram car the deceased was guilty of "folly and recklessness". At page 269 (supra) the Board said -

> "It is suggested that the deceased must have seen, or ought to have seen, the tramcar, and had no right to assume it would have been slowed down, or that its driver would have ascertained that there was no traffic with which it might come in contact before he proceeded to apply his power and cross the thoroughfare. But why not assume these things? It was the driver's duty to do them all, and traffic in the streets would be impossible if the driver of each vehicle did not proceed more or less upon the assumption that the drivers of all other vehicles will do what it is their duty to do, namely, observe the rules regulating the traffic of the streets."

The Board upheld the jury's finding that the deceased was not guilty of contributory negligence.

This assumption which Selvwright was entitled to make had the effect of lightening his duty of care towards traffic approaching him. He did not have to be watching all the time to see whether James was about to disobey the provisions of Section 44(1)(a) or (f) of the Road Traffic Law. As Scott, L.J. said in the course of his classic statement of the meaning of the statutory lightening of the duty to take care, Selvwright was "free from the burden of anxiety and care involved in having to depend on being perpetually on the look out for approaching traffic". (Sparks v. Edward Ash, Ltd. (1943) K.B. 223 at

231). In judging the manner of Seivwright's driving on the occasion, a distinct allowance must therefore be made for his legitimate expectation, firstly that James would keep to his proper side of the road, and secondly that if James did come on to the other side of the road, he would not allow his car to become an obstruction on that side. No such allowance was made by the Magistrate, and in this respect also, the reasons for his judgment are inadequate.

Nevertheless, although Seivwright was entitled to proceed on his half of the road on the assumption that James would not obstruct his right of way, this does not mean that he was free to relinquish that general state of attentiveness which is required of all drivers. To use the words of Carberry, C.J. in McNeish v. DeLisser (1951) 6 J.L.R. 47 at 55, Seivwright was not at liberty to drive "as though he were wearing blinkers, and unable to see anything to his right or left" or ahead of him. This duty to avoid an accident, if possible, is explicit in the provisionsof Section 44(3) of the Road Traffic Law. In view of the findings of the Magistrate, when he was a considerable distance away, Seivwright must have seen James' car come on to bis side of the road. At that stage Seivwright came under a duty to take "such action as may be necessary to avoid" the potential danger created by this manoeuvre of James' car. Seivwright did take some action. He applied and released his brakes. He checked his speed but not violently or continuously. In the circumstances this was not entirely unreasonable evading action. It was in keeping with his duty of care to his passengers, particularly his pregnant wife. In addition, Seivwright was still far away. He was entitled to expect that although James had come on to his side of the road , James would not loiter within, but would proceed out of his right of way. So Seivwright checked his speed, and by this action he removed himself from the category of a reckless person. But it does not absolve him from all blame. He should have driven in such a manner and at such a speed that, if,in breach of his duty, James allowed his car to remain as an obstruction on Seivwright's right of way, he (seivwright)

would be able either to stop or to pass without colliding with it. It is in this respect that Seivwright was in breach of his duty of care. He had taken some action to avoid the accident, but not all the action which was available to him and which would have completely exonerated him. Nevertheless, James was more to blame. In my view the accident was caused by the fault of both parties in the proportion of seventy-five per cent by James and twenty-five per cent by Seivwright. I would have determined the appeal on this basis. My brothers think differently. In accordance with their decision the appeal is dismissed with no order as to costs.