Dissenting Opinion

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 15/78

BEFORE: The Hon. Mr. Justice Robinson, President
The Hon. Mr. Justice White, J.A. (Ag.)
The Hon. Mr. Justice Marsh, J.A. (Ag.)

BETWEEN	PETER THOMPSON	PLAINTIFF/APPELLANT
AND	SAMUEL O'CONNOR	DEFENDANT/RESPONDENT

P.M. Millingen for Plaintiff/Appellant

Mrs. Pamela Benka-Coker for Defendant/Respondent

9th & 10th October, 1980;
& 5th June, 1981

ROBINSON, P.:

At about 2.30 p.m. on 26/6/71, the Plaintiff/Appellant was driving his new Mercedes-Benz Motor Car along the main Road from Old Harbour to Spanish Town in the parish of St. Catherine when he was involved in a collision with a blue Cortina Motor Car owned and driven by the Defendant/Respondent. The accident occurred in the vicinity of a place called McCooks Pen. There the road was very straight and the speed limit was 50 miles per hour. The Plaintiff/Appellant was proceeding in the direction of Spanish Town and there were 2 vehicles ahead of him proceeding in the same direction, a red Fiat and the blue Cortina. The blue Cortina was in front of the Fiat.

According to the Plaintiff/Appellant, he was travelling at about 40 m.p.h., the Fiat at about 35 m.p.h. and the Cortina at about 30 m.p.h. The Fiat was therefore gaining on the Cortina and he was gaining on both. When he was about 35 yards behind the Fiat,

he decided to pass the 2 cars which were ahead of him. The Cortina was then about 25 yards ahead of the Fiat. At that point he could see ahead of him for about ¼ mile and there were no vehicles coming from the opposite direction. Both the Fiat and the Cortina were then proceeding on the left hand side of the road. He put on his indicator indicating an intention to pull out to the right and he sounded his horn indicating his intention to overtake. The driver of the Fiat put out his hand and signalled him to pass. This he did and as he passed the Fiat, he sounded his horn again intimating his intention to pass the Cortina as well. As the road ahead was still clear, nothing coming from the opposite direction, he remained on the right side of the road and proceeded in an attempt to overtake the Cortina, but as he reached up to about 25 feet behind the Cortina, the Cortina suddenly and without warning made a right turn across his path. He applied his brakes but was then so close to the Defendant's vehicle that a collision was inevitable. The Plaintiff's car hit into the Cortina midway between the right hand front door and the right hand rear door.

The Defendant's version of the accident differed from the Plaintiff's. According to the Defendant, he, intending to make a right turn so as to go off the Main Road on to a Parochial Road leading to McCooks Pen, looked into his rear view mirror and saw a line of cars behind him. The nearest car was 25-30 yards away and he was then about 10 yards from the intersection where he intended to make his right turn. He put on his indicator, indicating a right turn, put out his right hand also indicating an intention to turn right, slowed down considerably, pulled to the white line in the centre of the road and then came to a stop. Having stopped in the centre of the road, two of three cars overtook him on his left and the third slowed down considerably but made no effort to pass him. He then "looked in the direction of Spanish Town and that was clear and I glanced in rear view mirror, looked down the road, made sure it was clear and then I started going across because it was clear to

do so from either end. " When he had actually crossed the white line and the front of his car had actually entered the Parochial Road to McCooks Pen, he felt a bang on the right rear of the car. The car spun around - couldn't say how many times - and landed against a light post at the intersection - at the beginning of the Parochial Road - on the left side thereof going in. He had no idea of what hit his car at the time of the impact. He never saw the Mercedes-Benz until he was taken from his car after the accident. He had no idea where it came from. He had not seen it in his rear view mirror. He agreed, however, that the range of view from where accident happened backwards was about a quarter mile and that he could see that distance backwards in his rear view mirror. He asserted that he was satisfied that the road was clear before he made his right turn. But he admitted that had he seen the Mercedes-Benz he would not have turned and he thought that his car had a blind spot - a metal spot to rear of windscreen.

In the light of that evidence it is inconceivable, even if every word of it were believed, that the Defendant could have been held completely free from blame for the accident. But every word of it was not believed by the learned trial Judge. She did not believe that the Defendant had come to a stop in the middle of the road before making his right turn. She found that there was no stopping and she found also that the Defendant did not give a sufficient signal of his intention to make a right turn. She found that he had only given "a short signal" - put out his hand but had to take it in to operate gear. But she found that with the distances between the cars it was reasonable for the Defendant to expect that he could safely cross before the cars behind could reach him. The Plaintiff had testified that the blue Cortina was approximately 25 yards ahead of the Fiat when he overtook the Fiat and the learned Judge opined that 25 yards was a far distance and that it provided ample space for the Mercedes-

Benz to get back to its left after passing the Fiat. What she failed to appreciate was that at 50 m.p.h. that distance would be covered in just 1 second flat (1.02 seconds to be exact) and that if the road ahead was clear, as indeed it was, there would be no sense in the Plaintiff moving back to his left only to move out again to his right so as to pass the Cortina. And what is even more important and what the learned Judge also failed to appreciate, was the fact that if the Defendant had been keeping a proper look-out and had not merely "glanced" in his rear-view mirror, he could not have failed to see the Plaintiff's approaching car. And her finding that with distance between cars, it was reasonable for the Defendant to expect that he could safely cross before cars behind reached him was inconsistent with her finding that the Plaintiff was "close to the Cortina."

The learned trial Judge also appears to have concluded that the Plaintiff was travelling at a "speed much too fast in the circumstances" because there was a drag-mark of 60 feet after the impact. This finding could only be arrived at by ignoring the fact that the speed limit in the area was 50 m.p.h. and that at that speed overall stopping distance would be in the vicinity of 175 feet and actual breaking distance, 125 feet. (See Bingham's Motor Claims Cases - Sixth Edition - p. 87). A total breaking distance of approximately 74 feet, that was the evidence, with 60 feet taking place after the impact, would therefore, in the absence of any evidence as to what effect the impact could possibly have on the stopping distance of the Plaintiff's car, be no indication whatever, of speed in excess of 50 miles per hour. There was, for example, no evidence as to the respective weights of the two cars, though it could be said to be common knowledge that a Mercedes-Benz is a larger and much heavier car than a Cortina. The learned Judge had herself described the Mercedes-Benz as a "powerful car."

Apart from this evidence of the 60 foot drag-mark, the only other evidence in the case relating to the Plaintiff's speed was his own evidence that he was going at about 40 m.p.h. and that of his

witness that the Fiat was doing 40 - 45 m.p.h. (and not 35 m.p.h. as opined by the Plaintiff), and that the Plaintiff was going faster, but how much faster he could not say.

On a perfectly clear road, with a dry asphalted road surface, with practically no traffic (not even pedestrians) in the immediate vicinity at time of the accident, except the Fiat, the Cortina and the Plaintiff's Mercedes-Benz - all travelling in the same direction - and the speed limit on which was 50 m.p.h. there were no circumstances whatever to suggest that a speed not exceeding that 50 m.p.h. was excessive. The fact that there was a side-road going into McCooks Pen, or that there were trailer crossings in the vicinity is in my view immaterial to the question of speed in the circumstances of this case. There were no trailers crossing or attempting to cross at the time of the accident. There were no vehicles emerging from or attempting to emerge from the side-road. And in any case the fact of a side-road or of trailer crossings would put the Plaintiff on the alert for the eventuality of traffic emerging from the side-road or of trailers attempting to cross. It would have had nothing whatever to do with the duties owing as between the Plaintiff and the Defendant to each other.

In Quinn v. Scott (1965) 2 A.E.R. 588 it was held that there was nothing wrong in overtaking 2 vehicles at 70 - 75 m.p.h. on a road that was straight for a considerable distance, where there was no impairment of the driver's vision of what lay ahead of him, where there was no evidence that any traffic whether wheeled or pedestrian might be expected to emerge from side-turnings, or openings at the side of the road and where the traffic was not heavy. At p. 590, Glyn-Jones J., in considering whether it was negligent to drive at such a speed, had this to say:

> "When I was first called to the Bar most Judges would have thought that it was; but times have changed. There are a number of makers of motor cars who, like the makers of the motor car which the first named defendant was driving,

> " make their motor cars for the express purpose that, in appropriate conditions, they may safely be driven at high speeds - higher, indeed, than seventy-five m.p.h. The high speed alone is not evidence of negligence unless the particular conditions at the time preclude it. "

And in Tocci v. Hankard (1966) 110 S.J. 835, C.A. it was held by the Court of Appeal in England that the rule in the Highway Code not to overtake at road junctions did not apply to side-roads and that it was not negligent for a driver on a Main Road to attempt to overtake another vehicle in the vicinity of a side-road. There the Defendant was in the act of overtaking a scooter travelling in the same direction as himself when the scooter swung to the right to enter a side-road. The Defendant was forced to swing also to his right in an attempt to avoid the scooter and ran into the Plaintiff who was proceeding on a moped cycle on his correct hand in the opposite direction. It was held that the Defendant was not to blame. In fact, said Lord Denning, the only person at fault was the driver of the scooter.

Similarly, in my view, the only person at fault in the instant case, is the Defendant/Respondent. He it was who acted in flagrant violation of Section 51 (1) of the Road Traffic Act which provides, inter alia, that the driver of a motor vehicle shall observe the following rules - a motor vehicle

> "(a) ..... being overtaken by other traffic shall be kept to the near side of the road ..... "
>
> "(b) being overtaken by other traffic shall be driven so as to allow such other traffic to pass; "
>
> "(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. "

The Defendant was in violation of every one of the aforementioned rules. On the other hand, the Plaintiff/Appellant had observed every one of the rules which applied to him.

Section 51 (1)(a) provides, in so far as applicable to him that "When overtaking other traffic the vehicle shall be kept on the right or off-side of such other traffic." This he had done.

Section 51 (1)(c) provides that a motor vehicle

> "(c) shall not be driven alongside of, or overlapping, or so as to overtake other traffic proceeding in the same direction if by so doing it obstructs any traffic proceeding in the opposite direction. "

There was no traffic proceeding from the opposite direction, hence he did not obstruct any such traffic.

> "(g) shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead. "

The view of the road ahead was clear and unobstructed for at least a ¼ mile, and remained so until the Defendant/Respondent suddenly turned across his path in breach of all the rules relating to the Defendant and at a time when the Plaintiff was so close that the accident was inevitable.

The learned Judge found that the Defendant had given a signal of his intention to make a right turn but that that signal was insufficient. If that is so, why should the Plaintiff be blamed for not seeing it? And even if the Defendant had given a sufficient signal, would it not have still been his duty to wait until the Plaintiff passed him before executing the turn? That is what the rules in Section 51 (1) prescribe.

Dealing with the Plaintiff, the learned Judge after stating that "Either Mercedes did not warn the Cortina of his presence and intent to overtake or if he did that was not appreciated," later proceeded to find that the Plaintiff was negligent because, inter alia, he had not given sufficient intimation of his presence. Implicit in that finding is, of course, that the Plaintiff did give some intimation of his presence, but that she did not think it sufficient. Well, what was the evidence on this? The Plaintiff stated and in this was supported by the owner of the Fiat, that

after passing the Fiat he again sounded his horn as a warning to the Cortina that he was about to overtake it. What other intimation of his presence could he be expected to give? And why should this be regarded as not sufficient?

The fact of the matter is that there was not one scintilla of evidence indicating any negligence whatever on the part of the Plaintiff/Appellant. He was travelling at a speed not in excess of the speed limit of 50 m.p.h. on a straight road with no oncoming traffic to impede him and was in the act of overtaking the Defendant's car at a time when it was perfectly safe to do so when on reaching about 25 feet from the Cortina (according to the owner of the Fiat, when he was almost abreast of the Cortina) it made a sudden right turn across his path, thereby causing the collision. But for that negligent act on the part of the Defendant, there would have been no accident.

True it is, that Section 51 (2) of the Road Traffic Act provides that the breach by a driver of any motor vehicle of any of the provisions of the section shall not exonerate the driver of any other motor vehicle from the duty to take such action as may be necessary to avoid an accident. An apt illustration of this duty on the part of the driver of an overtaking vehicle to take such action as may be necessary to avoid an accident may be seen from the case of Clarke v. Winchurch and Others (1969) 1 A.E.R. 275. There a bus driver, observing that the stream of traffic ahead of him was stationary and that the driver of a car parked at the edge of the road on the near side of the bus wished to cut across to the other side of the road with a view to proceeding in the opposite direction, stopped so as to allow the car driver to cross in front of him. The point along the road at which the bus driver stopped was not at a bus stop, but in between stops, and before reaching right up to the stationary stream that was ahead of him. He then looked in his mirror and not observing anything coming up behind him on his off-side, flashed his lights to the car driver. The car driver took this as an invitation to cross in front of the bus and having seen the bus driver look in his mirror before flashing his lights, assumed

that it was safe to proceed across the front of the bus. He therefore drove across in front of the bus, according to him in bottom gear and very, very slowly, until the front of the car protruded some two to three feet beyond the bus where it collided with a moped which was then overtaking the bus on its offside. It was held by a majority of the Court of Appeal that the collision was due solely to the negligence of the moped rider. They were, and not without considerable soul-searching, divided 2-1 as to whether to disturb the finding of the trial judge that the car driver was not negligent also. But they were unanimous in upholding the finding of the trial judge that the moped rider was negligent for the following reasons:

(1) He knew that there was a whole series of motor cars parked on his near side of the road, some of which would want to go in the opposite direction, some would want to cross the line of traffic through gaps (if they could find a gap) and if he chose to ride his moped along the offside of a stationary or very slow moving stream of traffic, overtaking cars one after the other, it did warrant "a very, very big degree of care indeed because you are blinded to a great extent, to what goes on on the left side of the road. You must therefore continue to ride or drive in such a way that you can immediately deal with an emergency. "

(2) When he saw the bus stopped in between regular stops, he ought to have realised that there was something going on in front of it. As Wilmer, L.J. put it, at p. 280:

> "The moped rider, after all, if he was keeping his eyes open, could see for himself that the bus had stopped, and in the circumstances he must have realised that something was going on ahead of the bus. This could only be that some vehicle was seeking to come out ahead of the bus. In that situation the moped rider, if he had been keeping

> "a good look-out and driving at a proper speed and at a proper distance from the bus, should have had no difficulty in dealing with any emergency that might be caused by the car driver's vehicle poking its nose out in front of the bus. "

There is no parallel to be found in the instant case. Here both the Plaintiff and the Defendant could and should have seen each other. The Plaintiff saw the Defendant. It was the Defendant who did not see the Plaintiff. He should have, and he would have, had he kept a proper lookout. And had he seen the Plaintiff, he would not, as he himself admitted, have turned across the Plaintiff's path at the time he did. And had he not done so, there would have been no accident. And if the Defendant suddenly turned across the path of the Plaintiff when the Plaintiff was in the act of overtaking and was a mere 25 feet or less behind and travelling as he was entitled to do at a speed of 40-50 m.p.h., what possible action could the Plaintiff then take to avoid the accident? And the learned Judge's finding that at the speed at which the Plaintiff was going he would be close to the Cortina and in Cortina's blind spot was no ground whatever for exonerating the Defendant from blame. It can be no excuse for a driver to say that there was a blind spot on his car which prevented him from seeing all vehicles that were necessary to be seen in order to determine whether it was safe to make a right turn and at the same time to assert that he had satisfied himself that it was safe to do so. If a blind spot prevented him from seeing a car that was in fact there, it was his duty to wait until such car, if any, came out of the blind spot and could be seen. Alternatively, he could have put his head out and looked back.

And if the Plaintiff did in fact warn the Defendant of his intention to overtake by sounding his horn after passing the Fiat, as the learned Judge appears to have conceded, then whose fault is it if the Defendant failed to appreciate the warning? And warning or no warning, why did the Defendant not keep to the near side of the road when he was being overtaken by other traffic? And why

did he not drive so as to allow the overtaking traffic to pass? And why did he drive so as to cross or commence to cross or be turned in the road when by so doing he was obstructing other traffic?

For all the above reasons, it is my considered opinion that the Defendant/Respondent was solely to blame for this accident and that there should therefore have been judgment for the Plaintiff/Appellant.

The learned trial Judge had stated that in such an event the Plaintiff would be entitled to an award of $10,130.00 damages.

I would therefore allow this appeal, set aside the judgment of the Court below and direct that judgment be entered for the Plaintiff/Appellant on the Claim and Counter-claim, on the Claim for $10,130.00 with costs here and in the Court below to be taxed or agreed.