NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 30/2000

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON.MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH J.A.(Ag.)

BETWEEN:	**JOSHUA TUCKER**	**PLAINTIFF/APPELLANT**
AND	**LASCELLES CHIN**	**1ST RESPONDENT**
	NEIL CHIN	**2ND RESPONDENT**

Ainsworth Campbell for Appellant

Patrick Foster and Katherine Francis instructed By Clinton Hart & Co. for respondents

FEBRUARY 19, 20 21 and May 21, 2001

DOWNER, J.A.

Smith J.A. (Ag.) will deliver the first judgment.

SMITH J.A. (Ag.)

This is an appeal from the judgment of Ms. Gloria Smith, J. in the trial of an action arising out of a collision between the appellant's motor bike and the 1st respondent's car which was driven by the 2nd respondent.

On the 28th October, 1993, about 6.20 p.m. the appellant was riding his motor bike in a northerly direction along Red Hills Road heading in the direction of Whitehall Avenue. He was riding on the left side of the road as one faces Whitehall Avenue. With him was a pillion rider. He was travelling at approximately 20 m.p.h. in second gear. He said the traffic was 'scanty' at the time. There was only one car ahead of him and that car was about three (3) chains in front of him when he first saw it.

The car ahead of him put on its left indicator and turned into premises known as "Lasco" owned by the first respondent. He was about one (1) chain behind the vehicle when it turned into Lasco. He was still driving in second gear and at approximately 20 m.p.h.

While the car was turning he left the middle of his lane, went to his right and went around it. When he returned to the middle of his lane he noticed a car driven by the 2nd respondent in front of him. He said the respondent's car drove out suddenly from the Lasco premises. He swerved to his right to avoid the accident, but to no avail. The car lights were in his face and he collided with the right front of the car. He was flung from his motor bike and suffered injuries.

The 2nd respondent's version

According to the 2nd respondent, about 6:20 p.m. he was driving a vehicle owned by the 1st respondent from the Lasco premises. When he reached the gate he stopped. He observed that the traffic travelling northerly on Red Hills Road was very dense. He intended to turn right. He remained stationary at the gate until a car to his right stopped to allow him entry on to Red Hills Road. He cautiously drove on to Red Hills Road and stopped at the centre of the left lane. He waited until the traffic to his left gave him free passage before going any further. A motorist travelling in the direction of Eastwood Park Road flashed his lights and came to a stop. The 2nd respondent moved off, at which point in time he observed the appellant two feet away coming from the outer side of the vehicle that had first stopped to let him out of Lasco. He immediately applied his brakes, but the appellant's bike collided with the front of his vehicle and slid right along the front of the car.

The learned trial judge gave judgment for the defendants/respondents holding that the plaintiff/appellant was solely to be blamed for the accident.

Mr. Ainsworth Campbell, for the appellant, filed some nine (9) supplemental grounds of appeal. These may conveniently be stated under four main heads:

(1) The judge erred in refusing to admit into evidence a conversation between the plaintiff/appellant and the 2nd respondent (ground 1)

(2) The learned trial judge misrepresented the evidence. (grounds 2,5,8 and 9).

(3) The judge failed to analyse all the material bits of evidence. (ground 3)

(4) The judgment was unreasonable having regard to the evidence and such inferences as could reasonably be drawn from the evidence (grounds 4, 6 and 7)

I will state at the outset the principle upon which this court will interfere with the judgment of a trial judge. It is this: An appellate Court will only interfere if the trial judge had been guilty of some error of law or misapplied some principle of law or so misdirected herself on the facts as would entitle this Court to say that it would be manifestly unjust to allow the judgment of the trial judge to stand. This principle was approved in **Edwin Clarke v Colin Edwards** 12 JLR 133 at 134 (B).

Improper rejection of evidence

This ground of appeal relates to an attempt by Mr. Campbell to elicit from the plaintiff/appellant the content of a conversation between the plaintiff/appellant and the 2nd respondent whilst the former was in hospital. The judge stopped him, ruling that it was irrelevant . Mr. Campbell submitted that what the 2nd respondent said 'might have amounted to an admission and therefore admissible.' This Court has no knowledge of the nature of the conversation and obviously is not in a position to rule on its relevance or otherwise. The plaintiff's pleadings make no mention of any admissions on the part of the 2nd respondent. The submission of counsel must therefore fail.

Misrepresentation of evidence

Mr. Campbell complains that the learned trial judge 'attributed to the plaintiff/appellant words and facts as if the plaintiff/appellant had said them or given evidence of them.'

The first of such misquotes he claimed was when the judge in her summary of the evidence had the plaintiff as saying that the car lights were in his face (ground 2). During the course of argument the Court referred counsel to the evidence of the witness under cross-examination where he said, 'On the day of the accident just before the impact, the light from the Benz was shining on me' (p. 39 of record of appeal).

The next alleged misquote by the judge is contained in the following statement: 'Tucker over-took the line of traffic which had stopped to allow Mr. Chin safe passage on to Red Hills Road, he was undertaking an operation fraught with great hazard and one which he undertook to his own detriment '(ground 5). Counsel complained that the trial judge had 'no basis in the evidence for saying so'. He told the Court that neither the plaintiff nor the 2nd defendant said anything about any line of traffic on the road at that time.

Again, the Court indicated the page of the record of appeal where the 2nd dependant's evidence is – 'It happened very fast – can't give an estimate of that distance. I can't say where the motor cycle was in relation to the line of traffic coming from the direction of Eastwood Park Road. I only saw him just before the impact': (page 51). The judge's comment was certainly not baseless. This submission must go the way of the first.

I will mention one more of these alleged misrepresentations of the evidence. Counsel for the plaintiff/appellant submitted that the learned trial judge treated as evidence a suggestion by the respondent's attorney-at-law, which the plaintiff/appellant

denied, that a motorist had flashed the lights of his car. This was another poor attempt to fault the judge. The 2nd respondent in his evidence-in-chief testified that 'a motorist slowed down and indicated they were going to give me passage by flashing their headlights and eventually they came to a complete stop.'

I am constrained to say that in exchanges between bench and bar Mr. Campbell had to concede that the statements challenged were indeed not misrepresentations of the evidence.

The trial judge's analysis of the evidence

The complaint under this head is that the judge 'failed to assess the witnesses on relevant and important issues i.e. their manner and or whether they contradicted themselves.'

The learned trial judge in her written judgment examined the similarities between the accounts given by the parties. She underscored the importance of the undisputed fact that neither party saw each other until just before the accident. This fact she found went to the root of both the plaintiff's and the defendants' cases as it indicated their conduct just before the accident. She identified two main issues:

> (1) Whether there was any negligence on the part of the defendant leading to the collision
>
> (2) Whether the plaintiff might by the exercise of ordinary care on his part have avoided the accident.

The learned trial judge proceeded to examine the testimonies of the appellant and the 2nd respondent. Having examined the evidence the trial judge stated:

> "What the Court will have to determine is what prevented the parties from seeing each other. Is it as the plaintiff is contending that a car was directly in front of him which turned into Lasco and Mr. Chin then drove out suddenly on him or is it as Mr. Chin describes, 'that traffic was heavy on Red Hills Road and he had to wait on safe passage until someone stopped and he had to come out in stages. On a balance of probabilities I am inclined to accept the evidence of Mr. Chin that traffic was heavy on Red Hills

> Road and that he had to wait until he was given safe passage first by motorist to his right and then by motorist to his left.
>
> I do not accept Mr. Tucker's evidence that at that hour on a Thursday evening on Red Hills Road there was very little traffic which could have facilitated the manoeuvre that he described, Mr. Chin as taking at that time."

Her examination and analysis of the evidence led her to the following findings of fact:

> (1) That Mr. Chin did in fact stop at the gate of Lasco's premises before proceeding onto Red Hills Road;
>
> (2) That Mr. Chin did maintain a proper look out for motorists who were on the main road and that he proceeded with caution to execute the manoeuvre of exiting from Lasco's premises onto Red Hills Road with the assistance and cooperation of the motorists who were proceeding in both directions on Red Hills Road that evening;
>
> (3) That when he drove onto Red Hills Road, having been given safe passage by the motorists in the two lanes of traffic on that road, that it was safe for him to do so;
>
> (4) I further find that the plaintiff failed to observe or give heed to the fact that the line of cars proceeding from the direction of Eastwood Park Road had stopped to facilitate Mr. Chin's manoeuvre and that the traffic coming from the opposite direction (i.e. Cassia Park Road) had also stopped and signalled the 2nd defendant to proceed;
>
> (5) That the plaintiff failed to exercise due care and attention while he was proceeding along the road because if he did, surely he would have seen what was taking place;
>
> (6) That he was in fact overtaking the line of traffic that had stopped without due care and attention and that is why he did not see 2nd defendant's car until he was some 2-3 feet away from him.

She accordingly concluded that the plaintiff had failed to prove the 2nd Respondent negligent and that on a balance of probabilities it was the plaintiff himself who was negligent.

Mr. Campbell complained that the learned trial judge in her examination of the evidence made no mention of the medical reports and a report from the Caribbean Loss Adjusters which were admitted into evidence. He adverted to the fact that the medical report which showed that the left leg of the plaintiff/appellant was traumatised and the loss adjusters' report which indicates that the point of impact was the left side of the motor bike. This is, he submitted, consistent with the plaintiff's evidence.

He submitted that the real evidence of the injuries to the left leg of the plaintiff and the damage to the left side of the motor cycle together with the admission of the 2nd respondent that he was coming from a place which was on the left of the plaintiff ought to have satisfied the trial judge that the accident happened as the plaintiff described it.

In this regard, Mr. Foster for the respondents submits that the evidence as contained in the assessor's report supports the 2nd respondent's evidence more than it supports the plaintiff's case. He however, concedes that the reports are not inconsistent with the appellant's version. Where the conflict lies he contends, is in the circumstances leading up to the collision. It is his contention that the respondent gave more details as to the collision – the process of the impact – than the plaintiff.

The assessor's report which was adduced into evidence by the plaintiff/appellant with the consent of the respondent clearly shows that the entire left side of the plaintiff's motor cycle was damaged. This gives credence to the 'sliding process' described by the 2nd respondent.

I accept the submissions of Mr. Foster that the evidence contained in the assessor's report is more supportive of the respondent's version that it is of the plaintiff's.

Mr. Campbell further submits that the trial judge failed to take into consideration, in her analysis of the evidence the assertion of the respondent that, "at no time before we collided or after we collided had the plaintiff passed the first vehicle that had stopped

to let me through." He argues that if the car to the right had stopped 7-10 feet away from Mr. Chin's Benz, which was in front of it, in order for the motor cyclist coming from the right to collide with the Benz it is imperative that the motor cycle should have passed the stationary vehicle.

The second respondent had also testified that at the point of impact, the motor cyclist had not passed the vehicle that had stopped. As Mr. Foster pointed out, the 7-10 feet distance referred to by the respondent existed when the respondent's vehicle was stationary at the gate of Lasco and does not relate to the distance between the Benz and that vehicle at the time of impact. The respondent had moved from the gate on to the road and would have been closer to the vehicle which had stopped on the road to let the respondent out.

The respondent's evidence that at no time "before or after" the collision had the motor cyclist passed the vehicle which had stopped could not be true. However, this does not make the judge's acceptance of the respondent's evidence that a vehicle had stopped to let him out and the rejection of the plaintiff's evidence that the vehicle in front of him had turned into Lasco unreasonable.

The trial judge is entitled to accept a part of the respondent's evidence and reject the other.The judge, in her analysis of the evidence, referred to aspects of the plaintiff/appellant's testimony which undermine his credibility. For example, the trial judge rejected the plaintiff's evidence that at the time of the accident (6.20 p.m.) the Red Hills Road was free of traffic. She accepted the respondent's evidence that the traffic on the road was heavy.

Having found that the traffic on the road was heavy, she concluded that it would be highly improbable that the respondent would drive out "suddenly" on to the road, as the plaintiff described. I am certainly not convinced that the existence of the discrepancy in the respondent's evidence, referred to by plaintiff's counsel, makes the

conclusion of the trial judge manifestly unreasonable so as to entitle this Court to interfere.

In coming to her conclusion, the learned trial judge demonstrated that she was aware of the relevant principles of law. At page 3 of the judgment she had this to say:

> "I am not unmindful of the fact that a driver especially one coming from a place or minor road onto a main road must keep a proper look out even for negligent motorists who are on the main road – and where such entrance is not controlled by traffic lights or signs then the driver must proceed with caution onto the main road. However in the case of **Clarke v Winchurch & Others** [1969] 1 W. L. R. at p. 69 where the facts are similar to the present case, the first defendant's car was parked on its off side facing on coming traffic on a parking strip at the side of the main road. Wishing to cross the road and drive in the direction in which he was facing, the first defendant pulled slightly out of the line of parked vehicles with his nearside indicator flashing. The 3rd defendant who was driving a corporation bus in a line of traffic approaching the first defendant, stopped to let him cross.
>
> The bus driver looked in his mirror, saw nothing coming up on his off side flashed his lights at the first defendant who took that as an invitation to cross the road. He pulled across in front of the bus and proceeded until the front of his car projected about a yard beyond it, when the plaintiff on his moped, who was overtaking the bus, hit the nearside, front lamp of the defendant's car. The plaintiff sustained personal injuries and brought an action alleging negligence against the 1st defendant, the Corporation and the bus driver. In the Judgment of Wilmer L.J. at P. 75 he said:-
>
> > 'The plaintiff, after all if he were keeping his eyes open could see for himself that the bus had stopped and in the circumstances he must have realized 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 plaintiff, 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 no difficulty in dealing with any emergency that might be caused by the first defendant's vehicle poking its nose out in front of the bus'."

After referring to the above passage from the judgment of Wilmer L.J. the learned trial judge concluded:

> "In the present case, had Mr. Tucker been keeping a good look-out and driving at a proper distance from the vehicle in front of him, should have had no difficulty in dealing with any emergency that was caused by Mr. Chin's vehicle coming out of Lasco onto Red Hills Road that evening."

The findings and decision of the trial judge

The burden of the complaint under this head is that the findings of fact and the inferences drawn by the learned trial judge either lacked necessary evidential basis or were unreasonable.

Mr. Campbell challenged, as being erroneous, the following conclusion of the trial judge:

> "In the circumstances it is reasonable to infer from all the facts in the case that Mr. Tucker (the plaintiff) was behind the vehicles coming from the Eastwood Park Road direction and when they stopped he decided to overtake them, hence that is the reason why neither he nor Mr. Chin saw each other until they were just 2 – 3 feet apart."

I am of the view that this is a manifestly reasonable inference for the judge to draw in light of the fact that she had accepted the account given by Mr. Chin (the 2nd defendant/respondent). In particular, she accepted his evidence that, 'I can't say where the motor cyclist was in relation to the line of traffic coming from the direction of Eastwood Park Road. I only saw him just before the accident.'

Mr. Campbell also contends that the learned judge erred in concluding that the plaintiff/appellant had lied when he said that he had travelled in second gear from his house to the point of impact, since there was no evidence to the contrary.

The evidence was that the bike had four gears and was capable of going at a speed of 70 m.p.h. The plaintiff gave no reason why he travelled in second gear all the

while up to the time of the collision. In this regard, the learned trial judge had this to say:

> "I reject the plaintiff's evidence that he travelled all the way from his house to the point of impact in 2nd gear – and he was travelling slowly. He never advanced any reason why on a motor cycle which had no defects and on a road which he said had little or no traffic why was he travelling in 2nd gear. I find that difficult to accept."

The credibility of a witness is entirely a matter for the trial judge who had the advantage of observing the demeanour of the witness. On matters of credibility, it is difficult to upset a judge's findings. This Court is handicapped in forming a view on the matter of credibility as between the plaintiff and the second defendant as we did not see and hear them give evidence. For example both witnesses were cross-examined at length by opposing counsel and that might have had a considerable impact on the trial judge in accepting or rejecting their evidence.

I have given anxious consideration to the submissions of Mr. Campbell. However, he has not been able to satisfy me that the judgment of the learned trial judge should not stand.

I would dismiss the appeal with costs to the respondents to be taxed if not agreed.

HARRISON, J.A:

In this appeal from the judgment of Miss Gloria Smith, J., in favour of the defendants/respondents with costs, the plaintiff/appellant advanced several grounds of appeal.

The facts in detail have been recited in the judgment of Smith, J.A. However the short facts are, that, on Thursday the 28th day of October 1993, at about 6:20 p.m., then at dusk, the appellant was riding his motor cycle on the left, westerly along Red Hills Road, St. Andrew, going towards Cassia Park Road in a line of traffic going in the same direction approaching the Lasco premises of the respondents on the left. A line of traffic was approaching from the opposite direction going towards Eastwood Park Road. Both lines of traffic had stopped. The second respondent in the act of leaving the Lasco premises, drove his motor car and stopped at the gate of the premises, and then continued slowly onto Red Hills Road. The appellant rode his motor cycle from the Eastwood Park Road direction overtaking on the outside, the line of traffic to the 2nd respondent's right and the front tyre of the motor cycle hit into the right front section of the 2nd respondent's motor car, causing the left side of the motor cycle to slide along the front of the said motor car, throwing the appellant and his pillion rider over the handle bar of the motor cycle onto the road surface. The appellant sustained injuries and was taken to the hospital. The motor cycle was extensively damaged to its left side.

Mr Campbell for the appellant argued that the learned trial judge erred in refusing to admit evidence of a conversation between the appellant and

the second respondent, in failing to assess the discrepancies of the witnesses, in finding that the appellant was overtaking a line of vehicles, whereas the evidence indicated one vehicle, and there was no evidence of speed. The learned trial judge was in error to question the failure of the pillion rider to give evidence, and to reject the appellant's assertion that he travelled in 2nd gear from his home. The logical inference he further argued, is that, from the admissions of the 2nd respondent he came out of the Lasco premises suddenly onto the roadway, did not see the appellant until he was 2 feet away or at all, and liability is to be attributed to the 2nd respondent.

Mr. Foster for the respondent submitted that the learned trial judge properly analyzed the evidence, considered both versions of the parties, highlighted the similarities in each and came to her decision based on her assessment of the credibility of the witnesses. An Appellate Court should not disturb the judgment unless it is convinced that the trial judge was wrong. The respondent's manoeuvres prior to the collision demonstrated the requisite standard of care and accordingly the appeal should be dismissed.

Negligence is a breach of the duty of care which is owed by a person using the public road to other users of the road. Besides exercising this duty to take care, a user of the road must proceed with caution on the road and take steps to avoid an accident at all times.

The "driving rules" prescribed by the Road Traffic Act are contained in section 51 of the Act. Section 51(2) reads inter alia:

> "**(2)** ... 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 other motor vehicle from the duty imposed on him by this subsection."

"Motor vehicle" which in section 2 of the said Act means:

> " ... any mechanically propelled vehicle intended ... for use on the roads,"

includes a motor cycle. The 2nd respondent said at page 51 of the record:

> "When I moved off the two lanes of traffic were at a halt ... I can't say where the motor cyclist was in relation to the lane of traffic coming from the direction of Eastwood Park Road. I only saw him just before the impact ... coming from the outer side of the vehicle which had stopped to let me out at Lasco ..." (Emphasis added)

The learned trial judge applied her mind to the obligation which rested on the 2nd respondent himself to exercise due care. She specifically referred to the case of ***Clarke v Winchurch et al*** [1969] 1 WLR 69, [1964] 1 All ER 275, the facts of which are that, a moped rider (motor cyclist) was injured when he overtook on the outside, a line of stationary vehicles and collided with a motor car which was crossing in front of a bus which had stopped at the head of the line of vehicles and signalled the driver of the car that it could cross. The court found that neither the driver of the bus nor of the car owed any duty of care to the moped rider. In the instant case, the learned trial judge referred to the words of Wilmer, L.J., [1969] 1 All ER, at page 280 namely:

> "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."

In addition, the learned trial judge relied on and adopted a statement of **Sellers, LJ** in ***Powell v Moody*** [Vol 110] Solicitor's Journal 1966, at page 215 observing the duty of care expected of road users. He there said:

> "... any road user who jumped a queue of stationary vehicles by going on the offside of a line of stationary vehicles in front of him was undertaking an operation fraught with great hazard. Such an operation had to be carried out with great care because it was always difficult to see from the offside of a queue of stationary vehicles gaps in the queue on its nearside from which traffic might emerge."

The appellant had given evidence that he saw only one car ahead of him when he rode from Eastwood Park Road onto Red Hills Road and this car was about 3 chains ahead of him at all times and then it turned left onto the Lasco premises from which the 2nd respondent subsequently emerged. The appellant said, in cross-examination at page 35:

> "I agree that 3 chains is 198 feet. ... The car that was right in front of me was about 3 chains in front of me before it turned. At the point where it turned in I was about 1 chain away from it. I was not closing in on the car. Car straight ahead. I am 3 chains behind on Red Hills Road - when the car just started turning. When I saw indicator light I was then 3 chains behind that car at every point I was 3 chains behind that vehicle."
>
> (Emphasis added)

Further in cross-examination, answering that he did not recall saying in a previous statement that just before the impact he was overtaking a vehicle, the appellant said, at page 37:

> "I said that the car that was turning left - I went around the back of it - as it turned in I went around the back of it.
>
> From the middle of my lane I went to my right around the back of the car to about 1 foot of the white line. I now say that this is not a proper recollection. Now say there is a white line in the middle of the road.
>
> I was about 2 feet from the white line in the middle of the road when I went around the back of the car - when I went around the car I went back to the middle of the lane."

It seems to me that if the car had turned left onto the Lasco premises when the appellant was 3 chains behind it, it was quite unlikely that he travelling in 2nd gear at 20 miles per hour, having traversed the distance of 3 chains would have found the car still turning when he reached up to the Lasco entrance. In addition, there was unlikely therefore to have been any situation existing for the appellant to have made the manoeuvre he described, that is, going around the back of the car, from the middle of his lane to his right, one (1) foot from the white centre line and back to the middle of the lane; that car would have already turned into the Lasco premises when he the appellant, was 3 chains behind it. The learned trial judge from this evidence, was correct to conclude that there was a stationary line of traffic which the appellant overtook, and reject his evidence of his

manoeuvre around the rear of a solitary motor vehicle which would have already long before turned onto the Lasco premises.

Counsel for the appellant, in his skeleton arguments in advancing that there was no evidence from which an inference of speed would be drawn said;

> "There was not even any evidence of the nature of the damages (sic) on the relevant vehicles to assist on the point."

Nevertheless, he did submit to us however, that the injuries to the left leg of the appellant and to the middle of the motor cycle supported the appellant's case that the 2nd respondent came out suddenly onto the roadway and caused the right side of the bumper of his car to hit into the appellant. The appellant said, at page 36:

> "The right bumper of the Benz came in contact with my bike. ... The middle of my bike collided with the Benz, not the front. Not true it was the front of my bike which collided with the right front bumper of the Benz."

The 2nd respondent said of the appellant at page 52:

> " ... he collided in the right front section of my motor vehicle ... his right front tyre hit the front of my vehicle ..."

The assessors' report of Caribbean Loss Adjusters Ltd., tendered in evidence by the appellant revealed that ... "as a result of an impact to the left side, damage was sustained to the following items. ..." The report then listed damage to the left side from the handle and head lamp panel, at the front, to the muffler, tail lamp and rear indicator lamp, to the rear. This is real evidence which is more consistent with the "sliding" effect of the motor cycle,

as described by the 2nd respondent, than the version of the appellant. This is real evidence, along with the credibility that the learned trial judge found in the evidence of the 2nd respondent which was more than ample, in justifying the conclusion at which she arrived.

In all the circumstances, the appellant displayed a clear lack of care in the manner of his riding on that day. He did not even attempt to reduce his speed from 20 miles per hour, having even observed in his version of the facts, the car turning to the left. He said at page 38:

> "I didn't brake just before the impact. I did not swerve before the impact to avoid the impact."

He did seek to explain that he first saw the relevant motor car when it was 2-3 feet in front of him. On the other hand, the 2nd respondent could not have observed the appellant, nor have expected him to be overtaking on the outside of that line of motor vehicles.

The learned trial judge in my view, was quite correct to come to the decision that she did, on the evidence before her. I would dismiss the appeal with costs to the respondents.

DOWNER, J.A.

I accept the analysis of the evidence by my brothers and wish to add a few observations. Gloria Smith, J., in her findings, after stating that each party had given opposing versions of how the accident occurred, stated that there were a few similarities. She outlined thus:

> "These similarities it must be stressed have been very influential in determining where negligence lies between the parties."

In this context, it is important to cite the report of Caribbean Loss Adjusters Ltd, which was put in by the appellant with the consent of the respondent. Regarding the evidence of damage to the appellant's Honda motor cycle., it reads:

> "We inspected this unit at 173 Harbour Street, Kingston, and as a result of an impact to the left side damage was sustained by the following items:
>
> | | |
> |---|---|
> | Carburetor and manifold | Seat |
> | Muffler | Frame |
> | Tail lamp | Fork stem |
> | Rear indicator lamp | Handle |
> | Bridge plate | Brake lever |
> | Two mirrors | Head lamp panel |
> | Clutch lever" | |

This aspect of the evidence, as my brother Harrison, J.A. pointed out in the course of submissions of counsel, demonstrated that the entire left hand side of the motor cycle was damaged. The significant injury to the appellant was a compound fracture to the left libia and fibula.

The crucial evidence which the learned judge accepted from the second respondent who was the driver of the motor car, runs thus:

> "The car that stopped to let me have safe passage onto Red Hills Road was to my right. After I came onto Red Hills Road and stopped – I turned my head to the left and looked down Red Hills Road in the direction of Cassia Park Road. I did not turn the car – The road to my left was heavily laden with cars. I waited until I could get safe passage from that lane of traffic before heading further

> onto Red Hills Road in the direction of Eastwood Park Road. Eventually a motorist slowed and indicated that he was giving me passage by flashing his car headlights and coming to a complete stop... I had stopped in the centre of the left lane (i.e. from the white line to side wall). The front wheels of my car was clear of the centre of the lane - After the vehicle flashed its lights, I turned the head of my vehicle in the direction I was headed and then cautiously started to proceed in the flow of traffic headed towards Eastwood Park Road – I was able to proceed for approximately a few feet ... as I started to proceed unto the lane going towards Eastwood Park Road a motor cyclist came down on the left (but on the right side of the stationery vehicle coming from Eastwood Park Road) and collided with me. He attempted to swerve trying to avoid me, but there was not enough room for such a manoeuvre. As a consequence he collided in the right front section of my motor vehicle. Upon impact his front tyre hit the front of my vehicle ... It slid right along the front of my vehicle – plaintiff was thrown over his handle bars and landed in the road." [emphasis supplied]

The emphasised words coincide with the report put in by consent and tells in favour of the respondent's version of the accident.

The second issue which must be addressed is the learned judge's finding that Joshua Tucker, the appellant, was not a credible witness. She based her finding primarily on the fact that Tucker gave evidence that he rode his Honda motor cycle in second gear from his home at 12 Upper First Street, Kingston 12 to the point of impact on Red Hills Road. This account,the learned judge found incredible especially as the vehicle had four gears and was capable of going at 70 miles per hour. Additionally, the learned judge saw and heard the appellant under examination in chief and cross-examination.

The third aspect of this case is the learned judge's finding that the appellant had failed to prove negligence by the respondent. She cited Sellars L.J. in **Powell v. Moody** [Vol. 10] 1996 Solicitor's Journal at p. 215 thus:

> "Any road user who jumped a queue of stationary vehicles by going on the off-side of a line of stationary vehicles in front of him was undertaking an operation fraught with

> great hazard. Such an operation had to be carried out with great care because it was always difficult to see from the off side of a queue of stationary vehicles gaps in the queue on its rear side from which traffic may emerge."

The other passage relevant to the circumstances of this case comes from **Clarke v Winchurch and Others** [1969] 1 W.L.R. 69. The passage relied on by the learned judge below is at p. 75 where Wilmer L.J. said:

> "The plaintiff, after all if he were 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 plaintiff, 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 no difficulty in dealing with any emergency that might be caused by the first defendant's vehicle poking its nose out in front of the bus."

Against this background, the learned judge gave an excellent summary of her findings and I quote it in full as it demonstrates why she found that the appellant had not proved that the 2nd respondent Neil Chin was negligent. It ran thus:

> "(1) That Mr. Chin did in fact stop at the gate of Lasco's premises before proceeding onto Red Hills Road.
>
> (2) That Mr. Chin did maintain a proper look out for motorists who were on the main road and that he proceeded with caution to execute the manoeuvre of exiting from Lasco's premises onto Red Hills Road with the assistance and cooperation of the motorists who were proceeding in both directions on Red Hills Road that evening.
>
> (3) That when he drove onto Red Hills Road, having been given safe passage by the motorists in the two lanes of traffic on that road, that it was safe for him to do so.
>
> (4) I further find that the plaintiff failed to observe or give heed to the fact that the line of cars proceeding from the direction of Eastwood Park Road had stopped to facilitate Mr. Chin's manoeuvre and that the traffic coming from the

opposite direction (i.e. Cassia Park Road) had also stopped and signalled the 2nd defendant to proceed;

(5) That the plaintiff failed to exercise due care and attention while he was proceeding along the road because if he did, surely he would have seen what was taking place.

(6) That he was in fact overtaking the line of traffic that had stopped without due care and attention and that is why he did not see 2nd defendant's car until he was some 2 – 3 feet away from him."

Conclusion

The appellant chose to demonstrate with a placard in the court yard stating that he wanted justice from Lasco and the law. That was his constitutional right of freedom of expression. Mr. Ainsworth Campbell took every possible point that could be made on the appellant's behalf. However, in the light of the reasonable findings of fact by Miss Gloria Smith J., it was impossible for the appellant to succeed. The appellant also held up photographs in Court showing the damage to his motor cycle. That was impermissible and should not be repeated. That he has suffered injuries is accepted. The medical report speaks of a compound fracture of the shaft of the left tibia and fibula. Yet in other jurisdictions there is a remedy for the injured who cannot prove negligence, that might one day commend itself to our legislators. In New Zealand, there are no fault claims so far as liability is concerned and tribunals administer a system of compensation to the injured. Such a system would have to be financed by taxation and perhaps insurance premiums. For this method of compensation to obtain in Jamaica legislation would have to be enacted. Of course, negligence actions are still permissible in the ordinary courts and damages are awarded. But the statutory compensatory remedy has served to reduce considerably the volume of negligence claims arising from motor vehicle accidents.

The result is that the appeal is dismissed, the order below is affirmed. The respondent must have the agreed or taxed costs of the appeal.