



[2024] JMSC Civ. 180

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 04262

BETWEEN	ROMAINE FACEY	CLAIMANT
AND	MICHAEL DESMOND SIMPSON	DEFENDANT

Consolidated with

Claim No. 2018 HCV02243

BETWEEN	MARVIN MARTIN ANGUS	CLAIMANT
AND	MICHAEL DESMOND SIMPSON	DEFENDANT

In Open Court

Aisha Robinson and Monique Rowe instructed by Michelle Shand Forbes for the Claimant.

Treveen Little for the Defendant

Heard: the 28th and 29th October, 6th of November and the 19th of December 2024.

Negligence – motor vehicle accident- whether there was a breach of a duty of care.

THOMAS, J

Introduction

[1] In these consolidated claims, the claimants, Romaine Facey and Marvin Angus are seeking damages in negligence arising from a Motor Vehicle which occurred on the

8th day of August 2017 in the vicinity of the intersection of Duke Street and North Street in Kingston. The collision occurred between a motorcycle, registered CG150 driven by Romaine Facey with Marvin Angus as a pillion passenger, and a motor car registered 4744HK, owned and driven by the Defendant Michael Desmond Simpson.

[2] In their respective Particulars of Claims dated 12 June 2018 and the 5th of November 2018, the claimants are contending that while travelling along Duke Street, upon reaching the intersection of East and Duke Street with the intention of turn right, Mr. Facey put on his right indicator, whereupon the Defendant who was travelling behind "negligently encroached on the motorcycle and impacted the right side of the vehicle causing both driver and pillion to become airborne". They allege that as a result they sustained injuries and suffered damage.

[3] The Defendant Mr. Simpson in his Defence has disputed, the Claims of Mr Angus and Mr Facey. He denies any claim of Negligence on his part He contends that the accident occurred at the intersection of Duke Street and North Street. His assertions are that; he was traveling along Duke Street when on reaching the intersection with North Street the rider of motorcycle registered CG 150 who was traveling behind his motor vehicle registered 4744 HK suddenly came from behind his said motor vehicle and collided into its left side in an attempt to turn on to North Street He therefore avers that the collision was caused by and or materially contributed to by the negligence of the driver of motorcycle registered CG 150, that is Mr. Facey

LIABILITY

The EVIDENCE of the Claimants

Romaine Facey

[4] In his witness statement which was permitted to stand as his evidence in chief Mr. Facey testifies that he as the driver and Mr Angus as the pillion rider were travelling on his motorcycle along Duke Street in the extreme right lane on August 8, 2017. He says

that he activated his right indicator upon approaching the intersection of East Street and Duke Street. He says further that the Defendant, who was travelling in the same direction, was always travelling behind them. He states that;” upon beginning to turn right, the Defendant collided into the right side” of his motorcycle and the impact caused himself and the pillion rider to become airborne. He also states that he fell in the middle of the road and that he sustained a fractured ankle and several cuts on his body.

[5] During cross-examination, Mr. Facey states that Duke Street is a road that he travels frequently, about five (5) days per week. He further states that on the date of the accident before he reached where the accident occurred, he rode past the Parliament building, as he was heading home after buying groceries at the supermarket, located close to the Mother’s Patty Store, after passing the Central Police Station. He further states that he was coming along Duke Street intending to turn on North Street and that from he left the supermarket he had the intention to turn on North Street. He says he is familiar with Heroes Circle and the gas station that is at the top of Duke Street. He says that East Street is close to North Street and that the accident occurred at the intersection of Duke Street and North Street near the stoplight. He admits that in his witness statement, he indicated that the accident took place at the intersection of Duke Street and East Street.

[6] He confirms that Duke Street is a one-way street with two lanes, He agrees that both lanes are wide enough to accommodate a truck. He also agrees that his motor bike is able to travel in the same lane with the Defendant’s car without either motor vehicle touching each other. He confirms that at the intersection where the accident occurred, there is a raised sidewalk to the right and there are also trees on the sidewalk. He indicates that he activated his indicator about 20 meters from the intersection of North and Duke Street. He states that he was in the middle of the road when he put on his indicator, but he knew he was going to make a right turn so he came over to the right side.

[7] He also states that the middle of the road and the extreme right lane is the same place and that when he rode past Gordon House he was still in the extreme right lane.

He states that he first observed the defendant travelling behind him at the Parliament Building and that at that time the defendant was about a car's length away. He says there were motor vehicles to his left when he was in the extreme right lane and that It was when he started to turn that the Defendant collided in his motorcycle. At that time, he says he was in the extreme right of the road.

[8] He further states that the area of his motorcycle that the defendant collided in was in the area of the tank which is on the right middle of the motorcycle. He agrees that where he says his motorcycle was positioned on the road the defendant could not have passed him on the right. He says he would have to pass him on the left. He agrees that being near to the sidewalk would have placed his motorcycle further away from the middle line that separates the left lane and the right lane. He states that when he dropped in the middle of Duke Street, he observed that the defendant's car was over the light and that his bike ended up in the middle of the road. However, he cannot recall where on the Defendant's vehicle the bike impacted. He however recalls a headlight being damaged.

[9] He is not sure whether the left quarter panel, the left bumper, and the headlight on the left side of the defendant's vehicle, were damaged by the impact. He denies that defendant was travelling ahead of his motorcycle in the right lane on Duke Street before the collision. Mr. Facey denies that he rode to the left of the defendant's car on reaching the intersection of Duke Street and North Street. He also denies that he proceeded to make a right turn from Duke Street on to North Street across the path of the defendant's car,

MARVIN ANGUS

[10] The 2nd Claimant Marvin Angus in his witness statement which stands as his states that on the relevant occasion, he and Mr Facey were travelling together along Duke Street in the extreme right lane on August 8, 2017. He recalls that Romaine Facey had turned on his right indicator as they neared the intersection of East Street and Duke Street. He states that. the defendant was behind them the entire time.

[11] He further states that as Romaine started to steer the motorcycle to the right, the defendant collided into the right side of the vehicle, which resulted in both of them being thrown in the air.

[12] He says the collision took place in the middle of the road and that as a result he sustained serious bodily injury and sustained what his doctors have termed an avulsion fracture to his medial cuneiform; his foot was also broken, and he sustained a minor head injury.

[13] On cross-examination, Mr. Angus states that prior to the accident Duke Street is not a road he travelled on frequently. He states also that on the date of the accident he and Mr. Facey rode past the Parliament building, travelling in the right lane. He also responded that he was travelling left to the centre of the right lane.

[14] He agrees that the left of the right lane and the centre of the right lane are two different places. He then says that he was in the left of the right lane. He also testifies that before the accident he was intending to go home.

[15] He further states that he knows the intersection of Duke Street and East Street. He says the accident did not happen at the intersection of Duke Street and East Street and that was a terrible mistake in his statement. He agrees that Duke Street has two lanes going upwards and that both lanes are wide. He also agrees that at the intersection where the accident occurred there is a raised side walk to the right. He further agrees that trees were on the side walk near the intersection. He says he observed Mr. Facey turn on his indicator from about 20 metres as they neared the intersection.

[16] Mr. Agus indicates that he did not notice the defendant behind him, when they were 20 meters from the intersection because he was carrying the goods, about three bags. He however, insists that the defendant was travelling behind them the entire time. He states that he noticed vehicles travelling to his left while he was at the intersection.

[17] He asserts that when they reached the stoplight and turned Mr. Facey was still in the left of the right lane. He says that the right side, the middle of the bike was impacted. He agrees that they both knew that they were going to make the turn onto North Street

but Mr. Facey did not position them on Duke Street to turn until they reached the intersection. He states that when he fell off the bike, he fell in the intersection and the defendant's car was driven past the intersection and was parked beyond the stoplight on Duke Street.

[18] Mr. Angus further states that The bike ended up in the middle of the road. He denies that that the defendant's car was travelling ahead of the bike in the right lane before the accident occurred. He also denies that Mr. Facey rode to the left of the defendant's car when he reached the intersection of Duke Street and North Street. He further denies that Mr. Facey turned right in front of the Defendant's car from the left lane. He says when Romaine turn right, "the car run into the right of the motorbike". He states that he never observed damage to the defendant's car. He says there was a filter light, but he does not recall which light was on green.

EVIDENCE OF THE DEFENCE

The Defendant Michael Simpson

[19] In his witness statement which stands as his evidence in chief Mr. Simpson states that in August 2017 he was the registered owner of a silver 2011 Nissan AD Wagon registered 4744 HK. He states that on August 8, 2017 he left his home in Montego Bay at around 11 a.m. and travelled to Kingston with his daughter who was 11 years old at the time. He was going to visit a friend in Kingston. He says that he stopped at a restaurant in Downtown, Kingston, had lunch and about 3 p.m. and he was travelling along Duke Street. going to meet his friend at Devon House.

[20] He indicates that Duke Street has two lanes which go in only one direction and he was travelling in the right lane. He says that when he got to the intersection with North Street, the traffic light was showing green, and as he proceeded to cross the intersection, a motorcyclist came from behind, passed him on the left, and then suddenly proceeded to cut in front of him to go right. He states that it was at that point that the motorcycle impacted the left front side of his vehicle.

[21] He asserts that he had just entered the intersection when the motorcyclist cut in front of him. He states that before the accident he had noticed the motorcyclist coming up Duke Street and that when he first saw him in his rearview mirror, he was about three car lengths away from him as he travelled towards the intersection.

[22] Mr. Simpson also states that the impact caused the motorcycle to spin and the rider and the pillion fell. He says he stopped his vehicle and got out and saw the pillion and rider and the motorcycle on the ground. He took them to Kingston Public Hospital. then reported the accident at Kingston Central Police Station.

[23] He further says that as a result of the accident there was damage to the left quarter panel, fender, headlight and left side of the bumper of his vehicle. Mr. Simpson also asserts that at no time before the accident was he travelling behind the motorcyclist.

[24] He states that he was not in a rush to get to Devon House before returning to Montego Bay. He further states that he is a sound recording engineer and is attuned to sounds. However, he did not hear the motorcycle as his car windows were up and the air condition was on.

[25] He maintains that the motorcycle came from behind and past him on the left. He further states that when the motorcycle came from behind him in the left lane at that time the light was green and he was in the right lane approaching the North Street intersection. He denies that the bike was travelling in front of him at any point, but states that it was right at the intersection with North Street when he was going through the green light, that the motorcyclist came from the left and just cut right in front of him to the right "and the car clipped him".

[26] He insists that the only time the bike came from behind, it came on the left lane and past to the side. The moment it past him it cut to the right. He asserts that he did not get a chance to blow his horn or swerve because it happened so fast. He states that he did not see how he could have avoided the accident that afternoon. He agrees that the accident took place in the middle of the intersection of Duke Street and North Street. He says further that he is unaware of where on the motorcycle was hit. He states that he did

not get an assessor's report done. He states that he does not recall seeing the claimants with any bag and denies the suggestion that he caused the accident.

Issue

[27] The issues in the matter are centred around the law of negligence and are as follows;

- (i) Whether the defendant owed a duty of care to the claimants
- (ii) Whether any duty of care owed by the defendant to the claimants was breached
- (iii) Whether the claimants suffered damages as a result of that breach.

The Law

[28] In the case **Nance v British Columbia Electric Co** [1951] 2 All ER 448 the Privy Council made it plain that users of the road whether they be motorists or pedestrians owe a duty of care to other road users. As such the Court expounded the law in this regard as follows;

“Generally speaking when two parties are so moving in relation to one another as to involve a risk of collision, each owes to the other a duty to move with due care and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle”

[29] In the case of **Foskett v Mistry** 1984 RTR 1, the court explained the law as follows;

“..... it was the duty of the driver or rider of a vehicle to keep a good look out. A driver who fails to notice in time that the actions of another person have created a potential danger is usually held to be negligent; he must look out for other traffic, which is or may be expected to be on the road, whether in front of him, behind him or alongside him, especially at crossroads, junctions and bends

Submissions

On behalf of the Claimant

[30] In making the following submissions Counsel for The Claimant relies on the authorities of (**Jowayne Clarke and Anthony Clarke v Daniel Jenkins** 2001/C211; **Nance v British Colombia Electric Co** [1951] 2 All ER; **Kemar Earl Danelio Bennett v Andrew Sheen**)

- (i) *Under cross-examination, the Defendant conceded that he did not blow his horn, nor try to swerve. When it was suggested that he did not try to avoid this accident, he said he did not see how he could have avoided it. It is the Defendant's evidence that when he first saw the motorcyclist, he was "about three car lengths away." They were both heading in the same direction so reasonably the presence of motorcycle should not have caught the Defendant by surprise.*
- (ii) *It is incredulous that the defendant who is a sound engineer could not have heard a motorcycle travelling behind him because his windows were up and his air conditioner was on. The defendant did not display sufficient regard for the claimants and his shared occupancy of the right lane along Duke Street. He took zero evasive action and operated his vehicle negligently and either wholly caused or significantly contributed to the material accident.*
- (iii) *Having purchased goods at the wholesale earlier that day, the manoeuvre that defendant described would have been implausible for persons trying to make a living, having just purchased assets for sale to operate the vehicle negligently.*
- (iv) *The fact that there was damage to the left side of the defendant's motor vehicle and the right side of the Claimants' motorcycle is not in dispute, but the Claimants were unable to comment on the range of damaged parts that the Defendant has alluded to. The fact that the claimants' right feet were injured places their version of events of the defendant allegedly colliding in the middle of their motorcycle, within the scope of believability.*
- (v) *Some of the evidence by the claimants presented an intellectual line of demarcation when juxtaposed with the defendant. A distinction should be made by the court between*

the simplicity and slower comprehension skills of the claimant witnesses with their credibility as witnesses of truth.

(vi) The simplicity of Romaine Facey was evident in the long pauses preceding simple questions and responses to the line of questions arising from cross examination:

(vii) The fact that the stoplight was on green which was not in dispute but the innocent simplicity of Marvin Angus was demonstrated when he was unable to genuinely distinguish the difference between a ball green light and a filter green light. Notwithstanding, the Claimants were clear and consistent in their oral testimonies that they knew where the accident took place at the intersection of North Street and Duke Street; about the route they intended to travel in order to return home. The fact that the material intersection was stated as being East and Duke Street in the Witness Statement, was explained by Mr. Angus. They were consistent about their activities preceding the accident. The claimants were consistent in stating that the right side and the middle of the bike was impacted, which is consistent with the injury to their right feet. The claimants were consistent in stating that the accident took place in the "middle of the road." The Defendant also agreed under cross-examination that the accident took place in the "middle of the intersection. The claimants were consistent in stating they were always ahead of the defendant and under cross-examination despite literacy deficits, Marvin Angus plausibly accounted for his inability to look behind as he was encumbered with three bags.

(viii) The defendant's credibility has been brought into question because he says he does not know if the Claimants sustained right broken feet. He does not know whether the tank of the motorcycle was hit. As he was not uninjured "he should have been able to survey the post-accident scene and the persons he transported. His complete unawareness of the point of impact, damage to the motorcycle, nature of injuries to the parties he transported to the hospital, items on the accident appears incredible at best"

(ix) There are admittedly, inconsistencies in Romaine Facey's evidence under cross-examination as he explained where the motorcycle was in the right lane, but we do not believe that the weight of these utterances go to the root of the issues of negligence and credibility. The Claimants, though intellectually challenged, presented a credible account of their version of the truth.

The Defendants Submission

[31] The defendant's submissions are summarized as follows.

- I. Given the two different accounts of the accident, liability will be dependent on the version that is more plausible and the credibility of the parties. The defendant's version is far more likely on the balance of probabilities. On the Claimants' case if at all material times, the claimants were ahead of the Defendant in the extreme right lane then this accident should not have occurred as there would have been no impediment to the 1st claimant effecting the right turn. The Defendant would have had a clear unimpeded view of the claimants with their indicator on some 20m away from the intersection. Based on where the claimants place themselves in the roadway being in the extreme right lane, passing on their right, the collision would have been impossible.
- II. Mr. Facey is not a witness of truth. During cross-examination he placed himself in the middle of the road which is also known as the extreme right lane. He agreed that the extreme right lane is also near to the sidewalk and further away from the line that separates the left and the right lane. He has not given this Court any definite answer as to where he was in the roadway at the material time as the middle of the road and the extreme right lane are two different places.
- III. The issue is further compounded by the fact that Mr. Facey gave evidence that the defendant could not pass him to his right based on where he Mr. Facey was positioned in the road when he started to make the right turn. His evidence is that "he would have to pass to my left". If Mr. Facey was indeed in the extreme right lane which is near to the sidewalk, on his evidence then the defendant could not pass him to his right as there would have been insufficient space to make such a manoeuvre and if the defendant passed on the left, the accident should not have occurred. If Mr. Facey was in the middle of the roadway (the middle of the right lane) then the defendant also could not pass him to his right.

- IV. It is the evidence of the claimant, Marvin Angus, that the collision took place in the middle of the road, the claimant, Mr. Facey having made the right turn from the left of the right lane and only positioning himself to make the turn once right up to the stoplight. The evidence of Mr. Facey, the rider, is contrasted with that of his pillion. It is not possible for one motorcycle to be in two different parts of the roadway at the same time.
- V. The court should draw the conclusion that either Mr. Facey or Mr. Angus is not being truthful or that both of them are not being forthright with the Court. The claimants' credibility is undermined by the glaring inconsistencies in their evidence and the Court ought to reject same.
- VI. There is no dispute that the collision took place in the middle of the road and we submit that same supports the Defendant's account that the claimants rode along the left side of his vehicle and attempted to turn right, across his path.
- VII. It is the defendant's unchallenged evidence that damage was to the left quarter panel and fender of his motor vehicle. It is highly unlikely if not improbable, that the defendant could have impacted the motorcycle which was travelling ahead in the extreme right lane or even the middle of the right lane on Mr. Facey's evidence, with the left side of his vehicle. The damage to the defendant's vehicle is more consistent with the Defendant's account of how the accident happened.
- VIII. The court can rely on the physical evidence of damage in determining which side is speaking the truth. (She cited the following quote from the judgment in the Jamaican Court of Appeal case **Grant v David Pareedon** et al unreported judgment delivered 4th October 1988: -

"Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical

evidence, I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of crucial importance in assisting a tribunal of fact in determining which side is speaking the truth."

- IX. There was no breach of the duty of care on the part of the defendant. It was the claimant, Romaine Facey who breached his duty of care by driving into the Defendant's path thus causing the collision. **Section 51 (1) (d)** of the **Road Traffic Act, 2003** provides that ***"a motor vehicle shall not be driven so as to cross or commence to cross or be turned in a road if by doing so it obstructs any traffic."*** Therefore, the claimant has failed to establish negligence against the defendant and as such the claimant's case must fail

Discussions

[32] In my assessment of the totality of the evidence in this case I bear in mind that it is the responsibility of both claimants to prove the issues arising in this case of negligence against the defendant on a balance of probabilities. There is no dispute on the evidence that both the claimants and the defendant were road users. It is settled law, therefore, that they would owe a duty of care to each other. In this regard, I find that the defendant Mr. Simpson did owe a duty of care to both claimants.

[33] I will therefore proceed to consider the next issue. That is whether the claimants have proven on a balance of probabilities that the defendant as a motorist failed to exercise due care and attention to them as other road users, causing injury and damage to them. The determination of this issue rests largely on the credibility of the parties, as, with the exception of where the impact occurred, both sides have presented divergent versions as to causation.

[34] Counsel for the claimants submits that I should find the claimants' version credible as they were consistent in particular areas of their testimonies. One of the areas that she has highlighted regarding the presence of consistency is the fact that they both indicate that the accident took place in the "middle of the road." However, I find that this depiction of consistency pales against the backdrop of the claimants' own narratives.

[35] It is Mr. Facey's evidence that he was at the extreme right of the right lane about to make the turn when the impact occurred. Further, it is his evidence that due to the limited space arising from his proximity to the right-side walk, Mr. Simpson's vehicle could not have passed him on the right. At that point, he says Mr. Simpson would have had to pass him on the left.

[36] However, bearing in mind that he bears the burden of proof, Mr. Facey has offered no explanation as to how, when and why his motor bike would have shifted from the extreme right of the right lane to end up in the middle of the road upon impact. Additionally, his evidence conflicts with that of Mr Angus who states that Mr. Facey was positioned in the left of the right lane when he made the turn.

[37] Furthermore, I do not share the view of counsel that these inconsistencies and discrepancies do not go to the root of the case. In my view they are directly relevant to the issue of causation which is a live and the main issue in the case. The Defence of Mr Simpson as expressed in his pleadings and his viva-voce evidence challenges the case of the claimants regarding the cause of the collision. His case is that he was properly positioned in the right lane, travelling straight ahead, on this two lane one-way street. He insists that the accident was caused by the actions of the claimant, Mr. Facey who had come from behind his motor vehicle and positioned himself in the left lane and sought to make the right turn from across the left lane. In so doing, travelling across the path of his motor car causing the collision.

[38] Therefore, the credibility of the evidence regarding the position of the motorcycle immediately prior to the collision is relevant to the determination of causation, and as such goes to the root of the case.

[39] Having assessed the demeanor and evidence of the claimants, they do not impress me as credible witnesses. I find the defendant to be more forthright and consistent in his version as to how the accident occurred.

[40] Additionally, bearing in mind that a motorbike is a much smaller motor vehicle than a car, it is my view that if Mr. Facey was in fact positioned in the right lane prior to making

his maneuver to turn, contrary to the evidence of Mr. Angus he would not have positioned himself to the left of the right lane .This is within the context of Mr. Facey's evidence that he had formed this intention to make this turn from the intersection of Duke Street and East Street some 20 meters away.

[41] Furthermore. I share the view of Counsel for the defendant that had Mr. Facey in fact positioned the bike in the extreme right of the right lane it is rather incredulous that the accident could have occurred in the way described by Mr. Facey.

[42] Mr. Facey admits that the lane was wide enough to hold both motor vehicles Mr. Angus evidence is that the defendant's car hit the motorbike out of the way. None of the claimants have said Mr. Facey brought the motorbike to a halt before he attempted to make the right turn. Both have indicated that he would have had his indicator on from 20 meters before reaching the intersection while always travelling in front of the defendant's motor vehicle. So, then the intention to make the right turn would have been apparent to the defendant.

[43] Consequently, in circumstances where both motor vehicles are in motion, the motorbike being ahead of the motor car, moving away and turning right, the motor car moving straight ahead, in a lane that is wide enough to accommodate both motor vehicles at the same time, I cannot envision an impact occurring between both vehicles in such circumstances. In such a scenario neither motor vehicle would be moving in the other's path.

[44] Counsel for the claimants has submitted that *"some of the evidence by the claimants presented an intellectual line of demarcation when juxtaposed with the defendant"*. She has suggested that *"distinction should be made by the court between the simplicity and slower comprehension skills of the claimant witnesses with their credibility as witnesses of truth"*

[45] However, my view of the evidence is that, the conduct of the cross-examination of the claimants was not based on a test of intellect. No technical language was put to them. The questions were put in simple terms seeking to distil greater details of and challenging

their version. The questions posed, regarding the positions of the motor vehicles at different times along the journey, that is regarding the relevant lanes and whether they were right, left, or middle of the lanes were simple enough for any mentally stable adult to comprehend. Additionally, as a licensed driver and these are positions Mr. Facey, like every other driver, who is authorized to drive on a public road, is expected to know.

[46] In any event, I find that the claimants' lack of consistency to simply maintain a true account of the accident has nothing to do with intelligence but a lack of credibility. In light of all the circumstances I find that the accounts of the Claimants regarding the cause of the accident lack credibility. Essentially I reject their evidence that Mr. Facey was always in the right lane traveling ahead of the Defendant. I reject their evidence that this was the circumstance under which Mr. Facey attempted to make a right turn, when the collision occurred.

[47] Accordingly, I find the account given by Mr Simpson to be more probable and truthful. I find his account to be more consistent. Considering where the motor vehicles impacted each other, I find this to be more consistent with the account given by Mr. Simpson. I find that it is more probable that the collision occurred because Mr. Facey having moved from behind Mr. Simpson where he was previously travelling, went to the left and then turned right across the path of the defendant's motor vehicle.

[48] Nonetheless, counsel for the claimant is asking the court to make a finding of negligence against Mr. Simpson merely on his evidence that despite seeing the motorcyclist prior to the impact, he was not able to avoid the accident, because Mr. Facey's maneuvering to the left, and then switching across in front of him was sudden. In my view the application of the law as expounded by May LJ in the case of **Foskett v Mistry** (Supra) will adequately addresses this issue. The learned judge made the pronouncement that;

"The root of liability is negligence, and what is negligence depends on the facts with which you are to deal. If the possibility of the danger emerging is reasonably apparent then to take no precaution is negligent: but if the possibility of the danger emerging is only a mere possibility that would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions"

[49] I take note of the circumstances in the **Foskett case**, that the claimant was a 16-year-old pedestrian who was running down a slope into the road that the defendant motorist failed to observe.

[50] The instant case concerns a motorcyclist who the defendant did observe travelling behind him. Whereas in the **Foskett case**, it was expected that the defendant should have observed the 16-year-old pedestrian and anticipated that there was a danger that in running down the slope he would run into the road, in the instant case, it is my view that it was not reasonable expected, and or apparent, that a motorcyclist travelling behind a motor car, would suddenly move to the left of the car and then turn right across the path of the motor car. In essence, I find that it was not reasonably expected for Mr. Simpson to foresee the actions of Mr. Facey that resulted in the accident.

[51] Counsel for the claimant has also submitted that the fact that Mr. Simpson did not observe the broken feet of the claimants is an indication that he is not credible. However, I take the view that this does not cast any negative shadow on the credibility of Mr. Simpson. The fact is, he has not professed to be a medical doctor. Therefore, he was not in a position to make any such diagnosis.

[52] Additionally, his inability to provide the court with any evidence with regards to any observations made as to where on the motorbike was damaged in my view does not affect his credibility or the root of his case. His lack of observation of details post-collision, in circumstances where it is not challenged that he at that time was concerned with assisting the injured claimants to the doctor, for me is comprehensible and commendable.

CONCLUSION

[53] I find that the claimants have failed to prove on a balance of probabilities that the collision that occurred on the 8th of August 2017, at the intersection of Duke Street and North Street between the motorbike driven by Mr. Facey and the motorcar driven by Mr. Simpson was due to Mr. Simpson's failure to exercise due care and attention for their

safety as fellow road uses. Essentially, I find that the claimants have failed to prove a case of negligence against Mr. Simpson. In light of the foregoing make following orders.

Orders

- I. Judgment for the Defendant*
- II. Cost to the Defendant to be agreed or taxed.*

.....
A. Thomas
Puisne Judge