JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 25/91

COR: THE HON. MR. JUSTICE CAREY, P. (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	DONALD NORTON	3RD DEFENDANT/APPELLANT
	LEROY STEWART	4TH DEFENDANT/APPELLANT
AND	LENA BAKER CHERRYLEE NONDRAM (EXECUTRICES OF THE ESTATE OF CORPORAL TREVOR LEE BROWN DEC'D)	PLAINTIFFS/RESPONDENTS
AND	THE ATTORNEY GENERAL	1ST DEFENDANT/RESPONDENT
AND	L. MILLER	2ND DEFENDANT/RESPONDENT

Donald Scharschmidt, Q.C. for Appellants

E.H. Oniss for 1st & 2nd Defendants/Respondents

Donovan Jackson for Plaintiffs/Respondents

November 23, 24 & December 18, 1992

GORDON, J.A.

On 17th October, 1986 Corporal Trevor Lee Brown died on the Ewarton Bypass main road in the parish of St. Catherine from injuries he sustained when the Jamaica Defence Force Lorry in which he was a passenger overturned after a collision with a Toyota Land Cruiser. In an action brought by the executrices of his estate to recover damages under the Fatal Accident Act and the Law Reform (Miscellaneous Provisions) Act 1955 against the defendants, Pitter J., on 18th March, 1991 adjudged the 3rd defendant, the driver of the Land Cruiser, and the 4th defendant the owner of the said vehicle, the present appellants, wholly liable to the plaintiffs in damages and ordered costs against them in favour of the plaintiffs and the 1st and 2nd defendants.

In this appeal the 3rd and 4th defendants sought to have the judgment of Pitter J., reversed and judgment entered against the 1st and 2nd defendants or alternatively that a new trial be had in this cause. It was urged that the learned trial judge failed to analyse the evidence in the case sufficiently or at all and failed to draw the proper inferences from primary facts given in evidence and came to a wholly erroneous conclusion on the question of liability. At the conclusion of the appellants' submissionswe dismissed the appeal with costs to the respondents.

There were three vehicles involved in the incident a truck-trailer which was parked in position to turn into the compound of Alcan Jamaica Limited, Ewarton Works, the Land Cruiser and the Jamaica Defence Force Lorry. Evidence for the plaintiff was given by Sergeant Carl Green and for the 1st and 2nd defendants by Private Lauriston Miller the driver of the Lorry. Their evidence was that the Lorry was proceeding from Ewarton towards Linstead on its correct side of the road at a moderate speed. On approaching the entrance to Alcan Ewarton Works they saw a truck-trailer with a flat bed parked on its correct side of the road. Private Lauriston Miller observed that the right indicator lights on the truck were blinking signifying the intention of the driver to turn right into the Alcan compound. The Lorry was in the act of passing the truck when a Land Cruiser suddenly swerved from behind the truck in the act of overtaking the same truck. The Land Cruiser was travelling at "60 m.p.h. or so". The Land Cruiser braked and started to broadside into the path of the Lorry on the Lorry's side of the road. Private Lauriston Miller braked and swerved to the left soft shoulder but the Land Cruiser crashed into the right front fender and right rear of the Lorry and ended up under the rear of the parked truck. The Lorry, in the meantime, with the right front fender crushed on to the right front wheel, careened out of control and overturned well beyond the rear of the parked truck.

The case for the 3rd and 4th defendants was that the 3rd defendant was driving the Land Cruiser, a left hand drive vehicle, towards Ewarton with the owner, the 4th defendant, sitting on his right. He saw the parked truck and pulled out to the right half of the road to overtake. He was warned by Stewart to return to his side of the road, he braked in an attempt to do so but his brakes failed. He crashed into the rear of the parked truck with 6" of the Cruiser's right rear protruding onto the incorrect side of the road. Whilst in this position, the Lorry crashed into his right rear. He did not see the indicator lights on the parked truck.

Patrick McKoy was the driver of the truck. His evidence was that he approached the Alcan Ewarton Works from the Linstead direction and indicated with his lights, his intention to turn right. He observed the Lorry approaching from the Ewarton end and he stopped and waited. The Lorry passed, then he glanced in his rear view mirror and saw the Land Cruiser on a collision course with the rear of his truck. To minimize the effect of the inevitable impact he neutralized his gears, took his foot off the brakes and absorbed the impact.

The learned trial judge found among other facts that the Lorry travelled at 40 m.p.h. and the Land Cruiser at 65 m.p.h. This finding of 65 m.p.h. was severely challenged as the highest estimate of the speed of the Land Cruiser was given by Sergeant Green as "60 m.p.h. or so." In this regard the learned trial judge fell in error but the weight of the evidence was to the effect that the Land Cruiser was travelling at a faster rate of speed than the Lorry. Donald Norton himself said "Lorry was not coming slow but not fast. The van was travelling faster."

The trial judge fell in error in ascribing to the Land Cruiser a speed in excess of that given by Sergeant Green. However,

when this error is viewed against the totality of evidence in the case it is seen an aberration that is insignificant. The real cause of the accident was not the speed but the manner in which the 3rd defendant drove his vehicle at the material time.

Another finding of fact that was challenged was:

> "The land cruiser came around the corner on the wrong side of the road at an excessive speed and travelled into the path of the lorry."

The evidence was that the Land Cruiser negotiated a corner as it approached from Linstead, before it crashed. There was no witness who said he saw the Land Cruiser when it was negotiating that corner. The witnesses said the Land Cruiser was travelling fast at the time they observed it which would relate to a time after it had come out of that corner. But the driver of the Land Cruiser admitted going on to the incorrect side of the road immediately before the accident. What was crucial was the position of the Land Cruiser at the time of the collision not the time it negotiated the corner. At the material time, as was admitted and as the judge found, the Land Cruiser was travelling on its incorrect side of the road. There was therefore no merit in these challenges levelled at the trial judge's findings of fact.

These undoubted errors of the learned judge cannot in my opinion affect his conclusion that "the driver of the Land Cruiser was the sole cause of the accident." In my view the cause of the accident was the manner in which the Land Cruiser was driven by the 3rd defendant in the act of attempting to overtake the parked truck when it was manifestly unsafe so to do. One needs only to evaluate the evidence of the 3rd defendant to see where the fault lies. He said that after he went under the parked truck he was pinned and "I then saw the front of the Jamaica Defence Force truck pass the Land Cruiser and the rear of truck hit the right rear panel of my Land Cruiser." (p. 44 exn in chief.) This statement may lead one

to infer that the 3rd defendant did not see the Lorry coming in the opposite direction before the accident. The evidence is that this defendant was driving a left hand drive vehicle, a circumstance which called for great care in overtaking. Any doubt on this evidence is dispelled by this defendant in answer to questions asked of him in cross-examination. He said:

> "After clearing the corner I saw the Alcan truck. I did not see any indicator blinking on the parked truck. Truck parked after the bend. I commenced overtaking by moving to the right of the road. I had travelled on to the right about 20 ft. when Mr. Stewart 4th defendant called out to me. I have been driving 15 years before accident. When I started overtaking i.e. when I pulled to my right I could not see around the truck. I know it is prohibited to overtake when you can't see around a bend.

This defendant by his own admission failed to observed the provisions of the Road Traffic Act, section 51 **(1) (c) and (g) of which require:**

> 51 - (1) The driver of a motor vehicle shall observe the following rules - 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;
>
> ...
>
> (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 conclusion of the learned trial judge is absolutely correct for it is supported on the evidence. For these reasons the appeal was dismissed.

FORTE, J.A.

My Lord, Gordon, J.A., has adequately detailed the evidence which the learned judge had before him and which, having analysed, led him to a determination of the issues, as to liability, which is adverse to the appellants. I gratefully adopt his account of the evidence.

In my view, this was a case in which the evidence demonstrated, that the cause of the accident was due solely to the negligent manner in which the driver of the Land Cruiser drove his vehicle. On his own case, though not admitting to excessive speed, he and the 4th defendant agreed with the other witnesses that he was attempting to overtake a parked vehicle, at a time when it was obviously unsafe so to do. That both appellants recognized that fact is revealed in the action of the 4th defendant when (in his own words), he warned the appellant Norton that he had to get back to his left. Significantly, there are witnesses, who were alerted to the dilemma as a result of the "squealing" of the brakes of the appellant's vehicle. There was also evidence of smoke coming from the tyres and the Land Cruiser appearing to skid. This together with the estimated evidence of speed from one witness at 55-66 m.p.h. all point to evidence upon which it can be concluded that the appellant's vehicle was travelling at a speed in excess of what safety permits, and at a time when its driver had commenced a manoeuvre which it was utterly unsafe to do i.e. to overtake a parked vehicle in those circumstances, an act which would certainly take it into the path of an uncoming vehicle travelling on its correct side of the road. Having placed himself in that dilemma, he attempted to avoid a certain collision which of course he did not do.

On the other hand, there is no dispute that the driver of the Army Lorry had the right of way and was entitled to a free passage as he passed the parked truck. Significantly, the driver of that parked truck recognized this, as he waited, with his

indicator lights flashing, for the 1st defendant to pass, before engaging his truck to turn into the Alcan premises. The only attempt to fix this respondent with any negligence, was to suggest that on the evidence, given the estimate of distances by various witnesses, as to the position of the parked truck vis a vis the white line in the centre of the road, the inference would be that the respondent's vehicle or part thereof was travelling on its incorrect side of the road. These estimates of course must be considered against the evidence of the respondent, who spoke of swerving to his left in an effort to avoid collision with the appellant and even travelling on the soft shoulder for some distance. Significantly, too, the appellants themselves admit even on their case, that their vehicle was 6" over the white line. In my view, the attempt by this method to determine facts must always be unsafe, when dependent upon estimated distances of witnesses whose competence in that regard has not been ascertained. This too against the background of the fact that the appellant has not pleaded that, as an act of negligence in their defence, and the 3rd defendant having stated in evidence that he was not asserting that the respondent's vehicle had come over unto his (the appellant's) side of the road. Indeed he admitted that had his vehicle been completely on its correct side of the road, there was a possibility that there would have been no accident.

In my view, this was a case in which the evidence left no option to the learned judge, but to find as he did. In the result, I find without difficulty that the conclusion arrived at in this appeal, by my Lord, Gordon, J.A., accords exactly with my own. For these reasons I agree that the appeal should be dismissed with costs.

CAREY, P. (AG.)

I entirely agree and have nothing useful to add.