28th November, 1986

1986/32

(60)

In the Royal Court of Jersey.

(Inferior Number)

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Before: Mr. V.A. Tomes, Deputy Bailiff

Jurat P.F. Misson

Jurat M.W. Bonn

—

Brian James Poole, Plaintiff

v

Clive Stuart Edingborough, Defendant

—

Advocate S.C.K. Pallot for the Plaintiff

Advocate A.D. Robinson for the Defendant

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On Monday, the 9th July, 1984, at 01.17 hours, a road traffic accident occurred at or near the top of Mont Sohier (St. Brelade's Bay Hill), in the Parish of St. Brelade, in which the Plaintiff, a pedestrian, was struck down by a motor vehicle, J12223, a mini clubman, driven by the Defendant. The Plaintiff suffered serious injuries. The Plaintiff alleges that the accident was caused by the negligence of the Defendant and claims damages.

Another road traffic accident had occurred on Mont Sohier at about 01.11 hours, involving personal injury and a police investigation. The Plaintiff alleges that he offered his assistance to the Police Officers who were at the scene of the earlier accident, that he was asked to go to the top of the hill - the junction between Mont Sohier and the Route des Genêts - in order to divert traffic away from the scene of the accident, and that whilst he was so re-directing traffic the Defendant drove his motor vehicle into that part of Mont Sohier in which the Plaintiff was positioned, and struck and injured him.

The Defendant denies negligence and avers that the accident was caused by the negligence of the Plaintiff. In the alternative, the Defendant alleges contributory negligence on the part of the Plaintiff.

It was agreed between the parties that we should decide only the question of liability.

At the request of the parties, the Court visited the scene of the accident.

The Facts:

There was a substantial conflict of evidence between the Plaintiff and a number of witnesses for the Plaintiff on the one hand, and the Defendant on the other, in particular with regard to the point of impact and consequently the speed at impact and the movement of the Plaintiff's body after impact. In addition to that conflict there were many discrepancies in the evidence of witnesses generally; notwithstanding which we believe that the witnesses were, in the main, truthful and trying to assist the Court to the best of their recollection; road traffic accidents are,

by their very nature, fast-moving and confusing, and false or erroneous impressions can become fixed in the mind as fact. It must also be said that such expert evidence as was available tended to support the version of the accident given by the Defendant. However, the Court has formed its own view of the events on that early morning of Monday the 9th July, 1984, and has done so on the balance of probabilities.

The earlier accident on Mont Sohier that night really has very little relevance to the present action except that it set the scene for the subsequent events. In that earlier accident a motor car had been turned onto its side and the three occupants trapped therein. The Plaintiff and Messrs. Mark Van Holstein and Alexander Andresa, with other help, had righted the vehicle, had removed the occupants from it had placed them on a grass verge, and generally assisted until the police arrived. In our view their actions were entirely laudable and the criticism of them unjustified. It is true that Mr. John Reginald Faiers, a retired Police Officer, who had investigated the accident and had overall control at the scene as the senior officer present, told us that a drunken man with a foreign accent, Australian, American or Canadian, by inference the Plaintiff, was excitable and gesticulating with hands and arms and was making such a nuisance of himself that Police Constable Roberts tried to get rid of him and threatened to arrest him. Police Constable Roberts, however, although describing the group of people involved as excitable and agitated said that one of the group offered to go the junction (of Mont Sohier with Route des Genêts) and stop traffic from coming down the road and that he readily accepted the offer. He, P.C. Roberts, would not have requested this help if he had considered drink to be a problem and he had no cause for concern or any reason to doubt the ability of the man to carry out the task. He had not asked anyone to leave the scene. The Plaintiff said that, the Police having arrived, he explained briefly what had happened

and offered assistance, whereupon a police officer had suggested that he go to the top of the hill to divert traffic away from the hill. This was corroborated by Mr. Van Holstein. The Plaintiff admitted, under cross-examination, that the "adrenalin was pumping through my veins" but denied both interference and intoxication. We have dwelt on this aspect of the matter because Mr. Robinson sought in part to rely upon it. We are satisfied that there was no evidence at all of intoxication, other than that of Mr. Faiers, which we reject on this point and, indeed, there was strong evidence to the contrary. We are satisfied that the Plaintiff and his two companions tried to do their honest best as citizens to assist in an emergency situation.

We are further satisfied that the Plaintiff and Mr. Van Holstein, followed by Mr. Andresa, proceeded up Mont Sohier with the intention of diverting traffic. Mr. Van Holstein was carrying a torch. As they went up the hill, a Triumph "Spitfire" motor car J43871, driven by Mr. Paul Dudley Walden, who had with him a Mr. Carl Anthony Miller, as passenger, entered the hill from Route des Genêts, and was waved down by the Plaintiff and Mr. Van Holstein; seeing the ambulance and other activity related to the earlier accident, Mr. Walden turned his vehicle around and proceeded back up the hill to the "yellow line" at the junction with Route des Genêts.

The Plaintiff had meanwhile proceeded up the hill and having reached the top, engaged in conversation with Mr. Walden who was in the driver's seat of his car.

Meanwhile, the Defendant had driven along Route des Genêts towards the junction with the intention of driving down Mont Sohier towards St. Brelade's Bay. He was not signalling his intention to bear left into Mont Sohier because Mr. Walden's vehicle was already stationary at the "yellow line" and he was not, in reality, changing course at all.

Mr. Van Holstein, who was in the middle of the right hand lane, facing up the hill waved with his torch and his hand, but there was no reaction from the Defendant, who drove into Mont Sohier. When the Plaintiff's vehicle did not stop, Mr. Van Holstein jumped to the right hand side of the road and shouted to the Plaintiff to "watch out".

The Plaintiff, hearing the shout, pivoted around to face the top of the hill, but he was already too late. He was standing very close or over the centre white line of the road, probably with one foot on either side of the line. He was struck by the Defendant's car, probably the bumper striking his right leg, and he was flung into the air, somersaulting or in a "loop", ending up in the roadway a short distance in front of the front of the Defendant's car where it finally came to rest.

The Defendant, as he approached the junction, saw a blue flashing light reflecting in the trees (from the ambulance attending the earlier accident): he started to apply his brakes; he denied seeing Mr. Holstein waving or flashing his torch; as he got closer he saw two men in the centre of the road, one in front of the other (the Plaintiff and Mr. Andresa) and started to brake harder. He left skid marks some 26 feet in length to the point where his vehicle stopped.

It is at this point that we have to resolve the substantial conflict of evidence concerning the point of impact. Mr. Andresa, Mr. Walden and the Plaintiff, were adamant that the point of impact was near the front, albeit fractionally to the side of Mr. Walden's vehicle. In this connection we consider the evidence of each witness.

Police Constable Breuilly investigated at the scene of the accident and took brief statements there or soon after. He also prepared a sketch plan of the accident.

Because the sketch is not to scale it is unreliable. The Defendant's statement at the scene was: "I had just come to the top of the hill, Route des Genêts and was heading towards St. Brelade's Bay. I saw one person on the opposite side of the road (Mr. Van Holstein). There was also one person in the middle of the road. There must have been one guy immediately behind the guy in the middle of the road. He must have just stepped out. I was doing 35-40 mph." This would place Mr. Andresa in front of the Plaintiff with the Plaintiff stepping out into the path of the Defendant's vehicle. We are satisfied that Mr. Andresa was further down the hill than the Plaintiff and we reject this statement.

The Plaintiff gave his statement in the Hospital at 03.05 hours. It reads: "I had been asked by the Police to stop traffic at the top of the hill due to an accident further down the hill. I was in the centre of the road. I saw the car approaching, it did not signal - I don't remember anymore apart from Mark (Van Holstein) jumping to the side." That statement is inconsistent with subsequent evidence that the Plaintiff had not seen the vehicle approaching the junction, although, of course, he does not state how late it was that he saw the vehicle approaching and he may have meant approaching him rather than the junction.

Mr. Walden said "I had stopped at the yellow line at the top of Mont Sohier. I could see his car, the mini, approaching. He seemed to be going at about 40 mph. He didn't signal at all. One guy was in front of my car, waving at the car to stop. He was the guy knocked over. The car just went straight through. On hitting the man he flew over the bonnet of my car and landed behind me".

Whilst Mr. Walden's statement is of doubtful validity and, in his evidence before us, he persisted in his claim that the Plaintiff was propelled into the air and

over his car, we can understand that he may well have had that impression and it does not invalidate his evidence to the effect that he was in conversation with the Plaintiff when his car was stationary at the yellow line. Thus, that the Plaintiff was standing near the front but slightly to the right of his car, very near the apex formed by the yellow line with the centre white line. The arrival of the Defendant's car interrupted the conversation, the Plaintiff turned around as if to make a signal; the Plaintiff actually started flagging the car down; and Mr. Walden saw the Defendant's car strike the Plaintiff. Mr. Walden also said that the Plaintiff did actually step out because he moved to the right to signal and his feet at the moment of "impact" were at the apex. Mr. Walden, under cross-examination, said that the Plaintiff had one leg on each side of the white line.

Mr. Van Holstein's statement read: "We had come up the hill to stop traffic coming down because of another accident. I was in the middle of the road and Brian (the Plaintiff) was running up the centre of the road trying to wave the car down but he didn't stop and just hit him". In evidence before us Mr. Van Holstein made it clear that he was in the middle of the right hand side of the road. He could see the Plaintiff, who was level or parallel with him, talking to the driver of the Triumph "Spitfire". The Plaintiff was at "1 o'clock" from Mr. Walden, and there was "no distance" between the Plaintiff and the car. He, Mr. Van Holstein, did stop another vehicle without problems by torch and hand waving, that vehicle continued on the main road. However, there was no reaction from the Defendant. At the moment of impact the Plaintiff had one foot on each side of the centre white line of the road at "1 o'clock" from the driver's seat. Mr. Van Holstein saw the Plaintiff struck and "make circles in the air", perhaps 2½ metres above ground, and 1½ somersaults. Under cross-examination, Mr. Van Holstein placed the Plaintiff opposite the driver's door, "where the door finishes and the windshield starts" rather than at the front of

the car as the Plaintiff, Mr. Walden and Mr. Andresa claimed, so that, when Police Sergeant Pryke gave evidence these were treated as separate impact points (1 and 2) when contrasted with the impact point claimed by the Defendant (3). However we take the view that the evidence of Mr. Van Holstein is consistent with that of the Plaintiff and Messrs. Walden and Andresa because it is impossible to have absolute precision in a fast-moving scene such as a road traffic accident and no debris or other positive evidence of the impact point was available.

The statement of Mr. Andresa said "I had just come up the hill. I could see Mark (Van Holstein) and Brian (the Plaintiff) up ahead. I saw the car coming. Mark jumped to the side of the road and Brian was on the centre line and he was just hit by the car. He was going too fast". It was clear from Mr. Andresa's evidence to us that he was running up the hill behind the Plaintiff and Mr. Van Holstein. The Triumph "Spitfire" had already been turned round and was stationary at the top of the hill. The Plaintiff was near the Triumph and Mr. Van Holstein was in the middle of the right hand side of the road. Mr. Van Holstein had a torch with him which he used, waving. Mr. Andresa corroborated the evidence of the Plaintiff and Mr. Van Holstein in every important respect - the conversation between the Plaintiff and Mr. Walden, Mr. Van Holstein's shout, the fact that the Plaintiff turned and was struck, with his right foot over the centre white line, that he was flung into the air, although he thought less than 2 metres, with a somersaulting or spinning movement. Mr. Andresa placed the Plaintiff in front and to the side of the Triumph "Spitfire".

The Defendant gave a different version in evidence before us. As he entered the hill, having already started to brake because of the flashing blue light of the ambulance, he saw two people in the centre of the road, one in front of the other on the centre white line (the Plaintiff and Mr. Andresa) in a position slightly past the

rear of the Triumph "Spitfire"; he started to brake harder, he saw another person on his left hand side (Mr. Van Holstein); the person in front on the centre line was standing facing him, waving his hand from shoulder height down. He thought someone had had a drink, which had happened before in his experience, and the signals were not clear. The person waving on the centre line (the Plaintiff) stepped into the road and into the corner of the vehicle. His speed was certainly not more than 10 mph at that point, if that; he had virtually stopped. He did not see a torch signal from anybody. The Defendant said that as he was braking the Plaintiff was standing on the centre white line, with his right leg only slightly over; as the Defendant got closer, the Plaintiff waved his arm more and moved to his right; the Plaintiff was facing him and moved towards his vehicle, he struck the vehicle in front of the front wing area; in relation to the Triumph "Spitfire" it was quite a distance (some 4 - 5 feet) after impact behind the Plaintiff fell over the bonnet of the Defendant's vehicle; he did not reach the windscreen but rolled off the bonnet onto the road. Possibly the Defendant's car carried the Plaintiff for 2 or 3 feet before it came to a halt, whereupon the Plaintiff rolled off; there was no somersault. The impact was some 12 or 18 inches over the centre white line on the Defendant's side of the road. This was impact point 3 referred to by Police Sergeant Pryke. If the Plaintiff had remained where he was when first seen by the Defendant he would not have been struck down.

We have to say that, as to the point of impact, we prefer the evidence of the Plaintiff, Mr. Walden, Mr. Van Holstein and Mr. Andresa to that of the Defendant. Mr. Van Holstein and Mr. Andresa were friends of the Plaintiff, but nevertheless, were impressive witnesses. Mr. Walden had never met the Plaintiff - and if the evidence of the Defendant was correct, it would have been impossible for Mr. Walden to have witnessed the accident unless he had turned round and there could have been

no conversation between him and the Plaintiff. We believe that the conversation did take place and that the point of impact was that described by Police Sergeant Pryke as Impact Point 1 or between Impact Points 1 and 2.

It is necessary that we should also consider the question of speed. In his statement at the scene the Defendant said "I was doing 35-40 mph". In his evidence he explained that that was on the Route des Genêts when approaching the junction. He started to brake before the junction. When he saw the Plaintiff he started to brake harder. He estimated his speed when 30 yards in front of the Triumph "Spitfire" and on his approach to the actual junction at 20-25 mph. At the point of impact his speed was less than 10 mph.

Centenier Upton put to the Defendant that his speed at the junction was between 35-40 mph. - the Defendant accepted it.

Mr. Walden, in his statement at the scene said (of the Defendant): "..... He seemed to be going at about 40 mph. ..... The car just went straight through .....". In evidence Mr. Walden said that there was no slowing down. The Defendant's car skidded to a halt after impact. Mr. Walden accepted that the sketch plan indicated earlier braking and said that perhaps the Defendant had braked for half a second before impact but that the impact was no more than half way along the skid mark shown on the plan. Mr. Walden also stated, in cross-examination, that the Defendant's speed was above 25 mph. at the point of impact.

Mr. Van Holstein claimed that the Defendant was "driving very fast" on his approach to the junction and that he did not slow down at all as he drove into the hill. Later, Mr. Van Holstein estimated the speed at 75-80 kmph. In cross-

examination. Mr. Van Holstein estimated the speed of the Defendant's vehicle as about 60 kmph at the moment that he, Mr. Van Holstein, jumped out of the way and, when pressed, said it could not be a lot less. He also estimated the decrease of speed when the Defendant's vehicle passed him as down to the 35-40 kmph, which would be the speed at point of impact.

In his statement to the Police Mr. Andresa said of the Defendant that "he was going too fast". In evidence, Mr. Andresa repeated that the Defendant was "going too fast". It appears that he based this statement on the high engine noise. Under cross-examination he accepted that noise was not an accurate guage of speed but went on to assess the speed of the Defendant's vehicle at between 60-65 kmph; nevertheless, he could not estimate the speed at the moment of impact because he did not know how quickly the Defendant had braked.

Police Sergeant Pryke, an expert in accident investigation told us that if the Plaintiff was struck close to the front offside headlamp, of Mr. Walden's vehicle the speed at impact would have been in the region of 19 mph and the speed at which the Defendant's vehicle started to skid would have been in the region of 22 mph. If the Plaintiff was struck close to the front offside door hinge of Mr. Walden's vehicle, the speed at impact would have been in the region of 16 mph and the speed at which the Defendant's vehicle started to skid would have been in the region of 22 mph. These speeds at which the vehicle started to skid refer to that point alone and it is not possible to determine the speed that may have been lost due to braking before the wheels locked and the vehicle commenced skidding.

The assessment of speed is a notoriously difficult matter. On the balance of probabilities we are of the view that the Defendant approached the junction at a

speed of 35-40 mph. On being alerted to some danger he commenced braking and reduced speed to 21 or 22 mph when his vehicle commenced skidding. The speed at point of impact was between 16 and 19 mph.

It must be conceded that the expert evidence tended to support the Defendant's version of the incident, although we have preferred that of the Plaintiff and other witnesses. Police Sergeant Pryke said that if it was true that there was absolutely no damage whatsoever caused to the Defendant's vehicle, it would indicate a very low impact speed. Certainly at an impact speed of 15-20 mph there is usually considerable re-shaping of the wing and bonnet and grille areas, assuming frontal impact. Even at an impact speed in the region of 8 mph he would have expected some damage or indication of a collision to show on the vehicle.

With regard to the movement of a pedestrain struck by a vehicle, Sergeant Pryke could not say what would have happened. He gave an example of a female pedestrian struck by the front part of a Suzuki jeep, which has a box shaped front, at an impact speed of about 21 mph. The pedestrian caused considerable damage to the bonnet and front offside wings and was projected forward a distance of about 12 metres, making contact with the road surface at least twice before coming to rest, 8 metres in front of the vehicle.

In the present case, Police Constable Le Breuilly examined the Defendant's vehicle at the scene, using his torch, and found no damage. The Defendant found no damage upon later examination. But the vehicle was not impounded, there was no detailed or forensic examination and Police Sergeant Pryke could not totally discount a high impact speed. Moreover it may be that the blow to the Plaintiff was a glancing blow to the side of the leg, propelling him forward, rather than a frontal

impact. Sergeant Pryke agreed that impact damage would be less if a small area only of the body was struck. The bracket behind the bumper could be very slightly distorted, which the investigating officer could have missed.

Mr. John G.B. Myles, an eminent surgeon, presented his report. The relevant injuries were a complete rupture of the medial ligament of the right knee and a fracture of the neck of the right fibula. The rupture would require a fairly severe blow; as an example, although it could be done on the rugby football field it would have to be as a result of a flying tackle. It can easily result from a road traffic accident and usually results from the victim being struck by the bumper of a car, or at about that level. It would be a blow to the outside of the leg about the level of the knee or slightly lower. The other injury, the fracture of the neck of the fibula, a little bone on the outside of the leg extending from knee to ankle, rather suggests where the Plaintiff was struck - the neck of the fibula is about 1" - 1½" below the knee joint. The other injuries were not relevant in that they occurred after the initial impact, the impact was almost certainly on the outside of the right knee and it was virtually impossible that it was on the front of the knee. The Plaintiff might well have been lifted from the ground. Whilst it was much more likely that the Plaintiff would have been lifted onto the bonnet of the Defendant's car one could not rule out other possibilities because the other car could interfere and it was possible that the Plaintiff could have been lifted over the other car; it was difficult to do more than guess.

In the considered opinion of the Court the expert evidence was insufficient to cause the rejection of the evidence of the Plaintiff, Mr. Walden, Mr. Van Holstein and Mr. Andresa as to what actually happened at the scene of the accident and we accept the substance of their evidence as to the point of impact, and the behaviour of the Plaintiff's body after impact.

Following upon our findings of fact we have to go on to consider whether the Defendant was guilty of negligence and if so whether that negligence was the sole cause of the accident or whether the negligence of the Plaintiff contributed to it. First, we must consider the Law to be applied :-

The Law

In Lowry v Hudson, 1972, Jersey Judgments p.2055, the Court at p.2062 said this:-

"The essential ingredients of actionable negligence are:-

1. the existence of a duty to take care owing to the complainant by the defendant;

2. failure to attain that standard of care prescribed by the law;

3. damage suffered by the complainant, which is causally connected with the breach of duty to take care.

The driver of a motor car owes a duty to exercise reasonable care and skill towards all persons using the highway, including pedestrians who, in general terms, have an absolute right to be on it. However, pedestrians are not entitled to more than the exercise of reasonable care on the part of drivers, and they must take reasonable care for themselves when using the highway. Moreover, although a driver is not entitled to assume that all other road users will take reasonable care, his duty to take care is based on the normal, so

that only when it is known that the abnormal is present is there a duty based on abnormality."

Mr. Pallot referred us to Boss v Litton, Volume 172 English Reports 1832 p.1030 which he described as the first english case in which the courts were coming to grips with accidents caused by users of the highway. In that case Denman C.J. (at p.1031) in summing up, said - "That all persons, paralytic as well as others, had a right to walk in the road, and were entitled to the exercise of reasonable care on the part of persons driving carriage along it".

Mr. Pallot also referred us to the case of Lang v London Transport Executive and another, 1959 3 All E.R. 609. The headnote in that case reads:-

L., While riding a solo motor cycle, emerged from a minor side road on to a major road and collided, at the junction of the two roads, with an omnibus which was travelling along the major road. L. was killed. About 180 feet from the mouth of the side road there was a "Slow, Major road ahead" sign, and it was the duty of traffic approaching the junction to observe this sign and to keep a look-out for traffic on the major road before emerging from the side road. The traffic on the major road was clearly visible from the side road from a distance of forty yards from the mouth of the side road. L. was travelling at twenty miles an hour along the side road; when he approached the junction, he did not slow down but carried on at the same speed, straight out on to the major road. The bus was travelling along the major road at a speed of not more than twenty miles an hour. Just after passing a "Slow" sign, painted on the major road about 190 feet away from the junction, the bus driver glanced in the direction of the side road, as was his usual custom, and saw that there

was some cyclists moving along it, although he could not identify L. as one of the cyclists; he did not look into the side road again. The bus driver knew that there was a major road ahead sign in this side road, but he was aware from experience (he had been driving buses for thirty-two years and had an exceptionally good driving record), that people would suddenly emerge from a side road when it was unwise to do so. In an action by L.'s widow claiming damages from the bus driver and his employers, L. was found guilty of a high degree of negligence. On the question whether the bus driver was also negligent in failing to see L. approaching the junction and in failing to slow down at the junction in case L. himself did not slow down,

Held: the possibility of danger was reasonably apparent and the bus driver was negligent in not taking the precaution of looking at the traffic in the side road as he approached it to see whether L. was still moving at twenty miles an hour and obviously intending to cross the major road; L., however, was much more responsible for the accident than the bus driver, and the responsibility would be apportioned as to two-thirds to L. and one-third to the defendants".

Mr. Pallot thus argued that an important matter of principle arises, i.e. that a driver approaching a junction, in the instant case the Defendant, is under a heavy duty to exercise care. The highest possible standards have to be observed if the driver is to escape liability.

The general principles to be applied are well set out in Charlesworth on Negligence, 5th Edition, para. 812:-

"The duty of a person who drives or rides a vehicle on the highway is to use reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the highway. Reasonable care in this connection means the care which an ordinary skilful driver or rider would have exercised under all the circumstances".

And at para. 821 -

"It is the duty of the driver or rider of a vehicle to travel at a speed which is reasonable under the circumstances. In determining what is reasonable, the nature, condition and use of the road in question, and the amount of traffic which is actually at the time, or which might reasonably be expected to be on it are important matters to be taken into consideration ..... If the driver of a vehicle sees a pedestrian in time to avoid a collision but does not slacken speed because he thinks there will be no collision if the pedestrian moves normally, and the pedestrian, owing to age or infirmity, does not do so and a collision occurs, the driver will be liable."

And at para. 823 -

"It is the duty of the driver or rider of a vehicle to keep a good lookout. 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 of him, especially at crossroads, junctions and bends, and for traffic-light signals and traffic signs including lines marked on the highway. Disregard of traffic signals and failure to keep a proper lookout is evidence of negligence. When there are pedestrians about, the driver or rider must be ready in case they step from a street

refuge or a footpath, or from behind a vehicle or other obstruction, and also be prepared for children, knowing that they may be expected to run suddenly on to the road. When passing a standing vehicle or other obstruction which prevents a clear view of oncoming traffic or pedestrians, care should be taken and a good lookout kept".

And at para. 830, after reciting certain provisions of the Highway Code -

"The effect of these rules is that although the vehicle on the minor road must give way to the vehicle on the major road it is also the duty of the vehicle on the major road when approaching a minor road to do so with caution,, but if the possibility of danger is reasonably apparent, then for the driver of the vehicle on the major road to take no precautions in such circumstances is negligence".

And at para. 832 -

"The driver or rider of a vehicle should give the proper signal before he moves out or overtakes, before he stops, slows down or changes his direction and all signals should be given clearly and in good time to give an indication of intention to other users of the highway. He must watch out for the signals of other drivers and act promptly".

Mr. Robinson urged upon us that a pedestrian owes to a driver the same reciprocal duty of care as is owed by the driver to the pedestrian.

In Nance, Appelant and British Columbia Electric Railway Company Limited Appeal Cases 1951 p.601 P.C. at P. 611, Viscount Simon, who delivered the Judgment of their Lordships said this:-

> "This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to their Lordships that in running-down accidents like the present such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve 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. If it were not so, the individual on foot could never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet such instances may easily occur, e.g. if the individual's rashness causes the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind or, indeed, in physical damage to the vehicle itself by contact with the individual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care, and if a sentence of Denning, L.J.'s judgment in the Davies case where he says, "when a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe any duty to a motorist who is going at an excessive speed to avoid being run down", is to be interpreted in a contrary sense, their Lordships cannot agree with it".

It cannot be doubted that the Defendant owed a duty of care to the Plaintiff. Equally. the Plaintiff owed a duty of care to the Defendant but this is not relevant to the present action since the third essential ingredient of actionable negligence - that damage was suffered by the Defendant, causally connected with the breach of duty to take care - is absent.

What is relevant, if we find that the Defendant is liable to the Plaintiff in negligence is the question of contributory negligence. In this respect we an do no better than to refer to Louis v E. Troy Limited and ors 1970 J.J. 1371. where at page 1399 the Court said this:-

> The general test to be applied on a plea of contributory negligence is stated in Halsbury (Third Edition), Vol. 28, paragraph 93 -
>
> "Where the defendant is negligent and the plaintiff is alleged to have been guilty of contributory negligence the test to be applied is whether the defendant's negligence was nevertheless a direct and effective cause of the misfortune. The existence of contributory negligence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish a plea of contributory negligence is to prove that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury.

The principle involved is that, where a man is part author of his own wrong, he cannot call on the other party to compensate him in full. The standard of care depends upon foreseeability. Just as actionable negligence requires the

foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might hurt himself. The plaintiff is not usually bound to foresee that another person may be negligent unless experience shows a particular form of negligence to be common in the circumstances. If negligence on the part of the defendant is proved and contributory negligence by the plaintiff is at best a matter of doubt, the defendant alone is liable."

One matter not argued before us, but which we consider to be relevant, is to be found in Article 12 of the Road Traffic (Jersey) Law, 1958, under the heading "Rule of the Road", as follows -

"(1) The rule of the road is ..... that vehicles shall keep as near as practicable to the left or near side of the carriageway .....;

(2) A failure on the part of any person to observe the rule of the road shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings ..... be relied upon by any party to the proceedings as tending to establish ..... any liability which is in question in those proceedings."

Decision

We are satisfied that the Defendant failed to attain that standard of care prescribed by Law, that is reasonable care and skill towards all persons using the highway.

The decision whether in any case a driver has been negligent is a decision on the facts of the particular case.

Centenier Upton, an experienced and able Centenier, put to the Defendant his view that the Defendant's speed at the junction was 35-40 mph. The Defendant accepted it but in evidence said he confused speed when approaching the junction with speed at the junction. The Centenier said it was an imprudent speed at night at that junction. The Defendant accepted that. The Defendant agreed that he had not given sufficient thought to the possibility of pedestrians walking along the hill and accepted that his approach speed was a little fast for that particular junction. The Centenier issued a written caution to the Defendant for an infraction of Article 15 of the Road Traffic (Jersey) Law 1956, i.e. driving a vehicle without due care and attention or without reasonable consideration for other persons using the road.

Centenier Upton recorded in the Accident Report the following:-

"Mr. Edinborough should have been cognizant with the possibility of pedestrians being in the area and driven his car at a more prudent speed when driving over the brow of the road". In evidence before us the Centenier explained that in his opinion a hazard had been created and the Defendant was not in a position to take the necessary action to avoid that hazard. The junction is in view for a considerable distance along the Route des Genêts but must be approached with care as one does not always know the intentions of drivers at the junction. A signal ought to be given for clarity; although, in fact, one is not changing course at all, it is helpful and safe to enable drivers emerging from Mont Sohier to know in which direction drivers on Route des Genêts intend to go.

No person charged with an offence under the Road Traffic (Jersey) Law, 1958, is bound to accept the decision of a Centenier and the Centenier can deal with the matter summarily only if his decision is accepted. We are satisfied that the Defendant was fully aware of his rights. In evidence, the Defendant admitted that the Centenier told him of his right to challenge the caution but that he "went along with it" and did not challenge anything. He explained that, at the time, he had started in business and did not want the aggravation of losing half a day to have the matter seen to in the Police Court. Later he said that he accepted the caution to get the matter over with and did not think sufficiently at the time.

Whilst the proceedings at the Parish Hall are not decisive of the issue of civil responsibility, we believe that the Defendant did acknowledge that he failed to attain the standard of care prescribed by law.

In evidence, the Defendant accepted that his approach speed may have been a little fast for the particular junction. We believe that the Defendant slowed down when he saw the reflection of the flashing blue light of the ambulance at the earlier accident but that he applied his brakes much harder only when he saw the Plaintiff.

We find that the Defendant failed to exercise reasonable care and skill towards persons using the road because (a) the speed of his vehicle when approaching the junction with the intention of proceeding down Mont Sohier was excessive having regard to the particular junction; (b) he failed to see the signals, including the waving of a torch, being given by Mr. Van Holstein and (c) he failed to comply with the rule of the road in that he entered Mont Sohier too close to the centre white line of the road. The Defendant also failed to give any signal of his intention to proceed into Mont Sohier. Whilst we do not found our decision on that failure, because Mr.

Walden's vehicle was stationary at the "yellow line", it nevertheless indicates a careless attitude or state of mind.

Turning now to the question of contributory negligence we are equally satisfied that the Plaintiff did not in his own interest take reasonable care of himself and that he contributed by this want of care to his own injuries. Centenier Upton was satisfied that the Plaintiff had created a hazard. He would not have thought it a safe thing to do to run up the centre of the road at any time. He considered it hazardous to run up the centre white line. A prudent person approaching to take up "point duty" would go up the left hand side of the road and then take up his position. The Plaintiff said that he stood with his back to the Route des Genêts talking to Mr. Walden. He then heard a shout, pivoted around and was struck. He agreed that anyone in his position at the time was going to take risks. With the benefit of hindsight he admitted that he should have asked for equipment, e.g. a torch or special clothing, to help him to divert traffic. But he thought it was necessary at the time to take risks and would do it again. He denied recklessness as to his own safety. We should interpose here that recklessness is not a necessary ingredient of negligence. Mr. Walden said that the Plaintiff was briefly in conversation with him and that when the Defendant's car approached the Plaintiff "sort of turned around" as if to make a signal. The Plaintiff as he turned did actually step out - he moved to the right - and the right part of his body was projecting over the centre white line. Mr. Van Holstein had a torch which he switched on as he and the Plaintiff were running up the hill. When they reached the top he could see the Plaintiff in conversation with Mr. Walden; he diverted another vehicle away before the Defendant arrived but the Plaintiff had not seen it. Mr. Van Holstein shouted to the Plaintiff to "watch out" and it was only then that the Plaintiff turned around to face the top of the hill but it was too late. The Plaintiff had one foot on each side of the centre white line. Mr. Andresa

confirmed that the Plaintiff turned and then was struck by the Defendant's car. He too had seen the Plaintiff in conversation with Mr. Walden. When he turned his right foot was over the centre white line. Mr. Andresa claimed that the Plaintiff was not taking an unnecessary risk; he was worried about Mr. Van Holstein when he heard the Defendant's car but not about the Plaintiff because he was on the left hand side of the road; nevertheless he agreed that the Plaintiff's movement brought him over the centre white line. When the Plaintiff spoke with Mr. Walden he was facing the occupants of Mr. Walden's car.

The description of the Plaintiff having turned from his conversation with Mr. Walden to face the approaching vehicle is consistent with the fact that he was struck on the outside of the right leg.

In our judgment the Plaintiff did not take reasonable care of himself and contributed by this want of care to his own injury. His failure to take reasonable care is made up of several components: his negligent attitude as evidenced by his running up the centre of the hill rather than on the left hand side, his failure to request the Police for equipment and his failure to leave the diversion of traffic to Mr. Van Holstein who was equipped with a torch: the fact that he engaged in conversation with Mr. Walden, facing Mr. Walden as he did so, with his back to the potential danger of traffic entering the hill - in this respect it must be noted that Mr. Van Holstein diverted another car from the hill without the Plaintiff having any knowledge of it - a reasonably prudent man going on 'point duty' would not turn his back on the direction from whence the traffic to be controlled would come; and the fact that when the Plaintiff heard Mr. Van Holstein shout, he turned to face the oncoming traffic in such a way that he moved over the centre white line of the road, rather than move against Mr. Walden's vehicle for protection. We believe that the Plaintiff

foresaw that he was placing himself in a position of risk to himself and we are satisfied that he ought reasonably to have foreseen that if he did not act as a reasonably prudent man - which he did not - he might be hurt. In our judgment the contributory negligence by the Plaintiff was not a matter of doubt.

We have given very careful consideration to the extent of the contributory negligence and we have come to the conclusion that the Defendant and the Plaintiff were equally to blame for the accident. Accordingly the total of any damage which may subsequently be recoverable by the Plaintiff for the personal loss suffered as a result of the accident should be reduced by one half.