25th November, 1988.

221.

IN THE ROYAL COURT OF JERSEY

Before Commissioner Francis Charles Hamon

Jurat M.G. Lucas
Jurat M.W. Bonn

Between	Michael John Halickyj	Plaintiff
And	David Alfred Peter Bougourd	First Defendant
And	Leslie Sutcliffe	Second Defendant
And	Inter Island Construction Limited	Third Defendant

Advocate D.F. Le Quesne for the Plaintiff
Advocate J.C.K.H. Valpy for the First Defendant
Advocate P.C. Sinel for the Second Defendant
Advocate J.C.K.H. Valpy for the Third Defendant

March 14th 1985, was a bright clear day. At about 7.30 in the morning of that day a stream of cars was driving along the Victoria Avenue dual carriageway in the direction of St. Aubin. In that stream of cars was a black saloon car (no more is known about it than that), an Alfa Romeo J31549 driven by Mr. Arsène Jules Henri Anger (who was at one time a party to this action but against whom action was discontinued on the 26th August, 1988), a Renault 14 J23228 driven by the Plaintiff and a Mitsubishi caravanette J68758 driven by the Second Defendant. Some way ahead of this stream of cars was another car driven by a Miss Mary Gilchrist (now Mrs. Cartwright).

It should be explained that the layout of that part of Victoria Avenue between the Rue du Galet on the land side and the Old Station Café on the sea side is not now as it was then. In 1985, there was a traffic island in what is now the west-bound outside lane transforming the dual carriageway for a short distance into a single lane. Traffic turning into Rue du Galet was channeled into the right-hand lane by the approaching traffic island and continuing west-bound traffic was channeled into a single lane until the junction had been passed.

At one stage the stream of traffic to which we referred was not in a single line. The Plaintiff had come from West Park onto Victoria Avenue and remained in the outside lane for some time. Mr. Anger and the Second Defendant were in the inside lane. At the First Tower traffic lights the situation remained the same but at some stage between the First Tower traffic lights and the Rue du Galet junction the Plaintiff pulled into the inside lane between the car driven by Mr. Anger and the caravanette driven by the Second Defendant.

The Plaintiff told the Court that he had to do this as the traffic island was some two to three hundred yards ahead and had he stayed in the outside lane in his words "he would have been trapped". He told us that when he pulled in there was plenty of room between the car in front and the caravanette behind. He said that the Second Defendant's caravanette was "a long way behind him". He was emphatic that it did not flash its lights nor sound its horn.

The Second Defendant gave the Court a different version of this particular incident. He told us that Mr. Anger's car was some eighty yards in front of him when the Plaintiff's car overtook. He thought the Plaintiff was eventually going to turn right into the Rue du Galet. He said that the Plaintiff pulled in too close to the caravanette and he flashed his lights. He did not apply his brakes but felt in any event that the Plaintiff's car was pulling away from him.

There is no doubt in the Court's mind that had that scenario remained as we have described it, nothing further would have happened. The file of three cars and a caravanette would have continued towards St. Aubin and Mrs. Cartwright's car would have turned right across the east-bound carriageway into the Rue du Galet.

The Court is satisfied that nobody was in a particular hurry that morning. The Plaintiff at the time was working as a painter for Ronez and was not due to start work at St. Ouen's until 7.45; the Second Defendant was

semi-retired and working part-time at the Airport. He had made a delivery in St. Helier and was driving back home to St. Brelade. The Court, of course, had no knowledge of the owner of the black car who was never traced. The Plaintiff told the Court that he was sure that in fact there was no black car but P.C. McMillan (and his evidence was not contradicted) was certain that both the Plaintiff and Mr. Anger mentioned the black car at some time. The First Defendant (and we shall deal with his evidence shortly) also mentioned a black car. We are satisfied that the black car was not a figment of imagination.

All the drivers who gave evidence (including of course the First Defendant) were experienced drivers with "clean" driving licences.

As always in a case such as this there now arises a complete conflict of evidence. This entirely centres around the activities that morning of a Ford cargo lorry J35991 driven by David Alfred Peter Bougourd (the First Defendant) in the course of his employment with Inter Island Construction Limited (the Third Defendant).

Let us examine Mr. Bougourd's evidence.

The Ford cargo tipper lorry weighed 7 tons and had a 41/2 ton load and a workmen's hut loaded on board. There was a double seat in the front cab. The First Defendant was driving the lorry and was accompanied in the cab by two workmates. The First Defendant had driven the lorry along the inner road, collected a newspaper as he did every morning and then turned on to the Rue du Galet to continue his journey west-bound to St. Brelade's Bay. He told us that he saw Mrs. Cartwright's car which flashed its lights to allow him through. In any event he was emphatic that he had priority over that car. He slowed down at the yellow line, and in second gear, at a slow speed, he crossed the east-bound carriageway and turned, in one operation, into the west-bound outer lane. He had seen the stream of cars coming along from St. Helier but, as a very experienced driver, expected them to overtake him on the inside. When it was safe to do so, he would move from the outside lane back into the inside lane.

He explained to the Court that a heavily laden lorry going even at a slow speed would heel over. It would take a lot for a lorry to topple over even on a camber such as existed near the traffic island. The noise of a lorry grinding in second gear would often give the impression of speed to the uninitiated. As the lorry completed its manoeuvre, the First Defendant heard the "squeal of brakes". He knew it was the black car which he had seen as he came out of the Rue du Galet but there was no collision. He had excellent views through his large wing mirrors. He noticed nothing further. He continued towards St. Aubin followed by the black car.

All of this was corroborated by a statement made some six days after the incident to P.C. McMillan. There the First Defendant:-

"I came down Rue du Galet up to this yellow (sic) at Victoria Avenue, I was doing 2mph. Victoria Avenue was clear in order for me to cross safely to the filter lane, going west. Looking to the left as I crossed, I saw a dark coloured car approaching on the inner lane. I saw him when he was about 150 to 200 yards away. As I straightened up along the outer filter lane, I heard a squeal of brakes. I looked in my mirror and I couldn't see him, possibly due to the angle he was at. I was straight, and I had not encroached on the inner lane. There were two other people in the cab, Mr. Patrick Devaney and Mr. D. O'Leary. They said he (the person in the car) must have thought I was going to go across his path, but I didn't. I had a 3 to 4 ton load and a workers' hut. I couldn't have been travelling at more than 10 to 15 miles per hour because the lorry would not accelerate that quickly."

The evidence of the other witnesses could not be more diametrically opposed. We must briefly summarise it.

Mrs. Cartwright, a nurse setting off to work at Sandybrook Hospital and accompanied by a colleague, said that she saw the lorry approaching the yellow line at Rue du Galet at quite a fast speed. It did not stop but as it crossed the east-bound carriageway it seemed to be shaking as if it might topple over. She

was adamant that the lorry was travelling too fast. She then heard the squealing of brakes and the sounds of collision. Commendably she pulled over to the Rue du Galet and her colleague went across the road to see if anyone was injured.

The Second Defendant also saw the lorry exit from the Rue de Galet. He saw the lorry "lurch over" as it passed the traffic island. He thought that it had hit the central kerbing. Its near side wheels went over into the inside lane a couple of feet - but no more than a yard before it corrected itself. He thought that for a short time it was out of control. He would certainly have braked had he been nearer to the lorry - he thought that there was a risk of it turning over.

The Plaintiff also saw the lorry come out of Rue du Galet. He was certain that it did not stop at the yellow line. He thought it was driving at twenty to twenty-five miles per hour. It lurched as it passed the traffic island and the Plaintiff formed the clear impression that it had hit the traffic island. The situation seemed to him to be quite dangerous and the lorry was driving "far too fast".

There is no doubt that what happened thereafter is a classic example "shunt-type" accident.

The black car swerved and braked but continued. Mr. Anger braked and stopped. The Plaintiff braked and stopped. The Second Defendant braked but was unable to prevent the caravanette (which is a comparatively heavy vehicle) from ramming the Plaintiff's car and driving it into Mr. Anger's car. The Plaintiff sustained injury.

The Court is asked today to establish liability (if any) leaving the parties to agree damages and failing agreement to refer the issue back to the Court for the assessment of damages.

The Court was taken in some detail through provisions of the Jersey and the "United Kingdom Highway Code". It is not necessary for the Court to repeat any of the illustrations given except perhaps to note the useful guidance of Lord Denning in Qualcast (Wolverhampton) Ltd. -v- Haynes (1959) 2 All E.R. page 38 at page 44, where he said (the facts are not relevant):

> "In the present case, the only proposition of law that was relevant was the well-known proposition - with its threefold subdivision - that it is the duty of a master to take reasonable care for the safety of his workmen. No question arose of that proposition. The question that did arise was this: What did reasonable care demand of the employers in this particular case? That is not a question of law at all but a question of fact. To solve it, the tribunal of fact - be it judge or jury - can take into account any proposition of good sense that is relevant in the circumstances, but it must beware not to treat it as a proposition of law. I may perhaps draw an analogy from the Highway Code. It contains many propositions of good sense which may be taken into account in considering whether reasonable care has been taken, but it would be a mistake to elevate them into propositions of law."

We entirely agree with that proposition.

Mr. Valpy in his very forceful and able argument asked the Court to consider whether the First Defendant owed any duty of care at all to the Plaintiff. His argument was clear. While every user of the highway be he in a lorry, a motor car or on a bicycle, owes a duty of care to other road users, the First Defendant did not fall into that category. He was too far removed from the collision to owe a duty of care to the Plaintiff. His lorry collided with no-one - and in fact both the driver of the black car and Mr. Anger also collided with no-one. Any negligence lay firmly with the Plaintiff by "cutting in" and with the Second Defendant by driving too fast and too close to the Plaintiff's car.

The Court entirely rejects that submission. The Court has no doubt that the cause of the accident was the driving of the First Defendant. The Court does not accept his version of the events but prefers the remarkably similar version of the other witnesses. He drove too fast and without taking any reasonable consideration for the safety of other drivers.

The Court has carefully considered all the authorities put to us by learned Counsel. It has done so because there must now fall to be considered the question of whether or not the Second Defendant participated in the negligence and if so, in what proportion. The Court does so in this context not to decide who had the last opportunity of avoiding the mischief but whose act caused the harm. The Court is clear that this is a case where it must apply apportionment if it finds that the Second Defendant's actions were mixed up with the state of things brought about by the First Defendant's proven negligence (for which, of course, the Third Defendant is vicariously liable as his employer).

The Court has much sympathy with the Second Defendant. His replies to questions were candid and, as far as the Court is concerned, truthful.

We do not, however, accept that he could not have slowed down once the Plaintiff had pulled in (and we prefer that expression rather than "cut in") between his caravanette and the car driven by Mr. Anger. He freely admitted that the Plaintiff had been in front of him for five or six seconds. He also saw all of the incident from the time that the lorry left the Rue du Galet. The Court feels that he had time to allow himself a safe braking distance before he was compelled to take emergency action.

In the circumstances we apportion blame as to 90% to the First Defendant and 10% to the Second Defendant.

The Plaintiff will have his costs in that proportion.

Authorities referred to: * in argument
β in the judgment.

* Article 12 Road Traffic (Jersey) Law 1956.
* Article 43.

β * The Jersey Highway Code.

β * The United Kingdom Highway Code, issued in accordance with resolution of UK Parliament in November 1977, Paragraphs 36, 46, 47, 70, 75, 83, 85, 155, 156, 163.

β * Qualcast v Haynes 1959 2 ALL ER 38

* Charlesworth on Negligence, 4th Edn. Pages 87, 90 - 93, 97, 100.

* Halsburys Laws of England, 4th Edn. Volume 34, paragraphs 46 - 52, 68 - 77.

Harvey v S.W. Thames Regional AHA (1979) CLY 268 (unreported).

* Kite v Nulan [1982] CLY 2160.

* Foskett v Mistry [1983] CLY 2563, [1984] CLY 2286.

* Grant v Sun Shipping Co. Ltd and another [1948] A.C. 549.

Davies v Swan Motor Co. (Swansea) Ltd [1949] ALL ER 620

Poole v Edingborough, 28 November 1986 Unreported Jersey Report.

* Froom v Butcher [1975] 3 ALL ER 520

Owens v Brimmell [1976] 3 ALL ER 765