[2019] JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 4/2017

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**LEIGHTON SAMUELS**	**APPELLANT**
AND	**LEROY HUGH DALEY**	**RESPONDENT**

Leonard Green, Ms Tashakaye Perue and Makene Brown instructed by Chen Green & Company for the appellant

Ms Suzette Campbell instructed by Burton-Campbell & Associates for the respondent

22 May 2019 and 31 July 2019

MCDONALD-BISHOP JA

[1] I have read in draft the reasons for judgment of my sister Foster-Pusey JA. I agree with her reasoning and conclusion and I have nothing to add.

SINCLAIR-HAYNES JA

[2] I too have read in draft the reasons for judgment of my sister Foster-Pusey JA and agree with her analysis and conclusion.

FOSTER-PUSEY JA

Background

[3] On 13 March 2008, the parties were involved in a motor vehicle collision. The appellant was riding a motorcycle registered 3242G and the respondent was driving a Toyota Townace Minibus registered 3234ER. They were both travelling in a line of traffic heading in the same direction along Watson Taylor Drive in the parish of Hanover, with the minibus about two car lengths ahead of the motorcycle.

[4] The appellant attempted to pass the line of traffic and continue straight towards Lucea. As the appellant pulled out of the traffic lane, and attempted to go around the minibus, a collision occurred between the two vehicles. The appellant was unfortunately thrown off his motorcycle and sustained injuries. Consequently, the appellant instituted a claim for negligence against the respondent in the Supreme Court, seeking, among other reliefs, damages for personal injuries sustained.

[5] The particulars of negligence outlined in the particulars of claim, filed on 13 October 2010, state:

> "**PARTICULARS OF NEGLIGENCE OF THE DEFENDANT**
>
> (a) Driving at a speed which was too fast in the circumstances;
>
> (b) Failing to keep any or any proper lookout;
>
> (c) Failing to give any or any adequate warning of his approach;

(d) Failing to heed the presence of other users on the said road;

(e) Failing to stop, to slow down, to swerve or in any way so to manage or control the said motorcar so as to avoid collision."

The respondent, in his defence, pleaded that the appellant was wholly to blame for the accident or was contributorily negligent.

[6] On 1 December 2016, the matter came up for trial before Wint-Blair J (Ag) (as she then was). The issue to be determined by the learned trial judge was whether it was the negligence of either the respondent or the appellant, or both, which caused the accident. Having heard evidence and submissions, the learned trial judge, on 12 January 2017, found in favour of the respondent.

The appellant's case

[7] The appellant stated that at about 5:30 pm on 13 March 2008, he was heading to Lucea in the parish of Hanover. As he approached the Rusea's High School, he slowed down because school had just dismissed, and there was a large number of school children on the road. There was a line of traffic ahead of him, including a Toyota Townace Minibus which was about two car lengths ahead.

[8] The vehicles in the line of traffic were heading for, what the appellant described as, a filter road to the left. Not seeing any oncoming vehicle, he turned on his right indicator, honked his horn twice and attempted to pass the line of traffic and continue straight towards Lucea. However, upon reaching the minibus, and attempting to pass it,

the respondent pulled out of the traffic lane, without having given any indication and collided with the appellant. As a result, the appellant was thrown from the motorcycle, landed on a signpost which said "Central Avenue", and the motorcycle landed in a gutter further up the road.

The respondent's case

[9] On the other hand, the respondent said that at about 6:00 pm on 13 March 2008, he was driving in the left lane from the direction of Negril going towards Lucea at a speed of approximately 30 miles per hour. He intended to make a turn from Watson Taylor Drive onto Central Avenue, which was a minor road on his right. On approaching the avenue, he slowed down and switched on his right indicator. He stopped and waited, because there was a vehicle approaching from the opposite direction. Whilst he was waiting, he observed that two vehicles had stopped behind him.

[10] After the oncoming vehicle had passed, he checked his mirror, noticed it was clear, and proceeded to make the right turn onto Central Avenue. He was in the process of making the right turn, having crossed over the white line in the middle of the road, when he saw a motorcycle coming from behind the minibus. The appellant had already overtaken the two vehicles which were directly behind the minibus. The respondent braked in an attempt to avoid the collision, but the appellant continued advancing and collided into the right back section of the minibus. On impact, the minibus stopped, and the appellant and the motorcycle ended up in a ditch on the right hand side of the road, about 50 feet away from the point of impact.

The decision of Wint-Blair J (Ag)

[11] The learned trial judge's decision was encapsulated in paragraph 7 of her judgment where she said:

> "The [appellant] evidently does not know the provisions of the Road Traffic Act in respect of overtaking. He proceeded to pass a line of traffic on his own account crossing an unbroken white line in the vicinity of an intersection. He wore no helmet for there is no evidence that he had. He simply did not want to wait in the line of traffic and caused the collision. Whether the line of vehicles was stationary or stopped is immaterial as the [appellant] jumped the queue. The case of **Powell v Moody** (1966) 110 Sol Jo 215, Times, 10 March, CA on similar facts as the instant case held that:
>
> > 'Any vehicle which jumped a queue of stationary vehicles was undertaking an operation fraught with great hazard and which had to be carried out with great care. There was always difficulty in such circumstances of seeing what was happening especially emerging from the gaps.'
>
> On a balance of probabilities, the [appellant] was responsible for causing the accident by his failing to obey the rules of the road and heeding the provisions of the Road Traffic Act. He is liable in negligence for causing damage to the [respondent's] vehicle.
>
> **Orders:**
>
> Judgment is hereby entered for the [respondent] with costs to be taxed if not agreed."

The notice and grounds of appeal

[12] By notice and grounds of appeal filed on 19 January 2017, the appellant challenges this decision. The following are the grounds of appeal:

> "i. The learned trial judge failed to demonstrate that she conducted any or any proper analysis of the evidence before her and came to conclusions that are inconsistent with the evidence adduced during the course of the trial in particular the evidence of the [respondent] adduced during the course of his cross examination.
>
> ii. The analysis of the evidence conducted by the learned trial judge failed to demonstrate that she understood her role to be balanced in all circumstances of the case and she commented in a manner that demonstrated bias particularly in her comments about the [appellant] not wearing a helmet when that was never an issue that was relevant in determining any facts that are in issue in the case.
>
> iii. The learned trial judge failed to demonstrate in her analysis of the evidence that she understood what was required of the tribunal to make a finding relevant to the issue of negligence and she failed, in her analysis, to identify the critical issues of duty of care, breach of that duty and the resulting damage. That failure caused her to run into error when she confused issues of fact with issues of law.
>
> iv. The learned trial judge's erroneously analysed the evidence before her made the findings that a breach of the Road Traffic Act, by itself, necessarily invited the conclusion that a breach of that Act, is conclusive of negligent conduct.

v. The learned trial judge erred in her reliance on the authority of **Powell v Moody** (1966) 110 Sol Jo 215 since that authority was decided on the special facts of that case which bears no similarity or resemblance to the facts of the case in this appeal.

vi. Any proper analysis of the answers given by the [respondent] during the course of his cross examination, demonstrates beyond peradventure, that the inescapable conclusion **must** be that the cause of the accident was due to the [respondent's] failure to make a right hand turn from a stopping position without ensuring that it was safe to do so.

ORDER SOUGHT

(i) That it be declared that the finding that judgment be entered for the [respondent] with costs to be taxed if not agreed be set aside.

(ii) An order that the Judgment be entered in favour of the [appellant] with costs to be agreed or taxed.

(iii) An order that the damages be awarded to the [appellant] in an amount to be determined by the court." (Emphasis as in original)

The appellant's submissions

[13] Counsel for the appellant, Ms Perue, sought and was granted permission to argue the grounds of appeal together and therefore made "global" submissions. Counsel submitted that, for the purposes of this appeal, the sole issue was whether the learned trial judge was correct in her finding that there was no negligence or no degree

of negligence on the part of the respondent. Flowing from this issue, was another matter, as to whether the learned trial judge properly applied judicial protocol in her analysis of the evidence and in arriving at her decision. This second matter concerned the adequacy of the reasons provided by the learned trial judge in respect of her determination of liability. Ultimately, the majority of the appellant's arguments focused on the latter issue, and not on a challenge to the findings of fact made by the learned trial judge.

[14] Counsel was highly critical of paragraph 7 of the judgment. She argued that the bases on which the appellant was found liable were the breach of the rules of the road and the breach of the Road Traffic Act ("the Act"). In her view, the learned trial judge treated section 95(3) of the Act, and a breach of the principles outlined in the Road Code, as a foregone conclusion of negligence without examining the evidence before her.

[15] Sections 95(1) and 95(3) of the Road Traffic Act state respectively:

> "95(1) The Island Traffic Authority shall prepare a code (in this Act referred to as the 'Road Code') comprising such directions as appear to the Authority to be proper for the guidance of persons using roads, and may from time to time revise the Road Code by revoking, varying, amending or adding to the provisions thereof in such manner as the Authority may think fit.
>
> …
>
> 95(3) The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that

> person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."

[16] It was argued that section 95(3) of the Act is a codification of the common law principle, "that breach of the road code does not create a presumption of negligence". Reference was made to the case of **Powell v Phillips** [1972] 3 All ER 864.

[17] It was submitted that, although by virtue of section 95(3) of the Act, a breach of the Road Code might be relied on as tending to establish, in civil proceedings, liability on the part of the person in breach, it was clear that a breach of the Road Code created no presumption of negligence calling for an explanation, still less a presumption of negligence making a real contribution to causing an accident or injury; it was merely one of the circumstances on which one party was entitled to rely in establishing the negligence of the other.

[18] The learned trial judge, counsel argued, should have embarked on a proper analysis, in light of the law of the tort of negligence, and should have examined the elements of duty, breach and causation. The appropriate question and issue to be determined was whether the breach of the Road Traffic Act and the rules of the road was the ultimate cause of the accident, or whether it was the respondent's act of turning across the roadway without ensuring it was safe to do so. Counsel argued that

the learned trial judge, in her reasons, failed to reflect an examination of the conduct of the respondent.

[19] It was further argued that the learned trial judge failed to consider all of the evidence because she came to a conclusion not supported by evidence. Her analysis was skewed as it ended at the breach of the Act. In these circumstances, counsel urged, this court can interfere, as the judge having heard the witnesses, gave reasons which were not satisfactory and which did not accord with the evidence. In addition, the learned trial judge was palpably wrong in her conclusion. The learned trial judge, as an arbiter, had a duty to consider all of the evidence and should have adopted a balanced and fair approach.

[20] Counsel then commented on the case of **Powell v Moody** (1966) 110 Sol Jo 215, Times, 10 March on which the learned trial judge relied in her reasons. In this case, the plaintiff was riding a motorcycle when he was confronted with a double line of stationary vehicles which were held up at a junction. The plaintiff decided to jump the queue, and go on the offside; while doing so he collided with the defendant's car which was emerging from a side road. The lower court judge held that the plaintiff and defendant were contributorily negligent in the proportion of 80 % and 20 % respectively. The plaintiff's appeal was dismissed by the Court of Appeal. Sellers LJ opined that, "… any road user who jumped a queue of stationary vehicles by going on

the offside of a line of stationary vehicles in front of him was undertaking an operation fraught with great hazard".

[21] Counsel indicated that the appellant was not taking issue with the principle as enunciated in the case of **Powell v Moody**. What was, however, in issue, was the limited application of the principle by the learned trial judge. In that matter, the court held that the parties were contributorily negligent, however in the instant case the learned trial judge found the appellant entirely to blame. It was submitted that such a conclusion was not supported by the evidence.

[22] The learned trial judge had, therefore, misapplied the decision in the **Powell v Moody** case when she focused on the submission of counsel for the respondent that the rider was jumping the queue when there was no evidence that that was so in the case she was deciding. The learned trial judge made no finding that there was a queue on the roadway at the time of the collision and that the three cars that had stopped, were a queue. The court also made no finding that the proper course of conduct for the rider of the motorcycle would be for him to join that queue.

[23] Counsel relied on the case of **Hay or Bourhill v Young** [1942] 2 All ER 396, in which, in distilling the neighbourhood principle, Lord Porter said at page 409:

> "The duty is not to the world at large. It must be tested by asking with reference to each several complainant was a duty owed to him or her. If no one of them was in such a position that direct physical injury could reasonably be

> anticipated to them or their relations or friends, normally I think no duty would be owed:…"

Earlier in the same case, Lord MacMillan expressed the duty in terms of "proper care" and had this to say at page 403:

> "Proper care connotes avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on. Then to whom is the duty owed? Again I quote and accept the words of Lord Jamieson:
>
> > '… to persons so placed that they may reasonably be expected to be injured by the omission to take such care.'
>
> The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."

[24] Counsel acknowledged that in order to succeed in his claim, the appellant must prove a causal connection between the respondent's negligence and the appellant's damage. The scope of responsibility tended to encapsulate what the notion of causation is all about (see **Rahman v Arearose Ltd** [2001] QB 351). Counsel accepted that in so far as motor vehicle accidents were concerned, a road user owes other road users a duty to exercise due care; and this is so regardless of the Highway or Road Codes that regulate the manner of driving on the roadways.

[25] Importantly, in the course of counsel's submissions, upon enquiry from the Bench, counsel indicated that the major issue which the appellant had in relation to the

matter was "process", as was borne out by the inadequacy of the reasons provided by the learned trial judge.

The respondent's submissions

[26] At the outset of her response, counsel for the respondent acknowledged that the judgment of the learned trial judge did not set out in detail the reasons for her decision. She agreed that the reasons did not reflect a full analysis of the evidence in the matter. Counsel argued, however, that although sparse, the reasons given by the learned trial judge were supported by the evidence and are satisfactory.

[27] Counsel proceeded to review paragraph 7 of the judgment of the learned trial judge. She accepted that there is a greater duty of care placed on a person who is turning across a roadway than a person who is going straight. The guidelines provide that when turning, a person is to indicate, look ahead and behind before turning across the roadway.

[28] Counsel submitted that clearly, the respondent did what was required of him. He put on his indicator, stopped to allow a vehicle coming from the opposite direction to pass, and checked his mirror to see whether the way was clear before he proceeded to cross the roadway.

[29] Counsel contended that while the appellant has questioned whether the learned trial judge gave adequate consideration to the relevant legal principles, and has stated that she incorrectly held that a breach of the Road Code was evidence of negligence,

the appeal was, essentially, a challenge to findings of fact arrived at by the learned trial judge.

[30] Counsel relied on the oft-cited case of **Watt (or Thomas) v Thomas** [1947] AC 484, and outlined the applicable principle of law in relation to the appellate court's review of a judge's findings of fact. She contended that the learned trial judge's findings of fact are supported by the evidence led in the matter, and her conclusions in law were sound.

[31] Counsel further argued that the elements of negligence are trite and are set out in the case of **Blyth v Birmingham Waterworks Company** (1856) 11 Exch 781. Harris JA in **Glenford Anderson v George Welch** [2012] JMCA Civ 43 stated at paragraph 26:

> "It is well established by the authorities that in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty…"

As it relates to motor vehicle accident cases, the author in **Bingham & Berrymans' Motor Claim** states:

> "There is a duty on the driver of a motor car to observe ordinary care or skill towards persons using the highway whom he could reasonably foresee as likely to be affected."

Further, it is a well-recognized principle that where there are two or more vehicles involved in an accident or pedestrian and vehicles, each owe to the other a duty of care to avoid causing harm to the other.

[32] Counsel referred to the case of **Berrill v Road Haulage Executive** [1952] 2 Lloyd's Report 490, where the court held that:

> "In running down accidents, 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 that 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."

[33] Ms Campbell also referred to the contention of counsel for the appellant that the learned trial judge did not give due consideration to the fact that the respondent owed a duty of care to the appellant. Counsel admitted that the learned trial judge did not mention the terms "duty of care, breach of duty, causation etc". She urged, however, that the relevant question is whether the lack of the legal linguistics is a conclusive indicator that the learned trial judge failed to consider and apply the correct legal principles in assessing the evidence.

[34] Counsel emphasized that the "duty of care" was a reciprocal responsibility between the appellant and the respondent. If, as the appellant contends, the learned trial judge failed to give due consideration to this principle, then that failure would impact both the case of the appellant as well as that of the respondent. The respondent

would, therefore, not have obtained any advantage from the learned trial judge's alleged failure to consider the evidence in accordance with the relevant principles.

[35] Counsel highlighted that, in delivering the judgment, the learned trial judge found as a matter of fact that the appellant came out of a line of traffic, jumped the queue and attempted to overtake the respondent's minibus, which ultimately was the cause of the accident. She argued that implicit in the learned trial judge's findings was an acceptance that the respondent had looked to ensure that the way was clear; and that his failure to see the appellant was not the cause of the accident. The learned trial judge would have therefore found that the respondent had discharged his duty of care, although the precise words may not have been used in the written judgment.

[36] Counsel referred to inconsistencies in the appellant's evidence. She noted that there was no attempt by counsel for the appellant to reconcile the appellant's conflicting evidence. As a result, it was open to the judge to find that he was not a credible witness. The learned trial judge's finding that there was a queue of traffic, which the appellant attempted to overtake, signified the learned trial judge's acceptance of the evidence of the respondent, even though she did not specifically state this in the judgment.

[37] The respondent's vehicle was always ahead in the line of traffic and it was not disputed that the appellant attempted to overtake the respondent. In light of these admitted facts, the learned trial judge's enquiry was focused on whether the overtaking

or passing was done within the accepted rules of driving and the standard of care required of motorists on the roadway. The learned trial judge's enquiry took her to the Road Traffic Act and rules which specify particular things that must be done, in particular circumstances, with a view to ensuring that the appellant did not cause an accident.

[38] Counsel referred to section 51(1)(g) of the Road Traffic Act which states:

> "A motor vehicle shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead."

Paragraph 8 of the Island Authority Road Code (1987) provides:

> "Do not overtake at or when approaching the following locations:
>
> (c) Road junctions…"

[39] Turning to comment on the **Powell v Moody** case, counsel accepted that the facts in the instant case are different. She did not, however, agree that the learned trial judge had misapplied the case. The principle to be extracted from the case, and which is clear, is that overtaking a line of traffic is a manoeuvre which had to be done with care as there are unseen dangers.

[40] In light of the learned trial judge's findings, counsel argued, it is also clear that she was of the opinion that the appellant had not exercised the level of care required when he attempted to overtake the respondent, and this was the cause of the accident.

While counsel for the appellant has indicated that some shared responsibility was found in the **Powell v Moody** case, this would have been supported by evidence.

[41] Counsel placed reliance on the case of **Brown and another v Thompson** [1968] 2 All ER 708, in which, the court in determining an apportionment of liability, held inter alia:

> "... regard must be had not only to the causative potency of the acts or omissions of each of the parties but their relative blameworthiness (citing **The Miraflores** [1967] 1 AC 826)"

The learned trial judge having seen and heard the witnesses did not agree that the respondent should bear any responsibility for the accident.

Discussion and analysis

[42] It is a well-established principle of law that when a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court, in reviewing the record of the evidence, should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies, or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses, or has failed to appreciate the weight and bearing of circumstances admitted or proved (see **Watt (or Thomas) v Thomas** [1947] AC 484).

[43] Further at page 486 of the case of **Watt (or Thomas) v Thomas**, Viscount Simon, in general terms, had this to say:

> "… an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached on that evidence should stand, but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

[44] This court has adopted and consistently applied the principle of law as enounced in **Watt (or Thomas) v Thomas**. Dukharan JA, in the consolidated cases of **Ronald Chang and another v Frances Rookwood et al** [2013] JMCA Civ 40, summarized the extent of this court's jurisdiction in reviewing factual decisions made by a judge in a court of first instance. At paragraph 26 he said:

> "These principles were followed with approval in **Watt v Thomas** [1947] AC 484. Lord Thankerton said at page 487 that, where a question of fact has been tried by a judge without a jury, and there is no question of his having

misdirected himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so **unless it is satisfied that the decision of the judge cannot be explained by any advantage which he enjoyed by reason of having seen and heard the witnesses**. Lord MacMillan developed the same point at page 490. He said that the printed record was only part of the evidence. What was lacking was evidence of the demeanour of the witnesses and all the incidental elements which make up the atmosphere of an actual trial. He said at page 491:

> 'So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong'." (Emphasis supplied)

[45] Although the appellant, in the notice and grounds of appeal, challenged certain findings of fact and law arrived at by the learned trial judge, the gravamen of the appeal concerned the adequacy of the reasons provided by the learned trial judge for the decision to which she arrived. The main complaint was, therefore, not focused on challenging findings of fact made by the learned trial judge; but was instead, that the learned trial judge failed to make critical findings of fact and determinations as to the

credibility and reliability of the parties. Neither party cited authorities which examined the issue of what is required by a judge in providing reasons for a decision.

[46] The case of **Flannery and Another v Halifax Estate Agencies Ltd (Trading as Colleys Professional Services)** [2000] 1 All ER 373 is instructive in relation to the standard of reasoning required of judges in their judgments. The head note of this judgment adequately encapsulates the facts of the case and the view point of the Court of Appeal. It states:

> "The plaintiffs purchased a flat, relying on a report from the defendant valuers which stated that there were no apparent undue hazards in respect of movement. Subsequently, the plaintiffs placed the flat on the market, but a prospective sale fell through after the valuers produced a fresh report, concluding that the property was affected by structural movement. The plaintiffs sued for negligence in respect of the earlier report, but the valuers contended that the flat had never suffered from any significant structural movement. At trial, the case centred entirely on a dispute between the rival expert witnesses concerning the cause of cracks in the property's superstructure. Without providing any reasons for his decision, the judge stated that he preferred the evidence of the valuers' expert witness, and accordingly dismissed the claim. **On appeal, the plaintiffs accepted that it had been open to the judge to conclude that the property had not suffered from structural movement, but they relied on his failure to provide any reasons for reaching such a conclusion.**
>
> **Held – Where a failure by a judge to give reasons made it impossible to tell whether he had gone wrong on the law or the facts, that failure could itself constitute a self-standing ground of appeal since the losing side would otherwise be deprived of its chance of appeal. The duty to give reasons was a function of due process and, therefore, of justice.** Its rationale was,

first, that parties should not be left in doubt as to the reasons why they had won or lost, particularly since, without reasons, the losing party would not know whether the court had misdirected itself and thus whether he might have any cause for appeal. Second, a requirement to give reasons concentrated the mind, and the resulting decision was therefore more likely to be soundly based on the evidence. The extent of that duty depended upon the subject matter of the case. Thus in a straightforward factual dispute, which depended upon which witness was telling the truth, it would probably be enough for the judge to indicate that he believed the evidence of one witness over that of another. However, where the dispute was more in the nature of an intellectual exchange, with reason and analysis exchanged on either side, the judge had to enter into the issues canvassed before him and explain why he preferred one case over the other. That was particularly likely to apply in litigation involving disputed expert evidence, and it should usually be possible for the judge to be explicit in giving reasons in cases which involved such conflicts of expert evidence. **In all cases, however, transparency should be the watchword. In the instant case the judge had been under a duty to give reasons, and had not done so. Without such reasons, his judgment was not transparent and it was impossible to tell whether the judge had adequate or inadequate reasons for his conclusion. Accordingly, the appeal would be allowed and a new trial ordered** (see p 377 j to p 378 e and p 379 e j, post)." (Emphasis supplied)

[47] Henry LJ at page 378 of the report had this to say:

"Mr Graeme McPherson, for the respondent valuers, reminded us of all the advantages enjoyed by a trial judge who has seen and heard the evidence. But, as he reminds us, Robert Goff LJ in Armagas Ltd v Mundogas SA, The Ocean Frost [1985] 3 All ER 795, [1986] AC 717, [1985] 1 Lloyd's Rep 1 at 56 quotes the 'classic statement' of the trial judge's advantage from Lord Thankerton's speech in Watt (or Thomas) v Thomas [1947] 1 All ER 582 at 587, [1947]

AC 484 at 488, where dealing with when the Court of Appeal may intervene he said:

> '**III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court**.'

That passage assumes the duty to give reasons, and for the appellate court to intervene when those reasons are unsatisfactory. To give no reasons cannot be satisfactory when reasons are required." (Emphasis supplied)

[48] We have also, in this court, adopted and applied the principles of law enunciated in the case of **Flannery and Another v Halifax Estate Agencies Ltd (Trading as Colleys Professional Services)**. In **National Commercial Bank Jamaica Limited v International Asset Services Limited** [2015] JMCA Civ 7, one of the grounds of appeal canvassed, was that the learned first instance judge erred in not giving reasons for refusing to strike out any of the sentences in paragraph 23 (iii) of the affidavit of Mark Jones in support of fixed date claim form filed on 20 January 2011 in Claim No 2011 HCV 00251. At paragraph [50], Phillips JA, having affirmed the duty on the court to provide reasons for its decision, concluded:

> "F Williams J did not do so in respect of this aspect of the application. So this ground of appeal (e) would also succeed. However, that is not the end of the matter, as the parties knew that the sentences in the affidavit had not been struck out, and could assume that the basis for that was that the

> court did not view them as scandalous, irrelevant and or unsubstantiated. The appellant was therefore not in doubt why it had lost on that point, and had not been prevented from drafting and arguing a ground of appeal on this issue. Nonetheless, I am still of the view that this ground succeeds."

[49] In the case of **New Falmouth Resorts Limited v National Water Commission** [2018] JMCA Civ 13, the appellant's application for relief from sanction was refused and it sought to appeal the decision. Although this was a case where no reasons were given for the decision (which is not the case here), Morrison P emphasized the need for judges to give reasons for their decisions and such reasons must be adequate. The heavy workload of our judges was expressly acknowledged by Morrison P who said at paragraph [50]:

> "In so saying, I readily appreciate that judges hearing applications of this nature in chambers in the Supreme Court are usually under tremendous pressure to give their decisions as quickly as possible. However, as Lord Phillips MR said in **English v Emery Reimbold & Strick Ltd** [2002] 1 WLR 2409, para. 15, "[t]here is a general recognition in the common law jurisdictions that it is desirable for judges to give reasons for their decisions ..." Such reasons can, as Lord Brown explained in **South Bucks District Council and another v Porter** (No 2) [2004] UKHL 33; [2004] 1 WLR 1953, para. [36], 'be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision'. **The important consideration, as the authorities make plain, is that the reasons given should be sufficient to give the parties, in particular the losing party, an intelligible indication of the basis for the court's decision**." (Emphasis added)

[50] The Court of Appeal in **Malaba v Secretary of State for the Home Department** [2006] EWCA Civ 820 per Pill LJ, at paragraph 29 stated:

> "**In assessing the adequacy of a fact-finding exercise, an appellate tribunal expects findings to be adequately reasoned.** By its reasoning, the fact-finding tribunal not only tells the losing party why he has lost but may also be able to demonstrate that it has adequately and conscientiously addressed the issue of fact which has arisen. That is particularly important when it is the credibility of an Applicant which is in issue. **A lack of reasoning may demonstrate a failure adequately to address the fundamental question: Is the Applicant telling the truth?**" (Emphasis supplied)

[51] The case of **V (A Child), Re** [2015] EWCA Civ 274 provides further assistance. That case was an appeal from a determination made by a judge sitting in a family court in the course of private law proceedings between the parents of a young child. The judge had to consider a range of factual allegations made by the child's mother against the father. On completion of the hearing, the judge delivered an ex tempore judgment which recited the evidence that he heard in some detail and stated his conclusions. The father appealed on the basis that there was a missing link in the process, namely a lack of reasons in the judge's judgment. The case initially came up before Black LJ as for permission to appeal. Black LJ, in accordance with the well-known practice, indicated that it was incumbent upon the applicant to return to the judge to seek further clarification of the judge's reasons. This was done, and the judge provided a statement of further reasons which were considered to be still inadequate, as a result of which the father was granted permission to appeal.

[52] McFarlane LJ examined the legal context within which the appeal fell. At paragraphs 13-16 of the judgment he stated:

> "13. It is not necessary to spend any significant time describing the legal context; it is well known. Two cases are, however, worthy of mention. The first is Flannery v Halifax Estate Agencies Ltd. (t/a Colleys Professional Services) [2000] 1 WLR 377, and within the judgment of Henry LJ in that case the following appears at page 382C:
>
> > 'This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword.'
>
> Then more recently there is the well-known judgment in the case of English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, when the then Master of the Rolls, Lord Phillips, at the conclusion of the judgment of the court, which he handed down, says this at paragraph 118:
>
> > 'In each of these appeals, the judgment created uncertainty as to the reasons for the decision. In each appeal that uncertainty was resolved, but only after an appeal which involved consideration of the underlying evidence and submissions. We feel that in each case the appellants should have appreciated why it was that they had not been successful, but may have been tempted by the example of Flannery to seek to have the decision of the trial Judge set aside. There are two

> lessons to be drawn from these appeals. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the Judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision.'

14. In simple terms, what the law requires is that the losing party needs to know why he or she has lost on any particular point. This court rightly affords a great deal of respect to trial judges who sit in a courtroom for a number of days immersed in the evidence in the case, be it written or oral, and, most importantly, seeing the demeanour of the key players in the courtroom, particularly when they come to give evidence. What I say in this judgment in this case is not, and I repeat not, intended to raise the bar, alter the law or otherwise cause 99.9 per cent of the judges who undertake this work to depart from their current practice. If indeed there is a general move to encourage judges to change their approach in these cases, it is a move towards giving shorter judgments, rather than longer judgments.

15. In a straightforward fact-finding exercise such as this, there is no need for an elaborate distillation of each and every point. **A straightforward case merely demands a straightforward explanation of the key factors that the judge has taken into account and his or her reasons for preferring one part of the evidence over another. Where oral evidence has been given by the key players it will often, if not always, be important to give a short appraisal of the witness' credibility and, where the testimony of one is preferred over another, a short statement of the reasons why that is**

> **so.** The trial judge has had the privileged position of seeing the protagonists and using that privileged perspective to inform a conclusion on credibility. For the judge not then to go on in his judgment to offer a brief description of what he has observed and as to how, as a result, he has approached credibility robs any recipient of the judgment of knowledge of that important aspect and, in particular, makes it harder for this court to afford the usual weight that is rightly to be given to the fact that the judge has had a ringside seat at the trial.
>
> 16. In summary, the well-established approach of an appellate court in cases such as this is that a basic, short but clear description of the factors considered and the reasoning that underpins any conclusion is all that is required. But it is nevertheless required, and the question in this appeal is whether the judicial analysis offered by Judge Wulwik in his judgment falls short of that requirement." (Emphasis supplied)

[53] Counsel for the mother had sought to support the judge's conclusions by submitting a respondent's notice. At paragraphs 30-31 of the judgment, McFarlane LJ stated:

> "30. Ms Huda, on behalf of the mother, has sought to support the judge's conclusions and she does so in part by submitting a respondent's notice which describes the thought process which the judge might have had on the evidence in this case in order to come to the conclusions that the judge reached. In doing so, she provides an exemplary description of a possible judicial process but as my Lord, McCombe LJ, has observed, in doing so Ms Huda in fact highlights the deficiencies in the judge's judgment. The Respondent's Notice is Ms Huda's version of what the judgment might have been. We have to evaluate the process in this case on the basis of the judgment that the judge gave together with such additional information as he was able to provide in his addendum. Again in her oral submissions, carefully and attractively made to the court, Ms Huda has sought to submit that this seasoned and

> experienced judge must have made the conclusions that he did as to credibility having seen the witnesses and we should respect that and that the discrepancies, such as they are, are explicable and were acceptable to the judge.
>
> 31. **Again Ms Huda might be right that this was what was going on in the judge's mind. But for my part the process has to be transparent. It should not be a matter of conjecture between counsel as to what the judge did or did not conclude and why he made that conclusion. The parties to a case like this need to know why the judge preferred the evidence of one against the other.** That is important not simply as a matter of justice and a matter of having a fair trial which comes to a clear and transparent conclusion but where, as here in this family case, the father is expected now to undertake some form of counselling or therapy on the basis of the findings that have been made, he needs to understand that the process has been a proper process and that these findings are based upon a clear analysis of the evidence." (Emphasis supplied)

[54] Having outlined the legal context, and having reviewed the judicial analysis of the judge, the court concluded that, although much time and effort had been invested in the fact-finding exercise, the process was inadequate "in terms of the judicial evaluation that arose from it" (see paragraph 33 of the judgment). The appeal was allowed and the matter was remitted for a form of rehearing. The court arrived at this conclusion for a number of reasons including that:

> i. Readers of the judgment were left in the dark as to why the judge preferred the evidence of the mother over that of the father;
>
> ii. There was no indication of the approach taken by the judge in respect of inconsistencies in the mother's evidence; and

iii. There was no appraisal of the relevant credibility of the various witnesses.

[55] The Privy Council, in the case of **Cedeno v Kenwin Logan (Trinidad and Tobago)** [2000] UKPC 48 emphasized, however, that there may be cases in which the absence of reasons (and by extension the inadequacy of reasons) may not lead to the setting aside of a magistrate's decision. Lord Hobhouse of Woodborough stated at paragraph 15:

> "…the authorities, while emphasising the importance of the giving of reasons as part of due process, also make clear that whether or not the 'unreasoned' decision should without more be set aside depends upon the circumstances of the particular case. A valuable judgment summarising the effect of the previous authorities is that of the Court of Appeal in *Flannery v Halifax Estate Agencies Ltd. (trading as Colleys Professional Services)* [2000] 1 WLR 377. In *Forbes v Maharaj* it was accepted (without deciding) that there may be cases where the absence of reasons may not lead to the quashing of the magistrate's decision. To a similar effect was the judgment of Lord Lane CJ in *Reg v Immigration Appeal Tribunal Ex parte Khan (Mahmud)* [1983] QB 790 (at 794-795):
>
> > 'A party appearing before a tribunal is entitled to know, either expressly stated by the tribunal or inferentially stated, what it is to which the tribunal is addressing its mind. In some cases it may be perfectly obvious without any express reference to it by the tribunal; in other cases it may not. Secondly, the appellant is entitled to know the basis of fact upon which the conclusion has been reached. Once again in many cases it may be quite obvious without the

> necessity of expressly stating it, in other cases it may not'."

[56] The Privy Council case of **Smith (Personal Representative of Hugh Smith (Deceased)) and others v Molyneaux (British Virgin Islands)** [2016] UKPC 35, concerned an appeal from the order of the Court of Appeal of the Eastern Caribbean Supreme Court, allowing an appeal from the order of Ross J.

[57] The appellants claimed possession of a certain parcel of land from the respondent, who had resided there for many years. The primary issue before the court was whether the appellants had given permission to the respondent to occupy said parcel of land and therefore whether he could, as he claimed, acquire a squatter's title by adverse possession.

[58] Therefore, the important questions to be answered in the case were (a)whether the judge found that permission had been given and, if so, in what terms; (b) whether certain answers amounted to the giving of permission; and (c) whether the judge gave an adequate reason for his finding of permission having been given. In addressing the latter question, Dame Mary Arden in announcing the conclusion of the Board said at the following paragraphs:

> "36. The Board finally has to consider whether the judge gave an adequate reason for his finding of permission. **It is an important duty of a judge to give at least one adequate reason for his material conclusions, that is, a reason which is sufficient to explain to the reader, and the appeal court, why one party has lost and the other has succeeded:** see, generally, the decision of the

Court of Appeal of England and Wales in **English v Emery Reimbold & Strick Ltd** [2002] EWCA 605; [2002] 1 WLR 2409, especially at paras 15 to 21. **The judge does not have to set out every reason that weighed with him,** especially if the reason for his conclusion was his evaluation of the oral evidence:

> '… if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon. (**English v Emery Reimbold & Strick**, para 19 per Lord Phillips MR, giving the judgment of the court)'

37. **If an appellate court cannot deduce the judge's reasons for his conclusion in a case, it will set aside the conclusion and either direct a retrial or make findings of fact itself**: see **English v Emery Reimbold** at para 26." (Emphasis supplied)

[59] In light of the authorities examined above, I wish to highlight a few important principles which they have outlined in relation to the provision of reasons by a judge:

a. the duty to provide reasons is a part of due process and fairness;

b. the judge must explain why he/she has reached the decision;

c. the scope of the duty to give reasons depends on the circumstances and the subject matter of the case;

d. failure to supply adequate reasons for a decision may constitute a good free-standing ground of appeal, even in cases where it was open to a judge to arrive at the conclusion in question;

e. a trial judge must identify and record those matters which are critical to his/her decision;

f. critical factual issues must be determined. Where there is conflicting evidence on matters, and those matters are vital in the analysis as to liability, the conflicts must be resolved by the judge;

g. in straight-forward fact-finding exercises there is no need for elaborate distillation of each and every point. What is required is a straightforward explanation of the key factors that the judge has taken into account and his or her reasons for preferring one part of the evidence over another;

h. where oral evidence has been given by the key players, it will often be important to give a short appraisal of the witness' credibility and, where testimony of one is preferred over another, a short statement of the reasons why this is so;

i. an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the judge has reached an adverse decision; and

j. the failure to supply adequate reasons for a decision may justify the setting aside of a judgment with the remitting of the case for retrial.

[60] I now examine the reasons handed down by the learned trial judge in light of the relevant principles. In her reasons, the learned trial judge:

i. gave a brief background of the nature of the matter (paragraph [1]);

ii. outlined that the issue of liability was in dispute and highlighted some of the evidence of the parties (paragraphs [2]-[4]);

iii. gave an outline of both counsel' submissions (paragraphs [5]-[6]); and

iv. outlined certain findings and found in favour of the respondent (paragraph [7]).

For ease of reference, I wish to outline the crux of the learned trial judge's reason as previously outlined at paragraph [11] herein. The learned trial judge said at paragraph 7 of her judgment:

> "The [appellant] evidently does not know the provisions of the Road Traffic Act in respect of overtaking. He proceeded to pass a line of traffic on his own account crossing an unbroken white line in the vicinity of an intersection. He wore no helmet for there is no evidence that he had. He simply did not want to wait in the line of traffic and caused the collision. Whether the line of vehicles was stationary or stopped is immaterial as the [appellant] jumped the queue. The case of **Powell v Moody** (1966) 110 Sol Jo 215, Times, 10 March, CA on similar facts as the instant case held that:
>
> > 'Any vehicle which jumped a queue of stationary vehicles was undertaking an operation fraught with great hazard and which had to be carried out with great care. There was always difficulty in such circumstances of seeing what was happening especially emerging from the gaps.'
>
> On a balance of probabilities, the [appellant] was responsible for causing the accident by his failing to obey the rules of the road and heeding the provisions of the Road Traffic Act. He is liable in negligence for causing damage to the [respondent's] vehicle.
>
> **Orders:**
>
> Judgment is hereby entered for the [respondent] with costs to be taxed if not agreed"

[61] There were a number of critical matters, which ought to have been addressed by the learned trial judge. These included:

i. Did the respondent put on his indicator and check his rear view mirror before executing the turn?
ii. Was the bus stationary at the time the appellant began passing the line of traffic?
iii. Where was the appellant positioned immediately before the respondent began to execute the turn? Was he immediately behind the bus? Or was he two car lengths away?
iv. Where was the bus positioned in the roadway when the collision occurred?
v. Where was the point of damage on the minibus?
vi. Whose account of the evidence was more credible and why?
vii. Which witness was more reliable and why?
viii. Generally, did the respondent comply with his duty of care to other road users before executing the turn? and
ix. Was the appellant contributorily negligent?

[62] Unfortunately, those critical matters were not addressed by the learned trial judge. While it is true, as the respondent submitted, that the learned trial judge appears to have accepted the evidence of the respondent, there is no such indication in the reasons. In a similar manner, as counsel for the mother in the case of **V (A Child), Re** approached the matter, counsel for the respondent in this case described a thought process which she felt is implicit in the judge's findings. It is possible that the judge,

indeed, had such a thought process. However, as the court opined in the **V (A Child), Re** matter, it should not be a matter of conjecture between counsel as to what the judge did or did not conclude, and why she arrived at her conclusion. In fact, as counsel for the appellant submitted, there was no analysis of the evidence of the respondent. I agree with the submissions of the appellant that, even if it could properly be said that the decision to which the learned trial judge had arrived was open to her on the evidence, she, regrettably, failed to identify and record matters which were critical to her decision.

[63] As the authorities indicate, in straightforward factual matters, there is no need to outline and analyse well known legal elements of negligence such as the elements of duty, breach, causation and damage. The workload of trial judges is well known, and such analysis of well-known legal principles is not necessarily required for a judge to arrive at and provide reasons for a decision. It is important, however, for a judge to outline and then resolve the critical factual matters for determination and indicate how he or she arrived at the decision in question.

What of the issue of the breach of the Road Traffic Act and the rules of the road?

[64] There is no dispute that all road users owe a duty of care to other road users. All motorists are obliged to observe the provisions of the Road Traffic Act, including section 51(1)(g), which states that a motor vehicle, "shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead".

According to section 51(3)(c) of the Road Traffic Act, "overtaking" includes passing or intending to pass any other vehicle proceeding in the same direction". Section 51(2) of the Road Traffic Act also imposes a duty on motorists to take such action as may be necessary to avoid an accident.

[65] The Road Code provides guidance to users of the road. Part 2 of the Road Code provides:

> "6. Before you slow down, stop, turn or change lanes, check your rear view mirror, signal your intention either by hand or indicator light signals and make sure you can do so without inconvenience to others. Never make a sudden or 'last minute' turn; it is very dangerous.
>
> …
>
> 8. Do not overtake unless you can do so without danger to others or to yourself. Before you overtake, make sure the road is clear far enough ahead and behind. Use your mirrors and if you are on a pedal cycle or motorcycle look behind and to your offside or right side. Signal before you start to move out. Be particularly careful at dusk, in the dark and in fog or mist, when it is more difficult to judge speed and distance.
>
> Do not overtake at or when approaching the following locations:
>
> …
>
> c. Road junction
>
> …"

[66] Section 95(3) of the Road Traffic Act provides:

> "The failure on the part of any person to observe any provisions of the Road Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure **may** in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) **be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings**." (Emphasis supplied)

[67] Turning attention again to the reasons of the learned trial judge, I agree with the submissions of counsel for the appellant that, in paragraph 7 of her reasons, the learned trial judge appeared to have focused solely on the appellant's breach of provisions of the Road Traffic Act and the rules of the road, and concluded that such a breach was, ipso facto, the cause of the accident. As the relevant authorities have shown, the mere fact that an individual breaches the Road Traffic Act or the rules of the road, does not, inexorably, mean that the person should be held to be liable in the event of the occurrence of an accident.

[68] This is clearly outlined in the case of **Powell v Phillips** [1972] 3 All ER 864. In this case, the plaintiff was walking along the left-hand side of a poorly-lit street. The street, which was 18 feet wide, was straight and was subject to the 30 mph speed limit. The pavement was covered with snow and slush, so periodically the plaintiff had to step off and walk in the roadway or near the gutter. Unfortunately, whilst walking in the roadway she was struck by a car driven by the defendant. According to the evidence, the car was travelling at '30 to 40 mph' or 'very fast', with side-lights and possibly headlights on. As a result of the accident, the plaintiff was unconscious for six weeks

and developed spastic quadriplegia. She subsequently initiated a claim for damages and was successful.

[69] The defendant thereafter appealed the award made by the court below. The defendant admitted negligence but claimed that the plaintiff was guilty of contributory negligence to the extent of 25 % in not acting in accordance with the Highway Code. The plaintiff was not wearing or carrying anything white, light coloured or reflective, and she was not on the right-hand side of the road facing oncoming traffic, she was, whilst in the roadway, in breach of rules 1, 2 and 4 of the Highway code. However, the judge held that that failure to comply with the Highway Code had played no part in the accident.

[70] Stephenson LJ commented on section 74(5) of the Road Traffic Act 1960(UK), which is in pari materia with section 95(3) of the Act. In delivering the main judgment of the court, the judge stated, at page 868, paragraphs b-d:

> "What then was the effect of those breaches in law and in fact? In law a breach of the Highway Code has a limited effect, as the wording of section 74(5) shows…It is, however, clear that a breach creates no presumption of negligence calling for an explanation, still less a presumption of negligence making a real contribution to causing an accident or injury. The breach is just one of the circumstances on which one party is entitled to rely in establishing the negligence of the other and its contribution to causing the accident or injury. Here it must be with all the other circumstances including the explanation given by Mr. Wakeman. It must not be elevated into a breach of statutory duty which gives a right of action to anyone who can prove that his injury resulted from it."

[71] There is no doubt that the failure of a person to observe any provisions of the Road Code may, in civil or criminal proceedings, be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings. However, this section has to be appropriately applied depending on the facts and the circumstances of the case. Therefore, a proper assessment of each case is necessary. The learned trial judge, therefore, erred in her approach to this issue.

[72] I agree with the submission of counsel for the appellant that the learned trial judge's application of the principle in the case of **Powell v Moody** was limited. At first instance Thesiger J found the parties to be contributorily negligent. The judge held that both the plaintiff and defendant were negligent in failing to keep a proper look-out, but he held that the plaintiff was the more to be blamed for the accident and apportioned liability between the plaintiff and the defendant at 80 % and 20 %, respectively. The majority of the Court of Appeal upheld this decision and dismissed the appeal. Salmon LJ, although agreeing to dismiss the appeal, dissented and said that he would have found both drivers equally to blame.

[73] The learned trial judge's application of the principle in the case was limited as she failed to assess the conduct of the respondent before he proceeded to turn right. It is a general principle that all road users have a duty of care to each other. In cases of this nature, the conduct of all parties must be properly assessed; this the learned trial judge failed to do.

The resolution of the matter

[74] While this court is a court of re-hearing, with the power to substitute findings of fact and law made at first instance, where an error in the decision is found, the nature of the issues which were left unexplained and unaddressed by the learned trial judge would not permit such an approach to this matter. This matter involves a critical dispute as to fact, which can only be resolved after hearing the parties. This court has not heard the parties, and so, in the circumstances, a retrial seems to be the best option to have the issues between the parties ventilated and properly resolved.

[75] Therefore, the following are the orders that I propose:

(1) The appeal is allowed.

(2) The judgment of Wint-Blair J (Ag) made on 12 January 2017 is set aside.

(3) The matter is remitted to the Supreme Court for hearing before a judge other than Wint-Blair J (as she now is) on a date to be fixed by the Registrar of that court.

(4) The matter is also to be fixed for pre-trial review by the Registrar of the Supreme Court as expeditiously as possible.

(5) Costs of the appeal to the appellant to be agreed or taxed.

(6) The parties to bear their own costs of the previous proceedings in the court below.

MCDONALD-BISHOP JA

ORDER

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