TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2008/024

BETWEEN:

MELVINA FRETT-HENRY

Appellant

and

[1] TORTOLA CONCRETE LIMITED
[2] CLAYTON SMITHEN

Respondents

Before:

The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Edward Bannister, QC — Justice of Appeal [Ag.]

Appearances:

Ms. Dionne Boreland-Fearon with Ms. Shamara Morton-Maynard for the Appellant
Mr. John Carrington for the Respondents

2010: May 19;
2011: November 21.

Civil appeal – Road traffic accident – Negligence – Collision on wet road – Unexplained skid – Causation – Contributory negligence – Apportionment of blame – Section 2(2) of the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 41, Revised Laws of the Virgin Islands 1991 – Whether the appellant's case as pleaded differed to that which was put forward at trial – Whether the trial judge erred in determining liability for the accident – Whether the trial judge erred in determining the matters arising from the defence of contributory negligence – Whether the trial judge erred in her assessment of the damages awarded to the appellant

On the morning of 15th June 2001, a collision occurred between a car driven by the appellant, Mrs. Frett-Henry, and a concrete truck driven by the second respondent, Mr. Smithen. Mrs. Frett-Henry was driving downhill along the winding Great Mountain public road in Tortola while Mr. Smithen, then employee of the first respondent, Tortola Concrete Limited ("the Company"), was driving the Company's truck in the opposite direction. Mr. Smithen drove the truck around a bend in the road in the middle of the road, causing Mrs. Frett-Henry to apply her brake while approaching the truck. Mrs. Frett-Henry's car slid into and collided with the right side of the truck after Mr. Smithen had returned to his proper driving side of the road. The road was wet when the accident occurred. Each party

alleged that the other had been negligent; the appellant alleged negligence in her statement of claim and the respondent alleged contributory negligence in the defence.

The trial judge concluded that it was the unsafe speed that Mrs. Frett-Henry was driving at which made it impossible for her to stop in time and also that Mr. Smithen had not been driving on his proper side of the road immediately before the accident occurred. She therefore found that they had both contributed to the accident and apportioned liability in the following way: 75% to Mrs. Frett-Henry and 25% to Mr. Smithen. Both parties were dissatisfied with the learned trial judge's findings of fact, her apportionment of liability, and her award of damages. Mrs. Frett-Henry adduced no expert testimony to prove damages. She relied on several medical reports, a letter from her employers, receipts and bills, and her evidence, to prove damages. Mrs. Frett-Henry appealed and the respondents filed a counter notice of appeal. The issues raised in Mrs. Frett-Henry's grounds of appeal and the respondents' counter notice may be summarised in three main issues: (i) whether the trial judge erred in determining who was liable for the accident; (ii) whether the trial judge erred in determining the matters arising from the contributory negligence defence; and (iii) whether the trial judge erred in her assessment of the damages awarded to the appellant.

Held: allowing the appellant's appeal against the apportionment of liability for her contributory negligence, varying paragraph 44(a) of the trial judge's order to reflect the decision of this Court on apportionment of liability, setting aside paragraphs 44(b)(i) and 44(b)(ii) of the trial judge's order, dismissing the appellant's other grounds of appeal and ordering that the respondent pay the appellant costs in the appeal; allowing the respondents' counter notice appealing the award of loss of earnings and future loss of earnings, setting aside paragraphs 44(b)(iii) and 44(b)(iv) of the trial judge's order, dismissing the other grounds of appeal in the respondent's counter notice and ordering that the appellant pay the respondents costs in the appeal, that:

1. Where a case comes to trial on pleadings which allege one set of facts and those facts are put forward but are defeated or rejected, the party putting forward those rejected facts cannot succeed on a different case which he/she had not raised and which the other side had not come to the trial prepared to meet. In the instant appeal however, the judge's findings on the respondents' liability were foreshadowed by some of the Particulars of Negligence alleged in the appellant's statement of claim, though the judge rejected the appellant's pleading that the truck driven by Mr. Smithen collided with the appellant's car. The finding that it was the appellant's car that collided with the respondents' truck was supported by and in accordance with the respondents' pleadings. The learned judge was entitled to decide in favour of the appellant on the basis of the scenario not pleaded by her, but by the respondent, provided the judge did so fairly. The respondents were not prejudiced since the facts upon which their liability was established were those pleaded by the parties.

   Waghorn v George Wimpey & Co. Ltd. [1969] 1 W.L.R. 1764 applied; John G. Stein & Co. Ltd. v O'Hanlon [1965] A.C. 890 cited.

2. Generally, a person is guilty of contributory negligence where that person fails to take reasonable care of himself/herself in circumstances where that person ought reasonably to have foreseen that if he/she did not act as a reasonable prudent person, he/she might be hurt; and in such reckonings he/she must take into account the possibility of others being careless. The primary question therefore for the trial judge, in relation to the skid and contributory negligence, would be whether Mrs. Frett-Henry had, by her evidence, established on a balance of probabilities that: (i) she did foresee harm to herself; and (ii) she acted as a reasonable prudent person for her own safety and guarded herself against the negligence of Mr. Smithen. The primary focus would be on the foreseeability of harm to herself apart from her duty to other road users. The learned judge failed to apply the law of contributory negligence where she made no distinction between the standard of care required for the appellant's contributory negligence and the respondent's negligence.

3. It cannot be assumed in the absence of evidence, that apart from being wet, the road surface was slippery or in any other poor condition. The existence of the dilemma would not excuse fault. The need to act reasonably in the dilemma defines the conduct to be expected of a reasonable prudent person when faced with the dilemma. In the absence of probative evidence negativing contributory negligence, the learned judge was not entitled to speculate, or draw inferences in favour of Mrs. Frett-Henry.

4. The cumulative effect of the evidence disclosing the unexplained skid, the failure of Mrs. Frett-Henry's brake to stop her car before the collision and the resulting harm to herself, is that she failed to act reasonably and take care of herself. Had the judge applied the correct law and principles, her findings and conclusions would not have been unreasonable on the totality of the evidence.

5. The appellant, Mrs. Frett-Henry, though driving at an unsafe speed, was not reckless. Mr. Smithen's negligence set in motion a trail of events culminating in the collision occurring after he had returned to his proper driving side of the road. His return to his proper side of the road should not be viewed in isolation from his prior negligence. Though he may not have been negligent after creating the dilemma, this would not necessarily preclude liability for his prior negligent conduct which produced the dilemma. There was no break in the chain of causation between the respondent's negligent act and that of the appellant. The trial judge correctly found the respondent's negligence to be part of the effective cause of the collision, although finding that the appellant was not free from fault.

Wright v Lodge and Another [1993] R.T.R. 123 distinguished.

6. There are no rules requiring that a trial judge reject the whole of the evidence of a claimant whose witness statement, oral testimony, pleadings, or other documentary evidence conflict on matters that are central to the issues to be determined by the judge. The trial judge's finding that Mr. Smithen was at first traveling in the middle of the road, was not an unreasonable inference to draw from the totality of the evidence.

7. On the well-known authorities, once an appellate court accepts the findings of fact of the court below that the two parties in an action are to blame, it should, in the absence of error of law, only in a strong and exceptional case revise the apportionment of blame made by the trial judge. In carrying out the exercise of an apportionment of blame as between a negligent defendant and a claimant who is found to have contributed to the damage he/she suffered, the trial judge would be concerned with the blameworthiness of each party as well as the relative importance of the acts causing the damage.

   The MacGregor [1943] A.C. 197 applied; Davies v Swan Motor Co. (Swansea) Ltd. [1949] 2 K.B. 291 applied.

8. In the present appeal, the trial judge did not apply the law on contributory negligence in her judgment and the absence of any indication that her apportionment was guided by the appropriate principles governing contributory negligence, amounts to an error of law. In the circumstances, this Court would be in a position to carry out anew the apportionment exercise under section 2(2) of the Law Reform (Miscellaneous Provisions) Ordinance.[1] (Per Edwards J.A. with Baptiste J.A. concurring, Bannister J.A. [Ag.] dissenting).

9. The apportionment of blame made by Olivetti J. was unexceptionable as a matter of approach, but wildly favourable to the respondent as a matter of assessment on the facts as she found them. People should not drive in the middle of roads and when accidents occur in consequence, a finding of 75% contributory negligence against the person injured is, in the absence of quite extraordinary facts (which these are not), perverse. (Per Bannister J.A. [Ag.]).

10. On the application of the relevant principles governing apportionment, Mr. Smithen's responsibility for the accident would weigh heavier than Mrs. Frett-Henry's. Consequently the responsibility is apportioned with 70% for the respondent and 30% for the appellant.

[1] Cap. 41, Revised Laws of the Virgin Islands 1991.

11. Although the judge found the presentation of Mrs. Frett-Henry's case to be unsatisfactory where the medical reports made no causal connection between her stated injuries and the accident and no medical expert was called to explain the medical terms and symbols in the reports, the absence of such evidence would not necessarily preclude the court from applying ordinary common sense in determining the proximate cause of Mrs. Frett-Henry's injuries. On the proven facts, the judge was entitled to form her own conclusions without the help of expert medical opinion, having taken judicial notice of the meaning of the medical terms by reference to the medical dictionary that she used. It was open to the respondents to adduce evidence showing the extent to which some other factor also contributed to the injuries that the judge found to be a product of the accident. In the absence of such evidence from the respondent, it was reasonable for the judge to conclude that the accident contributed materially or substantially to those injuries she found were caused by the accident based on the medical reports for the period 26th January 2001 to 9th September 2002 and make the findings that she did.

    Alphacell Ltd. v Woodward [1972] A.C. 824 applied; Jobling v Associated Dairies Ltd. [1982] A.C. 794 applied; McGhee v National Coal Board [1972] 3 All E.R. 1008 applied; Holtby v Brigham & Cowan (Hull) Ltd. [2000] 3 All E.R. 421 applied.

12. Since the learned judge found that Mrs. Frett-Henry had not satisfied her burden of proof in relation to the medical findings and diagnosis of Dr. Martinez in his medical reports from 1st February 2005, it was not open to the judge to subsequently rely on Mrs. Frett-Henry's employer's letter to justify the award of damages for loss of earnings and future loss of earnings where the radiculopathy that the letter referred to was the cervical radiculopathy C5 due to severe root C5 C6 spondyloarthritis that Dr. Martinez had diagnosed. That letter was pivotal in the appellant being placed on half salary for the period 15th April 2005 to 31st August 2005, and early retirement from 1st September 2005. The only other radiculopathy was the C6 left radiculopathy diagnosed by Dr. Borras on 16th November 2001, which the trial judge found Mrs. Frett-Henry had substantially recovered from by September 2002. The judge therefore erred in making the awards for loss of earnings and loss of future earnings at paragraphs 44(b)(iii) and 44(b)(iv) of her judgment respectively.

JUDGMENT

[1] EDWARDS, J.A.: A motor vehicle accident between the appellant's car and the respondent's truck occurred along the wet winding slope on the Great Mountain public road in Tortola on the morning of 15th June 2001. The truck, at the material time, was driven by the second respondent, Mr. Smithen, then employee of the first respondent, Tortola Concrete Limited ("the Company"). The appellant, Mrs. Frett-Henry, was the driver of her car. There were allegations of negligence from both sides.

Factual and Evidential Background

[2] The undisputed facts are that between 8:00 a.m. and 9:00 a.m. on the date of the accident, Mrs. Frett-Henry was driving her motor car PV9986 downhill while Mr. Smithen was driving a fully loaded Mack concrete truck CM1415 uphill on the road. As the truck rounded a bend in the road, Mrs. Frett-Henry's car slid into the right side of the truck at the rear of the driver's cab. At the point of collision, the road was 20 feet wide. The point of impact was exactly in the middle of the road. Mrs. Frett-Henry's car was 5 feet 3 inches wide and the truck was 8 feet 4 inches wide. The police report recorded the width of the car and the truck to be 5 feet 3 inches and 8 feet 4 inches respectively. The truck ended up with its left front wheel being completely off the left hillside of the road (Mr. Smithen's left) and its left rear wheel being 1 foot 7 inches from the left hillside of the road. The judge also accepted the undisputed measurement of 45 feet away recorded in the police report as the distance Mrs. Frett-Henry was from the truck when she first saw it.

[3] Mrs. Frett-Henry explained at different times how the accident occurred. At paragraph 3 of her witness statement she deposed:

> "…I was proceeding cautiously down the Great Mountain Road. As we approached a corner which is also at the top of a hump in the road, the truck came around the corner but was not positioned on its designated side of the road being more to the centre and my side of the roadway. When I saw the truck, I stepped on the brake pedal, the car skidded a bit and the vehicles collided on my side of the road."

[4] In an undated handwritten statement with her signature, she said:

> "I, Melvina Frett-Henry was driving down Great Mountain Road on June 15, 01 at approx. 8:45 am when approaching a corner, I saw a TCP concrete truck coming towards me in the opposite direction almost in the middle of the road. I tried to pull in close to the hill in order to avoid hitting the truck but the car slid as the road was wet and hit into the truck damaging my vehicle extensively."

[5] She signed her typed police statement dated 13th July 2001, in which she said:

> "On approaching the corner before reaching the bridge, there was a concrete truck from the opposite direction in the center of the road. I was driving in low gear as usual and more cautiously since the road was wet. I tried to avoid a head on collision, since I realized that because of the circumstances we were going to collide anyway. When I press [sic] the brakes trying to hit the corner, of the road instead of hitting head on to the concrete truck CM 1415 the car began to skid and we collided."

At the trial she testified that there were no skid marks on the road.

[6] Mr. Smithen's account in his witness statement[2] was as follows:

> "As I was coming up the hill on my left side of the road and had just reached and was into the first (left hand) bend, I noticed a car coming down the hill sliding towards me. I pulled my truck as far as possible to the verge on my side of the road but the car still collided with me. It collided with the right front wheel of my truck and then with water tank which is located behind the driver's cab of the truck and then went across the road to my right."

[7] Mr. Smithen's cross examination revealed that at a distance of about 25 feet more or less from him, Mrs. Frett-Henry began sliding downhill after applying her brake. He admitted seeing skid marks in the road on her side and the judge accepted this evidence. Mr. Smithen also testified[3] that Mrs. Frett-Henry "was doing so much speed coming down the hill…"

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[2] At para. 6.

[3] See Tab 20, p. 26 of the Record of Appeal.

The Judge's Findings of Fact Decision

[8] The learned judge stated[4] that Mrs. Frett-Henry "gave no evidence to explain the skid other than that the road was wet. In the absence of an explanation such a skid gives rise to the inference of negligence. See Richley v Faull [1965] 3 All ER [109]." She concluded that it was the unsafe speed that Mrs. Frett-Henry was driving at which made it impossible for her to stop in time and that Mr. Smithen failed to drive on his proper side of the road. She found that both parties had contributed to the accident and she apportioned liability for the accident: 25% to Mr. Smithen and 75% to Mrs Frett-Henry.

[9] Section 2(2) of the Law Reform (Miscellaneous Provisions) Ordinance[5] ("the Ordinance") states:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage…"

The word "fault" is defined in section 2(1) of the Ordinance to include negligence or other act or omission which gives rise to a liability in tort, or would apart from the Ordinance give rise to the defence of contributory negligence. Generally, a person is guilty of contributory negligence where that person fails to take reasonable care of himself/herself in circumstances where that person ought reasonably to have foreseen that if he/she did not act as a reasonable prudent person, he/she might be hurt; and in such reckonings he/she must take into account the possibility of others being careless.[6]

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[4] At para. 9 of her judgment.
[5] Cap. 41, Revised Laws of the Virgin Islands 1991.
[6] Denning L.J. in Jones v Livox Quarries Ltd. [1952] 2 Q.B. 608, 615.

[10] The learned trial judge assessed the damages which Mrs. Frett-Henry would have recovered if she had not been at fault to be: $15,000.00 for general damages; and $75,022.63 for total special damages. She finally awarded Mrs. Frett-Henry compensation amounting to 25% of the global damages being $22,505.65 and costs.

The Grounds of Appeal and Issues

[11] Both parties are dissatisfied with the learned trial judge's findings of fact, her apportionment of liability, and her award as to damages. The numerous complaints in the appellant's grounds of appeal and the respondents' counter notice may be conveniently subsumed into three main issues: (i) whether the judge erred in determining who was liable for the accident; (ii) whether the judge erred in determining the matters arising from the contributory negligence defence; (iii) whether the judge erred in her assessment of the damages awarded to the appellant.

Liability

Was determination on liability beyond the scope of the appellant's pleadings?

[12] In an action for negligence, the claimant bears the legal burden of proving that the defendant was negligent as pleaded. At paragraph 4 of her statement of claim, the appellant pleaded:

> "On 15 June 2001, the Claimant was driving towards Huntums Ghut, along the Great Mountain public road, when motor vehicle CM 1415, which is owned by First Defendant, and which was travelling in the opposite direction, was so negligently operated by the Second Defendant, that the said vehicle improperly negotiated a corner on the said Great Mountain Road and collided with the motor vehicle PV9986, which was being operated by the Claimant.
>
> "PARTICULARS OF NEGLIGENCE OF SECOND DEFENDANT
>
> (a) Failing to keep any or any proper lookout or to have any regard to other users of the road.
> (b) Negotiating a corner in an improper manner

(c) Negotiating a corner in a manner that resulted in the First Defendant's motor vehicle operating on the side of the road reserved for oncoming traffic.
(d) Negotiating a corner in a manner that resulted in the First Defendant's motor vehicle improperly operating in the direct path of the Claimant's on-coming motor vehicle
(e) Colliding with a motor vehicle being operated by the Claimant.
(f) Failing to swerve or in any other way, to manage his control of motor vehicle CM 1415 as to avoid collision.
(g) Failing to control or exert proper control over the said CM1415"

[13] Learned counsel Mr. Carrington contends that the effect of the trial judge's finding that it was Mrs. Frett-Henry's car that collided with the respondents' truck, means that Mrs. Frett-Henry has not proven her case as it was pleaded.

[14] He submitted further, that the rules require the appellant to set out the general nature of the case in her pleadings that the respondents were to meet and to foreshadow the evidence that the party will lead at the trial. Part 20(1)3 of Civil Procedure Rules 2000 ("CPR 2000") does not confer a power on the court to amend a party's pleadings of its own initiative. Mr. Carrington contends that the trial judge was therefore limited by the appellant's pleadings in considering the issue of causation and having determined that the collision was not caused in the manner pleaded by Mrs. Frett-Henry, the judge erred in proceeding to consider and impose liability on the respondents based on her finding of an alternative set of facts. This had the effect of amending the appellant's pleadings after the conclusion of the trial judge which is impermissible. He concluded that the appellant had failed to prove her case as pleaded and her appeal on liability must also fail as she now seeks to advance a case other than that pleaded.

[15] Learned counsel Ms. Boreland-Fearon submitted that it was within the ambit of the trial judge to find as she did on the appellant's pleadings as her action was for damages resulting from the collision between her vehicle and the respondents' vehicle caused by the dangerous and negligent driving of Mr. Smithen and there were allegations of negligence on both sides.

[16] Having specifically denied paragraph 4 of the statement of claim, the respondents pleaded at paragraph 5 of their defence that Mr. Smithen was slowly driving uphill with a full load of concrete on his left hand side of the road: "when the Claimant negligently drove her vehicle downhill around a bend on the road which was wet … so as to cause it to skid and/or cross the road into the path of the Defendant's vehicle and collide with it in the vicinity of the water tank at the rear of the driver's cab. By reason of her negligence, the Claimant caused or contributed to her own injuries and damage."

The Particulars of Claimant's Negligence included:

> "(E) Failing to manage or control her vehicle so as to avoid the collision with the Defendant's vehicle
> (F) Driving on a wet road at an excessive speed in the circumstances and braking too suddenly thereby causing her vehicle to skid onto the path of the Defendant's vehicle
> (G) Failing to stop or control her vehicle during the skid so as to avoid it coming into contact with the Defendant's vehicle."

[17] I am not persuaded that the judge's findings on the respondents' liability were not foreshadowed by the appellant's pleadings. The judge obviously accepted paragraphs 4(a), (b), (c) and (d) of the appellant's Particulars of Negligence, while rejecting that the truck driven by Mr. Smithen collided with the appellant's car. The finding that it was the appellant's car that collided with the respondents' truck was supported by and in accordance with the respondents' pleadings.

[18] The authorities which research unassisted by counsel disclosed, suggest that where a case comes to trial on pleadings which allege one set of facts and those facts are put forward but are defeated or rejected, the party putting forward those rejected facts cannot succeed on a different case which he/she had not raised and which the other side had not come to the trial prepared to meet. See for instance Waghorn v George Wimpey & Co. Ltd.[7]

[7] [1969] 1 W.L.R. 1764, approved and applied in Glenys Newman v Whitbread Plc [2001] EWCA Civ 326 by Lord Justice Henry at paras. 21-22.

[19] In that case, Lane J. (as he then was) identified the test to be applied and adopted for the issue under my consideration where he stated as follows:[8]

> "In the present case Mr. Archer contends that the true version of the facts [i.e. where it had happened] is just a variation, modification or development of what is averred, and is not something new, separate and distinct.
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> "The only similarities, however, between the plaintiff's allegations in his pleadings, the way his case was presented, and what in fact took place were these: first of all, the plaintiff slipped; secondly, he slipped at his place of work; and thirdly, he slipped somewhere near a caravan… . But the whole burden of the claim put forward by the plaintiff, and the whole burden of the defence to that claim prepared by the defendants and put forward on their behalf…, has been the safety or otherwise of the bank, and not the safety or otherwise of the path at the right-hand side of the caravan, where it runs alongside the dip.
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> "In my judgment, this is not a case which is just a variation, modification or development of what is averred. It is a case which is new, separate and distinct, and not merely a technicality. ...
>
> "One must test the plaintiff's submissions in this way: if these allegations had been made upon the pleadings in the first place, namely allegations based upon facts as they have now emerged, would the defendants' preparation of the case, and conduct of the trial, have been any different? The answer to that is undoubtedly "Yes". Evidence would have been sought as to the safety of the pathway alongside the caravan; as to the frequency with which it was used; as to the position of the valve under the caravan… . If the plaintiff's case had been pleaded to the effect that it was whilst he was on his way to that valve that he had slipped, then the preparation of the case would have been entirely different and its presentation would have been different." (My emphasis).

[20] I have applied the Waghorn test. I am of the view that the case the appellant made out against the respondents according to the judge's findings, was not radically or fatally different from that pleaded. Neither can it be said that the respondents were taken by surprise at the trial. The judge was entitled to decide in favour of Mrs. Frett-Henry on the basis of the scenario not pleaded by her, but pleaded by the respondent, provided the judge did so fairly. Further support for

[8] At 1770H.

my view exists in the judicial statement of Lord Guest, which was approved by the other Law Lords in John G. Stein & Co. Ltd. v O'Hanlon.[9] Lord Guest said in answer to a contention not dissimilar to the present one:

> "I fail to see how [the defenders] can have been in any way prejudiced when the facts upon which liability was established are those averred in the defences and spoken to by their witnesses in evidence."

The respondents were definitely not prejudiced in the instant appeal since the facts upon which liability was established were those pleaded by the parties. In the premise, this ground fails in my view.

Did the Judge err in her findings of fact and conclusions?

[21] Mrs. Frett-Henry's counsel referred to the judge's acknowledgment that Mr. Smithen was in the middle of the road which was wet and sloping downhill (for the appellant) and that because Mr. Smithen had created a dilemma for Mrs. Frett-Henry by the manner in which he had positioned his truck, this caused Mrs. Frett-Henry to take measures to avoid the accident. Counsel submitted that all of these factors explained the reason why Mrs. Frett-Henry skidded on applying her brake and it was therefore unreasonable for the judge to apply the decision in Richley v Faull,[10] and find that it was because she was travelling at an excessive speed that she was unable to stop before colliding with the truck. Ms Boreland-Fearon referred to several other authorities in her written submissions which I found unhelpful in deciding this issue.[11]

[22] I agree with Mrs. Frett-Henry's counsel that the decision in Richley v Faull was decided on factual circumstances which are different from Mrs. Frett-Henry's case. There was no evidence that Mrs. Frett-Henry collided with the truck on the truck's driving side of the road, unlike the defendant in Richley v Faull. Mrs Frett-Henry

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[9] [1965] A.C. 890 at page 910A. The Waghorn test, applied in numerous cases, has been accepted by the English Court of Appeal and House of Lords.

[10] [1965] 3 All E.R. 109.

[11] Industrial Chemical Co. (Jamaica) Ltd. v Ellis (1986) 35 WIR 303; M. V. Yorke Motors (A Firm) v Edwards [1982] 1 W.L.R. 444; Scott v The London and St. Katherine Docks Company 159 E.R. 665; Butty v Davey [1972] R.T.R. 75; McGeough v Thomson Holidays Limited [2007] EWCA Civ 1509; Powell v Auden [2009] EWHC 98.

was confronted with a dilemma created by Mr. Smithen. The defendant in Richley v Faull encountered no such dilemma while driving his Bentley car at about 15-20 m.p.h. on a road which was wet but not slippery from any other cause. His car skidded for an unknown reason across the road, turning as it went into the path of the Hillman car in which the claimant was a passenger. He said that the same thing happened two years before while driving the same car. He could not explain why it happened. The court held that his unexplained and violent skid was itself evidence of negligence. In Mrs. Frett-Henry's case, apart from the evidence that she was driving downhill on the wet road, she merely stated that when she saw the truck she stepped on the brake pedal and the car skidded a bit and the vehicles collided. It was only in her handwritten signed statement that she said that "the car slid as the road was wet."

[23] Before further consideration of the skid issue, I must say that I have not seen throughout the entire judgment of the learned trial judge any reference to or application of the relevant law for determining the defence of contributory negligence. In fact, the words "contributory negligence" do not appear anywhere at all in the judgment. This was not for want of assistance from counsel Mr. Carrington. He alluded to it albeit briefly in his written submissions, and referred to the authority Alphonso and Others v Deodat Ramnath[12] in which Satrohan Singh J.A. at pages 187 to 188 summarised the guiding principles for contributory negligence. I note with interest that a similar thing may have happened in that case, causing Singh J.A. to state that "…even though the judge might have approached the issue on the wrong legal premise, no injustice was done to the appellants."

[24] In the instant appeal, it seems to me that the judge overlooked the law on contributory negligence, when she made no distinction between the standard of care required for Mr. Smithen and that required for Mrs. Frett-Henry. The judge merely concluded at paragraph 9:

[12] (1997) 56 WIR 183.

> "Accordingly, in my judgment both drivers contributed to the accident as they both breached their duty to other road users – Mr. Smithen to drive on his proper side in a safe manner and Mrs. Frett-Henry to drive at a safe speed." (My emphasis).

This was not a case where the defendants had also counterclaimed against Mrs. Frett-Henry. "[W]hen contributory negligence is set up as a defence, … all that is necessary to establish such a defence 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. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."[13]

[25] The primary question therefore for the trial judge, in relation to the skid and contributory negligence, would be whether Mrs. Frett-Henry had, by her evidence, established on a balance of probabilities that: (i) she did foresee harm to herself; and (ii) she acted as a reasonable prudent person for her own safety and guarded herself against the negligence of Mr. Smithen. The primary focus would be on the foreseeability of harm to herself apart from her duty to other road users.

[26] There was no evidence as to the mechanical condition of the car Mrs. Frett-Henry was driving, or its brakes, or its tyres. In the absence of such evidence it must be presumed that Mrs. Frett-Henry, as a reasonable and prudent person, was driving a roadworthy car with effective brakes and tyres which were not smooth and defective at the material time. A reasonable and prudent driver would also be driving at a speed which enables her to stop within the limits of her vision, particularly having regard to the weather and the state of the road. Failure to do this will very likely result in a driver being held wholly or partly responsible for a collision.[14] It cannot be assumed in the absence of evidence, that apart from being wet, the road surface was slippery or in any other poor condition. No one

[13] Per Viscount Simon in Nance v British Columbia Electric Railway Co. Ltd. [1951] A.C. 601 at 611.
[14] See Harvey v Road Haulage Executive [1952] 1 K.B. 120.

testified about the mechanics and effect of a driver braking hard, suddenly, and/or sharply on a downward sloping wet road. It cannot be assumed without more that such an event may cause skidding in the manner that the appellant skidded. The cumulative effect of the evidence disclosing the unexplained skid, the failure of Mrs. Frett-Henry's brake to stop her car before the collision, and the resulting harm to herself is that she failed to act reasonably and take care of herself in my view.

[27] In the absence of probative evidence negativing contributory negligence, the learned judge in my view was not entitled to speculate, or draw inferences in favour of Mrs. Frett-Henry. There was evidence that she saw the truck in the middle of the road at a distance of 45 feet away and began skidding about 25 feet from the truck. There was also evidence from Mr. Smithen (which the judge accepted) that Mrs. Frett-Henry was speeding. The judge was entitled to consider and act on this evidence in determining the issue.

[28] The judge would also have taken the dilemma created by Mr. Smithen into account. The existence of the dilemma would not excuse fault as I understand the law. The need to act reasonably in the dilemma defines the conduct to be expected of a reasonable prudent person when faced with the dilemma. The existence of the dilemma is only a factor or part of the determination of what was reasonable action in the circumstances in my view. The judge concluded that from the time Mrs. Frett-Henry first saw the truck she would have had ample time to stop safely:[15]

> "She was unable to stop and it is thus reasonable to infer that she was driving at an unsafe speed having regard to the conditions of the road - wet and downhill slope."

[29] I am therefore of the view that had the judge applied the correct law and principles, her findings and conclusions would not have been unreasonable on the totality of the evidence. The impugned findings of fact would essentially be the same, though her conclusion would be expressed differently in terms of the contributory negligence standard of care. I find no merit in this complaint.

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[15] See para. 6 of the trial judge's judgment.

[30] Learned counsel Ms. Boreland-Fearon also finds it puzzling, that the learned trial judge would accept Mr. Smithen's evidence that the appellant was speeding, yet reject his evidence as to where the skid marks were, which supported the appellant's account that she was not encroaching on Mr. Smithen's side of the road when the collision occurred with the truck.

[31] Mr. Smithen's evidence was that he saw brake impressions on Mrs. Frett-Henry's side of the road and there were none on his side of the road. The judge, in rejecting Mrs. Frett-Henry's version, observed[16] that "in view of Mrs. Frett-Henry's evidence that she applied brakes and skidded on a wet road one would have expected that some evidence of this would be visible on the road and I accept Mr Smithen's testimony on this." However, the judge did not find that the collision occurred because Mrs. Frett-Henry had encroached on Mr. Smithen's side of the road. She found that Mrs. Frett-Henry could have avoided that accident had her brakes held as it should have and the vehicle not gone into a skid as it did. In that regard I see nothing wrong in principle with that finding of the judge.

Inconsistency in the Evidence of the Appellant

[32] On the other hand, Mr. Carrington contends that the judge should have completely accepted Mr. Smithen's version of the events and rejected Mrs. Frett-Henry's version as Mrs. Frett-Henry had been inconsistent, and given different accounts in statements which contradicted her pleadings as to how the collision occurred.

[33] Mrs. Frett-Henry admitted that she gave one of the statements that Mr. Carrington mentioned[17] to her Insurance Company. She also admitted that the police report and this statement at Tab 3 were her documents that her lawyer put together from her instructions. These documents were never tendered at the trial as exhibits or identified in any witness statements as documents the claimant was relying on as

[16] At para. 7 of her judgment.
[17] See Tab 3 of the Record of Appeal.

CPR 29.5(1)(g) stipulates. These documents were never shown to Mrs. Frett-Henry at the trial.

[34] The varying accounts by Mrs. Frett-Henry in her out of court statements would not elevate them as evidence of the truth of the statements contained therein without more in my view. The fact that the judge referred to the police statement of Mrs. Frett-Henry in concluding that Mr. Smithen had not significantly repositioned his truck after the accident and before the police took measurements, suggests that the judge did treat these out of court statements made by Mrs. Frett-Henry as evidence. However, Mr. Carrington did not really pursue a line of cross-examination which tested the credibility of Mrs. Frett-Henry as to how the accident occurred in relation to what she said in these out of court statements. Neither did Mr. Carrington use them in order to establish the inconsistencies he alluded to.

[35] In any event, there are no rules requiring that a trial judge reject the whole of the evidence of a claimant whose witness statement, oral testimony, pleadings, or other documentary evidence conflict on matters that are central to the issues to be determined by the judge. Each case presents its own peculiar set of circumstances. A judge may accept part of a witness' evidence whilst rejecting another part of that witness's evidence. In such circumstances, the judge is required to properly evaluate the evidence as a whole, take into account any explanations given by the witness for any established inconsistencies, assess and decide on the credibility of the witness having regard to the advantage that the judge has in observing the witness during the trial, and direct himself/herself on how any such inconsistencies should be regarded and resolved. That is trite law needing no supportive authority.

[36] The judge had the advantage of seeing the witnesses give evidence. The judge did state why she was accepting Mrs. Frett-Henry's evidence that Mr. Smithen was at first driving more in the middle of the road, while rejecting Mr. Smithen's evidence that he was driving on his left side of the road. At paragraph 5 of her judgment, she stated:

> "I find that Mr. Smithen was driving in the middle of the road just before the accident thus making it difficult for two vehicles of that size traveling in opposite directions to pass each other safely on that winding road. From his own evidence when he saw Mrs. Frett-Henry he pulled over towards the verge of the road and continued driving. Clearly he had been occupying more than his proper share of the road if he had to do that."

Apart from Mrs. Frett-Henry's testimony as to the position of the truck when she first saw it, the judge did take into account the width of the road, the point of impact, and the measurements of the police as to how the truck was positioned after the accident in arriving at her conclusion. That Mr. Smithen was at first travelling in the middle of the road, was not an unreasonable inference to draw from the totality of the evidence. There is therefore no good reason to interfere with this finding of the trial judge.

Causation of the Resulting Damage for Purposes of Liability

[37] Learned counsel Mr. Carrington submitted further that the judge's finding that the accident would have undoubtedly been avoided if the claimant's brake had held as it should have, is borne out by the learned judge's other finding that Mrs. Frett-Henry was driving recklessly at an unsafe speed and that there was ample space for her car to safely pass the respondent's truck. Those findings of the trial judge reflect the effective cause of the resulting damage, he argued. Any danger that was posed by Mr. Smithen's driving in the middle of the road, (prior to and certainly not at the point of collision) no longer existed at the point of collision, as Mr. Smithen had by then returned to his side of the road. The trial judge was therefore wrong to find that Mr. Smithen had contributed to the collision, he maintained.

[38] One of the tests for determining the effective cause of the resulting damage is stated in Clerk & Lindsell on Torts[18] as follows:

> "It has been said that the law seeks the *causa causan*s (effective factor) rather than the *causa sine qua non* (factor without which damage could not have occurred). In pursuit of the sometimes elusive effective cause

[18] 17th Ed. at para. 2-10.

> the test commonly propounded is the famous (or infamous) "but for" test. Would the damage … have occurred "but for" the negligence (or other wrong doing) of the defendant?" (My emphasis)

Mr. Carrington urged us to accept this as the proper test.

[39] In one of Mr. Carrington's authorities, Wright v Lodge and Another,[19] the Court of Appeal held that it was not every cause 'but for which' an accident would not have occurred that was necessarily a relevant cause in law for the purposes of liability, and the question of which causes were to be regarded as relevant had to be determined by the application of common sense. In that case a lorry driver drove recklessly at 60 m.p.h. in foggy weather conditions with visibility down to about 60 yards, and crashed into the back of a Mini motor car which had stalled and come to a stop in the near side lane of the carriageway. The lorry then crossed the off side lane of its own carriageway and the central reservation, emerged into the westbound carriageway and fell over on its side blocking that carriageway. There, the lorry was struck successively by 3 cars and another lorry, resulting in the death of one of the car's drivers. The contention on appeal was, that of the 3 contribution claims brought by the Scania lorry driver (who accepted liability) claiming contribution from the Mini car driver Ms. Shepherd, the judge ordered Ms. Shepherd to contribute 10% in respect of the claim brought by her passenger Ms. Duncan, and wrongly dismissed the contribution claims for damages to the plaintiffs who had collided with the Scania lorry on the west bound carriageway. The Court of Appeal dismissed the appeal while holding that the trial judge was clearly entitled to conclude that the presence of the Scania lorry in the westbound carriageway was wholly attributable to his reckless driving and that the Mini driver's negligence was not a relevant cause in the other cases.

[40] The Court considered, reconciled, and applied several different judicial pronouncements on the relevant law in previously decided cases including Stapley v Gypsum Mines Ltd.,[20] from which the following principles may be

[19] [1993] R.T.R. 123, 127F.
[20] [1953] A.C. 663, 681-682 per Lord Reid, Lord Asquith of Bishopstone dissenting at pp. 687-688.

distilled: (1) The different expressions as to the test(s) to be applied (including foreseeability in relation to the duty of care, causation, and remoteness) must all be related to the facts of the cases in which they were expressed and there is no single test to be applied. (2) The court must discriminate between faults which must be discarded as being too remote and those which must not be discarded. (3) One of the questions that may be asked is: was the fault of the party who caused the initial danger "so much mixed up with the state of things brought about" by another party's reaction to that initial danger that "in the ordinary plain common sense of this business" it must be regarded as having contributed to the accident? (4) In considering it another way as to whether there was a novus actus and a break in the chain of causation: "To break the chain of causation it must be shown that there is something which … [is] ultroneus, something unwarrantable, a new cause which …can be described as either unreasonable or extraneous. (5) A distinction must be made between reckless driving and negligent driving in considering this issue of causation. (6)[21] Where "a driver so negligently manages his vehicle as to cause it to obstruct the highway and constitute a danger to other road users, including those who are driving too fast or not keeping a proper look-out, … then the first driver's negligence may be held to have contributed to the causation of an accident of which the immediate cause was the negligent driving of the vehicle which because of the presence of the obstruction collides with it or with some other vehicle or some other person." (7) The first driver's negligence in the circumstances mentioned in (6) may not be held to have contributed to the causation of an accident where another road user "deliberately or recklessly drive[s] into the obstruction."[22] (8) An obstruction which is only a danger to a reckless driver does not constitute a relevant danger.[23]

[41] Mr. Carrington contends that Mrs. Frett-Henry was driving recklessly. It would be reckless driving if: (a) Mrs. Frett-Henry was driving in such a manner as to create an obvious and serious risk of causing physical injury to some other person who

[21] See Rouse v Squires [1973] R.T.R. 550 at 558 per Cairns L.J. in applying the authority Barber v British Road Services, The Times, 18th November 1964.
[22] Ibid, per Cairns L.J.
[23] Per Parker L.J. in Wright v Lodge [1993] R.T.R. 123 at 128K.

might happen to be using the road, or of doing substantial damage to property; and (b) in driving in that manner she did so without having given any thought to the possibility of there being any such risk or, having recognized that there was some risk involved, had nonetheless gone on to take it.[24]

[42] In my opinion, Mrs. Frett-Henry's manner of driving was not reckless driving because, as the judge found, she acted as she did in a sudden dilemma created by the actions of Mr. Smithen. The judge accepted her explanation as to why she had to apply her brakes suddenly, but found that she was unable to stop because of her unsafe speed in the circumstances. I am of the view that this explanation would serve to displace any initial inference of recklessness on her part, in the event that inference probably could be drawn.

[43] The factual matrix and findings of contributory negligence in the appellant's case are obviously distinguishable from those in the Scania lorry driver's contributory negligence claims, which showed that his wanton recklessness was the sole cause of the accidents on the westbound carriageway after he had collided with the Mini car. Mrs. Frett-Henry on the other hand, though driving at an unsafe speed, was not reckless. It is her unsafe speed, coupled with her inability to stop safely when faced with the dilemma and guard herself from injury, that amounts to contributory negligence.

[44] Although Mr. Smithen's initial act of negligence had been remedied at the time of the collision, nevertheless, the dilemma created by Mr. Smithen called for Mrs. Frett-Henry's split second decision. Her act of negligence followed very closely on Mr. Smithen's negligent driving. Mr. Smithen's negligence set in motion a trail of events culminating in the collision occurring after he had returned to his proper driving side of the road. His return to his proper side of the road should not be viewed in isolation from his prior negligence. Though he may not have been

[24] See R v Reid [1992] 1 W.L.R. 793 (H.L.) per Lord Keith. This was a case of causing death by reckless driving before the law was repealed. The Road Traffic Act 1991 (U.K.) abolished the offences of reckless driving and causing death by reckless driving and replaced them with new offences of dangerous driving and causing death by dangerous driving.

negligent after creating the dilemma, this would not necessarily preclude liability for his prior negligent conduct which produced the dilemma. Indeed, the two parties acts of negligence upon common sense principles are "mixed up with the state of things brought about" by Mr. Smithen's prior act of negligence to a great extent. I am of the view that there was no break in the chain of causation between Mr. Smithen's negligent act and that of Mrs. Frett-Henry. Respectfully, I find Mr. Carrington's submissions quite unreal in the context of this accident. I reject it. The trial judge in my view correctly found Mr. Smithen's negligence to be part of the effective cause of the collision, although finding that Mrs. Frett-Henry was not free from fault. This ground of appeal cannot succeed.

Issues arising from the Finding of Contributory Negligence

[45] The appellant's ground (d) alleges that the judge "erred in finding that the Second Respondent was only 25% liable for the accident having regard to all the circumstances and in particular the fact that the accident was created by the unlawful actions of the Second Respondent, having driven a very sizeable truck in a wholly unsafe and unlawful manner in the middle of the road which caused the Appellant to react suddenly by breaking to avoid collision [and] … erred in failing to find that the Second Respondent was more liable in light of the fact that had he not been driving in the middle of the road, the Appellant would not have been placed in a dilemma which required that she brake suddenly causing her to skid and collide into the Second Respondent's vehicle." Ms. Boreland-Fearon made similar submissions in support of this ground.

[46] A quick review of the approach that this Court should take in deciding whether or not to interfere with the learned trial judge's findings reminds us that we should not interfere where so far as the case stands on paper, a decision either way may seem equally open. However, we may interfere where the judge is shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or where the judge has gone plainly wrong.[25]

[25] Watt or Thomas v Thomas [1947] A.C. 484 per Lord Macmillan at pp. 490-491.

[47] More particularly, on the well-known authorities including The MacGregor,[26] once an appellate court accepts the findings of fact of the court below that the two parties in an action are to blame, it should, in the absence of error of law, only in a strong and exceptional case revise the apportionment of blame made by the trial judge. The apportionment may also be disturbed where there is an error in fact in the judgment.[27] "[I]f [we] agree with the findings of fact and the law of the learned Judge below, and the only difference is that the Court of Appeal attaches more importance to a particular fact than [s]he did, it would require an extremely strong case to alter the proportions of blame which the learned Judge below has attributed to [the parties]."[28]

[48] Lord Justice Scrutton summed it up nicely in The Luso[29] at page 165 where he stated that:

> "… before the Court of Appeal ought to interfere with that finding [establishing different degrees of fault between the parties] they must be able to put their finger on something and say that the learned Judge has been wrong on some particular point and that that particular point is so substantial that if he had taken what we say is the right view of it he [would] have altered the proportion of damage."

[49] I turn now to consider how a judge should approach the exercise of an apportionment of blame as between a negligent defendant and a claimant who is found to have contributed to the damage she suffered. The starting point for the judge would be the statutory criterion spelt out in section 2(2) of the Ordinance.[30] That criterion dictates that the damages recoverable by the claimant for the damage she suffered must be reduced to such extent as the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage.

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[26] [1943] A.C. 197.
[27] Owners of Steamship Kitano Maru v Owners of Steamship Otranto [1931] A.C. 194 (H.L.) per Lord Buckmaster.
[28] The Karamea (1921) 90 LJ.P. 81.
[29] (1934) 49 L1. L.R. 165.
[30] Set out at paragraph 10 of this judgment.

[50] In carrying out that exercise, the trial judge would be concerned with the blameworthiness of each party as well as the relative importance of the acts causing the damage. In Davies v Swan Motor Co. (Swansea) Ltd.[31] the court gave guidance couched in different terms where it stated that consideration should be given not only to the causative potency of a particular factor, but also its blameworthiness. This requires the judge to engage in a weighing and balancing exercise involving the issues of fact and their degree. The judge would conduct this exercise of course with the important advantage of having received the evidence at first-hand as it unfolded before him/her.

[51] The trial judge in the present appeal did not apply the law on contributory negligence in her judgment as I stated at paragraph 25 above. At paragraph 9 of her judgment she only stated as follows: "Accordingly, in my judgment both drivers contributed to the accident as they both breached their duty to other road users – Mr. Smithen to drive on his proper side of the road in a safe manner and Mrs. Frett-Henry to drive at a safe speed. However, Mrs. Frett-Henry bears the greater responsibility and I will apportion liability as to 25% to Mr. Smithen and 75% to Mrs. Frett-Henry." (My emphasis).

[52] Consequently, in the absence of any indication that the trial judge's apportionment was guided by the appropriate principles governing contributory negligence, in my opinion, this omission amounts to an error of law. It follows ineluctably that this Court should interfere with and reverse her apportionment of blame between the parties which was erroneously made. In the premise, this Court would be in a position to carry out anew the apportionment exercise under section 2(2) of the Ordinance in accordance with the relevant facts found by the trial judge and this Court.

[31] [1949] 2 K.B. 291, 326.

The New Apportionment Exercise

[53] I have taken into account and applied the principles stated at paragraphs 50 and 51 above. It is Mr. Smithen who was driving his large concrete truck in the middle of a road which could not be safely used by Mrs. Frett-Henry's approaching car while his truck was in her path. The judge found that he was driving uphill in the middle of the road with a concrete load just before the accident thus making it difficult for the two vehicles travelling in opposite directions to pass each other safely on that winding road. In my view, the truck then would be posing a major obstruction in the relatively narrow road when Mrs. Frett-Henry first saw it. Mr. Smithen had a statutory duty to drive with reasonable consideration for other users of the road. It was pleaded that Mr. Smithen failed to keep a proper lookout, failed to have regard to other road users, and improperly drove in the direct path of an oncoming vehicle. Mr. Smithen would have been aware of the large size of his truck, the concrete load it was carrying, the wet road, and the difficulties and danger presented in driving it around the bends and corners in the middle of the road by the very width and nature of the road. He would have foreseen also that driving the truck in the middle of the road would pose danger for oncoming drivers. Nevertheless he took that risk, drove the truck in the middle of the road, created a serious dilemma for Mrs. Frett-Henry and he must now take responsibility for his actions.

[54] On the other hand, Mrs. Frett-Henry was driving downhill on a wet road at an unsafe speed which probably did not allow her to stop safely after first seeing the truck 45 feet away in the middle of the road obstructing her path. Mr. Smithen pleaded that she drove on the wet road at an excessive speed in the circumstances and applied her brake too suddenly thereby causing her vehicle to skid into his path and collide with his truck. The trial judge found that her car would have been able to pass the truck safely without a collision after Mr. Smithen moved over to his proper side of the road. She should have taken into account the possibility that another approaching driver may be driving carelessly on the wet winding road while she was driving downhill, and she failed to drive at a speed

which would have allowed her to act reasonably in such a dilemma and guard herself from injury.

[55] The trial judge attributed 25% of the responsibility for the accident to Mr. Smithen and 75% to Mrs. Frett-Henry. I do not agree with that apportionment. In my view, Mr. Smithen's responsibility should exceed 25% for the manner in which he was driving that truck. His responsibility should weigh heavier than Mrs. Frett-Henry's. I would divide the responsibility 70% for the respondents and 30% for the appellant.

Issues Concerning the Assessment of Damages

[56] Between the date of the accident, 15th June 2001, when Mrs. Frett-Henry was 49 years old, and the date of trial, 6th October 2008, she was treated by several doctors including Dr. Geetha, Dr. Davis, Dr. Rosenberg, Dr. Ojuro, Dr. Borras, Dr. Trotman-Hastings, and Dr. Martinez. She also was subjected to 3 MRI scans: 1 by Dr. Rosenberg, and 2 by Radiologists Marques & Perez. Her medical treatment may be conveniently placed into two phases.

The First Medical Phase

[57] The first phase commenced on 24th June 2001, when she was first attended to by Dr. Geetha. She had a limitation of flexion and extension of the neck, and was diagnosed with myalagia/neck pain. Her cervical and thoraco lumbar x-rays were said to be normal. She was treated with pain killers, a Philadelphia cervical collar and referred to outpatient clinic at the Peebles Hospital. Dr. Davies saw her on 28th June 2001, when she was complaining of neck pain. Her x-ray review showed no abnormality. She received neck physiotherapy, but continued to complain of neck pain on 26th July and 9th August 2001 which resulted in Dr. Davies making an MRI referral. Dr. Rosenberg did the first MRI scan of her cervical spine on 22nd October 2001, which revealed a large cervical herniated disc between C5 and C6, centrally located, showing a huge herniated nuclea pulposa at C5 C6 centrally located and compressing the spinal cord. Dr.

Ojuro who saw her on 6th November 2001 stated in his medical report dated 14th October 2002, that: "She was apparently well until a day before presentation when she developed pain in the left shoulder radiating down the left arm associated with pain in the left hip and occasional muscle twitches. Examination revealed mild tenderness on the base of the neck with reduced power to the left upper limb. …She was admitted for pain controls and was subsequently … discharged from the hospital on 15th of November" 2001 to see neurosurgeon Dr. Borras in Puerto Rico to whom she was referred. Dr. Borras examined her on 16th November 2001 and made findings compatible with a C6 left radiculopathy which was consistent with the MRI findings of Dr. Rosenberg. Dr. Borras prescribed cervical traction treatment for 2 months. On 28th January 2002, Dr. Borras saw her and reported that:

> "She has no weakness, numbness and has a functional left upper extremity. No reflexes deficit either. She describes occasional pain when using her left upper extremity across her chest to grasp objects." (My emphasis).

Dr. Borras concluded that surgery is no longer considered. Dr. Borras stated in his report[32] that:

> "She was made aware that she still has a cervical herniated disc and should be very careful with her neck. If pain reappears another traction regime should be used." (My emphasis).

Dr. Ojuro saw Mrs. Frett-Henry several times after Dr. Borras' last visit. Dr. Ojuro reported[33] that:

> "She has remained relatively pain free most of the time with attack of pain from time to time. These were treated with pain killers and at times traction. I last saw Mrs. Frett-Henry on 9th of September, 2002 with complaint of pain in the right shoulder. This time her pain appears to be originating from a right supra spinatus tendonitis. She was treated with local injection of Kenalog." (My emphasis).

[32] Dated 28th January 2002.
[33] In the report dated 14th October 2002.

The Second Medical Phase

[58] There is an hiatus as to any relevant health concerns Mrs. Frett-Henry may have had for a year and 10 months after Dr. Ojuro last saw her. There was no evidence to explain what exactly was the state of Mrs. Frett-Henry's health between 9th September 2002 and 29th July 2004. What we do know is that her medical reports from Radiologists Marques & Perez,[34] Dr. Martinez[35] and Dr. Trotman-Hastings[36] reveal that she had another MRI scan of her cervical spine done on 30th July 2004, a subsequent evaluation and MRI scan of her Lumbrosacral Spine and made several visits to Dr. Trotman-Hastings before she was retired on medical grounds from her post in the Government Service as an executive officer in the Mental Health Department effective 1st September 2005. Prior to her retirement, the Government advised her by letter dated 5th May 2005, that she was placed on half salary effective 15th April 2005 until 31st August 2005.

[59] The sum total of these medical reports are:

(a) Mrs. Frett-Henry's scan[37] showed abnormal marrow signal appreciated at C3,C5,C6, and at the superior endplate of C4, which were probably on the basis of reactive marrow changes secondary to degenerative discogenic disease, and in addition, there was multilevel anterior spondylosis. The impression was that she had multilevel degenerative discogenic and spondylotic changes which are more severe at C5-6.

(b) Dr. Martinez diagnosed her on 20th October 2004, as having cervical radiculopathy C5 due to severe root C5 C6 spondyloarthritis and that she was unable to return to work until 1st February 2005.

(c) The MRI scan done on 14th February 2005 in relation to the bilateral lumbar radiculopathy; suspected HNP L4-L5 and L5-S1. The result was:

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[34] Dated 30th July 2004.
[35] Dated 20th October 2004 and 1st February 2005.
[36] Dated 5th January 2005 and 9th June 2008.
[37] Dated 30th July 2004.

"Degenerative osteoarthrosis changes were noted along the facet joints being hypertrophic at the L5-S1 level …"

(d) Dr. Trotman-Hastings' report[38] stated that Mrs. Frett-Henry has been undergoing treatment for cervical radiculopathy of C5 nerve secondary to severe C5-C6 spondyloarthritis over the past six months and the severity of the condition has prevented her from working during this period and it is unknown how much longer she will be able to work or if she will be able to work at all and she was scheduled to see a neurosurgeon on 1st February 2005 for further evaluation of her health as at 5th May 2005.

(e) Dr. Trotman-Hastings' final report[39] stated that Mrs. Frett-Henry continues to complain of pains to the back of her neck radiating down her right upper limb, with limited ability to move her head, and episodes of severe lower back pains radiating anteriorly, and restricting all movement. The symptoms wax and wane, tend to improve with fortnightly massages. She is unable to work due to her inability to sit for prolonged periods without exacerbation of her discomfort.

The Findings of the Judge Reproduced

[60] "[29].I find having regard to the evidence that on a balance of probabilities the accident resulted in serious neck injuries to Mrs. Frett-Henry. This took the form of injury to the root of the nerves in the cervical vertebrae, in other words the radiculopathy and a huge herniated nuclea pulposa at C5 C6. The hernia was discovered by the MRI scan done on the 22nd October 2001. It will be recalled that this scan was done as Mrs. Frett-Henry continued to complain of pain after her initial visit to Dr. Geetha. I also accept Dr. Borras' report of 28th January 2002 in which he states that on examination on 16th November, 2002 he found findings compatible with a C6 left radiculopathy which were consistent with the MRI findings.

"[30] …I find that the following injuries resulted from the accident:-.severe cervical radiculopathy, limited movements of flexion and extension of cervical spine; pain in the neck and shoulders; tenderness on the base of

[38] Dated 5th January 2005.
[39] Dated 9th June 2008.

the neck and reduced power to the upper limb; and huge herniated nucleus pulposa at C5 and C6. However, I am not satisfied that Mrs Frett-Henry has established that spondyloarthritis resulted from these injuries as she was diagnosed with this in July 2004 by Dr. Trotman-Hastings, about two years after the accident and Mrs Frett-Henry has adduced no evidence to establish that this condition is in any way linked to the trauma of the second accident and this cannot simply be left to inference. Certainly, the final reports of Drs. Ojuro and Borras make no mention of the likelihood of her suffering any degenerative changes in her cervical vertebrae as a result of the injuries. And the findings of those doctors on their last examination of her leads me to believe that she had recovered substantially from her injuries.

"[31] I find that Mrs. Frett-Henry suffered a serious injury from which she has not completely recovered as she will continue to suffer occasional pain according to the prognosis of Drs. Ojuro and Dr. [sic] Borras. And she has testified to having continuing pains of which some can reasonably be attributed to the radiculopathy which I have found to have resulted from the accident.

…

"[40] …The court has examined the various receipts pertaining to medical expenses and is satisfied that she is entitled to recover only for the expenses incurred up to November 2002. This amounts to $838.35. She is therefore entitled to recover 25% of that sum from the Defendants."

Applying the Test for Causation and Remoteness of Damage

[61] Ground (d) of the Amended Counter Notice[40] alleges that: the "Judge improperly applied the test for causation of damage and the burden of proof of damage and thereby erred in her conclusion that the Claimant suffered severe neck injuries as a result of the collision with the second Defendant. This conclusion is inconsistent with her findings that:

"i. the reports of Drs. Rosenberg, Ojuro and Borras do not explain the possible causes of the Claimant's herniated nuclea pulposa at C5-C6 or of her C6 left radiculopathy

ii. that from November 2001 (some 5 months after the collision) to September 20002 [sic] (15 months after the collision) the

[40] See the Amended Counter Notice by Respondents to the Appeal filed 11th January 2010.

Claimant was reported to be relatively pain free for most of the time with attack of pain from time to time

iii. that none of the medical reports and especially the reports from 2004 (three years after the collision) indicate whether the findings recorded relate to the initial injuries and the Court cannot be expected to infer that they can be so attributed

iv. that the Claimant had failed to give any proper explanation as to what lead [sic] to the later medical interventions

v. that the Claimant was only entitled to recover medical expenses incurred up to November 2002"

[62] Learned counsel Mr. Carrington submitted that the judge herself commented on the unsatisfactory nature of the presentation of the case for the claimant, by merely putting in medical reports which made no causal connection between the stated injuries of Mrs. Frett-Henry and the accident without calling the doctors. He submitted that once the judge made the findings referred to at Ground (d) i. to iv., the causal connection of the appellant's injuries were not met on a balance of probabilities and the judge should not have attributed the injuries as resulting from the accident. Further, Dr. Borras made a finding on 28th January 2002 in relation to the presence of a C6 left radiculopathy which was compatible with Dr. Rosenberg's MRI finding on 22nd October 2001, of a large cervical herniated disc between C5 and C6 centrally located. When Mrs. Frett-Henry was referred to Dr. Borras by Dr. Ojuro, her complaint was pain in her left shoulder and neck. After Dr. Borras prescribed the cervical traction treatments for nearly 2 months, Mrs. Frett-Henry recovered to the point where Dr. Borras reminded her that she still has a cervical herniated disc and should be careful with her neck. Between 28th January 2002 and September 2002, she had pain intermittently and the last pain diagnosis of Dr. Ojuro related to pain in her right shoulder from spinatus tendonitis. Mr. Carrington submitted that even if the judge could infer that Mrs. Frett-Henry's herniated disc was caused by the accident, that was resolved in January 2002 and any of the judge's findings founded on the medical reports after January 2002 in the absence of evidence establishing a causal link should not be sustained.

[63] The submissions of counsel for the appellant merely address the facts and the burden of proof, and render no assistance concerning the applicable law.

[64] I observe that the types of injuries that Mrs. Frett-Henry presented to the medical experts were internal injuries involving complexities of the human body. The nature of her injuries and the medical terms and symbols used to describe those injuries were not matters of common knowledge. Though the unexplained medical terms and symbols in the medical reports were not sufficiently understandable to the judge and normally within layman competency, they were capable of verification by reference to a medical book, or dictionary, the authority of which cannot reasonably be questioned. Section 127 of the Evidence Act, 2006[41] allowed the trial judge to verify such medical terms in an authoritative book, provided the parties have had the opportunity to make submissions and to refer to relevant information in relation to the judge's acquisition of such knowledge as is necessary to ensure that the parties are not unfairly prejudiced. The parties have not complained about any prejudice suffered where the judge stated at paragraph 17 of her judgment that she had relied on Tabers Cyclopaedic Medical Dictionary[42] ("Tabers Medical Dictionary") for the definition of the medical terms "nuclea pulposus"; "hernia"; "tendonitis"; "cervical"; and "radiculopathy", which means "any diseased condition of roots of spinal nerves."

[65] The judge's comments are repeatedly interspersed throughout paragraphs 11 and 16 to 30 of her judgment, concerning the absence of any explanation of the medical terms, the absence of reasons for the medical conditions that Mrs. Frett-Henry had, the absence of evidence as to the cause of these medical conditions referred to in the various reports and the absence of a "diagnosis and prognosis in terms which can readily be understood by a lay person." Nevertheless, having reminded herself that the burden of proof in civil cases is on a balance of probabilities, she opined quite correctly[43] that "one does not have to establish conclusively that one's medical problems arose from the accident." The judge

[41] Act No. 15 of 2006, Laws of the Virgin Islands.
[42] 13th Edition.
[43] At para. 13 of her judgment.

also noted that Mrs. Frett-Henry was involved in a previous motor vehicle accident on 3rd January 2001 and was diagnosed with whiplash injury for which she was treated and from which she had fully recovered before the second accident with Mr. Smithen's truck.

[66] Undoubtedly, the question of the causal connection between Mrs. Frett-Henry's injuries and the accident were within the scope of the medical inquiry carried out by the medical experts who treated her. Their reports lack evidence as to the cause of her injuries and medical condition, the type of event that her injuries and medical condition are consistent with, and other significant aspects as to the likely duration and effects of the injury in the future. I must stress the importance of having medical and other evidence addressing not only the causal connection between specific injuries and any given motor vehicle accident, but having regard also to the pre-existing or concurrent medical history of the injured party. The absence of such evidence however, would not necessarily preclude the court from applying ordinary common sense in determining the proximate cause of Mrs. Frett-Henry's injuries. Lord Salmon in Alphacell Ltd. v Woodward[44] observed that:

> "The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory."

It is a matter of determining what the respondents should be held justly responsible for, while recognizing, as Lord Wilberforce said in Jobling v Associated Dairies Ltd.,[45] that:

> "…no general, logical or universally fair rules can be stated which will cover, in a manner consistent with justice, cases of supervening events whether due to tortious, partially tortious, non-culpable or wholly accidental events."

[67] I infer from the judgment of the trial judge and the submissions of learned counsel Mr. Carrington that Mrs. Frett-Henry's medical conditions diagnosed after Dr.

[44] [1972] A.C. 824 at 847C.
[45] [1982] A.C. 794 at 804B.

Borras saw her in January 2002, may be conveniently regarded as resulting from either independent intervening events during the hiatus period, or that they were not products of the accident, there being no evidence that she had any pre-existing conditions.

[68] In McGhee v National Coal Board,[46] Lord Reid commented that:

> "It has always been the law that a pursuer succeeds if he can shew that fault of the defender caused or materially contributed to his injury. There may have been two separate causes but it is enough if one of the causes arose from fault of the defender."

[69] Lord Justice Stuart-Smith, in Holtby v Brigham & Cowan (Hull) Ltd.[47] revisited the relevant law while dealing with an appeal concerning an asbestos claim in which the claimant's damages were reduced by 25% on the grounds that other employers apart from the defendants had also caused some of the injury. Stuart-Smith L.J. said in his judgment with Mummery L.J. agreeing that:

> "…the onus of proving causation is on the claimant; it does not shift to the defendant. He will be entitled to succeed if he can prove that the defendant's tortious conduct made a material contribution to his disability. But strictly speaking the defendant is liable only to the extent of that contribution. However, if the point is never raised or argued by the defendant, the claimant will succeed in full as in [Bonnington Castings Ltd. v Wardlaw[48]] and [McGhee v National Coal Board[49]]. I agree with Judge Altman that strictly speaking the defendant does not need to plead that others were responsible in part. But at the same time I certainly think it is desirable and preferable that this should be done. Certainly the matter must be raised and dealt with in evidence, otherwise the defendant is at risk that he will be held liable for everything." (My emphasis).

[70] Having regard to the judicial statements on the relevant law previously stated, which I endorse, I find no error in principle to disturb the judge's conclusions at paragraphs 29 to 30 as to the injuries of Mrs. Frett-Henry that were caused by the accident. On the proven facts, the judge was entitled to form her own conclusions

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[46] [1972] 3 All E.R. 1008 at 1010f.
[47] [2000] 3 All E.R. 421 at para. 20.
[48] [1956] A.C. 613.
[49] [1972] 3 All E.R. 1008.

without the help of expert medical opinion, having taken judicial notice of the meaning of the medical terms by reference to the Tabers Medical Dictionary as she did (without any complaint of prejudice from counsel for the parties). It was open to the respondents to adduce evidence showing the extent to which some other factor also contributed to the injuries the judge found to be a product of the accident and having failed to do so, it was reasonable for the judge to conclude that the accident contributed materially or substantially to those injuries and make the findings as she did.

Remaining Grounds[50]

[71] (e) The learned Judge erred in her award of damages for future earnings in light of the above and in her finding that any injury suffered by the claimant as a result of the collision in June 2001 contributed to her retirement in 2005. In particular, the learned Judge erred in her finding that "radiculopathy" referred to in the letter from Department of Human Resources dated 14 September 2005 was related to any injury suffered as a result of the collision. Such finding is inconsistent with the learned Judge's finding that by 2002 the Claimant had recovered substantially from her injuries.

(f) The learned Judge erred in her award of damages for past earnings in light of the above and further in her calculation of loss of past earnings as the period mid April to mid August is 4 ½ months, not 5 ½ months.

[72] The judge stated at paragraph 37:

> "One of the causes of her retirement is stated to be radiculopathy. … I have found that she suffered from that condition as a result of the accident and therefore if this was a cause of her having to retire early as I have found then she is entitled to compensation for loss of future earnings from date of trial at retirement age."

[50] See Amended Counter Notice by Respondents to the Appeal.

[73] I have analysed the findings of the judge and do confirm Mr. Carrington's complaint that the judge omitted to identify which severe cervical radiculopathy resulted from the accident. However, it appears that the learned judge eliminated the findings in Dr. Martinez's medical reports[51] which diagnosed that Mrs. Frett-Henry was suffering from cervical radiculopathy C5 due to severe root C5 C6 spondyloarthritis. She clearly rejected the finding of spondyloarthritis, having found at paragraph 30 that Mrs. Frett-Henry had not satisfied her burden of proof. The judge also stated at paragraphs 27 and 28 of her judgment that the court cannot be expected to infer by the mere fact that the injuries found in the 2004 onwards medical reports exist, that they can be attributed to her initial injuries and "noted the length of time that had elapsed between her last visit to Dr. Ojuro in 2002 and the first report of Dr. Trotman-Hastings of 2004 and to the fact that no or no proper explanation was given as to what complaints led to these later medical interventions and the diagnosis of spondyloarthritis." Mrs. Frett Henry has not appealed these findings of the trial judge.

[74] There is therefore merit in Mr. Carrington's submissions and these two grounds of appeal which should succeed in my view. Since the learned judge found that Mrs. Frett-Henry had not satisfied her burden of proof in relation to the medical findings and diagnosis of Dr. Martinez in his medical reports from 1st February 2005, it was not open to the judge to subsequently rely on Mrs. Frett-Henry's employer's letter to justify the award of damages for loss of earnings and future loss of earnings where the radiculopathy that the letter referred to was the cervical radiculopathy C5 due to severe root C5 C6 spondyloarthritis that Dr. Martinez had diagnosed. That letter was pivotal in the appellant being placed on half salary for the period 15th April 2005 to 31st August 2005, and early retirement from 1st September 2005. The only other radiculopathy was the C6 left radiculopathy diagnosed by Dr. Borras on the 16th November 2001 which the trial judge found Mrs. Frett-Henry had substantially recovered from by September 2002. The judge therefore erred

[51] Dated 20th October 2004 and 1st February 2005.

in making the awards for loss of earnings and loss of future earnings at paragraphs 44(b)(iii) and 44(b)(iv) of her judgment respectively.

[75] The result of the appeal in summary is as follows:

(1) The appellant's appeal against the apportionment of liability for her contributory negligence is allowed and the judge's apportionment of liability as 25% to the respondents and 75% to Mrs Frett-Henry is reversed.

(2) Paragraph 44(a) of the trial judge's order is varied to reflect that Mrs. Frett-Henry's liability is 30% and the respondents' liability is 70%.

(3) Paragraph 44(b)(ii) of the trial judge's order awarding 25% of $838.25 for medical expenses is set aside and the award 70% of $838.25 is substituted.

(4) Paragraph 44(b)(i) of the trial judge's order awarding 25% of $15,000.00 for general damages is set aside and the award of 70% of $15,000.00 is substituted.

(5) The other grounds of the appellant's notice of appeal have failed.

(6) The respondent do pay the appellant costs in the appeal which is two thirds of the prescribed costs on the total amount of damages awarded to the appellant in the court below.

(7) The ground of the respondents' counter notice appealing the award of loss of earnings and future loss of earnings to the appellant is allowed and paragraphs 44(b)(iii) and 44(b)(iv) of the order awarding loss of earnings and future loss of earnings are set aside.

(8) The other grounds of the respondents' counter notice of appeal have failed.

(9) The appellant do pay the respondents costs in the appeal which is two thirds of the prescribed costs on the total amount of damages awarded to the appellant in the court below.

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

[76] BANNISTER, J.A. [Ag.]: I am very grateful to Justice of Appeal Edwards for having undertaking the considerable task of preparing this judgment and to have been given the opportunity to consider and comment upon it.

Specific conclusions

[77] I respectfully agree with the conclusions at paragraphs 20, 31, 36, 44 and 70 of the judgment.

[78] I personally feel that the apportionment of blame made by Olivetti J. was unexceptionable as a matter of approach, but wildly favourable to the respondent as a matter of assessment on the facts as she found them. Speaking entirely for myself, I would have preferred to have said that people should not drive in the middle of roads and that when accidents occur in consequence, a finding of 75% contributory negligence against the person injured is, in the absence of quite extraordinary facts (which these are not), perverse. While I am not, therefore, in agreement with the conclusion in paragraph 52 of the judgment, I do not disagree with the apportionment made in paragraph 55.

[79] For paragraphs 71 to 74 of the draft judgment I understand the point to be that although Olivetti J. found that Mrs. Frett-Henry suffered as a result of the accident

from radiculopathy and that that condition was a cause of her having to retire early,[52] the particular radiculopathy which led to her early retirement was radiculopathy of C5 nerve secondary to severe C5-C6 spondyloarthritis over six months preceding 5th January 2005[53] and that there was no evidence to connect this condition, arising apparently in mid 2004, with the accident (as the judge herself found at paragraph 30 of her judgment). Quite how this finding fits with what she said at paragraph 37 of her (the trial judge's) judgment[54] I am not sure, but assuming that the reasoning for disallowing the loss of earnings claims is as I have attempted to summarise it above, then I agree with the conclusion at paragraph 74 of this judgment.

Proposed form of order

[80] The effect of the two costs orders proposed would appear to result in a set off equivalent to their being no order as to costs. If that is the intention, then I respectfully agree with it.

Conclusion

[81] Subject to the small points mentioned above, I respectfully agree with the terms of the judgment proposed.

Edward Bannister, QC
Justice of Appeal [Ag.]

[52] Paragraph 37 of her judgment.
[53] Dr Trotman-Hastings' report of 5th January 2005 referred to at para. 60 of the judgment.
[54] Excerpted at paragraph 73 of this judgment.