EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2012/0019

BETWEEN:

MARGARET BLACKBURN

Appellant

and

JAMES A.L. BRISTOL

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Sydney Bennett, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Gregory Delzin and Ms. Michelle Emmanuel-Steele for the Appellant
Mr. Leslie Haynes, QC and Mr. Alban M. John for the Respondent

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2014: December 10;
2015: October 12.

Civil appeal – Motor vehicle accident –Whether the learned trial judge erred in making factual findings – Approach of appellate court on review of trial judge's factual findings – Negligence – Whether the learned judge erred in finding that the appellant was negligent

The appellant, Mrs. Margaret Blackburn and the respondent, Mr. James Bristol, were involved in a vehicular accident at night along the Grande Anse main road. Mr. Bristol was driving his vehicle in a southbound direction and Mrs. Blackburn was driving in a northbound direction. After getting to the top of a slight incline and coming around a bend in the road, Mr. Bristol met Mrs. Blackburn's vehicle in his lane. The two vehicles collided almost head-on in the vicinity of the Excel Plaza. At the time of the collision, Mrs. Blackburn had been attempting to maneuver her car into the entrance to the Excel Plaza. The collision resulted in both vehicles being a total loss and Mr. Bristol subsequently filed a claim against Mrs. Blackburn alleging negligence on her part.

Following the trial of the matter, the learned trial judge held that the collision was solely due to the negligent driving of Mrs. Blackburn. In reaching her decision, the judge made

important findings of fact. She found as a fact that the accident occurred in the southbound lane and that the corner approaching Excel Plaza from either direction is a blind corner so that vehicles coming south do not see the vehicles approaching in the opposite direction until they come around the corner and up the slight incline that leads to the entrance of the plaza. The judge also found that vehicles in the northbound lane do not see the vehicles coming in the opposite direction. Because of this blind corner, drivers in both directions have to exercise more caution than usual. However, drivers who seek to enter Excel Plaza from the northbound lane have to be extra cautious because they are crossing into the southbound lane to enter the plaza. Accordingly, on the facts of the case the manoeuvre being attempted by Mrs. Blackburn was legal, albeit dangerous and required that she exercise extra caution in carrying out the manoeuvre.

At trial, a witness for Mrs. Blackburn, who was a passenger in the front seat of her vehicle at the time of the accident, testified that she heard the sound of an engine prior to Mrs. Blackburn starting to turn into the entrance of the plaza. Another witness for Mrs. Blackburn also testified that he heard a car horn coming from the direction of Mr. Bristol's car before the collision. The trial judge concluded that Mrs. Blackburn was put on notice that a vehicle was approaching from the opposite direction and did not take heed of this when attempting to enter the Excel Plaza. The learned trial judge also rejected expert evidence given on behalf of Mrs. Blackburn that at the time of the accident Mr. Bristol was speeding.

The judge also reviewed pictures of the scene and damage to the vehicles and taking into account the evidence as a whole, she concluded that the collision was almost head-on with Mrs. Blackburn vehicle at an angle turning into the plaza and occurring in the southbound lane.

After considering the facts before her, the trial judge found that Mr. Bristol was not at fault in the collision and found that Mrs. Blackburn failed to exercise due care and attention in attempting the dangerous turn, given the prevailing circumstances. Mrs. Blackburn, being dissatisfied with the trial judge's decision, has appealed on several grounds, essentially against the trial judge's findings of fact.

Held: dismissing the appeal and ordering costs to the respondent on the appeal in the sum of $24,500.00 representing 2/3 of the prescribed costs of $36,750.00 awarded by the judge in the court below, that:

1. There is a well-recognized reluctance by appellate courts to interfere with a judge's findings of primary fact, especially when they depend to a significant extent upon the judge's assessment of witnesses that he or she has seen and heard give evidence. Accordingly, the correct approach of an appellate court with respect to interfering with a judge's factual findings is that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that the judge was plainly wrong. Further, the restraint against an appellate court interfering with findings of fact applies not only to findings of primary fact, but also the trial judge's evaluation of those facts and the inferences drawn from them.

Landau and The Big Bus Company Limited and another [2014] EWCA Civ 1102 applied; **Assicurazioni Generali SpA v Arab Insurance Group (BSC)** [2002] EWCA Civ 1642 applied; **Piglowska v Piglowski** [1999] 1 WLR 1360 applied; **McGraddie v McGraddie and another** [2013] 1 WLR 2477 applied; **Fage UK Ltd v Chobani UK Ltd** [2014] EWCA Civ 5 applied.

2. The phrase 'plainly wrong' does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts. Rather, it directs the court to consider whether it was permissible for the judge at first instance to make the findings of fact which he or she did in the face of the evidence as a whole. The appellate court is required to make this judgment bearing in mind that it has only a printed record of the evidence. Thus, to interfere with a judge's decision, the appeal court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine the judge's conclusions.

   Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21 applied; **In re B (A Child) (Care Proceedings: Threshold Criteria)** [2013] 1 WLR 1911 applied; **Central Bank of Ecuador and others v Conticorp SA and others** [2015] UKPC 11 applied; **Thomas v Thomas** [1947] AC 484 applied; **Langsam v Beachcroft LLP** [2012] EWCA Civ 1230 applied.

3. Where the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from a judge's evaluation. A determination of whether or not the standard of care was met by a defendant involves the application of a legal standard to a set of facts, that is, a question of mixed fact and law. Accordingly, unlike questions of pure law, an appellate court must be cautious in finding that a trial judge erred in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. In this appeal, the trial judge made a number of factual findings which lead to the conclusion that Mrs. Blackburn was at fault in the accident. In all the circumstances, the trial judge found no evidence of liability on the part of Mr. Bristol. The trial judge's conclusion as to the cause of the accident was a finding of fact and it was open to her on the evidence to so find. The judge's conclusion was reasonably justifiable on the evidence and it could not be said that the judge was plainly wrong.

   Biogen Inc v Medeva Plc [1997] RPC 1 applied; **Housen v Nikolasien** 2002 SCC 33 applied; **Thomas v Thomas** [1947] AC 484 applied.

4. Expert evidence does not stand alone and cannot be considered by a court in a vacuum. It is to be considered in the context of all the evidence before the court which the judge accepts. The weight to be attached to various pieces of evidence is essentially the preserve of the trial judge. In this appeal, there was conflicting expert evidence on the issue of Mr. Bristol's speed and although the learned trial judge did not explain why she preferred the evidence of Mr. Bristol's expert over

that of Mrs. Blackburn, the judge's assessment of Mr. Bristol's speed was a reasonable inference based on the evidence and was not plainly wrong.

5. The trial process ought not to ordinarily reach a conclusion which has never been canvassed during the trial and on the implications of which neither the lay witness nor the expert witness have had the opportunity to comment nor the parties the opportunity to marshal their arguments. In this appeal, although the trial judge did not make a finding as to the point of impact, the evidence was that Mrs. Blackburn turned across the path of Mr. Bristol. In the circumstances, the absence of a finding as to the point of impact was not very material. Accordingly, it cannot be said that the trial judge's conclusion was based on an alternate scenario or was not supported by evidence.

Faunch v O'Donoghue and another [2013] EWCA Civ 896 applied; **Sohal v Suri and another** [2012] EWCA Civ 1064 applied.

6. In an action for negligence, the claimant must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendant. It is the duty of the trial judge to examine all the evidence at the end of the case and decide whether on the facts he or she finds to have been proved and on the inferences that he or she is prepared to draw, that he or she is satisfied that negligence has been established. In this appeal, there was nothing in the judgment of the learned judge that was so erroneous so as to warrant appellate inference, as the conclusions reached by the trial judge could fairly be reached on the evidence.

Henderson v Henry E Jenkins and Sons and Evans [1970] AC 282 applied.

JUDGMENT

[1] **BAPTISTE JA:** This appeal arises out of a nocturnal collision between two cars; one driven by Mrs. Margaret Blackburn, the appellant, and the other driven by Mr. James Bristol, the respondent. Mr. Bristol was driving his vehicle in a southbound direction on the Grand Anse main road; after cresting a slight incline, he came around a bend in the road to be confronted with Mrs. Blackburn's vehicle in his lane. The resulting collision which took place in the vicinity of the Excel Plaza, was almost head-on and resulted in both vehicles being a total loss. Mr. Bristol filed a claim against Mrs. Blackburn alleging negligence on her part. The learned judge held that the collision was solely due to the negligent driving of Mrs. Blackburn in that she failed to keep a proper look out and take the necessary

action to avoid the collision and that in the absence of any evidence, the issue of contributory negligence did not arise.

Findings of Fact

[2] The learned judge made important findings of fact in arriving at her decision. She found that the accident occurred on the Grande Anse Main Road in the southbound lane. It is a fact that the corner approaching the Excel Plaza from either direction is a blind corner so that vehicles going south do not see the vehicles coming in the opposite direction until they come around the corner and up the slight incline that leads to the entrance of the Excel Plaza. The judge also found that vehicles coming from the Sugar Mill direction, that is, in the northbound lane, do not see the vehicles in the opposite direction. Because of the presence of this blind corner, drivers in both directions have to exercise more caution than is usual. But drivers who wish to enter the plaza from the northbound lane have to be extra careful and cautious because they are crossing into the southbound lane in order to enter the plaza. The persons in the southbound lane have the right of way and while they too must exercise due care, they are not turning across traffic but proceeding straight on, on their correct and proper side of the road. On the facts of this case, the manoeuver which Mrs. Blackburn sought to execute was a dangerous but legal one. There was nothing preventing her from attempting to enter the Excel Plaza from the northbound lane that night. But, bearing in mind that it was night and that there was a blind corner beyond the entrance of the plaza, she had to take extra precaution in carrying out such a dangerous manoeuver.

[3] Ms. Tessa Andrews, the passenger in the front seat of Mrs. Blackburn's vehicle, said she heard the sound of an engine prior to Mrs. Blackburn starting to turn into the entrance to the Plaza. Further, another witness, Mr. Piankhi Toussaint, also testified that he heard a car horn coming from the direction of Mr. Bristol's car before the collision. The judge concluded that from this evidence led by Ms. Blackburn, it appeared that she was put on notice that a vehicle was

approaching from the opposite direction yet she continued her attempt to enter the Plaza without taking heed of these warning signs. It is an established rule of the road that when one is seeking to perform a hazardous but legal manoeuver, one must ensure that it is safe to do so.

[4] With respect to the speed of Mr. Bristol's vehicle, the judge expressed herself thus:

> "It has been postulated that the Claimant [Mr. Bristol] was travelling in excess of the 40 mph speed limit and therefore bear some responsibility for the collision. I am not persuaded by the calculation of the expert putting the Claimant's speed at between 50-62.6 miles per hour. This calculation is based in part on the eye witness account of Mr. Toussaint, who himself was not a driver at the date of the accident. The police found no evidence that the Claimant was travelling at an excessive speed that night, there is no such finding contained in the police report, nor is there any indication by way of skid marks from which any clear determination could be made as to the speed of the Claimant's vehicle at the time of the accident."[1]

[5] The judge also considered the pictures of the scene and of the damage to the vehicles and looking at the evidence as a whole, concluded that this was an almost head-on collision with Mrs. Blackburn's vehicle at an angle turning into the plaza and Mr. Bristol's vehicle colliding with Mrs. Blackburn's on the southbound lane.

[6] After examining all the relevant factors, the judge concluded that she did not find that Mr. Bristol was at fault in the cause of this collision. Mrs. Blackburn failed to exercise due care and attention in attempting what she must have known to be a dangerous turn, given all the attendant circumstances. Mrs. Blackburn ignored or was oblivious to certain warning signs that night: the sound of the engine heard by her passenger Ms. Tessa Andrews before she attempted the turn into the plaza and the sound of the horn heard by Mr. Toussaint as well, before she attempted to turn. Had she heeded these warnings she may not have attempted to enter the plaza but may have waited until it was safe to do so.

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[1] Judgment delivered 15th October 2012, record of appeal, tab 3, at para. 50.

Grounds of Appeal

[7] Several grounds of appeal were advanced by Mrs. Blackburn. The grounds of appeal allege that:

(i) the judge's findings and conclusions are inconsistent with and against the weight of the evidence;

(ii) the judge erred in law in concluding that Mr. Bristol was not at fault in the cause of the collision and there was no evidence of contributory negligence;

(iii) the judge erred in concluding that the respondent was not traveling at an excessive speed;

(iv) the judge erred in concluding that the police evidence did not disclose a finding of excessive speed as there were no skid marks from which a clear determination could be made;

(v) the judge erred in concluding that Mrs. Blackburn was not driving with due care and attention when executing the manoeuvre or turn from the northbound lane into Excel Plaza;

(vi) the judge erred in concluding that Mrs. Blackburn was put on notice that a vehicle was approaching as the evidence was inconclusive and unable to form the basis of that conclusion; and

(vii) the judge did not find Mrs. Blackburn liable on the case put forward by Mr. Bristol, but essentially found her liable on her own case.[2]

[8] To a large extent the appeal concerns complaints against the judge's factual findings, the judge's evaluation of those facts and the inferences to be drawn from

[2] This ground was raised in oral arguments but did not form part of the written grounds of appeal.

them. In that regard, before delving into the grounds of appeal, it is instructive to pay regard to the approach of an appellate court to findings of fact by a lower court. This subject has in recent times occupied the attention of the Supreme Court of the United Kingdom, the Privy Council as well as the Court of Appeal.

[9] The principles governing appellate intervention with respect to the review of findings of fact and inferences of fact made by a judge at first instance are well established. There is a well recognised reluctance of appellate courts to interfere with a judge's findings of primary fact, especially when they depend to a significant extent upon the judge's assessment of witnesses he has seen and heard give evidence.[3] As Lord Hoffman said in **Piglowska v Piglowski**:[4]

> "The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts."

[10] In **McGraddie v McGraddie and another,**[5] the correct approach of an appellate court with respect to interfering with a judge's factual findings was summarized in the headnote thus:

> "It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong; …"

[11] The injunction against interfering with findings of fact unless compelled to do so, applies not only to findings of primary fact, but also the evaluation of those facts and inferences to be drawn from them. In **Fage UK Ltd v Chobani UK Ltd**,[6] Lewison LJ stated that the reasons for this approach include:

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[3] See Landau and The Big Bus Company Limited and another [2014] EWCA Civ 1102 at para 18 (Richards LJ); and Assicurazioni Generali SpA v Arab Insurance Group (BSC) [2002] EWCA Civ 1642 at paras. 14 to 22 (Clarke LJ).
[4] [1999] 1 WLR 1360 at 1372.
[5] [2013] 1 WLR 2477.
[6] [2014] EWCA Civ 5 at para. 114.

"(i) The expertise of the trial judge in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
(ii) The trial is not a dress rehearsal. It is the first and last night of the show.
(iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
(v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
(vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."

[12] In **Langsam v Beachcroft LLP**,[7] Arden LJ stated that:

> "Where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach."

[13] In **Piglowska v Piglowska**, Lord Hoffman cautioned the same appellate restraint in relation to the trial judge's evaluation of the facts as to his factual findings themselves. His Lordship stated at page 1372:

> "The appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc. v. Medeva Plc.* [1997] R.P.C. 1, 45:
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> > "The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance...of which time and language do

[7] [2012] EWCA Civ 1230 at paragraph 72.

not permit exact expression, but which may play an important part in the judge's overall evaluation"."

[14] In **Central Bank of Ecuador and others v Conticorp SA and others**,[8] Lord Mance stated:

> "any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ: see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2003] 1 WLR 577, paras 15-17, per Clarke LJ, cited with approval in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325, para 46.

[15] In **McGraddie v McGraddie and another**,[9] Lord Reed cited the well-known passage in the speech of Lord Thankerton in **Thomas v Thomas**:[10]

> "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, 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 any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (3) 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."

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[8] [2015] UKPC 11 at para. 5.
[9] [2013] UKSC 58 at para. 1.
[10] [1947] AC 484 at pp. 487-488.

This passage was also cited with approval by Lord Hodge, delivering the judgment of the Board, in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**.[11] Lord Hodge went on to say that it has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. His Lordship explained that this phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts. Rather it directs the appeal court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. The appeal court is required to make this judgment in the knowledge that it has only a printed record of the evidence. Lord Hodge gave guidance as to how this task is to be approached. He stated: 'The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions'. His Lordship stated that occasions meriting appellate intervention would include a failure of a trial judge to properly analyse the entirety of the evidence.

[16] In **re B (A Child) (Care Proceedings: Threshold Criteria)**,[12] Lord Neuberger stated at paragraph 52 that the Court of Appeal, as a first appeal tribunal, will rarely even contemplate reversing a trial judge's findings of primary fact. At paragraph 53, His Lordship stated that this is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and hearing and considering their evidence as it emerges. His Lordship opined that:

> "Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there is no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it. This can also be justified on grounds of policy (parties should put forward their best case on the facts at trial and not regard the potential to appeal as a second chance), cost (appeals on facts can be expensive), delay (appeals on facts can often take a long time to get on), and practicality (in many cases,

[11] [2014] UKPC 21 at para. 12
[12] [2013] 1 WLR 1911 at para 52.

> it is very hard to ascertain the facts with confidence, so a second, different opinion is no more likely to be right than the first)."

At paragraph 108 Lord Kerr stated:

> "A conclusion by a judge at first instance on which facts have been proved, and which have not been, involves the judge sifting the evidence that has been led, assessing it and then deciding whether it has brought him or her to the necessary point of conviction of its truth and accuracy. Although an appellate court is competent to hear appeals against the findings of fact that the judge has made, of necessity, its review of those findings is constrained by the circumstance that, usually, the initial fact-finder will have been exposed to a wider range of impressions that influence a decision on factual matters than will be available to a court of appeal. This is not simply a question of assessing the demeanour of the witnesses who gave evidence on factual matters, although that can be important. It also involves considering the initial impact of the testimony as it unfolds – did it appear frank, candid, spontaneous and persuasive or did it seem to be contrived, lacking in conviction or implausible. These reactions and experiences cannot be confidently replicated by an analysis of a transcript of the evidence. For this reason a measure of deference to the conclusions reached by the initial fact finder is appropriate. Unless the finding is insupportable on any objective analysis it will be immune from review."

[17] In **Thomas v Thomas**,[13] Viscount Simon and Lord Du Parcq cited with approval a dictum of Lord Greene MR in **Yull v Yull**:[14]

> "it can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."

In **Thomas v Thomas**,[15] Lord Macmillan mentioned some specific errors which might justify appellate intervention and added that the trial judge may be shown 'otherwise to have gone plainly wrong'. In **Henderson v Foxworth Investments Limited and another**,[16] Lord Reed explained that this phrase can be understood as signifying that the decision of the trial judge cannot reasonably be explained or justified. Lord Reed went on to state:

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[13] At p. 493.
[14] [1945] P 15, 19.
[15] At p. 491.
[16] [2014] UKSC 41 at para. 66.

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."[17]

[18] The rationale for the legal requirement of appellate restraint on issues of fact was also addressed by Lord Hodge in **Carlyle v Royal Bank of Scotland Plc**,[18] Lord Hodge explained that it went beyond the advantages which the first instance judge has in assessing the credibility of witnesses. Lord Hodge reminded that the first instance judge is tasked with determining the facts, not the appeal court. The question of costs and the diverting of judicial resources also play a role. Lord Hodge opined that the re-opening of all questions of fact for redetermination on appeal would expose parties to great cost and divert judicial resources for what would often be negligible benefit in terms of factual accuracy. His Lordship also commented that it was likely that the judge who has heard the evidence over an extended period will have a greater familiarity with it and a deeper insight in reaching conclusions of fact than an appeal court whose perception may be narrowed or even distorted by the focused challenge to particular parts of the evidence. The narrowly defined scope of appellate review dictates that a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges from the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others.

[19] From the authorities it is clear that the appellant faces formidable obstacles in the quest to reverse the judge's findings and conclusions.

Submissions on Grounds of Appeal

[17] At para. 67.
[18] [2015] UKSC 13 at paragraph 22.

[20] The first ground of appeal alleges that the learned judge made certain findings and drew certain inferences inconsistent with the evidence given at the trial. Mr. Haynes, QC contends on Mr. Bristol's behalf that this ground should be dismissed as no particulars are given as to what findings and conclusions are inconsistent with and against the weight of the evidence. Mr. Haynes, QC referred to rule 62.4(1) of the **Civil Procedure Rules 2000** ("CPR 2000") which provides:

> "(1) A notice of appeal …must give details of –
> (a) …
> (b) the decision which is being appealed, identifying, so far as practicable, any finding of –
> (i) fact; and
> (ii) law
> which the appellant seeks to challenge;
> (c) the grounds of appeal."

The grounds of appeal under CPR 63.5(1) must set out concisely the grounds on which the appellant relies, without any argument or narrative (CPR62.4 (5)).

[21] I note that the findings of fact challenged are that: (i) the appellant was put on notice that a vehicle was approaching from the opposite direction and (ii) the defendant was not travelling at an excessive speed. Under the rubric 'any finding of law challenged' the findings challenged are that: (i) the appellant failed to exercise due care and attention in attempting what she must have known to be a dangerous turn; (ii) the collision was caused solely by the negligent driving of the appellant in that she failed to keep a proper lookout and take the necessary action to avoid the collision; (iii) the respondent was not at fault in the cause of the collision; and (iv) in the absence of any evidence, contributory negligence does not arise.

[22] I agree with Mr. Haynes, QC's complaint. Ground 1 of the appeal as framed is in general terms; it is embarrassingly vague and unspecified and is accordingly struck out. I referred earlier to the findings of fact made by the learned judge. It will be seen later that the judge's findings and conclusions were clearly open to her on the evidence.

Was the Appellant at Fault?

[23] Ground 2 takes issue with the judge's conclusion that Mr. Bristol was not at fault in causing the collision and there was no evidence of contributory negligence. Learned counsel, Mr. Delzin, on behalf of Mrs. Blackburn, argues that there is no evidence that Mr. Bristol heeded the 'slow' sign posted as he approached the corner and the entrance to Excel Plaza immediately ahead. Reliance was also placed on the fact that Mr. Bristol did not stop before the collision, as evidence of speeding and contributory negligence. Mr. Haynes, QC contends that these charges are shortly answered by the fact that Mr. Bristol was found to be driving within the speed limit and that there was no evidence to indicate otherwise. Ground 2 involves a question of mixed fact and law. In considering this ground it is also instructive to keep in mind the observations of Lord Hoffmann in **Biogen Inc v Medeva Plc**,[19] as to the approach of an appellate court in relation to a trial judge's evaluation of facts by reference to a legal standard such as negligence or obviousness:

> "Where the application of a legal standard such as negligence or obviousness involved no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

[24] In **Housen v Nikolaisen**[20] the majority of the Supreme Court of Canada held that on a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on mere questions of law is one of correctness. Questions of mixed fact and law involve an application of a legal standard to a set of facts. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the

[19] [1997] RPC 1 at p. 45.
[20] 2002 SCC 33.

inference drawn is legal or factual. A determination of whether or not the standard of care was met by a defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. Appellate courts must be cautious however, in finding that a trial judge erred in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual.

[25] Mr. Bristol testified that on the night of the accident he was driving at about 30 to 40 mph. He denied that he was travelling so quickly he could not stop and said that the accident happened in an instant. He said when he first saw Mrs. Blackburn, having crested the incline leading up to the corner immediately prior to the entrance of Excel Plaza, she was about 30 ft. away and appeared to have just entered his lane and was at an angle to the central line.

[26] In cross-examination, Mrs. Blackburn stated that the manoeuvre she was making at the time of the accident was not one she would ordinarily make. She stopped close to the white central dividing line at the entrance of Excel Plaza. She said she could not stop in the middle of the entrance to the Plaza. She admitted she had not driven past the entrance either, but would have been more at the beginning of the entrance to the Plaza when she stopped. When she looked, having stopped, nothing was coming up to where she could see. She stated that the corner was a blind corner. She estimated the blind corner to be about 103ft to 108ft away from the position she had stopped prior to beginning the turn into the Plaza. Having looked ahead and seen nothing approaching she said she decided to cross and crossed over the white line, at an angle. At that point she said she got a shock and realized she had had an accident. The point of contact of the other vehicle with hers was the left front of her car. She did not see Mr. Bristol's vehicle before she was hit. She just saw a flashing light and was definitely in front the entrance on a turn when she was hit. She did not get up to the entrance and that the front part of her car was in Mr. Bristol's lane when she was hit. She said:

'The minute you move your car you're in the other person's lane'.[21] She admitted that she needed to get across the other side as quickly as possible.

[27] The evidence established that the corner in the vicinity of the entrance to Excel Plaza is a blind corner. Neither of the parties could see approaching vehicles around that corner. Mrs. Blackburn was intending to and did cross the central white line from her lane into Mr. Bristol's lane immediately before that blind corner. As put in Mr. Bristol's skeleton submissions, if Mrs. Blackburn stopped in her lane opposite the entrance to the Plaza before crossing into the southbound lane, as she said, the question then arises as to why she did not see the approaching headlights or hear the sound of Mr. Bristol's vehicle, as Ms. Tessa Andrews, the passenger in her car and Mr. Piankhi Toussaint, the witness standing outside the Plaza, said they did. Mr. Bristol was unshaken in his position that he drove within the speed limit at a speed of between 30 to 40 mph. Save for the conclusion of Mr. Carl Cupid – Mrs. Blackburn's expert witness – there is no evidence to the contrary. It is not suggested that Mr. Bristol at any time lost control of his vehicle or veered out of his lane. It is agreed by all that the accident occurred in Mrs. Blackburn's lane. In all of these circumstances there was no evidence of liability on the part of Mr. Bristol. The trial judge's conclusion as to the cause of the accident was a finding of fact and it was open to her on the evidence to so find. It could not be said that the judge was plainly wrong. The conclusion was reasonably justifiable on the evidence. Accordingly, the judge's findings and conclusion should not be interfered with. The words of Viscount Simon in **Thomas v Thomas** are relevant:

> "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."[22]

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[21] Transcript of trial proceedings, vol. 2, record of appeal, bundle no. 2, p. 442, lines 6 – 7.
[22] At p. 486.

[28] The issue of contributory negligence can be disposed of quickly. As Mr. Haynes, QC stated, it is the law that contributory negligence should be specifically pleaded. The difficulty Mrs. Blackburn faces is that she did not plead contributory negligence on Mr. Bristol's part. Unsurprisingly, in his oral submissions, Mr. Delzin indicated that Mrs. Blackburn was not relying on contributory negligence. Contributory negligence is therefore not a live issue in this appeal; accordingly, an appeal on that ground falls away.

Issue of Speed (Grounds 3 and 4)

[29] Grounds 3 and 4 challenge the judge's factual findings and conclusion on the issue of speed. Ground 3 alleges that the learned trial judge erred when concluding that Mr. Bristol was not travelling at an excessive speed, thereby dismissing the evidence of the expert, Mr. Carl Cupid, who put Mr. Bristol's speed at about 60 miles per hour. Mr. Haynes, QC contended that the difficulty Mrs. Blackburn faces is that the learned trial judge also had the evidence of the other expert, Mr. James Harris, who concluded that Mr. Bristol was travelling at a speed of about 35 – 40 miles per hour. Both Mr. Cupid and Mr. Harris were experts giving secondary evidence. Mr. Piankhi Toussaint said that he could judge the speed of Mr. Bristol's car was much faster than the limit of 35 miles per hour. The judge said that he was not a driver.

[30] Ground 4 complains that the learned trial judge erred when she concluded that the police did not disclose a finding of excessive speed as there were no skid marks from which a clear determination could be made. Also the learned trial judge failed to take into consideration the evidence of the police and Mr. Cupid. With respect to the lack of skid marks, I agree that due to the suddenness of the collision, the learned judge could not properly rely on the absence of skid marks in coming to a determination as to speed. I cannot conclude however, that the trial judge failed to consider the evidence of the police and Mr. Cupid. With respect to the resting place of the vehicles after impact, Mr. Bristol denied that

Mrs. Blackburn's vehicle was spun around. He said it turned 90 degrees to face the curb. Mr. Toussaint also said that Mr. Bristol stopped close to where the impact occurred. I agree with Mr. Haynes, QC that this is primary factual evidence which the learned judge is entitled to weigh above any conclusion Mr. Cupid may have arrived at.

[31] Mr. Bristol gave evidence as to the dry condition of the road, excellent visibility and speed and upon exiting the corner, cresting the incline and seeing Mrs. Blackburn's vehicle 30 feet away; and that he could not avoid the collision as there was no time to do so. Mr. Delzin contends in the skeleton arguments that the mere fact that Mr. Bristol could not avoid the collision places him in a difficulty that he was going at a pace at which he could not stop within the limits of his vision, or, if he could stop within the limits of his vision, he was not looking out. It matters not that he was travelling within the speed limit. Further, there was no evidence that on approaching the blind corner, Mr. Bristol heeded the road signs which stated 'Slow' and 'Vehicles exiting ahead'. In the circumstances, it was submitted that the trial judge was wrong in failing to conclude on this evidence that Mr. Bristol was negligent, thereby causing or contributing to the collision. As stated earlier, contributory negligence was not pleaded. Mr. Delzin stated that is not being relied on. I have already addressed the issue with respect to the allegation that Mr. Bristol caused the accident.

[32] I find the dictum of Judge LJ in **Scutts** v **Keyse and another**[23] to be instructive. He stated at paragraph 24:

> "When judged in relation to speed restrictions, speed alone is not decisive of the question of negligence. It is sometimes plainly dangerous to drive at the permitted maximum, and equally, driving in excess of the limit, even if liable to result in prosecution for speeding, is not necessarily, and invariably, negligent."

I agree with Mr. Haynes, QC's submission that the learned judge would have been left with her overall impression of all the evidence, primary and secondary, and in

[23] [2001] EWCA Civ 715.

the end, decided the issue of speed as she did. I would also add that the question as to whether the respondent was driving at an excessive speed is a question of fact. Accordingly, these grounds fall away.

Expert Evidence

[33] Two experts (both accident reconstructionists) gave evidence: Mr. Harris, on behalf of Mr. Bristol and Mr. Cupid, for Mrs. Blackburn. Mr. Harris said that the speed of Mr. Bristol's vehicle on impact was 35 to 40 miles per hour, and Mrs. Blackburn's, 10 to 15 miles per hour. The damage profiles to both vehicles indicate that this was a near head-on type of collision. The accident occurred within the southbound lane. Driver error on the part of Mrs. Blackburn was the proximate cause of the collision. Mr. Cupid stated that the direction of crush of sheet metal on both vehicles indicated that the collision was almost collinear. Although Mrs. Blackburn appeared to be liable, due to the logistics of the accident site, Mr. Bristol should have exercised caution. It is agreed that the impact occurred within the southbound lane. Mr. Cupid further opined that Mr. Bristol could not have had sufficient time to avert the crash and that could be attributed to his speed.

[34] There was conflicting expert evidence on the issue of speed. The learned judge did not explain why she preferred the evidence of Mr. Harris. It may be that his evidence accorded more satisfactorily with the facts the judge found. It must be noted that the expert evidence did not stand alone and cannot be considered in a vacuum. It is to be considered in the context of all the evidence before the court which the judge accepts. The weight to be attached to various pieces of evidence is essentially the preserve of the judge. The judge's assessment of speed was a reasonable inference based on the evidence and was not plainly wrong.

Due Care and Attention

[35] Ground 5 takes issue with the judge's conclusion that Mrs. Blackburn was not driving with due care and attention when executing the manoeuvre of turning from

the northbound lane into Excel Plaza. Mr. Delzin contended that the trial judge placed a heavy burden on the appellant in respect of due care and attention. In response to this ground, Mr. Haynes submitted, and I agree, that as it was Mrs. Blackburn who crossed into Mr. Bristol's lane, the duty was on her to ensure that it was safe to do so at the time that she commenced crossing. From Mrs. Blackburn's own evidence the position at which she claimed to stop before crossing into the southbound lane, she could see up to about 103 – 108 ft ahead. Mr. Bristol said that on cresting the incline and coming around the corner he saw Mrs. Blackburn about 30 ft. away and she appeared to have just crossed into his lane. Of significance also is the evidence of two of Mrs. Blackburn's witnesses. Ms. Tessa Andrews heard the sound of the approaching vehicle and said she could see Mrs. Blackburn was looking towards the entrance of the Plaza. Mr. Piankhi Toussaint heard both the sound of the approaching engine and the horn. Mrs. Blackburn heard neither or if she did, ignored both. The learned trial judge cannot be faulted in concluding that Mrs. Blackburn was not driving with due care and attention at the time she was executing the turn from her lane into that of Mr. Bristol.

Notice of Approaching Vehicle

[36] Ground 6 alleges that the learned trial judge erred when she concluded that Mrs. Blackburn was put on notice that a vehicle was approaching. The learned judge relied solely on the sound of an engine referred to by two of Mrs. Blackburn's witnesses – Ms. Tessa Andrews and Mr. Piankhi Touissant - to conclude that she herself was put on notice of the approach of Mr. Bristol's car. The evidence reveals that Ms. Tessa Andrews was sitting in Mrs. Blackburn's car when she heard the sound of an engine. As the car started to turn she saw Mr. Bristol's car. Mr. Piankhi Toussaint clearly, from a different position, heard it differently. He heard the sound as Mrs. Blackburn approached the entrance to the mall while crossing the road. But it is noteworthy that he describes her crossing the road slowly. Mr. Toussaint also said he heard a quick horn sound. Mr. Haynes, QC submitted, and I agree, that the fact that Mrs. Blackburn appeared

not to have heard what two of her witnesses heard from two different positions, should properly weigh with the judge, who, as a tribunal of fact, was entitled to weigh that evidence in coming to her conclusion. I cannot therefore conclude that the trial judge erred in her conclusion.

Ground 7 – Finding on a Case Not Pleaded

[37] Mr. Delzin opened the appeal with a ground that did not form part of the original grounds of appeal. This ground of appeal which was raised orally was to the effect that the judge found for Mr. Bristol on the basis of a case that was not put forward by him as a matter of fact, was not pleaded by him and accordingly was not open to the judge. This ground bore the brunt of his oral submissions.

[38] Mr. Delzin referred to various aspects of the pleadings and evidence and complained that the learned judge made a judgment on Mrs. Blackburn's case that she was negligent and in effect determined an alternative case. Mr. Delzin argued that there are two diametrically opposed cases, each alleging a different position of the vehicles and stated that Mr. Bristol has put in issue the question as to where the collision occurred. He is putting the vehicle in a different position from that of the appellant, Mrs. Blackburn. Mr. Delzin referred to paragraph 4 of the reply and defence to counterclaim which stated: "further or in the alternative the collision was caused wholly or in part by the negligence of the Defendant as set out in paragraph 4 of the Claimant's Statement of Claim …"[24] and contended that the learned judge did not question the alternative claim in relation to the position of the cars. Mr. Delzin argued that the alternative claim is not true.

[39] Mr. Delzin contended that the learned judge had to make a determination as to where the accident occurred and could not hold for Mr. Bristol because he pleaded a different case. Mr. Delzin submitted that if one wishes to rely on an alternative case, it must be pleaded. If you rely purely on your version of facts to establish contributory negligence you are bound by it and the court cannot find an

[24] Record of appeal, bundle no. 1, tab 7A, p 11.

alternative scenario that there is contributory negligence on the appellant's case. The claimant's evidence on its own was not supported. In support of his argument, Mr. Delzin referred to the case of **Faunch v O' Donoghue and another**.[25]

[40] For his part, Mr. Haynes submitted that the trial judge took Mrs. Blackburn's case at its highest and made a finding of negligence. Further, it was not unreasonable not to make a finding as to the point of impact and that the lack of such finding was immaterial. Mrs. Blackburn turned across Mr. Bristol's path. The trial judge took her judgment from the best case of the respondent.

[41] In considering Mr. Delzin's submissions, it is necessary to examine **Faunch v O' Donoghue and another** as well as certain aspects of the pleaded case. In **Faunch** there was a road traffic accident involving two vehicles. In the first decision in **Faunch**,[26] Lord Justice Tomlinson was faced with a renewed application for permission to appeal against a judgment of a recorder. His Lordship granted permission to appeal. At paragraph 18, he rightly stated that the trial process ought not ordinarily to reach a conclusion which has never been canvassed during the trial and on the implications of which neither the lay witnesses nor the expert witnesses have had an opportunity to comment, nor indeed the parties to marshal their arguments. In the actual appeal,[27] Lord Justice Clarke stated that the most critical question that the recorder had to decide was which car was occupying the middle lane immediately prior to the accident. At the hearing, two scenarios were in play; scenario one and scenario two. The recorder however decided the case on a third scenario which was inconsistent with scenario one and which was not canvassed with any witness. At paragraph 14, Lord Justice Clarke said:

> "Mr. Mark Laprell for the first Defendant, now the Appellant, submits that the judge has fallen into error. It was neither right nor fair for him to decide the case based on scenario three when that was not consistent

[25] [2013] EWCA Civ 896; and [2013] EWCA Civ 1698.
[26] [2013] EWCA Civ 896.
[27] Faunch v O' Donoghue and another [2013] EWCA Civ 1698.

> with either scenario one or two; when scenario three was never canvassed with any witness; and when the Recorder has based himself, at least in part, on the answer he thinks Mr Natt [an expert witness] would have given to a question which he was not asked."

[42] Flowing from that Lord Justice Clarke correctly stated at paragraph 15:

> "I agree. It is, of course, generally speaking, open to a judge to conclude that a road traffic accident happened in a different way to that put forward by the witnesses, but in a case such as this where the trial has been conducted by reference to two scenarios as to each of which expert evidence has been adduced and without the third scenario, which has a marked difference from scenario one, having been raised or suggested, it seems to me that the judge was bound before reaching a conclusion based upon it at the very least to indicate that he was minded to reach a conclusion on this new basis and invite submissions. In all probability, he would then have been asked to entertain further evidence which, it seems to me, he would have been bound to do. In those circumstances, the proceedings have miscarried."

[43] One cannot take issue with the principle enunciated in **Faunch** and the courts' decision therein, given the prevailing facts and circumstances. In my judgment, however, the situation in **Faunch** is a far cry from what is obtained in the present case and **Faunch** is easily distinguishable on the facts. In **Faunch**, it was accepted that the point of collision was in the middle lane, but neither the expert evidence nor the tyre marks could of themselves determine which car was in which lane prior to the accident and in particular, whether one was on the nearside and one in the middle or one in the middle and one on the off side before the collision occurred. In **Faunch**, two issues were of importance in determining what happened. The first was the point of collision; that is to say where on the ground the collision occurred. The second was the point of impact between the Vauxhall and the Ford and the direction of travel of the Vauxhall at that moment. In the present appeal, the court was not taxed with the issues which arose in **Faunch**. It was accepted by all that the accident occurred in Mr. Bristol's lane. The fact that it was a head-on or collinear collision was agreed by both experts. While it is true that the trial judge did not make a finding as to the point of impact, the evidence is that Mrs. Blackburn turned across the path of Mr. Bristol. In the circumstances, the absence of a finding as to the point of impact was not very material. I do not

consider this to be a case where the judge's conclusion was based on an alternative scenario or was not supported by the evidence. This ground of appeal also fails.

[44] It must be borne in mind, and as Lady Justice Arden reminds us in **Sohal v Suri and another**,[28] that a judge does not have to make a finding on every disputed item of evidence or every matter in issue in the trial. In general, a judge is only obliged to make findings on key matters which he needs to resolve before coming to his conclusions. Likewise, there is no obligation on the judge to make findings if, after having considered the matter conscientiously, he forms the view that it is not possible to make a particular finding. At paragraph 9, Her Ladyship stated:

> "If the judge drew some inferences from the evidence that are liable to be set aside on appeal, that would not necessarily mean that the whole of the judgment should be set aside. It would only be set aside if either that inference was an essential link in the chain of reasoning or if the inference was so intertwined into the "rope" of the judge's finding viewed collectively that it could no longer bear the weight of the conclusion".

[45] At this stage, it would be instructive to briefly refer to the pleadings. Paragraph 4 of the statement of claim states that the collision occurred as Mrs. Blackburn drove towards Mr. Bristol's car from the opposite direction and was caused by her negligence. The particulars of negligence pleaded by Mr. Bristol are that Mrs. Blackburn: drove on the wrong side of the road thereby collided with him; failed to keep any or any proper lookout or to have any or sufficient regard for other traffic, particularly oncoming traffic on the road; failed to give any or any proper warning of her approach or of her intention to drive on the wrong side of the road; failed to stop, slow down, to swerve or in any other way so to manage or control her car as to avoid the collision; failed to heed the presence of the claimant's motor car on the road; drove at a speed which was excessive in the circumstances; attempted to turn across a major road onto a minor road when it was unsafe to do so. By reason of Mrs. Blackburn's said negligence he suffered loss and damage.

[28] [2012] EWCA Civ 1064, at paras. 6 and 32.

[46] In the defence and counterclaim[29] Mrs. Blackburn denies paragraph 4 of the statement of claim and the particulars of negligence and states that the collision was caused solely by the negligent and reckless driving of Mr. Bristol. Particulars of negligence alleged are that Mr. Bristol: drove at an excessive speed; failed to keep any or any proper lookout or to have any or any sufficient regard for oncoming traffic turning right, into the entrance of the mall and for traffic preceding his vehicle around a blind corner; failed to observe or heed the 'slow down vehicles exiting ahead' placed on the defendant side of the road before the Excel Plaza entrance and exit. In the reply and defence to counterclaim, it is denied that the accident was caused or contributed to by the actions of Mr. Bristol. Further, each and every particular of negligence is denied and in particular that Mr. Bristol was driving at an excessive speed. Paragraph 4 alleges that further or in the alternative the collision was caused wholly or in part by the negligence of Mrs. Blackburn, as set out in paragraph 4 of Mr. Bristol's statement of claim.

[47] "The burden of proving causation rests with the claimant in almost all instances. The claimant must adduce evidence that it is more likely than not that the wrongful conduct of the defendant in fact resulted in the damage of which he complains."[30] It is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established. The burden remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendants. In **Henderson v Henry E Jenkins and Sons and Evans**[31] Lord Pearson stated:

> "In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. This is the issue throughout the trial and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on the balance of probabilities that the accident was caused by negligence on

[29] Record of appeal, tab 7A, at p. 7.
[30] Clerk and Lindsell on Torts (21st edn., Sweet & Maxwell 2006), para. 2-07.
[31] [1970] AC 282 at page 301.

the part of the defendants and if he is not so satisfied the plaintiff's action fails."

[48] There is nothing in the judgment that is so erroneous so as to warrant appellate interference, as the conclusions reached by the judge could be fairly reached on the evidence. While the appeal is partly based on Mr. Cupid's conclusion that Mr. Bristol was speeding and seeks to have this Court overturn the trial judge on that basis, the trial judge, however, found the evidence otherwise and this Court ought not to interfere. There being no evidence of contributory negligence on Mr. Bristol's part, the learned trial judge came to the correct conclusion, in all the circumstances.

Order

[49] I would therefore dismiss the appeal with costs to the respondent in the sum of $24,500.00 representing 2/3 of the prescribed costs of $36,750.00 awarded by the judge in the court below.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal

I concur.

Sydney Bennett, QC
Justice of Appeal [Ag.]