EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCVAP2013/0033

BETWEEN:

MICHAEL FRANCOIS

Appellant

and

RYAN RICHARDS

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Alban John for the Appellant
Ms. Cathisha Williams and Ms. Hazel Hopkin for the Respondent

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2017: April 7;
2018: June 1.

Civil appeal — Negligence — Personal injury — Contributory negligence — Apportionment of liability — Whether the trial judge erred in assessment of damages for pain and suffering and loss of amenities

On 18th January 2008, the respondent alighted from his motor omnibus parked on the right side of the Westerhall/Petite Bacaye road and attempted to cross over to the left side of the road. In attempting to cross, he was struck by a motor vehicle driven by the appellant. As a result of the accident, the respondent sustained injuries.

The respondent instituted proceedings against the appellant for damages for personal injuries resulting from the alleged negligence of the appellant in driving too fast and failing to exercise due care and attention. The appellant denied negligence on his part and

alleged that it was the respondent who was negligent in attempting to cross the road at a time when it was not safe to do so.

The trial judge found that the appellant was negligent since he breached his duty of care to drive at a speed that was safe in the circumstances and his duty of care to manage his vehicle to avoid the collision. She also found that, had the respondent exercised a greater duty of care, he would have seen the appellant's approaching vehicle and that he should, therefore, bear some responsibility for his actions in recklessly alighting from the bus almost in the middle of the road. The trial judge determined that both the appellant and the respondent contributed to the accident and were both liable. The trial judge made an award of $862.90 for special damages, general damages of $80,000 for pain and suffering, and $60,000 for loss of amenities, with the appellant being ordered to pay 70% of these amounts.

Dissatisfied with the decision of the trial judge, the appellant appealed to this Court. He submitted that the trial judge erred in finding that the accident was caused by his negligence and that she erred in the apportionment of liability. The respondent cross appealed against the decision of the trial judge contending that the appellant should be held 100% liable for the accident, and/or that the award of general damages for pain and suffering and loss of amenities should be increased.

The issues for this Court's determination are: (1) whether the trial judge erred in finding that the accident was caused by the negligence of the appellant; (2) whether the trial judge erred in finding that the respondent contributed by his own negligence to the accident and the resulting injuries; (3) whether the trial judge erred in her apportionment of 70% of the liability to the appellant and 30% to the respondent; and (4) whether the trial judge erred in her assessment of damages for pain and suffering and loss of amenities.

Held: dismissing the appeal and the counter appeal and ordering that each party shall bear his own costs in the appeal, that:

1. An appellate court should only interfere with a trial judge's conclusions on primary facts, or the inferences which she draws from the facts, if the judge misdirected herself in law or if the appeal court is satisfied on the evidence that the judge was plainly wrong. In the present case, there was ample evidence on the basis of which the trial judge could have made the finding of negligence by the appellant. The trial judge found that the appellant was driving at an excessive speed and that he was negligent since he breached his duty of care to drive at a speed that was safe in the circumstances, and his duty to manage his vehicle to avoid the collision. The finding of negligence by the trial judge was not based on the speed with which the appellant was driving, but on his breach of the duty of care to drive at a speed and in a manner that was safe. Therefore, the trial judge was entitled on the evidence to have made the findings of fact and the inferences that she made. Accordingly, there is no basis for this Court to interfere with the judge's determination on the issue of negligence.

   Watt v Thomas [1947] AC 484 applied; Grealis v Opuni [2003] EWCA Civ 177 applied.

2. The guiding principle in proving contributory negligence is whether the respondent by his acts or omissions contributed to his injuries, in the sense that he failed to take reasonable care for his own safety, taking into account (as he must) that other users of the road are likely to be negligent. Contributory negligence does not involve any breach of duty owed by the claimant to the defendant. The trial judge therefore approached the issue of contributory negligence incorrectly by focusing on the duty of care. She was plainly wrong in making the determination she made on the basis on which she made it and, as a result, her finding on the issue can be interfered with by this Court. However, having regard to the evidence, inasmuch as the trial judge took the wrong route to her destination, she did arrive at the correct destination that the respondent was contributorily negligent in causing the accident and his resulting injuries.

   Watt v Thomas [1947] AC 484 applied; Alphonso v Ramnath (1997) 56 WIR 184 applied.

3. The trial judge erred in failing to give reasons for her apportionment of liability between the parties. As a result, the issue of apportionment of liability fell to this Court to be properly determined. On the facts, although the primary cause of the accident was the appellant's negligence, the respondent did display a sufficient want of care for his own safety to share in the responsibility for the accident and, the apportionment of liability by the trial judge of 70% to the appellant and 30% to the respondent was just and equitable.

4. The assessment of general damages, particularly for pain, suffering and loss of amenities, which cannot be monetarily measured, is a matter within the discretion of the trial judge. The burden on the appellant, therefore, who invites a court of appeal to interfere with a judge's assessment of general damages, particularly for a head of damages which cannot be monetarily measured, is a very heavy one. Before an appellate court can be justified in interfering with a discretionary order of a trial judge, the court must first determine that the trial judge failed to apply the relevant principles and take cognizance of comparable awards and that the trial judge made an award which was outside the range of awards which could reasonably have been made on the facts of the case and was therefore manifestly wrong. In the present case, the trial judge outlined and applied principles applicable to the determination of awards for pain and suffering and loss of amenities and reviewed several cases to find 'comparables' for the making of an award for pain and suffering and loss of amenities. There is no basis, therefore, for interfering with the award made by the trial judge.

   Steadroy Matthews v Garna O'Neal BVIHCVAP2015/0019 (delivered on 16th January 2018, unreported) applied; CCCA Limited v Julius Jeffrey SVGHCVAP2003/0010 (delivered on 2nd March 2004, unreported) applied.

JUDGMENT

[1] MICHEL JA: On the night of Friday, 18th January 2008, the respondent (Ryan Richards) alighted from his motor omnibus parked on the right side of the Westerhall/Petite Bacaye road and attempted to cross over to the left side of the road. In attempting to do so, the respondent was accidentally struck by a motor vehicle being driven by the appellant (Michael Francois) travelling on the left side of the Westerhall/Petite Bacaye road. As a result of the accident, the respondent (who was 34 years old at the time) sustained the following injuries:

(1) displaced comminuted fracture mid shaft left femur;
(2) skin traction to the left lower limb;
(3) soft tissue injuries to shoulders and left arm and closed comminuted;
(4) permanent scars to shoulders and left arm;
(5) permanent limb and deformity to the femur uniting with some angulation and shortening.

[2] The respondent was hospitalized for 14 weeks and discharged with permanent scars on his shoulders and left arm and a shortening of his left leg. As a result of his injuries, he will be unable to run again or lift loads heavier than 30 pounds. The respondent resumed his occupation as a driver after 6 months.

[3] The respondent (the claimant in the court below) instituted proceedings against the appellant (the defendant in the court below) for damages for personal injuries resulting from the alleged negligence of the appellant in driving too fast and failing to exercise due care and attention. The appellant denied negligence on his part and alleged that it was the respondent who was negligent in attempting to cross the road at a time when it was not safe to do so.

[4] In a written judgment delivered on 7th November 2013, the trial judge found that the appellant was driving far in excess of the speed limit of 30–35 miles per hour and was speeding. She found that he was negligent since he had a duty of care

to drive at a speed that was safe in the circumstances and that he failed to do so, and he had a duty to manage his vehicle to avoid the collision and that he failed to do so. The trial judge, however, held that the respondent could not be absolved from any responsibility for the accident since, as a user of the road who knew that he was exiting the bus, not at the side of the road but almost in the middle, he too had a duty of care, given his clear line of visibility, to act prudently. The judge found that, by exiting the bus almost in the middle of the road, the respondent acted recklessly. She found that, had the respondent exercised a greater duty of care, he would have seen the appellant's approaching vehicle, but he failed to do so and he too must bear some responsibility for his act of recklessly alighting from the bus almost in the middle of the road. The trial judge accordingly determined that both the appellant and the respondent contributed to the accident and were both liable, with 70% liability to the appellant and 30% to the respondent.

[5] The trial judge made an award of $862.90 for special damages, and general damages of $80,000 for pain and suffering and $60,000 for loss of amenities, with the appellant being ordered to pay 70% of these amounts and 70% of the costs.

[6] By notice of appeal filed on 13th December 2013, the appellant appealed on five stated grounds of appeal and sought an order that the judge's apportionment of liability be reversed and 75% liability be attributed to the respondent and 25% to the appellant, or such other apportionment as the court deemed just.

[7] By counter notice of appeal filed on 30th December 2013, the respondent cross appealed on eight stated grounds of appeal and sought orders that the appellant be held 100% liable for the accident and/or that the awards of $80,000 as general damages for pain and suffering and $60,000 for loss of amenities be increased.

[8] The appellant filed skeleton arguments in support of his appeal and in opposition to the counter appeal on 27th February 2017, whilst the respondent filed skeleton arguments in opposition to the appeal and in support of his counter appeal on 30th

March 2017.

Issues for Determination

[9] Based on the notice of appeal, the counter notice of appeal, the skeleton arguments of the parties and the oral submissions by their counsel before this Court, there are four issues which can be identified for determination in this appeal. The first issue is whether the trial judge erred in the finding of fact which she made that the accident was caused by the negligence of the appellant. The second issue is whether the judge erred in the finding of fact which she made that the respondent contributed by his own negligence to the accident and the resulting injuries. The third issue is whether the judge erred in her apportionment of 70% of the liability to the appellant and 30% to the respondent. The fourth issue is whether the judge erred in her assessment of damages for pain and suffering and loss of amenities at $80,000 and $60,000 respectively.

[10] The first two issues to be determined by this Court arise from findings of fact made by the trial judge, whilst the other two issues arise from the exercise of judicial discretion by the judge.

[11] Based on the well-established principles espoused in several cases, the most celebrated of which is the English case of Watt v Thomas,[1] an appellate court should only interfere with a trial judge's conclusions on primary facts, or the inferences which she draws from the facts, if the judge misdirected herself in law or the appeal court is satisfied on the evidence that the judge was plainly wrong.

Appellant's Negligence

[12] In the present case, there was ample evidence on the basis of which the trial judge could have made the finding of negligence by the appellant in causing the accident which occurred on 18th January 2008 and which resulted in significant injury to the respondent. There was evidence that the appellant was driving at an excessive

[1] [1947] AC 484.

speed. The judge found that this was substantiated by the impact of the collision on the appellant's vehicle (damages to the bonnet and windscreen); the nature and extent of the injuries sustained by the respondent (which are itemized in paragraph 1 above); and the point of stoppage of the appellant's vehicle after the impact (approximately 40 feet). Based on this evidence, the judge stated that she had "no hesitation in finding that the [appellant] was negligent since he had a duty of care to drive at a speed that was safe in the circumstances and he failed to do so" and "a duty to manage his vehicle to avoid the collision and he failed to do so".[2]

[13] The trial judge was entitled on the evidence to have made the findings of fact that she made and to draw the inferences that she drew from them and to determine that the accident was caused by the negligence of the appellant, and there is no basis for this Court to interfere with the judge's determination of this issue.

[14] The appellant's ground of appeal and submission thereon that "the learned judge having cited law for the proposition that speeding of itself is not evidence of negligence, then appears to have gone on directly to hold the [appellant] negligent for the reason only that he was speeding and driving in excess of the speed limit at the time of the accident", would – if the statement was accurate – amount to a misdirection in law by the trial judge. The statement, however, is not accurate. The trial judge having made a finding (at paragraph 16 of the judgment) that the appellant "was driving far in excess of 30–35 mph and speeding", then went on (at paragraph 17) to quote from the judgment of the English Court of Appeal in the case of Grealis v Opuni[3] that:

> "Although it does not necessarily follow that negligence is to be imputed to a driver who breaks the speed limit, there is no doubt that evidence of the speed limit being broken may provide evidence of negligence."

[2] Paragraph 18 of the judgment.
[3] [2003] EWCA Civ 177.

The trial judge then concluded (at paragraph 18) that the appellant was negligent, since he breached his duty of care to drive at a speed that was safe in the circumstances and his duty to manage his vehicle to avoid the collision. The finding of negligence by the trial judge was therefore not based on the speed with which the appellant was driving, but on his breach of the duty of care to drive at a speed and in a manner that was safe.

Contributory Negligence

[15] On the issue of contributory negligence, the appellant submitted that the trial judge approached the issue incorrectly by focusing on the parties' duty of care to each other, instead of on the lack of care by the injured party (the respondent in this case) for his own care. On the same issue, the respondent submitted that the trial judge's findings with respect to the respondent's contributory negligence amount to an error in law because she failed to apply the relevant principles on contributory negligence. The respondent submitted too that, contrary to the judge's reasoning, contributory negligence does not depend on duty of care. Both parties cited Alphonso v Ramnath[4] as authority for their submissions.

[16] I agree with the submissions of both parties to the effect that the trial judge approached the issue of contributory negligence incorrectly by focusing on duty of care. In fact, the trial judge said at paragraph 20 of her judgment that:

> "the Claimant cannot be absolved from any responsibility for this accident since … he too had a duty of care … to act prudently."

[17] The trial judge also stated, in paragraph 20 that:

> "Even if the defendant was speeding, if the Claimant had exercised a greater duty of care he would have seen the Defendant's approaching vehicle, but he failed to do so and, in the circumstances, he too must bear some responsibility for his actions …"

[4] (1997) 56 WIR 184.

[18] In the case of Alphonso v Ramnath, decided by this Court in 1997, Satrohan Singh JA stated what he referred to as "the guiding principle in proving contributory negligence" as follows:

> "Whether the respondent by his acts or omissions contributed to his injuries, in the sense that he failed to take reasonable care for his own safety taking into account, as he must, that other users of the road are likely to be negligent."[5]

[19] Satrohan Singh JA further stated that:

> "Contributory negligence does not depend on duty of care, it does depend on foreseeability."[6]

[20] I find that a definition of contributory negligence contained in a textbook entitled "Commonwealth Caribbean Tort Law"[7] by Gilbert Kodilinye is apt, particularly on the facts of the present case. At page 63 of the text, the author states:

> "Contributory negligence is basically carelessness on the part of the plaintiff which combines with the defendant's negligence or breach of duty in bringing about the plaintiff's damage. In many cases, the plaintiff's negligence will have been a contributing cause of the accident which led to the damage, for example, where he steps into the road without keeping a proper lookout and is struck by a car being negligently driven by the defendant …"

[21] The author goes on to state that:

> "Contributory negligence does not involve any breach of duty owed by the plaintiff to the defendant, for it does not necessarily connote activity fraught with undue risk to others, but rather failure on the part of the person injured to take reasonable care of himself in his own interests."

[22] It is clear, therefore, that the trial judge erred in the approach that she took in making the determination that there was contributory negligence by the respondent in causing the accident which occurred and the injuries which he sustained as a result. In the circumstances, the judge was plainly wrong in making the determination that she made on the basis on which she made it and her finding on this issue can therefore be interfered with by this Court.

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[5] (1997) 56 WIR 184, p. 188.
[6] ibid, p. 187.
[7] Kodilinye G, Commonwealth Caribbean Tort Law, 4th edn, (Routledge 2003), p. 63.

[23] The error by the trial judge puts this Court in a position to make its own finding, based on the evidence led in the court below, whether the respondent contributed by his own negligence to the accident occurring and the injuries resulting. My own view though is that, inasmuch as the judge took the wrong route to her destination, she did arrive at the correct destination that the respondent was contributorily negligent in causing the accident and the injuries which he sustained as a result. The evidence of this is that, as found by the trial judge, the respondent alighted from his bus parked on the right side of the road and attempted to cross over to the left side of the road without first making sure that it was safe to do so at that time. In so doing, the respondent contributed to the occurrence of the accident and the injuries which he sustained as a result. In the words of Satrohan Singh JA in Alphonso v Ramnath, in addressing the finding made by the trial judge in that case on contributory negligence:

> "Therefore, even though the judge might have approached the issue on the wrong legal premise, no injustice was done to the appellants."[8]

[24] The other two issues to be determined by this Court arise from the exercise of discretion by the trial judge. The approach of an appellate court to a determination made by a trial judge in the exercise of a judicial discretion is now well established and need not be repeated here. Besides, the applicable principles are touched on in paragraph 36 of this judgment.

Apportionment of Liability

[25] On the issue of the apportionment of liability on the basis of a finding by the court that the appellant caused the accident by his negligence and the respondent contributed to the loss by his own want of care, both parties submitted that the trial judge erred in failing to give reasons for her apportionment of contribution and was therefore wrong in her allocation of 70% liability to the appellant and 30% to the respondent. The appellant's submission is that the respondent should be adjudged to be 100% liable or apportioned 75% of the liability, with the appellant

[8] ibid, p. 188.

being adjudged not to be liable at all or liable only as to 25% of the loss. The respondent's submission is that the appellant should be adjudged to be 100% liable or, alternatively, that the award of $80,000 for pain and suffering and $60,000 for loss of amenities should be increased so as to be reflective of a much higher award pursuant to the 70% liability attributable to the appellant.

[26] Both parties challenged the judge's apportionment of liability for the accident and each submitted that the other should be adjudged to be 100% liable for the accident. This, of course, is inconsistent with the judge's finding, which I have affirmed, that the accident was caused by the negligence of the appellant and that the respondent contributed to the occurrence of the accident and the resulting loss. The alternative submission by the respondent of increasing the amount of the damages award so that the quantum of his 70% share of it will be increased is not one that can be justified in law and the submission, and the ground of appeal which it supports, will be treated only as an appeal against the quantum of the damages award, which will be addressed later as the fourth issue for determination in this appeal.

[27] On the issue of the apportionment, as on the previous issue, I agree with the submissions of both parties to the effect that the trial judge erred in failing to give reasons for her apportionment of liability between the parties. Again, as with the previous issue, the result of the trial judge's error is that it falls to this Court to do what should have been properly done by the underlying court, which on this occasion is the apportionment of liability between the parties.

[28] The finding by the trial judge, with which I agree, that the accident was caused by the negligence of the appellant, but that the respondent contributed by his own want of care to the occurrence of the accident and the injuries sustained, places the primary liability for the accident at the feet of the appellant. He would therefore start off with at least 51% of the liability for the accident, rendering nugatory his submission that the respondent should be allocated (whether) 75% or 100% of the

liability. The fact of the respondent contributing by his own want of care to the occurrence of the accident would fix him with at least 1% of the liability, thereby rendering nugatory his submission that the appellant should be allocated 100% of the liability. The task of this Court, therefore, is to determine the appropriate percentage of liability to be allocated to the respondent, between 1% and 49%, and the resultant percentage of liability to be allocated to the appellant, between 51% and 99%, for which determination one must return to the facts of the case.

[29] On the facts as found by the judge who saw and heard the witnesses as they gave evidence in court, the appellant was speeding along a major road at night, with vehicles parked on one side of the road (Side A) and the occupants of the parked vehicles being on the opposite side of the road (Side B) to which they must have crossed as pedestrians. The road upon which the appellant was travelling was 18 feet wide, the respondent's vehicle, which had also been parked on Side A, occupied 6 feet of the road at the point of impact, leaving some 12 feet for the appellant to proceed unhindered along the road, with 5 out of the 12 feet taken up by the width of his vehicle. The appellant, however, struck the respondent as he attempted to cross the road (from Side A to Side B); the point of impact being in the middle of the road. So, apart from driving at an excessive speed, given the nature of the road, the amount of traffic that would have been expected on the road at the time of the accident (having regard to the fact that it was 9 o'clock on a Friday night in an area where patrons go to purchase barbecued chicken), the appellant was also driving in the middle of the road and failed to manage his vehicle to avoid colliding with a pedestrian who was crossing the road at the time.

[30] Also on the facts as found by the trial judge, the respondent parked his vehicle on the right side of the road and attempted to cross over to the left side, without first making sure that it was safe to do so, because if he had done so he would at least have noticed the approaching lights of the appellant's vehicle and awaited the passage of the vehicle before attempting to cross. So, although the primary cause of the accident was the appellant's negligence, the respondent did display a

sufficient want of care for his own safety to share in the responsibility for the accident.

[31] In these circumstances, I find that the apportionment of liability by the trial judge of 70% to the appellant and 30% to the respondent was 'just and equitable'.

Damages for Pain and Suffering and Loss of Amenities

[32] The fourth and final issue for determination by this Court is whether the trial judge erred in her assessment of damages for pain and suffering and loss of amenities at $80,000 and $60,000 respectively. The issue arises from the respondent's counter notice of appeal, in which he states as his seventh ground of appeal:

> "That the learned trial judge erred in law in the global award for the assessment of damages for pain and suffering and loss of amenities in the sum of $80,000 and $60,000 respectively …"

[33] In his aforesaid counter notice of appeal, the respondent sought an order that:

> "the global award of damages of $80,000 for pain and suffering and $60,000 for loss of amenities be increased to $150,000 and $100,000 respectively."

[34] In a judgment which I wrote and delivered earlier this year in the case of Steadroy **Matthews v Garna O'Neal**,[9] I addressed a similar issue on an appeal from the decision of a master on an assessment of damages for pain and suffering and loss of amenities, and I can do no better here than repeat in the next two paragraphs what I wrote then in paragraphs 52 and 53 of that judgment.

[35] The assessment of general damages, particularly for pain, suffering and loss of amenities, which cannot be monetarily measured, is a matter within the discretion of the trial judge. The burden on an appellant, therefore, who invites a court of appeal to interfere with a judge's assessment of general damages, and I would stress, particularly for a head of damages which cannot be monetarily measured, is a very heavy one.

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[9] BVIHCVAP2015/0019 (delivered on 16th January 2018, unreported).

[36] Whilst I agree with the view expressed by Gordon JA in delivering the judgment of this Court in the case CCAA Limited v Julius Jeffrey[10] that the discretion of a trial judge in making awards of general damages in personal injury cases "must be curtailed by attempting to achieve consistency in awards within the jurisdiction of this Court", I do not consider that this derogates from the established principle that before an appellate court can be justified in interfering with a discretionary order of a trial judge in circumstances such as the present, the court must first determine that the trial judge failed to apply the relevant principles and take cognizance of comparable awards and that he made an award which was outside the range of awards which could reasonably have been made on the facts and circumstances of the case, and was therefore manifestly wrong. This is so even if each member of the appellate court might have made a higher or lower award if the discretion was his or hers to exercise.

[37] In paragraphs 24 to 35 of the judgment in the underlying case, the trial judge outlined and applied the principles applicable to the determination of awards for pain and suffering and loss of amenities and reviewed several cases from the High Courts in the Eastern Caribbean to find 'comparables' for the making of an award for pain and suffering and loss of amenities in this case. At the conclusion of her review the trial judge stated that, in her judgment, "a fair award for pain and suffering for the claimant is in the sum of $80,000 and $60,000 for loss of amenities". I find no basis, therefore, for this Court to interfere with the award made by the trial judge by way of general damages for pain and suffering and loss of amenities.

Conclusion

[38] The appellant canvassed this Court on two of the four issues determined in this appeal - one is that the trial judge erred in finding as a fact that the accident was caused by the negligence of the appellant and the other is that she erred in the

[10] SVGHCVAP2003/0010 (delivered on 2nd March 2004, unreported).

apportionment of 70% liability to the appellant and 30% to the respondent. He did not prevail on either of them.

[39] The respondent canvassed the Court on three of the four issues determined in the appeal – the first is that the trial judge erred in finding as a fact that the respondent contributed by his own negligence to the occurrence of the accident; the second is that she erred in her apportionment of 70% liability to the appellant and 30% to the respondent; and the third is that she erred in her assessment of damages for pain and suffering and loss of amenities at $80,000 and $60,000. He did not prevail on any of them.

[40] Neither of the parties prevailed on any of the issues which they canvassed before this Court; I will accordingly dismiss the appeal and counter appeal and order that the parties shall bear their own costs in this appeal.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar