

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

SLUHCVP2024/0012

BETWEEN:

LISA VERNITA ALEXANDER

Appellant

and

NEIL NOEL

Respondent

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mde. Esco Henry
The Hon. Mr. Gerard St.C Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Sahleem B.K. Charles for the appellant
Ms. Maureen John-Xavier for the respondent

2025: January 15;
March 10.

Civil appeal – Personal injury – Contributory negligence – Appeal against apportionment of liability and damages awarded – Whether the learned trial judge erred in taking into account or having given too little weight to the appellant’s evidence as to the manner in which the collision occurred and/or the negligence of the respondent when apportioning liability for the collision at 75% to the appellant and 25% to the respondent – Whether the learned trial judge erred when exercising her discretion at paragraphs 54 and 55 of the judgment and by failing to give sufficient reason for her apportionment of liability – Whether the learned trial judge erred in her exercise of discretion by failing to take into account or giving too little weight to the appellant’s evidence as to the manner in which the collision occurred – Whether the learned trial judge erred in finding that the appellant had agreed that after the impact her vehicle travelled a further 78 feet before hitting a rock and a further 20 feet before coming to a stop on the side of the major road in the gutter and that the appellant was therefore negligent in causing the collision – Whether the learned judge erred in exercising her

discretion in her finding and award of damages against the appellant on the respondent's claim

On 3rd April 2017, at about 9:30am on the Micoud/Vieux-Fort Highway at the intersection near Up the Line Micoud in Saint Lucia, a vehicular collision took place between the appellant Ms. Alexander (defendant/counterclaimant in the court below) driving a Chevrolet motor car and the respondent, Mr. Noel (the claimant/counter-defendant in the court below) riding a XTL Super Bicycle. At the time of the collision, the respondent was emerging from a minor road at the junction of Up the Line at Micoud on to a major road, the Micoud/Vieux Fort Highway. The appellant was driving her motor vehicle in a southerly direction on said highway towards the town of Vieux Fort. In those circumstances, the appellant had the right of way and therefore it was the duty of the respondent when emerging from the minor road on to the major road to ensure that it was safe to do so. As a result of the collision, the respondent suffered serious injuries requiring extensive treatment and a prolonged period of recovery. The collision was investigated by the police and a Traffic Accident Report ("TAR") prepared by the investigating officer, which included certain measurements taken at the scene of the collision some time thereafter in the presence of the appellant and the respondent.

The respondent brought a claim in the High Court against the appellant for damages including general and special damages, interests and costs on 20th January 2020, some 2 years and 10 months after the collision occurred. The respondent pleaded, *inter alia*, that the appellant caused the collision by 'failing to keep to her left and proper side of the [main] road' at the junction and thereby colliding with the respondent. It was pleaded that the collision was caused solely as a result of the appellant's negligence or in the alternative, the appellant contributed to the accident.

The appellant filed a defence and counterclaim on 31st March 2020. She averred that the collision occurred solely as a result of the negligence of the respondent. It was pleaded that she was driving along the said highway when she saw an individual riding in a standing position a bicycle, which suddenly emerged from the minor road into her path without stopping at the junction. She attempted to avoid the accident by pulling right but the respondent continued into the path of her vehicle thereby colliding with it.

In his reply to the appellant's defence, the respondent further pleaded that the appellant was negligent because having seen him from about 36 feet and 3 inches away before the collision as borne out by the measurements in the TAR, she had every opportunity to avoid him and had she taken proper care and slowed down, she would have had all reasonable chance of avoiding the collision. Furthermore, she ought to have foreseen that the possibility existed that the respondent could have entered into the major road and that the circumstances which existed at the time made it obligatory that the appellant exercised extra care and drive cautiously.

In her reply to the defence to the counterclaim, the appellant averred that the respondent was liable for causing the accident as he failed to come to a halt at the junction and

injudiciously emerged on to the main road thereby colliding with the front left side of her vehicle.

The trial of this action took place on 28th October 2021 and judgment was delivered on 28th March 2024. During the trial, both parties relied evidentially on certain of the measurements in the TAR, while they each sought to call into question certain other measurements therein when being cross-examined. The learned judge found that both parties had breached their respective duties of care and were liable in negligence for the collision between their vehicles. The judge held that as a reasonable prudent driver, the appellant, by swerving her motor car from her left side to the right side of the major road to avoid colliding with the respondent on his bicycle, should have anticipated that this move would have placed her squarely in the path of the respondent if he did not stop and that a prudent driver would have kept to the left. The learned trial judge also found that the appellant, having not used her brakes or attempted to stop her motor vehicle to avoid the collision, had driven in breach of the duty of care to drive at a speed and in a manner that was safe in the circumstances. The learned trial judge also found that at the time of the collision, the respondent rode his bicycle in a negligent manner in breach of his duty of care and was therefore partially to blame for the collision. It was held that the respondent owed a duty of care to ensure that it was safe to enter on to the highway from the minor road, and by his own admission he had agreed that he could not see the main road due to the obstruction of bushes and his evidence was that having driven into the said junction he had the right of way and thought that he could make it. She also found that his emergence onto the highway did injudiciously create an obstruction to the appellant's oncoming vehicle.

On the issue of contributory negligence, the learned judge found that the appellant should bear the greater portion of liability for the collision which she apportioned at 75% to the appellant and 25% to the respondent. The learned trial judge therefore awarded the respondent damages in the total sum of \$68,362.50 plus interest at the rate of 6% per annum and prescribed costs discounted by 25%. The appellant was awarded on her counterclaim special damages in the sum of \$11,500.00 with interest at a rate of 6% per annum and prescribed costs discounted by 75%.

The appellant being dissatisfied with the finding of liability on her party, and alternatively with the greater apportionment of liability, appealed the judgment by notice of appeal filed on 10th May 2024. The appellant summarised her grounds of appeal into 5 issues, namely: (1) the failure by the trial judge to take into account or giving too little weight to the appellant's evidence as to the manner in which the collision occurred and/or the negligence of the respondent when apportioning liability for the collision at 75% to the appellant and 25% to the respondent; (2) the trial judge's error when exercising her discretion at paragraphs [54] and [55] of the judgment and by failing to give sufficient reason for her apportionment of liability; (3) the learned trial judge erred in the exercise of discretion at paragraph [40] of the judgment by failing to take into account or giving too little weight to the appellant's evidence as to the manner in which the collision occurred when she made certain specific findings that (i) the appellant should have anticipated that moving to the right would have placed her squarely in the respondent's path if he did not stop; (ii) a prudent driver would have kept to the left; and (iii) the appellant was negligent in having failed in her duty of care to keep a proper look out for other road users and failing to take prudent and reasonable actions to

avert the collision; (4) the trial judge erred in the exercise of her discretion at paragraphs [15] and [41] of the judgment when she found that the appellant had agreed that after the impact her vehicle travelled a further 78 feet before hitting a rock and a further 20 feet before coming to a stop on the side of the major road in the gutter, and that the appellant was therefore negligent in causing the collision; and (5) the trial judge erred in exercising her discretion in her finding and award of damages against the appellant on the respondent's claim, as the appellant ought not, in the circumstances, to have been found negligent or contributorily negligent in causing the collision and so ought not to be liable to pay damages to the respondent. The respondent did not appeal the judge's finding of negligence and award of damages made against him.

Held: allowing the appeal in part, setting aside the decision of the court below on the apportionment of liability and the award of damages, and making the orders at paragraphs [92] and [94] of this judgment, that;

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 satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses is not sufficient to explain or justify the trial judge's conclusion. Similarly, an appeal against the exercise of judicial discretion will not be allowed unless the appellate court is satisfied that: (i) in the exercise of the discretion the judge erred in principle either by failing to take into account or giving too little weight or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (ii) as a result of the error or the degree of error the judge's decision exceeded the generous ambit within which reasonable disagreement is possible such that the decision may be said to be clearly or blatantly wrong.

Michael Francois v Ryan Richards GDAHCVAP2013/0033 (delivered 1st June 2018, unreported) followed; **Watt (or Thomas) v Thomas** [1947] All ER 582 applied; **Dufour and Others v Helenair Corporation Ltd and Others** (1996) 52 WIR 188 applied.

2. The trial judge's findings at paragraphs [40] and [41] of the judgment that the appellant had, in the circumstances, driven her motor vehicle below the standard of a prudent driver and was accordingly negligent was correct as a conclusion of partial or contributory liability for the collision, and ought not to be disturbed or set aside by this Court based upon the principles in **Watt (or Thomas) v Thomas** and **Yates Associates**. This finding of negligence is well supported by certain factual evidence and findings made by the learned trial judge at paragraphs [40] and [41], the relevant measurements in the TAR, and the evidence and admissions of the appellant when she was cross-examined at the trial including that when she first saw the respondent riding his bicycle from the minor road into the junction with the main road he was some 36 feet away. In making these findings the learned judge committed no errors of fact or law. It follows therefore that there is no discernable basis entitling this

Court to disturb or set the learned judge's finding of negligence on the part of the appellant.

3. As a matter of principle, a driver cannot be held liable for the collision with another vehicle solely on the basis that in reacting to a sudden emergency he/she committed an error of judgment in the driving or management of the vehicle. Although the learned trial judge did avert to the appellant's evidence that she swerved to the right to avoid the sudden emergence of the respondent from the minor road at the junction, the learned judge failed to properly consider and to analyse this evidence and to make a determination as to whether the appellant's evasive action was reasonable or amounted to an error of judgment on her part having been confronted by a sudden emergence.

Simpson v Peat [1952] AER 447 applied.

4. The learned judge failed to consider whether the appellant having been confronted by the sudden emergence by the respondent riding his bicycle from the minor road into the junction whereby the respondent had injudiciously created an obstruction to the appellant, and the respondent by his own admission proceeding without stopping across the junction having decided 'if you are already in the road you can make it', meant that the respondent was either wholly to blame for the collision or ought to bear the greater proportion of the liability for the collision, as was the case for the appellant at the trial.
5. In deciding a case of negligent driving, a court must consider all aspects of a driver's driving leading up to and at the time of the collision in determining whether aspects of his/her driving was below the standard of a prudent driver in the circumstances, and therefore, in breach of their duty of care to other road users, including the driver of the other vehicle involved in the collision. This is because all drivers of motor vehicles owe in law a duty of care to other users of the road, including pedestrians, within the area of potential danger and who the driver objectively ought to foresee the risk of injury or damage to if he/she did not exercise reasonable care. The exercise of reasonable care would require the driver to always keep a proper look out when driving so as to determine whether it is safe to proceed or not to proceed, to drive at a speed and in a manner such that he/she would be able to stop their motor vehicle when confronted with the presence of another vehicle or cyclist or pedestrian road-user, to sound the horn to alert other road users of his/her approaching vehicle, to slow down or to bring the vehicle to a stop so as to avoid colliding with another vehicle or other road user, and to take such other prudent and reasonable evasive action to avoid a collision.

Cheryl Edward, Administratrix of the Estate of Janique Lewis v Ethel Mills
Claim No. ANUHCv1998/168 followed.

6. The learned judge was entitled at paragraph [41] of the judgment to draw from the measurements recorded in the TAR and from the appellant's responses to questions about them in cross-examination, the reasonable inference that the

appellant's vehicle was travelling at a speed and in a manner that was not safe in the circumstances when approaching such a busy junction. The inference drawn by the judge is not that the appellant was driving her motor vehicle in excess of the applicable speed-limit in that area, but that she was driving the vehicle at a speed and in a manner that was unsafe in the circumstances and in breach of the duty of care to other road users, including those likely to emerge from the minor road across the junction and onto the highway, as the learned judge found at paragraph [41]. These factors lead to the finding that the appellant did not slow down or drive cautiously when approaching the busy junction and was driving at a speed such that she could not stop her vehicle before colliding with the respondent, having first seen him 36 feet away.

7. An appellate court will generally only interfere with a finding of contributory negligence where there has been a substantial misjudgment of the factual basis of apportionment by the trial judge. In such circumstances, the appellate court may reassess the apportionment if it is satisfied that the assessment made by the judge was plainly incorrect. During the hearing of the appeal, counsel for the respondent conceded that the judge's finding that the appellant should bear the greater proportion of the liability for the collision assessed at 75%, ought not to be maintained. In this Court's view this was a proper concession having regard to: (i) the principles applicable to cases where a driver is presented with a sudden emergency and may have taken collision avoidance measures which can be said with hindsight to be an error of judgment for which no finding of negligent driving can be attached; (ii) the absence of any consideration of these factors and applicable principles by the learned judge which led her into serious error; (iii) mindful of the way in which the appellant in evidence explained how the collision occurred; (iv) the admissions made by the respondent during cross-examination; and (v) the evidence to be gleaned and the inferences of negligence to be drawn against the appellant from certain of the measurements in the TAR. Accordingly, the learned judge's conclusions on apportionment of liability cannot stand and must be set aside, and this Court conduct its own assessment afresh.

Melvina Fret-Henry v Tortola Concrete Ltd. [2002] EWCA Civ 605 applied; **Attorney General v Collingford John et al** SVGHC VAP2017/0006 (delivered 20th September 2018, unreported) followed.

8. While the learned judge provided at paragraphs [53] and [54] of the judgment some factual bases upon which she sought to ground her conclusion that the appellant ought to bear the greater proportion of liability for the collision which she apportioned at paragraph [55] at 75% to the appellant and 25% to the respondent, the learned judge erred in that she failed to fully consider the appellant's narrative and the import of it as to how the collision occurred. The learned judge further erred by failing to give sufficient weight to the evidence that the respondent failed to exercise the necessary degree of care for his own safety when entering from the minor road proceeding across the junction, in that he failed to keep a proper look out, and he ought reasonably to have foreseen that vehicles would be coming north along the busy highway. Weighing all these factors, the respondent must bear the greater

responsibility and hence the greater proportion of the liability for the collision, as conceded by counsel for the respondent. In conducting its own assessment, the Court is satisfied that the proper apportionment of liability for the collision is 75% to the respondent and 25% to the appellant. The learned judge's decision on apportionment is therefore set aside. Accordingly, the sums awarded for special damages to both parties and general damages to the respondent only, must be discounted by 75% in case of the award for the respondent and by 25% in case of the award for the appellant.

JUDGMENT

[1] **FARARA JA [AG.]:** This is an appeal from the judgment and orders of a learned judge of the High Court of Justice dated 28th March 2024 by which the learned judge found the appellant, Ms. Alexander, the owner and driver of a Chevrolet motor car registration number PC4284 ("the motor vehicle") and the respondent, Mr. Noel, the owner and rider of a XTL Super Bicycle ("the bicycle") both liable in negligence for the collision between their respective means of conveyance. The collision took place on 3rd April 2017 at about 9:30am on the Micoud/Vieux-Fort Highway at the intersection near Up the Line in Micoud, in Saint Lucia. In finding both drivers/parties liable, the learned judge, on the issue of contributory negligence, found that the appellant should bear the greater proportion of liability for the collision which she apportioned at 75% to the appellant (defendant/counterclaimant) and 25% to the respondent (claimant). Based her finding on contributory negligence and degree of apportionment, the learned judge awarded the respondent on his claim damages in the total sum of \$68,362.50 (special damages in the sum of \$4,612.50 and general damages of \$63,750.00), plus interest at the rate of 6% per annum from the date of judgment until payment in full, and prescribed costs discounted by 25%. The judge also awarded the appellant on her counterclaim special damages in the sum of \$11,500.00 (after deduction of his 75% contribution), together with interest on the said sum at the rate of 6% per annum from the date of judgment to date of payment, and prescribed costs on the said award, discounted by 75%.

[2] At the time of the collision, the respondent (the cyclist) was riding his bicycle emerging from a minor road at the junction of Up the Line at Micoud on to a major

road, the Micoud/Vieux-Fort Highway. The appellant was driving her motor vehicle in a southerly direction on the said major road towards the town of Vieux-Fort. It is indisputable that in those circumstances, the appellant had the right of way, and therefore it was the duty of the respondent when emerging from the minor road on to the major road to ensure that it was safe to do so and that he would be able to complete that maneuver safely and without presenting an obstruction to traffic on the major road, including the appellant's oncoming motor vehicle.

- [3] The collision occurred in April 2017. The respondent, who suffered serious injuries from the collision requiring extensive treatment and a prolonged period of recovery, brought his claim in the High Court against the appellant for damages on 20th January 2020, approximately 2 years and 10 months later. The trial took place before the learned judge in October and November 2021 and judgment was delivered some 2 years and 4 months later on 28th March 2024. At the trial the respondent and the appellant were the only witnesses to give evidence. However, a Traffic Accident Report dated 15th August 2028 ("the TAR") produced by the Royal St. Lucia Police Force was admitted into evidence and relied upon by both parties. The contents of the TAR, more specifically the recorded measurements made by the investigating police officer at the scene, is referred to and dealt with by the learned judge in her judgment. I shall return to the TAR later in this decision when dealing with certain of the grounds of appeal challenging findings of fact made by the learned judge.

Claim and Counterclaim

- [4] The respondent commenced his claim against the appellant on 20th January 2020 for damages, including general and special damages, interest and costs. In the statement of claim filed at the same time the respondent, as claimant, pleaded that the appellant, as defendant, caused the collision by failing 'to keep to her left and proper side of the road' at the junction and thereby colliding with the respondent. In describing how the collision occurred, the respondent pleaded he was riding his bicycle 'travelling along the Micoud/Vieux Fort Highway, Micoud [the major road] in

the northerly direction on the left and proper side of the road', when the appellant travelling in her motor vehicle along the said major road in a southerly direction towards Vieux-Fort 'failed to keep to its left or proper side of the road at the intersection of [the said highway]. As a result, her motor car collided with [the bicycle] which was driven/ridden by [the respondent] on the Micoud/Vieux-Fort Highway.' It was pleaded that the collision was caused solely as a result of the appellant's negligence and whose motor vehicle 'collided with the [respondent's bicycle]. Alternatively, [the appellant] contributed to the accident.

[5] The respondent in his statement of claim pleaded several particulars of negligence against the appellant. These are set out at paragraph 3 and included, notably, the following (in summary form):

- (i) driving too fast in all the circumstances;
- (ii) failing to keep a proper look out;
- (iii) failing to observe and/or heed the presence of traffic signs and exercising care and attention when approaching a major junction;
- (iv) failing to keep to her left and proper side of the highway and carelessly and injudiciously driving onto the path of the respondent;
- (v) failing to observe and/or heed the presence and/or approach of the respondent "who had maneuvered his [bicycle] at the material time on his left or proper side of the road and riding on the major road";
- (vi) driving into the path of the respondent;
- (vii) failing to heed the presence or approach of the respondent's oncoming bicycle;
- (viii) failing to apply her brakes in time or at all so as to avoid colliding with the respondent's oncoming bicycle;
- (ix) failing to sound her horn in time or at all;
- (x) failing to stop, to slow down, to swerve, or so to manage or control her motor vehicle as to avoid the collision.

- [6] The medical and other evidence adduced at the trial showed the respondent was knocked unconscious by the impact of the collision and sustained serious injuries as a result thereof. He was taken to the Emergency Department of the St. Jude Hospital immediately after the collision. Among the injuries he sustained, he was found to have suffered a traumatic brain injury and was unconscious for 3 days, hospitalized for 1 week, and unable to move around for about 2 months after the collision. He claimed special damages of \$11,310.00, general damages for the injuries and pain and suffering, interest at the rate of 6% per annum pursuant to Article 1009A of the **Civil Code** of Saint Lucia,¹ and costs.
- [7] The appellant filed her defence and counterclaim on 31st March 2020. She stoutly disputed the respondent's pleading as to the manner in which the collision occurred, asserting that it was solely as a result of the negligence of the respondent. In describing the way in which the collision did occur, the appellant pleaded that 'she was driving her motor vehicle along the said highway when she saw an individual mounted upon, and riding in a standing position a bicycle which suddenly emerged from a minor road into her path without stopping at the junction. The said junction was to the left of the [appellant's] vehicle. The [appellant] tried to avoid the accident by pulling right but the [respondent] continued into the path of her vehicle thereby colliding with it.' The appellant went on to plead that upon the collision the respondent fell onto her vehicle and then onto the road; and that 'in an effort to avoid driving over [the respondent], continued to pull her vehicle to the right thereby causing her to collide into a nearby wall on the opposite side of the road causing her to suffer loss and damage as a result'.
- [8] The appellant counterclaimed for the value of her motor vehicle which, as a result of the damage sustained, had been assessed by an authorized auto garage company as a 'complete loss/write off' in the amount of \$34,000.00 plus towing fees and survey fees, in the total sum of \$35,412.00. This counterclaim was brought on the basis that 'the accident was caused wholly or alternatively in part by the

¹ Chap 4.01 of the Revised Laws of Saint Lucia.

negligence of [the respondent] who failed to stop at the junction of the minor road with the major road thereby causing the collision which resulted in loss and damage suffered by [the appellant].” The pleaded particulars of negligence in the counterclaim are (as summarised):

- (i) failing to act prudently by emerging from a minor road onto a major road without stopping;
- (ii) failing to keep a proper look out;
- (iii) driving his bicycle into the path of the appellant’s vehicle;
- (iv) failing to stop, slow down, swerve, brake or to manage the bicycle so as to avoid the collision;
- (v) failing to have sufficient regard or any regard for other motor vehicles reasonably on the said road at the said time;
- (vi) failing to give any indication whatsoever of his approach;
- (vii) riding his bicycle at a speed which was excessive having regards to the conditions prevailing on the said road at the said time.

[9] The respondent filed on 1st April 2020 an extensive reply and defence to counterclaim. I shall not attempt to cover most of what was therein pleaded. Suffice it to be said that in the “reply” section, the respondent strongly disputed the appellant’s version of how the collision took place and her denial that he had completed his maneuver in crossing from the minor road into the major road and was on his proper left side of the major road when he was struck by the appellant in her motor vehicle. In particular, the respondent referred to the TAR pointing to the measurements therein which showed conclusively that the point of impact was on his left side (or the appellant’s right or wrong side) of the highway. He denied that he had injudiciously entered the major road creating an obstruction to the appellant’s vehicle and causing the collision. In this respect, the respondent pleaded that when he arrived at the junction and before entering from the minor road into the major road, he stopped, looked up and down, and listened as to whether any vehicle was approaching.² However, the respondent in his reply admitted that his ‘visibility to

² Respondent’s reply and defence to counterclaim Paragraph 3.

some extent was obstructed as a result of tall overhanging trees and bushes on the left side of the road that [the appellant] was driving, which was his right side of the road heading north (towards Castries).'

[10] In his reply, the respondent denied that he was mounted or standing while riding his bicycle crossing the junction from the minor road into the major road. He pleaded the appellant was negligent because having seen the respondent about 36' 3' away before the collision, she had every opportunity to avoid the collision, and had she taken proper care and slowed down, she would have had all reasonable chance of avoiding the collision. Furthermore, 'she ought to have foreseen that the possibility existed that [the respondent] could have entered into the major road³; and that the circumstances which existed at the time' made it obligatory that [the appellant] exercised extra care and drive cautiously', which circumstances are particularized in paragraphs 4.5.1 to 4.5.12 of the Reply.

[11] The respondent also pleaded in his reply that the appellant was driving her motor car at the time at an excessive speed, as she was 'unable to stop immediately although driving up an incline', asserting her driving at an excessive speed was also to be deduced from the measurement in the TAR that her vehicle moved a further 37' 10" after the impact, colliding with a rock and then stopping a further 78".⁴ Accordingly, the respondent maintained that the collision was caused solely by the negligence of the appellant and vehemently denied the counterclaim for damages. He denied the particulars of negligence pleaded in the defence and counterclaim, and averred that he had sounded the bell on his bicycle, stopped, slowed down, swerved, braked and managed his bicycle but could not avoid the collision. However, he admitted that he had "rushed to cross the road (after assessing it was safe to do so), given that he was crossing the highway."⁵

[12] The appellant filed a reply to defence to counterclaim on 28th April 2020. She too relied on certain matters in the TAR as 'clearly establishing that [the respondent]

³ Respondent's reply and defence to counterclaim, paragraph 4.3.

⁴ Respondent's reply and defence to counterclaim, paragraph 4.7.

⁵ Respondent's reply and defence to counterclaim, paragraph 12.6.

was liable for causing the accident as he failed to come to a halt at the junction and injudiciously emerged on to the highroad thereby colliding with the front left side of [the appellant's] vehicle.' In the said report the investigating officer stated that '[the respondent] was driving without due care and attention and determined that he ought to be prosecuted for this offence.' This latter statement in the officer's TRA is of no moment. It matters not evidentially what opinion or conclusion the investigating officer or the police arrived at with regard to the standard of driving of one or other person involved in a motor vehicle collision. This holds true with regard to this statement in the TAR as to the respondent's riding of his bicycle, unless he was charged and convicted of the offence of riding/driving without due care and attention or some such driving offence stemming from the collision in question. The appellant also denied that the TAR states that she saw the respondent from about 36' 3" before the collision. In fact, the exact statement recorded in the TAR on this aspect is: 'POI [point of impact] to where driver of PC4284 saw cyclist: 36' 3".' The difficulty with the evidential value of this statement, unless admitted by the appellant during the trial, is that the TAR does not record what statement, if any, either driver gave to the police when investigating the collision (which took place some time thereafter at the scene because of the injuries to the respondent).

- [13] Finally, on the pleaded cases, the appellant pleaded that at all material times she was 'driving within the speed limit'.⁶ However, the question is not whether a party was driving within what is the legal speed limit at the time of a collision, but whether they were driving at an excessive speed in all the prevailing circumstances at the time in the area where the collision occurred, such that they could apply brake and slow down or stop their motor vehicle within the distance at which they saw the other driver or ought to have seen the other driver, or whether this was a case where the appellant was confronted with a sudden and unexpected danger by the emergence of the respondent on his bicycle from a minor road across the junction and into the major road where the appellant was lawfully traversing in her motor vehicle.

⁶ Appellant's reply to defence to counterclaim, paragraph 7.

- [14] Both the appellant and respondent filed and served witness statements (respondent on 23/02/2021, and appellant on 12/03/2021) in which they each, essentially, recounted their respective and competing versions of how the collision occurred as was set out in their discreet pleadings. These witness statements constituted their evidence in chief at the trial upon which they were each extensively cross-examined.

Judgment in the court below

- [15] The learned judge found that having seen and heard both the appellant and respondent under cross-examination, they each 'presented themselves as credible witnesses.'⁷ In considering the evidence tendered at the trial concerning the driving of the appellant, the learned judge found that the point of impact was on the right side of the major road (the highway) as set out in a TAR. This finding was based, at least in part, on the recorded measurement of the width of the road at the point of impact being 24' 10" and the measurement from the point of impact to the left side (appellant's side) of the road as 13' 1", thereby placing the point of impact to the right of the median line by 7 inches. The learned judge found that the appellant as a reasonable and prudent driver, by swerving her motor car from her correct left side to the right side of the major road to avoid colliding with the respondent and his bicycle, should have anticipated that this move would have placed her motor vehicle squarely in the path of the respondent cyclist if he, the respondent, did not stop, and that a prudent driver would have kept to the left. The learned judge also found that the appellant having not used her brakes or attempted to stop her motor vehicle when she saw the respondent cyclist some 36' 3" away, and her said vehicle having travelled from the point of impact 'a further 78 feet before hitting a rock and then a further 20 feet before coming to a stop', had driven her motor vehicle in breach of the duty of care 'to drive at a speed and in a manner that was safe in the circumstances.'⁸

⁷ Paragraph 20 of the judgment below.

⁸ Paragraphs 40 and 41 of the judgment below.

[16] However, the learned judge also found that at the time of the collision the respondent rode his bicycle in a negligent manner in breach of his duty of care and was therefore partially to blame for the collision. The learned judge held that the respondent owed a duty of care to ensure that it was safe to enter on to the highway from the minor road, and by his own admission he had agreed that he could not see the main road due to the obstruction of bushes. She found that his emergence onto the highway 'did injudiciously create an obstruction to [the appellant's] oncoming vehicle', and that he was thereby negligent and in breach of his duty of care.⁹

[17] In assessing the apportionment of liability between the appellant and respondent for the said collision and resulting damages, the learned judge considered Article 989D of the **Civil Code** of St. Lucia on the meaning of "fault" and the defence of contributory negligence. She also considered the arguments on this issue proffered by counsel for the parties in support of their respective submission that their client was either not negligence at all in their diving/riding or, alternatively, that the other party ought to bear the greater contribution for the collision. The judge's conclusions on the issue of contributory negligence and apportionment of liability are set out at paragraphs [53], [54], and [55] of the judgment.

The appeal

[18] The appellant being dissatisfied with the finding of liability on her part, and alternatively, with the greater apportionment of liability to her for the collision, and the consequential award of damages, appealed the judgment and the said findings by notice of appeal filed 10th May 2024, relying on eight grounds of appeal. These grounds of appeal were helpfully condensed into five 'issues' in the appellant's skeleton argument filed 2nd July 2024, some of which do overlap and may conveniently be dealt with together or as one issue. They are:-

Issue 1 (grounds 3 and 4) concerns the failure by the trial judge to take into account or having given too little weight to the appellant's evidence as to

⁹ Paragraph 36 of the judgment below.

the manner in which the collision occurred and/or the negligence of the respondent when apportioning liability for the collision at 75% to the appellant and 25% to the respondent.

Issue 2 (ground 5) contends that the trial judge erred when exercising her discretion at paragraphs [54] and [55] of the judgment and by failing to give sufficient reason for her apportionment of liability.

Issue 3 (ground 1) challenges the learned judge's exercise of discretion at paragraph [40] of the judgment by failing to take into account or giving too little weight to the appellant's evidence as to the manner in which the collision occurred when she made certain specific findings that (1) the appellant should have anticipated that moving to the right would have placed her squarely in the respondent's path if she did not stop; (2) a prudent driver would have kept to the left; and (3) the appellant was negligent in having failed in her duty of care to keep a proper look out for other road users and failing to take prudent and reasonable actions to avert the collision.

Issue 4 (ground 2) that the judge erred in the exercise of her discretion at paragraphs [15] and [41] of the judgment, when she found that the appellant had agreed that after the impact her vehicle travelled a further 78 feet before hitting a rock and a further 20 feet before coming to a stop on the side of the major road in the gutter, and that the appellant was therefore negligent in causing the collision.

Issue 5 (grounds 6, 7 and 8) that the learned judge erred in exercising her discretion in her finding and award of damages against the appellant on the respondent's claim, as the appellant ought not, in the circumstances, to have been found negligent or contributory negligent in causing the collision and so ought not to be liable to pay damages to the respondent.

[19] The respondent did not appeal the learned judge's findings at paragraph [46] of negligence and breach of duty of care, or the appointment of liability to him of 25% at paragraph [55] based on the judge's assessment of the degree to which his negligence contributed to the collision occurring. Accordingly, the finding that the respondent was negligent and contributed to the extent of 25% to the collision stands. The main question, therefore, in this appeal is whether the judge's finding that the appellant was negligent at all was correct or not, and if her driving of the motor vehicle was negligent and in breach of her duty of care to the respondent and other road users, whether the learned judge was correct in her apportionment of blame to the appellant at 75% or whether some lesser percentage or degree of culpability ought properly, on the evidence, to be substituted.

Appellate Interference with findings of fact

[20] The appeal challenges, in the main, the judge's assessment of the evidence and findings of fact, leading to her finding of negligence and apportionment of liability against the appellant. This brings into focus the principles governing the proper approach to appellate consideration of interference with a trial judge's finding of fact, including the truthfulness of witnesses. It is well-established that an appellate court should only interfere with a trial judge's conclusions on primary facts, or inferences which he draws from the facts, if the judge misdirected himself in law or the appeal court is satisfied on the evidence that the judge was plainly wrong. **Michael Francois v Ryan Richards**¹⁰ per Michel JA at paragraph [11] and **Yates Associated Construction Company Ltd v Blue Sand Investments Limited**.¹¹ These well-established principles find authoritative exposition in many decisions of the English courts and this Court. These principles are derived from this statement of the law by Lord Thankerton in the seminal case of **Watt (or Thomas) v Thomas**:¹²

“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,

¹⁰ GDAHCVAP2013/0033 (delivered 1st June 2018, unreported).

¹¹ [2016] ECSCJ No. 62.

¹² [1947] All ER 582.

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.

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.

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 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.”

- [21] Underpinning the above guiding principles, is the cardinal precept that a trial judge possesses a unique and distinct advantage, one which any appellate court does not, and cannot from reviewing the written record of the evidence and proceedings at the trial. A judge presiding over a trial without a jury is the judge of both the facts and the law. The trial judge occupies, for the entire duration of the trial, a unique and advantageous position and vantage point, one which cannot be equated or duplicated or fully appreciated by even the most thorough review by the members of the appellate court of the transcript of the trial proceedings. **Jtrust Asia PTE Ltd v Mitsuji Konoshita and another**.¹³ This distinct advantage arises from the trial judge having the benefit of seeing and hearing the witnesses on both sides give their evidence and, most importantly, that evidence being tested by cross examination. In particular, observing each witness's response to questions posed to them challenging or disputing their evidence or some aspect of it, or the accuracy of their recollections, and testing their evidence against that of other factual witnesses concerning the same matters of relevance. This is the essence of the adversarial system of justice under which our courts operate and function in a democratic society. It is of critical importance and underpins the role of our first instance courts as the triers of the facts, of the demeanour and credibility of the witnesses (per Lord Pearce in **Onassis v Vergottis**,¹⁴ and ultimately, based upon

¹³ [2021] ECSCJ No. 571.

¹⁴ 1968] 2 Lloyd's Rep. 403).

their findings of fact and the applicable law, their exercise of discretion and determination of the core issues in the litigation, including issues such as negligence, contributory negligence and damages.

- [22] Likewise, there is much learning in the case law as to the proper approach of an appellate court when dealing with appeals from findings of fact by a trial judge in the exercise of his/her discretion. In this respect, this restatement of the guiding principles by Flossiac CJ in the seminal case of **Dufour and Others v Helenair Corporation Ltd and Others**¹⁵ is locus classicus in this jurisdiction:

“An appeal against the exercise of judicial discretion will not be allowed unless the appellate court is satisfied (1) that in the exercise of the discretion the judge erred in principle either by failing to take into account or giving too little weight or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of error, in principle the judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and, accordingly, the decision may be said to be clearly wrong.”

- [23] It is with the above-stated principles in mind that I approach this appeal and this Court’s consideration of the grounds of appeal. These grounds challenge the correctness and seek to have set aside the trial judge’s findings of fact in holding that on the day of the collision, the appellant drove her motor vehicle negligently or in a manner which fell below the standard of a prudent driver, and thereby failed to prevent the collision of her motor vehicle with the respondent’s bicycle at the intersection of Up the Line, Micoud and the Micoud/Vieu-Fort Highway. They also challenge and seek an order setting aside the judge’s finding that, in the circumstances, the appellant was 75% to blame for the said collision and resulting injuries and damages suffered by the respondent. This approach to the determination of the appeal must also take into account that there has been no appeal by the respondent of the judge’s factual and legal finding that the respondent rode his bicycle in a negligent manner and in breach of his duty of care, in that his emergence on to the main road from the minor road “did injudiciously create an

¹⁵ (1996) 52 WIR 188.

obstruction' to the appellant's oncoming motor vehicle, leading to the learned judge's assessment of his liability for the collision at 25 %.

- [24] In addressing these issues, I will summarize and consider the respective arguments of the appellant and respondent first on the issue of the finding of negligence against the appellant (grounds 3.1, 3.2, 3.6, and 3.7); second, on the issue of contributory negligence and the learned judge's apportionment of liability between the appellant and respondent (grounds 3.3, 3.4, 3.5); and finally, if necessary, on the judge's assessment and award of damages (ground 3.8)

Issue 1: Appellant's Negligence - grounds 3.1,3.2, 3.6 and 3.7

Appellant's Submissions

- [25] The appellant's principal contention was that the learned judge erred in finding that she was negligent in law in the driving of her motor vehicle on 3rd April 2017 and causing (to the extent of 75%) the collision with the respondent's bicycle. It is submitted that in reaching this conclusion on liability the learned judge committed certain errors. In particular, that she erred in fact and in law in:

“(a) failing to take into account or gave too little weight to the appellant's evidence as to the manner in which the collision had occurred: more specifically, in finding at paragraph [40] of the judgment that the appellant –

(i) should have anticipated that moving or steering her vehicle to the right after she saw the respondent on his bicycle, would have placed her squarely in the respondent's path if he did not stop;

(ii) that a prudent driver would have kept to the left; and

(iii) that the appellant was negligent in having failed in her duty of care to keep a proper look out for other road users and failing to take prudent and reasonable actions to avert the collision.

(b) finding at paragraphs [15] and [41] of the judgment when she found that the appellant had agreed when giving evidence at the trial that after the impact between the two means of conveyance, her vehicle travelled a further 78 feet before hitting a rock, and thereafter a further 20 feet coming to a stop on the side of the main road in a gutter, and therefore she was negligent in causing the collision;

- (c) finding the appellant was negligent in causing the collision; and
- (d) finding that the respondent was not the sole cause of the collision, despite her finding that the respondent was negligent due to his emergence on to the main roadway which injudiciously created an obstruction to the appellant's oncoming vehicle."

[26] As regards the appellant's evidence as to how the collision occurred, the appellant points to certain extracts from her witness statement and from her evidence on oath at the trial¹⁶The appellant also points to certain extracts from the evidence of the respondents and certain passages from the judgment of the court below at paragraphs 4.2 a to d.

[27] It was submitted that the evidence of both parties reveal that the respondent was in the process of riding across the front of the appellant's vehicle at the time of the collision from a minor road on to a major road; that the respondent did not see the appellant's vehicle upon his exit from the minor road; that the respondent suddenly emerged from the minor road on to the major road; that the respondent thought he had the right of way since he was already in the road; that due to the sudden emergency created by the respondent the appellant could do nothing else but swerve her vehicle to the right in an effort to avoid the respondent colliding with her vehicle; that the appellant could do nothing else but to keep on driving to the right in an effort to prevent her vehicle from driving over the respondent who had fallen to the road after he collided with her vehicle; that the respondent hit the left front of the appellant's vehicle and if he was riding on his left and proper side of the road facing Castries as alleged he would have collided with the front right of the appellant's vehicle, not the front left; and that there was no evidence that the appellant was speeding.¹⁷

[28] The appellant also submitted that the learned judge erred in the sense and to the extent justifying appellate review set out in **Watt v Thomas and Dufour v Helenair**

¹⁶ Appellant's skeleton arguments paragraphs 4.2.5 a to d.

¹⁷ Appellant's skeleton arguments paragraph 4.2.5

(above), entitling this Court to set aside the judge's finding of negligent driving on the part of the appellant and substituting a finding that the respondent was fully to blame for the collision and resulting damage to the appellant's motor vehicle. It is therefore submitted that the learned judge failed to take into account or gave too little weight to relevant factors as to how the collision occurred (from both the evidence of the appellant and respondent), resulting in an error or degree of error which led to her decision on liability exceeding the generous ambit within which reasonable disagreement is possible such that her said decision was clearly or blatantly bad.¹⁸

[29] The appellant submitted further that this evidence entirely undermines and renders bad in law the judge's finding of contributory negligence on the part of the appellant and her apportionment to her of 75% blame for the cause of the collision at paragraph 4.2.7. I shall consider the issue of the judge's approach to and finding of contributory negligence on the part of the appellant later in this judgment.

[30] Specifically regarding ground 3.1, the appellant challenges the correctness of certain findings made by the learned trial judge, specifically at paragraphs [15], [40], [41], and [46]. At paragraph [15] the learned judge stated that the appellant had agreed during the trial that 'after the impact her vehicle continued for 78 feet before hitting a rock, and a further 20 feet before coming to a stop on the side of the main road in the gutter.'

[31] At paragraph [40] of the judgment, the learned judge specifically disagrees with and does not accept the submission by counsel for the appellant that she was not negligent in her driving of the motor vehicle at the time of the collision and, accordingly, the claim ought to be dismissed. The learned judge goes on to refer to certain pieces of evidence given at the trial, including the evidence from the appellant herself as to the what she did to attempt to avoid colliding into the respondent, the point of impact, and the appellant's standard of driving on the day

¹⁸ Appellant's skeleton arguments paragraph 4.2.6

in question being below the standard of the prudent driver in the circumstances and in breach of the appellant's duty of care. Because of the importance of the judge's findings to the outcome of this appeal against her finding of negligence in the appellant, I set it out in full:

"I however disagree with this submission that there was no negligence on [the appellant's] part. [The appellant] accepted that she collided with [the respondent] on the right side of the road. The Traffic Accident Report also places the point of impact on the right side of the road. It was [the appellant's] evidence that she swerved based on the sudden emergence of [the respondent] from the junction in an attempt to avoid [the respondent] but her actions were unsuccessful and there was indeed a collision. [The appellant's] actions cannot be said to have been that of a reasonable and prudent driver. She said she swerved to the right **because she thought [the respondent] having seen her, would have stopped. However, to my mind, she should have anticipated that moving to the right would have placed her squarely in [the respondent's] path if he did not stop.** A prudent driver would have kept to the left. In the circumstances, I find that [the appellant] was negligent having failed in her duty of care to keep a proper look out for other road users and failing to take prudent and reasonable actions to avert the collision." (emphasis added)

[32] At paragraph [41], the learned judge made further findings of negligence and breach of duty of care against the appellant, specifically regarding her failure to apply brakes or to stop her vehicle, the distance the vehicle travelled after the impact, and regarding the speed at which she was driving in the circumstances. Paragraph [41] reads:

"[The appellant] further agreed that prior to [the] collision she only slowed a bit on the hill. However, upon collision and thereafter she never used her brakes or attempted to come to a stop. As a result, her vehicle travelled a further 78 feet before hitting a rock and then a further 20 feet before coming to a stop. I therefore find that [the appellant] was negligent in that she breached her duty of care to drive at a speed and in a manner that was safe in the circumstances."

[33] It was submitted that the learned judge erred in these findings, particularly at paragraph [40], which findings are blatantly wrong and diametrically opposed to the

evidence brought forth at trial wherein the appellant's evidence clearly gave the reasons why she swerved to the right.).¹⁹ Accordingly, the appellant submitted:

“as the transcript of the evidence reveal that the appellant did not say that she thought [the respondent] having seen her, would have stopped. Rather, her reasoning has always been that due to the respondent's sudden emergence onto her vehicle there was nothing else she could have done but to swing the vehicle to the right to avoid colliding with the respondent and to continue driving to the right to ensure that he was not run over by the vehicle. Therefore, the learned judge's finding that the appellant should have anticipated that moving to the right would have placed her squarely in the respondent's path is erroneous, as the appellant's evidence clearly shows that due to the respondent's sudden emergence on to her vehicle there was nothing else she could have done but to swing the vehicle to the right to avoid colliding with the respondent and to continue driving to the right to ensure that he was not ran over by her vehicle. All the evidence in this matter points to the fact that the respondent had not yet begun riding in the left and proper lane facing Castries but rather due to his sudden emergence on to the main road from the minor road, was still to the front of the appellant's vehicle at the time of the collision.”²⁰

- [34] Specifically with regard to the challenge to the correctness of the judge's statement at paragraph [15] and findings at paragraphs [40] and [41], the appellant referred to her evidence at the trial at pages 83,84,85,99 and 100 of the transcripts (extracts at para. 4.4.2) to show that she made no such admission or agreement with the measurements in the TAR. The TAR was admitted into evidence and relied upon by both parties, each of which also sought to dispute or to take issue with certain of the measurements and specific statements in the TAR. The relevant measurements recorded in the TAR seem to be: POI to POI #2 on rock by PC4284: 78'; and, Point of ran-off to POI #2 on rock: 21' 5". In disputing the accuracy of what the learned judge stated at paragraph [15] the appellant countered by citing the following extracts from the evidence of the appellant in answer to questions in cross-examination:

At page 83:

APPELLANT: “When he crossed the road, When I swerved instead of him stopping he kept coming towards the vehicle, which is why I kept swerving, and the more I swerve the more he drove onto the

¹⁹ Appellant's reply paragraph 1.6.

²⁰ Appellant's skeleton arguments, paragraph 4.3.1.

right hand side and that's when he, he collided with the front of the vehicle. I kept swerving further to totally avoid passing on him, because the way he, he just never stopped."

At page 84 of the transcript, is recorded (in part) that the appellant testified "When I hit the rock it sort of ... I didn't stop ... I hit the rock, and I ended up in the gutter 20 feet is ... that is very far, I did not reach 20 feet. The vehicle stopped in the gutter and all that was to avoid hitting him in the first place, because of the fact that he entered the road and he never stopped, and I, myself pulling away to avoid him."

At page 85: "If I remain on the left. You would have hit the vehicle and hurt himself ... maybe on the front door ... On the left side which is why I swerved."

And at page 99:

"MRS VAVIER: The fact that you stopped a distance of 78 feet after the impact or the collision is indicative of someone who had speed.

MS. ALEXANDER: My lady, 78 ft. is very far. Everything happened at the junction, 78 feet, no.

At page 100:

APPELLANT: Yes, I, I did act; I was in my right mind and to avoid him I had to move away I had to swerve. If I stopped, the way he was riding he would have hurt himself, so I moved away to avoid him."

- [35] The appellant submits that these extracts clearly show that she never accepted or testified that she swerved her vehicle to the right because she "thought" that the respondent would have stopped. Rather her evidence clearly showed that the respondent emerged suddenly from the minor road, she swerved her vehicle to the right to avoid him colliding with her, instead of him stopping he kept coming towards her vehicle, and that is why she kept on swerving to the right, but the more she swerved to the right the more he kept on coming riding his bicycle on to the right hand side of her vehicle which ultimately caused the collision. Regarding, the appellant's evidence at page 99 of the transcript, it is argued that she clearly had some difficulty in understanding the nine of questions that were put to her by counsel for the respondent in cross-examination, which prompted the judge to intervene for

the sake of clarity, and the appellant then clarified her evidence on the measurements (in the extract above).

[36] In these respects, it is submitted by the appellant, that the learned judge clearly misapprehended the evidence, got certain evidence wrong, erred in the exercise of her discretion, incorrectly preoccupied herself with her misapprehension of the evidence that the appellant swerved to the right because she “thought” the respondent would have stopped, and failed to give sufficient weight to the evidence of the appellant in determining the issue of liability (and apportionment). In this respect, the appellant places much reliance on the finding and dicta of this Court in **Clinton Louis v Miguel Jeffrey**.²¹ At paragraph [55] the Court states:

“Therefore, it appears that the judge incorrectly preoccupied himself with the logic of which direction the white van should have turned relative to the direction of force against it, when the appellant’s evidence made it clear that it was the loss of control of his vehicle, upon impact, that caused the white van to turn to the right...”

[37] For these reasons, the appellant submitted that in the circumstances she was not negligent in her driving, she was not the cause or major cause of the resulting collision between her vehicle and the respondent. Accordingly, this finding by the learned judge was incorrect on the evidence and clearly and blatantly wrong. It was crucial to the judge’s finding of liability in negligence against the appellant, ‘especially since the appellant at all times maintained that the only manner in which she could have driven was to swerve to the right in an attempt to avoid the respondent colliding with her due to his negligence in coming on to the highway from the minor road.’ The evidence at trial was consistent with the appellant being presented with a sudden emergence of the respondent from the minor road riding across the junction with the major road, as the learned judge found as a fact when, at paragraph [36] she made a finding of negligence against the respondent.²²

²¹ SLUHCVP2018/0010 (delivered 10th November 2021).

²² Appellant’s reply, paragraphs 1.3 and 1.4.

[38] Accordingly, it is the appellant's submission that the learned judge based her conclusion of negligence on certain incorrect statement or findings on the evidence in reasoning incorrectly to that conclusion. Moreover, it is the appellant's case that the evidence discloses that she was on the day of the collision confronted with a sudden emergency created by the respondent in his negligent riding of his bicycle emerging from the minor road onto the major road suddenly and without keeping a proper look out and ensuring that it was safe for him to do so without presenting an obstruction to uses of the main road, including the appellant, and without observing at all or in time the presence of the appellants oncoming vehicle on the said major road. Having been confronted with this sudden emergency, the appellant took reasonable evasive measures to avoid colliding with and possibly or likely running over the appellant, by swerving her vehicle to the right as the respondent continued to ride his bicycle across the junction without stopping or taking evasive action and without having observed the appellant's motor vehicle before the collision.

[39] It is the appellant's submission that the learned judge's findings and conclusions on negligence and liability are wrong and wholly unreasonable on the totality of the evidence; and was she plainly wrong in her assessment of the facts and consequently in coming to her decision that the appellant was liable in negligence. It is therefore open to this Court, on the principles of appellate review expounded in **Watt v Thomas** and **Dufour v Helenair**, to interfere with and set aside fully the learned judge's finding of negligence against the appellant, to substitute a finding that the appellant was not negligent and that, on the evidence, the sole cause of the collision was the negligence and breach of duty of care of the respondent, and to dismiss the Claim and uphold the Counterclaim.

Respondent's submissions

[40] In their submissions (both written and oral) on the appeal, the respondent posits that the grounds of appeal challenge findings of fact made by the trial judge. It is the respondent's principal submission on the finding of negligence on the part of the appellant that it cannot and ought not to be disturbed by this Court (including the

judge's apportionment of liability). The respondent submits that the learned trial judge correctly assessed the evidence adduced by both sides at trial as to the manner in which the collision took place and the operation of their respective means of conveyance on the day in question, properly took into account the measurements recorded in the TAR including that the appellant, having seen the respondent on his bicycle some 36 feet away, had wrongly and injudiciously swerved or driven her vehicle to the right, failed to apply her brakes or to stop her vehicle before colliding with the respondent, and that based on the measurements taken at the scene by the investigating police officer and recorded in the TAR and the appellant's admissions in cross-examination, the point of impact was on the appellant's right or wrong side of the main road and the appellant had driven her vehicle at a speed and in a manner that was not safe in the circumstances.

- [41] The respondent also submitted that all these were findings open to the trial judge on the evidence and ought not to be disturbed by this Court. Moreover, based upon the judge's findings of fact she had correctly determined that the appellant, in the particular circumstances of this case including at the intersection where this collision occurred, had driven her vehicle in a manner below the standard required of a prudent driver and in breach of her duty of care to other road users, including the respondent. These factors included the admitted fact that the said intersection or junction of the major and minor roads where this collision occurred was a busy and potentially dangerous junction, one which required road users to exercise great caution and heightened diligence, and to drive at a speed and in a manner whereby they can stop in time to avert colliding with a vehicle emerging from the minor road on to the major road at the said intersection. Accordingly, the respondent submits, there is no basis for this Court to disturb or to set aside the finding of breach of duty of care and of negligence on the part of the appellant; and, further, that the appellant, in all the circumstances, bore the greater responsibility and liability for the collision. For all these reasons, this appeal ought to be dismissed with costs to the respondent.

- [42] The respondent submits that it was within the ambit and discretion of the learned trial judge in assessing the evidence to determine which evidence to accept or not, and what weight she ought to give to certain pieces of evidence. This the trial judge did in coming to her findings of fact and of the appellant driving her vehicle in a negligent manner and in breach of duty. Essentially, it is submitted, the appellant's attacks on the learned judge's findings of negligence and that she gave too little weight to the evidence of the appellant, are attacks on the judge's exercise of discretion, which this Court, on well-established principles, ought not to disturb, unless it is found that the learned judge committed some error of law or of principle, or that she misapprehended the evidence or failed to take into account relevant evidence, such that it is established that her findings of liability were blatantly wrong.
- [43] The respondent submitted that paragraphs [4] and [41] must be read as a whole together with other parts of the judgment and not taken in a piecemeal manner, as the appellant has done. Thus, when the learned judge stated that the appellant had agreed that she swerved to the right because she "thought" the respondent would have seen her and stopped, this was merely the judge's understanding of the evidence which the appellant gave at the trial, and it is well accepted that the gist of the evidence may be lost in it being transcribed and later scrutinized by the appellate court.²³
- [44] In my view, this is a most strained attempt to water-down what was clearly a misapprehension of this aspect of the appellant's evidence. The transcript is clear on this, and the appellant gave no such evidence or justification for her swerving to the right. The gist of the appellant's evidence is that having been presented with the sudden emergence of the respondent on his bicycle from the minor road into the junction with the major road on which she was driving, she took evasive measures by swerving to the right to avoid colliding with and running over the respondent, but the respondent continued crossing the junction by riding his bicycle to the right in an attempt, obviously, to get on to the right or what would be his left side of the

²³ Respondent's skeleton arguments paragraph 4.2.

major road, and that he did so because he had admittedly not seen the appellant's approaching vehicle and he felt that having entered into the junction he had the right of way.

[45] The respondent goes further. He submits that in any event the important aspect of the appellant's evidence is that she did swerve to the right in an attempt to avoid the collision. This the learned judge found, was evidence of her negligence in that she ought to have simply kept on her left-hand side of the major road and, had she done so, the collision would not have occurred. Moreover, the learned judge found that she did not blow her horn, did not brake so as to slow down her vehicle or bring it to a stop to avoid colliding with the respondent, having seen the respondent some 36 feet away from the point of impact, as the TAR shows. Furthermore, the appellant accepted in cross-examination that because of the area where the collision took place and the high level of traffic in that area, anyone driving there would need to exercise some care and to anticipate that there may be vehicles coming out of the minor road onto major road. Accordingly, the respondent submits that whether the appellant swerved right because she thought the respondent would stop or simply to avoid the collision with the respondent "does not affect the [trial judge's] reasoning or assessment of the matter and the same reasoning would be applicable in either scenario.'

[46] In support of his submissions that the learned judge was correct to find on the evidence that the appellant was negligent and bore the greater responsibility for the collision, the respondent relies on certain extracts from the cross-examination of the appellant at pages 263, 264, 265, 265, 268, and 270 of the transcripts. In these extracts, the appellant agrees with the contents of the TAR. First, the respondent was cross-examined on the import of certain of the measurements in the TAR showing the width of the main road (24' 10") and the location of the point of impact being 13' 1" from the left side of the said road, thereby putting the point of impact on the right side of the road. When questioned in cross-examination regarding the point of impact being on the right side of the main road, the appellant's first response

was 'Not really, My Lady. We collided in the, in the ... more in the middle and I try to avoid him', before going on to say when pressed further by counsel: 'I would agree my Lady.' The record therefore clearly shows that appellant accepted that the point of impact was on the right side of the major road, albeit by a mere 8 inches.

[47] From these extracts, the appellant was also cross-examined regarding the measurement of 36' 3" from where she first saw the respondent to the point of impact. She responded: "That's what recorded ... but 36 feet from where I saw the driver that is not accurate, ... No, no thirty-six feet is a bit far. No, he was, he was very closer to the car." This is one area of interrogation in which the appellant seems to dispute (to some extent) not the fact that she saw the respondent on his bicycle some distance away from where the collision occurred, but that the said distance was as much as 36 feet, as recorded in the TAR. However, the appellant goes on to accept that the respondent had 'just existed the junction onto my side' of the main road when she first saw him.

[48] Next, the respondent addressed ground 2 of the appellant's appeal and paragraphs [15] and [41] of the judgment wherein the learned judge found that the appellant's vehicle had travelled 78' after the impact before hitting a rock and then a further 20 feet before coming to a stop on the side of the road in the gutter, and that these measurements were demonstrative of the appellant driving too fast in the circumstances and being negligent in causing the collision. To be clear, the learned judge at paragraph [41], having considered these measurements, found that the appellant 'had breached her duty of care to drive at a speed and in a manner that was safe in the circumstances.' In responding to this ground of appeal, the respondent submitted that the judge was correct accepting these measurements to be factually correct based on the TAR, and in her finding as to the appellant's speed and negligence leading to the collision. In relation to the former, the respondent relies on the TAR, and in relation to the latter, on extracts from the cross-examination of the appellant at page 279 lines 14-25, and page 280 lines 1-5. The essence of her evidence on these matters is that 'the impact on the rock is what stopped [her]

vehicle'; she admitted (eventually) that her vehicle did travel a distance of 78' from the point of impact before hitting the rock (as stated in the TAR); denied that her vehicle travelled a further 20' before coming to a stop; but nevertheless accepted that it "ended on the side of the road in ... sort of like the gutter."

- [49] As to ground 3.6 of the appeal, it is the respondent's submission (based on his responses to grounds 3.1 and 3.2) that the learned judge did not err when she found the appellant was negligent in causing the collision.

Analysis and Conclusions on finding appellant negligent – grounds 3.1, 3.2 and 3.6

- [50] In my considered view, the learned judge's finding at paragraphs [40] and [41] that the appellant had, in the circumstances, driven her motor vehicle below the standard of a prudent driver and was accordingly negligent was correct as a conclusion of partial liability for the collision, and ought not to be disturbed or set aside by this Court based upon the well-established principles in **Watt (or Thomas) v Thomas** and **Yates** governing appellate interference with a trial judge's findings of fact and exercise of discretion. This finding of negligence is well-supported by certain factual evidence and findings made by the learned judge at paragraphs [40] and [41], the relevant measurements in the TAR, and the evidence and admissions of the appellant herself when she was cross-examined.

- [51] In arriving at this conclusion I am also of the view that there is some merit in ground 3.1 of the appeal (judge gave too little weight to the appellant's version of how the collision occurred). However, I find no merit in ground 3.2 (disputing the finding that the appellant had agreed that her vehicle had travelled 78 feet after the collision being evidence of excessive speed and negligent driving) and, by extension, no merit in ground 3.6 (the judge erred in the exercise of her discretion in finding the appellant negligent at all).

- [52] I now set out in full paragraphs [40] and [41] of the judgment: -

[40] Ms. Alexander accepted that she collided with Mr. Noel on the right side of the road. The [TAR] also places the point of impact on the right side of the road. **It was Ms. Alexander's evidence that she swerved based on the sudden emergence of Mr. Noel from the junction in an attempt to avoid Mr. Noel but her actions were unsuccessful and there was indeed a collision. Ms. Alexander's actions cannot be said to have been that of a reasonable and prudent driver.** She said she swerved to the right because she thought Mr. Noel having seen her, would have stopped. **However, to my mind, she should have anticipated that moving to the right would have placed her squarely in Mr. Noel's path if he did not stop. A prudent driver would have kept to the left.** In the circumstances, I find that Ms. Alexander was negligent having failed in her duty of care to keep a proper look out for other road users and **failing to take prudent and reasonable steps to avert the collision.**

[41] Mr. Alexander further agreed that prior to [the] collision she only slowed a bit on the hill. However, upon collision and thereafter she never used her brakes or attempted to come to a stop. As a result, her vehicle travelled a further 78 feet before hitting a rock and then a further 20 feet before coming to a stop. I therefore find that Mr. Alexander was negligent in that she breached her duty of care **to drive at a speed and in a manner that was safe in the circumstances. (emphasis added)**

[53] By ground 3.1, the appellant contention is that the learned judge failed to give sufficient weight to her evidence as to the manner in which the collision occurred. I observe at this juncture that ground 3, if sustained by this Court even to some extent, will be of relevance to our consideration of grounds 3.3, 3.4 and 3.5 which challenge the reasonableness and correctness of the learned judge's apportionment of liability for the collision at 75% to the appellant and 25% to the respondent.

[54] In summary, the appellant's narrative as to how the collision occurred was that as the driver along the highway she had the right of way. She was confronted with what was effectively a sudden emergency by the emergence of the respondent on his bicycle from the minor road into the junction. The respondent's presence created an obstruction to the progress of her motor vehicle south along the highway and across the junction. Having been presented by the respondent with this dilemma she took immediate evasive action by swerving her motor vehicle to the right to avoid colliding with and running over the respondent, but the respondent (who by his own admission had not seen the approach of the appellant's motor vehicle), kept on

riding his bicycle across the junction towards the right side of the highway, and from his own evidence he did so as he felt, incorrectly, having entered the junction he could have made it, implicitly he could have completed this maneuver safely. The respondent did not stop and so the appellant kept turning to the right side of the highway to avoid colliding with the respondent. However, the vehicle and the bicycle nevertheless collided, causing damage to both the vehicle and the bicycle and serious injuries to the respondent.

[55] In my opinion, while at paragraph [40] the learned judge did avert to the appellant's evidence and narrative as to the manner in which the collision occurred, in particular that she swerved to the right to avoid the sudden emergence of the respondent from the minor road at the junction, the learned judge failed to properly consider and to analyse this evidence and to make a determination as to whether, the appellant having been confronted with the sudden emergence of the respondent from the minor road as the judge accepts at paragraph [46], whether properly assessed the appellant's evasive action was reasonable or amounted to an error of judgment on her part by swerving her vehicle to the right and continuing to do so as the respondent failed to come to a stop, if this was an error of judgment whether in such circumstances the appellant could as a matter of law be found liable in negligence because he made the wrong decision reacting to the respondent presenting an obstruction to the passage of her vehicle along the highway and through the junction.

[56] Furthermore, the learned judge failed to consider whether the appellant having been confronted by the sudden emergence by the respondent from the minor road into the junction, and the respondent by his own admission proceeding without stopping across the junction having decided 'if you are already in the road you can make it', meant that the respondent was either wholly to blame for the collision, as was the case for the appellant at the trial.

[57] The locus classicus case on the principles applicable to cases where a driver, through no fault of his own, is confronted with a “sudden emergency” is the decision of the Queen’s Bench Division in **Simpson v Peat**.²⁴ This dealt with an appeal from a decision of justices dismissing a charge of driving without due care and attention against a driver on finding that what the driver had done was an error of judgment. In delivering the decision of the court, Lord Goddard, CJ stated that the expression “error of judgment” ‘is not a term of art, but an expression of the vaguest possible description: ‘It can, colloquially, be used to describe either a negligent act or one which, though mistaken, is not negligent.’ He opined further (at page 449 D-E):

“Equally, because an accident does occur it does not follow that a particular person has driven either dangerously or without due care and attention. But if he has, it matters not why he did so. Suppose a driver is confronted with a sudden emergency through no fault of his own. In an endeavour to avert a collision he swerves to his right – it is shown that had he swerved to the left the accident would not have happened. That is being wise after the event, and, if the driver was, in fact, exercising the degree of care and attention which a reasonably prudent driver would exercise, he ought not to be convicted, even though another, and, perhaps, more highly skilled, driver would have acted differently.”

[58] In my judgment, having outlined (not entirely accurately) the appellant’s evidence and version of how the collision occurred between her vehicle and the respondent, the learned judge had a duty and was bound to consider the principles applicable to situations of ‘sudden emergencies’ creating errors of judgment, and the approach to be taken by a court when examining and assessing a driver’s response to a sudden emergency. This the learned judge did not do. Instead, the learned judge having incorrectly assumed that the appellant’s evidence was that she “thought” the respondent would stop, then went on to conclude that the prudent driver would have kept to the left and not swerve to the right to avoid a collision with the respondent. This failure by the learned trial judge undermines certain of the bases upon which she concluded that the appellant was negligent at paragraph [40] of the judgment, leading, in part, to her conclusion that she bore a greater proportion of liability for the collision, which she assessed at 75%. This failure on the part of the

²⁴ [1952] AER 447.

learned judge amounts to an error of law such as to entitle this Court to reassess the evidence and the learned judge's finding that the appellant 'would bear the greater proportion of liability.'²⁵

[59] It is beyond reproach that the point of impact was on the right side of the main road (albeit by a mere 8 inches), while the appellant's proper side for driving is the left. It is also clear from the evidence that the appellant saw the respondent some 36 feet away before the collision took place, but did not attempt to stop her vehicle by applying brakes. It is also clear from the evidence of the appellant herself that when she first saw the respondent, instead of staying on the left side of the main road she decided to swerve to the right to avoid hitting and running over the respondent. However, the respondent continued to ride across the junction towards the right side of the main road without stopping or slowing down. To this must also be added that it is the respondent's evidence that he did not see the appellant's car approaching when he decided to enter the junction crossing over towards the right side of the main highway, nor did he see the appellant's vehicle at any time before and up to the impact.

[60] To this must also be added the judge's finding of negligence on the part of the respondent at paragraph [46] and its significance in determining the extent to which the appellant ought to be held liable for the collision, if at all:

[46] I do not agree that Mr. Noel was the sole cause of the accident for the reasons mentioned earlier in this judgment. However, I do agree that Mr. Noel did owe a duty of care to ensure that it was safe to enter onto the highway from the minor road. **I find that Mr. Noel by his own admission agreed that he could not see the main road due to the bush. I also find that his emergence onto the roadway did injudiciously create an obstruction to Mr. Alexander's oncoming vehicle** and agree with the submission of Counsel and that Mr. Noel was negligent and in breach of his duty of care. **(emphasis added)**

[61] The learned judge incorrectly stated at paragraph [40] that the appellant had said in evidence that she had swerved to the right because she "thought" the respondent

²⁵ Paragraph 54 of the judgment below.

would have stopped, when in fact her evidence was that she swerved to the right to avoid running over the respondent. The judge then posits that the appellant should have anticipated that moving to the right would have placed her vehicle 'squarely' in the respondent's path 'if he did not stop'. This deduction takes no account of the principles applicable to an assessment of a drivers evasive measures when confronted by a "sudden emergency" situation and whether if such measures with hindsight are found to be an error of judgment, the learned judge ought to have found the appellant negligent because he did not keep to his left side of the highway, as she did at paragraph [40]. In my judgment, the appellant by swerving to the right was attempting to evade hitting and running over the respondent, with possible dire consequences to the respondent. On the principles enunciated in **Simpson v Peat** it was wrong as a matter of law and principle for the learned judge to conclude effectively that this was a bad decision for which the appellant ought to be found to have driven in a negligent and unsafe manner and in breach of his duty of care the respondent. In this respect at paragraph [40] the learned judge fell into error.

- [62] However, because as a matter of principle a driver cannot be held liable for the collision with another vehicle solely on the basis that in reacting to a sudden emergency he/she committed an error of judgment in the driving or management of the vehicle does not lead inexorably to the conclusion he/she had not driven negligently and was partially to blame for the collision. A court must also consider other aspects of the driver's driving leading up to and at the time of the collision in determining ultimately whether aspects of his/her driving was below the standard of a prudent driver in the circumstances and therefore in breach of their duty of care to other road users, including the driver of the other vehicle involved in the collision. This is because all drivers of motor vehicles owe in law a duty of care to other users of the road, including pedestrians, within the area of potential danger and who the driver objectively should foresee the risk of injury or damage if he/she did not exercise reasonable care. The exercise of reasonable care would require the driver to always keep proper look out when driving so as to determine whether it is safe to proceed or not to proceed, to drive at a speed and in a manner such that he/she

would be able to stop their motor vehicle when confronted with the presence of another vehicle or cyclist or pedestrian road-user, to sound the horn to alert other road users of his/her approaching vehicle, to slow down or to bring the vehicle to a stop so as to avoid colliding with another vehicle or other road user, and to take such other prudent and reasonable evasive action to avoid a collision. The degree of care required may be higher than normal depending on the circumstances of the area, be it residential or commercial, high traffic including pedestrian traffic on the roads, visibility at the time, obstructions to visibility including trees, bushes or other objects along the side or verges of the road, time of day, lighting along the road and in the area, and the weather condition of the road at the time which may make stopping or controlling the vehicle more difficult or problematic for the ordinary prudent and safe driver. **Cheryl Edward, Administratrix of the Estate of Janique Lewis v Ethel Mills**²⁶

- [63] These principles of law were neatly encapsulated by the learned authors of **Halsbury Laws of England** 10th Ed. Vol. 34 at para. 44:

“When two persons on the highway are so moving in relation to one another as to involve the risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. ... The duty is to use such care as is reasonable, and where a driver is faced with the sudden emergency he can only be expected to do that which an ordinary reasonable man would do. The duty is owed only to such persons as are within the area of potential danger and to whom the defendant could reasonably foresee the risk of injury if he or his employee failed to exercise care.”

- [64] This brings me to a consideration of the judge’s finding of negligence against the appellant at paragraph [41] and the challenge thereto in ground 3.2 of the appeal.
- [65] **Ground 3.2** of the appeal challenges the judge’s findings of negligence at paragraph [41]. I entirely reject the appellant’s arguments in support of the said ground. In my view, the evidence is clear and support the judge’s findings at paragraph [41]. Importantly, the appellant, having seen the respondent some 36 feet away failed to

²⁶ Claim No. ANUHCv1998/168

slow down sufficiently or at all or to stop or to blow her horn to alert the respondent of her oncoming vehicle, even while turning to the right to avoid colliding with the respondent. Furthermore, it has not been seriously challenged that the appellant's vehicle in fact travelled some 78 feet from the point of impact before hitting a rock and eventually coming to a stop as further 20 feet in a ditch off the main road. All these distances were taken by the learned judge from the TAR which was in evidence at the trial, although the investigating officer was not called as a witness by either party. The specific measures are: POI to POI #2 on rock by PC4284 78'; Point of ran-off to POI #2 on rock 21' 5"; and Point of ran-off to final resting place of PC4284 36' 3".

[66] In my judgment, the learned judge was entitled to draw from these measurements and from the appellant's responses to questions about them in cross-examination the reasonable inference that the appellant's vehicle was travelling at a speed and in a manner that was not safe in the circumstances approaching such a busy junction. To be clear the inference drawn is not that the appellant's was driving her motor vehicle in excess of the applicable speed-limit in that area of the , but that she was driving the vehicle at a speed and in a manner that was unsafe in the circumstances and in breach of a duty of care to other road uses, including those likely to emerge from the minor road across the junction and onto the highway, as the learned judge found at paragraph [41]. In my view, these factors lead to the reasonable inference that the appellant did not slow down and drive cautiously when approaching the busy junction and was driving at a speed such that she could not stop before colliding with the respondent, having first seen him 36 feet away. Moreover, when confronted with the respondent emerging from the minor road, although the appellant took reasonable evasive action by swerving her vehicle to the right to avoid colliding with the respondent on his bicycle, the evidence from the appellant is that she slowed down a bit on the hill, but did not stop and did not blow her horn.

[67] The physical circumstances of the area is that this was well-known to be a busy and dangerous junction for road users, with minor and major roads, and with visibility impaired when emerging from the minor road onto the major road by bushes lining the left side of the highway. It was the respondent's evidence that he could not see the oncoming traffic on the highway heading south toward Vieu-Fort when he made the decision to emerge from the minor road and to ride across the junction. Likewise, the appellant admitted that it was reasonable to anticipate that road users would be proceeding from the minor road across the junction into the major road. This required prudent users of the highway, and equally, users of the minor road when approaching the junction, to exercise caution, to keep a proper look out, and to proceed at a speed and in a manner which would permit them to stop when confronted with either a sudden emergency or the presence of some obstruction at or in the junction. Accordingly, the duty of care owed by drivers on the highway going south (as the appellant was proceeding) would require a prudent driver approaching such a busy and potentially hazardous junction or intersection of the minor and major roads to slow down, to keep a proper look-out, to traverse across the junction cautiously and at a speed at which they could stop their vehicle to avoid hitting a driver emerging from the minor road into the junction.

[68] In my opinion, the findings at paragraph [41] of negligence and breach of duty of care on the part of the appellant were reasonable and proportionate in all the circumstances and properly open to the learned judge to make on the evidence and on her unassailable findings of fact. In making these findings, the learned judge committed no errors either of fact or law. It follows, therefore, that there is no discernable basis entitling this Court to disturb or to set the learned judge's finding of negligence on the part of the appellant at paragraph [41] of the judgment. Accordingly, ground 3.2 fails.

Issue 2: Contributory Negligence and Apportionment of Liability – grounds 3.3, 3.4 and 3.5

[69] The issue of contributory negligence and apportionment of liability for the collision between the appellant's motor vehicle and the respondent and his bicycle, was dealt with by the learned judge when considering the appellant's counterclaim.²⁷ However, both the respondent (as claimant) and the appellant (as defendant/counterclaimant) pleaded and relied at the trial on the principles of contributory negligence. Both parties pleaded as their primary case that the other was wholly responsible in negligence for the collision and resulting loss and damage suffered by them. At paragraph 3 of the statement of claim the respondent pleaded in the alternative that the appellant by her negligent driving contributed to the collision, and the appellant also relied, in the alternative, on a plea at paragraph 11 of her counterclaim that the respondent was responsible in part for the collision. Thus, the parties' respective cases on contributory negligence were joined, with each one denying the other's claim of contribution.

[70] The kernel of the learned judge's findings on contributory negligence and apportionment of liability are at paragraphs [53], [54] and [55] of the judgment:

"[53] Having considered the witness statements, the evidence of the witnesses and their demeanour in cross-examination, and the Accident Report, I find that both parties are responsible for the collision and were both negligent.

[54] Ultimately, though, I find that the collision on the right side of the road which in the circumstances was not [the appellant's] side of the road, she having failed to keep a proper look out for other road users, having failed to slow down, stop or drive at a speed and in a manner so as to avoid collision with [the respondent] and the subsequent further damage to her vehicle. She therefore would bear the greater proportion of liability.

[55] I therefore apportion liability at 75% to [the appellant] and 25% to [the respondent]."

²⁷ Paragraphs 42 – 55 of the judgment below.

Appellant's submissions on apportionment

- [71] The appellant submits (in support of **ground 3.5**) that the learned judge, having found that both the appellant and the respondent were responsible in negligence for the collision, failed in the exercise of her discretion at paragraphs [54] and [55], to give sufficient reason for her apportionment of liability. In support of this submission, the appellant relied on dicta in the case of **Flannery v Halifax Estate Agencies Ltd**²⁸ dealing with the consequence of a judge's failure to give reasons for his decision making it impossible for the parties and an appellate court to tell whether he had gone wrong on the law or the facts, and such a failure constituting 'a self-standing ground of appeal'.
- [72] As to the applicable principles when a court is considering the issue of contributory negligence, including consideration by the trial judge of the question of whether, on the evidence, the driver did foresee harm to himself and other road users, and whether he acted as a reasonable prudent driver for his own safety and guarded against the negligence of other road users, the appellant relied on dicta from this Court's decision in **Melvina Frett-Henry v Tortola Concrete Ltd et al.**²⁹
- [73] In **Attorney General v Collingford John et al**³⁰ this Court summarized the principles applicable to appellate review of a trial judge's findings on contributory negligence and apportionment of liability:
- "An appellate court will generally only interfere with a finding of contributory negligence in the event of a substantial misjudgment of the factual basis of apportionment by the trial judge. In such circumstances, the appellate court may reassess the apportionment if it is satisfied that the assessment made by the judge was plainly incorrect."
- [74] The appellant submitted that the learned judge erred because she only took into account when exercising her discretion on the issue of apportionment some of the evidence and not the totality of the evidence; and failed to apply the law of

²⁸ [2000] 1 All ER 373.

²⁹ HCVAP2008/024 (delivered 21st November 2011, unreported).

³⁰ SVGHCVAP2017/0006 (delivered 20th September 2018, unreported).

contributory negligence by not making a distinction between the standard of care required for the appellant's contributory negligence and the respondent's negligence.³¹ Moreover, it is submitted, the judge erred when she failed to give sufficient reasons for her decision on apportionment and was plainly incorrect in her assessment of the facts in arriving at her decision.³²

[75] It is also submitted that if the finding of liability on the appellant's stands, the respondent must, on the evidence, bare the greater responsibility for the collision and in this respect the learned judge erred at paragraph [54] when she came to the opposite conclusion. At the hearing of the appeal, learned counsel for the appellant posited in her reply that the proper apportionment of liability should be 10% to the appellant and 90% to the respondent.

[76] In support of the submission that the learned judge gave too little weight to the negligence of the respondent when reaching her conclusion on apportionment (**ground 3.4**), the appellant relied on certain extracts from the judge's summary of the evidence at trial at paragraphs 5, 6, 7, 8 and 54 of the judgment. It is not necessary for me to repeat them here. The appellant's submissions based on those statement or findings of the judge is that they "clearly shows that at the time of the collision [the respondent] had not yet begun to drive on the left and proper side of the road heading towards Castries, but rather he was in the process of riding across the road in front of the appellant's vehicle. This is supported by his statement 'if you're already in the road you can make it.'"³³

[77] The appellant further submitted that the respondent's evidence shows that he did not see or observe the appellant's vehicle approaching on the highway as his vision was admittedly blocked by the bushes and trees along the side of that road, but this notwithstanding he took the view that he had the right of way because 'if he was already in the road he could make it'. To this, however, must be added that the

³¹ Appellant's skeleton arguments, paragraph 4.2.13.

³² Appellant's skeleton arguments, paragraph 4.2.14.

³³ Appellant's skeleton arguments, paragraph 4.2.1.

respondent's evidence at trial was because his vision of the main road was blocked or impaired by the bushes and trees, he looked first to see if there was any traffic on the main road and then sounded the horn (bell) on his bicycle before entering into the junction.³⁴

[78] Accordingly, it is the appellant's submission that the learned judge erred when in exercise of her discretion on the issue of apportionment she gave too little weight to this evidence of the respondent, which evidence and findings by the judge demonstrates that, contrary to his assertion, the respondent was still in the process of riding across the junction in front of the appellant's vehicle and had not made it to the right side of the main road heading towards Castries when the collision occurred, and thus did not have the right of way at the time of the collision. However, from the TAR it is clear that the collision did occur on the right side of the main road by some 8 inches.

[79] It is also the submission of the appellant that the learned judge erred in the exercise of her discretion on apportionment, when she gave too little weight to the evidence and narrative of the appellant as to the manner in which the collision occurred when she erroneously made a finding of 75% liability against the appellant (ground 3.3). In this respect, the appellant relies on certain extracts at paragraphs 9 to 14 (inclusive) of the judgment wherein the learned judge summarized the evidence of the appellant; and the cross-examination of the appellant at page 74 lines 20 to 25, and page 83 lines 10 to 14 of the transcript. Again it is not necessary for present purposes to regurgitate these extracts here, especially as most of what is stated in these extracts has been alluded to or summarized earlier in this judgment.

[80] The appellant's case on the alleged failures of the learned judge in the exercise of her discretion on the issue of apportionment is encapsulated in these terms at paragraph 4.2.5 of her skeleton argument:

³⁴ Paragraphs 7 and 8 of the judgment below.

“The appellant submits that the evidence of both parties reveal that the respondent was in the process of riding across the front of the appellant’s vehicle at the time of the collision from a minor road onto a major road, that the respondent did not see the appellant’s vehicle upon his exit from the minor road, that the respondent suddenly emerged from the minor road onto the major road, that the respondent thought that he had the right of way since he was already in the road, that due to the sudden emergency created by the respondent the appellant could do nothing else but swerve her vehicle to the right in an effort to avoid the respondent colliding with her vehicle, that the appellant could do nothing else but to keep driving to the right in an effort to prevent her vehicle from driving over the respondent who had fallen to the road after he collided with her vehicle, that the respondent hit the left front of the appellant’s vehicle and if he was riding on his left and proper side of the [main] road facing Castries as alleged he would have collided with the right front of the appellant’s vehicle, not the front left, that there was no evidence that the appellant was speeding.”

- [81] The appellant therefore submitted that the learned judge erred in the exercise of her discretion, her finding or conclusion of 75% liability to the appellant ought to be set aside and an apportionment of 90% to the respondent, and no more than 10% to the appellant, substituted.

Respondent’s submissions on apportionment

- [82] In response to grounds 3.3, 3.4 and 3.5 the respondent submitted that the conclusion and decision of the learned trial judge on the issue of apportionment of liability ought not to be disturbed by this Court. It is their argument that the judge considered all the evidence before her in arriving at her decision. Further, there is no “prescriptive formular” stipulating what should be stated in the reasoning of a judge when arriving at a conclusion on apportionment of liability, having found both drivers liable in negligence for a collision. Moreover, it is well-established that a judge in reasoning to conclusions on an issue at the trial need not deal with or address each and every argument or point raised or presented by the parties in support of their case and in opposition to the case of the other party; and it is sufficient for the parties and the appellate court to know from the judgement and reasoning the basis on which the judge came to his conclusion.

[83] In support of this principle, the respondent relied on the decision of the English Court of Appeal in the oft cited case **English v Emery Reimbold & Strick Ltd**³⁵:

“The judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence had to be identified and explained. But the issues the resolution of which were vital to the judge’s conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clear recollection of the material facts or the other gave answers which demonstrated his recollection could not be relied upon.”

[84] The appellant submitted that the learned trial judge gave sufficient reasons at paragraphs [53] and [54] of her judgment in arriving at her conclusion that the appellant should bear the greater proportion of the liability for the collision, which she assessed at 75%. However, learned counsel for the respondent having considered the principles on contributory negligence in **Melvina Fret-Henry v Tortola Concrete Ltd** conceded, properly in my view, that upon further reflection the conclusion by the judge that the appellant should bear the greater proportion of the liability for the collision assessed at 75%, ought not to be maintained and this Court should, in the circumstances, substitute an order of apportionment at 60% to the respondent and 40% to the appellant. In this regard, counsel implicitly disagreed with the 90/10 proportions argued for by counsel for the appellant.

Analysis and Conclusion on Apportionment

[85] As matters have turned out, this Court’s treatment with this issue has been much simplified by the concession made by counsel for the respondent. Implicit in this concession is an admission that the respondent, on the evidence and facts, ought to bear the greater proportion of liability for the collision and resulting loss and damage.

³⁵ [2002] EWCA Civ 605

- [86] With this conclusion I am entirely in agreement. In my view, having regard to (i) the principles applicable to cases where a driver is presented with a sudden emergency and may have taken collision avoidance measures with his/her motor vehicle which can be said with hindsight to be an error of judgment for which no finding of negligent driving can be attached; (ii) taking into account that the absence of any consideration of these factors and principles by the learned judge which led her into serious error; (iii) mindful of the way in which the appellant in evidence explained how the collision occurred; (iv) the admissions made by the respondent during cross-examination; and (v) the evidence to be gleaned and the inferences to be drawn against the appellant from certain of the measurements in the TAR as addressed above; the learned judge's conclusions on apportionment cannot stand and must be set aside.
- [87] Further, while the learned judge did provide at paragraphs [53] and [54] of the judgment some factual bases upon which she sought to ground her conclusion that the appellant ought to bear the greater proportion of liability for the collision leading her to an apportionment at paragraph [55] of 75% to the appellant and 25% to the respondent, I am satisfied that in doing so the learned judge erred in that she failed to fully consider the appellant's narrative and the import of it as to how the collision occurred and her failure to give sufficient weight to this evidence, and the gravamen of the evidence of the respondent and his responsibility for the collision.
- [88] I have also taken into account the findings of the learned judge at paragraph [46] of the judgment as to the negligence of the respondent by the manner in which he rode his bicycle from the minor road into the junction, that he did so in an injudicious way creating or presenting the appellant driving on the major road an obstruction. Further, that he did not see the appellant's oncoming motor vehicle, that he proceeded across the junction because he thought he could make it, that he did not attempt to stop or to take any other measures to avoid colliding with the appellant's oncoming vehicle. This is a normally busy and potentially dangerous intersection. The respondent failed to exercise the necessary degree of care for his own safety

when entering from the minor road across the junction, he failed to keep a proper look out, and he ought reasonably to have foreseen that vehicles would be coming north along the highway. In short, the respondent was reckless with his own safety and in doing so he presented an obstruction to the appellant who had the right of way.

- [89] Weighing all these factors, I am satisfied that the respondent must bear the greater responsibility and hence the greater proportion of the liability for the collision, as both sides now seem now to be in agreement. In assessing de novo what the proper apportionment of liability ought to be, I am mindful of the provisions of Article 989D of the **Civil Code of St. Lucia**, the principles set out in **Melvina Frett-Henry v Tortola Concrete Ltd** with regard to contributory negligence, and the principles applicable to appellate restraint in **Attorney General v Collingford**. For all these reasons, I am satisfied that the proper proportion of liability for the collision is 75% to the respondent and 25% to the appellant. I would so order and set aside the judge's decision on apportionment.

Award of Damages – ground 3.8

- [90] This issue is a short one. By ground 3.8 the appellant challenged the learned judge's award of damages against her on the respondent's claim on the sole basis that the judge ought not to have found that she was negligent or contributorily negligent for causing the collision and therefore she ought not to be liable to pay any damages. The appellant did not challenge the learned judge's assessment of or the quantum of damages as to basis for the award.
- [91] It follows, therefore, that the actual sums assessed by the judge (see paragraph [88]) as damages for both the respondent (as claimant) and the appellant (as counter-claimant) in the judgment as special damages and, in the case of the respondent only, as general damages, as well as the award of interest at the percentages stated and the calculation of prescribed costs, stand unchallenged by the appeal. However, as regards the award of prescribed costs to each of the

respondent and the appellant in the court below, the learned judge having applied the discounted rate applicable in both instances to each total sum of damages went on incorrectly to further discount the award of prescribed costs by the respective percentages applicable as she found. To my mind this was an error or misstatement which must now be corrected in the award of prescribed costs in the court below following the setting aside of the judge's awards based upon her discounted rates for contributory negligence.

[92] Accordingly, the sums awarded for special damages to both parties and general damages to the respondent only, must be discounted by 75% in case of the award for the respondent and by 25% in case of the award for the appellant. The resulting decision and award of this Court is as follows:

On the Respondent's Claim

- (i) Total award of \$6,150.00 special damages discounted by the respondent's contribution of 75% to \$1,537.50, together with interest on the said sum of **\$1,537.50** at the rate of 3% per annum from the date of the collision (3rd April 2017) to date of the judgment in the court below (28th March 2024);
- (ii) Total general damages for pain and suffering and loss of amenities in the sum of \$85,000.00 discounted by the respondent's contribution of 75% to **\$21,250.00**, together with interest on the said sum of \$21,250.00 at the rate of 6% per annum from the date of service of the Claim on the appellant/defendant to date of the judgment in the court below (28th March 2024);
- (iii) Prescribed costs on the total discounted award of **\$22,787.50** to the respondent in the court below.

On the Appellant's Counterclaim

- (iv) Total special damages of \$34,000.00 discounted by the appellant's contribution of 25% to \$25,500.00, together with interest on the said sum of **\$25,500.00** at the rate of 3% per annum from the date of the collision (3rd April 2017) to date of the judgment in the court below (28th March 2024);
- (v) Interest on the sum of \$25,500.00 at the rate of 6% per annum from the date of judgment in the court below (28th March 2024) to the date of payment;
- (vi) Prescribed costs on the total discounted award of \$25,500.00 to the appellant on her counterclaim pursuant to CPR 65.5;
- (vii) Prescribed costs to the appellant on the sum of \$68,362.50 being 75% of the total award of both special and general damages to the respondent on his Claim.

Costs

- [93] Having regard to this Court's decision on the apportionment of liability between the appellant and respondent for the collision and resulting loss and damages, consequential adjustments must also be made to the prescribed costs orders at sub-paragraph (5) in the case of the respondent and sub-paragraph (8) in the case of the appellant at paragraph [88] of the judgment below. The appellant has been mainly successful in the appeal and is therefore entitled to two-thirds of her costs of the appeal quantified based on the amount of costs to be awarded to her in the court below as a result of the outcome of the appeal.

Disposition

- [94] Accordingly, I would make the following orders:

- (1) the appeal is allowed in part and the decision of the court below on the apportionment of liability and consequential award of damages to the appellant and the respondent set aside;
- (2) the appellant is found to be 25% liable and the respondent 75% liable for the collision and resulting loss and damages;
- (3) damages, interest and prescribed costs in the court below are awarded to the appellant and to the respondent, respectively, in the sums set out at paragraph [92] above;
- (4) the respondent shall pay two-thirds of the amount of the appellant's prescribed costs award in the court below as ordered at sub-paragraph (vii) of paragraph [92] above.

Margaret Price Findlay

I concur
Justice of Appeal

Esco Henry

I concur
Justice of Appeal

By the Court

Chief Registrar